IN THE CAYMAN ISLANDS COURT OF APPEAL

CICA NO. 006 OF 2020
CAUSE NO. G 195 OF 2019

B E T W E E N:

THE CABINET OF THE CAYMAN ISLANDS

Appellant

-and-

SHIRLEY ELIZABETH ROULSTONE

Respondent

-and-

THE NATIONAL TRUST OF THE CAYMAN ISLANDS

Intervener

APPELLANT'S REPLACEMENT SKELETON ARGUMENT

FOR THE APPEAL HEARING
LISTED ON 6-7 MAY 2020

[References: Core Bundle "CB"; Appeal Bundle "AB"; Appeal Authorities Bundle "AA"

Format: Bundle/Tab/Page/¶ to extent relevant]

A: SUMMARY

1. This appeal arises from a petition prompting the first "people-initiated referendum" in the Cayman Islands. The issue to be addressed in the proposed referendum is whether the Cayman Islands Government ("CIG"), the Appellant, should continue to proceed with building a proposed cruise ship and enhanced cargo port facility in George Town harbour. The construction of such a facility ("the Port Project") has been Government policy for many years, and was a Progressive Party manifesto pledge in each of the last two elections. In 2019 CIG completed a procurement exercise, which resulted in the selection of a preferred bidder to undertake the construction work. However, all progress on the Port Project has since been stayed until a people-initiated referendum can be held to decide whether it should proceed at all.

2. The people's right to initiate a referendum on a matter of "national importance" is conferred by s. 70 of the Cayman Islands Constitution Order 2009 ("the Constitution"), which provides as follows:

> *(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 represented 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."*

3. This appeal is concerned solely with the proper construction of s. 70.[1] In particular, the issue is whether the legislation which the Cayman Islands Legislative Assembly has enacted in order to hold a referendum on the Port Project ("the Referendum Law") is compatible with, and satisfies the requirements of, s. 70(1).

4. In his judgment of 19 February 2020, Acting Justice Timothy Owen QC found that the Referendum Law is incompatible with s. 70 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*" **[CB/4/59/¶66]**. In other words, he found the Referendum Law to be deficient in <u>form</u>, rather than substance. The effect of his judgment is that s. 70(1) requires the enactment of a general, or "framework", law governing all referendums. Absent that, the judge ruled that any law purporting to provide for a specific referendum is necessarily unconstitutional (such that no referendum can lawfully be held thereunder), and he went on to quash the Referendum Law.

5. CIG invites the Court to allow the appeal on any or all of the Grounds set out in the Notice of Appeal. In summary, CIG's case is that:

[1] As originally drafted, the claim raised additional complaints regarding CIG's decision-making in relation to the proposed date of the referendum and the wording of the referendum question. However, those concerns were superseded or resolved before the substantive hearing.

a. S. 70 of the Constitution, properly construed, makes no prescription at all regarding the form of the law that must be enacted in order to provide for the holding of a people-initiated referendum once the petition signature threshold has been met. In particular, it makes no prescription as to the generality or specificity of such a law. Thus, the Referendum Law accords with s. 70(1) properly construed (Ground 1).

b. In reaching a contrary conclusion, the judge misdirected himself as to the proper approach to construction. His interpretation of s. 70 was explicitly based on his assessment of what would "*best guarantee*" **[CB/4/51/¶59 line 25-¶60 line 1]** the requirements of legality, legal certainty, fairness and consistency (which he held to be inherent in the right to a referendum). Instead, he should have considered whether a bespoke law such as the Referendum Law could in principle give effect to the constitutional right in issue. If (as CIG submits) it could, then the bespoke nature of the Referendum Law cannot, in itself, render it unconstitutional. Further or alternatively, the judge's assessment that a general law would *"better guarantee"* **[CB/4/33/¶34 lines 18-21 & CB4/43/¶47 lines16-20]** the s. 70 right than a bespoke law was not a sufficient basis for finding primary legislation passed by a democratically elected legislature to be unconstitutional, given the high bar and heavy burden applicable to such a challenge (Ground 2).

c. Furthermore, each of the two more particular bases on which the judge reached his conclusions is unsound (Grounds 3 and 4):

    i. He held that a bespoke law such as the Referendum Law is contrary to s. 70(1) of the Constitution because a general law is required to regulate the *prior* petition and verification processes under s. 70(2). CIG submits that the conclusion does not follow from the premise.

    ii. He also held that s. 70(1) requires enactment of a general law because it will "*reduce the risk*" of government seeking to stack the odds against petitioners who seek a referendum in order to overturn government policy. However, this is to derive a formal requirement from a speculative concern that the

legislature might enact implementing regulations that in substance disrespect the rule of law. The substance of such regulations might fail to respect the rule of law regardless of whether the legislation purports to regulate a specific referendum or referendums in general; and if that risk materialises, petitioners can/will have recourse to judicial review. A demand for generality is neither necessary nor sufficient to guarantee compliance with the rule of law. Accordingly, the judge's anxiety about substance do not, either in logic or in practice, support his conclusions as to the required legal form.

d. The judge erred, finally, in granting a quashing order by way of relief because declaratory relief would have been adequate for every practical purpose, and would have better respected the principles of comity and the separation of powers (Ground 5).

6. In a Respondent's Notice dated 187 March 2020 **[CB/9]**, the Respondent asks the Court to uphold the judgment below on the additional ground that the Referendum Law is unlawful because it fails effectively to secure the right to vote as guaranteed by s. 70 of the Constitution. This is addressed in paragraphs 43-54 below.

B: MATERIAL FACTUAL BACKGROUND

7. Building a cruise port facility in George Town harbour has been government policy for many years. It formed one of the central and explicit manifesto pledges, on the basis of which the present Government was elected. The policy considerations that underlie the project are explained in Mr Bodden's second affidavit ("2nd Bodden") at **[AB/25/¶5-7]**.

8. Since 2015 the proposal has formed part of a single integrated development project alongside the enhancement of existing cargo port facilities. In other words, for the last five years the development of adjacent cargo and cruise port facilities have formed a single government policy. This integration is designed to exploit the obvious efficiencies in conducting one merged, rather than two distinct, large-scale infrastructure projects, and to enable the cargo port enhancements to be financed by the commercial cruise companies as part of a package of investment in the new cruise port facility: 1st Bodden at **[AB/19/¶5]**.

