IN THE COURT OF APPEAL OF BELIZE AD 2012

CIVIL APPEAL NO 18 OF 2012

(1)THE ATTORNEY GENERAL OF BELIZE
(2)THE MINISTER OF PUBLIC UTILITIES Appellants

v

THE BRITISH CARIBBEAN BANK LIMITED Respondent

CIVIL APPEAL NO 19 OF 2012

(1)THE ATTORNEY GENERAL OF BELIZE
(2)THE MINISTER OF PUBLIC UTILITIES Appellants

v

(1)DEAN BOYCE
(2)TRUSTEES OF THE BTL EMPLOYEES TRUST Respondents

CIVIL APPEAL NO 21 OF 2012

FORTIS ENERGY INTERNATIONAL (BELIZE) INC Appellant

v

(1)THE ATTORNEY GENERAL OF BELIZE
(2)THE MINISTER OF PUBLIC UTILITIES Respondents

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BEFORE

The Hon Mr Justice Manuel Sosa	President
The Hon Mr Justice Douglas Mendes	Justice of Appeal
The Hon Mr Justice Samuel Awich	Justice of Appeal

DA Barrow SC, M Perdomo and I Swift for the Attorney General and the Minister of Public Utilities (in all appeals).

N Pleming QC, EH Courtenay SC, A Arthurs Martin and P Banner for the British Caribbean Bank Limited (in Civil Appeal No 18 of 2012).

Lord Goldsmith QC, G Smith SC and M Marin Young SC for Dean Boyce and the Trustees of the BTL Employees Trust (in Civil Appeal No 19 of 2012).

EH Courtenay SC and A Arthurs Martin for Fortis Energy International (Belize) Inc (in Civil Appeal No 21 of 2012).

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8, 9 and 10 October 2012 and 15 May 2014.

SOSA P

[1] I have read, in draft, the judgments of Mendes JA and Awich JA.

[2] For reasons which I shall hereinafter identify, I have arrived at the following determinations:

(i) in Civil Appeal No 18 of 2012, I would allow the appeals of the Attorney General and the Minister of Public Utilities ('the Minister'), but only with the qualification that the compulsory acquisition is valid and took effect as from 4 July 2011, rather than as from 25 August 2009 ('the qualification'), and I would reject the contentions of the British Caribbean Bank Limited ('British Caribbean'), under its respondent's notice, for variation of the decision of the court below;

(ii) in Civil Appeal No 19 of 2012, I would allow the appeals of the Attorney General and the Minister, but only with the qualification, and I would reject the contentions of Dean Boyce ('Mr Boyce') and the Trustees of the BTL Employees Trust ('the Trustees'), under their respondents' notice, for variation of the decision of the court below;

(iii) in Civil Appeal No 21 of 2012, I would dismiss the appeal of Fortis Energy International (Belize) Inc ('Fortis').

[3] In arriving at my determinations stated at (i) and (ii) above, I have concluded that, *inter alia*:

(i) both the Belize Telecommunications (Amendment) Act 2011, being Act No 8 of 2011 ('Act No 8 of 2011'), and the Belize Telecommunications Act (Assumption of Control over Belize Telemedia Limited) Order 2011('the 2011 BTL acquisition Order'), being Statutory Instrument No 70 of 2011, are valid and constitutional and took effect as from 4 July 2011, rather than as from 25 August 2009;

(ii) in particular, section 2(a) and (b) of Act No 8 of 2011 was operative and effectual and, accordingly, prospectively amended the provisions of section 63(1) of the Belize Telecommunications Act , Chapter 229 of the Laws of Belize ('the principal Act'), which provisions, together with the remainder of Part XII of the principal Act, it also re-enacted;

(iii) the so-called basic structure doctrine is not a part of the law of Belize and does not apply to the Belize Constitution ('the Constitution');

(iv) the power of the National Assembly to alter the Constitution is limited only by the provisions of such constitution, which, as relevant, are contained in its section 69;

(v) The Belize Constitution (Eighth Amendment) Act 2011, being Act No 11 of 2011, ('the Eighth Amendment') is valid and constitutional and, while commencing and taking effect as from 25 October 2011, it retrospectively confirmed the validity of Act No 8 of 2011 and the 2011 BTL acquisition Order as from 4 July 2011;

(vi) in particular, the Eighth Amendment effectually inserted into the Constitution its new sections 2(2), 69(9) and 145(1) and (2), which are, accordingly, all lawful and valid;

(vii) it was only up to 4 July 2011 that the relevant property of British Caribbean, Mr Boyce and the Trustees remained the subject of an unlawful, null and void compulsory acquisition purportedly effected under (a) the principal Act, as purportedly amended by the Telecommunications (Amendment) Act 2009, and (b) the two Belize Telecommunications (Assumption of Control over Belize Telemedia Limited) Orders 2009, being Statutory Instruments Nos 104 and 130 of 2009, which Act and Orders were all declared unlawful, null and void by this Court in Civil Appeals Nos 30 and 31 of 2010;

(viii) Mr Boyce and the Trustees are not entitled to the return of their former shares in Belize Telemedia Limited ('Telemedia') and their relevant loan

interests nor to the return of the business undertaking of Telemedia but are entitled to compensation for the compulsory acquisition effected by the 2011 BTL acquisition Order;

(ix) compensation for the lawful compulsory acquisition of the relevant respective properties of British Caribbean, Mr Boyce and the Trustees should, respectively, be in an amount equal to the value of the relevant property of British Caribbean on 4 July 2011, in an amount equal to the value of the relevant property of Mr Boyce on 4 July 2011 and in an amount equal to the value of the relevant property of the Trustees on 4 July 2011;

(x) the parts numbered 1, 3, 4 and 7 of the Order made by Legall J on 11 June 2012 and signed by the Deputy Registrar of the Court below on 22 June 2012 should be set aside.

[4] In arriving at my determination stated at (iii) above, I have concluded that, *inter alia*:

(i) sections 143 and 144 of the Constitution are not unlawful, null or void;

(ii) the Electricity (Amendment) Act 2011 is not unconstitutional, unlawful, null or void;

(iii) the Electricity (Assumption of Control over Belize Electricity Limited) Order 2011, being Statutory Instrument No 67 of 2011, is not unconstitutional, unlawful, null or void;

(iv) the compulsory acquisition by the Government of Belize of Fortis's 154, 422 shares in Belize Electricity Limited ('BEL') on 20 June 2011 is not unconstitutional, unlawful, null or void;

(v) the Eighth Amendment is not contrary, or repugnant, to, or inconsistent with, the Constitution and is not, therefore, unconstitutional, unlawful, null or void;

(vi) the Government of Belize should not, therefore, be restrained from taking any step to prevent the Board of Directors that was in place up to 20 June 2011 from resuming full control of BEL and having access to and/or control over BEL's premises and property;

(vii) the Registrar of Companies should not, therefore, be directed to take any step to ensure that her records reflect proprietorship on the part of Fortis of the 154,422 shares in BEL.

[5] Subject to what I shall say at para [8], below, I adopt *in toto* the reasons for judgment, determinations and conclusions set forth by Awich JA in his judgment and concur in all orders proposed therein by him. I would, in addition, order that the parts numbered 1, 3, 4 and 7 of the Order of Legall J referred to at (x) in para [3], above, be set aside.

[6] Having regard to the exceptional length of the respective judgments of Mendes JA and Awich JA, I am acutely conscious of the need to keep this concurring judgment short. I am compelled, however, to make a few observations and express a few views of my own.

The Declaration of Voidness etc in Civil Appeals Nos 30 and 31 of 2010

[7] I begin with the comment of Awich JA in his judgment that the Caribbean Court of Justice 'might take the view that it may examine the question' of the declaration of this Court in ***British Caribbean Bank Limited v The Attorney General and The Minister of Public Utilities***, Civil Appeal No 30 of 2010, and ***Dean Boyce v The Attorney General and The Minister of Public Utilities***, Civil Appeal No 31 of 2010, to the effect that the entire 'Acquisition Act and Orders' were 'unlawful, null and void'. On 24 June 2011, when that declaration was made, the terms of section 2 of the Constitution were that

> 'This Constitution is the supreme law of Belize and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void. [Emphasis added.]

That section was, to borrow the direct and simple language of Legall J in the judgment which is before this Court in the present appeals, 'binding on the court as the supreme law'. (See para 81 of that judgment.) Therefore, it would seem that the court below and this one can only declare a law to be void to the extent of such inconsistency. If, then, an Act or Order is not inconsistent in its entirety with the Constitution, whence do these courts derive their powers to declare such Act or Order void in its entirety? It is, in my view, a matter of great regret that, the troubling character of that question

notwithstanding, there is no alternative, in this Court, to the approach of Awich JA, which was, in his words (at para [367]), to

> '… accept entirely the submission by learned counsel Mr Pleming QC, for BCB, that it was too late [for Mr Barrow SC] to make the submission that this Court should not regard the entire Act No 9 of 2009 as "unlawful, null and void" … [T]he judges of the Court of Appeal (Morrison, Alleyne and Carey JJA) made the final order that Act No 9 of 2009 was unlawful, null and void.'

Mendes JA speaks for me when he says in his judgment (para [68]), albeit in another context:

> '… I know of no basis, and have not been referred to any, in which the Supreme Court of Belize, may invalidate legislation, other than on the ground that it violates the Constitution.'

If the Caribbean Court of Justice were to express some view on the question under consideration, the resulting guidance would greatly assist not only the court below but also this one.

Relative Degree of Authority in General and in Particular of the Advice in ***Akar v Attorney General of Sierra Leone***

[8] It is important, in view of my general agreement with the judgment of Awich JA in these appeals, to make it pellucid that I do not find myself able to regard the advice of their Lordships' Board in ***Akar v Attorney General of Sierra Leone*** [1970] AC 853, (and, as a matter of fact, that in ***Hinds v R*** (1975) 24 WIR 326, as well) in quite the same general light as he does. With respect, I am not persuaded that these 'decisions' should be treated by this Court as binding precedents. The relevant principle, as I have always known it, as regards decisions of the Judicial Committee is that those handed down on appeal from a given jurisdiction are, in strictness, binding only on the courts in that jurisdiction. The principle was not stated any more broadly than this in ***Baker v*** **R** (1975) 23 WIR 463, 471, where Lord Diplock, delivering the majority judgment of the Board, said:

> '… courts in Jamaica are bound as a general rule to follow every part of the *ratio decidendi* of a decision of the Board in an appeal from Jamaica that bears the authority of the Board itself.'

I am not aware that it has been established that a decision of the Board is binding in every jurisdiction from which there are appeals to it. I am familiar with 'the decision' of the Judicial Committee in ***Fatuma Binti Mohamed Bin Salim Bakhshuwen v Mohamed Bin Salim Bakhshuwen*** [1952] AC 1 but I do not regard it, and know of no 'decision' of the Committee which treats it, as having enunciated a principle of general application. My understanding is that the "decisions" of the Board hearing an appeal from a given jurisdiction are of no more than persuasive (albeit highly persuasive) authority in another jurisdiction from which there are appeals to it. The 'decision' in a case such as ***Bradshaw and Roberts v Attorney General of Barbados***, Privy Council Appeals Nos 36 and 40 of 1993, where ***Earl Pratt and Another v Attorney General of Jamaica*** [1994] 2 AC 1 was applied, is explainable on the basis that the latter was regarded as being of strong persuasive authority rather than binding *stricto sensu*. And I cannot imagine that the authority of such Privy Council 'decisions' in the courts of Belize will have increased to the point of becoming binding following the abolition of appeals from the courts of Belize to the Judicial Committee. Useful discussion of this subject must proceed on the basis of what was made clear *per curiam* by Warner J in ***Barrs v Bethell*** [1982] 1 Ch 294, 308, viz that where a court assumes a proposition of law to be correct without addressing its mind to it, the decision of that court is not binding authority for that proposition.

[9] Before leaving the advice of the Board in ***Akar***, I would react to the submission of Mr Barrow for the appellants (Written Submissions, para 39) that the 'decision' must be seen as depending on its particular facts. In my view, that is an eminently sound submission and entirely consistent with the narrowness, specificity and restraint of the core pronouncement by Lord Morris of Borth-Y-Gest, rendering the advice of the Board, at p 70, that-

> 'Their Lordships are quite unable to accept that Act No 39 should be regarded as explicitly reviving or re-enacting any invalid provisions of Act No 12 of 1962.'

This is decidedly not the ample, sweeping language in which principles of universal application are enunciated; and there is, moreover, no attempt, discernible to me, anywhere in the judgment, to formulate a wide principle of such application. The quoted dictum has, instead, all the hallmarks of a statement meant to deal with the particular circumstances of the case at hand and none other. I entirely agree that the value of ***Akar*** as a precedent has to be treated as significantly limited, even without taking into account the fact that the Board was not assisted by the citation in argument of the decisions of United States courts such as ***Ex parte Hensley*** 285 SW 2d 720 (Tex Cr App 1956) and ***State v Corker*** 52A 362, (NJ Ct Err & App 1902). It is a well-known principle of English law, for which no citation of authority should be necessary, that decisions of United States courts are precedents of persuasive authority. Suffice to say that a number of pertinent authorities are listed in that most elementary of English law textbooks, O Hood Phillips, *A First Book of English Law*, 6th ed, p 193.

Purpose of the Acquisition

[10] In his judgment (para [484]), Awich JA writes:

> 'I have stated earlier that, the motive, which in these appeals was the political reason for the enactment, was irrelevant once Act No 8 of 2011 was passed. The intention of the Legislature as conveyed by the Act is the relevant fact for this Court to consider. In interpreting an Act where intention is relevant, a court seeks to identify the intention of the legislature, not the intention of an individual member of the National Assembly.'

Apart from adopting this position as my own, I consider that it derives some (unnecessary) reinforcement from remarks made by the Judicial Committee in ***Toussaint v Attorney General of Saint Vincent and the Grenadines*** [2007] UKPC 48.(16 July 2007). That was a case of a claim by Mr Toussaint against the relevant government for constitutional relief in circumstances where he alleged that his property had been taken from him by an expropriation that was discriminatory and illegitimate. He sought to rely in support of his claim on a statement allegedly made by the Prime Minister in the House of Assembly. Before the matter could come to trial, a judge of first instance struck out certain paragraphs of his claim and a supporting affidavit. His

appeal to the Court of Appeal of Saint Vincent and the Grenadines was only partly successful. That court held that the statement allegedly made by the Prime Minister was, as matters then stood, inadmissible. On appeal to the Board, their Lordships held that the alleged statement was, even as matters then stood, admissible. Their Lordships did not, however, see fit to confine their remarks to the issue of admissibility. Thus, they pointed out at para 20 of their advice that one possible interpretation of the alleged statement of the Prime Minister was that the cabinet's motivation for the acquisition was not, as pleaded by Mr Toussaint, political, but, rather, a desire to reverse what the government, a newly elected one, perceived as a 'scandal' or 'injustice' involving a sale of state assets at an under-value to a close pal of the former Prime Minister. (There was before the Board a transcript of what purported to be a videotape of the speech in question as televised.) That said, the Board went on, at para 22, to direct attention to the fact that the Governor-General, who had acquired the property, was required by the constitution to act on the advice of the Cabinet, which meant that-

> 'It is the cabinet's purpose in advising the Governor-General which is the issue in Mr Toussaint's claim.'

Then, at para 23, their Lordships noted that-

> '… the Board observes that the meaning of the Prime Minister's statements to the House is an objective matter. [Counsel for Mr Toussaint] accepts that Mr Toussaint can only rely on the statements for their actual meaning, whatever the judge may rule that to be.'

One is left with the impression that their Lordships were holding up a light, as it were, to assist the courts below, in that part of the proceedings that was still to come, to be able to distinguish between certain language allegedly used by the Prime Minister himself, on the one hand, and the demonstrable purposes of the cabinet, on the other. And it is noteworthy, in this connection, that the Board, at para 21, quoted a passage from the transcript of the speech in which there was parenthetical mention of a thumping of desks (presumably of members of the House, some, if not most, of whom would, inevitably, also have been members of the cabinet) precisely when the Prime Minister, reading the draft wording of the acquisition declaration, came to the official public

purpose of the acquisition, viz the establishment of a learning centre for the people of a place identified as Canouan.

Application of ***Attorney General of Saint Christopher, Nevis and Anguilla v Yearwood***

[11] I desire further to add, for the sake primarily of emphasis, that I fully endorse the approach of Awich JA, akin to that of Peterkin JA, writing for the Eastern Caribbean Court of Appeal in ***Attorney General of Saint Christopher***, ***Nevis and Anguilla v Yearwood***, Civil Appeal No 6 of 1977 (unreported judgment delivered 11 December 1978), of adopting and applying to the case before him, albeit only indirectly through ***Yearwood***, the learning of the distinguished late Indian professor of law, high court judge and author, Durga Das Basu, as set forth in his famous work, *Limited Government and Judicial Review*, first published in 1972. Like the decisions of United States courts, those of Commonwealth courts are, under well-established English law, of persuasive authority in the absence of binding precedents.

[12] Finally, I consider it important to note that the very lengthy delay in the delivery of judgment in these difficult appeals (and related contentions for variation of decisions) has been the subject of apologies which I have previously tendered, with the utmost sincerity, to the parties through the Registrar and/or Deputy Registrar. That notwithstanding, I unhesitatingly grasp this opportunity personally and directly to offer my most profound apologies through the present medium.

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SOSA P

MENDES JA

[13] Apart from certain matters on which there is convergence, I am to unable to agree with the reasoning and conclusions of Awich JA, with whom the President has largely concurred. What follows are my own reasons and conclusions which, unfortunately, because of the number and complexity of the issues involved, I have not be able to state briefly.

Introduction

[14] This appeal concerns the legality of the compulsory acquisition of property belonging to British Caribbean Bank Ltd, Dean Boyce, the Trustees of the BTL Employees Trust and Fortis Energy International (Belize) Inc. The property belonging to British Caribbean Bank Ltd, Dean Boyce, and the Trustees of the BTL Employees Trust was purported to have been acquired, initially, by an order made pursuant to the Belize Telecommunications Act, as amended by what is purported to be an amalgam of the Belize Telecommunications (Amendment) Act 2009 and the Belize Telecommunications (Amendment) Act 2011. The property belonging to Fortis Energy International (Belize) Inc was purported to have been acquired, again initially, by an order made pursuant to the Electricity Act, as amended by the Electricity (Amendment) Act, 2011. These acquisitions are said to have been confirmed or validated by certain provisions of the Constitution of Belize, inserted by the Belize Constitution (Eight Amendment) Act, 2011. Or, it is said, the property purported to have been acquired by the said orders was re-acquired by those provisions of the Constitution.

[15] In what follows, I will refer to British Caribbean Bank Ltd as "BCB", to Dean Boyce and the Trustees of the BTL Employees Trust together as "the Trustees", and to Fortis Energy International (Belize) Inc, as "Fortis". When it is necessary or convenient to refer to them collectively, I will refer to them either as the "property owners" or "the complainants", as the context permits or necessitates.

[16] I will refer to the Belize Telecommunications Act as the "Telecoms Act' or the "Telecoms Act, as amended". I will refer to the Belize Telecommunications

(Amendment) Act 2009 and the Belize Telecommunications (Amendment) Act 2011 as "the 2009 Telecoms Acquisition Act" and "the 2011 Telecoms Acquisition Act", respectively, or simply as "the 2009 Act" and "the 2011 Act", respectively, as the context and clarity permit. And I will refer to the Electricity (Amendment) Act, 2011 as "the 2011 Electricity Acquisition Act".

[17] Finally, I will refer the Belize Constitution (Eight Amendment) Act, 2011 as the Eight Amendment Act.

[18] This is the second occasion on which this Court is called upon to consider the constitutionality of the compulsory acquisition of property belonging to BCB and the Trustees. On the first occasion, in ***British Caribbean Bank Limited and Dean Boyce v Attorney General of Belize and the Minister of Public Utilities*** (CA 30 and 31 of 2010, 24 June 2011) (hereafter "***BCB v Attorney General***"), Morrison, Carey, and Alleyne JJA held that the 2009 Telecoms Acquisition Act and the Acquisition Orders made thereunder, were inconsistent with the Constitution of Belize and accordingly void. The 2009 Act purported to amend the Telecoms Act by introducing a new Part XII under which the Minister of Public Utilities ("the Minister") was empowered, by Order, to acquire such property as he might consider necessary to assume control over telecommunications in Belize. By Orders made in August and December 2009 ("the 2009 Telecoms Acquisition Orders" or "the 2009 Orders"), the Minister purported to acquire, on behalf of the Government of Belize, shares which the Trustees held in a company called Sunshine Holdings Limited which, in turn, held 22.39% of the issued shares in Belize Telemedia Limited ("Belize Telemedia"). He also purported to acquire BCB's rights under a mortgage debenture with Belize Telemedia to secure the sum of US$22.5 million made available by BCB to Belize Telemedia, as well as BCB's rights under loan agreements with Belize Telemedia and Sunshine Holdings to the tune of US$22.5 million and US$2.6 million, respectively.

[19] This Court's order declaring the 2009 Telecoms Acquisition Act and the 2009 Telecoms Acquisition Orders unconstitutional was made on 24 June 2011. The Attorney General did not appeal. Instead, on 4 July 2011, the 2011 Telecoms Acquisition Act was passed. This Act purported to amend the very provisions of Part XII

of the Telecoms Act, inserted by the 2009 Telecoms Acquisition Act, which this Court had declared to be void, the assumption being, it would appear, that the text of the provisions contained in the invalidated Part XII were still in existence and available to be amended. The 2011 Act was stated to take effect from 25 August 2009, the very day on which the 2009 Act was supposed to have had come into force. On 4 July 2011, as well, an Order ("the 2011 Telecoms Acquisition Order" or "the 2011 Order") was made, pursuant to what was thought to be the reinstated provisions of Part XII of the Telecoms Act, acquiring the very property which had been acquired under the 2009 Telecoms Acquisition Orders.

[20] In the meantime, on 20 June 2011, just four days before this Court delivered its judgment, the 2011 Electricity Acquisition Act was passed amending the Electricity Act, by adding a new Part VII which contained provisions, similar to those contained in the 2009 Telecoms Acquisition Act, empowering the Minister, by Order, to acquire such property as he might consider necessary to assume control over electricity supply in Belize in order to maintain an uninterrupted and reliable supply of electricity to the public. By an Order gazetted on the same day ("the 2011 Electricity Acquisition Order"), the Minister acquired the shares in Belize Electricity Limited ("Belize Electricity") held by Fortis.

[21] On 22 September 2011 and 13 October 2011, respectively, BCB and the Trustees commenced separate proceedings challenging the constitutionality of the 2011 Telecoms Acquisition Act and the 2011 Telecoms Acquisition Order made thereunder. They both contend that, as the 2011 Act purports to amend provisions of the 2009 Act which this court declared void, the 2011 Act was necessarily without any effect. They contend further that the 2011 Act was inconsistent with sections 3(d) and 17(1) of the Constitution in a number of ways, that the acquisitions were not carried out for a legitimate public purpose and were disproportionate and arbitrary, that they were not accorded their right to be heard before the decision to acquire their property was made, and that to the extent that the 2011 Act and the order made thereunder was to have retrospective effect, they rendered the judgment of this Court in ***BCB v Attorney General*** nugatory and violated the separation of powers doctrine and the rule of law.

[22] On 20 October 2011, Fortis commenced a challenge of its own to the constitutionality of the 2011 Electricity Acquisition Act and the Order acquiring its shares in Belize Electricity on grounds which largely mirror the grounds relied on by BCB and the Trustees in their separate claims, except that there was no issue of retrospectivity in relation to the 2011 Electricity Acquisition Act.

[23] Apparently desiring to make assurance doubly sure, on 25 October 2011, the Parliament passed the Eight Amendment Act altering the Constitution of Belize by the addition of provisions which declared that the Government of Belize "shall have and maintain at all times majority ownership and control" of, inter alia, Belize Telemedia and Belize Electricity and, to that end, declared further that the acquisitions under the 2011 Telecoms Acquisition Order and the 2011 Electricity Acquisition Order "were duly carried out for a public purpose in accordance with the laws authorising the acquisition of such property" and that all property acquired under the terms of those Orders "shall be deemed to vest absolutely and continuously" in the Government of Belize. The Eighth Amendment Act was passed pursuant to section 69 of the Constitution with the special majorities required thereunder. For good measure, in an apparent attempt to insulate itself from challenge on the basis that it was inconsistent with the provisions of the Constitution, the Eighth Amendment Act amended section 69 itself to provide that the power to alter the Constitution vested in the National Assembly was not subject to any substantive or procedural restriction not already contained in section 69, and that the supreme law clause was not applicable to any law passed in accordance with section 69.

[24] As a result, BCB, the Trustees and Fortis amended their respective claims to include a challenge to the constitutionality of the Eight Amendment Act. They all contend that the attempt to insulate the Act from challenge constituted an unlawful attempt to alter the basic structure of the constitution by replacing constitutional supremacy with parliamentary sovereignty. They all contend as well that the provisions of the Act vesting majority control of Belize Telemedia and Belize Electricity in the Government of Belize, vesting ownership of their property in the Government of Belize and declaring the acquisition of their property to have been carried out for a public

purpose was contrary to the rule of law, the separation of powers doctrine, the basic structure of the Constitution, and in addition violated their rights under sections 3(d) and 17(1) of the Constitution.

[25] The constitutional challenges came before Legall J. In his judgment delivered on 11 June 2011, he held that those sections of the 2011 Telecoms Acquisition Act which purported to amend section 63 of the Telecoms Act, inserted by the 2009 Telecoms Acquisition Act, which had purported to vest power in the Minister to acquire property, were null and void because they constituted an attempt to amend a provision which, because of this Court's declaration that the 2009 Telecoms Acquisition Act was void, did not exist. As a consequence, there was no provision in existence empowering the Minister to acquire property so that the Government could assume control over Belize Telemedia, with the result that the 2011 Telecoms Acquisition Order was itself unlawful, null and void. On the other hand, he held that the other provisions of the 2011 Telecoms Acquisition Act which effected additions to the provisions of the parent Telecoms Act, did not suffer the same fate. They were stand-alone provisions which were valid even if, without the other voided provisions, they made no sense. He therefore declared these provisions to be valid.

[26] He also declared those provisions of the Eight Amendment Act which sought to oust the jurisdiction of the court to review legislation passed under section 69 of the Constitution to be contrary to the basic structure of the Constitution and therefore null and void. Likewise, those provisions which declared the 2011 Acquisition Orders to have been made for a public purpose and vested the property acquired by those Orders in the Government absolutely, were also contrary to the basic structure of the Constitution, including in particular the separation of powers doctrine. The power to determine whether property had been acquired for a public purpose was, by section 17 of the Constitution, a judicial power. A legislative declaration as to what a public purpose is, accordingly usurped judicial power, violated the separation of powers doctrine and, it followed, the basic structure of the constitution.

[27] On the other hand, those provisions of the Eighth Amendment Act which bestowed majority control over Belize Telemedia and Belize Electricity in the

Government did not violate the basic structure of the Constitution. Accordingly, given that, by constitutional mandate, the Government was required to maintain ownership and control over these public utilities, the trial judge considered that it was not permissible to grant the claimants any consequential relief, whether by way of damages or by order restoring their property, even though he was satisfied that the Minister had no power to acquire their respective properties in the first place.

[28] Legall J's judgment dealt entirely with the complaints brought by BCB and the Trustees. With regard to Fortis, he made no findings in relation to the constitutionality of the 2011 Electricity Acquisition Act or the Order made thereunder and confined his ruling to a statement that, because by the Eight Amendment Act the Government was deemed the majority owner and in control of Belize Electricity, no relief would be granted to Fortis.

[29] The Attorney General, the Minister and Fortis all appealed against the various findings of the trial judge adverse to them, while BCB and the Trustees cross-appealed, with the result that practically all of the issues canvassed before the trial judge are now before us for determination. Chronologically, the first question is whether the amendments purported to have been made to the Telecoms Act and the Electricity Act in 2011, and the Acquisition Orders made thereunder, are valid. Consideration of the validity and effect of the Eight Amendment Act would then follow.

The 2009 Telecoms Acquisition Act and its demise

[30] In order to fully appreciate the impact of the 2011 Telecoms Acquisition Act, it is first necessary to examine the provisions of the 2009 Telecoms Acquisition Act and the findings and effect of the decision of this Court declaring it to be unlawful and void.

[31] In its long title, the 2009 Act was said to be an Act intended to amend the Telecoms Act in order to provide for the assumption of control over telecommunications by the Government of Belize in the public interest. It repealed section 57A of the Telecoms Act and, immediately after section 62 thereof, added a new Part XII consisting of twelve substantive provisions, starting with section 63 and ending with section 74. Section 63 was made up of 11 subsections. Section 63(1) empowered the

Minister, with the approval of the Minister of Finance, to acquire all such property as he considered necessary to assume control over telecommunications where, inter alia, he considered such control should be acquired for a public purpose. The acquisition of property was to be carried out by Orders published in the Gazette. Section 63(2) provided that upon such publication, the property to which the Order related would vest absolutely in the Government free of all encumbrances. Section 63(3) required the payment of reasonable compensation within a reasonable time to the owner of property acquired, in accordance with the later provisions of Part XII. Section 63(4) confirmed the constitutional right of a person whose property was acquired to approach the Supreme Court to determine whether the acquisition was duly carried out for a public purpose. Section 63(6) empowered the Minister to include in his Order such directions as may be necessary to give full effect to the Order, including the appointment of an interim Board of Directors.

[32] Section 64 was made up of three subsections and dealt with the issue of a notice containing particulars of the property acquired and inviting the submission of claims for compensation. Section 65, consisting of two subsections, required the Financial Secretary to commence negotiations with claimants for the payment of reasonable compensation within a reasonable time and for the determination by the Supreme Court of what compensation should be paid in the event no agreement was reached. Section 66, made up of three subsections, dealt with the procedure for the referral of claims for compensation to the court. Section 67 (1) and (2) set out the rules which were to be applied in determining the compensation payable for the property acquired. Section 68, comprising two subsections, empowered the court to add interest to the amount found to be payable as compensation and section 69, consisting of six subsections, dealt with the court's power to award costs and the circumstances in which a claimant or the Financial Secretary should be ordered to bear his or her own costs or to pay the costs of the other. Section 70 set a limitation period of twelve months for the making of claims for compensation, unless the Court considered that injustice would otherwise be done. Section 71 provided for the payment of the compensation, interest and costs awarded out of moneys voted by the National Assembly for the purpose. Section 72 provided for the making of Rules by the Chief Justice to govern the practice and procedure to be

adopted in respect of claims before the Court, section 73 provided for appeals to the Court of Appeal and section 74 provided that, subject to the Belize Constitution, Part XII was to prevail over any inconsistent law, rule, regulation or articles of association.

[33] In ***BCB v Attorney General***, this Court held that the 2009 Telecoms Acquisition Act was inconsistent with section 17(1) of the Constitution. Section 17(1) provides as follows:

> "17(1) No property of any description shall be compulsorily taken possession of and no interest in or right over property of any description shall be compulsorily acquired except by or under a law that:
> (a) prescribes the principles on which and the manner in which reasonable compensation therefor is to be determined and given within a reasonable time; and
> (b) secures to any person claiming an interest in or right over the property a right of access to the courts for the purpose of
> (i) establishing his interest or right (if any):
> (ii) determining whether that taking of possession or acquisition was duly carried out for a public purpose in accordance with the law authorising the taking of possession or acquisition;
> (iii) determining the amount of the compensation to which he may be entitled; and
> (iv) enforcing his right to any such compensation."

[34] This Court held, by a majority (Carey and Alleyne JJA), that the 2009 Act was deficient in that, although it prescribed in section 67 comprehensive principles on the basis of which reasonable compensation for the compulsory acquisition of property, such as land, could be determined, the principles prescribed were not sufficiently wide to embrace the property which had been actually acquired, which, in the case of BCB, was a loan facility secured by a debenture (para 218). The Act therefore did not comply with section 17(1)(a). Morrison JA, dissenting on this point, was satisfied that by providing in section 67(1)(c) that in determining what was reasonable compensation the court was mandated to employ “the generally accepted methods of valuation of the kind of property that has been acquired”, the Act had not fallen short of what was required (para 90).

[35] On the other hand, this Court was unanimous in finding that the Act failed to prescribe the principles on which and the manner in which compensation was to be ***given*** within a reasonable time (paras 91-95 and 219-220). It was not enough simply to provide, as sections 63(3) and 71 did, that the compensation payable to the owner whose property was acquired was to be paid within a reasonable time. It was not enough, in other words, merely to repeat the words contained in section 17(1)(a). What was required was that the principles on which and the manner in which compensation was to be ***paid*** within a reasonable time were to be elaborated in the acquiring legislation itself. As Morison JA said (para 91):

> "(H)ad the framers of the Constitution been of the view that nothing further needed to be said about the principles upon and the manner in which compensation would be determined and paid to the property owner within a reasonable time beyond what is already stated in section 17(1)(a) itself, then it seems to me that they would not have found it necessary to require that those principles be explicitly stated in the acquiring legislation."

[36] Elaborating further, Morrison JA discerned that the true purpose of section 17(1)(a) was to "insulate the property owner against the purely discretionary exercise of governmental power." By merely repeating "the constitutional incantation that compensation shall be paid within a reasonable time", the landowner was left "entirely to the discretion of government as to what constitutes a reasonable time in all the circumstances" (para 94).

[37] What was therefore required at a minimum was the fixing of a time frame within which the compensation was to be paid, which when looked at objectively would be regarded as reasonable (per the majority, para 221), which (per Morrison JA, para 93) could include payment by instalments. In this regard, this Court found unanimously that by providing in section 71 that the compensation “shall be paid out of moneys voted for the purpose by the National Assembly”, the Act fell short of the requirements of section 17(1)(a), "given the virtual impossibility of enforcing any order directed at the National Assembly or its members" (para 100).

[38] This Court also held unanimously that the Act did not contain any provision securing to any person claiming an interest in or right over the property acquired, a right of access to court for the purpose of establishing his interest or right, as required by section 17(1)(b)(i). Section 64(3) of the Act, which the Attorney General claimed satisfied this requirement, provided for access to the court to determine whether the property had been acquired for a public purpose, in fulfilment of the requirement under section 17(1)(b)(ii). But this by itself was insufficient to satisfy section 17(1)(b))(i) (paras 101-104, 224-227). It was not sufficient to provide access to court for some other specific purpose, during the course of which the claimant's interest in or right over the property acquired could be determined as an incident of the court's jurisdiction so provided for.

[39] Finally, the Court held unanimously (paras 106, 229) that the Act failed to provide the property owner access to court for the purpose of enforcing his right to compensation, as required by section 17(1)(b)(iv). According to the majority (para 229), this meant that there had to be provision for the "execution of some process to collect the award." There was no such provision in this case.

[40] Morrison JA was also satisfied that, to the extent that section 63(1) of the Act provided that the Minister's order made pursuant to the Act for the acquisition of property was "prime facie evidence that the property to which it relates is required for a public purpose", it was inconsistent with section 17(1)(b)(ii) (para 113). In his view, section 17(1)(b)(ii) reserved to the court the task of determining whether the acquisition was carried out for a public purpose. It was therefore "the court's determination, and not the Minister's, which is important." To the extent that section 63(1) created a presumption that the property was acquired for a public purpose, it was inconsistent with section 17(1)(b)(ii) "because it seeks either to limit or qualify the property owner's right to a determination by the court whether the taking was for the stated public purpose" (para 113).

[41] In the light of his findings, Morrison JA was satisfied that he was not permitted to exercise the court's power under section 134 of the Constitution to modify the Act to

bring it into conformity with the constitution since the Act was not an ‘existing law’ for the purposes of section 134. He was also satisfied that the power to sever offending provisions on the basis that what remained after severance would still constitute “a practical and comprehensive scheme” (per Lord Diplock in ***Hinds v R*** (1975) 24 WIR 326, 344) was also not available "because what I have found to be offensive to the Constitution in the Acquisition Act relates to omissions, to which the tool of severance naturally cannot apply" (para 108). In the result, in accordance with section 2 of the Constitution, he had no choice but to declare the Act to be void to the extent of its inconsistency with section 17(1). It is worth noting, by way of contrast, that Morrison JA was equally satisfied that if the only deficiency in the Act was the stipulation in section 63(1) that the Minister's order was “prime facie evidence that the property to which it relates is required for a public purpose”, this could be cured by the application of the principle of severance (para 114). Carey JA, without more, signified his agreement with the order proposed by Morrison JA (para 270).

[42] On the assumption that the 2009 Act was valid, this Court also held unanimously that the evidence adduced did not establish to its satisfaction that the property had been acquired for the public purposes stated in the 2009 Telecoms Acquisition Orders, namely "the stabilisation and improvement of the telecommunications industry and the provision of reliable telecommunications services to the public at affordable prices in a harmonious and noncontentious environment" (paras 150, 249). This Court also held that the acquisitions were not proportionate because i) the stated objective, for which there was no evidential foundation, did not justify the compulsory acquisition of the appellants' property (paras 156, 251); ii) the measures designed to meet the legislative objective were not rationally connected since there was absolutely no evidence to suggest how the property acquired would assist in the improvement of the telecommunications industry by the provision of reliable telecommunications services to the public at affordable prices (paras 157, 255); and iii) the acquisitions were accordingly more than was necessary to accomplish the stated public purpose (paras 160, 255). It also followed from the fact that there was no evidence to justify the compulsory acquisitions as having been necessary to promote or further the stated public purpose, that the acquisitions were a disproportionate response to the

requirements of the stated public purpose, and there was "clear evidence that the compulsory acquisition had, as an explicit, dominant objective, the bringing to an end of "this one man's campaign to subjugate an entire nation to his will" ("a special measure for a special case")", that the acquisitions were carried out for an illegitimate purpose, and thus breached the appellants' constitutional right to protection from arbitrary deprivation of their property (paras 171, 260).

[43] This Court held, finally, that the Acquisition Orders were made without according BCB and Mr Boyce their right to heard as to why their property should not be compulsorily acquired, and for that reason as well were invalid (paras 199, 263).

The 2011 Telecoms Acquisition Act

[44] In its long title, the 2011 Telecoms Acquisition Act is described as an Act "to clarify and expand certain provisions relating to the assumption of control over telecommunications by the Government in the public interest." The Act then proceeds specifically to amend sections 63, 64, 67 and 71 of the Telecoms Act, by deletion, addition or substitution of provisions. It also provides for the addition of a new section altogether "immediately after section 74 in Part XII." A new section 75 is then set out. It seems clear, therefore, that the draftsperson assumed the continued existence of a Part XII of the Telecoms Act containing the sections 63 to 74 purported to have been inserted by the 2009 Telecoms Acquisition Act, and intended to amend those provisions in the manner set forth in the 2011 Act. The continued existence of Part XII was assumed despite this Court's order declaring the 2009 Act to be unlawful and void.

[45] It seems clear, as well, that an attempt of sorts was being made through the 2011 Act to correct the constitutional deficiencies in the 2009 Act which this Court had pinpointed. Thus i) a new subsection (4) of section 63 was to be inserted providing for access to court for the purpose of establishing a claimant's right or interest in the acquired property and for enforcing his right to compensation; ii) section 67 was to be amended to provide for methods of assessing reasonable compensation in relation to shares or stocks of a company and securities; and iii) a new section 71 was to be enacted to provide that an award of compensation was to be a charge on the

consolidated fund and was to be paid within such time as the Court considered reasonable in all the circumstances. In addition, in order no doubt to meet Morrison JA's express concerns, section 63(1) was to be amended by the deletion of the words "and every such order shall be prima facie evidence that the property to which it relates is required for a public purpose". More controversially, a new subsection 12 of section 63 was to be inserted providing that, in making an acquisition order, it was not necessary for the Minister to accord a right to be heard to persons whose property was intended to be acquired, no doubt to neutralise this court's finding that a person whose property was to be acquired was entitled to be heard.

[46] It is significant as well that the 2011 Telecoms Acquisition Order, made pursuant to the 2011 Telecoms Acquisition Act, declared that the property specified in the First Schedule was acquired for what was claimed to be public purposes namely “(a) to restore the control of the telecommunications industry to Belizeans; (b) to provide greater opportunities for investment to socially-oriented local institutions and the Belizeans society at large, and (c) to advance the process of economic independence of Belize with a view to bringing about social justice and equality for the benefit of all Belizeans.”

[47] It is quite apparent, therefore, that a concerted effort was made to create, by the amalgamation of the provisions of the 2009 and the 2011 Telecoms Acquisition Acts, a comprehensive code for the acquisition of property to facilitate the assumption of control by the Government of Belize over Belize Telemedia, which was compliant with section 17(1) of the Constitution. To that end, the public purpose of the stabilization and improvement of the telecommunications industry, which this court had found not to have been established on the evidence, was abandoned and replaced with a public purpose more in harmony with the declared purpose of the 2011 Telecoms Acquisition Act. Whether these adjustments would have collectively passed muster under section 17(1) of the Constitution is, of course, a matter for debate and determination.

[48] The first question, however, is whether the amendment of provisions which were declared by this court to have been unlawful and void, was effective to create a code empowering the Minister to acquire property for the stated purposes.

The amendment of a law found to be unconstitutional

[49] The trial judge took the view that the effect of the invalidation of the 2009 Telecoms Acquisition Act was that the provisions comprising the ill-fated Part XII were no longer in existence, with the result that the attempt by the 2011 Telecoms Acquisition Act to delete words from the erstwhile section 63(1) and to substitute words in the erstwhile section 63(2) were ineffective. In short, there was nothing which could be deleted and nothing which could be removed and replaced. On the other hand, the Telecoms Act remained in existence and was available to be amended. Accordingly, the addition of subsections to the now non-existent provisions of Part XII, whether by way of intended replacement of non-existent subsections, or by way of addition to the non-existent subsections of the non-existent provisions, was effective, even if in the absence of portmanteau introductory paragraphs they made no sense standing alone. The provisions so inserted might be impossible to apply, but they were nevertheless effective. Thus, for example, as a result of the enactment of the 2011 Act, section 63 of the Telecoms Act would read as follows:

> "(3) Subject to section 71 of this Act, in every case where the Minister makes an Order under subsection (1) above, there shall be paid to the owner of the property that has been acquired by virtue of the said Order, reasonable compensation in accordance with the provisions of this Act within such times as the Supreme Court considers reasonable in all the circumstances;
>
> (4) Any person claiming an interest in or right over the acquired property shall have a right of access to the courts for the purpose of –
>
> (i) establishing his interest or right (if any);
>
> (ii) determining whether that taking of possession or acquisition was duly carried out for a public purpose in accordance with this Act;
>
> (iii) determining the amount of the compensation to which he may be entitled; and
>
> (iv) enforcing his right to any such compensation.
>
> (11) The Minister may make an Order under this section with retrospective effect.

> (12) It shall not be necessary for the Minister to give the interested person(s) whose property is intended to be acquired an opportunity to be heard before making an Order under this section."

But given that the subsection (1) referred to in the new subsection (3) was non-existent, and there was otherwise no provision vesting in the Minister the power to acquire property, the new subsections (3), (4), (11) and (12) were incoherent, as were the new subsections in sections 64 and 67 and the new section 71 and 75, which are all premised upon the existence of a power in the Minister, by Order, to acquire property.

[50] Nor could it be said that the provisions intended to be inserted by the 2009 Act were incorporated by the reference made to them in the 2011 Act for the simple reason that, since those provisions no longer existed, there was nothing to incorporate. It followed, therefore, that the 2011 Telecoms Acquisition Order, purported to have been made under the non-existent section 63(1) of the Telecoms Act, was null and void, since the Minister had no power to make any such Order. He made declarations accordingly.

[51] The trial judge relied on the decision of the Privy Council in ***Akar v Attorney General of Sierra Leone*** [1970] AC 853 and that of the Eastern Caribbean Court of Appeal in ***Attorney General of Saint Christopher, Nevis and Anguilla v Yearwood*** (unreported, Civil Appeal No. 6 of 1997).

[52] In ***Akar***, section 43(1) of the Constitution of Sierra Leone empowered Parliament to alter any of the provisions of the Constitution, if a bill for that purpose was passed by a vote of not less than two-thirds of all the members of the House. Pursuant thereto, the Constitution (Amendment) (No. 2) Act, No. 12 of 1962, was passed on 17 January 1962 and assented to on 17 March 1962. By section 1, it was deemed to have come into operation on 27 April 1961. Section 2 purported to amend section 1(1) of the Constitution which, before amendment, provided that

> "Every person who, having been born in the former Colony or Protectorate of Sierra Leone, was on the twenty-sixth day of April, 1961, a citizen of the United Kingdom and Colonies or a British protected person shall become a citizen of Sierra Leone on the twenty-seventh day of April, 1961..."

The purported amendment consisted of the insertion of the words "of negro African descent" immediately after the words 'Every person' in the first line of subsection (1). Section 1 was also amended by the addition of two new subsections, 3 and 4, which defined the expression "person of negro African descent" and made provision for persons who were excluded from automatic citizenship, because they were not of negro African descent, to apply to be registered as citizens of Sierra Leone, but that such persons would not be entitled to run for certain elected offices unless they were resident in Sierra Leone for twenty five years.

[53] On its face, the amendments to section 1 ran afoul of section 23(1) of the Constitution which provided that "no law shall make any provision which is discriminatory either of itself or in its effect". Section 23(3) provided that "the expression 'discriminatory' means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race ..." Section 23(1) was subject, inter alia, to subsection 4(f) which provided that

> "Subsection (1) of this section shall not apply to any law so far as that law makes provision ... (*f*) whereby persons of any such description as is mentioned in subsection (3) of this section may be subjected to any disability or restriction or may be accorded any privilege or advantage which, having regard to its nature and to special circumstances pertaining to those persons or to persons of any other such description, is reasonably justifiable in a democratic society."

[54] On 3 August 1962, the Constitution (Amendment) (No. 3) Act, No 39 of 1962, was passed. It was also deemed to have come into operation on 27 April 1961. It purported to amend section 23(4) of the Constitution by, inter alia, the addition of a new paragraph (g) which made section 23(1) inapplicable to any law which made provision

> "for the limitation of citizenship of Sierra Leone to persons of negro African descent, as defined in subsection (3) of section 1 of this Constitution, and for the restrictions placed upon certain other persons by subsection (4) of the said section."

The subsections (3) and (4) of section 1 referred to were the subsections added to section 1 by Act No. 12 of 1962. Act No 39 of 1962 was described in its long title as being passed "to amend the Constitution in order to effect the avoidance of doubts", the reasonable assumption being that there were doubts in the minds of some persons that Act No. 12 of 1962 was inconsistent with section 23(1) and so invalid.

[55] Akar argued that the amendment to section 1(1) of the Constitution purported to be effected by Act 12 of 1962 was "discriminatory" within the meaning of section 23(3). Since it was conceded, properly in their Lordships view, that the adoption of the word "negro" involved a description by race, it was clear that Act No. 12 was indeed discriminatory in its effect. Their Lordships were also satisfied that section 23(4)(f), on which the Attorney General relied, was not applicable, for reasons which need not be explored here. In the circumstances, given that section 23(1) prohibited discriminatory laws, with the result that any law which offended section 23 could not be valid (p. 864), Act No 12 of 1962 was prima facie invalid (p. 869).

[56] In an attempt to side step this result, the Attorney General argued that the invalidity of Act No 12 of 1962 was avoided by the amendments made to section 23(4) of the Constitution by Act No. 39 of 1962, which exempted from the prohibition against discriminatory laws under section 23(1), laws which limited citizenship of Sierra Leone to persons of negro African descent, as defined in section 1(3) of the Constitution, and laws which provided for the restrictions placed upon certain other persons, as set out in section 1(4). Lord Morris rejected this argument. He said (at p. 870):

> "***It is to be observed that Act No. 39 does not refer to Act No. 12. It does not attempt any process of re-enactment.*** It purports to amend subsection (4) of section 23 of the Constitution by adding a new paragraph. The new paragraph refers to subsection (3) and subsection (4) of section 1. In the Constitution unless it had been validly amended there were no such subsections of section 1. Had the provisions of section 2 of Act No. 12 been valid then there would have been the addition to section 1 of the Constitution of such subsections. Act No. 39 needed as a basis an assumption that Act No. 12 was valid and so was an existing Act. That

was an incorrect assumption. Their Lordships are quite unable to accept the contention that Act No. 39 should be regarded as impliedly reviving or re-enacting any invalid provisions of Act No. 12. ***The provisions of section 2 of Act No. 12 were invalid when the Act was passed and assented to and the provisions must be treated as having been non-existent. There is no provision in Act No. 39 which purports or sets out to give them life.*** Though Act No. 39 was passed in accordance with the provisions of section 43 it becomes meaningless once the provisions of section 2 of Act No. 12 are ignored, as they must be." (Emphasis added)

[57] In ***Yearwood,*** the Sugar Estates Land Acquisition Act 1975 (No. 2 of 1985) was passed to provide for the acquisition of certain sugar estates. Section 4(2) of the Act provided that the aggregate compensation to be paid was to be determined on the basis of the commercial value at 30 April 1972 which a purchaser would attribute to the lands as part of a commercial undertaking for the production of sugar cane, and was not to exceed $10 million. Section 4(4) listed certain matters which were not to be taken into account in determining the compensation payable, including any transactions occurring and any improvements made after 30 April 1972. The Act was passed into law on 28 January 1975. By Order purported to be made pursuant to section 10, certain lands were transferred to and vested in the Crown as from 31 January 1975. On that same day, it appears, Yearwood and others issued a writ challenging the constitutionality of the Act. On 30 June 1975, while the writ was pending, the Sugar Estates' Land Acquisition (Amendment) Act 1975 (No. 8 of 1975) was passed. It came into force on 2 July 1975. It purported to amend section 4(2) of the principal Act by changing the date on which compensation was to be evaluated, from 30 April 1972 to the date of acquisition of the lands, and by deleting the mandatory maximum value of $10 million. Section 4(4) and certain other provisions were also amended.

[58] Focussing first on Act No. 2 of 1975, the Eastern Caribbean Court of Appeal held that the Act was inconsistent with section 6(1) of the Constitution of St. Christopher and Nevis (which prohibits the compulsory acquisition of property except under a law prescribing the principles on which and the manner in which compensation is to be determined and given) because it excluded "many of the elements of compensation which should be taken into consideration in order to arrive at a full compensation to

which the persons whose lands were acquired would be entitled." The Court held as well that by fixing a limit on the compensation which could be paid, the Act deprived the court of its jurisdiction under section 6(2)(a) of the Constitution to determine the amount of compensation. Denying any reference to comparable sales after 30 April 1972 and to improvements after that date, was also thought to be unconstitutional. Although the court found only that those parts of the Act dealing with the principles governing compensation violated the constitution, the entire Act was struck down because those provisions were "inextricably mixed up with, and form part of a single legislative scheme."

[59] The Attorney General pointed out, however, that since Act No. 8 of 1975 had been passed prior to the order of the court declaring Act No. 2 of 1975 to be unconstitutional, the cumulative effect of Acts No. 2 and No. 8 was what was before the court for consideration. In other words, what the court had to determine was whether Act No. 2 of 1975, as amended by Act No. 8 of 1975, was unconstitutional. The Court of Appeal did not agree. Writing for the court, Peterkin JA adopted the following passage from the judgment of the High Court of Australia in ***South Australia v Commonwealth*** (1942) 65 C.L.R. 375, at p. 408:

> " A pretended law made in excess of power is not and never has been a law at all … The law is not valid until a Court pronounces against it – and thereafter invalid. If it is beyond power it is invalid ah initio."

He also referred, with approval, to the following passages taken from Basu's, Limited Government and Judicial Review:

> "(i) An unconstitutional statute cannot be revived by subsequent amendment of the Constitution, unless it is expressly retrospective. It is void ab initio and is not therefore revived even if the Legislature acquires legislative power over the subject by a subsequent amendment of the Constitution, unless, of course, the constitutional amendment is expressly given retrospective effect. In such a case the amending authority directs that the Constitution should be read, as amended, since in its inception; as a result, the offending statute could not be said ever to have violated any provision of the Constitution. Where the amendment of the Constitution is not retrospective, the text of the fundamental right as it stood at the time of the making of the offending statute would hit the statute and render it void. (So that the removal or curtailment of that

fundamental right by a subsequent prospective amendment of the Constitution cannot revive the still-born legislation).

(ii) An unconstitutional statue cannot be revived by retrospective amendment of that statute. It would follow from (i) above that such unconstitutionality cannot be retrospectively removed by any subsequent amendment of that very statute which was dead ah initio...

It has been argued that if the Legislature can repeal an unconstitutional statute with retrospective effect, that shows that the unconstitutional statute was still in existence; and that, accordingly, there is no reason why the legislature should not be competent to amend the unconstitutional statute, prospectively or retrospectively. This involves arguing in a circle. An unconstitutional statute is dead in the eye of the law...

(a) Where the amendment is prospective, it virtually amounts to a re-enactment of the unconstitutional statute in a constitutional form, applicable to future cases, - to which there cannot be any objection.

(b) If, however, the statute is sought to be retrospectively amended, that would constitute a violation of the Constitution (assuming that it has not been retrospectively amended in the meantime), because to enforce the statute with the retrospective amendment in relation to cases arising prior to the amendment or to validate such unconstitutional cases would be to give legislative support to a breach of the Constitution, which is beyond the competence of a legislature created and limited by the Constitution."

[60] Peterkin JA then concluded, in terse fashion:

"I would hold … that nothing but an appropriate retrospective amendment of the Constitution itself could make the principal Act constitutional. Accordingly, in my view, it no longer becomes necessary to examine the principal Act as amended by Act No. 8 of 1975. As I see it, the provision of the amending Act would no longer fall to be considered.

[61] I understand Peterkin JA to be saying that since Act No. 8 of 1975 did not purport to amend the Constitution retrospectively, but rather was an attempt to amend Act No. 2 of 1975 retrospectively, it was ineffective as an attempt to revive Act No. 2 of 1975 which was to be treated as dead *ab initio* in the eyes of the law.

[62] I derive the following propositions of law from ***Akar*** and ***Yearwood***:

i) The provisions of an Act of Parliament held to be invalid by reason of its inconsistency with a written constitution, must be treated as having been non-existent when it was passed and assented to (per ***Akar***), or dead *ab initio* in the eye of the law (per ***Yearwood***);

ii) An invalid Act may be re-enacted, and would upon such re-enactment be valid, if its offending provisions are cured by amendment (per ***Akar***);

iii) The mere reference to the provisions of an invalid act in a later otherwise valid enactment will not be regarded as having impliedly revived or re-enacted the provisions of the invalid Act (per ***Akar***). The reference to the provisions of the invalid Act will be treated as meaningless (per ***Akar***);

iv) An unconstitutional statute may be revived by a subsequent, retrospective amendment of the Constitution (per ***Yearwood***);

v) Conversely, the subsequent, prospective amendment of the Constitution cannot revive a statute which is still-born because it is inconsistent with the provisions of the as yet un-amended provisions of the Constitution in existence at the time the statute was passed (per ***Yearwood***);

vi) An unconstitutional statute cannot be revived by a retrospective amendment of that statute (per ***Yearwood***); but

vii) Where an unconstitutional statute is amended prospectively, such prospective amendment amounts to a prospective re-enactment of the unconstitutional statute in constitutional form (per ***Yearwood***).

[63] ***Akar*** does not appear to have been cited to the court in ***Yearwood*** and there accordingly appears to be some tension between the two decisions to the extent that in ***Akar*** there was an attempt to amend the Constitution retrospectively to remove the constitutional blemish in Act No. 2 of 1975, but to no avail. The result in ***Akar*** therefore appears to contradict proposition (iv) which is derived from ***Yearwood***. But given that there was no attempt in this case to amend the Constitution retrospectively, there is no

need to attempt to reconcile the two decisions on this point, if indeed they are reconcilable.

[64] It also appears to me that proposition (vii) is not easily reconcilable with propositions (i) to (iii). ***Akar*** and, to some extent, certain of the statements adopted by Peterkin JA in ***Yearwood***, establish that the provisions of a constitutionally infirm statute are non-existent, or dead *ab initio* in the eyes of the law. I understand that to mean that an invalid statute has no effect as an expression of the will of the legislature. For the provisions of an invalid statute to be revived, they must therefore be re-enacted. The mere reference to the provisions of the invalid statute, whether in the context of an amendment to such provisions, or simply by way of reference without the express intention to enact those provisions into law, would appear to me to be insufficient to revive the invalid provisions. The mere amendment of provisions which in law are to be treated as non-existent not only falls far short of an expression of the legislature's power of enactment, but it in law has no meaning. The alteration of something which does not exist is of no legal consequence.

[65] On the other hand, the proposition that the prospective amendment of an invalid statute amounts to the re-enactment of that statute, presumes that the invalid statute continues in existence as a latent expression of legislative power which is only prevented from having any effect because of the presence of the debilitating, unconstitutional provisions. Once those unconstitutional provisions are removed, the once dormant legislative will erupts once again into existence. But such a theory appears to be incompatible with the notion that an unconstitutional statute is void *ab initio*, or is non-existent, or is dead in the eyes of the law. Proposition vii) therefore appears to me to be inconsistent with the clear ruling in Akar.

[66] On the authority of ***Akar***, therefore, the 2011 Telecoms Acquisition Act is meaningless in so far as it attempts to amend or to add to provisions of the Telecoms Act which must be treated as being non-existent because of the invalidity or voidness of the 2009 Telecoms Acquisition Act. The trial judge was therefore correct to find that the provisions of the 2009 Telecoms Acquisition Act had not been resuscitated by the mere

reference to its provisions and, in particular, that the provisions thereof empowering the Minister to acquire property had not been re-enacted into law.

[67] As Mr. Pleming pointed out, in both ***Akar*** and ***Yearwood*** the attempt to cure what were perceived to be constitutional defects were made before the original constitutionally defective legislation was found and declared to be unconstitutional and void. This is why, in ***Yearwood***, the court was invited to judge the constitutionality of the two Acts read together. In both cases, however, the later remedial Act was held to be ineffective because the original unconstitutional Act was deemed to be non-existent. *A fortiorari*, in a case such as this where, before the attempt was made in the 2011 Act to cure the constitutional defects identified, the 2009 Act had already been declared to be void.

[68] Mr. Pleming and Lord Goldsmith have submitted that since the 2011 Telecoms Acquisition Act is meaningless in so far as it refers to the invalid and non-existent provisions of its 2009 counterpart, it should be declared void. I can find no valid ground for doing so. Because the 2011 Act by itself does not empower anyone to compulsorily acquire property, it is not a law which attracts the proscriptions of section 17 of the Constitution. I have not been referred to any other provision of the Constitution which it might infringe and I know of no basis, and have not been referred to any, on which the Supreme Court of Belize may invalidate legislation, other than on the ground that it violates the Constitution. It is not unconstitutional, albeit pointless, to pass a meaningless law which has no impact on anyone's rights and freedoms. The 2011 Act is a meaningless law, but it is a law nonetheless.

[69] In this regard, I note that in ***Akar***, while upholding the declaration that Act No 12 of 1962 was ultra vires the constitution, null and void, the Privy Council did not restore a similar declaration in relation to Act No 39 of 1962 which, because of its references to the non-existent provisions of the invalid Act No 12 of 1962, was thought to be meaningless.

[70] Mr. Barrow SC for the Attorney General has sought to persuade us that ***Akar*** is distinguishable because, unlike in this case, the Act which was impugned in ***Akar*** was

held not to have been validly passed because the legislature had not complied with the formal procedure for passing an amendment to the constitution. Accordingly, the impugned legislation never became law because the legislature did not have the competence or authority to enact it.

[71] With respect, my reading of ***Akar*** differs from Mr Barrow's. One of the grounds on which Akar challenged the validity of Act No 12 of 1962 was that it had not been passed with the requisite two-thirds special majority . He pointed out that at the end of the Act, there appeared the following statement under the hand of the Clerk of the House: "Passed in the House of Representatives this 17th day of January, in the year of Our Lord one thousand nine hundred and sixty-two." He argued that because the endorsement merely stated that the bill was "passed," and did not state that it was passed by a two-thirds majority or that it was passed in accordance with section 43(3), the inference should be drawn that it was passed by a simple majority and not by the two-thirds majority which was required by section 43(3) to alter the constitution. Their Lordships were not persuaded. Lord Morris of Borth-y-Gest said (at p. 868):

> "There is no reason to suppose that there was any irregularity. It is recorded by the Clerk of the House of Representatives that the bill was passed. There is no basis for any suggestion that the bill was not properly passed or for supposing that a procedural requirement was forgotten or ignored."

[72] It was not the failure to comply with the procedural requirements of the Constitution which render the amendment unconstitutional, but rather the fact that the amendment ran afoul of a substantive constitutional prohibition against the passage of discriminatory laws. But even so, I imagine that Mr Barrow's point of distinction would be the same, to the extent that he is suggesting that in ***Akar*** the impugned amendment was one which the legislature was not empowered to make, but that the Belizean legislature did not suffer any such deficiency in enacting the 2009 Act. It was just that the 2011 Act was inconsistent with the Constitution. But even so reformulated, I do not accept Mr Barrow's argument. First of all, the power vested in the Belizean legislature by section 68 of the Constitution is expressly made subject to the provisions of the Constitution. Section 17 prohibits the compulsory acquisition of property except by or

under a law of a particular type, that is to say, one which contains the matters listed in section 17(1)(a)&(b). As such, the Belizean legislature has no power to pass a law authorising the compulsory acquisition of property which does not include these matters. I will have to return to and develop this point later on.

[73] Secondly, for the purposes of considering the status of the 2009 Act when the 2011 Act was passed, it does not appear to me to make a difference if the 2009 Act could be properly characterised as a law which the Belizean legislature was somehow competent to make, but which was inconsistent with the Constitution. The reason is that in this case, by the time the 2011 Act was passed, the 2009 Act had already been declared to be void, and hence non-existent.

[74] While not challenging the correctness or the authority of the principles of law to be derived from ***Akar*** and ***Yearwood***, but probably in anticipation of them being reviewed by a body competent to disregard them, Mr. Barrow has invited us not to reach the conclusions which they seem to compel us to do, for a number of inter-related reasons. Firstly, he points to some judicial authority for the proposition that, while as a general rule a statute declared to be unconstitutional is to be treated, retrospectively, as never having had any legal effect at all, the modern approach is to treat the statute as not dead for all purposes, thus providing a platform from which to propound the view "that legislation that has been pronounced unconstitutional may be effectively amended." Next, he referred us to a line of American authorities which has accepted that an unconstitutional statute is nevertheless a statute whose existence cannot be ignored, and is accordingly available to be amended and to be brought back to life to the extent that the amendment removes the constitutionally objectionable provisions or provides the omissions which rendered the statute constitutionally infirm. In sum, unconstitutional provisions declared to be void are merely unenforceable for the time being and are not to be treated as non-existent. He then submitted that a distinction is to be made in this case between those provision of the 2009 Act which this Court held to be inconsistent with the Constitution and those in respect of which no constitutional taint was identified at all. Even though the latter provisions may have been found to be void because they were incapable of being severed from the former, they are to be

treated merely as unenforceable and not non-existent because they were in fact constitutionally valid. Lastly, he submitted that the legislature must be taken to have been mindful of the decision of this Court declaring the 2009 Act to be void and of the distinction between provisions which were and were not constitutionally compliant. Accordingly, by referring in the 2011 Act to those provisions in the 2009 Act which were constitutionally valid, albeit declared void, the legislature must be taken to have incorporated them by reference into the 2011 Act.

[75] As I have already said, it is clear that the legislature intended by the device of amending the 2009 Act, to bring into being a comprehensive code for the acquisition of properties to effect the taking of control of telecommunications in Belize by way of the amalgamation of the two statutes. However, as inconvenient as the result may be, I am not persuaded that the path Mr. Barrow has charted for us takes us as far as he would like.

[76] For his first proposition, he relies on a decision of the English Court of Appeal in ***Percy v Hall*** [1996] 4 All ER 523 and two decisions of the Privy Council in ***Mossell (Jamaica) Limited v Office of Utilities Regulations*** [2010] UKPC 1 and ***Mc Lauglin v Governor of the Cayman Islands*** [2007] 1 WLR 2839. In ***Percy***, the question was whether constables who had exercised the power of arrest vested in them by bye-laws which were later found to be invalid for uncertainty, could raise a defence of lawful justification to a claim for false imprisonment and wrongful arrest on the basis of a reasonable belief that the plaintiff had been committing an offence against the bye-laws at the time they were arrested. The Court of Appeal held that whereas a subsequent declaration that the bye-laws were invalid would operate retrospectively to entitle a person convicted of an offence thereunder to have his conviction quashed, it could not convert conduct which had been regarded as the lawful discharge of the constable's duty at the time into tortious, actionable conduct.

[77] Such a result no doubt justifies the observation that a void Act may not in fact be dead for all purposes and explains the unease felt by experienced judges at the use of terms such as 'void', 'voidable', 'null' and 'nullify', as noted by Lord Bingham in ***Mc Laughlin***, having regard to the "problems arising in the period between an invalid act

and a declaration of invalidity, particularly where steps have been taken and third party rights acquired during this period" (para 15). As Schiemann LJ said in ***Percy*** (at p. 545):

> "It has been commonplace in our jurisprudence ... to speak of a basic principle that an ultra vires enactment is void ab initio and of no effect. This beguilingly simple formulation, as is widely acknowledged, conceals more than it reveals. Manifestly in daily life the enactment will have had an effect in the sense that people will have regulated their conduct in the light of it. Even in the law courts it will often be found to have had an effect because the courts will have given a remedy to a person disadvantaged by the application of the ultra vires enactment to him or because a decision, binding on the parties thereto, has been rendered on the basis of the apparent law or because some period of limitation has expired making it too late now to raise any point on illegality.
>
> The policy questions which the law must address in this type of case are whether any and if so what remedy should be given to whom against whom in cases where persons have acted in reliance on what appears to be valid legislation. To approach these questions by rigidly applying to all circumstances a doctrine that the enactment which has been declared invalid was 'incapable of ever having had any legal effect upon the rights and duties to the parties' seems to me, with all respect to the strong stream of authority in our law to that effect, needlessly to restrict the possible answers which policy might require.

[78] Of course, the question we are concerned here with is not the status or effect of the invalid 2009 Act on the rights of BCB and the Trustees prior to its being declared void by this Court. And Mr. Barrow did not cite these cases in that regard. More to the point is this statement by Lord Phillips in ***Mossel*** (at para 44):

> "Subordinate legislation, executive orders and the like are presumed to be lawful. If and when, however, they are successfully challenged and found *ultra vires*, generally speaking it is as if they had never had any legal effect at all: their nullification is ordinarily retrospective rather than merely prospective. ***There may be occasions when declarations of invalidity are made prospectively only or are made for the benefit of some but not others***." (Emphasis added)

[79] Mr. Burrow seizes upon this to suggest that there is now no hard and fast rule that unconstitutional legislation must be treated as being dead or of no legal effect, or non-existent for all purposes, and that there is some flexibility in treating a statute declared void as still being alive for the purpose of being revived by a later Act which amends its provisions to cure the constitutional infirmity. It is in this regard that he cites the American jurisprudence.

[80] Mr. Pleming's immediate response is that it is now too late to achieve that goal, that if it were possible to qualify a declaration of invalidity in this way it was for this court to have done do so when pronouncing upon the constitutionality of the 2009 Act, but that this Court has already declared the 2009 Act to be void without any proviso for a later revival by amendment. I do not agree. Whenever a court is called upon to determine the constitutional validity of a statute, it would not be known whether the legislature intended at some future date to resuscitate the invalid Act by necessary amendment. It is highly unlikely therefore that the question of keeping the legislation alive for this purpose would arise. It certainly did not in this case. Rather, the question is whether a declaration of voidness in compliance with section 2 of the Belizean Constitution is to be taken as not precluding subsequent legislative surgery to bring the invalid law back to life. The question arises for determination now and it is in that respect that Mr. Barrow deploys the American authorities.

