IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION

CAUSE NO. G169 OF 2020

BETWEEN: KATTINA ANGLIN

Plaintiff

AND THE GOVERNOR OF THE CAYMAN ISLANDS

Defendant

AND COLOURS CARIBBEAN

Intervener

Appearances: **Mr. Hugh Southey QC & Mr. Rupert Wheeler on behalf of KSG Attorneys-at-Law for the Plaintiff**
Mr. Tom Hickman QC and Mr. Tim Parker instructed by Ms. Reshma Sharma QC and Ms. Heather Walker of the Attorney General's Chambers for the Defendant
Mr. Alex Potts QC and Ms. Sarah McLennan on behalf of Conyers Dill & Pearman LLP for the Intervener

Before: **Hon. Justice Richard Williams**

Hearing: **2 December 2021**

Draft Judgment Circulated: **23 March 2022**

Judgment: **28 March 2022**

HEADNOTE

Judicial review – The reserved powers of the Governor pursuant to section 81 of Schedule 2 to the Cayman Islands Constitution Order 2009 ("the Constitution") - The scope of the Governor's responsibilities as defined by s.55 of the Constitution

JUDGMENT

Background - The parties, the application and the proceedings

1. The Plaintiff is Kattina Anglin. The Defendant is His Excellency the Governor of the Cayman Islands ("the Governor"). The Intervener is Colours Caribbean.

2. This is the substantive hearing of the Plaintiff's application for Judicial Review, brought pursuant to Grand Court Rules (1995 Revision) ("GCR") Order 53, of the decision ("the Decision") of the Defendant ("the Governor") made on 4 September 2020 to assent to the Civil Partnership Act 2020 ("the CPA")[1]. The Decision was made by the Governor when he decided to use his purported reserved powers under s.81 of Schedule 2 to the Cayman Islands Constitution Order 2009 ("the Constitution")[2]. The CPA provides for both opposite-sex and same-sex couples to enter into a civil partnership. It also amends various pre-existing legislation[3], thereby conferring on civil partners a large number of rights and obligations corresponding to those that attend on marriage.

3. The European Convention on Human Rights ("ECHR") has been extended to the Cayman Islands[4]. Section 9(1) of the Bill of Rights, Freedoms and Responsibilities ("BoR"), which protects the right to respect for family and private life, requires that the Legislature provide civil partners with a legal status functionally equivalent to marriage. The CPA and its associated regulations brought to an end the ongoing and continuing breach of the ECHR and the BoR found at Part 1 in the Constitution.

4. At the hearing, the Plaintiff reiterated her contention that the Governor erred in law by using s.81 of the Constitution to enact the CPA beyond the scope of his responsibility as defined by s.55 of the Constitution[5] ("the s.81 ground"). The Defendant and the Intervener contend that, in light of the history of the Constitution and its terms, (i) the UK Government

[1] Then referred to as the Civil Partnership Law, 2020.
[2] See paragraph 54 herein.
[3] But not the Marriage Act (2010 Revision).
[4] Pursuant to Article 56 of the ECHR the United Kingdom declared that the ECHR shall apply in relation to the Cayman Islands.
[5] See paragraph 56 herein.

was entitled to instruct the Governor to publish and assent to the CPA under s.81 of the Constitution to ensure that, following the Court of Appeal judgment in ***The Deputy Registrar and the Attorney General v Day and Bush*** 2020(1) CILR 99[6] and the failure on the part of the Legislative Assembly to pass a Bill to give effect to the Court of Appeal's declaration[7] made in that ruling ("the declaration"), the UK was compliant with the ECHR, and (ii) the Governor has acted within his powers under the Constitution.

5. On behalf of the persons for whom the Intervener advocates and gives a voice to, the Intervener forcefully submits that, *"If the Plaintiff's application is allowed, and if the Court quashes the CPA 2020 or declares it to have been ultra vires with retrospective effect,"* those persons and their children who have made clearly significant life decisions relying on the provision in the CPA, *"will face considerable legal uncertainty, as well as a variety of practical complications, and associated distress"*. Those submissions will require careful consideration if the Court finds for the Plaintiff and then has to go on to consider what relief may be ordered. However, it is important to remind oneself that the pleaded grounds for the Judicial Review application raise the discrete legal issue concerning the scope of the Governor's powers and whether he has acted in error of law in excess of his powers. Even if such a hearing was actually necessary after the conclusive declaration made by the Court of Appeal, and although it is evident that the Plaintiff and those members of the community who responded to her public plea by making donations towards her legal expenses[8] do not agree with the concept of civil partnership for single-sex couples, this is

[6] See paragraphs 15-16 herein.
[7] See paragraph 15 herein.
[8] See paragraph 14 Judgment of Williams J dated 29 October 2021 in the Plaintiff's appeal against the decision of the Director of Legal Aid.

not a hearing to determine whether or not individuals should have the right to be joined in civil partnership in the Cayman Islands.

6. Following adherence by the Plaintiff to the procedural requirements of Practice Direction No. 4 of 2013 Judicial Review (GCR O.53) Pre-Action Protocol for Judicial Review[9], the Leave to Apply for Judicial Review application was filed on 28 October 2020. It was contended that the Governor had erred in law (i) due to the s.81 ground[10]; and (ii) by using that section to remedy incompatibility because s.23 of the Constitution specifically reserves that power to the Legislature ("the incompatibility ground"). Leave to apply for Judicial Review was granted by this Court on 20 November 2020 in relation to the s.81 ground, but not in relation to the incompatibility ground. The reasons for that decision are contained in a written judgment delivered on 20 November 2020.

7. On 7 December 2020, the Plaintiff filed her Notice of Originating Motion. The relief sought therein by the Plaintiff is:

   (i) An order of *Certiorari* to review and quash the Governor's action; and

   (ii) A declaration that the Governor's action was unlawful.

8. On 11 June 2021, a Notice of Hearing was issued by the Listing Officer fixing the substantive hearing of the Judicial Review proceedings for 2 and 3 December 2021.

9. On 19 October 2021, this Court heard the application made by Colours Caribbean to intervene in these proceedings[11]. Colours Caribbean is the name used for the purpose of an

[9] Paragraphs 8-11 of the Practice Direction.
[10] See Paragraph 4 above.
[11] The application was made by way of a Summons dated 22 September 2021.

application to the Cayman Islands Registrar of Companies for incorporation of the organisation, which was known prior to incorporation as "Colours Cayman". Colours Cayman was registered as a Non-Profit Organisation in the Cayman Islands on 13 February 2018 and formally incorporated on 28 May 2020 as Colours Caribbean. The organisation was formed in 2015 *"with a mission to advocate for the rights of LGBTQI+ people in the Cayman Islands and to foster a safe and comfortable social environment for the LGBTQI+ community"*.

10. On 28 October 2021, this Court delivered its written Judgment in which it set out its reasons for granting Colours Caribbean leave to intervene in these proceedings by way of written submissions, evidence, and oral submissions at the substantive hearing not exceeding one hour.

11. At the Judicial Review hearing held on 2 and 3 December 2021, I received oral submissions from Counsel for each party. Due to the COVID-19 travel restrictions and limited availability of Counsel, Mr. Hugh Southey QC, Mr. Tom Hickman QC and Mr. Tim Parker joined the hearing remotely by Zoom. Their remote attendance was agreed by all parties and approved by the Court. Thankfully there were minimal connectivity issues and I am satisfied that I have been able to receive and assess the oral submissions properly.

12. At the end of the hearing, I adjourned the matter in order to prepare and then deliver this reserved written judgment. When determining the issues dealt with in this Judgment, I have considered the written and oral submissions received from each Counsel, as well as the content in the core bundle and the bundles of authorities. The challenge raised in relation to the scope of the reserved powers of the Governor under s.81 of the Constitution is a

matter of general public importance. There appears to be no case precedent on the issue in the Cayman Islands or any other British Overseas Territory and, in such circumstances, although I am grateful to the parties for their patience in waiting for the handing down of this Judgment, the parties will hopefully understand that this decision could not be rushed as the material submitted and submissions made merited a thorough review.

Factual Background

13. The factual background is set out in some detail in the leave application Judgment dated 20 November 2020. For the sake of convenience, I now replicate substantive parts of that review herein.

Background - The proceedings brought by Chantelle Day and Vickie Bodden Bush

14. On 14 September 2018, Chantelle Day and Vickie Bodden Bush sought declarations from the Grand Court that the Marriage Act (2010 Revision) did not conform with their rights enshrined in the BoR. On 29 March 2019 the Chief Justice ruled in ***Day and another v The Governor of the Cayman Islands and others,*** Cause Nos. 111 & 184 of 2018, 29th March, 2019 that the BoR gave Ms. Day and Ms. Bush the right to marry and that the Governor, the Deputy Registrar of the Cayman Islands, and the Attorney General of the Cayman Islands were in violation of certain rights found in the BoR. The Chief Justice ordered, pursuant to s.5 of the Cayman Islands Constitution Order 2009, certain amendments to the Marriage Act.

