IN THE COURT OF APPEAL OF BELIZE AD 2012

CIVIL APPEAL NOS 7, 9 & 10 OF 2011

PHILLIP ZUNIGA
DEAN BOYCE
KEITH ARNOLD
MICHAEL ASHCROFT
JOSE ALPUCHE
PHILLIP OSBORNE
EDIBERTO TESUCUM — **Appellants**

v

THE ATTORNEY GENERAL OF BELIZE — **Respondent**

AND

BCB HOLDINGS LIMITED
THE BELIZE BANK LIMITED
PHILLIP JOHNSON
KEN ROBINSON
THANET FINANCIAL SERVICES LIMITED
THE LAWN AT WESTGATE LIMITED
JACDAW INVESTMENTS LIMITED
SHAUN BREEZE
DAVID HAMMOND
JOHN LAMBIE
PAUL BIFFEN — **Interested Parties/Appellants**

BEFORE

The Hon Mr Justice Manuel Sosa	**-**	**President**
The Hon Mr Justice Dennis Morrison	**-**	**Justice of Appeal**
The Hon Mr Justice Douglas Mendes	**-**	**Justice of Appeal**

E Fitzgerald QC, E H Courtenay SC and P J Banner for the appellants
D A Barrow SC, L M Young SC and M Perdomo for the respondent
Lord Goldsmith QC and G Smith SC for the interested parties/appellants

20 October 2011 and 3 August 2012

SOSA P

1. I concur in the reasons for judgment given, and orders proposed, in the judgment of Mendes JA, which I have read in draft.

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SOSA P

MORRISON JA

2. I have had the great advantage of reading in draft the utterly convincing judgment prepared by Mendes JA in this matter. I agree with it and have nothing to add.

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MORRISON JA

MENDES JA

3. This appeal concerns the constitutionality of the Supreme Court of Judicature (Amendment) Act 2010 ("the Amendment Act") which amended the Supreme Court of Judicature Act by introducing a new section 106A. The Amendment Act was later itself amended by the Supreme Court of Judicature (Amendment) (No 2) Act 2010. The appellants and the interested parties appeal against Muria J's finding that all but subsections 106A(8), (9) and (12) of the Amendment Act, as amended, did not infringe the Belize Constitution. They also appeal against his order that each party bear its own costs. The respondent cross-appeals against the learned judge's order declaring subsections 106A(8), (9) and (12) to be ultra vires the Belize Constitution and striking them down.

4. The Amendment Act received the Governor General's assent on 31 March 2010 and came into force on 1 April 2010. The appellants launched their constitutional challenge in quick time on 16 April 2010. The interested parties were joined pursuant to an application made on 23 April 2010. Oral submissions began before Muria J on 29 September 2010. On that very day, the Amendment (No. 2) Act, 2010 was passed. It received the Governor General's assent on 22 October 2010 and was gazetted on 25 October 2010. Muria J delivered his judgment on 22 December 2010. Despite the commencement of the Amendment (No. 2) Act during the course of the proceedings, it is accepted that we must consider the constitutionality of the Amendment Act in its amended form.

5. The provisions of the Amendment Act are lengthy but, because the entire Act is under challenge, the quotation of its salient provisions in full is unavoidable. The amendments effected by the Amendment (No. 2) Act are indicated in italics. Section 106A(1) and (2) create the offence of disobedience to a court order and identifies the persons who may lay a complaint.

> "106A.(1) Notwithstanding any other law or rule of practice to the contrary but without prejudice to the power of Court to punish for contempt in accordance with Part 53 of the Supreme Court (Civil Procedure) Rules 2005 by way of committal and seizure of assets, every person, whether in Belize or elsewhere, who *knowingly* disobeys or fails to comply with an injunction, or an order in the nature of an injunction, issued by the Court (whether such injunction was issued before or after the commencement of this Act), shall be guilty of an offence and *shall be tried summarily in the Supreme Court by a judge sitting alone without a jury, on a criminal information and complaint laid under subsection (2)*, and in every such case, any rule of court relating to the unlimited jurisdiction of the Court shall apply.
>
> (2) A complaint for an offence under subsection (1) above may be laid by the Attorney General or the aggrieved party or a police officer not below the rank of Inspector."

Subsections (3) and (3a) establish the mandatory penalties which are to be imposed on persons found guilty of an offence against section 106A(1).

"(3) A person guilty of an offence under subsection (1) above shall be punished on conviction -

(i) in the case of a natural person, with a fine which shall not be less than fifty thousand dollars but which may extend to two hundred and fifty thousand dollars, or with imprisonment for a term which shall not be less than five years, or with both such fine and term of imprisonment, and, in the case of a continuing offence, with an additional fine of one hundred thousand dollars for each day the offence continues;

(ii) in the case of a legal person or other entity (whether corporate or unincorporate), with a fine which shall not be less than one hundred thousand dollars but which may extend to five hundred thousand dollars, and in the case of a continuing offence, with an additional fine of three hundred thousand dollars for each day the offence continues.

Provided that where a natural person who is convicted of an offence under this section shows that the extenuating circumstances (as described in subsection 3a below) exist in his case, a court may, in lieu of imposing the penalties specified above, impose a fine of not less than five thousand dollars and not more than ten thousand dollars, and in default of payment of such fine, a term of imprisonment of not less than one year and not more than two years.

(3a) For the purpose of the Proviso to paragraph (i) of subsection (3) above, the expression "extenuating circumstances: means where –

(a) the convicted person has previously been a law abiding person and has no criminal record; and

(b) the offence was committed through sheer ignorance of the consequences of his conduct; and

(c) the imposition of full penalties prescribed in subsection (3) above would cause grave hardship to him and his family."

Subsection (4) provides for the circumstances under which a person may be found guilty of abetting the offence of disobeying a court order.

"(4) Every person, whether in Belize or elsewhere, who –

(a) directly or indirectly, instigates, commands, counsels, procures, solicits, advises or in any manner whatsoever aids, facilitates, or encourages the commission of an offence under subsection (1) above; or

(b) knowing that an injunction has been issued by the Court, does any act the effect of which would be to disregard such injunction, whether such injunction was issued before or after the commencement of this Act,

shall be guilty of abetting the said offence and shall be punished in like manner as if he had committed that offence, and the penalties prescribed in subsection (3) above shall accordingly apply."

Subsection (5) makes a person acting in an official capacity on behalf of a corporate or an unincorporated body prima facie guilty of an offence committed by that body.

"(5) Where an offence under this section is committed by a body of persons, whether corporate or unincorporated, every person who, at the time of the commission of the offence, acted in an official capacity for or on behalf of such body of persons, whether as shareholder, partner, director, manager, advisor, secretary or other similar officer, or was purporting to act in any such capacity, shall be guilty of that offence and punished accordingly, unless he adduces evidence to show that the offence was committed without his knowledge, consent or connivance."

Subsection (6) gives the offence extraterritorial effect while subsection (7) extends the coverage of the offence to orders made before the Amendment Act came into force.

"(6) Notwithstanding anything to the contrary contained in any other law, the offences created by this section shall be investigated, tried, judged and punished by the Court regardless of whether the offences occurred in Belize or in any other territorial jurisdiction, or whether or not the offender was present in Belize or elsewhere, but without prejudice to extradition, where applicable, in accordance with the law.

(7) For the avoidance of doubt, it is hereby declared that this section shall have effect regardless of whether the injunction

> referred to in this section was issued before or after the commencement of this Act."

Subsection (8) vests in the Supreme Court the power to issue "anti-arbitration" injunctions and to nullify arbitral awards made in breach of any such injunction. One of the questions in this appeal is whether the power so bestowed merely confirms or alternatively extends the Court's common law powers.

> "(8) Without prejudice to the generality of the foregoing provisions, the Court shall have jurisdiction -
>
> (i) to issue an injunction against a party or arbitrators (or both) restraining them from commencing or continuing any arbitral proceedings (whether sited in Belize or abroad), or an injunction against a party restraining it from commencing or continuing any proceedings for enforcement of an arbitral award (whether in Belize or abroad), where it is shown (in either case) that such proceedings are or would be oppressive, vexatious, inequitable or would constitute an abuse of the legal or arbitral process;
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> (ii) to void and vacate an award made by an arbitral tribunal (whether in Belize or abroad), in disregard of or contrary to any such injunction."

Subsections (9), (10), (11) and (12) prescribe the modes of service of an injunction issued by the court and of any charge laid for breach of section 106A(1) and empowers the court to proceed with a criminal charge in the absence of the accused.

> "(9) In addition to the modes of service prescribed in the Supreme Court (Civil Procedure) Rules 2005, notice of an injunction issued by the Court, or of an application for such injunction, or of any order associated therewith (whether such injunction order was issued before or after the commencement of this Act), may be served by registered post, fax, courier service or a notice in the Belize Gazette (as may be appropriate in the circumstances of each case), regardless of whether the person against whom the injunction or order was issued, or against whom the application for such injunction or order was made, be present or resident within or outside Belize, and for this purpose, no leave of the Court for serving the injunction, notice or order, as the case may be, outside

Belize shall be required notwithstanding anything to the contrary contained in any other law or rule of practice.

(10) Where an offence created by this section was committed outside Belize, the information and complaint for such offence shall be laid in the Central District of the Supreme Court.

(11) A person charged with an offence under this section may be tried in his absence if the Court is satisfied that such person was given at least 21 days' notice of the charge and the date, time and place of the trial and that he had a reasonable opportunity of appearing before the Court but had failed to do so.

(12) The notice referred to in subsection (11) above may be served personally, or by registered post, or by a notice in the Belize Gazette, as may be appropriate in the circumstances of each case."

Subsection (13) ensures that a person prosecuted under Part 53 of the Supreme Court (Civil Procedure) Rules is not subject to double jeopardy and subsection (14) identifies the 'person' to whom the section applies.

"(13) No person shall be liable to be prosecuted for an offence under this section if he has already been punished for the same offence under Part 53 of the Supreme Court (Civil Procedure) Rules, 2005, or vice versa.

(14) In this Act, the word "person" shall have the meaning ascribed to it in section 3 of the Interpretation Act."

Lastly, subsection (15) empowers the Attorney General to make rules to give effect to section 106A and subsection (16) establishes the rules which are to apply until he exercises that power. These are contained in Appendix 1, relevant extracts of which are set out.

"(15) Subject to the foregoing provisions of this section, the Attorney General may, if he considers necessary, make rules for giving better effect to the provisions of this section, and all such rules shall be subject to negative resolution."

(16) Subject to the provisions of this section and any rules made by the Attorney General under subsection (15), the rules contained in Appendix I hereto shall apply to a trial on criminal information and complaint laid under this section.

APPENDIX 1

……

10.(1) Every criminal information and complaint shall be filed in the Supreme Court Registry at least twenty-one (21) days before the date of trial of the accused person charged in such criminal information and complaint.

(2) The Registrar shall, at least fourteen (14) days before the day of trial, deliver or cause to be delivered to the accused person, or if the accused person is in custody, to the keeper of the prison, a certified copy of the criminal information and complaint.

(3) For the purpose of subrule (2) above –

(a) the delivery to the keeper of the prison of the certified copy may be made by transmitting it in a registered letter by post properly addressed to him;

(b) if the accused person be out of Belize, the copy may be served by registered post, fax, courier service or a notice in the Belize Gazette (as may be appropriate in the circumstances of each case);

(c) the receipt purporting to be given by an officer of the Post Office for the registered letter, or an employee of the courier service for the package sent by courier, shall be deemed prima facie evidence of the posting or delivery on the day stated therein;

(d) a certificate signed by the Registrar, that a certified copy of a criminal information and complaint was duly sent in the manner aforesaid shall be deemed prima facie evidence that the copy reached the accused persons charged in the criminal information and complaint……"

The Grounds on which section 106A is challenged

6. The following are the main contentions, practically all of which are shared by the appellants and the interested parties:

i) The entire section violates the separation of powers doctrine and was passed for an improper purpose in that it is *ad hominem* legislation directed at

the appellants, the interested parties and a company called Dunkeld International Investment Limited ("Dunkeld") with which the appellants were at one time associated;

ii) To the extent that section 106A(3) imposes a mandatory sentence, it violates the separation of powers doctrine as it constitutes an unlawful usurpation of judicial power by the legislature;

iii) Section 106A(2) violates the separation of powers doctrine in that it vests in the Attorney General the power to determine the punishment which is to be imposed on a person convicted of an offence under section 106A(1), a power quintessentially reserved for the judiciary;

iv) Section 106A(3) violates the right guaranteed by section 7 of the Belize Constitution not to be subjected to inhuman or degrading punishment or other treatment in that the mandatory punishment provided for is grossly disproportionate;

v) Section 106A(5) violates the right to be presumed innocent until proved guilty guaranteed by section 6(3)(a) of the Constitution in that it requires an accused to disprove the mental element of the offence of knowingly disobeying or failing to comply with an injunction or like order;

vi) Section 106A(8) violates the right to property guaranteed by sections 3(d) and 17(1) of the Constitution in that it deprives a party to an arbitration contract of his right to pursue arbitration or to enforce an arbitration award. In respect of a right to arbitrate deriving from an international treaty, it is contended further that section 106A(8) violates the right to the protection of the law;

vii) Section 106A(9) violates the right to a fair hearing and access to court in that it makes inadequate provision for service of coercive orders and other related processes;

viii) Section 106A(11) and (12) violate section 6(2) in that it permits a criminal trial to proceed in the absence of an accused without making provision for adequate notice to be given.

7. The written and oral submissions put before us have been wide-ranging and voluminous. In these circumstances, it is perhaps inevitable that, and I therefore hope that I am forgiven if, not all of the points so vigorously advocated are dealt with. As will appear, however, it has proved unnecessary to address all of them. I would note as well that there was substantial overlap between the submissions put forward by Mr. Fitzgerald QC on behalf of the appellants and by Lord Goldsmith QC for the interested parties, and I hope I will also be forgiven if I fail to give credit to the appropriate persons for any unique submission which was advocated. Joint submissions were put forward by Mr. Barrow SC and Ms. Young SC on behalf of the Attorney General and I have had similar difficulty assigning credit. I hope it will suffice to say that I am grateful for the very helpful and illuminating submissions made by all concerned.

8. With that said, I will now proceed to examine the factual background leading to the enactment of section 106A.

The Background Facts

9. On 19 September 2005, the Government of Belize entered into an agreement with Belize Telemedia Limited (BTL) that it would take all necessary steps to ensure that BTL was able to charge its subscribers and customers rates and charges which would enable it to achieve a minimum rate of return of 15% per annum. The Government further agreed that, if in any given year BTL's annual rate of return was less than 15%, the Government would compensate BTL for any shortfall. The Government agreed as well that by 1 April 2008, the business tax levied on BTL would not exceed the amount of income tax that would be paid by BTL if it was assessed at the rate of 25%. The agreement is referred to hereafter as the Accommodation Agreement.

10. A general election was held on 8 February, 2008 and the opposition United Democratic Party was voted into power. The Honourable Dean Barrow

was appointed Prime Minister and Minister of Finance. It appears that not long thereafter, the Barrow Government was confronted with the Accommodation Agreement and asked to comply with its terms. Despite there being no dispute as to the agreement's authenticity, a decision was taken by Cabinet to flatly dishonour it. On 11 April 2008, the Prime Minister declared publicly his government's intention. He said:

> "What's happening with BTL is that we were confronted immediately with a position taken by the local management of BTL that there was this secret agreement that had been signed by the last government that committed us to all sorts of extraordinary, in my view, concessions to be given to BTL. I indicated that I don't care, I am not going to abide by any such agreement."

11. The Accommodation Agreement contained an arbitration clause which permitted either party to refer any dispute which could not be resolved amicably to the London Court of International Arbitration ("LCIA") for final resolution. In May 2008, BTL exercised its rights to refer to arbitration what it claimed were the Government's repeated breaches of the agreement and on 18 March 2009 the arbitration tribunal ordered the Government to pay damages in the total amount of BZ$38.5 million. BTL subsequently assigned the award to a company called the Belize Social Development Limited (BSDL), a company incorporated in the British Virgin Islands. In response, the Government commenced proceedings before the Belize Supreme Court and on 7 April 2009 persuaded Awich J to issue an order, ex parte, restraining BTL and BSDL from taking any steps to enforce the arbitration award, whether in Belize or in any other jurisdiction, and from commencing or continuing any other legal or arbitral proceedings in any country or jurisdiction relating to or arising out of the award. On 20 July 2009, Awich J continued the injunction until trial. Nevertheless, BSDL commenced proceedings before the United States District Court of Columbia to enforce the award.

12. BTL also applied to Awich J for recognition of the arbitration award, but before its application could be heard, the Belize Telecommunications

(Amendment) Act 2009 ("the Acquisition Act") was passed on 25 August 2009 empowering the Minister of Public Utilities to compulsorily acquire and take possession of any property he might consider necessary for the assumption of control over telecommunications in Belize. In the exercise of this power, the Minister, by Order made on the same day, acquired, inter alia, approximately 94% of the shareholding of BTL, which comprised, inter alia, the shareholding of Dunkeld. Dunkeld is a company based in the British Virgin Islands and is wholly owned by a charitable trust named Hayward Charitable Belize Trust ("the Hayward Trust").

13. While piloting the Bill, the Prime Minister made no secret of the fact that it was the Accommodation Agreement and the arbitration award obtained by BTL which provoked the move to take control of BTL. After referring to the guarantee of a 15% annual rate of return to BTL which the Government of Belize undertook to ensure; to the fact that in 2007 BTL paid "no business tax, no custom duties, no imprest of any kind"; to his Government's publicly stated resolve not to honour the Accommodation Agreement; to the arbitration award of BZ$38.5 million; to the arbitrator's order that the Government now begin to fulfill its obligations under the Accommodation Agreement; and finally to BTL's threat to make further claims before the LCIA which could result in an award which "could pale the current award of 38.5 million into insignificance", the Honourable Prime Minister declared:

> "Mr. Speaker, Members, fellow Belizeans: this is intolerable. I, and the United Democratic Party Government, in the name of the people will put up with it no longer. That an agreement so patently illegal, so patently immoral, so patently anti-Belize, should continue to torture us, to bleed us, to subject us to death by a thousand cuts cannot for one second more be countenanced. This is our House, this is our country. Here we are masters, here we are sovereign. And with the full weight of that sovereignty we must now put an end to this disrespect, to this chance taking, to this new age of slavery. There will thus be no more Telemedia awards against us; no more Telemedia court battles; no more debilitating waste of government's energies and resources; there will be no more suffering of this one

> man's campaign to subjugate an entire nation to his will. After long and sufficient consideration, therefore, and in the exercise of that national power that is ours by Constitution and inalienable right, this government will now acquire Telemedia."

The Prime Minister's assumption was that Michael Ashcroft, the fourth named appellant in these proceedings, had managed to leverage control of 94% of the shareholding in BTL. It was Lord Ashcroft who the Prime Minister had in mind as the person who was subjugating Belize to his will.

14. On 21 October 2009, British Caribbean Bank Limited ("BCBL"), a wholly owned subsidiary of BCB Holdings Limited, the first interested party on this appeal, commenced proceedings in the Belize Supreme Court challenging the constitutionality of the Acquisition Act. Mr. Dean Boyce, the second appellant, followed suit with a constitutional challenge of his own which he filed on 8 December 2009. For its part, Dunkeld chose to exercise its right to invoke the arbitration clause in a treaty called the "Agreement for the Promotion and Protection of Investment" entered into on 30 April 1982 between the Government of the United Kingdom and the Government of Belize. The treaty was declared to be made pursuant to the desire "to create favourable conditions for greater investment by nationals and companies of one State in the territory of the other State" and in recognition that "the encouragement and reciprocal protection under international agreement of such investments will be conducive to the stimulation of individual business initiative and will increase prosperity in both States." To that end, Article 5 prohibited the nationalisation or expropriation of investments except for a public purpose related to the internal needs of the party acquiring the investment and against just and equitable compensation. Dunkeld commenced arbitration proceedings by notice dated 4 December 2009 alleging, inter alia, that, in breach of Article 5 of the treaty, its shareholding in BTL had not been expropriated for a public purpose related to the needs of Belize and it was not entitled to fair and equitable compensation under the Acquisition Act. Around this time as well, BCBL notified the Government of Belize of its claims under the

treaty for the expropriation of its assets and of its intention to commence arbitration proceedings if its claims remained unsatisfied.

15. The Government's response was swift. First, the Prime Minister took his case to the airwaves. In an interview given on 9 December 2009, he is reported to have said in relation to Dunkeld's notice of arbitration:

> "That's all under the Belize UK Investment Treaty. That's the last, that's their last stand in so far as the litigation front are (sic) concerned. I don't want for people to get discouraged or to get excited where they put out press releases saying they are going to arbitration under the bilateral investment treaty. That is their right, there is a treaty.
>
> It will cost us because we are going to be represented but in terms of the result of those efforts, I am not worried. The investment protection treaty makes clear that people are entitled to remedies. Investors who have their properties taken away, if that property is taken away in consequence of an expropriation as opposed to a nationalization that is done for a public purpose and that provides for the payment of compensation. We made sure that we nationalized in the public interest and we made sure we provided for the payment for compensation.
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> I don't think they have a prayer but Ashcroft obviously has all the money in the world, he knows that there is a financial cost to us when he starts this litigation process under the treaty, we will simply have to confront it and deal with it. The point I want to make is this: nothing will stop this government from vindicating the move that it made in consequence of that nationalization.
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> I just ask the people of this country to continue to support the process and to support the government in every action that this government will take to resist and to finally see off this fellow. He must realize I don't care how much money he has, I don't care how powerful he thinks he is, he cannot and will not defeat the sovereign united nation, a sovereign united people. That is my message to him."

16. Then on 11 December 2009, the following report appeared in the Belize News online:

> "I really feel that this is frivolous," said Prime Minister Barrow, reacting to the arbitration request filed by Dunkeld, and adding that "…this is another of his tactics in terms of the war of nerves, the war of attrition and I am here to tell him [Ashcroft], there is no way that is a war that he [Ashcroft] can win."
>
> Barrow said that he has absolutely no doubt that Government can defend its position, and will use Ashcroft's status as a Belizean citizen to argue that he is not entitled to protection under the treaty he is using to invoke arbitration; but after that he could move to revoke it.
>
> "We take the view that under that bilateral investment treaty, he is not entitled to claim protection, because he also is a Belizean national. And that is a tactical weapon we don't want to give up. Once that litigation is sorted out, if I am still around, I am telling him publicly all bets are then off," said Barrow."