9. Between 2013 and 2018 CIG conducted extensive environmental impact investigations and extensive public consultation, prompting a procurement exercise: 2nd Bodden at **[AB/25/¶8-22]**. Late in 2018, however, CIG became aware that the campaign group CPR Cayman were seeking to gather sufficient signatures to initiate a referendum under s. 70 of the Constitution on whether the cruise port development should proceed. On 12 June 2019 CIG was informed that the required 25% signature threshold had been reached; and in September 2019 it completed verification of those electors' signatures. Although CIG went ahead with selection of a preferred bidder as planned, the signing of contracts with that bidder has been deferred until after the referendum.

10. Under s. 70(2)(b) and (c) of the Constitution, the wording of the referendum question and the date of the referendum are matters to be decided by Cabinet, in accordance with law. Accordingly, CIG held a Cabinet meeting on 3 October 2019, where it was resolved to hold the referendum on 19 December 2019 and that the referendum question would be: "*Should the Cayman Islands continue to move forward with building the cruise berthing and enhanced cargo port facility?*". However, following correspondence from CPR Cayman, CIG recognised that its decisions as to date and wording needed to be made after the passage, and in accordance with the requirements of, legislation passed by the Legislative Assembly under s. 70(1). The Legislative Assembly passed such a law (the Referendum Law)**[AA/4]** on 31 October 2019, and at a meeting held the same day, CIG revoked its previous decisions and proceeded to make new date and wording decisions in accordance with the Referendum Law.

11. The Respondent and the Intervener ("the National Trust") lodged applications for judicial review on **21st November 2019 [AB/1]** and **25th November 2019** respectively. Grounds 1-3 of the Respondent's claim raised complaints about CIG's date and wording decisions which have since fallen away. Ground 4 alleged that the Referendum Law was unconstitutional because it did not adequately address rules relating to campaign finance and the provision of information. The Respondent did not, at that stage, object to the bespoke character of the legislation. At a leave hearing before Acting Justice Tim Owen QC on 3 December 2019, the Respondent was granted leave to proceed and an interim injunction staying the referendum until the determination of these proceedings. At the judge's suggestion, the National Trust withdrew its application for leave on the footing

that, instead, it would feature in the instant proceedings as an Intervener. The Respondent subsequently obtained a Protective Costs Order following a hearing before the Chief Justice **[AB/7]**.[2]

12. In her skeleton argument for the substantive hearing **[AB/8]**, the Respondent refocused her case. Her central contention became the new proposition that the Referendum Law was unconstitutional because it was a specific law which purported to regulate the particular people-initiated referendum at hand, rather than a general law purporting to regulate any people-initiated referendum. At the start of the substantive hearing, the Respondent was granted leave (unopposed by CIG) to amend her claim to reflect this change of focus.

C: THE JUDGE'S JUDGMENT (ON THE SUBSTANTIVE CLAIM) AND RULING (ON RELIEF)

13. The claim was heard on 22-23 January 2020, and Acting Justice Timothy Owen QC handed down judgment on 19 February 2020 **[CB/4]**.

14. His analysis and reasoning commence at paragraphs 55 of the judgment. Paragraphs 55-60 contain preliminary observations.

    a. The judge noted that the live issue was novel, and that his task was to construe the true meaning and import of s. 70 of the Constitution applying agreed principles of law as recently summarised by the Court of Appeal in the case of *Deputy Registrar of the Cayman Islands & Anor v Chantelle Day & Anor* CICA No. 9 of 2019 (7 November 2019) **[AA/13]** ("the Day case") (paragraph 55).

    b. He saw little, if any, scope for deference to the Legislature where the Constitution is the supreme source of law and the judiciary is the guardian of the Constitution, adding that there was no equivalent to s. 70 of the Constitution and no useful guidance in any other jurisdiction (paragraphs 56-58).

[2] The Respondent continues to benefit from protection against an adverse costs order in relation to this appeal, on terms agreed between the parties.

c. He rejected CIG's submission that remarks made in the context of the Constitutional negotiations supported the view that s. 70 contemplates (or at least permits) legislation on a referendum-by-referendum basis (paragraph 59).

d. He then commented that "*In circumstances where I consider that there is a lack of clarity in the bare language of s. 70 concerning the form in which the Legislature must enact legislation to make provision for the holding of a people-initiated referendum, the Court must…give a generous and purposive interpretation to a unique constitutional provision which guarantees an important democratic right and decide if the Referendum Law is compatible with it*", and that this was a question of "*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*" (paragraph 59).

e. He made various criticisms of CIG's approach to legislating for the present referendum; including its failure to enact any general referendum legislation during the ten years since the Constitution's enactment, which (he suggested) had predictably resulted in controversy and uncertainty when CIG sought to provide for the present referendum (paragraph 60).

15. Paragraphs 61-65 then set out the substantive analysis on which the judge based his finding that s. 70 of the Constitution requires the enactment of a general or "framework" law.

a. At paragraph 61 he posed the question whether a general of "framework" law was a necessary implication of the enactment of s. 70 of the Constitution in order to guarantee the right to a fair and effective vote in a people-initiated referendum, and whether a pre-existing general law was therefore a necessary precondition for the legality of such a referendum.

b. At paragraph 62 he concluded that a general law "*to provide legal authority for the administration of people-initiated referendums*" was a necessary consequence of the enactment of s. 70, because such a law was necessary to govern the petition and verification processes. Absent such a law, "*the pre-Petition process lacked clarity or legal support in terms of any and all matters relevant to the pre-Petition process…as – standardised petition forms; topics able to be decided on (or not) by referendum; petition*

process clearly defined; notification of initiating a petition; Gazette publication following approval." Thus, "*a law which authorised and explained the pre-Petition process and the subsequent collection of signatures, as well as the process for verifying signature and certifying the Petition, was…necessary to ensure a sound, transparent, fair and above all legal basis for any people-initiated referendum*." Accordingly, "*the 'law' required by s. 70 must be a general or framework law because it must cover the process of collecting and verifying a petition and any such law must necessarily be general in character*." The judge then went on to state at paragraph 63 that "*the rule of law requires that limitations on the right to petition must be prescribed by law rather than left to the individual discretion of the Elections Office*."

