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IN THE GRAND COURT OF THE CAYMAN ISLANDS

Cause No: G 0195/2019

BETWEEN

SHIRLEY ELIZABETH ROULSTONE

Plaintiff

and

(1) THE CABINET OF THE CAYMAN ISLANDS

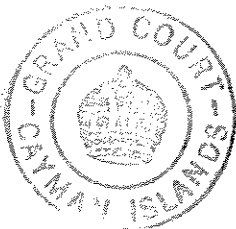
**(2) THE LEGISLATIVE ASSEMBLY OF THE
CAYMAN ISLANDS**

Defendants

and

THE NATIONAL TRUST FOR THE CAYMAN ISLANDS

Intervener



Appearances:

Mr. Chris Buttler, instructed by Ms. Kate McClymont and Mr. Richard Parrish of Broadhurst LLC for the Plaintiff

Mr. Mark Shaw QC and Ms. Jessica Boyd, instructed by Mr. Michael Smith of the Attorney General's Chambers for the Defendants

Mr. Tom Lowe QC instructed by Mr. Colm Flanagan, Mr. Nicholas Dixey and Ms. Alice Carver of Nelson & Co for the Intervening Party

Before:

The Hon Justice Tim Owen Q.C. (Actg.)

Heard:

22nd – 23rd January 2020

HEADNOTE

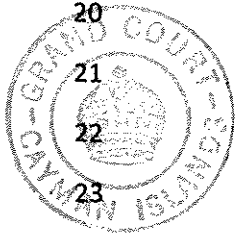
Civil Law – Judicial Review – the Cayman Island Constitution Order 2009 – The constitutional right to a fair and effective vote in a people-initiated referendum – Compatibility of the Referendum (People Initiated Referendum Regarding the Port) Law 2019 with s.70 of the Constitution.

JUDGMENT

1 **Introduction**

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1. The people of the Cayman Islands have a right, vouchsafed by s.70 of the *Cayman Islands Constitution Order 2009* (“the Constitution”), to a people-initiated referendum on a matter of national importance. If assented to by more than 50 percent of registered electors, the outcome of such a referendum is binding on the Government and the Legislature. The Court was told that this form of direct democracy remains unique amongst British Overseas Territories¹. Binding referendums are common in many civil law countries but they are a rarity in the common law world and in countries governed by the Westminster system. Before the enactment of the 2009 Constitution, the only route to a referendum available in the Cayman Islands was via an initiative by the majority of elected members of the Legislative Assembly. That discretionary power of the Legislature continues to exist in s.69 of the Constitution. But a clear decision was taken in 2009 to supplement the ability of the Legislature to call a referendum by conferring on “the people” (subject to securing the support of 25% of registered electors) the right to trigger a referendum with a view, in the words of the Constitutional Commission of the Cayman Islands in 2011, “to reject or amend *inter alia* acts of the legislature, existing laws, proposed laws, policies and regulations or to decide on particular circumstances or political issues”² so long as the referendum result does not contravene any part of the Bill of Rights or any other part of the Constitution. The inevitable tension between a Westminster model of representative democracy and a potentially binding form of direct democracy based on a people-initiated referendum is what lies at the heart of this case.

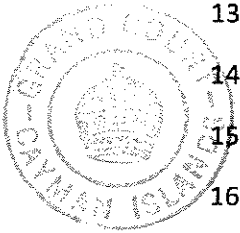


¹ The British Overseas Territories are Anguilla; Bermuda; British Antarctic Territory; British Indian Ocean Territory; British Virgin Islands; Cayman Islands; Falkland Islands; Gibraltar; Montserrat; Pitcairn Islands; St Helena; South Georgia and South Sandwich Islands; Sovereign Base Areas of Akrotiri and Dhekelia; Turks and Caicos Islands.

² “People-Initiated Referendums”, Constitutional Commission of the Cayman Islands Research Paper, 13th October 2011.

1 2. The Minutes of the Committee formed to negotiate the drafting of the 2009
2 Constitution show that on 15th January 2009, the Hon Samuel Bulgin, Attorney
3 General, was concerned that in its original draft form, s.70 of the Constitution
4 enabled a mere 20 percent of registered electors to trigger a referendum. On that
5 basis, warned Mr Bulgin, "I'm just saying that could end up having a referendum
6 every Wednesday morning". Ultimately s.70 in its final form required a petition
7 signed by not less than 25% of registered electors to trigger a referendum. But the
8 passage of a decade has shown that Mr Bulgin's fears were unwarranted. This
9 application for judicial review has been brought by Ms Shirley Roulstone ("the
10 Plaintiff") in the context of the first ever people-initiated referendum to be triggered
11 by the provisions of s.70 of the Constitution. It concerns an issue which no one
12 disputes is of great importance for the Cayman Islands, namely the question of
13 whether the Government's plan to develop a cruise port terminal in George Town,
14 alongside the enhancement of the cargo port, should be allowed to proceed. The
15 central focus of the argument advanced by Mr Chris Buttler, Counsel for the
16 Plaintiff, is on the incompatibility of the Referendum (People-Initiated Referendum
17 Regarding the Port) Law 2019 ("the Referendum Law") with s.70 of the Constitution
18 on the basis that what s.70 requires is a general or "framework" law rather than a
19 bespoke one enacted in order to address the specific issue of the cruise Port
20 referendum. In the alternative, Mr Buttler argues that the Referendum Law is
21 unlawful because it fails in substance to secure the right to a fair and effective vote
22 as guaranteed by s.70 of the Constitution.

23
24 3. When I granted permission to bring this application for judicial review on 3rd
25 December 2019 and ordered a stay on the referendum scheduled to take place on 19th
26 December, I observed that this case plainly involves issues of great constitutional
27 importance for the Cayman Islands and in his Judgment of 23rd December 2019,



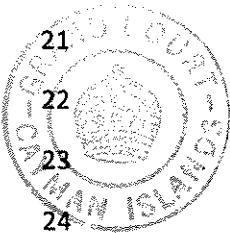
1 granting a Protective Costs Order (“PCO”) in favour of the Plaintiff, Chief Justice

2 Smellie said that:

3
4 *“In his grant of leave and a stay, Owen J. has properly recognised that the claim*
5 *here concerns the fundamental democratic right guaranteed by section 70 of the*
6 *Constitution: the right of every Caymanian voter to participate in a fair and*
7 *effective people-initiated referendum. Irrespective of the importance of the issue*
8 *which the referendum will decide, there is a very clear and strong public interest*
9 *in ensuring that the referendum is conducted in keeping with the law.”*

10
11
12 4. Mr Mark Shaw QC on behalf of the Defendants does not dispute the Chief Justice’s
13 characterisation of the nature of this case and the constitutional right in issue.

14
15 5. Since leave was granted, the issues before the Court have narrowed considerably.
16 The Statement of Facts and Grounds dated 10th December 2019 sought to attack the
17 Referendum law on the basis that the question originally framed by the Cabinet, as
18 well as the chosen date of 19th December 2019, had been unlawfully pre-determined;
19 that the Cabinet had failed to have regard to relevant material considerations
20 (including its duty to have due regard to the protection of the environment) in passing
21 the Referendum Law; that the referendum question itself was framed in a biased
22 manner in breach of s.4(3) of the Constitution and, finally, that the Cabinet and
23 Legislative Assembly had frustrated the purpose of s.70 of the Constitution by
24 enacting a Referendum Law which did not promote the constitutional right to a fair
25 and effective referendum. As a result of the grant of leave and a stay on the intended
26 referendum date together with the Government’s post-leave concession on the
27 wording of the referendum question, the Government’s express acceptance of its
28 duty to have regard to environmental concerns and its willingness to give reasons for
29 setting a revised date for the referendum, the sole question which the Court is
30 required to decide concerns the compatibility of the current Referendum Law with
31 the Constitution. The fact that the nature of the challenge has narrowed does not
32 however diminish the importance of this case for the people of the Cayman Islands.

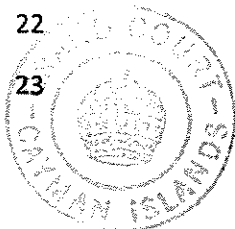


1 **Factual background**

2 6. The evidence establishes the following history of events leading up to this
3 application for judicial review:

4 a. Grand Cayman is one of the few islands in the Caribbean where cruise ships
5 must still ferry their passengers ashore using small vessels. As early as
6 October 2013, an outline business case for a cruise ship terminal was
7 produced by PWC. This reflected the Cayman Islands Government's ("CIG")
8 decision to explore the development of such a terminal "in order to improve
9 the quality and safety of the cruise passenger experience and maintain market
10 share"³. On 15th September 2015 an Environmental Statement ("the Baird
11 Report") was completed by a respected Environmental and Engineering
12 Consultancy company, Messrs Baird & Associates. The Report explained
13 that the proposed project would include a dredged berthing area and piers in
14 George Town harbour providing berths for four large cruise ships, with
15 additional reclaimed land for landside facilities (Exhibit LS-1, Binder A, p1).

16
17 b. The Premier first announced that the government was proceeding with the
18 Project on 30th September 2015. By this time, the policy of building a new
19 cruise port facility had been linked to a plan to enhance the existing cargo
20 facilities in George Town harbour. Since the completion of the 2015
21 environmental impact assessment, the two elements were seen by the
22 Government as inextricably linked, not least because the proposed cruise port
23 passenger disembarkation area would encroach heavily on the cargo port and

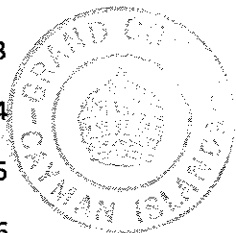


³ See Report prepared by Baird, 15th September 2015, "Proposed Cruise Berthing Facility, Grand Cayman: Environmental Statement ("Baird Report"), para 1.0.

1 there were obvious efficiencies in undertaking such large infrastructure
2 projects together rather than separately (Bodden-1, CB2, tab 7, para 5) .

3
4 c. The perceived benefit of the cruise ship terminal was that it would allow
5 cruise ship passengers to disembark more quickly and in greater comfort,
6 thereby allowing more short term visitors onto Grand Cayman with the profit
7 generated by the cruise lines cross subsidising the planned refurbishment of
8 the cargo terminal (Bodden-2, CB2, Tab 20, paras 5-7). Set against these
9 benefits, the environmental costs of the project related to the dredging of
10 George Town harbour. The harbour is the home to reefs that are thousands of
11 years old. The reefs contain more than 60 species of coral, all of which are
12 currently protected under the National Conservation Law 2013, including
13 colonies of Elkhorn and Staghorn coral which are designated as critically
14 endangered species. The reefs are the habitat and spawning grounds of a
15 variety of endangered species, including turtles and various species of fish.
16 There are also two historic shipwrecks, the Balboa and the Cali which nature
17 has integrated into the reefs. The George Town reefs are a world renowned
18 diving site and the only diving site of such quality which is accessible from
19 the shore in the Cayman Islands.

20
21 d. The dredging for the cruise ship terminal would destroy several acres of the
22 George Town harbour reefs and threaten a much wider area through plumes
23 of sedimentation which kills coral. The Government's current plan is to
24 attempt to relocate less than 3% of the coral that would be directly destroyed
25 and there is no plan to rescue the other species. In his Judgment on the
26 Plaintiff's application for a PCO, handed down on 9th January 2020, the Chief
27 Justice observed that "the underlying issue which the referendum will

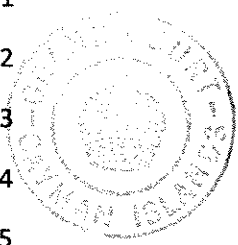


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decide...concerns the appropriate balance to be struck between the perceived economic opportunities of mass short-stay tourism and the destruction of internationally renowned coral reefs.”

- e. A general election was held on 24th May 2017 which resulted in the current coalition Government. It had been a manifesto commitment of the Progressive Party to proceed with the cruise berthing facility for their last two administrations elected in May 2013 and, in coalition, from May 2017.

- f. On 28th September 2018, the Minister of Tourism unveiled a new proposed design for a cruise ship terminal at a public meeting. One month earlier, on 27th August. 2018, a group calling itself Cruise Port Referendum Cayman (“CPR”), of which the Plaintiff is a member, began to collect signatures for a petition under s.70 of the Constitution (LS-1, Binder A, pp.91-95). A leaflet issued by CPR explained that “the aim of this petition is to satisfy s.70 of the Cayman Islands Constitution (2009) to start a people-initiated referendum via petition on whether the country should move forward with the proposed cruise Berthing Facility in George Town harbour”. It pointed out that according to the Cayman Islands Elections Office website, the total number of electors for July 1st 2018 was 21,150 and thus CPR Cayman needed to secure the signature of 25% of that total, namely 5,288 persons. In the absence of any legislation indicating the required form of a s.70 Petition and how signatures might be required to be verified, CPR Cayman produced its own Petition Form with various columns headed as variously Registration Number, Name of Elector, Polling Division, Street Address, Signature and Form of Identification (see for example LS-1, Binder A, p.95).

