IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS CICA NO. 006 OF 2020

Civil Cause No. F 0195/2019

BETWEEN:

(1) THE CABINET OF THE CAYMAN ISLANDS

(2) THE LEGISLATIVE ASSEMBLY OF THE CAYMAN ISLANDS

Appellants

AND

SHIRLEY ELIZABETH ROULSTONE

Respondent

AND

THE NATIONAL TRUST FOR THE CAYMAN ISLANDS

Intervener

RESPONDENT'S REPLACEMENT SKELETON ARGUMENT

For hearing: 6-7 May 2020

The Court has been provided with the following material:

- Core Bundle [CB/tab];
- Appeal Bundle [AB/tab/page];
- Authorities Bundle (two volumes) [Auth/vol/tab];
- Additional Bundle A (exhibit to Laura Stone's affidavit);
- Additional Bundle B, on a memory stick only (exhibit to Nadia Hardie's affidavit);
- Extracts from the exhibit to Nadia Hardie's affidavit (slim bundle);
- Additional Bundle C (exhibit 2 to Johann Moxam's affidavit).

A. INTRODUCTION

1. The Cayman Islands' Constitution came into force on 4 November 2009[1]. Uniquely among British Overseas Territories, the Constitution established a semi-direct democratic framework whereby the people (rather than the legislature) have the ultimate power to determine any issue of national importance through a direct vote. Section 70 of the Constitution requires the legislature to enact law to give effect to that power. On 13 October 2011, the Cayman Islands' Constitutional Commission[2] recommended that standing legislation be passed as soon as possible (judgment, paras. 11-16)[3]. The Government failed to respond. On 14 October 2014, the Commission again raised the issue and strongly recommended the establishment of a committee to consider the matter further[4]. Again, the Government failed to respond (judgment, para. 17).

2. On 12 June 2019, CPR Cayman presented a petition with a view to triggering a people-initiated referendum on the Government's policy to build a cruise ship terminal in George Town harbour (judgment, para. 6(h)[5]). As the Chief Justice observed on 9 January 2020, "*The underlying issue which the referendum will decide …concerns the appropriate balance to be struck between the perceived economic opportunities of mass short-stay tourism and the destruction of internationally renowned coral reefs*"[6].

[1] The Constitution Order was made on 10 June 2019 and was brought into force by a proclamation published by the Governor on 4 November 2009.
[2] Established by the s. 118 of the Constitution to, *inter alia*, "*advise the Government on questions concerning constitutional status*" and "*promote understanding and awareness of this Constitution*" [**Auth/1/2**].
[3] The Constitutional Commission's paper is at [**AB/38**].
[4] The Constitutional Commission's letter is at [**AB/11b**].
[5] The format of the petition is in Additional Binder A (exhibit LS-1), pp.91-104.
[6] PCO judgment, para.56 [AB/7]. As to the environmental impacts, the following is not in dispute. The harbour is home to reefs that are thousands of years old. The reefs contain more than 60 species of coral, all of which are protected under the National Conservation Law, including colonies of Elkhorn and Staghorn coral which are designated as critically endangered species. The reefs are the habitat and spawning grounds of a variety of endangered species, including turtles and various species of fish. There are also two historic shipwrecks, the Balboa and the Cali which nature has integrated into the reefs. The George Town reefs are a world renowned diving site and the only diving site of such quality which is accessible from the shore in the Cayman Islands. As recorded in the judgment: "*The dredging for the cruise ship terminal would destroy several acres of the George Town harbour reefs and threaten a much wider area through plumes of sedimentation which kills coral. The Government's current plan is to attempt to relocate less than 3% of the coral that would be directly destroyed and there is no plan to rescue the other species*" (para. 6(d)). The Director of the National Trust stated that "*What is proposed is one of the most significant deliberate destructions of a marine environment that has ever occurred*" (Hardie, para. 8 [**AB/24**]).

3. In the absence of any law governing the petition process, there were disputes about the method for verifying the petition, which fell away when the petition was accepted to be valid (judgment, paras. 6(i)-(m)).

4. On 3 October 2019, the Government determined the date of the referendum and the referendum question[7]. On 29 October 2019, the Government recognised that it was not permitted to determine the date of the referendum or the referendum question in the absence of law governing those issues and tabled amendments to the *Referendum (People-Initiated Referendum Regarding the Port) Bill 2019*[8]. On 30 October 2019, following minimal scrutiny, the Legislative Assembly passed the Referendum (People-Initiated Referendum Regarding the Port) Law 2019 (the "**Port Referendum Law**") (judgment, paras. 6(n)-(q)). This fixed the rules for the cruise port referendum in a way which "*heavily stacked*" the odds "*in favour of the Government side to an extent which endangered the right to a fair and effective vote*" (judgment, para. 64).

5. The Appellants now accept (for the first time on appeal) that s. 70 of the Constitution requires the legislature to enact a general law to govern the process by which the people may petition for a referendum (Appellants' skeleton, para. 36(a)). It follows that the Appellants must accept that the legislature is in (ongoing) breach of that duty, more than a decade after the Constitution came into force.

6. The Appellants also accept that it would be "*preferable*" for a general law to govern the whole referendum process (not just the petition stage) and has undertaken to enact such a law later in 2020 (Appellants' skeleton, para. 22).

