Trinity Term
[2025] UKPC 30
Privy Council Appeal No 0005 of 2024

JUDGMENT

Kattina Anglin (Appellant) *v* Governor of the Cayman Islands (Respondent) (Cayman Islands)

From the Court of Appeal of the Cayman Islands

before

Lord Reed
Lord Lloyd-Jones
Lord Burrows
Lady Simler
Dame Janice Pereira

JUDGMENT GIVEN ON
30 June 2025

Heard on 18 March 2025

Appellant
Hugh Southey KC
Rupert Wheeler
(Instructed by KSG Attorneys at Law (Cayman Islands))

Respondent
Tom Hickman KC
Reshma Sharma KC
Timothy Parker
Heather Walker
(Instructed by Cayman Islands Government)

Intervener (Colours Caribbean)
Alex Potts KC
Dr Alecia Johns
Anna Hoffmann
(Instructed by Travers Smith LLP)

LORD LLOYD-JONES:

1. This appeal concerns the scope of the reserved power of the Governor of the Cayman Islands ("the Governor") to legislate in respect of external affairs pursuant to section 81 read in conjunction with section 55 of the Cayman Islands Constitution Order 2009 (SI 2009/1379) ("the Constitution"). In particular it concerns whether the power of the Governor to legislate pursuant to those provisions includes a power to make laws necessary to ensure compliance with obligations of the United Kingdom and the Cayman Islands under the European Convention on Human Rights ("ECHR") in circumstances where the Cayman Islands Court of Appeal held in a judgment of 7 November 2019 that there had been a breach of the ECHR.

History of the proceedings

Proceedings in Day and Bush

2. On 12 April 2018, Chantelle Day and Vickie Bodden Bush applied for a marriage licence at the Cayman Islands General Registry. The application was refused the next day by the Deputy Registrar.

3. On 31 July 2018, having been granted leave to apply for judicial review, Ms Day and Ms Bush filed a Notice of Originating Motion. On 28 September 2018 they filed a constitutional challenge pursuant to section 26 of the Constitution in which they sought declarations that the Marriage Act (2010 Revision) did not conform with their rights under the Constitution, alternatively that the law should at least provide for them to enter into a civil partnership. They contended that this violated their rights including the right to private and family life under section 9 of the Bill of Rights, Freedoms and Responsibilities, which forms Part I of the Constitution ("the Bill of Rights") and/or article 8 of the ECHR. The two causes were consolidated. On 29 March 2019, Smellie CJ held that the Constitution gave Ms Day and Ms Bush the right to marry and that the Governor, the Deputy Registrar of the Cayman Islands, and the Attorney General of the Cayman Islands were in violation of sections 9(1), 10(1), 14(1) and 16(1) of the Constitution (*Day and Bush v Governor, Deputy Registrar and Attorney General*: 2019 (1) CILR 511). The Court ordered certain consequential amendments to be made to the Marriage Act pursuant to section 5 of the Constitution.

4. The Deputy Registrar and the Attorney General appealed to the Court of Appeal. The Governor did not appeal. On 7 November 2019 the Court of Appeal delivered judgment in *Deputy Registrar and Attorney General v Day and Bush*: 2020 (1) CILR 99. The Court of Appeal held that the constitutional right to marry extended only to opposite sex couples. On Ms Day and Ms Bush's alternative claim, which was conceded by the Deputy Registrar and the Attorney General, the Court of Appeal held that the absence of

a legal framework for the recognition and protection of same-sex relationships violated section 9 of the Bill of Rights and article 8 of the ECHR. It made the following declaration:

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

5. The Court of Appeal stated that it felt driven to make the following observation:

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

6. Ms Bush and Ms Day appealed against the decision of the Court of Appeal on the marriage issue to the Judicial Committee of the Privy Council which dismissed the appeal: [2022] UKPC 6; [2022] 3 LRC 557. In its Opinion of 14 March 2022, the Board stated at para 2:

> "2. It was common ground in the Court of Appeal and is common ground before the Board that under section 9(1) of the Bill of Rights (right to respect for family and private life) the Legislative Assembly of the Cayman Islands was required to provide the appellants with a legal status functionally equivalent to marriage, such as civil partnership. The Government and Legislative Assembly were in breach of this obligation, so the Court of Appeal made a declaration to that effect. The Government does not appeal against that declaration. This obligation has now been complied with, by the promulgation of the Civil Partnership Law 2020."

7. The Board observed (at para 3) that the United Kingdom is responsible for the international relations of the Cayman Islands and that it "is concerned to ensure that local law in the Cayman Islands should be compatible with the obligations of the United Kingdom under the ECHR in respect of the Cayman Islands".

