IN THE SUPREME COURT OF BELIZE, A.D. 2011

CLAIM NO. 647 OF 2011

IN THE MATTER OF AN APPLICATION PURSUANT TO PART 56 OF THE SUPREME COURT (CIVIL PROCEDURE) RULES

AND

IN THE MATTER OF SECTION 2(1)(b), 2(3), 2(4) AND SECTION 3 OF THE REFERENDUM ACT, CAP. 10 OF THE LAWS OF BELIZE AS AMENDED BY ACT NO. 1 OF 2008

AND

IN THE MATTER OF THE PREAMBLE AND SECTIONS 1, 2, 3, 6, 20, 68, 69, 81 AND 95 OF THE CONSTITUTION OF BELIZE

BETWEEN:

RICARDO EDMUNDO CASTILLO
VAUGHAN HARRISON GILL — **Claimants**

AND

THE PRIME MINISTER OF BELIZE
THE ATTORNEY GENERAL OF BELIZE
THE GOVERNOR GENERAL OF BELIZE — **Defendants**

BEFORE THE HON. CHIEF JUSTICE KENNETH BENJAMIN

DATED THE 21ST DAY OF OCTOBER 2011.

Appearances: Lord Goldsmith QC and Mr. Godfrey Smith, SC for the Claimants
Mrs. Cheryl Krusen SC, Solicitor General, Mr. Nigel Hawke, Mr. Herbert Panton and Ms. Iliana Swift with her, for the Defendants.

JUDGMENT

INTRODUCTION

[1] Before the Court is an application that is of great importance to the State of Belize. It arises from the introduction in the House of Assembly on July 22, 2011 of

the Belize Constitution (Ninth Amendment) Bill, 2011 ("the Ninth Amendment Bill"). Much public debate has since erupted throughout the length and breadth of Belize.

[2] The Claimants are registered electors in the Approved Voters' List of Belize. They have both deposed to having signed a Petition for a referendum on the Ninth Amendment Bill. The application is for an interim injunction until trial or until further order that the Defendants be restrained from taking any steps to bring the Ninth Amendment Bill into force until the Petition for the referendum has been verified by the Chief Elections Officer, and if certified by him as having been signed by the requisite number of electors, a referendum is held.

[3] The application is sought on the basis of a fixed date claim filed in appropriate form simultaneously with the said application on October 17, 2011 seeking the following declarations and orders:-

(1) A Declaration that the Government is obliged to hold a referendum on the Belize Constitution (Ninth Amendment) Bill 2011;

(2) A Declaration that such referendum should take place before bringing the Belize Constitution (Ninth Amendment) Bill 2011 into force;

(3) A Declaration that the Governor General should refer the Petition requesting a referendum on the Belize Constitution (Ninth Amendment) Bill 2011 to the Chief Elections Officer pursuant to Section 2(3) of the Referendum Act, Cap. 10 (as amended by Act No. 1 of 2008); and once the Chief Elections Officer has produced a certificate under Section 2(4) of the Referendum Act issue a Writ of Referendum pursuant to Section 3(1) of the Referendum Act;

(4) A Declaration that the Claimants who are registered electors and have signed a Petition for a referendum on the Belize

Constitution (Ninth Amendment) Bill 2011 have a legitimate expectation that such referendum will be help prior to the enactment of the Belize Constitution (Ninth Amendment) Bill 2011;

(5) A Declaration that the Governor General may assent to the Belize Constitution (Ninth Amendment) Bill 2011 only after the referendum on the Bill has been held;

(6) A Declaration that the enactment of the Belize Constitution (Ninth Amendment) Bill 2011 without first holding a referendum will constitute a violation of Sections 1, 2, 68, 29 and 81 of the Belize Constitution and be contrary to the normative values pronounced at clauses (c), (d) and (f) in the Preamble that underpin the Belize Constitution;

(7) A Declaration that the refusal of the Prime Minister to hold a referendum before the Belize Constitution (Ninth Amendment) Bill 2011 comes into force would be unlawful and would violate the Claimants' rights to the protection of the law guaranteed by sections 3 and 6 of the Constitution;

