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

CICA (Civil) Appeal No. 6 of 2022
(G 169 of 2020)

KATTINA ANGLIN

Appellant

-and-

THE GOVERNOR OF THE CAYMAN ISLANDS

Respondent

COLOURS CARIBBEAN

Intervener

Before:

The Rt Hon. Sir John Goldring, President
The Hon Sir Richard Field, Justice of Appeal
The Rt Hon Sir Alan Moses, Justice of Appeal (remotely)

Appearances: **Mr Hugh Southey KC instructed by Mr Rupert Wheeler of KSG Attorneys at Law, for the Appellant,**

Mr Tom Hickman KC and Mr Tim Parker, instructed by Ms Eeshm Sharma KC, Solicitor General, and Ms Heather Walker of the Attorney General's Chambers, for the Respondent

Mr Alex Potts KC and Dr Alecia Johns of Conyers, for the Intervener

Date of hearing: **9th and 10th May 2023**

Draft Judgment Circulated: **12th June 2023**

Judgment Delivered: **4th July 2023**

JUDGMENT

The Rt Hon Sir John Goldring, President:

Introduction

1. On 4 September 2020, in the purported exercise of his reserve power under s.81 of Schedule 2 to the Cayman Islands Constitution Order 2009 ("the Constitution"), the Governor of the Cayman Islands introduced and assented to the Civil Partnership Act ("CPA"), which, by s.3, provides:

"*(1) Two persons may enter into a civil partnership under this Act if-*

(a) either person is sixteen years of age or older but under the age of eighteen and the person's parent, legal guardian or the court consents to the civil partnership in accordance with this Act;

(b) both persons are over eighteen years;

(c) neither person is currently married, in a civil partnership or overseas relationship; and

(d) neither person is within the prohibited degrees of civil partnership.

(2) A civil partnership may be formalised by the Registrar or a Civil Registrar or by a civil partnership officer.

(3) After a civil partnership is formalised, a party to the civil partnership shall register it under section 21.

(4) The dissolution of a civil partnership is governed by the Matrimonial Causes Act (2005 Revision) …"

2. The primary issue in this appeal is whether the Governor was entitled to exercise his reserve power under s.81 to assent to the CPA: whether he could lawfully 'consider' that the enactment of the CPA was *necessary or desirable with respect to or in the interests of any matter for which he…was responsible* under s.55(1)(b) of the Constitution, namely *external affairs*. The Appellant, who has no interest other than as a citizen of the Cayman Islands, submits he was not, and that Williams J, sitting in the Grand Court, should have quashed the Governor's decision assenting to the CPA as being ultra vires. She submits that if the British Government wished to introduce a law in the Cayman Islands for such partnerships, it should have done so by enactment of an Order in Council by Her Majesty under s.125 of the Constitution, by which the Crown has *full power to make laws for the peace, order and good government of the Cayman Islands*. The secondary issue, which only arises if the Governor did act outside his reserve power, is the nature of any remedy, given, among other things, that since the enactment of the CPA some 93 couples have become civil partners in reliance upon the lawfulness of the CPA. At the hearing, the court indicated it would hear submissions on remedy at a further hearing should that become necessary.

3. Mr Hugh Southey KC represented the Appellant, Mr Tom Hickman KC the Respondent and Mr Alex Potts KC the Intervener, which is an advocacy group in the Cayman Islands for 'LGBTQI+ rights.'

The background

4. Part 1 of the Constitution is the "*Bill of Rights, Freedoms and Responsibilities*" ("the BoR"). S.9 ("*Private and family life*") states:

> "*9(1) Government shall respect every person's private and family life, his or her home and his or her correspondence…*
>
> *(3) Nothing in any law or done under its authority shall be held to contravene this section to the extent that is reasonably justifiable in a democratic society…*"

5. Article 8 of the European Convention on Human Rights ("ECHR") ("*Right to respect for private and family life*") states:

> "*1. Everyone has the right to respect for his private and family life, his home and his correspondence.*
>
> *2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with law and necessary in a democratic society…*"

6. Pursuant to A.56 of the ECHR the United Kingdom has declared that the ECHR is to apply to the Cayman Islands. The United Kingdom Government is answerable to the residents of the Cayman Islands and the European Court of Human Rights for any violation of the ECHR by the Government of the Cayman Islands.