17. Next, the Government commenced proceedings on 23 December 2009 against Dunkeld and all of the appellants on this appeal. The Government claimed, inter alia, a declaration that the commencement of the arbitration by Dunkeld was oppressive, unconscionable and an abuse of the arbitral process and an order restraining the defendants from taking any or any further steps in the continuation or prosecution of the arbitration. At the time, the appellants were all advisors to the Hayward Trust of which Dunkeld was a wholly owned subsidiary. The advice they claimed they gave was with respect to the distribution of grants to non-profit organizations in Belize and the Caribbean region that seek to "strengthen their educational, spiritual and cultural base in creative and sustainable ways." The Government contended, however, that they were trustees of the Hayward Trust and relied on the fact that they were named on the Hayward Trust website as trustees and advisors. On 29 December 2009, Awich J issued an ex parte interim injunction, returnable on 26 January 2010, in terms of the final order sought in the Claim. After an inter partes hearing on 5 February 2010, Awich J set aside his order on the ground that he ought not to have entertained an ex parte application, but nevertheless reissued the order until the determination of the Claim, or further order. Although the appellants

presented evidence that they had no control over Dunkeld or the arbitral process, Awich J found that "there is plausible evidence at this stage … that the (appellants) are trustees and advisors to Hayward Charitable Belize Trust, and that they exercise control over it and over its subsidiary, Dunkeld International Investment Limited." Up to this point, Dunkeld had not appeared to oppose the injunction and Awich J accordingly permitted it liberty to apply to set aside the order. The appellants appealed Awich J's order to this court.

18. With effect from 29 March 2010 the appellants resigned as advisors to the Hayward Trust. They took this step, they say, having regard to the injunction granted by Awich J and to the criminal sanctions for contempt of court imposed by the Amendment Act, which had at that time been passed but had not yet been assented to. They felt that they were at risk of being caught by the Act even though they maintained they had no control over the actions of Dunkeld, and would not have resigned and would seek to be re-appointed as advisers to the Hayward Trust, but for the Amendment Act. They all maintained that they were not in a position to influence the course of the arbitral proceedings initiated by Dunkeld. Nevertheless, they feared that as long as the injunction granted by Awich J remained in place, they may be charged with contempt of court in relation to something beyond their control.

19. In an immediate response to the injunction, the Prime Minister is reported in the media to have said:

> "Our lawyer succeeded in getting an injunction in court last week to stop the effort at international arbitration under the Belize-UK Treaty that Dunkeld and Hayward Trust and these people had attempted to mount. One of the things the judge said was that he found it remarkable that the UK Government seems to have no interest in suggesting that we breached that treaty. In any case, one of the trustees whom the injunction binds is Michael Ashcroft himself. So once that order has been prepared they continue with those proceedings, there are punitive sanctions that will be applied by the courts here."

20. It does not appear to be disputed that Dunkeld ignored Awich J's order and proceeded with its arbitration and enforcement action in another jurisdiction, even though there is no detailed evidence of exactly what Dunkeld did or when and where. As noted, the Amendment Act received the Governor General's assent on 31 March 2010 and came into force on 1 April 2010. It seems fairly clear that Dunkeld's defiance was a precipitating factor in the promotion and passage of the Act. On 26 May 2010, the Prime Minister is reported to have said:

> "We got an injunction here that said the people mounting the challenge abroad should not proceed. They completely ignored the court injunction, put out all sorts of statements that I think were rude and disrespectful of the court system here. ***That is why we amended the Supreme Court of Judicature Act to say if you will ignore injunctions from this court, already you can be, in fact, as it were, charged for contempt of court but we increased the penalties because we are letting these people know, don't treat us in that kind of contemptuous fashion, this is sovereign country***. ***We may be small but we are sovereign and we are not going to let you get away with that.*** If you can go to court as they are doing now and you can get that injunction lifted by the court of appeal, then all well and good but unless and until that happens, respect the fact we had to go and argue with you on the other side in front of a Justice of the Supreme Court here to make our case and that Justice found that indeed the injunction should be issued on the basis that you are trying to do, under the Investment Treaty, what you are already doing in Belize and cost the government all sorts of moneys to run absolutely the same operation under this arbitration proceeding in the UK. You hold on until the matter is cleared up here. Thereafter if you are not satisfied, you have all sorts of options …
>
> They will fight but ultimately we can maintain our position, you will not be able to get anything as a consequence of the arbitration proceedings you are trying abroad. We have said, in terms of the amendment to the law, if you get an arbitration award abroad in violation of a court injunction in this country, that award will be treated as invalid." (Emphasis added)

21. It should be noted that on 14 June 2010 the Court of Appeal discharged the injunction against the appellants on the ground that there was no evidence that they exercised any control over Dunkeld in so far as the commencement of

the arbitration was concerned. Accordingly, the appellants successfully applied to the Supreme Court to have the Claim struck out against them. They took this step, they say, because they wished to remove the risk that that they might be charged under the Amendment Act if Dunkeld continued the arbitration proceedings in breach of the court order.

22. Despite the above, the truth of which was not disputed by the respondent, an attempt was made to suggest other motives for the passage of the Act. Thus, the Solicitor General deposed that the Amendment Act was passed against the backdrop of what he termed the "widespread and contemptuous disregard of injunctions issued by the Supreme Court of Belize, both at home and abroad." However, he cited only four instances of what he considered disregard. The first was in relation to an injunction issued by the Chief Justice in September 2006 in Claims Nos. 179 and 190 of 2005 restraining the holding of the annual general meeting of BTL. He stated that the board of directors of BTL ignored the injunction and proceeded with the meeting, notwithstanding that the injunction was shown to the chairman while the meeting was yet in progress. The Solicitor General was not himself at the meeting and accordingly deposed only to what he was informed, and he did not identify the source of his information. As it happened, the first appellant, Mr. Phillip Zuniga, was at the time a member of BTL's board. Mr. Keith Arnold, the third appellant, was then the chairman. Mr. Zuniga deposed that the injunction was brought to the chairman's attention by Ms. Lois Young at a point in time when the meeting "had essentially been completed." The meeting was then brought to an end. No complaint was made of a breach of the court order. Mr. Zuniga was not cross-examined and his evidence was not contradicted by any first-hand testimony. In the circumstances, it seems to me that this could hardly be relied upon as an example of general disregard of orders of the court.

23. The second example cited by the Solicitor General is Claim No. 880 of 2008 between the Attorney General and NEWCO Ltd in which the Supreme

Court on 12 February 2009 ordered NEWCO to refrain from continuing a complaint filed in the United States District Court for the District of Columbia to enforce an arbitral award which NEWCO obtained against the Government of Belize. The Solicitor General deposed that NEWCO nevertheless continued its complaint in the US District Court. This is not disputed by the appellants or the interested parties.

24. The third example is the injunction restraining the BTL and BSDL from commencing or continuing proceedings to enforce the award made by the LCIA and which BSDL proceeded to ignore. This again is not disputed, but as the appellants point out, contempt proceedings were not taken in either of these two cases.

25. The last example relied on by the Solicitor General is the injunction issued against the appellants and Dunkeld which Dunkeld has ignored. Again, no contempt proceedings have been commenced.

26. As against the Solicitor General claim's of an all pervasive flouting of court orders, Mr. Zungia, who is a member of the inner bar of Belize, deposed that he personally was not aware of any widespread disregard of injunctions and indeed in his experience people obey injunctions and counsel in Belize regularly advise their clients to do so. Neither has there been any public outcry about the failure to comply with injunctions. Mr. Phillip Johnson, the third interested party, deposed that he too was not aware of any public outcry and that there were no prior Government reports or parliamentary debates or consultation with the bench or the bar on the question of a growing contempt of court orders.

27. It is of course indisputable that there were these three instances of companies continuing or commencing arbitration or enforcement proceedings abroad in apparent violation of orders made by the Supreme Court of Belize. While this by itself is cause for concern, this is not evidence of a rampant violation of injunctions. Three drops of rain does not a deluge make. But it is

equally indisputable that the Prime Minister stated categorically that it was the breach of the injunction issued against the appellants and Dunkeld which led to the increase in the penalties for contempt of court introduced by the Amendment Act. It is also not insignificant that the other examples cited by the Solicitor General involved breaches of orders restraining either the continuation of arbitration proceedings or the enforcement of arbitration awards. The appellants and the interested parties say this is evidence of impermissible *ad hominem* legislation passed for an improper purpose. I will get to this submission momentarily, but I will first address a preliminary point raised by the respondent on the appeal and the interested parties' appeal against Muria J's finding that they lacked *locus standi* to complain of breaches of the fundamental rights provisions of the constitution.

Standing

28. In the court below, the respondent submitted that neither the appellants nor the interested parties had the necessary *locus standi* to complain that the Amendment Act violated the constitution. Muria J. held that the interested parties did not have standing to complain of breaches of the fundamental human rights provisions of the Constitution, in respect of which access to the Supreme Court of Belize is provided by section 20. He held, however, that the appellant did have such standing. He held further that both the appellant and the interested parties had standing "to challenge the constitutionality of the Amendment Act under the second limb of legal standing under the Constitution," that is to say that they had sufficient interest to challenge the validity of the Amendment Act. I must say that I have had difficulty understanding the distinction which Muria J intended to make. Is it that he was saying that even though the interested parties could not complain of breaches of fundamental rights personal to them they could nevertheless challenge the constitutionality of the Act on the ground that fundamental rights *in rem* are breached? Or was he saying that they had sufficient interest to challenge the constitutional validity of the Act on grounds

that did not involve breaches of fundamental rights provisions, such as for example that the separation of powers doctrine has been violated? Be that as it may, on the basis of this finding, the trial judge proceeded to consider challenges to the Amendment Act on the ground that both the fundamental rights and non-fundamental rights provisions had been infringed.

The Respondent's Preliminary Point

29. Mr Barrow submitted, *in limine*, that before a challenge to the constitutionality of legislation can be allowed to proceed, the challenger must make a sustainable allegation of actual or likely contravention of a constitutional right and allege that the contravention affects him or her personally. Thus, in this particular case, the appellants and the interested parties must establish the existence of an agreement which contains an arbitration clause, a dispute arising out of that agreement, resort to or a likelihood of arbitration, an application to the court for an injunction to restrain the arbitration, the grant of an injunction and a challenge to the grant of the injunction on constitutional grounds. The respondent contends that the appellants and the interested parties failed to establish these threshold factors and accordingly the appeal ought to be dismissed outright.

30. The problem with the respondent's preliminary point is that it is really indistinguishable from the objection made before Muria J. on the standing of the appellants and the interested parties. Muria J. held that the appellants did, but the interested parties did not, have standing to complain that the Amendment Act violated the fundamental rights provisions of the Constitution and that both the appellants and the interested parties had a "sufficient interest" to challenge the constitutionality of the Amendment Act. The interested parties have appealed against Muria J's finding that they could not invoke the fundamental rights provision of the constitution. But the respondent did not appeal the contrary order and did not at any time seek leave to appeal out of time. Instead, Mr

Barrow contends that, despite appearances to the contrary, the preliminary objection was not to the standing of the appellants and the interested parties but to their failure to establish a cause of action, which could only be established by satisfying the court that the alleged contravention affected their interests directly, or were likely to do so. For this proposition, Mr Barrow relied on the following passage from the judgment of Byron C.J. (Ag.) (as he then was) in ***Baldwin Spencer v Attorney General of Antigua and Barbuda*** (CA 20A of 1997, 8 April 2008, p. 26):

> "… before any question of locus standi can arise, there must be a sustainable allegation that a provision of the constitution has been or is being contravened, and that the alleged contravention affects the interests of the applicant. On my reading of section 119(5) it says exactly the same thing. The limitation contained therein effectively makes locus standi a question of statutory interpretation. In my view it is essential that the two requirements of the alleged contravention of the constitution and a resultant effect on the interests of the applicant must both exist."

This was a case in which the trial judge (Saunders J, as he then was) held that the statement of claim did not disclose any cause of action under the Constitution, but he went on to find nevertheless that the appellant had locus standi to bring the action. The claim was brought pursuant to section 119(1) of the Antiguan Constitution which provides that

> "… any person who alleges that any provision of this Constitution (other than a provision of Chapter II) has been or is being contravened may, if he has a relevant interest, apply to the High Court for a declaration and for relief under this section."

Byron CJ. was keen to make the point that having decided that there was no sustainable allegation of a breach of the Constitution, there was no need to consider whether the applicant had locus standi to make the claim. Thus he said (at p. 23):

> "In my opinion however, there is a short point which is decisive and it derives from the finding that the appellant did not have any cause of action under the Constitution, in effect, there was no sustainable allegation that there was any contravention of the Constitution which affected his interests.
>
> The learned trial Judge did refer to this principle during his judgment:
>
> > "In my view a litigant invoking the provisions of section 119 should show on the face of the pleadings the nature of the alleged violation or contravention that is being asserted. The allegations grounding this violation must be serious. The trial judge must then assess whether in light of the allegations made and the degree to which they affect the litigant, whether personally or as a mere member of the general public, locus standi should be accorded."
>
> Had he applied this principle his finding that the pleadings did not contain allegations grounding any contravention of the Constitution would have been decisive. But seemingly, he got carried away into considering whether the appellant's interests would have been affected if there were viable allegations.
>
> The approach which our courts have adopted has recognised the principle that in these public law cases, the court first determines the nature of the alleged violation of the Constitution, and only a sustainable allegation of there is such a violation (sic) does it consider whether the applicant has a relevant interest."

31. I do not understand Byron CJ to be saying, as Mr Barrow suggests, that there is difference between the proposition that an applicant must establish a cause of action in the sense of an allegation of a breach of the constitution which affects his interests, and the proposition that an applicant must also establish that he has standing to challenge the constitutionality of an Act of Parliament. To the contrary, he has specifically stated that a finding that an applicant has failed to allege a sustainable breach of the constitution makes the question of locus standi otiose. As such, the respondent's attempt to raise as a preliminary point the failure of the appellants and the interested parties to establish a breach of the Constitution affecting their interests, it seems to me, is nothing short of an

attempt to circumvent the failure to appeal the trial judge's finding on standing. I would therefore reject the preliminary point.

The Interested Parties' Appeal on Standing

32. As noted, Muria J. held that the interested parties did not have standing to challenge the Act on the ground that their fundamental rights had been infringed. Given that we are bound to hear the appellant's appeal and the respondent's cross-appeal, and given as well that the interested parties appear to have been held by the trial judge to have standing at least in relation to non-fundamental rights issues, and given finally that there is substantial overlap between the arguments put forward by the appellants and the interested parties, it does appear to me to be pointless to determine whether the trial judge was right to deny the interested parties standing on the fundamental rights challenges raised in the proceedings. I therefore decline to do so.

Separation of Powers – Mandatory Penalties

33. I find it convenient to consider first the challenge to the constitutionality of the mandatory penalties provided for by section 106A on the ground that it violates the separation of powers doctrine.

34. Mr Fitzgerald and Lord Goldsmith contend that section 106A(3) improperly requires the judiciary to impose a disproportionate and severe minimum penalty on any person found guilty of an offence under section 106A(1) or section 106A(4) and accordingly ousts the jurisdiction of the court to determine the appropriate sentence in its discretion. The legislature, they contend, cannot legislate in such a way as to limit or remove the inherent power of the court to determine the appropriate sentence. The power of determining the level and severity of the sentence which should be imposed, they say, is an inherent judicial function and cannot be taken away by legislation. The question is not so

much whether the legislature is performing a sentencing function, but whether the legislature is selecting the punishment, or the severity of punishment, to be inflicted upon an individual within a class of offenders. If that is the case, they conclude, the separation of powers doctrine will be violated.

35. The first obstacle in the way of this argument is the dicta of Lord Diplock in ***Hinds v R*** [1997] AC 195 (at pp. 225-226):

> "In the field of punishment for criminal offences, the application of the basis principle of separation of legislative, executive and judicial powers that is implicit in a constitution on the Westminster model makes it necessary to consider how the power to determine the length and character of a sentence which imposes restrictions on the personal liberty of the offender is distributed under these three heads of power. The power conferred upon the Parliament to make laws for the peace, order and good government of Jamaica enables it not only to define what conduct shall constitute a criminal offence but also to prescribe the punishment to be inflicted on those persons who have been found guilty of that conduct by an independent and impartial court established by law ..... In the exercise of its legislative power, Parliament may, if it thinks fit, prescribe a fixed punishment to be inflicted upon all offenders found guilty of the defined offence - as, for example, capital punishment for the crime of murder. Or it may prescribe a range of punishments up to a maximum in severity, either with or, as is more common, without a minimum, leaving it to the court by which the individual is tried to determine what punishment falling within the range prescribed by Parliament is appropriate in the particular circumstances of his case.
>
> Thus Parliament, in the exercise of its legislative power, may make a law imposing limits upon the discretion of the judges who preside over the courts by whom offences against that law are tried to inflict on an individual offender a custodial sentence the length of which reflects the judge's own assessment of the gravity of the offender's conduct in the particular circumstance of his case. What Parliament cannot do, consistently with the separation of powers, is to transfer from the judiciary to any executive body whose members are not appointed under Chapter VII of the Constitution, a discretion to determine the severity of the punishment to be inflicted upon an individual member of a class of offenders ... In this connection their Lordships would not seek to improve on what was said by the Supreme Court of Ireland in *Deaton v. Attorney-General and the*

Revenue Commissioners [1963] I.R. 170, 182-183, a case which concerned a law in which the choice of alternative penalties was left to the executive.

> "There is a clear distinction between the prescription of a fixed penalty and the selection of a penalty for a particular case. The prescription of a fixed penalty is the statement of a general rule, which is one of the characteristics of legislation; this is wholly different from the selection of a penalty to be imposed in a particular case... The legislature does not prescribe the penalty to be imposed in an individual citizen's case; it states the general rule, and the application of that rule is for the courts ... the selection of punishment is an integral part of the administration of justice and, as such, cannot be committed to the hands of the executive..."

This was said in relation to the Constitution of the Irish Republic, which is also based upon the separation of powers. In their Lordships' view it applies with even greater force to constitutions on the Westminster model. They would only add that under such constitutions the legislature not only does not, but it *can* not, prescribe the penalty to be imposed in an individual citizen's case: *Liyanage v. The Queen* [1967] 1 A.C. 259.

36. Mr Fitzgerald submits, however, that there have been developments since then which presumably justify a departure from Lord Diplock's dicta. Firstly, in ***Reyes v R*** [2002] AC 235, the mandatory death penalty was declared to be unconstitutional in Belize precisely because it does not allow for individual sentencing, and in so holding the Privy Council accepted that "the need for proportionality and individualized sentencing is not confined to capital cases" (para 37). However, in ***Reyes***, the mandatory death penalty was struck down, not on the ground that it infringed the separation of powers doctrine, but on the ground that the absence of individualized sentencing made the punishment a cruel and unusual one.

37. The appellants also rely upon this passage from the judgment of Ackermann J in ***S v Dodo*** (2001) 5 BCLR 423 (at para 26):

> “The legislature's powers are decidedly not unlimited. Legislation is by its nature general. It cannot provide for each individually determined case. Accordingly such power ought not, on general constitutional principles, wholly to exclude the important function and power of a court to apply and adapt a general principle to the individual case. This power must be appropriately balanced with that of the judiciary. What an appropriate balance ought to be is incapable of comprehensive abstract formulation, but must be decided as specific challenges arise. In the field of sentencing, however, it can be stated as a matter of principle, that the legislature ought not to oblige the judiciary to impose a punishment which is wholly lacking in proportionality to the crime. This would be inimical to the rule of law and the constitutional State. It would *a fortiori* be so if the legislature obliged the judiciary to pass a sentence which was inconsistent with the Constitution and in particular with the Bill of Rights. The clearest example of this would be a statutory provision that obliged a court to impose a sentence which was inconsistent with an accused's right not to be sentenced to a punishment which was cruel, inhuman or degrading as envisaged by section 12(1)(e) of the Constitution, or to a fair trial under section 35(3).”

38. No doubt the statement that the legislature ought not “wholly to exclude the important function and power of a court to apply and adapt a general principle to the individual case”, does lend the appellants some support. However, it does appear that in ***Dodo*** the South African Constitutional Court expressly rejected the notion that the legislative prescription of a severe mandatory sentence infringed the separation of powers, far less for what might be considered to be a mild sentence.

39. ***Dodo*** concerned the constitutional validity of a provision which obliged the High Court to sentence an accused to imprisonment for life, unless the court was satisfied that "substantial and compelling circumstances" existed which justified the imposition of a lesser sentence. The Eastern Cape High Court declared the section to be constitutionally invalid because, inter alia, it was inconsistent with the separation of powers. Observing that "[s]entencing is pre-eminently the prerogative of the courts", Smuts JA held that the section "constitutes an invasion

of the domain of the Judiciary not by the Executive, but by the Legislature" in that “unless the Court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence, (an accused) faces a life sentence which was decided upon before the commencement of the trial, not by the Court itself, but by the Legislature." As such, the accused faced a trial not "… before an ordinary court … [but] … a trial before a court in which, at the imposition of the prescribed sentence, the robes are the robes of the judge, but the voice is the voice of the Legislature." The Eastern Cape High Court concluded:

> “[…W]hatever the boundaries of separation of powers are eventually determined to be, the imposition of the most severe penalty open to the High Court must fall within the exclusive prerogative and discretion of that Court. It falls within the heartland of the judicial power, and is not to be usurped by the Legislature."