[81] The principle on which Mr. Barrow relies was stated succinctly in 1956 by the Texas Court of Criminal Appeals in ***Ex parte Hemsley*** 285 S.W. 2d. 720, 722:

> "The rule which we believe to be controlling is that a statute which the courts have held to be unconstitutional does not lose its existence, at least for the purpose of amendment, and insofar as its future operation is concerned the legislature may amend it by removing its objectionable provisions or supplying others so as to make the act as amended conform to the requirements of the Constitution."

[82] Judging from the cases to which Mr. Barrow has referred us – ***Ex parte Hemsley***, supra; ***State v Corker*** (1902) 52 A. 362; ***People v Kevorkian*** 527 N.W. 2d, 714 (Mich, 1994); ***Valente v Mills*** 458 P. 2d 84 (1969); ***First National Bank of***

Fredericksbury v Commonwealth 520 A.D. 2d 895 (Penn. 1987); ***Milavety v Northwestern Bell Telephone Co.*** 1976 WL 1282 (Minn. 1976); ***In re Swartz's Estate*** 294 N.Y.S. 896 (1937); ***Pierce v Pierce*** 46 Ind. 86 (1874); ***People v Gillespie*** 974 NE 2d 988 (2012); ***Lawton Spinning Co. v Massachusetts*** 232 Mass. 28 (1919) – it does not appear that the rationale behind the rule has been oft explored. ***State v Corker***, supra, and the more recent case of ***People v Blair*** 986 NE 2d 75 (Ill., 2013), are exceptions.

[83] In ***People v Blair***, it was noted first of all (at para 29) that the void *ab initio* doctrine as expounded by the Supreme Court of the United States in ***Norton v Shelby County*** 118 U.S. 425 (1886), does not mean that the statute held unconstitutional never in fact existed. Indeed, echoing ***Percy v Hall***, the court noted that prior to being declared unconstitutional, the statute may have had "consequences which cannot justly being ignored." To hold that a statute declared void *ab initio* is non-existent, is "tantamount to saying that this court may repeal a statute." But this would contravene the separation of powers doctrine. The court continued (at para 30):

> "Although we are obligated to declare an unconstitutional statute invalid and void..., such a declaration by this court cannot, within the strictures of the separation of powers clause, repeal or otherwise render the statute nonexistent. Accordingly, when we declare a statute unconstitutional and void *ab initio,* we mean only that the statute was constitutionally infirm from the moment of its enactment and is, therefore, unenforceable. As a consequence, we will give no effect to the unconstitutional statute and instead apply the prior law to the parties before us... In short, a statute declared unconstitutional by this court " 'continues to remain on the statute books' "..., and unless and until the constitutional violation is remedied, our decision stands as an impediment to the operation and enforcement of the statute."

[84] According to Collin J in ***State v Corker***, the judicial function in relation to unconstitutional legislation is not exercised *in rem*, but always *in personam*. As such, "the supreme court cannot set aside a statute as it can a municipal ordinance. It simply ignores statutes deemed constitutional." He therefore preferred to speak of unconstitutional statutes as being unenforceable, not void. He concluded (363-364):

> "An unconstitutional statute is not merely blank paper. The solemn act of the legislature is a fact to be reckoned with. Nowhere has power been vested to expunge it or remove it from its proper place among statutes...
>
> The claim is that under the provision as to amendment, where a statute is wholly unconstitutional, an amendment of the section or sections that make it so leaves the other sections unaffected, unless inserted at length in the new statute, and that they should be considered as if never enacted, so that the new legislation is incomplete and ineffectual. This is a strained and unnatural construction of the provision. To me it seems very plain that the two documents are to be read together, and if, when so read, a constitutional enactment appears, the courts must give it effect."

[85] Mr. Barrow accepts that American courts are not unanimous on this point and that indeed some courts have held that an unconstitutional statute "is non-existent and cannot be made effective by an attempt to amend it." – ***Sutherland Statutory Construction*** 22:4 (7th ed). In one such case – ***In re the Interest of R.A.S***. 290 SE 2d. 34 (1982) – to which Mr. Pleming referred us, it is stated that "once a statute is declared unconstitutional and void, it cannot be saved by a subsequent statutory amendment, as there is, in legal consequence, nothing to amend." What Mr. Barrow submits is that given that the American constitutional arrangements as described in ***State v Corker*** and ***People v Blair*** are similar to ours viz, that the judiciary is not empowered to repeal legislation and can only declare it to be void in obedience to the Constitution, it follows that unconstitutional legislation in Belize is likewise merely unenforceable, and accordingly we should follow the line of cases he cites.

[86] It is no doubt sufficient to say that we are bound by the decision of the Privy Council in ***Akar*** to find that the provisions of an unconstitutional statute are non-existent and therefore cannot be amended, and can only be brought back to life by the solemn process of re-enactment. It is also sufficient to say that to the extent that the decision of the Eastern Caribbean Court of Appeal in ***Yearwood*** is persuasive authority only, it ought to be preferred to the line of American authorities on which Mr. Barrow relies, given that ***Yearwood*** established principles of law in relation to the status of a statute rendered void because of inconsistency with a Constitution belonging to the family of Westminster Model constitutions to which the Constitution of Belize belongs.

Nevertheless, it would not be inappropriate to express my own view as to why I think cases such as ***State v Corker*** and ***People v Blair*** ought not to be followed in Belize.

[87] In the first place, it is no answer to say that prior to being declared unconstitutional, the statute undoubtedly existed and would have been acted upon and may even have been given effect to in certain circumstances. The question is what is the status of the provisions of an unconstitutional statute and by what mechanism may they be brought back into force. Secondly, the American cases seem to be premised upon a declaration of voidness being a creation of the judiciary which must itself conform to the strictures of the Constitution, including the separation of power doctrine. As judges cannot repeal statutes, which is a quintessential legislative act, they can only hold such legislation to be unenforceable while the constitutional impediment identified by the court remains. By contrast, it is the Belizean constitution which mandates that unconstitutional legislation be held to be void, to the extent of the inconsistency. The question therefore is one of statutory interpretation, not definition of the contours of judicial power. ***Akar*** and ***Yearwood*** have interpreted the constitutional declaration that a unconstitutional law is void as meaning that the law is in fact non-existent or dead in the eyes of the law. This is consistent with the long established general rule that invalid executive acts or delegation legislation is to be treated as having no legal effect. Consistent with this tradition, the Caribbean Court of Justice held recently in ***BCB Holdings Limited v Attorney General of Belize*** [2013] CCJ 5 (AJ) that "the purported enactment of a law by a legislature that has no power to enact that law does not result in the creation of law. Such a “law” does not exist and never did; it is void *ab initio*."

[88] Furthermore, the position adopted in ***Akar*** and ***Yearwood*** conduces to certainty and poses no difficulty to a legislature wishing to remove the constitutional impediments identified by the judiciary. All it need do is re-enact the invalidated legislation shorn of its unconstitutional elements or buttressed by necessary remedial provisions. On the other hand, the adoption the American position which Mr. Barrow prefers, creates the rather incongruous state of affairs that a statute declared void is nevertheless to be treated as embodying a latent legislative force, rendered merely unenforceable because of its constitutional blemishes, but ready to re-emerge once the blemishes are removed,

and without the need for any further legislature act of recognition. I must say that the spectre of a number of frozen legislative corpses inhabiting the statute books just waiting for their cryonic master to flip the switch to bring them back to life is not one which can be comfortably reconciled with the legal traditions of Westminster model constitutions. I would therefore not have been minded to follow the American line of authorities, even if I was not bound by the decision in ***Akar***.

[89] Mr. Barrow's proposition that there are some provisions of the 2009 Act which are to be treated as constitutionally complaint, though void, or capable of having some legal validity, is with respect misconceived. It is of course also sufficient to say, as both Mr. Pleming and Lord Goldsmith do, that the order of this Court declaring the 2009 Act to be unlawful and void made no distinction between provisions which on their own were inconsistent with the Constitution and those which were not. They were all declared to be void and so are all to be treated as non-existent. But even admitting the possibility of recognition of such a distinction for present purposes, in this case it is fair to say that all provisions of the 2009 Act were held to be constitutionally non-complaint. The 2009 Act, as its long title suggests, was designed to enable the Government of Belize to assume control over telecommunications in the public interest. The mechanism by which this was to be achieved was to empower the Minister to acquire such property as he might consider necessary to achieve this end. This was purported to have been accomplished in section 63(1) and the remaining provisions of Part XII were designed to provide a comprehensive scheme governing the acquisition of such property. The 2009 Act was accordingly a law providing for the compulsory acquisition of property and therefore attracted the proscriptions of section 17(1) of the Constitution. To be valid, it had to be a law which contained the matters and provided the protections listed therein. This court found the 2009 Act to be wanting in the respects already noted. It was held not to be constitutionally compliant because it failed to provide for particular, compulsory matters. For those reasons, the entire Act was deficient and the entire Act had to be invalidated. As Morrison JA made clear, no question of severing constitutionally deficient provisions from constitutionally compliant provisions arose. Because of its fatal omissions, the entire Act was unconstitutional. Morrison JA did say that the defect he detected in section 63(1) could be cured by deleting the offending words, but I

understand him to mean that that would have been the appropriate solution if that were the only inconsistency uncovered.

[90] It would follow that Mr. Barrow's attempt to distinguish ***Yearwood*** on the ground that in that case the later Act had attempted to amend provisions which were held to be unconstitutional, whereas in this case the 2011 Act purported to amend only those provisions which had not been found to be unconstitutional, cannot be sustained. In any event, the purported distinction does not square with ***Akar*** where the later Act purported to amend provisions of the Constitution which were not even under challenge. The vice was that it referred to provisions which were unconstitutional and void and therefore not existent, and had to be treated as meaningless.

[91] It would follow as well that Mr. Barrow's final submission that the 2011 Act must be interpreted as incorporating the 2009 Act by reference, cannot be sustained, given that it is premised on a finding that there are “inoffensive” provisions in the 2009 Act which “are not invalidated by unconstitutionality” and are therefore “available to be given legislative force.” It is noteworthy that the argument appears to accept that mere reference to an unconstitutional and therefore non-existent provision is insufficient to effect its re-enactment and bring it back to life. What is contended, it appears, is that mere reference to provisions which have been declared void, but which were not held to be inconsistent with the constitution, is sufficient to do the trick. Apart from the fact that it is not possible in this case to make any distinction between constitutional and unconstitutional provisions in the 2009 Act, I can find nothing in ***Akar*** and ***Yearwood***, or indeed in principle or logic, to support such a conclusion. The 2009 Act was held to be constitutionally deficient and therefore void. Desiring no doubt to enact a scheme for the re-acquisition of the property held to have been unconstitutionally acquired, but this time in conformity with section 17 of the Constitution, the legislature could simply have repeated the text of the 2009 Act in the 2011 Act, minus its unconstitutional parts, but plugging the gaping holes which this court had identified. Or, instead of repeating word for word those provisions of the 2009 Act it wished to retain and re-enact, it could have employed the usual short-cut of expressly incorporating the provisions of the 2009 Act into the 2011 Act by stating something like, "the provisions of the 2009 Act are to be

read as incorporated herein". Mere reference to the provisions of the Act without express words of incorporation was not enough to effect their re-enactment.

[92] What the legislature chose to do was to refer in the 2011 Act to provisions which, according to ***Akar*** and ***Yearwood***, were to be treated as non-existent, and purport to amend or add to them. This had no legal meaning. Likewise, the statement in section 1 of the 2011 Act that it should be "read and construed as one with" the Telecoms Act, as amended, cannot be construed as importing wholesale into the 2011 Act the provisions of the 2009 Act. The reference in the side note to section 1 to the 2009 Act ("9/09") was not sufficient to have that effect. As Mr. Barrow submitted, the legislature must be taken to have known the effect of the decision of this court declaring the 2009 Act to be unconstitutional and void. That is to say, that it did not in fact effect an amendment to the Telecoms Act. The reference to Act No. 4 of 2009 in the side note is accordingly also a reference to an Act which must be treated as being non-existent.

[93] In the result, the 2011 Act was ineffectual in its attempt to bring into being a law which authorised the Minister to compulsorily acquire BCB's and the Trustee's property. The Telecoms Act had not been amended by the 2009 Act as the Minister recited in the 2011 Telecoms Acquisition Order. Nor was there a section 63 of the Telecoms Act, as amended, in existence empowering him to acquire property as he stated in preamble to the order. He therefore had no power to acquire the property listed in the First Schedule to the Oder which he purported to acquire on behalf of the Government of Belize or to appoint the interim Board of Directors of Belize Telemedia, as he purported to do. Accordingly, the compulsory acquisition of the property belonging to BCB, Dean Boyce and the BTL Trustees was at that point in time, unlawful as being accomplished without any legal authority to do so. The question is whether the acquisitions were made lawful by the Eight Amendment Act.

[94] Before addressing this question, it is first necessary to consider the alternative arguments put forward by BCB and the Trustees that even if it were permissible to read the 2011 Act as incorporating the 2009 Act, the combined product would nevertheless infringe section 17(1) of the Constitution. But I find it convenient first to turn to Fortis' case and to consider the question whether the 2011 Electricity Acquisition Act is

constitutionally compliant and whether, if it is, the acquisition of its property is nevertheless unlawful.

The 2011 Electricity Acquisition Act

[95] Fortis contends that the 2011 Electricity Acquisition Act is unconstitutional and void because, in breach of section 17(1)(a)&(b) of the Constitution, it i) does not prescribe the principles and manner in which reasonable compensation is to be determined within a reasonable time; ii) it does not prescribe the principles and manner in which reasonable compensation is to be given within a reasonable time; and iii) it does not provide a right of access to the Court for the purpose of enforcing a right to compensation. Fortis contends further that i) the Minister has failed to establish that the acquisition was duly carried out for a public purpose in accordance with the law authorising possession; ii) the acquisition of its shares was not a proportionate response to the public purpose identified; iii) the acquisition was arbitrary; and iv) it was carried out in breach of its right to be heard. For all these reasons, it contends, the acquisition of its shares was ultra vires the power of the Minister under the 2011 Electricity Acquisition Act, assuming it to have passed constitutional muster. These contentions will be considered in turn.

The principles for the determination of compensation

[96] It is common ground that but for certain minor differences, not relevant to the issue to be determined in this case, section 66 of the 2011 Electricity Acquisition Act is identical to section 67 of the 2009 Telecoms Acquisition Act which has been held by this Court ***BCB v Attorney General*** to be deficient. Accordingly, Mr. Courtenay submitted that the 2011 Electricity Acquisition Act should suffer the same fate. Mr. Barrow's only response was that in ***BCB v Attorney General*** this Court decided only that the required principles were not spelt out in relation to BCB's property, namely a loan facility, and that there was no specific determination that the principles set out in section 67 were not apt for the determination of reasonable compensation for the acquisition of shares. The question therefore is what exactly did this court decide.

[97] On this point, it does appear that Morrison JA focused only on the principles applicable to the acquisition of BCB's loan facility. He referred only to the Bank's submissions and concluded (para 90) that section 67 of the 2009 Act did not fall short of the requirements of section 17(1), "even when allowance is made for the special nature of property acquired from the Bank."

[98] Carey JA did as well recount only the submissions made by Mr. Courtenay on behalf of BCB, but he did note that Mr. Smith, who was appearing for Dean Boyce in that appeal, had associated himself with Mr. Courtenay's submissions, and that the property taken from Mr. Boyce consisted of shares (para 215). He then immediately referred to the Attorney General's response that the language used in section 67 was "sufficiently expansive to cover the situation as respects the property of Mr. Boyce and that of the Bank." He later concluded (at para 218) that "no provision was made in the Act setting out the principles and the manner for determining reasonable compensation for the property acquired" and specifically rejected "the proposition that the words of the provision are sufficiently wide to embrace the property acquired." It appears clear to me, therefore, that this court did decide that provisions identical to section 66 of the 2011 Electricity Acquisition Act did not prescribe the principles on which reasonable compensation for the acquisition of shares is to be determined and we have not been provided with any basis upon which we can depart from that decision in this case. Accordingly, in my judgment the 2011 Electricity Acquisition Act is inconsistent with section 17(1)(a) of the constitution in this regard.

The Principles on which and Manner in which reasonable compensation is to be given

[99] Section 17(1)(a) requires that the law authorising the compulsory acquisition of property must prescribe i) the principles on which reasonable compensation is to be given within a reasonable time; and ii) the manner in which such compensation is to be given within a reasonable time. Mr. Courtenay contends that the 2011 Electricity Acquisition Act falls short in both respects. He relies again on this Court's decisions in

BCB v Attorney General and, in addition, our earlier decision in ***San Jose Farmers' Cooperative Society Limited v Attorney General of Belize***.

[100] Section 62(4) of the Act provides that "there shall be paid to the owner of the property that has been acquired" under the Act "reasonable compensation within a reasonable time in accordance with the provisions of this Act." As soon as may be after an order is made by the Minister acquiring property, the Financial Secretary is required to publish a notice containing particulars of the property acquired and requiring interested persons to submit claims (s. 63(1)). Any person claiming an interest in the property acquired is required to quantify the amount claimed, providing facts and figures in support (s. 63(8)). Upon receipt and verification of a claim, the Financial Secretary must then enter into negotiations with the claimant "for the payment of reasonable compensation within a reasonable time" (s. 64(1)). Where agreement is not reached, the compensation payable is to be determined by the Supreme Court in accordance with the provisions of the Act (s. 64(2)). As already noted, section 66 details the principles on which reasonable compensation is to be determined. Section 67 empowers the Court to award interest for the whole or any part of the period between the date of acquisition and the date of payment of the compensation awarded and section 68 giving guidance on the awarding of costs of the proceedings before the court. Section 70 provides that:

> "All amounts which have been awarded by way of compensation under this Act, including any interest and costs to be paid by the Financial Secretary, and all other costs, charges and expenses which shall be incurred under the authority of this Act, shall be a charge on the Consolidated Revenue Fund of Belize and shall be paid within such time as the Court considers reasonable in all the circumstances."

[101] Mr Courtenay contends that section 70 falls short because no time frame is established for the payment of compensation. Mr. Barrow counters that, by empowering the Court to determine when compensation is to be paid, there is no inconsistency with section 17(1)(a) "because even a higher level of protection is afforded to the property owner as mandated by the Act itself." There is also greater protection in making compensation a charge on the consolidated fund, as compared to the corresponding

section 71 of the 2009 Telecoms Acquisition Act, which provided that compensation was to be paid out of monies voted for the purpose by the National Assembly.

[102] In ***San Jose Farmers***, section 32 of the Land Acquisition (Public Purposes) Act provided that where the property acquired exceeded five hundred acres or the compensation awarded exceeded $10,000.00, "the Minister may order that the compensation shall be paid in equal instalments over a period not exceeding ten years." Henry P was satisfied that this did not provide for payment within a reasonable time since it conferred on the Minister "the discretion to order that compensation may in certain circumstances be paid over a ten-year period" (p 67). The problem with section 32, Liverpool JA said, is that it empowered "the Minister, unilaterally, to order that the compensation is to be paid over a period of ten years." In his view, "compensation within a reasonable time can only mean that payment must be made in full as soon as is reasonably practicable after the amount of compensation due has been finally settled" (p. 82).

[103] In ***BCB v Attorney General***, the offending provisions provided simply that any compensation awarded was to paid "out of monies voted for the purpose by the National Assembly and all such compensation shall be paid within a reasonable time." Carey JA was not satisfied that such a provision complied with section 17(1)(a). It merely identified the source of the funds which would be used to pay compensation and provided no time frame for payment. In fact, given that the compensation was to be paid out of monies voted by the National Assembly, the person whose property was compulsorily acquired "can have no idea when that vote will occur" (para 221). "It is a wise counsel," Carey JA continued, "to make a time frame, which, looked at objectively, would be regarded as reasonable" (ibid).

[104] Like Carey JA (at para 220), Morrison JA (at para 99) accepted Mr. Courtenay's submission that the law by virtue of which property is compulsorily acquired must prescribe the principles on which and the manner in which reasonable compensation is to be given within a reasonable time. It was not sufficient merely to repeat the language of the Constitution. By way of example of the principles on which compensation would be given, he noted (at para 93) that:

> "it would obviously be important to an affected property owner to know what is the basis upon which payment is intended to be made, given, as Liverpool JA observed in **San Jose Farmers** (at page 82) that "Compensation within a reasonable time can only mean that payment must be made in full as soon as is reasonably practicable after the amount of compensation due is finally settled". While the ideal way of achieving this (certainly from the property owners' standpoint) would be by payment in full immediately after determination of the amount (and if this is GOB's intention, then the legislation should so state), this may not be practical given the exigencies of government and the many other demands on the public purse. If what GOB proposes is payment in instalments (always bearing in mind that in **San Jose Farmers** the court did not consider payment over 10 years at 6% interest to be payment of compensation within a reasonable time), then one would also expect the proposed basis of payment to be spelled out in the legislation as well."

In an attempt to tease out the aims and purposes of section 17(1), he continued (at para 94):

> "In my view, the specificity of the requirements of section 17(1) demonstrates the intention of the framers of the Constitution that, as part of its explicit aim of providing protection from arbitrary detention of property, the acquiring legislation should as far as possible insulate the property owner against the purely discretionary exercise of governmental power. The real problem with section 32 of the Act in **San Jose Farmers** was, as Liverpool JA observed (at page 83), that it left it within the Minister's discretion, unilaterally, to order that compensation should be paid in particular cases over a 10 year period. Similarly in the instant case, a provision such as section 63(3), which merely repeats the constitutional incantation that compensation shall be paid within a reasonable time, has the result, as Mr Courtenay observed, that the landowner may be left entirely to the discretion of government as to what constitutes a reasonable time in all the circumstances. It is clear that it is for precisely this reason that section 32 was held to be constitutionally offensive in **San Jose Farmers** and it is equally for this reason that I also consider section 63(3) to be similarly deficient, by the omission from it of the principles upon which compensation will be determined and paid, as required by section 17(1)(a)."

He then concluded (at para 95):

> "I would therefore conclude that section 17(1)(a) requires that the acquiring legislation do more than provide a framework within which government is to comply with its obligations. I accordingly consider that, in order to fulfil the constitutional requirements, the acquiring legislation is required to do precisely what Ms Young submitted ... that it was not

> required to do, that is, to provide details in the acquiring legislation itself, with regard to, for example, “deposits, incremental payments, bond [sic] debentures and the like”."

[105] ***San Jose Farmers*** and ***BCB v Attorney General*** therefore clearly establish that the law authorising the compulsory acquisition of property must set a time frame within which the compensation is to be paid, whether it is within 3 months or a year as the case may be, and whether by way of a lump sum or by instalments, and must further indicate whether the compensation is to be paid in cash or by the issue of bonds and such like. These together would constitute the principles on which and the manner in which the compensation is to be paid within a reasonable time. Of course, the Supreme Court will ultimately have the final say on whether the payment scheme set out in the acquisition legislation in fact, from an objective standpoint, accomplishes payment within a reasonable time.

[106] The provision in section 70 of the Act that compensation is to be a charge on the consolidated fund is an improvement on the provision in the 2009 Act by which compensation was to be paid out of money’s voted by Parliament, to the extent that the uncertainty as to when or if Parliament would or could be forced to vote is eliminated. And the fact that it identifies the source of payment as the consolidated fund does seem to implicitly suggest that the manner of payment would be by cash. According to section 114 of the Constitution, “All revenues or other moneys raised or received by Belize … shall be paid into and form one Consolidated Revenue Fund.” And by section 4(3) of the Finance and Audit Act Chap. 15 “money at the credit of the Consolidated Revenue Fund shall, except for day-to-day requirements, be kept in an account at such bank or banks as the Minister may approve." But what it does not do is to say when the compensation will be paid. Compensation may be a charge on the Consolidated Revenue Fund but a warrant of the Minister or some other authorised person is still required to get the money out of it (section 4(2) of the Finance and Audit Act).

[107] Neither does the requirement that payment be made “within such time as the court considers reasonable in all the circumstances” provide a time frame for the payment of compensation. What it does is to provide a mechanism for determining that

time frame. Admittedly, the combination of making compensation a charge on the Consolidated Revenue Fund and empowering the court to determine when such compensation would be paid goes quite far towards insulating the property owner against the purely discretionary exercise of governmental power and therefore achieves in part the goals of section 17(4) which Morrison JA identified. But as this Court has made clear in ***San Jose Farmers*** and ***BCB v Attorney General***, the Supreme Court is the final arbiter on whether the law authorising the compulsory acquisition of property has prescribed the principles on which and the manner in which compensation is to be paid within a reasonable time. Whatever time frame the legislature establishes, in other words, is subject to review by the court to determine whether objectively, payment is to be made within a reasonable time. In a real sense, therefore, and viewed in this light, section 70 merely repeats the constitutional requirement that compensation is to be paid within a reasonable time, given that what is in fact a reasonable time will in any event be determined finally by the Supreme Court. Indeed, to a large extent by refraining from setting a time frame for payment and ultimately requiring a claimant to approach the court to set the time frame, more delay is created. For example, where negotiations result in agreement on the amount of compensation, but the parties are unable to agree as to when payment will be made, an application to the court will be necessary and the Government will effectively be relieved of its obligation to pay while the application wends its way through the court system. On the other hand, had an objectively reasonable time frame for payment been fixed by law, that extra period of delay would have been eliminated.

[108] In the circumstances, I am satisfied that the 2011 Electricity Acquisition Act is inconsistent with section 17(i)(a) in this respect as well.

Access to Court to enforce the right to compensation

[109] Even though section 62(5)(iv) of the Act provides specifically that "Any person claiming an interest in or right over the acquired property, shall have a right of access to the courts for the purpose of …. enforcing his right to any … compensation", Mr. Courtenay insists that the Act does not comply with the requirements of section

17(1)(b)(iv) of the Constitution because it fails to specify how the right to compensation may be enforced by the Court. It provides for access only, he says. More is required by way of a procedure for enforcement. He relies again on ***San Jose Farmers*** and ***BCB v Attorney General***.

[110] In ***San Jose Farmers***, section 24 of the Land Acquisition (Public Purposes) Act provided for an appeal to the Court of Appeal against a determination by the Board empowered to assess compensation and provided further that for the purposes of such appeal "the determination of the Board shall be deemed to be a final judgment or order of the Supreme Court." At first instance, the Chief Justice was persuaded that this provision adequately satisfied the requirements of section 17(1)(b)(iv) because when the Court of Appeal heard and determined an appeal from the Board, its decision became an order of the Supreme Court which was enforceable. While it was clear to Liverpool JA that the award of the Board was deemed to be an order of the Supreme Court, there was as yet, in his view, no provision in the Act for the enforcement of the order. He accordingly approved of the modification to the Act suggested by Henry P in these terms: "The award may be enforced in the same manner as a judgment or order of the Supreme Court to the same effect."

[111] In ***BCB v Attorney General***, there was no provision addressing the question of the enforcement of the right to compensation but the Attorney General nevertheless submitted that the requirement of section 71 of the 2009 Act that compensation be paid from moneys voted by the National Assembly within a reasonable time, coupled with the presumption that Parliament will comply with the law and any declaration made by the court, was sufficient. Morrison JA dealt with this argument with short shrift. He said (at para 106):

> "The problem with this submission, it seems to me, is that, as Mr Courtenay submitted, in my view correctly, "reliance on other laws as a basis for enforcement does not pass constitutional muster". In my view, this must follow irresistibly from the decision of the court in **San Jose Farmers**, that what the Constitution states in section 17(1)(b)(iv) is that there must be provision as to the enforcement of compensation contained in the law which effects the compulsory acquisition..."

Carey JA elaborated further (para 224):

> "When the draftsman uses the words “enforcing his right to compensation”, he is to be understood I would suggest, as meaning execution of some process to collect the award. This follows from the sequence of steps the dispossessed property owner must take from the point in time when his property is compulsorily acquired until he enforces, that is, seeks to collect the award."

[112] There is therefore substance in Mr. Courtenay’s submission. Section 62(5)(iv) seems to presume that once an application is made to the Supreme Court to enforce an award for compensation, the normal processes available under existing law for the enforcement of awards of the Supreme Court would be available and would be deployed. But the Act does not say that. It does not even say that any agreement for compensation arrived at or any award made by the Court itself is to be deemed to be an order of the Supreme Court, as did the Land Acquisition Act in the ***San Jose Farmers’*** case. And this Court has made clear that it is not sufficient to rely upon enforcement practice contained in other laws. The process of enforcement must be spelt out in the acquisition law itself. It would have been sufficient, for example, if section 62(5)(iv) had provided access to the Supreme Court for the purpose of “enforcing his right to any such compensation, which may be enforced in the same manner as a judgment or order of the Supreme Court to the same effect."

[113] It is my judgment therefore that the 2011 Electricity Acquisition Act is inconsistent with section 17(1) of the Constitution of Belize in that it fails to prescribe the principles on which and the manner in which reasonable compensation for the compulsory acquisition of property is to be determined and given within a reasonable time and it fails to secure to any person claiming an interest in or right over property a right of access to the courts for the purpose of enforcing his right to compensation. I agree with Morrison JA that given that the defects in the Act which I have accepted exists are omissions, no question of severance can arise. Accordingly, in obedience to section 2 of the Constitution, the 2011 Electricity Acquisition Act must be declared void.

Acquisition for a Public Purpose

[114] On the assumption that the 2011 Electricity Acquisition Act was valid, Fortis contends that its shares in Belize Electricity were not in fact acquired for the declared

public purpose and that, even if it was, the acquisition was disproportionate and as a consequence arbitrary. Finally, Fortis contends that in arriving at his opinion that the constitutional and statutory pre-conditions for acquisition had been met, the Minister did not accord it any opportunity to be heard.

[115] Section 62 of the Electricity Act, as it would be amended by the 2011 Electricity Acquisition Act, permits the Minister, with the approval of the Minister of Finance, to issue orders acquiring property where he is of the opinion that any of the circumstances set out in section 62(2), or any combination of such circumstances have arisen, and it is necessary and expedient in the public interest that the Government should acquire control over electricity supply to maintain an uninterrupted and reliable supply of electricity to the public. Among the circumstances set out in section 62(2), as contained in sub-paragraphs a) and b), are a) that "the license holder is in grave financial difficulties and is unable to secure the continuity of electricity supply to public", and b) that "a notice to revoke the license granted to the license holder has been given to the license holder and it appears highly likely that the license will be revoked".

[116] In the 2011 Electricity Acquisition Order, it is declared that the property specified in the Schedule is acquired for the public purpose of maintaining an uninterrupted and reliable supply of electricity to the public. In addition, in the preamble, the Minister declared that he was of the opinion that the circumstances set out in section 62(2)(a) & (b) had arisen, and that, in accordance with section 23(1), it was necessary and expedient to issue the order to maintain an uninterrupted and reliable supply of electricity to the public.

[117] I do not understand Fortis to be gainsaying that the maintenance of an uninterrupted and reliable supply of electricity is indeed a public purpose, and I think this concession is rightly made. What they do say is that the Minister has provided no evidence that it was highly likely that Belize Electricity's license would be revoked and had not established to the requisite standard that there was an on-going threat to the supply of electricity such as to justify the invocation of the state's power to acquire its property in the public interest.

[118] This requires, first of all, an examination of the approach which the court must take in determining whether property has been acquired for a public purpose. In this regard, section 17(1) of the Constitution requires that a law authorising the acquisition of property must secure the right of access to court by the person whose property has been acquired to determine whether the acquisition "was duly carried out for a public purpose in accordance with the law authorising the taking of possession or acquisition." In compliance with section 17(1), the 2011 Electricity Acquisition Act makes such provision. Accordingly, it is for the Supreme Court ultimately to determine whether the acquisition was indeed carried out for a public purpose. The exercise which the Court carries out, therefore, is not one of reviewing the decision of the Minister on ordinary public law grounds, but of determining for itself whether the acquisition was carried out for a public purpose. This point was made by Morrison JA in ***BCB v Attorney General of Belize*** (at para120):

> "But I think that it is also necessary to bear in mind that what the court is concerned with in the instant case is not an application for judicial review of the findings of an administrative tribunal, but with the constitutionally mandated determination whether the compulsory acquisition of the appellants' property "was duly carried out for a public purpose"."

Morrison JA also made clear that in performing this exercise the Court will not presume in the Minister's favour that the acquisition was carried out for the stated public purpose but must be satisfied on the evidence that it was. He said (at para 116):

> "It seems to me that what the Constitution requires of the court is a consideration and assessment of the reasons for the compulsory acquisition put forward by GOB, with a view to determining whether the taking was indeed for the stated public purpose. GOB accepted this challenge by filing copious evidence that, it was contended, demonstrated the justification for the acquisitions and it seems to me that, however it may be characterised in traditional burden of proof analysis, it is for the court to consider that evidence for what it is worth. In this regard it therefore seems to that Lord Denning MR's statement (in **Prest**, para. [76] above) that "in any case…where the scales are evenly balanced – for or against compulsory acquisition – the decision – by whomever it is made – should come down against compulsory acquisition" is unremarkable and apt to convey no more than that in such a case, the court will not have been able to determine, on an overall assessment of the evidence put

> forward by both sides, that the compulsory acquisition was in fact duly carried out for a public purpose. In the context of this exercise, Lord Scarman's caution that "the technicalities of the law of evidence must not be allowed to become the master of the court" (in the context of judicial review proceedings in **R v Home Secretary, Ex parte Khawaja [1984] 1 AC 74, 114**), also appears to me to be entirely apposite."

[119] For his part, Carey JA held (para 238) that to "justify the acquisition, it has to be shown that the Minister acted upon the right legal principles, adequate evidence and a proper consideration of the factors which sways his mind into the decision." In this regard, he referred with approval to what Watkins LJ had to say in ***Prest v Secretary of State for Wales*** 81 LGR 193, at p. 211

> "In the sphere of compulsory land acquisition, the onus of showing that a compulsory order has been properly confirmed rests squarely on the acquiring authority and, if he seeks to support his own decision, on the Secretary of State. The taking of a person's land against his will is a serious invasion of his proprietary rights. The use of statutory authority for the destruction of those rights requires to be more carefully scrutinized. The Courts must be vigilant to see to it that that authority is not abused. It must not be used unless it is clear that the Secretary of State has allowed those rights to be violated by a decision based upon the right legal principles, adequate evidence and proper consideration of the factor which sways his mind into confirmation of the order sought."

[120] In this case, the Minister expressed himself to be of the opinion that a notice to revoke the license granted to Belize Electricity had been given and it appeared highly likely that the license would be revoked. Although, inadvertently it seems, a public notice from the Public Utilities Commission serving notice that the Commissioner proposed to cancel Belize Electricity's license was annexed to the first affidavit disposed to by Mr. Lyn Young on behalf of Fortis, no evidence was led as to the circumstances under which such notice was issued or as to the likelihood that the license would be revoked. The ground upon which the revocation was threatened was that Belize Electricity had not paid its annual license fee for the calendar years 2009 and 2010, an omission which, one imagines, could have been easily remedied. Fortis, accordingly, complained that the Minister had provided no evidence of the matters he took into account in deciding that it was highly likely that Belize Electricity's license would be

revoked, and that accordingly no reliance could be placed on section 62(2)(b). But the fact is that there is no indication in Fortis' Fixed Date Claim Form that the Minister's opinion that the revocation of Belize Electricity's license was highly likely was under challenge. Nor, apart for the apparent inadvertent annexure of the notice of revocation, is there any mention in the affidavits filed on behalf of Fortis, of the issue of the notice of revocation. It is therefore not surprising that the Respondents have not presented any evidence on that score. I would accordingly reject this ground of challenge.

[121] Fortis contends further that at the time of the acquisition, there was no threat to the supply of electricity by Belize Electricity and accordingly no basis to acquire any property to ensure a continuity of supply. In this regard, they contend that any difficulties which Belize Electricity may have been encountering was as a direct consequence of the Government's own conduct, in some respects illegal, of engineering a reduction in the rates Belize Electricity was allowed to charge its customers and increasing the tax which Belize Electricity was required to pay.

[122] The justification for the acquisition of Fortis' shares in Belize Electricity has been set out in affidavits deposed to by Mr. Bernard Pitts, the Attorney General of Belize, and Mr. Joseph Waight, the Financial Secretary of the Government of Belize. The Minister of Public Utilities, who issued the 2011 Electricity Acquisition Order and whose opinion on the existence of the relevant circumstances and the necessity of acquiring control over electricity is a pre-requisite to the issuance of the Order, has not given evidence in support of the action he took. However, no point has been taken by Fortis on the absence of explanatory evidence from the Minister himself and it must therefore be taken that that the evidence presented by Messrs Pitts and Waight as justification for the acquisition has been presented on his behalf. The following account is therefore taken from their affidavits.

[123] Belize Electricity is in the main, a distributor and not a generator of electricity. It purchases electricity from three main sources. The first is a Mexican entity called the Commission Federal de Electricidad ("CFE"). The other two are Belizeans entities, Belize Electric Company Limited ("BECOL") and Belize Generation Energy Limited ("BELCOGEN"). BECOL operates a hydroelectric facility and accordingly the quantity of

electricity it is able to generate depends upon the level of rainfall, its capacity increasing during the rainy season, which traditionally begins in or around the month of June. BECOL sells electricity to Belize Electricity at cheaper rates than CFE, whose rates are affected by fluctuating fuel prices. Under the power purchase agreement between CFE and Belize Electricity, CFE could cease the supply of electricity in the event of default in payment.

[124] In or about July 2008, Belize Electricity fell into arrears with CFE. It owed in the vicinity of US$2 million. It appears that CFE was threatening to exercise the option under the power purchase agreement to halt the supply of electricity. Accordingly, Mr. Young approached the Government of Belize to provide a letter credit which would guarantee payment in the event of default on the part of Belize Electricity and would stave off any interruption in supply by CFE. He set out his case in an email to Mr. Waight dated 21 July 2008, in which he estimated that with the onset of the rainy season and the maximisation of hydroelectric production, Belize Electricity would be in a position to avoid purchasing as much electricity from CFE, which charged twice as much as the electricity produced by BECOL, and would ease the strain on its cash flow such that "we can make it through perhaps to the end of the year by stretching the payment schedule a bit." He referred to a verbal understanding with CFE which allowed Belize Electricity to "stretch the payment to as much as 60 days", but noted that under the power purchase agreement CFE could either cease supply of electricity or draw down on the letter of credit.

[125] The Government was minded to provide the letter of credit but was concerned that CFE might immediately draw down on the facility in order to settle payments already due. Accordingly, by an email dated 21 July 2008, Mr. Waight asked for Mr. Young's thoughts on the matter as this would have "a bearing on our decision to move forward with the Letter of Credit."

[126] Mr. Young explained further that Belize Electricity was then in breach of several of its loan covenants which prevented it from incurring any further debt without the approval of its lenders but that it would take some time "to work through these issues and try to cure the defaults" but that this depended upon the new regulations which the

Public Utilities Commission planned to introduce. He therefore concluded that Belize Electricity would need the Letter of Credit to be in place for about one year and offered that "in the meantime, we feel that we will be able to meet the commitments if the monthly adjustment mechanism is introduced in September as promised."

[127] It is against this back drop that the Government of Belize agreed to provide an unconditional, irrevocable Stand by Letter of Credit in the sum of US $5 million in favour of CFE covering the life of the Power Purchase Agreement from 21 August 2008 to 31 December 2011.

[128] It would appear that with the Letter of Credit in place, the danger that CFE would exercise its power to halt the supply of electricity for non-payment had been successfully averted, at least for the period of time during which the Letter of Credit was in place. To be sure, we have not been told of any threats to cease supply during that period. However, with the expiry of the Letter of Credit in December 2011, and Belize Electricity's apparent inability to pay its debts as they came due, the threat of an interruption of supply by CFE once again reared its head. The Government of Belize became aware formally of this developing scenario by a letter dated 4 May 2011 from Mr. Young, following up on conversations and a meeting he had with Mr. Waight in late April. The letter was written to the Prime Minister. In it, Mr. Young disclosed that Belize Electricity was experiencing "a very serious cash flow problem stemming from steep increases in prices for power from … CFE which are being driven by increased oil prices." He summarised Belize Electricity's financial difficulties in the following paragraphs

> "For the last two weeks, electricity rates from CFE have been just less than our average tariff to customers, and is actually costing us more than the average tariff to customers when one takes into consideration the transmission losses. The steep increases in price from CFE have been exacerbated by the problems at Belcogen over the last two months. In addition, BEL has had to absorb an annual increase in business tax of more than $ 8 million.
>
> Currently, we owe almost BZ $10 million to CFE and because our liability is near the limit of the Letter of Credit (LC) that was put in place by the Government, CFE keeps sending us weekly advisories to make small

> payments so as to avoid exceeding the LC limit which would cause them to cut our service and draw down on the LC.
>
> In trying to keep up with the CFE payments, we have been having difficulties in meeting some major obligations to other creditors including the Caribbean Development Bank (CDB) and BECOL. We currently owe BECOL in excess of BZ $10 million. Now that Belcogen is back on line, we are receiving power from them, but will have problems meeting the payments to Belcogen as well. We are also struggling to make a payment to the European Investment Bank (EIB) that is due at the end of the month.
>
> On two other occasions when we experienced these acute cash flow problems, we were able to negotiate temporary facilities with the local banks. However, we continue to be in default of some of our loan covenants and our Bankers will not provide credit without a guarantee from Fortis. Hence we do not see the situation improving until we get some relief from the high cost of power through lower oil prices, or in the third quarter when lower cost Hydro production is at its fullest."

[129] Mr. Young welcomed the Government's offer, apparently made by Mr. Waight, to pay its electricity bills earlier than usual, and suggested that the Government could provide further assistance by increasing the amount on the Letter of Credit "to give us enough credit with CFE to make it through the dry season" and by providing a guarantee to Belize Electricity's bankers "to allow us to access short term credit." He suggested that the Government might be amenable to these forms of relief because the Government was financially exposed under agreements between CFE and BECOL and the loans agreements with CDB and IBRD and the EIB, to which the Government was a party.

[130] This was followed by a letter dated 25 May 2011 from Mr. Rene Blanco, Belize Electricity's Vice President and Chief Financial Officer, to Mr. Waight advising that Belize Electricity was "in critical need of assistance to avoid surpassing the limit of the Government provided LC to CFE." Although Belize Electricity had been making small, almost daily payments to CFE to avoid exceeding the limit, he did not expect to have sufficient funds to make another payment that week. He therefore asked for the Government's assistance by either paying a minimum amount of US $2.5 million directly to CFE, increasing the LC to US $10 million, persuading CFE through diplomatic

channels to extend credit to Belize Electricity to US $10 million, or making advance payments to Belize Electricity on its electricity bills for the next three months of US $3 million. In closing, Mr. Blanco asked for a speedy response as the situation was "very urgent."

[131] Some 7 hours later, Mr. Blanco emailed Mr. Waight asking him to provide the Government's response as soon as possible since "CFE has advised that we do not have sufficient credit for power purchases to take us through this weekend and will interrupt supply of services on Friday if no arrangement is made for any payment or extension of credit." He asked for the Government's urgent response "in order to determine how and when we should start planning rotation power outages for the country as appropriate – depending on your response."

[132] On 26 May 2011, the Government advanced the sum of BZ $4 million to Belize Electricity.

[133] On 10 June 2011 Mr. Young met with the Prime Minister and Mr. Waight at which Belize Electricity's financial position was discussed. By way of further relief, the Government agreed to pre-pay a further sum of US $4 million on its future electricity bills and asked Mr. Young to convey to Fortis Cayman Inc., the majority shareholder of Belize Electricity, the Government's interest in purchasing the majority shares in Belize Electricity so as to assume control of the company.

[134] Mr. Young claims that at this meeting he told the Prime Minister and Mr. Waight that he anticipated that the emergency which was being experienced would pass as soon as the rains began to fall again and BECOL was in a position to increase its supply of electricity at much reduced prices.

[135] Fortis Inc. was able to provide an immediate response to the Government's proposal to purchase a majority interest in Belize Electricity. By email later on 10 June 2011, Mr. Young informed Mr. Waight that Fortis was "not interested in a minority position but would be prepared to sell all their interest in BEL for the book value of their shareholdings provided that the book value is grossed up to include the $36M refund enacted by the PUC in 2008."

[136] By letter dated 13th June 2011, Mr. Waight conveyed the Government's response to Mr. Eamon Courtenay S.C., Fortis Inc's lawyer. He said that the "GOB could never agree to purchase Fortis' shares in BEL on conditions that include the rejection of the PUC–ordered $36 million refund to consumers, which refund was upheld by the Supreme Court of Belize." Mr. Waight was of the view that Fortis Inc's proposal that the sale price of its shares be grossed up by $36 million was made on a take-it-or-leave-it-basis and that accordingly the Government was obliged "to leave it."

[137] At this point, Mr. Waight points out, it was clear, in light of Belize Electricity's cash flow problems and its repeated requests for Government's assistance, that it was unable to pay for its power supply. There was also Mr. Blanco's looming threat, as communicated in his email dated 25 May 2011, of an interruption in the supply of electricity. Around this time as well, the Government noted a press release dated 13 June 2011 in which Fortis Inc. claimed to have assets worth CAN $13 billion and that it was the largest investor-owned distribution utility in Canada. This confirmed the Government's thinking, said Mr. Waight, that Fortis Inc. could easily have provided the assistance which Belize Electricity needed and so avoid the threat of power outages, instead of approaching the Government for assistance. It therefore appeared to the Government that Fortis Inc. had "abrogated their responsibility not only in respect of BEL but also in respect of the country of Belize" and it was in those circumstances, Mr. Waight deposed, that "the Government of Belize was left with no viable alternative but to take over BEL in the national interest." He deposed further:

> "It seemed obvious and was the considered view of GOB that unless the Government continuously advanced large amounts of money to BEL, a private company, the country would be plunged into blackouts. Given the sustained financial difficulties evident from the continued requests for assistance, the Company was not in a position to pay its suppliers and was already threatening interruption in the supply of electricity … It was the fact that BEL never gave any indication of any other solution to its problem of failure to pay its supplier than reliance upon GOB.
>
> Supply of electricity from BEL was therefore unreliable because at any given time CFE could have immediately ceased power supply and would have had good reason to do so … It was in those circumstances that Government decided to acquire the company."

[138] In response to Mr. Young's suggestion that Belize Electricity was only seeking temporary assistance, Mr. Waight argued that

> "… given that BEL's cash flow problems subsisted from 2008, became worse, reached crisis proportion, and no other solution was suggested, the company's sustained financial difficulties required a permanent resolution by the Government."

[139] In response to Mr. Young's claim that Belize Electricity would be able once again to meet expenses and would not require further Government Assistance once the rains came and BECOL was once again in a position to supply 52% of the electricity needed to meet the country's demand, at much cheaper rates, Mr. Waight revealed the Government's thinking in the following passage:

> "Again given the financial history of the company … the assessment of GOB was that BECOL would only be able to provide reliable supply as long as the rains subsisted. It did not provide a definite long term solution to BEL's financial difficulties. BEL kept building arrears with CFE and in any case the rates charged by BECOL were not much lower than the rates charged by CFE and the factor of lower rates was not enough to clear all the liabilities of CFE or return the company back to financial stability."

Mr. Waight concluded:

> "It was the GOB's considered view that by June 2011 the situation had reached crisis proportions and the Government was left with no practical and prudent alternative but to nationalise BEL so as to maintain an uninterrupted and reliable supply of electricity to the public."

[140] Fortis has challenged the factual foundation of the Minister's determination that it was necessary to acquire its property to maintain an uninterrupted supply of electricity on a number of grounds. First of all, while admitting that Belize Electricity was experiencing financial difficulties, Fortis claims that this was due to the misdeeds of the Government itself which acted in cahoots with the Public Utilities Commission to drastically reduce the rates which Belize Electricity charged its customers. Mr. Young points to the fact that during the campaign leading up to its election in February 2008, the United Democratic Party had as one of its campaign pledges the easing of the cost

of living by lowering electricity and telephone rates. He points next to a power point presentation prepared by Mr. Victor Lewis, the Director of Electricity at the PUC, as presented on 30 March 2008, in which he proposed that the PUC take the position that there should be no rate increase. Then two days later the Prime Minister's Press Secretary, Mr. Delroy Cuthkelvin stated in a television interview that the UDP government was committed to a reduction in electricity rates and that the Government has "all assurances that the PUC, utilising the full force of the Act, will now go to the second step, that of reducing electricity rates". This was followed by a meeting on 8 April 2008 with the commissioners of the PUC during the course of which Mr. Young was asked whether Fortis was willing to sell its shares, to which he responded in the affirmative, if the price was right. He concluded from this that the PUC intended to reduce the rates which Belize Electricity was permitted to charge so that Fortis would be forced to sell its shares cheaply.

[141] As Mr. Young said he feared, the PUC denied Belize Electricity's application for a rate increase, and instead awarded a rate decrease of 15%. Mr. Young has related a series of events which occurred involving the repeal of 2007 by-laws and the reinstatement of 2005 by-laws which changed the rate setting methodology, and of challenges made by way of appeal and in judicial review proceedings to the PUC's decision. But it is not entirely clear from his account exactly what is under challenge and on what grounds. Suffice it to say that as a result of an injunction obtained pending the determination of the legality of certain 2008 by-laws, the rate at which Belize Electricity has been permitted to charge its customers for electricity has been frozen at 2006 levels and Belize Electricity has not had the increase it believes it deserves. It is the absence of a rate increase, it is claimed, which is primarily responsible for the financial predicament which Belize Electricity found itself in in June 2008, forcing it to approach the Government for a letter of credit, and in May-June 2011 which led to the threats by CFE to withhold the supply of electricity if Belize Electricity fell further in arrears and exceeded the limit of the letter of credit. Its financial predicament was also exacerbated by the Government's decision to increase the business tax Belize Electricity was required to pay from 1.75% to 6.6%, an increase of almost 400%.

[142] Mr. Waight flatly denied the charge to the Government was in cahoots with the PUC to force the sale of Belize Electricity. He insisted that the PUC is an entirely independent entity and that the Government had no say in whether the PUC approved or refused a rate increase for Belize Electricity. The increase in business tax was based on profits declared by Belize Electricity in 2009 and was consistent with similar increases imposed in respect of telecommunications services. Far from taking any steps to cause Belize Electricity's financial difficulties, he maintained, the Government in fact took extraordinary steps to assist Belize Electricity in ensuring the continuity of its services by providing the letter of credit and by making prepayments for the supply of electricity.

[143] In this, Mr. Waight was supported by Mr. John Avery, the Chairman of the PUC. He pointed out firstly that even though PUC commissioners are appointed by the Government, at the time the application for a rate increase was considered he was the only commissioner appointed by the UDP Government, the others having been appointed by the outgoing administration. With regard to the meeting held on 8 April 2008, Mr. Avery pointed out that Mr. Young was only asked if Fortis was prepared to sell its shares in Belize Electricity after Mr. Young had stated that if the rates were not increased the Government should find a buyer for Belize Electricity as Fortis would no longer be interested in retaining ownership of the company. He said further that he did not recall any commissioner commenting that if Belize Electricity was forced to lose money, it would have to sell its shares at a reduced price.

[144] There has not been any cross-examination of the respective deponents in this matter and the trial judge has not made any findings of fact which might have assisted us on this appeal. The fact that the incumbent government has been intent upon reducing electricity rates and has seen it fit to increase the rates of business tax is not by itself evidence of an intention to bring about the financial demise of Belize Electricity, far less is it evidence upon which, without more, can be founded the more serious allegation that this was part and parcel of a concerted plan, executed with the complicity of the commissioners of the PUC, to engineer a scenario which would pave the way for the compulsory acquisition of the shareholding in Belize Electricity. The necessary

building blocks with the aid of which Fortis has constructed this indictment of the Government's motive being largely in contention, and in the absence of the means to choose between the competing versions of the facts, I find it is impossible to make a finding one way or the other.

[145] More to the point, however, are the undisputed facts that, at the time the decision was made on 20 June 2011 to compulsorily acquire Fortis' shareholding, the threat of disruption in the supply of electricity had dissipated with the prepayment of its electricity bills which the Government had made, and that with the oncoming raining season, Belize Electricity could depend upon the supply of hydro electric power from BECOL at cheaper rates and so put an end, temporarily at least, to its dependence on the more expensive electricity provided by CFE. Mr. Young has provided extensive documentary support for his claim that the supply of electricity from BECOL increases substantially during the rainy season, but it is not necessary to examine that evidence in any detail since Mr. Waight has accepted that the Government knew that within weeks, if not days, the supply of electricity from BECOL would increase to 52% of Belize Electricity's total intake. Fortis therefore argued that there was no longer any threat of the disruption in the supply of electricity and the acquisition was accordingly not carried out for a genuine public purpose.

[146] Mr. Waight has acknowledged the force of these arguments in so far as they relate to the existence of an imminent crisis and it may be said that he accepted that the crisis had been averted. His point, however, was that in the Government's judgment, Belize Electricity's financial position and its ability to pay its debts as they became due was such that the country was most likely to be plunged into crisis once again. The precise nature of this judgment call must be appreciated. Mr. Waight conceded that Belize Electricity would be able to provide a reliable supply of electricity as long as the rains subsisted. There was accordingly no fear, it seems, of the interruption in supply for the ensuing months. The Government's concern therefore was with Belize Electricity's ability to pay for the electricity supplied by CFE on a timely basis once the dry season kicked in again and its dependence on CFE returned. It is fairly clear that there would then not be an immediate default in the payment of CFE invoices, or an

immediate threat of a disruption of supply by CFE, as long as the outstanding debt was covered by the Government's letter of credit. And given that, as accepted, the rainy season would once again return in or about May-June of the following year, reducing dependence on CFE once again, there would likely only be a short window of potential crisis when Belize Electricity's ability to keep CFE from flipping the switch would be in question. And given further that the crisis which emerged in June 2011, was due to the fact that the dry season lasted longer than usual, a fact which is not disputed, that window of possible crisis appears to have narrowed even further. Accordingly, the Government's assessment that Belize Electricity could not guarantee a reliable supply of electricity was based upon a judgment that, given Belize Electricity's admitted financial difficulties, the country would more than likely find itself once again at the edge of a precipice at some ill-defined point in time in the not too distant future.

[147] I cannot pretend to be in a position to second-guess the Minister's judgment call and we will never know whether, if left to its own devices, Belize Electricity would have found itself in an identical position in 2012 before the rains came again. But, as Lord Denning warned ***Prest v Secretary of State for Wales*** (at p. 211), "no citizen is to be deprived of his land by any public authority against his will unless … the public interest decisively so demands." One cannot be faulted for expecting, therefore, that Mr. Waight would provide some reasoned basis for his Government's conclusion that the threat of a disruption in supply would once again rear its head, if not inevitably, at least on the preponderance of probabilities. He seems to have been aware that, though Belize Electricity was having trouble paying its bills on time, it was nevertheless turning a profit. Indeed, Belize Electricity's performance in 2009 was such, according to him, as to justify an increase in business tax. Belize Electricity's published accounts also reveal a performance over the period 2008 to 2010 which is respectable. Although it made a net loss before tax of BZE $8 million in 2008, it turned a net profit of BZE $11.5 million in 2009 and BZE $6.2 million in 2010. And we have not been told of any threats to the supply of electricity in 2009 or 2010, which seems to lend support to Mr. Young's analysis that it was the prolonged dry season in 2011 which caused the problem. In these circumstances, I would have expected more by way of analysis by Mr. Waight of Belize Electricity's financial prospects such as to justify the conclusion that once the

rainy season ended in 2012, the threat of disruption of supply was sure to return. His bald statement that Belize Electricity did not provide a definite long term solution to its financial difficulties, I fear, is not enough. And his unsubstantiated claim that the rates charged by BECOL are not much lower than the rates charged by CFE and was not enough to clear the debt owed to CFE was contradicted by Mr. Young who deposed in some detail that for the period January to June 2011 the average cost of power from CFE was $0.329 per kwh, whereas for the same period it was $0.261 per Kwh for BECOL. But the contract with BECOL provided that once the power supplied by BECOL exceeded 100 Gwh, which is usually met early in the rainy season, the price per kwh drops to an average of $0.145 per kwh, more than half of the price charged by CFE.

[148] It appears to me at best, therefore, that there is a reasonable doubt that the Minister's assessment of Belize Electricity's ability to provide a reliable supply was itself unreliable, and the balance must accordingly be resolved in Fortis' favour. In short, I am not satisfied that the Minister acted on adequate evidence or gave proper consideration to all the relevant factors. Accordingly, I find that it has not been established that the acquisition of Fortis' shares in Belize Electricity was for the stated public purpose.

Proportionality

[149] Strictly speaking, it is not necessary for me to consider whether the acquisition of Fortis' shares was disproportionate, but I will do so in the event it is determined that I am wrong in my assessment of the existence of the Minister's public purpose.

[150] As held by this Court in ***BCB v Attorney General***, the three pronged test to be applied in determining whether a compulsory acquisition is proportionate is i) whether the legislative objective is sufficiently important to justify limiting a fundamental right; ii) whether the measures designed to meet the legislative objective are rationally connected to it; and iii) whether the means used to impair the rights or freedoms are no more than is necessary to accomplish the objective.

[151] As to the first prong of the test, I am satisfied that the objective of ensuring an uninterrupted supply of electricity to the citizens of Belize is sufficiently important to justify the limitation of a fundamental right. Electricity is the life blood of most business enterprises and is a substantial guarantor of comfort in the private lives of the vast majority of citizens. It is not therefore unreasonable that the fundamental rights of citizens would in some way be restricted in order to ensure a reliable supply of electricity.

[152] I am also satisfied that there is a rational connection between the compulsory acquisition of the shareholding in Belize Electricity and the objective of ensuring a reliable supply of electricity. Admittedly the nationalisation of Belize Electricity does not appear, by itself, to guarantee that Belize Electricity would be in any stronger position to meet its debts to CFE during the next dry season, and stave off an interruption in supply. No evidence has been presented to demonstrate that mere Government ownership of Belize Electricity would somehow improve its financial prospects and render it capable of timely payment for its supply from CFE. The evidence is that the price at which Belize Electricity is permitted to sell power to its customers is $0.441 per kwh, whereas the price it pays CFE is $0.329 per kwh, leaving a small margin of $0.112 per kwh to meet its capital and operating expenditure. To achieve a better financial performance, either the rate payable by customers needed to be increased, or the rate paid for power needed to be reduced. There is no reason to think that that reality would charge because the ownership of Belize Electricity was now in the hands of the Government. But to the extent that it appeared in June 2011 that the only option available to Belize Electricity to get it out of its predicament was to get some form of relief from the government, it does appear that the fact of government ownership would be a factor compelling the government to provide the necessary relief to ensure a reliable supply of electricity now that, as owner of the distribution facility, the responsibility of ensuring an uninterrupted supply fell squarely on its shoulders.

[153] But I am not satisfied that the compulsory acquisition of Fortis' shares was no more than was necessary to accomplish the maintenance of an uninterrupted supply of electricity. Given that even with Government ownership of Belize Electricity the threat of

a disruption of the supply of electricity could only be averted by the Government providing some relief, such as the repayment of its electricity bills, it would appear to me that the compulsory acquisition of the shareholding in Belize Electricity was entirely unnecessary. The Government may as well have provided the relief requested rather than expropriate property which would commit it to spending hundreds of millions of dollars. The goal of maintaining the uninterrupted supply of electricity could have been achieved by the simple expedient of preparing its bills.

[154] In my judgment, therefore, the compulsory acquisition of Fortis' shareholding in Belize Electricity was disproportionate and violated Fortis' constitutional rights.

The Right to be Heard

[155] This Court established in ***BCB v Attorney General*** and in ***Attorney General v Samuel Bruce*** (Civil Appeal No. 32 of 2010, 30 March 2012) that a Minister who is minded to order that property be compulsorily acquired must give the person appearing to be the owner of the property an opportunity to be heard before the order is made. This principle of law is not disputed in this case. Nor is it disputed that the Minister did not inform Fortis of his intention to order that its shares in Belize Electricity be compulsorily acquired and did not offer him an opportunity to say why such an order should not be made. What the Minister says is that on 10 June 2011 Government representatives met with Mr. Lyn Young, the General Manager of Belize Electricity to discuss the company's financial position, during the course of which the Government's interest in assuming control of the company was also discussed. Mr. Barrow suggests that this exchange of views satisfied the Minister's obligation to afford Fortis a right to be heard.

[156] There are a number of answers to this. Firstly, as Mr. Courtenay points out, what the Prime Minister did at the meeting on 10 June 2011 was to ask Mr. Young to convey to Fortis his Government's interest in purchasing a majority of the shares in Belize Electricity. Mr. Young was not Fortis' representative at that meeting. He was representing Belize Electricity. Secondly, although Fortis did express willingness to sell its shares in terms which the Government did not accept, at no time did the question of

compulsory acquisition arise. In fact, the question of compulsory acquisition could not have arisen at that time since the 2011 Electricity Acquisition Act was not passed until 20 June 2011.

[157] This is clearly not the hearing which the principle of fairness requires. At the very least, a property owner must be informed of the prospect that his property might be compulsorily acquired and of the public purpose which such acquisition is intended to serve, in order that he might put before the Minister such facts and matters by which he might persuade the Minister, for example, that the perceived public purpose does not indeed exist, or that the public might be better served by acquiring other property, or that the acquisition might cause such hardship to the property owner which the Minister might think sufficient to look elsewhere to satisfy the public purpose. Merely informing the property owner, as in this case, of the desire to purchase his property, and engaging in negotiations for such purchase, without informing him of the possibility of compulsory acquisition, will not produce the type or quality of exchange which the right to be heard is intended to bring forward.

[158] Accordingly, in my judgment, in making the 2011 Electricity Acquisition Order, the Minister denied Fortis its right to be heard and the acquisition of Fortis' property is on this ground unlawful and void.

Section 17(1) and the 2011 Telecoms Acquisition Act

[159] On the assumption that, contrary to my earlier findings, the 2011 Telecoms Acquisition Act effectively amended and brought the provisions of the 2009 Telecoms Acquisition Act back to life, BCB and the Trustees contend that the product of the amalgamation of the 2009 and 2011 Telecoms Acquisition Acts is nevertheless inconsistent with section 17(1) of the Constitution. This is because the amalgamated Act fails to prescribe the principles on which and the manner in which reasonable compensation for the acquisition of their property is to be determined and given within a reasonable time and to provide access to court to determine the amount of compensation to which they are entitled and to enforce their rights to compensation. They contend further that to the extent that the 2011 Act purports to operate

retroactively to the commencement of the 2009 Act, it reverses the decision of this court in ***BCB v Attorney General*** and accordingly violates the separation of powers doctrine. They contend as well that the re-acquisition of their property was not for a public purpose, was disproportionate and arbitrary and carried out in breach of their constitutional right to be heard. To the extent that the 2011 Act provides that the Minister may choose not to accord them that right, they say finally that the Act to that extent is unconstitutional and void.

Principles on which and the Manner in which reasonable compensation is to be given

[160] Section 71(1) of the 2011 Telecoms Acquisition Act is in all material respects identical to section 70 of the 2011 Electricity Acquisition Act, which, I have held, does not comply with section 17(1)(a) in the Constitution. The amalgamated 2009 and 2011 Acts would accordingly suffer a similar fate.

[161] This, by itself, would render the amalgamated Act constitutionally deficient in failing to provide the principles on which the compensation is to be paid within a reasonable time. But Mr. Pleming and Lord Goldsmith have pinpointed other ways in which section 71 of the amalgamated Acts fall short of what is required and in the interest of resolving as many issues as possible for future guidance, it is important that these additional challenges should be examined.

[162] Section 71(4) provides that the compensation may be paid "either in a sum of money, or subject to the approval of the Court, by the issue of Treasury Notes in the manner provided in subsection (5) of this section." Subsection 5 provides that:

> "Subject as aforesaid, the compensation may be paid by the issue to the claimant of one or more Treasury Notes to an amount equal to the amount of compensation, and any Treasury Note so issued shall –
> (a) be redeemable within a period not acceding five years from the date of issue;
> (b) bear interest at the rate paid by commercial banks in Belize on fixed deposits at the date of acquisition; and
> (c) Subject to paragraphs (a) and (b) above, be governed by the provisions of the Treasury Bills Act."

[163] Lord Goldsmith objects to the use of Treasury Notes as a 'manner' of payment of compensation because, he says, Belize Government bonds have been traded at substantially discounted levels and Belize's credit rating has "dropped to below junk bond status". This does not amount "in real terms to the value that the shareholders have lost" because the issue of Treasury Notes "effectively extends a line of credit to the Government for unreasonable periods of time."

[164] I do not accept that the issue of a Belizean Treasury Note to the value of the compensation awarded, even assuming Belize's poor credit rating, cannot secure the payment of reasonable compensation within a reasonable time. This court has accepted that payment in full immediately upon the determination of the amount to be paid may not be practical "given the exigencies of government and the many other demands on the public purse." There is accordingly nothing wrong in providing that payment will be made in full at some reasonable time in the future. Treasury Notes are payable at par at a date not less than one year from the date of issue (s. 7(2) of the Treasury Bills Act). That is not, ex facie, an unreasonable period of time for the payment in full of an amount due as compensation. The fact that Belizean Treasury Notes may be considered junk bonds and may only be traded at discounted levels is largely irrelevant. At the date of maturity, the full value of the Note must be paid. The property owner whose property has been acquired loses nothing. Whether he chooses to trade his Note for less than par prior to maturity, is a matter for him.

[165] The real question, therefore, is how long after issue the Note may be redeemed. A period of ten years has been held to be unreasonable. On the other hand, a period of five years for the payment in full of compensation awarded may not be unreasonable, depending upon how large the sum awarded is, and whether the maturity dates are staggered over the period of five years such that the sum in effect is paid in instalments. For smaller sums, it would be unreasonable to provide for payment in full over a full five year period. It is therefore possible to conceive of a scheme of payment of Treasury Notes with staggered maturity dates over a five year period, with payment in full for smaller sums over a shorter period of time, and payment in full for larger sums being finally made with the maturity of the last 5 year Treasury Note. The trick is to provide in

clear terms what sums would qualify for payment over shorter periods and what sums over a full five year term. It is of course not possible in a vacuum to attempt to match particular amounts of compensation with what might be considered to be a reasonable time for payment, given that the exigencies of Government cannot be known or predicted. The most that can be done is to provide guidelines but to emphasise the need for clarity and certainty. There is no reason why, in principle, payment by Belizean Treasury Notes cannot fit the bill, and Lord Goldsmith's submission to the contrary is rejected.

[166] I would add one rider to this. While payment by Treasury Notes is not in principle objectionable, the small size of the compensation payable may be such as to make it unreasonable to require the property owner to wait a full year for payment. In such a case, payment by Treasury Notes would be unreasonable. This underscores the need, in the interests of certainty of payment, to fix the quantum of compensation which is payable over a shorter period of time, reserving an instalment scheme for more substantial awards of compensation.

[167] Mr. Pleming attacked the use of Treasury Notes from a different angle. He pointed out that under section 3(1) of the Treasury Bills Act, the Finance Secretary, when authorised by the Minister to issue Treasury Bills and Treasury Notes, may issue such Bills and Notes "within the terms of the authority and subject to any directions given by the Minister". This, he says, means that the Minister could include terms which render the Treasury Notes "incapable of constituting reasonable compensation within a reasonable time." This is compounded by the fact no rules here have been made by the Minister for the form which Treasury Notes are to take, as has been done in relation to Treasury Bills. Accordingly, the form, terms and contents, of Treasury Notes "fall completely in the direction of the Minister of Finance."

[168] He noted as well that under section 3(2) of the Treasury Bills Act, the principal sums represented by any Treasury Notes outstanding at any one point in time shall not exceed in aggregate the sum of $25 million, but that the Minister could, with the approval of the House of Representatives, authorise an increase in that amount. Where, therefore, the quantum of compensation payable for the acquisition of property

is such that, taken together with outstanding Treasury Notes, the maximum permissible aggregate principal sum of outstanding Treasury Notes is exceeded, the approval of the House of Representatives would be needed, which would introduce uncertainty as to when exactly Treasury Notes might be issued in satisfaction of compensation awarded and impact upon whether payment would be within a reasonable time.