c. At paragraph 64 he stated that the clear policy underpinning the enactment of s. 70 was the promotion of the exercise of effective, direct democratic rights with a view to increasing the checks and balances on Executive action, and that this was "*another powerful factor in favour of the need for a framework law governing people-initiated referendums*". In particular, "*the very fact that it is highly likely that the Government will have a strong view on whatever matter of national importance triggers a binding referendum*" was "*a powerful reason in favour of the need for 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*." He added that "*[e]nacting a general law, while not necessarily eliminating the risk that the odds may be stacked against those seeking to veto a particular Government policy, is bound in my view to reduce the risk*." A general law was the "*legislative response*" that "*best ensures that the policy which underpins [s. 70] is furthered*".

d. At paragraph 65 the judge expressly declined to make any comment on what a general "framework" law should contain. He observed that the materials before the Court clearly demonstrated "*a range of measures which may be considered for inclusion in a general referendums Bill in order to ensure a fair and effective right to* vote", with "*no obvious consensus on what these must be…*", and stated that "*it must be for the Legislature to decide what a general Cayman Referendums Law should contain*". He also expressly declined to rule "*on whether the absence of a general law has resulted in substantive unfairness in the context of the campaign to date*".

16. At paragraph 66, the judge concluded that "*[f]or 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*", the Referendum Law was incompatible with s. 70 "*because it fails to satisfy the requirement for a general law governing all s. 70 referendums and is not itself in accordance with such a law*".

17. After the judgment was handed down, the judge invited and received representations from CIG and the Respondent on the appropriate relief **[AB/14-17]**. The Respondent submitted that the judge should quash the Referendum Law, as the proper consequence of its invalidity; whereas CIG submitted that he should limit himself to declaratory relief because the legislation had been enacted by a democratic legislature and such relief would be sufficient to mark its invalidity and preclude reliance on it in practice.

18. In a ruling handed down on 2 March 2020, the judge quashed the Referendum Law, but stayed the quashing order pending appeal **[CB/5]**.

D: SUBMISSIONS ON GROUNDS OF APPEAL

Ground 1

19. The judge misconstrued s. 70 by implying into it a requirement for a general law, when there is neither any textual support nor any purposive justification for that implication.

20. The key words of s. 70(1) say that "*a law enacted by the Legislature shall make provision to hold a referendum among persons registered as electors.*" The Referendum Law is, indisputably, a law enacted by the Legislature, which makes provision to hold a referendum among persons registered as electors. As a matter of ordinary language, the reference to "*a referendum*" (emphasis added) in s. 70(1) suggests that a referendum-specific, rather than a general, law is contemplated (or, at the very least, is permitted). The use of the singular (indefinite article) suggests an intention that, when prompted by a valid petition, the Legislative Assembly will (or, at the very least, may) enact a specific law providing for *that* referendum to be held. Even if "*a law enacted by the legislature [to] make provision to hold a referendum*" is capable of encompassing a general law as well as a specific law, a specific law such as the Referendum Law clearly also falls within the linguistic and purposive scope of that description.

21. There is nothing unusual about the enactment of referendum-specific legislation. Individual referendums in the UK have, similarly, been launched on many occasions by a tailored Act of Parliament stipulating that a particular referendum shall take place on a single issue.[3] Nor is it unusual for the regulatory framework governing a referendum to be set out (wholly or partly) on a case-by-case basis in the enabling legislation which authorises that referendum, rather than in standing or general legislation. Before 2000, which saw the enactment of the Political Parties, Elections and Referendums Act 2000 **[AA/10]** ("PPERA"), this is how all referendums were undertaken in the UK: see Report of the Independent Commission on Referendums (the "UK Commission Report"), July 2018, Chapter 3, paragraph 3.2 **[AA/34]**.

22. A system whereby the legislature is required to provide for a referendum on a case-by-case basis, once a petition signature threshold is reached, does not of course preclude the enactment of an additional standing general law (such as PPERA) to deal with certain aspects common to the regulation of all referendums. In fact, CIG agrees that it is preferable, as a matter of policy, to enact a "framework" law regulating all s. 70 referendums. As the judgment recorded, CIG intends to introduce and promote such a Bill later in 2020. But nothing in the wording of s. 70 supports the conclusion that the Legislature is <u>required</u> to pass such general legislation before a lawful people-initiated referendum can take place. The petition and referendum on the Port Project have emerged at a time when no such general law yet exists. In those circumstances, the Legislative Assembly was certainly permitted, indeed probably bound, to honour the petition by passing a referendum-specific law.

23. The transcript of the Second Round Negotiations in relation to the Constitution **[AB/39]** supports the proposition that the "law" enacted under s. 70 may addresses only the referendum at hand. On p. 400 of that transcript, the Hon. D. Kurt Tibbetts observed that "*the people-initiated referendum would still have to be triggered by the action of the LA*" **[ibid.]**. There is then a discussion on pp. 400-401 concerning the absence of specification of a threshold at which the result of a s. 69 referendum would become binding (by contrast with the 50% threshold specified in s. 70) **[AA/2/61-2]**. This was explained and justified on the basis that the legislature should be allowed to decide upon the appropriate

[3] See for instance the Referendum Act 1975, the Greater London Authority Referendum Act 1998, the Parliamentary Voting and Constituencies Act 2011 and the Scottish Independence Referendum Act 2013.

threshold, for a legislature-initiated referendum, on a referendum-by-referendum basis: "*it is the intention because each time a law is created for that referendum you have in that law what the threshold is…*"; "*you may have depending on the type of referendum it is you may call for a different threshold. That is very possible depending on the nature of the issue.*" Clearly, therefore, in the context of s. 69, the words "*A law enacted by the Legislature may make provision to hold a referendum…*" were understood to require a different (specific) law for each Legislative Assembly-initiated referendum. The materially identical words in s. 70 ("*A law enacted by the Legislature shall make provision to hold a referendum…*") must be read identically.