7. In the case of *The Deputy Registrar and the Attorney-General v Day and Bush* **[2020(1) CILR 99]**, in a judgment subsequently upheld by the Judicial Committee of the Privy Council, this court allowed an appeal from the decision of Chief Justice Smellie in which, in broad terms, he decided that the BoR required that s.2 of the Marriage Act (2010 Revision), which defined marriage in terms of "*the union between a man and a woman as husband and wife*," should be modified so as to read, "*marriage means the union between two people as one another's spouses*."

8. Although the court did not uphold the Chief Justice's decision in respect of marriage, it made it clear that under the Constitution Ms Day and Ms Bush were entitled to legal protection which was functionally equivalent to marriage. It made a declaration in the following terms:

> "*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 or 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:

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

9. In the final paragraph of its judgment the court said that:

> "*...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*."

10. On 29 July 2020 the Legislative Assembly (now Parliament) rejected the Domestic Partnership Bill ("DPB"), by which the then Cayman Islands' Government sought to introduce civil partnerships. The Governor, conscious of the continuing violation by the Cayman Islands of the ECHR, and following consultation with the then Premier, informed the Foreign and Commonwealth Office, ("the FCO," as it then was), that there was no likelihood of the required legislation being enacted. Among the options he set out to remedy the position was the use of his reserve power under s.81, as well as an enactment of an Order in Council. On 5 August 2020, Baroness Sugg, the Minister for Sustainable Development and the Overseas Territories, acting on behalf of the Secretary of State, informed the Governor that:

> *"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 [sic] 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."*

11. On 5 August 2020 the Governor published the following statement:

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

12. On 10 August 2020, the Governor published the Civil Partnership Bill (a revised version of the DPB). He indicated that he intended to enact the CPA after the 21 day consultation period required by s.81 had elapsed.

13. On 14 August 2020, the Governor issued a further statement:

"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 ["OTs"], 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 [DPB]… 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".

14. The Governor's reference to the Foreign Affairs Committee was to a report, published on 21 February 2019, in which it was said:

> "*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 Constitution

The negotiating history

15. The background to the drafting of the Constitution was set out in the affidavit of Adam Pile, the Deputy Director of the Overseas Territories Directorate of the Foreign, Commonwealth and Development Office. It is not necessary to go into great detail. The position is encapsulated by the following observation of Mr Hendry, the chairman of the negotiations:

> "*We're not in the business of trying to inhibit sensible modernisation of a Constitution or advance of self-government in the Cayman Islands so far as it can be done in a way which allows the UK to continue to exercise its*

responsibilities. … So, the trick will be to find the ground whereby the constitution is modernised, advanced, more power is delegated, or there is more local economy, but with the reserved powers for the UK which are necessary and sufficient to enable it to fulfill its responsibility."

16. The Chair of the UK delegation made it plain that:

> "*The UK continues to need to retain sufficient reserve powers, including for Governors, to protect itself against contingent liabilities, implement its international obligations and of course ensure good governance…"*

17. Mr Hendry also spoke of the United Kingdom Government taking a *belts and braces* approach to ensuring that sufficient powers were reserved.

18. In short, while democratic accountability and self-government in the Cayman Islands was to be increased, the United Kingdom Government wished to ensure, among other things, that the Government of the Cayman Islands respected fundamental human rights, in respect of which the United Kingdom Government continued to have an international responsibility. Hence, as will shortly become apparent, significant powers were reserved to the Governor.

The statutory provisions

19. S.1 (within Part I of the Constitution, namely the BoR) states that:

> "*1(1) This Bill of Rights, Freedoms and Responsibilities is a cornerstone of democracy in the Cayman Islands.*
>
> *(2) This Part of the Constitution—*
>
> *(a) recognises the distinct history, culture, Christian values and socio-economic framework of the Cayman Islands and it affirms the rule of law and the democratic values of human dignity, equality and freedom…*"

The Governor (Part II of the Constitution)

20. The Governor is appointed by the Crown and holds office during the Crown's pleasure (s.29). By s.31:

"*(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 the 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."