[169] These two factors made the precise time when compensation would be paid dependent upon the discretionary exercise of executive and legislative power and for this reason payment by Treasury Notes was inherently inconsistent with section 17(1).

[170] There is much force in Mr. Pleming's submissions but it only gains traction where the payment of compensation by Treasury Notes is part of a scheme whereby payment may be made, with the approval of the Court, by Treasury Notes without further control. Where, however, the time when payment is to be made upon maturity of Treasury Notes is fixed by the acquisition legislation itself, any element of executive or legislative discretion is eliminated. Thus, for example, a provision which requires that compensation be paid by Treasury Notes of varying maturity dates, such that full payment is completed within, say, a period of three years appropriate to the size of the quantum of compensation, there is little which the Minister can do to affect the statutory timetable for payment. Similarly, where the legislature authorises the payment of compensation by Treasury Notes, this would constitute legislative authorisation in advance for exceeding the maximum amount permitted for outstanding Treasury Notes.

[171] I should make clear, as Lord Goldsmith has warned, that a scheme for the payment of compensation by instalments by the issue of Treasury Notes on the dates the instalments are due, with maturity dates varying from one year to five years, might inevitably result in full payment not being made until after the outer limit of five years which, as I have held, might be reasonable depending upon the size of the compensation awarded. Such a scheme would clearly not pass constitutional muster.

[172] Mr. Pleming next submits that permitting the payments of compensation by instalments in circumstances where "the exigencies of the public finances do not allow the immediate payment to the claimant of the compensation awarded by the Court", as

provided for in section 71(3), is contrary to section 17 in that making payment contingent upon the Government's ability to pay means that compensation need not be paid in full within a reasonable time and thereby introduces inherent uncertainty in the process. Mr. Pleming's argument was made in the context of a provision which empowers the Supreme Court to determine when payment is to be made out, having regard to the stated exigencies. He is right to say that such a provision introduces uncertainty as to exactly when payment would be made and it is for this reason, in part at least, that I have held that a similar provision in the 2011 Electricity Acquisition Act is inconsistent with section 17(1). But to the extent that Mr. Pleming would have us strike down any provision which does not provide for immediate payment, I am afraid that that ship has sailed given that this Court has held in ***BCB v Attorney General*** that the payment of compensation by instalments may in fact be justified because of Government's inability to pay immediately in full. The question in every case would be whether the period of time over which the instalments are to be made and the amount of the instalments, bearing in mind the size of the debt owed, constitutes payment within a reasonable time. In this regard, I do not consider that a scheme which results in the payment of compensation which is substantial over a longer period of time, than would be the case where the compensation payable is a smaller amount, is discriminatory for the very reason that the payment of a larger sum throws up different considerations and would impact upon what would be considered to be a reasonably practicable period of time over which payment is to be made.

[173] `Both Mr. Pleming and Lord Goldsmith complain that the provision in section 71(5)(b) that the Treasury Notes should bear interest at the rate paid by commercial banks in Belize on fixed deposits at the date of acquisition would not result in reasonable compensation, a submission which, it seems to me, would apply equally to section 68(1) of the 2009 Telecoms Acquisition Act (which was not previously challenged) and section 67(1) of the 2011 Electricity Acquisition Act (about which Fortis made no complaint), both of which require the Court to be guided by the rate paid by commercial banks in Belize on fixed deposits at the date of acquisition, in deciding what interest should be added to the compensation awarded. They both claim that fixing the rate of interest in this way is inconsistent with this Court's finding in ***San Jose Farmers***,

adopting the dicta of St. Bernard JA in ***Grande Anse Estates Limited v Governor General of Grenada*** (Eastern Caribbean Court of Appeal, CA. 3 of 1976, 7 October 1977) at p. 19 as follows:

> "In my opinion, the interest payable must be an interest at a rate applicable to give the expropriated owner a just equivalent of his loss at the time of the expropriation and not a rigid and fixed rate whatever his loss maybe."

In ***San Jose Farmers*** and ***Grande Anse Estates***, a fixed rate of interest of 6% and 5%, respectively, was held to be insufficient.

[174] Both Mr. Pleming and Lord Goldsmith criticise the formula for interest used on the ground that it results in an inflexible, one-size-fits-all rate, and accordingly may not be adequate in a particular case to compensate for the property owner's actual loss. Legal J rejected this argument because, in his view:

> "In the absence of evidence of the specific rate of interest payable, the court would be engaged in conjecture to hold that it does not amount to reasonable compensation. Interest tied to the rate of interest paid by, not one bank, but by commercial banks in Belize, would seem prima facie reasonable, rather than stating a specific figure in the legislation, not knowing from whence it came or the basis for it."

In addition, Mr. Pleming criticises the formula for fixing the rate of interest to that applicable on the date of acquisition, given that a significant period of time will have elapsed between the date of acquisition and the date the amount due as compensation is determined, with the result that the rate of interest prevailing on the date of acquisition might be wholly incapable of providing adequate compensation. Lord Goldsmith, for his part, complains that the rate of interest on fixed deposits with commercial banks is inadequate because fixed deposit accounts tend to be a safe place for investors to hold money and the rates accordingly tend to be low.

[175] I find that there is merit in all of these criticisms. Interest is traditionally awarded as compensation for depriving a person of money to which he is entitled. A property owner whose property has been compulsorily acquired becomes entitled to reasonable

compensation as at the date of acquisition. But inevitably, it will be some time before that amount is finally determined and full payment received. Had he or she received the compensation due on the date of acquisition, the money could have been invested. The safest such investment would no doubt be a fixed deposit and accordingly the amount lost would be, at least, the interest which such an investment might bring. As such, the interest payable on short-term investments has been used as a guide in personal injury cases – ***Jefford v Gee*** [1970] 2 Q.B. 130. On the other hand, the possibility exists that a property owner whose compulsorily acquired property was used as a source of income (an apartment building, for example), might choose to borrow money at commercial lending rates to replace his income earning asset, pending the determination and payment of reasonable compensation. For such a person, a rate of interest tied to that paid on fixed deposits would not compensate him for his loss. In commercial cases, for example, the rate of interest awarded may be determined by reference to the rate at which the plaintiff can borrow money, on the basis that restitutio in integram is the rationale for the award of interest – ***The Caribbean Civil Court Practice*** (Lexis Nexis, 2008), pp. 189-190. It is accordingly clearly not appropriate to fix one rate for all property owners, irrespective of the type of property acquired or the use to which it was previously put. Neither is it appropriate to fix it by reference only to that paid on risk-free fixed deposits, which, rather, ought to be the minimum which should be awarded.

[176] Likewise, it is not appropriate to limit the court's point of reference to rates in existence on the date of acquisition. Interest rates may change over the period of time it takes to determine what reasonable compensation is, with the possibility that the Government might take advantage of higher interest rates available after the date of acquisition and pocket the difference between interest earned on the property owner's compensation at the rate paid on the date of acquisition and the increased rates paid later on. Moreover, if the Government is entitled to pay by instalments, it is only fair that in determining what interest should be paid until full payment is actually made, interest rates applicable at the date the award is made should be taken into account. In my view, therefore, limiting the court's discretion in its award of interest, both as part of the compensation awarded or as to the rate to be paid on Treasury Notes, to fixed deposit

rates applicable on the date of acquisition, does not provide the property owner with reasonable compensation and violates section 17(1)(a).

[177] Mr. Pleming contends lastly that payment by Treasury Notes, which must be paid in Belizean dollars, does not amount to reasonable compensation to say, a foreign bank which has made a loan in US dollars. A foreign property owner, he submits, might suffer loss in the event he has to convert his compensation received in Belizean dollars into a foreign currency. Legal J. rejected this argument in the following terms:

> "Section 17 of the Constitution does not state the currency in which compensation is to be paid. The makers of the Constitution of Belize could not have intended that compensation for property located in Belize, and acquired in Belize, has to be paid, for instance, in US dollar or some other foreign currency, and not the Belizean dollar, because the Constitution of Belize is operative within the territory of Belize as defined in the Constitution, and to exclude the Belizean dollar as an effective means of payment for property acquired in Belize would be denying, in my view, the intent of the Constitution."

[178] I agree with the trial judge. Different considerations might apply if a loan which is acquired is required to be repaid in a foreign currency.

Right of access to the Court

[179] Lord Goldsmith submits that section 71(2) of the 2011 Act contravenes the constitutional right guaranteed by section 17(1)(b)(iii) and (iv) to access to court for the purpose of determining the amount of compensation and for enforcing the right to such compensation. Section 71(2) provides that:

> "The Financial Secretary shall be entitled to deduct from any compensation which may have been awarded such sums as are due to the Government as arrears of any taxes, duties and charges, and all other sums whatsoever, which are owed to the Government by the person entitled to compensation."

He submits that under Belizean law, tax becomes due upon the assessment of tax by the relevant authorities. In practice, therefore, the constitutional right to have the court determine and enforce reasonable compensation can be circumvented by the simple

expedient of assessing tax due and deducting it from the sum owed as compensation for the expropriated property.

[180] Lord Goldsmith stopped short of saying that section 17(1)(b) would be violated if the Government set off tax or other debts which was not disputed to be owing by the property owner. What he appears to be concerned about, though he refrained from saying so expressly, is the Government seeking to thwart the right to receive reasonable compensation within a reasonable time by wrongly assessing tax to be due and deducting same from compensation payable and thereby postponing the payment of compensation for so long as it would take the property owner to successfully challenge the assessment in a court of law. Were such a manoeuvre to be perpetrated, I would unhesitatingly hold the section 17 right to have been violated. But it is clear that section 71(2) ought not to be interpreted in such a way as to permit such abuse. Rather, consistent with the right to be paid reasonable compensation within a reasonable time, section 71(2) ought to be interpreted as permitting the deduction only of those debts owed to government which are not genuinely disputed by the property owner. So interpreted, section 71(2) does not infringe section 17 of the Constitution.

The right to be heard

[181] It is not disputed that before he issued the 2011 Telecoms Acquisition Order, the Minister did not inform BCB or the Trustees that he was considering the compulsory re-acquisition of their respective properties and did not give them an opportunity to say why he should not do so. In fact, the Minister ignored their letter dated 1 July 2011 asking specifically for a hearing. Legal J. held that the Minister was not required to give them a hearing because section 63(12) of the amalgamated Acts provides that "It shall not be necessary for the Minister to give the interested person(s) whose property is intended to be acquired an opportunity to be heard before making an order under this section."

[182] Mr. Pleming and Lord Goldsmith both contend, however, that section 63(12) is itself inconsistent with their clients' constitutional right to be heard and is accordingly

null and void. They both locate the right in the protection afforded in section 3(d) of the Constitution against arbitrary deprivation of property. As Conteh CJ said in ***Barry Bowen v The Attorney General of Belize*** (Claim No. 445 of 2008, 13 February 2009), *para 36*, "there will be arbitrary deprivation of property where due process is denied or unavailable." The right to procedural fairness is also encompassed in the right to the protection of the law guaranteed by section 3(a) – ***Attorney General of Barbados v Joseph and Boyce*** (CCJ Appeal No. CV 2 of 2005, 8 November 2006), para 64. To the extent, therefore, that section 63(12) permits the Minister to decide not to give the owner of property he proposes to acquire an opportunity to be heard on the question, it is inconsistent with section 3(a) and (d) of the Constitution and void.

[183] Legal J avoided this result because, in his view, this Court had held in ***BCB v Attorney General*** that a right to be heard is conferred only in the absence of an express statutory provision to the contrary. I am satisfied that he misread this Court's decision. Carey J.A. was quite clear that the property owners, who were individually affected by the proposed expropriation, were entitled to be heard, and expressed no reservation to this finding (para 263). It appears that Legal J. based his interpretation of this Court's finding on the following passage from the judgment of Morrison JA (para 198):

> "No reason has been advanced in this appeal why we should prefer the English position, that exempts legislative acts of all kinds, whether primary or delegated, from the application of the *audi alteram partem* principle, over the implication of a rule that would require, in the absence of express contrary statutory provision, that whenever a public official or body is empowered to do an act or take a decision that may prejudicially affect an individual in his constitutionally protected property rights, he should be entitled to a hearing before the act is done or the decision is taken."

[184] But it is clear that what Morrison JA was describing in this passage was the implication which the common law would make in relation to the exercise of a statutory power which affects the rights or interests of an individual. It is trite law that the common law right to natural justice may be excluded by an express statutory provision. What Morrison JA did not consider was whether the common law right to be heard before the Minister decides to acquire an individual's property is protected by the

Constitution and cannot be displaced by a statutory provision. In any event, in ***Attorney General of Belize v Samuel Bruce***, this Court, differently constituted, held that the unanimous view of this Court in ***BCB v Attorney General*** was that “in any case in which a decision "is calculated to cause particular prejudice to an individual or particular group of individuals, the person has a right to be heard” ". (para 79).

Retroactivity

[185] The 2011 Telecoms Acquisition Act declared itself to take effect from 25 August 2007. The 2011 Telecoms Acquisition Order also declared that it shall take effect from 25 August 2009. This was the same date from which the acquisition of the identical property was to have taken effect under the 2009 Telecom Acquisition Act and Orders. If effective, this would mean that the property acquired under the 2011 Telecoms Acquisition Order, would be taken to have been lawfully acquired since 25 August 2009 and would in effect nullify the orders made by this court in ***BCB v Attorney General*** declaring the 2009 Telecoms Acquisition Order to be unlawful and void.

[186] Both Mr. Pleming and Lord Goldsmith contend that the retrospective operation of the 2011 Telecoms Acquisition Order would accordingly violate the separation of powers doctrine and is contrary to the rule of law. I agree. The Constitution of Belize vests judicial power in the Supreme Court of Belize. This includes the power bestowed by section 20 of the Constitution to grant relief for the violation of fundamental rights and freedoms. Subject only to reversal on appeal, a decision of the Supreme Court constitutes a final determination of the rights of the parties to litigation. The power to resolve disputes in this way is an exclusive judicial power – see ***Nicholas v R*** (1998) 193 CLR 173, 201, per Toohey J.

[187] The National Assembly of Belize is entrusted with the power to make laws for the peace, order and good government of Belize. This is a plenary power and necessarily includes the power to alter the law as interpreted or declared by the Supreme Court – see ***R v Davis*** [2008] 1AC 1128. What the legislature is not empowered to do is to exercise judicial power. That is the exclusive preserve of the judiciary. The legislative annulment of a final judgment of the Supreme Court is nothing less than the assumption

of judicial power. In ***Plant v Spenthrift Farm Inc.*** (1995) 514 US 211, 225, the United States Supreme Court quoted with approval the following passage from the seminal text on Constitutional Limitations by Thomas Cooley, which, in my judgment, expresses succinctly the limitation on the legislative power of the National Assembly of Belize.

> "If the legislature cannot thus indirectly control the action of the courts, by requiring of them a construction of the law according to its own views, it is very plain it cannot do so directly, by setting aside their judgments, compelling them to grant new trials, ordering the discharge of offenders, or directing what particular steps shall be taken in the progress of a judicial inquiry."

See also ***Howard v Commissioner of Public Works in Ireland*** [1994] IR 394.

[188] Legall J accordingly erred when he found that the reversal of a decision of the Supreme Court by the legislature could not amount to a breach of the separation of powers principle. In so doing, he appears to have confused the legislative reversal of a principle of law declared by a court of law, which is permissible, with the legislative reversal of the final declaration by a court of law of the rights of the parties to a case before it, which is not.

[189] To the extent, therefore, that the 2011 Telecoms Acquisition Order declares that the acquisition took effect from any time prior to the delivery of the judgment of this Court in ***BCB v Attorney General***, it violates the separation of powers doctrine and is of no effect.

Public Purpose

[190] In the 2011 Telecoms Acquisition Order, the Minister declared that the property specified in the First Schedule to the Order was being acquired for the public purposes of restoring the control of the telecommunications industry to Belizeans, providing greater opportunities for investment to socially-oriented local institutions and the Belize society at large and advancing the process of economic independence of Belize with a view to bringing about social justice and equality for the benefit of all Belizeans. As has been noted previously, the property acquired under the 2011 Order is the same property which the Minister intended to acquire under the 2009 Order. This Court held not only

that the property had not been acquired for the public purpose stated in the 2009 Order, but that it had in fact been acquired for the illegitimate purpose of bringing to an end Lord Ashcroft's campaign "to subjugate an entire nation to his will." The purpose for which the property was stated to have been acquired in 2009 was to stabilise and improve the telecommunications industry and to provide a reliable service to the public at affordable prices in a harmonious and non-contentious environment. Over the course of the ensuing two years, therefore, it must be taken that, in the Minister's mind at least, there was a new public purpose which justified the reacquisition of the property which this court held to have been unconstitutionally acquired in 2009. It is, of course, possible that the social, economic, cultural or legal landscape may have changed in the meantime in such a way as to throw up a new, genuine public purpose to justify the re-acquisition of the property. But in the light of this Court's definitive finding that the property was acquired in 2009 for an illegitimate purpose, the onus was clearly on the Minister to demonstrate by evidence or argument that when he made the 2011 Order, there were in fact different circumstances which justified his Order. Indeed, when introducing the 2011 Act to the Assembly, the Prime Minister noted that this court had held that the Minister had not provided sufficient compelling evidence of the existence of a public purpose for the 2009 acquisition and that he was certain that "in making his new Order, the public purpose choices of the Minister now will be rooted in circumstances and references of a nature that will still the doubts of even the most censorious of courts." And Mr Barrow argued that the fact that the acquisition in 2009 was carried out for one purpose does not mean that he could not do the same thing in 2011 for a different purpose. He suggested that the law would pay heed to remorse, no doubt when genuinely tendered. But no attempt was made to take the Supreme Court into the Minister's confidence and to reveal the circumstances under which the new acquisitions were made such as would satisfy the court that the illegitimate purpose which this court had earlier identified was not longer operative. Lord Goldsmith submitted that, in these circumstances, it must be that the Minister had not discharged the burden cast on him to establish the existence of a public purpose for the re-acquisition. I agree with him and for this reason as well the 2011 Telecoms Order must be held to be invalid.

Taking Stock

[191] Thus far, I have found that the 2011 Telecoms Acquisition Act did not revive the 2009 Telecoms Acquisition Act and accordingly did not empower the Minister to acquire property, whether for a public purpose or otherwise. I have held as well that even if the two Acts were to be treated as an amalgamation, they would be inconsistent with section 17(1) of the Constitution. I have also held that the 2011 Electricity Acquisition Act suffers a similar fate. In the result, the Minister was not empowered in either case to issue orders acquiring the property belonging to BCB, the Trustees and Fortis. I have held further that, on the assumption that the power to acquire property was validly created, the Acquisition Orders were not issued for public purposes or the acquisitions were disproportionate and arbitrary and were effected in breach of the property owners' right to be heard. Ordinarily, this would naturally lead to an order declaring the acquisition to be unlawful and in breach of the property's owner's constitutional rights. But the question which now arises is whether the Eight Amendment Act has either cured the illegalities or by itself has effected the lawful acquisition of BCB's, the Trustees' and Fortis' respective properties.

The Effect of the Eight Amendment

[192] It is first necessary to determine the effect of the various provisions of the Eight Amendment Act. Section 4 of the Eight Amendment Act inserts a new Part VIII in the Constitution. Part VIII consists of three sections. Section 143 is a definition section. Section 144 provides as follows:

> "(1) From the commencement of the Belize Constitution (Eighth Amendment) Act, 2011, the Government shall have and maintain at all times majority ownership and control of a public utility provider; and any alienation of the Government shareholding or other rights, whether voluntary or involuntary, which may derogate from Government's majority ownership and control of a public utility provider shall be wholly void and of no effect notwithstanding anything contained in section 20 or any other provision of this Constitution or any other law or rule of practice:

> Provided that in the event the Social Security Board ("the Board") intends to sell the whole or part of its shareholding which would result in the Government shareholding (as defined in section 143) falling below 51% of the issued stock capital of a public utility provider, the Board shall first offer for sale to the Government, and the Government shall purchase from the Board, so much of the shareholding as would be necessary to maintain the Government's ownership and control of a public utility provider; and every such sale to the Government shall be valid and effectual for all purposes.
>
> (2) Any alienation or transfer of the Government shareholding contrary to subsection (1) above shall vest no rights in the transferee or any other person other than the return of the purchase price, if paid.

The term 'public utility provider' is defined by section 143 as including Belize Electricity Limited and Belize Telemedia Limited. The term 'Government shareholding' is deemed to include any shares held by the Social Security Board. And the phrase "majority ownership and control" is defined as meaning:

> "the holding of not less than fifty one centum (51%) of the issued share capital of a public utility provider together with a majority in the Board of Directors, and the absence of any veto power or other special rights given to a minority shareholder which would inhibit the Government from administering the affairs of the public utility provider freely and without restriction."

[193] It seems clear to me that section 144 does not effectuate the actual acquisition of the shares held by anyone in Belize Electricity or Belize Telemedia. What it does, and this is all that it does, is to declare the Government of Belize's right to hold not less than 51% of the issued share capital in Belize Electricity and Belize Telemedia, the assumption being that steps will be taken lawfully to compulsorily acquire the shareholding of existing shareholders, or even to cause the company to offer additional shares for sale, such that the Government would hold the required 51% shareholding.

[194] Section 145 provides as follows:

> "(1) For the removal of doubts, it is hereby declared that the acquisition of certain property by the Government under the terms of the –

(a) Electricity Act, as amended, and the Electricity (Assumption of Control Over Belize Electricity Limited) Order, 2011 (hereinafter referred to as the "Electricity Acquisition Order"); and

(b) Belize Telecommunications Act, as amended, and the Belize Telecommunications (Assumption of Control Over Belize Telemedia Limited) Order, 2011, (hereinafter referred to as "the Telemedia Acquisition Order"),

was duly carried out for a public purpose in accordance with the laws authorizing the acquisition of such property.

(2) The property acquired under the terms of the Electricity Acquisition Order and the Telemedia Acquisition Order referred to in subsection (1) above shall be deemed to vest absolutely and continuously in the Government free of all encumbrances with effect from the date of commencement specified in the said Orders.

(3) Nothing in the foregoing provisions of this section shall prejudice the right of any person claiming an interest in or right over the property acquired under the said Acquisition Orders to receive reasonable compensation within a reasonable time in accordance with the law authorizing the acquisition of such property."

[195] In the side note to section 145(1)(a), reference is made to the 2011 Electricity Acquisition Act and the 2011 Electricity Acquisition Order, the first of which I have held to be in inconsistent with the Constitution and consequently void, and the second of which, as a consequence, is likewise of no legal effect. The sidenote to section 145(1)(b) similarly refers to the 2009 Telecoms Acquisition Act, which this court had previously held to be void, to the 2011 Telecoms Acquisition Act, which I have held to be ineffective in bringing the 2009 Telecoms Acquisition Act back to life or in empowering the Minister to acquire property, and to the 2011 Telecommunications Acquisition Order, which I have held to have been issued unlawfully pursuant to a power which must be treated in law as never having existed.

[196] At the time the Eight Amendment was passed the 2009 Telecoms Acquisition Act had already been declared void by this Court. Properly construed, the 2011 Telecoms Acquisition Act did not revive the 2009 Telecoms Act and did not empower anyone to acquire property on behalf of the Government of Belize. As a matter of fact, therefore,

there was no law authorising the acquisition of the property purportedly acquired under the 2011 Telecoms Acquisition Order. The declaration in section 145(1) that "the acquisition of certain property by the Government under the terms of" the Telecoms Act, as amended and the 2011 Telecoms Acquisition Order, "was duly carried out for a public purpose in accordance with the laws authorising the acquisition of such property" accordingly has no legal meaning or effect since there was in fact no law authorising the acquisition of the property purported to have been acquired thereunder.

[197] The 2011 Electricity Acquisition Act, on the other hand, albeit inconsistent with the Constitution, as I have found, had not yet been declared as such by the time the Eight Amendment was passed. Yet still, in accordance with ***Akar***, it is to be treated as non-existent, with the result that, in relation to the property purported to have been acquired under the 2011 Electricity Acquisition Order, section 145 (1) is likewise meaningless.

[198] For the sake of completeness, I should add that on the assumption that the reference to "the laws authorising the acquisition of such property" can be taken properly to be a reference to the 2011 Electricity Acquisition Act and the amalgamation of the 2009 and 2011 Telecoms Acquisition Acts, section 145(1) would face this further fatal obstacle. On the assumption that both pieces of legislation are valid, it would have to be taken that they both secure to persons whose property is to be acquired, the right of access to the Supreme Court for the purpose of determining whether the acquisition was duly carried out for a public purpose. The declaration in section 145(1) that the acquisitions were "duly carried out for a public purpose in accordance with the laws authorising the acquisition of such property," would therefore constitute a usurpation by the legislature of power which is vested in the Supreme Court and indeed confirmed by section 145(1) itself. It is not so much a direction to the court as to the manner in which it was to exercise its jurisdiction, as a purported exercise of judicial power by the legislature itself.

[199] Section 145(2), in my judgment, suffers a similar fate. The property which is deemed to vest absolutely and continuously in the Government is that property 'acquired' by the terms of the 2011 Electricity Acquisition Order and the 2011 Telecoms Acquisition Order. But given that these orders are to be treated as having had no legal effect, there was in fact no property acquired thereunder and therefore no property to vest in the Government.

[200] Mr. Barrow argued the words "property acquired" in section 145(2) should be interpreted as "property described in", thereby avoiding the difficulties posed by the fact that the Acquisition Orders are to be treated as having no legal effect. He submitted that the Acquisition Orders actually do not by themselves effect the acquisition of property. Rather, it is the provisions of the corresponding Acquisition Acts, which in terms vest the property to which the Acquisition Orders relate, that do the acquiring. The suggestion in section 145(2) that the Acquisition Orders 'acquired' the property is accordingly to be treated as an error on the part of the draftsperson, but to give effect to the legislature's intention, the words "property acquired" should be given the meaning he puts forward.

[201] When the terms of the Acquisition Acts are examined, however, it turns out that Mr. Barrow's argument is based on a false premise. In both Acts, the Minister is empowered "by Order published in the Gazette" to "acquire for and on behalf of the Government, all such property as he may … consider necessary to take possession of ..." (s. 63(1) of the 2009 Telecoms Acquisition Act and s. 62(1) of the 2011 Electricity Acquisition Act). They also both provide that: "Upon publication in the Gazette of the order made pursuant to subsection (1) above, the property to which it relates shall vest absolutely in the Government" (s. 63(2) of the 2009 Telecoms Acquisition Act and s. 62(3) of the 2011 Electricity Acquisition Act). Both Acts treat the property as being acquired under the Order made by the Minister, with the property to which the Orders relate being vested absolutely in the Government by virtue of the Acts themselves.

[202] Mr. Barrow submitted further that, viewed in the round, the Eight Amendment Act was enacted to put the acquisitions under the Electricity and Telecoms Acquisition Acts beyond doubt, to validate the acquisitions as it were. He submitted that section 145(2) in effect is a 'deeming' provision which vested property in the Government of Belize and was not dependent for its effectiveness upon there having been a lawful acquisition under the Acquisition Orders. The acquisitions referred to in section 145(2), in other words, were acquisitions which had occurred in fact, if not in law. Section 145(2), therefore, did not assume the validity of the prior acquisitions.

[203] The problem with this submission is that section 145, in terms, has hitched its wagon to the validity of the Acquisition Act and the Orders made thereunder. Thus, section 145(1) and 145(3) declared the acquisitions to have been carried out for a public purpose and confirmed the right of any person claiming an interest in or right over any property acquired under the Acquisition Orders to receive reasonable compensation "in accordance with the law authorising the acquisition of such property." This could only have been a reference to the Electricity and Telecoms Acquisition Acts. The assumption was that these laws were valid and would govern the acquisitions referred to. The reference to "the property acquired under the terms of the Electricity Acquisition order and the Telemedia Acquisition Order" in section 145(2) likewise assumes the existence of a valid Order, and therefore a valid acquisition.

[204] In the result, therefore, the Eight Amendment does not validate the unlawful acquisition of the property belonging to BCB, Dean Boyce, the BTL Trustees and Fortis and accordingly, prima facie, appropriate relief ought to be granted.

The Eight Amendment and inconsistency with section 17(1)

[205] On the assumption that the effect of section 145 is indeed to achieve a taking of the complainants' respective properties, the further question which arises is whether section 145 is in any event inconsistent with section 17(1) of the Constitution, and if so, the effect of such inconsistency.

[206] There is no doubt that section 145 does not contain the fasciculus of matters which section 17(1) mandates that a law providing for the compulsory acquisition of property must contain. It fails to prescribe the principles on which and the manner in which reasonable compensation is to be determined and given within a reasonable time; and it fails to secure a right of access to court to establish the existence of the complainants' right or interest in the property acquired, to determine whether the acquisition was for a public purpose, to determine the amount of compensation payable and to enforce the right to compensation. All it does do is to declare that property is to be vested in the Government of Belize, that reasonable compensation is to be paid within a reasonable time, and directly contrary to section 17(1), declares that the acquisitions are for a public purpose. Putting to one side consideration of the amendment to the supreme law clause and section 69 effected by the Eight Amendment Act for the moment, there is also no doubt in my mind that, ordinarily, even an Act altering the Constitution, which compulsorily acquires property and which is passed in conformity with section 69, but is nevertheless inconsistent with section 17(1), would for that reason be invalid. I say so for the following reasons.

[207] Section 17(1) of the Constitution envisages that property may be compulsorily taken possession of or acquired by a public authority acting under a law which has the attributes set out in sub paragraphs (a) and (b), or by a law itself which has those attributes. But section 17(1) is not expressed merely in permissive language. In relation to the acquisition of property by a law, it prohibits the compulsory acquisition of any interest in or right over property of any description, except by a law that prescribes the matters listed in subsection 1(a) and secures the right of access to court for the purposes listed in subsection 1(b). Section 17(1) is therefore a command issued directly to the legislature not to acquire property, except by a law described therein. Section 17(1) could therefore just a well be read as providing that “no law shall compulsorily acquire any interest is or right over property of any description”, unless it contains the matters set out in subparagraphs (a) and (b). So read, section 17(1) limits the power of the National Assembly to make any law that it might wish to. To be sure, the compulsory acquisition of property is a subject matter which is not altogether

excluded from its consideration. But the impact of section 17(1) is that the only type of law which the National Assembly may enact which effects the compulsory acquisition of property is one which conforms to the description of a law set out in section 17(1).

[208] Moreover, the limitation of the power of the National Assembly to enact laws which compulsorily acquire property is not restricted in section 17(1) only to laws which are passed by simple majority. I say so because section 17(1) prohibits the compulsory acquisition of property except by or under a law which contains certain features, without limiting its prohibition to laws passed other than in accordance with section 69. The word 'law' in section 17 is not restricted to any particular type of law or any law passed by a particular procedure. Section 17(1) is to be interpreted generously and the prohibition on certain types of law is to be interpreted as including any law passed by parliament, including a law passed under section 69. Thus, to be valid, any law which provides for the compulsory acquisition of property must conform to section 17(1), whether or not passed under section 69. No law may compulsorily acquire property unless it conforms with section 17(1). To the extent therefore that the Eight Amendment Act purported to acquired property without complying with section 17, it was prima facie a law which the National Assembly was not empowered to enact, even by the special procedure under section 69.

[209] I derive support for these conclusions from the decision of the Privy Council in ***Akar***. In that case, it will be recalled, even though the Act which purported to amend section 1 of the Sierra Leone Constitution was passed following the procedure needed to alter the constitution, it was nevertheless held to be invalid because it derogated from the non-discrimination clause in the Sierra Leone constitution which it did not purport to amend. Similar to section 17(1), the non-discrimination clause in the Sierra Leone constitution provided that "no law shall make any provision which is discriminatory either of itself or in its effect." Lord Morris commented (p. 864):

> "It is to be observed that subsection (1) is direct and prohibitive: subject to certain exceptions "no law shall make any provision which is discriminatory." No provision which offends can therefore be valid."

[210] The Eight Amendment Act altered the Constitution by inserting section 145, but it left section 17(1) untouched, thereby creating an internal inconsistency between provisions of the Constitution. What it also left untouched was the complainants' rights under section 20 of the Constitution to complain that their rights under section 17(1) of the Constitution had been infringed. In my judgment, for so long as section 17(1) was left in its pristine form, it constituted a limitation on the powers of the National Assembly to acquire property, even following the special procedure under section 69.

[211] Mr. Barrow frankly conceded that if section 145 had been enacted in separate legislation which did not purport to alter the constitution itself, it would be void, even if it happened to have been passed with the majority needed to alter the Constitution. The fact that section 145 was deliberately put into the constitution itself, however, made a difference. He pointed out that the prohibition against laws acquiring property provided for in section 17(1) was subject to the many exceptions listed in section 17(2). There is of course no basis for challenging any of these exceptions on the ground that they are inconsistent with section 17(1). Given the Assembly's broad powers of alteration of the Constitution, there would be no basis either for challenging the creation of a new exception to section 17(1) under the procedure provided for alterations under section 69. Thus far, and subject to what I have to say below under the section entitled "Basic Structure Doctrine", I can find no fault with Mr Barrow's argument. But it is his next submission which is problematic. He submits that an alteration of the Constitution that has the effect of taking away rights stands on the same footing as an exception and accordingly, since it is part of the Constitution, it is unchallengeable. This is one of a piece with Mr Barrow's more general proposition that a constitutional amendment is, by definition, a part of the Constitution and is not to be considered an "other law" which, if inconsistent with the Constitution, is void to the extent of that inconsistency in accordance with the Supreme Law Clause.

[212] Mr Barrow's assumption, of course, is that any law passed in accordance with the procedures set out in section 69 and which actually purports to alter the Constitution, is, by dint of compliance with section 69, a provision of the Constitution, which for that

reason cannot be unconstitutional. He assumes, in other words, that the fundamental rights provisions of the Constitution cannot be interpreted as substantively limiting the Assembly's power to alter the Constitution. But I have found otherwise, at least in relation to section 17(1).

[213] I think it goes without saying that the Supreme Court of Belize is not empowered to declare one provision of the Constitution to be inconsistent with another provision of the Constitution null and void as a result. If there is a conflict between two provisions of the Constitution the Supreme Court will just have to do its best to devise a sensible construction of the inconsistent provisions. But where the National Assembly purports to alter the Constitution by including in it a provision which conflicts with an already existing provision of the Constitution, the Supreme Court is entitled to enquire whether the Assembly was empowered in the first place to alter the Constitution in this way. If it is empowered to alter the constitution to create what is in effect a conflict among the provisions of the Constitution, there would be no basis upon which the Supreme Court could declare the alteration to be unconstitutional. If it is not so empowered, on the other hand, the Supreme Court would be duty bound to so find, with the usual consequences which flow from a constitutional inconsistency. In other words, the National Assembly cannot rid itself of any prior constraint on its authority simply by obtaining a special majority under section 69.

The effect of the amendments to sections 2 and 69

[214] I have examined the validity of section 145 thus far without reference to the alterations made by the Eight Amendment Act to Supreme Law Clause and section 69. The question now is whether those alterations render a law passed without compliance with the substantive requirements of section 17(1) immune from challenge.

[215] Section 2 of the Constitution provides that

> "This Constitution is the supreme law in Belize and if any other law is inconsistent with the Constitution that law shall, to the extent of the inconsistency, be void."

Section 2 of the Eight Amendment introduces the following subsection to section 2.

> "(2) The words "other law" occurring in subsection (1) above do not include a law to alter any of the provisions of this Constitution which is passed by the National Assembly in conformity with section 69 of the Constitution."

[216] The Attorney General's argument is that the Eight Amendment Act, which compulsory acquires the property acquired by the 2011 Telecoms and Electricity Acquisition Orders, was passed in conformity with section 69 and accordingly is not an "other law" which can be held to be void because not in conformity with the Constitution.

[217] Being an exception to the general rule that laws inconsistent with the Constitution are void, subsection (2) must be interpreted narrowly. A reference to a law passed in conformity with section 69, therefore, must be interpreted as excluding any law which the National Assembly did not possess the power to pass, even with a section 69 majority. It refers, in other words, only to laws validly passed in conformity with section 69. It is worth repeating here what was said by the Caribbean Court of Justice in ***BCB Holdings Ltd v The Attorney General of Belize*** [2013] CCJ 5 (A5), at para 68:

> "The purported enactment of a law by a legislature that has no power to enact that law does not result in the creation of law. Such a "law" does not exist and never did, it is void ab initio."

Since the National Assembly did not have the power to enact those provisions of the Eight Amendment Act which compulsorily acquired the complainants' properties, they are to be treated as not having been enacted at all and not saved from invalidation by subsection (2).

[218] The amendment of section 69 requires more careful scrutiny. It provides that:

> "(9) For the removal of doubts, it is hereby declared 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."

To the extent that section 17(1) constitutes a substantive limitation on the National Assembly's power to alter the Constitution, it may be said that subsection 9 removes that limitation altogether, freeing the National Assembly to enact any law compulsorily acquiring property, without complying with section 17. If this is correct, it would mean as well that the National Assembly has freed itself of the restraint placed on it, for example, by section 16 of the Constitution which commands that "no law shall make any provision that is discriminatory either of itself or in its effect", thereby enabling the legislature to alter the constitution under section 69 by inserting provisions which impose disabilities or restrictions on, or accord privileges or advantages to members of the public because of their sex, race, place of origin, political opinions, colour or creed. Indeed it would mean as well that such disabilities could be imposed on specific named individuals under the guise of an alteration to the constitution. One would expect such a fundamental change in the powers of the National Assembly to be effected by the use of very clear language.

[219] To the extent that subsection 9 derogates from the protection afforded by the fundamental rights provision, it too must be construed narrowly. So construed, it is my view that the National Assembly is not to be taken as intending, without expressly saying so, to remove the limitation on its power which section 17 represents. I come to this conclusion for the following reasons.

[220] The National Assembly of Belize is not intended to be a legislature of unlimited power. Indeed, its power to make laws for the peace, order and good government of Belize is expressly made subject to the provisions of the Constitution. It is worth repeating in this context what Lord Pearce said nearly a half century ago in ***Bribery Commissioner v Ranasinghe*** [1965] AC 172, 197: "a legislature has no power to ignore the conditions of law-making that are imposed by the instrument which itself regulates its power to make law." Of course, subject to the existence of provisions of the constitution which are unalterable, which will be considered below, section 69 does empower the National Assembly by a special majority to alter any provisions of the Constitution, including those, such as section 17(1), which place substantive limitations on its power. Indeed, the National Assembly may alter section 69 itself, as long as it is

passed with the majority provided for in section 69(3), and presumably may even remove the requirement that the Constitution may only be altered by a special majority. But until the substantive or procedural limitations on its power are relaxed by such an alteration, the National Assembly remains constrained in what it may do, even with a special majority.

[221] In the Eight Amendment Act, the National Assembly made no attempt to alter section 17 or any of the other provisions of PART II of the Constitution which impose similar substantive limitations on its power. At the time the Eight Amendment Act was enacted, there was no doubt as to the restriction which section 17(1) placed on its power. This had been explained by this Court in the ***San Jose Farmers*** case as long ago as 1991, and was repeated just three months previously in ***BCB v Attorney General*** when the 2009 Telecoms Acquisition Act was struck down. Further, as long ago as 1967, it was made clear in ***Akar*** that the exercise of the power of amendment of the Constitution in derogation of an express prohibition against discriminatory laws was invalid. Subsection (9) was expressly enacted "For the removal of doubts", there apparently being some unstated doubt in relation to the substantive or procedural limitations on the Assembly's powers to alter the Constitution. Whatever those doubts may have been, they could not have been in relation to the clear and unchallenged limitation on the Assembly's power to enact a law which compulsorily acquires property.

[222] Further, the general declaration in section 69(9) that there are no other substantive limitations on the legislature's power to alter the constitution cannot derogate form the specific command in section 17(1) that laws which compulsorily acquire property must comport to the strictures of section 17(1). In ***Thomas v Attorney General of Trinidad and Tobago*** [1982] AC 113, the question was whether a provision in the Trinidad and Tobago Constitution which prohibited the High Court from enquiring into the question whether the Police Service Commission had validly performed any function vested in it by the Constitution, prevented the court from determining whether a police officer's right to a fair hearing had been denied when the Commission terminated his appointed. Holding that the ouster clause was inapplicable to breaches of constitutional rights, Lord Diplock said (at p. 135D-F):

> "In exercising such jurisdiction the commission is clearly performing a function vested in it by the Constitution and the question whether it has performed it validly by removing the plaintiff from the police service falls fairly and squarely within the language of section 102 (4) (*a*) as a question into which by the Constitution itself the court is prohibited from inquiring. At the date when the Constitution was drafted the decision of the majority of the House of Lords in *Smith v. East Elloe Rural District Council* [1956] A.C. 736 still held the field, upholding the complete ouster of the jurisdiction of the courts by a "no certiorari" clause in similar terms to that contained in section 102 (4)...
>
> There is also, in their Lordships' view, another limitation upon the general ouster of the jurisdiction of the High Court by section 102 (4) of the Constitution; and that is where the challenge to the validity of an order made by the commission against the individual officer is based upon a contravention of "the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations" that is secured to him by section 2 (*e*) of the Constitution, and for which a special right to apply to the High Court for redress is granted to him by section 6 of the Constitution. Generalia specialibus non derogant is a maxim applicable to the interpretation of constitutions. The general "no certiorari" clause in section 102 (4) does not, in their Lordships' view, override the special right of redress under section 6.

The complainants are asserting in this case their right under section 20 of the Constitution not to have their property compulsory acquired other than by a law which complies with the dictates of section 17(1). The specific right to relief granted by the Constitution is not to be interpreted as having been overridden by the general exemption in section 69(9).

[223] Interpreting subsection 9 narrowly, therefore, I would hold that it does not remove the limitation on the Assembly's power as set out in section 17. In the result, therefore, to the extent that section 145 can be interpreted as acquiring the complainants' properties, it is enacted ultra vires the powers of the National Assembly and is accordingly invalid.

Can Sections 143 and 144 be severed?

[224] The question which then arises is whether sections 143 and 144, even though constitutionally complaint, must nevertheless be struck down on the ground that it cannot be severed from section 145.

[225] The classic test of severability continues to be that stated by Viscount Simon in ***Attorney General for Alberta v Attorney General for Canada*** [1947] AC 503, at 516:

> "The real question is whether what remains is so inextricably bound up with the part declared invalid that what remains cannot independently survive or, as it has sometimes been put whether on a fair review of the whole matter it can be assumed that the legislature would have enacted what survives without enacting the part that is ultra vires at all."

[226] More recently, the Caribbean Court of Justice in ***Attorney General of Belize v Zuniga*** [2014] CCJ 2 (AJ), by a majority, formulated the court's task in this way (at para 90):

> "In performing the exercise of severance the court has no remit to usurp the functions of Parliament. Assuming severance is appropriate, the aim of the court is to sever in such a manner that, without re-drafting the legislation, what is left represents a sensible, practical and comprehensive scheme for meeting the fundamental purpose of the Act which it can be assumed that Parliament would have intended. The court is entitled to assess whether the legislature would have preferred what is left after severance takes place to having no statute at all. If it can safely be assessed that what is left would not have been legislated, then severance would not be appropriate. As Demerieux notes, severance involves speculation about parliamentary intent. The court seeks to give effect, if possible, to the legitimate will of the legislature, by interfering as little as possible with the laws adopted by Parliament. Striking down an Act frustrates the intent of the elected representatives and therefore, a court should refrain from invalidating more of the statute than is necessary."

[227] Mr. Pleming argued that the aspiration of majority ownership of public utilities expressed in sections 143 and 144 was to be achieved and fulfilled by section 145. It could not have been the legislature's intention, he claimed, to provide for majority ownership in public utilities by the Government and not at the same time provide a

mechanism whereby such ownership could be achieved or maintained. Absent section 145, therefore, there was no sensible legislative scheme and the legislature could not have intended sections 143 and 144 to survive on their own. Mr. Courtenay and Lord Goldsmith made similar submissions. I do not agree.

[228] Section 145, on its face, was enacted to make clear, lest there be any doubt, that the acquisitions purported to have been made under the 2011 Electricity Acquisition Act and Order, on the one hand, and the 2011 Telecom Acquisition Act and Order, on the other, were duly carried out for a public purpose, and secondly, to deem that the property acquired under those Orders were vested absolutely and continuously in the Government of Belize. Sections 143 and 144, on the other hand, were enacted to declare that the Government shall have and maintain majority ownership and control of public utility providers, one of which is Belize Water Services Limited, which is not the subject of the confirmatory provisions of section 145. Sections 143 and 144 do envision that steps would be taken legislatively or otherwise to cause the government to first obtain, and if it had already obtained, to maintain majority ownership and control over public utility providers. But there is nothing in sections 143 and 144 which indicates that this was to have occurred by virtue of section 145. Neither is there anything in section 145 to suggest that it is dependent upon section 144. It does not say, for example, that the properties are deemed to have been acquired for the public purpose set out in section 144. Section 144 is not therefore inextricably bound up with section 145 such that it cannot independently survive. And given that section 144 can be viewed as 'aspirational', and can be seen to be expectant upon steps being taken by the Government to obtain majority control, if it had not already done so, and more so that section 145 does not address the acquisition of ownership of Belize Water Services Limited, there is every reason to think that the legislature would have enacted sections 143 and 144 without enacting section 145.

Does the validity of Sections 143 and 144 preclude relief?

[229] Although the trial judge concluded, on different grounds, that the complainants' property had been unlawfully acquired, he declined their request to grant any relief on the ground that under section 144, which escaped constitutional sanction, the Government of Belize was required to hold at least 51% of the issued share capital in Belize Electricity and Belize Telemedia. I am unable to agree that this provides any justifiable basis for refusing to grant relief. First of all, the continued possession of BCB's loan facility does not contribute to the government attaining or maintaining ownership or control of any shares in Belize Telemedia. Secondly, there is no evidence that all of the shares held by Sunshine Holdings in Belize Telemedia or by Fortis in Belize Electricity are needed by the Government either to attain or maintain ownership or control of those public utilities to the extent of 51%. It may be that such level of ownership could be achieved by acquiring some shares from each of the shareholders of the respective public utilities in proportion to their actual shareholdings. That certainly would be the fairest way to conform to the constitutional mandate. Finally, and most importantly, there is as yet no law which complies with section 17(1) of the Constitution regulating the acquisition of and the determination and payment of reasonable compensation for the property which has been appropriated.

The Basic Structure Doctrine

[230] On the assumption that the power of the National Assembly is not limited by section 17(1) in the way I have described, or that the enactment of section 69(9) declaring that there are no substantive limitations on the legislature's power of alteration was effective to liberate the National Assembly from any stricture on its power to alter the constitution which section 17(1) represented, the complainants have a final string in their bow. They say that, in any event, the National Assembly’s power to alter the Constitution is confined to alterations which do not destroy or derogate from the basic structure of the Constitution, that the compulsory acquisition of their property by section 145 has had that effect, and that accordingly section 145 is ultra vires and void.

[231] For the purposes of this submission, the complainants have asked us to adopt the jurisprudence of the Supreme Court of India emanating in particular from its decisions in ***Kesavananda Bharati v State of Kerala*** AIR 1973 SC 1461 and ***Minerva Mills Ltd. v Union of India*** 1981 SCR (1) 206, commonly referred to as the basic structure doctrine. They ask us as well to uphold the decision of Conteh CJ in ***Bowen v Attorney General of Belize*** (Claim No. 445 of 2008, 13 February 2009) holding that the basic structure doctrine applied to Belize, and the judgment of Legal J in the court below who followed Conteh CJ in ***Bowen***. It is accordingly first necessary to determine exactly what it is that was decided in these cases and to flesh out the ways in which the complainants say that the National Assembly ran afoul of the purported, unalterable basic structure of the Belizean Constitution.

[232] Thirteen judges presided in ***Kesavananda***. Eleven judgements were delivered taking up more than six hundred pages of the All India Reports. Seven of the thirteen held for the existence of a basic structure of the Indian Constitution which was unalterable. Summarising and distilling those judgments would have been an Olympian task but fortunately a useful summary has been provided by Chandrachad CJ in ***Minerva Mills*** (at pp. 236-238). According to him:

> "Sikri, CJ., held that the fundamental importance of the freedom of the individual has to be preserved for all times to come and that it could not be amended out of existence ..., though a reasonable abridgement of those rights could be effected in public interest. There is a limitation on the power of amendment by necessary implication which was apparent from a reading of the preamble and therefore ... the expression "amendment of this Constitution" in Article 368 means any addition or change in any of the provisions of the Constitution within the broad contours of the preamble, made in order to carry out the basic objectives of the Constitution. Accordingly, every provision of the Constitution was open to amendment provided the basic foundation or structure of the Constitution was not damaged or destroyed.
>
> Shelat and Grover, JJ. held that the preamble to the Constitution contains the clue to the fundamentals of the Constitution. According to the learned Judges, Parts III and IV of the Constitution which respectively embody the fundamental rights and the directive principles have to be balanced and harmonised. This balance and harmony A between two integral parts of the Constitution forms a basic element of the Constitution which cannot be altered. The word 'amendment' occurring in Article 368 must therefore be

construed in such a manner as to reserve the power of the Parliament to amend the constitution, but not so as to result in damaging or destroying the structure and identity of the Constitution. There was thus an implied limitation in the amending power which precluded Parliament from abrogating or changing the identity of the Constitution or any of its basic features.

Hegde and Mukherjea, JJ. held that the Constitution of India which is essentially a social rather than a political document, is founded on a social philosophy and as such has two main features: basic and circumstantial. The basic constituent remained constant, the circumstantial was subject to change. According to the learned Judges, the broad contours of the basic elements and the fundamental features of the Constitution are delineated in the preamble and the Parliament has no power to abrogate or emasculate those basic elements or fundamental features...

Jaganmohan Reddy, J., held that the word 'amendment' was used in the sense of permitting a change, in contra- distinction, to destruction, which the repeal or abrogation brings about. Therefore, the width of the power of amendment could not be enlarged by amending the amending power itself. The learned Judge held that the essential elements of the basic structure of the Constitution are reflected in its preamble and that some of the important features of the Constitution are justice, freedom of expression and equality of status and opportunity. The word 'amendment' could not possibly embrace the right to abrogate the pivotal features and the fundamental freedoms and therefore, that part of the basic structure could not be damaged or destroyed... In conclusion, the learned Judge held that though the power of amendment was wide it did not comprehend the power to totally abrogate or emasculate or damage any of the fundamental rights or the essential elements on the basic structure of the Constitution or to destroy the identity of the Constitution. Subject to these limitations, Parliament had the right to amend any and every provision of the Constitution.

Khanna, J. broadly agreed with the aforesaid views of the six learned Judges and held that the word 'amendment' postulated that the Constitution must survive without loss of its identity, which meant that the basic structure or framework of the Constitution must survive any amendment of the Constitution. According to the learned Judge. although it was permissible to the Parliament. in exercise of its amending power, to effect changes so as to meet the requirements of changing conditions it was not permissible to touch the foundation or to alter the basic institutional pattern. Therefore, the words "amendment of the Constitution", in spite of the width of their sweep and in spite of their amplitude, could not have the effect of empowering the Parliament to destroy or abrogate the basic structure or framework of the Constitution."

[233] Central to the court's finding that the legislature's power of amendment was limited, therefore, is the preamble of the Constitution which is said to provide the 'clue' to the fundamentals of the Constitution which are unchangeable. However, while the majority in ***Kesavananda*** were at one in finding that the basic structure or essential features of the Indian Constitution could not be altered, they differed as to exactly what constituted those unalterable essential features. For Sikri, C.J. the basic structure included the supremacy of the Constitution, the republican and democratic form of government, the secular and federal character of the Constitution and the separation of powers between the legislature, executive and the judiciary. Shelat and Grover JJ added the mandate to build a welfare state and the unity and integrity of the nation to Sikri CJ's list. Hegde and Mukherjea JJ agreed that the democratic character of the polity, the unity of the country and the mandate to build a welfare state were part of the basic structure but would add the sovereignty of India and the essential features of the individual freedoms secured to the citizens of India. Reddy J. Limited his list to the sovereignty of the democratic republic, parliamentary democracy and the separation of powers.

[234] In ***Barry Bowen v Attorney General of Belize*** (Claim No. 445 of 2008, 13 February 2009) section 17 of the Constitution was amended to make section 17(1) inapplicable "to petroleum, minerals and accompanying substances, in whatever physical state, located on or under the territory of Belize (whether under public, private or community ownership) or the exclusive economic zone of Belize." It was further provided that "the entire property in and control over" such substances shall be exclusively vested and deemed always to have been so vested in the Government of Belize. The Act amending section 17(1) was passed in accordance with section 69. Nevertheless, Conteh CJ held that the Act violated the preamble to the Constitution regarding the ownership of private property and sections 3(d), 6(i) and 17(1), and further offended and upset the basic structure of the Constitution in so far as it undermined the separation of powers, the rule of law and the protection of fundamental rights, especially those relating to the ownership and protection of property from arbitrary deprivation. In his view, the preamble to the Belize Constitution is not a "mere preamble, but rather integral to the Constitution itself." It was not to be considered just an aid to

interpretation. It went beyond that. It animated and breathed life into the very structure of the constitution. Further, by disapplying section 17(1), the Act was a legislative judgment to the extent that recourse to a judicial process to determine the propriety of a compulsory acquisition was denied, thereby violating the separation of powers doctrine. The fact that the Act was passed with the requisite majority under section 69 did not avail the state. Section 69 only established the manner and form requirements for the alteration of provisions of the Constitution. On the other hand, "the enabling constitutional provision" for the making of law is to be found in section 68, which is expressed to be subject to the provisions of the constitution, which includes the fundamental rights provisions and the separation of powers doctrine. In his view, "any proposed amendment to the Constitution being an exercise of making laws for Belize must meet the imperatives of section 68. That is to say, it must be compliant with the provisions of the Constitution." (para 107) Even further, he held that the Constitution of Belize contained a basic structure which cannot be altered. According to him (paras 118-119):

> "… it cannot be denied today, that most written Constitution have certain features that can properly be regarded as their basic structure … In my view, the basic structure doctrine is at bottom the affirmation of the supremacy of the Constitution in the context of fundamental rights."

His justification for the view that that basic structure is unalterable can be gleaned from the following passages (paras 123-124):

> "The hallmark of this position is that in the face of the requisite majority in the Legislature … no provision is beyond alteration or even revocation. In my view, on this hypothesis, the guarantee of fundamental rights and freedoms assured in Part II would only be a paper guarantee; and that any of those rights and freedoms may, in the hands of the requisite majority in the Legislature, likely disappear by the process of alteration. I find that it is no answer to say that it is unlikely. This case itself disproves that facile answer.
>
> In my view, fundamental rights and freedoms, if they are to mean anything, are too fundamental to be left to the vagaries of a General Election whose outcome may determine the arithmetical computation of the majority specified in section 69(3) (three quarters of all members of the House) for so fundamental a measure as the alteration, by derogation, of any of the fundamental rights stipulated in Part II of the Constitution.

> Surely such an arrangement puts in the hands of the three-quarter majority in the House at anytime, an all too powerful mechanism that has the undoubted potential to enable that majority to alter, abolish or change in a derogatory manner, any and all of the fundamental rights provisions of the Constitution, tempered only by the 90 day interval between the introduction of such a bill and its second reading."

[235] Legall J was also quite satisfied that the basic structure doctrine is a feature of the Constitution of Belize. In his view, the legislature's power to alter the constitution was subject to an implied limitation which prevented the National Assembly from removing or revoking the basic features of the Constitution. He could not conceive that the framers of the Constitution intended to empower the legislature, by a special majority, to remove "the fundamental pillars of democratic rule and the rule of law" expounded in the Preamble of the Constitution, such as the judiciary or the legislature itself. To be sure, every provision of the Constitution was open to amendment under section 69, provided that "the foundation or basic structure of the Constitution is not removed, damaged or destroyed." According to him, the basic structure would include "the judiciary, the Legislature, the Rule of Law, judicial review, separation of powers, and maintaining the balance and harmony of the provisions of the Constitution, all of which are protected and safeguarded by the Preamble." He also appears to have thought that the fundamental rights and freedoms guaranteed and protected under the constitution were all protected under the basic structure doctrine, except that "a reasonable abridgment of fundamental rights could be effected for public safety or public order." It appears as well that, to his thinking, the Preamble to the Constitution has pride of place in the formulation of the doctrine, for according to him, "(t)he basic structure doctrine holds that the fundamental principles of the Preamble of the Constitution have to be preserved for all times to come and they cannot be amended out of existence" (para 45). Indeed, the notion that the National Assembly could, subject only to the requirements of section 69, make any amendment to the Constitution, ignored the intention of the framers of the Constitution as propounded in the preamble. In an illuminating concluding passage, he said (para 50)

> "The Preamble is the root of the tree from which the provisions of the Constitution spring, and which forms the basis of the intent and meaning of the provisions. The framers of the Preamble could not have intended, that the National Assembly with the required majorities under section 69 could make literally any amendment to the Constitution to, for instance, abolish the judiciary, or expropriate private property without compensation, or imprison its enemies without trial. It is not conceivable that a legislature in the democratic State such as Belize would attempt to accomplish the above matters; but, if the submission of the defendants is correct, such accomplishments are legally attainable which I do not think is consistent with the intention of the Constitution. The Constitution was made by, and for the protection of all the people of Belize, and its intention could not be that a required majority of the people, as represented by the government, in the National Assembly could take away or destroy fundamental or basic structures of the Constitution enjoyed by the people."

[236] Section 145(1) violated the separation of powers doctrine, and accordingly, the basic structure of the constitution, because the legislature by that means determined that the acquisitions were for a public purpose when section 17(1) of the Constitution reserves any such determination for the judiciary. Likewise, section 145(2) violated the separation of powers doctrine by vesting the complainants' property in the Government absolutely and continuously, thereby precluding a contrary judicial determination under section 17(1)(b)(i). Lastly, the amendments to the supreme law clause and to section 69 violated the separation of powers doctrine by preventing the courts from holding amendments to the Constitution to be contrary to the Constitution, and from holding that the power to alter the Constitution is limited in ways not set out in section 69, such as under the basic structure doctrine. As the separation of powers doctrine is part of the basic structure of the Constitution, these were all alterations which the National Assembly was not empowered to make.

The parties' rival contentions

[237] BCB, the BTL Trustees and Fortis all contend that Legal J was right. They contend that the power to alter the Constitution under section 69 is subject to the implied limitation that the National Assembly may not revoke or remove the basic features of the Constitution.

[238] For his proposition that the basic structure doctrine applies to the Belize Constitution, Mr. Courtenay relies on a series of cases in which the Privy Council has found the existence of implied principles, such as the separation of powers, the breach of which would result in the invalidation of Acts of Parliament. He also relies on what he refers to as "the centrality of the preambles to the meaning and content of the Constitution." But he goes further. Noting that in ***Bowen***, Conteh CJ observed that the Preamble to the Constitution of Belize was itself enacted as part of the Belize Constitution Act, he submits that the Preamble "forms part of the law of Belize in its own right" and that it was accordingly incumbent on the Court to give effect to the protection of democracy, the rule of law and the separation of powers enshrined in the Preamble. In light of the guiding principles contained in the Preamble and the acknowledged existence of implied principles which imbue the Constitution, Mr. Courtenay submits that section 69 ought not to be interpreted as being "exhaustive of the constitutional standards against which an amendment is to be tested." While the National Assembly is empowered by section 69 to alter <u>any</u> provision of the Constitution, section 69 does not authorise the National Assembly to make <u>any</u> alteration. The extent of the alterations which may be made is impliedly limited by the basic structure of the constitution.

[239] Borrowing from an article authored by Aharon Barak, the retired President of the Supreme Court of Israel, entitled "Unconstitutional Constitutional Amendments" (2011) 44 Israel Law Review 321, Mr. Courtney submits that it is the Supreme Court's highest duty to protect the Constitution and the principles it expounds. According to Barak:

> "Protecting the constitution does not only involve protection against statements that violate the constitution but also against amendments to the constitution that violate its foundations. Statutes that violate the constitution's foundations are both at odds with the idea of the constitution and the authority to change it…. When an amendment changes the fundamental principles and the fundamental structure, it removes the constitutional basis upon which the entire edifice rests."

In this light, Mr. Courtney submits that the power to alter the Constitution under section 69 must be interpreted as being subject to an implied limitation that alterations which damage or destroy the basic structure of the Constitution are invalid.

[240] According to Mr. Courtenay, the rule of law, separation of powers, equality before the law and the prohibition against the arbitrary deprivation of property are principles which are fundamental to the Constitution of Belize. The new sections 2(2), 69(9) and 145 of the Constitution, inserted by the Eight Amendment Act, violate each of these fundamental principles because i) they preclude judicial review of a law purporting to alter the constitution, save for inconsistency with section 69; ii) they usurp judicial power by directing the outcome of the exercise of constitutional review of a law which purports to alter the Constitution; iii) they exclude judicial review of an arbitrary deprivation of property; and iv) they single out the property of certain public utility providers for compulsory acquisition without access to court in breach of the principle of equality before the law and the rule of law. The right not to be arbitrarily deprived of property is a component of the Constitution's basic structure, Mr Courtenay submits. Any law which purports to authorise a deprivation of property without the right of access to a court to make a binding ruling on whether a person has an interest or right in property which has been compulsorily acquired, whether such acquisition was for a public purpose, the amount of compensation to which a person may be entitled and to enforce his or her right to compensation, will be arbitrary and would breach the separation of powers doctrine and the rule of law. This indeed is the effect of section 143 and 144, he says. Elaborating, he submits that the principle that all persons are equal before the law is at the heart of the rule of law and forms part of the basic structure of the Constitution. Singling out those shareholders who might own the majority of shares of public utility providers and depriving them of access to court to review the expropriation of their property, while maintaining the protections under section 17(1) for minority shareholders and all other property owners, including shareholders in other public utilities, impermissibly derogates from the principle that all persons are equal before the law. "It provides for a mechanism by which the property of a small sub-set of persons may be seized without justification and without effective and meaningful judicial oversight, whereas full constitutional protection applies to persons owning interests in companies providing the same services." Section 2(2), 69(9) and 145 are abhorrent to the rule of law and the separation of powers in that they "subordinate the requirements of the Constitution to the will of the National Assembly", dictate to the Supreme Court

the outcome of Fortis' application under section 20 of the Constitution to enforce its fundamental right not be deprived arbitrarily of its property and denies Fortis of the right of access to court for effective redress for breaches of its rights under section 3(d) and section 17(1) of the Constitution.

[241] In order to ferret out the basic structure of the Constitution, Mr. Pleming submits, an understanding of its key characteristics must be appreciated. The starting point in this exercise is the Preamble to the Constitution which he submits, relying on the decision of Conteh CJ in ***Bowen*** and mirroring Mr Courtenay's submissions, is not merely an aid to interpretation, but forms part of the Constitution of Belize. There has to be consistency between the Preamble and the Constitution, he continued, and where an amendment to the Constitution derogates from the high ideals proclaimed in the Preamble, it must yield to the intendment and spirit of the founding principles. The Preamble, in other words, provides the Grundnorm or the basis on which the Constitution was brought into being. The Constitution may be capable of alteration, but the Grundnorm is not. More particularly, he submits, one of the core foundation principles of the Constitution, as confirmed in the preamble, is the sacredness of the institution of private property. The Eight Amendment Act is in fundamental conflict with this principle and therefore cannot stand. As well, a crucial feature of the preamble is its affirmation that "men and institutions remain free only when freedom is founded upon... the rule of law." Integral to the concept of the rule of law is the doctrine of the separation of powers. Taken together with the declaration in section 1 that Belize is a sovereign democratic state and the fact that the three branches of Government are dealt with in separate chapters, the separation of powers is an integral part of the structure of the Constitution and according cannot be altered. The basic structure doctrine, he contends, posits that there are certain unwritten constitutional principles which provide the jurisprudential basis of the constitution and which cannot be altered, not even by an amendment to the Constitution. The separation of powers doctrine is one such principle. Like Mr Courtenay, Mr. Pleming does not dispute that the National Assembly may alter any of the provisions of the constitution. Thus, he concedes that the constitution may be lawfully altered to abolish appeals to the Privy Council or to convert the legislature into a unicameral body. What the Assembly cannot do, however,

is to abolish the judiciary, or the legislature altogether. Such amendments would flout the founding principles of the Constitution.

[242] Lord Goldsmith joins with his counterparts in the general complaint that the separation of powers doctrine is breached by deeming the acquisitions to be lawful, without allowing for the scrutiny of the courts as provided for under the constitution, by removing the court's power to determine whether the acquisitions were for a public purpose, and by interfering with the judicial process to the extent that the outcome of the constitutional challenges in existence before the Eight Amendment Act was passed are conclusively determined. The separation of powers doctrine is part of the basic structure of the constitution which cannot be altered, he contends, and accordingly the Eight Amendment Act is unconstitutional and void.

[243] Mr. Barrow contends in response that the Supreme Court of India found itself able to discern a limitation on the legislature's power to amend the Indian Constitution because of the absence of any definition of the power of amendment. In ***Kesavananda***, he says, Khanna J was accordingly free to posit that

> "The word amendment postulates that the old Constitution survives without loss of its identity despite the change and continues even though it has been subject to alterations… The words "amendment of the Constitution" with all their wide sweep and amplitude cannot have the effect of destroying and abrogating the basic structure or framework of the Constitution."

[244] In the Constitution of Belize, on the other hand, the power to alter the Constitution or any of its provisions includes the power to revoke it "with or without re-enactment thereof or the making of different provisions in lieu thereof", the power to modify it "whether by omitting or amending any of its provisions or inserting additional provisions in it or otherwise", and the power to suspend its operations for any period (s. 69(8)). The power to revoke any provisions of the constitution, he submits, is incompatible with the existence of any provision or principle of the constitution which cannot be abolished altogether or replaced. He cites the decision of the Supreme Court of Sri Lanka in ***In re the Thirteenth Amendment to the Constitution and the***

Provincial Councils Bill [1990] LRC (Const.)1, where four of a panel of nine judges, in rejecting the applicability of the basic structure doctrine to the constitution of Sri Lanka where the power to amend was defined as including the power to repeal, alter and add, said (at p. 14):

> "Fundamental principles or basic features of the Constitution have to be found in some provision or provisions of the Constitution and if the Constitution contemplates the repeal of any provision or provisions of the entire Constitution, there is no basis for the contention that some provisions which reflect fundamental principles or incorporate basic features are immune from amendment."

[245] He also referred us to a number of decisions of the Privy Council from which, he contends, it can be inferred that the existence of substantive limits on the power to alter Westminster model constitutions has been rejected. In both ***Ibralebbe v R*** [1964] AC 900 and ***Independent Jamaica Council for Human Rights (1988) Ltd. v Marshall-Burnett*** (2005) 65 WIR 268, the Privy Council acknowledged that Parliament could use its power to amend the constitution to abolish appeals to the Privy Council. How more basic to the structure of a written constitution can one get, asks Mr. Barrow rhetorically. Moreover, he referred to a number of judicial pronouncements on the power to alter Westminster model constitutions expressed in language of such width as not to countenance the existence of any limits on the power of alteration, other than those expressly stated in the particular constitution. Thus, in ***Hinds v R*** (1975) 24 WIR 326, Lord Diplock said (at p. 333):

> "... (W)here, as in the instant case, a constitution on the Westminster Model represents the final step in the attainment of full independence by the peoples of a former colony or protectorate, the constitution provides machinery whereby any of its provisions, whether relating to fundamental rights and freedoms or to the structure of government and the allocation to its various organs of legislative, executive or judicial powers, may be altered by those peoples through their elected representatives in the Parliament acting by specified majorities, which is generally all that is required, though exceptionally as respects some provisions the alteration may be subject also to confirmation by a direct vote of the majority of the peoples themselves. The purpose served by this machinery for "entrenchment" is to ensure that those provisions which were regarded as important safeguards by the political parties in Jamaica, minority and majority alike, who took part in the negotiations which led up to the

> constitution, should not be altered without mature consideration by the Parliament and the consent of a larger proportion of its members than the bare majority required for ordinary laws."

