IN THE COURT OF APPEAL OF BELIZE, A.D. 2024

CIVIL APPEAL NO. 12 OF 2022

BETWEEN:

[1] CONTROLLER OF SUPPLIES

[2] MINISTER OF ECONOMIC DEVELOPMENT, PETROLEUM, INVESTMENT, TRADE AND COMMERCE

[3] ATTORNEY GENERAL

Appellants

v

[1] GAS TOMZA LTD

[2] WESTERN GAS COMPANY LTD

[3] SOUTHERN CHOICE BUTANE LTD d.b.a. ZETA GAS

[4] BELIZE WESTERN ENERGY LTD

Respondents

CIVIL APPEAL NO. 13 OF 2022

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Appellants

v

[1] CONTROLLER OF SUPPLIES

[2] MINISTER OF ECONOMIC DEVELOPMENT, PETROLEUM, INVESTMENT, TRADE AND COMMERCE

[3] ATTORNEY GENERAL

Respondents

Before:

The Hon Madam Justice Hafiz-Bertram — President
The Hon Mr. Justice Foster — Justice of Appeal
The Hon Mr. Justice Bulkan — Justice of Appeal

Appearances:

Mr. Edward Fitzgerald KC, Mr. Andrew Marshalleck KC and Ms. Angeline Welsh KC for the Appellants in Appeal No. 12/2022 and the Respondents in Appeal No. 13/2022.
Mr. Douglas Mendes SC, Mr. Godfrey Smith KC, Mr. Hector Guerra and Mr. Luke Hamel-Smith for the Respondents in Appeal No. 12/2022 and the Appellants in Appeal No. 13/2022.

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2023: June 27 & 28;
2024: May 2

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JUDGMENT

[1] **BULKAN, JA:** As noted human rights scholar Margaret Demerieux observed more than three decades ago, "Of all the rights dealt with in the constitutions, that of property is most often and most profoundly affected by governmental action in planning and development. Practically all the cases decided in the area so far have involved broad concerns of public and socio-economic policy, going beyond the relation of the individual (proprietor) to the state."[1] The case before us neatly fits this categorisation, though it is worth bearing in mind at the outset that the mere invocation of socio-economic policy does (or should) not automatically immunise challenged governmental law or action from scrutiny. It is precisely because private property rights are constitutionally protected, and because all state action (and, increasingly, non-state action in direct and indirect ways) must conform to constitutional prescriptions, that such action or policy where disputed must pass constitutional muster.

[2] The genesis of the dispute in question lies in the efforts by the government to transform the LPG (liquified petroleum gas) sector in Belize. LPG is a type of fuel used for a variety of purposes including cooking, and for which there is widespread demand. Since LPG is not produced locally it must be imported into the country, and prior to the legislative changes under consideration the four claimant companies together controlled the bulk of the import market. Each of them dealt with suppliers in different Central American countries from whom they sourced the LPG, which

[1] Margaret Demerieux, *Fundamental Rights in Commonwealth Caribbean Constitutions*, Faculty of Law Library, UWI 1992, p. 385.

would then be trucked into Belize for distribution to wholesalers and retailers. These four companies are Belize Western Energy Ltd, operating since 1987, Western Gas Co. Ltd, operating since 1990, Southern Choice Butane Ltd (also known as Zeta Gas), which existed between 1994 and 2020,[2] and Gas Tomza Ltd, operating since 2004 (hereafter collectively referred to interchangeably as the "claimants" and "LPG companies").

[3] The government's stated concerns being the stability and predictability of the LPG supply, along with ensuring its quality, safety, and affordability, embarked on the National Liquefied Petroleum Gas Project (NLPGP). The NLPGP evolved over several years, one crucial component in its execution being the creation of a special purpose vehicle, namely the National Gas Company (NGC). Subsequent developments included an MOU executed on May 8th, 2017 between the government of Belize (GOB) and the predecessor of the NGC, namely Belize Natural Energy Ltd., followed by a so-called Definitive Agreement between the GOB and the NGC on July 10th, 2018. That Definitive Agreement contemplated the importation of LPG wholly by sea and the construction of supporting infrastructure for importation, distribution and supply of LPG throughout Belize.

[4] Making good on these agreements, the *National Liquefied Petroleum Gas Project Act* (hereafter the 'NLPGP Act') was enacted on September 4, 2019, which implemented various regulations for the gas industry. Crucially, this Act conferred on the NGC the exclusive right to import LPG into Belize. In addition, it exempted the NGC from obligations under a raft of fiscal legislation covering income and business taxes, sales tax, customs and excise duties, stamp duties, exchange control regulations, and environmental taxes. The result was that the LPG import business, hitherto spread across multiple companies, became concentrated in a single monopoly, namely the NGC, with the claimants thereafter confined to retail sales. Being forbidden by law from importing, the claimants lost a substantial proportion of their customer base, which necessarily was acquired by the NGC as the sole entity permitted to import LPG.

[5] Shortly after the creation of the NGC monopoly, the claimants instituted this action challenging the constitutionality of the *NLPGP Act*. In sum, their claim alleges that the monopoly conferred upon the NGC, exacerbated by the various tax exemptions granted to it, violate their rights to the enjoyment of property, to work, to their freedom of association, and to equality of treatment, all

[2] Zeta Gas went out of business following the legislative and executive measures in issue in this case.

of which are guaranteed under the Belize Constitution. The defendants named in the suit are the Controller of Supplies, a public officer appointed under the *Supplies Control Act*, Chapter 293, responsible for oversight and control of the LPG industry, along with the relevant line Minister and the Attorney General as principal legal officer for the GOB.

[6] At the close of the trial and after submissions were filed, the GOB amended the *NLPGP Act* in November 2021, purportedly to remove the monopoly granted to the NGC. Henceforth, LPG importation by other companies was possible, though as a condition for obtaining a licence to import, prospective importers would be required to construct an import facility with a storage capacity of 1.5 million US gallons, or alternatively to pass their imported LPG through the NGC's already constructed LPG terminal. Considering these requirements to be unreasonable and/or unattainable, the claimants argue that the effect of the amended licensing scheme is to maintain the prohibition on any other company re-entering the LPG import business and to preserve the NGC monopoly. As such, they maintained their claim for compensation for the breach of their rights as alleged, as well as for vindicatory damages.

[7] The defendants vigorously denied these contentions, relying (*inter alia*) on the removal of the monopoly as well as the interests of public safety and public health to justify the regulatory measures. Consistent with the trend of cases in this area adverted to above, they invoked the socioeconomic aims of what are in essence policy decisions of the executive branch, claiming these to be insulated against judicial scrutiny by virtue of the separation of powers principle. Any impacts on the claimants' fundamental rights – which they deny – are purely unintended and indirect, and as such do not amount to constitutional breaches for which relief is possible.

[8] At the conclusion of the trial, which was re-opened following the amendment of the *NLPGP Act*, the parties agreed on the issues to be determined, which were reproduced in a statement and duly filed. These issues all focused on the amended Act, raising first whether it imposed unreasonable conditions on the claimants for the importation of LGP into Belize, followed by specific questions as to its constitutionality in relation to each of the rights invoked by the claimants. The trial judge, Arana CJ (as she then was), found in favour of the defendants on all but one of the claims, that being the right to property. Her reasoning is briefly summarised hereunder.

[9] First, the learned CJ found that the amended Act does not impose onerous and unreasonable conditions on the claimants, those being matters of policy which are properly within the sole remit of the legislature. In support, she cited ***Hope v New Guiana Co. Ltd*** (1976) 26 WIR 233 (CA Guy), a case relied upon by the defendants, as authority for the principle that every country in the world must exercise control over imports and exports in the public interest, and further that courts are not competent to inquire into this sphere of executive policy. Arana CJ buttressed this finding by the presumption of constitutionality. While this and the other findings of the learned trial judge will be examined in detail below, it is noteworthy to observe at the outset that this approach did not answer the substantive question, so that the CJ's conclusion is no endorsement of the reasonableness of the legislative conditions. Rather, her approach was simply an exercise of judicial deference to the executive. Put another way, Arana CJ pointedly refrained from assessing the reasonableness of the conditions in question on the basis that they represented policy decisions, solely within the competence of the legislative branch, while further presuming their constitutionality.

[10] The learned trial judge also rejected claims that the amended Act violated three of the four rights invoked. On the right to work, she reiterated the accepted standard that s. 15 of the Belize Constitution entails an opportunity to earn a living and is not a guarantee of employment or of profit from any chosen business activity. Further, she noted that the GOB has the legal right to regulate the industry, and in the absence of evidence that its power was exercised in bad faith, found no breach of s. 15. Rejecting the claim of a breach of the right to freedom of association, Arana CJ held that options are available under the amended Act, namely those of building one's own storage facility or using the one belonging to the NGC, so it could not be said that prospective importers are forced to associate with the NGC. She also adverted to the reasons proffered for regulating the LPG industry, namely, to protect public health and safety as well as to elevate importation in Belize to international standards, so that there was "nothing nefarious" in the amended Act and thus no violation of s. 13. The learned trial judge also rejected the claim of unequal treatment contrary to s. 6 of the Constitution. While acknowledging that the amendments did not level the playing field for all operators in the industry, she noted that the monopoly was removed, enabling anyone to import LPG once the statutory conditions are met. Further, she reiterated her reliance on the principle of executive discretion, which entitled the GOB to grant the benefits it did to the NGC, while noting that the right to equality does not guarantee sameness of treatment but rather forbids discrimination.

[11] The claimants succeeded only on the right to property under s. 17 of the Constitution. The learned trial judge found a violation of this right on the basis that the legislation enabled the compulsory possession of the goodwill in the claimants' LPG import business by the NGC without compensation. In her words, "there can be no doubt that the direct effect of the original as well as the amended Act is that the NGC abruptly seized the clients and customer base of all five of these claimant companies that they had established in Belize over the past thirty years, without compensation, thereby violating the claimants' constitutional right to property." The learned trial judge further noted that although the GOB was entitled to impose conditions for importation, as with the acquisition of land for a public purpose, compensation had to be paid since the claimants' customers were all acquired by the NGC, the sole importer licenced under both Acts. For this breach Arana CJ awarded as damages to each of the claimants, sums purportedly representing the additional costs of having to purchase LPG from the NGC instead of their previous suppliers as well as the losses incurred as a result of losing customers and sales to the NGC.

[12] Both parties to the litigation were dissatisfied with this outcome and each appealed the findings adverse to them. In appeal #12 of 2022, the GOB through its representatives appealed the trial judge's decision that the amended Act violated the claimants' right to property, relying on three main grounds:

- first, that the amended Act is regulatory in nature and thus did not take or acquire any property of the claimants;
- second, that there was no property to take because there was no goodwill in the LPG companies' import businesses; in the alternative, if there was a taking, it was one excepted from requiring compensation as a 'tax, rate or due'; and
- third, if there was a compensable taking, the claimants nonetheless failed to prove damages in the amount of BZ$10,896,748.25 as awarded by the trial judge.

[13] In appeal #13 of 2022, the LPG companies appealed the trial judge's findings insofar as she upheld the constitutionality of the amended Act. They began by noting that since Arana CJ mentioned in the course of her decision that the (original) *NLPGP Act* clearly violated all the claimants' constitutional rights, this should have resulted in it being declared void pursuant to the supremacy principle enshrined in s. 2 of the Belize Constitution. This error was compounded by the failure of the trial judge to declare the *NLPGP Act* as amended void to the extent of its inconsistency on the basis that it purported to amend a void Act (the original one) without first re-enacting it. In the alternative, and assuming that the *NLP Amendment Act* was effective in

amending the original Act, the claimants contended that the learned trial judge erred by finding that the amended Act did not violate their rights to work, their freedom of association, and their right to equal treatment under the law. The claimants also appealed the trial judge's refusal to award the additional sums claimed, in the vicinity of BZ$55 million, which represented the penalties they purportedly incurred for not purchasing LPG from their overseas suppliers and the additional cost of purchasing from the NGC.

[14] With this overview of the factual and procedural background, the remainder of this judgment proceeds as follows:

a. Preliminary Considerations
    i. Assessing the constitutionality of limits to fundamental rights
    ii. The presumption of constitutionality
b. Whether the amended Act violates the LPG companies' property rights by maintaining a de facto monopoly on the importation of LPG in favour of NGC (the right to property claim)
c. Whether the trial judge erred by failing to declare the amended *NLPGP Act* to be void given her conclusion that the original Act violated all the claimants' rights as averred (the supremacy issue)
d. Whether the amended Act denies the claimants the opportunity to gain their living from their freely chosen work of operating LPG import businesses (the right to work claim)
e. Whether the amended Act hinders the claimants' freedom of association by requiring them to purchase LPG from the NGC (the freedom of association claim)
f. Whether the amended Act subjects the claimants to unequal treatment under the law because of the benefits granted exclusively to the NGC (the equality claim);
g. Whether the trial judge erred in her estimation of the amount of damages awarded as compensation, including by rejecting some of the amounts claimed (the quantum of damages issue); and
h. Assuming that any of the aforesaid breaches are established, what remedies are the claimants entitled to for the enforcement of their right(s) (the remedies issue)?

(a) Preliminary Considerations

(i) Assessing the constitutionality of limits to fundamental rights

[15] At the centre of this dispute lies a familiar clash between individual entitlement and the public interest, one commonly framed as the tension between rights and restrictions. In navigating this terrain during the trial and the appeal thereafter, both parties largely relied upon standard tests used in balancing these competing interests. As I perceived it, however, insufficient attention was paid to the specific textual provisions at hand, which meant that at times inapposite comparisons were made. The arguments included references to caselaw that was either inapplicable because of the jurisdiction from which it may have originated or misplaced because of the time or era in which it was decided. These slippages have implications for the rigour of the analysis as well as the accuracy of the conclusions. Accordingly, to set the stage for the substantive discussion in relation to each right, I propose to begin by clarifying the applicable framework for assessing the constitutionality of measures alleged to violate any provision of the Belize bill of rights.

[16] In their written submissions for the hearing of this appeal, both parties agreed on the applicable case law as "common ground" between them.[3] According to them, the required test is set out in ***Suraj v AG of Trinidad and Tobago***, encapsulated in the holding that "interference with [individual fundamental rights] should be permitted in the public interest, but only if the interference is proportionate to a legitimate aim."[4] The claimants continued by delineating the elements of the proportionality test in relation to s. 13 of the Trinidad and Tobago Constitution, as set out in ***AG of Trinidad and Tobago v Charles***, which replicates the familiar ***Oakes***[5] test in Canadian jurisprudence that requires an examination of (i) the objective of the law, (ii) whether the measures employed are rationally connected to that objective and (iii) are the least intrusive ones possible, and (iv) ultimately whether a fair balance has been struck between the rights of the individual and the interests of the community.[6]

[17] At the outset, I start by acknowledging that, in ***Titan International Securities Inc v AG & FIU*** the CCJ accepted that the three-tiered test articulated in ***de Freitas v Permanent Secretary***[7] is the appropriate one when assessing the constitutionality of limiting measures, which in turn binds this court accordingly.[8] However, given the thrust of the parties' written submissions, a brief

[3] Contained in the written submissions of the LPG companies dated 30th May 2023 at paras. [132] and [133] and endorsed by the GOB in its submissions of 19th June 2023 at paras. [59] and [60].
[4] *Suraj v AG of T&T* [2022] UKPC 26, per Lord Sales and Lord Hamblen at [68].
[5] *R v. Oakes* [1986] 1 SCR 103 (SC Can).
[6] *AG of T&T v Charles* [2022] UKPC 31, per Lord Hamblen at [31].
[7] *De Freitas v Permanent Secretary* (1998) 53 WIR 131 (PC A&B).
[8] *Titan International Securities Inc v AG & FIU* [2018] CCJ 28 (AJ), per Rajnauth-Lee JCCJ at [39].

elaboration is apposite to identify why, aside from the doctrine of precedent, reliance on *de Freitas* is both appropriate and justifiable.

[18] The early post-independence phase of constitutional interpretation was marked by excessive deference in the approach to the interpretation of fundamental rights, prominently reflected in ***AG v Antigua Times*** (1975) 21 WIR 560. But a trio of Privy Council decisions from the Eastern Caribbean and delivered in the late 1990s and early 2000s, of which *de Freitas* is the best-known, heralded a decisive shift, particularly by introducing greater coherence and rigour to the process of constitutional review.[9] As articulated in these cases, the starting point is to determine whether there has been a breach of a fundamental right. The applicant or claimant must prove that breach, which invariably is not a heavy burden, since only a prima facie breach need be established.[10] I will return to this first stage in section (b) below, but for now, it suffices to say that as more modern cases have established, the standard required in proving a prima facie breach is quite low.