24. That conclusion is also consonant with the view of Mr Ian Hendry, the UK Foreign and Commonwealth Office's constitutional advisor and co-author of the leading textbook on British Overseas Territories Law, who chaired the Cayman Constitutional Negotiations. His view was expressed in response to a query from the Cayman Islands Constitution Commission ("the CICC") in October 2014. The CICC had written to the Governor raising a number of points in relation to sections of the Constitution that it suggested could be considered for amendment **[AB/11b]**. In relation to s. 70, the CICC had stated: "*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 Attorney General provided the CICC's letter to Mr Hendry, who stated in response **[AB/11c]** "*it seems clear that section 70 deals with <u>individual</u> people initiated referendums.*" (emphasis added, see judgment at paragraph 17).

25. Thus, the judge erred in implying into s. 70 a requirement for a general law, as a precondition for a specific lawful referendum, in circumstances where the text of s. 70 gives no support for such an implication. The judge's suggestion that this implication is warranted on a purposive approach is addressed within Ground 2 below.

<u>Ground 2</u>

26. Axiomatically, the Constitution is the supreme source of law in the Cayman Islands. Any and all legislation must accord with it. The judge was correct to proceed on the basis that, when interpreting the Constitution, the Court should adopt a broad purposive approach. However, it is equally axiomatic that the Court must be vigilant not to trespass on the

legislature's territory by implying into legislation rights, requirements or qualifications that the Court may consider desirable and/or sensible.

27. The applicable principles of constitutional interpretation have recently been synthesised in paragraphs 29-40 of the unanimous judgment of the Court of Appeal of the Cayman Islands in the Day case. In paragraphs 30-37 the Court of Appeal cited extracts from the underlying jurisprudence, concluding as follows in paragraphs 38-39:

> "*38. It is clear from the authorities cited that the court must approach constitutional provisions, such as those in the BoR, in a broad and purposive manner, not narrowly and technically…*
> *39. As we readily accept, for the reasons the decisions make plain, the court must interpret the Constitutional Law of the Cayman Islands and that part of it which deals with citizens' rights in a broad and purposive way… However in doing so it is not open to the court simply to ignore or put on one side what the provisions clearly say. For the court to do that, on the basis of what are said to be current norms or mores or values, has the real danger, as Lord Hoffmann put it in Matadeen v Pointu, of the court giving "free rein to whatever [the judge]…considers should have been the moral and political views of the framers of the constitution." Or as Kentridge AJ put it in State v Zuma, it could quickly amount, not to interpretation but to "divination". As Ms Rose submitted, it was not for the courts to impose their own values because they disagree with the values expressed in a constitution. In other words, it is not for the courts effectively to legislate in respect of a constitutional provision, the meaning and effect of which is clear, and reflects the drafter's intentions, because it disagrees.*"

28. The judge adopted a purposive approach to construing s. 70, which took at its starting point the direct democratic rights that s. 70 confers (paragraph 55 of the judgment). Thus far, the judge's approach was correct. However, he erred in his application of the purposive approach. He should have asked himself whether the requirement of generality, which the Respondent invited him to read into s. 70, was necessary to give effect to the rights in question: in other words, whether those rights could be given effect if s. 70 were *not* construed as imposing a requirement to enact a "framework" law. Instead, the key question he (erroneously) asked himself was whether the rights in question were "*best guarantee[d]*" (paragraphs 59 and 66) or "*best ensure[d]*" (paragraph 64) on the Respondent's interpretation[4].

[4] This reflected in the way in which the Respondent put her case. As recorded at paragraph 34 of the judgment, the Respondent invited the court to consider whether a general or a bespoke law "*better promotes the fullest expression of the right to participate effectively in a s. 70 referendum*" (emphasis added).

29. The judge concluded (paragraph 64) that the *best* safeguarding would be through a general rather than a specific law (because, inter alia, a general law would "*reduce [the] risk*" of the executive seeking to regulate any particular referendum in a way that was favourable to its own political/policy objectives) and, therefore, that s. 70 should be read as requiring the enactment of a general law. In so doing, he trespassed beyond judicial and into legislative territory. A judge adopting a purposive construction is not thereby empowered to read into a piece of legislation any provision that will cause it (in his view) to better or best serve its purposes. In circumstances where s. 70 makes no express prescription as to the form of referendum legislation, a purposive approach could not justify reading in a requirement of generality unless the judge had concluded that the democratic rights under s. 70 simply could not be served (properly or at all) by bespoke referendum-by-referendum legislation.

30. The judge reached no such conclusion; nor could any such conclusion reasonably be reached. There is no reason why, in principle, bespoke legislation should not be capable of giving effect to the right to a fair and effective vote in a people-initiated referendum. As noted in paragraph 21 above, bespoke legislation has been used in the UK over many years to give effect to such rights.

31. Further and in any event, the judge failed to acknowledge, or apply, or afford sufficient weight to, the presumption of constitutionality and/or the heavy burden which an applicant bears when challenging the constitutionality of legislation that has been passed by a democratic legislature. In *Grant v R* (2006) 68 WIR 354 **[AA/21]**, Lord Bingham stated at paragraph 15 that:

> "*It is, first of all, clear that the constitutionality of a parliamentary enactment is presumed unless it is shown to be unconstitutional, and the burden on a party seeking to prove invalidity is a heavy one: Ramesh Dipraj Kumar Mootoo v Attorney-General of Trinidad and Tobago (1979) 30 WIR 411 at 415. Thus, the appellant has a difficult task.*"

32. In *Suratt v Attorney General of Trinidad and Tobago* [2007] UKPC 55 & (2007) 71 WIR 391 **[AA/30]** Baroness Hale, speaking for the majority, held at paragraph 45:

> "*It is a strong thing indeed to rule that legislation passed by a democratic Parliament establishing a new type of judicial body to adjudicate upon a new body of law is unconstitutional. The constitutionality of a parliamentary enactment is presumed unless it is shown to be unconstitutional and the burden on a party seeking to prove invalidity is a heavy one…*".