[246] Similarly, in ***Attorney General of Trinidad and Tobago v McLeod*** (1984) 1 All ER 694*,* Lord Diplock emphasised that Parliament was empowered to alter <u>any</u> provision of the Constitution, coining what has now become a constitutional adage, that "(a)lthough supreme the Constitution is not immutable." Furthermore, in ***Akar***, Lord Morris made clear (at p. 870) that he did not find acceptable the argument which found favour in the court below, but which was not advanced before their Lordships' Board, that it was not open to the legislature to make any alteration to the Constitution which did not amount to an improvement of existing law. Such a proposition, had it been accepted, would no doubt have been compatible with the existence of substantive limits on the legislature's power to alter the constitution.

[247] Mr. Barrow would no doubt concede that in none of these cases was the question of the existence of such substantive limits up for consideration and, accordingly, it is probably correct to say that they do not constitute binding authority against the acceptance of a basic structure doctrine. But, as the President remarked during the course of argument, they certainly create an 'inhospitable' environment for the reception of implied substantive limits on the National Assembly's power to amend.

[248] Mr. Barrow also referred to as an extensive array of Commonwealth decisions hailing from Singapore (***Teo Soh Lung v Minister of Home Affairs*** [1990] LRC (Const.) 490, Pakistan (***Mahmood Khan Achakzai v Federation of Pakistan*** PLD 1997 SC 426 and ***Pakistan Lawyers Forum v Federation of Pakistan*** PLD 2005 SC 719), Zambia *(**Zambia Democratic Congress v Attorney General***, SCJ No. 37 of 1999, 13 January 2000), Tanzania *(**Attorney General v Mtikila*** [2012] 1 LRC 647) and Zimbabwe (***Mike Campbell (Private) Limited v Minister of National Security,*** Const. App. No. 124 of 2006, 22 January 2008), which rejected the applicability of the Indian basis structure doctrine to their respective constitutions on the ground, either, that if the framers of the constitution intended that legislative power to amend the constitution was subject to such substantive limitations, they would have made specific provision for

same, or that the question of the vires of a constitutional amendment was a political not a judicial one, or that it was incompetent for the judiciary to declare any constitutional amendment to be invalid or repugnant, or that since all provisions of the constitution could be amended, there was no room for an unalterable basic structure.

[249] Lord Goldsmith has countered with a list of cases from South Africa, Bangladesh and Malaysia which went the other way –***Certification of the Constitution of the Republic of South Africa; Hossain Chowdhary v Bangledesh*** (1989) 18 CLC (AD); ***Sivarasa Rasiah v Baden Peguan Malaysia*** [2010] 2 MLJ 333; and ***Muhammad Hilman bin Idhan v Keragaan Malaysia*** [2011] 6 MLJ 507. And we were regaled with detailed analyses of each of these cases which demonstrated, it was said, that they either were or were not based upon particular provisions, not to be found in the Constitution of Belize, and were accordingly either of little or enormous help, as the case may be.

Discussion

[250] I would wish to pay tribute to the enormous effort expended by the parties in researching and putting before the court what must be the full gamut of cases on the subject of the basic structure doctrine. But I am sure it would not be taken as a mark of disrespect if I were not to repay their industry with an equally detailed examination of this wide array of authorities. Suffice to say that it must be right that in determining whether there are any implied limitations on the power to alter the Constitution of Belize, the provisions of the Constitution of Belize, including its preamble, must be closely examined.

[251] I would begin by examining the provisions of the Constitution which vest the National Assembly with law-making power, including the power to alter the Constitution. By section 68, the Assembly is empowered to make law for the peace, order and good government of Belize, but this power is expressed to be "subject to the provisions of this Constitution." This undoubtedly means that any law passed by the National Assembly which is inconsistent with the Constitution is outwith the powers of the Assembly, and,

what is more, is void to the extent of that inconsistency. That said, the National Assembly is nevertheless empowered to alter any of the provisions of the Constitution, as long as the procedure specified in section 69 is followed. Historically, that meant that, before the first general election after independence, the Constitution could only be altered if a Bill for that purpose was supported by the unanimous vote of all members of the National Assembly (s. 69(1)). It now means that in relation to certain specified provisions, which includes section 69 itself, a vote of not less than three-quarters of all members of the Assembly is needed (s. 69(3)), and in relation to all the rest, a two-thirds majority at least (s. 69(4)). Further, in respect of those provisions the alteration of which can only be achieved by a three-quarters majority, an interval of not less than ninety days must elapse between the first and second reading of the Bill. It is also a requirement that a certificate of the Speaker must accompany the Bill when presented to the Governor General for his assent, certifying that the requirements of section 69 have been complied with (s. 69(6)(a)).

[252] No provision of the Constitution is exempt from alteration, but it is noteworthy that the entire part guaranteeing and protecting the fundamental rights and freedoms and the entire part establishing and protecting the independence of the judiciary, can only be altered by a three-quarters majority, signifying no doubt the importance which the framers attached to these provisions and their desire that they not be so easily altered. But the fact that they may be altered is beyond doubt, and any alteration in that regard may include simple modification, whether by omission, amendment or addition, at one end of the spectrum, or outright revocation with or without re-enactment, at the other (s. 69(8)).

[253] I do not accept that the power of alteration is to be read as in any way limited by the fact that the powers of the Assembly under section 68 to make law is expressed to be subject to the provisions of the Constitution. Taken to its logical conclusion, if the power to alter the Constitution was itself subject to the provisions of the Constitution, it would necessarily mean that the provisions of the Constitution could not be altered at all. Section 68 is not to be interpreted as taking away what section 69 has given.

[254] Neither is there any basis for interpreting the power of alteration as limited to making improvements to the Constitution. There is no such indication in section 69 and it is fairly obvious that the revocation of any provision, which the Assembly is expressly empowered to do, could only result in a dis-improvement. To the extent therefore that Conteh CJ would interpret the power of alteration of the fundamental rights and freedoms as limited to ameliorating revision, he was, without respect, in error.

[255] Mr. Pleming makes a different point. He starts by referring to the fact that under section 68 of the Constitution, the Assembly's power to make law is subject to the provisions of the Constitution. This would include unwritten principles of the Constitution, a clarification with which I would readily agree. He notes further that section 68 is not expressed to be subject to section 69 and concludes from this that section 68 is to be treated as conferring substantive law making power on the Assembly, while section 69 is to be treated as procedural only. As a consequence, section 69, which provides only for the manner and form of legislation altering the constitution, must be read in the context of the Preamble and the existence of a basic structure of the Constitution. This means that any revocation or modification must be done in accordance with, not contrary to, that basic structure.

[256] I must confess that I have had difficulty following the argument. First of all, while section 68 is not expressed specifically to be subject to section 69, it is expressed to be subject to the provisions of this Constitution, which includes section 69. Mr. Pleming was careful not to say that, since section 68 is subject to the fundamental rights provisions of the constitution, this meant that in the exercise of its powers under section 69, the fundamental rights provisions could not be altered, even to their detriment. The same would apply to unwritten principles of the Constitution, I would imagine.

[257] I am also unable to appreciate how section 69 is properly to be categorised as procedural only. The power to make laws under section 68 is subject to the provisions of the Constitution and accordingly any law, not being one to alter the constitution, which is inconsistent with the Constitution, is void to the extent of the inconsistency. In other words, the power to alter the Constitution is not to be found under section 68.

Section 69, on the other hand, expressly empowers the Assembly to alter the provisions of the Constitution. This is a substantive power, but it can only be exercised in accordance with the procedural requirements of section 69. In any event, I do not follow why, even if section 69 is to be considered to be procedural only, whatever that means, it would follow from this that section 69 is limited by the basic structure of the Constitution.

[258] Mr. Pleming submits still further that under section 69 the Assembly is not empowered to revoke the entire constitution without replacing it with a new one. He points out, correctly, that under section 69(8), reference in section 69 to “altering this Constitution or any provision thereof includes references ... to revoking it, with or without re-enactment thereof or the making of different provision in lieu thereof". He then points out, correctly again, that under section 69(1), the National Assembly is empowered only to alter “any provision of this Constitution”, and that there is no power to “alter this Constitution.” There is accordingly, he concludes, no procedure for revoking the Constitution, without replacing it. Any such interpretation would lead to a manifest absurdity, he says. But even if this is the proper interpretation of section 69, that is to say, that the Constitution cannot be revoked in its entirety without being replaced, I am unable to appreciate how this supports the existence of a doctrine which protects the Constitution's basic structure from alteration. Even if the Constitution cannot be revoked without replacement, it nevertheless begs the question whether there are provisions of the unaltered Constitution which are sacrosanct.

[259] Despite the broad powers of alteration with which it is vested, this does not mean that there are no limits to what the National Assembly can do under the guise of the exercise of its power under section 69 to alter the Constitution. I have already held that so long as sections 16 and 17 remain in their unaltered form, the Assembly may not use its power of alteration to discriminate on the prohibited grounds or to acquire property without providing for the matters listed in section 17(1).

[260] It also seems to me that the power which the Assembly possesses under section 69 is limited by the nature of that power. The power granted to the Assembly to alter the

Constitution is first and foremost an aspect, albeit a crucial one, of its plenary power to make laws for the peace, order and good governance of Belize. As wide and all-embracing as this power may be, it is nevertheless a law-making power which has its own inherent limitations. For example, a Bill which receives the necessary votes of the National Assembly and the assent of the Governor General and declares that a named person is guilty of an offence and is to be sentenced to a term of imprisonment, is not a law, even if bearing all the procedural insignia of one. It is a judicial sentence. As Blackstone once commented:

> "Therefore a particular act of the legislature to confiscate the goods of Titius, or to attaint him of high treason does not enter into the idea of a municipal law: for the operation of this act is spent upon Titius only and has no relation to the community in general: it is rather a sentence than a law."

And it does not become transformed to the status of a law because styled an alteration to the Constitution and carried out in accordance with the more exacting procedure provided for such alterations under section 69.

[261] In ***re Derek Knight*** (1988) 1 O.E.C.S. LR. 531, People's Laws No. 96 of 1979, intituled the "John Derek Knight Assets (Vesting in Government) Law 1979", was passed. It provided that certain assets belonging to John Derek Knight shall vest in the Government of Grenada "by virtue of this section and without further assurance". No provision was made for the payment of compensation. The confiscation of Mr. Knight's property was expressly stated to have been done in consideration of the fact that, while performing the duties of Minister without portfolio in the Government of the Grenada United Labour Party, he also practised in Grenada as a Barrister-at-Law, contrary to public policy and to the best interests of the State of Grenada. As a consequence, the Preamble to the Act continued, the People's Revolutionary Government ordered that certain assets acquired by Mr. Knight during the period he served as a Minister be vested in the Government. Graham CJ held that the Constitution of Grenada "having reposed the judicial power in the judiciary, if the legislative body purports to pass a law which is, in substance an exercise or usurpation of this judicial power, such a law is, by virtue of the structure or provisions of the Constitution, ultra vires" (p. 546). A law ad

hominem, he found, “may frequently be found not to be legislative properly so called … Laws directed to punish or otherwise penalise a single person or a limited number of persons are frequently a usurpation of the functions of the courts" (p. 546). In the Chief Justice’s view, People’s Law No. 96 of 1979 was “a legislative judgement and an exercise of judicial power” and was accordingly ultra vires and invalid.

[262] I am also not prepared to rule out entirely, at this formative stage in the development of the jurisprudence of the constitutional law of Belize, the possibility that in the appropriate, though no doubt, exceptional case, this court might find that the National Assembly’s power to alter the constitution is subject to some implied limitation. Westminster Model constitutions have been interpreted as being subject to implied principles, the breach of which would result in the invalidation of ordinary legislation. These have been referred to as "vital unstated assumptions upon which the text is based" - ***Reference re Secession of Quebec*** [1998] 2 S.C.R. 21, para 49. ***Hinds v R*** is the prime example, but in that case the separation of powers doctrine was said to be derived from the allocation in the Jamaican constitution of executive power to the executive, legislative power to the legislature and judicial power to the judiciary. Given that the National Assembly is empowered to alter any of the provisions which it is said give rise to the separation of powers doctrine, it would be difficult to imply a limitation on the legislature’s power to introduce some reallocation of those powers. But, whether a law which altogether strips the judiciary of its judicial power and transfers same, say to an executive body, would itself be tantamount to the exercise of judicial power by the Assembly or simply the usurpation of judicial power, thereby stripping the ‘law’ of its legislative character, or emptying the Constitution of its essential character as the guarantor of the rule of law, and as a result constituting an impermissible exercise of the power of alteration, would be a matter worthy of consideration. In the United Kingdom, where the doctrine of parliamentary sovereignty has long been paramount, Lord Steyn was moved to ask a similar searching question in light of the United Kingdom's relationship with the European Court of Human Rights and the enactment of a Human Rights Act of its own. In ***R (Jackson) v Attorney General*** [2005] 3 WLR 733, 767 he said:

> "If the Attorney General is right the 1949 Act could also be used to introduce oppressive and wholly undemocratic legislation. For example, it could theoretically be used to abolish judicial review of flagrant abuse of power by a government or even the role of the ordinary courts in standing between the executive and citizens. This is where we may have to come back to the point about the supremacy of Parliament. We do not in the United Kingdom have an uncontrolled constitution as the Attorney General implausibly asserts. In the European context the second *Factortame* decision [1991] 1 AC 603 made that clear. The settlement contained in the Scotland Act 1998 also point to a divided sovereignty. Moreover, the European Convention on Human Rights as incorporated into our law by the Human Rights Act 1998, created a new legal order. One must not assimilate the European Convention on Human Rights with multilateral treaties of the traditional type. Instead it is a legal order in which the United Kingdom assumes obligations to protect fundamental rights, not in relation to other states, but towards all individuals within its jurisdiction. The classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom. Nevertheless, the supremacy of Parliament is still the *general* principle of our constitution. It is a construct of the common law. The judges created this principle. If that is so, it is not unthinkable that circumstances could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism. In exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts, the Appellate Committee of the House of Lords or a new Supreme Court may have to consider whether this is constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish.

[263] The development of our jurisprudence has also shown that limitations on the power of the legislature have been implied without reference to any particular provision of the Constitution and without expressly filling a perceived gap in those provisions. Limitations on the power of the legislature to make law can, in other words, be presumed to exist without more. In ***Surratt v Attorney General of Trinidad and Tobago*** [2008] 1 AC 676, the question was whether the establishment of an Equal Opportunity Tribunal to hear complaints of discrimination on the grounds of, inter alia, sex, race or disability, violated the separation of powers doctrine, having regard to the fact that the members of the Tribunal did not enjoy the same protection as judges of the High Court of Trinidad and Tobago, but were nevertheless vested with judicial power. Having held that there was no violation of the separation of powers doctrine because

the new jurisdiction vested in the Tribunal was not "so characteristic of a Supreme Court, that, it is implicit … that it must be exercised by a judiciary enjoying exactly the same protection as a High Court judge", their Lordships considered it necessary to determine nevertheless "whether the protection enjoyed by the tribunal is sufficient to afford the necessary degree of independence of the legislature and executive." In other words, it was found to be implicit that any body vested with judicial power must enjoy a "necessary degree of independence" of the legislature and the executive.

[264] The point is that if it is acceptable to imply the existence of constitutional principles, the breach of which would render laws passed by Parliament invalid, it is theoretically possible to imply principles which would likewise limit the power of the National Assembly to alter the Constitution of Belize. I am therefore not prepared to rule out the possibility that the power to alter the constitution might in the exceptional case be subject to implicit limitations. In the appropriate case, it might indeed be right to interpret the power to alter as not including the power to obliterate. But it is important to appreciate that where courts of law have implied unwritten principles into the constitutions, they have not done so pursuant to a grand doctrine of implicit limitations on the power of the legislature to enact laws. They have done so in relation to the demands of the particular case and in response to the particular legislative measure. Necessarily, therefore, the question whether there are any implied limitations on the Assembly's power to alter the Constitution of Belize must be decided on a case by case basis.

[265] Against this backdrop, I am now in a position to say that I do not think it appropriate to adopt the Indian basic structure doctrine as part of the constitutional jurisprudence of Belize. I have come to this conclusion primarily because I am not satisfied that the methodology implicit in the basic structure doctrine in compatible with Belizean constitutional traditions. I am also not persuaded by the arguments which have been presented for the existence of such a doctrine.

[266] I would start by noting that the basic structure doctrine stands for the proposition that there are some alterations to a written Constitution which the legislature is not

permitted to make. What those impermissible alterations are, are not expressly stated in the Constitution. They are to be implied. And the key to determining what these implied limitations are, is to discover what the basic structure or the essential features of the Constitution are.

[267] I need to emphasise the point, though, that the adoption of a basic structure doctrine does not simply involve the declaration of the existence in the constitution of a basic structure or essential features. Any such determination is not controversial and, indeed, if that were all to it, it would really not matter that judges may disagree on the constituent elements of that basic structure or those essential features. Where the doctrine becomes controversial is in its implicit mandate that the basic structure or essential features identified cannot be altered. Judges may agree on what constitutes the basic structure of the Constitution of Belize, but may part ways on what aspects of that basic structure are immutable. For example, while it might be correct to say that the basic structure of the Constitution of Belize has given rise to the separation of powers doctrine, that by itself does not dictate that the way power is currently distributed is immutable. There is no reason to think, for example, that the Assembly is prohibited from altering the Constitution to vest judicial power in a judicial body other than the Supreme Court of Belize, made up of judges who do not enjoy the same protection with which the Supreme Court is clothed, but nevertheless enjoying a sufficient degree of independence from the legislature and the executive as not to raise concerns that the rule of law will be undermined.

[268] It is the process involved in identifying an unalterable basic structure which I find problematic. It appears to require a judge to pronounce in advance of a live controversy, the existence of unalterable aspects of the constitution based, it would appear, on what that judge thinks to be features of the constitution which the legislature ought not to be allowed to touch. This is a process that is more akin to law making, which is not the province of the judiciary, and involves less constitutional construction, which is. I do not consider it wise or appropriate to determine whether there are any unalterable aspects of the Constitution of Belize, except in relation to the particular circumstances of a particular case.

[269] To my mind, the most compelling argument in favour of the existence of an over-arching doctrine which places limits on the legislature's power to amend the constitution is the one liberally employed by the complainants and the first instance judge, that otherwise the legislature could employ its untrammelled power of alteration to effect the most undemocratic alterations to the Belizean system of government and to undermine the rule of law. If that is a state of affairs that appears undesirable, the argument goes, there must be limits on the power of alteration.

[270] Deployed alongside what might not unfairly be called the jury argument, is the contention that the Preamble to the Constitution of Belize points the way towards not only the existence of implied constraints on the power of alteration, but also the nature of those constraints. It is declared in the Preamble, for example, that the people of Belize are of the belief 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 and in which all persons may, to the extent of their capacity, play some part in the institutions of national life and thus develop and maintain due respect for lawfully constituted authority."

In fulfilment of that belief, the constitution provides specifically that Belize is a sovereign democratic state, guarantees the rights to freedom of movement, freedom of conscience, freedom of thought and of religion, freedom of expression, and freedom of assembly and association, including the right to form or belong to political parties, and provided for the election of representatives to the National Assembly. It could not be, therefore, that the framers of the Constitution would nevertheless intend that the National Assembly would be empowered, by nothing more than a special majority, to abandon rule in accordance with the will of the people and foist upon the people of Belize a system of tyrannical governance by the anointed few.

[271] It would also be passing strange if, having recognised that "men and institutions remain free only when freedom is founded upon respect for moral and spiritual values and upon the rule of law", and having gone to great lengths to establish a judiciary institutionally independent of the executive and the legislature, and having vested in that

body the guardianship of the Constitution, the framers would nonetheless empower the National Assembly, by no more than a special majority, to vest judicial power in a body beholden only to the Executive. If the power of the National Assembly to so undermine the democratic foundations of the Constitution and the rule of law is not expressed to be limited in any way, it should be.

[272] The fact, however, is that despite declaring in the Preamble lofty affirmations of faith in fundamental rights and freedoms, paying due respect to the principles of social justice, avowing a fervent belief in democratic principles, solemnly recognising the importance of the rule of law to freedom, insisting that the state pursue policies which would, among other things, eliminate economic and social privilege but yet still preserve the right of the individual to the ownership of private property, and expressing the bounden desire that the Constitution should enshrine and make provision for ensuring the achievement of same, the National Assembly was nevertheless empowered to alter any provision of the Constitution, without reservation.

[273] Against this backdrop, it would in my judgment be wrong to adopt wholesale a doctrine which places implied limitations on the Assembly's power to alter the Constitution, which is premised on the judiciary's ability to identify in advance of a live controversy what is referred to as the basic structure or essential features of the Constitution. I say this for two basic, but inter-related reasons.

[274] First of all, I consider it extraordinarily difficult in the abstract to make any attempt to sketch even broad principles to assist in determining what that unalterable basic structure or those essential features might be. Mr. Courtenay has suggested that the contours of such unalterable aspects of the Constitution can be derived from an understanding of the text of the Constitution, from the historical context and from previous judicial interpretation. But while, as I have already pointed out, these guidelines may assist in teasing out from the written text of the Constitution, implicit but no less important constitutional principles on a case by case basis, I have great difficulty constructing from them a board and ill-defined doctrine that, despite the uncompromisingly clear words in which the power of alteration is expressed, there is a

basic structure or essential features of the Constitution which may not be damaged or destroyed.

[275] It is also difficult to construct any such broad doctrine given that the Assembly is expressly empowered to alter any provision of the Constitution, a power which includes total revocation. Important, unexpressed, constitutional principles have been implied from the cold words used in the constitutional text. But given that the very provisions which have given rise to these implied principles are themselves subject to alteration, it is difficult to discern, far less define a basic structure which is unalterable.

[276] In this regard, I do not accept that the Preamble to the Constitution provides very much assistance in determining whether a basic structure doctrine exists. I would first make clear that I do not accept the notion that the Preamble itself is a part of the constitution, in the sense that a law which is inconsistent with it is for that reason alone void. To be sure, the high principles and aspirations expounded in the Preamble provide important guidance in interpreting the text of the constitution, which is said to have been formulated precisely to give effect to those principles and aspirations. But the Preamble is not part of the operative provisions of the Constitution. This point was made by the Privy Council in ***Matthew v State*** [2005] 1 AC 433, para 46:

> "We attach significance to the principles upon which, as declared in the preamble to the 1976 (as to the 1962) Constitution, the people of Trinidad and Tobago resolved that their state should be founded. This declaration, solemnly made, is not to be disregarded as meaningless verbiage or empty rhetoric. Of course, the preamble to a statute cannot override the clear provisions of the statute. But it is legitimate to have regard to it when seeking to interpret those provisions ... and any interpretation which conflicts with the preamble must be suspect."

[277] The Supreme Court of Canada has made the same point. In **Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island** [1997] 3 S.C.R. 3, the Court noted (at para 94):

> "(A)lthough the preamble is clearly part of the Constitution, it is equally clear that it “has no enacting force” ... In other words, strictly speaking, it is not a source of positive law, in contrast to the provisions which follow it."

And in ***Reference re Secession of Quebec*** [1998] 2 S.C.R. 217, para 53, the Court reiterated that the unwritten norms or organising principles, such as judicial independence, which may be derived from the preamble,

> "... could not be taken as an invitation to dispense with the written text of the Constitution. On the contrary, we confirmed that there are compelling reasons to insist upon the primacy of our written constitution. A written constitution promotes legal certainty and predictability, and it provides a foundation and a touchstone for the exercise of constitutional judicial review."

[278] To the extent therefore that Conteh CJ would imbue the Preamble with legislative force, he was accordingly, with respect, wrong.

[279] Secondly, the principles set out in the Preamble which the People of Belize desired to have and set about incorporating in the text of the Constitution, do not all necessarily speak with one voice. Thus, the belief that "the operation of the economic system must result in the material resources of the community being so distributed as to subserve the common good", and the requirement that policies are pursued which "eliminate economic and social privilege and disparity among citizens of Belize", are in a state of tension with the requirement that policies be pursued which "preserve the right of the individual to the ownership of private property and the right to operate private business." These competing aspirations have no doubt been mediated under the Constitution by permitting the compulsory acquisition of property for public purposes (to be determined by the judiciary), upon payment of reasonable compensation within a reasonable time, or by expropriation without compensation in the circumstances listed in section 17(2). But there is nothing in the Preamble which suggests that the list of circumstances under which property may be compulsorily acquired without compensation may not be added to, nor is there anything which suggests that the existence of a public purpose must always be the exclusive preserve of the judiciary. For this reason, as well, therefore, I consider it inadvisable to construct an ill-defined doctrine on the basis of which the Assembly's power to alter the Constitution is to be held to be circumscribed.

[280] However, given that I have not ruled out the possibility that in the appropriate case, the power of alteration may be subject to implicit limitations, the question is whether there is any implied limitation on the power of the National Assembly to enact the Eight Amendment Act.

[281] With regard to the new sections 69(a) and 2(2), it is said that these provisions signify the end of constitutional rule and the introduction of parliamentary supremacy. The constitution, in other words, is subordinated to the legislature. I am afraid I have had difficulty appreciating the significance of the argument. If Mr. Barrow is right and there never was any limitation on the Assembly's power to alter the Constitution, other than the restrictions contained in section 69 itself, then section 69(9) will not have signified any adjustment in the power of the legislature, not already provided for under the constitution. If the power which the Assembly thus had under section 69 is to be characterised as parliamentary supremacy, then this would be as a consequence of the arrangements put in place by the constitution itself. Rule by the Constitution would not have been displaced, but given effect to.

[282] If, on the other hand, the power of the legislature is found to be subject to implied limitations, section 69(9) will have had no effect because the Assembly would by definition be devoid of competence to give itself a power which the Constitution, properly interpreted, says that it should not have. In such an event, section 69(9) will, to the extent that it purports to remove any substantive limitation on the Assembly's power, be unconstitutional and void. As Chandrachad CJ said in ***Minerva Mills*** (para 240): "The donee of a limited power cannot by the exercise of that power convert the limited power into an unlimited one."

[283] Section 2(2) is subject to the same analysis. Any alteration which the Assembly is permitted to make under section 69 cannot by definition be inconsistent with the Constitution, in which case section 2 would not apply in any event. And if an alteration is enacted under section 69 which the Assembly is found not to be competent to make, the new section 2(2) would be inapplicable, for the reasons already given. I am accordingly unable to discover any basis for holding section 69(9) and section 2(2) to be unconstitutional.

[284] I am also unable to appreciate any implied limitation on the enactment of section 144. There is no express or, I would hold, implicit prohibition against the Government of Belize acquiring a controlling interest in any business enterprise. While we have been witness to debates over the course of the last century about the wisdom of governments becoming involved in private enterprise, our experience in this region certainly does not compel the conclusion that the proper functioning of a free and democratic society demands government abstention from involvement in the economy. To the contrary, our experience indicates that, in many instances, the provision of services such as water and electricity requires government involvement. Whether majority ownership or control of water, electricity or telecommunications by the government is good policy is of course not a question the judiciary is equip to answer. Whether the Constitution prohibits such involvement is, but I am unable to discern any such prohibition nor am I able to appreciate how the democratic structure on which the constitution is based is threatened thereby. Whether the eventual acquisition by the Government of majority ownership and control of public utility providers is carried out in accordance with law, is another matter entirely.

[285] For the purposes of assessing whether there are any implied limitations on the National Assembly's power to insert section 145 in the Constitution it has to be assumed that section 69(9) has effectively removed the restraint which section 17(1) has placed on the Assembly's power to alter the constitution. In other words, it has to be assumed that the Assembly first freed itself of the requirement that any law which acquired property had to contain the matters referred to in section 17(1), including the requirement that the question whether the acquisition was for a public purpose is to be determined by the Supreme Court of Belize. The question therefore becomes whether the compulsory acquisition of property by the legislature, in exchange for reasonable compensation within a reasonable time, for a public purpose determined conclusively by the legislature, violates an unalterable principle of the Constitution of Belize.

[286] I imagine that the question may also be posed in this way, given that it is conceded, and rightly so, that the National Assembly is empowered to alter section

17(1): Is there any implied limitation on the power of the National Assembly to alter section 17(1) in such a way as to remove the requirement that the judiciary is to determine whether a compulsory acquisition is for a public purpose. Given that the National Assembly is empowered to alter section 17(1), the answer must, prima facie, be that the text of section 17(1) can be altered to exclude any reference to the judiciary determining whether a public purpose for the acquisition exists. Is there then any suggestion in the Preamble to the Constitution or elsewhere that the existence of a public purpose is an exclusive judicial preserve? I am unable to find any words or principle to that effect.

[287] As noted in the Preamble, the people of Belize do require the pursuit of policies which preserve the right of the individual to private property and the right to operate private business, but it is not disputed that this does not preclude compulsory acquisition of private property in the public interest. And I can find no expression of principle in the Preamble or elsewhere in the constitution that the elected representatives of the people of Belize in the National Assembly are incompetent to determine whether property is required for a public purpose or in the public interest. I am therefore unable to interpret the Constitution or to discover any basis for an unwritten constitutional principle which will prohibit use of the power to alter the Constitution to take away the judiciary's hitherto exclusive right to determine whether an acquisition is for a public purpose.

[288] Having said that, it is not possible to ignore the fact that in this case it had already been determined by this Court that the acquisition of BCB's and the BTL Trustee's property was for the illegitimate purpose of hindering what were thought to be the undesirable activities of Lord Ashcroft. That this illegitimate purpose continued to motivate the legislature was made clear by pronouncements made by the Honourable Prime Minister after the passage of the 2011 Telecoms Acquisition Act but before the passage of the Eight Amendment Bill. In an open letter dated 15 August 2011, the Prime Minister said:

> "The whole purpose of putting control of the utilities into the Constitution is to make that control unassailable. But Lord Ashcroft, for one, is already seeking in the Caribbean Court of Justice to prevent the very passage of the amendment to constitutionalise the control. To allow him, even after passage, the ability to have a Court strike down the amendment, would be truly to frustrate the sovereign will of the Belizean people."

And in a press release dated 17 August 2011, the following is stated:

> "In the Government's view what was most important about yesterday's developments (referring to proceedings before the CCJ) is the confirmation it provided of the Ashcroft Alliance's implacable determination to defeat the will and sovereignty of the Belizean people. It must be just as clear, though, that Government will never let that happen. But the greatest weapon to safeguard the new nationally owned Telemedia from Ashcroft's continuing billionaire powerplays, is the Eight Amendment."

[289] To the extent that section 145 was designed to confiscate property for what this Court had already determined to be an illegitimate purpose, it is in the nature of the imposition of a penalty or a punishment for wrongs which, rightly or wrongly, Lord Ashcroft was perceived as perpetrating on the people of Belize. It was accordingly not a law, but a judicial act, and was outwith the legislature's power under section 69. It is significant, in my view, that even having declared quite properly under section 143 that the Government of Belize was to have majority control over Belize Telemedia, section 145 did not declare that the acquisition was in furtherance of that purpose.

[290] In addition, for the reasons already given, by providing that the acquisitions were to take effect since August 2009, section 145 reverses this Court's judgment in ***BCB v Attorney General*** and to that extent usurps of judicial power and is not a law at all. In this regard, by way of section 145, the Assembly constituted itself an appellate court and reversed the order of Court of Appeal. The power of alteration cannot be used for this purpose.

[291] However, I would not characterise the acquisition of Fortis' property in the same way. Although I have held that the Minister failed to discharge the burden of establishing that the acquisition under the 2011 Electricity Acquisition Order was for the public

purpose stated in the order, I have no reason to conclude that the acquisition was not carried out in good faith, in the genuine belief that it was in the public interest to do so. I have no reason to think therefore that section 145 was an attempt to penalise or punish Fortis in any way.

[292] I do not accept either that, even though the effect of section 145 (on the assumption that it amounts to a valid acquisition of complainants' properties) would be to stymie the constitutional challenges to the acquisition of their respective properties which they had launched prior to the passage of the Eighth Amendment Act, this would amount to an impermissible exercise of legislative power or a usurpation of judicial power. Section 145 is not a direction to the judiciary as to the way in which those constitutional motions are to be disposed of, again assuming that the effect of section 69(9) is to dis-apply section 17(1) and its requirement that whether an acquisition is for a public purpose is for the judiciary to determine. Section 145, it is assumed, constitutes an acquisition of property pure and simple. There is no intrusion into the judicial arena.

[293] I must say that it has troubled me greatly that the effect of this ruling is that the National Assembly would be authorised to litter the constitutional text with an array of provisions expropriating the property of individual citizens. That does not appear to me to be what the power of alteration was intended for. As noted, Mr. Barrow conceded that if any such expropriation had been contained in a statute not altering the Constitution, it would have to be struck down as being in violation of section 17(1). This caused me to wonder aloud during the course of the oral arguments whether it was legitimate to use the power of alteration as what appeared to be a colourable device. After all, once the compulsory acquisition of the individual citizen's property was a fait accompli, the alteration to the Constitution would cease to have any effect as part of the constitutional law of Belize.

[294] However, the conclusion that I have come to that the compulsory acquisition of Fortis' shares by section 145 is constitution compliant, is premised upon a determination that section 66(9) has had the effect of releasing the National Assembly from the constraints of section 17(1) which otherwise renders section 145 unconstitutional in its

entirety. Secondly, even though unusual, it is not unheard of that the legislature's law making power is used to confer benefits, such as pensions, on individual persons. Even though even more unusual, it would likewise not be an impermissible use of the legislator's power under section 69 to acquire an individual's property in return for reasonable compensation and for a public purpose determined by the legislature, as long as this did not constitute a penalty or punishment.

Disposition

[295] In the premises, I would have made the following declarations:

i) The compulsory acquisition of the property of the British Caribbean Bank Limited, Dean Boyce and the Trustees of the BTL Employees Trusts identified in the Belize Telecommunications (Assumption of Control Over Belize Telemedia Limited) Order 2011 is unconstitutional and void;

ii) The Belize Communications (Assumption of Control Over Belize Telemedia Limited) Order 2011 is unconstitutional, ultra vires and void;

iii) The compulsory acquisition of the property of Fortis Energy Investment (Belize) Inc. identified in the Electricity (Assumption of Control Over Belize Electricity Limited) Order 2011 is unconstitutional and void.

iv) The Electricity (Amendment) Act 2011 and the Electricity (Assumption of Control Over Belize Electricity Limited) Order 2011 are unconstitutional and void;

v) Section 145 of the Belize Constitution (Eight Amendment) Act 2011 is unconstitutional and void.

[296] Even though I have held that section 145 has not had the effect of validating the unlawful acquisition of the complainant's properties, given my finding that it is in any event in violation of section 17(1) of the Constitution, I thought it appropriate to order accordingly.

[297] I can see no reason as well not to order that the complainants be paid damages for the breach of their constitutional rights, as would be appropriate in the ordinary case – ***Subiah v Attorney General of Trinidad and Tobago*** [2008] UKPC 47, para 11 - but would require further submissions from the parties on the question of the quantification of such damages and I would have reserved my position on whether vindicatory damages should also be awarded. I would also have given the parties liberty to apply for any further consequential orders which they might think appropriate.

Postscript **- Delay**

[298] It has taken nearly a year and a half to deliver this judgment. I acknowledge that this is unacceptable. By and large, judgments of this court are delivered in the session after the appeal has been heard, exceptionally in the second session thereafter. This judgment is not in accordance with that trend. For my part, the reason, if not the excuse, why the preparation of this judgment has taken longer than normal is directly related to the number of discreet issues which have had to be resolved, the sheer length of the written submissions (totalling some 500 pages at least, all together) and the plethora of authorities which were put before us (at least 194). But this judgment could and should have been completed earlier, and for failing to do so, I apologise to the parties.

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MENDES JA

AWICH JA

The three appeals and the underlying claims.

[299] This is my judgment in the three appeals presented and heard together, namely, No. 18 of 2012, No. 19 of 2012 and No. 21 of 2012. The appellants in appeal No. 18 of 2012 are the Attorney General and the Minister for Public Utilities; the respondent is The British Caribbean Bank Limited. I shall refer to the respondent as BCB or the respondent.

[300] The appellants in appeal No. 19 of 2012 are the same as in appeal No. 18 of 2012; the respondents are Dean Boyce and Trustees of the BTL Employees Trust. I shall refer to the respondents as Boyce, and the Employees' Trustees or simply as the Trustees, or the respondents.

[301] The appellant in No. 21 of 2012 is Fortis Energy International (Belize) Inc.; the respondents are the Attorney General and the Minister for Public Utilities who are the appellants in appeals No. 18 of 2012 and No. 19 of 2012. I shall refer to Fortis Energy International (Belize) Inc. as Fortis or the appellants.

[302] Overall, my decision is that, the appeals of the Attorney General and the Minister are allowed in appeals No. 18 of 2012 and No. 19 of 2012, except to the limited extent that, the compulsory acquisition by the Minister responsible of the property of the respondents is valid but took effect from 4 July 2011, not from 25 August, 2009. The cross-appeals in those two appeals are dismissed. The Belize Telecommunications (Amendment) Act, No. 8 of 2011, and the Belize Telecommunications (Assumption of Control over Belize Telemedia Limited) Order, 2011, S.I. 70 of 2011, are valid, they commence and have effect from 4 July, 2011. The Belize Constitution (Eighth Amendment) Act, No. 11 of 2011, is also a valid Act. It commences and takes effect generally from 25 October, 2011, although it also takes effect retrospectively to the limited extent that it validates Act No. 8 of 2011, and the Belize Telecommunications

(Assumption of Control over Belize Telemedia Limited) Order, 2011 from 4 July, 2011. The validation by the Eighth Amendment of the Act and the Order is in the end merely an additional measure since the Act and the Order are independently valid. I shall refer to the Belize Constitution (Eighth Amendment) Act, No. 11 of 2011, simply as the Eighth Amendment.

[303] The Eighth Amendment does not validate Act No. 9 of 2009. The compulsory acquisition under Act No. 9 of 2009 remained unlawful as declared by this Court (Morrison, Alleyne and Carey JJA), in appeals Nos. 30 and 31 of 2010, but now only from 25 August, 2009 to 4 July, 2011. The reason is that, Act No. 8 of 2011 did effect amendment prospectively, from 4 July 2011, and the Eighth Amendment, by its wording, validated Act No. 8 of 2011 and the Order, S.I. No. 70 of 2011 only, it did not Act No. 9 of 2009 and the Orders made under.

[304] Any question about damages for the acquisition on 25 August, 2009 and on 4 December, 2009 cannot be part of these present appeals which are about claims Nos. 597, 646 and 673 of 2011. The claims challenged the validity of compulsory acquisition in 2011 of the properties owned by the respondents said to have been authorised by Act No. 8 of 2011, Act No. 11 of 2011 and S.I. 70 of 2011.

[305] It follows that, Boyce and the Employees' Trustees are not entitled to the return of their shares and loan interests in Belize Telemedia Limited and the return of the business undertaking; they are entitled to compensation as a matter of law, for the lawful compulsory acquisition of their properties effected by the Order, S.I. 70 of 2011 made under Act No. 8 of 2011, and also authorised by ss. 143, 144 and 145 of the Constitution as amended by the Eighth Amendment..

[306] I have also dismissed appeal No. 21 of 2012 of Fortis. It follows likewise that, Fortis is not entitled to the return of its shares in Belize Electricity Limited, but to compensation for the lawful compulsory acquisition of the shares. My reasons are given in the judgment when each ground of appeal and cross-appeal is considered.

[307] The claims from which the appeals came were Nos. 597 of 2011, 646 of 2011 and 673 of 2011 respectively. They were tried in the Supreme Court by Legall J. The first two claims were by BCB, and by Boyce and the Trustees of BTL Employees' Trust, against the Attorney General and the Minister for Public Utilities. The two claims were consolidated and tried together. Legall J rendered a single joint judgment dated, 11 June, 2012 in these first two claims; he granted them to a large extent.

[308] The learned judge then proceeded to make an order dismissing the third claim, No. 673 of 2011 of Fortis, for the reason that the decisions he had reached on certain constitutional questions of law in the joint judgment in the first two claims also applied to Fortis' claim, in particular, his decision that, "from the commencement of the Belize Constitution (Eighth Amendment) Act, 2011, the Government shall have and maintain majority ownership and control of BTL, a public utility services provider [BTL]". The same questions of law arose in Fortis' claim.

[309] The Attorney General and the Minister have appealed against the joint judgment of Legall J. allowing claims Nos. 597 and 646 of 2011 to a large extent. Their appeals are the first two, No. 18 of 2012 and No. 19 of 2012. They filed a joint notice and grounds of appeal for both appeals. In answer, the respondents, Boyce and the Trustees, filed: "Notice of Intention to Contend that Decision [of Legall J] be Varied". The notice is a cross-appeal. It was filed in both appeals although Boyce and the Trustees are not parties to appeal No. 18 of 2012, and BCB, the respondent in appeal No 18 of 2012, did not sign the notice. No objection was taken to BCB adopting the notice as its own.

[310] Fortis also appealed. On 6 July, 2012 it filed notice and grounds of appeal, its appeal is No. 21 of 2012. The Attorney General and the Minister did not file in the appeal respondents' notice to vary the order made by Legall J. They were not obliged. Legall J did not write a judgment in Fortis' claim. He resolved the claim by simply making a final order dismissing the claim based on the conclusions he had reached on questions of law in the joint judgment in the first two claims.

[311] Very briefly, the facts stated for the claim of BCB, claim No. 597 of 2011, the subject of appeal No. 18 of 2012, were that: the Government of Belize, acting by the Minister for Public Utilities, unlawfully contrary to the Constitution, compulsorily acquired monetary interests of BCB in loan arrangement between BCB and Belize Telemedia Ltd. (later referred to as BTL) and loan arrangement between BCB and Sunshine Holdings Ltd.; both loan arrangements had been secured by mortgage debentures. It was deposed for BCB that, the Government unlawfully acquired the monetary interests by procuring the enactment of the Belize Telecommunications (Amendment) Act, 2011, No. 8 of 2011, and thereunder the Minister issuing the Belize Telecommunications (Assumption of Control over Belize Telemedia Limited) Order, 2011, Statutory Instrument No. 70 of 2011. BCB claimed that both the Act and the Order were unconstitutional, null and void and of no effect.

[312] The key grounds on which BCB claimed that the Act and the Statutory Instrument were unconstitutional were that: (1) "the Belize Telecommunications (Amendment) Act, 2011, is inoperative, void and of no effect in that it purports to amend provisions of the Belize Telecommunications Act (the 2002 Act) purportedly amended by the Belize Telecommunications (Amendment) Act, 2009 which said Act was declared null and void", and (2) the Belize Telecommunications (Amendment) Act, No. 8 of 2011, and Statutory Instrument No. 70 of 2011, were contrary to the preamble of the Constitution and ss. 2, 3(d), 6, 16, 17, 20 and 68; and also contrary to the principles of separation of powers, the rule of law, the protection of the law, and the protection of fundamental rights.

[313] A further ground of BCB's claim was that, the Belize Constitution (Eighth Amendment) Act, 2011, No. 11 of 2011, (which declares and requires that the Government shall at all times have majority ownership and control of a public utility provider, and that the compulsory acquisition by S.I. 70 of 2011 was carried out for a public purpose) is unlawful because it is contrary to the preamble of the Belize Constitution and ss. 2, 3(d), 6, 16, 17, 20 and 68 of the Constitution, and contrary to, the principles of separation of powers, the basic structure of the Constitution, constitutional

supremacy, the rule of law, protection of the law and protection of fundamental rights. So, BCB claimed, the compulsory acquisition carried out under Act No. 8 of 2011 and confirmed by Act No. 11 of 2011 in order that the Government would obtain majority control over BTL could not be lawfully authorised by the Belize Constitution as amended.

[314] A further more ground claimed by BCB was that, Act No. 8 of 2011, and the Order, S.I. 70 of 2011, were made to circumvent the effect of the judgments of this Court in Civil Appeals Nos. 30 of 2011 and 31 of 2011, and was made *in ad hominem*, and so the compulsory acquisitions under the legislations were unlawful.

[315] For relief, BCB claimed court declarations that would be consistent with the grounds that this Court was urged to accept, and court orders for the return of the loan interests, damages and costs.

[316] Also very briefly, the facts deposed to for the claim of Boyce and the Employees' Trustees, claim No. 646 of 2011, the subject of Appeal No. 19 of 2012, were that: the Government of Belize, acting by the Minister, unlawfully contrary to the Constitution, acquired 94% of the issued shares in Telemedia Limited, 23.39% of the shares had been owned by Sunshine Holdings Limited; and all the shares in Sunshine Holdings Limited were owned by Boyce and the Employees' Trustees.

[317] The claim of Boyce and the Employees' Trustees was conducted on the assumption that, the 23.39% shares gave Sunshine Holdings Ltd. shareholders' controlling power over BTL so, Boyce and the Trustees who controlled Sunshine Holdings Ltd. in the end controlled BTL. Boyce and the Trustees accordingly claimed that, the acquisition of the shares owned by Sunshine Holdings Ltd. which they had controlling interests in, was unlawful on the same grounds of law stated by BCB in Claim No. 597 of 2012, that is, that: (1) the acquisition was made under Act No. 8 of 2011, which was "inoperative and void" because it purported to amend provisions purportedly in the principal Act, which provisions had never become part of the principal

Act because Act No. 9 of 2009 which was intended to introduce the provisions into the principal Act had been declared null and void by the Court of Appeal; (2) the acquisition was made under Act No. 8 of 2011 and Statutory Instrument No. 70 of 2011, which were inconsistent with the Constitution; and (3) the acquisition could not be validated and justified by the Belize Constitution (Eighth Amendment) Act, No. 11 of 2011, because the Eighth Amendment was inconsistent with the preamble and several sections of the Constitution, and contrary to, "the principle of basic structure", and therefore void. Boyce and the Trustees also sought declarations, and the return of the 23.39% shares, and with it the control of BTL. That would in turn secure the return of the business undertaking of BTL to Boyce and the Trustees.

[318] Also briefly stated, the facts deposed to for the claim of Fortis, claim No. 673 of 2011 the subject of Appeal No. 21 of 2012, were that: the Government acting by the Minister, unlawfully contrary to the Constitution, compulsorily acquired 154,422 shares owned by Fortis in Belize Electricity Limited - BEL, the acquisition was unlawfully carried out by the Government procuring the passing of the Electricity (Amendment) Act, 2011, No. 4 of 2011, and the Minister issuing thereunder the Electricity (Assumption of Control over Belize Electricity Limited) Order 2011, Statutory Instrument No. 67 of 2011.

[319] Fortis' grounds for its claim were that: (1) the Act and the Order, were inconsistent with ss. 2, 3(a) and (d), 6(1) and 17 of the Constitution, and were null and void and of no effect; and (2) the Belize Constitution (Eighth Amendment) Act, 2011, No. 11 of 2011 was, "contrary to, repugnant to and inconsistent with the Constitution of Belize and therefore unconstitutional, unlawful, null and void", and could not authorise the acquisition. Fortis sought declaratory orders, the return of the shares, and with it the control of BEL. Those orders would secure the return of the business undertaking of BEL to Fortis.

[320] The joint judgment of Legall J in the first two claims was a mixed bag, but it largely accepted the claims of BCB, Boyce and the Trustees. It was also the basis on which the judge made an order dismissing Fortis' claim. The joint judgment accepted

the claims that the compulsory acquisition of the loan interests and the shares in BTL were unlawful. The judge's decisions were conveyed in the orders numbered 1, 3 and 4 that he stated at paragraph 85 of the judgment as follows: "(1) [a] declaration is granted that sections 2(a) and (b) of Belize Telecommunications Amendment Act, 2011 (the 2011 Act) are unlawful, null and void …; (3) [a] declaration is granted that the Belize Telecommunications (Assumption of Control over Telemedia Limited) Order, 2011 is unlawful, null and void; [and] (4) [a] declaration is granted that sections 2(2), 69(9), 145(1) and (2) of the Constitution as inserted by the Belize Constitution (Eighth Amendment) Act, 2011, are contrary to the separation of powers and the basic structure doctrine of the Constitution and are unlawful, null and void; section 145(3) is declared meaningless."

[321] The consequence of the three declarations made by Legall J. in favour of BCB, Boyce and the Trustees was that, the compulsory acquisition by the Minister (the Government) on 25 August, 2009, of the loan interests which had been owned by BCB, and the shares which had been owned by Sunshine Holdings Ltd. in which Boyce and the Trustees had interests, remained unlawful. The 25th August, 2009 was merely a retrospective date stated in the Acquisition Order No. S.I. 70 of 2011. Shares and other interests in BTL, owned by other entities and acquired by the Order under the Act would also be unlawfully acquired; but Legall J was not concerned with the shares and interests of the other persons.

[322] On the other hand, Legall J rejected parts of the first two claims in as far as they impugned some important sections of the Eighth Amendment. In his orders numbered 5, 6, 8, 9 and 10, he stated: "5. [a] declaration is granted that section 143 of the Constitution as inserted by the Eighth Amendment is valid; 6. [a] declaration is granted that the following portion of section 144(1) of the Constitution is valid, namely: [f]rom the commencement of the Belize Constitution (Eighth Amendment) Act, 2011, the Government shall have and maintain majority ownership and control of a public utility provider; 8. [t]he claims by the claimants in both claims for declarations and orders to the effect that the Government shall not have and maintain majority ownership and

control of BTL and for consequential reliefs are dismissed; 9. [t]he claims for damages and injunctions are dismissed; 10. [a] declaration is granted that from the commencement of the Belize Constitution (Eighth Amendment) Act, 2011, the Government shall have and maintain majority ownership and control of Belize Telemedia Limited."

[323] It is convenient to set out in full the orders made by Legall J, so as to show fully the partial, but important success of the claims in the first two appeals. The orders were these:

> "1. A declaration is granted that sections 2(a) and (b) of the Belize Telecommunications Amendment Act 2011, (the 2011 Act) are unlawful null and void.
>
> 2. A declaration is granted that sections 2(c) (d) (e), 3, 4, 5, and 6 of the 2011 Act are valid.
>
> 3. A declaration is granted that the Belize Telecommunications (Assumption of Control Over Belize Telemedia Limited) Order 2011, No. 70 of 2011, (the 2011 Order) is unlawful, null and void.
>
> 4. A declaration is granted that sections 2(2), 69(9), 145(1) and (2) of the Constitution as inserted by the Belize Constitution (Eighth Amendment) Act 2011 are contrary to the separation of powers and the basic structure doctrine of the Constitution and are unlawful, null and void. Section 145(3) is declared meaningless.
>
> 5. A declaration is granted that section 143 of the Constitution as inserted by the Eighth Amendment is valid.

6. A declaration is granted that the following portion of section 144(1) of the Constitution is valid, namely: 'From the commencement of the Belize Constitution (Eighth Amendment) Act 2011, the government shall have and maintain majority ownership and control of a public utility provider.

7. A declaration is granted that the remaining portions of section 144(1) of the Constitution, beginning from the words: 'and any alienation' to the words: 'rule and practice' (both inclusive), are null and void and severed from the subsection. Section 141(2) is therefore declared useless or meaningless.

8. The claims by the claimants in both claims for declarations and orders to the effect that the government shall not have and maintain majority ownership and control of BTL and for consequential reliefs are dismissed.

9. The claims for damages and injunctions are dismissed.

10. A declaration is granted that from the commencement of the Belize Constitution (Eighth Amendment) Act 2011 the Government shall have and maintain majority ownership and control of Belize Telemedia Limited.

11. The claimants in both claims and the defendants in both claims, along with such other persons as the claimants and the defendants may think fit, shall meet and enter into discussions, commencing from 1st August, 2012, with respect to any matter relevant to the case, including the payment of reasonable compensation to the claimants within a reasonable time for the properties of the claimants in the ownership and control of the Government."

Appeals Nos. 18 of 2012 and 19 of 2012.

The background.

General.

[324] The factual background to the disagreements between the Government of Belize and BCB, Boyce and the Trustees is necessary for the full appreciation of the complaints in the claims, the subject of the first two appeals, especially the complaint that, Act No. 8 of 2011 and Statutory Instrument No. 70 of 2011 were made to circumvent the judgments of this Court (Morrison, Alleyne and Carey JJA) in appeals Nos. 30 of 2010 and 31 of 2010, and, "made in *ad hominem*". Morrison JA and Carey JA on the panel of three judges wrote separate judgments. Alleyne JA simply concurred with Carey JA. The disagreements between the Government and BCB, Boyce and the Trustees were outlined in those two judgments and in affidavits filed in the claims the subject of these first two appeals. The judgments have now been made part of the issues in the present appeals. Affidavits used in those earlier appeals Nos. 30 and 31 of 2010, outlining the background facts to those appeals were referred to extensively by Legall J in the joint judgment in the present two claims. Indeed Legall J in his judgment gave a fairly long account of appeals Nos. 30 and 31 of 2011, and ended by reporting that, an appeal, No. 2012 1AJR, to the Caribbean Court of Justice was pending regarding those two appeal cases. The affidavits of Mr. Dean Boyce and Mr. Phillip Johnson on the one side, and of Mr. Joseph Waight and Mr. Melvin Hulse, the Minister, on the other, stated much of the background facts which Legall J took into consideration.

[325] It was the central fact of the first two claims before Legall J, now the first two appeals, that the Government compulsorily acquired (or nationalised) the business of providing telecommunications services in Belize twice, and BCB, Boyce and the Trustees considered that they lost BTL's business twice, and were aggrieved twice. The first occasion was on 25 August, 2009; they took their complaint to court. This

Court (Morrison, Alleyne and Carey JJA) in appeals Nos. 30 and 31 of 2010, declared the compulsory acquisition, "unlawful, null and void". An appeal regarding certain aspects of the cases is pending in the Caribbean Court of Justice. The second occasion was in 2011, when the Government reacquired BTL and interests in it effective retrospectively. Again BCB, Boyce and the Trustees went to court. It is the subject of these first two appeals.

[326] At one point in time the only telecommunications services business undertaking in Belize was owned by Belize Telecommunications Authority, a public authority with corporate status. Then Belize Telecommunications Limited was incorporated and took over the business undertaking of the Authority; thus the business was to a large extent privatised. The Government of Belize had some investment shares in the then newly incorporated Belize Telecommunications Ltd., but more important to it was that, it had "one $1 special rights redeemable preference share", in the company. The special share could only be transferred to a Minister of Government. It gave the Minister the right to speak at shareholders meetings and to appoint at least two directors. It also limited what the majority of directors could do without the consent of the Government's directors, and what members in a general meeting could do without the consent of the Minister. It conferred no real economic benefit to the Government, it was an instrument of control. The Government could, however, appoint more directors if it acquired a certain percentage of the ordinary shares, that is, if it engaged in substantial investment.

[327] By subsequent agreements the shares including the special share owned by the Government were transferred on until Sunshine Holdings Ltd. "owned" by the respondents Boyce and the Employees' Trustees obtained 23.39% of the shares. The special share was first transferred away by the Minister (the Government) in 2004. So, in 2004 the Government of Belize gave away its instrument of control, and privatised the business of providing telecommunications services in Belize completely. To confirm the result of the transfers of the shares by the Minister, that is, the privatisation, the Government procured in 2007, the enactment of the Telecommunications Undertaking (Belize Telecommunications Ltd. Operations) Vesting Act, 2007. It vested the business

undertaking in yet another company, Belize Telemedia Limited - BTL. The privatisation was thus cast in stone, so it was thought. BTL became the largest and dominant entity in the business of providing telecommunications services in Belize.

[328] In the year 2008, as a result of the general elections held, there was a change of government; the Hon. Said Musa, the Prime Minister then, lost office. The Hon. Dean Barrow became the Prime Minister. This Court is entitled to take judicial notice of the change of government. The new government did not like the fact that the Government of Belize had no say in the affairs of the most dominant provider of telecommunications services in Belize. According to the speech by the Prime Minister quoted as evidence in the judgment of Morrison JA in appeals Nos. 30 and 31 of 2010: the Prime Minister did not like the fact that the agreements that the previous government had entered into regarding telecommunications business had generated more than eight court cases and counting, against the Government of Belize, all brought by one Lord Ashcroft who had controlling interests in BTL and connected companies; the Prime Minister did not like the way BTL controlled telecommunications services in Belize; the Prime Minister did not like one man's campaign to subjugate an entire nation to his will; and the Prime Minister did not like a certain secret accommodation agreement which had bound the Government to pay to BTL shortfall in annual profit of BTL in the event BTL did not achieve 15% profit in the year. The accommodation agreement has recently been declared illegal in the judgment of the Caribbean Court of Justice in CCJ Appeal No. CV 001 of 2013.

The Background

The first compulsory acquisition, the court claims, and appeals

[329] In 2009, the Prime Minister, Dean Barrow, presented to the House of Representatives a Bill and had it passed by the House and the Senate, and was assented to by His Excellency the Governor General on 25 August, 2009. It became the Belize Telecommunications (Amendment) Act, 2009, No. 9 of 2009. It was intended

to amend the Belize Telecommunications Act, No 16 of 2002, the principal Act, so as: "to provide for assumption of control over telecommunications by the Government in the public interest; and to provide for matters connected therewith or incidental thereto". In other words, the Act provided for nationalization of telecommunications services business in Belize. This was clearly a change in political and economic policy in regard to providing telecommunications services. But to take effect it had to be lawful, that is, consistent with the Constitution of Belize.

[330] Following the enactment of Act No. 9 of 2009, the Minister for Public Utilities made and published under the Act, the Belize Telecommunications (Assumption of Control over Belize Telemedia Limited) Order, 2009, Statutory Instrument No. 104 of 2009, and later the Belize Telecommunications (Assumption of Control over Belize Telemedia Limited) Order, 2009, Statutory Instrument 130 of 2009, which amended the earlier Order, S.I. 104 of 2009, by adding some more financial interests acquired. The public purpose for the acquisitions stated in the two Orders was: **"the establishment and improvement of the telecommunications industry and the provision of reliable telecommunications services to the public at affordable prices in harmonious non-contentious environment"**. The two Orders compulsorily acquired 94% shares in Telemedia Ltd. and the loan interests of BCB; so it was thought. The 94% shares acquired included all the 23.39% owned by Sunshine Holdings Ltd. whose shares were all owned by Boyce and the Employees' Trustees, and in addition, shares held by six other entities, "BB (or BCB) Holdings Limited"; BTL International Inc; BTL Investments Limited; ECOM Limited; Mercury Communications Limited; and New Horizon Inc. The six were not parties to the 2009 claims and 2010 appeals. The Government then proceeded to take possession and control of BTL's telecommunications business undertaking.

[331] But BCB and Boyce had other ideas, they brought separate claims in the Supreme Court, namely, Claim No. 874 of 2009, and Claim No. 1018 of 2009. They claimed on the grounds that, the principal Act, No, 16 of 2002, as amended by Act No. 9 of 2009, did not comply with ss. 3(d), 6, 16 and 17(1) of the Constitution in that, it

infringed upon the constitutional fundamental right not to be arbitrarily deprived of property; it did not prescribe the principles on which, and the manner in which reasonable compensation therefor was to be determined and given within a reasonable time; it did not secure to persons whose properties would be compulsorily acquired, access to court for the purposes of, establishing their rights or interests, determining whether the acquisition was carried out for a public purpose, determining the amount of compensation to which they may be entitled, and enforcing their right to compensation. Boyce alone further claimed that, the Act and the two Assumption of Control Orders were unconstitutional because they, "breached the doctrine of Separation of Powers", and were discriminatory against him based on his place of origin, contrary to s. 16 of the Constitution. Legall J dismissed the two 2009 claims in his judgment dated, 31 July 2010.

[332] BCB and Boyce appealed to the Court of Appeal. Their appeals were Nos. 30 and 31 of 2010 referred to earlier. We know that, on 24 June, 2011 the Court of Appeal (Morrison, Alleyne and Carey JJA) allowed the appeals and made orders to that end. In particular the order at paragraph 203(e) stated: "[i]t is hereby declared that the Acquisition Act and Orders are inconsistent with the Constitution and are unlawful, null and void." The meaning and effect of the order are important in the determination of the present appeals because it was submitted for the respondents in the two claims the subjects of these appeals, and in these appeals that, there is a rule of law that a statute declared unconstitutional cannot be amended, that is, it cannot be improved upon, to make it consistent with the Constitution and valid, so the provisions of the "2009 acquisition Act" could not, under the law, be amended and improved upon to rid that Act and the principal Act, No. 16 of 2002, as amended by the "2009 acquisition Act" of the invalid provisions of the "2009 acquisition Act", nor could any provisions of the "2009 acquisition Act" (including those not inconsistent with the Constitution) remain in the principal Act.

[333] The Court of Appeal made the final orders that Act No. 9 of 2009 was unlawful, null and void and that appeals Nos. 30 and 31 of 2010 were allowed, as the end results

of several decisions that they had reached, namely that: (1) the Acquisition Act (No. 9 of 2009 which amended the principal Act) was inconsistent with s. 17 of the Constitution; (2) the Belize Telecommunications (Assumption of Control over Belize Telemedia Limited) Order, 2009, Statutory Instrument No. 104 of 2009, and the Belize Telecommunications (Assumption of Control over Belize Telemedia Limited) Order, 2009, Statutory Instrument No. 130 of 2009, were also inconsistent with s. 17 of the Constitution; (3) although the purposes stated for the compulsory acquisitions, were clearly public purposes, on the evidence the acquisitions were not carried out for the stated public purposes; (4) the acquisitions were made for illegitimate purposes; (5) the acquisitions were not a proportionate response to the requirement of the public purposes; (6) the claimants had not been afforded opportunity to be heard; but (7) the acquisitions were not made for discriminatory reason against Mr. Boyce, based on his place of origin.

[334] In reaching the decision that the acquisition law, Act No. 9 of 2009, that authorised the compulsory acquisitions was inconsistent with s. 17 of the Constitution, the Court of Appeal applied its earlier decision in **San Jose Farmers Co-operative Society v The Attorney General (1991) 43 WIR 63 (Henry P, Liverpool and Sir James Smith JJA)**, and the decision of the Privy Council in **Attorney General of St. Christopher, Nevis and Anguilla v Raynolds [1980] A.C. 637 PC**.

[335] In **San Jose Farmers** the Court when upholding a preliminary ruling by the trial judge about whether the **Land Acquisition (Public Purpose) Act, Cap. 150 (now 184)**, was inconsistent with the Constitution, stated that, s. 17 of the Constitution of Belize which protected right to property sought to ensure that a law which provided for compulsory taking of possession of property or for compulsory acquisition of interest in property, must prescribe: "(a) the principles on which reasonable compensation was to be determined and given within a reasonable time and (b) the manner in which reasonable compensation was to be determined and given within a reasonable time". Further, the Court stated that, the law must also secure to a person who claimed a right or interest in the property, a right of access to courts for the purposes of: "(a)

establishing the right or interest; (b) determining whether the acquisition was for a public purpose in accordance with the law; (c) determining the amount of compensation; and (d) enforcing the person's right to compensation".

[336] The Court proceeded to hold that, certain provisions of Cap. 150 (then) were inconsistent with ss. 3 and 17 of the Constitution, namely the provisions that: the declaration by the Minister that the land was required for a public purpose would be conclusive evidence that the land was so required for a public purpose; the market value of the land two years prior to the acquisition would be the value of compensation; the Minister would, in the case of undeveloped land and land valued in excess of $10,000.00, order that payment of compensation be by annual instalments over a period not exceeding ten years, and the payment could be by debentures; and that the Board for acquisition could add interests at the fixed rate of 6% per annum on sums that remained unpaid.

[337] The Court then exercised its power under ss. 21 and 134 of the Constitution which empowered courts to read and construe "existing laws", that is, laws that existed on Independence Day, 21 September 1981, with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution. The Court excluded from the Act the provisions which were inconsistent with the Constitution, and appropriately declined to award costs against the appellants.

[338] The five year period for construing existing laws with modifications, adaptations, qualifications and exceptions to bring them into conformity with the Constitution has long elapsed. Courts in Belize are now left with the usual rules of interpreting legislation liberally in favour of consistency with the Constitution. However, it must be remembered that, Henry P. opined that, courts do generally have, to a limited extent, the power to construe laws with such limited modifications, adaptations, qualifications as may be necessary to bring them into conformity with the Constitution.

[339] The starting point is the assumption that, the provision of a legislation or the legislation is not inconsistent with the Constitution – see the judgments of the Privy Council in **The Prime Minister of Belize and The Attorney General v Alberto Vellos and Others [2010] UKPC 7**; **Attorney General of The Gambia v Jobe [1984] A.C. 689 (PC)**; **Attorney General of Trinidad and Tobago v Morgan [1985] LRC 770**; and **Minister of Home Affairs v Fisher [1980] AC 319**. In the first case, an appeal from the Court of Appeal of Belize, at paragraph 43 of the opinion (judgment) of their Lordships delivered by Lord Phillips, their Lordships referring to the Referendum Act stated that:

> **"…** ***a basic principle of statutory interpretation requires the Referendum Act to be given an affect that is valid, rather than void, in so far as this is possible."***

[340] Because of this rule and the rule that, provisions of a constitution about fundamental rights and freedoms should be given a generous and purposive interpretation, courts do read into legislations provisions that give them consistency with constitutions - see **Reyes v The Queen [2002] 2 A.C. 235**; **Vasquez v The Queen [1994] 1 WLR 1304**; **Kanda v The Government of Malaya [1962] AC 322**; **The DPP of Jamaica v Mollison [2003] 2 A.C. 411 (PC)**; and **The Minister of Home Affairs v Fisher [1980] AC 319**. Where there are more than one meanings, the meaning which is consistent with the Constitution should be taken.

[341] Despite allowing the two appeals, Nos. 30 and 31 of 2010 (made issues in the present appeals), the Court of Appeal did not make a consequential order for the return of the shares and the loan interests compulsorily acquired. BCB, Boyce and the Trustees subsequently applied to the Court for the consequential relief. The Court refused the application. It directed that, "the appeals having been heard and disposed of by the Court in terms of the relief sought by the appellants in the notice of appeal, any further or consequential relief desired by either party, must be sought from the Court below"

[342] BCB and Boyce appealed to a limited extent, to the Caribbean Court of Justice on the grounds that, the Court of Appeal erred in confirming the decision of the trial judge that the acquisition of Boyce's shares was not discriminatory against Boyce, and that, the direction refusing to order consequential relief, namely, the return of the loan interests to BCB, the return of the 23.39% shares to Sunshine Holdings Ltd., and the return of possession of the business undertaking to Boyce and the Employees' Trustees was erroneous. The appeal is pending. The Attorney General and the Minister did not appeal, instead the Government pursued a legislative measure.

Appeals No. 18 of 2012 and No. 19 of 2012.

The second compulsory acquisition, the court claims and these two appeals.

[343] Instead of appealing to the Caribbean Court of Justice against the judgments of this Court in appeals Nos. 30 of 2010 and 31 of 2010, the Government procured the enactment of two legislations, the Belize Telecommunications (Amendment) Act, 2011, No. 8 of 2011, and the Belize Constitution (Eighth Amendment) Act, 2011, No. 11 of 2011. In Act No. 8 of 2011, provisions were included which the Government hoped met the shortcomings which had been identified in Act No. 9 of 2009, in the judgments in appeals Nos. 30 of 2010 and 31 of 2010, and which the Court said made Act No. 9 of 2009 inconsistent with the Constitution. Then acting by the authority of Act No. 8 of 2011, the Minister compulsorily acquired again the 94% shares in BTL including the 23.39% owned by Sunshine Holdings Ltd., and the loan interests of BCB, by issuing and publishing the Belize Telecommunications (Assumption of Control over Belize Telemedia Limited) Order, 2011, S.I. 70 of 2011 on 4 July 2011. Indeed, all the shares and interests that had been acquired under Act No. 9 of 2009, and Statutory Instruments No. 104 of 2009 and No. 130 of 2009, were acquired anew.

[344] BCB again responded by filing a claim, No. 597 of 2011, against the Attorney General and the Minister; the claim is the subject of appeal No. 18 of 2012. Boyce and the Employees' Trustees also responded in the same way; their claim was No. 646 of

2011, the subject of appeal No. 19 of 2012. I have outlined the two claims earlier and stated that the joint judgment of Legall J in the claims rendered on 11 June, 2012 was a mixed bag, but largely in favour of the claimants, now respondents.