[19] If a breach is proved, the burden then shifts to the respondent – usually the state – which in defending the limiting measure (whether law or action) must prove that it is "reasonably required". Here, the standard of proof is higher, the justification being that human rights are involved with the consequent need of having to "guard against the tyranny of the majority".[11] The approach to be followed at this second stage of proving "reasonably required" is replicated across diverse jurisdictions. Essentially, the limiting measure must make provision for one of the goals explicitly named in the sub-sections that follow and its impact or effect must be reasonable. In *de Freitas*, the Privy Council did not spell out in detail how "reasonableness" is to be assessed, but from the analysis in the judgment it can be deduced that this involves balancing the benefit of the limiting measure against the extent to which it restricts the right. Under scrutiny in that case was a section in the *Civil Service Act* in Antigua and Barbuda that prohibited civil servants from expressing any opinion in a public place on matters of national or international political controversy. The Board held that the law failed at this second stage of reasonableness because it did not strike an appropriate balance between the duty of civil servants to conduct their public functions and their freedom of expression. More particularly, it was a "blanket" restriction that excessively invaded the right of public servants to freedom of expression.

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[9] *Hector v AG* [1990] 2 AC 312 (PC A&B) and *Observer Publications Ltd v Matthew* (2001) 58 WIR 188 (PC A&B) in addition to *de Freitas*.
[10] *Julian Robinson v AG* [2019] JMFC Full 04 (FC Jam) per Sykes CJ at para. [203 (i)].
[11] Ibid, at para. [203(j)]

[20] Finally, there is a third stage which is, however, applicable only to constitutions like Antigua and Barbuda's (and not Belize's), but which I nonetheless mention for the sake of completeness. This kicks in only if the respondent succeeds in proving that the limiting law is reasonably required for one of the goals enumerated therein. If so, then the burden shifts back to the applicant/claimant, who has one last chance to prove that the law is unconstitutional on the basis that it is not "reasonably justifiable in a democratic society". At this stage, *de Freitas* derived the applicable test from *Oakes* involving an assessment of the measure's rationality, connection and degree of intrusion on the right.[12] It is precisely this three-step test that was referred to in *Titan* and which has been accepted as the applicable approach to measuring the constitutionality of limits in Belize.

[21] By contrast, the Trinidad and Tobago bill of rights is unique in the Commonwealth Caribbean and its interpretation differs in important ways. For example, rights therein are enumerated in general terms and limits are implied. This is quite significant, for it means that the justification for limits is a broad and open-ended one of the "public interest", with the task falling to the judiciary to determine precisely what that interest entails. However, such an exercise is largely foreclosed in conventional Caribbean bills where exceptions are painstakingly detailed. At the risk of being pedantic, but only to make this point pellucidly clear, while Trinidad and Tobago's right to property is curtly expressed in their section 4(a) as "the right of the individual to … enjoyment of property and the right not to be deprived thereof except by due process of law", the equivalent right in the Belize constitution is limited by at least 14 exceptions specified in section 17(2)(a) to (17)(2)(m)(ii). The breadth (or vagueness) of the Trinidad and Tobago formula necessarily renders the exercise of judicial review there a wider and more flexible exercise.

[22] A further complication is posed by s. 13 of the Trinidad and Tobago constitution – referred to in *Charles* – which is a special mechanism to override fundamental rights and one that has no equivalent in any other Caribbean constitution. In line with its exceptional nature, the interpretation and application of this limiting mechanism carries a distinctly different burden and standard of proof[13] that cannot be applied to the standard limitation clause found in conventional bills of rights, such as the one in the Belize constitution.

[12] *de Freitas,* note 7 above at pp. 143-144.
[13] See *Northern Construction Ltd v AG* (CA TT) Civ App #100/2002, decision dated 27 February 2009.

[23] Ultimately, reliance on Trinbagonian authorities may not necessarily be misleading, given that all proportionality analyses end up by measuring the twin elements of rationality (why a law is passed) and reasonableness (the extent to which it interferes with a claimed right). Nonetheless, I would avoid using such authorities as *the* guide (or even as a starting point) for Belize because T&T's unique format means that the exercise facing a judge in that jurisdiction is more open-ended and flexible. Further, where s. 13 of the T&T constitution is invoked, both the burden and standard of proof are materially different from that applicable to a standard limitations analysis under the conventional model. This context does not require discarding the guidance of the Trinbagonian cases, but necessitates that the potential impact of the textual differences must be borne in mind.

[24] Lastly, on the issue of interpretation, it is worth emphasising that the *de Freitas* approach – borrowing as it does from a seminal Canadian case that in turn was influenced by European human rights jurisprudence – reflects a global trend that cuts across diverse constitutional frameworks[14] and one endorsed at the highest levels of human rights adjudication.[15] Aside from the fact that it is binding on this court, it also represents the culmination of decades in the evolution of interpretation of limitation clauses in conventional Caribbean bills of rights, and thus not an authority to be lightly distinguished.

(ii) The presumption of constitutionality

[25] Littered throughout these proceedings are references to the 'presumption of constitutionality', expressed in those direct terms but also in other oblique ways. Two instances from the written submissions of the GOB are worth quoting verbatim. In one section headed 'Legal principles', they posit that "established rules of interpretation and canons of construction" which must guide the courts include "deference to the Legislature given by the presumption of constitutionality and the doctrines of the 'margin of discretion' or 'margin of appreciation'."[16] In applying this to the facts, they continue:

> "Deference to the elected Legislature is an important aspect of a fundamental tenet underpinning the Constitution i.e. the separation of powers. In this particular case, as the Learned Judge correctly recognised, exercising control over imports and exports in

[14] Robinson et al, *Fundamentals of Caribbean Constitutional Law*, 2nd ed. (Sweet & Maxwell, 2021) page 476.
[15] Human Rights Committee, General Comment No. 34 on article 19 of the International Covenant on Civil and Political Rights, (CCPR/C/GC/34, 12 September 2011), para. 35.
[16] Written submissions of the GOB dated 19th June 2023, Appeal #13/2022, at para. 7.

the public interest is part of executive policy into which the courts of law are not competent to enquire."[17]

[26] These submissions were evidently very influential. At the outset of her decision, for example, Arana CJ asserted that (at page 14) "There is the principle of presumption of constitutionality with which the Court must view all legislation." Later, in assessing the conditions imposed by the amended *NLPGP Act* on importation, she expanded on this position, stipulating that "the fact remains that the government has the legal right to make the decision that it made. The right dates back to 'the power of the King' as described by Jeffreys LCJ in ***East India Company v Sandys*** (1684) 10 St Tr 371 referred to as the great case of monopolies. In these modern times, that power previously wielded by the King is now exercised by Parliament."

[27] These invocations of judicial deference, which in my view seem more akin to judicial subservience, are founded on an outdated view of the presumption of constitutionality. It is true that this presumption was historically treated as imposing a burden of proof on the party challenging legislation – and a heavy one at that – to prove its unconstitutionality. Early cases like ***Hinds v R*** *(1975) 24 WIR 326* (PC Jam) and *Antigua Times* embodied the most lethal manifestations of this doctrine, whereby in proceedings invoking claims to fundamental rights, the constitutionality of legislation is simply assumed (much as been urged upon us here) with the burden of proving otherwise placed upon the claimant. How any ordinary litigant would discharge such a burden, given their obvious lack of knowledge of the policy informing a law's passage, was an impediment that never received any consideration under this approach.

[28] *Antigua Times* is an example of the deleterious effects of the older view of this doctrine. The law in question imposed a hefty licence fee on newspapers, with dire consequences for their continued existence and thus for the litigant newspaper's freedom of expression. Nonetheless, the Privy Council cursorily held that this fee was reasonably required for the purpose of raising revenue, even though the limiting subsection of the right in the Antigua and Barbuda Constitution made no exception for taxation or the raising of revenue. Moreover, since monies paid into the Consolidated Fund can be applied to any public purpose and not necessarily one of those itemized in the limiting subsection, a finding of constitutionality required further speculation, namely that the revenue thereby raised would be used to promote one of those goals (those of defence, public order, etc.). This outcome was achieved in the absence of any evidence from the

[17] Ibid at para. 12(1).

State justifying the law, merely by the court applying presumption upon presumption. The Privy Council reasoned:

> "Their Lordships think that the proper approach to the question is to presume, until the contrary appears or is shown, that all Acts passed by the Parliament of Antigua were reasonably required. This presumption will be rebutted if the statutory provisions in question are, to use the words of Louisy J, 'so arbitrary as to compel the conclusion that it does not involve an exertion of the taxing power but constitutes in substance and effect, the direct execution of a different and forbidden power'."[18]

Antigua Times demonstrates how this older interpretation of the doctrine can render the procedure of judicial review meaningless. The effect of the presumption there was to save legislation that significantly trenched on a constitutional right, but which was wholly silent as to its purposes. However, by piling one assumption on top of another, the court did the work for the State of justifying the licence fee, thereby saving the law without evidence as to its aim or conducting any analysis of its impact.

[29] Significantly, however, this eviscerating application of the presumption has long since been discredited, by the Privy Council no less, which has fashioned a more tempered role for it. One of the earliest cases where this revised view appears is ***AG v Momodou Jobe*** [1984] AC 689, where the Privy Council in an appeal from the Gambia now described the presumption as

> "…but a particular application of the canon of construction embodied in the Latin maxim *magis es tut res valeat quam pereat*, which is an aid to the resolution of any ambiguities or obscurities in the actual words used in any document that is manifestly intended by its makers to create legal rights or obligations."

What this means is that instead of constituting an evidential burden, the presumption of constitutionality is meant to operate as an interpretive technique, whereby a court can save a statute if its meaning is ambiguous, and then only if it is possible to read words into it to make it intelligible. Thus, if a statute is 'ambiguous or obscure', that is, capable of two meanings – one in which it is consistent with the constitution and the other not – the court will apply the former meaning on the basis that Parliament did not intend to violate the constitution and so save the statute.

[18] *AG v Antigua Times Ltd* (1975) 21 WIR 560 per Lord Fraser at p. 574.

[30] Notably, this altered view of the presumption came to be applied in the Commonwealth Caribbean, first in ***Hector v AG of Antigua and Barbuda*** [1990] 2 AC 312 and thereafter in other cases such as ***De Freitas*** and ***Observer Publications v Matthew*** (2001) 58 WIR 188. In these cases, the Privy Council reinforced the *Jobe* position that the presumption of constitutionality functions as an aid to statutory construction, and in *De Freitas*, Lord Clyde repeated the above quotation from *Jobe* verbatim. Moreover, as several Caribbean judges have since held, not only is it the responsibility of the State as author of the law to save it, but this is a burden that can only be discharged by evidence. Perhaps the most extensive treatment of this issue to date has been in *Julian Robinson v R*, where Sykes CJ in the Jamaican court of appeal discussed the limits of the doctrine and emphasised that it did not relieve the State from justifying a limiting measure once an applicant discharges the initial (low) burden of proving that a right has been violated.[19] Declining to follow the older cases like *Hinds v R* which interpreted the presumption as imposing a heavy burden of proof on a litigant, the learned Chief Justice noted: "The presumption confers no immunity from challenge and certainly no longer connotes that there is a heavy burden on the claimant and neither does he/she have to prove unconstitutionality to the criminal standard."[20] Crucially, Sykes CJ stressed the point made above that the State having enacted the law, it would be irrational to impose the burden on the litigant to prove that it has no legitimate aim, as he or she would not be privy to the policy reasons which led to its enactment.[21]

[31] Nonetheless, despite this evolution in the approach to the presumption of constitutionality, confusion persists as to its true role and, as in this case, the older discredited approach continues to be invoked and even applied. However, such lingering applications are *per incuriam* and do not represent an approach which can be adopted, given that *de Freitas* has been expressly held to be binding on this court.[22] Ultimately, as explained by UWI professor Tracy Robinson:

> There can be no justification for presuming that a law challenged for breach of a fundamental right is reasonably required for a legitimate goal, as had been suggested in [older cases like *Antigua Times*]. The respondent must prove this. The state has access to the information giving rise to policy decisions in the interests of the public and it makes good sense that it should bear the burden of establishing a measure is justified.[23]

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[19] *Robinson v AG*, note 10 above, per Sykes CJ at [111]-[131].
[20] Ibid at [112].
[21] Ibid at [125]. See also *Vieira Communications Ltd v AG* (2009) 76 WIR 279 (CA Guy), per Singh C at 291-2 and *Maccabbee v COP* KN 2019 HC 26 (CARILAW).
[22] *Titan* (see note 8 above and accompanying text).
[23] Tracy Robinson, "The Presumption of Constitutionality" (2012) Vol. 37, Nos. 1&2 *West Indian Law Journal* 1 at 18.

[32] In the same vein, it is important to note that as with the presumption of constitutionality, other interpretive techniques which would relegate the judiciary to a subservient or toothless role have no place in a constitutional democracy. I am referring here to submissions by the GOB invoking the need for "judicial deference" to the executive/legislature because of the margin of appreciation or as a necessary requirement of the separation of powers principle. Mr. Fitzgerald KC for the GOB also repeatedly invoked ***Frank Hope v New Guiana Co. Ltd.***, a decision of the court of appeal of Guyana from the 1970s which fashioned a 'direct impact test' to determine whether a claimant's right is violated. Relying on *Frank Hope*, Mr. Fitzgerald stressed the government's right to determine import policy. Mirroring this position was the turn to history by the trial judge, who referenced the "power of the King" to make laws, now exercised by Parliament.

[33] The essence of *Frank Hope's* 'direct impact test' is that *only* legislation which is directed against or which directly affects a particular right constitutes a violation thereof. If the effect is merely indirect, incidental or inconsequential, there is no contravention or hindrance within the meaning of the article under consideration.[24] Thus, in that case, where the plaintiff (an opposition-run newspaper company) was denied a licence to import newsprint, the court held that there was no breach of its freedom of expression because the government was merely regulating imports, which it had a right to do, and did not intend to hinder the plaintiff's freedom of expression.

[34] Given the developments of Caribbean human rights law, this direct impact test holds no currency, if indeed it ever did. By focusing on the legislature's intent (not easily ascertainable, to be sure), it enables a court to find no breach at the first stage, as was done in *Frank Hope*, without ever assessing the benefit of the law as against the impact on the right. In other words, the direct impact test inverts the proportionality test, and once it is decided *at the outset* that the legislature did not 'intend' to breach the right, then that is the end of the analysis. Such an approach cannot credibly be followed today, especially in light of the advances of *de Freitas* and similar cases. As explained regarding the latter, there are essentially two stages of the required analysis, starting with an inquiry into whether the right in question has been breached. If so, it is at the second stage that the court considers the legislature's intent and balances the legislation's benefits against the harm done to the right. However, any approach that would simply deny a breach at the outset based on the intent of Parliament must be rejected, as this forecloses any balancing

[24] *Frank Hope v New Guiana Co. Ltd.* (1979) 26 WIR 233 (CA Guy) per Crane JA at 264-265.

exercise as to the respective advantages and disadvantages of the law, not to mention being contrary to *de Freitas* and *Titan*, which are binding upon this court.

[35] There is no question that the government, in its executive and legislative roles, has the legal right to make decisions shaping socioeconomic and financial policy. But this right is not equivalent to imperious royal will, unquestionable and unaccountable. There may well be an area of policy, involving complex financial or economic matters, where the judiciary is institutionally incapable of second-guessing legislative decisions; despite this, however, all policy must be consistent with the constitution and the judiciary is well-equipped (and best placed) to determine whether fundamental rights have been unduly or excessively limited.