21. There is no doubt that the Governor purported to exercise a function prescribed by, and in accordance with the Constitution and instructions addressed to him, as s.31(1) and (2) required.

The Executive (Part III of the Constitution)

22. Under the Constitution the Governor is part of the Executive. He ceased to be a member of the legislature, which had been the case under the Cayman Islands (Constitution) Order 1972 (s.17(2)(a)). S.43(1) vests the executive authority of the Cayman Islands in the Crown. S.43(2) states:

"*Subject to this Constitution, the executive authority of the Cayman Islands shall be exercised on behalf of Her Majesty by the Government, consisting of the Governor as Her Majesty's representative and the Cabinet, either directly or through public officers*."

23. S.55 ("*Special Responsibilities of the Governor*") falls within Part III. It provides:

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

(a) defence;

(b) external affairs, subject to subsections (3) and (4);

(c) internal security; …

(2) The Governor, acting after consultation with the Premier, may assign or delegate to any member of the Cabinet…responsibility for the conduct on behalf of the Governor of any business in the Legislative Assembly with respect to any of the matters listed in subsection (1).

(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…responsibility for the conduct of external affairs insofar as they relate to any matters falling within the portfolios of Ministers…"

24. The Appellant's essential submission can be shortly expressed. It is that the breach by the Government of the Cayman Islands of its international obligation to comply with the ECHR cannot, under the Constitution, be a matter *of any business of the Government with respect to external affairs* for which the Governor had a special responsibility under s.55(1)(b). Under the Constitution such a breach is a matter solely for the Cayman Islands' Government.

The Legislature (Part IV of the Constitution)

25. By s.59:

"*(1) There shall be a legislature of the Cayman Islands which shall consist of Her Majesty and a Legislative Assembly [now Parliament].*

(2) Subject to the Constitution, the Legislature may make laws for the peace, order and good government of the Cayman Islands."

26. S.78 ("*Assent to Bills*") falls within Part IV and 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 Legislative Assembly 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 Legislative Assembly 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."

27. As I shall enlarge upon, it was an important aspect of the Appellant's case that the terms of s.78(2) suggest that *external affairs* under s.55(1)(b) does not include a breach of an international obligation. Under s.78(2)(c) the Governor may refuse assent to any Bill if the proposed legislation is inconsistent with *any obligation…[of the United Kingdom] towards any other State or any international organisation*. Under sub-section (e) he may do so if the proposed legislation *affect[s] any matter for which the Government is responsible under s.55*. If *external affairs* included international obligations, sub-section (c) would be otiose, was the submission.

28. S.81 (*"Governor's reserved power"*), which also falls within Part IV, 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 Legislative Assembly of a Bill for the purpose or that the Assembly 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 Assembly) 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 his or her hand that the matter is too urgent to permit such delay in the giving of assent and so informs the Secretary of State*."

29. There is no doubt that following consultation with the Premier, it appeared to the Governor that the Civil Partnership Bill would be unlikely to be enacted, that the Secretary of State had approved its introduction and that the Governor considered that its enactment *was necessary or desirable with respect to or in the interests of any matter for which he…[was] responsible under section 55*. The issue is whether the enactment of the Bill could be a matter of any business of the Cayman Islands' Government *with respect to external affairs* for which the Governor had responsibility under s.55(1)(b).

30. S.23 of the Constitution ("*Declaration of incompatibility*"), which falls within the BoR, for reasons I shall come to, is said by the Appellant to support her submission that *external affairs* under s.55(1)(b) excludes any breach by the Cayman Islands' Government of an international obligation. S.23 states:

"*23-(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."