Events following the judgment of the Court of Appeal in Day and Bush

8. In July 2020, in response to the Court of Appeal's declaration, the Cayman Islands Government introduced the Domestic Partnership Bill into the Legislative Assembly (now the Parliament by virtue of article 3 of the Cayman Islands Constitution (Amendment) Order 2020 (SI 2020/1283)). Following two days of debates it was defeated by nine votes to eight on 29 July 2020.

9. Thereafter, the Governor consulted with the Premier of the Cayman Islands and informed the Foreign and Commonwealth Office of the United Kingdom Government that the Domestic Partnership Bill had been defeated and that there was no likelihood that legislation would be passed to provide legal protection equivalent to marriage to same-sex couples. The Governor set out possible options to the UK Government, including:

(1) the use of the section 81 powers to enact a civil partnership law; or

(2) its enactment through an Order in Council by Her Majesty.

10. The UK Government and the Governor considered that section 81 could be used to enact legislation in light of the ruling of the Court of Appeal that the United Kingdom was in continuing breach of its obligations under the ECHR. The UK Government and the Governor considered it to be necessary and desirable in the interests of external affairs for legislation to be enacted to provide legal protection functionally equivalent to marriage to persons such as Ms Day and Ms Bush. After consulting with the Premier, it

appeared to the Governor that the Legislative Assembly would not enact legislation for this purpose and therefore that it was appropriate for legislation to be enacted under section 81.

11. On 5 August 2020, Baroness Sugg, the Minister for Sustainable Development and the Overseas Territories, acting on behalf of the UK Secretary of State for Foreign and Commonwealth Affairs, gave instructions to the Governor to use section 81 of the Constitution:

> (1) to publish in a Government Notice a Bill on domestic partnerships which complied with the Court of Appeal's declaration; and
>
> (2) to assent to the Bill on behalf of Her Majesty 21 days after its publication.

This instruction was given on behalf of Her Majesty pursuant to section 31(2) of the Constitution.

12. The Governor then used his reserved power to enact the legislation. On 5 August 2020, he published a statement, stating in relevant part:

> "The failure of the Legislative Assembly to pass the Domestic Partnership Bill leaves me, as Governor and the UK Government, with no option but to act to uphold the law. … I believe it is therefore imperative that the Domestic Partnership Bill is passed into law so that the discrimination suffered by Chantelle Day and Vicky Bodden-Bush, and others in same sex relationships, is brought to an end as required by the Court of Appeal. …
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> [T]he FCO decided that passing a version of the current Bill would be the right approach as this would fully comply with the Court of Appeal judgment. Acting on instructions from the Foreign Secretary, I intend to publish on 10 August the Domestic Partnership Bill and allow 21 days consultation for the public and Members of the Legislative Assembly. …
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> 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. …"

13. On 10 August 2020, the Governor published a revised version of the Domestic Partnership Bill.

14. On 14 August 2020, the Governor issued a further statement in which he said:

> "The Court [of Appeal] 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 Minister for Sustainable Development and the Overseas Territories, Baroness Sugg, who is acting on behalf of the UK Secretary of State, to utilise section 81 of the Cayman Islands Constitution to rectify this situation."

15. On 31 August 2020, the consultation period ended. The consultation led to some amendments to the Domestic Partnership Bill resulting in a Bill that would become the Civil Partnership Law 2020. (On 8 December 2020 it became the Civil Partnership Act 2020 ("the CPA") by virtue of the Cayman Islands Citation of Acts of Parliament Act 2020.)

16. On 4 September 2020, the Governor used his reserved powers under section 81 to give assent to the CPA and 11 consequential pieces of legislation.

17. On 28 September 2020, the associated Civil Partnership Regulations 2020 (SL 124/2020) took effect.

18. The CPA provides for both opposite-sex and same-sex couples to enter into civil partnerships. It also amends pre-existing legislation (other than the Marriage Act) thereby conferring on civil partners certain rights and obligations corresponding to those that attend on marriage.

Proceedings below

19. On 4 September 2020, attorneys acting for the appellant, Kattina Anglin, sent a letter before action to the Governor. The letter contended that the Governor was not entitled to enact the CPA through his section 81 reserved powers, as it did not fall within his special responsibilities under section 55 of the Constitution.

20. By application dated 23 October 2020 and filed on 28 October 2020, the appellant sought leave to apply for judicial review of the Governor's use of his reserved powers to enact the CPA on the following grounds:

> (1) the Governor erred in law by using section 81 to enact the CPA because the nature of the CPA was beyond the scope of the Governor's section 55 responsibilities (Ground 1); and
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> (2) the Governor erred in law by using section 81 to remedy the incompatibility where section 23 of the Constitution reserved the remedying of incompatibility to the legislature (Ground 2).