[36] One of the most cogent responses to claims of executive dominance when it comes to imports and other matters of policy is that given by Sykes CJ, where he explained the following:

> "Governance in a constitutional democracy based on the rule of law is actually an institutional arrangement founded upon each arm acting within its designated sphere. It is by understanding this fundamental idea that tyranny is restrained and liberty advanced. No arm has absolute power. All power is subject to constitutional restraint. Popularity and constitutionality are separate things. Popularity does not determine constitutionality. It is the text of the Constitution, its interpretation, and application that determines constitutionality. The final say on this is a judicial function and not an executive one."[25]

[37] Thus, the type of deference advocated by the GOB and apparently approved by the learned trial judge would be exaggerated if it requires the judiciary to sit back passively and give the other arms of government unfettered discretion in deciding and enacting policy. On the contrary, precisely as part of the separation of powers principle, it is the right and duty of the judiciary, as guardian of the constitution, to scrutinise state action for conformity therewith. Indeed, this is a duty to which this court is acutely alive. In ***AG v Orozco*** *[2020] 2 LRC 501*, the State objected to the trial judge's interpretation of 'sex' in s. 16(3) of the constitution to encompass 'sexual orientation' as amounting to a trespass on the legislative function. In dismissing this objection, this court upheld the trial judge's approach as firmly within the separation of powers doctrine,

[25] *Robinson v AG*, note 10 above, per Sykes CJ at [167].

while quoting with approval his assertion that the "Supreme Court is the designated guardian of the rights conferred under the Constitution."[26] Decades ago, Fitzpatrick JA magisterially framed this changed reality in relation to Guyana by noting that "Guyana as a constitutional Republic should not adopt the same reverential attitude to the prerogative. Republics have, or should have, little truck with royal grace and favour which are founded in the arbitrary will of kings. And republican courts should be guided by republican principles."[27] Similarly, Belize is an independent constitutional democracy where every branch of government is accountable under a supreme constitution. In this dispensation, references to parliamentary omnipotence are equally misplaced and cannot be used as an impervious shield for executive or legislative action. Rather, it is the judiciary's role to scrutinise challenged state action to ensure its conformity with the constitution. Bearing these principles in mind, I cannot abandon the task at hand by mechanically upholding the challenged law as a manifestation of executive or legislative policy. Instead, in fulfilling this court's duty, I now turn to examine whether the impugned provisions violate any of the fundamental rights guaranteed by the constitution, as alleged by the LPG companies.

(b) The Right to Property claim

[38] The GOB challenged the substantive finding that the amended Act violated the LPG companies' right to property on two main grounds: first, that the trial judge misconstrued the true meaning and effect of the amended *NLPGP Act*, which they submitted is regulatory in nature and effected no 'taking' giving rise to a right of compensation, and second, that her finding is against the weight of the evidence insofar as the LPG companies had no property to take or, alternatively, even if there was a taking, the user costs are a tax, rate or due and thus not compensable by virtue of s. 17(2)(a). To ensure that this judgment flows logically, I propose to invert the order of these contentions in addressing them. The GOB raised a third ground in this appeal, concerning the quantum of damages awarded, but I propose to deal with this along with the claimants' appeal against the trial judge's rejection of some heads of losses, after examining all of the substantive grounds in both appeals.

(i) Was there property at stake?

[26] *AG v Orozco* [2020] 2 LRC 501 (CA Bel) per Awich JA at [140].
[27] *Yaseen and Thomas v AG* (1996) 62 WIR 98, per Fitzpatrick JA at 115.

[39] The GOB advanced three arguments in support of their submission that the LPG companies had no goodwill and thus no property which could be taken: first, that the claimants had no right to import LPG into Belize, including no constitutional right to import, and thus no expectation that they could continue to engage in such activity into the future; second, that they imported LPG for themselves and had no separate importation business that was distinct from their wholesale and retail sales; and third, seemingly out of nowhere I might add, that if there was a taking, something known as 'user costs' are a tax, rate or due for the purposes of s. 17(2)(a) of the constitution. I will consider these arguments in turn.

[40] As used in connection with business activity, the expression 'goodwill' captures the positive reputation of a business and its likely continued patronage by clients, considered as part of its market value. In ***Ulster Transport Authority v James Brown & Sons*** *[1953] NI 79*, Lord MacDermott LCJ explained the concept as follows:

> '"Goodwill" is a word sometimes used to indicate a ready formed connection of customers whose custom is of value because it is likely to continue. But in its commercial sense, the word may connote much more than this. It is, as Lord Macnaghten observed in *Inland Revenue Commissioners v Muller*…, "the attractive force which brings in custom," and it may reside, not only in trade connections, but in many other quarters, such as particular premises, long experience in some specialised sphere, or the good repute associated with a name or mark. It is something generated by effort that adds to the value of the business."

Crucial elements of this concept include a business's existing customer base and reputation which form part of its market value.

[41] According to the GOB, the requirement of a licence to import prevents the LPG companies from acquiring any goodwill. The obvious flaw of this argument is that over the preceding three decades these companies built up existing customer bases, acquiring in the process "long experience in a specialised sphere", as established in the evidence. In other words, there is no need to resort to hypotheticals in the future because each currently has a customer base with an accompanying reputation, all part of being an ongoing concern. If the evidence is accepted – which the trial judge did – then the claimants have already incurred losses, including to their goodwill, as a result of the exclusive right granted by law to the NGC to import LPG.

[42] Nor does the fact that an activity is regulated or that there is no constitutional right to engage in it mean that companies involved have no expectation of continuing to conduct business in the

future and thus unable to acquire any goodwill. Many business undertakings are regulated by the State, but that fact by itself cannot prevent the creation of goodwill as there is a reasonable expectation that applicable procedures will be fairly followed. It is always possible that conditions may be imposed by law or that a required permit or licence may not be granted, but projections for the future cannot be frustrated (or denied) simply by speculation. The existence of a legal pre-condition is not meant to hamper business activity or any goodwill that may develop as a result; quite the contrary, the requirement to obtain permits and licences is designed to achieve various regulatory goals in the general interest.

[43] In their submissions replying to this argument, the claimants gave as examples various companies such as banks that are subject to regulation, but which are nonetheless capable of developing goodwill. Those examples are apt illustrations of the hollowness of the point in issue, as banking is a heavily regulated field and there is no constitutional right to obtain a banking licence. Despite this, none can seriously dispute that individual companies such as Belize Bank, Atlantic Bank, Barclays Bank (UK) and others are able to build and maintain their individual customer base and goodwill. A plethora of other examples can be given, from areas as diverse as entertainment to dining to aviation to manufacturing and so on, each of which must abide by regulations governing, for example, safety standards, sanitation, quality, the environment, and so on. The fact that there is no constitutional "right" to sell alcohol does not mean that a restaurant cannot develop goodwill, and none would suggest that KFC (or Dario's Meat Pies, to use a local example) cannot acquire goodwill because they require licences as a routine part of operating. Or that COPA and American Airlines can each develop their own goodwill, even though they obviously must pass safety inspections and meet other industry standards. The same principle applies to the LPG companies.

[44] Ultimately, saying that there is no right, constitutional or otherwise, to import as an impediment to the development of goodwill is to introduce a red herring. The state is entitled to regulate all business activity, but rules and standards must be fairly and routinely applied; further, whether required licences and permits will be granted are future occurrences that turn on circumstances to be judged at the time. However, that businesses are required to operate within the confines of the law, which includes regulatory standards, does not prevent them from developing in the present a customer base, reputation, and goodwill.

[45] The second argument advanced by the GOB on the subject of goodwill was that the claimants imported LPG for themselves and had no separate importation business distinct from their wholesale and retail sales. This submission lacks a clear evidential foundation. Under cross-examination, for example, the witness Ernesto Uh – the accountant who testified for Southern Choice Butane Ltd – explained that they never needed storage space as wholesaler because their product (i.e. LPG) would move directly from their supplier's facility through the border to their customers in Belize.[28] This was precisely the opposite of what the GOB argued, as Uh affirmed that they were not importing for themselves and then re-selling but importing and supplying customers directly. The testimony of other witnesses asked about this, such as Amira Gutierrez, is hardly reliable since the point being made is obscure and it does not appear from a careful read of the cross-examination that they understood what was being asked.

[46] At any rate, even if the course of the business was as described by the GOB for companies other than Southern Choice – that they did not import for customers for a price but would import LPG and then re-sell to customers in Belize – this does not mean that they had no importation business. Not only is the distinction upon which this submission rests strained and artificial, it also defies logic. According to the evidence, the LPG companies were not importing LPG to consume it themselves. They did so as part of a business for profit, in which they would re-sell to customers, many of whom were regulars. The importation was not a standalone transaction followed separately by re-sale – rather, these were different stages of the same business. I have little difficulty in rejecting this argument as wholly without merit.

[47] Finally, the GOB argued that if there was a taking, something known as 'user costs' are a tax, rate or due for the purposes of s. 17(2)(a) of the constitution. This was the most bewildering of all the arguments advanced, as an objection to user costs does not form part of the claim brought by the LPG companies. The initial claim challenged the exclusivity conferred on the NGC by the *NLPGP Act* as a breach of s. 17(1) of the Constitution; after the Act was amended the LPG companies maintained their claim on the basis that the conditions imposed for a licence served to perpetuate the NGC monopoly. If these legislative measures effect a taking or acquisition, they would only be exempt from the requirement of paying compensation if they fall within one of the categories listed in s. 17(2), one of which is taxation. But the offending measure complained of is the monopoly conferred on the NGC, first by the express prohibition on

[28] Record of Appeal, Part 4, at pp. 3384-5.

importation and then later by the alleged de facto prohibition posed by unattainable conditions. It is those conditions that must come within s. 17(2) to qualify as a limit on the requirement to pay compensation, but none of them is a "tax, rate or due". Nowhere in this scenario have user costs arisen as an issue.

[48] It follows from the above that this ground fails. The trial judge's finding was not against the weight of the evidence and none of the arguments made demonstrates that the LPG companies could or did not acquire goodwill or did not establish importation businesses.

(ii) Can regulatory laws constitute compensable takings?

[49] Turning now to the first ground, the GOB relied on several authorities in support of the argument that there is a difference between legislation which constitutes a 'taking' and that which is essentially regulatory. The latter, they submitted, does not give rise to a right of compensation unless the intent of the legislation is specifically to acquire property. In this case, they continue, the trial judge expressly found that the object of the legislation was lawful, that is, it was intended to regulate not expropriate, and moreover, its effect was not to vest title to property in a governmental entity but merely to divert customers to a non-governmental body. Accordingly, no compensable taking took place on the facts and the trial judge erred in finding a violation of the claimants' property rights.

[50] The LPG companies vigorously contested each of these arguments. Relying principally on ***Paponette v AG of Trinidad and Tobago*** (2010) 78 WIR 474, they submitted that the effect of legislation is just as important as intention in determining its constitutionality, and that the effect of the amended *NLPGP Act* was to take their property. In any event, they continued, the intent of the impugned legislation was indeed to take the property of the LPG companies, as openly revealed in the Definitive Agreement. Further, the LPG companies stressed that the reasons proffered for the regulatory scheme were in no way connected to the actual requirements of the Act, which strongly suggests that the GOB wanted to make importation an unfeasible business.

[51] An appropriate starting point for examining these rival contentions is the text of the guarantees themselves. Section 3 of the Belize Constitution, which sets out the overarching framework connecting and giving sense to the whole body of disparate rights following thereafter, provides as follows:

> "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 Chapter 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."

[52] The specific guarantee of property is provided in section 17, subsection (1) of which protects property from compulsory acquisition, except under a law that sets out the principles governing compensation and provides a right of access to the courts to enforce such right to compensation. The text does not provide much detail about those principles governing compensation, but it does indicate that the taking or acquisition must be for "a public purpose" and that both the amount and timing of the compensation must be reasonable.

[53] Subsection (2) of section 17 details a variety of situations where acquisition of property does *not* give rise to a right to compensation, such as, for example, taxation, criminal fines, and other instances related to the regulation or management of various property interests. Notably, nowhere in this exhaustive list of exceptions is there any general provision for what is known as the 'police power', that is, the generalised goals of 'defence, public safety, public order, public morality and public health', which are frequently attached as limits to other rights. The omission of those residual discretionary goals with their potential for expanding the areas of limitations, strongly suggests that this is a closed list of exceptions. At any rate, the text of the right conforms to the two-tiered formula found in relation to several other fundamental rights, with 17(1) as the right-conferring section providing a right to compensation for an acquisition or deprivation of property, and 17(2) as the limitation provision, restricting that right to compensation in certain carefully defined circumstances.

[54] The regulation cases do threaten to disrupt the longstanding and familiar approach to analysing the constitutionality of limitations, which (as discussed above)[29] mirrors the text by first asking whether a violation occurred and, if the answer is yes, then examining whether that restriction on

[29] Note, in particular, paragraphs [18]-[19] and [23]-[24], above.

the right is justifiable. If the regulation approach as submitted prevails, that would represent a radical departure from the norm, for the mere characterisation of a measure as regulatory would eliminate the second stage of the proportionality analysis. In other words, by denying that a taking occurred (which is what happens when the measure is described as 'merely' regulatory), the reasonableness of the measure in question is not examined. This submission thus requires careful consideration.

[55] One of the authorities on which the GOB relied was ***Grape Bay v AG (1999) 57 WIR 62***, where constitutional proceedings invoking the right to property were precipitated by legislation that would restrict foreign restaurant franchises from operating in Bermuda. The appellant company, which had been trying to establish a McDonald's fast-food restaurant on the island, objected to this prohibition and sought a declaration that the legislation infringed its rights under the constitution. In dismissing the challenge, Lord Hoffman outlined the principles governing the protection of property as first, the need that there be some 'public interest' to justify the acquisition of private property for the benefit of the State, and second that any such acquisition in the public interest should be borne by the public as a whole, hence the need for compensation payable by the State. However, one limit on this principle is indeed posed by regulations of general application enacted for the public benefit, examples of which were given as laws imposing rent restrictions and planning (zoning) controls. This limit would apply even if such general legislation affected some people (such as landlords, for example) more than others. According to Lord Hoffman, "It is well settled that restrictions on the use of property imposed in the public interest by general regulatory laws do not constitute a deprivation of that property for which compensation should be paid."[30]

[56] While the Privy Council in *Grape Bay* did acknowledge the impact of general regulatory laws on the right to compensation, careful note must be made of the context of that case. Much turned on the fact that Grape Bay Ltd had no "property" to speak of – no land or existing business – and was seeking to protect some very limited choses in action. Those were the benefit of a letter of intent, an agreement to employ a manager if the restaurant got off the ground, and the grant of an option to rent premises, all of which, according to Lord Hoffman, "it would be highly artificial [to be classified] as separate items of property". As for the liberty to acquire premises and open a McDonald's, their Lordships minimised this as a "liberty shared with the rest of the population".

[30] *Grape Bay Ltd v AG of Bermuda* (1999) 57 WIR 62, per Lord Hoffman at 72.

[57] Given the slender nature (if any) of the property rights at stake in *Grape Bay*, the principle articulated therein cannot be framed as expansively as it was in the GOB's submissions. The legislation in question did not acquire any property of Grape Bay Ltd because the company had no assets to speak of, so the judgment can hardly be authority for a situation involving actual property of a far greater scale, such as expensive real estate or a thriving business concern. Even the examples given in the judgment, such as imposing rent restrictions or zoning controls, are modest interferences when compared to a measure which causes a going concern to go bankrupt. At best, then, one could deduce from this case that prohibitions which are regulatory in nature *might not* constitute a compensable 'taking' or 'acquisition', relevant considerations in so determining being the nature of the property at stake and the extent of the regulatory action.

[58] This interpretation is validated by ***Campbell-Rodriques v AG of Jamaica [2008] 4 LRC 526***, the other Caribbean authority relied upon by the GOB. In that case, the appellants sought unsuccessfully to persuade the court that a proposed toll road linking a suburban community with the capital of Kingston would interfere with the "enjoyment" of their property. Once again, the claim was founded on an intangible, even nebulous, notion of property – the highway did not involve the physical acquisition of the appellants' property – and in essence their complaint invoked the economic burden posed by the toll on accessing their property, which was said to affect their enjoyment of it. And again, the Privy Council refrained from examining the concept of property in depth, only observing that the right claimed by the appellants, namely that of access, was one shared by a potentially unlimited number of people. For that reason, it was doubtful whether they had any property interest attracting protection under the section. Beyond this, however, the judgment's discussion of acquisition in the context of regulatory statutes is instructive.