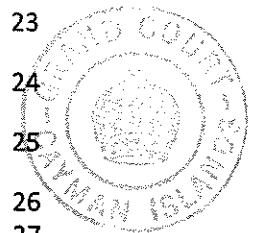


1 g. On 30th May 2019, the Cayman Islands Elections Office issued a Press
2 Release explaining that the Supervisor of Elections had met with CPR on 29th
3 May “to discuss the process of the People Initiative Referendum according to
4 the Cayman Islands Constitution Order 2009”. The press release then went
5 on to describe the various stages towards the referendum which included the
6 staff of the Election Office conducting an independent verification of the
7 petition “in accordance with constitutional requirements under s.90 and s.70
8 (1) (b)”. It said that election officials will ensure the provided referendum
9 signatures correspond with the current electoral register and that as part of
10 the verification process “under the law” manual checks will also be
11 conducted by Election Office officials with each petitioner “to ensure
12 signature validity” (LS-1, p.107).

13
14 h. The completed Petition comprising some 622 original signature pages was
15 eventually presented by CPR Cayman on 12th June 2019 and official receipt
16 in accordance with s.70 of the Constitution was confirmed by Wesley
17 Howell, the Supervisor of Elections (LS-1, p.89).

18
19 i. Almost immediately the verification process proved to be controversial with
20 CPR Cayman raising concerns with the Governor at the fact that there had
21 not yet been any press release explaining the specifics of the verification
22 process and expressing concern that the Election Office had adopted a
23 method of requiring signatories to the Petition to re-confirm their signature
24 via a separate form (see email to Governor Roper of 19/06/19 at LS-1, 114-
25 116). In response, the Governor issued a statement on 20th June stating –

26
27 *“I am aware of the concerns that have been expressed about the*
28 *comprehensive process being followed to verify the signatures on the*
29 *petition which was presented to the Elections Commissioner by cruise*



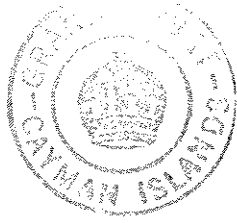
1 *Port Cayman. I can assure everyone that cabinet has no role whatsoever*
2 *in the verification process which remains the sole responsibility of Mr*
3 *Howell, who reports to me and in whom I have full confidence. This is*
4 *the first time in Cayman's history that we have been on the verge of a*
5 *people's initiated referendum. We need to ensure that we get the process*
6 *right. There can be no shortcuts to democracy. To provide clear and*
7 *unambiguous proof that the signatures on the petition are valid will*
8 *provide a solid base for what will follow and help to protect the process*
9 *from any potential legal challenge in the future. Mr Howell and his team*
10 *will carry out the exercise as quickly as possible and will try to make it*
11 *as easy for everyone to verify their signatures as they can. He will take*
12 *independent decisions based on appropriate legal advice and will also*
13 *have access to advice from the UK's Electoral Commission going*
14 *forward. My office and I will help to oversee the process and ensure*
15 *there is no interference in the important task that Mr Howell is*
16 *undertaking. We now need to let him get on with the task and respect his*
17 *independence.” (LS-1, p.113)*
18

- 19 j. On 28th June 2019 the Elections Office issued a further press release
20 concerning progress in the verification process which had been conducted via
21 door-to-door visits and which had resulted in the approval of some 12.9% of
22 the 5,438 signatures originally submitted by CPR. The same release invited
23 individuals to attend in person at the Elections Office and also identified
24 various verifications booths in two supermarkets (LS-1, p.119). On 31 July
25 an advert was placed by the Elections Office inviting any persons who wished
26 to remove their names from the Petition to call a phone number (LS-1, p.121).
27 This suggestion generated controversy as reported by the Cayman Compass
28 which referred to complaints about political interference in the verification
29 process. In an article dated 7th August 2019, the elections Supervisor, Mr
30 Howell, was quoted as acknowledging that the validity of allowing persons
31 to “unverify” their signatures has been questioned and a member of CPR

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Cayman observed that there had never been any prior discussion with the Elections Office about a mechanism for people to retract their vote in favour of a referendum (LS-1, pp.125-126).

k. On 9th August 2019, Broadhurst Attorneys, CPR Cayman’s lawyers, wrote a letter before action to the Elections Office explaining its intention to challenge what it called the verification decision, by which it meant the decision to conduct manual checks for each signature, the requirement to sign a separate verification form and the ability of individuals to remove their signatures from the Petition and to “un-verify” previously verified signatures (LS-1, p.135-141). While accepting that the Elections Office was pursuing a legitimate goal in seeking to verify the signatures, CPR Cayman alleged that the process was unclear, ambiguous and disproportionate. Significantly, they asserted that the impugned verification process impaired the constitutional right to petition because a registered elector will have his or her signature discounted unless officials of the Elections Office are able to obtain a signed declaration to confirm the validity of the signature. Insofar as such a process impaired the right to petition under s.70, it was said that the verification process was not in accordance with law because there was no law in force prescribing any process for collecting or verifying signatures.



l. The CIG’s response to the letter before action dated 23rd August 2019 was lengthy and, in para 12, stated that:

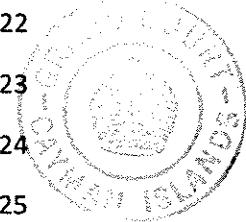
“In the absence of governing legislation prescribing the procedures to be followed for people-initiated referenda, the verification process adopted by the Elections Office was reasonable, fair, proportionate and efficient. Further in providing regular detailed updates on the progress of the verification process, the Elections Office acted in an open and

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transparent manner. Whilst there are varying views about how a verification process should be conducted, deference should be accorded to the views and approach of the Elections Office given its statutory mandate and experience in the field of elections. Further, the empirical evidence to date confirms that the process has been progressing smoothly.” (LS-1, pp.143-149).

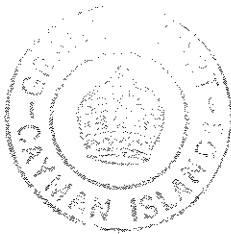
m. In the event, Broadhurst Attorneys wrote in reply by letter dated 26th August rejecting the Government’s legal arguments but explaining that in light of the fact that it was by then certain that the requisite number of verified signatures would be achieved (and a referendum therefore certain to take place) no judicial review claim would be issued in relation to the verification decision (LS-1, p.151-154). On 11th September 2019, it was announced that the verification process had been completed and the petition had been verified to meet the 25% threshold required by s.70 of the Constitution.

n. On 3rd October 2019 the Premier’s Office issued a Press Release, announcing that the Government had that day gazetted a bill entitled “A Bill for a Law to provide for the holding of a people-initiated referendum on the issue of whether the Islands should continue to move forward with the building of the cruise berthing and enhanced cargo facility; and for incidental and connected purposes.” It explained that the Bill provided for the holding of a referendum under s.70 of the Constitution, that the Cabinet had determined that the referendum would be held on 19th December (which would be a public holiday) and that the Cabinet had settled the referendum question as “Should the Cayman Islands continue to move forward with building the cruise berthing and enhanced cargo facility?”. The Premier’s announcement acknowledged that “no guidance is given in the Constitution on how Cabinet should go about settling the wording and there is no direct Cayman Islands



1 precedent". It was stated however that "there are some common sense and
2 natural justice principles that can be drawn upon" which suggested that the
3 Cabinet should construct a question which was, as far as possible, clear and
4 simple, easy to understand and written in plain language; to the point, that is
5 directed at the core issue in contention; definitive and not ambiguous or open
6 to a variety of interpretations; and neutral "which means the wording should
7 not create any encouragement for voters to consider one response more
8 favourably than another and should not mislead voters" (LS-1,pp.181-184).
9 The Premier's Statement recorded the fact that the Cabinet had also had
10 regard to the Council of Europe's Commission for Democracy Through Law
11 ("the Venice Commission") Code of Good Practice on Referendums when
12 settling the question.

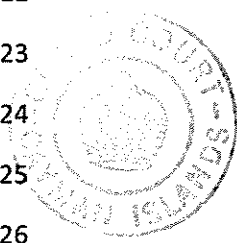
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14 o. On 26th October 2019 Broadhurst Attorneys wrote once again to the CIG on
15 behalf of CPR Cayman and enclosed an Opinion prepared by Helen
16 Mountfield QC and Mr Buttler which set out reasons why certain aspects of
17 the Referendum Bill were incompatible with s.70 of the Constitution and thus
18 susceptible to judicial review. In particular it was said that the following
19 aspects would be amenable to challenge if passed into law – (a) the setting of
20 the referendum question without first enacting a law that prescribes the
21 manner in which the referendum question is to be set, (b) the setting of the
22 referendum date without first enacting a law that prescribes the manner in
23 which the referendum date is to be scheduled and (c) the exclusion of the
24 application of Part V of the Elections Law 2017, which addresses campaign
25 financing limits, without any separate campaign financing provisions being
26 included in the Bill. The letter noted in particular a number of adverse
27 consequences of setting the Referendum question and date before enacting



1 legislation that prescribes the procedure for so doing, namely that the
2 proposed question was not neutral; it conflated the cargo port with the cruise
3 berthing project; the proposed date unnecessarily disenfranchised some 200
4 people who would be able to vote if the referendum were held in 2020; the
5 fact that the short time before the referendum would give CPR Cayman
6 insufficient time to find and train referendum observers; and that the close
7 proximity of the date to Christmas would discourage voter participation in
8 the Referendum (LS-1, pp.213-216).

9
10 p. On 27th October, the Premier issued a Press Release which explained that the
11 CIG had taken its own advice from London Counsel experienced in
12 constitutional law and that “we are more than satisfied that the process being
13 followed is fair and proper in every respect”. It went on to say that “what is
14 becoming increasingly clear however is that CPR is not really interested in
15 holding a referendum, presumably because they think they will likely lose
16 but are simply intent on derailing the cruise port and cargo port project by
17 any means possible including frustrating it by delay” (LS-1, p.257). The
18 statement concluded by saying that the Referendum Bill would be debated in
19 the Legislative Assembly the next day, Monday 28th October 2019.

20
21 q. Notwithstanding the Premier’s statement, on 29th October 2019, the
22 Government tabled an amendment which was apparently designed to address
23 some of the concerns set out in the Opinion of Ms Mountfield QC and Mr
24 Buttler. Legislative Assembly Standing Orders provide for at least 2 days’
25 notice of any amendment proposed to be moved to a Bill and in debate on
26 30th October 2019 the Opposition raised concerns that they had only received
27 one hour’s notice of the amendments before the Committee stage and that

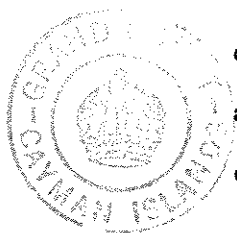


1 absent such notice it was not possible properly to scrutinise them. The
2 Committee was chaired by Speaker Bush who waived the notice requirement.
3 It was noted that on 23rd October 2019 the Speaker had posted his strong
4 support for the port proposal on his personal Facebook page. On 30th October
5 the Legislative Assembly passed the Bill as amended.

6
7 r. On 12th November 2019, Broadhurst Attorneys wrote a letter before action to
8 the CIG indicating its intention to apply for judicial review of the Cabinet's
9 decision to make the Referendum Day Notice; the decision of the Cabinet
10 making the Referendum Question Regulations; the decision of the Cabinet to
11 publish and disseminate an information booklet and advertising and to
12 conduct certain public meetings; and the decision of the Cabinet and
13 Legislative Assembly to enact the Referendum Law (LS-1, pp. 373-390). The
14 CIG responded by letter dated 19th November rejecting all the arguments
15 advanced by CPR Cayman and refused to consent to a stay of the planned
16 Referendum process (LS-1, pp.393-403).

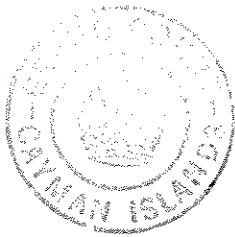
17
18 s. On 12th November 2019, the National Trust of the Cayman Islands wrote a
19 letter before action setting out its discrete reasons for requesting a deferment
20 of the Referendum. The letter also sought a deferment of the commencement
21 of any works in connection with the Cruise Berthing project until such time
22 as all necessary studies on the impact of the revised design of the project on
23 coral reefs had been made publicly available and an Environmental Impact
24 Assessment had been updated and taken into consideration by the CIG (LS-
25 1, pp.415-418).

26
27 t. On 3rd December 2019, the applications filed by both Shirley Roulstone (who
28 is a member of CPR Cayman) and the National Trust for permission to apply



1 for judicial review and interim relief in the form of a stay on the referendum
2 process were listed before me. I granted permission on all four grounds
3 contained in the original application for judicial review and ordered a stay on
4 the holding of the referendum pending a full hearing of the claim which I
5 ordered to be heard between 22 - 24th January 2020. In light of the grant of
6 permission to Ms Roulstone, the National Trust withdrew its application for
7 judicial review on the basis that it would act as an Intervening Party in her
8 claim. I directed that Mr Roulstone's application for a PCO be listed before
9 the Chief Justice on 23rd December 2019 and in a Judgment announced on 6th
10 January 2020, he granted Ms Roulstone's application with the consequence
11 that the Plaintiff would bear no liability in any event for any of the CIG's
12 costs of the proceedings and there would be a reciprocal costs cap so that the
13 Plaintiff, if successful, would recover no more than CI\$66,600 from the CIG
14 in any event⁴.