The appellant sought an order quashing the Governor's enactment of the CPA and a declaration that he had acted unlawfully.

21. On 20 November 2020, Williams J granted the appellant leave to apply for judicial review of the Governor's decision on Ground 1 only.

22. On 7 December 2020, the appellant filed a Notice of Originating Motion commencing the judicial review application. She sought an order of certiorari to review and quash the Governor's action and a declaration that the Governor's action was unlawful.

23. On 28 October 2021 Williams J granted Colours Caribbean leave to intervene in the proceedings.

24. Following a two-day hearing, on 28 March 2022 Williams J dismissed the application for judicial review.

25. The appellant appealed and, following a hearing on 9 May 2023, the Court of Appeal (Goldring P, Field and Moses JJA) dismissed the appeal on 4 July 2023. On 18

October 2023 the Court of Appeal refused leave to appeal to the Judicial Committee of the Privy Council.

26. The appellant sought leave to appeal from the Judicial Committee of the Privy Council which was granted on 22 May 2024.

The provisions of the Constitution

27. The principal provisions of the Constitution with which this appeal is concerned are:

> "81. 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 a Secretary of State."

> "55. (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—
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> (a) defence;
>
> (b) external affairs, subject to subsections (3) and (4);
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> (c) internal security including the police, without prejudice to section 58;

(d) the appointment (including the appointment on promotion or transfer, appointment on contract and appointment to act in an office) of any person to any public office, the suspension, termination of employment, dismissal or retirement of any public officer or taking of disciplinary action in respect of such an officer, the application to any public officer of the terms or conditions of employment of the public service (including salary scales, allowances, leave, passages and pensions) for which financial provision has been made, and the organisation of the public service to the extent that it does not involve new financial provision.

(2) The Governor, acting after consultation with the Premier, may assign or delegate to any member of the Cabinet, by instrument in writing and on such terms and conditions as he or she may impose, 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, by instrument in writing and on the terms and conditions set out in subsection (5), responsibility for the conduct of external affairs insofar as they relate to any matters falling within the portfolios of Ministers, including—

(a) the Caribbean Community, the Association of Caribbean States, the United Nations Economic Commission for Latin America and the Caribbean, or any other Caribbean regional organisation or institution;

(b) other Caribbean regional affairs relating specifically to issues that are of interest to or affect the Cayman Islands;

(c) tourism and tourism-related matters;

(d) taxation and the regulation of finance and financial services; and

(e) European Union matters directly affecting the Cayman Islands.

(5) The terms and conditions referred to in subsection (4) are the following—

(a) separate authority shall be required from or on behalf of a Secretary of State for the commencement of formal negotiation and the conclusion of any treaty or other international agreement by the Government;

(b) no political declaration, understanding or arrangement in the field of foreign policy shall be signed or supported in the name of the Government without the prior approval of a Secretary of State;

(c) a formal invitation to a member of government or Head of State of another country to visit the Cayman Islands shall not be issued without prior consultation with the Governor;

(d) the costs of any activities in pursuance of subsection (4) shall be borne by the Government;

(e) the Premier or other Minister shall keep the Governor fully informed of any activities in pursuance of subsection (4);

(f) the Premier or other Minister shall provide the Governor on request all papers and information, including the text of any instrument under negotiation, available to the Premier or other Minister with respect to any activities in pursuance of subsection (4); and

(g) any directions given by the Governor on any matter which in his or her judgement might affect defence or security shall be complied with.

(6) In the event of any disagreement regarding the exercise of any authority delegated or assigned under subsection (4), the matter shall be referred to a Secretary of State whose decision on the matter shall be final and whose directions shall be complied with.

(7) The Governor may, by directions in writing and with the prior approval of a Secretary of State, delegate or assign such other matters relating to external affairs to the Premier or another Minister designated by the Premier as the Governor thinks fit on such conditions as he or she may impose."

28. It is also necessary to refer to the following further provisions of the Constitution:

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

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

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

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

"33. (1) Subject to subsection (2), in any case where the Governor is required to consult with the Cabinet he or she shall act in accordance with the advice given to him or her by the Cabinet.

(2) The Governor may act against the advice given to him or her by the Cabinet—

(a) if he or she is instructed to do so by Her Majesty through a Secretary of State; or

(b) if, in his or her judgement, such advice would adversely affect any of the special responsibilities of the Governor set out in section 55.

(3) Whenever the Governor acts otherwise than in accordance with the advice given to him or her by the Cabinet, his or her reasons shall be recorded in the minutes, and any member of the Cabinet may require that there be recorded in the minutes the grounds of any advice or opinion which he or she may have given on the question."