The Constitutional Court (at para 13) expressly rejected the proposition that the imposition of the most severe punishment falls within the "exclusive prerogative and discretion" of a High Court. This, Ackermann JA said, does not correctly reflect the law under the South African Constitution. Rather, he said (at paras 23 and 25), mirroring Lord Diplock in ***Hinds***, “(b)oth the legislature and executive share an interest in the punishment to be imposed by courts, both in regard to its nature and its severity”, and in pursuance of that interest “(t)hey must have the power, through legislative means, of ensuring that sufficiently severe penalties are imposed on dangerous criminals in order to protect society.” Emphasising (at para 31) that the separation of powers doctrine “does not confer on the courts the sole authority to determine the nature and severity of sentences to be imposed on convicted persons”, Ackermann J concluded accordingly (at para 34) that the only relevant enquiry was whether the section was inconsistent with the accused's right under section 12(1)(e) of the Constitution "not to be . . . punished in a cruel, inhuman or degrading way."

40. Accordingly, neither ***Reyes*** nor ***Dodo*** provides any support for the appellants' suggested development of the approach to mandatory sentences since ***Hinds***. Indeed, they in material respects contradict the propositions which Mr Fitzgerald would have us accept. ***Reyes*** and ***Dodo*** establish that the legislative fixing of what might be considered an overly severe punishment might violate the prohibition against cruel, inhuman and degrading punishment, but it does not constitute the assumption by the legislature of judicial powers. There is accordingly as yet no basis for departing from Lord Diplock's dicta in ***Hinds***, and accordingly, in agreement with the trial judge, I would reject this ground of challenge.

The Separation of Powers and Improper Purposes – *Liyanage v R*

41. Mr. Fitzgerald and Lord Goldsmith submit that the Amendment Act is legislation introduced ***ad hominem*** to deter an identifiable group of persons, which includes their clients, from exercising their rights to arbitrate disputes with the Government of Belize before international tribunals. This is achieved, they say, by vesting the Supreme Court of Belize with the power to restrain the commencement or continuation of arbitration proceedings both here and abroad, by making it an offence to disobey such orders punishable by disproportionately severe penalties and by expanding the categories of persons who may commit the offence. In the result, the power of the judiciary is usurped or interfered with in breach of the separation of powers principle as applied in ***Liyanage v R*** [1967] 1 AC 259. In what appears to be a separate contention, they say as well that, for similar reasons, the Act was passed for an improper purpose in breach of section 68 of the Constitution.

42. Muria J appeared to take the view that it was not sufficient to establish that the object of the Act was to target particular individuals. According to him, the National Assembly of Belize enjoys "the constitutional plenary mandate … to make laws, whether such laws affects (sic) existing rights or right (sic) yet to be

declared." Any violation of the separation of powers doctrine must therefore be found in the language of the Act itself. In that regard, he was satisfied that section 106A (1), (4), (5), (7), (10), (13), (14) and (15) were all drafted in general terms and were not directed at any specific persons or at any existing litigation. They were accordingly not objectionable. On the other hand, he found that section 106A(8) was clearly directed at particular individuals or groups of individuals and specific arbitration proceedings, in violation of the separation of powers doctrine. In his view -

> "Whilst it is true that not every **ad hominen** and **ex post facto** legislation will be seen to infringe or usurp the judicial power, the enactment of such a law or the alterations in the law which is not passed or intended for the generality of citizens and directed at pending litigation will clearly amount to a transgression of the line between the legislature and the judiciary." (Emphasis in the original)

He took account of the fact that section 106A(8) deals specifically with injunctions to restrain arbitrations, including foreign arbitrations, and empowered the Supreme Court to vacate an award made by an arbitral tribunal following a breach of a local injunction. It did not take much imagination to discern the true import of the section, he thought, in light of the evidence before the court of the pending arbitration proceedings and the injunction obtained by the Government of Belize against the appellants. He accepted that section 68 of the Constitution does not empower the legislature to make laws for an improper purpose but it is not clear whether he also accepted that legislation can be declared void on that basis alone. In his view, it was the combination of the *in personam* nature of section 106A(8) and the fact that it was passed for an improper purpose that resulted in the violation of the separation of powers doctrine.

Improper Purposes

43. I will first consider the contention that the Amendment Act was passed for an improper purpose. In this regard, the submissions made on behalf of the

appellants and the interested parties are not entirely the same. For his part, Mr Fitzgerald contends that the Act was passed for improper purposes and is outwith the powers vested in the legislature by section 68 of the Constitution. The power to legislate for "the peace, order and good government of Belize" thereby bestowed, he argues, is reviewable by the Supreme Court, not only for inconsistency with the constitution, but "on ordinary public law principles". Mr. Fitzgerald did not elaborate on this latter point and indeed conceded that it was not open to the court to hold that legislation did not in fact conduce to the peace, order or good government of Belize. Nevertheless, he maintained that legislation is reviewable for inconsistency with the Constitution and the fundamental principles on which the Constitution is based, and this includes that legislation has been introduced for improper purposes. In that regard, he submits that the Amendment Act was not introduced to meet "a legitimate and real concern about adherence and obedience to court injunctions, but as a means to intimidate and target those individuals who have been or are perceived by the Government to have been or continue to be concerned with the arbitral proceedings brought by Dunkeld and Telemedia and to prevent arbitration proceedings being continued, or awards enforced in relation to that litigation".

44. Lord Goldsmith's argument differed only to the extent that he would urge us to find that legislation passed for an improper purpose violates section 68 which, he argues, limits the power of the legislature to make laws for the "peace order and good government of Belize". Implicit in this is the contention that an Act passed for an improper purpose does not promote peace order or good government and is accordingly unconstitutional and liable to be invalidated. In that light, we asked the parties for their comments on the decisions of the Judicial Committee of the Privy Council in ***Riel v The Queen*** (1885) 10 App Cas 675 and ***Ibralebbe v The Queen*** [1964] AC 900, of the High Court of Australia in ***Union Steamship Co. of Australia Ltd v King*** (1988) 166 CLR 1 and of the House of Lords in ***Secretary of State for Foreign and Commonwealth Affairs ex parte Bancoult (No. 2)*** [2009] 1 AC 453.

45. In ***Riel***, the Privy Council rejected out of hand the contention that a law passed by the Parliament of Canada which differed from the provisions which in the United Kingdom have been made for administration, peace, order, and good government "cannot, as matters of law, be (a law) for peace, order, and good government in the territories to which the statute relates", and that if found by a court not to be "calculated as matter of fact and policy to secure peace, order and good government", it was for that reason "ultra vires and beyond the competency of the Dominion Parliament to enact." The power to make laws for peace order and good government, their Lordships declared, authorised "the utmost discretion of enactment for the attainment of the objects referred to." Or as their Lordships put it in ***Ibralebbe***, it connoted "the widest law-making powers appropriate to a sovereign." In ***Union Steamship***, after referring to ***Riel*** and ***Ibralebbe*** and to other decisions of the Judicial Committee confirming the plenary nature of the powers granted to colonial legislatures (***Reg. v. Burah*** (1878) 3 App Cas 889; ***Hodge v. The Queen*** (1883) 9 App Cas 117; ***Powell v. Apollo Candle Company*** (1885) 10 App Cas 282; and ***Chenard and Co. v. Joachim Arissol*** (1949) AC 127), a unanimous High Court of Australia concluded (at para 16):

> "(T)he words "for the peace, order and good government" are not words of limitation. They did not confer on the courts of a colony, just as they do not confer on the courts of a State, jurisdiction to strike down legislation on the ground that, in the opinion of a court, the legislation does not promote or secure the peace, order and good government of the colony…"

46. Finally, in ***Bancoult***, Lord Hoffmann held (at para 50) that the words "peace, order and good government" "have never been construed as words limiting the power of a legislature" and that "the courts will not enquire into whether legislation within the territorial scope of the power was in fact for the "peace, order and good government" or otherwise for the benefit of the inhabitants of the territory." Similarly, Lord Rodger said (at para 109):

> "(I)t is not open to the courts to hold that legislation enacted under a

> power described in those terms does not, in fact, conduce to the peace, order and good government of the territory. Equally, it cannot be open to the courts to substitute their judgment for that of the Secretary of State advising Her Majesty as to what can properly be said to conduce to the peace, order and good government of BIOT. This is simply because such questions are not justiciable. The law cannot resolve them: they are for the determination of the responsible ministers rather than judges. In this respect, the legislation made for the colonies is in the same position as legislation made by Parliament for this country, as the High Court of Australia pointed out. In both cases, the sanction for inappropriate use of the legislative power is political, not judicial."

47. Lord Goldsmith's proposition does gain some support from the judgments of Street CJ and Priestly JA in ***Building Construction Employees & Builders Labourers' Federation of NSW v Minister of Industrial Relations*** (1986) 7 NSWLR 372, both of whom took the view that laws inimical to the peace order and good government of a parliamentary democracy would be struck down by the courts as unconstitutional. Street CJ said (at p. 387 C-D):

> "I prefer to look to the constitutional constraints of "peace, welfare, and good government" as the source of power in the courts to exercise an ultimate authority to protect our parliamentary democracy, not only against tyrannous excesses on the part of a legislature that may have fallen under extremist control, but also in a general sense as limiting the power of Parliament.

The debate which Street CJ and Prieslty JA tried to ignite was alluded to by the High Court of Australia in ***Union Steamship*** (at para 13) but was obviously rejected. It is significant however that their Honours thought it important to note (at para 16) that "(w)hether the exercise of that legislative power is subject to some restraints by reference to rights deeply rooted in our democratic system of government and the common law ….. is another question which we need not explore."

48. I empathise with Mr Fitzgerald and Lord Goldsmith's attempt to forge an alternative basis on which the fundamental principles on which Westminster model constitutions are founded can be defended. Although unlikely, it is not

hard to imagine that measures adopted in other former colonies which strike at the heart of a parliamentary democracy might be introduced in Belize using the special legislative procedure for the alteration of the constitution. A law abolishing freedom of expression, for example, comes to mind. If such a case were ever to arise, it would be an interesting question whether such a law, which is prima facie inimical to the peace, order and good government of a parliamentary democracy, is beyond the legislative power granted to the National Assembly, even if passed with a special majority. For the time being, the Court of Appeal of Belize continues to be bound by decisions of the Privy Council, at least in respect of decisions made before the Caribbean Court of Justice replaced the Judicial Committee as Belize's final appellate court – see ***Attorney General of Belize v Joseph and Boyce*** (2006) 69 WIR 104. In ***Chenard***, Lord Reid cited ***Riel*** as authority for the proposition that "a court will not inquire whether any particular enactment ... does in fact promote the peace, order or good government of the colony". It is therefore not open to this court to review legislation on the ground that, in breach of section 68, it has not in fact been passed for the peace order and good government of Belize.

49. That said, both Mr. Fitzgerald and Lord Goldsmith maintain that the National Assembly of Belize is not empowered to pass laws for an improper purpose and, in Mr. Fitzgerald's case, that legislation is reviewable on ordinary public law principles. No authority was cited for these far-reaching principles. Contrary to Mr. Fitzgerald's suggestion, Muria J. did not accept that legislation was reviewable on ordinary public law principles and although he did initially say that section 68 did not permit a law to be made for an improper purpose, he did not find that a law passed for an improper purpose was for that reason alone unconstitutional. It was the combination of the *in personam* nature of section 106A(8) and the fact that to his mind it was passed for an improper purpose that resulted in a breach of the separation of powers doctrine. We were reminded in this context of the uncontested and incontestable founding principle that legislation may be reviewed on the grounds of inconsistency with the

Constitution, as for example, for breach of the human rights provisions or the fundamental principles on which the constitution is based, such as the separation of powers, or the independence of the judiciary, or, one might add, the judiciary's core function of upholding the law including in particular the constitution itself. But we have not been referred to any provision of the constitution or regaled with any argument in support of the proposition that legislation passed for an improper purpose may be invalidated by the judiciary. In my judgment, it is not possible to eke out an implied principle that the judiciary may second guess the elected representatives on the question of what purpose it is appropriate for legislation to serve. Such a power would put the judiciary in competition with the legislature for the determination of what polices ought to be pursued in the best interests of Belize. That is a question which in my judgment is not justiciable. As Lord Diplock pointed out in ***Hinds*** (at pg. 14), in deciding whether legislation is inconsistent with a constitution, a court is not concerned with "the propriety or expediency of the law impugned".

50. I would also reject the proposition that legislation is reviewable on ordinary public law principles. It seems to me to be inconceivable that it was intended that the Supreme Court would be empowered to strike down legislation on the ground, for example, that persons whose interests are affected by an Act of Parliament were not given an opportunity to be heard before enactment, or that the legislators were biased, or that they took into account irrelevant considerations.

51. The contention that the Act is *ad hominen* legislation which violates the separation of powers doctrine stands on an entirely different footing and is grounded in the principle of constitutional supremacy which both Mr. Fitzgerald and Lord Goldsmith have championed. It is to this argument that I now turn, beginning with an examination of the Privy Council's decision in ***Liyange v R*** [1967] 1 AC 259 on which they primarily rely.

Liyanage

52. In ***Liyanage***, the eleven appellants were involved in a coup d'etat in Ceylon which failed at the very last moment. They were all arrested and questioned both on the night of 27 January 1962, and on occasion thereafter while in custody. They were eventually charged with conspiring to wage war against the Queen, to overawe the Government of Ceylon by means of criminal force or the show of criminal force and, to overthrow the Government of Ceylon otherwise than by lawful means. Just over two weeks later, the Government of Ceylon published a white paper which set out the names of thirty alleged conspirators, including the appellants, and provided details of the parts played by them, what their intentions were and of their interrogation after arrest. The White Paper concluded with the observation:

> "It is also essential that a deterrent punishment of a severe character must be imposed on all those who are guilty of this attempt to inflict violence and bloodshed on innocent people throughout the country for the pursuit of reactionary aims and objectives. The investigation must proceed to its logical end and the people of this country may rest assured that the Government will do its duty by them."

In apparent fulfillment of this promise, on 16 March 1962, the Ceylonese Parliament passed an Act which effected a number of changes to the existing law. With the exception of one provision, it was given retrospective effect from just less than one month before the abortive coup and provided that the provisions of Part I were to be limited in its application to any offence against the State alleged to have been committed on 27 January 1962, the day of the coup. Part I legalised the detention for 60 days of any person, suspected of having committed any offence against the State, who had been arrested and imprisoned in respect of the attempted coup. However, the fact of such person having been arrested was to be notified to the magistrate's court. Under the law then applicable, an arrested person was to be taken or sent before a magistrate

without unreasonable delay, and if arrested without a warrant, the reasonable period should not exceed 24 hours. Section 5 retrospectively allowed arrest without a warrant for the offence of waging war against the Queen, whereas previously a warrant had been necessary.

53. Part II of the Act permitted the Minister of Justice to direct that a defendant be tried by three judges without a jury in the case of the offence of sedition, and any other offences against the State, which included the offences with which the appellants were charged. Where the Minister directed a trial by three judges without a jury, the three judges were to be nominated by the Minister of Justice. (This provision was later amended to put the power of appointment in the hands of the Chief Justice, in circumstances not relevant at this point).

54. The Act altered the penalty for the offences of waging war against the Queen and for conspiring to wage war against the Queen and overawe the Government by criminal force by providing for a minimum sentence of not less than ten years' imprisonment in the former case and a minimum penalty of ten years' imprisonment and the forfeiture of all property, in the case of the latter. It also in effect created a new offence ex post facto which was expressed in terms to meet the circumstances of the abortive coup. Section 11 of the Act provided that the Attorney-General might before or at any stage during the trial pardon any accomplice with a view to obtaining his evidence. Section 12 allowed statements made in the custody of a police officer to be admitted into evidence, provided that the police officer was not below the rank of Assistant Superintendent. Previously, confessions made to a police officer in the course of an investigation and confessions made in the custody of a police officer other than in the presence of a magistrate, were inadmissible. In addition, a confession by one of several co-defendants could not be used against the other defendants. These protections were repealed. Further, the Act put the burden of proving that a statement was not made voluntarily on the accused whereas previously the onus of proving a confession to be voluntary was on the prosecution. Section 15 removed the right

of appeal to the Court of Criminal Appeal in the case of trials before three judges without a jury. Finally, the Act made these changes operative only so long as legal proceedings connected with or incidental to any offence against the State committed on 27 January 1962 was in train, or for one year, whichever was later, but the period could be extended for one year at a time.

55. Thus, as the Privy Council noted (at pp 281-282), with few unavoidable exceptions, “the whole of these elaborate provisions for altering the nature of the offence, for providing a trial without a jury, and for allowing the admission of otherwise inadmissible statements and confessions is to end when the proceedings based on the coup come to an end. By that time it would have served its purpose which would appear to be the fulfillment of the promise implied in the last two sentences of the White Paper, quoted above.” The trial proceeded before three judges nominated by the Chief Justice. In April 1965, after a very extensive trial, the appellants were convicted and sentenced to ten years' rigorous imprisonment and forfeiture of all their property.

56. The appellants argued that the Act contravened the separation of powers doctrine in that it amounted to a direction to the court “to convict the appellants or to a legislative plan to secure the conviction and severe punishment of the appellants and thus constituted an unjustifiable assumption of judicial power by the legislature, or an interference with judicial power”. Their Lordships were clear that Parliament’s power to make laws “for the peace order and good government” of Ceylon did not entitle Parliament to pass legislation which usurps the judicial power of the judicature, for example, by passing an Act of attainder or instructing a judge to bring in a verdict of guilty. Parliament was however permitted to legislate “for the generality of its subjects” and in the exercise of that power could create crimes and enact rules relating to evidence. But their Lordships did not consider the Acts under challenge to have such a general intention. As Lord Pearce said (at p. 289):

> "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."

57. However, Lord Pearce was quick to note that simply because an Act was not general in its application or could be described as *ad hominem* and *ex post facto* did not inevitably mean that judicial power was being usurped or infringed. Each case had to be decided on its own facts and even though he conceded that the task of tracing where the line is to be drawn between what would and what would not constitute an interference with judicial power was nigh impossible, he did venture to identify the following factors as relevant to the exercise (at p. 290):

> "... the true purpose of the legislation, the situation to which it was directed, the existence (where several enactments are impugned) of a common design, and the extent to which the legislation affects, by way of direction or restriction, the discretion or judgment of the judiciary in specific proceedings"

58. Their Lordships accepted that "the pith and substance" of the legislation was a legislative plan ex post facto to secure the conviction and enhance the punishment" of particular individuals identified in the White Paper. This was achieved by legalising their imprisonment pending trial, by making admissible previously inadmissible confessions, and by altering *ex post facto* the punishment which the court was now mandated to impose on them. Although such *ad hominem* legislation directed to the course of particular proceedings would not always amount to an interference with the functions of the judiciary, their Lordships had no doubt that there was such interference in this case since that was "not only the likely but the intended effect of the impugned enactments" and that was "fatal to their validity". Lord Pearce continued (at pp. 290-291):

> “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. These alterations constituted a grave and deliberate incursion into the judicial sphere. Quite bluntly, their aim was to ensure that the judges in dealing with these particular persons on these particular charges were deprived of their normal discretion as respects appropriate sentences. They were compelled to sentence each offender on conviction to not less than ten years' imprisonment, and compelled to order confiscation of his possessions, even though his part in the conspiracy might have been trivial.”

He also endorsed the following comments of the trial judge (at p. 291):

> “The Act removed the discretion of the court as to the period of the sentence to be imposed, and compels the court to impose a term of 10 years' imprisonment, although we would have wished to differentiate in the matter of sentence between those who organised the conspiracy and those who were induced to join it. It also imposes a compulsory forfeiture of property. These amendments were not merely retroactive: they were also ad hoc, applicable only to the conspiracy which was the subject of the charges we have tried. We are unable to understand this discrimination."

In their Lordships’ view, the Acts were “legislative judgments; and an exercise of judicial power" and were foreshadowed by Blackstone in his Commentaries in the following passage:

> "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."

59. Focusing on the factors which Lord Pearce indentified as relevant viz. “the true purpose of the legislation, the situation to which it was directed, … and the extent to which the legislation affects, by way of direction or restriction, the discretion or judgment of the judiciary in specific proceedings”, Mr Fitzgerald and Lord Goldsmith submit that the statements and actions of the Government of

Belize both before and after the Act was passed demonstrate that it was intended to target an identifiable group of persons, including the appellants and the interested parties, who they anticipated might breach an anti-arbitration order, and to prevent them from pursuing legitimate international arbitration proceedings against the Government of Belize and to secure the criminal prosecution of those individuals if they attempted to do so. The *ad hominem* nature of the Act, they say, is also borne out by the timing of its passage; by the inclusion in the Act of the power to restrain arbitration proceedings, including international arbitrations, and to invalidate arbitral awards obtained in violation of such orders in circumstances where the Government had already obtained an anti arbitration injunction against the appellants; by the introduction of new criminal offences and a new summary procedure in relation to breaches of court orders when there was no reason to think that the then existing law was inadequate; by broadening the categories of persons who can be found guilty of contempt; by the sheer scale of the fines provided for which indicate that they are not intended to be applied to the general public; by the specific provisions for trial *in absentia* and the extraordinary notice provisions which indicate that overseas individuals and companies are being targeted; by the vesting of power in the Attorney General to initiate criminal proceedings under the Act thereby empowering the Government in its own right to take action in respect of any perceived breach, an indication in itself that the regime is intended to be invoked only in specific circumstances so as to disapply the existing contempt jurisdiction, and not in relation to the general citizenry to whom the pre-existing law will continue to be applied; and finally, by the restriction of the discretion of the judiciary to impose the most appropriate punishment by providing for overly harsh mandatory penalties.

60. In short, a special alternate procedure for the punishment of the offence of disobeying a court order, which could be initiated by the Government itself, was introduced to ensure, and make more likely, the conviction and severe punishment of the targeted parties. Of particular importance in determining in this

case whether judicial power has been usurped or infringed, they argue, is the imposition of severe mandatory penalties, thereby dictating to the judiciary the punishments which are to be meted out to the particular individuals targeted by the Act.

61. The evidence does indicate quite clearly that in proposing the Amendment Bill to Parliament, the Government of Belize had Dunkeld and the appellants within its sights. The Government had obtained an injunction against Dunkeld and the appellants, which Dunkeld proceeded to ignore. The Government's case was that the appellants were influential in Dunkeld's decision to take the dispute over the expropriation of its assets to arbitration. The Prime Minister stated publicly at a later date that it was the acts of Dunkeld and the appellants which prompted this legislation. Around that time as well, BDSL was in violation of an injunction prohibiting the taking or continuing of arbitration proceedings, BCBL was threatening arbitration under the Treaty, which, consistent with its actions in relation to Dunkeld, the Government was likely to take action to stop, and both BCB Holdings and the Belize Bank had obtained substantial arbitration awards which they were seeking to enforce.