33. More recently, in *Bar Association of Belize v Attorney General* (2017) 91 WIR 123 **[AA/31]**, Nelson JCCJ, sitting in the Caribbean Court of Justice, held at paragraph 22:

> "*At the outset when considering the constitutionality of a law, which may perhaps include a constitutional amendment, courts presume that the impugned law is valid and place the burden of establishing at least prima facie transgression on the party alleging breach. The presumption of unconstitutionality will also apply where an instrument is issued or an act is done under the Constitution and the relevant provision of the Constitution can fairly be interpreted so as to preserve the constitutionality of the instrument or act.*"

Most recently, those cases were cited by the Jamaican Supreme Court in *Robinson v The Attorney General of Jamaica* [2019] JMFC Full 04 **[AA/32]**, at paragraphs 59-70.

34. The judge's approach in the present case flouted the approach demanded by those cases. Faced with language in s. 70 which plainly permits a reading through which a specific law (such as the Referendum Law) satisfies the requirement of s. 70(1), he failed to apply the presumption of constitutionality. Instead, he adopted a prescriptive reading on the footing that it would better or best promote his view of the relevant democratic rights. Both his approach and his consequential conclusion were wrong in law.

Ground 3

35. As set out in paragraph 15.b) above, the judge accepted the Respondent's argument that the Referendum Law was unconstitutional because a general law is required to govern the initiating petition and verification processes.

36. In CIG's submission, the conclusion of this argument does not follow from its premises.

    a. The argument's premises (which CIG does not dispute) are that (1) the rule of law requires (or at least favours) the enactment of regulations governing the petition and verification processes which necessarily pre-date any people-initiated referendum under s. 70, and (2) such regulations must necessarily be general.

    b. It does not follow from those propositions that the "law" referred to in s. 70(1), providing for a referendum to be held once verification is complete, cannot be a bespoke law addressed to regulating the holding of the referendum at hand.

37. The absence of general legislation governing the petition and verification processes does not preclude the Legislative Assembly, after verification has taken place and a petition has been accepted as valid, from passing specific legislation to regulate the referendum then in train.

38. It is correct, of course, that the petition and verification processes in the present case were conducted without the benefit of standing regulations. Those processes gave rise to various controversies, which might reasonably be ascribed to the absence of standing regulatory provision. However, ultimately and analytically, those disputes are irrelevant to these proceedings. The petition *was* verified, and accepted by CIG as giving rise to a people-initiated referendum. So issues surrounding those (historical) elements are moot. Neither the Respondent nor the Intervener has ever sought in these proceedings to impugn the petition and verification processes as unlawful or irregular. Even if it is accepted (for the sake of argument) that a general law regulating those processes is not only useful but also legally required, that does not establish a basis for the Respondent to succeed in this judicial review.

Ground 4

39. The further "*powerful*" and *'important"* factor on which the judge rested his finding of unconstitutionality was his assessment (paragraph 64) that a general law would *"reduce [the] risk"* that the odds would be *"heavily stacked"* against those seeking to veto a particular government policy by the Legislative Assembly's willingness to enact regulations favourable to CIG's position, in circumstances where s. 70 was intended to confer direct (not representative) democratic powers on the people: see paragraph 15(c) above.

40. This argument is flawed by the same vice which infects Ground 2 above: it seeks to imply requirements into s. 70 on the flawed basis that they will *"better"* serve the democratic rights in issue (or will *"reduce [the] risk"* of those rights being undermined), rather than on the basis that such implication is necessary to protect those rights. As such, the argument fails to respect the presumption of constitutionality.

41. In addition, CIG submits that the argument is flawed for other reasons.

a. The judge purports to derive a requirement about the form of legislation under s. 70(1) from a speculative concern about whether the substance of such legislation will respect the rule of law. That concern cannot, reasonably, be a basis for finding the Referendum Law unconstitutional in circumstances where the judge has expressly declined to criticize the substance of that law or to indicate what substantive provisions a general referendum law must contain in order to give effect to the relevant democratic rights.

b. Moreover, the argument overlooks that it is the Legislative Assembly, not the Executive (CIG), which is responsible for passing legislation under s. 70. This itself represents a balance that the drafters of the Constitution have chosen to strike. The Legislative Assembly can be expected to perform its constitutional role of keeping the Executive in check in relation to any draft legislation it might propose (in case the draft fails to respect the rule of law or democratic rights under s. 70). Nor is the possibility that the legislature (in authorising and regulating a referendum) might itself have a position on the referendum topic, unique to a people-initiated referendum. On the contrary, the legislature might often have a pre-formed position. For instance: a majority of MPs in the UK House of Commons were clearly in favour of remaining in the EU when the Brexit referendum was called. This does not, in principle, preclude a legislature from competently, reasonably and fairly setting rules for a referendum on that very issue.

c. The focus on form is misguided. If legislation were to abuse the rule of law by seeking to "*create an unequal playing field*" (paragraph 64) adverse to petitioners, it would be rendered unconstitutional by its substance not its form. A general law may, in principle, contain the very same regulatory provisions as a bespoke law. It may, in principle, in the same ways and to the same extent, interfere with the right to a fair and effective vote in a referendum. And it may (if drafted in the shadow of a particular referendum) be influenced, in its substance, by a government's or legislature's views on the merits of a particular issue. Generality is no safeguard against unconstitutionality, as the judge himself recognised in paragraph 63 of his judgment.

d. Were a bespoke law to contain provisions interfering with or undermining the people's right to a referendum under s. 70, that law could be challenged by way of judicial review. The bespoke nature of the law would not lessen the degree of protection provided by s. 70 of the Constitution or by the Court's adjudication. Conversely, were a bespoke law to contain no provisions that were objectionable in substance, it could not reasonably be held to be unconstitutional purely because of its bespoke nature.

42. For all the above reasons, CIG submits that the judge's conclusion that the Referendum Law is unconstitutional as insufficiently *general* is unsustainable.

E: SUBMISSIONS ON THE RESPONDENT'S NOTICE [CB/9]

43. The Respondent invites the Court to uphold the judgment below on the alternative basis that s. 70 of the Referendum Law fails substantively to secure an effective right to vote under s. 70 of the Constitution. She relies on five features of the Referendum Law, namely (1) the absence of specific provision for voter registration, (2) the absence of rules governing campaign finance, (3) the lack of "clear rules" on party political broadcasting, (4) the lack of any general rules relating to the formulation of the referendum issue, and (5) the absence of rules governing the provision of objective information under the Referendum Law.