(8) A Declaration that the Government should take all necessary steps to hold the referendum on the Belize Constitution (Ninth Amendment) Bill 2011 in an expeditious manner;

(9) An injunction restraining the Defendants whether by themselves or by their servants or agents from taking any steps (including presenting the Bill to the Governor General for his signature, or the Governor General giving his assent to the Bill) to bring the Belize Constitution (Ninth Amendment) Bill 2011 into force until a referendum is held;

(10) Such other declarations and orders and such directions as this Honourable Court may consider appropriate for the purpose of enforcing or securing the enforcement of the aforementioned Declarations and Orders;

(11) Any other relief that the Court deems just and equitable;

(12) Liberty to the Claimants to apply for further or consequential relief; if necessary; and

(13) Costs."

Attention is drawn to the permanent relief sought by way of injunction to restrain the Defendants from taking steps to bring the 9th Amendment Bill into force pending the holding of a referendum.

[4] The Claimants assert that as qualified electors, a referendum ought to be held before the 9th Amendment Bill is again placed before the House of Assembly and that passage of the Bill would visit irremedial damage on them. In this regard, the Prime Minister of Belize is sought to be restrained by virtue of the assignment to him of Cabinet responsibility for the Parliamentary matters of the Government; the Governor-General of Belize is sought to be restrained by virtue of the power conferred upon him by section 81 of the Constitution to give or withhold his assent to Bills passed by the National Assembly.

BACKGROUND

[5] On July 22, 2011, the 9th Amendment Bill had its first reading in the House of Representatives. The Hon. Attorney-General averred, without demur, that the Government has held countrywide consultations with the general public in every District of the Country and met with various stakeholders. The meetings with stakeholders included consultation with the two religious groupings – namely, the Belize Council of Churches and the Evangelical Association of Churches. Arising therefrom, the Government issued a press statement on August 22, 2011 to the

effect that certain clauses of the 9th Amendment Bill will be amended by deletion. On the same date, the said religious organizations issued a press release detailing amendments to the 9th Amendment Bill and expressing support for the Bill in its amended form. The Claimants say that the amendments proposed do not meet the objections of themselves and other citizens to the 9th Amendment Bill.

[6] The affidavit of the first-named Claimant ("the Castillo affidavit") referred to and exhibited evidence of objections to the original 9th Amendment Bill from various associations including the Bar Association of Belize, the Belize Chamber of Commerce and Industry and Belizeans for Justice. These were followed up by a further press release from the Bar Association dated August 25, 2011 urging the Government to refrain from passing the 9th amendment Bill notwithstanding the amendments proposed at the instance of the religious organizations. In addition, the Bar Association commissioned and circulated an opinion by a renowned academic, Dr. Albert Fiadjoe.

[7] Learned Queen's Counsel for the Claimants devoted a considerable amount of time in detailing the Claimants' objections to the 9th Amendment Bill in its altered state. The matter at hand in so far as the amendment of the Constitution is concerned is governed by section 69 of the Constitution which provides that, in order to alter the fundamental rights and freedoms provisions set out in sections 3 to 20 of Part II of the Constitution, the validity of the bill requires that a period of 90 days elapse between the first and second readings. In addition, for passage, the Bill must be supported by not less than three-quarters of the House of Representatives on its third reading. Both sides concede that the legislative process does not include the requirement of a referendum; indeed, nowhere in the Constitution of Belize is there any requirement of a referendum.

THE BELIZE CONSTITUTION (NINTH) AMENDMENT BILL

[8] This judgment would not be complete without a synopsis of the key objections to the Amendment Bill in its altered form, which is attached for reference. Although, these objections do not form the substantive subject-matter of the present application and the accompanying Fixed Date Claim, they are the *fons et origo* of the

proceedings. The proposed amendments are to the existing sections 2 and 69 and by the addition of a Part XIII including new sections 143, 144 and 145.