15
16 u. The exchange of Skeleton Arguments and correspondence between the grant
17 of permission and the commencement of the full hearing on 22nd January
18 2020 helpfully clarified and narrowed the issues before the Court. The grant
19 of a stay, pending judgment on the application for judicial review, inevitably
20 meant that the choice of 19th December 2019 as the date for the referendum
21 was no longer contentious. Moreover, paragraph 32 of the Defendants'
22 Detailed Grounds of Resistance made it clear that the CIG accepted that the
23 duty under s.18 of the Constitution to have due regard to the need to foster
24 and protect the environment will apply to the making of a fresh Referendum
25 Day notice. Accordingly, this aspect of the Plaintiff's challenge and the



⁴ Cause No G195 of 2019 (ASCJ), 6th January 2020.

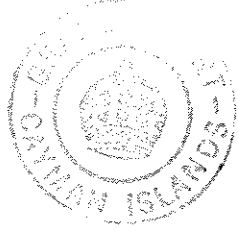
1 concerns of the National Trust fell away. The CIG also gave a clear
2 undertaking to give reasons for the setting of a new date for the referendum
3 (without conceding any binding legal obligation to do so) thereby removing
4 the reasons issue as something on which the Court needed to rule. Finally, on
5 17th December 2019 the Cabinet amended the Referendum Question
6 Regulations to amend the wording of the question in response to this
7 application and the Plaintiff does not challenge the new wording.

8
9 v. In the circumstances, the argument before me was solely focused on ground
10 4 in the Statement of Facts and Grounds, namely the question of whether the
11 Referendum Law accords with s.70 of the Constitution. Mr Buttler’s
12 Skeleton Argument had reformulated this ground so that its principal focus
13 was on the CIG’s decision to enact a discrete law for the port referendum in
14 circumstances where it had failed since the enactment of the 2009
15 Constitution to pass a general or “framework” law. Mr Buttler maintained, in
16 the alternative, that the Referendum Law was in any event flawed because it
17 failed adequately to protect the constitutional right of Caymanians to a fair
18 and effective referendum. At the outset of the hearing, I granted leave to Mr
19 Buttler (without objection from Mr Shaw QC) to amend the Statement of
20 Facts and Grounds so as to reflect the new way that the Plaintiff’s case was
21 being advanced.

22 **The legal framework**

23 *The enactment of s.70 of the Constitution 2009*

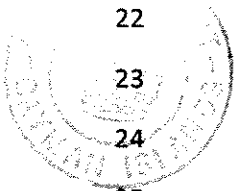
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25 7. In a helpful Note provided by Mr Shaw QC and Ms Boyd after the hearing concluded
26 on 23rd January, an explanation was given of the background to the enactment of the



1 2009 Constitution and, in particular, the inclusion in it of a provision granting a
2 constitutional right to a people-initiated referendum. Prior to the negotiations on
3 enacting a new Constitution, the CIG had formulated proposals for constitutional
4 modernisation, and had proposed to put them to referendum, before undertaking
5 negotiations with the UK. A Government brochure entitled “The Cayman Islands
6 Constitution: A Reflection of Who We Are”, published on 12 January 2008, stated
7 that a referendum on the proposals (which included a proposal for a people-initiated
8 referendum) would be held in May of that year. Interestingly, the brochure urged all
9 potential voters to make sure that they were registered to vote no later than 29th
10 February 2008 with a view to being eligible to vote in the proposed May referendum.
11 The purpose behind this exhortation was clearly to ensure that all persons who
12 wished to be eligible to vote in the referendum should have time to register.

13

14 8. A further (undated) brochure, entitled “Revised Proposals for Constitutional
15 Modernisation”, explained that the January 2008 proposals had been reviewed and
16 revised in light of feedback received over a four month consultation period. It stated
17 that a referendum on the revised proposals would be held in July 2008. In his
18 Foreword to the document, the Leader of Government Business, D. Kurt Tibbetts
19 JP, MLA said that “the existing Constitution is outdated and does not effectively
20 address the realities of today.” He urged Caymanians to vote in the referendum on
21 the Constitution “because it will send a clear message to the United Kingdom that
22 Caymanians fully support a new constitutional relationship which not only gives us
23 more say in running our affairs but also protects our identity, culture and values.”
24 Proposal 24 was addressed to people-initiated referendums. Having set out what the
25 Constitution would guarantee, the brochure said that “this proposal is an important
26 part of increasing the checks and balances on Government and increasing
27 democracy”.



1 9. Ultimately no referendum was held in July 2008. Instead, three rounds of
2 negotiations with the UK commenced, which took place on 29 September – 2
3 October 2008 (First Round), 13-16 January 2009 (Second Round) and 3-5 February
4 2009 (Third Round). The First Round negotiations were informed by a number of
5 documents making, and elaborating, proposals for the Constitution, in terms similar
6 to those set out in the Government’s published proposals (which delegates had before
7 them). Proposal 24 in the Government’s “Revised Proposals” brochure addressed
8 people-initiated referendums, but sheds little light on the issues in this case.

9
10 10. Following the First Round, the Constitutional Review Secretariat produced a “Draft
11 Outcome Report” dated 31 October 2008. Proposal 24 addressed people-initiated
12 referendums, but again it sheds little light on the issues in this case. It appears that a
13 draft Constitution was produced on 20 January 2009, following the Second Round
14 Negotiations, but the CIG has not been able to locate a copy. The UK and CIG
15 reached agreement on the text of the draft Constitution on 5 February 2009; it was
16 tabled in the Legislative Assembly on 11 February 2009; the Legislative Assembly
17 passed the Referendum (Constitutional Modernisation) Law 2009 on 24 February
18 2009; and the draft Constitution was subject to a referendum held on 20 May 2009
19 when it was approved by a majority of 62% of registered voters. Section 70 of the
20 Constitution states as follows:

21 ***“People-initiated referendums***

22
23 70.— (1) *Without prejudice to section 69, a law enacted by the*
24 *Legislature shall make provision to hold a referendum amongst*
25 *persons registered as electors in accordance with section 90 on*
26 *a matter or matters of national importance that do not*
27 *contravene any part of the Bill of Rights or any other part of*
28 *this Constitution.*



29
30 (2) *Before a referendum under this section may be held—*
31 (a) *there shall be presented to the Cabinet a petition signed*
32 *by not less than 25 per cent of persons registered as*
33 *electors in accordance with section 90;*

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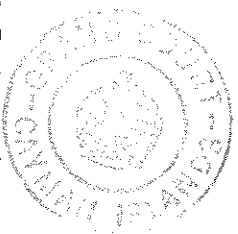
- (b) *the Cabinet shall settle the wording of a referendum question or questions within a reasonable time period as prescribed by law; and*
 - (c) *the Cabinet shall make a determination on the date the referendum shall be held in a manner prescribed by law.*
- (3) *Subject to this Constitution, a referendum under this section shall be binding on the Government and the Legislature if assented to by more than 50 per cent of persons registered as electors in accordance with section 90."*

The Cayman Constitutional Commission

11. By s.118, the Constitution makes provision for the creation of a Constitutional Commission as follows:

“Constitutional Commission

- 118— (1) *There shall be in and for the Cayman Islands a Constitutional Commission.*
- (2) *The Constitutional Commission shall consist of a Chairman and two other members appointed by the Governor, acting after consultation with the Premier and the Leader of the Opposition, at least one of whom shall be an experienced lawyer.*
- (3) *The functions of the Constitutional Commission shall be—*
- (a) *to advise the Government on questions concerning constitutional status and development in the Cayman Islands;*
 - (b) *to publish reports, discussion papers, information papers and other documents on constitutional matters affecting the Cayman Islands;*
 - (c) *to promote understanding and awareness of this Constitution and its values; and*
 - (d) *to exercise such other functions as may be prescribed by a law enacted by the Legislature.*
- (4) *In the exercise of their functions, the Constitutional Commission and its members shall not be subject to the direction or control of any other person or authority.*
- (5) *Subject to this Constitution, further provision relating to the establishment and operation of the Constitutional Commission may be made by the Legislature.”*



12. The minutes of the meeting of the Constitutional Commission held on 12th May 2011 show that a decision was taken to commission a discussion paper on people-initiated referendums for the Commission’s approval. On 13th October 2011 the Commission published a research paper entitled “People Initiated Referendums” and its introductory first paragraph read as follows:

1 *"The Constitutional Commission is of the view that legislation should be passed*
2 *as soon as possible to govern the referendum process whether initiated by the*
3 *Legislative Assembly pursuant to section 69 of the Cayman Islands Constitution*
4 *Order 2009 (the Constitution) or by the people of the Cayman Islands under the*
5 *provisions of section 70 of the Constitution."*
6

- 7 13. The paper then set out the context in which it considered the right to a people-
8 initiated referendum should be viewed under Cayman law:

9
10 ***"Types of Democracy***

11 *Democracy is a political system based on the belief that there should be equality*
12 *amongst all people and that the people's interest is paramount, therefore the*
13 *governing practices are decided by the people. The people will either execute*
14 *those practices collaboratively by themselves in a direct democracy or they will*
15 *elect officials to represent the opinions of the people in a representative*
16 *democracy. In today's society, there is a movement to include elements of direct*
17 *democracy in a representative democracy to ensure that the representatives are*
18 *fully informed of the wishes of the people.*

19 *Direct democracy is the type of governance that a growing number of political*
20 *parties, citizens and states around the world are embracing. For example,*
21 *Switzerland, Italy, Liechtenstein and twenty-four States in the United States of*
22 *America (USA) utilize direct democracy; 70% of the USA population now live*
23 *in a state that gives them the right to vote on initiatives and referendums.*
24 *Moreover, the European Union has incorporated referendums into its*
25 *constitution. The Swiss experience is one illustration of direct democracy being*
26 *successful at empowering a nation to decide issues of national importance. The*
27 *Swiss have used direct democracy for over one hundred and forty years through*
28 *the citizens initiated referendum, constitutional referendum, veto referendum*
29 *and the recall referendum; all of which are binding on the Swiss government.*

30
31 *Representative democracy is a form of government founded on the principle of*
32 *elected officials representing the people. It is based on the premise that*
33 *Parliament (the elected legislature) is sovereign. The Cayman Islands, as an*
34 *Overseas Territory of the United Kingdom, governs through this form of*
35 *government, however the 2009 Constitution includes elements of direct*
36 *democracy as part of the modernisation process. The United Kingdom now*
37 *includes referendums and petitions in its governance framework, although its*
38 *model of democracy is representative democracy based on the premise that*
39 *Parliament (the elected legislature) is sovereign."*
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- 41
42 14. Having commented on the issue of who is qualified to sign a petition and vote in a
43 referendum, the Commission proceeded to outline in a list of bullet points what it
44 termed "the basic process contemplated for the administration of People Initiated
45 Referendums":

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“Prior to Petition

- Standardised petition forms
- Topics able to be decided on (or not) by referendum
- Petition question approval process clearly defined
- Notification of initiating a petition
- Gazette publication following approval

Collection of Signatures

- Financing of the petition (disclosure)
- Promoting awareness of the petition
- Soliciting signatures of electors
- Persons permitted to collect signatures on behalf of the petition’s originator
- Required information of electors signing the petition (name, address, DOB, signature)
- Timeframe in which to collect signatures
- Timeline to collect additional signatures if the original petition submitted to Cabinet does not meet threshold (25%)

Verification of Signatures / Certification of Petition

- Measures to confirm identity (and qualification) of persons signing
- Restrictions placed on civil servants and others based on the nature of the petition
- Amending the petition following presentation to Cabinet
- Withdrawal clause (for the petitioner) in the instance the legislature fulfils the petition
- Body / Authority responsible for counting & verifying petition signatures
- Timeframe allotted for counting and verify petition signatures
- Cabinet’s allotted time to finalise wording
- Publication of petition results
- Cabinet’s decision of when to hold the referendum

The Referendum process

- Proclamations
- Publication of the Writ of Referendum
- Voter Education
- The Referendum
- Publication of Referendum Results.”

15. The identification of certain basic matters which required to be clear in advance of holding a people-initiated referendum was of course entirely consistent with the view that the enactment of s.70 of the Constitution required the Legislature to apply its mind to enacting a general or framework law. And in the final section of the paper, headed “Looking Ahead – Addressing Legislation”, the Commission concluded its analysis in the following terms:

“Negotiators of the Constitution Order (2009), through Section 70 – people initiated referendums – indeed fostered the concept of direct democracy, subsequently providing an avenue for the electorate to gain more control with respect to matters of national importance that directly affect their lives. Critics of direct democracy argue that it weakens representative democracy by undermining the role and importance of elected representatives. However, supporters of the use of referendums argue that direct democracy acts as a useful discipline on the behaviour of elected representatives, ensuring that they fully consider the likely views of voters when taking decisions on their behalf. As previously noted, other jurisdictions have found people-initiated referendum to be a very useful tool in enhancing democracy.