44. The Respondent's Notice is extremely brief. CIG may seek to submit a supplemental skeleton argument after the Respondent has developed her submissions in her own written arguments. At this stage, however, CIG notes that the Respondent's case in relation to the substance of the Referendum Law (and her complaint about the absence of certain substantive regulatory provisions she would have liked to see enacted in that Law) has changed at every stage of these proceedings.

a. As originally drafted, Ground 4 of the Claim alleged that the Referendum Law was unconstitutional because it failed to make adequate provision for campaign finance or objective information **[AB/1a/Section F]**. As noted above, no complaint was raised about the specificity of that Law.

b. In her skeleton argument, the Respondent changed her case to allege instead that the Referendum Law was unconstitutional chiefly by virtue of its specificity rather than its substance **[AB/8/Section B]**.

c. In oral argument, her counsel raised complaints about the five features of the Referendum Law now relied on. However, as recorded in paragraph 40 of the judgment, those features in themselves were not said to render the Referendum Law unconstitutional but to illustrate the advantages of having a general law.

d. In her Respondent's Notice, the Respondent has reverted to the claim that the lack of provision for campaign finance and/or objective information, together with three additional features of the Law that were not relied on in either the claim or the amended claim, render the Referendum Law unconstitutional in its substance .

45. Pending its further elaboration in the Respondent's skeleton argument, CIG responds to the complaint's latest iteration in paragraphs 46-54 below.

Campaign finance and provision of objective information

46. The questions (i) whether the state should be required to provide neutral information in the context of a referendum and (ii) what, if any, restrictions on campaign finance or government campaigning activities should be imposed, are substantive questions of legislative policy, on which different legislatures in different jurisdictions can take and have taken distinct but equally legitimate positions. There is substantial international variation.[5] Neither the regulation of campaign finance nor the provision of objective information by government can be said to be inherent in the very concept of a (fair and effective) people-initiated referendum. A legislature may lawfully and reasonably decline to impose such rules and many legislatures, internationally, have done so. Nor is the right to vote in such a referendum rendered ineffective by the absence of such requirements and prohibitions. As paragraph 65 of the judgment rightly recorded: "*On the basis of the*

[5] See CIG's Detailed Grounds of Resistance ("DGR"), paragraphs 44-47 **[AB/3/14]** and Annex **[*ibid.* 3a]**, and the references in DGR footnotes 7 and 8 **[*ibid.*]**. See further Quartrup M, *Direct Democracy*, (2013) Manchester University Press, Ch. 9, "Regulation of direct democracy: international comparisons and patterns" **[AA/36]**.

materials presented to the Court … there is clearly a range of measures which may be considered for inclusion in a general referendums Bill in order to ensure a fair and effective right to vote. But there is no obvious consensus on what these must be, still less a standard blueprint which is required to pass muster in constitutional terms. Ultimately it must be for the Legislature to decide what a general Cayman Referendum Law should contain to guarantee a fair and effective right to vote in a s. 70 referendum …".

47. In the Cayman Islands, the Constitution leaves these policy choices to the Legislative Assembly. It has considered what rules and regulations should apply to the present referendum and has chosen neither to limit campaign finance nor to require that the government supply objective information to voters. (By contrast, it has chosen to impose certain substantive requirements in relation to the setting of the referendum question, and minimal requirements regarding the date). The Legislative Assembly enjoys a broad discretion in relation to such matters. The absence of campaign finance and information provisions is consistent with, and does nothing to undermine, the exercise of democratic rights under s. 70. After all, it is fanciful to suppose that CIG is (or could sensibly be required to be) neutral in the present referendum. The referendum challenges long-established government policy, which CIG has a democratic mandate (indeed duty) to seek to implement. As paragraph 64 of the judgment recognises, *"it is highly likely that the Government will have a strong view on whatever matter of national importance triggers a binding referendum".*

Voter registration

48. S. 70 of the Constitution requires the Legislature to "*make provision to hold a referendum amongst persons registered as electors in accordance with section 90*". The Respondent is understood to object to the absence of provision in the Referendum Law for voters (who are not already registered as electors in accordance with s. 90) to register specifically for the purpose of voting in a s. 70 referendum. However, it is perfectly legitimate (and workable) for the two electorates to be conterminous; and, thus, for s. 70 to provide that the roll of those entitled to vote in a referendum matches the roll of those entitled to vote in elections, nothing more. The failure of the Referendum Law to make distinct provision for the registration of voters who wish to be entitled to vote specifically or solely in a referendum does not render it unconstitutional and does not undermine the democratic right under s. 70. It was and remains open for anyone to apply to become an elector. Such

an application would be processed in the normal way in accordance with s. 90 of the Constitution and the Elections Law 2017 **[AA/3]** ("Elections Law"). If eligible, once registered such an elector would be entitled to vote in any referendum and/or election.

49. The various constitutional provisions cited in paragraphs 3-5 of CIG's post-hearing note of "Further Information" to the Court on 31 January 2020 **[AB/11]** indicate that it is not unusual for a constitutional right to vote in a referendum to be made coterminous with the right to vote in an election in that way.

Party political broadcasting

50. The Respondent suggests that the absence of "clear" provision in the Referendum Law in relation to party political broadcasting fails to secure an effective right to vote in the present referendum. However, the Referendum Law is clear on this issue.

    a. S. 12 of the Referendum Law has the effect of applying the provisions of the Elections Law to the present referendum, subject to the modifications set out in the Schedule to the Referendum Law **[AA/4]**.

    b. Part VI of the Elections Law 2017 addresses the issue of political broadcasts **[AA/3/48-50]**.

    c. Accordingly, those provisions apply to the present referendum as they would apply to an election, subject only to the "necessary changes" to s. 74 of the Elections Law 2017.

51. To the extent that any complaint about political broadcasting in the context of this referendum relates to the application of these provisions, it is not a complaint about the constitutionality of the Referendum Law. To the extent that it relates to the substance of these provisions, CIG relies on the points made in paragraphs 46-47 above: the legislature has a wide discretion concerning how to regulate matters such as broadcasting in the context of a referendum, and the choices which the legislature has made in the present case cannot be said to undermine or negate the democratic rights ensured by s. 70.