7. However, notwithstanding that a standing, general referendum law would promote the purpose of s. 70 (as the Constitutional Commission and now the Appellants recognise), the Appellants contend that the Judge erred in construing s. 70 of the Constitution as requiring the enactment of such a law. The Respondent submits that the Judge's conclusion was correct for the reasons he gave.

[7] Additional Binder A (exhibit LS-1), p.181.
[8] The amendments are in Additional Binder A (exhibit LS-1), p.269.

8. This document is structured as follows:

   8.1. The constitutional framework (section B).

   8.2. The proper approach to construing the constitution (section C).

   8.3. The proper construction of s. 70 (section D).

   8.4. The flaws in the Port Referendum Law (section E).

   8.5. The appropriate relief (section F).

B. THE CONSTITUTIONAL FRAMEWORK

9. As stated in Halsbury's Laws of England, vol 13 (2017), para. 761:

> "*The colony of the Cayman Islands was acquired by settlement toward the end of the seventeenth century. In 1863 the United Kingdom Parliament brought the Islands within the jurisdiction of the Governor, legislature and Supreme Court of Jamaica. As a dependency of Jamaica, the islands entered the Federation of the West Indies in 1957; from 1959 to 1962 they were a separate part of the federation. The 2009 Constitution is made by Order in Council under the West Indies Act 1962, and a general power of legislating for the colony is reserved to Her Majesty in Council*."

10. The *West Indies Act 1962* is the governing act [**Auth/1/6**], made by the sovereign Westminster Parliament. The Cayman Islands Constitution Order 2009 (the "**Constitution**") is a statutory instrument, made by the Queen in Council in the exercise of powers conferred by the *West Indies Act 1962* [**Auth/1/2**].

11. The Constitution provides for three branches of government: the executive (Part III) the legislature (Part IV) and the judiciary (Part V).

12. The legislature in the Cayman Islands is not sovereign. Its powers are derived solely from the Constitution, conferred under the statutory authority of the Westminster Parliament[9]. This is expressly stated at s. 59 of the Constitution, which provides that the Legislative Assembly may only legislate "*subject to*" the Constitution. Any law purportedly passed by the legislature but which is unconstitutional is "*void and inoperative*" (pursuant to s. 2 of the *Colonial Laws Validity Act 1865* [**Auth/1/5**] – as the Appellants note at para. 56(f) of their skeleton).

13. Although the legislatures of British Overseas Territories are subordinate to their constitutions, they may (with the exception of the Cayman Islands) be described as possessing supreme power within the parameters of their constitutions.

14. Uniquely, the Cayman Islands' Constitution imposes a semi-direct democratic model[10]. Even within the parameters of the Constitution, the legislature is not supreme. Although day-to-day law-making is the exclusive province of the legislature, in relation to matters of national importance its powers are always susceptible to direct democratic override under s. 70 of the Constitution. In this way, sovereignty (within the confines of the Constitution) rests directly with the electorate, not the legislature.

15. The position is not comparable to advisory referendums, by which a legislature seeks the opinion of the electorate (as in the UK, and as provided for in the Cayman Islands by s. 69 of the Constitution [**Auth/1/2**] p.61). An advisory referendum is premised on the supremacy of the legislature. Although the will of the electorate may generate political force, it has no legal power.

16. The direct democratic powers of the electorate under s. 70 are limited in only three ways: first, its powers are limited to matters of national importance and, accordingly, do not extend to the day-to-day running of the country; second, its powers may not be exercised in contravention of the Constitution, including the Bill of Rights; and third, the power requires the votes of more than 50% of registered electors.

---

[9] As explained in the context of the Rhodesian legislature in *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645, 722A [**Auth/2/26**] and in the context of the Bahamian legislature in *Bahamas District of the Methodist Church in the Caribbean and the Americas v Symonette* (2000) 59 WIR 1, 13J-14D [**Auth/2/28**].

[10] See the survey of British Overseas Territories in the Constitutional Commission's Research Paper on People-Initiated Referendums [**AB/38**] at p.7.

17. The issue in this case arises because s.70 of the Constitution requires the legislature to make law to implement the people's sovereign power to bind the legislature and executive. Thus, the legislature is mandated to implement the mechanism for the curtailment of its own powers. As the Judge pointed out, this creates "*inevitable tension between direct and representative democracy*" (judgment, para. 65).

18. The issue is one of constitutional construction. Does s.70 mandate a standing law setting the general ground rules for the manner in which the people may exercise their sovereign power or does it permit the legislature to change the rules referendum by referendum, depending on the legislature's views on the issue on which the people propose to exercise their power?

C. THE APPROACH TO CONSTRUING CONSTITUTIONAL PROVISIONS

19. In relation to constitutional enactments, a "*generous and purposive approach*" is required, whereby the Court 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*" (*R v Reyes* [2002] 2 AC 235, para. 26, *per* Lord Bingham [**Auth/2/29**]). That approach was applied by the Cayman Islands Court of Appeal in *The Deputy Registrar v Day*, CICA No. 9 of 2019, paras. 38-39 [**Auth/1/13**].