31. S.125 (*Power reserved to Her Majesty*), which falls within Part IX (*Miscellaneous*) states:

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

32. S.126 (added by the Cayman Islands Constitution (Amendment) Order 2020), states:

> "*Notification of proposed Acts of Parliament extending to the Cayman Islands or Orders in Council extending such Acts of Parliament to the Cayman Islands*
> *126.—(1) Where it is proposed that—*
> *(a) any provision of a draft Act of the Parliament of the United Kingdom should apply directly to the Cayman Islands, or*
> *(b) an Order in Council should be made extending to the Cayman Islands any provision of an Act of Parliament of the United Kingdom,*
> *the proposal shall normally be brought by a Secretary of State to the attention of the Premier so that the Cayman Islands Cabinet may signify its view on it.*
> *(2) This section does not affect the power of the Parliament of the United Kingdom to make laws for the Cayman Islands or the power of Her Majesty to make an Order in Council extending to the Cayman Islands any provision of an Act of Parliament of the United Kingdom*."

The Appellant's submissions

33. Mr Southey submitted that any obligation to enact legislation to implement treaty obligations was, under the Constitution, a matter for the Cayman Islands Parliament (as it now is), not the Governor, albeit the Crown did have power to legislate under s.125 of the Constitution. The meaning, as he submitted, of *external affairs* is illustrated by Hendry and Dickson, when in the second edition of their publication, <u>*British Overseas Territories Law*</u>, they state that "*the term external affairs, which is common in territory constitutions, might just as easily have been 'external relations,' 'international relations,' or 'international affairs*.'" Mr Southey submitted there is a distinction under the Constitution between such external relations or affairs, in respect of which the Governor does have responsibility under s.55(1)(b), and international obligations, which fall solely within the remit of the Cayman Islands' Parliament.

34. In support of his construction of the Constitution, Mr Southey relied upon a number of matters.

35. He placed great weight on his construction of the provisions of s.78(2) (paragraph 26 above). If, as he submitted, s.55(1)(b) was intended to include as the responsibility of the Governor a breach of an international obligation, it would not be necessary to have both s.78(2)(c) and (e). Sub-section (c) would not be needed and would be otiose. The judge was wrong, submitted Mr Southey, to find (as he did), that the inclusion of both sub-sections (c) and (e) was the result of the legislature adopting a *belt and braces* approach. Mr Southey referred to the 8th edition of *Bennion, Bailey and Norbury* to the effect that:

> "*Given the presumption that the legislature does nothing in vain, the court must endeavour to give significance to every word of an enactment. It is presumed that if a word or phrase appears, it was put there for a purpose and must not be disregarded. This applies a fortiori to a longer passage, such as a subsection or section*."

36. Mr Southey also placed reliance on the distinction in s.55(3) between entering into or agreeing or finally approving any international agreement, from its implementation. The earlier matters are for the Governor, once there is implementation it is a matter for Parliament, he submitted.

37. S.23 of the Constitution (paragraph 30 above) lent support to his analysis, submitted Mr Southey. In the event of any incompatibility between primary legislation and the BoR, the offending legislation remains in force pending a decision by Parliament as to how to remedy it. Such remedial action, in respect of which there is no time limit, is solely a matter for Parliament. That must be so whether or not the incompatibility amounts to a breach of an international obligation.

38. Mr Southey submitted that his construction of the meaning of *external affairs* is required by the dualist constitutional principle, a principle which is applicable to the Cayman Islands as it is to the United Kingdom. It was explained in the following terms in the judgment of the United Kingdom Supreme Court in *R (Miller) v Secretary of State for Exiting the European Union (Birnie & others intervening)* [2018] AC 61 [32]:

> "*The general rule that the conduct of international relations, including the making and unmaking of treaties, is a matter for the Crown in exercise of its prerogative powers arises in the context of the basic constitutional principle […] that the Crown cannot change domestic law by any exercise of its prerogative powers. The Crown's prerogative power to conduct international relations is regarded as wide and as being outside the purview of the courts precisely because the Crown cannot, in ordinary circumstances, alter domestic law by using such power to*

make or unmake a treaty. By making and unmaking treaties the Crown creates legal effects on the plane of international law, but in doing so it does not and cannot change domestic law. It cannot without the intervention of Parliament confer rights on individuals or deprive individuals of rights."