15. The Chief Justice's order was appealed[12] by the Deputy Registrar and the Attorney General[13]. The Court of Appeal delivered its Judgment on 7 November 2019. The Court of Appeal, whilst understanding why the Chief Justice reached the decision that he did, allowed the appeal on the question of marriage[14] and set aside the orders made by him. The ECHR was a major consideration when the Constitution negotiations were taking place. The Court of Appeal highlighted that the BoR is clearly based on the ECHR as its form and content substantially follow the ECHR, and it repeated that the Appellants had:

> *"... finally accepted that s.9(1) of the BoR requires the Legislative Assembly to provide the Respondents with legal status functionally equivalent to marriage"* and added that *"Its failure to comply with its obligations under the law in that regard is woeful."*

The Court of Appeal stated that such an obligation had "*been apparent for several years*" and that:

> *"It is difficult to avoid the conclusion that the Legislative Assembly has been doing all it can to avoid facing up to its legal obligations."*

With this in mind, the Court of Appeal deemed it appropriate to make the following declaration[15], which contains no reference to any specific piece of legislation:

> *"In recognition of the longstanding and continuing failure of the Legislative Assembly of the Cayman Islands to comply with its legal obligations under section 9 of the Bill of Rights*
> *And in recognition of the Legislative Assembly's longstanding and continuing violation of Article 8 of the European Convention on Human Rights,*
> *IT IS DECLARED THAT:*

[12] The Governor was not an Appellant.
[13] ***The Deputy Registrar and the Attorney General v Day and Bush*** 2020(1) CILR 90.
[14] The Court of Appeal found that the constitutional right to marry extended only to opposite-sex couples.
[15] At paragraph 117 of the Judgment.

Chantelle Day and Vickie Bodden Bush are entitled, expeditiously, to legal protection in the Cayman Islands, which is functionally equivalent to marriage."

16. The Court of Appeal then felt *"driven"* to make the following *"final observation"* at paragraphs 120-121 in the Judgment, namely:

> *"120. This court is an arm of government. Any constitutional settlement requires the executive and the legislature to obey the law and to respect decisions of the court. It would be wholly unacceptable for this declaration to be ignored. Whether or not there is an appeal to the Privy Council in respect of same-sex marriage, there can be no justification for further delay or prevarication.*
>
> *121. Moreover, in the absence of expeditious action by the Legislative Assembly, we would expect the United Kingdom Government, to recognise its legal responsibility and take action to bring this unsatisfactory state of affairs to an end."*

Background – Events flowing from the Court of Appeal's' Ruling and leading up to the enactment by the Governor of the CPA

17. The Court of Appeal's decision was appealed. The decision of the Court of Appeal which held that, at the time[16], the Legislative Assembly was in ongoing breach of the positive duty under s.9 of the BoR and Article 8 of the ECHR to introduce a legal frame-work for same-sex relationships was not appealed and therefore that part of their decision is final.

18. Following the conclusion of the hearing before me, the Privy Council delivered its Judgment[17] in which the Board dismissed the appeal and upheld the judgment of the Court of Appeal. At paragraph 3 therein, the Board stated that the United Kingdom is responsible for the international relations of the Cayman Islands and that she *"is*

[16] Which was before the CPA was enacted.
[17] On 14 March 2022.

concerned to ensure that local law in the Cayman Islands should be compatible with the obligations of the United Kingdom under the ECHR in respect of the Cayman Islands." The Board added in relation to the Court of Appeal's declaration that the obligation under s.9(1) BoR to provide the Appellants with a legal status functionally equivalent to a marriage had been complied with by the promulgation of the CPA.[18]

19. In light of the declaration, the Domestic Partnership Bill 2020 ("DPB") was introduced by the Government to the Legislative Assembly. The Bill had an unsuccessful passage, as the Legislative Assembly voted against enacting it on 29 July 2020. This meant that there remained a continuing violation of Article 8 ECHR and section 9 BoR.

20. As a result of the declaration, and being cognisant of the Court of Appeal's unequivocal observation that it expected the United Kingdom to take action if the then Legislative Assembly did not promptly act in conformity with the declaration, the Governor, following consultations with the Premier, informed the Foreign and Commonwealth Office of the United Kingdom Government ("the FCO") about the defeat of the Bill and that there was no likelihood that legislation would be passed to provide legal protection equivalent to marriage to single-sex couples. He also set out the options (as he perceived them) to the UK Government, including (i) the use of his powers under s.81 to enact a civil partnership law or (ii) the enactment of an Order in Council by Her Majesty[19].

[18] Paragraphs 2 and 27 of the Privy Council Judgment.
[19] See paragraph 12 of the Defendant's Written Submissions, but this reference to the communication from the Governor to Baroness Sugg raising the Order in Council option does not appear in the affidavits sworn by Adam Pile and Christine Rowlands.

21. On 5 August 2020, Baroness Sugg, the Minister for Sustainable Development and the Overseas Territories, acting on behalf of the United Kingdom's Secretary of State, approved the Governor using s.81 of the Constitution for the following purpose:

> *"After giving this matter due consideration, I approve, on behalf of the Secretary of State, the use of your powers under section 81 of the Cayman Islands Constitution to: (i) publish in a Government Notice bills on domestic partnerships which is in compliance with the Court of Appeal's judgement of 7 November 2019; and (ii) assent to the bills on behalf of Her Majesty 21 days after its publication. As well as serving as Secretary of State approval under section 81 of the Cayman Islands Constitution, please treat this letter as instructions addressed to you on behalf of Her Majesty (as referred to in section 31(2) of the Cayman Islands Constitution) to act in the manner described above."*

The instruction given by the Secretary of State was given on behalf of Her Majesty, and was not itself an act of the United Kingdom Government.

22. It is only after the events and procedures outlined in paragraphs 19 and 20 above have occurred/been followed[20] that the Governor would be able to enact legislation that he considers to be necessary or desirable with respect to or in the interests of any matter for which he is responsible under s.55[21] of the Constitution.

23. On 5 August 2020, the Governor published a Statement on the Domestic Partnership Bill, in which he said:

> *"Following the failure of the Legislative Assembly to pass the Domestic Partnership Bill on the 29th July 2020 in to law, I have discussed the legal implications of the decision with the FCO and UK Ministers.*

[20] See s.81 of the Constitution and paragraph 54 herein.
[21] See paragraph 56 herein.

The Cayman Islands Court of Appeal was clear that Cayman is in breach of the Bill of Rights in the Constitution and the European Convention on Human Rights (ECHR) by its continuing failure to put in place a framework for same sex couples that is functionally equivalent to marriage. ……

It was clear to me that the Bill would satisfy the legal requirement and at the same time maintain the current definition of marriage. I fully recognise how sensitive and controversial this issue is. But it was my expectation, and that of the FCO, that all lawmakers would recognise their legal responsibility and pass the Bill after debate in the Legislative Assembly.

The failure of the Legislative Assembly to pass the Domestic Partnership Bill leaves me, as Governor and the UK Government, with no option but to act to uphold the law. …. I believe it is therefore imperative that the Domestic Partnership Bill is passed into law so that the discrimination suffered by Chantelle Day and Vicky Bodden-Bush, and others in same sex relationships, is brought to an end as required by the Court of Appeal.

…… As Governor, this is not a position I would ever have wanted to be in. Since arriving in October 2018, I have fully respected Cayman's extensive responsibility for dealing with domestic matters. <u>But I cannot simply stand aside when it comes to upholding the rule of law and complying with international obligations, which fall squarely within my responsibilities as Governor</u>." [My emphasis]

24. On 10 August 2020, a revised version of the enactment of what became the CPA was published by the Governor. Pursuant to s.81, the Domestic Partnership Bill had to be published at least 21 days before the Governor could assent to it. The Governor indicated that he intended to enact the CPA after a 21 day consultation period.

25. On 14 August 2020, the Governor issued a further statement on the DPB in which he stated:

"In its ruling of 7 November 2019 the Cayman Islands Court of Appeal was clear that, by its continuing failure to put in place a legal framework for same sex couples, functionally equivalent to marriage, the Cayman Islands was in breach of

the Bill of Rights in the Constitution and the European Convention on Human Rights (ECHR). The Court also made it clear that, should the Cayman Islands Legislature fail to act to rectify the situation, the UK should recognise its responsibility for ensuring that the Cayman Islands complies with its responsibilities under the Constitution and its international obligations. Ensuring compliance with international obligations falls squarely within my responsibilities under section 55(1)(b) of the Constitution. Given that responsibility I was instructed, on 5 August, by the Minster for Sustainable Development and the Overseas Territories, Baroness Sugg, who is acting on behalf of the UK Secretary of State, to utilise Section 81 of the Cayman Islands Constitution to rectify this situation. ……

This instruction by the UK, and action by me as Governor, is fully consistent with the UK response to the Foreign Affairs Committee in 2019. The UK stated that these matters are best handled by local legislatures, justice mechanisms and legal processes. In the Cayman Islands, the Legislature rejected the Domestic Partnerships Bill providing a legal framework for same sex couples. In such circumstances, the Court of Appeal Declaration was clear, that the UK must step in to rectify this situation. The Cayman Islands Government and Attorney-General had already accepted that it was in breach of the Bill of Rights….