20. In *Hewitt v Rivers & Attorney General of the Cayman Islands*, cause 198 of 2013 [**Auth/1/15**], the Chief Justice held that, when construing a constitutional provision purposively, "*the context will be most important, including as it reflects the aspirations of the Caymanian society which the Constitution embodies*" (para. 37). *Hewitt v Rivers* was concerned with eligibility for public office. In that context, the Chief Justice held: "*The provisions regulating the eligibility for election must be regarded as reflecting the equality and freedom of Caymanians to participate in the fullest expression of the political life of the Islands but this must be balanced against the needs of the society to have competent representatives who are loyal to the people who they are elected to serve*" (para. 37). Having regard to those objectives, the Chief Justice construed "*attendance as a student at any educational establishment*" (one of the reasons justifying a period of absence from the

Cayman Islands for the purposes of the minimum residence requirements for political office, under s. 61 of the Constitution) as broad enough to cover working abroad for Allen & Overy.

21. The Appellants accept that "*The Judge was correct to proceed on the basis that, when interpreting the Constitution, the Court should adopt a broad purposive approach*" (Appellants' skeleton, para. 26).

22. However, the Appellants allege that the Judge erred as follows:

    22.1. First, they contends that the Judge "*erred in his application of the purposive approach*" by asking which of the competing interpretations of s.70 "*best guaranteed*" or "*best ensured*" the purpose of s. 70 (Appellants' skeleton, para. 28, original emphasis). The Appellants submit that the Judge should instead have asked whether the purpose of s. 70 "*simply could not be served (properly or at all) by bespoke referendum-by-referendum legislation*" (Appellants' skeleton, para. 29, addressing Ground 2 of the appeal, original emphasis).

    22.2. Second, the Appellants appear to contend that the legislature's interpretation of the Constitution should be afforded a margin of deference: "*the Court must be vigilant not to trespass on the legislature's territory by implying into legislation rights, requirements or qualifications that the Court may consider desirable and/or sensible*" (Appellants' skeleton, para.26, addressing Ground 2 of the appeal) and should afford a "*presumption of constitutionality*" (Appellants' skeleton, paras. 31-34).

23. As to the first point, the Judge took a textbook approach. As Lewison LJ stated in *Pollen Estate Trustee Company Ltd v Revenue and Customs Commissioners* [2013] 1 WLR 3785 at para. 24 [**Auth/1/18**]:

> "*The modern approach to statutory construction is to have regard to the purpose of a particular provision and interpret its language, so far as possible, in a way which best gives effect to that purpose*" (emphasis added).[11]

24. Once it is recognised that the purpose of s. 70 is to establish and give effect to the people's sovereign right to determine matters of national importance, it must follow that the framers of the Constitution were committing to the full expression of that sovereignty and that the Court's task is to construe the mechanism for the implementation of that sovereign right (*i.e.* the "law" which s. 70(1) mandates the legislature to enact) so as to secure such full expression.

25. As to the second point:

    25.1. The "*presumption of constitutionality*" is a principle applicable to the construction of the legislature's laws, not to the construction of the Constitution[12]. It means that the Courts will not too readily construe a law as being incompatible with a (known) constitutional provision so as to avoid trespassing on the sovereign territory of the legislature. The presumption has no role to play here because there is no dispute over the construction of the Port Referendum Law. If s. 70(1) of the Constitution requires the legislature to pass a general law governing referendums, then it is common ground that the Port Referendum Law is unconstitutional.

    25.2. As the Judge identified at para. 56 of his judgment, citing Dickson J in the Canadian Supreme Court decision of *Hunter v Southam Inc* [1984] 2 SCR 145, "*the task of expounding a Constitution is crucially different from that of construing a statute*

[11] Cited in *Bennion on Statutory Interpretation*, section 11.1 ("Presumption that enactment to be given a purposive construction") [**Auth/2/39**].

[12] Were it otherwise, the legislature (which is subordinate to the Constitution, created by the Queen in Council under the sovereign authority of the Westminster Parliament) would be able, through its law-making, to influence the scope of the powers conferred on it by the Constitution.

…the judiciary is the guardian of the Constitution". There is no basis for the courts to defer to the legislature's construction of the Constitution.

25.3. Section 70 mandates the legislature to pass law. In enacting the Port Referendum Law, the legislature therefore had to construe the Constitution to ascertain the nature of the law required. It assumed that the Constitution permitted a law to be made for a specific referendum in the absence of any general referendum law. In principle, the courts might find the reasoning that led to that conclusion persuasive, but the legislature's bare assertion as to what the Constitution permits is, of itself, of no weight.

25.4. That must apply *a fortiori* where (as here) the legislature is not even sovereign within the bounds of the Constitution. Section 70 establishes the people's ultimate sovereignty over matters of national importance (within the bounds of the Constitution) at the expense of the legislature. For the courts to presume that the legislature had, in making the Port Referendum Law, correctly construed the Constitution would risk trespassing on the sovereign territory of the people.

D. THE PROPER CONSTRUCTION OF SECTION 70

26. Section 70(1) mandates the legislature to enact "*a law*" to make provision for the holding of "*a referendum*". Contrary to the Appellants' suggestion (Ground 1; Appellants' skeleton, para. 20), the use of the singular ("*a law*", "*a referendum*") does not, without more, indicate that the law relates to a particular referendum, because words in the singular are usually taken to include the plural, and *vice versa*, unless the contrary intention appears[13].