1 *The legislation required by the Constitution to govern referendums has*
2 *not yet been implemented. Some key elements to be included have been*
3 *described in Section 70(2) (b) and (c), namely the settling of the wording*
4 *of the referendum question; the time frame for settling the question and*
5 *the process to be followed for the administration of the referendum.*

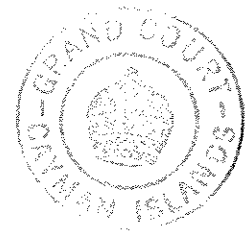
6 *Various factors must be taken into account to ensure that the process is clear*
7 *and reliable. One issue to determine is whether the referendum will be held*
8 *separately or with another poll. It is sometimes argued that combining polls can*
9 *increase the risk that voters will confuse separate issues (e.g., the performance*
10 *of the incumbent government can be confused with the issue on which the*
11 *referendum is being held). However, from an administrative point of view, it may*
12 *be more cost effective to hold a referendum at the same time as an election.*
13 *There is also the question of whether to regulate referendum campaigns in a*
14 *manner similar to election campaigns. This is an important consideration to*
15 *ensure open debate and a fair and free campaign and referendum. Voter*
16 *education, the role of government and the role of the media are also key issues*
17 *in the administration of a referendum.” (Emphasis added)*
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19 16. In the course of the hearing I asked Mr Shaw QC whether the CIG had ever
20 responded to the Commission’s 2011 Research Paper and in a Note lodged after the
21 hearing I was informed that it is not known whether it was provided to the
22 Government of the day and there is no record of such provision or receipt by the
23 current Government. Accordingly it is believed that no CIG response was given. It
24 was however confirmed that the 2011 Paper was in the public domain from 13th
25 October 2011 and that it was believed that all members of the Legislative Assembly
26 would have been invited to a joint meeting between the Commission and the
27 Premier’s White Paper Committee on 27th October 2011 when (as I understand it)
28 the research paper was discussed. I confess I find it hard to believe in light of the
29 constitutional status of the Constitutional Commission that the CIG was not formally
30 served with a copy of the Research Paper.



31
32 17. What is clear from documents lodged after the hearing had concluded (in response
33 to the Court’s request for clarification) is that on 14th October 2014 a differently
34 constituted Constitutional Commission wrote to the Governor raising 34 short points

1 about the Constitution on the basis that it had identified several sections which it
2 considered to be sufficiently important to warrant being considered for amendment.
3 Point 17 concerned s.70 and the comment made by the Commission was “it is
4 unclear as to whether this section requires that a law be enacted which governs all
5 people-initiated referendums or simply a law enacted providing for each individual
6 referendum when it is petitioned for.” The Attorney General provided the
7 Commission’s letter and list of points to Mr Ian Hendry, the Foreign and
8 Commonwealth Office’s constitutional advisor, Chairman of the Cayman
9 Constitutional Negotiations and the co-author of a textbook on British Overseas
10 territories law. Mr Hendry’s response was expressly caveated as amounting to
11 “personal comments” and his brief response to point 17 was “it seems clear that
12 section 70 deals with individual people initiated referendums”. It is also to be noted
13 that in its 14th October 2014 letter to the CIG, the chairman of the Commission, Mr
14 David Ritch, said that “the Commission strongly recommends that the Premier and
15 the Leader of the Opposition establish a Committee to consider this matter in further
16 detail”. Perhaps surprisingly, the Government did not take up the Commission’s
17 suggestion and indeed it seems that the Government made no response at all to the
18 Commission’s concerns. It is equally surprising that in the course of considering
19 what legislative response was needed to CPR Cayman’s Petition it would appear that
20 the views of the Constitutional Commission were not taken into account by the
21 Cabinet or the Legislative Assembly. The Court was provided with no evidence that
22 they were or indeed that any member of the Government had consulted the
23 Commission before responding to this first s.70 referendum.



1 *The Referendum (People-Initiated Referendum regarding the Port) Law 2019*

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18. The Referendum Law comprises 14 sections and a single Schedule which applies and modifies certain provisions of the Elections Law (2017 Revision) to the planned port referendum. As the Preamble sets out, it is a bespoke item of legislation exclusively directed at a single referendum with no wider application to potential future referendums:

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“WHEREAS section 70(1) of the Constitution of the Cayman Islands provides for people-initiated referendums and that a law enacted by the Legislature shall make provision to hold a referendum amongst persons registered as electors in accordance with section 90 of the Constitution on a matter or matters of national importance that do not contravene any part of the Bill of Rights or any other part of the Constitution;

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17

AND WHEREAS, in accordance with section 70(2)(a) of the Constitution of the Cayman Islands, there was presented to the Cabinet a petition signed by not less than twenty-five per cent of persons registered as electors in accordance with section 90 of the Constitution of the Cayman Islands;

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AND WHEREAS, in accordance with section 70(2)(b) and (c) of the Constitution of the Cayman Islands, the Cabinet shall settle the wording of the referendum question and shall make a determination on the date for the holding of the referendum in a manner prescribed by this Law:

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NOW, THEREFORE, it is DECLARED that the matter specified in section 4(1) of this Law is a matter of national importance that does not contravene any part of the Bill of Rights or any other part of the Constitution.”

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19. Section 4 of the Referendum Law confirms the matter of national importance to be decided by the referendum and places limits on the Cabinet’s discretion in settling the referendum question:

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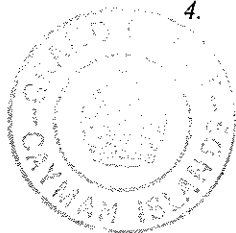
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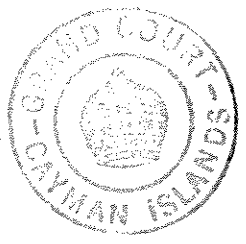
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“Matter of national importance and referendum question



4. (1) *The matter of national importance is whether the Islands should continue to move forward with the building of the cruise berthing and enhanced cargo port facility.*
- (2) *The Cabinet shall, in accordance with section 70(2)(b) of the Constitution, settle the wording of the referendum question for determining the matter of national importance under subsection (1) within thirty days of the coming into force of this Law.*
- (3) *In settling the wording of the referendum question the Cabinet shall, as far as possible, ensure that the referendum question is — (a) clear and simple; (b) directed at the core matter of*

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national importance under subsection (1); (c) unambiguous; and (d) neutral.

(4) *Upon settling the wording of the referendum question under subsection (2), the Cabinet shall promptly publish the referendum question — (a) by regulations in the Gazette; (b) in at least one newspaper circulating in the Islands; and (c) on Government websites.*

(5) *Cabinet shall prescribe the form of the ballot paper to be used for the purpose of the referendum in the regulations made under subsection (4) (a).*

(6) *The outcome of the referendum shall be binding on the Government and the Legislature if more than fifty per cent of persons registered as electors pursuant to the Elections Law (2017 Revision) vote in the referendum in favour of, or against, the referendum question."*

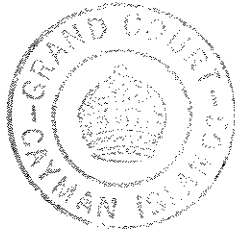
20. Section 5 defines who is entitled to vote in the referendum as being those persons who on the day of the holding of the referendum are registered as electors in accordance with s.90 of the Constitution and would be entitled to vote as electors at an election in an electoral district in accordance with the Elections Law 2017. Section 6 addresses the conduct of the referendum and section 7 deals with the issue of appointment by the Governor of persons to observe the conduct of the referendum, the verification of the ballot paper accounts and the counting of the votes. Sections 8-11 deal with the basis for a legal challenge by petition to the Grand Court to the referendum result. Section 12 explains how the Elections Law (2017 Revision) applies to the referendum:

"Application of Elections Law (2017 Revision)

(1) *For the purposes of the referendum, votes shall be cast, and the proceedings shall be conducted, so far as may be, as if the referendum was an election of members to the Legislative Assembly and the Elections Law (2017 Revision) and any rules in force under that Law shall, for those purposes, be construed accordingly, but any reference to a candidate, nomination, agent, election agent, polling agent or counting agent shall, unless the context otherwise requires, be disregarded.*

(2) *Without prejudice to subsection (1), the provisions of the Elections Law (2017 Revision) and the Elections Rules (2017 Revision) specified in column 1 of the Schedule shall apply in connection with the referendum, subject to the modifications or*

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exceptions specified in relation to those provisions in column 2 of that Schedule.

(3) *Unless the contrary intention appears in this Law and in the provisions of the Elections Law (2017 Revision) applied by this Law —*

(a) *a reference to an election or poll shall be construed as a reference to the referendum;*

(b) *a reference to an electoral district shall be construed as a reference to the area for which the relevant returning officer acts;*

(c) *a reference to polling day shall be construed as a reference to the day appointed for holding the referendum; and*

(d) *a reference to a ballot paper shall be construed as a reference to the ballot paper to be used for the purpose of the referendum.*

(4) *The Cabinet may by Order amend the Schedule.”*

21. The Schedule takes the form of a two column Table which sets out under the heading “provision applied and subject matter” the relevant section from the Elections Law and then in column 2 under the heading “Modification” sets out the nature of any modification for the purpose of the referendum including whether a particular provision is omitted or subject to a substituted provision. In relation to the issue of election expenses, column 2 simply says “omit” with the consequence that there are no limits on what the Government or any other interested person or group may spend on campaigning in the port referendum. In relation to the issue of regulating political broadcasts, the effect of the modification to the Elections Law is that there is no provision for equality of access to State owned media.

The Venice Commission Code of Good Practice

22. The European Commission for Democracy through Law (“the Venice Commission”) in its Code of Good Practice has set out non-legally binding guidelines on how States should guarantee an effective right to vote in referendums. The Commission is the

1 Council of Europe’s advisory body on constitutional matters and the UK Supreme
2 Court has in the past attached weight to its opinions⁵. Moreover, as Mr Buttler
3 emphasised in his submissions, the CIG has itself recognised the relevance and
4 importance of the Venice Code. Appendix three to the Cabinet Papers prepared for
5 the 31st October 2019 meeting is a paper headed “drafting the Question for the Port
6 Referendum” and at para 4 it states:

7
8 *“In addition, it is recommended that as far as possible the Cabinet should have*
9 *due regard to the position of [the Venice Commission]..in its Code of Good*
10 *Practice on Referendums last revised in October 2018. The Code has been*
11 *accepted by 47 European democracies and thus provides a significant yardstick*
12 *by which to consider Cabinet’s proposals.”* (emphasis added)
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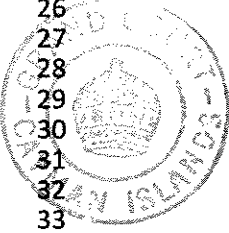
15 23. Mr Buttler relied on the following provisions of the Venice Commission Code in
16 support of his central submission that the Cayman Referendum Law is
17 unconstitutional:

18 *“Guideline I.2.2(a): “Equality of opportunity must be guaranteed for the*
19 *supporters and opponents of the proposal being voted on. This implies a neutral*
20 *attitude by administrative authorities, in particular with regard to: ...ii.*
21 *coverage by the media, in particular by the publicly owned media; iii. public*
22 *funding of campaign and its actors...”*
23

24 *Guideline I.2.2 (d): “Equality must be ensured in terms of public subsidies and*
25 *other forms of backing. It is advisable that equality be ensured between the*
26 *proposal’s supporters and opponents. Such backing may, however, be restricted*
27 *to supporters and opponents of the proposal who account for a minimum*
28 *percentage of the electorate. If equality is ensured between political parties, it*
29 *may be strict or proportional. If it is strict, political parties are treated on an*
30 *equal footing irrespective of their current parliamentary strength or support*
31 *among the electorate. If it is proportional, political parties must be treated*
32 *according to the results achieved in the elections”*.
33

34 *Guideline I.2.2(g): “Political party and referendum campaign funding must be*
35 *transparent”*.
36

37 *Guideline I.2.2(h): “The principle of equality of opportunity can, in certain*
38 *cases, lead to a limitation of spending by political parties and other parties*
39 *involved in the referendum debate, especially on advertising”*.
40



⁵ See for example *R (Barclay) v. Lord Chancellor & Secretary of State for Justice* [2010] 1 AC 464, para 68 and *AXA General Insurance Ltd v HM Advocate* [2012] 1 AC 868.

1 Guideline I.3.1(b): “Contrary to the case of elections, it is not necessary to
2 prohibit completely intervention by the authorities in support of or against the
3 proposal submitted to a referendum. However, the public authorities (national,
4 regional and local) must not influence the outcome of the vote by excessive, one-
5 sided campaigning. The use of public funds by the authorities for campaigning
6 purposes must be prohibited”.