[59] As highlighted prominently in the GOB's written submissions, Lord Carswell adverted to the distinction between 'regulation' and 'taking', observing: "It is well established that measures adopted for the regulation of activity in the public interest, such as planning control or the protection of public health, will not constitute the taking of property, notwithstanding the fact that they may have an adverse economic effect on the owners of certain properties."[31] However, this quote represents only a fraction of Lord Carswell's observations, and it is necessary to consider his analysis of the subject in its entirety.

[31] *Campbell-Rodriques and others v AG* [2008] 4 LRC 526, per Lord Carswell at para. [18].

[60] Lord Carswell's starting point, grounded in "a long line of cases", was in fact to acknowledge that "taking is not limited to direct appropriation, but *may encompass regulation* of the use of land which adversely affects the owner to a sufficiently serious degree"![32] Lord Carswell then reiterated the much-cited principle, found in American cases, that regulation in the public interest may be enacted without the right to compensation – but as to this he advised that such authorities should be used "with a degree of caution", bearing in mind that across the various constitutional provisions there are textual differences.[33] Finally, he referenced *Belfast Corp. v OD Cars Ltd [1960] AC 490*, a decision of the House of Lords concerning planning restrictions on the use of land, which in turn approved a principle laid down in an American case that regulation of property in the public interest is not a taking, at least in the circumstances outlined in that case. Crucially, Lord Carswell pointed out that *Belfast Corp* adopted the qualification, also taken from the US Supreme Court, that "*if a regulation goes too far it will be recognised as a taking, it being a question of degree*."[34]

[61] By now, it must be clear that the true position as regards regulatory prohibitions is far more nuanced than the submissions have made out. Crucially, there is no *a priori* assumption that legislation which regulates the use of property does not effect a taking/acquisition and does not give rise to a right of compensation. On the contrary, it depends on the nature of the prohibition and the degree to which it affects the property right. According to these authorities, it is possible that a given regulation may amount to a taking if it 'goes too far'.

[62] Also to be noted is that the general principles regarding regulatory activity were fashioned in the UK – a country with no entrenched bill of rights and where parliament is supreme – which in turn borrowed from the US Supreme Court, operating in a federal system (and thus different levels of jurisdiction) and a unique set of constitutional provisions. This distinctive context inevitably impacts on how so-called regulatory provisions should be analysed in Belize, where the overarching framework is governed by constitutionally entrenched fundamental rights. This means that even if a statutory prohibition can be characterised as a regulation, that does not automatically render it a measure not requiring compensation – for once a taking occurs (i.e., if

[32] Ibid at [17] (emphasis added).
[33] Ibid.
[34] Ibid (emphasis added).

it 'goes too far'), compensation is only excluded if it falls within one of the situations itemised in s. 17(2)(a) to (m)(ii).

[63] A second major plank of the GOB arguments on this first ground was focused on the relevance of the *intent* of the legislation in question. As mentioned above, this submission was that regulatory legislation does not give rise to a right of compensation unless its intent is specifically to acquire property. In support, the GOB relied heavily on *Ulster Transport Authority*, where in issue was the vires of legislation prohibiting the use of a motor vehicle for the collection or delivery of furniture by persons other than the appellant Authority. The effect of the prohibition was that a substantial portion of the respondent's furniture removal business, which they could no longer carry on, was diverted to the appellant. This was found to constitute the taking of property without compensation, and since the latter was expressly forbidden by s. 5(1) of the *Government of Ireland Act 1920,* the relevant prohibition was declared ultra vires and void. According to the GOB, what was determinative in that case was the finding that the intent of the legislation in question was specifically "for the purpose of enabling the appellants to capture that portion of the rival business which the respondents were prohibited from carrying on".

[64] The GOB also relied on ***Manitoba Fisheries Ltd v the Queen [1979] 1 R.S.C. 101*** as to the relevance of intent. In that case, the respondent granted a commercial monopoly in the export of fish, which led to the destruction of the appellant's business as a retailer and exporter of fish. According to the GOB, it was the finding of the purpose of the legislation which led to this outcome. By comparison, they argued, the trial judge in this case expressly found that the legislation had a lawful object, which was not to deprive the LPG companies of their property, so that she erred in concluding that there was a violation of the right to property.

[65] I find this argument wholly unpersuasive, not only because it does not accord with the authorities cited, but more fundamentally because it is not logical and would disrupt decades of development in human rights adjudication. In the first place, it is not clear that the cases cited insist that intent is determinative in the way that has been pressed upon us. In *Ulster*, for example, the concepts of 'intent' and 'effect' were used interchangeably and, more importantly, no evidence of legislative intent existed or was identified beyond an inference derived from the effects of the legislation. The court even acknowledged that it was applying a presumption, stating 'Parliament must be

presumed to intend the necessary effects of its enactments."[35]. In other words, intent had far less salience in that case than has been made out, being presumed rather than proved. Legislative intent played an even lesser role in *Manitoba Fisheries*, where the crux of the court's reasoning lay in its finding as to the *effect* of the law in destroying the appellant's business.

[66] More fundamentally, according intent the pre-eminence suggested by the GOB would impede a proper assessment of the nature of the regulatory measure in question. As the cases cited by the GOB establish, where the interference is substantial, then it may amount to a compensable taking. However, the only way of knowing whether a regulation has 'gone too far' is by measuring its impact. This suggests that in the first stage of proving a breach, legislative intent has no role.

[67] A more principled objection to this submission, by which the proof or presumption of an innocuous intent would preclude a finding of a violation even in circumstances where a taking or acquisition did occur, is that (like the direct impact test) it circumvents the standard proportionality analysis. As outlined above, the governing approach for analysing limiting measures is laid down in *De Freitas*,[36] whereby in the first stage the claimant must show a violation and if so, the burden then shifts to the respondent state to prove that the limit is reasonably required for some identified constitutional goal. At that second stage, legislation purporting to promote a goal in the public interest is subjected to a searching inquiry to test its proportionality – specifically, whether it is rationally connected to the goal and uses the least restrictive means possible. Legislative intent is thus not ignored, but neither is its mere assertion accepted as automatic validation of the measure in question. Instead, at the second stage, both the intent and impact of the measure are scrutinised to ensure that a fair balance is struck between the public interest and the individual right.

[68] If, however, consideration of intent takes place at the very first stage, resulting in a finding of no breach where deemed to be innocuous, this means that a court will never get to the second stage of assessing the reasonableness of the legislative measure. Put another way, by classifying a measure as regulatory and automatically concluding that it involves no taking, there is no examination of the reasonableness of the so-called regulation, even if its impact is severe. Under this approach, presumed or proven legislative intent would be deployed at the outset to foreclose

[35] *Ulster Transport Authority v James Brown & Sons* [1953] NI 79, per Lord MacDermott LCJ at 112.
[36] Note discussion at paras. [18]-[19], above.

any examination of proportionality, and this is what makes it so invidious. Not only is this a retrograde step, rolling back decades of development in human rights adjudication, it would provide a blanket shield to legislation and frustrate the letter and spirit of the fundamental rights guarantees. For these reasons, I cannot accept this submission as to the 'paramountcy'[37] of intent as correct.

[69] It is also worth bearing in mind that *Ulster* – a UK case of more than 7 decades past – is of doubtful relevance on a point of interpretation such as this, given that the legal framework in which it was decided was so radically different from the present. Given the constitutional protection afforded to private property in Belize, for what principled reason should the effect of legislation be ignored where in fact it does lead to a violation of the right? Put another way, if legislation causes a breach of a right, why should its supposed intent override its effects and lead to an artificial conclusion that there is no violation at all? For the victim who actually experiences a violation, it is cold comfort that the law did not intend to cause one.

[70] To summarise, therefore, I do not accept that the mere characterisation of legislation as regulatory automatically means that no taking is effected. A negative prohibition that merely interferes with the enjoyment of property may not give rise to a right of compensation, but it is different if the 'regulation' goes too far. As the cases cited by the GOB establish, where the interference is substantial, then it may amount to a compensable taking. In determining whether a regulation "goes too far", legislative intent is not dispositive. On the contrary, *measuring the impact of a regulation is the only way to know whether it has in fact gone too far*. Finally, while an open-ended principle to the effect that regulatory prohibitions are not compensable may have developed in both English and American law, this common law position must give way to the constitution. What that means is that even if a measure is indeed regulatory, once it effects a taking it will only be exempt from providing compensation where it falls within one of the exceptions set out in section 17(2) of the Belize Constitution. It is with these principles in mind that I now turn to an examination of the legislative scheme in issue in this case.

(iii) What are the nature and effect of the legislative measures in question?

[71] Section 5 of the original *NLPGP Act* conferred the exclusive right on the NGC to import wholesale LPG into Belize, making good on a promise in clause 18 of the Definitive Agreement of 2018. As

[37] The language of the GOB in their written submissions dated 29th May, 2023, Appeal #12/2022, at para [57].

of May 1, 2020, when the NGC began its commercial operations, the claimants' businesses as importers of LPG came to an end, with the NGC thereafter enjoying a monopoly in the LPG import market. The effect of this statutory monopoly on the claimants was immediate. As found by the trial judge, they abruptly lost their existing customer base that had been built up over the preceding three decades, without receiving any compensation. For one of the companies, Southern Choice Butane Ltd, its exclusion from the import market was catastrophic, as it was eventually forced out of business altogether.

[72] One of the arguments of the GOB was that none of the above consequences amounted to a taking, for the effect of the legislation was merely to divert the erstwhile customers of the LPG companies to a non-governmental body (namely, the NGC).[38] This takes a very narrow view of the right, which covers not just 'takings' and 'acquisition' in section 17(1) but also 'deprivation', which is expressly protected against in section 3. Thus, even if the claimants had simply lost their customer base as a result of the statutory prohibition, such an outcome would still run afoul of the constitutional protection. But it is not true to describe what happened as the claimants simply being deprived of their customers, because the customers they lost were immediately acquired by the NGC. As in *Ulster*, this statutory diversion of customers from one company to another amounts to an acquisition.[39]

[73] Alternatively, could it be that the GOB is arguing here that there is no right to compensation because the diversion was to a non-governmental body? I mention this even though it is not obvious that the NGC is indeed non-governmental, for the government holds a substantial stake of 25% in it. This can hardly be an objection to compensation, however, because the right protects against any statutorily effected acquisition, irrespective of whether the beneficiary is the state or another private company. What Commonwealth Constitutions usually require, Belize being no exception, is that acquisition must be for a public purpose,[40] which renders redistribution schemes from one private owner to another possible provided that there is some public benefit being promoted.[41] For this reason, the argument could hardly be that no compensation is possible because the NGC is a private company – because if so, and if no public purpose was involved – then the purported acquisition would clearly be unconstitutional.

[38] Ibid at para [74].
[39] *Ulster Transport*, note 33 above at pp. 112-113.
[40] Belize Constitution, s. 17(1)(b)(ii).
[41] Tom Allen, *The Right to Property in Commonwealth Constitutions* (Cambridge: CUP, 2000), chapter 7.

[74] One and a half years after this action was instituted, in November 2021, the *NLPGP Act* was amended, purportedly to remove the exclusive right that had been conferred on the NGC to import LPG into Belize. Following the amendment, anyone could now import LPG, provided that they construct an import facility with a storage capacity of 1.5 million US Gallons, or alternatively, pass their imported LPG through the NGC's existing LPG Terminal. As established at trial, neither of these conditions was feasible or realistic: constructing such a massive facility could only be done at a prohibitive cost, the most conservative estimate being in excess of BZ$44 million, and even then there would be no guarantee of obtaining the licence; while the alternative would subject potential importers to a competitor. In such circumstances, it was argued, the amendment was purely superficial, and its real effect was to enable the monopoly to continue.

[75] With the monopoly persisting despite the amendment, the claimants continue to suffer a deprivation or loss of property without compensation. This would constitute a breach of s. 17, unless the statutory conditions imposed by the amended Act fall within one of the exceptions itemised in s. 17(2). In other words, it is not enough to call the statutory scheme a 'regulation', in which case there would be no requirement of compensation, as the GOB has submitted. Rather, for any regulatory activity to be exempted from compensation, it must be pursuant to one of the specific exceptions provided for in the right. On this first condition, the measure fails, for it does not come within any of the stated exceptions. The arguments of the GOB attempted to make this connection by introducing the concept of import wholesale price (IWP), but this seemed to be an attempted sleight of hand, since what is in issue in this challenge is not the cost charged by the NGC for LPG, but rather the exclusivity granted to it by the original Act, which was effectively maintained in spite of the amendment.

[76] The GOB also sought to justify the exclusivity (and later, the statutory requirements of the amended *NLPGP Act*) on the basis that they were required to promote several goals in the public interest – namely, the health and safety of consumers, the reduction of smuggling, price transparency and to increase storage capacity. However, quite apart from the fact that none of these goals is covered by s. 17(2), there is no rational connection between the statutory conditions and any of them. I will return to this analysis of proportionality in relation to the other rights, but for now will simply make reference to the evidence of Lennnox Nicholson who acknowledged that any of those objectives, including that of increasing storage capacity, could be achieved by a smaller storage terminal and not only by monitoring one terminal. Thus, neither

requirement of a 1.5 million US gallon facility or using that of the NGC as a pre-condition for a licence to import can be justified as necessary or reasonable. The statutory conditions are thus an unreasonable restriction on the right and cannot meet the governing proportionality test as laid down in *De Freitas* and similar cases.

[77] Accordingly, the claimants suffered a loss of their property involving both goodwill and their business as an ongoing concern as a result of the legislative scheme which first conferred a monopoly on a competitor and then maintained it in a de facto manner by imposing unattainable conditions for re-entry into the LPG market. These measures were not to facilitate any of the goals identified in s. 17(2), and even if were for the more generic 'public interest' goal, were too excessive and disproportionate to the losses suffered by the claimants. This was accordingly a 'taking' or 'acquisition' for which compensation was required, and in the absence of any such provision in the enabling legislative measures, the claimants sustained a violation of their right to property under s. 17(1) of the constitution and the learned trial judge did not err in so finding. I therefore find no merit in the GOB's appeal against this finding.

[78] In this appeal, #12 of 2022, the GOB advanced one final argument, namely that even if the amended Act is an unjustifiable taking, the LPG companies failed to prove loss or damage in the amount awarded by the trial judge. I propose to delay consideration of this ground until all the substantive grounds bearing upon liability are examined, and then to consider it together with the claimants' appeal against the quantum awarded in appeal #13 of 2022. Accordingly, I turn next to appeal #13 of 2022, where the LPG companies appealed against the finding of the trial judge that there was no breach of any of the other fundamental rights claimed by them.

(c) The implications of Supremacy

[79] In Appeal #13 of 2022, the LPG companies launched their attack on the findings below by focusing on a comment made by the trial judge in the course of her decision, where she observed that "…if the original Act had remained unamended, the Claimants would have succeeded on all the issues raised in this claim because the monopoly created by that original Act clearly violated all the Claimants' constitutional rights as they have averred." Having so held, the LPG companies submitted that the trial judge ought to have declared the original Act void pursuant to the express direction contained in the supremacy clause. Section 2 of the constitution stipulates that all laws inconsistent with the constitution are void to the extent of their inconsistency, and for that reason

they argued that the trial judge should have either severed the inconsistent portion of the law or declared the law to be void if severance was not possible.[42] Continuing, the LPG companies submitted further that the trial judge compounded her error by not finding that the *NLPGP Act* as amended to also be void on the basis that it purported to amend an Act (namely, the original one) which was void and thus incapable of being amended. On behalf of the LPG companies, Mr. Mendes SC submitted copious authorities in support of this contention that unconstitutional legislation is void ab initio and cannot be amended unless first re-enacted.

[80] While the GOB agreed that a law inconsistent with the constitution is void, they noted that there are important qualifications to this principle. Principally, the GOB stressed that the supremacy clause only invalidates an inconsistent law to the extent of its inconsistency, and further, that amending legislation may be effective to re-enact the provisions of a void law by incorporating its provisions by reference and providing an independent basis for its legislative effect.

[81] With all due respect to the industry of Mr Mendes, who argued the point vigorously and with extensive references to the authorities, this submission cannot prevail because, as the GOB pointed out, its premise is faulty. The learned trial judge's statement as to the validity of the original Act was evidently made *en passant*, almost at the end of her decision, and one would be hard pressed to describe it as a "holding".