[13] This is the rule in relation to Acts of Parliament (s. 6 of the *Interpretation Act 1978* [**Auth/1/8**]) and, the Respondent submits, must similarly to constitutional instruments. Section 4 of the *Interpretation Law (1995 Revision*) [**Auth/1/1**] applies the same approach to laws and other instruments of a public character made in the Cayman Islands.

27. However, the structure of s. 70 offers a clear indication of the intentions of the drafters of the Constitution:

27.1. First, s. 70(1) requires the legislature to enact law. The duty was triggered (without more) by the making of the Constitution. The duty is not triggered by the presentation of a petition[14]. This indicates that the law which the legislature was required to enact was a standing, general law to cover people-initiated referendums generally.

27.2. Second, not only does that follow from the wording of s. 70(1) but it is also obvious as a matter of logic. The law governing referendums must include the rules by which a referendum may be initiated (*i.e.* the rules governing petitions). A petition cannot predate the law.

27.3. Third, the Appellants now concede (for the first time) that petitions under s. 70 must be governed by law and that such law "*must necessarily be general*" (Appellants' skeleton, para. 36(a)). As a matter of logic (divorced from the structure and purpose of s. 70) the need for a general law governing the petition process does not necessarily mean that there must also be general rules governing the post-petition process. However, recognising that the "law" of which s. 70(1) speaks must include standing rules for the petition process strongly fortifies the indication that s. 70(1) is concerned with a standing, general law.

28. Importantly, the Appellants have not identified anything repugnant about this construction of s. 70(1). Indeed, the Government "*agrees that it is preferable, as a matter of policy, to enact a 'framework' law regulating all s. 70 referendums*" and, accordingly, "*intends to introduce and promote such a Bill later in 2020*" (Appellants' skeleton, para. 22).

29. Moreover, this reading of s. 70(1) promotes its purpose. Section 70(1) requires the legislature to make a self-denying law which cedes power to the people, allowing them to veto its policy choices. There is less scope for conflict of interest between the legislature

[14] The Appellants are wrong to submit that the s. 70(1) duty is "*prompted by a valid petition*" (Appellants' skeleton, para. 20).

and the people if those rules are made in the form of a standing, general law rather than a law which is forged in the heat of a particular policy dispute.

30. As the Judge put it: "*The very fact that it is highly likely that the Government will have a strong view on whatever matter of national importance triggers a binding referendum – and in the case of the port referendum, the Government is strongly in favour of a Yes vote – is in my view a powerful reason in favour of the need for a general law setting out the ground rules for the conduct of all referendums rather than proceeding by way of specific, ad hoc enactment of a new law each time a s. 70 referendum is triggered*" (para. 64).

31. The Judge was there referring to the likelihood that *the Government* will have a strong view on any issue of national importance. But the same is true of the legislature. The Respondent notes that the close union between executive and legislative powers in Westminster (which Bagehot described as a "*nearly complete fusion*"[15]) is even closer in the Cayman Islands. The legislature in the Cayman Islands comprises a single, elected chamber. It has 19 elected members, of whom currently 12 are members of the ruling coalition government and 7 are Cabinet members. A clear majority of the legislature supported a cruise port development and even the Speaker posted his strong support for the proposal before the passing of the Port Referendum Law[16] (judgment, para. 5(q)).

32. The Appellants themselves noted (Detailed Grounds of Resistance, para. 52 [**AB/3**]) that "*given the nature of the present referendum, which concerns a key manifesto commitment, it is unsurprising that the Legislative Assembly should have decided not to constrain Government from campaigning or spending public funds in doing so*". In other words, it is unsurprising that the legislature should set the rules of the game by reference to its view of the desirable outcome. But allowing the legislature to set the rules by which the people may overrule a particular policy choice risks undermining the purpose of s. 70, which is to secure the people's right to determine issues of national importance. As the Judge recognised, that risk is reduced (and the purpose of s. 70 promoted) by reading s. 70(1) as requiring the enactment of general rules which are not informed by the legislature's view of the desirable outcome of a particular referendum.

[15] The English Constitution, 2nd Ed., 1873, p.48 [**Auth/2/40**].
[16] See, for example, the Speaker's Facebook post in Additional Binder A (exhibit LS-1), p. 329.

33. To take the example cited in the Detailed Grounds of Resistance, the legislature's decision to disapply campaign financing provisions for this referendum promotes its position on the referendum issue given that the spending power of the Government and its commercial partners dwarfs that of opponents of the proposal. Applying the same logic, if a policy dispute were to pitch the Government and Legislative Assembly against powerful commercial interests, the legislature would presumably attempt to influence the people's exercise of their direct democratic powers by imposing strict campaign finance rules. Permitting the legislature to use its powers to influence the people's decision in this way risks impairing the people's sovereign right to determine issues of national importance for themselves, and thereby undermines the purpose of s. 70.