"78. (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."

> "125. There is reserved to Her Majesty full power to make laws for the peace, order and good government of the Cayman Island."

29. Section 5(1) of the West Indies Act 1962 provides:

> "Her Majesty may by Order in Council make such provision as appears to Her expedient for the government of any of the colonies to which this section applies, and for that purpose may provide for the establishment for the colony of such authorities as She thinks expedient and may empower such of them as may be specified in the Order to make laws either generally for the peace, order and good government of the colony or for such limited purposes as may be so specified subject, however, to the reservation to Herself of power to make laws for the colony for such (if any) purposes as may be so specified."

<u>The approach to interpretation of the Constitution</u>

30. In delivering the judgment of the Board in *Bush and Day*, Lord Sales cited (at para 34) the following statement of the principles of constitutional interpretation made by Lord Hoffmann in *Matadeen v Pointu* [1999] 1 AC 98 at p 108C-F:

> "Their Lordships consider that this fundamental question [sc regarding the relationship between the courts and the legislature of Mauritius] is whether section 3, properly construed in the light of the principle of democracy stated in section 1 and all other material considerations, expresses a general justiciable principle of equality. It is perhaps worth emphasising that the question is one of construction of the language of the section. It has often been said, in passages in previous opinions of the Board too familiar to need citation,

> that constitutions are not construed like commercial documents. This is because every utterance must be construed in its proper context, taking into account the historical background and the purpose for which the utterance was made. The context and purpose of a commercial contract is very different from that of a constitution. The background of a constitution is an attempt, at a particular moment in history, to lay down an enduring scheme of government in accordance with certain moral and political values. Interpretation must take these purposes into account.
>
> Furthermore, the concepts used in a constitution are often very different from those used in commercial documents. They may expressly state moral and political principles to which the judges are required to give effect in accordance with their own conscientiously held views of what such principles entail. It is however a mistake to suppose that these considerations release judges from the task of interpreting the statutory language and enable them to give free rein to whatever they consider should have been the moral and political views of the framers of the constitution. What the interpretation of commercial documents and constitutions have in common is that in each case the court is concerned with the meaning of the language which has been used. As Kentridge A.J. said in giving the judgment of the South African Constitutional Court in *State v Zuma* [1995] (4) BCLR 401, 412: 'If the language used by the lawgiver is ignored in favour of a general resort to "values" the result is not interpretation but divination'."

The scope of the reserved legislative power

The effect of sections 81 and 55

31. Section 81 makes provision for a reserved power in the Governor to enact legislation. The Governor purported to act pursuant to this power to give assent to the CPA and 11 consequential pieces of legislation on 4 September 2020. The power exists 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 Legislative Assembly is unlikely to pass a Bill introduced into it for the purpose. Section 55, which concerns the special responsibilities of the Governor, provides that the Governor shall be responsible for the conduct, subject to the Constitution

and any other law, of the business of the Government with respect to certain matters which include "external affairs" (section 55(1)(b)). The present proceedings do not seek to challenge the Governor's judgement that the enactment of the CPA was necessary or desirable. Rather, the appellant maintains that this does not fall within the Governor's responsibility to act with respect to external affairs. What is meant by "external affairs" in section 55 is a question of construction of the Constitution and therefore a question of law. (See, by way of analogy, *Secretary of State for the Home Department v Rehman* [2001] UKHL 47; [2003] 1 AC 153, per Lord Hoffmann at para 50.)

32. The essential point made by Mr Hugh Southey KC on behalf of the appellant is that the power to legislate in respect of "external affairs" does not extend to legislation necessary to bring the domestic law of the Cayman Islands into compliance with international obligations of the Cayman Islands or of the United Kingdom in respect of the Cayman Islands. He points to the fact that the legislative power conferred by section 81 is defined by reference to section 55 which provides for executive functions and suggests that this limits the legislative power to the subject matter of the executive functions in relation to external affairs. In particular, because there is no executive power in the Governor to bring the law into conformity with international obligations, it is said that that requires a narrow reading of the legislative power. The legislative power does not extend to securing compliance with international obligations.

33. The starting point for the interpretation of these provisions must be the natural meaning of the words considered in the context of this constitutional instrument and having regard to the purpose of the provisions. In the light of the United Kingdom's general responsibility for the international relations of the Cayman Islands as a British Overseas Territory, the term "external affairs" would appear to connote the relationship between the Cayman Islands and the United Kingdom on the one hand and other countries and international organisations on the other. (See *Hendry and Dickson*, *British Overseas Territory Law*, 2nd ed (Oxford: Hart, 2018), ch 13 (External Relations).) It is a broad term and, as *Hendry and Dickson* observe (p 248):

> "The term 'external affairs', which is common to the territory Constitutions, might just as easily have been 'external relations', 'international relations' or 'international affairs' of the territory."