39. The principle is a necessary corollary of Parliamentary sovereignty (see *R (SC) v Secretary of State for Work and Pensions* [2021] 3 WLR 428).

40. Mr Southey's submission may be summarised in the following way. Under the Constitution the Governor is not a member of the Cayman Islands' legislature, but of the Executive. By introducing and assenting to the Civil Partnership Bill he was purporting, in the absence of parliamentary approval, directly to enforce an international obligation. That is contrary to the dualist principle. It cannot have been the intention under the Constitution to give the Governor the power to act contrary to that principle. The meaning of *external affairs* under s.55(1)(b) must therefore be construed so as to limit the role of the Governor to the royal prerogative of conducting international relations or affairs and exclude from it the breach of an international obligation. S.78(2) distinguishes between the two and makes that plain. S.55(3) similarly draws such a distinction. S.23 underlines that the performance of an international obligation is a matter for the Cayman Islands' Parliament.

41. In further support of his argument, Mr Southey referred the court to the constitutions of other British Overseas Territories which, as he submitted, reflect the dualist principle and distinguish between external affairs and compliance with international obligations. They are a further basis for interpreting external affairs under the Cayman Constitution as excluding a breach of an international obligation. He drew particular attention to the constitutions of Bermuda and Montserrat, in each of which the Governor is responsible *with respect to external affairs* (in Bermuda under s.62 of Schedule 2 to the Bermuda Constitution Order 1968) and is also obliged to "*reserve for the signification of Her Majesty's pleasure*" any bill which (in the case of Bermuda) appears to the Governor:

> *(a) to be inconsistent with any obligation of Her Majesty or Her Majesty's Government in the United Kingdom towards any other state or power or international organisation…*
>
> *…*
>
> *(d) to affect any matter for which he is responsible under section 62 of this Constitution…*" (see s.35(2) of Schedule 2 to the Bermuda Constitution Order 1968)

42. Consistently with his submission in respect of s.78(2) of the Cayman Islands Constitution, Mr Southey emphasised that (a) is otiose if *external affairs* under s.62 includes a breach of international obligations. He made a similar point in respect of the Montserrat Constitution Order 2010, which, while slightly differently worded, contains provisions which in substance are similar.

43. It is unnecessary to refer to other constitutions to which the court's attention was drawn.

44. Mr Southey further submitted that the Cayman Islands Constitution was the product of careful negotiation. The negotiating history underlines the United Kingdom's intention to increase local democracy and give to the Cayman Islands' legislature a broad remit in respect of domestic legislation. The Governor ceased to be a member of the legislature. His role was reduced in favour of a greater role for the democratically elected legislature. The judge's wide interpretation of the powers of the Governor to legislate had the effect, submitted Mr Southey, of limiting those fundamental rights of democratic accountability and self-determination which under the Constitution it was intended to grant. Mr Southey emphasised what is said in s.1 of the Constitution (paragraph 19 above). Given the intention to increase democratic accountability and self-determination, it could not have been intended to grant the Governor a power to legislate in the event of a breach by the Cayman Islands' Government of an international obligation.

45. Mr Southey accepted that the CPA could have been introduced by legislation in the United Kingdom and an Order in Council under s.125 (paragraph 31 above). He submitted the judge was wrong to accept the Respondent's submission that the power to legislate under s.81 was preferable to that under s.125 on the basis that s.81 amounted to an internal mechanism within the Constitution. The power to legislate under s125, which is broader, was just as much part of the Constitution. Moreover, s.126 provided for the views of the Cayman Islands' Government to be taken into account. There was too a suggestion that there might have been political consequences had the United Kingdom Government sought to legislate under s.125, which was not the case under s.81.

46. In his affidavit, Adam Pile set out his understanding of the powers of the Governor under the Constitution, as did Christine Rowlands, the Head of the Governor's Office, in her affidavit. Mr Southey was critical of the judge for taking into account their interpretation of the constitutional provisions. I agree with Mr Southey. Their understanding of the legal effect of the provisions is irrelevant in interpreting them.