[82] As recounted above in the overview of the procedural background, at the close of the trial the parties submitted a document entitled "Further pre-trial memorandum of the claimants based on further amended application for relief under the constitution", pursuant to Rule 38.5 of the CPR 2005. This 14-page document was signed by representatives of both parties. It set out a summary of the facts and reliefs claimed, the admissions made, the contentions of each party, and ended with a section entitled "Statement of Issues to be determined at Trial". The entire document was focused on the amended Act, seeking relief in relation to it and, more importantly, questioning its terms for conformity with the fundamental rights claimed. Since it was expressly agreed between the parties that it was the constitutionality of the *amended* Act which was in issue, there is no way that the judge's passing remark on the original Act could have been intended to or fairly be treated as a holding.

[42] Pursuant to *AG v Zuniga* [2014] CCJ 2, per Saunders JCCJ at para. [88].

[83] It must also be noted that the learned judge conducted no analysis or discussion of the original Act and this statement as to its effect was made without explanation or elaboration. It appears almost at the end of the decision, seemingly as an afterthought. In all the circumstances, it is much too casual and unsupported to constitute or be described as a holding. For these reasons, I do not accept this first ground of appeal argued by the LPG companies and proceed to consider the judge's findings on the remaining fundamental rights they invoked.

(d) The right to work claim

[84] The learned trial judge rejected the claim that the amended Act denies the claimants the opportunity to gain a living from their freely chosen work of operating LPG import businesses in violation of the right to work, guaranteed by s. 15(1) of the constitution. First affirming that section 15 entails the opportunity to earn a living and is not a guarantee of employment from any business activity, she continued by noting that the GOB has the legal right to regulate the industry, a right dating back to the 'power of the King'. She added that this power can only be interfered with by the judiciary if it was manifestly demonstrated to have been exercised in bad faith. In the absence of any such evidence in this case, Arana CJ accordingly rejected the claim of a breach of s. 15.

[85] The LPG companies appealed this finding, citing as evidence of the violation the fact that the statutory restrictions prohibit them from continuing to engage in their business of importation, which they had been carrying on for decades. They also submitted that "bad faith" is not a requirement for proving a breach of the right, arguing that the learned trial judge erred in rejecting the claim on that basis.

[86] By contrast, the GOB raised a slew of arguments in support, focused both on denying that there was a breach of the right and, alternatively, on justifying any purported limit to its exercise as coming within one or more of the exceptions provided for in s. 15. On the question of breach, the GOB's position was that the right to work by natural persons is a more robust one than that which the LPG companies might assert. They also reiterated their position that the LPG companies have no goodwill in importation and that in any case, these companies were still free to import and distribute LPG. They submitted further that this right does not include a right to profit.

[87] In the alternative, the GOB noted that section 15 does not create an unqualified right but permits the State to impose limits on its exercise, which include licensing requirements and restrictions to promote public health or affecting the rights of non-citizens. As the provisions objected to are aimed at promoting such constitutionally permitted goals, they are justifiable limits and thus do not result in a violation of the right.

[88] An appropriate starting point in determining this issue is the terms and scope of the right itself. In keeping with the usual pattern, section 15(1) is the right-conferring provision, which states: "No person shall be denied the opportunity to gain his living by work which he freely chooses or accepts, whether by pursuing a profession or occupation or by engaging in a trade or business, or otherwise." Subsection (2) makes provision for licences, fees and qualifications as acceptable conditions for engaging in work, while subsection (3) exempts from this right, laws that make "reasonable provision" in the interests of defence, public safety, public order, public morality and public health (the so-called 'police power' limitation), laws required for protecting the rights and freedoms of other persons, and laws imposing restrictions on non-citizens of Belize.

[89] The few cases that have considered the meaning and scope of this right consistently stick to the language of the text, emphasising that it guarantees the "opportunity" to work and nothing more. In ***Fort Street Tourism Village v AG (2008) 74 WIR 133***, one of the leading cases on the subject, the construction of walls on a boardwalk by the appellant authority, which had the effect of preventing direct access by passengers coming off of cruise ships to the businesses of the claimants on either side of the boardwalk, was held not to violate s. 15. Overruling the Chief Justice on this point, this court unanimously held there was no violation of the claimants' right to work because passengers could still access the said businesses – albeit by a more circuitous route. In elaborating on the meaning of this right, Mottley P said:

> "In order for s 15(1) to be breached in so far as a denial of the opportunity to work was concerned, legislation or some statutory instrument would have to provide that the claimants were not entitled to engagement in any business or in a particular type of business."[43]

[90] Morrison JA was slightly more expansive, finding that a breach could occur not just by legislation but also by "administrative action on the part of a public authority", which places an "unjustifiable

[43] *Fort Street Tourism Village v AG* (2008) 74 WIR 133, per Mottley P at para [47].

fetter" on the citizen's right to freely choose or practice a trade or profession.[44] In that case, not only was there no legislation in issue, but passengers were not prevented from accessing the claimants' businesses – the wall just made it more inconvenient to do so – and so no breach of the right was found. This interpretation has been cited with approval in the CCJ, which has affirmed that "…the right to work is not a guarantee of employment but merely an opportunity to earn a living. No legislative or administrative fetter or regulation may be placed on that right."[45]

[91] An instructive example of the application of this right was in ***Bowman Ltd v AG***,[46] where Hafiz-Bertram J (as she then was) concluded that legislation which required fruit growers to join an Association in order to sell their produce was an unjustifiable restriction on their right to work. The legislation in question did not prevent anyone from embarking on the business of growing citrus fruit and only imposed the condition in order to sell the produce. This was nonetheless regarded as a restriction on the ability to engage in the citrus business and the court so held. Taking a purposive view of the right, Hafiz-Bertram J declared, "In my view, the production of citrus which cannot be sold to the sole citrus producer without a licence and which will only be granted to members of the Association is in effect denying the claimants the opportunity to work in the field which they chose."[47]

[92] From these cases it is possible to identify what the courts consider to be the key elements of this right. First, it is the opportunity to work, and not actual employment, which is guaranteed and, crucially, that opportunity guaranteed is in one's "freely chosen" field. The requirement of being freely chosen must surely resonate powerfully in a society with a dehumanising past as this, where labour was for centuries compelled and unwaged. Second, no fetter must be placed on this right by the State, whether by way of law or administrative action, which "disentitles" or even "hinders" the free exercise of the right. Third, any such fetter is only objectionable where it is "unjustifiable".

[93] What, then, occurred in this case? As will be recalled, the original Act conferred the exclusive right to import wholesale LPG on the NGC, which meant that, as the trial judge put it, "in one fell swoop" when the NGC commenced its operations, the claimants lost all their customers who

[44] Ibid, per Morrison JA at para [137].
[45] *Lucas v Chief Education Officer* [2015] CCJ 6 (AJ) per Nelson JCCJ at para. [48].
[46] *HTA Bowman Ltd and others v AG and others* (#730/2009, decision dated 13/5/2010).
[47] Ibid, per Hafiz-Bertram J at para. [74]; and see also *Belize Petroleum Haulers Association v Habet and others* (Civ App No. 20 of 2004, decision dated 24/06/05).

became obliged to source LPG from the NGC alone. But before the end of the trial, more than a year and a half into the NGC's monopoly, the *NLPGP Act* was amended to remove the exclusivity provision. Thereafter, any person could apply to import LPG, but only if they either constructed an import facility with a storage capacity of 1.5 million US gallons or import their LPG through the NGC's existing terminal. The claimants submitted that neither of these conditions was reasonable or attainable – the cost of building such a gigantic terminal is prohibitive and the alternative of storing in the NGC's terminal subjects them to the uncertainty of relying on a competitor. Accordingly, they alleged that the amendment did not truly open up the LPG market but instead, with its unreasonable conditions, was meant to preserve the NGC's monopoly. As such, both the original and amended Act prevent them from engaging in their chosen business.

[94] These facts present little complexity in answering the first question as to whether a breach occurred. Unless one or more of the rebuttals raised by the trial judge or the GOB can be sustained, the clear effect of the legislative scheme is to fetter the LPG companies' opportunity to engage in their freely chosen business activity. Those rebuttals must therefore be examined to see if they preclude a finding of a breach.

[95] For her part, the trial judge declined to make any finding as to breach because, firstly, regulating imports in her view was within the power of the King and second, because the claimants did not demonstrate that this power was exercised in bad faith. As noted above, however, Belize is a constitutional democracy, and the King is merely a titular head of state with no power to legislate at will or at all. While imperial power has devolved to the legislature, it is the constitution and not Parliament which is supreme. The key point is that no doctrine of parliamentary supremacy survives in this jurisdiction, so that that the mere assertion that the government is entitled to regulate imports does not mean that this power is unaccountable or unreviewable. Thus, even though the State through its legislative and executive arms can implement a scheme to govern LPG importation and sale, that scheme cannot run afoul of the constitution.

[96] As for the second impediment raised by the trial judge, I agree with the claimants' submission that bad faith is not relevant to the assessment of constitutionality of legislation. In the discussion above on this preliminary point, it was noted that at the first stage of determining whether a right has been violated, the court must examine the effect of the law or state action. Purpose – as distinct from intent or good faith – is only relevant at the second stage when examining whether

an offending measure was aimed at promoting a constitutionally stated exception. However, at neither stage is good faith an excuse or justification.

[97] Out of deference to the position taken below, it would be useful to provide some examples to illustrate this position. Where legislatures make provision for mandatory sentences, they are invariably motivated by notions – perhaps now outdated – of the need to prioritise preventative and deterrent goals of sentencing. Such sentences, however, have been frequently invalidated for violating constitutional prohibitions against the imposition of inhuman punishments, even in the complete absence of bad faith on the part of policymakers and legislators.[48] Likewise, when legislatures create non-bailable offences, this is always in a good faith effort to discourage crime. But the lack of bad faith has never stopped courts from invalidating such measures as contrary to the right to liberty – it being a matter of judicial discretion and not legislative fiat to determine whether an accused person should be denied pre-trial liberty.[49] Or, where minimum height requirements have been imposed for law enforcement bodies, these were motivated by a misguided view as to the relationship between height, agility/physical prowess and effective policing, and not because legislatures have some animus towards short people. Again, however, the lack of bad faith has not stopped the invalidation of such legislative requirements as discriminatory.[50] I can continue in this vein but suffice it to say that there is copious authority establishing that what counts is the impact or effect of legislation, not bad faith, when determining whether there is a breach. Neither of the reasons raised by the learned trial judge is therefore relevant to determining whether a breach occurred as alleged.

[98] For its part, the GOB raised a slew of reasons in denying that any breach of this right occurred. First, they questioned – surprisingly, I might add – whether the right to work may be invoked by a corporate entity.[51] This resurrected an objection raised at trial, where it was asserted that the right to work by natural persons is a more robust one than that which the appellant companies might assert. However, not only is there no authority for that position, but the reverse is actually well-settled in Caribbean human rights law. Since 1975 in ***AG v Antigua Times***, the Privy Council clarified that the language of the enforcement provision, which stipulates that "any person"[52] may seek relief, includes both natural and artificial persons. In the course of an extensive discussion

[48] *Reyes v the Queen* (2002) 60 WIR 42 (PC Bel); *August v R* (2016) 89 WIR 201 (CCJ Bel).
[49] *Nation v DPP and AG* 2010 HCV 5201 (Cons Ct, Jam) decision dated 15 July 2011.
[50] *Renaldo Marajh v AG* CV2021-00647, decision dated 8 February 2024 (HC TT).
[51] Written submissions of GOB dated 19 June 2023, Appeal #13/2022, at para [30].
[52] See Belize Constitution, s. 20.

justifying the standing of artificial persons under the equivalent enforcement provision of the Constitution of Antigua and Barbuda, Lord Fraser observed: "Having regard to the important place in the economic life of society occupied by corporate bodies, it would seem natural for such a modern Constitution, dealing with inter alia rights to property, to use the word "person" to include corporations."[53] Subsequent judicial interpretation has elaborated that once an entity is capable of enjoying a right, then it is a person for the purposes of the redress clause,[54] as in fact Lord Fraser had indicated over four decades ago. In the years of human rights litigation since *Antigua Times*, claims have been entertained from newspaper and other media outfits, religious organisations, telephone and television conglomerates, multinational companies, and so on. The entitlement of corporate entities – or indeed artificial persons as a whole – to invoke the enforcement provision of the bill of rights is simply not open to question.

[99] The GOB next denied that any breach of the right to work occurred in this case because, they allege, the LPG companies continue to have an opportunity to import, distribute and sell LPG in both the wholesale and retail markets. Relatedly, they contend that what has happened is that the claimants' profits have been affected, but that there is no right to profit subsumed within the right to work. This submission is only partially true from a factual standpoint. The LPG companies were prohibited from importing LPG by the original Act (and only one company could bid to supply the NGC, effectively shutting out the others), while the 2021 amendment maintains NGC's monopoly by the imposition of unreasonable and unattainable conditions. While the LPG companies are still free to distribute and sell in the local wholesale and retail markets, they can no longer import, which is their freely chosen business. This exclusion from the import market is what constitutes a breach of s. 15 given that, as pointed out above, the right encompasses the opportunity to work in one's "freely chosen" trade or business. It is therefore no defence for the GOB to say that companies are still free to sell locally, as they are still prohibited by statute from engaging in their chosen business of importing LPG. Nor are any of the claimants constructing their challenge around profits. While lost revenues have been given as an indication of the losses sustained, the substantive breach alleged by the companies is the denial of any opportunity to carry on their chosen business of LPG importation.

[53] *AG v Antigua Times* (note 18 above) per Lord Fraser at 566-570.
[54] *Sanatan Dharma Maha Sabha v AG* (2009) 76 WIR 378, per Jamadar J at 418.

[100] The GOB also returned to its argument that the LPG companies never engaged in any importation business per se, but that they imported for themselves and then resold LPG to wholesale and retail customers. This contention has been dealt with exhaustively above, and I need only reiterate that it rests upon a strained and artificial distinction in the claimants' operational practices. Their businesses cannot sensibly be divided in this way, for it is clear that they each engaged in importation for re-sale, an activity that none can continue to pursue as a result of the legislative changes.

[101] Accordingly, none of the arguments in denying a breach as raised by the GOB, or by the trial judge, is sustainable. On this first limb, there is no doubt that the LPG companies have suffered a breach of their right under s. 15(1), as the legislative scheme prevents them from importing LPG. This is precisely what the cases describe as constituting a breach, being a legislative fetter which prevents them from engaging in their freely chosen business.

[102] Having identified a legislative fetter on the exercise of their right, it must then be ascertained whether that fetter is justifiable. As a prelude to examining this issue, it might be useful to recall the approach to determining the constitutionality of limitations, as outlined above. Briefly, once a prima facie breach of a right is established, the burden shifts to the respondent to justify the measure in question. This can be done by showing, in relation to the right in question, that the limiting law or action is "reasonably required" to promote a constitutionally stated goal. In constitutions like that of Belize's which contain detailed limits, the governing test is that as set out in *De Freitas*, as affirmed by the CCJ. As interpreted in *Titan*, the *de Frietas* proportionality test requires consideration of three factors: (i) whether the law or action promotes a legitimate goal, (ii) whether its measures are rationally connected and (iii) are the least intrusive means of accomplishing that goal.

[103] Before applying the *de Freitas* test, it would be convenient to address two preliminary arguments. First, the GOB submitted that the LPG companies are "clearly not citizens of Belize" and thus subject to reasonable restrictions.[55] The full submission (as set out in para. 34 of the written submissions) is somewhat impenetrable, not to mention that it is not clear whether "citizenship rights" can be held by artificial persons. Nonetheless, there is no need to delve into this because the evidence elicited, including under cross-examination, confirms that these companies are

[55] Written submissions of GOB dated 19 July 2023, Appeal #13/2022, para. [34].

registered in Belize and that they employ Belizean citizens at every level.[56] Whatever might be the meaning of non-citizenship, then, it is not established on the evidence that these companies can be described as such.

[104] Second, the GOB reiterated its argument that the 'user fees' are a "rate or due… for the purposes of s. 15(2)." As already discussed more fully above, however, this submission is misplaced, for nowhere in this case have the claimants put in issue user fees. Indeed, the LPG companies conceded that the NGC is free to calculate the cost at which they sell LPG in Belize; their objection is to the conditions which ensure their exclusion from the import market and deny them the opportunity of pursuing their freely chosen business activity. It is *those* conditions which must be justified.