34. The Board agrees here with the reasoning of Sir John Goldring P in the Court of Appeal (at para 49). The expression "any business of the Government with respect to … external affairs" is broadly drafted and its meaning is plain and obvious. Furthermore, its application to the present case would seem to be clear. There is no dispute that the Government of the Cayman Islands was in breach of its international obligations to comply with the ECHR, a matter for which the United Kingdom would bear international responsibility. That state of affairs and the action taken to remedy it by establishing

compliance with international obligations would seem to be a paradigm example of "business of the Government with respect to … external affairs" of the Cayman Islands. It is necessary therefore to consider whether there is a good reason for giving those words a more restricted reading.

35. The Board is unable to see any reason in principle why "external affairs" in section 55(1), when applied in conjunction with section 81, should be read as excluding action taken to secure compliance with international obligations. On the contrary, such a limited reading would be unduly restrictive. It would be very strange if the Governor's reserved power to legislate permitted legislation with respect to the conduct of external affairs but stopped short whenever the legislation was intended to give effect to an international treaty obligation. Indeed, while diplomacy and the conduct of external affairs are predominantly executive functions which would not normally require legislation, situations such as the present where it is necessary to secure that domestic law is in compliance with international treaty obligations are precisely where a legislative power would be required. As Mr Tom Hickman KC put it, on behalf of the respondents, such a reading could lead to the bizarre consequence that the Governor could exercise reserved legislative powers to enact laws to further the external relations of the United Kingdom and the Cayman Islands with other States and international actors where this is not required by a treaty or customary international law, but could not do so where those external relations are reflected in binding international obligations. In the Board's view, the Constitution properly interpreted does not require such an unprincipled result.

36. Section 55(1)(b) must be read subject to subsections (3) and (4). Subsection (3) imposes certain conditions before the Governor may conclude an international agreement, treaty or instrument that would affect internal policy or require implementation by legislation in the Cayman Islands. This demonstrates that the responsibility of the Governor in respect of external affairs extends widely to such matters, including matters of internal policy and securing compliance with international obligations. Similarly, subsection (4) provides for the assignment or delegation to the Premier or another Minister of the responsibility for the conduct of external affairs insofar as they relate to certain matters including participation in regional organisations, tourism, taxation, the regulation of finance and financial services and European Union matters directly affecting the Cayman Islands. This again demonstrates the breadth of the power and that it extends to internal policy.

Dualism

37. On behalf of the appellant, Mr Southey submits that the restricted interpretation of section 55(1)(b) for which he contends is required by the dualist nature of the Cayman Islands legal system. The dualist principle was expressed as follows in *R(Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; [2018] AC 61 (at para 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."

Similarly, in *R (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26; [2022] AC 223 Lord Reed observed (at para 78):

> "… [T]he dualist system, based on the proposition that international law and domestic law operate in independent spheres, is a necessary corollary of Parliamentary sovereignty. It is only because 'treaties are not part of UK law and give rise to no legal rights or obligations in domestic law' (para 55) that the prerogative power to make and unmake treaties is consistent with the rule that ministers cannot alter the law of the land."

38. In the present case we are concerned with the Constitution of the Cayman Islands where the Legislative Assembly is not a sovereign Parliament. Nevertheless, the legal system of the Cayman Islands is dualist in that the conduct of foreign relations, including entering into treaty obligations, is an executive function while the amendment of the domestic law of the Cayman Islands in order to conform with such international treaty obligations requires legislation. Obligations arising under a treaty do not have effect in domestic law unless implemented by legislation.

39. On behalf of the appellant, it is submitted that the dualist principle supports the proposition that "external affairs" in section 55 should be interpreted as excluding compliance with international obligations which can only be achieved by legislation. The Governor's special responsibilities within section 55 are said "to exist in the sphere of executive responsibility" and that section "is not intended to grant the Governor responsibilities related to the business of the legislature". Construing "external affairs" to include securing legislative compliance with the ECHR would go beyond the scope of executive power and into the realm of legislative power which, it is submitted, would be contrary to the dualist principle and the plain words of section 55. It is objected that the

reading of section 55 upheld by the Court of Appeal would allow the Governor to reach an agreement with a foreign State in relation to any aspect of government in order to enable the Governor to impose domestic obligations. Accordingly, it is said, the dualist principle supports a narrow reading of "external affairs" in section 55.