[9] The amendment to section 2 is by the creation of a subsection (2) within the supreme law clause by adding a definition of the words “other law” in the original section. The words are defined as not including a law to alter any of the provisions of the Constitution passed pursuant to section 69. In essence, an amendment passed in conformity with section 69 would not be eligible to be declared inconsistent with the Constitution.

[10] The proposed alteration to section 2 is best understood by reference to proposed amendment to section 69 which adds a new subsection (9). That proposed subsection as altered declares that “the provisions of this section are all-inclusive and exhaustive and there is no other limitation, whether substantive or procedural, on the power of the National Assembly to alter this Constitution.” The Claimants complain that the combined effect of the amendments to sections 2 and 69 would profoundly affect the power of the Court to review legislation since the courts’ jurisdiction would be ousted.

[11] The new Part XIII is devoted to and headed “Government Control over Public Utilities.” Section 143 deals with the interpretation of ‘public utilities’ among other definitions and section 144 mandates that there be majority ownership and control of public utilities. The proposed section 145 declares that certain acquisitions by the Government to be carried out ‘for a public purpose’ in accordance with the laws authorizing the acquisition of property by such means. The property is declared to be vested absolutely in the Government free of incumbrances. Subsection (4) of section 145 preserves the right to any person claiming an interest in or right over property acquired to receive reasonable compensation within a reasonable time according to law.

[12] The Claimants say that the new Part XIII is referrable to partially successful challenges to legislation on constitutional grounds in the recent decision of the Court of Appeal striking down an acquisition as ,inter alia, not being for a public purpose (see: **Dean Boyce v Attorney General et al – Civil Appeal No. 30 of 2010**). It

was urged by learned Queen's Counsel that the plain intention of the Government, by declaring the re-nationalization to be a public purpose, was to preclude the Court from inquiring into the 'public purpose' issue. Thus, the jurisdiction of the Court to address that fundamental freedom would be ousted. Reference was further made to the Press statement from the Government of Belize of August 22, 2011 wherein it was written that in its altered form the 9th Amendment Bill would retain all its essential provisions and "would still guarantee the impregnability of the utilities' nationalization."

[13] By reference to the Constitution's constituent parts, learned Queen's Counsel iterated that Belize is a constitutional democratic state established on the foundation of constitutional supremacy and not parliamentary supremacy. The supremacy clause residing in section 2 was coupled with the enforcement provisions of sections 17 and 20 to support the foundation. The Court was reminded that by the establishment of the Supreme Court in section 95, the rule of law and the protection of fundamental rights and freedoms were safeguarded by the Judiciary which enjoys constitutional separation from the Executive. In **Attorney General for Barbados v Joseph & Boyce (2006) 69 WIR 104**, Wit, J explained that, unlike in the United Kingdom where the common law is central to its unwritten constitution, the Constitutions of the Caribbean are essentially different "because of the very fact that they are written and because of the fact that the people themselves, and therefore their constitutions, are deemed to be sovereign and supreme." His Lordship continued:

> "Further, the legislatures under the Caribbean Constitutions, although extremely important, cannot, as Parliament can in the United Kingdom, claim superiority over the other two branches of government. Caribbean parliaments are not at liberty to legislate whatever or however they see fit without regard to the limits enshrined in the constitutions which ultimately have to be construed, and guarded, by the Judiciary."

This dictum was put forward as the beginning of the contention that under the Constitution of Belize, the ultimate power rests in the hands of the people.

[14] At the outset of her response, the learned Solicitor General was swift in acknowledging the supremacy of the Constitution as the fundament of the Constitution. Be that as it may, the direction of the Claimants' argument was that, having regard to the Preamble as an integral component of the constitution, the will of the people and not the sovereignty of parliament provides the basis of government under the constitution. In embracing the Preamble as being open to interpretation co-extensive with the remainder of the constitution, several authorities were cited (**Attorney General of Barbados v Joseph and Boyce** (supra); **Njoya et al v Attorney General et al [2004] LLR 4788** (High Court of Kenya). This Court fully embraces this expansive approach to constitutional interpretation.