As Governor, this is not a position I ever wanted to be in. Such situations have been, and will be, extremely rare. The UK, and I as Governor, fully respect Cayman's extensive responsibility for domestic affairs. But I am ultimately responsible for good governance". [My emphasis]

It is evident that the Governor is here stating that compliance with international obligations falls under external affairs and is therefore one of his special responsibilities and resulted in the relevant direction made on behalf of the Secretary of State.

26. On 4 September 2020, after the 21 days mentioned in paragraph 24 above had elapsed, the Governor assented to the CPA[22]. The associated regulation to the CPA[23] took effect on 28 September 2020.

27. On 4 September 2020 the Governor issued a statement on giving assent to the CPA 2020[24] in which he remarked:

> *"In line with instructions from UK Ministers to use my reserved powers under s81 of the Constitution, I have today given Assent to the Civil Partnership Law and 11 consequential pieces of legislation….*
> *UK Ministers instructed me to take this action to uphold the rule of law and comply with the Cayman Islands Court of Appeal Judgment in November 2019. The Court of Appeal declared that same sex couples were entitled, expeditiously, to legal protection in the Cayman Islands, which is functionally equivalent to marriage. The Court also declared that in the absence of expeditious action by the Legislative Assembly, they would expect the United Kingdom Government to recognise its legal responsibility and "take action to bring this unsatisfactory state of affairs to an end.*
> *After the narrow vote on 29 July against the Domestic Partnership Bill, it was evident from my consultations with the Premier and others that there was no prospect of the Bill coming back to the Legislative Assembly, or if it did that it would be successfully passed. The UK therefore had no option but to step in to ensure we comply with the rule of law and international obligations under the terms of the European Convention on Human Rights."*
> *….*
> *".....what we are required to do is provide a legal framework functionally equivalent to marriage for same sex couples, from which heterosexual couples will also be*

[22] Due to views expressed during the consultation process the title Domestic Partnership in the Bill was changed to Civil Partnership in the Law and some other amendments were made.
[23] Then referred to as the Civil Partnership Law.
[24] Then referred to as the Civil Partnership Law.

able to benefit, should they so choose. That is necessary to comply with our own courts and our Constitution. The Government of the Cayman Islands and the Attorney-General have accepted that this is a legal requirement that cannot be ignored. As the Court of Appeal stated - that Cayman had such an obligation has been apparent for several years. An important principle in our Constitution and Bill of Rights is the protection of minorities. That principle protects all of us, now and in the future. We cannot pick and choose which rights are protected….

Let me also reiterate that Cayman retains full autonomy for domestic issues including in education and immigration. The UK fully respects Cayman's autonomy in domestic affairs. Indeed this will be made even clearer in the package of constitutional changes that are likely to be adopted later this year.

UK intervention in this manner is extremely rare. As Governor it is not a position I would ever have wanted to be in. Abolition of the death penalty in 1991 and legalising homosexuality in 2000 were previous examples where the UK intervened to ensure its legal and international obligations, in a British Overseas Territory, were upheld. It is wrong to suggest that the UK will seek additional pretexts for intervening."

It is right to point out that the two above *"interventions"* mentioned by the Governor in his assent statement were made by Order in Council and not by the route taken by the Governor in the present matter.

The arrangements between the United Kingdom and the Cayman Islands as an Overseas Territory

28. The UK Government has a sovereign responsibility to ensure the good governance of the British Overseas Territories. This stems from international law as well as longstanding political commitment to the wellbeing of the Overseas Territories. Each territory has its own constitution, its own government, and its own local laws. Each territory's constitution

sets out the powers and responsibilities of the institutions of its government, which for the Cayman Islands includes the Governor.[25]

29. The Governor is the Queen's representative in the Cayman Islands. He is the Senior Officer of the Government appointed on the advice of, – and reports to, the Secretary of State. He is charged by Ministers in the UK with endeavouring to ensure good governance in the Cayman Islands, as well as with representing the policies of the UK Government. He is to act in the best interests of the Cayman Islands so far as such interests are consistent with the interests of the UK. He is also tasked with representing and explaining the views of the Cayman Islands Government to the UK. The UK Government relies on the elected Ministers and Legislature to provide good governance in the spheres that have been delegated to them, whilst the Governor retains responsibility for specified areas, including, the relevant sphere for these proceedings:– external affairs.[26] Section 55(4) of the Constitution illustrates that external affairs includes matters that are internal and which involve internal legislation, for instance taxation[27]. The authors of the authoritative text, Hendry and Dixon, British Overseas Territories Law, 2nd Edition (Hart, 2018) address the meaning of external affairs when they write: *"The term 'external affairs', which is common in territory constitutions, might just as easily have been 'external relations'', 'international relations' or 'international affairs' of the territory."*[28] When referred to by me in this judgment, although of assistance, this oft quoted text is, of course, not binding upon me.

[25]The Governor is appointed by Her Majesty The Queen on the advice of Her Ministers in the UK.
[26] Although under s.55(4) of the Constitution the Governor is, after consultation with the Premier, required to assign or delegate, by directions in writing to the Premier or to another Minister, responsibility for the conduct of external affairs insofar as they relate to any matters of that fall within the portfolios of Minsters. Section 55(4)(a)-(g) contains a non-exhaustive list of the matters which must be included in the Governor's directions.
[27] Section 55(4)(d) of the Constitution.
[28] Page 248.

30. The Overseas Territories are not sovereign states in their own right. They are recognised internationally as territories with the United Kingdom being responsible for their international relations. The Cayman Islands are therefore part of the United Kingdom for the purposes of international law. This means that the UK can sign treaties on their behalf. In the Cayman Islands, there are constitutional requirements relating to consent to treaties. Section 55(3) of the Constitution provides that:

> *"The Governor shall not enter, agree or give final approval to any international agreement, treaty or instrument that would affect internal policy or require implementation by legislation in the Cayman Islands without first obtaining the agreement of the Cabinet, unless instructed otherwise by a Secretary of State."*

This provision reflects the established practice of the United Kingdom not to take such an action without consulting with the elected government of an overseas territory. However, the section also indicates that external affairs will involve things that need to be used internally.

31. As highlighted by Hendry and Dickson, the United Kingdom is responsible for compliance by the Cayman Islands with obligations arising under international law, whether deriving from customary international law or from applicable treaties. The responsibility may arise in respect of obligations under treaties and other international agreements applied to the Territories by the United Kingdom Government. The United Kingdom is, as a matter of international law, responsible for the external relations of the Cayman Islands, which includes compliance with international obligations under treaties. The United Kingdom is concerned about the manner in which the Overseas Territories implement treaty and convention obligations, because it could be held responsible if the territory violates them

and it may (as happened in a case dealing with the Cayman Islands, ***K.F. Ebanks v. United Kingdom*** [2010 (1) CILR 200][29]) be brought before an international tribunal like the ECtHR.

32. The above concern and responsibility of the United Kingdom is why the UK Government and the Secretary of State have reserved powers which are set out in each Overseas Territory's constitution. This is why the Secretary of State may instruct the Governor to assent to legislation in certain circumstances. The UK rightly feels that this is necessary to enable it to discharge its constitutional and international responsibilities to the residents of the Overseas Territories and in the international sphere.

33. In exceptional circumstances, the UK Parliament uses its powers to legislate for Overseas Territories without their consent, for example by making Orders in Council. In the Cayman Islands, s.125 of the Constitution deals with the powers reserved to Her Majesty and provides that:

> *"There is reserved to Her Majesty full power to make laws for peace, order and good government of the Cayman Islands."*

This provision reflects the position under s.5 of the West Indies Act 1962, whereby Her Majesty may by Order in Council make such provision as appears to her to be expedient for the government of any of the *"colonie*s" to which s.5 applies.

34. I note that in the House of Commons Foreign Affairs Committee Report "Global Britain and the British Overseas Territories: Resetting the Relations" (published 21 February 2019) a recommendation was expressed in the following manner:

[29] ECHR Application 36822/06.

"It is time for all OTs to legalise same-sex marriage and for the UK Government to do more than simply support it in principle. It must be prepared to step in, as it did in 2001 when an Order in Council decriminalised homosexuality in OTs that had refused to do so. The Government should set a date by which it expects all OTs to have legalised same-sex marriage. If that deadline is not met, the Government should intervene through legislation or an Order in Council."

The 1999 White Paper entitled '*Partnership for Progress and Prosperity – Britain and the Overseas Territories'* expressed a view that if an Overseas Territory failed to take the option of enacting necessary reform legislation, then legislation could be imposed by Orders in Council. Although the abovementioned report concerned the different issue of single-sex marriage, the suggested approach and the content of the White Paper are consistent with the view expressed by all of the parties before me, namely that s.125 of the Constitution could have been a route used by the United Kingdom Government to enact legislation the same as or similar to the CPA, instead of the UK instructing the Governor to adopt the s.81 of the Constitution approach. The Plaintiff highlights that there is "*no doubt*" that the United Kingdom Government had powers to address the declaration of the Court of Appeal by issuing an Order in Council. Therefore, if the s.125 route had been taken, it appears that it would have been unlikely that it would have been challenged. If such an approach were to be similarly challenged, an applicant would have had to surmount a challenging application for leave to apply for judicial review.