62. One might be forgiven for using a war time metaphor, but it is not difficult to appreciate that the Government was arming itself through the Amendment Act with new and improved weaponry in the battle which it had decided to wage against Lord Ashcroft and his cohorts. Thus, section 106A(8) provides the Court with the power to restrain arbitration proceedings, whether here or abroad, on the ground that such proceedings are or could be oppressive, vexatious, inequitable or an abuse of the legal or arbitral process. It provides further that any award made in disregard of or contrary to an injunction may be declared void by the Supreme Court. The Amendment Act also increases the likelihood of a conviction for disobedience to an injunction, including of course, anti-arbitration injunctions, and stiffens and makes more certain the penalties to which an offender is liable. Thus, it is an offence under section 106A(1) to knowingly

disobey or fail to comply with an injunction, without the need for the prosecution to prove that there was no reasonable excuse for such disobedience. The offence is extended to persons who advise, facilitate or encourage disobedience, or knowing of an injunction, commit acts the effect of which would be to disregard the injunction. In an attempt to cover no doubt injunctions already issued against Dunkeld and the appellants, the offence applies to injunctions issued before the commencement of the Act, as well as after. It is also made clear that the offence can be committed in Belize or in any other territorial jurisdiction and whether or not the offender was present in Belize or elsewhere, a provision which is clearly directed at foreign arbitrations and persons or companies resident outside of Belize. Finally, once a company or an unincorporated body is found guilty of the offence, any persons acting in an official capacity for or on behalf of such body is deemed to be guilty of the offence as well, unless he or she adduces evidence that the offence was committed without his knowledge, consent or connivance. And to cap it all off, the Attorney General is empowered to initiate criminal proceedings under the Act, thus enabling the Government to act independently of the police or the Director of Public Prosecutions.

63. It might therefore be correct to characterize the Amendment Act as having been passed with the appellants and the interested parties in mind, with the intention of tipping the scales in favour of the Government in its disputes with persons who might enjoy the contractual or treaty right to arbitrate such disputes, and with the intention of deterring such persons from breaching any anti-arbitration injunction the Government might obtain, but it might be a bit of an exaggeration to say that the intention was to intimidate or deter such person from exercising their rights at all.

64. On the other hand, the Act is not expressed to apply to specific individuals, or to specific arbitrations, or to be applicable to any pending criminal or other proceedings. It is expressed in terms of general application. It is also common ground that the new offence of disobedience to a court order and the

power to invalidate an arbitral award made in disregard of or contrary to an injunction issued under section 106A(8), do not apply to breaches occurring before the Act came into force, even though an offence against section 106A(1) may be committed in relation to an order issued before then. On the face of it, therefore, the new offence created applies to anyone and any order without restriction and is not limited to the breach of anti-arbitration injunctions or to the appellants or the interested parties or their associates or persons in similar positions to them.

65. Similarly, the power to issue anti-arbitration injunction applies to all arbitrations, whether in Belize or abroad, and whether pursued by the appellants, the interested parties or whomsoever. As such, the Government of Belize has armed itself with the wherewithal to stymie any arbitration, whether already commenced or to be commenced in the future, by applying for an anti-arbitration injunction, to initiate proceedings to punish disobedience of any order made restraining the pursuit or continuation of any such arbitration, and to apply to the Court to vacate or void any award made in violation of such order.

66. Apart from mandating the sentence to be imposed on anyone found guilty of a section 106A(1) offence, there is no direction to the judiciary as to how it should exercise the jurisdiction which is bestowed upon it. In a prosecution under section 106A(1) or an application for an injunction under section 106A(8), the prosecutor or applicant will bear the normal burden of adducing sufficient evidence of disobedience or of oppression etc as the case might be, to establish their case. There is no provision in the Act which seeks to predetermine the result of such proceedings or to direct the judiciary as to how it is to exercise the jurisdiction vested in it. Having found someone guilty of disobeying a court order the presiding judge is mandated to impose a minimum sentence. But that by itself, as I have already found, does not violate the separation of powers doctrine.

67. On the face of it, therefore, the Act constitutes an ordinary exercise of legislative power. It is the business of the legislature to identify conduct to which

penal sanctions are to attach and to determine the severity of such punishment. It is also the business of the legislature to vest new powers in the judiciary and to create new rights and obligations. As Mason CJ, Dawson J and McHugh J said in their joint judgment in ***Leeth v Commonwealth*** (1992) 174 CLR 455, para 30, **"**a law of general application which seeks in some respect to govern the exercise of a jurisdiction which it confers does not trespass upon the judicial function." The mere fact that such new powers, rights and obligations might be put to use by the Government in its dispute with the appellant or the interested parties in the future, does not by itself constitute the usurpation or interference with the judicial function.

68. Mr Fitzgerald acknowledges that unlike in ***Liyanage***, the Amendment Act is prospective, not retrospective, and does not purport to determine the course of any pending proceedings. However, the ***Liyanage*** principle, he submits, is wider than that and precludes the usurpation of the judicial function by the legislature "by dictating that a special regime should be applied to the trial and punishment of a particular individual or group (rather than the generality of citizens) for a particular offence, and that special penalties should apply. That is what is meant by the prohibition of *in personam* legislation … The Legislature cannot pick on a particular individual or a particular group for special treatment, and direct the judiciary how to treat them in criminal proceedings." To the extent that Mr Fitzgerald's formulation of the applicable principle is intended to reflect the facts of this case, it is inaccurate in part. There is no dictation in the Act that its special regime is to apply to particular persons, even if in practice the executive might so limit it. That apart, there is no authority for the broadening of the ***Liyanage*** principle to the dictation of the regime which the judiciary is to apply to particular individuals as opposed to the dictation of the decision to which the judiciary is to come in a particular case to which that special regime is applied. Such authority as there is has consistently pointed to the distinction between the legislature's power to create rights and obligations even if in so doing the outcome of pending litigation is impacted, and directing a court to come to a particular conclusion.

Liyanage has been consistently treated as a special case falling within the latter category.

69. In ***Australian Building Construction Employees' & Builders Labourers' Federation v Commonwealth*** (1986) 161 CLR 88, the High Court of Australia reiterated the well established constitutional principle that Parliament may legislate so as to affect and alter rights in issue in pending litigation without interfering with the exercise of judicial power in a way that is inconsistent with the Constitution. It was only where "the legislation in question interferes with the judicial process itself, rather than with the substantive rights which are at issue in the proceedings" (para 18) that an impermissible interference with the judicial function would occur. ***Liyanage*** was described as such as case. In that case, the legislation in question altered the rights at play in pending judicial proceedings in such a way as to make those proceedings redundant. The impugned law had decreed the cancellation of the registration of the BLF even while its challenge to an earlier decision by the Australian Conciliation and Arbitration Commission that it had engaged in conduct which empowered the minister to order its deregistration was pending in court. The union sought orders quashing the declaration and prohibiting the Minister from ordering the Registrar of the Commission to cancel its registration. There was no violation of the separation of powers principle even though the motive for enacting the statute was to circumvent the proceedings and forestall any decision which might be given in those proceedings.

70. By contrast, in ***Building Construction Employees & Builders Labourers' Federation of NSW v Minister of Industrial Relations*** (1986) 7 NSWLR 372, the registration of the State branch of the BLF was declared by the relevant Minister to be cancelled in circumstances which gave rise to a challenge in court on the ground that the BLF was not given a fair hearing. Just one week before the union's appeal against the dismissal of its claim was due to be heard, the New South Wales Parliament enacted the Builders' Labourers Federation

(Special Provisions) Act 1986 which provided that, notwithstanding any decision in any court proceedings, the union's registration "shall, *for all purposes*, be taken to have been cancelled" by the Minister's declaration (s. 3(1)), and that the Minister's declaration "shall be treated, *for all purposes*, as having been validly given from the time it was given or purportedly given" (s. 3(2)). In addition, s. 3(4) provided that the costs in any proceedings commenced before the Act came into force to challenge a declaration of cancellation should be borne by the party "and shall not be the subject of any contrary order of any court." Both Street CJ and Kirby J were satisfied that the Act was an impermissible intrusion into the judicial process. Unlike the corresponding federal act considered by the High Court of Australia which cancelled the registration of the union "by the force of this section", the State law did not simply enact that the registration was cancelled or that the Minister's certificate was to be treated as valid, it provided that the cancellation shall "for all purposes" be treated as cancelled and that the Minister's certificate of cancellation shall "for all purposes" be treated as valid. In other words, it did not merely effect an alteration of the rights of the union then under consideration in the Court of Appeal; it amounted to a direction to the court as to how the case was to be disposed of. According the Street CJ (at p. 378 B-C):

> "The provisions of s 3(1) and s 3(2) appear to me to be cast in terms that amount to commands to this Court as to the conclusion that it is to reach in the issues about to be argued before it. Rather than substantively validating the cancellation of the registration and the Ministerial certificate, Parliament chose to achieve its purpose in terms that can be more accurately described as directive rather than substantive…
>
> It is difficult to see any nexus at all in a legislative sense between the cancellation of the Federation's registration and the disposition of costs in the pending court proceedings. Section 3(4) amounts, in my view, to a direct interference with the ordinary operation of the judicial process in particular litigation pending before the Court. Likewise, it too can be appropriately described as directive to the Court rather than substantively legislative."

To similar effect, Kirby J said:

> (The Act) is addressed to a particular legal person, namely the BLF. It deals, with specificity, with incidents of particular litigation involving the BLF. Thus, particular provision is made in respect of the costs incidental to the proceedings already on foot in the Court. Doubtless this provision was included to obviate argument, for the purpose of resolving costs, of the validity of the BLF's cancellation. But the result is that the legislature has passed ad hominem legislation. Its disclosed purpose is to remove doubts that had arisen in the argument of the cases before Lee J. Its plain object was to remove any risk of an adverse determination of the appeal from Lee J. It amounts, in effect, although not in its terms, to a legislative judgment.

71. In ***Chu Kheng Lim v Minister for Immigration Local Government & Ethnic Affairs*** (1992) 176 CLR 1, the High Court of Australia held that a law which provided that a court "is not to order the release from custody of a designated person" impinged unconstitutionally on the judicial function. According to the majority judgment of Brennan, Deane and Dawson JJ (at para 38):

> "In terms, s.54R is a direction by the Parliament to the courts as to the manner in which they are to exercise their jurisdiction. It is one thing for the Parliament, within the limits of the legislative power conferred upon it by the Constitution, to grant or withhold jurisdiction. It is a quite different thing for the Parliament to purport to direct the courts as to the manner and outcome of the exercise of their jurisdiction. The former falls within the legislative power which the Constitution … entrusts to the Parliament. The latter constitutes an impermissible intrusion into the judicial power …"

72. In ***Nicholas v R*** (1998) 193 CLR 173, the appellant was charged for possession of a prohibited import, namely heroin. The heroin had been imported into Australia by Australian and Thai law enforcement officers in contravention of the Customs Act. In accordance with the rule then established by the High Court of Australia in ***Ridgeway v The Queen*** (1995) 184 CLR 19, the court in its discretion could exclude, on public policy grounds, all evidence of an offence or an element of an offence procured by unlawful conduct on the part of law enforcement officers. Relying on ***Ridgeway***, Nicholas applied successfully for a

stay of the proceedings on the basis that, since the drugs in question were illegally imported by a law enforcement officer, evidence of their importation should be excluded. The Crimes Amendment (Controlled Operations) Act was then passed to reverse ***Ridgeway***. In respect of law enforcement operations which predated the commencement of the Act, section 15X provided that in deciding whether the evidence of importation was admissible, the court was to disregard the fact that a law enforcement officer committed an offence in importing those narcotic goods. If, in Nicholas' case, there was no other reason for rejecting evidence of illegal importation, that evidence would be admitted at his trial, on the assumption that section 15X was valid, When section 15X came into force, therefore, the prosecution applied to have the stay lifted. The question for the Court was whether section 15X was an unconstitutional interference with the judicial function. By a majority, the High Court of Australia held that it was not. Although the change which section 15X wrought could have a profound effect on the outcome of a given case, and was likely to have such an effect in Nicholas' case, there was in the end thought to be no direction as to manner in which judicial power should be exercised. According to Brennan CJ (at paras 20-21),

> "... a law which merely prescribes a court's practice or procedure does not direct the exercise of the judicial power in finding facts, applying law or exercising an available discretion... [T]he function of a court to which s 15X relates is the finding of facts on which the adjudication and punishment of criminal guilt depend....
>
> Section 15X does not impede or otherwise affect the finding of facts by a jury. Indeed, it removes the barrier which *Ridgeway* placed against tendering to the jury evidence of an illegal importation of narcotic goods where such an importation had in fact occurred. Far from being inconsistent with the nature of the judicial power to adjudicate and punish criminal guilt, s 15X facilitates the admission of evidence of material facts in aid of correct fact finding."

To similar effect, Guadron J said (at para 80):

> "Properly construed, s 15X does no more than exclude the bare fact of illegality on the part of law enforcement officers from consideration when determining whether the *Ridgeway* discretion should be exercised in favour of an accused person. So construed, it is clear that it does not prevent independent determination of the question whether that evidence should be excluded or, more to the point, independent determination of guilt or innocence."

73. Their Honours appreciated that section 15X would apply to only a relatively small number of persons but they were not satisfied that this was sufficient to bring the ***Liyanage*** principle into play. The absence of an attempt to target specific individuals made the difference in Toohey J's estimation. He said (at para 57):

> "There is nothing in the relevant provisions which singles out an individual … or which singles out a particular category of persons. It is simply the fact that by applying to controlled operations commenced before Pt 1AB, s 15X necessarily operates only by reference to accused persons to whom those operations related… The legislation held invalid in *Liyanage v The Queen* went a great deal further by purporting to legislate *ex post facto* the detention of particular persons charged with particular offences on a particular occasion."

Likewise, Guadron J identified ***Liyanage's*** distinguishing feature as the impugned legislation's lack of general application and its targeting of particular known individuals with an *ex post facto* plan to secure their conviction. However, in agreement with Lord Pearce's note of caution that "not ... every enactment ... which can be described as *ad hominem* and *ex post facto* must inevitably usurp or infringe the judicial power", Guadron J thought that even a more specifically focused law would not necessarily run afoul of the separation of powers principle. An element of direction to the court was still necessary. He explained (at para 83):

> "If legislation which is specific rather than general is such that, nevertheless, it neither infringes the requirements of equal justice nor prevents the independent determination of the matter in issue, it is not, in my view, invalid. And as already indicated, s 15X does not offend in either respect."

Hayne J was satisfied that section 15X would apply to a limited number of persons who it would be possible to identify. But again, for him, the crucial question was the extent to which an independent determination of guilt or innocence would be interfered with. He said (at para 247):

> "...the mere fact that it may be possible to identify all the persons in relation to whom s 15X applies does not mean that the legislation interferes with judicial power. Where legislation deals only with events which have happened before the legislation comes into effect, it must always be possible, at least theoretically, to identify all cases to which the legislation may apply; the events have happened and can, in theory, be identified... The number of cases affected may be a relevant consideration but I doubt that it is a sure guide to validity.... For present purposes it is enough to say that because the legislation does not deal directly with ultimate issues of guilt or innocence but only with whether evidence of only one of several elements of an offence can be received and deals not with a single identified, or identifiable, prosecution but with several prosecutions (albeit prosecutions which I assume can be identified and are relatively few) it does not have the character of a bill of attainder or like impermissible interference in the judicial process."

He concluded (at para 255):

> "Inevitably then, the application of … s 15X … in the circumstances of this case may mean that evidence of an essential element of the alleged offences which was previously excluded may now be admitted. But that should not be permitted to obscure two very important facts: first, that the proof of the matter alleged against the accused must still be undertaken by the prosecution and judged by the court in the ordinary way and second, that the discretion to reject evidence of illegally procured conduct is a discretion that is not focused upon the need to ensure a fair trial for the accused. It is a discretion that is based on other, different, considerations."

74. In his comment published at (2008) 30(1) Sydney Law Review 95, Sir Anthony Mason described ***Liyanage*** as an extreme case which has been "consigned to perennial distinction". Even so, he was prepared to accept that less extreme cases could involve unconstitutional interference with the judicial process. Such cases, he said

> "… would generally involve retrospective legislation affecting pending litigation which targets individuals, departs in some significant respect or respects from normal processes and amounts to a direction on a crucial issue in the case, the direction being confined to the litigation which is the target of the legislation."

75. While I would accept that a law which meets these criteria will more than likely involve the usurpation of the judicial function or an unconstitutional interference with the judicial process, I am not prepared to say that nothing short of this will do. Neither am I prepared to accept Mr. Fitzgerald's formulation of the principle.

76. The separation of powers doctrine precludes the usurpation of judicial power by the legislature, but it does not deprive the legislature of the power by law to vest jurisdiction in the judiciary and direct it to exercise it, even if such jurisdiction might turn out to be applicable to a particular individual or a particular group, either because of the express parameters of the jurisdiction so vested or the way in which it is invoked in practice. Parliament frequently enacts legislation which imposes obligations or disqualifications on specific groups of persons, such as lawyers or accountants, and requires the judiciary to implement the scheme, without any complaint or concern that the judicial function is being usurped. What the legislature cannot do is, having vested jurisdiction in the judiciary, whether specific or not, to direct the judiciary as to the outcome of the exercise of the jurisdiction so granted. Where the line is to be drawn between the one and the other will be difficult to determine in any given case and this no doubt is the result of the fact that the precise contours of judicial power are hard to define. The best that can be done is to have regard to the factors identified by Lord Pearce, namely, "the true purpose of the legislation, the situation to which it was directed, … and the extent to which the legislation affects, by way of direction or restriction, the discretion or judgment of the judiciary in specific proceedings."

77. As already noted, the Amendment Act is cast in terms of general application. In respect both of the offences it creates and the anti-arbitration jurisdiction it bestows, it establishes objective criteria for the determination of guilt and for the grant of coercive orders. It leaves it to judiciary to determine by its ordinary processes who should be punished and what arbitrations should be restrained or awards vacated. Apart from the imposition of mandatory sentences, it leaves unrestricted the independent exercise of judicial power. It is not sufficient that the conduct of certain individuals prompted the passage of the legislation or that the government intends to use the Act to target those persons. In ***Australian Building Construction Employees' & Builders Labourers' Federation v Commonwealth*** there was held to be no violation of the separation of powers principle even though the motive for enacting the statute was to circumvent the then pending proceedings and forestall any decision which might be given in those proceedings. As Street CJ put it in ***Building Construction Employees & Builders Labourers' Federation of NSW v Minister of Industrial Relations*** (at p. 377 B-C):

> "It is … to the terms of the … Act alone that reference is to be made in deciding whether it amounts to an exercise by Parliament of judicial power as distinct from legislative power."

The appellants and the interested parties' contention that the Act infringes the separation of powers doctrine is accordingly rejected.

78. Stripped to its essence, the appellants and the interested parties' real complaint is that it is unfair for the Government of Belize to use its control over the National Assembly to pass a law to provide it with additional tools to resist the submission of claims against it to international arbitration and the enforcement of any awards obtained in violation of anti-arbitration injunction. This is probably why they have cast their respective cases on the basis of an exercise of legislative power for an improper purpose. I have already said why I do not think that ground is sustainable. The consolation is that any advantage which the

government may seek to obtain for itself through its influence in the legislature can only be achieved if the fundamental rights and freedoms and the fundamental principles on which the Constitution is based are complied with.

79. In the result, I would reject this ground of appeal and allow the cross-appeal against the trial judge's order declaring section 106(8) to be unconstitutional.

Separation of Powers – Selection of Sentence

80. Mr Fitzgerald and Lord Goldsmith argue that section 106A(1) and (2) violates the separation of powers doctrine in that it results in the Attorney General being vested with the discretion to decide whether to prosecute under section 106A(1) for breach of a court order or under the pre-existing section 269 of the Criminal Code, in circumstances where the penalty under section106A(1) is mandatory while the penalty under section 269 is not. The exercise of that choice, it is submitted, involves a determination by the Attorney General as to which individuals will face mandatory penalties and which will not, and accordingly vests in the Attorney General a sentencing power. Section 269 provides that:

> "Every person who being bound by law to obey any order, warrant, summons or process made or issued by any court or magistrate, willfully neglects without reasonable excuse to obey the same in any material particular shall, without prejudice to any other punishment or penalty provided by law, be liable on summary conviction to imprisonment for three months."

81. While the Attorney General has been expressly vested with the power of laying a criminal complaint under section 106A, the parties appeared to assume that the Attorney General was similarly empowered to institute criminal proceedings under section 269 of the Criminal Code, but we were not referred to any statutory provision or common law rule which empowers him to do so. Nevertheless, it is unnecessary to resolve this issue since under section 106A(2)

the police are also permitted to lay a complaint and they clearly may also initiate criminal proceedings under section 269. The question whether sentencing power has thereby been vested in the executive can just as well be raised in relation to the police.

82. The appellants and the interested parties rely almost exclusively on the decision of the Privy Council in ***Ali v R*** [1992] 2 AC 93. In that case, section 28(1)(c) of the Mauritian Dangerous Drugs Act made it an offence to import, cause to be imported, aid, abet, counsel or procure the importation of any drug specified in subsection (2). Upon conviction, a fine not exceeding 200,000 rupees and imprisonment not exceeding 20 years could be imposed. On the other hand, where the court trying the offence found that the accused was a trafficker in drugs, the penalty for a first conviction was a fine which was not to exceed 100,000 rupees together with imprisonment for a term not exceeding 20 years, while the penalty for a second or subsequent conviction was a fine of not less than 100,000 rupees nor more than 250,000 rupees together with imprisonment for a term of 30 years. The Act provided further that a person charged with an offence under section 28(1)(c) could be tried either before a judge without a jury, before the Intermediate Court or before the District Court. Where the trial was to take place was to be determined by the Director of Public Prosecutions in his discretion. However, where a person charged with an offence under section 28(1)(*c*) is tried before a judge without a jury and is found to be a trafficker in drugs, the Act required that he or she be sentenced to death.