Appeals No. 18 of 2012 and No. 19 of 2012

The grounds of the first two appeals – No. 18 of 2012 and No. 19 of 2012.

[345] The joint appeals of the Attorney General and the Minister in appeals Nos. 18 and 19 of 2012 are against:

> "That part of the decision of the Honourable Mr Justice Oswell Legall holding that:
>
> 2.1 sections 2(a) and (b) of the Belize Telecommunications Amendment Act 2011, (the 2011 Act) are unlawful, null and void;
>
> 2.2 the Belize Telecommunications (Assumption of Control Over Belize Telemedia Limited) Order 2011, No. 70 of 2011, (the 2011 Order) is unlawful, null and void;
>
> 2.3 sections 2(2), 69(9) 145(1) and (2) of the Constitution as inserted by the Belize Constitution (Eighth Amendment) Act 2011 are contrary to the separation of powers and the basic structure doctrine of the Constitution and are unlawful, null and void, and that section 145(3) is declared meaningless;
>
> 2.4 the remaining portions of section 144(1) of the Constitution, beginning from the words "any alienation" to the words "rule of practice" (both inclusive) are null and void and severed from the

subsection, and that section 144(2) is therefore declared useless or meaningless."

[346] The grounds of appeal relied on by the Attorney General and the Minister were stated and elaborated upon at the same time; that made them rather long. They are the following:

"3.1 The learned trial judge erred in law in holding that as the Belize Telecommunications (Amendment) Act, 2009 (No. 9 of 2009) had been declared unlawful, null and void by the Court of Appeal in Civil Appeals Nos. 30 and 31 of 2010, section 63(1) of the said Act had become 'non-existent' and had to be 're-enacted' to give force and effect (paras 7, 13, 14, 23, 24, 69, 72 and 84 of the Judgment); and in so holding the learned trial judge -

(a) misconstrued the meaning of 'voidness' in law and wrongly equated it with 'non-existence' or repeal;

(b) failed to appreciate that under the Belize Constitution, only the National Assembly has the power to make, amend or repeal laws; and that a judicial declaration of unconstitutionality of a statute **does not repeal the statute** but merely has the effect of ignoring or disregarding it so far as the determination of the rights of private parties are concerned;

(c) misdirected himself in assuming that a statute declared void by the court is erased from the statute book and becomes 'non existent'.

3.2 The learned trial judge erred in law in finding that sections 2(a) and 2(b) of the Belize Telecommunications (Amendment) Act, 2011 ("the 2011 Act") were unlawful, null and void on the ground that they were amending provision of the 2009 Act which were 'non-existent' consequent upon the said decision of the Court of Appeal (paras 7, 13, 14, 23, 24, 69, 72 and 84 of the Judgment); and in so finding, the learned trial judge -

(a) proceeded on a fundamental misconception that sections 63(1) and (2) of the 2009 had been erased from the statute book following the decision of the Court of Appeal;

(b) failed to appreciate the significance of section 2 of the Constitution which states that a statute is void only 'to the extent of the inconsistency';

(c) failed to take note of the finding of the Court of Appeal (as set out in para 114 of their Judgment) that 'section 63(1) of the 2009 Act was void only to the extent of its inconsistency with section 17(1)(b) (ii) of the Constitution and that the particular deficiency could be cured without doing any violence to the remainder of the legislation'; and

(d) failed to appreciate that section 2(a) of the 2011 Act was merely remedying the deficiency pointed out by the Court of Appeal (in para 113 of their Judgment), by deleting the impugned words from section 63(1).

3.3 The learned trial judge erred in law in holding that the Belize Telecommunications (Assumption of Control Over Belize Telemedia Limited) Order 2011, S.I. No. 70 of 2011 (the 2011

Order) was unlawful, null and void on the ground that there was no statutory authority to make it (paras 18, 24, 72 and 84 of the Judgment); and in so holding, the learned trial judge –

(a) wrongly assumed that section 63(1) under which the 2011 Order was made was 'non-existent' at the time of its making;

(b) misconstrued the law by holding that there was no statutory authority for the Minister to make the 2011 Order and that the Minister exceeded his jurisdiction.

3.4 The learned trial judge erred or was misconceived in law in holding that sections 2(2), 69(9), 145(1) and (2) of the Constitution as inserted by the Belize Constitution (Eighth Amendment) Act, 2011 were contrary to the separation of powers and the 'basic structure doctrine' of the Constitution and were unlawful, null and void and that section 143(3) was meaningless; and in so holding, the learned trial judge –

(a) wrongfully assumed that the 'basic structure doctrine' was a part of the law of Belize;

(b) misconstrued or failed to give full effect to section 69 of the Constitution which prescribes the procedure for amending the Constitution, including the entrenched provisions;

(c) misconstrued section 68 of the Constitution by holding that it provided a 'limit' on the power of the National Assembly to alter or amend the Constitution (para 10 of the Judgment)'

(d) erred in law in holding that the phrase 'provisions of the Constitution' occurring in section 68 include the preamble and that the preamble circumscribed the power of the National Assembly to alter or amend the Constitution (para 10 of the Judgment);

(e) failed to appreciate that the "provisions of the Constitution" commence only **after** the enacting words **"Now, Therefore, the following provisions** shall have effect as the Constitution of Belize', appearing at the end of the preamble;

(f) misconstrued the words "any other law" occurring in section 2 of the Constitution, by holding that these words also included a law to amend the Constitution; and failed to appreciate that this interpretation would lead to a logical absurdity as a law to amend the Constitution must, of necessity, be inconsistent with the existing provisions.

3.5 The learned trial judge erred in law by declaring that the words commencing from the words "any alienation" to the words "rule of practice" (both inclusive) occurring in section 144(1) of the Constitution were null and void and severed from the subsection and that section 144(2) was useless or meaningless.

3.6 The learned trial judge erred in law in holding that section 145(2) of the Constitution (Eighth Amendment) Act was insufficient to give the acquisitions in question a retrospective effect.

3.7 The learned trial judge, while purporting to apply the principle of separation of powers breached it in several respects by purporting to give the Judiciary the power to make and amend laws and to

superimpose on a written Constitution certain alien doctrines thereby limiting the power of the National Assembly to alter the Constitution or any other law."

[347] The Attorney General and the Minister then sought from this Court in the two appeals, the following orders:

"4.1 [a declaratory order] that, the Belize Telecommunications (Amendment) Act 2011 (the 2011 Act) is valid and constitutional in its entirety;

4.2 [a declaratory order] that, the Belize Telecommunications (Assumption of Control Over Belize Telemedia Limited) Order 2011, No. 70 of 2011 (the 2011 Order) is valid and constitutional in its entirety;

4.3 [a declaratory order] that, the so-called 'basic structure doctrine' is **not** a part of the law of Belize and does not apply to the Belize Constitution;

4.4 [a declaratory order] that, the provisions of section 69 of the Constitution are all inclusive and exhaustive and that there is no other limitation, whether substantive or procedural, on the power of the National Assembly to alter the Constitution;

4.5 [a declaratory order] that, the Belize Constitution (Eighth Amendment), Act 2011 is valid and constitutional in its entirety;

4.6 [an order] that, the Court of Appeal [set] aside that part of the decision of the trial judge set out in para 2 above and [enter] judgment for the Appellants; [and]

4.7 [an order for] costs."

Appeals No. 18 of 2010 and No. 19 of 2010.

The cross-appeal in the two appeals Nos. 18 of 2012 and 19 of 2012.

[348] The respondents' notice of intention to contend that the judgment of Legall J be varied commenced with a very wide request that, all the orders made by Legall J, "be varied by removing all paragraphs of the order … with the exception of paragraph 3 …" That all encompassing request by Boyce and the Trustees has been made despite the fact that some of the eleven orders made by the learned judge were in their favour. The order at paragraph 3 which Boyce and the Trustees were completely satisfied with was a declaration that, "the Belize Telecommunications (Assumption of Control over Belize Telemedia Limited) Order, 2011 is unlawful, null and void." The effect of that order was that the re-acquisition made in 2011 was of no effect.

[349] The rest of the orders that BCB, Boyce and the Trustees, by their notice, would like this Court to make may be summed up as follows: (1) an order directing that the Government surrender control of Telemedia Ltd. and possession of the business undertaking to Sunshine Holdings Ltd., that is, surrender control and possession effectively to Boyce and the Employees Trustees; (2) an order restraining the Government from "frustrating" the two respondents from exercising rights of the owners of the majority and controlling shares in BTL; (3) an order directing payment of damages by the Government; (4) BCB, Boyce and the Trustees have leave to apply for further consequential relief; and (5) orders for interests and costs.

[350] I have to say right away that, the request for leave to apply for further consequential relief is premature. I shall add that it is not appropriate to offer any opinion now about whether this court has jurisdiction to consider the application.

[351] The grounds for the cross-appeal covered up to 8 pages; they were as extensive as the grounds of appeal set out also on 8 pages. These unnecessarily extensive way of stating appeals and cross-appeals remind me of a joke told by an attorney in Sri Lanka that, a judge asked counsel what were the grounds of his client's case; counsel answered: "My Lord, all the principles in all the relevant statutes and all the principles in all the relevant common law and customs in Sri Lanka."

Appeals No. 18 of 2012 and No. 19 of 2012.

The first three grounds of appeal and the respective grounds of cross-appeal.

Submissions for the appellants.

[352] The first three grounds were about whether Act No. 8 of 2011 that amended the Belize Telecommunications Act, No. 16 of 2002, the principal Act, should be regarded as having merely amended Act No. 9 of 2009 which had been declared null and void and so, Act No. 8 of 2011 was, "null and void and inoperative". Learned counsel Mr. Denys Barrow SC, for the Attorney General and the Minister, argued the three grounds together.

[353] The first submission by Mr. Barrow was that, the trial judge made an error common to these grounds, namely that, the judge erred in his decision that, the Court of Appeal having declared in appeals No. 30 of 2010 and No. 31 of 2010 that, the acquisition Act No. 9 of 2009 was, "unlawful, null and void", the 2009 Act must be regarded as dead, and non-existent, with the result that it must be regarded as not having amended the principal Act, the Belize Telecommunications Act, No. 16 of 2002, on 25 August 2009. Based on the error, Mr. Barrow submitted, the judge misdirected himself in the several ways that the appellants set out in the three grounds of appeal. Mr. Barrow contended that, a statute that has been declared null and void exists textually for purposes of amending.

[354] The above submission contested the judgment of Legall J at paragraphs 23 and 24 where he held as follows: *"23. The defendants submitted that by referring in the new Act – the 2011 Act – to the provisions in the void Act, the 2011 Act gave to the old provisions … the same operation as if they were inserted in the instrument referring to them … The submission of the defendants is that the 2011 Act by referring to the provisions of the 2009 Act – reenacted the provisions of the 2009 Act with modifications such as sections 2(a) and (b) of the 2011 Act. The problem with this submission, as the claimants point out, is that there was nothing to incorporate by reference. The provisions of the 2009 Act were not in existence at the time the 2011 Act was passed … There was therefore nothing for the 2011 Act to incorporate … 24. The 2011 Order that acquired the properties of the claimants was made on the foundation of s. 63(1) of the Principal Act, inserted by the 2009 Act which died in the Court of Appeal, and which was non-existent at the time the 2011 Order was made. There was therefore no legal basis, no statutory authority that empowered the Minister to make the order, and the Eighth Amendment did not change this position, …"*

[355] Legall J in the end made, among others, the three main orders in favour of the claimants/respondents, and which appellants appeal against, that: *"1. [a] declaration is granted that s (2)(a) and (b) of the Belize Telecommunications (Amendment) Act, 2011, are unlawful, null and void …; 3. [a] declaration is granted that the Belize Telecommunications (Assumption of Control over Belize Telemedia Limited) Order, 2011, No. 70 of 2011, is unlawful null and void; and 4. [a] declaration is granted that sections 2(2), 69(9), 45(1) and (2) of the Constitution as inserted by the Belize Constitution (Eighth Amendment) Act, 2011 are contrary to the separation of powers and the basic structure of the Constitution and are unlawful, null and void."* The three orders are the main objects of the appeal of the Attorney General and the Minister. They ask this Court to set aside the orders.

[356] I need to point out that a slip of the pen error occurred in the judgment of Legall J. In the first ground (numbered 3.1), Mr. Barrow repeated a sentence in the judgment at paragraph 7 that, "[t]he legislative draftsperson … treated section 63(1) above of the

2009 Act inserted in the principal Act, as if it were still legally there, although the Court of Appeal had previously declared … that the 2009 Act, in which appeared the said section 63(1) unlawful, null and void". There was a slip of the pen in the words, 'section 63(1) above of the 2009 Act'. There was no section 63 of Act No. 9 of 2009. The judge must have meant section 63(1) of Act No. 16 of 2002, the principal Act, after it had been amended, or purportedly amended by Act No. 9 of 2009 on 25 August, 2009. Act No. 9 of 2009 has since been declared, "unlawful, null and void". The judge held that section 63(1) should be regarded as having been deleted from the principal Act by the judgments of the Court of Appeal in appeals Nos. 30 of 2010 and 31 of 2010 – see paragraph 21 of Legall J's judgment.

[357] Mr. Barrow gave several reasons for the submission about the common error in the three grounds. First, was that, the trial judge misunderstood the meaning of "voidness", the judge, "wrongly equated it with non-existence, or repeal". Counsel cited, **Percy v Hill [1996] All ER 523**, for the statement of Schieman LJ that:

> ***"It has been common place in our jurisprudence to speak of a basic principle that an ultra vires enactment is void ab initio and of no effect. This beguilingly simple statement formulation, as is widely acknowledged, conceals more than it reveals. Manifestly in daily life the enactment will have had an effect in the sense that people will have regulated their conduct in the light of it. Even in the law courts it will often be found to have had an effect because the courts will have given remedy to a person disadvantaged by the application of the ultra vires enactment, or a decision binding on the parties thereto, has been rendered on the basis of the apparent law …"***

[358] **Percy v Hill** was a case in the Court of Appeal (England and Wales), it was about a byelaw (a delegated legislation) which was found to be uncertain and could not found a criminal charge of trespass on a security area, and the accused were acquitted. They brought a civil case claim for damages for false imprisonment and wrongful arrest

against the arresting constables and their department. The question arose as a preliminary matter, whether the defendants could raise the defence of justification on the basis of a reasonable belief that the plaintiffs were committing an offence at the time of their arrest. The Court held that they could. The claim was dismissed and an appeal was also dismissed; it was held that, even if the byelaws were void for uncertainty, that would not deprive the constables of the defence of lawful justification to allegation of wrongful arrest and false imprisonment, provided they could show that they had acted in the reasonable belief that, the plaintiffs were committing a byelaw offence.

[359] Mr. Barrow then cited, **McLaughlin v Cayman Islands [2008] 2 LRC 317**, an appeal case from Cayman Islands to the Privy Council, where the Privy Council approved the statement in **Percy v Hill**. He also cited **Mossell (Jamaica) Ltd. (t/a Digicel) v Office of Utilities Regulations [2010] UKPC 1**, an appeal case from the Court of Appeal of Jamaica, to the Privy Council, where the Privy Council stated that, **"subordinate legislations, executive orders and the like, if found ultra vires, generally speaking it is as if they had never had any legal effect at all"**, and that there were occasions when they were found to have legal effect. Mr. Barrow emphasised the words 'generally speaking'. Based on the three cases, counsel urged this Court to accept that, Act No. 9 of 2009 and ss. 63 to 75 of the Principal Act existed for the purpose of amending.

[360] Secondly, counsel made the submission in a philosophical way. He said that, in Belize, based on the doctrine of separation of powers, s. 68 of the Constitution of Belize gives the power to enact, which includes the power to repeal legislation solely to the Legislature, the National Assembly; the courts have not been given such powers, and courts have always been careful to point out that they review primary legislation pursuant to s. 2 of the Constitution which authorises that, other laws if inconsistent with the Constitution, shall be void to the extent of the inconsistency. He argued that, "the Constitution does not empower the courts to review and declare legislation void based on laws that the courts find satisfactory according to criteria selected by courts, or according to some overarching legal principle".

[361] Accordingly, Mr. Barrow submitted that, in their review of legislations for inconsistency, courts may make the order that, the legislation is void to the extent of the inconsistency. Such an order, said counsel, does not amount to a repeal of the law because the law making function, which includes repeal function, is solely for the National Assembly, it is a separate power from the power to adjudicate that is conferred on the Judiciary. Counsel then argued that, a law declared void by court has not been repealed, it is unenforceable, but "remains textually and formally in existence and capable of being amended."

[362] Counsel proceeded to inform this Court that, the rule proposed by the respondents that, a statute declared unconstitutional cannot be amended and revived by amendment of that statute because it is a nullity, has not been accepted all round. He said that the majority view in courts of the Unites States of America is that, an unconstitutional statute is void and has no effect, but it remains in existence and may be amended to cure the unconstitutionality. He cited ten state level appeal cases to that effect. He also cited **Kamau v Attorney General [2011] 1 LRC 399**, a case decided by the Supreme Court of Kenya (the final court) for the statement of the court that, its role was to interpret and declare the law, and that the doctrine of separation of powers prevented the court from amending the law, which role rested with the Parliament, and in regard to revoking and adopting a new Constitution, with the people of Kenya.

[363] Counsel then turned to the precedents relied on by Legall J for the proposition that, a provision of an Act, or an Act which has been declared by court to be unconstitutional is dead, non-existent and cannot be amended by another Act in order to make it constitutional and brought back to life. Legall J stated in his judgment that, he relied on: **Attorney General of St. Christopher Nevis and Anguilla v Reginald Yearwood and Others, Civil Appeal No. 6 of 1977, Eastern Caribbean Court of Appeal**; the views of Basu in his book, Limited Government and Judicial Review; a quotation from an Australian case, **South Australia and Others v Commonwealth (1942) C.L.R. 373**; and **John Joseph Akar v The Attorney General of Sierra Leone [1970] AC 853**.

[364] **Attorney General v Yearwood** was a case about the legality or otherwise of compulsory acquisition of sugar cane estates in Saint Christopher, Nevis and Anguilla (as the territory was known then). Mr. Barrow recounted that, after the principal Act, the Sugar Estates Land Acquisition Act 1975 (No. 2 of 1975) was passed and some of the estates were compulsorily acquired by a ministerial Order and a claim was brought for a declaration that the Act was unconstitutional on several grounds including that its compensation provisions were unconstitutional, another Act, No. 8 of 1975, was passed to amend the principal Act to make it constitutional. But the provisions of Act No. 8 of 1975, were not effective to rescue the earlier Act [Act No. 2 of 1975], it remained unconstitutional, Mr. Barrow said. The latter Act did not purport to repeal and replace the principal Act, he argued. He submitted that it was the reason for which the Court of Appeal of St. Christopher, Nevis and Anguilla held, as the trial judge had held, that the amending Act did not make the principal Act constitutional and valid. Counsel also submitted that in the case (**Attorney General v Yearwood**), the Court also considered severance of the offending parts of the principal Act, and concluded that, manifestly what would be left would not provide a law that would prescribe the principles on which and the manner in which compensation was to be determined and given.

[365] About **Akar**, Mr. Barrow argued that, the amending provisions in Act No. 12 of 1962 were held to be unconstitutional, whereas some provisions of Act No. 9 of 2009 (an issue in these appeals) were held by Legall J to be valid. He urged this Court to accept that as a distinguishing feature. He also urged the Court to regard **Akar** as a case decided on its peculiar facts.

[366] Besides his submission urging this Court to distinguish **Yearwood** and **Akar** from the present first two appeals, Mr. Barrow urged the Court to regard the court declaratory order in appeals Nos. 30 and 31 of 2010 that, Act No. 9 of 2009 was null and void as meaning that, the Act had no effect in determining the rights of the appellants and the respondents then, but that, the Act should be treated as available for amendment purposes. His reason was that, the Court of Appeal decided that several sections and provisions of Act No. 9 of 2009 were not unconstitutional. He pointed out that Morrison

JA in his judgment stated that, ss. 64, 65, 66, and 67 of the Act met the requirements of s. 17 of the Constitution, and that only a part of s. 63 was inconsistent. Counsel argued that the Court of Appeal did not mean that the entire Act No. 9 of 2009 should be treated as void. In support he quoted a sentence at paragraph 114 of the judgment of Morrison JA that: "The result of all this is that, in my view, s. 63(1) is to the extent of its inconsistency with s. 17(1)(b)(ii) void. However, I accept that, as Ms. Young submitted (and the appellants did not dispute), if necessary, this particular deficiency could be cured, without doing any violence to the remainder of the legislation, by applying the principle of severance (see para. 108 above)."

[367] I think it is appropriate to dispose of the last submission about what Morrison JA stated straightaway. The submission by counsel is tenable, given, for example that, the part of s. 63(1) which authorised the compulsory acquisition could remain a meaningful part if the part regarded as limiting access to court was severed. It is also arguable that several provisions were not inextricably mixed with and formed a single scheme, but remained practical and comprehensive. But this submission should not detain this Court. It is now water under the bridge as far as this Court is concerned. I accept entirely the submission by learned counsel Mr. Pleming QC, for BCB, that it was too late to make the submission that this Court should not regard the entire Act No. 9 of 2009 as "unlawful, null and void". In my view, whatever they meant and whatever their views in the course of examining appeals Nos. 30 and 31 of 2010, the judges of the Court of Appeal (Morrison, Alleyne and Carey JJA) made the final order that Act, No. 9 of 2009 was unlawful, null and void. It is not appropriate on this occasion for this Court to re-examine the correctness of the order in those appeals.

Appeals No. 18 of 2012 and No. 19 of 2012

The first three grounds of appeal and the respective grounds of cross-appeal.

Submissions for BCB, Boyce and the Employees' Trustees.

[368] Mr. Pleming QC, Lord Goldsmith QC, Mr. Courtenay SC and Mr. Smith SC shared out making submissions for their clients, the respondents. Submission for one respondent was often submission for the other or others as well, and counsel often adopted the submission of one another. To avoid attributing wrongly a particular submission to one or the other counsel, I may not refer to counsel by name. I mean no disrespect.

[369] The first main submission by counsel for the respondents was that, "the learned judge was correct to hold that, sections 2(a) and (b) of the 2011 Act [the Belize Telecommunications (Amendment) Act, 2011] are meaningless and void because sections 63(1) and (2) of the Belize Telecommunications Act, 2002 (the Principal Act) did not exist in law following the Court of Appeal's declaration in BCB and Boyce [appeals Nos. 30 of 2010 and 31 of 2010] that, the Belize Telecommunications (Amendment) Act, 2009 (the 2009 Act) was unlawful, null and void in its entirety."

[370] The background to the submission was this. Originally the Belize Telecommunications Act, No. 16 of 2002, the principal Act, stopped at Part XI, s. 62. Part XII comprised of sections 63 to 74 were added on 25 August, 2009 by the Belize Telecommunications (Amendment) Act, No. 9 of 2009, which subsequently on 24 June, 2011 was declared null and void by the Court of Appeal. Section 75 was added subsequently by Act No. 8 of 2011. Sections 63(1) and (2) which had been added by Act No. 9 of 2009 before the declaration that the Act was null and void, were the enabling sections that had been intended to authorise compulsory acquisition of property for the purpose of telecommunications services. The section was as follows:

PART XII
ASSUMPTION OF CONTROL OVER
TELECOMMUNICATIONS BY THE GOVERNMENT

63. (1) Where the licence granted to a public utility provider is revoked by the Public Utilities Commission, or where a licensee ceases operations or loses control of operations, or where the Minister considers that control over telecommunications should be acquired for a public purpose, the Minister may, with the approval of the Minister of Finance, by Order published in the Gazette, acquire for and on behalf of the Government, all such property as he may, from time to time, consider necessary to take possession of and to assume control over telecommunications, *and every such order shall be prima facie evidence that the property to which it relates is required for a public purpose.*

(2) *Upon publication in the Gazette* of the Order made pursuant to subsection (1) above, the property to which it relates shall vest absolutely in the Government free of all encumbrances without any further assurances, …

[371] After Act No. 9 of 2009 was declared null and void, the National Assembly passed on 4 July, 2011 **the Belize Telecommunications (Amendment) Act, No. 8 of 2011**. By its **s. 2(a)** the Act amended the principal Act, **No. 16 of 2002** by deleting from **s. 63(1)** the words: "and every such order shall be prima facie evidence that the property to which it relates is required for a public purpose", By **s. 2(b), Act. No. 8 of 2011** amended **s. 63(2)** of the principal Act by substituting the words: "As from the date of commencement", for the words: "Upon publication in the Gazette".

[372] The amendment that **Act No. 8 of 2011** makes to **s. 63(1) of the principal Act** by removing the provision that the acquisition itself would be *prima facie* evidence that the property was required for a public purpose was intended to ensure that the right to

access to court for determining that question was not viewed as fettered by the *prima facie* presumption in favour of the Minister. The Court of Appeal had decided in appeals Nos. 30 and 31 of 2010, that the *prima facie* presumption was inconsistent with the Constitution.

[373] I take that decision to be applicable to the particular circumstances of those appeals. Our law of evidence and procedure abounds in rebuttable presumptions. Even the common law rule of construction to determine constitutional validity or otherwise of Acts requires that courts should start with a presumption of validity – see **Regina (Jackson and Others) v Attorney General [2005] 3 WLR 733**, **Attorney General (Trinidad and Tobago) v Morgan [1985] LRC 770**, and **The Prime Minister of Belize and the Attorney General v Alberto Vellos and Others [2010] UKPC 7**. All those presumptions have never been viewed as diminishing access to court. The many presumptions are, of course, claimed or applied when parties are in court and continue to have access to court. I prefer a statement of the law that will not have unintended general consequence to the law of evidence and the rules of construction of the Constitution, other legislations and some documents. In the present appeals the question of *prima facie* presumption that the compulsory acquisition was for a public purpose does not arise. Act No. 8 of 2011 seeks to remove the presumption from s. 63 of the principal Act.

[374] **Sections 63(1) and (2) of Act No. 16 of 2002** as amended by ss. 2(a) and (b) of Act No. 8 of 2011 are the following:

> **PART XII**
> **ASSUMPTION OF CONTROL OVER**
> **TELECOMMUNICATIONS BY THE GOVERNMENT**
>
> **63. (1) Where the licence granted to a public utility provider is revoked by the Public Utilities Commission, or where a licensee Minister considers that control over telecommunications should be acquired for a public purpose, the Minister may, with the approval of**

the Minister of Finance, by Order published in the Gazette, acquire for and on behalf of the Government, all such property as he may, from time to time, consider necessary to take possession of and to assume control over telecommunications.

(2) As from the date of commencement of the Order made pursuant to subsection (1) above, the property to which it relates shall vest absolutely in the Government free of all encumbrances without any further assurances …

[375] Counsel supported the decision of Legall J. that, the amendment by ss. 2(a) and (b) of Act No. 8 of 2011, are meaningless and inoperative for the same reason given by the judge, namely: that the law is that an unconstitutional statute is null and void and remains "dead" and "non-existent", and so, Act No. 9 of 2009 and its provisions incorporated in the principal Act are also null and void, and are non-existent. Secondly that, an unconstitutional statute cannot be revived by amendment of that very statute so, "the 2011 Act [No. 8 of 2011] lacked the authority to revive the provisions of the 2009 Act [No. 9 of 2009]", and of the relevant provisions of the principal Act - see paragraph 18 of Legall J's judgment. Although the quotation from Basu's book, relied on by the judge differentiates between a retrospective amendment and a prospective amendment; and between an amendment of an unconstitutional Act by an ordinary Act and an amendment of the Constitution itself to validate the unconstitutional Act, Legall J did not consider the difference in regard to the two claims.

[376] Counsel also submitted that Legall J was right in applying the judgment of the Court of Appeal of St. Christopher, Nevis and Anguilla in **Yearwood**, and that he was right in his view that, a quotation from the Australian case, **South Australia and Others v Commonwealth**, was the correct law. Counsel stated the law to be that quoted by the Court of Appeal of St. Christopher, Nevis and Anguilla. What was quoted by that court as the law in the case was in fact derived from Basu's book. Counsel read to this Court the quotation at (ii) that: "An unconstitutional statute cannot be revived by

retrospective amendment of that statute. It would follow … that such unconstitutionality cannot be retrospectively removed by any subsequent amendment of that very statute which was dead ab initio." But Counsel seemed not to concern themselves in the present appeals with the difference between retrospective amendment and prospective amendment of an unconstitutional Act, a point which was made in the next quoted paragraph.

[377] Counsel submitted further that, the judgments in **Yearwood** and **Akar** established that, "a legislature cannot retrospectively cure an unconstitutional Act, save by amending the Constitution expressly to do so". The amendment of the Constitution must be given retrospective effect, counsel emphasised. The submission was a repetition of part of the rule proposed by Basu. But counsel did not make a submission about whether the Eighth Amendment could not validate Act No. 9 of 2009 and Act No. 8 of 2011. Presumably because they took the view that the Eighth Amendment was void.

[378] In reply to the submission for the appellants regarding a void statute existing for the purpose of amending, counsel for the respondents answered that, **Percy v Hill** and the other English cases cited for the argument were not apposite. Counsel contended that it was a flawed argument that: "a void law may still have collateral effects on third parties; that it is the province of the Legislature, not the Judiciary, to repeal or amend legislative acts; and that statutes sometimes may be held to be unconstitutional as applied, as opposed to being unconstitutional and void in all circumstances" - see paragraph 30 of the written submission. Counsel argued further that, "it does not follow from the recognition, in **Percy v Hill**, of the effect that an invalid law may have on individuals in the ordinary course, that an Act deemed to be a legislative nullity nevertheless exists to be amended and built upon by a subsequent legislation".

[379] Mr. Pleming QC submitted that, English common law cases about the effects that a void subsidiary legislation may have notwithstanding, cannot apply to these appeals because the voidness in these appeals flows from a written Constitution in Belize,

namely s. 2 of the Belize Constitution, and that section directs that a law which is inconsistent with the Constitution is void to the extent of the inconsistency, the Constitution does not provide that the law may be regarded as not void for some purposes.

[380] Regarding cases from the USA cited by counsel for the appellants for the submission that void statutes do exist for amending, counsel for the respondents submitted that: judgments of USA courts are not precedents in the courts of Belize; in any case, courts in the USA differ on the point of law. On the other hand, counsel cited other USA court cases to support their submission that, unconstitutional statutes cannot be amended. Counsel for the respondents also advanced a philosophical argument of their own that, the appellants have not stated the rationale for the decisions of the courts in the USA that, unconstitutional statutes exist for the purposes of amending.

Appeals No. 18 of 2012 and No. 19 of 2012

Determination.

The first three grounds.

The legislations at issue.

[381] Before examining the submissions of parties about the first three grounds, it is convenient to set out, or at least outline the legislations at issue. The first is the **Belize Telecommunications Act, No. 16 of 2002**. It is the principal Act, after the demise of the Belize Telecommunications Authority Act and the Authority. It provides the basic laws about telecommunications in Belize. It sets out among other things, the objects of the Act which include: **providing reliable and affordable telecommunications services; providing services that meet economic and social requirements of users; encouraging investment, ensuring acceptable technical standard, promoting stability of telecommunications services, preserving national security**

and others. The rest of the Act covers, among others: the Public Utilities Commission, the regulator public authority concerned with telecommunications services, its regulatory functions, powers, duties, immunities of providers of telecommunications services and connected administrative matters such as marketing; consumer protection; offences; and even the power of telecommunications services providers to compulsorily acquire private property required for the purpose of providing telecommunications services to the public.

[382] The principal Act as at 25 August, 2009 is important in these appeals because before that date the Act did not authorise the Minister to compulsorily acquire private properties for the purposes of providing telecommunications services to the public or at all. The original Belize Telecommunications Authority had been authorised to do so, but the Authority was no more. When the Government decided in 2009, to nationalise back the business of providing telecommunications services, that is, to have controlling power over the dominant provider of the services at the time, it had to get enacted a law that would authorise the compulsory taking of the shares in BTL and of the assets and the business undertaking from Belize Telemedia Ltd. That is because the **Constitution of Belize in s. 17** requires that any private property should not be compulsorily acquired, except for a public purpose and under a law that prescribes the principle and manner in which reasonable compensation may be determined and given within a reasonable time, and provides for access to court by the owner of the property.

[383] **Belize Telecommunications (Amendment) Act, 2009, No. 9 of 2009** was the legislation to provide for the compulsory acquisition intended. It is important in these appeals because it was the first of two statutory efforts by the Minister, through the Legislature, the National Assembly, to compulsorily acquire the properties and interests of BCB, Boyce and the Employees' Trustees in BTL for purposes of telecommunications in Belize, including the purposes of providing telecommunications services to the public. The National Assembly chose, instead of enacting a new Act, to simply add provisions to the then existing principal Act, No. 16 of 2002, that would authorise and enable the Minister to take private property for public purposes relevant to telecommunications in

Belize, and to provide for compensation and access to court by owners of properties that would be compulsorily acquired.

[384] The National Assembly, by Act No. 9 of 2009, added **Part XII** comprised of **ss. 63** up to **74 to the principal Act**. The most important addition for the purposes of the present appeals was **s. 63**; it was the enabling section, the acquisition section, that authorised the Minister to compulsorily acquire properties for the purposes of telecommunications. I have already quoted the section, it is worth repeating it here. It provided as follows:

> **PART XII**
> **ASSUMPTION OF CONTROL OVER**
> **TELECOMMUNICATIONS BY THE GOVERNMENT**
>
> **63. (1) Where the licence granted to a public utility provider is revoked by the Public Utilities Commission, or where a licensee ceases operations or loses control of operations, or where the Minister considers that control over telecommunications should be acquired for a public purpose, the Minister may, with the approval of the Minister of Finance, by Order published in the Gazette, acquire for and on behalf of the Government, all such property as he may, from time to time, consider necessary to take possession of and to assume control over telecommunications, and every such order shall be prima facie evidence that the property to which it relates is required for a public purpose.**
>
> **(2) Upon publication in the Gazette of the Order made pursuant to subsection (1) above, the property to which it relates shall vest absolutely in the Government free of all encumbrances without any further assurances …**

[385] **Subsections (2) to (11) of section 63** provided for matters such as the date on which acquisition would take effect, the meaning of property, access to court, and compensation.

[386] **Sections 64 to 71** provided for the manner and form of making claim for compensation, the manner of determining compensation and court proceedings. **Section 72** provided for the making of Rules of Court by the Chief Justice for court proceedings under the principal Act, concerning compulsory acquisition. **Section 73** provided for appeal to the Court of Appeal; and **s. 74** provided for the Act to prevail over others, but subject to the Constitution.

[387] It is now well known that, the Court of Appeal in appeals Nos. 30 of 2010 and 31 of 2010 held that Act No. 9 of 2009 was inconsistent with s. 17 of the Constitution and declared the Act unlawful, null and void. It was held inconsistent by omission of important requirements and some inadequacies. I have outlined the above provisions of Act No. 9 of 2009 simply because BCB, Boyce and the Trustees have argued that, it followed from the declaration made by the Court of Appeal in appeals No. 30 of 2010 and No. 31 of 2010 that, the principal Act must be regarded as never has been amended by Act No. 9 of 2009, because Act No. 9 of 2009 never existed, and therefore the subsequent Act, No. 8 of 2011, could not amend the principal Act as if it had the provisions of Act No. 9 of 2009 added to the principal Act.

[388] That brings me to the **Belize Telecommunications (Amendment) Act, No. 8 of 2011**. It is crucial in the determination of the first three grounds of the present appeals. At the trial BCB, Boyce and the Trustees challenged the Act directly. They contended that it was an Act which purported to amend a non-existent Act, No. 9 of 2009, which this Court in appeals No. 30 of 2010 and No. 31 of 2010, had declared to be inconsistent with ss. 3 and 17 of the Constitution, and therefore unlawful, null and void. They also challenged the Act on its contents on the ground that, the provisions that it sought to introduce into the principal Act were inconsistent with the Constitution. I shall note here that, Act No. 8 of 2011 states that it intends to amend the principal Act, No. 16

of 2002, it does not state that it intends to amend Act No. 9 of 2009. So, it was a conclusion by deduction made by BCB, Boyce and the Trustees that Act No. 8 of 2011 amended Act No. 9 of 2009. They contended that, Act No. 8 of 2011 "is inoperative".

[389] The Attorney General and the Minister, of course, contended otherwise that, despite its shortcomings identified by the Court of Appeal, Act No. 9 of 2009, existed until it was repealed by amendments made by Act No. 8 of 2011 to the principal Act. Mr. Barrow said that, the Government procured the enactment of the Belize Telecommunications (Amendment) Act, No. 8 of 2011, to amend the principal Act in order to rectify the shortcomings in the provisions of the principal Act that had been added by Act No. 9 of 2009. We know as a matter of fact that, Act No. 8 of 2011 declared amendments to ss. 63, 64, 67 and 71 of the principal Act, and that those sections had been added earlier by Act No. 9 of 2009 by aborted amendments. We also know that Act No. 8 of 2011 added a new section numbered s. 75 which concerns service of notices and documents regarding compulsory acquisition.

[390] **Section 2(a) of Act No. 8 of 2011** states that, it amends **section 63(1) of the principal Act** that authorises compulsory acquisition of property, the enabling section, by excising the words, "**and every such order shall be prima facie evidence that the property to which it relates is required for a public purpose**". **Section 2(b) of Act No. 8 of 2011** amends **s. 63 of the principal Act** by authorising the date of commencement of the acquisition order as the date of the acquisition. So, the Minister would be able to choose any date of commencement of acquisition. The date of acquisition had been the date of publication of the order. I have earlier mentioned these amendments and set out the amended versions. **Subsections (3) and (4) of section 63** (that had been added by earlier amendments made by Act No. 9 of 2009), are amended by **s. 3 of Act No. 8 of 2011** as follows:

> **3. Section 63 of the principal Act has been amended as follows:-**
>
> **…**

(c) by repealing subsection (3) and replacing it by the following:-

'(3) subject to section 71 of this Act, in every case where the Minister makes an Order under subsection (1) above, there shall be paid to the owner of the property that has been acquired by virtue of the said Order, reasonable compensation in accordance with the provisions of this Act within such time as the Supreme Court considers reasonable in all the circumstances.'

(d) by repealing subsection (4) and replacing it by the following:-

'(4) Any person claiming an interest in or right over the acquired property shall have a right of access to the courts for the purpose of -

(i) establishing his interest or right (if any);

(ii) determining whether that taking of possession or acquisition was duly carried out for a public purpose in accordance with this Act;

(iii) determining the amount of the compensation to which he may be entitled; and

(iv) enforcing his right to any such compensation.'

(e) by renumbering subsection (11) as subsection (13), and by inserting the following new subsections immediately after subsection(10):-

'(11) The Minister may make an Order under this section with retrospective effect.

(12) It shall not be necessary for the Minister to give the interested person(s) whose property is intended to be acquired an opportunity to be heard before making an Order under this section.'

[391] The rest of the amendments that Act No. 8 of 2011 makes were also challenged by the claimants/respondents in the trial court for being amendments to non-existent provisions, and some were challenged for being inconsistent and contrary to, or falling short of the requirements of the Constitution, or simply meaningless. Non-existent was used to mean non-existent in the eyes of the law; the provisions were physically on statute books. The contentions have been repeated in this Court.

[392] Legall J accepted some of the challenges by the respondents. On the other hand, he said that Act No. 8 of 2011 repealed and replaced some of the sections in the principal Act by new ones, and also added completely new sections to the principal Act. The replacements were, he stated, in sections, (63(3), (4), (11), (12), 64(3), (4), 67(1)(f), (g), 71 and 75 of the principal Act. He concluded that, these sections were validly added to the principal Act. He stated: "I do not think that it could be reasonably argued that provisions in a void Act which were previously inserted in another Act cannot be replaced in that other Act by new provisions enacted by parliament, as the 2011 Act does in relation to the new provisions above." This is a rather incongruous statement given the judge's view that the law was that an Act declared void did not exist. However, the judge seemed to correct that incongruity by explaining and concluding overall that: "ss. 63(5), (6), (7), (8), (9), (10), 64(1), (2), (3), 65, 66, 67(1) (a) to (h), (2), 68, 69, 70, 72, 73 and 74 all of the principal Act, which were inserted there by the now void 2009 Act, were not amended or affected by the 2011 Act. These provisions are, in accordance with the Court of Appeal's decision, non-existent in the principal Act – null and void" - see paragraphs 13, 17 and 18 of the judgment.

[393] The Attorney General and the Minister also appeal against the decision of Legall J that, some of the provisions added by the amendments were unconstitutional or

became meaningless. I set out the rests of the amendments here for the convenience of reference:

> **3. Section 64 of the principal Act is amended by renumbering subsection (3) thereof as subsection (5) and by inserting the following new subsections immediately after subsection (2):-**
>
> > **'(3) All claims made pursuant to the notice of acquisition or otherwise shall be quantified by the claimant and shall show with facts and figures the basis of the amount claimed.**
> >
> > **(4) The Financial Secretary may require the claimant to provide additional information and documents as he may consider necessary to verify the claims.'**
>
> **4. Section 67 of the principal Act is hereby amended in subsection (1) thereof by renumbering paragraph (f) as paragraph (h), and by inserting the following new paragraphs immediately after paragraph (e):**
>
> > **'(f) where the acquired property consists of shares or stock of a company, the Court shall, in assessing compensation, employ the generally accepted methodology for valuing companies, including the standard Discounted Cash Flow (DCF) method, and may call for expert evidence in this regard;**
> >
> > **(g) where the property acquired consists of securities, such as a mortgagee's or chargee's or lender's interest in the property, the value of the property for the purpose of compensation shall be deemed to be the book value of such security, subject to any challenge to the validity of the security and to any other impediments that may exist in the recovery of its full value.'**
>
> **5. Section 71 of the principal Act is hereby repealed and replaced by the following:**

‘71. (1) Subject to the provisions of this section, all amounts which have been awarded by way of compensation under this Act, including interest and costs to be paid by the Financial Secretary, and all other costs, charges and expenses which shall be incurred under the authority of this Act, shall be a charge on the Consolidated Revenue Fund of Belize and shall be paid within such time as the Court considers reasonable in all the circumstances.

(2) The Financial Secretary shall be entitled to deduct from any compensation which may have been awarded such sums as are due to the Government as arrears of any taxes, duties and charges, and all other sums whatsoever, which are owed to the Government by the person entitled to compensation.

(3) Where the exigencies of public finance do not allow the immediate payment to the claimant of the compensation awarded by the Court, the Attorney General, representing the Minister of Finance, may apply to the Court for approval of a schedule of payments by instalments, provided that any such amortization schedule shall not exceed a period of five years unless the claimant agrees.

(4) The compensation determined by the Court may be paid either in a sum of money or, subject to the approval of the Court, by the issue of Treasury Notes in the manner provided in subsection (5) of this section.

(5) Subject as aforesaid, the compensation may be paid by the issue to the claimant of one or more Treasury Notes to an amount equal to the amount of compensation, and any Treasury Note so issued shall –

(a) be redeemable within a period not exceeding five years from the date of issue;

(b) bear interest at the rate paid by commercial banks in Belize on fixed deposits at the date of acquisition; and

(c) subject to paragraphs (a) and (b) above, be governed by the provisions of the Treasury Bills Act.

(6) Subject to the foregoing provisions of this section, the Court shall have the power to order the Minister of Finance to take all necessary steps to procure the payment of compensation to the claimant in the manner approved by the Court and the court may make all necessary and consequential orders to enforce the claimant's right to all such compensation.

(7) Nothing in the foregoing provisions of this section shall preclude the claimant and the Financial Secretary from mutually agreeing to a different manner of payment of compensation, including, but not limited to, the conveyance to the claimant of land or other property of equivalent value, or the offsetting of compensation or part thereof against any future tax liability of the claimant; and in any such case, the Court may make a consent order to effectuate the agreement between the parties."

6. The principal Act is hereby amended by the addition of the following new section immediately after section 74 in Part XII:-

"75. For the purposes of this Part [dealing with assumption of control over telecommunications by the Government], any documents (including a court process) required or intended to be served on a person outside Belize may be served by registered post or courier service, and for this purpose, no leave of the Court for serving the document out of the jurisdiction shall be required notwithstanding anything to the contrary contained in the Supreme Court (Civil Procedure) Rules, 2005 or any other law or rule of practice."

7. This Act shall take effect from the 25th day of August, 2009.

[394] The fourth legislation relevant to the first three grounds of appeal is the **Belize Telecommunications (Assumption of Control over Telemedia Limited) Order, 2011, Statutory Instrument No. 70 of 2011**. It effects or purports to effect the

compulsory acquisition and sets out the properties owned by BTL, and shares and interests in BTL that the Minister compulsorily acquired. There has been no issue as to the identity of the properties owned by BTL and the interests that BCB, Boyce and the Employees' Trustees said they had in BTL. The date of acquisition was stated retrospectively, namely, 25 August 2009, whereas the date of making the Order and of publication of the Order was 4 July 2011. That is the only issue in the first three grounds of appeal regarding Statutory Instrument No. 70 of 2011. Otherwise the validity of the Acquisition Order, S.I. 70 of 2011, depends wholly on whether Act No. 8 of 2011 is "operative", that is, effectual and it is not contrary to the Constitution and void in the ways complained about. The Order was made under Act No. 8 of 2011.

[395] The fifth legislation is **the Belize Constitution (Eighth Amendment) Act, No. 11 of 2011**. It adds, by amendment, **Part XIII** to **the Belize Constitution**. The part authorises, and provides for majority ownership and control by the Government of public utilities providers, including BTL and BEL. The respondents contended that, the Eighth Amendment is null and void.

[396] The sixth legislation is the **Constitution of Belize, Chapter 4, Laws of Belize**. It is relevant to the first three grounds of appeal because the Attorney General and the Minister contended that, under s. 68 of the Constitution of Belize, only the National Assembly may make laws and repeal them, so Act No. 9 of 2009 existed, although without legal effect on the rights and duties of individuals, for the purpose of repealing or amending. **Section 68** states:

> **68. Subject to the provisions of this Constitution, the National Assembly may make laws for the peace, order and good government of Belize.**

No provision in the Constitution gives the same or similar power to make laws to the other two Branches of the State (the Executive and the Judiciary).

[397] The Attorney General and the Minister also contended in regard to the rest of the grounds of appeal that, under s. 69(1) of the Constitution the National Assembly may alter any law, including s. 69, and so, the National Assembly may amend or repeal any section of the Constitution. Further, they submitted that, the provisions in the Belize Constitution (Eighth Amendment) Act No. 11 of 2011, were within the power of the National Assembly to legislate. So, Mr. Barrow submitted, the amendment made by the Eighth Amendment declaring that the Government shall at all times have ownership and control of public utilities providers was a good amendment. **Section 69(1) of the Constitution** states:

> **69(1) The National Assembly may alter any of the provisions of this Constitution in the manner specified in the following provisions of this section.**

[398] The rest of the subsections of **s. 69** provide for the different manners of amending or repealing different sections of the Constitution. Some sections may be amended or repealed by two thirds majority, others by three-quarters majority. In some cases a certain number of days must pass after a Bill is presented to the National Assembly before the House of Representatives takes a vote on the Bill, and in others, a referendum is part of the process. All these are various ways that entrench those provisions of the Constitution by differing degrees. There is no provision prohibiting totally amendment of any provision of the Constitution.

[399] Boyce and the Employees' Trustees contended that, despite the words of s. 69(1) of the Constitution, the section does not authorise amendments of certain aspects of the Constitution. They relied on the preamble of the Constitution and what they called, 'the doctrine of basic structure of the Constitution'.

The reasons given by the trial judge for his decision that ss. 2(a) and (b) of Act No. 8 of 2011 did not amend Act No. 16 of 2002.

[400] Legall J decided that, ss. 2(a) and (b) of Act No. 8 of 2011 were meaningless and could not amend s. 63(1) of the principal Act because s. 63 of the principal Act, the acquisition section, was non-existent and incapable of being amended, and that the acquisition Order, S.I. 70 of 2011, was issued without authorisation by an Act. The decision was summed up in paragraph 18 in the judgment in these words:

> *"In **Yearwood**, the court quoting the Indian jurist Basu in his book, Limited Government and Judicial Review states that:*
>
> > *'An unconstitutional statute cannot be revived by retrospective amendment of that statute. It would follow … that such unconstitutionality cannot be retrospectively removed by any subsequent amendment of that very statute which was dead ab initio.'*
>
> *The 2011 Act therefore lacked the authority to revive the provisions of the 2009 Act. The provisions of the 2009 Act remain dead. Therefore section 2(a) and (b) of the 2011 Act is meaningless because of the absence of section 63(1). It follows, as night follows day, that the 2011 Order, which was purportedly made under section 63(1) is null and void because there is no statutory authority to make it as we shall further see below. The minister who made the order exceeded his jurisdiction."*

[401] The first three grounds of appeal were just different ways of stating the same complaint against that decision. Legall J accepted the submissions for the claimants/respondents that, because Act No. 9 of 2009 was declared "null and void *ab initio*", all its provisions (sections) must be regarded as null and void and non-existent,

accordingly the provisions in ss. 63 to 74 of the principal Act, added thereto by amendments made by Act No. 9 of 2009, must all be regarded as non-existent, and so Act No. 8 of 2011 must be regarded as purporting to amend non-existent provisions in the principal Act; therefore Act No. 8 of 2011 was inoperative, null and void. Further, that Act No. 8 of 2011 could not and did not amend the principal Act so as to cause it to authorise the Minister to compulsorily acquire the respondents' loan interests and shares on the second occasion; the Minister lacked statutory authority to compulsorily acquire the properties, and so, he lacked authority to issue the acquisition Order, S.I. No. 70 of 2011, the Order was null and void. In short, Legall J accepted that, the amendments made by Act No. 8 of 2011 to the principal Act were merely amendments to Act No. 9 of 2009 which had been declared null and void and could not be amended and revived. It is appropriate to recall here that, the trial judge stated that he applied the case law in **Yearwood** in which the Court of Appeal of St. Christopher, Nevis and Anguilla accepted the views of Basu in his book, the words of Latham CJ in **South Australia and Others v Commonwealth**; and the case law in **Akar v Attorney General**.

[402] The central point of law in the submission accepted by Legall J. was that, a provision in an Act, or an Act, which had been declared by court to be unconstitutional, "was dead and did not exist", it could not be amended in order to make it constitutional and be brought back to life.

Appeals No. 18 of 2012 and No 19 of 2012.

My decision on the rule regarding amendment of unconstitutional Act.

[403] Regarding the first three grounds of appeal, I have reached the conclusion that, the learned trial judge erred in holding that, because the Belize Telecommunications (Amendment) Act, No. 9 of 2009 was declared unlawful, null and void, s. 63(1) of the Belize Telecommunications Act, No. 16 of 2002, the principal Act, could not be amended by the Belize Telecommunications Act, No. 8 of 2011. He further erred in

holding that, ss. 2(a) and (b) of the Act, which purported to amend s. 63(1) and (2) of Act No. 16 of 2002, were meaningless, unlawful, null and void. Furthermore, the trial judge erred in holding that, the Belize Telecommunications (Assumption of Control over Belize Telemedia Limited) Order, S.I. 70 of 2011, was issued by the Minister without statutory authority, and was unlawful, null and void. I concluded that, ss. 2(a) and (b) of Act No. 8 of 2011 were not inoperative and did amend s. 63(1) of the principal Act, and further that, the Minister lawfully issued the acquisition Order, S.I. 70 of 2011, under a valid statutory authority.

[404] The reasons for my conclusions are the following: (1) **Akar v the Attorney General** did not establish a rule of law that an Act declared inconsistent with a constitution and void could not be amended prospectively in a form that was consistent with the Constitution; or that the policy of the Executive and the Legislature in a void legislation could not be extracted and re-legislated with prospective effect in a form that is consistent with the Constitution. Such a rule would be inconsistent with the Constitution, and would not have come from the common law or any other source of laws of Belize; and (2) the rule in **Attorney General v Yearwood** expressly permitted amendment of unconstitutional Act to have effect prospectively, and permitted validation of an unconstitutional Act retrospectively by amendment of the Constitution to have effect retrospectively.

[405] **Akar v Attorney General** is important because it was a judgment of the Privy Council in an appeal from Sierra Leone, a common law parallel jurisdiction; and the Privy Council was also the final appeal court for Belize. The judgment remains binding on this Court where the legislations are the same, unless the CCJ departs from the *ratio decidendi*. **Attorney General v Yearwood** was a judgment from the Court of Appeal of St. Christopher, Nevis and Anguilla, also a common law parallel jurisdiction. The judgment is persuasive, not binding on this Court, but could be adopted, or rejected where appropriate. I think it is appropriate to point out that in both cases the courts started by applying the constitution to the amending Acts in question, then once the

courts declared the Acts inconsistent with the Constitution and void, they applied the common law that, a void statute was non-existent.

Appeals No. 18 of 2012 and No. 19 of 2012.

The rules in ***Akar****.*

[406] In **Akar**, section 1(1) of the Constitution of Sierra Leone which came into effect on Independence Day, 26 April, 1961, provided that, "every person born in Sierra Leone and was on 26 April, 1961 a citizen of the United Kingdom and colonies, or a British protected person shall become a citizen of Sierra Leone on 27 April 1961". Section 9 provided that: "Parliament may make provisions – (a) for the acquisition of citizenship of Sierra Leone by persons who do not become citizens of Sierra Leone by virtue of the provisions of this chapter; (b) for depriving of his citizenship of Sierra Leone any person who is a citizen of Sierra Leone otherwise than by virtue of subsection (1) of section 1 or section 4 of this Constitution; (c) …" The Constitution also adopted the universal declaration of fundamental rights and freedoms to which every person in Sierra Leone was entitled. Sections 23(1), (2) and (3) of the Constitution afforded every person in Sierra Leone protection from discrimination on the ground of race; they were: "(1) subject to the provisions of subsections (4), (5) and (7) of this section, no law shall make any provision which is discriminatory either of itself or in its effect; (2) subject to the provisions of subsection (6), (7) and (8) no person shall be treated in a discriminatory manner by any person acting by virtue of any law in the performance of a public office or any authority; and (3) in this section, the expression 'discriminatory' means affording different treatment to different persons attributable wholly or mainly to their respective description by race, tribe, place of origin, political opinion …" Section 23(4) provided for exceptions where discrimination was permissible as follows: "(4) Subsection (1) of this section shall not apply to any law so far as that law makes provision … (f) where persons of any such description as is mentioned in subsection (3) of this section may be subjected to any disability or restriction or may be accorded privilege or advantage which, having regard to its nature and to special circumstances

pertaining to those persons or to persons of any other such description, is reasonably justifiable in a democratic society."

[407] On 17 March 1962, s. 1(1) of the Constitution was amended by the Constitution (Amendment) Act (No. 2), 1962, Act No. 12 of 1962, to read, "every person of Negro African descent" in place of, "every person". Subsection (3), a definition of a person of Negro African descent was added. Subsection (4) was also added, to provide for persons in the same circumstances but, not of Negro African descent, to apply and be registered as citizens, however, it denied to them certain political offices for 25 years. The amendments were deemed to have come into effect retrospectively on 27 April, 1961. Subsequently another amendment Act was passed, it was the Constitution (Amendment) Act (No. 3) 1962, Act No. 39 of 1962. It amended s. 23 of the Constitution, "for avoidance of doubt". It sought to add a new exception to the prohibition of discrimination on the ground of race in s. 23. The added exception was in s. 23(4)(g) which was, "discrimination for limitation of citizenship of Sierra Leone to persons of Negro African descent …", so that the Constitution would permit, by exception, the making of laws that would make provisions for discrimination on the ground of race for the purpose of limiting citizenship of Sierra Leone.

[408] Akar was born in 1927 in the Protectorate of Sierra Leone, of a Lebanese father born and bred in Senegal, and an indigenous Sierra Leonese mother. The father had lived in Sierra Leone for 56 years. It was common ground that Akar was not 'a Negro'. He was born in Sierra Leone and was a British protected person. He became a citizen on Independence Day, but as the result of Act No. 12 of 1962 he was deprived of his citizenship. He held the positions of director of broadcasting, director of national dance troupe and secretary to Hotels Board. Faced with the amendments made by No. 12 of 1962, he applied and was registered as a citizen of Sierra Leone.

[409] Akar brought a claim on the ground that the amendments made him ineligible for election to the House of Representatives. He claimed as relief constitutional declarations that, (1) the Constitution (Amendment) Act, (No. 2), Act No. 12 of 1962,

had not been passed by the required special majority, and (2) the amendments to s. 1(1) of the Constitution were discriminatory on the ground of race under s. 23 of the Constitution. The High Court of Sierra Leone granted Akar's claim, it held that the amendments by Act No. 12 of 1962 and Act No. 39 of 1962 were "ultra vires". The Court of Appeal reversed the judgment of the High Court. Akar appealed to the Privy Council.

[410] The Privy Council, by majority, allowed Akar's appeal. It held that: (1) the added qualification, 'of Negro African descent' was a racial qualification and for it to be an accepted exception to prohibition of discrimination on the ground of race under s. 23, there would have to be special circumstances pertaining to Akar which would make the discrimination justifiable in a democratic society, there were no such circumstances, the amendments in Act No. 12 of 1962 to the Constitution offended against the letter and flouted the spirit of the Constitution, and were ultra vires and invalid; (2) but absence of indication in the endorsement by the Clerk of Parliament on the Bill that, it had been passed by the required special majority did not prove, in the absence of express requirement, that the Bill was not passed by the required special majority; and (3) Act No. 39 of 1962 which sought to amend s. 23 of the Constitution so as to validate the provisions of s. 1(1) of the Constitution (the principal Act) as amended by Act No. 12 of 1962 should not be regarded as impliedly reviving or re-enacting any invalid provision of Act No. 12 of 1962. At page 870, their Lordships stated –

> ***"It is to be observed that Act No. 39 does not refer to Act No. 12. It does not attempt any process of re-enactment. it purports to amend subsection (4) of section 23 of the Constitution by adding a new paragraph. The new paragraph refers to subsection (3) and subsection (4) of section 1. In the Constitution unless it had been validly amended, there were no such subsections of section 1. Had the provisions of section 2 of Act No. 12 been valid, then there would have been the addition to s. 1 of the Constitution of such subsections. Act No. 39 needed as a basis an assumption that Act***

No. 12 was valid and so was an existing Act. That was an incorrect assumption. Their Lordships are quite unable to accept the contention that Act No. 39 should be regarded as impliedly reviving or re-enacting any invalid provisions of Act No. 12 of 1962. The provisions of section 2 of Act No. 12 were invalid when the Act was passed … the provisions must be treated as having been non-existent. There is no provision in Act No. 39 which purports or sets out to give them life".

[411] About a view accepted by the trial judge that, "it was not open to the Legislature to make any alteration (whatever its form) to the Constitution which did not amount to an improvement of the existing law", their Lordship rejected it. They stated at page 870, letter E that:

"A view-point (which found favour with the Chief Justice) that it was not open to the legislature to make any alteration (whatever its form) to the Constitution which did not amount to an improvement of the existing law was not advanced before their Lordships and would not have been accepted."

[412] Further down the page at letter H, in discussing the power of the Parliament of Sierra Leone to make laws retrospectively, their Lordships stated:

"But whether this be so or not, the power of Parliament is only restricted to the extent which is set out in the Constitution. The general power of Parliament must include a power to enact that legislation (if valid and validly passed) is to have retrospective effect. An intention so to enact would have to be shown by clear and definite words. So, also Parliament is entitled to have recourse to deeming provisions. It is not for the court to decide as to the wisdom or the desirability of exercising such powers."

[413] In a dissenting judgment Lord Guest held that: any democratic State must have control over the qualification for its citizenship; courts are precluded from inquiring into the motives behind an Act, and should not inquire into the motives of Act No. 12 of 1962; it was a matter for Parliament; all that was required was for special circumstances to appear *ex facie*, and there were in the case special circumstances *ex facie* to show that it was justifiable in a democratic society to limit citizenship. His Lordship held that Act No. 12 of 1962 was not invalid.

[414] The rules in **Akar** were not stated in one comprehensive sentence as the submissions tended to suggest. In the course of their judgment, their Lordships made several statements of law. About discrimination based on race, they held that, amending **s. 1(1) of the Constitution** so that the appellant or any other person was deprived of his citizenship which had initially been recognised and declared by the Constitution, and which amendment was inconsistent with **s. 23 of the Constitution** (the same Constitution) was *ultra vires;* Act No. 12 offended against the letter and flouted the spirit of the Constitution.

[415] When this Court considers the second issue in **Akar**, namely, whether an invalid (void) legislation could be amended, the Court must bear in mind that, in the English common law there is a constitutional principle that, Parliament, the Legislature, can enact, repeal and amend any law. Conversely put, there is no constitutional principle that, Parliament, the Legislature, cannot enact, repeal or amend any law – see **R (Jackson) v Attorney General [2006] 1 AC 262**, a case that Lord Goldsmith would be personally acquainted with. But the sovereignty of Parliament in the United Kingdom is now subject to European Community law – see the **Treaty of Rome, 1957** and **the European Communities Act, 1972**.

[416] In the common law, what a statute enacted could not be unlawful because a statute was the highest form of law. In **Cheney v Conn. (Inspector of Taxes) [1968] 1 All ER** 779, a tax payer claimed that certain provisions of the Finance Act, 1964 (UK), should not be given legal effect because a substantial part of the intended revenue was

intended to be used for construction of nuclear weapons, an unlawful purpose contrary to a Geneva Convention to which the UK was a signatory. It was held that, if the purpose of the enactment included an unlawful purpose, the enactment was not vitiated; what a statute enacted could not be unlawful.

[417] In Sierra Leone, as in Belize, where a written Constitution, on the Westminster model was adopted at independence, the supremacy of Parliament, the Legislature, was modified by the fact and law that, the power of the Legislature to make law was given by the Constitution and subject to the Constitution. The power was given to the Parliament of Sierra Leone, "to make laws for the peace, order and good government of Sierra Leone" – see s. 42 of the Constitution of Sierra Leone (also s. 68 of the Constitution of Belize). The power is also subject to compliance with constitutional procedural rules which entrench some of the provisions of the Constitution and some Acts. The most important limitation to the power of Parliament in a system where a written Constitution on the Westminster model has been adopted is that a legislation shall be void if it is inconsistent with any of the provisions of the Constitution. Subject to the Constitution and statutes, Sierra Leone adopted the common law of England and Wales, and so did Belize.

[418] There was no question in **Akar** that, the Constitution of Sierra Leone could be amended provided the procedural requirement for the amendment of the particular part or section was complied with. I think the main difficulty about Act No. 12 of 1962 of Sierra Leone was its contents. Were they acceptable in a democratic society? About whether Act No. 39 of 1962 could amend s. 23 of the Constitution in order to remove therefrom the provision that Act No. 12 of 1962 was inconsistent with, their Lordships stated that, Act No. 39 of 1962 did not refer to Act No. 12 of 1962, it **did not attempt any process of re-enactment**. They observed that, Act No. 39 of 1962 was intended to amend s. 23 in order to validate ss. 1(3) and (4). They concluded that, amending ss. 1(3) and (4) was not possible because the subsections were provisions that came from Act No. 12 of 1962 which was invalid and non-existent, so, sections 1(3) and (4) were

also non-existent. Their Lordships' particular words which were part of the earlier quotation were:

> ***"In the constitution, unless it had been validly amended there were no such subsections [(3) and (4)] of section 1. Had the provisions of Act No. 12 been valid, then there would have been the addition to section 1 of the Constitution of such subsections. Act No. 39 needed a basis, an assumption that Act No. 12 was valid and so was an existing Act. That was an incorrect assumption. Their Lordships are quite unable to accept the contention that, Act. No. 39 should be regarded as impliedly reviving or re-enacting any invalid provisions of Act No. 12. The provisions of section 2 of Act No. 12 were invalid when the Act was passed and assented to and the provisions must be treated as having been non-existent. There is no provision of Act No. 39 which purports or sets out to give them life. Though Act No. 39 was passed in accordance with the provisions of section 43, it becomes meaningless once the provisions of section 2 of Act No. 12 are ignored as they must be."***

[419] So, the first part of the rule in **Akar** regarding amendment of an unconstitutional provision or an Act, was that, a provision of an Act which, "was invalid when the Act was passed", or which was declared invalid (also null or void or *ultra vires* or unlawful), "must be treated as having been non-existent". I accept that long established rule of the common law (applicable in the UK to delegated legislation). It is one way of emphasizing that, an unconstitutional provision of a legislation has no legal effect. No legal effect is the key factor in an unconstitutional and void legislation. I prefer the more direct expression that, an unconstitutional provision or unconstitutional Act should be regarded, *"as if [it] had never had any legal effect at all"*, instead of non-existent - see **Mossell (Jamaica) Limited (t/a Digicell) v 1. The Office of the Utilities Regulations, 2. Cable and Wireless Jamaica Limited and Centennial Jamaica Limited [2010]**

UKPC 1 at page 21, where the Privy Council used that expression in an appeal from the Court of Appeal of Jamaica 41 years after the Privy Council's statement in **Akar**.

[420] The second part of the rule in **Akar** regarding amendment of an invalid provision of an Act is particularly conveyed in the following words in the passage quoted above:

> **"Their Lordships are quite unable to accept the contention that, Act No. 39 should be regarded as impliedly reviving or re-enacting any invalid provisions of section 2 of Act No. 12."**

[421] Further, on page 870 - 871 their Lordships stated:

> **"Whatever the position could have been deemed to be, the fact would remain that the appellant had become a citizen. He would continue to be one <u>until some valid enactment brought about a change</u>."**

[422] In my view, two meanings are conveyed in the full passage quoted earlier in paragraph 110. First, the passage could mean that, once provisions in the first amending Act, No. 12 of 1962 were unconstitutional and invalid, the provisions could never ever be revived by any amendment, including an amendment with effect in the future (a prospective amendment), or by amendment of the Constitution; the unconstitutional provisions together with the economic, social and political policies in them were dead. This is the meaning contended for by counsel for the respondents and applied by Legall J.

[423] Secondly, the quotation could mean that, only certain amendments of the unconstitutional provisions could be made which would have the effect of giving life to the unconstitutional and invalid provisions. This meaning would be consistent with two of the rules in **Yearwood** that: "unconstitutional statute cannot be revived by retrospective amendment of that statute, … where the amendment is prospective, it

virtually amounts to a re-enactment of the unconstitutional statute in a constitutional form, applicable to future cases to which there cannot be any objection"; and that, an amendment of the Constitution with retrospective effect could revive the unconstitutional Act. I note that, both Acts, No. 12 and No. 39 were Acts to amend the Constitution, but there was no discussion in the submissions and the judgment of the Privy Council, of the difference in amending the Constitution and amending an unconstitutional Act or its unconstitutional provisions.

[424] To revive means to bring someone or something back to life. Logically, to amend an unconstitutional Act prospectively, that is, with effect in the future, does not mean an amendment to revive the invalid Act in the same form. A prospective amendment in a constitutional form means a re-enactment giving effect to the Act in a constitutional form in the future. That was accepted in **Yearwood**. If in **Akar** the amendment in Act No. 39 of 1962 was prospective only, for what good reason of law, of constitutional principle (or norm), anyway, would court deny to the Parliament of Sierra Leone its function to enact or even to re-enact a policy in a form which was not inconsistent with the Constitution?

[425] My view is that, the second meaning of the quoted passage was the meaning intended by their Lordships in **Akar**. It was the meaning that was compatible with the constitutional function and responsibility of the Parliament of Sierra Leone, namely, to, "make laws for the peace, order and good government of Sierra Leone". I do not accept that their Lordships intended the first meaning, it would deny to the Parliament of Sierra Leone its constitutional function and responsibility, and would be inconsistent with the Constitution. Moreover, their Lordships' statement that, ***"whatever the position could have been deemed to be, the fact would remain that the appellant had been a citizen; he would continue to be one until some valid enactment brought about a change"***, was permissive of an amendment to bring into effect the objective, the policy, in the invalid Act, No. 12 of 1962, in a constitutional form in the future.