[105] The crux of the GOB's defence of the legislative scheme came from Lennox Nicholson, the Controller of Supplies who took over from his predecessor, Jose Trejo, in October 2021. According to Nicholson, the measures in question – first the exclusive right to import conferred upon the NGC and its replacement 18 months later by the pre-conditions of building a 1.5 million US gallon terminal or passing all imported LPG through the NGC's terminal to be eligible to enter the import market – were introduced for the following reasons: (i) to protect the health and safety of the population, (ii) to promote quality control, (iii) to ensure price transparency, (iv) to reduce the risk of smuggling via the bowsers used to transport LPG across the border, and (v) to secure and stabilise the LPG market by ensuring sufficient inventory. Each of these reasons is undoubtedly in the public interest and would satisfy the police power exception insofar as they can be said to promote either public health, public safety and/or public order. But it is necessary to ask whether those are in fact the goals sought to be achieved, and if so, whether the measures in question can properly achieve them or do so in a reasonable manner without excessively impacting upon the claimants' right to work.

[106] As to the first question, Mr. Nicholson was subjected to rigorous cross-examination, the result of which was to undermine much of what he said on this subject. It was revealed, for example, that the information he provided about the claimants was taken from websites on the internet, which could not be verified as the sources were not shared with the court; he also conceded that the

[56] See, for example, the first affidavit of **Amira Gutierrez** dated 5 October 2020 and cross-examination at page 2948, Record of Appeal, Part 4, and cross-examination of **Ernesto Uh** at page 2992, Record of Appeal, Part 4.

reasons he advanced for the policy were his personal opinion and not based on any official or first-hand source such as a government minister or Parliamentarian. Nor did Mr. Nicholson have any evidence to verify the necessity for governmental intervention on the grounds identified – he could point to no incident or injury connected to the transport of LPG by truck or to any incident of smuggling, nor did he identify any investigation into or charges against any of the claimants or their employees for violating the required standards for LPG mixtures. Ultimately, his reasons appeared to be baseless, speculative claims as distinct from evidence-based explanations.

[107] Moreover, Mr. Nicholson conceded that the power to fix the sale price of LPG rested with him, as Controller of Supplies, calling into question yet another reason for these elaborate measures. As to the goal of securing sufficient inventory, Mr. Nicholson was unable to explain the rationale for massive storage tanks, since the existing supply comfortably met the demand. In truth, such was the devastation wrought by the cross-examination that there was no credible, verifiable reason left to be discerned from Mr. Nicholson's testimony, which would explain the need for the LPG scheme implemented in 2020 and revised in 2021.

[108] Nonetheless, these reasons were also given by another witness, namely Joseph Waight, and the long title of the original Act hints at some of these goals by describing itself as "An Act…for the proper rationalization of cost, supply and pricing and enhanced efficiency of the liquefied petroleum gas sector, to optimize quality control and in the overall interest of the public…". Further, since the trial judge accepted and acted upon this evidence, I will examine whether the proffered reasons satisfy the remaining elements of the proportionality test. In doing so, I bear in mind the submission of the GOB that it is unnecessary for the legislation to advance all of the stated objectives. Obviously, one goal in the public interest would be enough. Equally true, however, is that to be justifiable not only must that goal correspond to one of the legislative aims, but the measures enacted must be rationally connected to that goal and must not be excessive.

[109] The size of an importer's storage terminal has no bearing on four of the five goals identified, namely, health and safety, quality control/conformity assessments, price transparency or smuggling – and Mr. Nicholson, the government's witness, explicitly agreed with this. Indeed, it requires no expertise to appreciate that any of those four goals can be achieved just as easily with a terminal of any size. This leaves the remaining goal of increased storage capacity, but even here requiring a massive terminal would not necessarily help, as the LPG companies pointed out so comprehensively in their submissions. In the first place, requiring each importer

to construct a 1.5 million US gallon tank would result in tremendous over capacity, given that the government's initial position was that 1.5 million gallons represented the overall needs of the country, confirmed by NGC records and the fact that there have been no supply problems for the country with the existing storage terminals. No credible evidence was produced to justify the need for an increase, as the document relied on from the International Energy Agency relates to oil, not LPG. If there was indeed the need for greater capacity, the law could not provide as an alternative that prospective importers pass their LPG through the NGC's existing terminal – as that would not increase overall supply; and, in any event, as the claimants noted, merely requiring a terminal of any size without mandating the quantity of LPG to be stored would not ensure that companies would actually keep excess reserves in stock. Nothing about this requirement, therefore, suggests that it was conceptualised or designed to ensure that it would indeed increase storage capacity in the country.

[110] In fact, as the LPG companies pointed out, requiring the construction of a 1.5 million US gallon tank before being allowed to import (without any accompanying assurances, tax breaks or other financial assistance from the State as the NGC enjoyed) is so risky that it would prohibit any other prospective importer from entering the market. On the other hand, allowing terminals of any size – which could still be subject to inspection to ensure quality control, safety, etc. – would actually facilitate the participation of others in the market and ensure greater supplies. In other words, the effect of this unattainable requirement is counter-productive, by deterring other companies from entering the market. Upon close scrutiny, then, it becomes apparent that the condition of building a 1.5 million US gallon tank is completely unrelated to 4 of the 5 purported reasons advanced and is unlikely to achieve the fifth one of increasing storage capacity. This requirement possibly fails the second step of the *de Freitas* proportionality analysis, as its connection to the goal of increased storage capacity is tenuous at best.

[111] The alternative condition of passing imported LPG through the NGC's terminal contradicts the goal of increasing storage capacity (since space used by the LPG companies would be space the NGC cannot use, leaving overall capacity and supply the same), though, as conceded by the claimants, this requirement is connected to at least two of the reasons – as it would enable State agents to monitor imports to ensure compliance with prevailing standards and detect smuggling.

[112] Since there might be some connection, however tenuous, between the pre-conditions and some of the reasons proffered, it is necessary to examine whether either one meets the remaining limb

of the proportionality test – that is, their respective impact on the claimants' right. There is little doubt that the requirement of constructing a 1.5 million US gallon tank involves astronomical expenditure and is thus both excessive and serves to obliterate the right of the LPG companies to work in their freely chosen business – as it guarantees their continued exclusion therefrom. Moreover, if the goals are indeed those as identified by Mr. Nicholson, any one of them could be achieved by terminals of much smaller size. This specific requirement is thus not the least intrusive means of achieving the goal but is in fact excessive.

[113] The alternative requirement of passing all imported LPG through the NGC's terminal also does not pass muster under the remaining limb of the proportionality test. It would subject other importers to a competitor and therefore creates a climate of uncertainty and vulnerability for them. Further, it would seem to be unnecessary as the state should be able to monitor other terminals as they would that of the NGC. For these reasons, this requirement cannot be described as the least intrusive for it is possible for the State to achieve its objectives without trespassing on the rights of importers to such a degree. Accordingly, it too cannot be justified.

[114] To summarise, therefore, the conditions imposed by the amended Act on importing LPG are clear fetters on the right of companies who wish to enter or re-enter their chosen business of LPG importation. These conditions are largely not required to achieve any of the reasons for which they were purportedly enacted, and even where connected, are excessively burdensome on the right in question. In other words, the stated goals can be achieved by much less onerous measures. Since these conditions do not meet the standard in s. 15(3) of making "reasonable provision" for any of the goals listed therein, they constitute an unjustifiable limit on the right to work. For these reasons, I disagree with the learned judge's finding on this issue and hold that the conditions on importing LPG imposed by the amendment to the *NLPGP Act* are unjustifiable violations of s. 15 and are accordingly unconstitutional.

(e) Freedom of Association

[115] The LPG companies failed to establish a breach of their right to freedom of association. In rejecting this claim, the trial judge noted that the amendment to the *NLPGP Act* provided options to prospective importers: if they could not afford the expensive price tag of constructing their own facility, then they could store their imported LPG in NGC's terminal. Referencing once again the aims of the legislation, those of protecting public health and safety and elevating importation of

LPG in Belize to international standards, the learned judge concluded that there is "nothing nefarious" in the amendments that would amount to a violation of the freedom of association.

[116] In their appeal against this finding, the LPG companies started from the position that freedom of association includes the fundamental freedom *not to associate* with others.[57] This was reinforced by the decision in *AG v Smith*,[58] which interpreted the right as entitling persons to choose their relationships, whether these were social, professional, or otherwise. In *Smith*, legislation deeming teachers to be appointed as if they were public officers was struck down for violating the freedom of association. It is worth reproducing a portion of the judgment of Williams J, which the claimants quoted in support:

> "…in a society of free men and women freedom of association must guarantee the individual as well the right to choose with whom he wishes to have social, business and other relationships. A man or woman must be free to choose his or her spouse, his or her friends, his or her business partner, his or her employer or employee. And, conversely, he or she must be entitled to reject social, business and other relationships which they do not wish and to object to such relationships being forced on them against their will."[59]

[117] Building on these authorities, the claimants argued that they are forced to associate with the NGC in order to make a living. They strongly disputed the trial judge's finding that the amendment provided options, arguing that since one was unattainable, the alternative was that of forced association, which constituted a violation of their freedom of association. As they put it colourfully, if the choice is between forced association and jumping off a cliff, the right is infringed.

[118] In response, the GOB defended the trial judge's decision on the basis that this is a right which inures to individuals rather than to corporations, which by their very nature cannot join trade unions. Even if they could claim such a right, the GOB argued that the LPG companies are not forced to associate with the NGC as they are free to build their own facility. In justifying the latter position, the GOB reiterated their argument that the costliness of building a 1.5 million US gallon terminal is irrelevant as there is no right to profit under the constitution.

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[57] *Trinidad Island-Wide Cane Farmers Association Inc and AG v Seereeram* (1975) 27 WIR 329 (CA TT) and *HTA Bowman v AG* (Claim No. 730 of 2009, decision of Hafiz-Bertram J dated 13/5/2010).
[58] *AG v Smith* (1984) 38 WIR 33 (HC Bar).
[59] Ibid at page 46.

[119] The parties' respective positions traverse familiar ground, including those of the standing of corporations and the justification of the pre-conditions imposed by the legislative amendments. There is no need to repeat the discussion relating to the former, covered earlier in this judgment – except to say, perhaps, that the right of juristic persons (such as trade unions, non-profits, charitable organisations, and other types of civil society organisations) to claim protection under this particular freedom is recognisably indispensable. As repressive governments across the world de-register various civic and political organisations to crush dissent, the latter's right to exist is recognised as a crucial component of the freedom of association and has been protected as such under international human rights law.[60] In other words, it is not simply trite law that associations themselves are entitled to claim the protection offered by this right, but there is also a relevant and pressing need for them to be allowed to do so to advance their own interests. That said, before examining the various positions taken by the parties in relation to this right, a preliminary issue as to its scope must be resolved. That is to say, does freedom of association cover a personal or private business relationship such as the one claimed by the LPG companies in this dispute?

[120] As always, a useful starting point is the actual text. Section 13(1) of the Belize Constitution provides that "Except with his own consent, a person shall not be hindered in the enjoyment of his freedom of assembly and association, that is to say, his right to assemble freely and associate with other persons and in particular to form or belong to trade unions or other associations for the protection of his interests or to form or belong to political parties or other political associations." Still the most authoritative elaboration of its meaning is that given by Wooding CJ, who said as follows:

> "…freedom of association means no more than freedom to enter into consensual arrangements to promote the common-interest objects of the associating group. The objects may be any of many. They may be religious or social, political or philosophical, economic or professional, educational or cultural, sporting or charitable. But the freedom to associate confers neither right nor licence for a course of conduct or for the commission of acts which in the view of Parliament are inimical to the peace, order and good government of the country."[61]

[121] As is evident from this definition, which is buttressed by substantial commentary, there are several key characteristics of this right. First, it is premised on a notion of collectivity, as Wooding

[60] *Belyatsky v Belarus* U.N. Doc. CCPR/C/90/D/1296/2004, communication dated 24 July 2007, at para. 7.2.
[61] *Collymore v AG* (1967) 12 WIR 5 per Wooding CJ at 15 (CA TT).

CJ acknowledges by his reference to "associating group". Of course, individuals may invoke the right insofar as some dispute arises between them and the collective – as did Prakash Seereeram or the company, HTA Bowman Ltd. However, the relationship or subject-matter must involve a group or collective. Relatedly, to come within the protection of article 11 of the European Convention on Human Rights – one of the precursors of Commonwealth Caribbean bills of rights, including Belize's – which guarantees freedom of assembly and association, an association must be established formally under an organisational or institutional structure to which a person can belong or with which she or he can affiliate.[62] This means that purely social gatherings – or, in this case, one-on-one relationships of a private business nature – do not come within the scope of this right.

[122] Another signature aspect of this right, also noted by Wooding CJ, is that the *raison d'etre* of the association or group in question is that of promoting some common interest or objective. International (or domestic) human rights law does not restrict those objectives, for as Wooding pointed out they could span a variety of types, including economic, but that objective must have at its heart some 'public' element. In other words, the group comes together to achieve a common goal – whether that concerns workers' rights (trade unions), humanitarian assistance (charities), entertainment (social and cultural entities), governance (political parties and NGOs) and so on. In their commentary on the International Covenant on Civil and Political Rights (ICCPR), Joseph et al make this very point of the public nature of the purposes of protected associations, noting that groups with solely private interests could seek protection under other articles of the ICCPR.[63]

[123] It follows from this that Williams J in *AG v Smith* erred in his interpretation of this right as including the freedom of individuals to choose with whom they wish to have social and business relationships, such as spouses, business partners and employees. That was not only an unsupportable extension of the right, but a distortion – if not trivialisation – of its purpose. Freedom of association evolved to confer protection upon collectives to pursue their common (or 'public') goals, including goals of an economic nature such as higher wages. However, it does not cover *personal* relationships such as those existing within marriage, as confirmed in a recent Caribbean case,[64] or, I would add, those existing in business and commerce. This does not mean

[62] Halsbury's Laws of England, 4th ed., Volume 88A, para. [466] and Harris, O'Boyle et al, *Law of the European Convention on Human Rights* (2009), 525.
[63] Joseph, Schultz and Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (2nd ed, Oxford: OUP, 2004), para. 19.11.
[64] *Centre for Justice v AG & Minister of Legal Affairs* (2016) 88 WIR 227 (SC Ber) per Kawaley CJ at para [63].

that such relationships are devoid of protection, as bills of rights contain other rights that may be relevant such as, for example, protection of the family or protection of the opportunity to work. However, it is clear that freedom of association does not confer protection on the private relationships between individuals.

[124] On this view of the scope of the right to freedom of association, it does not apply in the circumstances of this case. Even if the amended conditions force the LPG companies to "associate" with the NGC so as to obtain a licence to import, that constitutes a commercial relationship of a wholly private nature. There is no "association" or formal group/collective in issue, or far less, no common objective that this relationship concerns. I therefore find that section 13 is not implicated on these facts and has been incorrectly invoked. Given this, there is no need to consider the remaining arguments on this ground as to the justification of the government's measures. Accordingly, I uphold the conclusion of the learned trial judge in rejecting a breach of s. 13, albeit for different reasons.

(f) Equality before the law

[125] The final right invoked by the claimants was that of equality before the law, enshrined in s. 6(1) of the Belize Constitution, which was also rejected by the trial judge. In so finding, the learned judge acknowledged that the playing field had not been levelled for all operators in the industry, but reasoned that with the removal of the monopoly, anyone could now participate in the business of importing LPG once they fulfilled the statutory conditions. She added that it is well within the executive power to grant the benefits it did to the NGC, while noting that equality does not guarantee sameness to all but entails instead that persons must not be discriminated against.

[126] In their appeal against this finding, the claimants argued that they are not in the same position as the NGC but were in a situation of significant commercial disadvantage. The inequalities, they alleged, continued even after the legislative amendments. They elaborated that for over a year the NGC had enjoyed a monopoly in importation and was thereby able to poach all their customers, and further, that the NGC was granted extensive tax concessions which enabled them to build the 1.5-million-gallon storage facility. Relying on ***Webster v AG*** *[2015] UKPC 10* (PC TT), the claimants submitted that equal treatment of persons who are not similarly circumstanced is just as violative of the right to equality before the law as a law which unjustifiably treats unequally, persons who are similarly circumstanced. Thus, standardising the conditions

for re-entry into the LPG import market constituted a violation of their right to equality because the claimants and the NGC were not equal in the first place, given all the initial advantages enjoyed by the latter.