[15] Paragraphs (c), (d), (e) and (f) of the Preamble recite as follows:

"Whereas the people of Belize:

(c) believe that the will of the people shall form the basis of government in a democratic society in which the government is freely elected by universal adult suffrage …

(d) recognise that men and institutions remain free only when freedom is founded upon respect for moral and spiritual values and upon the rule of law;

(e) require policies of state which protect and safeguard the unity, freedom, sovereignty and territorial integrity of Belize; …

(f) desire that their society shall reflect and enjoy the above mentioned principles, beliefs and needs and that their constitution should therefore enshrine and make provisions for ensuring the achievement of the same in Belize."

This extensive reference to the Preamble was the starting point of the Claimant's argument that the sovereign power of the people fuelled the status of constitutional

supremacy and that, therefore, the principle of supremacy of the people was enshrined in the Referendum Act.

[16] The learned Solicitor General did not specifically address this source of reasoning and confined her arguments to a plain reading of the Referendum Act vis-à-vis the Constitutional process under section 69. I am content to follow the Solicitor General's approach as will become evident as the judgment progresses.

REFERENDUM ACT

[17] The original Act No. 1 of 1999 now the Referendum Act, Chapter 10 of the 2000 Revised Edition of the Laws of Belize has been amended by Act No. 1 of 2008. The relevant sections as relied upon the argument enact as follows:

> "2.(1) Subject to the provisions of this Act, a referendum shall be held in any of the following circumstances:
>
> (a) …
>
> (b) where a petition is presented to the Governor-General signed by at least ten percent of the registered electors in Belize whose names appear in the approved voters' list existing at the time of presentation of the petition (…) praying that in their opinion a certain issue or matter is of sufficient public importance that it should be submitted to the electors for their views through a referendum; or
>
> (c) …
>
> (d) …
>
> (2) Every petition presented to the Governor-General pursuant to subsection (1) (b) above shall contain the full name of the elector (in block letters) his date of birth, the place of his residence, the electoral division in which he is registered, and

such other information as the Governor-General may by regulations made under this Act, prescribe.

(3) Where a petition is presented to the Governor-General under the foregoing provisions of this section, the Governor-General shall forthwith refer the petition to the Chief Elections Officer for verification of the signatures of the petitioners, and for certification that at least ten percent of the registered electors in the entire country, (…) have in fact appended their signatures to the petition.

(4) On receipt of the petition from the Governor-General, the Chief Elections Officer shall proceed with due expedition to verify the signatures on the petition and return the petition to the Governor-General as soon as practicable but no later than two months from the date of receipt of the petition, with a certificate as to whether or not the petition has been duly signed by the requisite number of electors as specified in subsection (34) above.

(5) …

3.(1) The Governor-General shall, within thirty days –

(a) …

(b) of the receipt of the certificate from the Chief Elections Officer pursuant to section 2(4) above, verifying the petition has been duly signed by the requisite number of electors as specified in section 2(3);

(c)…

Issue a Writ of Referendum in a form similar to the Writ of Election in the Fifth Schedule to the Representation of the People Act, with such modifications and adaptations as may be necessary to satisfy the provisions of this Act, to the returning officers of the electoral divisions of Belize …"

It is to be highlighted that a referendum can be invoked by the signatures of 10% of the electorate "praying that in their opinion a certain issue or matter of sufficient public importance" be put to the electorate for 'their views.'

[18] It is plain from the use of the word 'shall' in subsections (2), (3) and (4) of section 2 and in section 3 of the Act, that the requirements of the petition are mandatory and that duties are placed on the Governor-General and the Chief Elections Officer to act within a stipulated time-line, if not forthwith. (see: Per Lord Diplock in **Grunwick Processing Laboratories Ltd et al v Advisory, Conciliation and Arbitration Service et al 1978 1 All ER 338** at pp. 361 – 362). The time limits aggregate a period of four (4) months from the time of the presentation of the petition. In this context, the Claimants say that any restraint by injunction would be for this length of time. Learned Queen's Counsel told the Court that having waited 90-days as required by the provisions of section 69(5) of the Constitution, a further delay of four months was a small price to pay for the will of the people to be ascertained.