35. The Plaintiff contends that the Order in Council was the only available route to take, and adds it was not taken because that would mean that the UK Government would have had issues of political accountability to deal with, as such an approach would not be consistent with the expressed and preferred self-determination policy of the UK Government to allow

Overseas Territories to self-regulate on issues such as single-sex marriage. She states that such a course would involve the exercise of executive power by a minister of the UK Government, with resultant accountability to the UK Parliament. The Plaintiff states that the Governor's purported powers should not be used as *"a way of avoiding that political cost"* and that there is a check and balance arising in the s.125 Order in Council route, which is political accountability.

36. The fact that the Order in Council route exists does not necessarily mean that a Constitution cannot provide an alternative mechanism. Leading Counsel for the Defendant suggests that the s.81 option was preferred, as it meant that the Court of Appeal's declaration was being addressed *"within the framework of the Constitution"* without having to resort to the external measure of an Order in Council and rightly adds that, in any event, Baroness Sugg, as the relevant minister, would still have to be politically accountable for her written approval given on behalf of the Secretary of State.[30] The power to legislate by Order in Council is a very wide power, as it enables the UK to unilaterally act without any of the checks and balances found in the procedure (which includes consultation with the Premier) that has to be followed in the Cayman Islands before the Governor exercises a reserve power under s.81. Although Orders in Council are judicially reviewable on the grounds of illegality, irrationality and procedural impropriety, the resultant legislation is not susceptible to judicial review on the grounds of alleged incompatibility with its purpose being for the peace, order and good governance of the Cayman Islands. It is submitted that the s.81 approach, unlike an Order in Council, has inherent local checks and balances which must be crossed before the Governor can exercise his reserved power. When exercising his

[30] See paragraph 21 above.

powers to enact legislation in relation to an area of his special responsibilities (which include the areas of external affairs which have not been delegated to the Cayman Parliament), the Governor must act in accordance with any instructions from Her Majesty, so the ultimate control of the conduct of external affairs is with the Secretary of State in London.

The Constitution

37. It is necessary to set out the detail of the relevant provisions of the Constitution referred to in these proceedings and the principles which govern how one interprets the Constitution.

Approach to interpreting the Constitution

38. The exercise to ascertain the meaning of the reserved power and special responsibilities provision, including the phrase *"external affairs"*, requires the Court to consider the appropriate approach to interpreting the provisions in the Constitution. The Plaintiff argues that the interpretation should be a narrow one, considering the natural meaning of words. The Defendant and Intervener suggest that a wider, less rigid and purposive interpretation is required and this includes looking at the background surrounding how the Constitution was arrived at. The parties refer to the different parts of the Constitution set out above, to the Constitutions of other Overseas Territories and to case law from (i) the Cayman Islands, (ii) the United Kingdom and (iii) other British Commonwealth jurisdictions.

39. The Plaintiff contends that the enacting of the CPA, being legislation concerning legal status within the Cayman Islands, is an internal domestic matter. She adds that there is no evidence that such legislation had any implications for relations with international bodies or foreign states and, therefore, it has nothing to do with external affairs. She highlights

that in England and Wales, the Royal Prerogative embraces the making of treaties but does not extend to altering the law or conferring rights upon individuals without the intervention of Parliament.[31] The Plaintiff submits that although rights are in issue, so are rights of the public generally to self-determination and democratic process and this supports a narrow interpretation of the Constitution.

40. Reference is made to ***Hewitt v Rivers, Solomon and Attorney General*** 2013 (2) CILR 262 at paragraphs 27-28 where the Chief Justice highlighted that the basic approach where there is no ambiguity must be to give the words of the Constitution their ordinary, literal meaning and not alter that meaning by the application of a generous or flexible interpretation. The Plaintiff highlights the Chief Justice's observation at paragraph 31 that provisions whose construction could derogate from the fundamental rights or the democratic rights of the electorate should not be construed any more broadly than is necessary. The Plaintiff submitted that the situation in the matter before me involves a situation where the Defendant is arguing for additional powers for the Governor who is not democratically accountable to the public. She argues that this is a rights case for the whole public and therefore there should be a more narrow interpretation due to the importance that the Constitution places on self-determination.

41. The Plaintiff cautions that a broad interpretation of s.55 of the Constitution could undermine the role of the Governor who must work with and in partnership with the Cayman Islands Government in a manner that is in the best interests of the Cayman Islands so far as those interests are consistent with the interests of the United Kingdom. It is

[31] Lord Oliver in ***JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry*** [1990] 2 AC 418 at page 500.

suggested that the wide interpretation of what amounts to a special responsibility sought by the Defendant would mean that the requirement for the Governor to work collaboratively will be lessened as he will have greater powers to *"impose*" legislation contrary to the views of the Cayman legislature, which would amount to him playing a political role.

42. In relation to the appropriate approach to interpreting constitutional provisions, the Defendant relies upon the Court of Appeal's thorough review conducted at paragraphs 29 to 40 in its Judgment in ***Deputy Registrar and Attorney General v Day and Bush***.

43. The first case highlighted by the Court of Appeal was ***Minister of Home affairs and Another v Collins Macdonald Fisher and Another*** [1980] AC 319, which was an appeal to the Privy Council from the Court of Appeal of Bermuda. At paragraph 31, the Court of Appeal referred to Lord Wilberforce's observations made at paragraph 329C about whether constitutional provisions should be construed in the same way as Acts of Parliament or whether the court should treat a constitutional instrument *"... sui generis, calling for principles of interpretation of its own ... without necessary acceptance of all presumptions that are relevant to legislation of private law."* Lord Wilberforce stated at 329E:

> *"... A Constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect*

to those fundamental rights and freedoms with a statement of which the Constitution commences."

44. At paragraph 32 of the ***Deputy Registrar v Day and Bush***, the Court of Appeal referred to ***Matadeen and Another v Pointu and Others and Minister of Education and Science*** [1999] 1 AC 98 at page 108C-F. This was an appeal to the Privy Council from the Supreme Court of Mauritius, in which Lord Hoffmann stated:

"Their Lordships consider that this fundamental question is whether section 3, properly construed in the light of the principle of democracy stated in section 1 and all other material considerations, expresses a general justiciable principle of equality. It is perhaps worth emphasising that the question is one of construction of the language of the section. It has often been said, in passages in previous opinions of the Board too familiar to need citation, that constitutions are not construed like commercial documents. This is because every utterance must be construed in its proper context, taking into account the historical background and the purpose for which the utterance was made. The context and purpose of a commercial contract is very different from that of a constitution. The background of a constitution is an attempt, at a particular moment in history, to lay down an enduring scheme of government in accordance with certain moral and political values. Interpretation must take these purposes into account. Furthermore, the concepts used in a constitution are often very different from those used in commercial documents. They may expressly state moral and political principles to which the judges are required to give effect in accordance with their own conscientiously held views of what such principles entail. It is however a mistake to suppose that these considerations release judges from the task of interpreting the statutory language and enable them to give free rein to whatever they consider should have been the moral and political views of the framers of the constitution. What the interpretation of commercial documents and constitutions have in common is that in each case the court is concerned with the meaning of the language which has been used. As Kentridge AJ said in giving the judgment of the South African Constitutional Court in State v Zuma, 1995 (4) BCLR

401, 412: 'If the language used by the law giver is ignored in favour of a general resort to "values" the result is not interpretation but divination.'"

45. Lord Hoffman went on to say at page 114G:

> *"Since 1973 Mauritius has been a signatory to the International Covenant on Civil and Political Rights. It is a well-recognised canon of construction that domestic legislation, including the Constitution, should if possible be construed so as to conform to such international instruments. Again, their Lordships accept that such international conventions are a proper part of the background against which section 3 must be construed."*

46. At paragraph 35 in ***Deputy Registrar v Day and Bush***, the Court of Appeal highlighted an extract in the dissenting judgment of Lord Bingham in ***Mathew v The State*** (**Trinidad and Tobago)** [2004] UKPC 33 in which Lord Bingham referred to the following statement of Lord Sankey describing the Constitution established by the British North America Act in Canada[32] as *"a living tree capable of growth and expansion within its natural limits"* and adding that the provisions of the Act were not to be cut down *"by a narrow and technical construction"*, but called for *"a large and liberal interpretation."*

47. The Court of Appeal in ***Deputy Registrar v Day and Bush***, also referred to Smellie CJ's following views (which I adopt), expressed in ***Hewitt v Rivers, Solomon and Attorney General*** at paragraph 37, about the approach he should take to the Constitutional provisions at issue in that matter:

> *"In summary, I consider that my approach to the interpretation of the Constitutional provisions at issue on this petition must seek to give effect to the real meaning of the provisions and where that meaning is not plain, to apply a purposive interpretation.*

[32] In ***Edwards v Attorney-General for Canada*** [1930] AC 124, 136.

In that sense, the context will be most important, including as it reflects the aspirations of the Caymanian society which the Constitution embodies."