34. The purposive reading of s. 70 of the Constitution set out above results in a position that is consistent with international good practice. Although not legally binding, important guidelines on how States should guarantee an effective right to vote in referendums have been laid down by the European Commission for Democracy through Law ("**the Venice Commission**") in its Code of Good Practice on Referendums [**AB/37**]. The Commission is the Council of Europe's advisory body on constitutional matters[17]. The Government itself recognised that: "*The Code has been accepted by 47 European democracies and thus provides a significant yardstick by which to consider Cabinet's proposals*"[18]. Under the heading "*stability of referendum law*", the Venice Commission's Code provides: "*The fundamental aspects of referendum law should not be open to amendment less than one year before a referendum, or should be written in the Constitution or at a level superior to ordinary law*" (guideline II.2.b [**AB/37**] p.10).

35. The "*throwaway remarks*" by one of those present at the second round negotiations on the Constitution (judgment, para. 59)[19] and the *post hoc*, unreasoned, "*personal comments*" by the chair of the negotiations (judgment, para. 17)[20] do not cast any doubt on the points set out above.

[17] See *R (Barclay) v Lord Chancellor & Secretary of State for Justice* [2010] 1 AC 464, para 68, *per* Lord Collins.
[18] Appendix 3 to the Cabinet papers, Bulgin 1 exhibit SaB1 [**AB/23**].
[19] The remarks the Appellants rely on are at [**AB/39**] pp.400-401.
[20] The email containing those comments is at [**AB/11c**].

36. The Appellants appear to suggest that there is no need to read s. 70(1) as requiring a standing, general law setting out the manner in which the people's sovereign powers may be exercised because any bespoke law could be struck down if it unfairly restricted the people's power to decide matters of national importance (Appellants' skeleton, Ground 4, paras. 39-42). However, once it is recognised that (a) the purpose of s. 70(1) is to guarantee the full expression of the people's sovereign right to determine matters of national importance, and (b) a general law better promotes that purpose by providing a structural safeguard against encroachment on the people's sovereign right by the legislature, it is nothing to the point to identify the (suboptimal) remedies that would exist if s.70(1) were not construed so as to require a standing, general law. There are two further points. First, any manipulation of people-initiated referendums by the legislature may be difficult to detect by reference to a single referendum law. For example, there might appear to be nothing objectionable *per se* in the legislature making no provision for campaign finance rules in relation to a referendum, whereas changing those rules referendum by referendum so as to influence its outcome would be objectionable. In that example, a court would only be able to detect such manipulation when the second or subsequent referendum laws were enacted. It could not be detected in the first referendum law. Second, appearances matter. It is not only important to ensure that the legislature does not actually manipulate the people's right to decide matters of national importance, but also that the risk of interference is minimised so that the public can have full confidence in the process.

E. THE FLAWS IN THE PORT REFERENDUM LAW

37. There are five features of the Port Referendum Law which exemplify the need for a general law (as set out above) and, further or alternatively, mean that the law unacceptably undermines the people's sovereign right to determine whether or not to veto the cruise port project[21].

[21] This alternative argument was pleaded in the amended statement of facts and grounds [**AB/4**], for which the Judge gave permission at para. 6(v) of the judgment. The Judge did not adjudicate on this alternative argument, but it has been maintained through a Respondent's Notice [**CB/9**].

E.1 Voter registration

38. Section 70 of the Constitution [**Auth/1/2**] provides that those entitled to sign petitions and vote in people-initiated referendums are "*persons registered as electors in accordance with section 90*". Section 90 sets out the substantive qualification requirements for electors, but does not set out the process by which persons may register as electors.

39. The Elections Law (2017 Revision) provides for the registration of persons to vote in general elections.[22] Prior to the Port Referendum Law, there was no law providing for the registration of electors for the purposes of s. 70 of the Constitution.

40. In relation to general elections, s. 11(1) of the Elections Law provides that a person must apply "*on or before the registration date*" to have his name placed on the Register of Electors "*for the following quarter*" [**Auth/1/3**] p.12. Under s. 2(1), the "*registration date*" means the first day of January, April, July or October [p.8]. The time-lag is therefore at least 3 months and up to (just under) 6 months. For example, a qualifying person who applies for registration on 1 January will be eligible to vote in a general election from 1 April (3 months), and a person who applies on 2 January will be eligible from 1 July (just under 6 months).

41. Section 5 of the Port Referendum Law [**Auth/1/4**] provides that persons registered to vote under the Elections Law may vote in the referendum. There is nothing objectionable *per se* about using the voter registration mechanism for general elections for the purposes of referendums (as the Appellants point out at para. 48 of their skeleton). The problem is one of timing (to which the Appellants offer no answer):

    41.1. The Port Referendum Law came into effect on 31 October 2019. Section 3(2) of the Port Referendum Law provides for the referendum to be held not earlier than the 30th day after the publication of a notice of the referendum. This meant that the referendum could be held at any time after 1 December 2019. It was duly fixed by the Cabinet for 19 December 2019.

[22] Under s. 2(1) of the Elections Law, "'election' means an election of a member or members of the Assembly" and "'elector' means any person who votes or is entitled to vote at an election" [**Auth/1/3**] p. 7.

41.2. However, as at 31 October 2019, when the Law was passed, the earliest that a new elector could be placed on the register to vote under the Elections Law was 1 April 2020.