[426] Another point worth noting here is that, were the meaning of the passage in **Akar** contended for by counsel for the respondents that, an unconstitutional Act could never

ever be amended, to be accepted, the rule would be incompatible with the principle of separation of powers of State and inconsistent with the Constitution. **Hines and Others** illustrates the point, In the case, an Act, not a constitutional amendment Act, created a court known as The Gun Court. Among others the Act provided for, "a mandatory sentence of detention at hard labour", from which the detainee could be discharged at the direction of the Governor General acting in accordance with the advice of a review board. The Privy Council held that, the Parliament of Jamaica could not, consistently with the principle of separation of powers, transfer from the Judiciary to an executive body whose members were not appointed in the same way under the Constitution as judges were, a discretion to determine the severity of the punishment to be inflicted upon an individual offender in a particular case. The Privy Council declared the provision inconsistent with the Constitution. The rule contended for by counsel for the respondents would allow court to transfer to itself the legislative discretion to decide which Bill, even if presented in a constitutional form, as in the present appeals, may not be passed by Parliament. It would be inconsistent with the principle of separation of powers of State.

[427] This is not a new point that I have raised at appeal stage for the first time. It is a point about the meanings of the rules in **Akar**, a judgment put before the trial court and relied on by the respondents. The trial judge applied the judgment. The respondents continued to rely on the judgment in this Court.

[428] I have concluded that, the second rule in **Akar** about amendment of an unconstitutional Act, an invalid Act, was that, it could not be amended by an ordinary Act retrospectively in order to revive it, but the rule stopped short of prohibiting re-enacting an unconstitutional Act in a constitutional form with prospective effect. The difference between an amendment of an unconstitutional Act by an ordinary Act, and an amendment to the Constitution, in order to revive an unconstitutional Act was not discussed in **Akar**. The difference was discussed in **Yearwood** although it did not arise on the facts. The effect of reviving an unconstitutional Act by amending the Constitution with retrospective effect was accepted in **Yearwood**, as an *orbita dicta*.

The rules in Yearwood.

[429] In **Yearwood**, the plaintiffs/respondents agreed with the Government that, to save the sugar industry the Government would buy most of the sugar cane estates. They were unable to agree on the purchase price. The Government had the Sugar Estates Land Acquisition Act, 1975, No. 2 of 1975 passed on 28 January 1975. The Minister of Agriculture acting under the Act, issued an Order (S.R. and O. No. 4 of 1975) by which the Government compulsorily acquired the estates on St. Christopher Island on 31 January 1975, and took possession of them.

[430] Three days after the acquisition Order issued, the respondents made a claim under s. 6 of the Constitution that protected the right to property, in which they claimed the relief of: (1) a declaration that, Act No. 2 of 1975 was unconstitutional, void and of no effect; (2) the estates purportedly acquired still vested in the claimants/respondents; (3) an injunction order restraining the Minister from taking possession of the estates and doing anything prejudicial; and several other reliefs. Five months after the claim was issued but before it was tried, the government secured the passing of a second Act, the Sugar Estates Land Acquisition (Amendment) Act, 1975, Act No. 8 of 1975. It amended certain provisions of Act No. 2 of 1975, said to be unconstitutional. The claimants/respondents amended their claim to include grounds that, the amendments did not correct the unconstitutional provisions of Act No. 2 of 1975, and that, certain provisions of the amending Act, No. 8 of 1975 were also inconsistent with s. 6 of the Constitution.

[431] At the trial, Act No. 2 of 1975 and Act No. 8 of 1975 were both at issue. For the Attorney General it was submitted that what the trial court and the Court of Appeal had to decide as unconstitutional or not were the provisions of Act No. 2 (the principal Act) as amended by Act No. 8 of 1975. The Court of Appeal considered first whether the provisions of Act No. 2 of 1975 before the amendment were inconsistent with the

Constitution. It concluded that several provisions were inconsistent in several aspects. The court held, among others, that: the provision that access to the Court of Appeal would be sufficient access to court was insufficient compliance with the Constitution; the provisions limiting compensation to a stated maximum other than providing for full compensation was inconsistent with s. 6 of the Constitution; the provisions that payment of compensation would come from profit and that, the Minister would determine the mode and period of payment did not provide for prompt payment; and were inconsistent with s. 6 of the Constitution.

[432] The Court of Appeal then considered whether Act No. 2 of 1975 could, as a matter of law, be amended (by Act No. 8 of 1975) so that Act No. 2 of 1975 would be regarded as consistent with the Constitution. The Court upheld the decision of the trial judge that, *"nothing but an appropriate retrospective amendment of the Constitution itself could make the principal Act constitutional"*. The court stated that, it adopted the views of Dr. Basu in his book, for the decision. Two of those academic views were that: "(i) an unconstitutional statute cannot be revived by subsequent amendment of the Constitution, unless it is expressly retrospective; it is void ab initio and is not therefore revived even if the Legislature acquires legislative power over the subject by a subsequent amendment of the Constitution, unless of course the constitutional amendment is expressly given retrospective effect … (ii) an unconstitutional statute cannot be revived by retrospective amendment of that statute. It would follow from (i) above that, … such unconstitutionality cannot be retrospectively removed by any subsequent amendment of that very statute which is dead ab initio". The Court of Appeal of St. Christopher, Nevis and Anguilla also relied on the quotation in Basu's book of what Latham CJ stated in the Australian case, **South Australia v Commonwealth**. Latham CJ stated at page 408 that:

> ***'A pretended law made in excess of power is now and never has been a law at all … The law is not valid until a court pronounces against it – and thereafter invalid, if it is beyond power, it is invalid ab initio.'***

[433] The court declined to consider whether the provisions of Act 8 of 1975 were unconstitutional, because, the court stated, it would serve no purpose since the court had decided that Act No. 8 of 1975 could not amend Act No. 2 of 1975. But from the judgment generally, it was apparent that the court was of the view that, the provisions of Act No. 8 of 1975 were also inconsistent with the Constitution. The trial judge had held so. The Court of Appeal then considered severance of the provisions of Act No. 2 of 1975 that were inconsistent with the Constitution; it concluded that severance was not possible. The Court declared Act No. 2 null and void. **Akar v Attorney General** was an earlier case decided by the Privy Council. It was never mentioned in **Attorney General v Yearwood**.

[434] In regard to the **South Australia and Others v Commonwealth** case, the Court of Appeal of St. Christopher, Nevis and Anguilla did not outline the facts or the context in which the quotation taken from the case was made. In this Court counsel did not attempt to do so either.

[435] In that case, the States of South Australia, Victoria, Queensland and Western Australia brought a claim against the Commonwealth (the Federal Government) for the relief of: (1) court declaration that, four Commonwealth war-time Acts - the States Grants (Income Tax Reimbursement) Act, No. 20 of 1942; the Income Tax (War-time Arrangements) Act, No. 21 of 1942; the Income Tax Assessment Act No. 22 of 1942; and the Income Tax Act, No. 23 of 1042, whether considered individually or together, were invalid, and (2) a permanent injunction order restraining certain officers of the Federal Government from putting the Acts into operation. The claimants alleged that, the Acts were *ultra vires* the powers to legislate given under the Federal Constitution to the Federal Parliament in several ways, namely: by legislating in areas that were within the powers of the States to legislate in; by making it impossible because of a very high rate of income tax, imposed by the Commonwealth Parliament, for the States to impose any more tax on income, by compulsorily taking over tax officers and properties of the States; and by the Acts being discriminatory. The claimants relied on implied prohibition of interference by the Commonwealth with the functions of States, capacities of States

and activities of States. There was no specific provision regarding sharing out the power to legislate about income tax. In the course of pleadings, the claimants applied for an interlocutory injunction order; and the court directed a full trial.

[436] By majority, the High Court of Australia, the final court, held that, the Acts were not *ultra vires* the taxing powers of the Commonwealth under the Federal Constitution. Latham CJ explained that, in the federal system in Australia the Federal Constitution gave power to the Commonwealth (the Federal Government Parliament) to make laws in respect to certain subjects, and exclusive powers in respect to some, but also provided that, it should not make laws with respect to certain subjects, and that the States had powers not exclusively given to the Commonwealth. So, Latham CJ explained further, if the Commonwealth or a State exceeded its power, the attempt to make the law would fail because the alleged law was unauthorized and was not a law at all. Latham CJ proceeded to state:

> ***"Common expressions such as: 'The courts have declared a statute invalid', sometimes lead to misunderstanding. A pretended law made in excess of power is not and never has been a law at all. Anybody in the country is entitled to disregard it. Naturally he will feel safer if he has a decision of a court in his favour – but such a decision is not an element which produces invalidity in any law. The law is not valid until a court pronounces against it – and thereafter invalid. If it is beyond power, it is invalid ab initio."***

Legall J relied on the above quotation also. Counsel for the respondents support it in this Court.

[437] My respectful view is that, the statement of the learned Chief Justice in the **South Australia and Others v Commonwealth**, was a general statement, it does not assist in the determination of the issues in the present two appeals. It was a general statement made in a case where the four Acts challenged were not found, albeit by

majority, to be unconstitutional, void and invalid. In any case, the facts were starkly different from the facts in the present appeals. In the **South Australia and Others v Commonwealth** case, all the Acts at issue were not Acts that amended any other Act or the Constitutions of the appellant States or of the Federal Constitution. The statement by the Chief Justice was made without any consideration having been given to whether an unconstitutional Act could be amended, or to prior practical effect of an unconstitutional Act before it had been declared unconstitutional.

[438] I think the **South Australia and Others v Commonwealth** was cited to this court merely for the eye-catching sentence: *"**A pretended law** **made in excess of power is not and never has been a law at all**."* There was no precedent in the judgment regarding the question of amendment of an Act that had been declared void that, may be accepted as persuasion to be applied to the present two appeals. I do not think over-emphasizing the factual fiction inherent in the statement of law adds to understanding the rule contended for in these appeals, or explains how to deal with the practical reality of some of the consequences of the rule regarding amendment of unconstitutional legislation. There is already a strong factual fiction in the rule that an unconstitutional legislation never existed. Factually such a legislation would have existed before it was declared unconstitutional. In some instances it would have affected rights and duties, and sometimes irreversibly. In **Akar** their Lordships noted that reality and made the observation that I quoted earlier that, whatever the position, Akar would continue to be a citizen of Sierra Leone until some valid enactment brought about a change.

[439] A clearer explanation of the effect of declaring a legislation void has been given more recently in 2010, by the Privy Council in **Mossell (Jamaica) Limited (t/a Digicell)** an appeal from this region, which I mentioned earlier. I repeat the facts here for convenience. In the case, the Minister for telecommunications asked the Office of Utilities Regulations of Jamaica – the OUR, not to cap prices and rates in interconnection agreements and in determinations by the OUR. The Director of the OUR refused to comply. The Minister issued a "Direction" to the OUR in which the

Minister directed that there be no price and rates capping. The OUR obtained legal advice from a senior counsel confirming that, the Minister had no power to direct that the OUR should not cap prices and rates. The OUR went ahead and issued approval of interconnection agreements and a determination which included prices and rates cap. This proved favourable to Cable and Wireless, but unfavourable to Mossell. Mossell issued a claim against the OUR for an order quashing the determination made by the OUR. The OUR reacted by issuing a claim for a declaration that, the Minister's Direction was *ultra vires*. On appeal to the Privy Council, it held that, the Minister's Direction was *ultra vires*.

[440] The Privy Council also considered whether the OUR had been obliged to comply with the Minister's Direction before the court declaration of *ultra vires*. It concluded that, because the OUR had obtained advice from a senior counsel confirming that, the Direction was *ultra vires*, it was not obliged to comply with the Direction. Their Lordships made an explanation at page 21, paragraph 44, of what a declaration that a legislation was *ultra vires* (or void or null) meant as follows:

> ***"44. What it all comes to is this. Subordinate legislations, executive orders and the like are presumed to be lawful. If and when, however, they are successfully challenged and found ultra vires, generally speaking it is as if they had never had any legal effect at all: their nullification is ordinarily retrospective rather than merely prospective. There may be occasions when declarations of invalidity are made prospectively only or are made for the benefit of some but not others. Similarly, there may be occasions when executive orders or acts are found to have legal consequences for some at least (sometimes called "third actors") during the period before their invalidity is recognised by the court – see, for example, Percy v Hall [1997] QB 924. All these issues were left open by the House in Boddington. It is, however, no more necessary that they be resolved here than there. It cannot be doubted that the OUR was perfectly***

entitled to act on the legal advice it received and to disregard the Minister's Direction. This much too is plain from Boddington (see Lord Irvine's speech at pp 157H – 158D) and, indeed, in the context of ministerial "guidance", from Lord Denning's judgment in Laker Airways."

[441] In my view, the explanation that a legislation is presumed to be lawful, but that upon a declaration of *ultra vires* it is regarded **"as if [it] had never had any legal effect"**, appropriately lays stress on the **'no legal effect'** nature of an *ultra vires* legislation, and appropriately moderates the emphasis on the 'non-existent' nature of such a legislation. It is a recent version of the rule in **Akar** 41 years after. Other cases on the point include: **Boddington v British Transport Police [1999] A.C. 143**; **F. Hoffman – La Roche & Co AG v Secretary of State for Trade and Industry [1975] A.C. 295**; and **Smith v East Elloe Rural District Council [1956] AC 736**.

[442] In **Yearwood**, the Court of Appeal of St. Christopher, Nevis and Anguilla like in **Akar**, did not state the rule applicable to amendment of an unconstitutional Act in one short sentence. First the court adopted as part of the rule the words of Latham CJ in **South Australia and Others v Commonwealth** at page 408 that: **"A pretended law made in excess of power is not and never has been a law … The law is not valid until a court pronounces against it – and thereafter invalid. If it is beyond power it is invalid ab initio."** So the first part of the rule contended for was that, an unconstitutional Act was invalid *ab initio*, it never existed. I have accepted that much. In the common law, a void delegated legislation or a void act of the Executive is one, having no legal effect" – see **Boddington v British Transport Police**. The phrase, 'null and void' is mere legalese, it does not add to the meaning of each of the words null, or void or invalid singularly. There is of course no such thing as a void Act of Parliament, a primary legislation, in the common law because of the sovereignty of Parliament over laws.

[443] The second part of the rule in **Yearwood** was comprised of a long quotation by Peterkin JA writing for the Court of Appeal of St Christopher Nevis and Anguilla, of the passage from Dr. Basu's book as follows:

> "(i) An unconstitutional statute cannot be revived by subsequent amendment of the Constitution, unless it is expressly retrospective. It is void ab initio and is not therefore revived even if the Legislature acquires legislative power over the subject by a subsequent amendment of the Constitution, unless, of course, the constitutional amendment is expressly given retrospective effect. In such a case the amending authority directs that the Constitution should be read, as amended, since its inception; as a result, the offending statute could not be said to have violated any provision of the Constitution …
>
> (ii) An unconstitutional statute cannot be revived by retrospective amendment of that statute. It would follow from (i) above that such unconstitutionality cannot be retrospectively removed by any subsequent amendment of that very statute which was dead ab initio.
>
> And again,
>
> (a) Where the amendment is prospective it virtually amounts to a re-enactment of the unconstitutional statute in a constitutional form, applicable to future cases, - to which there cannot be any objection.
>
> (b) If, however, the statute is sought to be retrospectively amended, that would constitute a violation of the Constitution (assuming that it has not been retrospectively amended in the meantime), because to enforce the statute with the retrospective amendment in relation to cases arising prior to the amendment or to validate such unconstitutional cases would be to give legislative support to a breach of the Constitution, which is beyond the competence of a legislature created and limited by the Constitution."

[444] Peterkin JA concluded:

"I would adopt this learning and apply it to the instant case. I would hold as the trial judge has held, that nothing but an appropriate retrospective amendment of the Constitution itself could make the principal Act constitutional."

[445] The court held that, Act No. 8 of 1975 (not an Act amending the Constitution) should be rejected as an amendment to Act No. 2 of 1975, the unconstitutional principal Act, to revive it. The rule became the law of St. Christopher, Nevis and Anguilla.

[446] A summary of the second part of the rule in **Yearwood** about amendment of unconstitutional Act is this. An unconstitutional legislation could not be amended by another ordinary legislation to make it conform to the Constitution retrospectively and thereby reviving it retrospectively, but a prospective amendment by an ordinary statute was a re-enactment of the unconstitutional legislation in a constitutional form to have effect prospectively; a subsequent amendment of the Constitution with retrospective effect would revive the unconstitutional Act so that it would have legal effect retrospectively. The quotation which conveyed the rule in **Yearwood** did not prohibit amendment of an unconstitutional Act, contrary to the submission for the respondents. The rule allowed amendment prospectively, and allowed validation of unconstitutional legislation by amendment of the Constitution retrospectively; and I might add, prospectively from the date of the amendment. It must be noted that the rules in **Akar**, and the rules in **Yearwood** were the outcome of the construction of the provisions of the respective Constitution that required that no law would be inconsistent with the Constitution, and that such a law would be void.

[447] The rule in **Yearwood** has persuasive value in this jurisdiction. I have been persuaded, and I accept it. I hold in the present first two appeals that, Act No. 8 of 2011, could and did amend Act No. 16 of 2002, (or Act No. 9 of 2009) prospectively only; that is from 4 July, 2011 when Act No. 8 was enacted; and I hold that, Act No. 8 is a re-enactment in the circumstances; it is a valid and not an invalid and "inoperative"

Act; sections 2(a) and (b) of the Act validly re-enacted s. 63(1) and (2) of Act No. 16 of 2002 prospectively.

[448] I respectfully note that, to the extent that the rule in **Yearwood** would allow retrospective validation of an unconstitutional legislation by retrospective amendment of the Constitution, the rule is not compatible with the statement of the rule in **Akar**. Both amending Acts in **Akar** sought to amend the Constitution, and with retrospective effect from 27 April, 1961. The first amending Act, No. 12 of 1962, was held invalid, the second, No. 39 of 1962, meaningless. However, the incompatibility does not concern this Court in these appeals. Further, I would like to make an observation that, the decision in **Akar** invited, and left a difficult question about amendment of an unconstitutional provision of an Act unanswered.

[449] The decision in **Akar** was based on the non-existent nature of subsections (3) and (4) of section 1 of the Constitution of Sierra Leone, introduced into the Constitution by amendments made by Act No. 12 of 1962. The Privy Council held that, the subsections were invalid because they introduced into s. 1 racial discrimination that was inconsistent with s. 23 of the same Constitution. The Privy Council also held that, Act No. 39 of 1962 could not amend subsections (3) and (4) because the subsections were invalid and non-existent. The difficult question is: had the first amending Act No. 12 which amended s. 1(1) and introduced by amendment subsections (3) and (4) restricting citizenship to Negro Africans, also at the same time in the same Act No. 12 of 1962 amended s. 23 by adding the exception of racial discrimination for limiting citizenship to Negro Africans so that ss. 1 and 23 were not inconsistent after the amendments made by the one Act, No. 12 of 1962, would all the amendments have been acceptable merely because ss. 1 and 23 existed at the time of the amendments? If the answer is yes, then the same intention of the Legislature rejected then, would have been acceptable and carried out. This may be a weakness in the rule that emphasises the non-existent nature of an invalid provision or an Act rather than the, “no legal effect”.

The effect of the declaration of nullity of Act No. 9 of 2009, and the question of amendment and re-enactment.

[450] This Court must accept that, Act No. 9 of 2009 was of no legal effect because it was declared null and void and unlawful by the Court (in appeals No. 30 of 2010 and No. 31 of 2010), and that the Act may be described as not having existed. This Court must also accept that, all the provisions of Act No. 9 of 2009 which were included in Act No. 16 of 2002, or otherwise amended the Act, must be regarded as having no legal effect. That means the entire Part XII of Act No. 16 of 2009 must be regarded as having no legal effect. However, according to the rule in **Yearwood**, and because it is not inconsistent with the Constitution to carry out the amendments, I do not accept that, Act No. 9 of 2009, the provisions of which became Part XII of Act No. 16 of 2002 could not be amended prospectively in a constitutional form such that it is regarded as a re-enactment – see paragraph (a) of the quotation in **Yearwood**. There is no provision in the Constitution prohibiting such a prospective amendment, and there are no words of limitation in the Constitution restraining such an amendment. I also do not accept that, the amendment of the Constitution by the Eighth Amendment do not revive Part XII of Act No. 16 of 2002.

[451] In my view, the amendments intended by Act No. 8 of 2011, to the extent that they were read as effective prospectively only, were in reality re-enactment of the policy of the Executive adopted by the National Assembly, whether it was by incorporation or by reading into the principal Act the intended missing words or provisions, all of which were found by Legall J not inconsistent with the Constitution, but merely meaningless without s. 63(1) of the principal Act. The amendments were not inconsistent with the Constitution, the common law, or any other source of the laws of Belize. Any rule claimed to be an authority for excluding such an amendment must come from the construction of the Constitution, or from any other source of laws of Belize, provided that law is not inconsistent with any provision of the Constitution. The proposition of law that, an unconstitutional Act cannot be amended at all, does not come from the Constitution or the common law.

[452] When the National Assembly passed Act No. 8 of 2011 its intention was clear, it intended to nationalise telecommunications business and regain control of it as was the case during the days of Belize Telecommunications Authority. It is the intention of the National Assembly obtained from the words of Act No. 8 of 2011 that matters in the enactment, regardless of the motive of the Prime Minister, or of any other individual member of the National Assembly – see **Fletcher v Peck 6 Cranch 87 (1810)**, where an Act was not vitiated by an allegation that it had been procured by bribing members of Parliament. See also, the **State of South Australia v Commonwealth** case; and **British Railway Board v Pickin [1974] AC 765**.

[453] The intention of the National Assembly in Act No. 8 of 2011 in the present appeals was to re-enact the words of s. 63(1) of the Principal Act without the words, "and every such order shall be prima facie evidence that the property to which it relates is required for a public purpose". The rest of words intended to be retained are in no way inconsistent with the Constitution or uncertain. In my view, constitutionally what gave the re-enactment legal effect, that is, the force of law prospectively, was the process of presenting the Bill to the National Assembly and having it passed as an Act in accordance with the procedure set out in the Constitution, and the resulting Act containing the intention of the National Assembly.

[454] Respectfully, I do not accept the submission by Mr. Barrow that, just as in some circumstances the effect of a legislation before it has been declared void has been recognised for practical reasons, namely, the reality of the prior effect, amendments of some invalid legislations may also be acceptable. I do not consider that it is justifiable by the meaning of the word "void" or "voidness" or by the principle of separation of powers of State; although it is an attractive logical argument that, enacting and repealing legislation are the functions of the Legislature. Courts have for far too long taken it upon themselves the power to strike down legislation. In such a case repeal would be a formality or a law revision exercise. It is now beyond the power of this Court to change that.

Appeals No. 18 of 2012 and No. 19 of 2012.

A summary of the decision on the first three grounds.

[455] I hold that: Act No. 8 of 2011 is not, "null and void and inoperative", it has the force of law in effecting amendment of Part XII of Act No. 16 of 2002; in particular, ss. 2(a) and (b) of Act No. 8 of 2011 are not, "meaningless and void"; the true nature of Act No. 8 is a re-enactment of the intention of the National Assembly in a constitutional form. Part XII of Act No. 16 of 2002, was a new part of the Act introduced for the first time by Act No. 9 of 2009, but as part of the principal Act, it has been amended prospectively and re-enacted by Act No. 8 of 2011; the re-enactment (or amendment) takes effect from 4 July 2011, the commencement date of Act No. 8 of 2011. Although s. 7 of the Act states that it takes effect from 25 August 2009, that is not possible because the law is that an ordinary Act cannot amend and revive an earlier unconstitutional Act retrospectively. Act No. 8 of 2011 is a re-enactment prospectively of the political, economic and social policy chosen by the Executive and adopted by the National Assembly in Act No. 8 of 2011, despite the fact that it might have hurt the respondents, but at the pain to the Executive of payment of compensation. The first three grounds of appeals succeed on the question of amendment made by Act No. 8 of 2011 and the validation authorised by the Eighth Amendment. The respective grounds of cross-appeal fail. Respectfully, Legall J erred in his decisions complained about in the first three grounds of appeal.

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The effect of the Belize Constitution (Eighth Amendment) Act, No. 11 of 2011 and Act No. 8 of 2011.

[456] Besides, it is my view that, **the Belize Constitution (Eighth Amendment) Act, No. 11 of 2011,** '**the Eighth Amendment**', is a valid Act for the reasons I shall revert to. The Eighth Amendment created and authorised a constitutional right of the Government

to have majority ownership and control of public utilities providers at all times beginning generally on 25 October 2011, the date of commencement of the Eighth Amendment, although s. 145 gives some retrospectivity to its effect. **Section 144** which created the right of the Government states:

> **144(1) From the commencement of the Belize Constitution (Eighth Amendment) Act, 2011, the Government shall have and maintain at all times majority ownership and control of a public utility provider, and any alienation of the Government shareholding or other rights, whether voluntary, or involuntary, which may derogate from the Government's majority ownership and control of a public utility provider shall be wholly void and of no effect, notwithstanding anything contained in section 20 or any other provision of this Constitution or any other law or rule of practice.**

[457] What then is the combined effect of the Eighth Amendment and Act No. 8 of 2011? It follows from my decision that Act No. 8 of 2011 was a valid Act that, the Act authorised by amendment and re-enactment, compulsory acquisition of BTL and interests therein on 4 July 2011, some three months and three weeks before the Eighth Amendment was enacted and came into effect generally on 25 October, 2011. The Act authorised the Minister to issue an acquisition order; he issued the Oder, S.I. 70 of 2011, also on 4 July 2011. The Order took effect on 4 July, 2011, the date of its publication, despite the declaration in it that, it would take effect retrospectively on 25 August 2009. That is because the authorising Act, No. 8 of 2011 took effect only on 4 July 2011. So, in my judgment, the Eighth Amendment merely confirmed the compulsory acquisition of BTL from 4 July 2011. The wording of **s. 145(1)(b)** extends validation (which is just confirmation) only to the Order, **S.I. 70 of 2011**, not to the Orders, S.I. 103 and S.I. 140 of 2009. The section states:

145(1) For the removal of doubts, it is hereby declared that the acquisition of certain property by the Government under the terms of the –

(a) Electricity Act as amended …

(b) Belize Telecommunications Act, as amended, and the Belize Telecommunications (Assumption of Control Over Belize Telemedia Limited) Order, 2011 (hereafter referred to as "the Telemedia Acquisition Order"),

was duly carried out for a public purpose in accordance with the laws authorising the acquisition of such property.

[458] The **Eighth Amendment** was intended to nationalise and return the majority ownership and control of telecommunications business in Belize to the Government in a lawful way. The law intended was to have constitutional force. So, the nationalisation was included in the Constitution by the Eighth Amendment. I do not consider it to be within the competence of this Court to question the merit of making the intention a constitutional matter. That is within the power of the Legislature, in my view. There is no provision in the Constitution that forbids the National Assembly from enacting the subject matter of ss. 144 and 145 into the Constitution. In the absence of a provision in the Constitution, we resort to the common law, which is one of the sources of the laws of Belize. The common law is of course that, an Act of Parliament cannot be unlawful.

[459] The Eighth Amendment has therefore rendered the question of acquisition of BTL, and in particular, the question of a public purpose, under **s. 17 of the Constitution** mute. The requirement of a public purpose does not arise anymore regarding compulsory acquisition of BTL and BEL, because **section 144** of **the Constitution** takes away the requirement of a public purpose regarding compulsory acquisition of public utilities providers from **s. 17 of the Constitution** and puts it under

Part XIII of the Constitution which was added by the Eighth Amendment. The only question that may be contentious is the question of assessment of compensation. It is not an issue in the first three grounds of appeal, and is premature in regard to the other grounds.

[460] The overall combined effect of **ss. 144 and 145 of the Eighth Amendment** on the one part, and Act No. 8 of 2011 on the other, is that, a gap in statutory authority for the compulsory acquisition exists from 25 August, 2009 to 4 July 2011. The compulsory acquisition on and from 25 August, 2009 to 4 July, 2011 remains unlawful by reason of the order of this Court in appeals Nos. 30 and 31 of 2010. The question of damages for the unlawful acquisition on 25 August, 2009 was a matter for decision in appeals Nos. 30 and 31 of 2010. No order for damages is made in these appeals in regard to the unlawful acquisition on 25 August 2009. Compensation for the lawful compulsory acquisitions of the respondents' property on 4 July, 2011 may be agreed; but failing agreement, any party may apply to the Supreme Court for assessment on evidence. That the respondents are entitled to compensation for the acquisitions if lawful, has not been an issue.

[461] The respondents have submitted that the Eighth Amendment was unconstitutional because it was contrary to the principle of separation of powers of State. I have concluded that it is not unconstitutional for the reasons I shall revert to when I consider the cross-appeal ground that, Act No. 8 of 2011 and the Eighth Amendment are Acts that are contrary to the principle of separation of powers of the State and are void.

[462] Further, it was mentioned in the submissions that, BCB was not a public utility provider so, compulsory acquisition of its loan interests in BTL was unauthorised. The answer is that, the loan interests had some controlling effect over the business of BTL, a provider of a public utility, the loan interests owned by BCB would be a derogation on the nationalisation to some extent if it was not also compulsorily acquired. It seems to me that, it was in the interest of BCB that, when the assets that were part of the

business undertaking of BTL were compulsorily acquired the loan liabilities were also acquired. The creditor, BCB, could then be paid compensation and did not have to wait until the expiry of the loan period and be exposed to business risk.

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The rest of the grounds of appeal and the respective grounds of cross-appeal.

[463] The rest of the grounds of appeal were complaints in different formulation that, the trial judge erred in holding that, only a part of the Eighth Amendment was valid, the greater part was unconstitutional because it was contrary to the doctrine of separation of powers and the basic structure of the Constitution. In particular, the appellants contended that, Legall J. erred in holding that, the amendments made by the Eighth Amendment by introducing new ss. 2(2), 69(9), 145(1) and (2) of the Constitution were contrary to the doctrine of separation of powers and the "basic structure doctrine"; and that s. 145(3) was meaningless.

[464] Mr. Barrow made several submissions to support the contentions. He submitted that, the conclusion reached by the cases of, **Kasavananda v State of Kawala AIR 1973 SC 1461** and **Minerva Mills Ltd. v Union of India AIR 1980 SC 1789**, the two cases that are said to have established the basic structure rule in India, depended on the fact that the Constitution of India did not give the definition of the word, "amend", and the Supreme Court of India construed it in a limited way. Mr. Barrow cited in support the judgment of the Supreme Court of Sri Lanka in the **In re the Thirteenth Amendment to the Constitution and the Provincial Council Bill**, decided on 6 November 1987, where that Court said that, the basic structure doctrine did not apply in Sri Lanka, and refused to apply the doctrine for the reason that the Constitution of Sri Lanka provided unlimited power to amend the constitution, The word, "amendment" in the Constitution of Sri Lanka was defined as: "includes repeal, alteration and addition".

[465] Mr. Barrow proceeded to submit that, the "basic structure doctrine" did not apply in Belize, the power of the National Assembly of Belize to amend the Constitution of Belize was exhaustively set out in **s. 69 of the Constitution** which states that: "The National Assembly may alter any of the provisions of this Constitution in the manner specified …" He cited s. 69(8) where reference to altering the Constitution or its provisions is defined as reference to: (a) revoking it without re-enactment thereof or the making of different provisions in lieu thereof; (b) to modifying it, whether by omitting or amending any of its provisions or inserting additional provisions in it or otherwise; and (c) suspending its operations for any period or terminating any such suspension."

[466] Mr. Barrow cited several judgments of the Privy Council in support of his submission that, the power to amend written constitutions based on the Westminster model depends on the provisions of the constitutions themselves; there may be limitation or no limitation. Counsel emphasised that, the doctrine of basic structure is not part of the law of Belize. He outlined the rule in the doctrine.

[467] Apart from holding that, Act No. 8 of 2011 could not amend and revive Act No. 9 of 2009, (the provisions of which were made Part XII of the principal Act) and therefore ss. 2(a) and (b) of Act No. 8 of 2011 which amended s. 63(1) in Part XII were meaningless, Legall J. decided that, Act No. 8 of 2011 "repealed", that is, would have repealed, all the sections of Act No. 9 of 2009 which had been declared void by the Court of Appeal, and, "validly added", that is, would have validly added, new sections to the principal Act. So, according to Legall J., had the rule prohibiting amendment of unconstitutional Act allowed amendment of such an Act instead, the amendment intended to s. 63(1), the amendment on which all the other amendments introduced by Act No. 8 of 2011 were based, would not have been unconstitutional. Legall J said that, the rest of the sections that were added to the principal Act by Act No. 8 of 2011 were not invalid, but meaningless because s. 63 could not be amended. That is the main cause for the cross-appeal. The respondents complained that, several sections of Act No. 8 of 2011 are unconstitutional and void, the Eighth Amendment is also void, and that, Legall J erred in not ordering the return of BTL to the respondents.

[468] Counsel for the respondents conveyed the above complaints in their submissions that, Legall J did not consider whether the provisions in ss. 63 to 75 of the principal Act, added by amendments made by Act No. 8 of 2011, were inconsistent with the Constitution and void. Counsel argued that, most of the provisions of the sections were unconstitutional, so the respondents were entitled to relief which included the return of the properties compulsorily acquired and damages.

[469] In written form, the respondents Boyce and the Employees' Trustees included the contention in their notice to vary the judgment of Legall J. They cross-appealed on several grounds that, particular provisions of Act No. 8 of 2011 which they identified, were inconsistent with the Constitution, and so the entire Act and the Order, S.I. 70 of 2011, were void. The grounds of the cross-appeal were the following:

> "The 2011 legislation is unconstitutional in its entirety.
>
> 1. While the learned trial judge correctly struck down The Belize Telecommunications (Assumption of Control over Belize Telemedia Limited) Order, 2011 (the "2011 Order") and portions of the Belize Telecommunications (Amendment) Act 2011 (the "2011 Act") and the Belize Constitution (eighth Amendment) Act 2011 ("the English Amendment"), he nevertheless erred by failing to find that this legislation is unlawful, and void in its entirety for all the reasons that had been submitted by the Second Respondents including improper purpose, violation of the separation of powers doctrine, violation of the basic structure doctrine, violation of the Preamble, s2, s3(a), s6, s3(e), s17, s16, s20, and s68 of the Belize Constitution, violation of the rule of law and natural justice, and for the reason of being ad hominem.
>
> Improper purpose.
>
> 2. The learned trial judge erred in law when he failed to find that the 2011 Act and Order and the Eighth Amendment were unlawful and wholly null and void as they were all passed for the same illegitimate purpose as the Court of Appeal found in respect of the 2009 acquisition.

Separation of powers.

3. The learned trial judge erred in law when he failed to find that the 2011 Act and Order and the Eighth Amendment were unlawful and wholly null and void as they were all passed in breach of the fundamental principle of the separation of powers.

2011 Act in entirety void because no retrospectivity.

4. The learned trial judge erred in law when he failed to find that the Belize Telecommunications (Amendment) Act 2011 was wholly null and void since a void Act cannot be amended or validated retrospectively.

S 143 and s 144(1) unconstitutional, null and void.

5. The learned trial judge erred in law in holding that s 143 and s 144(1) of the Constitution as introduced by the Eighth Amendment can independently survive notwithstanding the unconstitutionality of the other provisions of the eighth amendment.

6. The learned trial judge erred in law in holding that the underlined portion of s 144(1) and s 143 were not in breach of the Preamble, separation of powers or the basic structure of the Belize Constitution, in light of his holding that s 144(1) prevented him from granting consequential relief.

7. The learned trial judge erred in law by failing to consider the lawfulness of s 143 and 144(1) in the context of the other grounds presented by the Second Respondents, and by failing to find that they breach the Preamble, s 2, s 3(a) and s 6, s 3(d) and s 17, s 16, s 20, and s 68 of the Belize Constitution, rule of law and natural justice, separation of powers, basic structure, and are *ad hominem.*

Right to be heard.

8. The learned trial judge erred in law by holding that there was no breach of the second Respondents' right to be heard since,

properly construed, s. 17(1) of the Belize Constitution places a duty on the Minister to consider representations from the Second Respondents before deciding whether or not to acquire the Second Respondents' property.

Compensation.

9. The learned trial judge erred in law in holding that sections 71(3) and (5) of the 2011 Act did not breach s17(1)(a) of the Constitution by failing adequately to prescribe the principles for payment of reasonable compensation within a reasonable time, and by rendering it uncertain when compensation may be paid by affording discretion to the Government and to the Court as to when payment may be made. This includes in particular that the learned trial judge erred:

(a) in placing a burden on the Second Respondents to prove under section 71(3), approved payment by the court would not be within a reasonable time (at paragraph 74 of the Judgment);

(b) by holding that the burden was on the Second Respondents to adduce evidence that the minister or the legislature would act in a way which would render payment by treasury notes incapable of constituting reasonable compensation within a reasonable time (at paragraph 76 of the Judgment);

(c) by holding that in the absence of evidence of the specific rate of interest payable, the court would be engaging in conjecture to hold that it does not amount to reasonable compensation (at paragraph 77 of the Judgment). Section 71(5)(b) restricted interest to that which would be payable on fixed deposits as at the date of acquisition. As such it unconstitutionality limits the amount which could be paid in compensation; and

(d) by failing to hold that, nearly three years on since being deprived of their property, the Appellants are in breach of the obligation to provide reasonable compensation within a reasonable time.

Consequential relief.

10. The learned trial judge erred in reaching the conclusion that s 143 and s 144(1) of the Belize Constitution (as amended by the Eighth Amendment) preclude his granting of consequential relief to the Second Respondents. Further, the learned trial judge erred by failing to order that the Second Respondents shall be at liberty to apply for any further consequential relief.

11. In any event, the learned trial judge erred in law by failing to grant consequential relief to the Second Respondents, for reasons including:

    (a) the learned trial judge erred in law by failing to secure the Second Respondents their right under s 20 of the Constitution to redress;

    (b) the learned trial judge erred in law by refusing consequential relief because this denied the second Respondents the fruits of their litigation;

    (c) in any event, at the very least, having found that the relevant provisions of the Act and Order were null and void, the Learned Judge erred in law in not granting at least some relief for damages and lost profits, etc, for the period from 25 August 2009 when the property was first acquired to 25 October 2011 when the Eighth Amendment was passed/

Negotiations.

12. The learned trial judge lacked the power to order the parties to negotiate and therefore erred in so ordering.

Costs.

13 The learned trial judge erred in failing to award costs to the Second Respondents having found that the compulsory acquisition of the second Respondents' property was unconstitutional, null and void."

[470] There are two common answers besides others to the complaint in the cross-appeal that, Act No. 8 of 2011 is, in any case, unconstitutional because some of the provisions of the Act are inconsistent with ss. 3, 6, 16, 17, 20 and 68 of the Constitution. The first answer is that, the **Eighth Amendment** which is a lawful enactment, in my view, has removed from **s. 17 of the Constitution** the requirement of a public purpose regarding compulsory acquisition of private property to the extent that, the compulsory acquisition is for the purpose of the Government obtaining majority ownership and control of a public utility provider, and placed it in **ss. 143, 144 and 145 of the Constitution**. So, all the sub-grounds that raised the question of a public purpose under **s. 17 of the Constitution** are raised in vain, even if they were to succeed under s. 17 of the Constitution.

[471] The second common answer is this. **Section 20** is not a right that a defendant can infringe upon or breach. The section merely provides for a special speedy procedure without pleadings, for a claimant of a constitutional fundamental right to bring a claim to enforce his constitutional right. The respondents have utilized the procedure in s. 20, and these are their claims and appeals. What else are they entitled to under s. 20 of the Constitution? The fact that their claims and appeals have been entertained by courts is also evidence that, they have been afforded protection of law – see **McLeod's case**.

[472] **Section 3 of the Constitution** which the respondents rely on generally and in particular, for the second ground of the cross-appeal that, Act No. 8 of 2011, the Order, S.I. 70 of 2011, and the Eighth Amendment were made for improper purpose, is a declaration of what are regarded as constitutional fundamental rights. That much is not

an issue. The right to, "protection from arbitrary deprivation of property", is one of the constitutional fundamental rights. It is protected by the measures in **ss. 17(1) and 20 of the Constitution**. One of the measurers in s. 17(1) is that, there must be a public purpose for a public authority to compulsorily acquire private property. That is how s. 3 and s. 17(1) of the Constitution are connected. The respondents contended at trial and in this Court that, despite the statement of public purposes in the acquisition Order, .S.I. 70 of 2011, there is, as a matter of fact and law, no public purpose for the compulsory acquisition of the shares in BTL and the loan interests owned by BCB in BTL.

[473] It is convenient to set out here, **sections 3, 17 and 20 of the Constitution** relied on by the respondents in the grounds of the cross-appeal. The sections are the following:

PART II

Protection of Fundamental Rights and Freedoms.

3. Whereas every person in Belize is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely -

(a) life, liberty, security of the person, and the protection of the law;

(b) freedom of conscience, of expression and of assembly and association;

(d) protection from arbitrary deprivation of property,

the provisions of this Part shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any person does not prejudice the rights and freedoms of others or the public interest.

…

17.-(1) No property of any description shall be compulsorily taken possession of and no interest in or right over property of any description shall be compulsorily acquired except by or under a law that –

(a) prescribes the principles on which and the manner in which reasonable compensation therefor is to be determined and given within a reasonable time; and

(b) secures to any person claiming an interest in or right over the property a right of access to the courts for the purpose of –

(i) establishing his interest or right (if any);

(ii) determining whether that taking of possession or acquisition was duly carried out for a public purpose in accordance with the law authorizing the taking of possession or acquisition;

(iii) determining the amount of the compensation to which he may be entitled; and

(iv) enforcing his right to any such compensation.

(2) Nothing in this section shall invalidate any law by reason only that it provides for the taking of possession of any property or the acquisition of any interest in or right over property -

(a) in satisfaction of any tax, rate or due;

...

20.-(1) If any person alleges that any of the provisions of sections 3 to 19 inclusive of this Constitution has been, is being or likely to be contravened in relation to him (or, in the case of a person who is

detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the Supreme Court for redress.

(2) The Supreme Court shall have original jurisdiction –

(a) to hear and determine any application made by any person in pursuance of subsection (1) of this section; and

(b) to determine any question arising in the case of nay person which is referred to it in pursuance of subsection (3) of this section,

and may make such declarations and orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 3 to 19 inclusive of this Constitution:

Provided that the Supreme Court may decline to exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law.

(3) If any proceedings in any court (other than the Court of Appeal or the Supreme Court or a court-martial) any question arises as to the contravention of any of the provisions of sections 3 to 19 inclusive of this Constitution, the person presiding in that court may, and shall if any party to the proceedings so requests, refer the question to the Supreme Court unless, in his opinion, the raising of this question is merely frivolous or vexatious.

(4) Any person aggrieved by any determination of the Supreme Court under this section may appeal therefrom to the Court of Appeal:

Provided that no appeal shall lie from a determination of the Supreme Court under this section dismissing an application on the grounds that it is frivolous or vexatious.

(5) Where any question is referred to the Supreme Court in pursuance of subsection (3) of this section, the Supreme Court shall give its decision upon the question and the court in which the question arose shall dispose of the case in accordance with that decision or, if that decision is the subject of an appeal to the Court of Appeal or to Her Majesty in Council, in accordance with the decision of the Court of Appeal or, as the case may be, of Her Majesty in Council.

…

Ground No. 1 of the cross-appeal.

[474] Ground No. 1 of the cross-appeal is headed, "the 2011 Act is unconstitutional in its entirety". The details are merely a summary of most of the other grounds stated as separate grounds of the cross-appeal. Each specific ground is determined under the respective heading.

Ground No. 2 of the cross-appeal: improper purpose, including ad hominem.

[475] Ground No. 2 of the cross-appeal is worded as follows: "2. The learned trial judge erred in law when he failed to find that, the 2011 Act and Order and the Eighth Amendment were unlawful and wholly null and void as they were all passed for the same illegitimate purpose as the Court of Appeal found in respect of the 2009 acquisition." The complaint about *ad hominem* was stated separately.

[476] There are three complaints in this ground of the cross-appeal: (1) that Act No. 8 of 2011 is, "wholly null and void", (2) that the acquisition Order, S.I. 70 of 2011 is "wholly null and void", and (3) that the Eighth Amendment is, "wholly null and void". All three are said to be null and void for the same reasons, namely, that they were passed

"for the same illegitimate purpose as Act No. 9 of 2009", had been passed before; and they were, "disproportionate to the purpose and arbitrary", as the Court of Appeal (Morrison, Alleyne and Carey JJA) had found in regard to the same facts in respect to the 2009 acquisition.

[477] The purpose for which private property may be compulsorily acquired is a matter of political policy as well as of law. The question whether a particular legislative enactment is a necessary or desirable solution to a particular problem, in these appeals whether ownership and control of utilities providers, is a political question best left to the political process – see **Castlemaine Tooheys Ltd. v South Australia (1990) 169 CLR 436**. As far as law is concerned, generally private property can be compulsory acquired only for a public purpose. It is a requirement imposed by **s. 17(1) of the Constitution**. The general constitutional requirement is that, a law that will authorise compulsory acquisition of private property must have a provision, among others, in it that, the acquisition will be for a public purpose. This is a common law rule that has been given a constitutional force in Belize by including it in the written Constitution of Belize.

- *Public purpose and ss. 144 and 145 of the Eighth Amendment.*

[478] A further and specific constitutional requirement has been added by **ss. 144 and 145 of the Constitution**, which were introduced into the Constitution by the Eighth Amendment. The sections were added to the Constitution because the Government considered it necessary and desirable to acquire private property in order for the Government to obtain and maintain majority ownership and control of public utilities providers. That desire was transformed by the enactment of the Eighth Amendment by the National Assembly and became the intention of the Legislature, conveyed by the words of the Eighth Amendment. In my view, the public purpose for compulsory acquisition of public utilities providers is inherent in the right of the Government to have majority ownership and control of public utilities providers.

[479] The general requirement in **s. 17 of the Constitution** is not concerned with the amendment made to the Constitution, it is not concerned with whether the National Assembly has power to amend the Constitution in the terms and circumstances of the Eighth Amendment. Further, the general public purpose requirement is not a limitation to the power of the National Assembly to amend the Constitution in the manner effected by the Eighth Amendment or at all. **Section 17(1)** itself could be amended by the National Assembly if it desired – see **s. 69 of the Constitution**.

[480] Amendment of the Constitution, including the amendment made by the Eighth Amendment, is a question of the plenitude of power to, "make laws for the peace, order and good government of Belize", under **s. 68 of the** Constitution; and a question of the extent of the power to amend the Constitution under **s. 69**. It is a question about whether there are limits to those powers of the National Assembly. On the evidence, the manner in which the Eighth Amendment was enacted was not an issue, it was not unconstitutional any way. It was my view also that, the subject matter was not unconstitutional. The Eighth Amendment is not void in any way connected to the general requirement of a public purpose in s. 17(1) of the Constitution. Once the Eighth Amendment was passed, it became no less a part of the Constitution than s. 17. The Eighth Amendment is not, "wholly void" because of any limitation in the Constitution. Whether the amendment is contrary to the doctrine of separation of powers of State will be considered under that ground.

- *Public purpose and Act No. 8 of 2011*.

[481] Similarly, the complaint about improper purpose is not concerned with the power of the National Assembly to enact **Act No. 8 of 2011**, nor with the form of the Act, nor with illegality of any of its provisions. The complaint about Act No. 8 of 2011 under cross-appeal ground No. 2 is about the effect of the Act on the judgments in appeals Nos. 30 and 31 of 2010, and so, on the interests of BCB, Boyce and the Employees' Trustees in BTL. The complaint is that, Act No. 8 of 2011 is based on, and brings back the public purpose in the 2009 acquisition Orders S.I. 104 and 130 of 2009 which were

declared illegitimate in appeals Nos. 30 and 31 of 2010, and reverses the judgments which were for the respondents.

[482] Act No. 8 of 2011 amends or re-enacts s. 63(1) of the principal Act by excising the words, "and every such order shall be *prima facie* evidence that, the property to which it relates is required for a public purpose". The amendment or re-enactment adopts among others, the remaining provision of s. 63(1) of the principal Act that authorises compulsory acquisition and requires a public purpose for the acquisition, in the event the Minister considers that there is need for compulsory acquisition of BTL. Section 17(1) of the Constitution does not require a particular public purpose to be included in an Act authorising compulsory acquisition of BTL or any other property. Act No. 8 of 2011 does not omit the constitutional requirement of a public purpose although it does not specify a particular purpose. Act No. 8 of 2011 is not "wholly void" for lack of the requirement for a public purpose. Whether enacting Act No. 8 of 2011 was contrary to the doctrine of separation of powers will be considered under that ground.

- *Purpose, motive and intention in the Act.*

[483] The facts that underlie the complaint of the respondents was that, the purpose of Act No. 8 of 2011 was the Prime Minister's view about Ashcroft, which view, this Court (Morrison, Alleyne and Carey JJA), in appeals Nos. 30 and 31 of 2010, had found was the purpose for the compulsory acquisition in 2009, and which the Court declared was, "an illegitimate purpose". The complaint about the motive of the Prime Minister was meant to convey to the Court that there was no public purpose, but the personal motive and purpose of the Prime Minister, for the compulsory acquisition in 2009, and there was still no public purpose on 4 July, 2011 when Act No. 8 of 2011 was passed, the motive and purpose of the Prime Minister had not changed; he repeated it in Parliament in 2011. No particular section of Act No. 8 of 2011 was pointed out for the submission about the personal motive and intention of the Prime Minister prevailing in the words of the Act other than the required public purpose. The Court was called upon to accept as evidence, statements made in and outside the National Assembly by the Prime Minister.

There was no objection by counsel for the appellants about the statements made in the National Assembly. That does not make it admissible.

[484] I have stated earlier that, the motive, which in these appeals was the political reason for the enactment, was irrelevant once Act No. 8 of 2011 was passed. The intention of the Legislature as conveyed by the Act is the relevant fact for this Court to consider. In interpreting an Act where intention is relevant, a court seeks to identify the intention of the Legislature, not the intention of an individual member of the National Assembly. Courts look at the words of the Act, not what was said in or outside the National Assembly by members. Intention is the legal meaning of the words of the enactment. The motive for promoting the Act is not taken as the intention in the Act, unless the motive is also what the words of the Act mean.

[485] **The South Australia and Others v the Commonwealth**, cited by the respondents for a different point, is an example of cases in which it was stated that, speeches in Parliament are irrelevant and inadmissible as evidence in determining the intention in an Act. In the case, Latham C.J. stated on page 410, the following:

> ***"Reports of the speeches in Parliament are also irrelevant and inadmissible … Neither the validity nor the interpretation of a statute passed by Parliament can be allowed to depend upon what members, whether Ministers or not, choose to say in parliamentary debate. The court takes the words of Parliament itself, formally enacted in the statute, as expressing the intention of Parliament (Richard v McBride 181 8 Q.B.D. 119; R v Comptroller General of Patents 1898 1 Q.B.D. 909) … An interesting example of the irrelevance to the question of validity of a statute of motives, objects or intentions of the members of a legislature is to be found in Fletcher v Peck 1809 6 Cranch 87 Law Ed. 86 …"***

[486] In the affidavits filed for the respondents, and in the submissions by counsel, it was assumed that, what was said in the National Assembly was evidence of the intention in Act No. 8 of 2011. The common law rule of construction of statute which I have stated in the above two paragraphs, required that statements made in Parliament be excluded. In the UK, **Pepper (Inspector of Taxes) v Hart [1993] AC 593** changed the rule, and Hansard could be looked at if regarding a point at issue the enactment was, (1) ambiguous or obscure, or (2) its literal meaning led to an absurdity. But there seems to be some back-tracking since – see **Torlochan Singh Flora v Wakom (Heathrow) Ltd [2006] EWCA Civ. 1103**.

[487] Belize adopted the common law of England as existed before **1 January, 1899** by the authority of **s. 2(1) of the Imperial Laws (Extension) Act, Cap. 2**. **Pepper v Hart** was decided in 1992, it does not automatically apply to Belize. In any case, it was never suggested by the respondents that, Act No. 8 of 2011 was ambiguous or obscure, or that its literal meaning led to absurdity. Moreover, the point at issue is the motive of the Prime Minister. It did not arise from interpretation of any section of Act No. 8 of 2011, and is irrelevant to court anyway, although it may be a relevant political reason in and outside the National Assembly to persuade members of the National Assembly.

[488] **British Railways Board v Pickin [1974] AC 765**, which is based on the common law, is an example of cases in which motive, even fraud, was held not to be a factor that could defeat an Act. The facts were these. An Act set up a railway line. It provided that in the event the line was abandoned, the lands acquired would vest in the owners for the time being of the adjoining lands. A subsequent Act passed the land to British Railways Board. The appellant claimed under the first Act, alleging that, the Board in obtaining the passage of the second Act had misled Parliament by false recital in the preamble of the Bill in reference to the documents deposited at Parliament, and so, the second Act should not be given effect. The claim was struck out for not disclosing reasonable ground for bringing a claim. The Court of Appeal reversed the order. The House of Lords allowed the appeal and restored the order striking out the claim. Their Lordships stated this:

> ***"The functions of the court was to consider and apply the enactments of Parliament and accordingly, in the course of litigation, it was not lawful to impugn the validity of a statute by seeking to establish that Parliament, in passing it, was misled by fraud or otherwise, nor might a litigant seek to establish a claim in equity by showing that the other party, by fraudulently misleading Parliament had inflicted damage on him ... any investigation into the manner in which Parliament had exercised its function would or might result in adjudication by courts, bringing about a conflict with Parliament."***

[489] I am aware that in Belize it is the supremacy of the Constitution, not the supremacy of Parliament, the National Assembly, that applies; nevertheless the first part of the quotation applies in Belize because it is in no way inconsistent with the Constitution.

[490] In Belize courts may investigate the passing of a particular Act to the limited extent authorised by the Constitution – see **Vellos v the Prime Minister and Attorney General**. The limitation may be in regard to procedure or to subject matter as required by the Constitution. In these appeals the respondents did not identify any provision of the Constitution on which they relied for challenging the enactment of Act No. 8 of 2011. There is no provision in the Constitution that declares that, motive of a member of the National Assembly vitiates an Act. The complaint that Act No. 8 of 2011 is bad for repeating an illegitimate purpose harboured by the Prime Minister fails.

- *Public purpose and S.I. 70 of 2011*

[491] Whether or not the stated purposes for the compulsory acquisition of BTL were public purposes, and whether the purposes were bad for repeating an earlier void purpose, were matters for the content of the actual acquisition Order, S.I. 70 of 2011. If I find that, the Order was made for a purpose other than a public purpose, I should uphold the complaint and declare the Order *ultra vires*, and the acquisitions the second

time around unlawful. Only one of the purposes need be a true public purpose. It does not matter if other purposes are improper, or "illegitimate" purposes.

[492] Lord Goldsmith submitted that, the facts had not changed from the nationalization in 2009 to the nationalization in 2011; the reasons for the nationalization remained the same reasons that were declared illegitimate in appeals No. 30 of 2010 and No. 31 of 2010. The matter was *res judicata*, he argued. He cited **Arnold v Westminister Bank plc [1991] 2 AC 93**, and **Henderson v Henderson [1843 – 1960] All ER Rep. 378** for the application of *res judicata* and *issue estoppel* rules.

[493] Lord Goldsmith then submitted that, Legall J was bound to hold that the compulsory acquisitions in 2011 were carried out for the same illegitimate purpose (not a public purpose) for which the Court of Appeal in appeals Nos. 30 and 31 of 2010 declared the compulsory acquisitions in 2009 null and void, Legall J. erred in not so holding. Counsel did not cite any section of Act No. 8 of 2011 or of the Constitution as a peg for his submission, he relied on a general impression about the Act.

[494] The public purposes stated in the Acquisition Orders S.I. 104 of 2009 and S.I. 130 of 2009 were: **"the establishment and improvement of the telecommunications industry and the provision of reliable telecommunications services to the public at affordable prices in harmonious non-contentious environment"**. The public purposes stated in S.I. 70 of 2011 were: "**(a) to restore the control of the telecommunications industry to Belizeans, (b) to provide greater opportunities for investment to socially-oriented local institutions and Belizean society at large;** and **(c) to advance the process of economic independence of Belize with a view of bringing about social justice and equality for the benefit of all Belizeans"**. The two sets of public purposes may share the ultimate aim, but are not the same – compare, an English case, **R (on the application of SAM Global Master Fund LP) v Treasury Commissioners [2010] BCC 558**, where the Bank of England bailed out a bank and subsequently the government nationalised the bank.

The purpose of the shareholders and the purpose of the government were different, but they shared the common aim of rescuing the bank.

[495] I respectfully acknowledge the extensive experience of Lord Goldsmith in constitutional matters. He was Her Majesty's Attorney General (UK) for a long and eventful period during which the wars in Iraq and Afghanistan took place, the landmark constitutional case in which he was counsel, **Regina (Jackson and Others) v Attorney General [2005] 3 WLR 733** was decided by the House of Lords and several other important public law cases such as, **Regina (Anderson v Secretary of State for the Home Department (Consolidated Appeals) [2003] 1 AC 837**, and **Secretary of State for the Home Department v Rehman (Consolidated Appeals) [2003] 1 AC 153** were also decided by the House of Lords.

[496] With much respect, I cannot accept the submission by Lord Goldsmith. My respectful view is that, the submission is mistaken. Morrison, Alleyne and Carey JJA accepted that, the purposes stated in S.I. 104 of 2009 and S.I. 130 of 2009 "were indeed public purposes", "purposes that serve the public". Secondly, Legall J. when hearing the claims in the present appeals was bound by the *ratio decidendi*, not the finding of facts made by the Court of Appeal in appeals Nos. 30 and 31 of 2010. He would have been bound by the finding of facts, if in the appeals a retrial was ordered with an order as to the facts that the trial judge must take. The claims, the subjects of these appeals, were new claims impugning the Eighth Amendment, 2011, Act No. 8 of 2011 and the Order, S.I. 70 of 2011, the evidence presented had to be assessed anew by Legall J.

[497] Similarly, it is the *ratio decidendi* in appeals No. 30 and 31 of 2010 that, I must in this Court regard with the greatest respect. About the evidence, I am obliged by law to concern myself with the evidence in the claims, the subjects of these present appeals.

[498] The facts have since changed. Several additional affidavits were filed. Some were filed at this Court just before the hearing of the appeals. It will be remembered

that at the commencement of hearing Mr. Smith SC applied for permission to cross-examine deponents for the appellants. The application was not opposed, but Mr. Barrow SC, for his part, also applied for permission to cross-examine Mr. Boyce on his affidavits. Mr. Smith then applied for adjournment. On the adjourned date he opposed Mr. Barrow's application. Mr. Barrow made a suggestion that he would withdraw his application if Mr. Smith would withdraw his. Mr. Smith readily accepted, and both applications were withdrawn. There was no cross-examination of witnesses.

[499] In my view, Order, S.I. 70 of 2011 states for the compulsory acquisition of BTL purposes that are public purposes. In the Commonwealth Caribbean region Byron CJ in **Spencer and Others v Attorney General and Others [1999] 31 LRC**, after outlining the statutory definition of a public purpose stated that, "the root decision on the meaning" of a public purpose was the judgment of the Privy Council in the consolidated appeals **Hamabai Pramjee Petit v Secretary of State of India**; and **Moosa Hajee Hassam and Others v Secretary of State of India [1914] LR Vol. XLII Indian Appeal 44** [also Privy Council Appeals No. 3. 139 and 140 of 1913]. In the appeals the Privy Council stated about "public purpose" that:

> ***"… the phrase, whatever else it may mean, must include a purpose, that is an object, or aim, in which the general interest of the community as opposed to the particular interest of individuals, is directly and vitally concerned".***

The Privy Council held that, the two tracts of land acquired in India for building houses to be let to civil servants were acquired for a public purpose.

[500] In **the Spencer** appeal itself, the Court of Appeal for the Eastern Caribbean held that, the purpose stated, as development of tourism in Antigua and Barbuda, without providing detail was a public purpose. The Court of Appeal also cited the Privy Council appeal, **Williams v The Government of the Island of St. Lucia (1996) 14 WIR 177**. In

the present appeals the public purposes stated in S.I. 70 of 2010 compare well with the public purposes in **Williams** and in **Spencer**.

[501] The facts in **the Spencer case** were these. The government of Antigua and Barbuda entered an agreement with the third respondent, Asian Village Antigua Ltd., whereby the government would acquire land and give to Asian Village and provide financing for developing the land by construction of hotels and other tourism facilities. The government presented to Parliament a Bill known as, "Asian Development Act 1977", for enactment. Mr. Spencer, the leader of Opposition, and others brought a constitutional claim in which one of the claims was that, the Bill was *ultra vires* s. 9 of the Constitution of Antigua and Barbuda which required a public purpose for compulsory acquisition of land. The appellant contended that, acquiring and transferring the land to a private developer who would develop it for his private profit was not acquisition for a public purpose. The claim was struck out for insufficient particulars. On appeal to the Court of Appeal, the appeal was dismissed. The Court of Appeal relied on **Hamabai Petit**, and **Williams v The Government of Saint Lucia**. On page 15 Byron CJ stated the following:

> ***'The root decision on the meaning of public purpose can be found in the Privy Council decision of Petit v Secretary of State for India (1914) LR vol XIII (Indian Appeals) 44 at 47 where Lord Dunedin said:***
>
> > ***'The argument of the appellants is really rested upon the view that there cannot be a 'public purpose' in taking land if that land when taken is not in some way or other made available to the public at large. Their Lordships do not agree with this view. They think the true view is well expressed by Batchelor, J. in the first case, when he says: 'General definitions are, I think, rather to be avoided where the avoidance is possible, and I make no attempt to define precisely the extent of the phrase 'public purpose' in the least; it is enough to say that, in my opinion, the phrase, whatever else it may mean, must include a purpose, that is, an object or aim, in which the general interest of the community, as opposed to the particular interest of individuals, is directly and vitally concerned.'***

[502] Then on page 17, Byron CJ again stated:

> ***"Similarly, in this case the factual premise on which the principles were expressed was that the objects were the relief of private objects and debts, no public purpose was alleged …***
>
> ***In the Australian case of Clunies-Ross v Commonwealth of Australia [1985] LRC (Const) 292, more modern American cases were considered. Passages from the judgment demonstrate that in both Australia and America the courts employ principles of interpretation which require a broad and generous interpretation of the phrase 'public purpose':***
>
> ***…***
>
> ***When one applies the principles to the instant case not only is it abundantly clear that the stated purpose of the 'development of tourism in Antigua and Barbuda' is a public purpose but the principle has already received judicial approval."***

[503] Mr. Courtenay in his submission questioned the merits of the stated purposes in S.I. No. 70 of 2011. He contended that, the purpose at (a) was a re-statement of the 2009 purposes which had been held to be unsupported by evidence. He contended that, the purpose at (b) "was unclear and there was no justification that dealing with this asset would achieve greater opportunity for investment". He contended about purpose at (c) that, "there is nothing to support that this is the reason". The contentions raise questions of law only marginally. They belong elsewhere in the main.

[504] With due respect, I reject the contentions. First, the purposes stated in the Order, S.I. 70 of 2011, are not the same as the purposes stated in the Orders, S.I. 104 and S.I. 130 of 2009. Secondly, there is a direct answer in **Williams** and in **Spencer** for the last two submissions. What is required is a statement of purpose, not detail or method of achieving the purpose, or I might add, the probability of a successful result.

[505] In the **Williams v the Government of Saint Lucia case**, land owned by the appellant was compulsorily acquired under Land Acquisition Ordinance of Saint Lucia. The Ordinance required a public purpose for land acquisition. The purpose stated in the declaration of acquisition was, "the development of tourism". The appellant claimed that, the stated purpose, "the development of tourism, was not a sufficient statement of a public purpose … [it] should have included the particular use of the land by which the government intended to promote tourism on the island". The appellant lost his claim and appeal to the Court of Appeal of the West Indies Associated States. On appeal to the Privy Council, he again lost the appeal, their Lordships stated on page 179 as follows:

> ***"The appellant challenged the validity of the declaration also upon the ground that the statement 'the development of tourism' was not a sufficient statement of a public purpose to satisfy the terms of the Ordinance. That the promotion of tourism can be a public purpose on the Island of Saint Lucia can scarcely be denied. But it is said by the appellant that the particular use of the land by which the Government intended to promote tourism on the Island ought to have been stated, presumably to enable a judgment to be formed as to whether or not such a use could conceivably promote tourism. No doubt, the expression 'the development of tourism' has a degree of vagueness but what is called for by the Ordinance is the statement of a public purpose, which necessarily must be in very general terms. The Ordinance, in their Lordships' opinion, is satisfied by a statement of the objective to be achieved. It is a purpose and not a method which has to be stated. The expression 'the development of tourism' does state a purpose which is a public purpose. Such an approach has been found appropriate where constitutional as well as statutory validity is in question, see W H Blakeley & Co Pty, Ltd v The Commonwealth of Australia (1953), 87 CLR 501). Their Lordships are unable to accept the appellant's submission that the declaration fails adequately to state a public purpose for which the land is to be acquired."***

[506] Based on the fact that the purpose in the Orders S.I. 104 and 130 of 2009 and the purposes in the Order S.I. 70 of 2011 are different, and on the above two precedents, I reject the submissions by Mr. Courtenay.

[507] In addition, I shall mention that, courts do not examine the **merits and demerits** of a policy that the Executive or the Legislature intends to pursue, be they political, social, cultural, economic, revenue collection and allocation, security and international relations policies. This point has been stated in many judgments including in the judgments in **Akar** and in **the South Australia v Commonwealth case**. Comity and mutual deference between the Organs of powers of State required by convention under the doctrine of separation of the powers of State demands that, courts leave policies and merits to the executive and the legislature. In regard to restoring telecommunications to Belizeans, that is, nationalisation, my respectful view is that, all that a court should do is to look at the statement *ex facia* for any public purpose of the nationalisation, that is, for an intended benefit or disadvantage to the public as opposed to personal benefit or advantage. It would be meddling for a judge to examine the merits and demerits of state ownership and control of telecommunications business, electricity supply business, water supply business, (or any other public sector business) *vis- a- vis* private ownership of them. State ownership (nationalisation) is usually intrinsically a public interest matter. The merits and demerits are political.

[508] Any argument for or against, communism or socialism, as compared to capitalism (better sounded these days as, "free market") is not for courts. State ownership, selective state ownership, free-market and mixed economy have been tried and will continue to be tried by many countries. If it is the choice of political policy makers in Belize to try some or part-nationalisation in Belize, I do not think it is appropriate for courts to require evidence of the expected success of the policy and ask question about proportionality. I do not think it is appropriate for courts to require evidence of the social and economic success of the policies, stated as: to restore ownership and control of communications business to Belizeans; to provide greater opportunities for investments to socially-oriented local institutions; and to advance economic independence. Would it be proper for courts in Belize to examine evidence such as economic indicators, labour market, social benefits, social behaviour, and others, in order to determine whether there is or no public purpose in those policy matters?

[509] **Regina (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No. 2) [2009] 1 AC 453**, was a case in which wholesale compulsory land acquisition from the entire inhabitants of the Chagos Archipelago was made. The House of Lords accepted the reason (purpose) given by Her Majesty's Government without questioning. The case is an authority that, courts will accept the statement of the Executive regarding certain matters without proof.

[510] The facts were these. In 1965, the French ceded the Chagos Archipelago to the British. It became a British colony, the British Indian Ocean Territory – BIOT. In 1971, under an Ordinance promulgated by the Commissioner for BIOT, all the inhabitants were removed to Mauritius because the main island of Chagos Archipelago, Diego Garcia, was to be used as a U.S.A. military base under a treaty. This was during the height of the cold war. The removal order was declared *ultra vires* by the Divisional Court in England. Compensation was paid and the Secretary of State allowed the inhabitants to return, except to Diego Garcia.