48. The Chief Justice reached those views having himself referred to the following dictum of Lord Bingham in the Privy Council delivered after a wide review of the case law in ***Patrick Reyes v the Queen*** [2002] 2 A.C. 259, [2002] UKPC 11 at paragraph 26:[33]

> *"As 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. But it does not treat the language of the constitution as if it were found in a will or a deed or a charterparty. A generous and purposive interpretation is to be given to constitutional provisions protecting human rights. The court has no licence to read its own predilections and moral values into the constitution, but it is required to consider the substance of the fundamental right at issue and ensure contemporary protection of that right in the light of evolving standards of decency that mark the progress of a maturing society (see Trop v Dulles, above, at 101). In carrying out its task of constitutional interpretation the court is not concerned to evaluate and give effect to public opinion…."*

The Chief Justice stated this should be borne in mind when construing constitutional provisions the meaning of which are not plain and obvious when issues impact on the rights of individuals and of wider society.

49. The guidance about the applicable principles of construction and interpretation of the Constitution given by the Court of Appeal after a careful review of local and English case law should be followed, and I adopt that approach. Having carefully considered the Plaintiff's contentions as to why the Constitution and in particular s.55 should be construed narrowly, I am not persuaded that there should be a departure from the approach advocated by the Court

[33] At paragraphs 33-34 of the Chief Justice's ruling.

of Appeal. I am satisfied that the Constitution should be read as a whole and one should not interpret the Constitution with a strict technical analysis of one clause (for examples s.78(2)) in isolation. That is why I see merit in the *"belt and braces"* approach mentioned by the Defendant when adopting the wording used by Mr. Ian Hendry during the constitutional negotiations. Such an approach may result in the addition of provisions that add even greater clarity by specifically highlighting any obligation of the United Kingdom to an international organisation under s.78(2)(c) of the Constitution, although doing that may result in duplication under s.78(2)(e) of the Constitution.

50. There has been a substantial amount of evidence given about the White Papers which led to the constitutional reforms as well as about the negotiating parties' positions taken and remarks made during the constitution negotiations.[34] At paragraph 114 in ***Deputy Registrar v Day and Bush***, the Court of Appeal indicated that the Court may consider the negotiating history when interpreting the Constitution.[35] I agree with the Defendant that this background material, in this case, provides a context which is helpful when interpreting the Constitution where there is some uncertainty about the relevant sections. I have regard to that evidence as an aid when interpreting the terms of the Constitution.

The relevant provision in the Constitution

51. One must turn to the sections of the Constitution which relate to the actions taken by the Governor. Firstly, s.31 of the Constitution sets out what the Governor's functions are, and it provides:

[34] See the review herein of the affidavits of Adam Pile and Christine Rowland field by the Defendant.
[35] Although the Court of Appeal also stated that they did not need to consider it in that case as the meaning and effect of the relevant section was sufficiently clear.

"(1) The Governor shall have such functions as are prescribed by this Constitution and any other law, and such other functions as Her Majesty may from time to time be pleased to assign to him or her in exercise of the Royal prerogative.

(2) The Governor shall exercise his or her functions in accordance with this Constitution and any other law and, subject thereto, in accordance with such instructions (if any) as may be addressed to the Governor by or on behalf of Her Majesty.

(3) In the exercise of his or her functions under subsection (2), the Governor shall endeavour to promote good governance and to act in the best interests of the Cayman Islands so far as such interests are consistent with the interests of the United Kingdom.

(4) Notwithstanding the jurisdiction of the courts in respect of functions exercised by the Governor, the question of whether or not the Governor has in any matter complied with any instructions addressed to him or her by or on behalf of Her Majesty shall not be inquired into in any court."

52. Section 31 of the Constitution makes it clear that the Governor's authority is limited and that his functions derive from the three above sources, namely (i) the Constitution; (ii) any other law, and (iii) by assignment from Her Majesty. Other laws can include local legislation in force in the Cayman Islands which confers various functions on the Governor as well as certain Acts of Parliament and Orders in Council that extend to the Cayman Islands. As highlighted by Hendry and Dixon, the functions of the Governor are defined and are therefore constrained by the Constitution of the Cayman Islands.

53. It is clear that the acts of the Governor are in principle subject to judicial review in the normal way[36], but there is the s.31(4) of the Constitution exception preventing the Court from inquiring into the question as to whether or not the Governor has complied with

[36] ***McLaughlin v Governor of the Cayman Islands*** [2007] UKPC 50.

instructions from Her Majesty. I note that the Defendant's letter dated 21 September 2020 sent from the Attorney General's Chambers in response to the Plaintiff's letter before action[37], contained a number of contentions about why the judicial review should fail, but placed no reliance upon or made no mention about s.31(4) of the Constitution. For avoidance of doubt, at the hearing, Leading Counsel for the Defendant rightly confirmed that remained the position, as the issue in this case does not involve the question as to whether or not the Governor has complied with the instructions relayed by Baroness Sugg.

54. Having in mind the functions of the Governor prescribed by the Constitution and how he exercises them, a core section for the purpose of this hearing is the one setting out the Governor's reserved power to enact legislation found at s.81 of the Constitution and the scope of those powers elaborated on at s.55 of the Constitution. This power may be used, if the prescribed procedure is followed, where the Cayman Islands Parliament fails to pass a bill that the Governor considers ought to be passed. Section 81 of the Constitution provides:

> *"If the Governor considers that the enactment of legislation is necessary or desirable with respect to or in the interests of any matter for which he or she is responsible under section 55 but, after consultation with the Premier, it appears to the Governor that the Cabinet is unwilling to support the introduction into the Parliament of a Bill for the purpose or that the Parliament is unlikely to pass a Bill introduced into it for the purpose, the Governor may, with the prior approval of a Secretary of State, cause a Bill for the purpose to be published in a Government Notice and may (notwithstanding that the Bill has not been passed by the Parliament) assent to it on behalf of Her Majesty; but the Bill shall be so published for at least 21 days prior to assent unless the Governor certifies by writing under*

[37] Sent in compliance with the Pre-Action Protocol for Judicial Review - see paragraph 6 above.

his or her hand that the matter is too urgent to permit such delay in the giving of assent and so informs a Secretary of State."

Although, as confirmed by the House of Lords in **R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No.2)** *[2008] UKHL 61 at para 49* that when legislating Her Majesty may prefer the interests of the United Kingdom, when considering the instruction from Baroness Sugg to the Governor, I note that the Governor cannot lawfully be instructed to act contrary to the Constitution or other laws in force in the Cayman Islands. He can only be instructed to act in a way that is consistent with the laws of the Cayman Islands.

55. In this case, the evidence shows that the Governor has followed the procedure set out in s.81 of the Constitution by (i) consulting with the Premier; (ii) forming a view that it was unlikely that the Parliament would act to pass the Bill; (iii) receiving the approval/instruction from Baroness Sugg given on behalf of Her Majesty; and (iv) following the required procedure after publishing the Bill. One then turns to s.55 of the Constitution to consider the matters for which the Governor has special responsibility.

56. Section 55 of the Constitution sets out the special responsibilities of the Governor in certain fields of executive government for which he has reserved legislative powers. External affairs are an area of special responsibility. That said, the Constitution requires the Governor to delegate a number of functions to Minsters in the external field. For present purposes, and for context, the relevant parts of s.55 provide:

"(1) The Governor shall be responsible for the conduct, <u>subject to this Constitution and any other law</u>, of any business of the Government with respect to the following matters -

(a) …..;
(b) external affairs, subject to subsections (3) and (4);
(c) …..;

(2) ….

(3) The Governor shall not enter, agree or give final approval to any international agreement, treaty or instrument that would affect internal policy or require implementation by legislation in the Cayman Islands without first obtaining the agreement of the Cabinet, unless instructed otherwise by a Secretary of State.

(4) The Governor shall, acting after consultation with the Premier, assign or delegate to the Premier or another Minister, by instrument in writing and on the terms and conditions set out in subsection (5), responsibility for the conduct of external affairs insofar as they relate to any matters falling within the portfolios of Ministers, including—

(a) the Caribbean Community, the Association of Caribbean States, the United Nations Economic Commission for Latin America and the Caribbean, or any other Caribbean regional organisation or institution;
(b) other Caribbean regional affairs relating specifically to issues that are of interest to or affect the Cayman Islands;
(c) tourism and tourism-related matters;
(d) taxation and the regulation of finance and financial services; and
(e) European Union matters directly affecting the Cayman Islands." [My emphasis by underlining]

57. The parties agree that the CPA was enacted to address the Court of Appeal's declaration that there was a breach of Article 8 of the ECHR. In such circumstances, and where the requirements set out in s.81 Constitution have been met, the Plaintiff contends that one must then look at s.55 to see whether the matter for which the Governor considered the enactment of legislation to be necessary or desirable is one of those matters for which he is responsible under s.55 of the Constitution. To put it another way, she submits that the primary issue is whether or not the power of the Governor to make legislation under s.81 of the Constitution, read together with s.55 of the Constitution, includes a power to ensure

compliance with the UK's obligations under the ECHR in light of the Court of Appeal's declaration. She highlights that compliance with international obligations is not separately set out in s.55 as being a special responsibility. The Plaintiff argues that this means the Court will have to determine whether compliance with international obligations falls within the conduct of external affairs and is therefore a matter for which the Governor is responsible and thereby enabling him to take the course of action that he did.