[19] The Claimants accepted that the Act does not say that the Government is bound by the result of the referendum. This was acknowledged by Mottley, P in the case of **Prime Minister of Belize & The Attorney General vs Alberto Vellos et al – Civil Appeal No. 17 of 2008**, in this dictum:

> "… there is nothing in the Referendum Act which prevents the Government from proceeding with an issue or matter which does not obtain the approval of the electorate. Nonetheless, it must be recognised that the sanction is political – to be dealt with by the electorate at the next general election."

[20] Further, on appeal from the Court of Appeal in the said **Vellos** case, the Privy Council upheld both the Learned Chief Justice at first instance as well as the Court of Appeal in finding that the Referendum Act did not impose a fetter on the amending procedure under the Constitution. As to the relationship between the original Referendum Act and a Bill to amend the Constitution, the advice of the Privy Council went thus (at 2010 UKPC 7 at pp. 14 -15 – paragraph 46):-

> "It was, however, common ground that, under the unamended Referendum Act, the Amendment Bill could not properly be placed before the Governor-General for his assent until a referendum had been held, and this view appears to have been generally held. Were this view correct as a matter of law, the Board would have concluded that the obligation to hold a referendum was just as much a fetter on the legislative process as if the holding of a referendum was an integral part of the process and that the provision in the Referendum Act that required a Part II referendum to be held purported to alter the Constitution and was, accordingly, void. The Board has not, however, reached this conclusion. While the obligation to hold a Part II referendum would necessarily be triggered by some stage of the amendment of the Constitution Act, it was possible, as a matter of law, to treat the two processes as independent, so that the process of amending the Constitution Act could proceed in the normal way, whether or not a referendum was held and regardless of its result. This scenario is not attractive, for those who drafted the Referendum Act plainly intended that relevant legislative process should be informed by the views of the electorate. Nonetheless, the Board feels constrained to conclude that it was the true state of affairs, for the alternative would be to hold that the requirement to hold a Part II referendum was of no effect at all. Under the Referendum Act, the incentive to comply with the obligation to hold a Part II referendum lay in the political fall-out that would follow disregard of that obligation and the effect of proceedings such as those brought by the respondents in this case. The obligation was, of course, one which in an appropriate case could be enforced by proceedings for judicial review. The obligation did not, however, impose a legal fetter on the legislative process."

[21] The Privy Council went on to pose the question as to what was the true purport of the Referendum Act. The answer was acknowledged by both sides in the present case to be equally applicable to the Act in its amended form. Was the result of the referendum obligatory or was it advisory or consultative in nature? The Privy Council stated the following in declaring the referendum to be purely advisory:

> "There is a difference in principle between requiring a referendum as part of the legislative process and requiring a referendum which is no more than advisory. The result of the referendum in the latter case imposes no obligation on the legislative."

Persuasive authority was taken from the United States Supreme Court in the cases of **Hawke v Smith 253 US 221** and **Kimble v Swackhamer (1978) 439 US 1385** dealing with Article 5 of the United States Constitution.

[22] The consultative or advisory nature of a referendum under the Referendum Act as amended is reinforced by the very language of section 2(1) (a) and (b) which speak to certain issues or matter of sufficient national importance being submitted to the electors by way of referendum for their 'views'. This state of affairs was helpfully pointed out by the learned Solicitor General.

[23] The Castillo affidavit deposed that on October 12, 2011, a petition was presented to the Governor-General and that the petition was presented to the Governor-General and that the petition had more than 21,000 signatures. A copy of the petition was exhibited. In it, the signatories called for a referendum to be had "on the Belize Constitution (Ninth Amendment) Bill introduced into the House of Representatives on July 22, 2011."

[24] In a letter dated October 14, 2011 to Tanya Usher, Executive Officer of the Friends of Belize, the Governor-General's Office communicated that: (1) The Petition was incomplete in that it failed to contain a specific question or proposition to be put to the electorate for a vote; (2) against the background of the Government having declared its intention to amend the original Bill, the Petition called for a referendum on the original Bill; and (3) since the 90-day period was soon to expire

paving the way for the Bill's second reading, the Bill was likely to have been passed before the procedures contemplated by the Referendum Act would have been completed.