47. For the reasons I have sought to summarise, Mr Southey submitted the Governor did not have the power to introduce and assent to the CPA. He was acting ultra vires when he purported to do so. His decision should be quashed.

My analysis

48. As I have indicated, there is no doubt that the Governor considered that in the light of the continuing breach by the Government of the Cayman Islands of its international law obligation to provide legal protection functionally equivalent to marriage, the enactment of the CPA was "*necessary or desirable with respect to or in the interests of a matter for which he was responsible under s.55*," namely "*a matter with respect to external affairs*," as s.81 required. The issue is whether under the Constitution the enactment of the CPA was *a matter with respect to external affairs* in respect of which the Governor had responsibility.

49. The words *a matter with respect to external affairs* are not difficult to understand. Their meaning, as Mr Hickman on behalf of the Respondent put it, is plain and obvious. *A matter with respect to external affairs* encompasses any matter with respect to the international relations or affairs of a territory, as Hendry and Dickson observed. The circumstances in which the CPA was enacted are not disputed. The Government of the Cayman Islands was in breach of its international obligation to abide by the ECHR, in consequence of which the Government of the United Kingdom was answerable at the suit of residents of the Cayman Islands, and in respect of any proceedings which might be brought before the European Court of Human Rights. Setting the plain and obvious meaning of the words against those undisputed facts leads in my view to the inevitable conclusion that the breach by the Cayman Islands Government of its international obligations was a matter *with respect to external affairs.* To succeed in her appeal, the Appellant must show that under the Constitution it was intended to carve out from that plain and obvious meaning, the breach of an international obligation.

50. As Mr Hickman rightly pointed out, a construction of *external affairs* which excludes the breach of international obligations would have the surprising and illogical consequence that the Governor would be responsible for the external affairs of the Cayman Islands, such as its good relations with other states, including its compliance with international norms, but would have no responsibility once that non-compliance arises from a failure to implement international obligations under a treaty. It seems to me such an outcome could not conceivably have been intended under the Constitution.

51. In seeking to carve out from that plain and obvious meaning, Mr Southey placed great weight on his 'redundancy' argument with regard to s.78(2). However, as Mr Hickman, again in my view

rightly submitted, there is no basis for thinking that each matter listed in s.78(2) is distinct or mutually exclusive. Sub-section (2) simply sets out the legal bases in which a bill must be reserved for signification of the Crown's pleasure. It is not only sub-sections (c) and (e) which overlap, sub-section (d) (likely prejudice to the Royal prerogative) does too. And as Mr Potts on behalf of the intervener observed, a bill can be both inconsistent with the Constitution (sub-section (a)) and an international obligation of the United Kingdom (sub-section (c)).

52. Moreover, as Moses JA pointed out in argument, there is ample authority that redundancy in interpreting a statute is not a strong tool: see for example the speech of Lord Hoffmann in *Walker v Centaur Clothing* [2000] 1 WLR 799 at 805, summarised more recently by Lewison LJ in *DMWSHNZ Ltd v Revenue and Customs Commissioners* [2017] STC 1076 at [38].

53. In my view, as the judge concluded, any overlap between the provisions of s.78(2) reflects no more than a *belt and braces* approach by the drafter of the Constitution. It reflects the importance the United Kingdom Government attached to minimising any risk of it failing to comply with its international obligations. The fact there may be some overlap in the provisions does not in my judgment begin to provide a basis for interpreting the words of s.55(1)(b) in a way contrary to their plain and obvious meaning. Neither do the provisions of ss.55(3) or 23 provide such a basis.

54. S.55(3) concerns the manner in which the Governor may exercise his responsibility in respect of external affairs. As Mr Potts put it, s.55(3) limits the ability of the Governor to enter into treaties that would require implementation by legislation in the Cayman Islands, unless instructed otherwise by the Secretary of State. That does not form any basis at all for excluding from external affairs the breach of an international obligation which arises following implementation.