58. The Defendant and Intervener, on the other hand, contend that the Plaintiff's approach is too narrow and simplistic. The Defendant argues that when considering s.81 of the Constitution and s.55 of the Constitution together, the Court is not required to simply determine whether the matter can be categorised as falling under external affairs (which they in any event say that it does), because s.81 permits the Governor to legislate where he considers the enactment of the CPA to be necessary or desirable with respect to the interests of external affairs. It is submitted that what amounts to external affairs is a matter of law, whereas what is in the interest of external affairs is a policy matter for the Governor which involves him exercising a wide margin of discretion and that he has not exceeded that margin. He rightly states that the question as to whether something is in the interests of external affairs is not a question of law but is matter of judgment and policy.[38] That approach would require consideration, in this case, as to whether the Governor's view that his actions were in the interests of external affairs were genuine and reasonable. Part of that consideration would be whether it was reasonable and rational, which I find it was, to consider that international obligations fell under the umbrella of external affairs.

[38] ***Home Secretary v Rehman (HL(E))*** [2003] 1 AC at 192, paragraph 50B, Lord Hoffman.

59. The Plaintiff relies heavily on s.78 of the Constitution to support her contention that ensuring compliance with UK's international obligations does not form a part of external affairs and therefore is not one of the Governor's s.55 special responsibilities. Section 78 of the Constitution deals with assent to bills, and it provides:

> *"(1) A Bill shall not become a law until—*
>
> *(a) the Governor has assented to it in Her Majesty's name and on Her Majesty's behalf and has signed it in token of his or her assent; or*
> *(b) Her Majesty has given Her assent to it through a Secretary of State and the Governor has signified Her assent by proclamation.*
>
> *(2) When a Bill is presented to the Governor for his or her assent, he or she shall, subject to this Constitution and any instructions addressed to him or her by Her Majesty through a Secretary of State, declare that he or she assents or refuses to assent to it or that he or she reserves the Bill for the signification of Her Majesty's pleasure; but, unless he or she has been authorised by a Secretary of State to assent to it, the Governor shall reserve for the signification of Her Majesty's pleasure any Bill which appears to him or her, acting in his or her discretion—*
>
> *(a) to be in any way repugnant to, or inconsistent with, this Constitution;*
> *(b) to determine or regulate the privileges, immunities or powers of the Parliament or of its members;*
> *(c) to be inconsistent with any obligation of Her Majesty or of Her Majesty's Government in the United Kingdom towards any other State or any international organisation;*
> *(d) to be likely to prejudice the Royal prerogative;*
> *(e) to affect any matter for which the Governor is responsible under section 55; or*
> *(f) to affect the integrity or independence of the public service or of the administration of justice.*
>
> *(3) Before refusing assent to any Bill, the Governor shall explain to the members of the Parliament why he or she proposes to do so, if necessary in confidence, and shall allow those members the opportunity to submit their views on the matter in writing to a Secretary of State."* [My emphasis]

60. The Plaintiff highlights the fact that s.78(2)(c) of the Constitution speaks to when a bill is inconsistent with an international obligation, whereas s.78(2)(e) of the Constitution

separately speaks to the Governor's special responsibilities under s.55 of the Constitution. She contends that s.78(2) of the Constitution illustrates that, for the purpose of the special provisions about assenting to bills, inconsistency with international obligations is regarded as being a different basis for doing so and not falling under the Governor's s.55 special responsibility category (external affairs being in that category). The Plaintiff contends that s.78(2)(c) becomes otiose if the Defendant's submissions are accepted, because there would be no reason to have a separate clause for international obligations if they are to be treated as an external affair matter. The Plaintiff submits that, in light of the way that s.78(2)(c) was drafted, for the Governor to be able to rely upon compliance with international obligations to permit him to exercise his reserved power, that would have been separately set out as a special responsibility in s.55 of the Constitution or separately set out in s.81, as it is in s.72(1) of the Turks and Caicos Islands Constitution.[39]

61. The Plaintiff, adopting a narrow approach to the interpretation of the Constitution, relies upon the wording of the Constitutions of other territories, when seeking to establish that, unlike those Constitutions, there is no power for the Governor to enact legislation to ensure compliance with international obligations. For example, she highlights that s.60 of the British Virgin Islands Constitution Order 2007, also provides that the Governor has special responsibility for external affairs. However, at s.81 of that Constitution, under the heading *"Governor's reserved power"* it provides that if the House fails to pass a bill in such form as the Governor thinks fit in circumstances where he considers it urgently necessary for the purposes of complying with any international obligation applicable to the Territory, he may declare that bill to have effect**.**

[39] See paragraph 62 herein.

62. She also refers to the Turks and Caicos Islands Constitution Order 2011, which also provides that the Governor has special responsibility for external affairs. However, s.72 of the Constitution provides that the Governor has a reserved power if he considers the enactment of legislation to be necessary or desirable for the purpose of securing compliance with an international obligation. The Plaintiff submits that this shows a clear distinction between compliance with international obligations and external affairs, which is consistent with the fundamental distinction in a dualist system between negotiating treaties and their implementation.

63. Reference is made by the Plaintiff to s.16(2) of Schedule 2 to the Montserrat Constitution Order 1989 which also provides that the Governor's special responsibilities include external affairs. She highlights that s.48(2)(a)(ii) provides that the Governor shall reserve any bill that is likely to affect any of the matters mentioned in s.16 and that s.48(2)(a)(i) separately provides the same if the bill is inconsistent with any obligation of the United Kingdom Government towards any other state or power or international organisation. Reference is also made to the Bermuda Constitution Order 1968 which also provides (at s.62 of Schedule 2) that the Governor's special responsibilities include external affairs. Similar to the position in Montserrat, s.35(2) provides that the Governor shall reserve any bill that is likely to affect any of the matters mentioned in s.62 and separately provides the same if the bill is inconsistent with any obligation of the United Kingdom Government towards any other state or power or international organisation.

64. In a similar vein to the contention made in relation to s.78(2) of the Cayman Islands Constitution, it is suggested that this illustrates that, for the purpose of the special

provisions about reserving bills, inconsistency with international obligations is regarded as being a separate basis for doing so and not falling under the Governor's special responsibility category (external affairs being in that category). The Plaintiff again contends that the two sections would become otiose if external affairs includes compliance with treaties because there would be no reason to have a separate clause for international obligations if they are to be treated as being an external affairs matter.

65. Hendry and Dixon, in the chapter headed *"External Relations"* and under the sub heading *"Legislative Action and Controls"*[40], discussed constitutional provisions concerning the Governors in the Overseas Territories and assent to bills. They wrote that:

> *"For the most part the territories legislate locally to give effect to international obligations that extend to them or to deal with other aspects of external affairs that require legislation…..There are however, some constitutional controls on local legislation affecting external affairs in the section assent to bills. Under these constitutions the Governor is required to reserve for the signification of Her Majesty's pleasure certain Bills unless he or she has already been authorised to assent to such a Bill by the Secretary of State. Under the Bermuda, Cayman Islands, St Helena, Montserrat and Virgin Islands constitutions such Bills include those which appear to the Governor, acting in his or her discretion, to be inconsistent with any international obligation of the United Kingdom Government.*[41] *The Bermuda, Montserrat and Cayman Islands constitutions also require such actions where a Bill affects any matter for which the Governor has special responsibility under the constitution, which includes external affairs.*[42] [My emphasis].

66. The authors of Hendry and Dixon mention the Cayman Islands as being one of five territories in which the special provisions apply in circumstances where it appears to the

[40] Ian Hendry and Susan Dickson "British Overseas Territories Law" 2018 2nd Edition - page 263.
[41] Section 78(2)(c) of the Constitution.
[42] Section 78(2)(e) of the Constitution.

Governor, acting in his own discretion, that a bill is inconsistent with international obligations of the UK Government. They also describe the Cayman Islands as one of only three aforementioned five territories in which the special provisions apply where a bill affects a matter for which the Governor has a special responsibility under the Constitution, *"including external affairs"*[43]. At first glance one might read this separation by Hendry and Dixon as them stating that the UK's international obligations do not fall under the special responsibility category. However, when one considers their comments set out in the chapter headed *"External Affairs"* and under the sub-heading "*Legislative Actions and Controls",* one can see that the context they were commenting on was one where they were addressing *"the constitutions of several territories, (where) there is special provision relating to external affairs*[44] *in the section on assent to bills".* This tends to show that they regard international obligations as falling into the category of external affairs. In fact greater clarification is given on page 264 where they write:

> *"Legislation is also from to time made in the United Kingdom relating to external affairs of the territories, most often to give effect in the territories to international obligations that will extend to them. Such legislation may be in the form of an Act of Parliament, or more frequently an Order in Council made under specific statutory powers or (except in the case of Bermuda) in exercise of the general reserved legislative power of Her Majesty."*

67. I do not read the above as the authors stating that international obligations and external relations[45] are two separate matters. They are clearly, in this chapter dealing with external affairs, of the view that a bill dealing with international obligations is a bill in the sphere

[43] Ian Hendry and Susan Dickson "British Overseas Territories Law" 2018 2nd Edition - pages 264.
[44] My emphasis.
[45] See their definition of external affairs set out at paragraph 29 herein.

of external affairs. The fact that the authors go on to mention that the Cayman Islands is one of the Territories that require the Governor to act in this way where a bill relates to any of his special responsibilities should not be read as them distinguishing compliance with international obligations from being a part of external affairs and excluding it from being one of the Governor's special responsibilities. There is an overlap and the separate reference to international obligations is consistent with a belt and braces approach.