83. It was clear to their Lordships that since cases of importing dangerous drugs in the course of trafficking may vary widely in gravity, the intention was that the Director would exercise his discretion as to which of the three tribunals was appropriate to try the case according to his view of the seriousness of the offence. Thus, the Director would presumably only select a trial before a judge without a jury, where death was the only available sentence, in the most egregious of cases. Nevertheless, what the Act purported to do, in effect, was to

authorise the Director to select the punishment to be inflicted upon a person who was convicted under section 28(1)(*c*) and found to be a trafficker. This was so because, if the Director chose to prosecute before a judge without a jury, the judge was obliged to impose the death penalty. By deciding to try a case before a judge without a jury, therefore, it was the Director who selected the death penalty. This infringed the proscription against transferring from the judiciary to a member of the executive "a discretion to determine the severity of the punishment to be inflicted upon an individual member of a class of offenders," as explained in ***Hinds***.

84. Mr Barrow argues that section 106A(1) and (2) do not empower any member of the executive to select the sentence which is to be imposed for disobedience to an order of the court. What it does is to create a new offence, albeit similar to existing offences, such that the Attorney General or the Director of Public Prosecutions or the police can now decide for which offence a person is to be charged. There is nothing unconstitutional in vesting in the executive the power to choose from a menu of offences. In ***Teh Cheng Poh alias Char Meh v. Public Prosecutor, Malaysia*** [1980] A.C. 458, it was argued that the decision to prosecute the appellant for unlawful possession of a firearm under the Malaysian Internal Security Act 1960, which carried the mandatory death sentence, instead of under the Arms Act 1960, for which the punishment was a fine or imprisonment or both, contravened article 8(1) of the Malaysian Constitution. Article 8(1) provided that "All persons are equal before the law and entitled to the equal protection of the law." The offence under the Internal Security Act 1960 applied only to possession in a security area, whereas the offence under the Arms Act applied to possession anywhere in Malaysia. The appellant was caught with a weapon in a security area and although he could have been charged under the Arms Act, he was charged under the Internal Security Act. In rejecting the constitutional argument, Lord Diplock said (at p. 475):

> "There are many factors which a prosecuting authority may properly take into account in exercising its discretion as to whether to charge a person at all, or, where the information available to it discloses the ingredients of a greater as well as a lesser offence, as to whether to charge the accused with the greater or the lesser. The existence of those factors to which the prosecuting authority may properly have regard and the relative weight to be attached to each of them, may vary enormously between one case and another. All that equality before the law requires, is that the cases of all potential defendants to criminal charges shall be given unbiased consideration by the prosecuting authority and that decisions whether or not to prosecute in a particular case for a particular offence should not be dictated by some irrelevant consideration."

85. It was argued in ***Ali*** as well that the power which the Director was permitted to exercise was simply to determine the offence for which the appellant was to be charged. The Privy Council rejected this. In their Lordships' view, the discretion vested in the Director was not concerned with whether a person should be charged with one offence rather than another, but with the court before which a person was to be tried, and because the sentence of death was mandatory if the trial was before a judge without a jury, the discretion was exercisable with reference to the sentence which was to be imposed. As Lord Keith explained (at p. 104):

> "In general, there is no objection of a constitutional or other nature to a prosecuting authority having a discretion of that nature. Under most, if not all, systems of criminal procedure the prosecuting authority has a discretion whether to prosecute a wide range of offences either summarily or under solemn procedure, and the choice depends upon the view taken about the seriousness of the case. If the choice is for prosecution before a court of summary jurisdiction, or other court having limited sentencing powers, that court can usually, if it considers that these powers do not match the seriousness of the offence, take steps to secure that the offence is dealt with by a court whose powers are not so limited..... In *Teh Cheng Poh alias Char Meh v. Public Prosecutor, Malaysia* [1980] A.C. 458 all persons convicted under the Internal Security Act 1960 of possession of a firearm in a security area were subject to the mandatory death penalty. That offence was a more serious one than mere possession of a firearm under the Arms Act 1960. As Lord Diplock observed, a discretion in the prosecuting authority to

> prosecute for a more serious offence rather than for a less serious one is not open to any constitutional objection. If in Mauritius importation of dangerous drugs by one found to be trafficking carried in all cases the mandatory death penalty and importation on its own a lesser penalty, the Director of Public Prosecution's discretion to charge importation either with or without an allegation of trafficking would be entirely valid. The vice of the present case is that the Director's discretion to prosecute importation with an allegation of trafficking either in a court which must impose the death penalty on conviction with the requisite finding or in a court which can only impose a fine and imprisonment enables him in substance to select the penalty to be imposed in a particular case."

86. At a superficial level, the choice which results from vesting in the police the power to lay a complaint under section 106A(1) is a power to decide in which court the offence of disobeying a court order is to be prosecuted. A section 269 offence is triable summarily before a magistrate, while a section 106A offence is to be tried before a judge of the Supreme Court. Accordingly, it might be said that the choice vested in the police is analogous to the choice vested in the Director in ***Ali***. Similarly, at a superficial level, it may be said that since the choice is between an offence under section 269 and a separate offence under section 106A(1), the police would be exercising the ordinary power of determining which offence is more appropriate to the circumstances of the case, a discretion which is not constitutionally objectionable.

87. In my view, however, the problem is not resolved simply by determining whether the choice is of the one type or the other. The question is whether, in effect, the law vests in the executive the power to determine the sentence to be imposed on an individual who breaches a court order. In ***Ali***, the Director was required to determine whether the offence of importing dangerous drugs in the course of trafficking should be tried in one of three tribunals, only one of which was obliged to impose the death sentence. His choice of tribunal constituted an inevitable selection of sentence. In ***Teh Cheng Poh***, the Director was required to decide whether a person in unlawful possession of a firearm in a security area should be charged with an offence under the Internal Security Act, the only

penalty for which was death, or under the Arms Act which was punishable by a fine or imprisonment at the discretion of the court. A crucial element of the offence under the Internal Security Act was possession in a security area, which no doubt explained the harsher penalty. While there no doubt was some element of the selection of the mandatory penalty of death in deciding whether to prosecute under the Internal Security Act, there was an intimate connection between this additional element of the place where the possession occurred and the penalty to be imposed, such as to imbue the Director's choice more with the characteristics of the ordinary prosecutorial function of determining the appropriate offence with which the perpetrator should be charged, than with the judicial function of determining the appropriate punishment in an individual case. One key to the distinction between the one case and the other therefore is the correlation between the elements of the offence and the more severe penalty. Where there is such correlation, the case is more likely to involve the exercise of the ordinary prosecutorial function. Whether this case falls on the wrong side of the line is therefore a question of the extent to which the discretion vested in the police is more or less of the one type or the other and requires a closer examination of the elements of the offences involved and the exercise which the police must undertake.

88. Under section 269 of the Criminal Code a person who "willfully neglects without reasonable excuse to obey … in any material particular" an order of any court by which he or she is bound, is liable on summary conviction to imprisonment for three months. Accordingly, the burden would rest on the prosecution to establish the existence of an order by which the accused is bound, a failure to obey the order in a material particular, willful neglect on the part of the accused to obey the order and the absence of any reasonable excuse for failing to obey the order. Under section 106 A(1), on the other hand, an offence is committed where a person knowingly disobeys or fails to comply with an injunction. The prosecution accordingly need only provide proof of disobedience or of failure to comply, with the accompanying knowledge on the part of the

accused that his or her conduct amounts to such disobedience or failure. The offence is committed even if there is a reasonable excuse for it. Where the police are unable to prove the absence of a reasonable excuse, they would have no choice but to prosecute under section 106A(1). On the other hand, where the police think they can establish that a person has knowingly disobeyed an order of the court, amounting to willful neglect, and there is no known reasonable excuse for such behaviour, it has the choice of prosecuting under either section 269 or section 106A(1). In such an event, one would expect that the choice whether to proceed under section 106A(1) or section 269 would depend upon the view which the police take of the seriousness of the breach under consideration. There would ordinarily be nothing objectionable about that. However, ordinarily one would expect that the section 269 offence which envisages the more flagrant conduct of willfully neglecting to obey an order, without any reasonable excuse for so doing, would carry the more severe penalty. But in this case, the opposite is potentially the case. A person charged under section 269 is subject to a maximum term of imprisonment of three months, if the magistrate is of the view that a custodial sentence is appropriate, and to a fine in his or her discretion, if not. Under section 106A(1), on the other hand, where an offence is committed, even if there is a reasonable excuse for the breach, a minimum fine of BZ$50,000.00 is payable by a natural person, plus BZ$100,000.00 per day for a continuing offence, or a minimum term of imprisonment of 5 years, if a custodial sentence is thought appropriate. In the case of a body corporate or incorporate, the minimum punishment is a fine of BZ$100,000.00, plus BZ$300,000.00 for each day the offence continues.

89. Unlike the choice with which the Director was confronted in ***Teh Cheng Poh***, therefore, there is here no correlation between the more severe penalty and an element of the offence which would ordinarily be seen as the explanation for the harsher penalty imposed by Parliament. In this case, the harsher mandatory penalty is imposed for what on the face of it, seen from the standpoint of the elements of the offence, is the less serious offence, that is, simple, knowing

disobedience, whether or not accompanied by a reasonable excuse. By contrast, the milder discretionary penalty is imposed where there is willful neglect not accompanied by a reasonable excuse. Where the police decide to prosecute under section 106A instead of section 269, therefore, there will inevitably be more of a selection of the penalty to be imposed on the particular defendant, than an attempt to match the seriousness of the conduct of the accused with the appropriate offence. The selection which the police are allowed to make by section 106A(8)(2) therefore amounts more to the exercise of a sentencing function than the exercise of prosecutorial discretion. For this reason, the separation of powers doctrine is infringed.

90. In ***Ali***, the Privy Council held that the constitutional vice which was identified stemmed from the statutory provision which required a judge sitting without a jury to impose the death penalty on anyone found guilty of trafficking in drugs. Accordingly, it was that provision which had to be declared invalid. Similarly, in this case, it is section 106A(3) which creates the vice of permitting the executive to select the sentence to be imposed by mandating the Supreme Court to impose the minimum penalties provided for. It is this section which must accordingly be declared invalid.

Mandatory Penalty – An inhuman or degrading punishment

91. The appellants and the interested parties contend that the mandatory penalties provided for by section 106A(3) of the Amendment Act are grossly disproportionate and accordingly violate section 7 of the Belize Constitution. Section 7 provides that “No person shall be subjected to torture or to inhuman or degrading punishment or other treatment.”

92. In ***Aubeeluck v State*** [2011] 1 LRC 627, the Privy Council held (at para 32) that a punishment is inhuman or degrading if it is grossly disproportionate to what the offender deserves. In that case, a mandatory sentence of three years

imprisonment for the offence of possession of drugs as a trafficker, of selling a single packet of cannabis as a trafficker and of smoking cannabis was wholly disproportionate given that the appellant was "dealing in a small way in small quantities of gundia", was a person of good character and would not at the time of judgment be charged as a trafficker having regard to changes in the law. Their Lordships thought that, even though trafficking in drugs was a serious matter, "to disregard all mitigation, including the fact that these were first offences by the appellant, and to impose a minimum sentence of three years' penal servitude would be grossly disproportionate."

93. Their Lordships provided no specific guidance on the factors to be taken into account in determining whether a punishment is grossly disproportionate. But all parties in their respective cases have referred us to the judgment of Lamer J in ***R v Smith (Edward Dewey)*** [1987] 1 SCR 1045, which was also referred to with approval by the Privy Council in ***Aubeeluck*** and in ***Reyes v R*** [2002] 2 AC 235 and by the House of Lords in ***R v Lichniak*** [2003] 1 AC 903. The principles held by Lamer J in ***R v Smith*** to be applicable in a case such as this have themselves been the subject of refinement in later decisions of the Supreme Court of Canada, such as ***R v Lyons*** [1987] 2 SCR 309, ***R v Luxton*** [1990] 2 SCR 711, ***R v Goltz*** [1991] 3 SCR 48, ***R v Morrisey*** [2000] 2 SCR 90, and ***R v Ferguson*** [2008] 1 SCR 96. I have attempted to distill the current position in Canada as established in these cases in the following paragraphs.

94. The prohibition against inhuman and degrading punishment is intended to protect against punishment which is so excessive as to outrage the society's standards of decency. A punishment which is merely disproportionate is not unconstitutional. Rather, to be condemned as inhuman and degrading, a punishment must be *grossly* disproportionate for the offender, such that members of society would find it abhorrent or intolerable. The test is so framed that the means and purposes of legislative bodies are not to be easily upset in a challenge. The use of the word 'grossly' "reflects this Court's concern not to hold Parliament to a standard so exacting ... as to require punishments to be perfectly

suited to accommodate the moral nuances of every crime and every offender" – ***Lyons*** 344-345.

95. A minimum mandatory punishment is not in and of itself cruel and unusual. In order to determine whether the constitutional standard has been breached, a number of factors must be considered although no single factor is determinative. The factors include: the gravity of the offence; the personal characteristics of the offender; the particular circumstances of the case in order to determine what range of sentences would have been appropriate to punish, rehabilitate or deter this particular offender or to protect the public from this particular offender; the actual effect of the punishment on the individual; the penological goals and sentencing principles upon which the sentence is fashioned; the existence of valid alternatives to the punishment imposed; and a comparison of punishments imposed for other crimes in the same jurisdiction - ***Morrisey***, paras 26-28.

96. Ordinarily, an assessment of whether the law imposes an inhuman or degrading punishment would occur in a challenge made by an offender who has been sentenced to the prescribed punishment and the evaluation of the relevant factors would be carried out in relation to the personal circumstances of that particular offender. If the sentence is found to be grossly disproportionate for that offender, the court will proceed to give the appropriate relief. If on the other hand the punishment is not considered to be grossly disproportionate for the particular offender, the court will proceed to consider whether the punishment would be grossly disproportionate in relation to a reasonably hypothetical offender. The hypothetical scenario selected for analysis must not be "far-fetched or marginally imaginable as a live possibility" or a "remote or extreme example", but rather must be reasonable in view of the crime in question and be realistic or one which "could commonly arise in day-to-day life" having regard to the nature of the crime, and bearing in mind that some crimes "do not easily lend themselves to resorting to reasonable hypotheticals as guides to assessing

punishment as cruel and unusual as they can be committed in an almost infinite variety of ways" - ***Morissey***, para 31. In such cases, it would be appropriate to develop hypotheticals from the case law by distilling their common elements. Thus when dealing with rare or uncommon crimes, it would be sufficient if the hypothetical scenario be a common example of the crime rather than an example of common everyday occurrences. In most cases, however, the proper approach is to develop imaginable circumstances which could commonly arise with a degree of generality appropriate to the particular offence - ***Morissey***, para 50.

97. I am happy to accept these principles as providing a sound basis for determining whether under the Belizean Constitution, a punishment is so grossly disproportionate as to be an inhuman or degrading punishment.

98. This is obviously not a case in which the constitutionality of section 106A(3) can be assessed by reference to the circumstances of any particular individual. No one has yet been charged under section 106A(1), far less convicted. Accordingly, Mr Fitzgerald and Lord Goldsmith have pressed upon us for our consideration the case of a legal adviser to a foreign company which commences or continues an arbitration in breach of an injunction, or of a father who breaches an order restraining him from being within a certain distance of his estranged wife in order to attend to his sick child. Or, we might reasonably imagine a small company which is required by order to return a vehicle to its rightful owner, but fails to do so by the stipulated time because, say, of a death in the family. The offence under consideration is breach of an injunction and there are probably an infinite variety of such orders and consequently an infinite variety of ways in which they might be breached.

99. The offence under section 106A(1) is committed where a person knowingly disobeys or fails to comply with an injunction. As already pointed out, the absence of a reasonable excuse for the breach is not an element of the offence. An offender is accordingly exposed to the mandatory penalties provided

for under section 106A(3), even though he or she may have a perfectly justifiable excuse for ignoring or defying the order.

100. The mandatory penalties provided for under section 106A(3) apply to three different categories or persons. The first is to legal persons, that is to say, corporate or incorporate bodies, who must be fined a minimum of BZ$100,000.00 and BZ$300,000.00 for each day the breach continues. In the hypothetical scenario described above, the company which returns the motor vehicle, say, four days late, must be fined a total of BZ$1.3 million. If this company is small or otherwise not financially well off, it may lead to its destruction. If it is a family business, the family's accumulated wealth could be wiped out. In my view, such a punishment in such circumstances, imposed without consideration of the individual circumstances of the company, or the reasons for the breach, or any other possible mitigating factors, is prima facie disproportionate and grossly so. It would outrage the standards of decency of Belizeans.

101. The second category of persons to whom section 106A(3) applies is those natural persons who fall within the extenuating circumstances set out in subsection 3(a), that is to say, persons who have previously been law abiding and have no criminal record, who committed the offence through sheer ignorance of the consequences of his conduct and would suffer grave hardship to himself or his family by the imposition of the full penalties under section 106A(3). Such a person is liable only to a minimum fine of five thousand dollars and to imprisonment of one year in default of payment of the fine. This category excludes anyone who might have been convicted of any offence, however trivial, over the course of his life and appears to exclude as well anyone who has not complied with the law, even though never convicted. It also excludes the well to do for whom a minimum fine of BZ$50,000.00 would not cause grave hardship. It excludes further anyone who breached the order out of sheer ignorance of the consequences of his or her conduct, but it is difficult to imagine someone who has been found to have knowingly disobeyed an injunction, not at the same time

being aware that his actions would result in the breach of a court order or that such breach might result in him facing a penalty.

102. The third category is any natural person who does not fall within the 'extenuating circumstances' category. Where such a person knowingly disobeys an injunction, the Court must impose either a fine of at least BZ$50,000.00 but not more than BZ$250,000.00, or a term of imprisonment of at least 5 years, or both such fine and term of imprisonment. It is clear that upon conviction the presiding judge has a choice of three fixed penalties: the fixed fine of BZ$50,000, the fixed term of imprisonment of 5 years, or both, but in the case of a continuing offence, there is to be imposed in addition a fine of BZ$100,000.00 for each day the offence continued. Mr Fitzgerald and Lord Goldsmith have focused their fire on the five year minimum sentence on the assumption that a judge who considers that a custodial sentence is appropriate would be bound to impose the mandatory term of imprisonment of five years. That may be so, but as a practical matter, it is more likely that a judge who thinks a custodial sentence is appropriate but considers a five year term to be excessive would choose instead to impose a fine, reserving the five year prison sentence for the most egregious and least deserving offender. This must affect any assessment of whether the penalty is grossly disproportionate since it is unrealistic to suppose that a judge would consider it appropriate to sentence the father who breaches the order to tend to his sick daughter or even the lawyer who advises his or her client wrongly, to imprisonment for five years. In reality, therefore, the mandatory sentence imposed by section 106A(3) is a fine of BZ$50,000.00, plus a daily fine of BZ$100,000.00 for a continuing offence.

103. No doubt the offence of knowingly disobeying an order of the court is a serious one. Confidence in the administration of justice requires that court orders be obeyed. It seems fairly clear that the enormity of the minimum fine which section 106A(3) imposes was designed to deter natural persons such as those who may have advised Dunkeld or BDSL to proceed with arbitration or

enforcement proceedings abroad in defiance of orders made by the Supreme Court of Belize. In the absence of any explanation, the actions of Dunkeld and BDSL no doubt display contempt for the courts of Belize, moreso since on its face they appear to be outright acts of defiance. I say so, even as I acknowledge that there is evidence that the Government of Belize has commenced proceedings locally in breach of an injunction of an English court and the Supreme Court of Belize has issued orders which do not give full respect for the principle of comity. Nevertheless, it is no doubt clear that even though one might think that the minimum penalties are severe for those persons who may have advised or counseled Dunkeld and BDSL, it is probably inaccurate to describe such penalties as grossly disproportionate in relation to them, given that they are likely to be entitled to levels of remuneration which would make it possible for them to afford to pay any fine imposed, if not without difficulty, at least without descending into penury. Moreover, there is the likelihood that the corporate entities who they advised to breach the order may be prepared to indemnify them. It may very well be justifiable, therefore, to impose these stiff financial penalties, with the outside option of imprisonment, to ensure compliance by foreign companies which might otherwise be outside the reach of enforcement mechanisms locally.

104. But we are to judge disproportionality not only by those cases which might justify the harsh penalties imposed, but also by those reasonably hypothetical cases which may not. In other words, a penalty which is grossly disproportionate in a reasonably hypothetical situation is not saved because of an equally reasonably hypothetical case where it may not be. Given the wide variety of circumstances in which injunctions are issued, in relation to a wide variety of individuals who may breach orders in a wide variety of circumstances, it is probably inevitable that there would be hypothetical situations which are not farfetched or extreme in respect of which ‘a one size fits all’ penalty would be found to be grossly disproportionate.

105. A BZ$50,000.00 fine would probably cripple thousands of Belizeans who do not earn close to that much on an annual basis. It is accordingly not hard to imagine a number of realistic situations where such a fine would cause disproportionate hardship on the average Belizean who, for good cause falling short of the requirements needed to establish say the common law defence of necessity, breaches an injunction but does not fall within the 'extenuating circumstances' category because of a previous conviction for an offence, however minor and however aged. The example of defiance exemplified by the conduct of Dunkeld and BDSL is therefore probably not representative of commonly imaginable instances of the offence. Indeed, it is no doubt precisely because it was not difficult to conceive of many situations where the average Belizean citizen or business might be financially destroyed by the minimum fine that it was thought necessary to create the 'extenuating circumstances' category which as it turns out appears to be too narrowly drawn. The 'extenuating circumstances' category is accordingly evidence itself of the harshness of the fixed penalties which the Supreme Court is mandated to impose.