55. S.23 places an obligation upon the Cayman legislature to remedy any incompatibility. That similarly provides no basis to curtail the reserve power of the Governor. It does not follow that because the responsibility for remedying any incompatibility is for the Cayman legislature, if it fails to do so the Governor has no power to act. It cannot have been intended under the Constitution that the Governor is powerless where an unremedied incompatibility results in the breach of an international obligation.

56. I turn now to Mr Southey's argument that the Governor's introduction and assent to the CPA amounted to a breach of the dualist principle.

57. Implementing an international obligation other than through legislation would amount to a breach of the dualist principle. Within the United Kingdom, the principle is an expression of the sovereignty of Parliament. While the principle applies to the Cayman Islands in that treaty

obligations are not self-executing, its application in the Cayman Islands inevitably reflects the fact that the Cayman Islands is a United Kingdom Overseas Territory. Its Parliament is not sovereign in respect of the implementation of international treaties in the same way as is the United Kingdom Parliament. The Constitution of the Cayman Islands which, as Mr Potts put it, is locally supreme, reserves legislative powers to the Governor, who may, independently from the Cayman Islands' Parliament, and in prescribed circumstances, introduce and assent to legislation. Under the Constitution he may exercise his legislative power directly contrary to the wishes of that Parliament (as this case illustrates). The application of the dualist principle in the Cayman Islands must therefore be viewed through the prism of the Constitution of the Cayman Islands.

58. In the present case, the Governor recognised that the international obligation to permit civil partnerships could not become part of Cayman Islands' law unless there was domestic legislation. That is why he introduced and assented to the Bill. In doing so, he could not conceivably be said to have been acting contrary to the dualist principle. To the contrary: it was a recognition of the principle as it applies under the Constitution to the Cayman Islands.

59. Consideration of the constitutions of other overseas territories adds nothing to that analysis.

60. I accept, as Mr Southey submitted, that the Constitution was the product of careful negotiation, that it was intended to increase local self-government and democracy. However, it is plain, both from the negotiations leading to the enactment of the Constitution, and its ultimate contents, local self-government and democracy were constrained in order to secure observance by the Government of the Cayman Islands of its international obligations, in respect of which the United Kingdom Government was responsible. The United Kingdom Government required the assurance of adequate powers to secure such observance, and to enable it to take action to avoid possible liability should the Cayman Islands' Government violate its international obligations. Hence in such a case the Constitution gave the Governor the reserve power to legislate. The present, it seems to me, is a paradigm example of the sort of case for which the power was reserved. It reflects the balance struck under the constitutional settlement between local democracy and the protection of the international obligations of the Cayman Islands for which the United Kingdom was responsible. I do not accept Mr Southey's submissions to the contrary.

61. The argument that the judge was wrong to conclude that exercising the power under s.81 was preferable to such an exercise under s.125 seems to me wholly sterile. I can take it very shortly. If, as I find he did, the Governor had the reserve power under s.81, it was a matter entirely for the United Kingdom Government under which section it wished to act.

62. In the result, for the reasons I have set out, it is in my judgment clear that the Governor, in exercising his reserve power under s.81 to introduce and assent to the CPA, far from failing to respect the Constitution, acted entirely in accordance with it.

63. In reaching my view, like the judge, I have not found it necessary to consider the Australian authorities which Mr Hickman and Mr Potts have drawn to the court's attention as persuasive support for the judge's decision (and consequently my view). For completeness, I shall briefly refer to them.

64. S.51 of the Australian Constitution adopted in 1900, delineates the legislative competence of the federal Parliament (as against that of the legislatures of the states and territories). It states:

> "*The [federal] Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to…*
>
> *…(xxix) external affairs*."