Formulation of the referendum issue

52. The Respondent suggests that the absence of rules in the Referendum Law relating to the formulation of the referendum issue fails to secure the effective right to vote under s. 70.

53. However, the Referendum Law does contain clear rules relating to the formulation of the issue. S. 4 of that Law provides **[AA/4/7]**:

> "*(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.*"

54. In its letter before claim, the Respondent raised a substantive complaint about the formulation of the referendum question by CIG **[Exhibit LS1 - Binder 'A', pp.374-390]**. However, following further pre-action correspondence she chose not to pursue that complaint as a ground for judicial review. Having so chosen, she cannot revive that complaint at the appeal stage.

F: RELIEF (GROUND 5 OF THE APPEAL)

55. In written submissions filed after judgment, CIG submitted that declaratory relief was appropriate and sufficient . However, in his ruling of 2 March 2020, the judge granted the Respondent an order quashing the Referendum Law **[CB/5]**. He held that there was a "*danger of obfuscation*" were he to limit relief to a declaration, and that such relief would "*risk giving the impression that the Referendum Law remains in force pending its revision/repeal*" (paragraph 9), adding that no countervailing principle applied to restrain the Court from quashing the Law (paragraph 10).

56. If the appeal on Grounds 1-4 is not successful, CIG invites the Court nonetheless to substitute a declaration for the relief granted by the judge, on the basis that declaratory relief is sufficient for all practical purposes and consistent with the principles of separation of powers and judicial comity. CIG relies on the following points.

a. S.23 of the Constitution provides that, where a piece of primary legislation is found to be incompatible with the Bill of Rights, the Court must make a declaration recording, first, that the legislation is incompatible with the relevant section(s) and, second, the nature of that incompatibility. It is then for the Legislature to decide how to remedy the incompatibility: s.23(3) **[AA/2/37]**.

b. Breaches of the Bill of Rights are the gravest form of constitutional violation, engaging individual rights which have been given elevated status and special protection. If, where a piece of primary legislation violates part of the Bill of Rights, the Court is nonetheless limited to making a declaration of incompatibility, and is simply not entitled to quash the legislation, the same must (*a fortiori*) be true of constitutional violations which, as here, do not engage the Bill of Rights. Nowhere, in the Constitution or elsewhere, is power expressly conferred on the Court to strike down primary legislation. In paragraph 12 of his ruling, the judge rejected this reliance on the contrasting remedy under s. 23 of the Constitution as *"an argument against [CIG's] construction"*, but gave no further explanation.

c. In fact, the above approach, which respects the constitutional principle of comity and separation of powers, applies in the UK. Where primary legislation violates the European Convention on Human Rights, courts are limited to making a declaration of incompatibility. Where primary legislation violates European Law, the same approach is adopted: such legislation is declared to be contrary to EU Law[6]. The UK court does not purport to quash the primary legislation. As Lord Bridge of Harwich observed in *R v Secretary of State for Transport, ex p Factortame Ltd* [1990] 2 AC 85, 150 **[AA/23]**:

> "*the form of final relief available against the Crown has never presented any problem. A declaration of right made in proceedings against the Crown is invariably respected and no injunction is required.*"

d. Moreover, as Zamir & Woolf state in The Declaratory Judgment 4th edition (2011) at 1-07:

> "*whilst the defendant is assumed to have respect for the law, justice does not rely on this alone. A declaration by the court is not a mere opinion devoid of legal effect: the controversy between the parties is determined and is res judicata as a result of the declaration being granted.*"

[6] *R v Secretary of State for Employment, ex parte Equal Opportunities Commission* [1995] 1 AC 1 **[AA/22]**.

In other words, a declaration will often be sufficient because a declaration is clear, binding and will be honoured.

e. As regards the choice between declarations and quashing orders in judicial review generally, Zamir & Woolf state at 4-243:

> "*On applications for judicial review, the declaration is particularly appropriate because public bodies will almost invariably respect a declaration and a court is unlikely to insist on the use of the more intrusive prerogative orders. There will, however, remain situations where it will be tidier to make a quashing order so as to make it clear that a particular decision no longer has any effect. Thus in the Pyx Granite case [1960] AC 260 at 290, Lord Goddard said:*
>
> > *'I know of no authority for saying that if an order or decision can be attacked by [a quashing order] the court is debarred from granting a declaration in an appropriate case. The remedies are not mutually exclusive, though no doubt there are some orders, notably convictions before justices, where the only appropriate remedy is [a quashing order].'"*

If that is true in relation to administrative decisions, it is all the more true of primary legislation. This is not a case where a conviction (or some other decision, order or instrument) must be erased from the record by the Court, because no other person or body has the power to do so. Here, the Legislative Assembly has the power to remedy the defect identified by the Court[7].

f. Other Caribbean constitutions contain explicit supreme law clauses which render inconsistent primary legislation unconstitutional by operation of law[8]. By contrast, no similar power is expressly conferred on the Cayman Island courts by the Constitution. The same position is, however, achieved by section 2 of the Colonial Laws Validity Act 1865 **[AA/5]**. It provides that:

> "*Any colonial law which is or shall be in any respect repugnant to the provisions of any Act of Parliament extending to the colony to which such law may relate, or repugnant to any order or regulation made under authority of such an Act of Parliament, shall be read subject to such Act, order or regulation, and shall to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative.*"

Under section 1, for present purposes, "*colony*" includes the Cayman Islands and "*colonial law*" includes the Referendum Law. If found to be unconstitutional, it is "*repugnant*" to an "*order*" (the Cayman Islands Constitution Order 2009) made under the authority of an "*Act of Parliament*" (the West Indies Act 1962 **[AA/6]**)

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[7] Paragraph 56(g)(i) below.