[127] The GOB defended the trial judge's ruling on this point, starting from the premise that the exercise of proving discrimination is not a 'simple' one of assessing whether the parties are the same, but rather that of establishing some *unjustified* difference in treatment. Like the claimants, the GOB also invoked *Webster* in support, citing Baroness Hale who held that in assessing whether difference in treatment is justified, both the aims of the treatment and the means chosen must be examined for their legitimacy and proportionality. Applying this test to the facts, the GOB came to the opposite conclusion of that reached by the claimants, namely that no difference in treatment was identified by the LPG companies under the current legislation. Further, they argued, any difference in treatment that might have existed under the original NLPGP Act was justified as necessary to achieve the various public purpose objectives earlier identified.

[128] Although both parties relied on *Webster v AG*, I am not persuaded that this case is an applicable (or appropriate) authority, and for the same reason mentioned at the outset of being mindful of the text. Trinidad and Tobago's Constitution contains two equality guarantees – equality before the law/protection of the law and equal treatment from any public authority – each one formulated in the terse style characteristic of its bill of rights. In contrast, Belize's bill of rights contains both a generalised equality provision (section 6(1), invoked in this case) and a narrower non-discrimination clause (section 16), which lists six forbidden grounds of discrimination. At the time of the constitution's enactment this was unique, insofar as it contained both the open-ended guarantee of equality on the Trinidadian model as well as a prohibition against discrimination on certain specified grounds common to the remaining Caribbean constitutions. Because of its unique hybrid nature, I am reluctant to apply *Webster* without qualification. At the least, there should be some attention to the implications, if any, of having multiple equality guarantees within the same document.

[129] The main case in this court to have considered s. 6(1)'s guarantee that "all persons are equal before the law" remains, to date, *Fort Street Tourism Village v AG (2008) 74 WIR 133* which, as discussed above, concerned the implications of a barrier erected on the boardwalk used by passengers exiting off cruise ships into Belize City. The claimants complained that the barrier made it more difficult for tourists to access their business premises, which they alleged

constituted discriminatory treatment contrary to s. 6(1). The most comprehensive treatment of the equality arguments was given at first instance by Conteh CJ. He held that section 6(1) was merely a procedural guarantee,[65] that is, a "guarantee of due process to everyone".[66] According to his interpretation, the section requires that any unfairness of treatment alleged had to be measured by reference to section 16, that is, the detailed anti-discrimination section.[67] Thus, unless the reason for the different treatment corresponded to one of the specific grounds listed in section 16, there could be no violation of section 6(1). In that case, because the treatment complained of did not come within any of the listed categories, the Chief Justice found no breach of either section. On appeal, this interpretation was unanimously upheld. The Court of Appeal focused on the absence of an element of state action, holding that, for this reason, the constitutional right was not applicable in the first place. But each judge went on to find that, in any event, there was no discrimination that would fall within the terms of section 16(1). Morrison JA pointedly added that the Chief Justice was "plainly right" in his interpretation of section 6(1).[68]

[130] In my respectful view, the most glaring problem with the *Fort Street* approach to section 6(1) is that it turns the provision into mere surplusage. If a claim alleging a breach of either equality before the law or the equal protection of the law can only succeed where the ground of differentiation is one of those listed in section 16(3), there is nothing to gain by invoking 6(1) and a litigant need only rely on section 16. However, since it is presumed that Parliament does not legislate in vain, section 6(1) must have some meaning independent of and distinct from s. 16. *Fort Street* therefore represents an approach to s. 6(1) that I am unwilling to follow.

[131] The alternative of *Webster*, which both parties invoked in their arguments, is equally unsatisfactory as it commits the same error as *Fort Street* – though in the opposite direction. If, pursuant to *Webster*, any and all legislative classifications are treated as impermissible and require justification on the basis proposed by Baroness Hale (namely, that they pursue a legitimate aim and adopt proportionate means), that would now render s. 16 otiose. Litigants could then easily sidestep the added layer of having to prove the difference in treatment is motivated by one of the forbidden grounds required by s. 16(3) and simply invoke the open-ended guarantee of equality in s. 6(1). To use Lord Hoffman's graphic description in an appeal

[65] *Fort Street Tourism Village v AG* (note 43 above) at para [44].
[66] Ibid at [49].
[67] Ibid at [52].
[68] Ibid, per Morrison JA at [148].

from Mauritius, on this approach the general right would "swallow up" the enumerated grounds and much else.[69] Thus, although these two cases adopt diametrically opposite approaches – one narrow and the other wide – each has the same flaw of rendering the other right irrelevant.

[132] Given this conundrum, there must be a way of interpreting both rights – s. 6(1)'s open-ended guarantee of 'equality' and s. 16's narrower protection against discrimination on six specific grounds – that does not render the other meaningless. There is little guidance to be had from either Guyana or Jamaica, the other two Caribbean jurisdictions where constitutional reforms have resulted in the inclusion of multiple equality guarantees in their chapters protecting fundamental rights, as litigation of those provisions has not yielded, to date, detailed examination of this issue. In ***McEwan and others v AG*** *[2019] 1 LRC 608* for example, the appellants invoked both the detailed non-discrimination right in Art 149(1) and the wider equality guarantee in Art. 149D of the Guyana constitution in their challenge of a statutory prohibition on cross-dressing in public for an improper purpose. While the CCJ found a breach of both rights, there was no discussion of their respective scope, apart from the terse statement that the two provisions are distinct though complementary.[70] With this absence of local jurisprudence on this issue, there is justification for turning further afield. In this regard, the South African constitution – which, incidentally, provided the model for Guyana's reformed bill of rights – provides useful guidance as it also contains multiple equality guarantees. Moreover, the South African Constitutional Court has articulated a comprehensive approach to these rights that demonstrates how their complementarity operates in practice.

[133] Section 9(1) of the South African constitution provides, in terms largely similar to Belize's s. 6(1), that "Everyone is equal before the law and has the right to equal protection and benefit of the law." Subsection (3) then goes on to stipulate: "The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth." Thus, in their constitution, provision is made for two equality rights: one an expansive right to equality and the other a more detailed one forbidding discrimination on specific grounds. In interpreting these dual guarantees – one

[69] A statement made in *Matadeen v Pointu* [1999] 1 AC 98 (PC Mauritius).
[70] *McEwan and others v AG* [2019] 1 LRC 608 (CCJ Guy) per Saunders PCCJ at [63].

apparently wide and unrestrained and the other meshed in by specific grounds – the Constitutional Court has established three stages of inquiry to be followed.[71]

[134] At the first stage, the court scrutinises statutory classifications, and a law can fail at this stage if any differentiation lacks a rational connection to a legitimate government purpose. If any differentiation is found to bear a rational connection to a legitimate aim, then the second stage of analysis arises.

[135] At the second stage, the court must ascertain whether the identified differentiation is unfair. This involves two inquiries: first, determining the motivation, and second, the impact, of the different treatment. If the motivation or reason for the differentiation is based on a ground specified in section 9(3), then unfairness is presumed and discrimination is established. This presumption can be rebutted. Alternatively, if the motivation is not based on a specified ground, it may still be unfair (though not presumptively so) if the reason for the differentiation is based on "attributes or characteristics" that have the potential to impair human dignity or affect persons adversely. At this second stage, if the consideration of certain factors leads to a conclusion that the differentiation is not unfair, then there is no violation of 9(3), but if the differentiation is found to be unfair, then the final stage of enquiry arises.

[136] At the third stage, which arises if unfair discrimination is established and only in relation to laws of general application, the court has to examine whether the proved discrimination can be justified. In undertaking this analysis, the court adopts a proportionality test, much like that propounded in *Webster*, of balancing the object of the provision against the extent of its infringement of equality. It is worth stressing that under this approach, the requirement to justify only arises in relation to laws that unfairly discriminate, which is determined not merely on the basis that the law in question differentiates.

[137] There are several interesting aspects to the South African approach. First, the grounds in s. 9(3) are not treated as closed – which then leaves a role for s. 9(1); at the same time, 9(1) is not treated as a free-for-all whereby any and all legislative distinctions are treated as impermissible. The difference articulated between the two provisions is that the detailed non-discrimination right sets out protected statuses which are presumptively inviolable and any distinction on this ground

[71] Notably in *Harksen v Lane NO* 1988 (1) SA 300 (CC) and *Hoffman v South African Airways* 2001 (1) SA 1 (CC).

is immediately suspect, whereas different treatment for any other reason is not automatically lawful or unlawful but must be connected to some aspect of human dignity in order to be treated as unfair. Thus, while the protected characteristics in s. 9(3) do not form a closed list, where a litigant alleges inequality s/he must still attribute it to some other ground in order to establish a breach.

[138] Put another way, a key aspect of the South African approach is that the wider equality right is *not* fenced in by the grounds listed in the subsequent non-discrimination clause (a la *Fort Street*). However, at the same time, the wider equality right does not mean that every legislative classification is necessarily forbidden (a la *Webster*) – only those that would distinguish between persons for some reason connected to personal attributes bearing upon human dignity or that would otherwise affect persons adversely are considered to be unfair. Under this approach, there must still be some factor motivating the difference in treatment which is improper in some way. Section 9(1) is therefore not a free-for-all, to repeat an inelegant expression, that treats every legislative classification as suspect.

[139] At this juncture, I should hasten to clarify that I am not suggesting that to constitute discrimination, law or action must evince an *intention* to discriminate. The irrelevance of intention to non-discrimination analysis has long been settled, in Trinidad and Tobago most decisively by the Privy Council in ***Bhagwandeen v AG*** *(2006) 64 WIR 402*. Rather, I am invoking the issue of motivation, which is distinct from intention or good/bad faith, and which captures the *reason* for the differential treatment. Essentially, what the concept of improper motivation is meant to prevent is that laws or action must not treat people differently on account of some protected characteristic or attribute (such as race, religion, gender, etc., usually a personal, immutable one) – and where such improper motivation exists, the intention of the actor is irrelevant. To return, then, to the South African approach, *motivation is relevant to both provisions* – with specific characteristics protected in s. 9(3) and a more open-ended formulation in s. 9(1), but which would still require the existence of some impermissible factor as the reason for the different treatment to ground a violation.

[140] Looked at this way, *Webster* is in my respectful view problematic even for Trinidad and Tobago, because it treats all legislative classifications as suspect, requiring the state to justify them, where challenged, under the proportionality approach. That imposes an enormous burden on the state, given that legislation routinely makes distinctions between classes of people for legitimate

reasons. Early on in its jurisprudence, the South African Constitutional Court demonstrated an awareness of this reality, and in one case they cautioned that:

> "If each and every differentiation made in terms of the law amounted to unequal treatment that had to be justified by means of resort to [a proportionality analysis], or else constituted discrimination which had to be shown not to be unfair, the Courts could be called upon to review the justifiability or fairness of just about the whole legislative programme and almost all executive conduct… The Courts would be compelled to review the reasonableness or the fairness of every classification of rights, duties, privileges, immunities, benefits or disadvantages flowing from any law. Accordingly, it is necessary to identify the criteria that separate legitimate differentiation from differentiation that has crossed the border of constitutional impermissibility and is unequal or discriminatory 'in the constitutional sense'."[72]

[141] For these reasons, I would decline to follow *Fort Street*, as its approach to s. 6(1) renders the provision useless. At the same time, I would also decline to follow *Webster*, as that sits at the other extreme, requiring every legislative classification to be justified, thereby swallowing up the grounds listed in s. 16(3). I am persuaded by the South African approach and in the absence of any binding authority to the contrary, I would interpret s. 6(1) as not restricted to the grounds listed in s. 16(3), though at the same time, as not completely open-ended. To establish a breach of this provision, a claimant must show that any difference in treatment is unfair by reason of some improper motivation.

[142] Applied to the facts of this case, there was clearly a statutory differentiation, despite the protestations of the GOB. Under the original Act, only the NGC could import LPG and it was granted a raft of favourable fiscal benefits. Such preferential treatment remained even after the Act was amended in 2021, because the conditions required to meet eligibility to import were prohibitive and/or unrealistic, thus effectively keeping companies other than the NGC from re-entering the import market. This differentiation was purportedly to advance several goals in the public interest, in particular those of increasing the storage capacity of LPG in Belize and thus stabilising supply, ensuring quality control and to limit the risk of smuggling. This, however, is as far as the claim can go – because in order to establish inequality under s. 6(1) pursuant to the test I propose, the claimants would have to show that this difference in treatment was unfair because it was motivated by some improper reason – and it is here that they have fallen short. While they have established different treatment that affected them adversely, in the absence of

[72] *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC), para 17.

some improper motivation (whether for a reason corresponding to or beyond those mentioned in s. 16), there can be no finding of discrimination or unequal treatment.

[143] Decades ago, before the detailed advances of the South African Constitutional Court, Professor Demerieux insightfully made these very points in relation to Trinidad and Tobago's broad equality provisions. Her critique of the then-emerging jurisprudence was that the rights were interpreted as guaranteeing identical treatment to all – if one person obtained a permit then another should too – without any allowance being made for the *motivation* behind the different treatment. Describing two of the cases[73] as "total conceptual disasters", she observed:

> "[*LJ Williams*] makes of section 4(d) something quite different from discriminatory treatment in the other West Indian sections and indeed discriminatory treatment as generally understood in law. This is the conferral of benefits or burdens, or the making of decisions on the basis of unlawful distinctions and criteria of differentiation, which constitute specific wrongful ***motives*** for the governmental decision or action."[74]

[144] Ultimately, constitutional law is distinct from administrative law and is concerned with more than process. Procedural missteps may amount to a breach of administrative law when one company obtains a benefit and another does not, but that is not enough to constitute a violation of equality, with all the ignominy that accompanies a constitutional violation. I am not importing here good or bad faith into the test for constitutional breaches. Rather, I am simply acknowledging the superiority of constitutional precepts. In relation to the constitution's equality provisions, there is a difference between legislative classifications done for a legitimate purpose and which are not unfair, and those where the underlying motive is specifically forbidden or otherwise suspect. Only the latter constitutes a violation of s. 6(1) or 16. It is that further element of motivation which the claimants have failed to prove, and for that reason I find that there is no breach of article 6(1) on these facts.

(g) Quantum of damages

[145] Having found a breach of the claimants' right to property under s. 17, the trial judge also accepted the evidence of the witnesses Amira Gutierrez (AG), Stivaly Andrade (SA) and Ernesto Uh (EU)

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[73] *LJ Williams v Smith and the AG* (1980) 32 WIR 395 (CA TT) and *AG v KC Confectionary Ltd* (1985) 34 WIR 387 (CA TT).

[74] Demerieux, *Fundamental Rights in Commonwealth Caribbean Constitutions* (above note 1) at p. 432 (emphasis in the original).

as contained in their affidavits regarding losses sustained. She proceeded to award damages in the amounts claimed in a table set out in paragraphs 46 and 47 of the claimants' written submissions dated March 2, 2021, to the tune of BZ$10,896,751.20. This sum was said to represent the loss of wholesale customers and the loss of sales (that is, lost revenue) flowing therefrom. However, the trial judge declined to award the further sums claimed by the LPG companies in their follow-up submissions of September 16, 2022, on the basis that these were unsubstantiated. Both parties appealed this outcome.

[146] In appeal #12/2022, the GOB contested the trial judge's award for its lack of substantiation. Mr. Marshalleck SC submitted that the sums awarded do not appear anywhere in the evidence and that no indication was given of the basis upon which they were calculated. More fundamentally, Mr. Marshalleck relied upon the principles affirmed in *Titan* that losses must be pleaded and proved and that causation must be established, arguing that neither requirement was met by the claimants. Further, Mr. Marshalleck submitted that expert evidence should have been led to prove the various categories of losses claimed. The LPG companies countered with the submission that the damages were for goodwill and not losses, and that since calculating goodwill is an imprecise art, there was no need for a perfect calculation. They added that the trial judge having made her determination on the evidence she accepted, it would be wrong for this court to interfere.