106. It is significant that the offence is committed without the need on the part of the prosecution to prove moral blameworthiness, that is to say, that there is no reasonable excuse for the offender's action. Section 106A(3) is to be compared with section 296 of the Criminal Code where the offence is committed where there is willful neglect of an order without a reasonable excuse. A person who knowingly disobeys an order of the court and has no or no reasonable excuse for so doing no doubt can expect a severe penalty and society would insist upon such, even if only as a matter of deterrence. But society would wonder at the pointlessness of punishing someone who has a reasonable excuse for his actions. The imposition of a fine of BZ$50,000.00 on a father for breaching a restraining order because his daughter is sick is unlikely to engender in the public respect for the administration of justice but may instead generate contempt for it. The offender is also unlikely to be deterred in future from breaching a court order if confronted with similar circumstances, and neither would society want or

expect him to. The aim of the section therefore is to require strict obedience to injunctions and to brook no excuse, whether reasonable or not. Parliament has clearly judged existing prohibitions to be insufficient and has decided to lay down strict liability for knowing disobedience. The emphasis is on deterrence.

107. But assuming that existing penalties are insufficient to induce compliance, no reason has been given as to why the simple expedient of increasing the maximum penalties which could be imposed and leaving it to the Court to select the penalty which fits the circumstances of the case would not have done just as well. Indeed, so great is the impulse to deter that an offender who might be financially destroyed by a minimum penalty of BZ$50,000.00 and who, though knowingly disobeying an order, can show that he was ignorant of the consequences of his action, would nevertheless be subjected to the BZ$50,000.00 minimum penalty because he had been convicted fifteen years ago of a traffic offence. But for that conviction, he would have fallen into the 'extenuating circumstances' category and been subject to the much lower minimum fine of only BZ$5,000.00. Members of society would undoubtedly be outraged by such a result and would view the vast disparity in such sentences, based upon an inconsequential differentiating factor, as wholly arbitrary.

108. I am therefore of the view that the mandatory penalties imposed by section 106A(3) are grossly disproportionate and so infringe section 7 of the Constitution.

109. Mr Barrow submits that even if we were to find that the fixed penalties are grossly disproportionate we should not strike down section 106A(3) for that reason but should await a case where someone is found guilty of the offence and sentenced accordingly and to then determine whether, in light of the individual circumstances of the offender, the penalty is shown to be grossly disproportionate. If so, the court could then grant relief by reducing the penalty. He pointed out that this was the option exercised by the Privy Council in

Aubeeluck. In that case, the Director of Public Prosecutions submitted that, as explained in ***State v Vries*** [1997] 4 LRC 1, there may be cases where it would be appropriate to declare that the offending provision was of no force or effect for all purposes. The other options were to declare it to be of no force and effect in particular classes of case and to read it down accordingly, or simply to quash the sentence and substitute an appropriate one. Their Lordships accepted the Director's submissions and considered that the latter was the preferable option. Lord Clarke said (at para 37) no more than that "The first course would plainly be inappropriate. There is a case for taking the second course. However, the Board has concluded that much the best course is the third." He gave no reason why declaring the provision to be invalid was plainly inappropriate.

110. In ***Vries***, the Namibia High Court held that the first two options were appropriate where the court was satisfied that the mandatory penalty imposed by the impugned statutory provision was grossly disproportionate "with respect to hypothetical cases which can be foreseen as likely to arise commonly." I therefore do not understand their Lordships to have ruled out the possibility of invalidating a mandatory penalty which is held to be grossly disproportionate. In fact, they appeared, albeit not in the most direct way, to have endorsed the option at least in the circumstances described in ***Vries***. It would be recalled as well that in ***Reyes v R***, the mandatory death penalty was declared to be inconsistent with section 7 of the Belize Constitution and modified accordingly even though there was no determination made as to whether the death sentence was grossly disproportionate in the particular circumstances of the murder committed by the appellant.

111. Not long before ***Aubeeluck*** was decided, the Supreme Court of Canada, in ***R v Ferguson*** [2008] 1 S.C.R. 96, in a unanimous decision, considered what the appropriate remedy would be in a case where a mandatory penalty was held to be grossly disproportionate. The Court held that if the law imposing a minimum sentence is found to be unconstitutional on the facts of a particular case, it

should be declared inconsistent with the Charter and hence of no force or effect. In so doing, the court rejected an approach which would involve making constitutional exceptions for individual cases where the sentence imposed is thought to be grossly disproportionate on the facts of that particular case, but otherwise leaving the provision intact. Two main arguments were put forward in favour of such an approach: i) where the impugned section generates an unconstitutional result in a small number of hypothetical cases, it is better to grant a constitutional exemption than to strike down the law as a whole (para 38); and ii) granting constitutional exemptions fits well with the Court's practice of severance, reading in and reading out in order to preserve the law to the maximum extent possible (para 39). The court did not find these arguments persuasive for the following reasons:

i) In applying alternative remedies such as severance and reading in, courts are at risk of making inappropriate intrusions into the legislative sphere and creating something different in nature from what Parliament intended (para 50). Allowing courts to grant constitutional exemptions for mandatory minimum sentences directly contradicts Parliament's intention in passing mandatory minimum sentence legislation in the first place, which was to remove judicial discretion to impose a sentence below the stipulated minimum (paras 52-54). Parliament must be taken to have specifically chosen to exclude judicial discretion in imposing mandatory minimum sentences. As such, to permit judges to go below the established floor runs counter to the clear intent that Parliament evinces;

ii) When a law produces an unconstitutional effect, the usual remedy lies under s. 52(1) which provides that the law is of no force or effect to the extent that it is inconsistent with the Charter. The presence of s. 52(1) with its mandatory wording suggests an intention of the framers of the Charter that unconstitutional laws are deprived of effect to the extent of their inconsistency, are not left on the books subject to discretionary case-by-case remedies;

iii) When a constitutional exemption is granted, the successful claimant receives a personal remedy but the law remains on the books, intact. The mere possibility of such a remedy thus necessarily generates uncertainty: the law is on the books, but in practice, it may not apply (para 70);

iv) Allowing unconstitutional laws to remain on the books deprives Parliament of certainty as to the constitutionality of the law in question and thus of the opportunity to remedy it (para 73).

112. I am persuaded by the reasoning of the Supreme Court of Canada and indeed I rather think that once it is determined that a law passed after the commencement of the Belize constitution is inconsistent with any of its provisions, the Supreme Court has no choice but to declare the law to be null and void and of no effect, to the extent of the inconsistency. This is the effect of section 2 of the Constitution which appears to rule out the option of dis-applying section 106A(3) on a case by case basis, but leaving it otherwise intact. Because section 106A(3) is not an existing law to which section 134(1) of the Constitution applies, the power of modification, adaption, qualification or the making of exceptions is not available. Neither does the Supreme Court of Belize have to power to read in or read out words in a statutory provision in order to save it from invalidity. It might be theoretically possible to interpret a mandatory penalty which is found to be grossly disproportionate in reasonably hypothetical cases which occur with frequency in such a way as to make it inapplicable to those cases where it would not be, if it is possible to define those exceptions with great precision. But this would have to be a rare and truly exceptional case. I am mindful that where "it is possible to read statutory language as subject to an implied term which avoids conflict with constitutional limitations the court should be very ready to make such an implication" ***– Hector v Attorney General of Antigua and Barbuda*** [1990] 2 AC 312, 319. However, I am ever aware of the danger that reading in an implied exception may produce a provision which Parliament never intended to enact – see ***de Freitas v Ministry of Agriculture***

[1999] AC 69, 79. The first option therefore will usually be to declare the law to be invalid and void. In this case, I find myself unable to formulate any implied term which would capture those situations where the mandatory penalty imposed by section 106A(3) would pass constitutional muster. On the principles accepted in ***R v Ferguson***, therefore, section 106A(3) should be declared invalid.

113. I would add that, in the event that the Privy Council did intend in ***Aubeeluck*** to restrict the power to declare a provision to be of no effect to those cases where the mandatory penalty is grossly disproportionate in hypothetical cases which can be foreseen as likely to arise commonly, my conclusion would be the same. It should be clear from what I have said above that I do anticipate that there would be an unquantifiable number of categories of cases which one can expect would commonly occur where the mandatory penalty of BZ$50,000.00, plus the daily rate of BZ$100,000.00, would financially cripple an errant litigator whose individual circumstances might warrant a much lesser sentence and so would be grossly disproportionate. On this formulation of the rule, therefore, I would also exercise the option of declaring section 106A(3) to be invalid.

The Right to Property

114. The appellants and the interested parties challenge the constitutionality of section 106A(8) on the grounds that, in every respect, it violates the right to be protected from the arbitrary deprivation of property guaranteed by sections 3(d) and 17(1) of the Constitution and, in the case of international arbitrations carried out pursuant to a treaty, it violates the right to the protection of the law guaranteed by 3(a) thereof.

115. Under section 106A(8), the Supreme Court of Belize is empowered to do three things: i) to restrain any party or an arbitrator from proceeding with arbitration proceedings (whether sited in Belize or abroad) on the ground that

such proceedings are or would be oppressive, vexatious, inequitable or would constitute an abuse of the legal or arbitral process; ii) to restrain a party from commencing or continuing any proceedings for the enforcement of an arbitral award (whether in Belize or abroad) on the same grounds; and iii) to void or vacate an award made by an arbitral tribunal (whether in Belize or abroad) in disregard of or contrary to any such injunction.

116. With regard to the power to restrain international arbitration proceedings commenced pursuant to a treaty, and in particular the UK-Belize Bilateral Investment Treaty, Mr. Fitzgerald submits that section 106A(8)(i) violates the right to conclude any judicial process without the interference by either the executive or the legislature. This right, he argued, was recognised and given effect to by the Privy Council in ***Thomas v Baptiste*** [2000] 2 AC 1. In that case, condemned prisoners sought a stay of their execution pending the determination of petitions they had lodged with the Inter-American Commission on Human Rights challenging their death sentences. Their petitions were lodged pursuant to rights they enjoyed under the Inter-American Convention on Human Rights to which their host state, Trinidad and Tobago, was a party. Their Lordships held that the right to the due process of law guaranteed to them by the Trinidad and Tobago Constitution included "the right of a condemned man to be allowed to complete any appellate or analogous legal process that is capable of resulting in a reduction or commutation of his sentence before the process is rendered nugatory by executive action" (p. 22). This included the right to complete their petitions before the Commission before the executive decided to execute them. Their Lordships acknowledged the principle that international conventions are not self-executing and so do not create rights and obligations which are enforceable domestically. But the right of a condemned man to complete proceedings before an international human rights body did not infringe this principle. This was because the right which was being claimed was not the particular treaty right to petition the commission or to complete the particular process already initiated. Rather, the right their Lordships recognised was (at p. 23):

> "..... the general right accorded to all litigants not to have the outcome of any pending appellate or other legal process pre-empted by executive action. This general right is not created by the Convention; it is accorded by the common law and affirmed by section 4(*a*) of the Constitution. The applicants are not seeking to enforce the terms of an unincorporated treaty, but a provision of the domestic law of Trinidad and Tobago contained in the Constitution. By ratifying a treaty which provides for individual access to an international body, the government made that process for the time being part of the domestic criminal justice system and thereby temporarily at least extended the scope of the due process clause in the Constitution."

Likewise, Mr. Fitzgerald argues, the UK-Belize BIT, temporarily at least, made the right to arbitrate disputes with the Government of Belize before international arbitration tribunals a part of the domestic law of Belize and extended the scope of the right to the protection of law guaranteed by section 3(a) of the Belize Constitution which, it is not disputed, encompasses the due process of law.

117. There is no merit in this argument. Contrary to Mr Fitzgerald's submission, the right which the Privy Council in ***Thomas v Baptiste*** held protected under the due process clause was the right not to have a legal process pre-empted by executive action, not legislative action. The complaint in this case is that the legislature has pre-empted international arbitrations proceedings, not the executive. I do not think there is any basis for extending the rule in ***Thomas v Baptiste*** to cover legislative action, if this is what Mr Fitzgerald is suggesting. The rule on which the decision in ***Thomas v Baptiste*** was founded is the common law rule prohibiting the preemption of pending appellate or other legal processes. A common law right against the preemption of appellate or other legal processes by the legislature cannot possibly exist since the common law is itself subject to change by legislation duly passed under the constitution. Whether, a law which permits the judiciary to restrain arbitration proceedings under a treaty is contrary to other rights guaranteed by the constitution is another question.

118. The other answer to Mr Fitzgerald's argument is that ***Thomas v Baptiste*** was disapproved of by the Caribbean Court of Justice in ***Attorney General of Barbados v Joseph and Boyce*** (CCJ Appeal No. CV 2 of 2005, 8 November 2006). In short, their Honours were satisfied that the effect which the Privy Council gave to the treaty was inconsistent with the principle that an unincorporated treaty created no rights in domestic law (see paras 67-77 of the joint judgment of de la Bastide J and Saunders J). Accordingly, this aspect of ***Thomas v Baptiste*** can no longer be considered good law in Belize in so far it applies to a treaty right to pursue proceedings before an international tribunal.

119. On the other hand, while the right to arbitrate granted by a treaty will not for that reason alone be protected under the Constitution, there may be circumstances where the treaty right may crystallize into a contractual right between the state party to the treaty and the individual on whom the treaty bestows the right to arbitrate. In ***British Caribbean Bank Limited v Attorney General of Belize*** (CA 6 of 2011), for example, I pointed out (at para 90) that a provision in a BIT permitting an investor to refer an investment dispute to international arbitration

> "… may be seen … as an offer at large by the state parties to investors to arbitrate disputes arising under the treaty, which is accepted and crystallizes into an agreement to arbitrate upon the submission to arbitration by the investor."

Where such an agreement to arbitrate does arise it will receive such protection as any other contractual right is accorded under the constitution.

120. In this regard, the contractual right to arbitrate, Lord Goldsmith argues, is property protected by section 3(d) of the Constitution. I have no hesitation accepting this proposition. As Lord Nicholls observed in ***Wilson v First Citizens Trust Ltd*** [2004] 1 AC 816*, para 39*, "Contractual rights may be more valuable and enduring than property rights." Accordingly, Lord Goldsmith says, since section 106A(8) empowers the judiciary to restrain the interested parties and the

appellants from exercising their contractual right to arbitrate, it violates both section 3(d) and section 17(1) of the Constitution. Section 3(d) provides that

> 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-
> ...
> (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.

Section 17, so far as is relevant, provides as follows:

> (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.

121. The Attorney General's only response is to observe that the power granted by section 106A(8) is one which the Supreme Court of Belize already possessed at common law. To a large extent he is correct. In ***British Caribbean Bank Limited v Attorney General of Belize*** (CA 6 of 2011) (at paras 99-106), this court acknowledged the Supreme Court's jurisdiction to restrain a party to

arbitration proceedings from pursuing or continuing an arbitration, whether in Belize or abroad, which was oppressive or vexatious, or what is probably the same thing, unconscionable or an abuse of the process of the court. This specific power derives from the court's more general power vested in it by section 27(1) of the Supreme Court of Judicature Act CAP 91 to issue injunctions where "it appears to the court to be just and convenient to do so". I do not interpret section 106A(8) as intending to extend the court's power in so far as an arbitration which would be 'inequitable' may be restrained under section 106A(8). This phrase does no more than invoke the court's equitable jurisdiction already encompassed in the 'oppressive', 'vexatious', and 'unconscionable' categories. On the other hand, we have not been referred to any authority which establishes the court's power to restrain an arbitration on the ground that its continuation would be an abuse of the arbitral process. With this exception, therefore, I do not see section 106A(8) as extending the Supreme Court's preexisting power. This means that the extreme caution which the Supreme Court has traditionally exercised in granting such injunctions is not displaced by section 106A(8) either. This is in recognition in part of the fact that the parties have voluntarily chosen to settle their disputes by arbitration and that the arbitrator is competent to determine matters concerning his or her own jurisdiction.

122. That said, I understand the Attorney General's submission to be that any contractual right to refer a dispute to arbitration would have been limited by the Supreme Court's common law power to issue anti-arbitration injunctions. Put another way, the right which a party to a contract acquires under an arbitration clause does not include the right to pursue an arbitration which will cause oppression or vexation or which would be inequitable or an abuse of the legal process, as these terms have been understood and applied by the court in the exercise of its common law powers. Accordingly, there could be no breach of the right to property. I do not accept this submission. In ***Wilson v First County Trust Limited (No 2)***, Lord Hope said (at para 106):

> "…. it is a matter for domestic law to define the nature and extent of any rights which a party acquires from time to time as a result of the transactions which he or she enters into. One must, of course, distinguish carefully between cases where the effect of the relevant law is to deprive a person of something that he already owns and those where its effect is to subject his right from the outset to the reservation or qualification which is now being enforced against him. The making of a compulsory order or of an order for the division of property on divorce are examples of the former category. In those cases it is the making of the order, not the existence of the law under which the order is made, that interrupts the peaceful enjoyment by the owner of his property. The fact that the relevant law was already in force when the right of property was acquired is immaterial, if it did not have the effect of qualifying the right from the moment when it was acquired."

I agree. In this case the Supreme Court's common law power to restrain the pursuit or continuation of arbitration proceedings did not have the effect of qualifying the contractual right to arbitrate from the moment the contract containing an arbitration clause was executed. Upon such execution, the parties to the contract become possessed of an unqualified right to refer their disputes to arbitration. An injunction restraining the exercise of that right deprives the parties of the contractual right with which they are already vested. It is therefore clear to me that an order restraining a party to an arbitration agreement from commencing or continuing arbitration proceedings deprives him of his contractual right to arbitrate and a law which empowers the judiciary to make any such order fails to protect him from the deprivation of his property, contrary to section 3(d).

123. On the other hand, it is not immediately obvious that an order restraining the commencement or continuation of arbitration proceedings constitutes the compulsory taking of possession or acquisition of the contractual right to arbitrate. The right to arbitrate continues to belong to the original owner, albeit he or she has been deprived of its use. What constitutes a compulsory taking or acquisition must of course be given a generous interpretation and it has been held in ***Campbell-Rodriques v Attorney General of Jamaica*** [2007] UKPC 65 that a taking is not limited to direct appropriation, but may encompass regulation

of the use of the property which adversely affects the owner to a sufficiently serious degree. Lord Carswell said (at para 15):

> ".... there may be a taking which is not a direct physical appropriation of property or an ouster of possession: cf the remarks of Scalia J in *Lucas v South Carolina Coastal Council* (1992) 505 US 1003. Nor does it appear necessary to show that there has been a transfer or change of ownership or possession from one person to another person or body: see *OD Cars Ltd v Belfast Corporation* [1959] NI 62, 84, per Lord MacDermott LCJ in the Northern Ireland Court of Appeal."

124. Given that I have already found that section 106A(8) deprives a party to a contract containing an arbitration clause of his contractual right to arbitrate contrary to section 3(d) of the Constitution, I do not find it necessary to determine whether section 106A(8) also effects a compulsory taking or acquisition, moreso since the rights protected by sections 3(d) and 17(1) are both subject to derogation in the public interest – see section 3(d); ***Campbell-Rodrigues***, para 18; ***Grape Bay Limited v Attorney General of Bermuda*** [2000] 1 WLR 574, 583. The question is whether prohibiting the pursuit of arbitration proceedings which are or would be oppressive, vexatious and inequitable or would constitute an abuse of the legal or arbitral process is in the public interest.

125. In ***Wilson v First Country Trust Ltd***, in an analysis which is now common place in defining the contours of permitted limitations on fundamental rights in the public interest, Lord Nicholls observed (at para 68):

> "The fairness of a system of law governing the contractual or property rights of private persons is a matter of public concern. Legislative provisions intended to bring about such fairness are capable of being in the public interest, even if they involve the compulsory transfer of property from one person to another …"

However, there must always be a "reasonable relationship between the means employed and the aim sought to be achieved. The means chosen to cure the

social mischief must be appropriate and not disproportionate in its adverse impact."

126. It seems fairly plain to me that prohibiting the pursuit of arbitration proceedings which bear the descriptions set out in section 106A (8) as they have been understood at common law pursues the legitimate aim of promoting fairness between parties to an agreement to arbitrate. The right of access to justice, so important to the maintenance of the rule of law, cannot be exercised in such a way as to abuse the process of the court. This is a principle which is fundamental to our system of justice. Likewise, the right to arbitrate cannot be fairly pursued if the arbitration process is itself abused. Arbitration proceedings which cause oppression, vexation or inequity, as these terms have been understood at common law, are similarly not in the public interest. Further, I can think of no fairer way to deal with arbitration proceedings which fit these descriptions then by vesting in the Supreme Court the power, in its discretion, to grant injunctive relief. In any event, as Lord Nicholls cautions, due deference must be paid to means which the legislature has selected. He said in ***Wilson*** (at para 70):

> "… courts should have in mind that theirs is a reviewing role. Parliament is charged with the primary responsibility for deciding whether the means chosen to deal with a social problem are both necessary and appropriate. Assessment of the advantages and disadvantages of the various legislative alternatives is primarily a matter for Parliament. The possible existence of alternative solutions does not in itself render the contested legislation unjustified … The court will reach a different conclusion from the legislature only when it is apparent that the legislature has attached insufficient importance to a person's Convention right."

127. It is also fairly clear that an arbitration award is property – ***Societe United Docks v Government of Mauritius*** [1985] AC 585 – and that an order prohibiting the enforcement of such an award constitutes a deprivation of property within the meaning of section 3(d). For the reasons just given, however, prohibiting the enforcement of an award which would produce oppression,

vexation or inequity, as these have been understood at common law, or would be an abuse of the legal or arbitral process, is similarly in the public interest. It would follow as well that setting aside an award made in disregard of or contrary to an injunction issued for reasons which are in the public interest, would *ipso facto* be in the public interest. In any event, any attempt to enforce such an award domestically prior to the enactment of section 106A(8), would have been met with the objection that the party in breach of the order must first purge his or her contempt.

128. In my judgment therefore section 106A(8) does not infringe the right to property.

Taking stock

129. Thus far, I have found section 106A(3) to be inconsistent with the separation of powers doctrine and section 7 of the Constitution. Section 106A(3) imposes a mandatory penalty for the offence created by section 106A(1). It is clear that section 106A(3) is an important part of the scheme enacted by section 106A. If it falls, it follows that section 106A(1) and all other provisions connected with it would have to be declared invalid as well. That would leave only subsections (8) and (9) which can stand separate and apart from the criminal offence and its satellite provisions. Apart from subsection (9), therefore, which the trial judge struck down as violating the right to a fair hearing and the right of access to the court, it is strictly unnecessary to consider the separate challenges made to the other subsections. However, because of the possibility that this case will be taken further, I will express my views on the other major points which the appellants and interested parties have made.