[8] For example, Jamaica and Trinidad and Tobago. Section 2 of the latter's Constitution provides as follows: "*This Constitution is the supreme law of Trinidad and Tobago, and any other law that is inconsistent with this Constitution is void to the extent of the inconsistency*".

within the meaning of section 2 above[9]. Accordingly, the Referendum Law would "*be and remain absolutely void and inoperative*" by operation of law. This might be reflected in a declaration, but needs no quashing order[10].

g. In any event, as a matter of principle, the Court should be very slow to quash primary legislation enacted by a democratically-elected legislature unless this is necessary. It is not necessary in the present case.

   i. In practice, a declaration that the Referendum Law is incompatible with s.70 of the Constitution would require the Legislative Assembly to reconsider how to give proper legal effect to s. 70 and to the petition which triggered the Referendum Law. The Legislature has the power, and the function, to repeal/revise the Referendum Law. It should be allowed to do so, in line with the Court's judgment.

   ii. In the meantime, a declaration will make it crystal clear to both the parties and the public that the Referendum Law is invalid and cannot be operated. It would be sufficient to preclude the taking of any executive or administrative act under the Referendum Law, and to preclude any reliance or expectation.

   iii. After all, the unconstitutionality identified by the Court is one of form not substance or content.

h. In *R (National Council for Liberties) v Secretary of State for the Home Department* [2018] EWHC 975 **[AA/16]** the Divisional Court recommended caution on the issue of remedy for a UK court which had found primary legislation to be incompatible with EU law. Although it was not in dispute that the court had power to disapply domestic legislation for such incompatibility, Singh LJ observed at paragraphs 76-77:

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[9] *Euro Bank Corporation* 2001 CILR 156 (Smellie, CJ), paragraph 39, *Nadan v R* [1926] AC 482, pages 492-493, *Liyanage v The Queen* [1967] 1 AC 259, page 284, *Allan Garfield Ebanks v Her Majesty The Queen* CICA No. 29 of 2006, 3 December 2007, paragraphs 33-38.

[10] Section 94(1) of the Constitution limits the Court's powers to those conferred by the Constitution or any other law.

"*These are deep constitutional waters, in which the courts of this country have been and still are feeling their way. In our judgment, the appropriate and principled approach is for the court to allow both the Government and Parliament a reasonable amount of time in which they have the opportunity to enact national legislation to correct the defects which exist and which are incompatible with EU law…*
In our view, courts in this country should proceed with great caution in a context such as this… [T]his is relatively uncharted territory for courts in this country, possibly in contrast to courts in other countries which have a much longer history of constitutional adjudication in which even primary legislation can be challenged."

The same considerations apply with respect to the Cayman Islands. Judicial adjudication under the 2009 Constitution Order is relatively uncharted territory. From the Supreme Court judgment in *R (Chester) v Secretary of State for Justice* [2014] AC 271 **[AA/17]**, Singh LJ derived the principle that "there is no automatic rule that, once it is held or conceded that a provision of primary legislation is incompatible with EU law, the national legislation must immediately be disapplied", noting that "what is crucial is the nature of the incompatibility". The Court went on to consider whether an "order for disapplication" or a declaration was the appropriate relief in the case in hand, and concluded that a declaration as to the incompatibility with EU law was sufficient, together with a requirement that it be remedied within a reasonable time (paragraph 100). The Court observed at paragraph 93:

"*[We do not] consider that any coercive remedy is either necessary or appropriate. This is particularly so in a delicate constitutional context, where what is under challenge is primary legislation and where the Government proposes to introduce amending legislation which, although it will be in the form of secondary legislation rather than primary, will be placed before Parliament for the affirmative resolution procedure to be adopted.*"

For similar reasons, a similar degree of judicial restraint is appropriate in the present case.

i. In Hong Kong, another common law jurisdiction, the Court of Final Appeal has treated the Court's role, in the case of unconstitutional primary legislation, as being discharged by the making of a declaration. See for instance *Ng Ka Ling v Director of Immigration* (1999) 2 HKCFAR 4 **[AA/24]** (emphasis added):

"*61. In exercising their judicial power conferred by the Basic Law, the courts of the Region have a duty to enforce and interpret that Law. They undoubtedly have the jurisdiction to examine whether legislation enacted by the legislature of the Region or acts of the executive authorities of the Region are consistent with the Basic Law* ***and,***

***if found to be inconsistent, to hold them to be invalid**. The exercise of this jurisdiction is a matter of obligation, not of discretion so that **if inconsistency is established, the courts are bound to hold that a law or executive act is invalid at least to the extent of the inconsistency**. ...*

*"62. What has been controversial is the jurisdiction of the courts of the Region to examine whether any legislative acts of the National People's Congress or its Standing Committee (which we shall refer to simply as "acts") are consistent with the Basic Law **and to declare them to be invalid if found to be inconsistent**. In our view, **the courts of the Region do have this jurisdiction and indeed the duty to declare invalidity if inconsistency is found**. It is right that we should take this opportunity of stating so unequivocally."*

See further *HKSAR v Lam Kwong Kwai* (2006) 9 HKCFAR 574 **[AA/25]** (emphasis added):

*"77. Courts have traditionally, and for very good reason, been reluctant to engage in what may be seen as legislative activity. That is why, in earlier times the courts stopped short of engaging in remedial interpretation which involves the making of a strained interpretation. The justification for now engaging in remedial interpretation is that it enables the courts, in appropriate cases, to uphold the validity of legislation, albeit in an altered form, rather than strike it down. To this extent, the courts interfere less with the exercise of legislative power than they would if they could not engage in remedial interpretation. **In that event, they would have no option but to declare the legislation unconstitutional and invalid.** Indeed, it can be safely assumed that the legislature intends its legislative provision to have a valid, even if reduced, operation than to have no operation at all, so long as the valid operation is not fundamentally or essentially different from what it enacted."*

j. There is a recent precedent for that approach in the Cayman Islands. In *Bennett v The Honourable Speaker of the Legislative Assembly* Cause No. G0003 of 2018 (28 December 2018) **[AA/14]** Hon. Justice Nova Hall (Actg) concluded that s.11 & s.26 of the Legislative Assembly (Powers, Privileges and Immunities) Law (2015 Revision) breached s.82 of the Constitution [113]. As regards relief, the Court stated that the impugned sections remained valid unless and until the Legislature acted [114] and made declarations of unconstitutionality [131]. No quashing order was made.

G: CONCLUSION

57. For the reasons set out above, the Court is invited to allow the appeal. Alternatively, it should modify the relief by substituting a declaration for the quashing order.

MARK SHAW QC

JESSICA BOYD

Blackstone Chambers

London

25 March 2020

Revised 20th April 2020