40. The short answer to this submission is that in acting pursuant to reserved powers under section 81 the Governor is, exceptionally, exercising a legislative power which is expressed to apply to external affairs. In acting pursuant to section 81 the Governor has brought about compliance with an international obligation by legislation. Giving effect in domestic law in this way to international obligations involves no contradiction of the dualist principle. On the contrary, it is the fulfilment of the dualist principle. There is, therefore, no basis for the suggested presumption of interpretation which would restrict the natural meaning of the provision.

41. So far as the suggestion of abuse of sections 55 and 81 is concerned, the Constitution includes safeguards. With regard to the executive power with respect to external affairs (section 55), the Governor is required by section 55(3) not to 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 (section 55(3)). With regard to the legislative power with respect to external affairs (section 81), this power may be exercised only after consultation with the Premier and with the prior approval of a Secretary of State. Sections 55 and 81 in conjunction provide a mechanism within the framework of the Constitution with appropriate checks and balances to protect the interests of the Cayman Islands. The Board notes in passing that similar safeguards are not present in the alternative legislative routes commended by the appellant, namely section 5 of the West Indies Act 1962 and section 125 of the Constitution (provisions which are considered further below).

42. The appellant's case overlooks the fundamental requirement that the Constitution should be read as a coherent whole. Considered in isolation section 55 confers an executive power. Clearly, that executive power could not be used by the Governor to enact legislation securing the conformity of domestic law with international treaty obligations. However, section 55 and, in particular, the concept of "external affairs" in section 55(1)(b) are also required to operate in conjunction with section 81 which confers a legislative power and they must be interpreted in that wider context. Given that "external affairs" in its natural meaning is wide enough to include securing compliance with international obligations, nothing in this wider context requires the restricted reading for which the appellant contends.

43. The enactment of the CPA pursuant to section 81 of the Constitution therefore involved no breach of the dualist principle. Compliance with international treaty obligations under the ECHR was achieved by the exercise by the Governor of the reserved

power to enact legislation on the ground that it was necessary or desirable in the interests of external affairs as prescribed by section 81.

Further submissions based on provisions of the Constitution

44. On behalf of the appellant, Mr Southey advances a series of further submissions founded on other provisions of the Constitution.

45. First, the appellant relies on section 78(2). Section 78 deals with assent to Bills which may be given by the Governor or by His Majesty the King. Section 78(2) provides that, unless authorised by a Secretary of State to assent to it, the Governor shall reserve for the signification of His Majesty's pleasure any Bill which appears to him or her, acting in his or her discretion, to fall within one of the six categories set out in sub-paragraphs (a) to (f). Sub-paragraph (c) applies where the Bill appears "to be inconsistent with any obligation of His Majesty or of His Majesty's Government in the United Kingdom towards any other State or any international organisation". Sub-paragraph (e) applies where the Bill appears "to affect any matter for which the Governor is responsible under section 55".

46. The appellant submits that the reason for the distinction between sub-paragraph (c) and sub-paragraph (e) is that the two provisions are concerned with different concepts. The former relates to legislative inconsistency with international obligations while the latter relates to matters for which the Governor is responsible under his executive special responsibilities, including the business of government with respect to "external affairs". This, it is submitted, is intended to reflect the dualist legal system of the Cayman Islands. Separate provision needs to be made where powers are intended to cover compliance with international obligations as such compliance is not an "external affair". This distinction, it is submitted, must be read over to the interpretation of "external affairs" in section 55(1)(b). It is further submitted that if external affairs include securing compliance with international obligations section 78(2)(c) would be otiose.

47. Redundancy is not a strong tool in statutory interpretation. (See *Walker v Centaur Clothes Group Ltd* [2000] 1 WLR 799 per Lord Hoffmann at p 805; *DMWSHNZ Ltd v Revenue and Customs Comrs* [2015] EWCA Civ 1036; [2017] STC 1076 per Lewison LJ at para 38.) In the present instance, there is no reason to think that each matter listed in section 78(2) is intended to be a discrete and mutually exclusive category. On the contrary, there will be obvious overlaps between the various categories. For example, sub-paragraph (a) (a Bill which appears to be repugnant to or inconsistent with the Constitution) and sub-paragraph (d) (a Bill which appears likely to prejudice the Royal prerogative) will overlap with sub-paragraphs (c) and (e). In the same way there is an obvious overlap between a Bill which is inconsistent with an international obligation and a Bill which affects external affairs.