Reverse Burden

130. The burden which section 106A(5) imposes on an official of a body to disprove guilt, Mr Fitzgerald and Lord Goldsmith contend, violates the right of

every person charged with a criminal offence to be presumed innocent until he is proved or has pleaded guilty, contrary to section 6(3)(a) of the Constitution. They say further that section 106A(5) is not saved by section 6(10)(a) of the Constitution because it is not a law which simply "imposes upon any person charged with a criminal offence the burden of proving particular facts." Section 106A(5) is not a law which fits this description because it does not merely impose an evidential burden on the accused to adduce evidence of a lack of knowledge, consent or connivance, leaving it to the prosecution to prove lack of knowledge, consent or connivance beyond a reasonable doubt. What it requires the accused to do is to disprove the most essential element of the offence of knowingly disobeying an injunction, that is to say, the means rea of the offence, willful intent and disobedience. They pointed out that traditionally the offence of contempt of court for disobedience of a court order requires a mental element. Indeed, section 106A(1) requires proof of knowing disobedience or failure to obey. What is more, the accused is required to disprove guilt in circumstances where the minimum penalties for the offence are severe. The burden which is imposed on an accused by section 106A(5) is accordingly not within reasonable limits.

131. Mr. Barrrow submits, on the other hand, that the burden imposed on the accused operates within reasonable limits given that the prosecutor would not ordinarily know what has occurred in "the boardroom or the corridors of the corporate body" and it would be relatively easy for the accused to prove lack of knowledge, consent or connivance since these will be matters peculiarly within the knowledge of the accused. He contends further that section 106A(5) leaves the primary responsibility to prove guilt on the prosecution.

132. The parties were agreed on the authorities which are relevant to a consideration of this challenge. For his part, the trial judge was content simply to refer to the settled principle which the authorities establish, that the right to the presumption of innocence is not an absolute right and does not prohibit the imposition of a burden on the accused to establish a defence, as long as the

overall burden of proof remained on the prosecution, nor did it prohibit the establishment of a presumption of law or fact, provided it operates within reasonable limits. In a terse conclusion, he observed that the challenge to the constitutionality of section 106A(5) was sufficiently answered by these propositions of law.

133. All parties to the appeals referred us to ***Attorney General of Hong Kong v. Lee Kwong-kut*** [1993] AC 951. In that case two provisions were challenged on the ground that they violated to right to be presumed innocent guaranteed by article 11(1) of Hong Kong Bill of Rights. The first (section 30 of the Hong Kong Summary Offences Ordinance) provided that:

> "Any person who is brought before a magistrate charged with having in his possession or conveying in any manner anything which may be reasonably suspected of having been stolen or unlawfully obtained, and who does not give an account, to the satisfaction of the magistrate, how he came by the same, shall be liable to a fine of $1,000 or to imprisonment for three months."

134. The second (section 25 of the Drug Trafficking (Recovery of Proceeds) Ordinance) made it an offence to become involved with a "relevant person" in a number of wide-ranging arrangements “knowing or having reasonable grounds to believe that the relevant person is a person who carries on or has carried on drug trafficking or has benefited from drug trafficking”. However, criminal liability could be avoided if the accused “discloses to an authorised officer a suspicion or belief that any funds or investments are derived from or used in connection with drug trafficking or any matter on which such a suspicion or belief is based” before he does the act in question, or, if such disclosure is made after he does the act, it is made on his own initiative and as soon as it was reasonable for him to do so. He would also escape liability if he establishes that “he did not know or suspect that the arrangement related to any person's proceeds of drug trafficking”; that he did not know or suspect that as a result of the arrangement entered into with the relevant person, “the retention or control by or on behalf of the relevant person of any property was facilitated” or, that by the arrangement any proceeds of drug

trafficking was used; or that he intended to disclose to an authorised officer his suspicion or belief but there is reasonable excuse for his failure to make such disclosure.

135. Lord Woolf began by noting (at pg. 968) that provisions such as the right to be presumed innocent “are always subject to implied limitations so that a contravention of the provisions does not automatically follow as a consequence of a burden on some issues being placed on a defendant at a criminal trial.” He referred to a passage from the decision of the European Court of Human Rights in ***Salabiaku v. France*** (1988) 13 E.H.R.R. 379 in relation to the comparable article 6(2) of the European Convention which he said illustrates the position taken in jurisdictions other than Canada. The ECHR said (at pg. 388):

> "Presumptions of fact or of law operate in every legal system. Clearly, the Convention does not prohibit such presumptions in principle. It does, however, require the contracting states to remain within certain limits in this respect as regards criminal law.... Article 6(2) does not ... regard presumptions of fact or of law provided for in the criminal law with indifference. It requires states to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence."

The right to be presumed innocent must therefore be read as containing an implicit degree of flexibility which “allows a balance to be drawn between the interests of the person charged and the state.” As he pointed out (at pg. 969-970):

> “There are situations where it is clearly sensible and reasonable that deviations should be allowed from the strict applications of the principle that the prosecution must prove the defendant's guilt beyond reasonable doubt. Take an obvious example in the case of an offence involving the performance of some act without a licence. Common sense dictates that the prosecution should not be required to shoulder the virtually impossible task of establishing that a defendant has not a licence when it is a matter of comparative simplicity for a defendant to establish that he has a licence... Some exceptions will be justifiable, others will not.

> Whether they are justifiable will in the end depend upon whether it remains primarily the responsibility of the prosecution to prove the guilt of an accused to the required standard and whether the exception is reasonably imposed, notwithstanding the importance of maintaining the principle which article 11(1) enshrines. The less significant the departure from the normal principle, the simpler it will be to justify an exception. If the prosecution retains responsibility for proving the essential ingredients of the offence, the less likely it is that an exception will be regarded as unacceptable. In deciding what are the essential ingredients, the language of the relevant statutory provision will be important. However what will be decisive will be the substance and reality of the language creating the offence rather than its form. If the exception requires certain matters to be presumed until the contrary is shown, then it will be difficult to justify that presumption unless, as was pointed out by the United States Supreme Court in *Leary v. United States* (1969) 23 L.Ed. 2d 57, 82, "it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend.""

With regard to the Canadian position he first expressed his agreement with the general conclusion arrived at by Dickson C.J.C. in ***Reg. v. Oakes*** 26 D.L.R. (4th) 200, 222:

> "In general one must, I think, conclude that a provision which requires an accused to disprove on a balance of probabilities the existence of a presumed fact, which is an important element of the offence in question, violates the presumption of innocence . . . If an accused bears the burden of disproving on a balance of probabilities an essential element of an offence, it would be possible for a conviction to occur despite the existence of a reasonable doubt. This would arise if the accused adduced sufficient evidence to raise a reasonable doubt as to his or her innocence but did not convince the jury on a balance of probabilities that the presumed fact was untrue."

Under the Canadian constitution, however, a two stage approach is adopted which involves firstly a determination as to whether the right in question is infringed, followed by an enquiry as to whether the impugned law operates within reasonable limits as can be demonstrably justified in a free and democratic society. It was accordingly understandable, Lord Woolf observed, that the Canadian Supreme Court eventually adopted a strict approach as to when there

had been a prima facie contravention of the presumption of innocence. Thus, in the later case of ***Reg. v. Whyte*** 51 D.L.R. (4th) 481 Dickson C.J.C. did not confine the presumptions which might offend the right to be presumed innocent to "important" or "essential" elements of the offence. Rather, he said (at p. 493):

> "In the case at bar, the Attorney-General of Canada argued that since the intention to set the vehicle in motion is not an element of the offence, section 237(1)(*a*) does not infringe the presumption of innocence. Counsel relied on the passage from *Oakes* quoted above, with its reference to an 'essential element,' to support this argument. The accused here is required to disprove a fact collateral to the substantive offence, unlike *Oakes* where the accused was required to disprove an element of the offence. The short answer to this argument is that the distinction between elements of the offence and other aspects of the charge is irrelevant to the section 11(*d*) inquiry. The real concern is not whether the accused must disprove an element or prove an excuse, but that an accused may be convicted while a reasonable doubt exists. When that possibility exists, there is a breach of the presumption of innocence. The exact characterization of a factor as an essential element, a collateral factor, an excuse, or a defence should not affect the analysis of the presumption of innocence. It is the final effect of a provision on the verdict that is decisive. If an accused is required to prove some fact on the balance of probabilities to avoid conviction, the provision violates the presumption of innocence because it permits a conviction in spite of a reasonable doubt in the mind of the trier of fact as to the guilt of the accused."

As a consequence, it has been held in Canada in ***Reg. v. Chaulk*** (1990) 62 C.C.C. (3d) 193 that the onus on a defendant to prove insanity as a defence to murder contravenes the presumption of innocence, but it was a demonstrably justifiable limit on the right and so constitutional. In making the latter determination, the court considered whether “the objective of the impugned provision ... [is] of sufficient importance to warrant overriding a constitutionally protected right or freedom” which in turn requires that the impugned provision must “relate to concerns which are pressing and substantial in a free and democratic society”. If it is determined to be of sufficient importance the next question is whether the means chosen to achieve the objective passes a

proportionality test. The impugned law must “(a) be 'rationally connected' to the objective and not be arbitrary, unfair or based on irrational considerations; (b) impair the right or freedom in question as 'little as possible,' and (c) be such that their effects on the limitation of rights and freedoms are proportional to the objective" - ***Reg. v. Chaulk***, 62 C.C.C. (3d) 193, 216-217. But in applying this test, the Canadian Supreme Court made clear that there must be some flexibility. A provision will not be held to fail the test even if Parliament failed to adopt “the least possible intrusive means of attaining its objective as long as it has chosen from a range of means which impairs [the right] as little as is reasonably possible.” This led Lord Woolf to conclude (at pg. 971) that “applying the two-stage approach, the courts in Canada in the end tend to come to the same conclusion as would be reached in other jurisdictions.” However, he cautioned against applying the Canadian two stage approach to the interpretation of the corresponding Hong Kong provision. He said (at pg. 972):

> “Normally, by examining the substance of the statutory provision which is alleged to have been repealed by the Hong Kong Bill, it will be possible to come to a firm conclusion as to whether the provision has been repealed or not without too much difficulty and without going through the Canadian process of reasoning. The application of a test along the lines suggested by Lawton L.J. in *Reg. v. Edwards* [1975] Q.B. 27, 39-40, in the manner already indicated will often be all that is required. The court can ask itself whether, under the provision in question, the prosecution is required to prove the important elements of the offence; while the defendant is reasonably given the burden of establishing a proviso or an exemption or the like of the type indicated by Lawton L.J. If this is the situation article 11(1) is not contravened.
>
> In a case where there is real difficulty, where the case is close to the borderline, regard can be had to the approach now developed by the Canadian courts in respect of section 1 of their Charter. However in doing this the tests which have been identified in Canada do not need to be applied rigidly or cumulatively, nor need the results achieved be regarded as conclusive. They should be treated as providing useful general guidance in a case of difficulty.”

The passage from the judgment of Lawton LJ referred to is as follows:

> "... over the centuries the common law, as a result of experience and the need to ensure that justice is done both to the community and to defendants, has evolved an exception to the fundamental rule of our criminal law that the prosecution must prove every element of the offence charged. This exception, like so much else in the common law, was hammered out on the anvil of pleading. It is limited to offences arising under enactments which prohibit the doing of an act save in specified circumstances or by persons of specified classes or with specified qualifications or with the licence or permission of specified authorities. Whenever the prosecution seeks to rely on this exception, the court must construe the enactment under which the charge is laid. If the true construction is that the enactment prohibits the doing of acts, subject to provisoes, exemptions and the like, then the prosecution can rely upon the exception."

136. Turning to an examination of the impugned provisions, Lord Woolf noted that section 20 made it an offence for a person to have in his possession anything which may be reasonably suspected of being stolen or unlawfully obtained, without being able to give a satisfactory account of how he came by it. In his view (at pg. 962), the third element (being unable to give a satisfactory account) was not "a special defence ..... but an ingredient of the offence which places the onus on the defendant, in order to avoid a finding of guilt, to establish that he is able to give an explanation as to his innocent possession of the property." Moreover, he continued, (at pg. 962):

> "This third ingredient is the most important element of the offence since, were it not for the third ingredient, it is not difficult to envisage circumstances in which a defendant in possession of property could be guilty of an offence without any behaviour on his part to which it would be appropriate to attach the strictures of the criminal law. He could, for example, be in possession of the property without having any knowledge of any of the circumstances which gave rise to the reasonable suspicion that the property was either stolen or obtained unlawfully which justified the police officer detaining him."

As such all the prosecution needed to prove was possession and facts from which a reasonable suspicion that the items were unlawfully obtained could be inferred. These were matters which Lord Woolf thought (p. 973) were likely to be

a formality in the majority of cases. Section 20 accordingly breached the right to be presumed innocent.

137. Section 25(2) of the Drug Trafficking Ordinance, on the other hand, required the prosecution to prove all the elements of the offence, namely engaging in the identified transaction with a relevant person with the requisite knowledge of the illicit activities of that person. With such knowledge the accused would have known that he was at risk of committing an offence and that he should take the necessary steps to ensure that he could rely on the defences provided. One way to do this, Lord Woolf noted (at pg. 973), was to insist on documents establishing the untainted source of the funds. If he did so, "he will be aware of the relevant facts and it is reasonable that he should be required to establish them. It would be extremely difficult, if not virtually impossible, for the prosecution to fulfil the burden of proving that the defendant had not taken those steps." In the context of the war against drug trafficking, Lord Woolf concluded, it was manifestly reasonable for a defendant to bear the onus of establishing the facts which would found the defences provided for.

138. In ***Vasquez v R*** [1994] 1 WLR 1304, the Privy Council had for consideration section 116(a) of the Belize Criminal Code which placed the burden of proof of provocation on a charge of murder upon the accused. On the other hand, at common law, the Crown was obliged to prove that the killing was both intentional and unprovoked. Section 114 of the Code gave effect to the common law and, in their Lordships view (at pgs. 1323-1313), this "clearly demonstrates that in the absence of provocation an intentional killing can amount to murder" and that "the lack of provocation is an essential ingredient of murder." The Crown argued that that section 116 was protected from inconsistency with the right to be presumed innocent by virtue of section 6(10)(*a*) of the constitution "because the burden cast upon an accused by section 116(*a*) of the Code was no more than "the burden of proving particular facts" within the meaning of that section." Their Lordships rejected this submission. In the first place, they held (at

pg. 1313), that while section 6(3)(*a*) of the constitution had to be given a generous construction, subsection (10)(*a*) "should not be construed in such a way as to emasculate the provisions of the former subsection." (Section 6(10)(a) is the type of provision which derogates from the full application of the fundamental rights and freedoms which their Lordships later said in ***R v Hughes*** [2002] 2 AC 259, 264 should be narrowly interpreted.) Referring to the exceptions to the fundamental rule that the prosecution must prove every element of an offence set out in the passage from the judgment of Lawton L.J. in ***Reg. v. Edwards*** quoted above and the passage from Lord Woolf's judgment in ***Lee Kwong-kut*** (at pgs. 969-970), also quoted above, Lord Jauncey said (at pg. 1314):

> "It is to these exceptions ... that section 6(10)(*a*) is intended to apply and not to the essential ingredients of an offence. Any other construction would enable the legislature to drive a coach and four through the fundamental provisions of section 6(3)(*a*) whenever it wished."

Their Lordships accordingly held that section 116(a) contravened section 6(3)(a) of the Constitution.

139. While in the two cases discussed thus far the question whether the accused or the prosecution was required to prove or disprove as the case may be an essential element of the offence loomed large, there have been cases where the presumption of innocence has been held to be infringed even though the burden cast on the accused was with respect to a matter which was not an element of the offence which the prosecution was required to prove. In ***R v Lambert*** [2002] 2 AC 545, for example, it was a defence to a charge of being in possession of a controlled drug which was found in a bag in the accused's possession, that the accused neither knew nor suspected nor had reason to suspect the nature of the contents of the bag. The House of Lords held that the prosecution was bound to prove that the accused had a bag with something in it in his custody or control and that the something in the bag was a controlled drug. But it was not necessary for the prosecution to prove that the accused knew that

the thing was a controlled drug. Nevertheless, their Lordships held that the presumption of innocence was violated by requiring the accused to prove his lack of knowledge as a defence. Lord Steyn explained why identifying the matter which the accused is required to prove as an essential element of the offence is not determinative. He said (at para 35):

> "The distinction between constituent elements of the crime and defensive issues will sometimes be unprincipled and arbitrary. After all, it is sometimes simply a matter of which drafting technique is adopted: a true constituent element can be removed from the definition of the crime and cast as a defensive issue whereas any definition of an offence can be reformulated so as to include all possible defences within it. It is necessary to concentrate not on technicalities and niceties of language but rather on matters of substance. I do not have in mind cases within the narrow exception "limited to offences arising under enactments which prohibit the doing of an act save in specified circumstances or by persons of specified classes or with specified qualifications or with the licence or permission of specified authorities": *R v Edwards* [1975] QB 27, 40; *R v Hunt (Richard)* [1987] AC 352; section 101 of the Magistrates' Courts Act 1980. There are other cases where the defence is so closely linked with mens rea and moral blameworthiness that it would derogate from the presumption to transfer the legal burden to the accused, e g the hypothetical case of transferring the burden of disproving provocation to an accused."

In this regard, Lord Steyn expressly approved of the approach advocated by Dickson C.J.C. in ***R v Whyte***, supra.

140. In ***Sheldrake v Director of Public Prosecutions*** [2005] 1 AC 264, there were two separate appeals before the House of Lords. Both concerned the compatibility with the presumption of innocence of provisions which put the burden on the accused to establish defences. In one, it was an offence (section 5(2) of the Road Traffic Act) to be in charge of a motor vehicle on a road or other public place, after consuming so much alcohol that the proportion of it in the accused's breath, blood or urine exceeded the prescribed limit. But it was a defence if the accused proved that at the time he is alleged to have committed the offence the circumstances were such that there was no likelihood of his

driving the vehicle whilst the proportion of alcohol in his breath, blood or urine remained likely to exceed the prescribed limit.

141. In the majority judgment, Lord Bingham distilled the applicable Convention jurisprudence in the following passage (at para 21):

> "The overriding concern is that a trial should be fair, and the presumption of innocence is a fundamental right directed to that end. The Convention does not outlaw presumptions of fact or law but requires that these should be kept within reasonable limits and should not be arbitrary. It is open to states to define the constituent elements of a criminal offence, excluding the requirement of mens rea. But the substance and effect of any presumption adverse to a defendant must be examined, and must be reasonable. Relevant to any judgment on reasonableness or proportionality will be the opportunity given to the defendant to rebut the presumption, maintenance of the rights of the defence, flexibility in application of the presumption, retention by the court of a power to assess the evidence, the importance of what is at stake and the difficulty which a prosecutor may face in the absence of a presumption. Security concerns do not absolve member states from their duty to observe basic standards of fairness. The justifiability of any infringement of the presumption of innocence cannot be resolved by any rule of thumb, but on examination of all the facts and circumstances of the particular provision as applied in the particular case."

142. In his view, although there was an obvious risk that a person in control of a car when unfit may drive it, with the consequent risk of causing death, injury or damage, and that the mischief at which section 5(2) was aimed was to prevent driving when unfit through drink, the ingredients of the offence did not include doing a preparatory act towards driving or forming an intention to drive. In that light, even assuming that section 5(2) infringed the presumption of innocence, he concluded that the Strassbourg test of acceptability was satisfied. He said (at para 41):

> "Plainly the provision is directed to a legitimate object: the prevention of death, injury and damage caused by unfit drivers ... I do not regard the burden placed on the defendant as beyond reasonable limits or in any way arbitrary. It is not objectionable to criminalise a defendant's conduct in these circumstances without

> requiring a prosecutor to prove criminal intent. The defendant has a full opportunity to show that there was no likelihood of his driving, a matter so closely conditioned by his own knowledge and state of mind at the material time as to make it much more appropriate for him to prove on the balance of probabilities that he would not have been likely to drive than for the prosecutor to prove, beyond reasonable doubt, that he would. I do not think that imposition of a legal burden went beyond what was necessary. If a driver tries and fails to establish a defence under section 5(2), I would not regard the resulting conviction as unfair ..."

143. The second appeal concerned a charge under section 11(1) of the Terrorism Act which made it an offence to belong or profess to belong to a proscribed organisation. It was however a defence to prove that the organisation was not proscribed on the last (or only) occasion on which the accused became a member or began to profess to be a member, **and** that he had not taken part in the activities of the organisation at any time while it was proscribed. Lord Bingham exposed the sheer breadth of the provision in the following passage (at para 47):

> "It would cover a person who joined an organisation when it was not a terrorist organisation or when, if it was, he did not know that it was. It would cover a person who joined an organisation when it was not proscribed or, if it was, he did not know that it was. It would cover a person who joined such an organisation as an immature juvenile. It would cover someone who joined such an organisation abroad in a country where it was not proscribed and came to this country ignorant that it was proscribed here ... It would cover a person who wished to dissociate himself from an organisation he had earlier joined, perhaps in good faith, but had no means of doing so, or no means of doing so which did not expose him to the risk of serious injury or assassination. If section 11(1) is read on its own, some of those liable to be convicted and punished for belonging to a proscribed organisation may be guilty of no conduct which could reasonably be regarded as blameworthy or such as should properly attract criminal sanctions."