Plaintiff's additional submissions

68. I have carefully considered the well-presented submissions made on behalf of the Plaintiff, who contends that legislating about civil partnerships cannot be regarded as being an external affairs matter. She highlights that the United Kingdom and the Cayman Islands have dualist systems of law and that parliamentary sovereignty is protected by the concept of dualism. The Defendant notes that the power of the Crown to conclude international treaties is an exercise of the Royal Prerogative.

69. It is submitted by the Plaintiff that the dualist system means that when concluding or extending a treaty, the Crown cannot require the Legislature to enact new legislation even if this would be necessary to enable the UK to be in compliance with its treaty commitments. To put it succinctly, it is submitted that the *"negotiation of treaties is plainly 'external affairs'. The implementation is not"*. In ***R (Miller) v Secretary of State for Exiting the European Union (Birnie intervening)*** [2018] AC 61 page 77D at paragraph 33, the Divisional Court[46] reiterated that the Crown *"cannot through the use of its prerogative powers…change domestic law in anyway without the intervention of*

[46] After referring to the leading speech of Lord Oliver of Aylmerton in ***JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry*** [1990] 2 AC 418, 499-500.

Parliament". At paragraph 78 in the Supreme Court decision, ***R (SC) v Secretary of State for Work and Pensions*** [2021] 3 WLR 428, Lord Reed, referred to Lord Oliver's dictum and the reassertion of the principle which it laid down in ***Miller*** and then stated that:

> *"… the dualist system, based on the proposition that international law and domestic law operate in independent spheres is a necessary corollary of Parliamentary sovereignty."*

Lord Reed added that:

> *"It is only because "treaties are not part of UK law and give rise to no legal rights or obligations in domestic law" (para 55) that the prerogative power to make and unmake treaties is consistent with the rule that ministers cannot alter the law of the land."*

70. The Plaintiff contends that the ECHR or any other treaty does not change the internal law and that if it is to be given effect through legislation to modify Cayman Islands law to enable parts of the ECHR to be applied, this can only be done through the Cayman Islands Parliament. Depending on the subject matter, it is for the Cayman Islands Legislature to pass the required implementing legislation.

71. The Plaintiff rightly highlights that the BoR's form and content substantially follows the ECHR and that enforcement of the BoR should be dealt with in the Cayman Islands. The Plaintiff, therefore, highlights s.23 of the Constitution and states that it reflects Cayman's dualist system and allows Parliament to (i) conclude that it does not wish to remedy an incompatibility and (ii) to keep in place or not pass laws which have the effect of putting the UK in violation of its international obligations under the ECHR. It is argued that this should be taken into account when interpreting whether the compliance with the

obligations emanating from the ECHR falls under the Governor's special responsibilities. Section 23 provides under the heading "Declaration of Incompatibility":

> *(1) If in any legal proceedings primary legislation is found to be incompatible with this Part, the court must make a declaration recording that the legislation is incompatible with the relevant section or sections of the Bill of Rights and the nature of that incompatibility.*
>
> *(2) A declaration of incompatibility made under subsection (1) shall not constitute repugnancy to this Order and shall not affect the continuation in force and operation of the legislation or section or sections in question.*
>
> *(3) In the event of a declaration of incompatibility made under subsection (1), the Legislature shall decide how to remedy the incompatibility.*

72. As already highlighted herein, it is clear that in the negotiations leading up to the Constitution being promulgated, the UK consistently expressed the importance of there being reserved powers, admittedly often mentioning reference to Orders in Council. Section 23 results in the Cayman Islands taking the same approach as the UK Human Rights Act as it does not allow the Courts to find that primary legislation is invalid. Section 23(3) means that if a court makes a declaration that a piece of legislation is incompatible with the BoR, it is for the Legislature to decide how to remedy the incompatibility and not the Court. This does not mean that the UK Government can never legislate, as all parties recognise that at the very least s.125 of the Constitution enables the UK Government to legislate to remedy breaches of its international obligations caused by the Cayman Islands failure to implement the ECHR**.** Therefore, I do not accept the submission that s.23 means that only the Cayman Parliament may make domestic laws when the absence of a law or the existence of a law places the UK in breach of its international obligations under the ECHR.

73. The Defendant accepts that a treaty cannot, of itself, take effect in the Cayman Islands, so the Crown cannot by ratifying a treaty change the domestic law and this can only be done through Parliament. However, he rightly submits, as set out in the evidence reviewed herein, that the situation in this case is quite different, as the Governor acted under s.81 of the Constitution which provides him with a power to legislate for the Cayman Islands. The Legislature clearly has an important role to play in the implementation of the treaty obligations, but if they fail to put in place the necessary legislation to enable the full effect to be given to the UK's treaty obligations, the UK may remain internationally responsible in law for any breaches of the treaty that arise. This is why the UK has reserved the power to Her Majesty, for example legislating by Order in Council for the *"peace, order and good governance"* of the Cayman Islands which can be in respect of treaty obligations. There is always a risk that when treaty commitments are assumed that cannot be fully implemented in the law at the time, that will place the UK in a position where it is in breach of its international obligations. In the UK this, in the past, may have caused a delay in the ratification of international treaties pending the enactment of necessary implementing legislation, there being an established practice to not give consent to the treaty until that has been done. The Parliaments in both the UK and in the Cayman Islands are free, in principle at least, to pass domestic legislation that contravenes the UK's obligations under international law. That said, there is also an interpretative presumption, subject to the terms of the piece of legislation, that Parliament does not legislate contrary to international law, but in a way that would not place the United Kingdom in breach of its international obligations.

Evidence filed on behalf of the Defendant and the reasoning as to why the Governor's actions were appropriate

74. The affidavits of Adam Pile, who is the Deputy Director of the Overseas Territories Directorate of the Foreign, Commonwealth, and Development Office, and of Christine Rowlands[47], who is the Head of the Governor's Office, set out the events leading up to the enacting of the CPA from the Defendant's perspective. Counsel for the Plaintiff indicated that the significant facts are not in dispute and that no issue is taken with the facts outlined in these affidavits. The affidavits also contain the reasoning relied upon by the Defendant[48] at this hearing as to why it is contended that the Governor's actions were properly taken.

75. Having regard to the arrangement set out in paragraphs 28 to 36 above in mind, Mr. Pile used his affidavit to not only set out the events leading up to the enacting of the CPA from the Defendant's perspective, but importantly to also to provide background information *"relating to the division of competence between the UK Government, the Governor and the Government of the Cayman Islands in relation to external affairs"*.

76. In his affidavit, Mr. Pile referred to the four principles set out in the FCO's White Paper published in 1999 on the subject entitled: *"Partnership for Progress and Prosperity - Britain and the Overseas Territories"*. The principles were (i) promoting the right of self-determination of the peoples of the Overseas Territories; (ii) mutual responsibility (which he says includes an expectation that each Territory will observe the UK's international commitments); (iii) that people in the Territories must exercise the greatest possible control of their lives; and (iv) that UK will continue to provide help to the Territories that need it.

[47] Both affidavits were sworn on 5 March 2021.
[48] Which is supported by the Intervener.

77. Mr. Pile commented that the White Paper highlighted an expectation that the Overseas Territories *"should abide by the same basic standards of human rights"* as the UK, including compliance with the same international obligations (including in relation to protecting vulnerable groups), such as the ECHR. It is submitted by the Defendant that this was a fundamental part of the negotiations, with Ian Hendry actually stating that if agreement could not be reached about reserved powers sufficient to enable the UK to fulfil its international responsibilities then, if the people of the Cayman Islands wished to be free of such constraints, they could choose independence.[49] He said that the UK's expectation is that Overseas Territories' governments have a duty to ensure local law complies with the relevant conventions and court judgments, and is non-discriminatory and that the governments take action, including legislating where necessary in areas of disparity, to reach full compliance. This is why, during the later constitutional review negotiations with the Cayman Islands, the UK made it clear that it would not agree to a Constitution unless it contained a fundamental rights chapter which would give effect to the ECHR[50].

78. Mr. Pile noted that the 1999 White Paper raised a concern that non-compliance with the ECHR in an Overseas Territory may risk the UK Government being found to be in breach of international obligations and expose the UK to a contingent liability of costs and possible damages. The FCO's correct view was at the time and remains that the UK Government is responsible in international law for ensuring that the British Overseas Territories fulfil their obligations arising from relevant human rights conventions including the ECHR and on the

[49] Comments made in Round 1 of the Constitutional Talks, 29 September 2008.
[50] The Bill of Rights, Freedoms and Responsibilities chapter set out at Part 1 of the Constitution. This came into force three years after the entry into force of the Constitution on 6 November 2009. The delay was intended to give time for the reforms to be made to give effect to the enshrined fundamental rights.

issue of LGBTQI+ rights. Mr. Pile stated that the preferred approach has been to encourage legislative change to be taken by the legislature in each territory, but he added that the White Paper highlighted that if an Overseas Territory failed to take the option of enacting necessary reform legislation, then legislation could be imposed by Orders in Council.