[147] In appeal #13/2022, the LPG companies argued that the trial judge erred by not awarding them the additional sums claimed and asked us to interfere with that determination. Those sums, which exceeded BZ$55 million, were said to represent the additional cost of having to purchase from the NGC and the penalties they incurred under pre-existing contracts for not buying from their foreign suppliers. The claimants submitted that, contrary to the trial judge's finding, these losses were extensively proved. The claimants also appealed the trial judge's decision not to award vindicatory damages, submitting that the breaches in this case were sufficiently egregious to justify an additional award as an expression of public outrage at the violation of their rights. The GOB defended the trial judge's decision on this issue, noting the vastness of the sum claimed and arguing that its quantification remained opaque. They submitted that not only would these heads, if granted, result in double recovery for the claimants, but that there was in fact no evidence that any of the penalties under the contracts had been paid. The GOB also defended the trial judge's decision not to award vindicatory damages, arguing that this case was

fundamentally about economic loss where there were, at least, some legitimate objectives for reforming the LPG sector.

[148] At the outset, it should be noted that the power granted to the higher courts to enforce the fundamental rights provisions of the constitution is a "very wide"[75] one to "make such declarations and orders, issue such writs and give such directions as it may consider appropriate".[76] In the recent past, the CCJ has repeatedly affirmed the breadth of this clause, noting that its object is to give "effective" relief.[77] While it has long been settled that compensation may be awarded under this clause,[78] entitlement to a monetary award is not automatic[79] and the court must be satisfied that where a constitutional right is breached, the appropriate redress should be, at least in part, monetary in nature.[80]

[149] Moreover, as stressed by Hafiz-Bertram JA (as she then was) in *Titan*, which was endorsed on appeal by the CCJ, where a claimant seeks monetary compensation for a breach, the damages sought must be specifically pleaded and proved.[81] Because the claimant in that case had failed to substantiate its losses, the court of appeal overturned the award made by the trial judge even though a constitutional breach had been established. On further appeal, the CCJ noted not only that there was no satisfactory basis to support the trial judge's assessment of Titan's alleged losses, but that causation was not proved either, insofar as showing that the damages bore a reasonable relationship to the nature and extent of the harm caused. Delivering the judgment of the court, Rajnauth-Lee JCCJ insisted that "Although this is a constitutional and not a normal tort action, given the nature of and basis for Titan's monetary claim, there must be some causal link between the contravention of the constitutional right and the millions in losses claimed."[82]

[150] In this action, the millions of losses claimed and awarded were not specifically pleaded. From the evidence of the witnesses, it is possible to identify three broad categories of losses alleged:

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[75] *Lendore and others v AG* [2017] UKPC 25; [2017] 5 LRC 369 (PC TT), per Lord Hughes at [35].
[76] Belize Constitution, s. 20
[77] *Maya Leaders Alliance v AG* [2015] CCJ 15 (AJ), 87 WIR 178 at [6]; *Marin Jnr v the Queen* [2021] CCJ 6 (AJ) BZ at [147]; *Sears v Parole Board* [2022] CCJ 13 (AJ) BZ at [33].
[78] *Maharaj v AG (No 2)* (1978) 30 WIR 310 (PC TT).
[79] *Maya Leaders Alliance* (note 77) at [61].
[80] *Titan* (note 8) at [44].
[81] Ibid, per Hafiz-Bertram JA quoted by Rajnauth-Lee JCCJ at [48].
[82] Ibid at [49].

- Losses arising from the higher prices charged by the NGC for LPG, compared against the cost of purchasing from their Central American suppliers;
- Losses caused by reduced LPG sales, arising directly from the loss of customers to the NGC as a result of the monopoly of the import market with which it was legislatively gifted; and
- Losses representing penalties incurred by the LPG companies under their existing contracts, by which they had committed to purchasing specified amounts from their suppliers but which they could no longer do given the said monopoly.

However, closer scrutiny of that evidence upon which the trial judge based her awards reveals significant shortcomings.

[151] First, as the GOB submitted correctly, the amounts claimed were obscure insofar as there was no information as to how they were calculated. For example, on behalf of BWEL, AG gave the figure of $328,051.07 as their losses for the period January-March 2021. However, it was not demonstrated what this sum represents, whether it reflects the entire picture, or whether all of it was caused by the monopoly. Similar problems arise in relation to the figures given by EU and SA. It is true that all these witnesses gave extensive evidence as to lost revenue, but these figures were presented without explanation or context so that it is very difficult to decipher them.

[152] Second, and of even greater concern to me, is that the information presented was incomplete. Taken at face value, the figures do indicate that each claimant sustained a significant decline in profitability. But it was by no means clear that the entirety of the sums claimed represented the actual losses sustained by the companies, because under cross-examination by Mr. Marshalleck, a different picture emerged. For example, while SA claimed the figure of BZ$6,804,855.07 as actual monetary loss, under cross-examination he admitted readily that the exhibits in support show calculations of gross profit and did not factor in expenses.[83] It was the same with the witness AG, who simply presented global figures of lost revenue.[84] Likewise, EU in his third affidavit dated May 3, 2021, attached statements of profit and loss for 2019 and 2021.[85] However, these statements contained only calculations of sales revenue (from the sale of LPG and other items) less the cost of the goods sold (namely, the cost of the LPG, sales

[83] Record of Appeal, Vol 4, pp. 3128-3130.
[84] Cross-examination of AG, Record of Appeal Vol 4, pp. 2980-1.
[85] See, for example, TAB 31.

expenses and bank charges). It would appear from reading this that no account was taken of other expenses such as operating costs, overheads, and taxes and duties. The difficulty of relying on these totals is that they are incomplete and do not represent the actual losses sustained by the claimants, which would have had other expenses in addition to the higher cost of purchasing from the NGC, but which are not accounted for in these calculations. Moreover, the cross-examination of EU indicated that the figure of loss (provided by Exhibit 36 of his second affidavit) had been computed by adding together the losses from not being able to import and the profits from a previous period, and although it was put to the witness that this seemed like a double counting of the losses, no satisfactory explanation was given.[86]

[153] Third, some items of loss were simply unproven. A major element represented the penalties allegedly charged by the claimants' suppliers under their pre-existing contracts, but again under cross-examination considerable doubt was cast on whether they were even liable as alleged. The claimants submitted demand letters from these suppliers, but it turned out that up to the time of trial, none had been sued for payment of these penalties much less paid any. Moreover, AG admitted under cross-examination that the contracts contained "force majeure" clauses, which would have exempted them from performance in the event of a change in the law preventing importation of LPG into Belize (which was precisely the cause of their inability to continue purchasing LPG as previously agreed).[87] In the face of this admission the witness could muster no explanation other than that she did not consider invoking the clause. Her competence aside, if there was such a force majeure clause in the contracts, how could the claimants be awarded a sum for which they were not liable?

[154] Fourth, in my view there is a conceptual difficulty with the nature of the losses claimed. Several of these witnesses presented tables of wholesale customers they lost to the NGC, but this is only a starting point and it needed to be demonstrated – which it was not – how that translated into actual losses. The witnesses provided figures of lost sales, but that alone cannot represent actual losses since operating costs and expenses were not factored into the calculations. Even if it were, this evidence was only a snapshot of a particular period in the past, and what remained unclear was whether this was representative of a standard or even whether a historical accounting is an accurate predictor of future losses. Put another way, why would three months

[86] Record of Appeal Vol 4, pp. 3014-16.
[87] Ibid at pp. 2961-2962.

in 2021, for example, be conclusive both as to the companies' profitability in the past and a determinant of the future? Do companies experience variations over time, and if so, what were those? Given that these events commenced at the start of a global pandemic, which continued for at least a year thereafter, how did national restrictions on all activities affect the companies' balance sheets over this period? And why would any period in the past, particularly one as limited as this and occurring during a global pandemic, represent an accurate estimate of future losses?

[155] Fifth, and a more general weakness of the evidence related to the previous concern, is that there was too much vagueness in the testimony justifying the losses claimed. For example, in AG's affidavit dated February 17, 2021, she averred that their profit levels had taken a "hit". While she did go on to provide various accounts of losses, these were deficient in the ways itemized above. In any event, it would appear that the claimants recognised this weakness, for they submitted that calculating goodwill is not a precise art and that the losses presented were an approximation of the value of their goodwill, there being no need for a perfect calculation. With respect to Mr. Mendes SC, I am uncomfortable with such a casual, even haphazard, approach.

[156] Ultimately, I agree with the GOB that expert evidence was needed as to the nature of the losses sustained. Goodwill may be an imprecise concept, but for that very reason the court needed guidance on how to calculate it. Given that three of the four LPG companies have continued to operate, how is the value of the lost business to be measured? How accurate is it to use a specific period in the past to calculate lost goodwill, especially when other factors operated but which do not seem to have been considered at all?

[157] In the court below, the trial judge awarded the claimants sums totalling in excess of BZ$10 million. On appeal, the LPG companies complained that she rejected a further claim amounting to more than BZ$55 million and asked this court to make an award in that vicinity. However, as noted earlier, the CCJ has upheld this court on this very point, namely that where specific damages are claimed they must be pleaded and proved. Absent such particularity, how would the other party be able to respond to and dispute the claim? In the absence of details, how would the other party probe its accuracy? And if that is the case where a specific amount is claimed, as here, the duty for precision must necessarily be heightened where the amount in question is so vast. In this case, not only were special damages not particularised in the claim, but the figures presented in evidence and as tested under cross-examination were too generalised, unsubstantiated, and lacking in cogency to justify an award in such terms. This being the state of the evidence as to

losses, I would quash the order for damages as awarded by the trial judge and would decline to make any additional award of further sums, in the terms as prayed for by the claimants.

[158] The LPG companies also appealed the trial judge's refusal to award vindicatory damages. Over the last two decades, the Privy Council has developed this head of monetary compensation "to reflect the sense of public outrage, to emphasise the importance of the constitutional right and the gravity of the breach, and to deter future breaches."[88] Although taking pains not to characterise this as punitive or exemplary damages, it would seem that the making of an additional award is meant to function in the same way, granted where the facts are particularly egregious in order "to underscore the courts' displeasure at the way in which the rights were infringed".[89]

[159] In this case, the LPG companies sought such an additional award on the basis that the breaches in this case were sufficiently egregious – deliberately intended to give the NGC a monopoly and 'steal the valuable assets' of the companies. The GOB resisted this characterisation of the legislation and pointed out that no such improper motive was made. While I agree with the claimants that the effect of the legislation was tremendous, even catastrophic for one of the companies which became bankrupt, it would be going too far to describe the government's aims as encompassing theft. Certainly, no such motive was proved or accepted by the trial judge, and I am inclined to agree with her. There was an acceptance at some level that the government was motivated by an intent to reform the LPG sector in Belize, though the means and manner in which they attempted to do so were deeply misguided. Ultimately, three of the companies remain very much in business, operating in all areas except that of importation. In these circumstances, I do not think that this was a fit case in which to award vindicatory damages and agree with the trial judge's decision in declining to do so.

[160] This means that on the issue of damages, I would uphold the appeal of the GOB in appeal #12/2022 and dismiss the appeal of the LPG companies in appeal #13/2022. In the latter appeal, I agree with the learned trial judge the additional sums claimed were not proven and in the circumstances, I am unable to make an award in those or any amount.

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[88] *AG v Ramanoop* [2005] UKPC 15, (2005) 66 WIR 15 (PC TT), per Lord Nicholls at [19].
[89] *Mukesh Maharaj v AG of T&T* (Civ App #118/2010, decision dated 25/3/2015) per Archie CJ at [12].

(h) Remedies

[161] The claimants have therefore established violations of two of their constitutional rights, namely the right to work under section 15 and the protection of property under section 17. The source of both breaches lies in the monopoly granted to the NGC to import LPG, which prevented the claimants from continuing in their business of choice and resulted in the loss of goodwill along with extensive pecuniary losses. For this, the claimants sought both financial compensation and, as it would appear from their submissions in appeal #13/2022, invalidation of the legislative scheme itself.

[162] The constitution is, of course, supreme law and legislation or action inconsistent therewith is void and of no effect. However, striking down legislation in its entirety is an extreme step and a court must be careful not to overstep; indeed, the constitution itself provides that a law is only void to the extent of its inconsistency.[90] As Saunders JCCJ (as he then was) explained in ***Zuniga v AG*** *[2014] CCJ 2 (AJ)*, "provided it is possible and feasible to save a law that may contain one or more inconsistent provisions, a scalpel, rather than a machete, is to be used by the court to sever that which is consistent."[91]

[163] In this case, the State recognised the source of the problem and amended the legislation in 2021 to remove the monopoly and open up the import market, provided of course that the pre-conditions were satisfied. However, as emerged at the trial and on appeal, this was ineffective as the conditions themselves were so unattainable or unreasonable that the monopoly remained. The requirement of constructing a 1.5 million US gallon terminal is a gargantuan undertaking beyond the reach of any company not enjoying the same benefits as the NGC; the alternative of passing all imported LPG through the latter's terminal is equally unpalatable as it would subject the claimants to the uncertainties and vagaries of relying on their competitor. Since the state itself has recognised the problem and tried in good faith to remedy it, I would propose deleting the one pre-condition imposed which prevents achieving the legislative compromise. This is the first condition specified in Schedule II of the amendment Act, namely that each Authorized Import Facility is required to have, at a minimum, an "installed storage capacity of no less than one and a half million (1.5 million) US gallons". All the other conditions specified in Schedule II would

[90] Belize Constitution, s. 2(1).
[91] *Zuniga v AG* (note 42 above), per Saunders JCCJ at [36].

remain, mandating that other import facilities would have to be built, operated and maintained in full compliance with the listed codes and standards, secure the specified permits, licences and authorizations, develop and implement the listed plans, programmes and manuals, and maintain the required insurance policies. In this way, by removing the sole unconstitutional requirement that import facilities have an installed capacity of 1.5 million US gallons, it would open up importation of LPG by any person or company as before, in line with the government's professed intent, without compromising on necessary regulatory standards to ensure quality and safety. As for the possibility of smuggling illegal substances in the bowsers, this remains against the law and the State is already in possession of considerable powers of search and seizure to aid in the investigation, detection, prosecution, and punishment of such crimes. Thus, with this limited severance, the statute's goals of monitoring imported LPG would remain, except that anyone would be free to enter the market by applying for the requisite licence, unfettered by the identified unreasonable pre-conditions.

[164] There remains the issue of the financial losses sustained by the claimants as a result of the monopoly granted to the NGC. However, as discussed in the preceding section, these losses were neither pleaded nor properly proven and there is no basis upon which I can make an alternative award to that ordered by the learned trial judge. However, the LPG companies sustained extensive and debilitating financial consequences, to the extent that one of the claimants became bankrupt as a result of the monopoly, so it would be unfair for them not to be compensated for direct consequences of constitutional violations. Accordingly, I would remit the case to the High Court for an assessment of damages to be conducted. This would no doubt entail expert evidence to guide the court below in interpreting the evidence, including how to measure the goodwill lost and properly quantify the other pecuniary losses sustained.

[165] In sum, therefore, I would allow each appeal in part and make the following declarations and/or orders:

I. The claimants' right to property under section 17 of the constitution was violated by the legislation in question, by reason of the monopoly to import LPG into Belize which it conferred upon the NGC and subsequently maintained, and the trial judge was correct in so finding;

II. The claimants' right to work under section 15 of the constitution was violated by the said legislation, insofar as an unjustifiable legislative fetter was placed upon their ability to

engage in their business of choice, and the trial judge erred in coming to the opposite conclusion;

III. There was no breach of the claimants' rights to freedom of association under section 13 or their right to equal treatment under section 6(1) of the constitution as found by the trial judge;

IV. The order of the trial judge granting to the claimants damages in the sum of BZ$10,896,751.20 is quashed, as their entitlement to this amount was not pleaded or proved nor did they satisfactorily establish that this was the amount of their financial loss caused by the amended Act;

V. The decision of the trial judge to not make an additional monetary award in vindication of the claimants' rights that were breached is upheld;

VI. Schedule II of the amended NLPGP Act is amended by the deletion of the first condition which requires each Authorized Import Facility to have an installed storage capacity of no less than 1.5 million US gallons;

VII. The case is remitted to the High Court for an assessment of damages to be conducted into the losses sustained by the claimants as a result of the aforesaid constitutional breaches; and

VIII. Since each party has been partially successful in each appeal, each party is to bear its own costs.

Arif Bulkan
Justice of Appeal

[166] I have read the draft judgment of my learned brother, Bulkan JA, and I concur with the orders proposed and the reasons for doing so.

Minnet Hafiz-Bertram
President

[167] I concur.

Peter Foster K.C.
Justice of Appeal