Lord Bingham rejected the submission that participation in the activities of the organisation while proscribed was an ingredient of the offence even though it was a defence that the accused had not taken part in the activities of the organisation while it was proscribed. Further, he was of the view that section

11(1) was directed to the legitimate end of deterring people from becoming members and taking part in the activities of proscribed terrorist organisations. Nevertheless he concluded that the imposition of a legal burden on the accused to establish the defence was not proportionate or justifiable. He gave four main reasons (at para 51):

> "1) ... a person who is innocent of any blameworthy or properly criminal conduct may fall within section 11(1). There would be a clear breach of the presumption of innocence, and a real risk of unfair conviction, if such persons could exonerate themselves only by establishing the defence provided on the balance of probabilities. It is the clear duty of the courts, entrusted to them by Parliament, to protect defendants against such a risk. It is relevant to note that a defendant who tried and failed to establish a defence under section 11(2) might in effect be convicted on the basis of conduct which was not criminal at the date of commission.
>
> 2) While a defendant might reasonably be expected to show that the organisation was not proscribed on the last or only occasion on which he became a member or professed to be a member ... it might well be all but impossible for him to show that he had not taken part in the activities of the organisation at any time while it was proscribed ... Terrorist organisations do not generate minutes, records or documents on which he could rely. Other members would for obvious reasons be unlikely to come forward and testify on his behalf. If the defendant's involvement ... had been abroad, any evidence might also be abroad and hard to adduce. While the defendant himself could assert that he had been inactive, his evidence might well be discounted as unreliable...
>
> 3) If section 11(2) were held to impose a legal burden, the court would retain a power to assess the evidence, on which it would have to exercise a judgment. But the subsection would provide no flexibility and there would be no room for the exercise of discretion. If the defendant failed to prove the matters specified in subsection (2), the court would have no choice but to convict him.
>
> (4) The potential consequence for a defendant of failing to establish a subsection (2) defence is severe: imprisonment for up to ten years."

144. In assessing whether section 106A(5) strikes a proper balance between the interests of the individual and the interests of the state, it is important first to recall the fundamental importance of the right to be presumed innocent until proven guilty in the administration of criminal justice and its underlying rationale. As Lord Bingham put it in ***Sheldrake*** (at para 9):

> "…. it is repugnant to ordinary notions of fairness for a prosecutor to accuse a defendant of crime and for the defendant to be then required to disprove the accusation on pain of conviction and punishment if he fails to do so. The closer a legislative provision approaches to that situation, the more objectionable it is likely to be."

It is also important to bear in mind that where an accused fails to establish the exculpatory element on a balance of probabilities, the fact finding tribunal will be required to convict even though it nevertheless entertains a reasonable doubt as to guilt – see Dickson CJC in ***R v Whyte****, supra, p. 493*; Lord Nicholls in ***R v Johnstone*** [2003] 1 WLR 1736, para 50. As such, whether the legislative provision falls within the permissible reasonable limits will not be an easy question and this case is no exception. In making that assessment, among the factors which are relevant are the extent to which the accused is required to disprove an essential element of the offence; the extent to which the matter which the accused is required to prove flows naturally from the facts which the prosecution must still prove; the extent to which facts which the accused is required to prove are matters within his own knowledge or to which he has ready access; the extent to which it would be difficult for the prosecution to prove those matters; the severity of the punishment which is imposed where the accused fails to discharge the burden cast on him; the extent to which conduct which would otherwise not attract criminal condemnation would nevertheless be subject to criminal sanction under the impugned law; the importance of the goal which the impugned provision seeks to attain; and whether any such goal might have been achieved by some other less intrusive means.

145. By virtue of section 106A(5) a person who was acting in an official capacity for or on behalf of a body of persons, whether corporate or incorporate, at the time that body committed the offence under section 106A(1) of knowingly disobeying or failing to comply with an injunction, is deemed to be guilty of the offence, unless he or she adduces evidence to show that the offence was committed without his or her knowledge, consent or connivance. As such, in order to establish criminal liability under subsection (5), the prosecution need prove only that the corporate or incorporate body has committed the offence and that the accused was acting or purporting to act in an official capacity at the time the offence was committed. The official capacity in which the person was acting may be either as a shareholder, director, manager, advisor, secretary or other similar officer, but is not limited to these categories, albeit they are collectively quite wide. What the prosecution must prove is that the accused was acting in an official capacity on behalf of the body at the time the offence was committed, whatever may be the designation of the post held. On the other hand, it is not necessary to prove that the accused was acting or purporting to act on behalf of the body in the commission of the offence itself. Otherwise, there would be no need to create the presumption of guilt. Thus, once the prosecution establishes these two factors, the burden shifts to the accused to adduce evidence of lack of knowledge of, consent to or inconvenience in the commission of the offence. If he fails to satisfy the presiding judge on a balance of probabilities of the non-existence of all three he will be found guilty of the offence of knowingly disobeying or failing to comply with an injunction. He will be found guilty, therefore, of an offence which requires a mental element but which the prosecution is relieved of the duty of establishing beyond a reasonable doubt. There is no requirement that the prosecution prove either that the accused knew of the injunction or in any way advised or counseled or participated in the commission of the offence, even though it is patent that the mens rea of the offence is the most important element.

146. One of the cases cited by the trial judge in disposing of the appellants and interested parties case in relation to section 106A(5) was ***Khan v State of Trinidad and Tobago*** [2004] 2 WLR 692. It was argued in that case that a statutory formulation of the felony/murder rule infringed the presumption of innocence. Section 2A of the Trinidad and Tobago Criminal Law Act provided that:

> "Where a person embarks upon the commission of an arrestable offence involving violence and someone is killed in the course or furtherance of that offence (or any other arrestable offence involving violence), he and all other persons engaged in the course or furtherance of the commission of that arrestable offence (or any other arrestable offence involving violence) are liable to be convicted of murder even if the killing was done without intent to kill or to cause grievous bodily harm."

It was argued that the presumption of innocence was infringed because the provision relieved the prosecution of the need to prove one of the ordinary ingredients of murder, namely the requisite intent. Lord Bingham, speaking for a majority of their Lordships' Board of the Judicial Committee, noted that while the presumption placed on the prosecution the duty of proving guilt, it did not control the ingredients of the offence which the prosecution must prove to establish such guilt. Lord Bingham continued (at para 14):

> "Difficult questions can arise where a law provides that, on proof of certain facts, a defendant shall be guilty unless he establishes some ground of exoneration. Depending on the precise statutory context, such a reverse burden may indeed infringe the presumption of innocence. But no such difficulty arises here. Section 2A defines what the prosecution must prove. If it fails to do so, the defendant must be acquitted. In proving the charge the prosecution has the benefit of no presumption and the defendant is subject to no burden."

147. As can be seen from the terms of section 2A, the felony/murder offence was specifically defined as not including the intention to kill or to cause grievous bodily harm. No presumption of fact or law was created. Section 106A(5), on the

other hand, deems the offence of knowing disobedience of an injunction, committed by a corporate or incorporate body, to have been committed by a person acting in an official capacity on behalf of the body where the prosecution proves that the offence was committed by the body and the accused held such an official position. In such a case, knowing disobedience on the part of the accused is presumed. Section 106A(5) does not declare in terms that the mental element is irrelevant.

148. It is noteworthy as well that in order to escape criminal liability the accused must establish all three matters: lack of knowledge, lack of consent and lack of connivance. Of course, if he is able to establish that he did not know that the offence was being committed, that would ordinarily suffice to disprove consent and connivance. But it is significant that an accused may adduce evidence to show, and may satisfy the court on a balance of probabilities, that he did not consent to or connive at the commission of the offence, but may yet be incapable of rebutting the presumption of guilt because he knew that the offence was being committed. Indeed, it would appear that the accused would be unable to discharge the burden even if he made efforts to prevent the commission of the offence, but was unable to persuade other officials to desist.

149. In the result, the possibility is created that a person whose only "offence" was holding an official position on behalf of a company at the time it knowingly disobeyed an injunction, is in jeopardy of being held criminally responsible for the company's criminal conduct. In large companies which employ a number of persons acting on its behalf in official capacities which do not include as part of the job description the company's compliance with court orders, a number of persons would potentially be exposed to criminal charges and the possibility of conviction for doing no more than representing their employer in circumstances where, as a matter of contractual obligation, they had no choice in the matter. Even worse, given that in order to escape criminal liability an unsuspecting official of the errant company must establish not merely that she did not consent

to or connive at the commission of the act, but also had no knowledge that the offence was being committed, the possibility exists that an employee acting in an official capacity, or purporting to do so, may be guilty of the company's offence simply because she knew that the offence was being committed, even if she attempted to prevent its occurrence.

150. In ***Sheldrake***, Lord Bingham said (at para 43) that "the closer the connection between the fact proved and the fact presumed the more reasonable the presumption would usually be. Conversely, the more far-fetched a presumption is, the more suspect it is likely to be." There will no doubt be cases where proof that the accused acted in an official capacity on behalf of a company at the time the offence was committed creates an inference that the accused knew of, consented to and connive at its commission. Proof that the accused was at the relevant time a director of a company may be such a situation. But there will equally be many cases where there is no inexorable connection between proof that the accused was acting in an official capacity and proof that he either knew of, consented to or connived in the commission of the offence. And given the wide net which is cast, the probability that such cases exist is high. Moreover, even if there are cases in which the inference of knowledge of the commission of the offence can be easily drawn, there would yet be no inevitable link between such knowledge, on the one hand, and consent or connivance, on the other.

151. There is accordingly an unfair imbalance in what the prosecution must prove to establish the offence and what the accused must prove, albeit at a lower standard, to escape criminal liability.

152. It is no doubt the case that the facts which would go to establish lack of knowledge consent or connivance will ordinarily be known to the accused. It is also no doubt a legitimate goal to punish the human actors behind an inanimate legal entity's criminal conduct. But I do not perceive that there will be insuperable difficulties in obtaining the necessary evidence to fix liability on culpable officials. The breach of an injunction by a company will in many cases be a public event

and those responsible will be identifiable. Moreover, depending on the nature of the case and the evidence already adduced to persuade the court to grant the injunction, the *dramatis personae* will be known. In addition, it ought not to be too difficult to identify the controlling mind in an organization and it will be presumed at the very least that the directors of a body corporate will have had something to do with the breach. Police search powers can also be deployed in the appropriate case to ferret out incriminating documents. In these circumstances, it better conduces to respect for and confidence in the administration of justice that a guilty official slips through the cracks because of the absence of incriminating evidence, than one official whose only 'crime' is acting in an official capacity be punished for failing to disprove criminal intent, moreso in circumstances where the existence of reasonable doubt is possible and the penalties imposed are severe even if not grossly disproportionate.

153. Furthermore, there is no reason to think that the imposition of an evidential burden on the accused to adduce evidence of lack of knowledge, consent or connivance, leaving it to the prosecution to satisfy the court beyond a reasonable doubt of such knowledge, consent or convenience would not assist in achieving the goal of flushing out the guilty human actors. The presumption which is created but section 106A(5) is not the only way in which the otherwise legitimate aim of the legislature could be achieved.

154. Mr. Barrow has urged upon us the case of ***A.G. v Malta*** which was referred to in Lord Bingham's judgment in ***Sheldrake*** (at para 15). In that case, the European Commission of Human Rights considered a provision in terms similar to section 106A(5) which deemed directors of a company guilty of offences committed by the company, "unless he proves that the offences were committed without his knowledge and that he exercised all due diligence to prevent the commission of the offence." The unreported transcript of the Commission's decision is rather brief and I am unable to derive much assistance from it, except anecdotally. It is not clear whether the Commission was

considering the constitutionality of the impugned section in the context of a particular offence or all offences which companies might commit, nor is it clear what essential elements of the offence the prosecution would have been relieved of proving in any particular case. Further, unlike this case, the domestic constitutional court held that without the impugned provision it would be impossible in the majority of cases for the prosecution to prove its case against the company. In addition, it appears that the main if not the only argument put forward by the applicant in support of his claim that the presumption of innocence was violated was that the impugned provision was self-contradictory in that if the applicant proved lack of knowledge it is necessarily implied he was insufficiently diligent. This argument was rejected. Finally, it does not appear that the Commission considered persons in positions other than directors who can ordinarily be expected to be the directing minds of a company.

155. I am mindful of what Lord Nicholls said in ***R v Johnstone*** [2003] 1 WLR 1736, at para 51:

> "In evaluating these factors the court's role is one of review. Parliament, not the court, is charged with the primary responsibility for deciding, as a matter of policy, what should be the constituent elements of a criminal offence. I echo the words of Lord Woolf in *Attorney-General of Hong Kong v Lee Kwong-kut* [1993] AC 951, 975: 'In order to maintain the balance between the individual and the society as a whole, rigid and inflexible standards should not be imposed on the legislature's attempts to resolve the difficult and intransigent problems with which society is faced when seeking to deal with serious crime.' The court will reach a different conclusion from the legislature only when it is apparent the legislature has attached insufficient importance to the fundamental right of an individual to be presumed innocent until proved guilty."

156. In light of the above, I am satisfied that the legislature has indeed taken insufficient account of the right to be presumed innocent. Section 106A(5) infringes the right guaranteed by section 6(5)(a) of the Constitution and is not saved by section 6(10)(a).

Notice – Trial *in absentia*

157. The trial judge found that the requirements for service under section 106A(9) were wholly inadequate in that no time is specified within which service is to be effected, there is no requirement of personal service on a person located within Belize, no procedure to affect service out of jurisdiction and no grounds have been given for effecting service on a person abroad by fax, courier service or notice in the Belize Gazette. In the circumstances, he held that subsection 9 contravenes the right to a fair hearing and the right of access to court under section 6 of the Constitution. He held further that section 106A(12) infringed section 6 because it allowed a trial of an offence under section 106A(1) to proceed in the absence of the accused upon a notice of the trial published in the Gazette. He considered this to be inadequate notice particularly in relation to persons who may live abroad or in rural Belize. Accordingly, he struck down both subsections 9 and 12.

158. Mr Fitzgerald and Lord Goldsmith ask us to uphold the trial judge's findings. Lord Goldsmith submits further that the notice period of 21 days provided for in subsection (11) is inadequate and that the trial judge was wrong to find otherwise. They both submit that notice by way of publication in the Gazette is clearly inadequate since there is no guarantee that service by this method would ensure that a person abroad or living in rural Belize would actually become aware of the proceedings. With regard to subsection (9), Lord Goldsmith has emphasized the absence of any procedure for service out of the jurisdiction as compared with Supreme Court Rule 7.

159. In relation to subsection (9), Mr. Barrow submits that the methods of service by registered post and fax merely mirror corresponding methods of service already provided for in the Supreme Court Rules, about which there is no complaint. With regard to service by notice in the Gazette, he points out that this method of service, as with the others, is qualified by the phrase "as may be appropriate in the circumstances of each case". The trial judge, he points out,

did not consider the effect of this phrase in his findings. Mr. Barrow further observes that there is no provision in subsection 9 which deems service to have been affected once the process in question is sent by registered post, by fax, courier service or by notice in the Gazette. The person applying for an injunction or seeking enforcement of an injunction already granted is obliged to ensure service of the application or order on the persons whose rights are or may be affected thereby. In the absence of any provision deeming service to have been effected, the presiding judge would be entitled and expected to require an affidavit of service to be filed and to scrutinise the method of service used in order to satisfy himself that proper notice has in fact been given. The affected party's right to a fair hearing and access to court is accordingly adequately protected.

160. I agree with Mr. Barrow. A person against whom an injunction is sought or obtained is entitled to notice of the application or order made so that he may defend it or seek to discharge it or conduct his affairs in the meantime so as to ensure he obeys it. There must therefore be adequate provision for the service of any application for an injunction and any injunction which may have been issued in the affected party's absence. In the absence of such notice, the presiding judge is to be expected not to proceed with the application for the injunction or any proceedings to enforce an injunction already granted unless proof of adequate service is provided. Over time, various methods of service have been devised to ensure that due process is accorded, beginning with personal service at one end of the spectrum and substituted service by notice in the newspapers or in the Gazette on the other. An order for substituted service is likely not to be made unless a court is satisfied that other more traditional methods of service have been tried but have not succeeded. Service out of the jurisdiction by registered post or by courier at a specified address or through a consular office are other methods used with the permission of the court where other more direct methods of service are likely to fail. These various methods of service are provided for in the Supreme Court Rules and are not under challenge

in these proceedings. The innovation which subsection 9 appears to introduce is to permit service by the four methods of registered post, fax, courier service or notice in the Gazette both locally and extraterritorially, at whatever address or number the party seeking or having obtained the injunction might choose, and, in the case of service outside of the jurisdiction, without the need to obtain the leave of the Court to do so. The possibility is thereby created that the Claimant in an action may choose to send a court document by registered post or courier service at an address at which the defendant does not live, or by fax at a number which the defendant does not have access to, or by notice in the gazette in circumstances where the defendant, even though residing in Belize, may not see it because it is not his habit to consult the gazette, or being resident abroad may not have ready access to the gazette at all. The danger is that the presiding judge may proceed nonetheless thereby denying the defendant the right to be heard. A defendant is no doubt entitled to a fair system of justice and in that regard he is entitled to the necessary mechanisms which would ensure that the presiding judge would scrutinize carefully the method of service used to ensure that adequate notice has in fact been given. On the other hand, he is not entitled to an infallible judge. In ***Chokolingo v Attorney General of Trinidad and Tobago*** [1981] 1 WLR 106, 111 Lord Diplock said that the fundamental rights guaranteed under a Westminster model constitution "is not to a legal system which is infallible but to one which is fair." A sustainable complaint can only be made that due process will be not accorded by the methods of service permitted if the defendant can establish that there are either no mechanisms in place to ensure that the method of service used has achieved its goal of bringing the proceedings to his attention or that the mechanisms in place (as distinct from the way in which, in a particular case, they are put into practice) are bound to fail or would otherwise be subverted – see ***Boodram v Attorney General of Trinidad and Tobago*** [1996] AC 842, 854.

161. In this case there is no provision deeming service to have been properly effected by the particular method of service which the claimant selects. Indeed,

by providing for a choice of four methods "as may be appropriate in the circumstances of the case", subsection 9 anticipates the exercise by the presiding judge of his powers of superintendence over the method of service used to ensure that the defendant is indeed informed of the court proceedings or orders which might affect his interests. I am accordingly of the view that subsection 9 does not infringe the right to a fair hearing or to access to court.

162. Mr. Barrow makes similar arguments in relation to subsection 12. He relies again on the expectation that the judge presiding at the trial of an offence under section 106A(1) will be astute to ensure that service has in fact been effected. As he says, "it is inconceivable that a judge before whom a trial for criminal contempt of court is about to start would be other than strict in deciding whether there has been effective service of notice of trial upon an absent defendant".

163. By section 6 of the Constitution a criminal trial may take place in the absence of the accused "in any case in which it is so provided by a law under which he is entitled to adequate notice of the charge and the date, time and place of the trial and to a reasonable opportunity of appearing before the court." It hardly needs to be said that section 6 requires that before a trial can proceed in an accused's absence notice of the trial be actually received by him.

164. Subsection (11) reproduces these words almost verbatim and in addition requires that 21 days notice be given and empowers the Court to decide whether such notice has in fact been given. The interested parties' challenge to the 21 day period of notice can be disposed of briefly. Lord Goldsmith submits that 21 days is not sufficient time to prepare for trial. The trial judge thought otherwise. For my part, I agree with the trial judge, particularly since before embarking on the trial in the absence of the accused, the court, even though satisfied that 21 days notice has been given, must nevertheless be satisfied as well that the accused has had a reasonable opportunity of appearing before the court but has failed to do so.

165. As regards the method of service, subsection 12 is formulated less as a description of the modes of delivery of notice which might be considered adequate and more as a definition of what adequate notice would comprise. It says in terms that "the notice referred to in subsection (11) above may be served" in the three ways which follow. The interpretation which the trial judge appeared to favour is that once notice is sent by registered post or posted in the gazette, the judge presiding at the trial would be bound to accept that adequate notice has been given and would be entitled to proceed with the trial in the accused's absence. On this interpretation, he was right to be taken aback that a criminal trial could proceed in the absence of the accused on the basis of service by notice in the gazette in relation to a person living abroad or in rural Belize who is unlikely to have seen the notice. But I do not think his interpretation is correct. Subsection 12 provides for service of the notice required by subsection 11 by any one of three methods, as may be appropriate in the circumstances of each case. It leaves open the question of whether the method of service chosen is indeed appropriate, a matter which the court will consider and determine in deciding whether notice has been given and whether a reasonable opportunity of appearing has been had. In this regard, subsection (11) is to be interpreted so far as possible as to be consistent with section 6 of the Constitution - ***Public Service Appeal Board v Omar Maraj*** [2010] UKPC 29, para 26 - and accordingly must be interpreted as requiring the presiding judge to be satisfied, not simply that a notice has been sent, by whatever method chosen, but indeed that it has been received by the absent accused. In that light, I am hard pressed to think of any circumstance in which, without more, the judge presiding at a criminal trial would be satisfied that an accused living abroad or in rural Belize has been made aware of criminal proceedings against him by way of notice in the gazette.

166. For these reasons, subsections 11 and 12 do not infringe section 6 of the Constitution.

167. I note parenthetically that the rules made under subsection 16 provide for service of a certified copy of the criminal information and complaint and deem service by way of the methods provided for to be "prima facie evidence that the copy reached the accused persons charged in the criminal information or complaint." I have not given consideration to these rules, (the parties made no submissions on them) because there is no provision in the form of the criminal information or complaint contained in the rules for notification of the date, time and place of the criminal trial. Service of the criminal information or complaint accordingly is no way affects the obligations relating to service under subsections 11 and 12.

Disposition

168. In the result, I would issue the following orders:

i) It is declared that section 106A(3) violates the separation of powers doctrine and section 7 of the Belize constitution;

ii) It is declared that section 106A(5) violates section 6 of the Belize constitution;

iii) It is declared that Section 106A(1)–(7), (10)–(13) and (16) are invalid null and void and of no effect.

Given that both the appeals and the cross appeal have been successful, I would order further i) that the appellants and interested parties shall have 75% of their costs, here and in the court below, certified fit for three counsel (including a Queen's Counsel and a Senior Counsel); and ii) that the respondent shall have 75% of his costs of the cross-appeal, certified as fit for three counsel (including two Senior Counsel), all costs to be taxed, if not sooner agreed. This order as to costs shall stand unless application be made for a contrary order within 7 days of

the date of delivery of this judgment, in which event the matter shall be decided by the Court on written submissions to be filed within 15 days from the said date.

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MENDES JA