[511] In 2004 the Secretary of State directed that to return to any part of BIOT, the inhabitants required permit. The reasons he gave included: poor feasibility of resettlement of returnees based on unsustainability of large population on BIOT after the business company, Chagos Agalega Ltd., on which the inhabitants depended closed down; public expenditure to sustain the population; state security interests; and diplomatic interests. All were accepted by the House of Lords because they, "lay peculiarly within the competence of the Executive". The appeal of the Secretary of State against the judgment of the Court of Appeal (England) that, the decision of the Secretary for Foreign and Commonwealth Affairs to re-impose control and prevent resettlement was unreasonable, was allowed.

[512] I think that, in political policy matters such as the three purposes given in S.I. 70 of 2011, courts must show sensitivity and recognise that, they are more appropriate for legislative rather than judicial decision. Sometimes submissions made to court drift unintentionally to social and political merits of the subject matter; it is less often in some

jurisdictions than in others. In that event, it is necessary for a judge to heed the extra-judicial wise words of Lord Hoffman in a lecture, the COMBAR Lecture 2001 (UK), at paragraph 10 that:

> ***"[It] is for the court itself to show a proper sensitivity to the separation of powers. The fact that it has the last word makes it exercise great restraint. Indeed, it is that restraint that may be said to be the source of the court's power. Nothing would be more destructive of its authority than a perception that it was making decisions which were properly the territory of the elected branches of government …"***

Further, at paragraph 30 Lord Hoffman stated:

> ***"The Separation of powers therefore raises questions of great subtlety and complexity, far more difficult and interesting than the question of whether the Lord Chancellor should sit as a judge. It requires a degree of political awareness from judges, the ability to identify cases in which behind the formal structure of legal reasoning with which judges are so familiar, there lie questions of policy which are more appropriately decided by the democratically elected organs of the state. And it requires a degree of restraint on the part of judges; a willingness to stand back from the thickets of the law and accept that judges are not appointed to set the world to rights. However slow, obtuse and maddening the democratic process may be, there is a legitimacy about the decisions of elected institutions to which judges, however enlightened, can never lay claim."***

[513] The advice by Lord Hoffman applies equally to the Legislature and the Executive. Lord Hoffman emphasised sensitivity by judges to the doctrine of separation of powers

because his lecture was to those concerned with judicial powers and professional law practice. The Legislature and the Executive too must show sensitivity to separation of powers. The Organs of powers of State in the UK have long and rich history to draw from, and are at distinct advantage in dealing with the issue. The showdown fomented by the series of **Stockdale v Hansard**, and **Stockdale v The Sheriff of Middlesex** cases is a significant one from which important lessons were learnt. It should be noted carefully in this jurisdiction – see **Stockdale v Hansard (1839) 9 Ad & E1**; **112 ER 1112** and the cases that followed, and **The Case of the Sheriff of Middlesex (1840) 11 Ad & E 273**; **113 ER 419**,

[514] The facts are these. Mr. Hansard, by authority of Parliament, published a prison report in which it was stated that, a book published by Stockdale had been circulating at a prison, and that, the book was, "of the most disgusting nature … and obscene and indecent in the extreme". Stockdale sued Hansard in libel. The jury accepted the defence that the words, disgusting, obscene and indecent were true. That disposed of the case. But the jury also found that, the report was authorised by the House of Commons and was protected by parliamentary privilege. Although the claim was dismissed, Lord Denman CJ remarked that, he was not aware of such privilege. That upset members of the House of Commons. Subsequently the inspectors of prisons replied in writing to the criticism of their report. Hansard reported this. Stockdale sued Hansard again. The House of Commons passed a resolution that, such a report was, "an essential incident of the constitutional function of Parliament", and that, "Parliament had the exclusive jurisdiction to determine its privilege", and it would be a breach and contempt of Parliament for a court to assume to decide privilege of either House of Parliament. The House of Commons then instructed Hansard not to raise the defence of truth. The Court of Queen's Bench decided that, parliamentary privilege was not a defence to libel, and the claim succeeded.

[515] Stockdale brought a third claim against Hansard. This time Hansard offered no defence. Judgment was entered against him, and damages in the sum of £600 was

ordered. The sheriff's Office (Mr. Evans and Mr. Wheelton) executed a writ and collected £600. They deferred payment until the legality of the payment was resolved.

[516] The House of Commons resolved and ordered Evans and Wheelton to return the money to Hansard. They failed and the House issued a warrant and detained them. Stockdale obtained a court warrant of commitment of the two men for refusing to pay over the £600 to him. They replied by affidavit that, they were in custody by warrant of the House of Commons. Evans was later released on compassionate ground, and Wheelton was released later. The matter was finally resolved by Parliament passing the Parliamentary Papers Act, 1840. It gave protection to reports, papers and other documents authorised by Parliament.

[517] While sensitivity is called for where appropriate, it does not mean that, judges should shy away from their responsibility to strike down an Act which is clearly a breach of the Constitution, or to quash an act of the Executive which is unlawful. It is the duty of a judge to decide a case fairly according to law.

[518] In appeals Nos. 30 and 31 of 2010 the Court took the view that, to prove the stated public purpose, it was necessary to adduce evidence, of the need for improving telecommunications industry in Belize, of lack of affordability, and of reliability of the telecommunications services provided. The Court went on to observe that, the business report available disproved the need for improvement which was stated in S.I. 104 of 2009 as part of the required public purpose, and the Court concluded that, the stated public purpose was not proved, instead the motive of the Prime Minister, an illegitimate purpose was proved. The Court, on the facts of those appeals felt competent and confident to judge the need or otherwise; for improvement in the industry, affordability and stability.

[519] In the present appeals on the present facts, I do not consider that, this Court should feel competent to decide that, there is or no public benefit, public purpose, in: restoring telecommunications industry to Belizeans after the privatisation in 2007;

providing greater opportunity for investment to socially-oriented local institutions; and advancing the process of economic independence of Belize. The facts warrant a judge considering exercising the deference that the three Organs of State will usually exercise in regard to the function of one another, and accepting the view of the Legislature that, there is public benefit in those three purposes.

[520] In the UK there has been nationalisation and subsequent privatisation and repeat of the cycle in several industries. Nationalisation of railway services and coal mines led to the creation of British Rail and National Coal Board in 1947/1948. Rolls-Royce and British Layland were nationalised and subsequently privatised. Johnson Mathey Bank was rescued (nationalised) by the Bank of England purchasing it for £1. When after privatisation Railtrack's business of maintaining railtracks and train stations failed and the government placed it under a not-for-profit organization, that is, nationalised it, shareholders successfully sued and obtained compensation for the nationalisation. It is common knowledge worth judicial notice that, as the result of the banks and financial institutions crisis in 2007, the governments of the USA and of the UK intervened in the private sector of their respective economies. It was reported that, the government of the UK spent £37 billion in the bail-out.

[521] In any case, there has been ample evidence in the present appeals to prove public purposes, that is, benefits or advantages to the public, despite the irate statements made by Prime Minister Barrow. There has been evidence proving that, the state monopolistic telecommunications business, the Belize Telecommunications Authority, was privatised, and that a private monopoly or a dominant controller, BTL was created in 2007. There has been evidence proving that, a secret accommodation agreement (now an illegal agreement) was part of, or followed the deal, and that, the agreement burdened the government with the obligation to top up BTL's annual profit to 15%. These are matters that concern public interest. There have been other items of such evidence. But it is arguable whether much inconvenience caused by much litigation was a public purpose for the purpose of s. 17(1) of the Constitution, given the right to litigate. One public purpose is sufficient.

[522] In my view, the public purposes in the present appeals would have existed whether the ultimate nameless owner of BTL was Lord Ashcroft or someone else, and whether the Prime Minister made or did not make irate statements. It is probable that, the Prime Minister would have made the irate statements about any owner or owners of BTL, given the secret accommodation agreement. The evidence does not indicate hostility towards Lord Ashcroft personally, rather, hostility founded on what the Prime Minister believed Lord Ashcroft as owner, was doing in and through BTL to Belizeans. It did not matter whether the Prime Minister was mistaken about Lord Ashcroft being the real owner of BTL as was suggested. The respondents volunteered the information that, Lord Ashcroft was not the "owner" of BTL, they might have not volunteered to the Prime Minister the information about who the owner or owners were. If it was all personal, that might have stopped all this. The Prime Minister could have substituted the words, "one unknown person", for the words, "Lord Ashcroft", and the reason for the Prime Minister's irritation would have remained the same. The irritation was founded on public interest. I think the Prime Minister's statements were irate, rather than virulent. In any case, any extraneous motive and intention of the Prime Minister, or of any member of the National Assembly could not and did not count once Act No. 8 of 2011 was passed.

[523] The words of S.I. 70 of 2011 show clearly anyway, what the intention of the Minister responsible for telecommunications was. The respondents urged that it be implied that the Minister intended to reverse the judgments in appeals Nos. 30 and 31 of 2010 instead of pursuing the three stated purpose. That is partly true in as far as the Order was declared to take effect retrospectively from 25 August, 2009. But the Order was also intended to change rights to have majority ownership and control over public utilities providers for the future. The retrospective part is jettisoned. The Minister clearly intended, from the express words of S.I. 70 of 2011, as a matter of policy, to return telecommunications to state ownership, that is, to Belizeans, and he intended the other two purposes. There has also been evidence that, the Social Security Board of Belize has since taken the most shares in BTL. That proves investment by a socially-oriented local institution. That was one of the public purposes stated by the Minister in

S.I. 70 of 2011. There has been no proof that the investment is for individual and private benefit.

[524] It is my respectful view that, there is benefit or advantage to the public in the stated public purposes, namely, to restore the control of telecommunications industry to Belizeans, (nationalisation), providing investment opportunities to socially-oriented institutions and advancing economic independence of Belize. There is no private and personal advantage from the purposes. The purposes in S.I. 70 of 2011 are public purposes and are not vitiated by reason that the purposes may share the same aim as the 2009 public purposes. The public purposes were not made individual private purposes by the statements made by the Prime Minister. It is also my view that, the facts of the claims were unsuitable for application of the principle of proportionality for the reason that, one Organ of the powers of State should show deference to the other. Consideration of proportionality would invite consideration of the merits of political policies, and therefore interference by court with political policies. It is further my view that, where a restriction or interference with a constitutional fundamental right such as the right to protection from arbitrary deprivation of property has been declared in the Constitution itself (in these appeals by the Eighth Amendment) the principle of proportionality cannot apply. The Constitution is the supreme law, the principle of proportionality must give way. The second ground of the cross-appeal fails.

Ad hominem.

[525] It was pleaded and submission was made to Legall J. and in this Court that, "the Belize Telecommunications (Amendment) Act, 2011; the Belize Telecommunications (Assumption of Control over Belize Telemedia Limited) Order 2011; and the Belize Constitution (Eighth Amendment) Act, 2011, are unconstitutional and void for the reason that, they are *ad hominem*". Counsel did not explain how that was the case. The phrase was used in **Francis Liyanage v The Queen [1967] 1 AC 259**. My view is that, contending that the legislations were, "made *ad hominem*", is erroneous in the circumstances of the present appeals.

[526] *Ad hominem*, meaning, "to the person", is usually a complaint that, the opponent's case or argument appeals to personal prejudice and personal character of the opponent, rather than appeals to the assertion made in the opponent's case – see Black's Law Dictionary. In other words, it means that, the case complained about or resisted is based on an *"ad personem* argument*"*, a personal attack. The record does not show evidence that, the case for the Prime Minister and the Minister was conducted by personal attack on Boyce, the Employees' Trustees, Lord Ashcroft or any other person. Statements made outside court are different matters. An irate speech is often an item in the stuff that political speeches are made of. The appellants' case was that, it was for public purposes that, the appellants nationalised BTL and restored it to Belizeans, and intended to provide through BTL opportunities for investment to local institutions, and to advance economic independence for Belize. Their case was not conducted *ad hominem*.

[527] It is also erroneous that the three legislations were made *ad hominem*, that is, for personal reasons against the appellants. The Eighth Amendment and Act No. 8 of 2011 together show that, by the legislation, the National Assembly intended that, the Government should have majority ownership and control of businesses that provide public utilities including telecommunications services business. This ground of the cross-appeal is rejected.

Ground No. 3 of the cross-appeal: separation of powers of State.

[528] Ground No. 3 of the cross-appeal is that, "the learned trial judge erred in law when he failed to find that the 2011 Act and Order, and the Eighth Amendment were unlawful and wholly null and void as they were all passed in breach of the fundamental principle of the separation of powers".

[529] The submission for this ground of the cross-appeal was that, the appellant instead of appealing the judgment in appeals Nos. 30 and 31 of 2010, passed the Eighth Amendment and Act No. 8 of 2011 in breach of the principle of separation of

powers of State. The Eighth Amendment and the Act, argued counsel, erased and reversed the final judgments of the Court retrospectively, as between the same parties. Counsel stated that, the principle of separation of powers required that, a final judgment of a court determining rights and obligations between particular parties remain inviolable. Counsel cited in support: **John Francis Liyanage v The Queen [1967] 1AC 259**; **Ahnee v DPP [1999] 2AC 291**; **D.P.P. v Mollison [2003] 2AC 411**; and **Chokolingo v Attorney General of Trinidad and Tobago [1981] 1 All E.R. 244**.

[530] Counsel for the respondents proceeded to request this Court to distinguish, the present appeals from, **The Queen v Davis [2008] 3 WLR 125**; **Australian Building Construction Employees and Builders Labourers Federation v Commonwealth (1986) 161 CLR 88**; and **Burmah Oil Company (Burmah Trading Ltd.) v Lord Advocate (and three Other Appeals consolidated) [1965] AC 75**, in which the judgments are contrary to the submission by counsel.

[531] Separation of powers of State is a doctrine that, the liberty of the individual is secure only if the three primary functions of State, legislative, executive and judicial are exercised by distinct and independent Organs (arms or departments) of State, that is, exercised by separate and independent sets of persons. The origin of the doctrine were the studies by John Locke, a philosopher in the seventeenth century. His theory was that, society and government were based on natural law (also law of nature); and that, legitimate government was based on separation of powers of State, namely, the legislative power which was supreme, the executive power, and "the federative power". Although Locke did not mention judicial power, he was not opposed to having courts as specific institutions. He considered interpreting the law, and making the judgment necessary for applying the specific rules to specific cases part of the executive power.

[532] A French philosopher, Montesquieu, developed the idea of separation of powers of State further by studying the system of government in England. He identified the powers of State to be legislative, executive, and judicial, which are the current categories of powers of State. He regarded the legislative power as supreme. He

believed that, to secure liberty these powers of State should be exercised by independent sets of persons. This Political Science doctrine is now an important part of our jurisprudence. In practice there is no absolute separation of powers of State. It is impractical. There are some necessary and desirable overlaps in the functions between the Organs of powers of State, but unacceptable intrusion must be avoided or it will be restrained. So, separation of powers of State is an important doctrine, but is not wholly true.

[533] The doctrine of separation of powers of State has not been expressly written in the Constitution or any legislation of Belize. It has been accepted from the structure of the powers of government that prevailed before independence on 21 September, 1981 and continued as the structure of the powers of State in independent Belize from and after independence.

[534] The colonial structure of government has been adopted and confirmed by the Constitution of the independent State of Belize. Most former colonies and dependent territories have adopted the doctrine in their constitutions. Although in most, if not all those constitutions, there are no express provisions establishing and applying the doctrine of separation of powers, courts in the former colonies and territories have held that, the doctrine is implicit in the structure of their constitutions. Examples are in the Australian consolidated appeals to the Privy Council, **Attorney General of the Commonwealth of Australia v The Boilermakers' Society of Australia and Others**, and **Kirby and Others v The Boilermakers Society of Australia, consolidated appeals**, **Liyanage v The Queen**, and **Moses Hines and Others v R**.

[535] **The Boilermakers Society of Australia** was a case in which the Privy Council held that, an Act of the Federal Parliament of Australia, the Conciliation and Arbitration Act, 1904 – 1952, was invalid. The reason was that, while the primary and essential object of the Act was the settlement of trade disputes, an administrative and executive function, the Act also created contrary to the provisions of Part III of the Constitution of the Commonwealth, the "Court of Conciliation and Arbitration", and vested it with judicial

as well as administrative, arbitral and executive functions which were not merely incidental to judicial function, so the Act was contrary to the doctrine of separation of powers of State implicit in the structure of the Constitution.

[536] Their Lordships stated their decision on the issue in a question and answer form at pages 5 and 6 of their judgment as follows:

> ***"The problem can now be stated. Is it permissible under the Constitution of the Commonwealth of Australia for the Parliament to enact that upon one body of persons, call it tribunal or Court, arbitral functions and judicial functions shall be together conferred? The problem can be solved only by an examination of the Constitution itself ...***
>
> ***… It can safely be assumed (and it is the historical fact) that in convention after convention in Australia the terms of the Constitution were hammered out by members of the several States who were profoundly conversant with the political systems of the United Kingdom and the United States and were in particular well aware both of the advantages of the separation of powers in a federal system and of the danger of a too rigid adherence to that theory. It is with this background that the Constitution must be interpreted, …***
>
> ***That the Constitution is based upon a separation of the functions of Government is clearly to be seen in its structure, which closely follows the model of the American Constitution. By Section 1 which is contained in Chapter I 'The Parliament', it is provided that the legislative power of the commonwealth shall be vested in a Federal parliament and the following 59 sections deal broadly with its composition and powers. It is only necessary at this stage to refer to section 51 which provided that the Parliament shall, subject to the Constitution have power to make laws for the peace order and good government of the Commonwealth with respect to (amongst other matters) '(xxxv) conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State.' By section 61, which is the first section of Chapter II 'The Executive Government', it is provided that the executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor General as the Queen's representative and extends to the execution and maintenance of the Constitution and of the laws of the Commonwealth. The following nine sections of Chapter II deal with***

the exercise of executive power. By section 71 which is the first section of Chapter III 'The Judicature' it is provided that the judicial power of the Commonwealth shall be vested in a Federal supreme Court to be called the High Court of Australia and in such other Federal Courts as the Parliament creates and in such other Courts as it invests with federal jurisdiction. The following nine sections of Chapter III deal with the appointment of Judges, their tenure of office and remuneration, the appellate jurisdiction of the High Court, appeals to the Queen in Council, the original and additional jurisdiction of the High Court, the power of Parliament to define jurisdiction and certain other matters.

Such is the bare structure of the Constitution and it will be necessary to look more closely into some of its provisions. But enough has been said to suggest that in the absence of any contrary provision the principle of the separation of powers is embodied in the Constitution."

[537] The structure of the Belize Constitution, as is the structure of the Federal Constitution of Australia, implies the application of the doctrine of separation of powers of State. The Constitution segregates and confines executive power to Part V sections 36 to 54; the legislative power to Part VI, sections 55 to 93; and the judicial power to Part VII, sections 94 to 104. Some overlaps of powers are specifically provided for. That, in my view, is reason to infer that, impermissible exercise by one organ of the powers of the other Organs of government is prohibited.

[538] There has since been firm judicial authority for the application of the doctrine of separation of powers to former colonies and dependent territories in the judgments of the Privy Council when it was the final appeal court for Belize. Three notable precedents are, **Moses Hines and Others v R**; **DPP v Mollison**; and **Liyanage v The Queen**.

[539] **Liyanage**, was an appeal from the Supreme Court of Ceylon (now Sri Lanka) to the Privy Council. The Constitution of the independent State of Ceylon did not expressly vest judicial powers in the courts, but provided for courts, appointment of judges by an independent commission and for secure tenure of their office. Influencing

a decision of the commission was an offence. The courts continued to carry out judicial function after independence under a colonial ordinance, the Courts Ordinance. After a failed coup de' état in January 1962, the appellants, except one, were detained on the same day. The last appellant was detained on 31 July 1962. The law required that, a person arrested without warrant be brought before a magistrate, that is, charged as soon as possible, in any case, within 24 hours. The Parliament of Ceylon passed two Acts. The first Act provided for several offences, including "conspiring to or overthrowing the government by use of force, conspiring to or waging war" and several other offences. It also provided for special penalties. The second Act provided for receiving confession as evidence outside the usual rules and for detention for 60 days before an accused detained on suspicion of committing the said offences could be brought before a magistrate. The commencement dates of the Acts were back-dated so that the Acts applied to the appellants. The Acts were to expire after all proceedings relating to the coup were completed. The appellants were convicted of offences of conspiring to overthrow the government and conspiring to wage war, and were each sentenced to 10 years imprisonment, the mandatory minimum punishment, and orders were made that, they forfeit all their property as required under the Acts.

[540] On appeal to the Privy Council, their Lordships in a judgment delivered by Lord Pearce, rejected the submission by the Solicitor General of Ceylon that, because the Constitution did not expressly vest judicial power of State in the courts, the two Acts should not be held void for inconsistency with the doctrine of separation of powers. Their Lordships stated at page 287 the following:

> ***"And although no express mention is made of vesting in the judicature the judicial power which it already had and was wielding in its daily process under the Courts Ordinance, there is provision under Part 6 for appointment of judges by a Judicial Service Commission which shall not include a member of either House … any attempt to influence any decision of the Commission is made a criminal offence … These provisions manifest an intention to secure***

in the judiciary freedom from political, legislative and executive control. They are wholly appropriate in a Constitution which intends that judicial power shall be vested only in the judicature. They would be inappropriate in a constitution by which it was intended that judicial power should be shared by the executive or the legislature. The Constitution's silence as to the vesting of judicial power is consistent with its remaining where it had lain for more than a century, in the hands of the judicature. It is not consistent with any intention that, henceforth it should pass to or be shared by the executive or the legislature."

[541] In answer to the question whether the Acts of 1962 infringed the judicial power of State, their Lordships stated on the same page 287 that:

"It goes without saying that the legislature may legislate for the generality of its subjects, by the creation of crimes and penalties or by enacting rules relating to evidence. But the Acts of 1962 had no such general intention. They were clearly aimed at particular known individuals who had been named in a White Paper and were in prison awaiting their fate … That the alterations in the law were not intended for the generality of the citizens, or designed as any improvement of the general law is shown by the fact that the effect of those alterations was to be limited to the participants in the January coup, and that, after these had been dealt with by the judges, the law should revert to its normal state."

On page 290 they concluded in these words:

"As has been indicated already, legislation ad hominem which is thus directed to the course of particular proceedings may not always amount to an interference with the function of the Judiciary. But in

the present case their Lordships have no doubt that there was such interference; that it was not only the likely, but the intended effect of the impugned enactments; and that it was fatal to their validity. The true nature and purpose of these enactments are revealed by their conjoint impact on the specific proceedings in respect of which they were designed, and they take their colour, in particular, from the alterations they purported to make as to their ultimate objective, the punishment of those convicted. The alterations constituted a grave and deliberate incursion into the judicial sphere."

[542] In answer to the submission that, the Parliament of Ceylon was limited to passing legislation which was not contrary to fundamental principles of justice, their Lordships stated that, there was no such limitation, but the power of the Parliament of Ceylon as were the powers of Parliament in all countries with written Constitutions on the Westminster model must be exercised in accordance with the terms of the Constitution.

[543] In **Moses Hines**, the Constitution of Jamaica did not expressly provide for separation of powers of the State. The Privy Council applied the same reasoning when they allowed the appeal of **Moses Hines** for the reason that, the provision of The Gun Court Act which authorised that a person convicted under the Act would be, "detained at hard labour", and would be released by the Governor General acting on the advice of a board whose members were not judges and were not appointed under the Constitution, unlawfully authorised the Executive to exercise judicial function.

[544] **Mollison**, also an appeal from the Court of Appeal of Jamaica to the Privy Council was similarly decided. Section 29 of Juveniles Act, 1951 of Jamaica, was declared unconstitutional by the Court of Appeal of Jamaica and by the Privy Council because it provided that, a convicted juvenile was to be detained during the Governor General's pleasure. The section was modified so that the appellant and all juveniles were to be detained at the pleasure of the court.

[545] In the cases that I have cited above, specific provisions of the Acts at issue were cited for breach of the doctrine of separation of powers of State. In the present appeals, no particular provisions of Act No. 8 of 2010, and no particular term of the Order, S.I. 70 of 2011, was cited for breach of the doctrine. It was simply submitted that, the Act and S.I. 70 of 2011 were made to reverse the judgments in appeals Nos. 30 and 31 of 2010. Nothing of the sort was stated in, or happened in regard to Act No. 8 of 2011 and the Order, S.I. 70 of 2011.

[546] Act No. 8 of 2011 amends s. 63(1) of the principal Act to remove the provisions that an acquisition order would be *prima facie* evidence that the property acquired was acquired for a public purpose. I have held that the Act takes effect only prospectively from 14 July 2011. From that date, the Act does not reverse the judgments in appeals No. 30 and 31 of 2010 and cancel the rights of BCB, Boyce and the Trustees declared in the judgments. It does not alter their rights to their properties as at the time .S.I. 104 and S.I. 130 of 2009 were published, that is, retrospectively, or even prospectively. The Act further, repeals provisions that had been found by the Court to be inconsistent with s. 17(1) of the Constitution. Far from interfering with the function and power of court, the Legislature sought to comply with the orders of the Court made in appeals Nos. 30 and 31 of 2010, and thereby promoted the doctrine of separation of powers of State.

[547] Then the Act introduced new provisions that the National Assembly considered would be consistent with s. 17(1) of the Constitution in accordance with the judgments of the Court. In addition, the Legislature insisted on pursuing its three policies stated in the public purposes in S.I. 70 of 2011. Those provisions did not, by their words, attempt to reverse the judgments at issue. The Legislature has power to change the law by legislation after a court judgment. The legislation is presumed to take effect prospectively unless clearly stated in the Act to take effect retrospectively – see **Hitchcock v Way (1837) 6 Ad & E 943**, **Bonning v Dodsley [1982] 1 WLR 279** and **In re a Debtor, ex parte Debtor [1936] Ch. 237**. In these appeals I have held that Act No. 8 of 2011 takes effect prospectively only. My decision regarding the effect of Act

No. 8 of 2011 on the doctrine of separation of powers of State is that, Act No. 8 of 2011 does not offend the doctrine of separation of powers of State .

[548] The Order, S.I. 70 of 2011, declares that, the Minister had decided to take the properties at issue for public purposes. It sets out the public purposes. The Order does not cancel and reverse the rights of the respondents which accrued when their properties were acquired in 2009, and crystallised when on 24 June 2011 they won appeals Nos. 30 and 31 of 2010. There has been evidence proving that, the Government intended providing opportunity for investment to socially-oriented institutions. On the other hand, there has been no evidence proving that, the Minister (the Government) did not intend to use the properties acquired for the stated public purposes. There is no law that prohibits forever, the Minister (the Government and the National Assembly) from lawfully taking the same properties unlawfully acquire in 2009 for different public purposes. The Order, S.I. 70 of 2011 did not breach the doctrine of separation of powers of State.

[549] The third submission under this ground was that, the Eighth Amendment was also contrary to the doctrine of separation of powers of State. It has been argued that, the Eighth Amendment also denies to the respondents the fruits of the judgments in appeals Nos. 30 and 31 of 2010 and so, the Eighth Amendment is contrary to the doctrine of separation of powers of State. Sections 144 and 145 of the Constitution were singled out for the complaint.

[550] An amendment to the Constitution once passed according to the requirement of the Constitution becomes an Act which is part of the Constitution on its commencement, that is, at "the time at which the Act … comes into operation" – see **s. 18 of Interpretation Act, Cap. 1, Laws of Belize**. The Act, like all others, commences on assent to it by the Governor General, unless it is provided in the Act that, it will commence on a particular day.

[551] In my view, one part of the Constitution cannot be declared contrary to or inconsistent with another part and pronounced void. But the Constitution may provide that, one part or a section may prevail over another part or section in regard to a particular subject matter. One part of the constitution cannot be declared inconsistent with another because under **s. 2 of the Constitution**, the entire Constitution, "is the supreme law". It is, "any other law" that may be regarded as inconsistent with the Constitution. Where does the proposed inconsistency between sections and between terms of the Constitution come from? I repeat **s. 2 of the Constitution**, the supremacy section, here for convenience. It states:

> **This Constitution is the supreme law of Belize and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency be void.**

The words of the provision are ordinary words, and should be given their ordinary meaning.

[552] The Irish case, **Riordan v Taoiseach [1999] IESC 1** illustrates this point. In the unanimous judgment of the Supreme Court, of a panel of five judges, delivered by Barrington J., the judges stated at pages 9 and 10 as follows:

> ***"A proposed amendment to the Constitution will usually be designed to change something in the Constitution and will therefore, until enacted, be inconsistent with the existing text of the Constitution, but, once approved by the people under Article 46 and promulgated by the President as law, it will form part of the Constitution and cannot be attacked as unconstitutional. When the President promulgates a Bill to amend the Constitution duly passed by the people in accordance with Article 46 'as a law' within the meaning of Article 46 s. 5 she is promulgating it as part of the basic law or***

'bunreacht' because it is an amendment to the Constitution duly approved by the people."

[553] Another relevant case is from the Court of Appeal of Tanzania, the final court, of a panel of seven judges. It is **Attorney General v Mtikila [2012] 1 LRC 647**. It was a case in which the appellant asked court to declare an Act void. The Act amended the Constitution of Tanzania by adding a qualification that, candidates for parliamentary elections must be members of political parties. The appellant claimed that, the amendment "conflicted" with article 21(1) of the Constitution which guaranteed the fundamental right of every citizen to participate in public affairs. His appeal was dismissed. The Court of Appeal held that, courts had no power to declare an article of the Constitution unconstitutional, except where it was not enacted in accordance with the prescribed procedure; and that one article of the Constitution could not be "in conflict" with another, the word "law" in s. 30 of the Constitution, the supremacy section, did not apply to a law that would amend the Constitution. The court also held that, the doctrine that the Constitution had a basic structure which could not be amended did not apply to the Constitution of Tanzania. The Indian precedent in **Kesavanada v State of Kerala AIR 1973 SC 1461**, was not persuasive on the point of law in Tanzania (a common law jurisdiction).

[554] I reject the submissions for the respondents that, the Eighth Amendment is inconsistent with the doctrine of separation of powers of State and therefore void. The doctrine is, by construction of the Constitution, an implied term of the Constitution. How does this implied term render another term of the Constitution whether express or implied, inconsistent with the Constitution? If ss. 144 and 145 were inconsistent with the Constitution, the sections would have been inconsistent only when they were part of the Eighth Amendment Bill. There was no moment upon the Bill having received the assent of the Governor General and become an Act when the Act was not part of the Constitution and was inconsistent with the Constitution. The Bill upon receiving the assent became an Act and part of Constitution. There may be suggestion to the contrary in European law. That is not a source of the laws of Belize.

[555] That the doctrine of separation of powers of State is an implied term of the Constitutions means simply that, the doctrine is part of the Constitution of Belize and no more. There is no inherent rule in the doctrine about amendment of the Constitution. There is no inherent rule in the doctrine of separation of powers of State that limits the power of the National Assembly to even curtail the scope of the doctrine. I do not accept that, because the doctrine of separation of powers of State is implied in the Constitution, an amendment of the Constitution cannot be made to alter rights in the future or even retrospectively. I also do not accept that, because the doctrine of separation of powers of State is part of the Constitution the National Assembly has no power to enact an ordinary Act that prospectively alters rights under a law other than the Constitution, after the rights have been declared by court and have crystallized and may be enforced.

[556] On the facts of these appeals, I have held earlier that, the correct construction of s. 144 of the Constitution, introduced by the Eighth Amendment, is that, the section confirmed the validity of the Belize Telecommunications (Assumption of Control over Telemedia Limited) Order, S.I. 70 of 2011 (not S.I. Nos. 104 and 130 of 2009), and also confirmed the validity of Act No. 8 of 2011 under which the Order was made. The Act and the Order were made on 4 July 2011, a prospective date to the judgments in appeals Nos. 30 and 31 of 2010. The judgments were delivered on 24 June 2011. The right of the respondents as declared in the judgments in appeals Nos. 30 and 31 of 2010 were not altered by the Eighth Amendment, or by Act No. 8 of 2011, contrary to the doctrine of separation of powers of State or otherwise unconstitutionally. The rights of other telecommunications services providers are also altered in the future. There is at least one other telecommunications services provider in Belize.

[557] I cannot reject summarily though that, had Act No. 8 of 2011 and Order S.I. 70 of 2011 taken effect from 25 August 2009, it might have been said that, the Act (not a constitutional amendment Act) was contrary to the doctrine of separation of powers of State because it purported to reverse the judgments in appeals Nos. 30 and 31 of 2010 without constitutional force.

Ground No. 4 of the cross-appeal: that amendments made by Act No. 8 of 2011 are void (because Part XII of the principal Act is non-existent).

[558] The cross-appeal ground No. 4, that, "the learned trial judge erred in law when he failed to find that, the Belize Telecommunications (Amendment) Act, 2011, was wholly null and void since a void Act cannot be amended or validated retrospectively", has already been decided when the first three grounds of appeal were decided. I decided that, an unconstitutional Act could be amended prospectively, and the principal Act, No. 16 of 2002, was validly amended in Part XII prospectively by Act No. 8 of 2011 from 4 July, 2011; and further that, the Eighth Amendment confirmed the validity of Part XII of the principal Act with effect from 4 July, 2011.

Cross-appeal grounds Nos. 5, 6 and 7.

[559] Cross-appeal grounds Nos. 5, 6 and 7 raise the same or related issues. The complaints in the grounds in a consolidated version is that: the trial judge erred by failing to consider and declare that, the Eighth Amendment was, "entirely null and void" because the provisions in ss. 143, 144 and 145 introduced into the Constitution by the Eighth Amendment were void. The complaints were based on the proposition that, the provisions in the new ss. 143, 144 and 145 of the Constitution were, "in breach of the preamble, [the doctrine of] separation of powers, the basic structure of the Belize Constitution, s. 2, s. 3(a), s. 3(d), s. 6, s. 16, s. 17, s. 20 and s. 68 of the Constitution."

[560] The first law relied on for the complaints in the grounds is **s. 2 of the Constitution**. I have noted earlier that, **s. 2 of the Constitution**, referred to in the cross-appeal, is what gives the Constitution its supremacy over all other laws. If **any other law** is inconsistent with the Constitution, that other law shall, to the extent of the inconsistency, be void. In the examination of the cross-appeal grounds 5, 6 and 7, section 2 of the Constitution can only be applied if some **other law** about which the respondents complain is found to be inconsistent with the Constitution. Sections 143, 144 and 145 of the Constitution which have been challenged are parts of the Constitution, they are not **other laws**, and cannot be void for inconsistency. The

amendment introduced as subsection (2) clarifies this meaning. In my view, the amendment adds no new meaning, and does not alter the meaning of the original text of s. 2.

[561] The next law relied on for the complaint is **s. 3(a) and 3(d) of the Constitution**. **Section 3 of the Constitution** merely sets out what must be regarded as constitutional fundamental rights. A right to the protection of the law in s. 3(a) and a right to protection from arbitrary deprivation of property in s, 3(d) are among the constitutional fundamental rights. There is no issue about that.

[562] Similarly **s. 6 of the Constitution** merely declares that, all persons are equal before the law, and provides for how protection of the law is afforded to all persons by a fair trial of both civil and criminal cases by independent courts. Counsel for the respondents did not explain the relevance of this section to the question of the validity of ss. 143, 144 and 145 of the Constitution, which they impugn.

[563] **Section 16 of the Constitution** provides for protection of the constitutional fundamental rights against discrimination based on sex, race, creed, place of origin, political opinion and others. This section is not relevant to these appeals at all. Legall J. did not accept the validity of part of s. 144 of the Constitution by applying or not applying s. 16 of the Constitution.

[564] **Section 20 of the Constitution** provides for the making of a court claim by an application, a fast manner of bringing proceedings, for the enforcement of a claimant's constitutional fundamental rights. In that way the fundamental rights are preserved. **Section 20** is related to **s. 6**. On the evidence, the sections do not apply to the question of the validity of ss. 143, 144 and 145 of the Constitution. The respondents have indeed been afforded the right to the protection of the law. They brought claims in the Supreme Court, and a judgment was rendered in two claims and an order made in the other ,by Legall J. They are now pursuing cross-appeals. The complaints in grounds 5, 6, and 7, as far as are based on ss. 6 and 20 of the Constitution fail.

[565] I have already decided that, the Eighth Amendment, an Act that amended the Constitution, cannot under s. 2 of the Constitution be inconsistent with an existing term of the Constitution, in particular, with the implied term of the Constitution regarding separation of powers of State. Legall J. erred when he stated at paragraph 42 of his judgment that, "when the National Assembly passes an amendment to the existing Constitution, that amendment is a law which would have its own provisions and identity previously not contained in the Constitution … I am in respectful agreement that an amendment to the Constitution may be held inconsistent with another provision of the Constitution".

[566] I do add that, in all the Privy Council appeal cases from the Caribbean region that I have cited and in **Liyanage** from Ceylon, also decided by the Privy Council, and in **the Boilermakers Society of Australia** decided by the High Court of Australia, the enactments challenged on the ground of breach of the doctrine of separation of powers of State, were ordinary Acts of the Parliaments of those countries. They were not Acts which had constitutional force, they were not constitutional amendment Acts. The Privy Council noted this in **Hines** and in **Independent Jamaica Council for Human Rights (1988) Ltd. v Marshall Burnett (2005) 65 WIR 268**. The Eighth Amendment is a constitutional Amendment Act, the provisions it introduces as ss. 143, 144 and 145 into the Constitution cannot be declared inconsistent with some other provision of the Constitution, in these appeals, with the implied doctrine of separation of powers of State.

- *Power of the National Assembly to amend the Constitution*

[567] The only question left for consideration, raised in grounds 5, 6 and 7, is whether the National Assembly has power to amend the Constitution to the extent effected or purportedly effected by ss. 143, 144 and 145 introduced into the Constitution by the Eighth Amendment. The submission for the respondents is that, although s. 69(1) of the Constitution authorises amendments to the Constitution, the amendments must be regarded as limited by the statements in the preamble, "the doctrine of basic structure of

the Constitution", and the doctrine of separation of powers of State. Counsel for the respondents argued that, the Eighth Amendment unlawfully introduces ss. 143, 144 and 145 into the Constitution; the new sections unlawfully authorise compulsory acquisition of property in a way that excludes the requirements in s. 17 of the Constitution, and so, the amendments made and the Eighth Amendment itself are unconstitutional; they are in breach of the preamble of the Constitution, "the doctrine of basic structure" and the doctrine of separation of powers of State.

[568] I have already held under the appropriate cross-appeal ground that, the amendments made by the Eighth Amendment could not be defeated by the doctrine of separation of powers of State.

[569] On the other hand, the submission by counsel for the appellants is that, a preamble is not part of the provisions of an Act, and so the preamble of the Constitution is not part of the provisions of the Constitution, and cannot limit the power of the National Assembly expressly stated in s. 69(1) to alter the Constitution. Secondly, his submission is that, the doctrine of basic structure is not part of the law of Belize, section 69 of the constitution is exhaustive about amendment of the Constitution; amendments are limited only by the requirement to follow the various prescribed procedures set out in s. 69 itself.

[570] Legall J. accepted the submission for the respondents that, the power of the National Assembly is limited by, the preamble and, "the doctrine of basic structure", and that, the amendments made by the Eighth Amendment were contrary to the doctrine of separation of powers of State.

[571] For ease of reference I repeat the provisions of **ss. 69(1) and (8) of the Constitution** as follows:

69(1) The National Assembly may alter any provisions of this Constitution in the manner specified in the following provisions of this section.

…

(8) In this section, references to altering this Constitution or any provisions thereof include references -

(a) to revoking it, with or without re-enactment thereof or the making of different provisions in lieu thereof;

(b) to modifying it, whether by omitting or amending any of its provisions or inserting additional provisions in it or otherwise; and

(c) to suspending its operations for any period or terminating any such suspension.

- *The preamble*

[572] With due respect to the learned judge, my view is that, he erred about the effect of the preamble of the Constitution (or of any Act). His view was that, the preamble of the Constitution was a provision on which the validity of all the other sections depended. In paragraph 50 of his judgment he stated this:

"50. The submission that the National Assembly of Belize can, subject to the limitations contained in section 69(2)(3)(4) of the Constitution, make any amendment to the Constitution seems, as shown above, to ignore the intention of the makers of the Constitution as propounded in its Preamble. The Preamble is the root of the tree from which the provisions of the

Constitution spring, and which forms the basis of the intent and meaning of the provisions. The framers of the Preamble could not have intended, that the National Assembly with the required majorities under section 69 could make literally any amendment to the Constitution to, for instance, abolish the judiciary, or expropriate private property without compensation, or imprison its enemies without trial. It is not conceivable that a legislature in a democratic State such as Belize would attempt to accomplish the above matters; but, if the submission of the defendants is correct, such accomplishments are legally attainable which I do not think is consistent with the intention of the Constitution. The Constitution was made by, and for the protection of all the people of Belize, and its intention could not be that a required majority of the people, as represented by the government, in the National Assembly could take away or destroy fundamental or basic structures of the Constitution enjoyed by the people. I have no doubt that the basic structure doctrine is a feature of the Constitution of Belize."

[573] It is settled law that, a preamble is a guide in the interpretation of a provision (a section) of an Act where the meaning is unclear – see **Mathew v State [2005] 1 AC 433**, an appeal to the Privy Council from the Court of Appeal of Trinidad and Tobago. The Privy Council stated at page 433 this:

"We attach significance to the principles upon which, as declared in the preamble to the 1976 (as to the 1962) Constitution, the people of Trinidad and Tobago resolved that their state should be founded. This declaration, solemnly made, is not to be disregarded as meaningless verbiage or empty rhetoric. Of course, the preamble to a statute cannot override the clear provisions of the statute. But it is legitimate to have regard to it when seeking to interpret those provisions … and any interpretation which conflicts with the preamble must be suspect."

The statement of their Lordships regarding a rule of the common law is still a binding precedent on this Court and of course, on all the courts of Belize below.

[574] A persuasive judgment to the same effect is in the Canadian case, **Reference re Secession of Quebec [1998] 2 S.C.R. 217**, where the Supreme Court of Canada stated that,

> ***"The unwritten norms or the organizing principles such as judicial independence which may be derived from the preamble of the Constitution could not be taken as an invitation to dispense with the written text of the Constitution."***

See also paragraph 89 of the judgment of Lord Steyn in the **R (Jackson) v Attorney General** where he stated:

> ***"In any event, arguments based on the preamble cannot possibly prevail against the clear language of the substantive provisions."***

[575] A preamble will not override a provision of an Act which is inconsistent with the preamble. In **Attorney General v Prince Augustus of Hanover [1957] AC 436** it was held that, the preamble did not override the plain words of an Act which authorised that, descendants of the Electress Sophia of Hanover, whenever they might be born, would be naturalized as British subjects. The preamble stated that, it was desirable that they may be naturalized. The provision of the Act prevailed over the preamble. The position of the prince was assured.

[576] Although I see no inconsistency between the preamble and s. 69(1) of the Constitution, I hold that, Legall J. erred in applying the preamble to limit the power of the National Assembly in s. 69(1) and in holding that, because of the preamble the amendments in ss. 144 and 145 of the Constitution, except a portion of s. 144, were unconstitutional and invalid. The words of ss. 69(1) and (8) of the Constitution are

unambiguous, there is no place for the preamble in interpreting the sections. As a matter of the wording of the preamble, it does not prohibit amendment of the Constitution in the way effected by all the sections of the Eighth Amendment.

[577] The learned trial judge also gave as a reason for deciding that, the power in s. 69(1) of the Constitution is limited, possible hypothetical consequences, namely, that the National Assembly would be free to abolish courts, expropriate private property without compensation and imprison all opponents. The judge adopted the hypotheticals from the submission by counsel for the respondents who repeated the submission in this Court. I do not accept that as a valid reason for reading ss. 69(1) and (8) regarding the power of the National Assembly to alter the Constitution as capped provisions. We are concerned with interpreting the provisions in ss. 69(1) to 69(8), their meaning cannot be obtained from hypotheticals. It must come from interpreting the written words. It must come first from the words of the section, then from reading the words in the context of the particular Part of the Constitution and the Constitution as a whole; and then the history of the law may be taken into consideration, if necessary.

[578] As a matter of comparison, the UK has no cap to the power of Parliament to legislate, subject to certain European Union enactments. The Parliament of the UK has not indulged in hypothetical absurdity such as mentioned. In the **Regina (Jackson and Others)** case, the House of Lords, referring to the hypothetical suggestion often made by academics that, courts would strike down an Act of Parliament that would abolish the House of Lords (the Judiciary) commented as follows:

> ***"It is sufficient to note at this stage that, a conclusion that there are no legal limits to what can be done under s. 2(1) does not mean that the power to legislate which it contains is without limits whatsoever. Parliamentary sovereignty is an empty principle if legislation is passed which is so absurd or so unacceptable that the populance at large refuses to recognise it as law" –*** see the judgment of Lord Hope at paragraph 120.

[579] Lord Hope was careful not to suggest that, the response to absurd legislation would be a court judgment or order, rather rejection by the populace. See also **Blackburn v Attorney General [1971] 1 WLR 1037**, and **British Coal Corporation v The King [1935]** where Viscount Sankey L.C. stated:

> ***"… the Parliament could, as a matter of abstract law repeal or disregard section 4 of the Statute of Westminster. But that is theory and has no relation to realities".***

- *"The basic structure doctrine"*

[580] Legall J. also applied what he called, "the doctrine of basic structure", in interpreting s. 69 of the Constitution. He said, despite the express provisions of s. 69, the "doctrine" prohibited an amendment of the Constitution which would destroy the foundation or the basic structure of the Constitution. He accepted the submission for the respondents on the point, and the judgments of the Supreme Court of India in **Kesavananda v State of Kerala AIR 1973 SC 1461**, and in **Minerva Mills Ltd v Union of India AIR 1980, SC 1789**, and the judgment of Conteh CJ in the Supreme Court of Belize, a court below, in **Barry M. Bowen v The Attorney General, Civil claim No. 445 of 2008**, cited in support.

[581] Applying "the doctrine", Legall J. in discussing the meaning of the word "alter" in s. 69(8) stated in paragraph 44 of his judgment this:

> *"I think there is an implied limitation in the amending or altering power of section 69(8) which prevents the National Assembly from revoking or removing the basic features of the Constitution. The framers or Founding Fathers of the Belize Constitution could not have intended by section 69 to empower the government with the required majorities, in the National Assembly, to make any amendment to the Constitution such as the above that would remove the fundamental pillars of democratic rule and the rule*

of law, which they have pellucidly expounded in the Preamble; because this would be antithesis to their brave affirmations in the Preamble. In other words, the Founding fathers or framers of the Constitution, if they were asked whether the purposes of section 69 were to authorize the National Assembly, with the required majorities, to remove, for instance, the judiciary or the legislature or other basic feature, would have, in my view, vociferously exclaimed in the negative; for they could not have intended, having regard to the Preamble, the removal of basic structures of the Constitution by a government with the required majorities to the detriment of the people of Belize."

[582] Legall J's summary of his decisions about basic structure is at paragraph 53 of his judgment in these words:

"The basic structure doctrine holds that the fundamental principles of the Preamble of the Constitution have to be preserved for all times to come and that they cannot be amended out of existence, though a reasonable abridgment of fundamental rights could be effected for the public safety or public order as fundamental rights provisions of the Constitution of Belize recognize. There is though a limitation on the power of amendment by implication by the words of the Preamble and therefore every provision of the Constitution is open to amendment, provided the foundation or basic structure of the Constitution is not removed, damaged or destroyed. The basic structure includes the judiciary the Legislature, the rule of Law, judicial review, separation of powers, and maintaining the balance and harmony of the provisions of the Constitution, all of which are protected and safeguarded by the Preamble. I therefore rule that even though provisions of the Constitution can be amended, the National Assembly is not legally authorized to make nay amendment to the constitution that would remove or destroy any of the basic structures of the Constitution of Belize."

- *Is the basic structure prohibition a doctrine?*

[583] I concluded from the explanation of the so called doctrine of basic structure given in the judgment of Legall J., and in the submissions for the respondents made to this Court, that the so called "doctrine of basic structure" proposed to this Court is no more than **a postulate** that has been accepted in India and Bangladesh, but rejected in Hong Kong in **Teo Lung v The Minister of Home Affairs [1989] 2 MJ 449**, in Sri Lanka in **In re Thirteenth Amendment to the Constitution [1990] LRC (Const) 1**, in Pakistan in **Mahmood Khan Achakzai v Federation of Pakistan PL5 1994 SC 416**, and in **Pakistan Lawyers Forum and Others v Federation of Pakistan PLD 2005 SC 719**, in Tanzania in **Attorney General v Mtikila [2012] LRC 647**, in Zambia in **Zambia Democratic Congress v Attorney General**, Appeal No. 37 of 1999, in Zimbabwe in **Mike Campbell (Private) Limited v Minister of National Security, Application No. 124 of 2006** and in Australia. The judgment of the Supreme Court of Uganda in **Paul Ssemogerere v Attorney General, Appeal No. 1 of 2002**, cited to this Court is ambiguous about "the doctrine".

[584] Further, "the doctrine of basic structure" does not apply in countries where the power of the Legislature is not limited, such as the United Kingdom and New Zealand. In the Commonwealth Caribbean it seems the basic structure "doctrine" lingers only in the Supreme Court of Belize, the trial court. No precedent from the rest of the Commonwealth Caribbean was cited to this Court for the "doctrine".

[585] The so called doctrine of basic structure is about prohibition of amendment of the Constitution in a certain way. I shall refer to it as, "the basic structure prohibition". It is an attractive idea, but it is not law in Belize. Nor is it a doctrine, given the rejection of it in so many jurisdictions. It lacks wide acceptance and belief in it to qualify as a doctrine in the common law jurisdiction. It is not a principle because it is not a basic rule or idea which controls or explains results with reasonable certainty. It is a postulate so far.

[586] The idea of a basic structure prohibition is not completely new. The idea existed by other names before and during John Locke's lifetime. Locke was an eminent English philosopher in the eighteenth century. It was manifest in Locke's theory of natural law as contrasted with positive law. Locke's idea is that, people have natural rights such as, the right to life, liberty, and property, that have a foundation independent of the laws of any particular society. Some of the rights that Locke regarded as natural rights have found their way into the UN Declaration of Human Rights 1948, and in **s. 3 of the Constitution** of Belize. Not all Locke's ideas have been adopted in the Constitution or other legislations of Belize or the common law. Locke's idea may be an attractive idea, but it is not a basis for prohibiting amendment of any law in Belize, especially where there is express legislative authority to amend. See also Thomas Hobbes' theory.

[587] Indeed some countries wished at the time their constitutions were drafted, that certain provisions in their constitutions should not be changed. They expressly provided for that in their constitutions. They include Germany; the USA, France, Italy and Turkey. In the case of Germany, it was dictated by the victors in the Second World War. The Constitution of Germany provides for eternity of certain, "Basic Laws". The Constitution of the US provides that, provisions of the Constitution for equal representation of States in the Senate may not be changed. The Constitution of France provides that, the republican form of France may not be changed by amendment. There is a similar provision in the Constitution of Italy. In the Tanzania appeal case, **Mtikila**, Ramadhani CJ stated that, there were provisions in the constitutions of Algeria, Chad, Namibia, Malawi and South Africa, that cannot be amended because their Constitutions provide so. In the Kenya case, **Njoya v Attorney General**, the High Court of Kenya took the view that the Constitution of Kenya could be revoked and a new one promulgated only by a constituent assembly of representatives elected for that purpose. These are indications that express provisions in constitutions are desired where it is intended that certain principles included in the constitutions should not be amended.

[588] As a matter of reality it is unlikely that such provisions will never be changed. Sometimes countries abrogate constitutions altogether and adopt new ones. It becomes a matter of political authority. Recently in 2013, the Government of Chad was overthrown, the Constitution perished in the *coup d'état*.

[589] The present Constitution of Trinidad and Tobago was adopted on 28 March, 1976 when the previous one was repealed. After the preamble, the new Constitution provides as follows:

> **NOW, THEREFORE, BE IT ENACTED by the Parliament of Trinidad and Tobago as follows:-**
>
> **1. (1) This Act may be cited as the Constitution of the Republic of Trinidad and Tobago Act.**
>
> **(2) This Act shall have effect for the purpose of the alteration of the former Constitution.**
>
> **…**
>
> **3. On the appointed day all the provisions of the former Constitution are repealed and the Order-in-Council of 1962 is revoked, and thereupon the Constitution shall have effect as the supreme law of the State in place of the former Constitution.**

[590] The Constitution of Guyana states in its long title and in s. 3 as follows:

> **An Act to enact a new Constitution of the Co-operative Republic of Guyana, to repeal the Guyana Independence Order 1966, and the**

existing Constitution, and to provide for matters incidental thereto or connected therewith.

Section 3. Subject to the provisions of this Act, all the provisions of the existing Constitution are repealed and thereupon the Constitution shall have effect as the supreme law of Guyana in place of the existing Constitution.

[591] The common law constitutional principle retained by the United Kingdom, that Parliament cannot bind a future Parliament is the law that accords much with reality in this area of constitutional law. But even this realistic principle has practical limitation. In the **Blackburn v Attorney General** case, Lord Denning MR, gave the example that, the Acts of the Parliament of the UK that granted independence to Dominions and Dependent Territories could never, as a matter of reality, be reversed by any future Parliament of the UK. No Act of Parliament of the UK could take away the independence of those countries. On page 1040 Lord Denning MR declared: ***"Legal theory must give way to practical politics."*** In that case, Mr. Blackburn who, had on several occasions pursued his political views in court, brought a claim to stop Her Majesty's Government from signing the Treaty of Rome 1957, establishing the European Economic Community, under which the United Kingdom would join the European Common Market, now the European Union. One of his grounds was that, the treaty would require Her Majesty's Parliament to surrender its sovereignty forever, contrary to the law that Parliament could not bind future Parliament. The Court of Appeal regarded it as a matter of the prerogative of Her Majesty acting by Her Government, to enter treaties. The court declined to decide the case.

[592] I would like to point out that, the respondents do not contend that, "the doctrine of basic structure", is the result of the construction of any section or any provision of the Constitution. They contend that, because there are basic structures of the Constitution which include the separation of powers of State, and fundamental rights including the right to protection from arbitrary deprivation of property in ss. 3 and 17 of the

Constitution, the Constitution cannot be amended to alter or destroy those basic features (structures they say) of the Constitution. The difficulty with that submission is that, **s. 69(1)** read with **s. 69(8)** expressly states that, **"the National Assembly may alter any provisions of this Constitution"**. The word "alter" is defined in the Constitution to include amending and revoking. The basic structure prohibition is not part of the express or implied term of the Constitution of Belize. It cannot prevail over express or implied terms of the Constitution.

- *The source of the basic structure prohibition.*

[593] I have also concluded , going back to basics, that the postulate of basic structure prohibition is not part of: the Constitution of Belize; any other legislation of Belize; the common law including equity up to 1 January 1899; international treaties to which Belize is a party; any precedent established by the Privy Council when it was the final appeal court for Belize; any precedent established by the CCJ; or any accepted custom. In my respectful view, if a doctrine, a principle, a rule or an idea however noble, cannot be found in these sources of the laws of Belize, it is not the law of Belize, it is not our law.

[594] The nearest to the basic structure prohibition being a source of the laws of Belize would be precedent, had it been identified. The two judgments, **Kesavananda** and **Minerva Mills**, from India were cited as persuasive about the postulate; they are not persuasive to me, the scope of the basic structure prohibition is rather too uncertain. It would generate a lot of disagreement over which provisions of the Constitution were "basic" so that they would not be amended. Moreover, had the basic structure prohibition come from any one of the sources of the laws of Belize, except from the Constitution, it would have been inconsistent with the express provisions of s. 69 of the Constitution, and would have been void under s. 2 of the Constitution. From 1947 when India attained independence to 2011, it amended its Constitution 95 times. Spain amended its Constitution only once since 1978. One wonders whether the split decision in **Kesavananda** was not influenced by the large number of amendments to the Constitution of India .

- *The basic structure prohibition and rules of interpretation.*

[595] It is my view further that, as a matter of application of established rules of interpretation of legislation, to s. 69 of the Constitution of Belize, the basic structure prohibition postulate propounded by the Supreme Court of India cannot be accepted to limit the meaning of s. 69 of the Constitution of Belize.

[596] I start with applying the literal rule and the golden rule together. When I examine the ordinary meaning of the words in s. 69 and apply the technical meaning of the word **"alter"** given in the section, the conclusion that I come to is that, any limitation to the power **to alter,** that is, **to amend** the Constitution must come from the Constitution itself. In Belize the common law supremacy of the Legislature has been limited, but only as far as the Constitution prescribes. So far, the Constitution prescribes only procedural limitations. It does not prescribe limitation to subject matters. My interpretation based on the two rules of interpretation is that, the basic structure prohibition that is said to prohibit amendment of fundamental features of the Constitution has no place in s. 69 or any other part of the Constitution of Belize; **s. 69 of the Constitution** means that, even fundamental rights provisions may be amended by the authority of s. 69. This interpretation is confirmed by the majority judgment delivered by Lord Diplock in **Moses Hines** at page 333 and in the judgment in **Independent Jamaica Council for Human Rights (1988) Ltd**.

[597] I then proceed to apply the rule of interpretation of legislation that, alteration of the common law is not presumed – see **Lee v Walker [1985] QB 1991** and **Attorney General v Brotherton [1992] 1 All ER 230**; together with the rule that the history of the law may be taken into consideration. The original law regarding the power of the Legislature was the common law of England where Parliament could enact any law. There is still supremacy of Parliament in England subject to certain European Union laws. So, from the two rules of interpretation I conclude that, I should not introduce limitation such as the basic structure prohibition postulate in place of the common law, if the meaning of s. 69 is doubtful. I should revert to the common law. There is no rule or

even a guide that leads me to obtain an interpretation from a postulate. It is not a question of personal preference, it is a question of how the courts should arrive at the law applicable, given other known established relevant principles and rules.

[598] Another way in which I considered the applicability or not of the basic structure prohibition postulate is this. Assuming that, the meaning of s. 69, taking into consideration the basic structure prohibition, is that amendment of the basic features of the Constitution cannot be made; then that would be one meaning of s. 69. There is also the meaning in the express words of s. 69 that, "the National Assembly **may alter any of the provisions of this Constitution**", and the words, "references to altering include references - **(a) to revoking with or without re-enactment … (b) to modifying …, and (c) to suspending its operation"**. These words mean that, there is no limit to the power of the National Assembly to amend or even revoke any provision or part of the Constitution, certainly no limit or prohibition to amending s. 17(1) of the Constitution. That would be the second meaning. A basic principle of statutory interpretation is to give an Act, ***"an effect that is valid rather than void, in so far as this is possible"*** – see the judgment of the Privy Council in **the Prime Minister v Vellos** at paragraph 43. So, I take the meaning of s. 69 that gives effect that, the amendments are valid. I accept the meaning that, the power of the National Assembly in s. 69 is not limited, subject only to compliance with prescribed procedures. The amendments made by the Eighth Amendment introducing new ss. 2(2), 143, 144, 145 and 69(9) into the Constitution are permissible.

[599] Further, because of existing examples of overlaps of functions across Organs of powers of State in the laws of Belize, acknowledging practical realities, the postulate of basic structure prohibition cannot be accepted in Belize. The basic structure in regard to separation of powers of State is not perfect in Belize and in other common law jurisdictions. For examples, the Governor General is part of the Executive and the Legislature, all cabinet ministers, except the Attorney General, must be members of the National Assembly. The Attorney General makes extradition order. There are other overlaps. These existing overlaps that have been accepted in the laws of Belize

indicate that, changes to the important doctrine of separation of powers can be made, should it become necessary.

[600] An important example is that, the most fundamental feature of the Belize Constitution is that, Belize is an independent sovereign State. But the Privy Council in the UK remained the final appeal court for Belize for 29 years. I did not hear much complaint about the arrangement, except that it did not favour death sentence in criminal cases whereas a large majority of the population of Belize did. Belize has now replaced the Privy Council with the Caribbean Court of Justice, authorised to be the final appeal court for Belize by **the Belize Constitution (Seventh Amendment) Act, 2010**. The Court's headquarters are in Trinidad and Tobago. No one has complained about that partial surrender of sovereignty. It seems to me that, amendment of the subject matter of the Constitution of Belize, that is, amendment about what can be included or excluded from the Constitution, however important or trivial the subject matter, is a matter for the populace through the required special majority of their representatives in the National Assembly, not a matter for the courts, unless the Constitution is amended to give courts that jurisdiction. It is a matter of politics. As stated in **Blackburn**, "legal theory must give way to practical political policy". I cannot accept the basic structure prohibition as law without it having become a precedent established by the CCJ or introduced into the Constitution by a constitutional amendment Act. It is such a major and controversial idea, in my respectful view, that if the populace wishes it to become part of the laws of Belize, it should be brought in by legislation.

[601] Finally, I reject the submission for the respondents that, the power of the National Assembly to alter the Constitution under s. 69 is limited by the basic structure prohibition for the reason that, I have been persuaded by the several case authorities cited by Mr. Barrow. In all the quotations taken from those cases, the Privy Council stated unambiguously that, the power of the Legislature to enact laws in jurisdictions where there are written constitutions on the Westminister model depends on the terms of the written Constitution itself. In all the cases cited, the restrictions were in regard to prescribed procedure, not in regard to the subject matter. That is not surprising

because, absent a written constitution, the law should be the common law, which is the supremacy of Parliament. All the utterances of the Privy Council in those cases are consistent with excluding the basic structure prohibition.

[602] Mr. Courtenay for the respondents, submitted that, the issues in those cases were not, "the doctrine of basic structure". I accept it, but add that the overall issues were about whether the power of the National Assembly to make or amend laws was limited. The basic structure prohibition would be only one part of those larger issues. The utterances by their Lordships in the cases cited were consistent with the meaning of s. 69 of the Constitution of Belize that, the National assembly may alter, that is, amend, revoke or suspend any provision of the Constitution, and that the only limits must come from the Constitution, and were so far procedural.

[603] In **Akar** which has been cited earlier as an important authority regarding the question whether an unconstitutional Act can be amended and revived, their Lordships of the Privy Council, referring to the power of the Parliament of Sierra Leone to amend the Constitution, stated at page 870, C to F, the following:

> ***"A view point (which found favour with the Chief Justice) that it was not open to the legislature to make any alteration (whatever its form) to the Constitution which did not amount to an improvement of the existing law was not advanced before their Lordships, and would not have been acceptable."***

[604] In **Ibralebbe v R [1964] AC 900**, their Lordships of the Privy Council had to decide whether the jurisdiction of the Privy Council to entertain criminal case appeals from Ceylon came to an end on attainment of independence by Ceylon in 1947. Their Lordships decided that continuance of the appeal jurisdiction was not inconsistent with the status of Ceylon as an independent sovereign State, however, the Parliament of Ceylon could terminate the jurisdiction. Their Lordships stated at page 925, the following:

"… it is recognised, as it must be, that the legislative competence of the Parliament of Ceylon includes power at any time, if it thinks right, to modify or terminate the Privy Council Appeal from its courts …"

The significance of that statement is that, the Privy Council was an important feature in the laws of Ceylon, nevertheless, it could be terminated by the Parliament of Ceylon.

[605] A very extensive statement of the law about the power of the National Assembly to amend the Constitution was made by the Privy Council in the **Moses Hines** case, which I have cited about the doctrine of separation of the powers of State. In the majority judgment of the Privy Council delivered by Lord Diplock, their Lordships stated this:

"One final general observation: where, as in the instant case, a constitution on the Westminster Model represents the final step in the attainment of full independence by the peoples of a former colony or protectorate, the constitution provides machinery whereby any of its provisions, whether relating to fundamental rights and freedoms or to the structure of government and the allocation to its various organs of legislative, executive or judicial powers may be altered by those peoples through their elected representatives in the Parliament acting by specified majorities, which is generally all that is required, though exceptionally as respects some provisions the alteration may be subject also to confirmation by a direct vote of the majority of the peoples themselves. The purpose served by this machinery for "entrenchment" is to ensure that those provisions which were regarded as important safeguards by the political parties in Jamaica, minority and majority alike, who took part in the negotiations which led up to the constitution, should not be altered without mature consideration by the Parliament and the consent of a

larger proportion of its members than the bare majority required for ordinary laws.

So in deciding whether any provisions of a law passed by the Parliament of Jamaica as an ordinary law are inconsistent with the Constitution of Jamaica, neither the courts of Jamaica nor their Lordships' Board are concerned with the propriety or expediency of the law impugned. They are concerned solely with whether those provisions, however reasonable and expedient, are of such a character that they conflict with an entrenched provision of the Constitution and so can be validly passed only after the Constitution has been amended by the method laid down by it for altering that entrenched provision."

[606] So, according to their Lordships of the Privy Council, any provision of the written Constitution of Jamaica, "whether relating to fundamental rights and freedoms or to the structure of government, and the allocation to its various organs of legislative, executive or judicial power may be altered by [the] people [of Jamaica] through their elected representatives in the Parliament …" Those provisions mentioned are certainly very important matters in a constitution. They are important enough to be part of the basic structure of a constitution. They were indeed the examples of "the basic structures" given in the submissions by counsel for the respondents. Their Lordships also confirmed that, the Constitution must be amended first if it is intended to pass a law that would otherwise be inconsistent with the Constitution. **Moses Hines** is a binding authority because it is about a provision of the Constitution of Jamaica which is similar to s. 69 of the Constitution of Belize. It is not just a persuasive postulate as the Indian cases, **Kesavananda** and **Minerva Mills**.

[607] I conclude by mentioning the **Independent Jamaica Council for Human Rights (1988) Ltd.** case where the Privy Council stated at paragraph 9 the following:

"While it is true, as Lord Diplock explained in Hinds, Hutchinson, Martin and Thomas v R (1975) 24 WIR 326 at 330, 331, that certain important assumptions underlie Constitutions drafted on what he called the Westminister model, it is also true that when the people of Jamaica adopted their Constitution as an independent nation in 1962 they made certain very significant departures from the constitutional practice of the United Kingdom. The governing institutions and practices of the nation were identified and stated in a single instrument, the Constitution. That Constitution was to have effect, by s 2, that (subject to ss 49 and 50) –

> ***'if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void.'***

Thus the Constitution and not, as in the United Kingdom, Parliament is (save in respect of Chapter III of the Constitution) to be sovereign. It was of course foreseen that with the passage of time and the benefit of experience alteration of the Constitution would on occasion be necessary, and the framers of the Constitution took care to grade its provisions so as to require differing levels of popular support depending on the structural significance of the provision to be altered."

[608] It was also mentioned in the submission for the respondents that, ss. 143, 144 and 145 of the Constitution introduced by the Eighth Amendment unlawfully take away the right to compensation and the right to access to court provided for in s. 17 of the Constitution. I do not see that in those sections or in any other provision of the Eighth Amendment. It cannot be assumed that, the Eighth Amendment, or any legislation derogates from constitutional rights such as access to courts and compensation for private property. Those rights do not derive solely from s. 17 of the Constitution

anyway. It is a presumption in statutory interpretation that a statute preserves constitutional rights and the common law. Clear express words would have to be used in the Eighth Amendment to take away the right to compensation and to access to courts.

Ground No. 8 of the cross-appeal: the right to be heard.

[609] The right to be heard was first stated indirectly in ground No. 1 as a factor that made Act No. 8 of 2011 unconstitutional. It was therein stated that: "the learned trial judge … nevertheless erred by failing to find that this legislation is unlawful and void in its entirety for all the reasons … including … violation of the rule of law and *natural justice* …"

[610] This ground indirectly invites consideration of natural justice, made up of the rule against bias and the rule to hear the other party – *audi alteram partem*. The composite expression is the rule of fairness. A complaint about a breach of the rule of law may also include a complaint about denial of a hearing to a party – see **Attorney General of Barbados v Joseph and Boyce, CCJ Appeal No. CV2 of 2008**. But there has been no pleading to that effect, the pleading was that, s. 63(11) of the principle Act as amended by Act No. 8 of 2011, made the right to a hearing merely discretionary, and so the Act was unconstitutional.