7
8 Guideline I.3.1(d): “The authorities must provide objective information. This
9 implies that the text submitted to a referendum and an explanatory report or
10 balanced campaign material from the proposal’s supporters and opponents
11 should be made available to electors sufficiently in advance ... the explanatory
12 report must give a balanced presentation not only of the viewpoint of the
13 executive and legislative authorities or persons sharing their viewpoint but also
14 of the opposing one”.

15
16 Guideline II.3.4(a): “The general rules on the funding of political parties and
17 electoral campaigns must be applied to both public and private funding”. The
18 explanatory report states that this means: “National rules on both public and
19 private funding of political parties and election campaigns must be applicable
20 to referendum campaigns” (para 24).

21
22 Guideline II.3.4(b): “The use of public funds by the authorities for campaigning
23 purposes must be prohibited”.

24
25 In the event of a breach of the funding rules “for instance if the cap on spending
26 is exceeded by a significant margin, the vote may be annulled” (explanatory
27 report, para 24).

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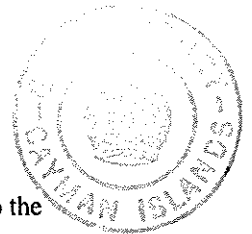
29 The parties’ submissions

30 24. In view of the novelty of the issue at the heart of this case and its importance to the
31 people of the Cayman Islands I intend to set out the rival arguments presented to the
32 Court in greater detail than is customary so that the wider public may better
33 understand what divides the parties.

34
35 25. *The Plaintiff’s submissions*

36
37 26. In paragraph 9 of his Skeleton Argument, Mr Buttler summarised the essence of his
38 argument on behalf of the Plaintiff as follows:

39 “9.1 Section 70 of the Constitution is an exception to the Cayman Island’s
40 political model of representative democracy. It provides for direct
41 democratic decision-making. In that direct democratic decision-making
42 process, the Legislative Assembly and the executive do not occupy a

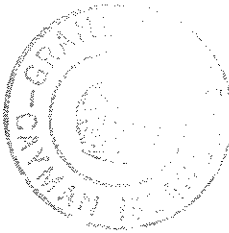


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privileged position. They are no more than parties to the debate. Given that a people-initiated referendum will almost invariably constitute a challenge to the policy choices made by the Legislative Assembly and the executive, they will (as here) stand on one particular side of the debate.

9.2 *Section 70 does not, as the Government contends, merely confer a "bald" constitutional right to a people-initiated referendum (DGD §43). The constitutional right to vote in a people-initiated referendum casts a positive obligation on the state to implement a framework of law to ensure that the right can be exercised effectively, including by ensuring that voters have access to fair and accurate information about the issue on which they have the right to vote.*

9.3 *The Legislative Assembly has discretion as to the means by which its laws should secure that the right to vote is effective. However, the Constitution requires the enactment of a general framework of law. It does not permit the Legislative Assembly to change the rules of the game depending on the subject-matter of the particular referendum. The Constitution does not permit the Legislative Assembly to formulate different sets of rules depending on the nature of its support or opposition for the particular referendum issue.*



9.4 *The Port Referendum Law breaches that requirement. It is tailored to the cruise port, which the Legislative Assembly supports. As the Government itself notes, "given the nature of the present referendum, which concerns a key manifesto commitment, it is unsurprising that the Legislative Assembly should have decided not to constrain Government from campaigning or spending public funds in doing so" (DGD §52). Indeed, nor is it surprising that the Legislative Assembly disapplied the usual campaign spending limits, in circumstances where this would reduce the risk of its decision being vetoed.*

9.5 *This has resulted in real and widely perceived unfairness. It has allowed the Government inter alia to monopolise political broadcasts on the state broadcaster and to spend public funds at a level that dwarfs the spending of those on the other side of the debate.*

9.6 *The Referendum Law should be quashed on the ground that it is incompatible with s 70 of the Constitution."*

27. Expanding on this fundamental argument, Mr Buttler relied on well-established principles on interpreting constitutional rights in support of his submission that the court should take a broad, purposive approach to s.70 of the Constitution and should

1 also take into account rules of international law. He cited Lord Bingham's oft cited
2 statement in *R v Reyes*⁶ that:

3 *"A generous and purposive interpretation is to be given to constitutional*
4 *provisions protecting human rights. The court has no licence to read its own*
5 *predilections and moral values into the Constitution, but it is required to*
6 *consider the substance of the fundamental right at issue and ensure*
7 *contemporary protection of that right in the light of evolving standards of*
8 *decency that mark the progress of a maturing society"*.

9
10 28. Mr Buttler also relied on the decision in *Hewitt v Rivers & Attorney General of the*
11 *Cayman Islands*⁷, in which Chief Justice Smellie gave guidance on the proper
12 approach to interpreting the Caymanian Constitution.

13
14 "37. *In summary, I consider that my approach to the interpretation of the*
15 *Constitutional provisions at issue on this petition must seek to give effect*
16 *to the real meaning of the provisions and where that meaning is not*
17 *plain, to apply a purposive interpretation. In that sense, the context will*
18 *be most important, including as it reflects the aspirations of the*
19 *Caymanian society which the Constitution embodies. The provisions*
20 *regulating the eligibility for election must be regarded as reflecting the*
21 *equality and freedom of Caymanians to participate in the fullest*
22 *expression of the political life of the Islands but this must be balanced*
23 *against the needs of the society to have competent representatives who*
24 *are loyal to the people who they are elected to serve.*

25
26 38. *It will follow then, that the court is required, where the words are not*
27 *plain, to have keen regard to the apparent aim which underlies a*
28 *particular constitutional provision in determining how it is to be*
29 *applied. And this approach also requires the court to be cognizant of the*
30 *import of modern developments – avoiding the artificial strictures of*
31 *what Lord Wilberforce stigmatized (in the words of Professor De Smith*
32 *which he made famous [de Smith, *The New Commonwealth and its**
33 *Constitutions (1964), p194 and see *Matthew v State* [2004] UKPC 33])*
34 *as "the austerity of legalism" [[1980] AC 319 at 329] that could deprive*
35 *the constitutional provision of its true spirit and meaning"*.

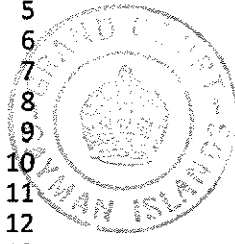
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37 29. The passage of *Matthew v State of Trinidad and Tobago*⁸ referred to by the Chief
38 Justice reads:

⁶ [2002] 1 AC 235, para 26

⁷ Cause 198 of 2013

⁸ [2005] 1 AC 433

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“In recent years the Privy Council has generally shown itself to be an enlightened and forward-looking tribunal. It has of course recognised that the provisions of any constitution must be interpreted with care and respect, paying close attention to the terms of the constitution in question. But it has also brought to its task of constitutional adjudication a broader vision, recognising that a legalistic and over-literal approach to interpretation may be quite inappropriate when seeking to give effect to the rights, values and standards expressed in a constitution as these evolve over time. It is such an approach which Lord Wilberforce stigmatised, in the phrase of Professor de Smith which he made famous, as ‘the austerity of tabulated legalism’: de Smith, *The New Commonwealth and its Constitutions* (1964), p 194; *Minister of Home Affairs v Fisher* [1980] AC 319, 328.” (para 34, per Lords Bingham, Nicholls, Steyn and Walker).

30. As to the significance of international law, Mr Buttler relied on Lord Sumption’s observation in *McGeoch v Lord President of the Council*⁹, that:

“The courts have for many years interpreted statutes and developed the common law so as to achieve consistency between the domestic law of the United Kingdom and its international obligations, so far as they are free to do so”.

31. Against that background he submitted that s 70 of the Constitution should be interpreted consistently with Article 25 of the *UN International Covenant on Civil and Political Rights*¹⁰ (“ICCPR”). It is obvious, argues Mr Buttler, that s 70 guarantees an effective right to vote (see for example Chief Justice Smellie’s observation in his PCO Judgment at §56) and construing s 70 consistently with the Cayman Islands’ obligations under Article 25 ICCPR fortifies that conclusion. Mr Buttler relied on General Comment 25 issued by the UN Committee on Human Rights on 12th July 1996 and in particular on paragraphs 1, 10-12 and 19 for the principle that the right to participation in a fair and effective referendum inevitably requires the State to implement laws to safeguard that right.

⁹ [2014] AC 271, para 121
¹⁰ “Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:
(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
(c) To have access, on general terms of equality, to public service in his country.”

1 32. Expanding on his written argument, Mr Buttler submitted that the use of the singular
2 "a law" and "a referendum" in s.70 of the Constitution is of no assistance in
3 construing the nature of the law required because words in the singular are deemed
4 to include the plural and vice versa – see the Interpretation Law, s4. The wording of
5 s 70 alone does not, he argued, compel the conclusion either that a framework law
6 is required or that it is not required. The "law" referred to in s.70(1) and "in a manner
7 prescribed by law" in s.70(2) does not prescribe the form of law required. However,
8 on a purposive construction, what s.70 clearly does require is a law governing the
9 petition process. That law has to be a general or framework law. It follows that s.70
10 requires some form of framework law and that the Legislative Assembly is in breach
11 of its legal duty to enact one.

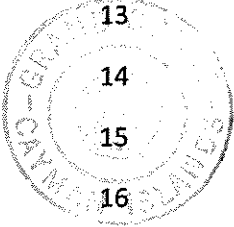
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13 33. Mr Buttler relied on four points in favour of the need for a framework law in order
14 properly to vindicate the right to a fair and effective opportunity to vote in a people-
15 initiated referendum. First, there must be some kind of process for verifying petition
16 signatures. Secondly, such a procedure has to be prescribed by law (see the judgment
17 of the Privy Council in *de Freitas v. Ministry of Agriculture*¹¹.) It follows from this
18 that the procedure which is required to determine the validity of petition signatures
19 must be prescribed by law. In the case of the port referendum, the decision of the
20 Elections Office to discount signatures on the basis that an individual had not signed
21 a second declaration or to allow signatures to be removed interfered with the right to
22 petition for a referendum under s.70. Those restrictions may or not be justified but
23 the point, according to Mr Buttler, is that the rule of law requires that limitations on
24 the right to petition must be prescribed by law and cannot be left to the individual
25 discretion of the Elections Office. Thirdly, this means that the "law" to which s.70
26 of the Constitution refers must include rules relating to the collection and verification

¹¹ [1999] 1 AC 69)

1 of signatures. Fourthly, those rules have to exist *before* an individual begins to
2 collect signatures. The individual must be able to regulate his or her conduct in light
3 of the law. Thus, the rules must be general in character. They cannot possibly relate
4 to a specific referendum.

5

6 34. Applying relevant principles of construction summarised above, Mr Buttler submits
7 that the court’s touchstone for construing s 70 of the Constitution should be: which
8 of the possible interpretations of s 70 best promotes the right that s 70 guarantees?
9 Section 70 confers on the electorate the right to vote in a binding referendum. This
10 right to vote empowers the electorate to veto or compel the implementation of a
11 proposal by the Government or Legislative Assembly. It is common ground that this
12 right to vote must be an effective right to vote and that an effective right to vote
13 imposes a correlative positive obligation on the State to implement laws to safeguard
14 the right (see Plaintiff’s Skeleton Argument, paras 21-24; Government’s Skeleton
15 Argument, para 9.) Recalling the words of the Chief Justice in *Hewitt v Rivers*, s.70
16 should be interpreted to reflect the aspirations of the Caymanian society which the
17 Constitution embodies, including the “freedom of Caymanians to participate in the
18 fullest expression of the political life of the islands”. Posing the question of what
19 better promotes the fullest expression of the right to participate effectively in a s.70
20 referendum – a framework law or bespoke laws for individual referendums – Mr
21 Buttler submits the answer is clear. Only a framework law will do.