65. The issue in *Polyukhovich v The Commonwealth of Australia & Anor* (1991) 172 CLR 501 was whether the enactment of domestic war crimes legislation implementing Australia's international obligation to criminalise war crimes was within this head of commonwealth legislative power. At 233, Dawson J said that:

> "*[T]he power extends to places, persons, matters or things physically external to Australia. The word 'affairs' is imprecise, but is wide enough to cover places, persons, matters or things. The word 'external' is precise and is unqualified. If a place, person, matter or thing lies outside the geographical limits of the country, then it is external to it and falls within the meaning of the phrase 'external affairs'…*"

66. Mason CJ observed that:

> *"15. Discussion of the scope of the external affairs power has naturally concentrated upon its operation in the context of Australia's relationships with other countries and the implementation of Australia's treaty obligations. However, it is clear that the scope of the power is not confined to these matters and that it extends to matters external to Australia. I have previously expressed the view that the grant of legislative power with respect to external affairs should be construed with all the generality that*

the words admit and that, so construed, the power extends to matters and things, as well as relationships, outside Australia …

18. The very recent cases on the external affairs power - Koowarta, The Tasmanian Dam Case, Richardson v. Forestry Commission (1988) 164 CLR 261 and Queensland v. The Commonwealth (1989) 167 CLR 232 - concerned the impact on the States of Commonwealth legislation implementing Australia's obligations under international conventions designed to protect human rights and the domestic environment. These cases vindicated the regulation by the Parliament of conduct within Australia pursuant to the external affairs power when that regulation is undertaken by way of implementation of an international convention. The cases serve to illustrate the proposition that legislation enacted pursuant to the power, though necessarily concerned with some aspect of externality, will have a domestic or internal operation…

19 …The legislation makes conduct outside Australia unlawful, thereby visiting that conduct with legal consequences under Australian law. The conduct made unlawful constitutes a criminal offence triable and punishable in the ordinary criminal courts in this country. But, to the extent that s.9 operates upon conduct which took place outside Australia and makes that conduct a criminal offence, the section is properly characterized as a law with respect to external affairs and is a valid exercise of power…it is not necessary that the Court should be satisfied that Australia has an interest or concern in the subject-matter of the legislation in order that its validity be sustained. It is enough that Parliament's judgment is that Australia has an interest or concern. It is inconceivable that the Court could overrule Parliament's decision on that question. That Australia has such an interest or concern in the subject-matter of the legislation here, stemming from Australia's participation in the Second World War, goes virtually without saying.

67. In *Richardson v Forestry Commission* (1988) 164 CLR 261, the court said that:

"*18… In The Commonwealth v. Tasmania…the Court held that the external affairs power enables the Parliament of the Commonwealth to give effect to the Convention as an international treaty to which Australia is a party. The majority of the Court…considered that, when Parliament exercises the external affairs power so as to carry into effect or give effect to such a treaty, it is for Parliament to choose the means by which this is to be achieved, provided at any rate that the means chosen are capable of being*

> *reasonably considered appropriate and adapted to that end… The majority expressly recognized that the power was not limited to the implementation of obligations imposed on Australia by a treaty which Australia is bound to implement…*"

68. I agree with Mr Hickman and Mr Potts that the wide definition applied by the Australian courts to *external affairs* does amount to persuasive support for the case they have advanced. It supports the proposition that *external affairs* is a broad and flexible concept. However, as I have said, I have not found it necessary to place reliance upon the Australian decisions.

69. For the reasons I have given, I would dismiss this appeal. It will not be necessary for the court to consider remedy. Any submissions on costs should be submitted in writing within 14 days of the judgment being handed down.

A final observation

70. It seems to me clear that on any proper analysis this application for judicial review was bound to fail. Moreover, it was brought by an applicant who had no direct interest in the outcome. Given her (inevitable) concession that the CPA could have been enacted by an Order in Council, Mr Potts' description of the proceedings as an academic exercise is not without substance. It is also of note, again as Mr Potts observed, that no challenge to the Governor's use of s.81 has been brought by the Cayman Islands' Government. The unfortunate consequence of the proceedings has been years of uncertainty for those who entered civil partnerships in the understandable belief that the CPA was lawful. It is always open to a judge at the leave stage of an application for judicial review to invite the Respondent to attend and make submissions. Had that happened here, it may well be that these proceedings, conducted, as I understand it, entirely at the public's expense, would have been stopped at the outset.

The Hon Sir Richard Field JA

71. I agree.

The Rt. Hon Sir Alan Moses JA

72. I also agree.