79. Mr. Pile contended that the 2012 White Paper entitled: *"The Overseas Territories – Security, Success and Sustainability"* re-emphasised an expectation of the UK Government that the Overseas Territories would abide by the same basic standards of human rights as the UK[51]. He quoted the following extract found at page 53 in the White Paper:

> *"The UK Government is responsible in international law for ensuring that the Territories comply with international human rights conventions that have been extended to them. Territory Governments have a duty to ensure local law complies with the relevant conventions and court judgements and is non-discriminatory. We expect Territories to take action, including legislating where necessary, in areas of disparity to reach full compliance."* [My emphasis]

80. Mr. Pile explained that, after the 1999 White Paper was considered, work began to develop new constitutions for the Overseas Territories, resulting in the 2009 Cayman Islands Constitution which was approved following a referendum.

81. Mr. Pile, and Ms. Rowlands, confirmed that, under the Constitution, the Governor is responsible for external affairs and Mr. Pile reiterated the accurate view that it is the UK Government which is ultimately responsible for the Overseas Territories' compliance with applicable international obligations. I note that Mr. Pile stated that, during the negotiations

[51] Page 52 of the White Paper.

leading up to the final draft of Constitution, the UK delegation stressed the importance, when considering the balance between obligations and expectations, of the Governor retaining sufficient reserved powers to ensure that the U.K.'s international obligations would be met and to thereby avoid any contingent liability, which could arise as a result of a breach of any such obligation.[52] Mr. Pile referred to the remarks of the Chairman of the negotiations, Mr. Ian Hendry, made at the first round of the discussions concerning the development of a new constitution for the Cayman Islands. Mr. Hendry similarly stated that there was a need for the UK Government to retain sufficient reserve powers to enable it to fulfil its international and constitutional responsibilities for the Cayman Islands. He shared Mr. Hendry's comment that *"...the trick will be to identify precisely what those reserve powers shall need to retain are, why we need to retain them, how to express them, but not go beyond what is a considered necessary".* Mr. Hendry was here referring to the reserved powers necessary and sufficient to enable the UK to fulfil its responsibilities and obligations.

82. Mr. Pile correctly suggests that the Constitution reflects the position set out by the UK delegation in the pre-constitution negotiations. He highlights the uncontentious observation that (i) the Governor is responsible for external affairs; (ii) the Cayman Islands Government cannot enter into any treaty negotiations, or conclude any international agreement without separate authority from the Secretary of State; and (iii) the Governor must not assent to any Bill which appears to be inconsistent with any international obligation and reserve any such Bill for the signification of Her Majesty's pleasure; and (iv) the Governor, pursuant to s.

[52] The remarks of the Rt. Hon Gillian Merron, the Parliamentary Undersecretary of State for Foreign Affairs made in Round 3 of the Constitutional Talks.

81 of the Constitution, may enact legislation, where he considers it necessary or desirable in respect of the interests for which the Governor is responsible under s.55 of the Constitution if such legislation is unlikely to otherwise be passed. Mr. Pile then went on to share his view that the Governor is empowered under ss.55 and 81 of the Constitution to legislate where it is necessary in order to give effect U.K.'s international obligations. He rightly concluded that the concept of external affairs is a broad one and that *"ensuring compliance with the U.K.'s obligations under a human rights treaty, falls squarely within the remit of external affairs"*. Mr. Pile seems here to be addressing the Plaintiff's submission that what the Court has to determine is whether compliance with international obligations falls within the conduct of external affairs by him contending that it does, rather than specifically addressing the submission made by the Defendant's Counsel[53] that one should be concentrating on the Governor's consideration about the enactment being necessary or desirable with respect to or in the interests of external affairs. The Plaintiff submits that the Defendant's exercise of discretion contentions, which she terms as being *"ex post facto"*, and the Defendant's wider submissions about the detrimental impact on the UK if there is a breach of an international obligation, are not supported by the evidence which, she says, points to the Governor exercising his reserved power only because he believed that compliance with international obligations falls within external affairs. I do not accept that contention, when one looks at the wider evidence which is before me and which I have outlined herein.

83. In her affidavit, Ms. Rowlands set out the consequences that flowed from the defeat of the DPB, including the Governor forming the view that it was *"necessary and desirable in the*

[53] See paragraph 58 herein.

interests of external relations for legislation to be enacted to provide legal protection functionally equivalent to marriage to persons…" Ms. Rowlands confirmed that the Governor informed the FCO about the defeat of the DPB and, after consulting with the Premier, he concluded that the Legislative Assembly would not enact the above legislation and as a consequence, it was appropriate for legislation to be enacted under s.81 of the Constitution.

84. Ms. Rowlands contended in her affidavit that *"external affairs"* includes entering and observance of international agreements that require implementation in domestic law as well as including *"regional affairs, tourism, taxation and regulation of finance and financial services and European Union matters directly affecting the Cayman Islands"*. Ms. Rowlands stated that *"the scheme of"* s.55 of the Constitution *"makes clear"* that external affairs includes *"ensuring compliance with the United Kingdom's international obligations and that ultimately this is the responsibility of the Governor and the Secretary of State"*. This, like Mr. Pile's observations mentioned in paragraph 82 above, appears to be addressing the Plaintiff's contention about the requirement to determine whether compliance with international obligations amounts to external affairs, rather than specifically addressing the submission made by the Defendant's Counsel[54] about the question being one of policy concerning what is in the interests of external affairs.

85. Ms. Rowlands added that:

> *"..... , in relation to any matter in respect of which the Governor has authority to enter into international obligations on behalf of the United Kingdom and which would require implementation by legislation, or affect internal policy, in the*

[54] See paragraph 58 herein.

Cayman Islands, the Governor is required to obtain approval from the Cabinet before concluding any such agreement. However, this is subject to the caveat, "unless instructed otherwise by the Secretary of State." The Secretary of State can therefore require the Governor to conclude international obligations that require implementation by legislation in the Cayman Islands. Such implementation can be enacted under s.81 if the Cabinet and/or Legislative Assembly is unwilling to do so."

86. Ms. Rowlands rightly concluded that the Governor was *"entitled"* to use his power under s.81 to enact legislation to ensure that the Cayman Islands gave effect to the U.K.'s international obligations and that it was *"incumbent"* on the Governor *"as the person responsible for external affairs, to ensure that the situation did not persist"*.

Conclusion

87. It is abundantly clear from (i) the evidence of both Mr. Pile and Ms. Rowlands; (ii) the exhibited material relating to the constitutional negotiations; and (iii) the content of the White Papers that the importance of ensuring compliance with international obligations was very much in all parties' minds when the Constitution was being created. The preferred approach in London, no doubt, was, and remains, for the government of each Overseas Territory to act itself, by recognising the responsibility placed upon it to enact internal legislation to conform with applicable obligations arising out of international treaties like the ECHR. It is also evident from the above evidence that the Overseas Territories and the Cayman Islands negotiators would have understood that the UK Government's position was consistent with an approach that, if a territory continued to fail to address compliance with an international obligation of the UK, the Constitution provisions would enable the Secretary of State to take on that role in its place to ensure such compliance. There could

have been little doubt that, in such an extreme situation where the Court of Appeal had (i) found that the 'Legislative Assembly' had failed to *"face up to"* its legal obligations under the BoR (and therefore importantly also under the ECHR) and (ii) had taken the extraordinary step of expressing its expectation that the United Kingdom Government should recognise its legal responsibility and take action to address the *"unsatisfactory state of affairs"*, the intention of those creating the Constitution was that the Constitution would enable the Secretary of State to take that action or direct that action to be taken by the Governor. I accept that the section 125, Order in Council route provides *"a catchall"* option. However, s. 81 of the Constitution read together with s.55 of the Constitution is the internal mechanism within the Constitution, with some local checks and balances, that provides a different mechanism which could also be used without having to resort to the more external measure, namely an Order in Council. By this mechanism, the Constitution strikes a constitutional balance. In the circumstances where the Court of Appeal has so forcefully set out its expectations, it is understandable and reasonable for the Governor to have felt it necessary to enact the CPA due to the long ongoing breach of the international obligation of the UK which otherwise would not have been adequately addressed by Parliament. It is reasonable for him, when exercising his discretion, to decide that taking such an action, within the Constitutional framework, is in the interests of external affairs. I am satisfied when reviewing the Constitution as a whole that the responsibility for compliance with the obligation in the ECHR, one so clearly expressed by the Court of Appeal, falls within external affairs and is a special responsibility. Therefore, the Governor having ensured that the checks and balances set out in s.81 of the Constitution were followed, was entitled to exercise his reserved power and enact the CPA. I am satisfied that

the Governor has not acted contrary to the Constitution or other laws in force in the Cayman Islands.

[illegible]. Accordingly, I find that the Governor has acted lawfully. His use of s.81 of the Constitution to gazette the OPA was not an error of law and was within the scope of his responsibility as defined in s.55 of the Constitution. Therefore, the declarations and relief sought by the Plaintiff are not made.

....
The Honourable Mr. Justice Richard Williams
JUDGE OF THE GRAND COURT