[25] In the course of her submissions, the learned Solicitor General submitted that for the reasons communicated from the Governor-General, the petition is null and void. Predictably, learned Queen's Counsel took issue with the three issues raised and sought to refute them. Quite correctly, he argued that the Government intended to proceed to the passage of the Bill. It was also surmised that this displayed an intention to ignore the duty under section 2 of the Referendum Act to forward the petition forthwith to the Chief Elections Officer.

[26] At this stage of the proceedings, it suffices for the Court to recognise that the issues raised do invite argument and serious consideration in some measure. However, as is apparent from the authorities the Court is not now charged with ruling on these points.

INTERIM INJUNCTIONS

[27] The Court is guided by the principles governing the grant of interim injunctions as set out in the case of **American Cyanamid Co v Ethicon Ltd** **1975 A.C. 396**. The principles have been adopted by the Privy Council in **National Commercial Bank Jamaica Ltd v Olint Corporation Ltd** **[2009] 1 WLR 1405** which case has been embraced by the Court of Appeal in **Belize Telemedia Ltd v Speednet Communications Limited** **– Civil Appeal No. 27 of 2009**. In **American Cyanamid**, Lord Diplock said:

> "The Court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried.
>
> It is no part of the Court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are

matters to be dealt with at the trial. … So, unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in this claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought.

As to that, the governing principle is that the Court should first consider whether, if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction, he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial.

It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, that the question of balance of convenience arises. It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case."

In the **Olint** case, Lord Hoffman explained the principles in **American Cyanamid** in this way (at para. 16):-

"The purpose of such an injunction is to improve the chances of the court being able to do justice after a determination of the merits at the trial. At the interlocutory state, the Court must therefore assess whether granting or withholding an injunction is more likely to produce a just result. As the House of Lords pointed out in **American Cyanamid Co v Ethicon Ltd**, that means that if damages will be an adequate remedy for the plaintiff, there are no grounds for interference with the defendant's freedom of action by the grant of an injunction. Likewise, if there is a serious issue to be tried and the plaintiff could be prejudiced by the acts or omissions of the defendant pending trial and the cross-undertaking in damages would

> provide the defendant with an adequate remedy if it turns out that his freedom of action should not have been restrained, then an injunction should ordinarily be granted."

[28] No cross-undertaking as to damages would suffice in the particular circumstances of this case. In such a situation, Lord Hoffman prescribed that the Court ought "to take whichever course seems likely to cause the least irremediable prejudice to one party or the other." As such, the court must be alive as to the result of its order to grant or not grant an injunction.

FINDINGS

[29] The opportunity to pray by petition for a referendum arose when the 9th Amendment Bill had its first reading. (see: para. 52 of **Vellos** case). This was the conclusion arrived at by the Privy Council in the **Vellos** case in relation to the original Act, but it equally applies in relation to the Act as amended. The situation was altered by the Government's stated intention to remove certain portions of the Bill. It therefore required some expedition for the requisite signatures to be obtained from the requisite amount of electors.

[30] In as much as there are duties created under the Act upon the presentation of a petition, the Court must be mindful of the legal positions as stated earlier, which are not in dispute, namely , the referendum mechanism is merely consultative and advisory and the referendum cannot be construed as a fetter or part of the legislature process.

[31] The Claimants argue that to give efficacy to the will of the people and for the provisions of the Referendum Act to be effectual, the result of the referendum must inform the legislative process. This, of course, creates the conundrum that the House of Assembly must pause the legislative process to await the outcome of the referendum, which it is not legally obliged to do. Indeed, for this Court to so rule would be to fly in the face of the law.