22

23 35. Mr Buttler submitted that the absence of a general referendum law and the
24 Legislative Assembly’s hurried decision to enact an issue specific law for the
25 purposes of the cruise port referendum has generated serious impediments to the
26 holding of a fair and effective referendum. He relied on five features. First, the
27 Referendum law lacks effective provision for voter registration. Section 70 of the

1 Constitution provides that persons eligible to vote are those covered by s 90 and
2 although s 90 identifies the eligibility criteria it does not specify the manner in which
3 people may register. To give effect to the right to vote under s 70, every person
4 meeting the qualifying criteria under s 90 must be given a fair and effective
5 opportunity to register to vote in the referendum. The Referendum Law failed to
6 secure this because in light of the registration provisions under the Elections Law
7 (which apply to the port referendum by s.5 of the Referendum Law) and the coming
8 into force of the Referendum Law on 31st October 2019 the earliest that a new elector
9 could become enrolled to vote in the referendum was 1 April 2020. The fact that the
10 Referendum Law provided by s.3 (2) that the port referendum could be held not
11 earlier than the 30th day after publication of the referendum notice meant the
12 referendum could be held at any time after 1 December 2019. And it was in fact
13 fixed for 19 December. Accordingly, submitted Mr Buttler, this meant that the
14 Referendum Law made no provision to enable people to register to vote for the
15 precise purpose of the referendum. It was, he argued, perfectly possible that a person
16 uninterested in voting in a general election might nevertheless wish to register to
17 vote in the referendum. And some people will only have qualified as electors – by
18 turning 18 – since the last electoral list was published. Accordingly, the Referendum
19 Law strikingly failed to guarantee the right of people to register *for the purpose of*
20 *voting in the referendum.*

21
22 36. Secondly, the Referendum Law lacks any rules to govern the issue of campaign
23 financing. Whereas the Elections Law contains detailed provisions for the conduct
24 of general elections (see Part V governing candidates' expenses, third party funding
25 etc), the Referendum law fails to provide any controls on campaign financing. Part
26 V of the Elections Law is expressly disapplied with nothing in its place in
27 circumstances where the absence of such control suits the Government (which is

1 strongly in favour of a Yes vote in the port referendum). The absence of campaign
2 finance controls has caused real prejudice in this case submits Mr Buttler (see for
3 example Mr Moxam’s affidavit – Core Bundle 2, tab 24). In support of his argument
4 that it is inherent in the constitutional right to vote that there must be transparency
5 in relation to third party funding, Mr Buttler cited the ruling of the South African
6 Constitutional Court in *My Vote Counts NPC v. Minister of Justice and*
7 *Correctional Services*¹² which concerned a challenge to the absence of a right of
8 access to information on the private funding of political parties and independent
9 candidates under South Africa’s Promotion of Access to Information Act. Reliance
10 was placed on the constitutional duty of the State to respect, protect, fulfil and
11 promote the right to vote by ensuring that it is exercised meaningfully or with
12 understanding. Mr Buttler specifically cited paragraphs 32-34 of the Court’s ruling:

13 “[32] *The right to vote derives its fundamentality from the central role voting*
14 *plays in the establishment, functionality and vibrancy of a constitutional*
15 *democracy. It is a pre-requisite for the very existence of the Legislature*
16 *and the Executive at all levels of the State. And the proper exercise of*
17 *that right is so critical to the coming into being of our political arms of*
18 *the State and the effective and efficient functioning of the entire State*
19 *machinery that the need for transparency and accountability from those*
20 *seeking public office is self-evidently more pronounced. The future of*
21 *the nation largely stands or falls on how elections are conducted, who*
22 *gets elected into public office, how and why they get voted in. Only when*
23 *transparency and accountability occupy centre stage before, during and*
24 *after the elections may hope for a better tomorrow be realistically*
25 *entertained.*

26 [33] *This case is after all about establishing a principle-based system that*
27 *will objectively facilitate the meaningful exercise of the right to vote,*
28 *regard being had to its veritable significance. The system’s inbuilt*
29 *capacity to sift the corrupt from the ethically upright is an indispensable*
30 *requirement. For this reason, any information that completes the*
31 *picture of a political party or an independent candidate in relation to*
32 *who they really are or could be influenced by, in what way and to what*
33 *extent, is essential for the proper exercise of the voter’s “will” on which*
34 *our government is constitutionally required to be based.[28] An*
35 *environment must thus be created for the public to know more than what*
36 *is said in manifestos or during campaign trails. As will become*
37 *apparent below, what is implicitly envisioned by section 19 is an*
38 *informed exercise of the right to vote.*

¹² [2018] ZACC17, handed down on 21st June 2018.

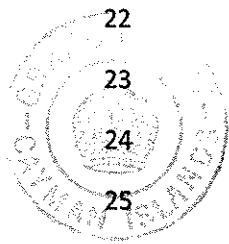
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[34] *For every citizen to be truly free to make a political choice, including which party to join and which not to vote for or which political cause to campaign for or support, access to relevant or empowering information must be facilitated. Not only must the information be "held" in one form or another, it must also be reasonably accessible to potential voters. They need it to be able to make a quality decision to vote for a particular political party or independent candidate."*

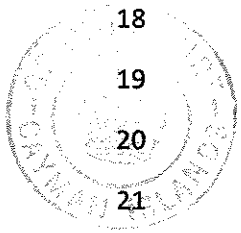
37. Thirdly, Mr Buttler attacked the Referendum law on the basis that it lacks clear rules on party political broadcasting. Although the Schedule to the Law does purport to make some provision for political broadcasts (see the Schedule and its reference to s.74 of the *Elections Law*), it makes no provision for equality of access to state-owned media (see Mr Moxam's Affidavit, Core 2, tab 24 at paras 23.1-23.3 and 30). The result has been a gross disparity in access to the state broadcaster and even the limited rules provided for under the Port Referendum Law have not been complied with.

38. Fourthly, argues the Plaintiff, the Referendum Law is flawed for want of any general rules relating to the formulation of the referendum issue. Mr Buttler points out that the Venice Commission take it as read that if a person is entitled to petition for a referendum, s/he is entitled to define the issue on which the vote will be held. For the right to initiate referendums to be effective, the people must be able to define the issue. Otherwise, the state can subvert the right by amending the issue to one that it would prefer were addressed. Under s.70 of the Constitution, the right to petition is on a "matter of national importance", but the Constitution does not identify how the matter of national importance is to be determined. In the case of the cruise port referendum, the Petition sought a "final say on the proposed cruise berthing facility" (LS-1, p95). It did not raise the refurbishment of the cargo facility at all. The Government argues that the cruise ship terminal is needed to cross-subsidise the refurbishment of the cargo facility. But this doesn't logically require the issue raised



1 by the petition to be redefined. The ability of the cruise terminal to generate profits
2 that can be used to fund the refurbishment of the cargo facility is merely a potential
3 argument in favour of the cruise terminal. The Government's approach mixes the
4 matter which the petitioners oppose – the cruise terminal – with a matter which they
5 support – the refurbishment of the cargo facility. And voters may well have different
6 views on the different matters. Mixing the issues, argues Mr Buttler, risks
7 undermining the effectiveness of one aspect of the s 70 constitutional right. That is
8 the right to petition to have determined the issue of national importance that the
9 petitioners want determined. Eliding a controversial issue with a popular issue
10 decreases the prospect of the Government and Legislative Assembly's policy being
11 vetoed. This therefore illustrates the need for a stable framework law. Mr Buttler
12 argues that one would expect the framework law to specify how an issue of national
13 importance is to be determined, thereby avoiding the risk of the approach being
14 tailored to suit the Legislative Assembly's position on a specific referendum issue.

15
16 39. Finally, Mr Buttler points to the absence of rules governing the provision of objective
17 information under the Referendum Law. He relies on para 3.1 of the Venice
18 Commission Code which although not demanding that a Government must remain
19 neutral on a subject submitted for referendum does require the provision of objective
20 information "which implies that the text submitted to a referendum and an
21 explanatory report or balanced campaign material from the proposal's supporters
22 and opponents should be made available to electors sufficiently in advance". The
23 Port Referendum Law makes no provision for objective information and Mr Buttler
24 argues that it suits the Government's and Legislative Assembly's purpose for the
25 information provided to the public to be one-sided. He submits by reference to the
26 evidence of Nadia Hardie, the Executive Director of the National Trust, that the

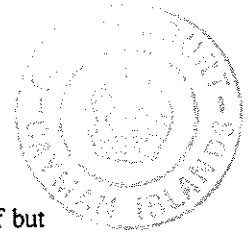


1 Government has disseminated brochures and leaflets at public expense which have
2 actively misled the public.

3
4 40. The fundamental point that Mr Buttler seeks to make is not that each of the five
5 identified defects in the existing Referendum Law necessarily renders it
6 unconstitutional. Rather they illustrate the matters which a general law might cover
7 and the difference which a general or framework law would make in terms of
8 vindicating the constitutional right to a fair and effective referendum. The numerous
9 controversies which have surrounded the Government's response to the cruise port
10 Petition vividly demonstrate, submits Mr Buttler, why, as the Constitutional
11 Commission had urged in its 2011 Research Paper, a framework law was a necessary
12 consequence of the decision to confer a constitutional right to a people-initiated
13 referendum on all Caymanians.

14
15 *The National Trust's submissions*

16 41. On behalf of the National Trust as interveners, Mr Tom Lowe QC made brief but
17 helpful submissions to supplement the Skeleton Argument lodged by the Trust. He
18 acknowledged that the Court was not engaged in an exercise of reviewing the legality
19 of the Government pursuing the cruise berthing project although it is clear from the
20 Trust's evidence that it is gravely concerned at the environmental damage that will
21 be inevitably caused by the dredging of George Town harbour even under the revised
22 scheme. Since the grant of leave on 3rd December 2019, attorneys for the National
23 Trust have written a letter before action to the CIG threatening to bring fresh
24 proceedings arising from the Trust's fear that the CIG will remove the protected
25 status of George Town harbour. But Mr Lowe accepted that that of course had no
26 relevance to the issue currently before the Court which simply concerns the
27 constitutionality of the Referendum Law.



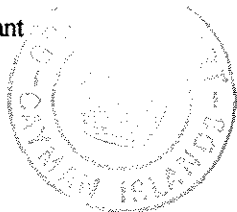
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42. Mr Lowe made clear that he endorsed all the arguments advanced by the Plaintiff and simply added three submissions on the issue of the proper construction of s.70 of the Constitution. First, he stressed the significance of the fact that the Cayman islands is a small jurisdiction of some 60,000 people and that it lacks the full institutional panoply that applies in larger States (such as a planning system and the holding of public inquiries into significant planning projects). In circumstances where a Government Minister was never going to call for a public inquiry into the benefits of the cruise port project pursuant to a planning law obligation, it was of vital importance, argued Mr Lowe, for the people to be able to debate the issues generated by the referendum fairly. Secondly, he emphasised that the right to an effective right to vote should not vary from issue to issue depending on the strength of view of the Government on the matter of national importance raised by an individual Petition. A purposive construction of s.70 thus demanded consistency and this required a framework law rather than one rushed through to deal with a single Petition. Finally, an effective right to vote demanded that there be principles of fairness embedded in the referendum process and it was plainly contrary to the principles set out in the Venice Commission to allow the Government to conduct what he called a one-sided propaganda campaign (as had happened in the instant case).

The Defendants' submissions

43. The essence of Mr Mark Shaw QC's argument in defence of the Plaintiff's assault on the Referendum Law is helpfully summarised in paragraph 5 of the Government's Skeleton Argument as follows:

"a. The Constitution requires the passage of a law by the Legislative Assembly regulating a s. 70 referendum. But nothing in the wording of s. 70 suggests



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that this is must be a *general law* applicable to all referendums, rather than a *specific law* enacted for the referendum triggered (as it has to be) by a particular petition. The Constitution leaves it to the Legislative Assembly to decide on the form and scope of the enactment. The Plaintiff's position is unduly restrictive and formulistic, giving the Constitution too narrow an interpretation, in demanding a general law *alone*. CIG urges the Court to favour a more liberal and flexible construction.

- b. The enactment of a specific law to address a specific referendum is not inherently problematical or impractical; nor is it unusual; nor does it undermine the right to a people-initiated referendum. After all, referendums are rare. S.70 came into force on 6 November 2009. So the port referendum is the first in a decade.
- c. In the present case, in the absence of a general law, and where a prompt referendum is a legitimate aim, the Legislative Assembly has chosen to address the regulation of the port referendum specifically. A general law would obviously take much longer to enact. While this might not be the *only* possible approach, it is lawful, reasonable and understandable in all the circumstances.
- d. In fact, CIG recognises policy reasons favouring a general law, including considerations of legal certainty and consistency. Accordingly, it is in the process of drafting such a law, which it anticipates being able to lay before the Legislative Assembly in the second half of 2020. The Court should not pre-empt that legislative process. It should reject the Plaintiff's apparent submission that s. 70 requires the deferral of the pending port referendum until after a general law has been enacted and applied, however long that might take and whatever consequences the Port Project suffers through delay. Such a conclusion is unwarranted for both legal and practical reasons.
- e. In any event, however the case is now put, the Plaintiff's real objection is not to the context (form) of the Referendum Law but to its content (substance). The Plaintiff's allegation of "real and widely perceived unfairness" is targeted at particular provisions (or non-provisions) in that Law, not at its specificity. After all, there would be nothing to prevent the Legislative Assembly from enshrining the very same regulatory measures within a general law. For reasons set out in CIG's Detailed Grounds of Resistance ("DGR") and further below, there is no basis in the Constitution for the Court to require the Legislative Assembly to make different regulatory choices from those it has made in this case."