41.3. The effect of this was that the Port Referendum Law made no provision to enable people to register to vote for the purposes of the referendum. Such persons would include those who have no wish to vote in general elections but who would wish to exercise their rights under s. 70, and those who had qualified as electors (*e.g.* by turning 18) since the register was last updated.

41.4. Thus, the Port Referendum Law strikingly failed to enable all eligible persons (as specified by s. 70 of the Constitution) to exercise their right to vote in the referendum. The Port Referendum Law could only legitimately have relied on the voter registration mechanism set out in the Elections Law if s. 3(2) of the Port Referendum Law specified that the referendum could not be held earlier than 1 April 2020.

41.5. Voter registration for referendums is exactly the kind of basic, general provision that one would expect to be included in a standing, general law.

E.2 Formulating the issue of national importance

42. It is axiomatic that for the people's right to determine issues of national importance to be effective, the people must be permitted to define the issues. The drafters of the Constitution cannot have intended that the executive be permitted to formulate the issue of national importance because that would allow the executive to control the scope of the people's right to determine issues of national importance.

43. The only limits to the people's right to determine issues of national importance which can properly be implied into s. 70 of the Constitution are those which (a) ensure that the issue is of national importance; and (b) ensure that the issue is formulated in a way that can be put to an effective vote. The Constitutional Commission identified the obvious means of

achieving this in its research paper: a standing law for the approval of questions on which petitions are proposed. Thus, an independent body (*e.g.* the Elections Office) could verify the issue when approving the initiation of a petition. If a petition is successful, the executive is required to "*settle the wording of a referendum question …as prescribed by law*" under s. 70(2) of the Constitution, but (properly construed) this concerns matters of drafting detail, not the formulation of the issue of national importance.

44. In this case, the petition identified the issue of national importance as whether "*the proposed cruise berthing facility*" should proceed[23]. Nothing was said about the refurbishment of the existing cargo facility, which the Respondent and CPR Cayman support. Section 4(1) of the Port Referendum Law recast the issue as: "*whether the Islands should continue to move forward with the building of the cruise berthing and enhanced cargo port facility*" (emphasis added) [**Auth/1/4**]. Thus, the legislature mixed the issue which the petitioners sought to determine with another issue (an enhanced cargo facility), which they did not.

45. It is understandable that the Appellants should wish to formulate the issue in this way. They do not wish to spend public money on refurbishing the cargo facility and instead wish to cross-subsidise the refurbishment through the proposed cruise ship terminal. That is a legitimate policy choice within their sphere of decision-making. However, it is impermissible for the legislature or the executive to dictate the issues on which the people may adjudicate for the purposes of s. 70, because s. 70 empowers the people to determine such issues of national importance as they wish. In this case, the people are entitled to mandate the legislature and executive (a) to proceed or not to proceed with the cruise ship terminal, (b) to proceed (and spend public money on) or not to proceed with the refurbishment of the enhanced cargo facility and/or (c) to proceed or not to proceed with the cruise ship terminal and enhanced cargo facility. They petitioned for a free vote on issue (a). The legislature was not entitled to limit them to determining issue (c).[24]

[23] Additional Binder A (exhibit LS-1), p.95.

[24] The Government could always, if it so wished, conduct an advisory referendum on issues (b) and (c) at the same time it carries out the people-initiated referendum, pursuant to s. 69 of the Constitution.

E.3 Campaign financing

46. The Venice Commission's Code contains clear guidelines on campaign financing. As summarised at para. 24 of the Explanatory Memorandum: "*National rules on both public and private funding of political parties and election campaigns must be applicable to referendum campaigns (point II.3.4.a). As in the case of elections, funding must be transparent, particularly when it comes to campaign accounts. In the event of a failure to abide by the statutory requirements, for instance if the cap on spending is exceeded by a significant margin, the vote may be annulled. It should be pointed out that the principle of equality of opportunity applies to public funding; equality should be ensured between a proposal's supporters and opponents (point I.2.2.d)*" [**AB/37**] p.20.

47. There is clear, standing law on campaign financing for general elections in Part V of the Elections Law (2017 Revision) [**Auth/1/3**]. It:

    47.1. Limits election expenses to CI$40,000 (s. 67) [p.44].

    47.2. Prohibits third-party expenditure unless authorised in writing (s. 65) [p.44], save in certain limited circumstances (s. 72) [p.47].

    47.3. Requires candidates publicly to declare their election expenses (s. 69) [p.45] and keep an account of campaign contributions (s. 71) [p.46].

48. Thus, the legislature recognised the need for clear, standing law on campaign financing to ensure the constitutional right to free and fair elections for members of the Legislative Assembly.

49. Through s. 12 and a schedule, the Port Referendum Law [**Auth/1/4**] imports much of the machinery for general elections from the Elections Law, with modifications to address the different nature of a referendum. However, strikingly, the Port Referendum Law expressly omits Part V of the Elections Law (Election Expenses) [p.21].

50. The omission of campaign finance rules enabled the Government to outspend the port's opponents by a ratio of almost six to one (CI$420,000 compared to CI$74,000[25]), excluding the undisclosed expenditure of the Government's multi-billion dollar commercial allies.

51. As set out at para. 32 above, the omission of campaign finance rules represented a deliberate policy choice by the legislature designed to enable the Government to influence the outcome of the people's decision on whether a cruise ship terminal should be built.