[611] It was then contended separately in ground No. 8 that, "the learned trial judge erred in holding that, there was no breach of the second respondents' constitutional right to be heard since, properly construed, s. 17(1) of the Belize Constitution places a duty on the Minister to consider representations from the second respondents before deciding whether or not to acquire the second respondents' property". Counsel submitted that, the duty under s. 17 was an implied duty.

[612] Neither Mr. Pleming nor Lord Goldsmith nor Mr. Courtenay did explain how failing to afford a hearing to BCB, Boyce and the Employees' Trustees rendered the

enactment of Act No. 8 of 2011 unconstitutional. Mr. Pleming and Lord Goldsmith would, of course, be well aware that there is no requirement in the common law that, Parliament or the Minister concerned must afford a person who will be affected by an intended Act, a hearing before the Bill is passed and enacted – see **Bates v Lord Hailsham [1972] 1 WLR 1373**, and compare the Privy Council appeal case from Belize, **The Prime Minister of Belize v Vellos** where the Privy council held that, holding a statutory referendum under the Referendum Act, 1999, when it was intended to amend Part II of the Constitution of Belize was, "only consultative or advisory" and was not a necessary part of the legislative process. It was, "not an integral part of the process". The Constitution itself did not require a referendum.

[613] Besides the common law, the Constitution of Belize does not generally require a hearing of persons who may be affected, before a Bill is passed and becomes an Act. My first decision on the right to a hearing is that, if there was failure by the Minister to afford the respondents or any other public utility provider, an opportunity to be heard before Act No. 8 of 2011, or the Belize Constitution (Eighth Amendment) Act, No. 11 of 2011, was passed by the National Assembly, it did not render Act No. 8 of 2011 or the Eighth Amendment unconstitutional and void.

[614] A further submission by counsel on the "constitutional right" to a hearing was that: "the deprivation of a right to be heard [was] clearly contrary to s. 17(1) and s. 3(d) of the Belize Constitution". Counsel cited for authority what Morrison JA stated in appeals Nos. 30 and 31 of 2010 at paragraphs 198 and 199 as follows:

> ***"No reason has been advanced in this appeal why we should prefer the English position that, exempts legislative acts of all kinds, whether primary or delegated, from the application of the audi alteram partem principle, over the implication of a rule that would require, in the absence of express contrary statutory provision, that whenever a public official or body is empowered to do an act or take a decision that may prejudicially affect an individual in his***

constitutionally protected property rights, he should be entitled to a hearing before the act is done or the decision is taken. It seems to me that the implication of such a requirement is entirely in keeping with the clear tendency of the authorities to which we have been referred, as also with the statement of Conteh CJ in Bruce, with which I find myself in respectful agreement, that it is "elementary fairness and justice that a person whose land is about to he compulsorily acquired should know beforehand and be afforded an opportunity, if he wants, to make representation to dissuade the decision maker".

[199] I have therefore come to the view that in the instant case, in which the Minister's decision to compulsorily acquire their property plainly and prejudicially affected their protected constitutional rights, the appellants were entitled to be heard by the Minister before the Acquisition Orders were issued."

[615] The quotation from the judgment of Morrison JA commences with a view and a suggestion that, the *audi alteram partem* rule should be applied when an Act is to be passed, but ends with a decision that identifies and applies the common law rule to hear a person who would be affected to the decision by the Minister to make acquisition orders in appeals Nos. 30 and 31 of 2012. Morrison JA then concluded that, the Minister was required to hear the respondents **before he made the acquisition order**. The quotation does not mention any constitutional right to a hearing before Act No. 9 of 2009 was enacted, or at all. Moreover, a hearing before the National Assembly enacts a law is about powers of the State allocated to the National Assembly, an important constitutional matter about which, in my respectful view, no assumption can be made. It seems to me that the dicta of Morrison JA was not about a constitutional right to a hearing before an Act is passed or at all.

[616] Given the view taken by the Privy Council in **The Prime Minister v Vellos** case that, the consultation under the Referendum Act, 1999 was not an integral part of the legislative process in the enactment of the Belize Constitution (Sixth Amendment) Act, and having applied the rule of interpretation of statute that, courts presume that Parliament does not intend implied repeal of the common law, I would prefer that any constitutional right to a hearing under s. 17(1) of the Constitution be expressly stated in the section or in some other section of the Constitution, otherwise the right to a hearing when an acquisition order is to be made remains the common law right, or a matter of statutory right where it is provided for.

[617] In the present appeals, the submission that, s. 17(1) of the Constitution properly construed places a duty on the Minister to consider representations from the second respondents before the Minister decides whether or not to acquire the respondents' property, quickly drifted to a submission applicable to the common law and statutory right to a hearing. Counsel for the respondents were, indeed, submitting that, notwithstanding s. 63(11) of the principal Act as amended, which made the right to be heard discretionary, the common law would still require the Minister to give the respondents a hearing in the circumstances, before the Minister issued the acquisition Order, S.I. 70 of 2011.

[618] The implied right asserted by the respondents in this Court was said to be a constitutional right, not a common law right. It was said to be implied because it was not declared among the constitutional fundamental rights in s. 3 of the Constitution, and was not expressly required by s. 17(1) of the Constitution. Without all the adjunct, the submission was simply that, when the Minister acted under Act No. 8 of 2011, by issuing .S.I. 70 of 2011, he should have given the respondents a prior hearing notwithstanding s. 63(11) of the principal Act as amended, which made the right to a hearing discretionary. It was a submission about a typical judicial review complaint, rather than a complaint under the Constitution.

[619] I accept the submission by counsel for the respondents that, the law required a hearing of the persons affected in the examples that counsel cited. However, I note that, the examples were about the right to a hearing under the common law or under specific legislations. On some occasions the right was implicit rather than expressly provided for in the legislations. The common law principle is well illustrated in well known cases such as **Cooper v Wandsworth Board of Works (1863) 14 CB (NS) 180**; **Prest v Secretary of State for Wales (1982) 81 LGR 193**; and **Council for the Civil Service [1985] AC 374**. When the common law requires the right to be heard, or the right is implied from a legislation, or "the common law supplies the omission of the legislature", it does not mean that the right to be heard comes from the Constitution. So, if it is determined in these appeals that, a hearing was necessary before the Order, S.I. 70 was issued, it will not mean that the duty to hear the respondents would have come from s. 17(1) of the Constitution and it is a constitutional right.

[620] I would like to emphasise that, the right to be heard has not been expressly stated among the constitutional fundamental rights and freedoms in **s. 3 of the Constitution**, namely, the rights and freedoms to: (a) life, liberty, security of the person, and the protection of the law; (b) freedom of conscience, of expression and of assembly and association; (c) protection for his family life, his personal privacy, the privacy of his home and other property and recognition of his human dignity; and (d) protection from arbitrary deprivation of property. Obviously these fundamental rights and freedoms were well thought out. It must be inferred that it was deliberate that, the right to be heard was not directly protected under Part II, ss. 3 to 22 as a constitutional fundamental right for a reason.

[621] Notwithstanding, the right to be heard may indirectly manifest itself as part of the constitutional fundamental rights to the equal protection of the law set out in **s. 6(1) of the Constitution**; and part of the constitutional right to have one's right or duty in a civil claim determined by a court or other authority prescribed and established by law, and which shall be independent and impartial, and such a court or authority shall give one's case a fair trial within a reasonable time, set out in **s. 6(7) of the Constitution**. So, the

right to be heard may be indirectly protected under the Constitution where it manifests itself. The respondents included s. 6 of the Constitution as one of the laws that supported their complaint about having been denied, "a constitutional right to a hearing". **Section 6 of the Constitution** does not apply. It is about a **trial** by a court or other authority established by law for the determination of the existence or extent of a civil right or obligation. The process of compulsory acquisition of property by the Minister is not a trial by a court or authority established for that purpose. In the end, the respondents exercised the right under s. 6 and came to court.

[622] It does not mean that, because the right to be heard is not a direct constitutional fundamental right, it is not important and is not protected otherwise in law. In the cases cited by counsel the right was protected as a common law right or a statutory right. The people of Belize, represented by their representatives, elected not to include directly the right to a hearing among the constitutional fundamental rights enumerated in **s. 3 or s. 17 of the Constitution**, it would be wrong, in my respectful view, for a court to ignore that choice by the people of Belize and regard the right to a hearing as a constitutional fundamental right, rather than a common law or statutory right, however noble the intention of the court may be. It would be "judicial activism", alias "judicial legislation". The court would be ignoring the time honoured deference that the three Organs of powers of State accord to one another by not interfering with the function of one another.

[623] A further reason for which I rejected the submission that, "a deprivation of the right to be heard is clearly contrary to s. 17(1) of the Constitution", is that a court should not grant a constitutional claim under s. 20 of the Constitution when there is a suitable claim in judicial review in the common law, or under statute. Assuming that the Minister did not give a hearing to BCB, Boyce and the Trustees before he issued S.I. 70 of 2011, the complaint would be a proper one in judicial review for a relief available in judicial review proceedings.

[624] In **Kemrajh Harrikissoon v Attorney General of Trinidad and Tobago [1980] AC 265**, an appeal from the Court of Appeal of Trinidad and Tobago to the Privy Council, the appellant, a teacher, was transferred to another school, without his will and for improper reason. Statutory regulations were not followed, in particular, he was not given three months notice, and the transfer was not made, "after due inquiry", that is, it was made without hearing the appellant. He claimed by constitutional right procedure under s. 6 of the Constitution of Trinidad and Tobago (equivalent to s. 20 of the Constitution of Belize), exclusively breach of his constitutional fundamental rights under ss. 1 (a) and 1(b) of the Constitution, that he was not heard and was denied natural justice; and he was denied equality before the law and the protection of the law. He did not claim under the Education Act or under the common law. His constitutional claim was dismissed and his appeal to the Court of Appeal of Trinidad and Tobago was dismissed.

[625] On final appeal, the Privy Council dismissed the appeal. Their Lordships stated that, the protection of the law afforded to the appellant was the procedure for complaint under the statutory Regulations, and that the right not to be transferred without appellant's will was, ***"not included among the human rights and fundamental freedoms specified in Chapter 1 of the Constitution"***. Their Lordships held that, the proceedings to enforce constitutional fundamental rights was misconceived. On pages 267 to 268 their Lordships stated:

> ***"These proceedings in which the appellant claims a declaration that human rights guaranteed to him by section 1 of the 1962 Constitution had been contravened and seeks redress from the High Court under s. 6 [of the Constitution] are, in their Lordships' view, wholly misconceived.***
>
> ***…***

The notion that whenever there is a failure by an organ of government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by Chapter 1 of the Constitution is fallacious."

[626] In these appeals the protection of the law afforded to BCB, Boyce and the Employees' Trustees is in the fact that, the judicial system in Belize has afforded to them an opportunity to bring their claims to court.

[627] In **McLeod**, the Privy Council allowed the appeal of the Attorney General. Their Lordships restored the decision of Bernard J. the trial judge, that an Amendment Act which would require the respondent to vacate his seat in the Parliament of Trinidad and Tobago, if he resigned or was expelled from his party, was passed by a valid majority. Relevant to the present appeals, their Lordships said that, had the respondent succeeded in showing that, the Act was passed by an invalid majority, he would not have been denied the constitutional right that he claimed or any at all. Their Lordships stated on pages 530 to 531 the following:

"In this originating motion however the only infringement of his fundamental rights that Mr. McLeod alleged was his right to 'the protection of the law' under section 4(b) of the Constitution. The 'law' of which he claimed to have been deprived of the protection was section 54(3) of the Constitution, which he contended … prohibited Parliament from passing the Amendment Act, except by the majorities specified in that subsection. This argument, … is in their Lordships' view fallacious. For Parliament to purport to make a law that is void under section 2 of the Constitution, because of its inconsistency with the Constitution, deprives no one of the 'protection of the law', so long as the judicial system of Trinidad and Tobago affords a procedure by which any person interested in

establishing the invalidity of that purported law can obtain from the courts of justice, in which the plenitude of the judicial power of the state is vested, a declaration of its invalidity that will be binding upon the Parliament itself and upon all persons attempting to act under or enforce the purported law. Access to a court of justice for that purpose is itself 'the protection of the law' to which all individuals are entitled under section 4(b)."

[628] The final reason that I give for rejecting the submission that, "a constitutional right" of owners of properties, or persons who have interests in property, to be heard before compulsory acquisition is carried out is a constitutional right implied in s. 17(1) of the Constitution is this. Section 17(1) is a direction regarding the manner in which the fundamental right to private property should be protected by law. It is a direction with a constitutional force regarding what must be done when it is intended to compulsorily acquire private property. The direction negates arbitrary deprivation of property. What must be done have been set out, they are: (1) a law, an Act, must be passed unless the law exists already, (2) in the Act there must be provisions that, prescribe the principles on which, and the manner in which reasonable compensation is to be determined and given within a reasonable time; and (3) there must be provisions that secure to claimants of rights and interests access to court, (i) for establishing their rights to the property, if any, (ii) for determining whether the taking was for a public purpose, (iii) for determining reasonable compensation and (iv) for enforcing payment of compensation.

[629] From the above, one would recognise that the stage for hearing individuals would be in the future when it would be intended to acquire a particular property. If the National Assembly intended to make the right to a hearing a constitutional right in the event of a compulsory acquisition of property, it would have included it in the direction in s. 17(1) of the Constitution. The Legislature left it for the particular law (Act or an acquisition order) for the particular compulsory acquisition.

[630] Elevating the right to a hearing from the common law to a constitutional fundamental right would have the effect of rendering a legislation or an administrative act which is inconsistent with "the constitutional right to a hearing" void, whereas if the right to a hearing is kept as a common law right, courts will have discretion as to the appropriate relief, or even whether to grant relief at all. Given this important difference in the relief, it is reasonable to infer that, the National Assembly would have expressly included among the constitutional fundamental rights in s. 3 and 17(1) of the Constitution, the right to a hearing, if it was intended that denying to a claimant the right to a hearing in the event of compulsory acquisition should result in the acquisition being declared void without any discretion, and the acquisition Act also void.

[631] It is my conclusion on this ground of the cross-appeal that, the framers of the Constitution deliberately left the right to a hearing of persons who would be aggrieved or otherwise affected by compulsory acquisition of property to be regulated by the principles of the common law, or by the specific applicable legislation such as Act No. 8 of 2011. The Act makes the right to be heard discretionary. It is not inconsistent with s. 17(1) or any other section of the Constitution. We know, however, that the common law sometimes, depending on the circumstances, requires that, a hearing be given notwithstanding an express contrary statutory provision, or absence of a provision for a hearing – see **Cooper v Wandsworth Board of Works**; **Marandana Mosque Trustees v Mahmud [1967] 1 AC 13**; and **Durayappa V Fernando [1967] 12 AC 337**.

[632] Should this Court proceed then to determine whether the respondents were denied the right to a hearing under the common law? The claimants/respondents did not in the trial court plead the common law right to be heard, they pleaded, "constitutional right to be heard". They were not prepared to settle for less than, "a constitutional right to a hearing". In their submissions in this Court, counsel for the respondents argued that, the right to be heard was part of s. 3(d), and was implied in s. 17(1) of the Constitution; they urged that, a true construction of s. 17(1) included implied constitutional right to be heard. I have rejected the arguments.

[633] It is unfair to raise the complaint about a breach of the common law right to a hearing for the first time in submissions on appeal, or even in the trial court without it having been pleaded, particularly in the circumstances of the two claims the subjects of these appeals. There has been, according to the evidence, much correspondence, press statements and related cases about the subject matter. A pleading clearly relying on the common law right to a hearing should have been made in order to afford the appellants a full opportunity to respond in an affidavit – see **Owners of the Tasmania and the Cargo v Smith and others**, **Owners of Ship City of Corinth [1890] 15 App. Cas. 223** – **The Tasmania** and also **Order II rr 5 and 6 of the Court of Appeal Rules**.

[634] The claims in these appeals based on the ground of denial of a right to a hearing is similar to the claim in **Harrikissoon**. The Privy Council did not decide in place of the constitutional claim of Mr. Harrikissoon, a claim under the Education Regulations or the common law, so that Mr. Harrikissoon's claim would be salvaged. The decision by Legall J not to decide the question of any constitutional, or the common law right to a hearing cannot be described as an error. I reject the submission that attempted to include the common law right to a hearing in the appeal.

[635] I reject the grounds of the cross-appeal based on, "a constitutional right to a hearing", a constitutional right to protection of the law, a constitutional right to a fair hearing under s. 6(7) of the Constitution, a constitutional right to due process, and I decline to entertain submission on the common law right to a hearing. They all fail.

Cross-appeal ground No. 8: Compensation.

[636] The cross-appeal complaints about compensation were the following:

> <u>"Compensation.</u>
>
> 9. The learned trial judge erred in law in holding that sections 71(3) and (5) of the 2011 Act did not breach s. 17(1)(a) of the Constitution by failing adequately to prescribe the principles for

payment of reasonable compensation within a reasonable time, and by rendering it uncertain when compensation may be paid by affording discretion to the Government and to the Court as to when payment may be made. This includes in particular that the learned trial judge erred:

(a) in placing a burden on the Second Respondents to prove under section 71(3), approved payment by the court would not be within a reasonable time (at paragraph 74 of the Judgment);

(b) by holding that the burden was on the Second Respondents to adduce evidence that the minister or the legislature would act in a way which would render payment by treasury notes incapable of constituting reasonable compensation within a reasonable time (at paragraph 76 of the Judgment);

(c) by holding that in the absence of evidence of the specific rate of interest payable, the court would be engaging in conjecture to hold that it does not amount to reasonable compensation (at paragraph 77 of the Judgment). Section 71(5)(b) restricted interest to that which would be payable on fixed deposits as at the date of acquisition. As such it unconstitutionality limits the amount which could be paid in compensation; and

(d) by failing to hold that, nearly three years on since being deprived of their property, the Appellants are in breach of the obligation to provide reasonable compensation within a reasonable time."

[637] A simpler version of the complaint is that, the principal Act as amended, does not in ss. 71(3) and (5) adequately prescribe the principles on which reasonable compensation may be given within a reasonable time to the respondents; and that, the provisions unlawfully allow discretion to the Government and the court in determining what is a reasonable time and a reasonable manner of giving compensation, so, the provisions are unconstitutional. There is no complaint about the principle on which reasonable compensation is to be determined.

[638] I approach the complaints regarding the provisions of the principal Act, as amended by Act No. 8 of 2011, relating to compensation, bearing in mind several rules of interpretation of statue.

[639] The first is the rule in the Privy Council appeal case, **The Prime Minister v Vellos**, that I have earlier quoted that: **"… a basic principle of statutory interpretations requires the Referendum Act to be given an effect that is valid, rather than void, insofar as this is possible".** The basic rule requires Act No. 8 of 2011 to be given an effect that is valid rather than void, in so far as this is possible.

[640] The facts of the **Prime Minister v Vellos** case were these. The Government presented two Bills to Parliament. One was the Belize Constitution (Sixth Amendment) Bill which intended to make the right of the Government to oil and other minerals a constitutional right of the Government. The other was The Referendum (Amendment) Bill. It intended to remove the provision of the Referendum Act 1999, that a referendum be held when it is intended to amend Part II of the Constitution. It was claimed that, the Sixth Constitutional Amendment abrogated certain constitutional private rights to property declared in Part II of the Constitution so, a referendum was required, but the Government intended to amend the Referendum Act 1999, to avoid holding a referendum about the Constitution (Sixth Amendment) Bill. Initially the numbering of the constitutional amendment Bill was different. The response of the Government was that, it wanted to avoid the large expense of holding a referendum. Once it became a court case, the Government contended in defence that, the Referendum Act, not being part of the Constitution, was unlawful anyway, because it purported to amend the Constitution without having complied with the procedure prescribed for amendment of the Constitution, it was a fetter on the Constitution.

[641] By the time the appeal reached the Privy Council, the claim of the respondents/claimants had been spent. The Referendum (Amendment) Bill had been passed. The Government had altered the Belize Constitution (Sixth Amendment) Bill in regard to rights of an owner of land under which mineral is found. The Bill had been

passed, but not presented to the Governor General for his assent. It was considered that, it was not appropriate to present the Bill for assent before the proceedings, including the final appeal to the Privy Council, had been concluded.

[642] Nevertheless, the Privy Council answered the question on appeal about whether the provision of the Referendum Act ,1999, requiring that a referendum be held was a condition for enacting an amendment to Part II of the Constitution, in which case, the provision would be an unlawful fetter on the Constitution because it was a provision in an ordinary Act passed without the necessary majority for amending the relevant provision of the Constitution. Both the Supreme Court, the trial court, and the Court of Appeal held that, a referendum was required before the Belize Constitution (Eighth Amendment) Bill was passed. The two courts differed only on the stage at which the referendum should be held.

[643] The Privy Council held that, although the purpose of the Referendum Act was for the National Assembly to consult the public in the event it wished to amend Part II of the Constitution, the referendum under the Referendum Act, 1999, was not "a necessary step in the legislative process", not, "an integral part of the process", of the enactment of an amendment of the Constitution in Part II, and therefore was not a fetter on the Constitution. The provision or the Referendum Act, 1999, was not inconsistent with the provision of the Constitution requiring a special procedure for amending the Constitution, and was not struck down. This decision demonstrates that, courts should not strike down an Act unless it is necessary.

[644] The second rule is that when interpreting an Act to determine whether it may be inconsistent with the Constitution, the Act may be read with modifications, adaptations, qualifications and exceptions. Words may be read in, or words may be read down, provided this does not usurp the power of the Legislature to make laws.

[645] The third rule is that, a provision of an Act, which is inconsistent with a provision of the Constitution may be severed if severance will not render the Act meaningless –

see **Moses Hines** case and **Attorney General for Alberta v Attorney General for Canada and Another [1947] AC 503**.

[646] In my view, the three rules of interpretation aim at ensuring that, when the validity of a provision of an Act or the Act is in question in a jurisdiction where the supremacy of the Constitution obtains, courts do not, unless necessary, reach a decision which is viewed as merely frustrating the political policy in the Act rather than one which ensures that whatever may be the merits of the policy in the Act, it must be presented within the laws laid down by the Constitution – see the quotation from **Moses Hines** case. Several cases illustrate the three observations I have made.

[647] In **the San Jose** case, land owned by the appellants was compulsorily acquired by the Minister responsible under the **Land Acquisition (Public Purposes) Act, Cap. 150 (now Cap. 184).** The appellants claimed that, several sections of the Act were inconsistent with s. 17(1) of the Constitution and void, and so the acquisition of their land was invalid. The trial judge, acting by a transition power given to courts in **ss. 21 and 134 of the Constitution**, to construe existing laws (in force on Independence Day) with modifications, adaptations, qualifications and exceptions, construed Cap. 150 with modifications, and dismissed the claim. On appeal, the Court of Appeal also held that, by authority of ss. 21 and 134 of the Constitution, Cap. 150 would be construed with modifications, adaptations, qualifications and exceptions. The two majority judges ordered modifications in ss. 3, 8, 17 and 18 of Cap. 150 by adding provisions, and completely deleted s. 32 which gave the Minister discretion to pay compensation of over $10,000.00 by instalments. They said that, s. 32 could not be modified to comply with the requirement in s. 17(1) of the Constitution that, reasonable compensation be given within reasonable time. Liverpool JA stated at page 74 that:

> ***"The problem was that s. 32(1) empowered the Minister unilaterally to order that compensation is to be paid over a period of ten years. Compensation within a reasonable time can only mean that payment***

must be made in full as soon as is reasonably practicable after the amount of compensation due has been finally settled."

[648] The Court did not alter the order of the trial judge that had altered part of s. 3(1) of Cap. 150 from: "the declaration shall be conclusive evidence that the land to which it relates is required for a public purpose" to a provision that: "the declaration shall be *prima facie* evidence that, the land is required for a public purpose". The Court did not strike down Cap. 150. I note that in appeals Nos. 30 and 31 of 2010, the Court of Appeal (Morrison, Alleyne and Carey JJA) decided that it was not good enough to provide in Act No. 9 of 2009 that, the declaration was *prima facie* evidence that, the land was required for a public purpose.

[649] An important point that must be made is that, Henry P took the opportunity to state that, as a matter of law generally, the power to modify, adapt and qualify Acts existed beyond the transition period. On page 7 of the report he stated:

"The section does not, however, in my view, detract in any way from the power of a court either during the five-year period or afterwards to construe an existing law 'with such modifications, adaptations, qualifications, and exceptions as may be necessary' to bring it into conformity with the Constitution. At the same time the modifications, etc, must be such only as are necessary and a court must be wary of usurping the functions of Parliament by introducing new and possibly controversial legislation in the guise of a modification necessary to bring a particular law into conformity with the Constitution."

[650] Five years after, the Privy Council decided the **Williams v Government of St. Lucia** case. It was a case where the appellant's land was compulsorily acquired and he was paid compensation. He challenged the compulsory acquisition on the ground that, the contents of the acquisition order and the publication of it did not meet the

requirement of the law, and further that, a statement that, the land was required for the development of tourism did not meet the requirement of a public purpose. He lost his claim, and his appeals to the Court of Appeal of the West Indies Associated States and to the Privy Council.

[651] In their judgment, their Lordships set out section 3 of the Acquisition Ordinance, Chapter 109, Laws of Saint Lucia. The section included subsection (1) which stated:

> ***"(1) If the Governor in Council considers that any land should be acquired for a public purpose he may cause a declaration to that effect to be made in the manner provided by this section and the declaration shall be conclusive evidence that the land to which it relates is required for a public purpose."***

[652] The Privy Council noticed the constitutional defect in the provision in s. 3(1) although it was not an issue. The defect was in the provision that, "the declaration shall be conclusive evidence that the land … is required for a public purpose". On page 941 their Lordships stated about it that:

> ***"… the fact that the Administrator in council had considered that the land should be acquired is nonetheless relevantly declared by*** [the order] ***although contained in a recital.***
>
> ***However, their Lordships would observe that section 3(1) may possibly be construed to require no more than a declaration that the land should be acquired."***

[653] By that statement the Privy Council simply ignored the unconstitutional part of s. 3(1). Their Lordships demonstrated that, courts should be slow to strike down legislation. They were reluctant to declare the entire Ordinance unconstitutional and

void because of the provision in s. 3(1) which was not an issue. They had not been called upon to decide the validity of s. 3(1) of the Ordinance.

[654] In **Moses Hines case**, the Privy Council declared inconsistent and void the provision of the Gun Court Act, 1974, that provided for a sentence of detention at hard labour during the pleasure of the Governor General acting on the advice of a board of non judicial officials and the provision that established the Full Court Division of the Gun Court. The claim was for an order declaring the Gun Court Act or certain provisions of it inconsistent with the Constitution and void. The Privy Council did not declare the entire Act of 1974, inconsistent with the Constitution and void. They considered the question of severance of the two unlawful provisions and decided that the unlawful provisions could be severed without rendering the Gun Court Act meaningless. They modified the Act by severance of the offending provisions, and reading into the Act new provisions. Their Lordships stated that, they hoped that, "Parliament would prefer half the loaf to no bread". I would comment that, after severing the punishment provision, there was in fact a vacuum about punishment. There was some incompleteness, but for the fact that their Lordships read into the Gun Court Act, 1974, a penal provision from another Act, the Firearms Act, 1947 and made the Gun Court Act complete.

[655] **Mollison's case** was decided in a similar way. The Juveniles Act, 1951, was modified and the appellant's sentence was altered by the Privy Council from that of detention at the governor General's pleasure to that of detention at the court's pleasure. One of the reasons for the relevance of **Mollison's case** to these appeals is that, the court, after the transition period had expired, still modified a section of the Juveniles Act, 1951, which was inconsistent with the Constitution, instead of declaring the entire Act void.

[656] Following the guides in the above Privy Council appeals from the Commonwealth Caribbean, and paying heed to the observation of Henry P. in **San Jose**, I would consider modifying and adapting ss. 71(3) and (5) of the principal Act before I consider

declaring them void, were I to find that the sections were inconsistent with s. 17(1) of the Constitution.

[657] I cannot accept the complaint of the respondents that, the trial judge erred in holding that, "ss. 71(3) and (5) of the 2011 Act" (meaning the principal Act as amended) did not breach s. 17(1)(a). The explanation by the learned judge at paragraphs 73, 74 and 75 of his judgment is, in my view, sound except for his view about part of s. 144 and s. 145 of the Eighth Amendment Act. The arrangement in s. 71(3) of the principal Act regarding payment of compensation comes in only where the Government is strapped for cash. I do not see how a court approved scheme of payment should be regarded as unlawful. Court's approval is a court order. Payment by Treasury Notes also comes in where funds are not readily available, and is subject to court's approval in subsections (3) and (4). This practical difficulty has been recognised in **Gairy v Attorney General of Grenada [2001] UKPC 30**. At paragraph 31 of their judgment their Lordships stated:

> ***"If the exigencies of public finance prohibit immediate payment to the appellant of the full sum outstanding, the Attorney General representing the Minister of Finance, may apply to the judge for approval of a schedule of payment by instalments."***

In **San Jose**, Liverpool J. also recognised the possibility that the Government may not have funds readily available, he stated that, payment should be made in full, "as soon as is reasonably practicable".

[658] In my view, ss. 71(3) and (5) of the principal Act, No. 16 of 2002, as amended, are not inconsistent with s. 17(1) of the Constitution and are not void. In any case, these are provisions that would be severed easily and other provisions would be read in. Further, the provisions of ss. 143, 144 and 145 which by constitutional force authorises the Government to have and maintain majority ownership and control of public utilities providers would not be defeated were I to hold that, ss. 71(3) and (5) of Act No. 16 as amended, regarding giving of reasonable compensation within a

reasonable time were unconstitutional. The provisions in ss. 143, 144 and 145 make sense, they show clearly the intention to nationalise BTL. The appropriate provisions regarding reasonable compensation could be read into the Act were the Court to decide that, the present provisions about compensation were unconstitutional.

[659] Furthermore, I reject the submission which urges the Court to accept that, upon proof that any one requirement of s. 17(1) of the Constitution is lacking the Court must strike down the entire provisions introduced by Act No. 8 of 2011 into Act No, 16 of 2002. My respectful view is that, a court cannot adopt a mathematical logic in interpreting legislation, and ignore the three rules of interpretation of legislation stated above.

[660] I also accept the decision of Legall J. regarding interest rates. He had to go by evidence. Moreover, the question of interest rate to be charged would only arise where there would have been lack of funds, and payment over a period of time would have been approved by court. Interest rate would be included in the court approval.

[661] All the complaints under cross-appeal ground No. 9 about compensation for acquired property was made to the trial court, but the parties did not produce evidence of what compensation had been offered or demanded. It makes the whole question abstract. I reject the ground of cross-appeal No. 9, and hold that Legall J. did not err about it.

Cross-appeal grounds 10 and 11: Consequential relief.

[662] Given that I would allow the first two appeals, the cross-appeal ground of consequential relief would not arise regarding the compulsory acquisitions in 2011. Claims for consequential relief from the declaration in appeals Nos. 30 and 31 of 2010 could not properly be made by Legall J. in claims Nos. 597 and 646 of 2011 which are the subjects of these appeals Nos. 18 and 19 of 2012. The present appeals and the claims from which the appeals came are about the consequences of the Eighth

Amendment Act, Act No. 8 of 2011 and S.I. 70 of 2011. I have decided that, the two Acts and the Statutory Instrument are not void so, the consequences are not unlawful. Compensation for compulsory acquisition has to be paid as a matter of law for properties lawfully compulsorily acquired under Act No. 8 of 2011. The value of the properties will be assessed as at 4 July 2011. This Court is not concerned with the period 25 August 2009 to 3 July, 2011.

[663] My view about the quantum and actual payment of compensation for the compulsory acquisition in 2011 is that, I would not entertain a question about them before they have been presented to the trial court. I do not accept that, Legall J. erred in not holding that, after three years when compensation had not been paid, the appellants were in breach of a duty to pay reasonable compensation. The question was not before him to decide. It should have been pleaded if no offer of compensation was ever made for the acquisition in 2011. In any case, it would be on evidence.

[664] I have read the judgment of Sosa P. in draft and agree with, and adopt, such orders proposed in it as have not been proposed in my own judgment. I would make the following orders in appeals Nos. 18 and 19 of 2012.

1. Appeal No. 18 of 2012 of the Attorney General and the Minister of Public Utilities is allowed.

2. Appeal No. 19 of 2012 of the Attorney General and the Minister of Public Utilities is allowed.

3. The respondents' notice to vary the judgment of Legall J. (the cross-appeal) is dismissed in both appeals; all the court orders including orders for the return of the properties compulsorily acquired and damages, requested from this Court by the British Caribbean Bank Limited, Dean Boyce and the BTL Employees Trustees are refused.

4. A declaration is made that, the Belize Telecommunications (Amendment) Act, No. 8 of 2011, is not unconstitutional, it is a valid Act, but commences on 4 July 2011.

5. Sections 2(a) and (b) of the Act, No. 8 of 2011, are not inoperative, the sections amended sections 63(1) and (2) of the Belize Telecommunications Act, No. 16 of 2002, the principal Act.

6. A declaration is made that, the Belize Telecommunications (Assumption of Control over Telemedia Limited) Order, Statutory Instrument No. 70 of 2011, is a valid acquisition order, it takes effect from 4 July 2011.

7. A declaration is made that, the Belize Constitution (Eighth Amendment) Act, No. 11 of 2011, is a valid Act; it commences generally on 25 October, 2011, but has specific retrospective effect from 4 July, 2011, in regard to Act No. 8 of 2011, and Statutory Instrument No. 70 of 2011.

8. As far as appeals Nos. 18 and 19 of 2011 are concerned, the quantum of compensation for the lawful acquisition of the properties of BCB, Boyce and the Employees Trustees shall be the value of the properties on 4 July, 2011.

9. A postulate described as, “the basic structure doctrine” is not part of the laws of Belize.

10. The power of the National Assembly of Belize to alter the provisions of the Constitution of Belize is limited only by the provisions of the Constitution itself.

11. The judgment dated 11 June 2012, of Legall J in the Supreme Court is set aside.

12. Costs in Civil Appeals Nos. 18 and 19 of 2012, the appellants shall have 85% of their costs here and in the court below, certified fit for one Senior Counsel and two junior counsel, to be taxed, if not agreed, and that this order shall stand unless an application (which may be made by letter to the Registrar) is made for a contrary order within seven days of the date of delivery of this judgment, in which event the question of costs shall be decided on written submissions to be filed and exchanged within a further 15 days.

Appeal No. 21 of 2012.

[665] Appeal No. 21 of 2012 is against the court order made by Legall J. on 4 July 2012. The order dismissed claim No. 673 of 2011 of Fortis, the subject of appeal No. 21 of 2012, in these words:

"IT IS HEREBY ORDERED AND DECLARED as follows:

1. In light of the submissions made by both parties that the claim in this matter be dismissed due to the decision of the Court in Claims Nos. 597 and 646 of 2011, in particular paragraphs 72, 81, 82 and 85 thereof, the Claim in this matter is dismissed.

2. Costs shall abide the outcome of any appeal herefrom."

[666] The proceedings were rather unusual. The claim was not presented orally in court. After consolidated claims Nos. 597 and 646 of 2011, the subjects of appeals Nos. 18 and 19 of 2012, had been presented orally and judgment rendered, parties in

this appeal, No. 21 of 2012, considered that, the decision by Legall J. on questions of law in the consolidated claims would apply to claim No. 673 of 2012 the subject of this appeal between them. They agreed to the above order based on the determination of the questions of law made in the consolidated two claims. Nothing in this appeal turns on those unusual circumstances.

[667] A summary of the facts is this. Fortis was a shareholder in Belize Electricity Limited, a wholly private company at the time the claim arose. The undertaking was a State corporation in the past. The respondents said that, Fortis was the majority shareholder owning 70% of the shares in BEL. Mr. Lynn Young, the Chief Executive Officer of BEL, said, Fortis owned only 0.03% of the shares. Mr. Courtenay in his submission for Fortis stated a different factual position. BEL was almost a monopoly supplier of electricity in Belize during the relevant period, 2007 to 2011. Supply of electricity by others was not much.

[668] At the material time, BEL obtained a very large part of the electricity that it supplied to consumers in Belize from Comision Federal de Electricidad – CFE, of Mexico, and only smaller parts from Belize Electricity Limited – BECOL, and Belize Co-Generation Energy Limited – BELCOGEN. From May, 2008 BEL was unable to pay its bills. The CEO said that, BEL had, "serious cash flow problem, but was not insolvent". It sought financial assistance from the Government to pay its bills, especially sums owed to CFE. In July, 2008 the Government, at the request of BEL, opened US $5 million letters of credit in favour of CFE to avoid it cutting off supply of electricity to Belize. BEL was unable to provide the Government with any security for the letters of credit. BEL was in arrears of payment by US $2 million. It could not obtain loan from commercial sources because it had defaulted in loan payment, and to obtain new loans it had to obtain approval from existing creditors. It was expected that the relief from the Government would stave off the debt problem of BEL until 31 December, 2010. There was, however, no improvement in the financial situation of BEL.

[669] By May, 2011 BEL was in arrears of payment by over US $5 million. Again it asked for assistance from the Government, this time in the sum of US $10 million. It informed the Government that, the country faced imminent cut of supply of electricity. On 25 May, 2011 BEL wrote two letters begging for assistance; it informed the Prime Minister and the Financial Secretary that, supply of electricity would be cut off in a matter of one week. On 26 May, 2011 the Government loaned BZ $4 million. The situation did not improve. On 10 June, 2011, the Government agreed to pre-pay BZ $4 million towards the Government's future electricity bills so that BEL could make payment to CFE.

[670] In June, 2011 in a meeting with Mr. Young, the Government inquired whether Fortis would sell its shares in BEL. Fortis replied through Mr. Young that, it would sell the entire shares, and it demanded that in addition to the book value of the shares it should be paid $36 million that it had refunded to customers, and had lost a court claim for. The Government did not pursue the counter offer.

[671] The Government formed the view that, Fortis was unwilling to help BEL out of the financial situation, despite its global annual revenue of Canadian $13 billion, and that, unless the Government continued paying BEL's bills, electricity supply to the country would be cut off abruptly soon. The Government also considered that, the financial situation that had lasted from May, 2008 to June, 2011 would continue unless a long term solution was found.

[672] On 20 June, 2011 the Government passed the Belize Electricity (Amendment) Act, No. 4 of 2011, authorising compulsory acquisition of BEL. On the same day, the Minister responsible, acting under s. 62 of the Act, issued and published the Belize Electricity (Assumption of Control over Belize Electricity Limited) Order, S.I. No. 67 of 2011, compulsorily acquiring BEL. On 25 October, 2011 the Government passed the Belize Constitution (Eighth Amendment) Act, No. 11 of 2011, providing for the Government to have at all times majority ownership and control of public utilities providers, including providers of electricity.

[673] About those hard facts, Mr. Young provided explanations in the form of a combination of facts, opinions, law and arguments. He confirmed that, by May, 2008 BEL was cash-strapped, and that, the Government loaned to BEL the sums of US $5 million and later loaned BZ $4 million, and also paid in advance for the Government's electricity bill. Mr. Young, "BEL had serious cash-flow problem, but was not insolvent." May be commercially, there is a significant difference, a serious cash-flow problem is not a significant business problem. In law it is a serious problem if a company is not able to pay its debt within three weeks of demand made by a creditor, or if it has been proved otherwise that, the company is unable to pay its debt. A petition for a court winding order may be made, by any creditor (including the Government) and the company may be wound up. On the evidence, BEL could be wound up unless BEL could overcome its cash-flow problem and pay up the debt owed to creditors within weeks. Total debt was said to be over US $5 million in 2011.

[674] Mr. Young's narration starts with the year 2007. He said that, the Government then promulgated the Electricity (Tariffs, Charges and Quality of Service Standards) (Amendment) Bylaws, Statutory Instrument, No. 141 of 2007. It established a "full tariff period of 1 July, 2007 to 30 June, 2011", and established a methodology for determining and reviewing rates charged for electricity supplied to consumers (the public). Mr. Young proceeded that, before the general elections in 2008, the opposition party at the time, adopted a policy "to ease the costs of living by lowering electricity rates". The opposition won the general elections, and formed the Government. In the same year BEL requested a review of rates with a view to raising it. The Public Utilities Commission – the PUC, refused to review rates, and instead it proposed the restoration of the methodology in S.I. 145 of 2005. The Minister, for his part, issued the Electricity (Tariffs, Charges and Quality of Service of Standards (Amendment) Bylaws, Statutory Instrument No. 58 of 2008. It cancelled S.I. 141 of 2007. BEL was not consulted. The 2008 methodology tended towards lower rates than the 2007 methodology.

[675] Mr. Young attributed "the serious cash-flow" situation of BEL to rise in price of oil that caused CFE to sell electricity to BEL at a higher price, and to an unusual dry

season that resulted in low water levels in the rivers that flowed to dams that BECOL generated hydro-electricity from. He said that, rains were due in a matter of a week before the Government nationalised BEL. Once rains came BEL would buy hydro-electricity at cheaper price, he said.

[676] Mr. Young described the state of electricity business of BEL at paragraphs 26, 27 and 28 of his first affidavit as follows:

> "26. BEL therefore called on the Government for temporary assistance, whether by guaranteeing an increase of the Letter of Credit or pre-paying its electricity bill to BEL. By an e-mail dated 25th May 2011 Mr. Rene Blanco, Chief Financial Officer of BEL, wrote to representatives of the Government, including the Financial Secretary, advising that BEL did not have sufficient credit with CFE to make it through to the weekend and unless arrangements were made with CFE for payment or extension of the Letter of Credit. Mr. Blanco added that "We need an urgent response in order to determine how and when we should start planning rotation power outages for the country as appropriate – depending on your response." A copy of the said e-mail is now produced and shown to me marked "LY5".
>
> 27. Contrary to what the Prime Minister represented to the National Assembly at the time the Bill to nationalize BEL was presented, BEL had no intention of plunging Belize into rolling black outs. The intention, at that time, was to reduce the purchase of power from CFE by having scheduled power outages during peak hours of the day. This would have been on a rotation basis and at the maximum, 25% of the country would not have power at any one time. Furthermore, this would only have become necessary if the Government provided no assistance to BEL.
>
> 28. Although BEL was experiencing severe cash flow problems in may and June 2011, the Prime Minister was aware that the situation would have changed in late June 2011 when the rains arrived and BEL would have been in a position to purchase most of its power from BECOL."

He did not consider it a dire state of affairs.

[677] Then at paragraphs 36 to 40, Mr. Young set out his views about what the Government should have done to rectify BEL's cash-flow problem as follows:

> "36. I am informed by Courtenay Coye LLP and verily believe that the compulsory acquisition of property will also be unconstitutional where the acquisition of the property is not proportionate.
>
> 37. As stated above, the Government acquired BEL at a time when the government knew that BEL would have been able to meet its expenses. The acquisition was not therefore necessary.
>
> 38. As the Prime Minister acknowledged during his speech to the National Assembly, the advance payment made by the Government on its electricity bill would have enabled BEL to purchase power from CFE for another 21 days. The payment would have been sufficient to take BEL through to the end of June when BEL would have been able to purchase cheaper power from BECOL.
>
> 39. Furthermore, even if the Government believed that it required majority control of the shares in BEL in order to achieve the stated objective, it was not necessary to acquire the claimant's shares. The Claimant was the proprietor of 154,422 shares in BEL which accounted for a mere 0.3% of the total shares acquired by the government. It was not therefore necessary for the Government to acquire the Claimant's shares in order to achieve the stated objective or majority control of BEL.
>
> 40. It is important to note that other alternatives were open to the Government to ensure an uninterrupted supply of electricity if the Government truly believed that there was a real risk that Belize would have been plunged into blackouts. These alternatives include:
>
> (1) the Government could have assisted BEL by increasing the Letter of Credit to CFE to US $10 million as BEL had requested;
>
> (2) the Government could have provided a loan of BZ$ 4 million to BEL to get it through to the rainy season;

(3) the Government could have reversed its decision to introduce a new rate setting methodology which BEL considered would certainly result in a rate decease and would render BEL's operations unsustainable. Government could have reverted to the 2007 methodology if it chose. In fact, the PUC publicized a notice one week after the acquisition of BEL that it was rescinding the order to reduce rates. A copy of the notice is now produced and shown to me marked "LY6".

(4) the Government could have exercised its powers under section 45 of the Electricity Act which provides for temporary state control of the company in the event of emergencies threatening the electricity supply.

(5) the Government could have negotiated a purchase of the Claimant's shares in BEL."

[678] Based on the explanation by Mr. Young of the state of electricity supply business of BEL, and on his views about what the Government should have done to keep the business of BEL running, Fortis, a shareholder, made a claim that the compulsory acquisition of BEL was unlawful. It claimed the following relief:

"(a) A Declaration that the Electricity (Amendment) Act, 2011 is inconsistent with sections 2, 3(a) & (d), 6(1) and 17 of the Constitution of Belize and is therefore unconstitutional, unlawful, null and void;

(b) A Declaration that Electricity (Assumption of Control over Belize Electricity Limited) Order, 2011, Statutory Instrument No. 67 of 2011 is contrary to Sections 3(a) & (d), 6(1) and (17) of the Constitution of Belize and is therefore unconstitutional, unlawful, null and void;

(c) A Declaration that the compulsory acquisition by the Government of Belize of the Claimant's 154,422 shares in Belize Electricity Limited ("BEL') on 20th June 2011 pursuant to Electricity (Assumption of Control over Belize Electricity Limited) Order, 2011, Statutory Instrument No, 67 of 2011 is unconstitutional, unlawful, null and void.

(d) A Declaration that the Belize Constitution (Eighth Amendment) Act, 2011 is contrary to, repugnant to and inconsistent with the Constitution of Belize and is therefore unconstitutional, unlawful, null and void.

(e) An Order that the Government of Belize, whether by its employees, agents or assigns or howsoever be restrained from taking any step whether directly, indirectly or otherwise (including by orders or directions to the Commissioner of Police) to prevent the Board of Directors of BEL that was lawfully in place up to 20th June 2011 (comprised of Rodwell Williams, Kay Menzies, Anthony Michael, H. Stanley Marshall, Dennis Jones, Dylan Reneau, Lynn Young, Richard Hew and Eddinton Powell) from resuming full management and control of BEL and having unrestricted access to and/or control over all of BEL's premises and property;

(f) An Order directing the Registrar of Companies to take such steps as may be necessary to ensure that her records reflect that the Claimant is the proprietor of the 154,422 shares in BEL;

(g) Compensatory as well as vindicatory damages;

(h) An Order that damages be assessed;

(i) Interest;

(j) Such other reliefs as the Court deems just and equitable; and

(k) Costs."

[679] After Legall J. had made the order dismissing Fortis' claim for the reasons given in the judgment in claims Nos. 597 and 646 of 2011, Fortis appealed the order on the grounds that the reasons given by Legall J. in the claims were erroneous, and so, the dismissal of Fortis' claim based on the erroneous reasons was also erroneous.

[680] Fortis gave the following specific grounds for its appeal:

"3.1 The learned Trial Judge erred in construing section 143 and 144 of the Belize Constitution as precluding him from granting consequential relief to the Appellant.

3.2 The learned Trial Judge erred in construing sections 143 and 144 of the Belize Constitution as he did in Claims 597 and 646 of 2011 in particular in paragraphs 72, 81, 82 and 85 thereof, and thereby dismissing the Claim.

3.3 The learned Trial Judge erred in severing section 144 as he did in Claims 597 and 646 of 2011.

3.4 The construction placed on sections 143 and 144 by the learned Trial Judge violates the separation of powers and the basic structure of the Belize Constitution.

3.5 The construction placed on sections 143 and 144 by the learned Trial Judge is unconstitutional as it permits breaches of

fundamental constitutional rights without remedy in violation of the Rule of Law."

[681] Fortis requested from this Court the same set of relief it had claimed in the Supreme Court, which relief I have set out above.

Determination.

[682] I shall again set out ss. 143, 144 and 145 of the Constitution as amended by the Eighth Amendment, for the convenience of reference. The sections are:

PART XIII
GOVERNMENT CONTROL OVER PUBLIC UTILITIES

143. For the purposes of this Part:-

"public utilities" means the provision of electricity services, telecommunication services and water services;

"public utility provider" means –

"(a) Belize Electricity Limited a company incorporated under the Companies Act, or its successors by whatever name called;

(b) Belize Telemedia Limited, a company incorporated under the Companies Act, or its successors by whatever name called;

(c) Belize Water Services Limited, a company incorporated under the Companies Act, or its successors by whatever name called;

"Government" means the Government of Belize;

"Government shareholding" shall be deemed to include any shares held by the Social Security Board;

"majority ownership and control" means the holding of not less than fifty one per centum (51%) of the issued share capital of a public utility provider together with a majority in the Board of Directors, and the absence of any veto power or other special rights given to a minority shareholder which would inhibit the Government from administering the affairs of the public utility provider freely and without restriction.

144.(1) From the commencement of the Belize Constitution (Eighth Amendment) Act, 2011, the Government shall have and maintain at all times majority ownership and control of a public utility provider; and any alienation of the Government shareholding or other rights, whether voluntary or involuntary, which may derogate from Government's majority ownership and control of a public utility provider shall be wholly void and of no effect notwithstanding anything contained in section 20 or any other provision of this Constitution or any other law or rule of practice:

Provided that in the event the Social Security Board ("the Board") intends to sell the whole or part of its shareholding which would result in the government shareholding (as defined in section 143) falling below 51% of the issued stock capital of a public utility provider, the Board shall first offer for sale to the Government, and the Government shall purchase from the Board, so much of the shareholding as would be necessary to maintain the Government's majority ownership and control of a public utility provider; and every such sale to the Government shall be valid and effectual for all purposes.

(2) Any alienation or transfer of the Government shareholding contrary to subsection (1) above shall vest no rights in the transferee or any other person other than the return of the purchase price, if paid.

145. (1) For the removal of doubts, it is hereby declared that the acquisition of certain property by the Government under the terms of the –

(a) Electricity Act, as amended and the Electricity (Assumption of Control Over Belize Electricity Limited) Order, 2011 (hereinafter referred to as "the Electricity Acquisition Order"); and

(b) Belize Telecommunications Act, as amended, and the Belize Telecommunications (Assumption of Control Over Belize Telemedia Limited) Order, 2011 (hereinafter referred to as "the Telemedia Acquisition Order"),

was duly carried out for a public purpose in accordance with the laws authorising the acquisition of such property.

(2) The property acquired under the terms of the Electricity Acquisition order and the Telemedia Acquisition order referred to in subsection (1) above shall be deemed to vest absolutely and continuously in the Government free of all encumbrances with effect from the date of commencement specified in the said Orders.

(3) Nothing in the foregoing provisions of this section shall prejudice the right of any person claiming an interest in or right over the property acquired under the said Acquisition Orders to receive reasonable compensation within a reasonable time in accordance with the law authorising the acquisition of such property.

[683] None of the grounds of appeal is about **The Electricity (Amendment) Act, No. 4 of 2011**, which authorises compulsory acquisition of properties which are, "necessary to take possession of and to assume control over electricity". Also none of the grounds is about **The Electricity (Assumption of Control over Belize Electricity Limited) Order, Statutory Instrument No. 67 of 2011**. Counsel for the appellant argued that he made submissions about the Act and order on the ground that, **s. 19(1)(a) and (2) of the Court of Appeal Act, Cap. 90**, authorises the Court of Appeal to make such orders

that the trial court could have made in the claim. Counsel for the respondents did not object to the submission bringing into the appeal new grounds without leave of the Court. Counsel for the respondents simply responded to the new grounds of appeal by his own submission to the contrary. The Court entertained the submission.

The manner in which reasonable compensation is to be determined.

[684] The submission that the Act was unlawful raised several questions of law which I have already answered in appeals Nos. 18 and 19 of 2012. The answers that I give in this appeal are summaries.

[685] This Court (Morrison, Alleyne and Carey JJA) in appeals Nos. 30 and 31 of 2010 accepted that the provisions in ss. 64, 65, 66 and 67 of Act No. 9 of 2009 (now void) were appropriate for determining reasonable compensation for properties such as land, but said that the provisions were not suitable for determining the value of shares. Those provisions have been reproduced in Act No. 4 of 2011 and Act No. 8 of 2011. In addition the deficiency in the principles in assessment of the value of shares in companies and other properties was rectified in the two Acts of 2011 by additional provisions. For example, s. 66(1)(c) of Act No. 4 of 2011 provides that, in assessing compensation, the court shall employ the generally accepted methods of valuation of the kind of property that has been acquired.

[686] The scheme and principle of valuation starts at **s. 63 of Act No. 4 of 2011**. A summary is the following. The Financial Secretary asks claimants to submit their valuation of the property. So, the Financial Secretary has as a starting value, the claimant's own valuation. The claimant's own valuation cannot be regarded by him as unreasonable. Section 64 then provides for negotiation between the Financial Secretary and the claimant. That, in my view, would only be necessary if the Financial Secretary has reservation about the claimant's valuation. If after negotiation there is still disagreement about the value of compensation, the value is determined by the Supreme Court. This will of course be on evidence which may include expert's

evidence of more than one methods, that is, principles, to chose from. A sum assessed by court cannot be regarded as unreasonable compensation. An aggrieved party may, of course, appeal.

[687] In my view, ss. 63, 64, 65, 66 and 67 of Electricity Act, Cap. 221 as amended, and which together set out a procedure that may end with assessment by court, is sufficient to meet the requirement in s. 17(1) of the Constitution that, the principles and manner in which reasonable compensation is to be determined should be set out in the law authorising compulsory acquisition.

[688] I have outlined the manner of assessment of reasonable compensation simply to give the complete account of the process of compensation. There is no appeal regarding the principle by which reasonable compensation is to be determined.

The manner in which reasonable compensation is to be given within a reasonable time.

[689] I do not see any merit in the submission that, Act No. 4 of 2011, or Act No. 8 of 2011 does not provide for the principle and manner in which reasonable compensation is to be given within a reasonable time. A court always starts with the rule that, a provision of an Act should be given a meaning that is valid where this is possible. Section 70 of Cap. 221 commits the consolidated fund to paying the compensation assessed. Tying compensation to other specific sources of funds has been held not to be a reasonable manner of giving compensation. Not much can be said about this submission. This is a matter which is difficult to decide in abstraction. So far there has been no evidence that, an objectionable manner of paying compensation has been proposed by the respondents to the appellant. I think the appellant should go ahead and submit its own valuation as required under s. 63 of Act No. 16 of 2002 and set the process in motion. There may be no need to complain about “giving” the compensation. I do not think it is proper to ask court to decide the validity of an Act without presenting the facts on which the claim is based.

[690] Similarly, I see no merit in the complaint about the provision in the Act for enforcement of award of compensation. Where the exigencies of public finance does not allow for full payment immediately, the guide given by the Privy Council in **Gairy v Attorney General of Grenada [2001] UKPC 30** will be applied. The question of interests also arises where the exigencies of public finance does not allow for immediate payment of the full compensation sum. Unless agreed Court approval of payment by instalments may include approved interests rate. Court approved payment by instalments and the interests rate applicable cannot be unlawful.

Right to a hearing of Fortis.

[691] There is no ground of appeal about denial of a hearing. This point was simply included in the submission of counsel. The trial judge did not decide it. The facts of any denial of a hearing to Fortis were never presented to the trial judge. This Court does not know what the trial judge would have decided. However, I shall mention that, there is no requirement in constitutional principles that, affected persons or the public must be given a hearing before an Act is passed. I have cited English cases and the appeal from Belize, the **Prime Minister v Vellos** for authority.

Public purposes.

[692] The purpose of the compulsory acquisition of BEL was given in Act No. 4 of 2011 as well as in the acquisition order S.I. 67 of 2011. In the Act in s. 62 it was stated as:

> **62(1) where in the opinion of the Minister … it is necessary and expedient in the public interest that the Government should acquire control over electricity supply to maintain an uninterrupted and reliable supply of electricity to the public, the Minister may … by Order published in the Gazette, acquire all such property as he may, from time to time, consider necessary to take possession of and to assume control over electricity supply.**

[693] The circumstances which are considered to cause interruption and unreliability in the supply of electricity are stated as: "(a) the licence holder is in grave financial difficulties and is unable to pay its debts …; (b) the licence granted to the licence holder is revoked by the PUC, or a notice to revoke such licence has been given …; (c) the licence holder ceases or suspends electricity supply operations wholly or partly, or loses control over such operations for any reason whatsoever; or (d) there is imminent danger of the disruption of electricity supply to the public."

[694] In the Order, S.I. 67 of 2011, the public purpose is stated as:

> **"2. … for the public purpose aforesaid, namely, to maintain an uninterrupted and reliable supply of electricity to the public".**

[695] Counsel submitted that, the Minister did not acquire the shares in BEL for the stated purpose. He argued that: (1) there was no threat of interrupted or unreliable supply of electricity on 20 June 2011, when BEL was acquired, or of unreliability in supply of electricity; (2) BEL was not unable to pay CFE because the Government had made advance payment for its own bill in June 2011, and BEL had paid US$ 1.5 million to CFE and staved off interruption in electricity supply until 30 June 2011; (3) rain would have come and BEL would have obtained hydro-electricity cheaper locally; (4) the Government was pursuing its "manifesto pledge to lower electricity rates"; and (5) the Government caused the financial situation of BEL by causing PUC to refuse to raise electricity rate by 15%.

[696] From Mr. Young's own affidavits for the appellant, Fortis, which affidavits exhibited his letters requesting the Government to assist financially to avoid CFE cutting off electricity supply to Belize, there is only one conclusion that one can draw, namely, that BEL had been unable to pay its bill from May 2008, and the situation continued over three years. There must have been rain in those three years. The threat of cutting off electricity supply came to a matter of days, according to Mr. Young. The only source of loan was said to be the Government. BEL was, from the evidence, unable to pay its

debt and unable to raise money from commercial market. The evidence also proved that, Fortis attempted to take advantage of the fact that, the Government would pay BEL's debt to avoid disruption of electricity supply to Belize. Fortis chose this near crisis time to demand the refund of $36 million which BEL could not get by a court claim in exchange for relinquishing control of BEL to the Government.

[697] The merits of the several suggestions by Mr. Young about ways in which the Government could have dealt with the situation is not for the court to decide. Equally it is not for the court to decide the merits of the "manifesto pledge" by the Government. The PUC through Mr. John Avery, its chairman at the time, gave the view of the PUC about the methodologies. Its view was that, the one preferred by Mr. Young was not fair to the public. I do not think it was necessary for the court to choose between the two views.

[698] The difficulty in the appellant's case about the public purpose in the acquisition order, and the question of proportionality regarding Fortis' claim is that the issues were not tried and not decided by the trial judge. This Court has been asked to decide the issues on the evidence for the first time. I do not think this Court has that jurisdiction. Nevertheless, on the facts put before this Court I would say that the ground about lack of a public purpose is baseless. How can compulsory acquisition in order to avoid interruption of electricity supply to the country not be for a public interest? It was said by BEL itself that, unless the Government assisted financially, electricity supply would be cut. In my view, presenting to court Mr. Young's suggestion side by side with the Government manifesto promise was an attempt to put two opposing economic and social policies to court to decide. Courts are not competent to decide such policies.

[699] Mr. Young's affidavits which in some parts were argumentative, seemed to suggest that Fortis or Mr. Young believed that the Government had an obligation to keep BEL afloat in business in private hands. The affidavit pontificated what the Government should have done to keep BEL in business. The true position on the evidence was that the Government was a lender of last resort, BEL had run its business

broke. The Government was not an ordinary lender, its purpose was to maintain supply of electricity to Belize. It is hard to come by a borrower who lays down conditions to a lender. While BEL and the Government, and may be Fortis, had the same aim in keeping BEL in business, and to have it secure uninterrupted supply of electricity, their interests and purposes were different. BEL and Fortis were interested in private profit. The Government's interest and purpose was the interest of the public in having uninterrupted supply of electricity for the benefit of the public.

[700] On the evidence, it is not a wild view that, if Fortis realised that it would not get much of a profit, it would not spend much more money in keeping BEL in business. On the other hand, if the Government realised that BEL would not continue in business unless the Government continued to loan money while the Government had no say in the business, the Government would consider other options. The Government had assisted BEL for three years without seeing improvement in the financial situation of BEL. The Government then decided to nationalise the business. Without deciding the merit of nationalisation, the step taken does not seem unreasonable and unproportional. It struck a fair balance between the demands of the public interest in protecting the supply of electricity and respect for the fundamental right to private property.

[701] The situation in which BEL found itself occurred in the UK in **R. (on the application of SRM Global Master fund LP) v Treasury Commissioners [2010] BCC 558**; **[2009] EWCA Civ. 788**. In the case, Northern Rock carried on business as a banker. It borrowed most of the money it loaned to customers, on the wholesale money market. It suffered liquidity problems when the global financial market suffered meltdown in 2007. The Government stepped in and arranged with the Bank of England to provide short term loan to Northern Rock. By the end of the year the Bank of England had loaned £27 billion to Northern Rock. The Government sought private sector solution without success. It nationalised Hard Rock. Compensation was to be assessed by an independent assessor. A condition to be taken into consideration was an assumption that all the funds provided by the Bank of England was withdrawn. The shareholders claimed that on that condition the valuer was likely to conclude that the

value of the shares was nil; they argued that, in the circumstances they would have been deprived of valuable property for nothing or a negligible amount. The shareholders lost their claim and lost their appeal to the Court of Appeal (UK).

[702] The important points in that case as far as this appeal is concerned, is the decision of the Court of Appeal that: the government support was accorded for the protection of the banking system and the economy as a whole, a public purpose; the nationalisation was part of the measures to protect the banking system and the economy; and that, "the court would only interfere, if it were to conclude that the Government's judgment as to what was in the public interest was manifestly without reasonable foundation"

[703] About proportionality the Court of Appeal decided that, the decision taken by the Government to provide public money as loan through the Bank of England to protect the banking system, and finally to nationalise Northern Rock struck the balance required by the European Union Convention between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights, the actions taken were proportional.

[704] In this appeal, I do not think that the judgment of the Minister that it was in the public interest to acquire BEL in order to avoid disruption in the supply of electricity to Belize was manifestly without reasonable ground so that court may stop it.

[705] The **SRM Global Master Fund** case is almost identical to Fortis' case and similar to the cases of BCB, Boyce and the Trustees. So there is proportionality in those cases as well. But I repeat my view that, the social and economic nature of the cases in the three appeals makes it difficult for courts to examine the cases for proportionality without at the same time examining the merits of the social and economic policies of the Government. That will be contrary to the deference required under the doctrine of separation of powers of State.

[706] Generally, I have reservation about applying the principle of proportionality in Belize. It is a principle derived from European Union law, and is not a principle in the common law. However, that has not affected my decisions in the present three appeals. I proceeded on the assumption that the principle of proportionality applies to Belize.

The Belize Constitution (Eighth Amendment) Act.

[707] The grounds of appeal of Fortis against the decision of Legall J. regarding the Eighth Amendment are the same as the grounds of the cross-appeal in appeals Nos. 18 and 19 of 2011. The main complaint is that, although Legall J. decided correctly, in the view of Fortis, that amendments made to the Constitution by the Eighth Amendment Act were void, Legall J. erred in holding that, a part of the amendment in s. 144 is valid. That part is that: **"(1) From the commencement of the Belize Constitution (Eighth Amendment) Act, 2011, the Government shall have and maintain at all times majority ownership and control of a public utility provider."** The submission by counsel for Fortis was that, Legall J. should have declared the entire Eighth Amendment void, and granted consequential relief that would include the return of the properties acquired. The reasons given by counsel were that: an amendment of the Constitution should not be inconsistent with the Constitution; and the doctrine of basic structure prohibits amendments such as were made by the Eighth Amendment.

[708] I have already decided in appeals Nos. 18 and 19 of 2012 that, the Eighth Amendment is a valid Act, as a matter of interpretation of ss. 69(1) and (8) of the Constitution which authorise amendments of any provision of the Constitution. Further, I have decided that, the basic structure prohibition is not part of the laws of Belize. I now apply the full reasons given in the judgment in the first two appeals to this appeal.

[709] About the argument that, an amendment of the Constitution should not be inconsistent with the Constitution, I consider that the cases I cited provide good persuasion against the argument. In addition, I would like to point out in particular that

the statements of the law made by the Privy Council in the passages quoted from **Akar**, and **Moses Hines** do unambiguously mean that, there has never been any question about an Act amending the Constitution introducing inconsistent provisions or even repealing provisions of the Constitution.

[710] In **Akar**, the statement on page 870 in response to the view of the Chief Justice that, it was not open to the Parliament to alter the Constitution in a way that did not amount to an improvement of the existing law, their Lordships stated:

> ***"A view-point (which found favour with the Chief Justice) that, it was not open to the legislature to make any alteration (whatever its form) to the Constitution which did not amount to an improvement of the existing law was not advanced before their Lordships and would not have been accepted."***

That must mean that an amendment which may be inconsistent with the Constitution is permissible provided the requirements in s. 69 of the Constitution are complied with.

[711] Part of the passage in **Moses Hines** on page 333 is this:

> ***"One final general observation: where, as in the instant case, a constitution on the Westminster Model represents the final step in the attainment of full independence by the peoples of a former colony or protectorate, the constitution provides machinery whereby any of its provisions, whether relating to fundamental rights and freedoms or to the structure of government and the allocation to its various organs of legislative, executive or judicial powers may be altered by those peoples through their elected representatives in the Parliament acting by specified majorities, which is generally all that is required, though exceptionally as respects some provisions the***

alteration may be subject also to confirmation by a direct vote of the majority of the people themselves."

The quotation from the judgment of their Lordships of the Privy Council means that, an alteration, that is, an amendment to the Constitution may be made of important provisions such as those about fundamental rights and separation of powers of State; and that, an alteration may be inconsistent with the existing provisions of the Constitution. The statement is a rejection of the basic structure prohibition of amendment.

[712] That the National Assembly has the power to alter any provision of the Constitution does not mean that, all the amendments permissible will be made. But the power is available in the event of need. The **Burmah Oil Company** case is an example. Parliament of the United Kingdom passed the War Damage Act, 1965 (UK) that reversed the judgment of the House of Lords. The Act prohibited payment of compensation awarded by the House of Lords for damage to the oilfields of Burmah Oil Company, deliberately carried out by Her Majesty's Army to prevent the oilfields falling into the hands of enemy forces during the Second World War. That was the end of the matter. Parliament in the UK has unlimited power to legislate. The National Assembly in Belize has the power to legislate, but subject to limitation prescribed by the Constitution. The Constitution is supreme. In my respectful view, where there is no provision in the Constitution limiting the power of the National Assembly, courts have no jurisdiction to take the place of the Constitution and impose a limit that courts consider to be desirable.

[713] The amendments in ss. 2 and 69(9) are as follows:

"2. Section 2 of the Constitution is hereby amended by renumbering that section as subsection (1) thereof and by adding the following as subsection (2):-

"(2) The words "other law" occurring in subsection (1) above do not include a law to alter any of the provisions of this Constitution which is passed by the National Assembly in conformity with section 69 of the Constitution."

3. Section 69 of the Constitution is hereby amended by the addition of the following new subsection after subsection (8):-

(9) for the removal of doubts, it is hereby declared 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."

[714] In my view, the two amendments do not add new meanings to the two sections before the amendments were made by the Eighth Amendment. In any case, the amendments are not prohibited by the Constitution and nothing else can prohibit them.

[715] I repeat that, all the questions of law raised in appeal No. 21 of 2012 have been answered in great detail in the determination of appeals Nos. 18 and 19 of 2012. The answers defeat appeal No. 21 of 2012. The orders that I would make are the following:

1. Appeal No. 21 of 2012 of Fortis is dismissed.

2 The order made on 11 June 2012 by Legall J. is affirmed for the different reasons given in this judgment.

3. Costs in Civil Appeal No. 21 of 2012, the respondents have all their costs here and in the court below under a costs order otherwise in the same terms as that set out at (ii), above, with the exception that such costs be certified fit for one senior Counsel and one junior counsel only.

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AWICH JA