48. Furthermore, in agreement with the judge and the Court of Appeal, the Board considers that the inclusion of an express reference to a Bill which appears to be inconsistent with an international obligation is no more than a "belt and braces" approach which reflects the importance attached by the UK Government to minimising any risk of its failing to comply with its international obligations. As Mr Hickman observes on behalf of the respondents, section 78(3) requires the Governor to explain to members of the Legislative Assembly why he or she proposes to refuse assent to a Bill. If assent is to be refused on the ground that it would be inconsistent with treaty obligations, section 78(2)(c) enables and requires (in conjunction with section 78(3)) that this specific reason should be identified, notwithstanding that a Bill might be required to be reserved or that assent may be refused for reasons that also engage section 78(2)(e) more broadly. The appellant's argument provides no support for an interpretation of the words "external affairs" in section 55(1)(b) contrary to their natural meaning.

49. Secondly, the appellant relies on a limitation on the Governor's power imposed by section 55(3) which provides that the Governor shall not enter, agree or give final approval to any international agreement, treaty or instrument that would affect internal policy or require implementation by legislation in the Cayman Islands without first obtaining the agreement of the Cabinet, unless instructed otherwise by a Secretary of State. Mr Southey points to the fact that under section 44(3) of the Constitution the Cabinet has responsibility for the formulation of policy insofar as it relates to every aspect of government "except those matters for which the Governor has special responsibility under section 55". It is submitted that, as a result, legislative compliance with international obligations is a responsibility of the Cabinet and not a special responsibility of the Governor under section 55.

50. Section 55(3) is an acknowledgement of the fact that if performance of an international obligation requires amendment of the internal law of the Cayman Islands this will require implementing legislation. The prior approval of the Cabinet, unless otherwise instructed by a Secretary of State, is a limitation on the power of the Governor to enter into such an international obligation. However, the Governor is still able to act without the agreement of the Cabinet provided he or she is so instructed by the Secretary of State. Consequently, this aspect of section 55(3) provides no support for the submission that compliance with international obligations falls beyond the Governor's power to conduct external affairs under section 55. In fact, it demonstrates that the contrary is the case. In any event, this has no bearing on the power of the Governor to act under section 81 to implement such an international obligation once undertaken.

51. Thirdly, the appellant draws attention to section 23(3). Section 23 concerns a declaration of incompatibility. Section 23(1) provides that, if in any legal proceedings primary legislation is found to be incompatible with Part I of the Constitution, 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. Section 23(3) provides that in the event of a declaration of incompatibility the Legislature shall

decide how to remedy the incompatibility. The appellant submits that although this provision addresses compatibility with the Bill of Rights (which implements the ECHR in the Cayman Islands) rather than international obligations, it reflects the dualist principle that the alteration of domestic law to comply with human rights norms is a matter for the Legislature. The appellant submits that it would be inconsistent for the Governor to have no power to change domestic law to remedy incompatibility with the Bill of Rights but to have a power to override the Legislature and alter domestic law where incompatible with the ECHR. That is because, it is said, in practice doing the latter would result in the Governor usurping the Legislature's role in respect of the former.

52. The Board is unable to accept this submission. When read in context it is apparent that section 23(3) was intended to make clear that it was not for the courts but for the Legislature to remedy the incompatibility. Section 59 of the Constitution defines the Legislature as consisting of His Majesty and a Legislative Assembly. However, section 23(3) cannot be read as depriving the Governor of the reserve power under section 81 to enact legislation in order to secure compliance with obligations under the ECHR and as conferring exclusive competence in this regard on the Legislature. It was common ground before the Board that incompatibility of Cayman Islands law with the ECHR could be remedied by the law-making power reserved to His Majesty under section 125 of the Constitution and/or section 5(1) of the West Indies Act 1962. Accordingly, the Legislature does not possess exclusive competence in this regard. Section 81 reserves a legislative power to the Governor where it appears to the Governor that the Cabinet is unwilling to support the introduction of a Bill into the Legislative Assembly or that the Assembly is unlikely to pass the Bill. Section 23(3) does not curtail the power of the Governor in those circumstances where the reserve power under section 81 is still needed.

53. For completeness it should be recorded that the declaration made by the Court of Appeal in *Bush and Day* was not a declaration of incompatibility under section 23. There it was the absence of legislation, not the content of existing legislation, which breached the Bill of Rights and the ECHR. As a result, section 23 had no application.

54. Fourthly, the appellant submits that section 125 of the Constitution confers on the United Kingdom a practically unfettered power to pass laws for the Cayman Islands, subject to a safeguard in the form of legislation enacted under section 125 being subject to democratic control by the UK Parliament. It is submitted that as a result section 81 should be construed narrowly as there is no direct democratic control of the Governor. The appellant says that enlarging the reserve legislative power of the Governor under section 81 curtails fundamental rights and democracy by undermining the efficacy and value of the constitutional right to vote under section 93.