52. The Respondent submits that it is impermissible for the legislature to exercise its s. 70 duty to enact law to enable the people to exercise their right to determine issues of national importance by setting rules for a particular referendum, in the absence of any standing rules, for the purpose of influencing the outcome of the referendum.

53. The Appellants' response is to assert a "*democratic mandate (indeed duty) to seek to implement*" their policy to build a cruise port referendum (Appellants' skeleton, para. 47). This fails to recognise that the "*democratic mandate*" of the legislature and the executive is subordinate to the people's direct sovereign right to determine matters of national importance. To allow the democratic representatives to formulate the rules for the exercise of the people's direct right so as to influence its outcome would trespass upon and undermine the sovereignty of the people's right, contrary to the purpose of s. 70 of the Constitution.

E.4 Political broadcasting

54. The Venice Commission's Code provides that there should be equal opportunity to access publicly owned media (Guideline I.2.2(a) [**AB/37**] p.7).

55. The schedule to the Port Referendum Law [**Auth/1/4**] [p.21] records that s. 74 of the Elections Law ("*Regulation of political broadcasts*") shall apply to the referendum, subject to the modification that "*(2) The provisions of this Part shall, with the necessary changes being made, apply in respect of a referendum as they apply to an election*". The Port Referendum Law does not identify what those "*necessary changes*" are.

[25] Moxam, exhibit JM-2 [**AB/30**].

56. The only material restrictions on political broadcasts in the Elections Law is that: *"During a political broadcast or political announcement, there shall be indicated visually or aurally as may be appropriate having regard to the mode of the broadcast or announcement - (a) the name of the political party or candidate (as the case may be) responsible for the broadcast or announcement; and (b) the fact that the broadcast or announcement has been paid for*" (s. 75(2) of the Elections Law [**Auth/1/3**] [p.49]).

57. The Government's advertisements on Radio Cayman breached s. 75(2) of the Elections Law (as modified for the purposes of the Port Referendum Law), in that they did not identify the political party responsible for them[26]. The Government has not offered any explanation for that breach. It appears to be a product of the insufficient clarity in the Port Referendum Law as to how political broadcasts are to be regulated for the purposes of the referendum.

58. More fundamentally, there is a striking absence of rules on affording access to publicly owned media in the Port Referendum Law. The practical effect of this was as follows. The Government was provided with more than 4,000 free advertisements on Radio Cayman, the wholly state-owned radio station. By contrast, Radio Cayman refused to offer free political broadcasts to CPR Cayman[27]. The Appellants suggest that it was legitimate, in light of the Government's "*democratic mandate*", for the legislature to use the rules to promote the Government's policy position on the port (Appellants' skeleton, para. 51, cross-referring to para. 47). Again, this fails to recognise that s. 70 of the Constitution does not permit the democratic representatives to formulate the rules for the exercise of the people's direct right so as to influence the outcome of the people's vote on a particular issue. This is not to say that the Government may not campaign in support of its policy objectives. The point is that s. 70 does not permit the legislature and the Government to skew the rules of the game to bolster its campaigning power in a particular referendum.

[26] Additional Binder C (Moxam, exhibit JM-1), p.67.
[27] First Affidavit of Renard Johann Moxam, paras. 23.1-23.5 and 30 [**AB/29**].

E.5 Providing objective information

59. The UN International Covenant on Civil and Political Rights was extended to the Cayman Islands on 20 May 1976. It forms a proper part of the background against which to construe constitutional rights (*Matadeen v Pointu* [1999] 1 AC 98, 114G [**Auth/2/27**]). Article 25 of the ICCPR guarantees the right to vote and the free expression of the will of the electors [**Auth/2/38**]. General Comment No. 25, adopted by the UN Committee on Human Rights, states that Art. 25 applies to referendums (para. 6) [**Auth/2/38**]. The General Comment also provides that: "*Voter education and registration campaigns are necessary to ensure the effective exercise of article 25 rights by an informed community*" (para. 11). Similarly, the Venice Code provides that "*the authorities must provide objective information*" on the referendum issue such as "*an explanatory report or balanced campaign material from the proposal's supporters and opponents*" (Guideline I.3.1.d – "*Freedom of voters to form an opinion*") [**AB/37**] [p.8])

60. The Port Referendum Law said nothing about providing objective information and, in the absence of regulation, the Government has delivered brochures to the homes of voters at public expense which are actively misleading. For example, the brochure (which purports to be objective[28]) indicates that the Cayman Islands will lose CI$200million unless the project goes ahead[29], when the Government's own base case figure is CI$2million/year[30]. The brochure also asserts "*the goal is to replace 10 times the amount of coral that is removed*"[31], when it is common ground that the Government is not proposing even to attempt to relocate more than 3% of the coral[32].

[28] The brochure states: "*Government is held to a higher standard and has a responsibility to tell the truth. We have not and will not distort the facts nor spread misinformation to you the people, who we answer to*" (Hardie, exhibit NH-1, p.1422 (contained in a slim binder entitled "EXTRACTS FROM EXHIBIT NH-1").
[29] "*Can the country afford to lose $200 million in revenue from the cruise industry?*" (Hardie, exhibit NH-1 p.1422).
[30] Hardie, exhibit NH-1, p.83.
[31] Hardie, exhibit NH-1 p.1423.
[32] Judgment, para. 6(d).