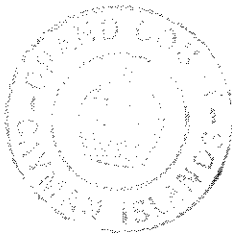


44. As for the proper approach to construing s.70 of the Constitution, Mr Shaw agreed with Mr Buttler that the Court should adopt a broad, purposive approach rather than a narrow technical one and should take non-binding rules of international law into account. However he said that the Court must also be vigilant not to trespass on the legislature's territory by implying into legislation rights, requirements or qualifications that the Court may consider desirable. Mr Shaw referred to the recent syntheses of the principles of constitutional interpretation in paragraphs 29-40 of the

1 unanimous judgment of the Court of Appeal of the Cayman Islands in (1) *Deputy*
2 *Registrar of the Cayman Islands & (2) Attorney General of the Cayman Islands v*
3 *(1) Chantelle Day & (2) Vickie Bodden Bush*¹³. In paragraphs 30-37 the Court of
4 Appeal cited with approval extracts from the underlying jurisprudence, concluding
5 as follows in paragraphs 38-39:

6 “38. *It is clear from the authorities cited, that the court must approach*
7 *constitutional provisions, such as those in the BoR, in a broad and*
8 *purposive manner, not narrowly and technically ...*
9

10 39. *As we readily accept, for the reasons the decisions make plain, the court*
11 *must interpret the Constitutional Law of the Cayman Islands and that*
12 *part of it which deals with citizens' rights, in a broad and purposive way*
13 *... However in doing so it is not open to the court simply to ignore or*
14 *put on one side what the provisions clearly say. For the court to do that,*
15 *on the basis of what are said to be current norms or mores or values,*
16 *has the real danger, as Lord Hoffmann put it in *Matadeen v Pointu*, of*
17 *the court giving "free rein to whatever [the judge] ... considers should*
18 *have been the moral and political views of the framers of the*
19 *constitution." Or as Kentridge AJ put it in *State v Zuma*, it could quickly*
20 *amount, not to interpretation but to "divination". As Ms Rose*
21 *submitted, it was not for the courts to impose their own values because*
22 *they disagree with the values expressed in a constitution. In other*
23 *words, it is not for the courts effectively to legislate in respect of a*
24 *constitutional provision, the meaning and effect of which is clear, and*
25 *reflects the drafter's intentions, because it disagrees."*
26

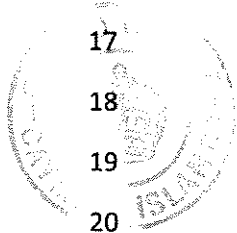


27 45. Mr Shaw submitted that Mr Buttler's arguments on the legality of the Referendum
28 Law violate those principles because they seek to convert legislative discretion into
29 duty, advocating an unduly restrictive and technical approach and inviting the Court,
30 in effect, to legislate on a matter of legislative and electoral policy just before the
31 Legislative Assembly itself does so (probably later in 2020).

32
33 46. In support of his central argument that a framework law was not a necessary
34 precondition of safeguarding the right to a fair and effective right to vote in a people-
35 initiated referendum, Mr Shaw made seven points. First, he argued that nothing in

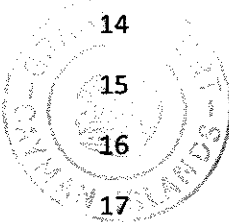
¹³ CICA No.9 of 2019 (7 November 2019) ("the Day case")

1 the wording of s.70 or its purpose indicated that a referendum law had to be of
2 general, as opposed to specific, application. The Constitution leaves it to the
3 Legislature to decide on the form and scope of a referendum law and the Court must
4 not imply rights, regulations and qualifications which the Constitution did not decide
5 were desirable. Mr Shaw submitted that there is nothing ambiguous about the
6 wording of s.70 and that the reference to “a referendum” suggests that a specific
7 rather than a general law is contemplated. Accordingly, s.70 envisaged that when a
8 valid petition is presented the Legislative Assembly will enact a particular law
9 providing for *that* referendum to be held. He submitted that a system whereby the
10 legislature is required to provide for a referendum on a case-by-case basis, when the
11 signature threshold is achieved, does not of course preclude the enactment of an
12 additional standing general law. And Mr Shaw made clear that in fact, CIG agrees
13 that it is preferable, as a matter of policy, to have a standing law to regulate
14 referendums under s. 70. The Court was told that the Government intends to sponsor
15 such a law later in 2020. But Mr Shaw asserted that it is not *legally required* to do
16 so. In response to Mr Buttler’s submission that the wording of s.70 is ambiguous on
17 the issue of a general versus a specific referendum law, Mr Shaw argued that if that
18 was right then it was permissible to look at the negotiations which preceded the
19 enactment of the Constitution. He relied on the Minutes of the Legislative
20 Committee chaired by Mr Hendry on 1th January 2009 in the Second Round of
21 Negotiations and, in particular, on what Mr D Kurt Tibbetts was recorded as saying
22 on p.401 in the context of a discussion about the intended difference between a
23 referendum initiated by the Legislative Assembly (s.69) and one initiated by “the
24 people” (s.70). During the discussion Mr Tibbetts appeared to assume that an
25 individual law would be created for each referendum instigated by the Legislature
26 pursuant to s.69 with the Legislature deciding, on a case by case basis, what the
27 threshold would be for it to be binding “depending on the nature of the issue”. Mr



1 Shaw submits that the fact that the same wording is used in both s.69 and s.70 of “a
2 law enacted by the Legislature” shows that both sections are to be read in the same
3 way as requiring a new referendum law to be made for each referendum whether
4 resulting from s.69 or s.70 of the Constitution.

5
6 47. Secondly, Mr Shaw submitted that there is nothing inherently impractical or unusual
7 about enacting a specific referendum law. He referred to the fact that prior to a
8 general referendum law being enacted in the UK in the form of the Political Parties,
9 Elections and Referendums Act 2000 (“PPERA”), individual referendums in the UK
10 were launched by a tailored Act of Parliament stipulating that a particular
11 referendum shall take place on a single issue. The Court was referred to the Report
12 of the Independent Commission on Referendums published in July 2018 which
13 makes this very point at §3.2. Mr Shaw also relied on the Venice Commission Code
14 to support his submission that there was no generally held view or universal principle
15 that *only* a general law could tick all the boxes which require to be ticked in order to
16 satisfy the requirements of fairness and effectiveness. He said that Mr Buttler’s
17 approach of asking what would “better promote” the constitutional right to a fair and
18 effective vote in a referendum under s.70 began from the wrong premise. The
19 Court’s task is to construe the natural and ordinary meaning of the s.70 and to further
20 its purpose rather than to seek to achieve perfection.



21
22 48. Thirdly, Mr Shaw submitted that the argument that a general or framework law is
23 necessary was excessively rigid and calculated to cause delay. There was, he argued,
24 a compelling need to hold a referendum on the cruise port issue reasonably promptly
25 and a requirement to enact a general law would inevitably cause serious delay in
26 resolving the issue of national importance raised by the CPR Cayman petition. He
27 submitted that if one reading of s.70 of the Constitution resulted in delaying the port

1 referendum, this told against such a construction and that it was ironic that Mr
2 Buttler's central submission was calculated to frustrate his client's wish for a speedy
3 referendum on the cruise port issue.

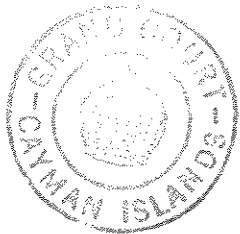
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5 49. Fourthly, and briefly, Mr Shaw submitted that the Court should not pre-empt that
6 which the CIG intends to do later in 2020 which is to enact a general law. Fifthly, he
7 argued that insistence on a general law is a plea for form to triumph over substance.
8 Ultimately, so he argued, the Plaintiff must identify relevant legal flaws in the
9 content of the Referendum Law as enacted and he pointed to paragraph 54 of the
10 Plaintiff's Skeleton which he characterised as an acknowledgement that there was
11 no guarantee that a general law would better promote the right to vote in a fair and
12 effective referendum and thus achieve a more lawful outcome.

13
14 50. Sixthly, Mr Shaw argued that a review of the relevant materials before the Court in
15 the form of case law, learned articles, reports and comparative law materials
16 established no binding or consistent norms governing the issues on which Mr Buttler
17 relied for his attack on the Referendum Law (such as campaign funding or a duty to
18 provide neutral, objective material to educate voters). He pointed out that there is
19 not a single case in which, in reliance on Article 25 of the ICCPR, the UN Human
20 Rights Committee has identified an absolute requirement for campaign finance laws
21 to exist. As for the Venice Commission Code, he argued that it does not purport to
22 crystallise international law; it is merely a guideline for best practice and that there
23 is no case law which holds that a referendum law must tick all the boxes in the Venice
24 Code. Mr Shaw submitted that the questions whether the State should be required to
25 provide neutral information in the context of a referendum and what, if any,
26 restrictions on campaign finance or governmental campaigning activities should be
27 imposed are substantive questions of legislative policy on which different
28 legislatures in different jurisdictions have taken different positions. He referred to

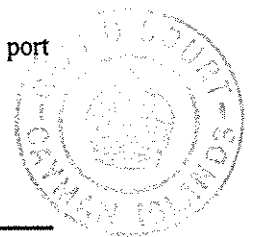
1 an extract from an academic work *Direct Democracy: A comparative study of the*
2 *theory and practice of government by the people* (2013) by Professor Matt Qvortrup
3 in which the author observes that in light of the considerable constitutional and
4 political implications of referendums in European states “it is somewhat odd that the
5 referendum is practically unregulated in these polities”¹⁴. Mr Shaw dismissed Mr
6 Buttler’s reliance on the South African decision in the *My Vote Counts* case on the
7 basis that it arose in the context of grave societal anxiety in South Africa concerning
8 corruption in political life and the consequent need for transparency in funding. He
9 also argued that it was a case concerning a general election rather than a referendum
10 and so the requirement of neutrality by the Government party and transparency in
11 campaign funding were addressed in a very different context. At the Court’s request
12 the Government’s legal team produced a Table which sought to summarise the
13 outcome of the Venice Commission survey into referendums and which showed that
14 in the great majority of Council of Europe jurisdictions which provided for people
15 initiated referendums, the result of the referendum is binding. However the Table
16 did not illuminate the issues in this case in terms of assisting in the construction of
17 s.70 of the Cayman Constitution which, uniquely amongst British Overseas
18 Territories, provides for a binding people-initiated referendum.

19
20 51. Finally, Mr Shaw relied on what he described as the reality of the local position in
21 Cayman in the context of his argument that the Referendum Law was

¹⁴ Interestingly, Prof Qvortrup concludes chapter 9, headed “Regulation of Direct Democracy” with some “Final thoughts” as follows: “These impressions do not amount to a general theory of direct democracy regulation. The patterns of regulation vary considerably. Yet a pattern can be discerned: America is easily the most regulated country – not because American politicians are more prone to regulate than Europeans and Australians, but because regulation makes it more difficult for the people to co-legislate and pass laws opposed to the wills of the legislators (and the interest groups). The politicians in Western Europe, on the other hand, have an incentive not to regulate the process, as this would increase the probability of defeats of their own proposals. In short referendums are seldom accompanied by regulation. What all this amounts to is a simple – yet undisputed – law of political science: politicians always seek to maximise their own influence – if necessary at the expense of others.”

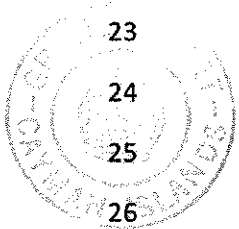


1 unobjectionable in terms of the absence of regulatory details for which Mr Buttler
2 had contended. He pointed out that s.70 is an unusual provision insofar as it enables
3 a minority of voters to trigger a referendum on what he described as a key Manifesto
4 commitment of the Progressive Party for their last two administrations elected in
5 May 2013 and May 2017. He said that it would be remarkable if a construction were
6 to be placed on the conduct of a referendum which had the effect of requiring the
7 Government to remain neutral. He accepted that the Government was plainly not
8 impartial on the port issue but argued that it could not be expected to be so. He said
9 that it was equally unrealistic to argue for a requirement that public funds may not
10 be spent on campaigning because the Government's democratic duty was to support
11 a policy on which it was elected. As for the fact that for want of *any* kind of law –
12 either general or specific – the petition verification process lacked any legal basis (in
13 breach of what Mr Buttler termed the *De Freitas* principle) this was a purely
14 technical complaint and that it was both lawful and reasonable to rely on the good
15 sense of the Elections Supervisor to devise a scheme for verification without any
16 pre-existing framework law. In relation to the question of voter registration and Mr
17 Buttler's argument that the Referendum Law disenfranchised persons from
18 registering in time to vote in the port referendum, Mr Shaw argued that there was
19 nothing wrong in linking the right to vote in a s.70 triggered referendum to the
20 Elections Law. The fact that certain persons may be unable to become registered to
21 vote in time for the referendum via the Elections Law registration process did not
22 mean that they were being disenfranchised. This is simply a consequence of ss. 13-
23 18 of the Elections Law 2017, which provides for the electoral roll to be updated on
24 a quarterly basis. They were simply not eligible to vote under the Elections Law and
25 could not complain that this translated into an inability to vote in the port
26 referendum.
27



1 52. Responding to the Plaintiff’s argument that the “specificity” of the referendum Law
2 has led to it being deficient in various ways and has enabled the Government and/or
3 legislature to proceed in a way that is unfair, Mr Shaw submitted that the complaints
4 about specificity and substance are distinct. The Legislative Assembly could just as
5 well have passed a *general* law that omitted the various prohibitions and protections
6 that the Plaintiff wishes to see included. And as for the specific respects in which
7 the Plaintiff alleges that the referendum has been rendered unfair, Mr Shaw said that
8 they concern the *substance* of the Referendum Law, not its *specificity*. The CIG
9 submits that there is no basis for the Plaintiff’s suspicion that the Government chose
10 the date of 19 December to reduce turnout. Nor does the date of 19 December 2019,
11 more than any other date, prevent votes being cast by those who are registered to
12 vote but have not yet been entered on the approved electoral roll. Whatever date is
13 set, there will be people who are registered to vote but have not yet been entered on
14 the approved electoral roll.