55. The Board rejects this submission. The availability of an alternative power to legislate under section 125 of the Constitution and section 5(1) West Indies Act 1962 is no reason to adopt a narrow interpretation of the reserve legislative power under section

81. The Constitution confers legislative power on the Governor under section 81 and also reserves plenary legislative power to His Majesty under section 125. Either was available in the present case. However, section 81 is designed to ensure that, as far as possible, the direct imposition of legislation by the United Kingdom on the Cayman Islands is unnecessary. Furthermore, section 81 contains safeguards (referred to above at para 41) which are not required under section 125. It is perhaps understandable therefore why a decision was taken to act within the Constitution under section 81.

56. In the Board's view these further arguments provide no support for the appellant's suggested restrictive reading of sections 81 and 55 of the Constitution.

Constitutional context

57. A consideration of the provisions of the Constitution in their constitutional context confirms the Board's reading of sections 81 and 55.

58. In 1997 the Foreign and Commonwealth Office undertook a major review of the United Kingdom's relationships with its Overseas Territories (then called "Dependent Territories"). In 1999 it published a White Paper entitled "Partnership for Progress and Prosperity – Britain and the Overseas Territories" (Cm 4264). In his foreword the Secretary of State set out the principles underlying the relationship, in particular that of mutual responsibility:

> "Britain is pledged to defend the Overseas Territories, to encourage their sustainable development and to look after their interests internationally. In return, Britain has the right to expect the highest standards of probity, law and order, good government and observance of Britain's international commitments."

The White Paper stated (at para 4.1):

> "We regard the establishment and maintenance of high standards of observance of human rights as an important aspect of our partnership with the Overseas Territories. Our objective is that those territories which choose to remain British should abide by the same basic standards of human rights, openness and good government that British people expect of their Government. This means that Overseas Territory legislation should comply with the same international obligations to which Britain is subject, such as the European Convention on Human

> Rights and the UN International Covenant on Civil and Political Rights."

The White Paper identified certain areas in which legislation in Overseas Territories was problematic in human rights terms and explained that this left the UK Government at risk of being held in breach of its international obligations. It continued (at para 4.3):

> "In keeping with our commitment to a modern relationship with the Overseas Territories based on partnership and responsible self-government, our preference is that the Overseas Territories should enact the necessary reforms themselves. But in the absence of local action, legislation could be imposed on the Caribbean territories by Orders in Council."

59. The White Paper was followed by the British Overseas Territories Act 2002 which renamed "Dependent Territories" "British Overseas Territories".

60. The Constitution was adopted in 2009 after an extensive process of public consultation followed by a democratic process of negotiation in which both the Government and the Official Opposition joined. This was chaired by the constitutional expert, Mr Ian Hendry. The draft agreed between the UK and Cayman Islands governments was approved by over 62% of the Cayman Islands electorate in a referendum. Under the Constitution the Governor is responsible for the conduct of, inter alia, the defence, external affairs and internal security of the Cayman Islands. Under international law the UK Government is ultimately responsible for compliance by Overseas Territories with applicable international obligations.

61. During the negotiations leading to the Constitution, the UK delegation made clear that it attached great importance to the Governor retaining sufficient reserved powers to ensure that the United Kingdom's international obligations would be met and any contingent liability that might arise as a result of a breach of an international obligation avoided. Accordingly, Mr Hendry emphasised during the negotiations that:

> "…continuations of British Overseas Territory carries with it the need for the UK Government to retain sufficient reserved powers … to enable it to fulfil its responsibilities, both international and constitutional, for the Cayman Islands." (Constitutional Talks, 29 September 2008, p 50.)

62. It appears therefore that reserving sufficient powers to secure the observance of international obligations was an essential feature of the constitutional settlement.

Furthermore, the UK Government was anxious to ensure that reserved powers of the Governor would be adequate, where necessary, to take action to avoid liability for breaches of international obligations. Should further support be required for the Board's reading of the provisions of the Constitution, the constitutional context provides it.

Other Constitutions

63. The appellant invited comparison with the constitutions of other British Overseas Territories. However, the Board was not assisted by these comparisons which add nothing to the analysis.

Australian Constitution, section 51(xxix)

64. The Court of Appeal referred, by way of analogy, to two decisions of the High Court of Australia on the external affairs power under section 51(xxix) of the Australian Constitution (*Polyukhovich v The Commonwealth of Australia* (1991) 172 CLR 501; *Richardson v Forestry Commission* (1988) 164 CLR 261). However, in the light of the clear conclusion to which the Board has come on the basis of the interpretation of the Cayman Islands Constitution in its constitutional context, it is not necessary to refer to these authorities.

Conclusion

65. For these reasons the Board will humbly advise His Majesty that the appeal should be dismissed.