F. REMEDY

61. It is common ground that, if it is contrary to s. 70 of the Constitution, the Port Referendum Law is void and inoperative. The Appellants therefore do not question the Judge's jurisdiction to make a quashing order. However, they contend that he should have exercised his discretion differently and only granted declaratory relief. The Respondent makes the following points.

62. First, the Judge had a discretion as to the form of remedy to grant. The Appellants have failed to allege any error of law in the Judge's approach. They simply seeks to re-run the points which failed to persuade the Judge.

63. Second, there is a fundamental contradiction in the Appellants' case. Their main point appears to be that it was unnecessary to quash the Port Referendum Law because a declaration would make it sufficiently clear that the Port Referendum Law is "*void and inoperative*" (Appellants' skeleton, para. 56(f)). However, in the next paragraph, the Appellants state that the law should not be quashed so as to allow the legislature "*to repeal/revise it*" (para. 56(g)(i)). The Appellants' position is contradictory because, as the Judge recognised, something which is a nullity has no legal effect and is therefore incapable of being repealed or revised (judgment on relief, para. 9). In asking the Judge to forbear from quashing the void law so as to enable it to be repealed or revised, the Appellants were inviting him to participate in a legal fiction. As the Judge put it, the Appellants asked him to obfuscate the effect of his judgment (judgment on relief, para. 9).

64. Third, the comparisons which the Appellants seek to draw are misplaced:

    64.1. The Bill of Rights (Appellants' skeleton, paras. 56(a)-(b)). As the Court of Appeal explained in *The Deputy Registrar v Day*, CICA No. 9 of 2019 [**Auth/1/13**], para. 16, the Bill of Rights is based on the European Convention on Human Rights. It is therefore unsurprising that the drafters of the Constitution modelled the remedial provisions for breaches of the Bill of Rights on the *Human Rights Act 1998*. In any event, as the Judge identified, the fact that the Constitution expressly limits the form of relief available for a breach of the Bill of Rights but not for a breach of Part IV of

the Constitution indicates that the limitation does not apply to the latter (judgment on relief, para. 12).

64.2. EU law (Appellants' skeleton, paras. 56(c) and (h)). As the Judge held, UK primary legislation which is incompatible with EU law is not comparable to Caymanian legislation which is incompatible with the Constitution because the UK Parliament is supreme whereas the Caymanian legislature is not (judgment on relief, para. 10).

64.3. Hong Kong cases (Appellants' skeleton, para. 56(i)). These cast no light on the issue. They simply record the uncontroversial proposition that unconstitutional laws are invalid.

64.4. *Bennett v The Honourable Speaker of the Legislative Assembly* [**Auth/1/14**] (Appellants' skeleton, para. 56(j)). As the Judge pointed out (judgment on relief, para. 11), the judgment in *Bennett* appears to contain a contradiction, namely that a law can be of "*no effect*" (para. 131) and yet "*remain valid law unless and until the Legislature acts*" (para. 114). The Respondent has now been provided with correspondence[33] which shows that the parties in *Bennett* drew the attention of Hon. Justice Nova Hall (Actg.) to that contradiction. The Attorney General's position was quoted as follows: "*it is difficult to reconcile the Court's finding at para 114 with para 131 …In para 114, the Court states that those sections remain valid law whereas in para 131, the Court states that they are of no effect*" (original emphasis) [**AB/34**]. Hall J does not appear to have addressed those submissions expressly, but her formal declarations following those submissions stated that the laws in issue were of "*no effect*" [**AB/34**] [p.8]. It therefore appears doubtful that Hall J meant what para. 114 of her judgment appears to say. However, if Hall J did mean to say that a law could be of no effect and yet remain valid, that conclusion was incoherent and unsound (as the Judge in this case held at para. 11 of his judgment on relief).

65. The response of the UK Courts to invalid subordinate legislation provides a far closer analogy than the comparisons the Appellants seek to make. It is outside the powers of the

[33] Letter dated 29 January 2019 from Rosie Whittaker-Myles to Hall J (Acting) setting out the positions of the Plaintiff and the Attorney-General [**AB/34**]. It is not clear why the Government did not disclose that letter when making submissions about the effect of *Bennett* in the present proceedings.

Caymanian legislature to make a law that is incompatible with the Constitution in the same way that it is outside the powers of the relevant authority to make subordinate legislation that is incompatible with its parent Act. As held in *R (C) v Secretary of State for Justice* [2009] QB 657 [**Auth/1/20**], para. 85, *per* Keene LJ, and by the Supreme Court in *Ahmed v HM Treasury* [2010] 2 AC 534 (judgment on relief, paras. 4-8, *per* Lord Phillips) [**Auth/1/19**], *ultra vires* legislation should normally be quashed so that its (void) status is clear.

G. CONCLUSION

66. For the reasons set out in the Grand Court's judgment and the reasons set out above, the appeal should be dismissed.

CHRIS BUTTLER
MATRIX CHAMBERS

8 APRIL 2020
REPLACED 29 APRIL 2020