[32] The Claimants say that the Prime Minister has held himself out as being bound by the public consultative process. It is to be noted that the statement was made on the heels of the roll-out of a series of country-wide public consultations and meetings between the Government on the one hand and electors and stakeholders on the other as early as July 29, 2011. It is fair to say that there is no evidence that the issue of referendum had been mooted in the public domain. Accordingly, it is not difficult to conclude that the reference to the consultation process alluded to that initiated by the Government. In the later press release of August 22, 2011, the Government stated that "additional changes to further safeguard the Bill may still be made, depending on the outcome of the consultation process." Here again, in the context of that document, which addressed the amendments made after meetings with the religious organizations, reference was more likely than not being made to the consultation process embarked upon by the Government.

[33] The Claimants went on to urge that the signatures on the petition afford a measurable indicant of the will of the people. That may be correct, but for the Court to use this as the basis of the grant of the injunction sought would be to step into the political arena.

[34] Returning to the first principle under **American Cyanamid**, the Defendants have urged on the Court that the matter is frivolous and vexatious. As earlier alluded to, there is a live issue as to the holding of a referendum pursuant to the duties created under the Act. The issues thrown up are deserving of judicial attention. Having said so, while recognising that it would be sensible to have the referendum inform the legislative process if it is to be effective, the Court cannot step out of the clear legal position presented upon a construction of the Referendum Act (as amended) vis-à-vis the provisions of section 69 of the Constitution.

[35] The very attitude of the Courts is to be loathe to interfere in the legislative process. This was emphasized by the Privy Council in **The Bahamas District of the Methodist Church in the Caribbean and the Americas et al v The Hon. Vernon J. Symonette MP et al (2000) 5 LRC 196**. The advice of Lord Nicholls cautioned that the Court's role is to declare unconstitutional laws invalid after passage rather than to restrain the legislature from making unconstitutional laws.

His Lordship went on to recognise the exclusive control of Parliament over its own affairs. The point was made in this dictum (at para. 31) –

> "… so far as possible, the courts of The Bahamas should avoid interfering in the legislative process. The primary and normal remedy in respect of a statutory provision whose content contravenes the Constitution is a declaration, made after the enactment has been passed, that the offending provision is void. This may be coupled with any necessary, consequential relief. However, the qualifying words "so far as possible" are important. This is no place for absolute and rigid rules. Exceptionally, there may be a case where the protection intended to be afforded by the Constitution cannot be provided by the courts unless they intervene at an earlier stage. For instance, the consequences of the offending provision may be immediate and irreversible and give rise to substantial damage or prejudice. If such an exceptional case should arise, the need to give full effect to the Constitution might require the courts to intervene before the Bill is enacted. In such a case parliamentary privilege must yield to the courts' duty to give the Constitution the overriding primacy which is its due."

[36] The Claimants sought to make a case for the present application to be treated as exceptional. The Defendants warned against encroachment on the doctrine of separation of powers. It is true that the legislative process may well lose the opportunity to be advised by the outcome of the referendum but as previously reasoned that eventuality does not offend the law. It has been further said on behalf of the Claimants that the Claimants as electors would suffer irremediable damage and therefore the balance of convenience is in their favour. Respectfully, I do not agree. As pointed out by Lord Nicholls, the remedy of seeking a declaration as to the unconstitutionality of the legislation remains available.

[37] In the course of argument, the Court was taken to the remarks of the Judges of the Caribbean Court of Justice in a recent application for leave to appeal in the case of **<u>Dean Boyce v Attorney General et al</u> CCJ Application No. AL8 of 2011** heard by teleconference on August 16, 2011. I have had the opportunity to review the

audio recording and I note that although the Applicants did not press for such relief, the Court, especially Nelson J., was adamant in not being prepared to grant injunctive relief in respect of the threatened passage of the 9th Amendment bill. Reference was there made to the **Bahamas Methodist** case.

ORDER

[38] For the reasons given, I therefore order that the application by the Claimants for an interim injunction against the Defendants be refused. Based on the representations made on both sides there shall be no order as to costs. The Fixed Date Claim will be heard on November 14, 2011 unless an application is made for time to be abridged.

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KENNETH A. BENJAMIN
Chief Justice