15
16 53. The fact that the original bill purported to specify the wording of the referendum is
17 entirely irrelevant, since the law (as enacted) did not do so. Section 4 specifically
18 required the CIG to word the question neutrally, so it cannot be said that the rules
19 were stacked in favour of the government by permitting non-neutral wording. Mr
20 Shaw said that it is strongly denied, in any event, that the wording was not neutral.
21 It has been changed since the grant of leave for pragmatic reasons. Insofar as the
22 Plaintiff laments the absence of a framework for determining what constitutes an
23 issue of national importance, such absence cannot have led to any unfairness in the
24 present case, since the national importance of the issue in question has always been
25 accepted by CIG. In any case, it is not clear that this concept is suitable for further
26 elaboration in the context of regulations: whether an issue is an issue of national



1 importance for the purposes of s. 70 is a matter ultimately for the courts construing
2 the Constitution.

3
4 54. As regards the reference in the referendum question to the cargo port facility, Mr
5 Shaw submitted that this simply reflects the fact that the government policy (which
6 CPR Cayman wishes by the referendum to challenge) is to build both facilities
7 together, for reasons explained in Mr Bodden’s first Affidavit (see paragraph 5). This
8 was well established by the time that CPR Cayman launched its petition, and a
9 referendum on the question whether to proceed with the new port facility *is* therefore
10 a referendum on the question whether to proceed with the enlarged and refurbished
11 cargo port facility as well. Finally, says Mr Shaw, the Plaintiff’s complaints at
12 paragraphs 48-53 of her Skeleton Argument similarly relate to the *content* of the
13 Referendum Law, and in particular the absence of a provision relating to the training
14 of observers, limits on use of public funds, the provision of objective information by
15 the state, and access to state-owned media. None is a consequence of the Law’s
16 specificity. And, the absence of such provision cannot be said to render the right to
17 vote in a s.70 referendum “ineffective”.

18 **Analysis**

19
20 55. The issue which I am required to decide is a novel one. No case law from any
21 jurisdiction was cited to me which analyses, in the context of a provision equivalent
22 to s.70 of the Cayman Islands Constitution Order 2009, whether the constitutional
23 right to a fair and effective vote demands by necessary implication the enactment of
24 a framework law to clothe the referendum process with legality from start to finish
25 or whether a bespoke law, providing *ad hoc* for a legal framework as each people-
26 initiated referendum is triggered, can just as well guarantee compatibility with the
27 Constitution. Accordingly, my task is to construe the true meaning and import of



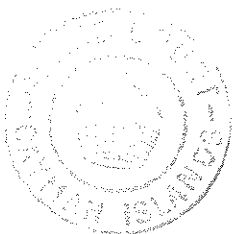
1 s.70 of the Constitution applying agreed principles of law as recently summarised by
2 the Court of Appeal in the *Day* case. In performing that task, a vital consideration to
3 be borne in mind is that s.70 is a provision which confers direct democratic rights on
4 the people of the Cayman Islands. In the words of Chief Justice Smellie when
5 considering the Plaintiff's application for a PCO in this case:

6 *"the claim here concerns the fundamental democratic right guaranteed by*
7 *section 70 of the Constitution: the right of every Caymanian voter to participate*
8 *in a fair and effective people-initiated referendum. Irrespective of the*
9 *importance of the issue which the referendum will decide, there is a very clear*
10 *and strong public interest in ensuring that the referendum is conducted in*
11 *keeping with the law."*
12
13

14 56. In deciding what the law requires, there is little, if any, scope for deference to the
15 Legislature in circumstances where the Constitution is the supreme source of law
16 and, as Dickson J. held in the Canadian Supreme Court decision in *Hunter v*
17 *Southam Inc*¹⁵, "the task of expounding a Constitution is crucially different from
18 that of construing a statute...the judiciary is the guardian of the Constitution". The
19 fact that there is no equivalent provision in the laws or Constitution governing any
20 other British Overseas Territory, no binding (or even persuasive) authority or
21 guidance at appellate level, no binding instrument of international law and, as I find,
22 no clarity to be gleaned on this subject from the negotiations which preceded the
23 Constitution to guide the Court means that a solution must be crafted on a blank
24 canvas.

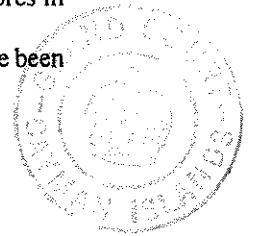
25
26 57. In the *Day* case, the Court was required to decide if the Marriage Law infringed the
27 Plaintiff's right to private and family life under the Constitution on the basis that it
28 defined marriage as "the union between a man and a woman as husband and wife".
29 The Plaintiff sought a declaration that the Marriage Law should be read so as to bring

¹⁵ [1984] 2 SCR



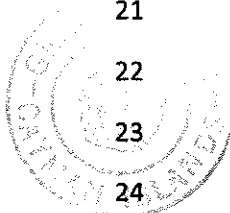
1 it into conformity with the Constitution on the basis that it guaranteed marriage
2 between persons of the same sex. In deciding in favour of the Plaintiff, the Chief
3 Justice held there was no ambiguity in the Constitution to justify recourse to the
4 negotiations which preceded its enactment. The Court of Appeal allowed the appeal
5 and agreed that the meaning and effect of s.14 (1) of the Cayman Bill of Rights was
6 sufficiently clear so that recourse to the negotiating history was unnecessary. In
7 reaching a different conclusion from the Chief Justice, the Court of Appeal
8 concluded that the Cayman Bill of Rights was plainly based on the European
9 Convention on Human Rights and that at the time of the legislation the jurisprudence
10 of the European Court of Human Rights was clear. Article 12 of the ECHR did not
11 impose an obligation to grant a same-sex couple access to marriage and it followed
12 that the rationale underlying the decisions of the European Court of Human Rights
13 applied equally to the Bill of Rights.

14
15 58. I cite this explanation of what was at stake in the *Day* case simply to point out that
16 in relation to s.70, there is no equivalent provision in the European Convention on
17 Human Rights - or any other relevant instrument - which is capable of informing the
18 true construction of the right conferred by the Constitution to a people initiated
19 referendum. In *Day* the Court of Appeal concluded that what the Bill of Rights had
20 to say about marriage was clear. It conferred a specific right to marry a person of
21 the opposite sex not a person of the same sex. In interpreting the Constitution in a
22 broad and purposive way, the Court of Appeal held that it was not open to the Court
23 to put aside what the provisions clearly say and to apply current norms or mores in
24 a manner which gave “free rein to whatever [the judge]...considers should have been



1 the moral and political views of the framers of the constitution” (*per* Lord Hoffmann
2 in *Matadeen v. Pointu*¹⁶).

3
4 59. In my view Mr Shaw’s reliance on what I regard (when viewed in the context of the
5 discussion as a whole) as some throwaway remarks by Mr D Kurt Tibbetts in the
6 course of the meeting on 15th January 2009 is unsound and incapable of supporting
7 his argument that s.70 clearly anticipates a bespoke referendum law to be enacted as
8 each petition crosses the threshold to trigger a binding referendum. No paper or other
9 aid to understanding the legislative intent behind s.70 was apparently presented to
10 the Committee engaged in the Second Round of Negotiations on the Constitution
11 and Mr Tibbetts’ isolated reference to “each time a law is created for that
12 referendum” is not capable in my view of providing a clear or definitive statement
13 of intent as to the form of law intended to be enacted to give life to the right
14 guaranteed by s.70. It was not suggested by Mr Shaw that any clear consensus
15 emerged from the Negotiations which throws light on the question whether a general
16 or specific law was necessary to respond to the words of s.70. In circumstances
17 where I consider that there is a lack of clarity in the bare language of s.70 concerning
18 the form in which the Legislature must enact legislation to make provision for the
19 holding of a people-initiated referendum, the Court must therefore give a generous
20 and purposive interpretation to a unique constitutional provision which guarantees
21 an important democratic right and decide if the Referendum Law is incompatible
22 with it. It is not a question of the Court applying contemporary mores to the right
23 contained in s.70 of the Constitution and imposing the Judge’s own moral or political
24 views about what should have been in the minds of the framers of the Constitution.
25 Rather it is a question of identifying how the requirements of legality, legal certainty,
26 fairness and consistency are best guaranteed given the nature of the right in issue and



¹⁶ [1999] 1 AC 98)

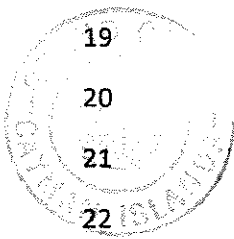
1 the apparent purpose behind its enactment. Determining the requirements of
2 legality, certainty and fairness is classically the function of a Court¹⁷. As recorded
3 above, in explaining to the people of the Cayman Islands the intention behind
4 enacting the 2009 Constitution, the Leader of Government Business said that “the
5 existing Constitution is outdated and does not effectively address the realities of
6 today.” He urged Caymanians to vote in the referendum on the Constitution “because
7 it will send a clear message to the United Kingdom that Caymanians fully support a
8 new constitutional relationship which not only gives us more say in running our
9 affairs but also protects our identity, culture and values.” Proposal 24 was addressed
10 to people-initiated referendums and the brochure distributed by the Government
11 explained “this proposal is an important part of increasing the checks and balances
12 on Government and increasing democracy”. While not of course a conventional aid
13 to construction, this statement is, in my view, illuminating in a situation where the
14 Court is now called upon to decide what are the minimum legislative requirements
15 necessary to ensure that the procedure for triggering a s.70 referendum, the rules
16 governing eligibility to vote as well as the conduct of the referendum process itself
17 combine to guarantee a fair and effective vote in a direct democratic process which
18 was plainly intended to increase the checks and balances on Government.

19
20 60. The fact that the first people-initiated referendum triggered by s.70 of the Cayman
21 Constitution Order 2009 has resulted in controversy and uncertainty, culminating in
22 this application for judicial review, is in my view the predictable consequence of the
23 Legislature’s failure to make any form of legislative provision in response to its
24 enactment more than a decade ago until after it became clear that CPR Cayman’s
25 Petition had gathered the necessary number of signatures by September 2019. And

¹⁷ See for example *R (Osborn) v. Parole Board* [2014] AC 1115 para 65.



1 the reaction of the Government to the campaign to gather the required number of
2 signatures hardly inspired confidence in the fairness and transparency of the
3 referendum process. Between August 2018 and September 2019 the process of
4 gathering and verifying signatures on the Petition organised by CPR Cayman lacked
5 any basis in law and it should have come as no surprise that objection was made by
6 CPR Cayman's lawyers to the actions taken by the Elections Supervisor in requiring
7 manual checks for each signature, the signing of a verification form and the
8 opportunity to un-verify signatures already gathered. Lacking any basis in a law
9 enacted by the Legislature (as required by s.70 of the Constitution), the process of
10 verification was, as CPR Cayman alleged, unclear and had the potential to impair
11 the constitutional right to petition. Having announced on 11th September 2019 that
12 the verification process had been completed and the Petition certified as meeting the
13 25% threshold required by s.70, the Government then proceeded to announce that
14 the Cabinet had already determined the referendum question and the date for the
15 referendum *before* any law had been enacted to authorise such sensitive matters. In
16 response to the detailed objections to the Government's actions raised by CPR
17 Cayman's legal team the Government initially rejected them before tabling
18 amendments to the Referendum Bill which were clearly designed to meet some of
19 the objections. The Bill (as amended) was then enacted on the basis of one hour's
20 notice to Opposition members, with the referendum question and date as initially
21 determined by the Cabinet re-confirmed in the Referendum Question Regulations
22 and Referendum Day Notice issued on the same day that the Referendum law was
23 passed.



24
25 61. But does this sequence of events and what I regard as the understandable reaction it
26 provoked, mean that a general or framework law was a necessary (as opposed to a
27 desirable) implication of the enactment of s70 of the Constitution in order to

1 guarantee the right to a fair and effective vote in the first people-initiated
2 referendum? Or, put another way, was a pre-existing general Referendum Law a
3 necessary precondition for the legality of this, the first people-initiated referendum
4 concerning the cruise port project? As stated above, the Cayman Islands
5 Constitution Commission clearly took the view as long ago as October 2011 that a
6 framework law should be passed as soon as possible to govern the referendum
7 process whether initiated by the Legislative Assembly pursuant to s.69 or a people-
8 initiated referendum pursuant to s.70 of the Constitution. Having cited the terms of
9 s.70, the Commission's Paper went on to state as follows:

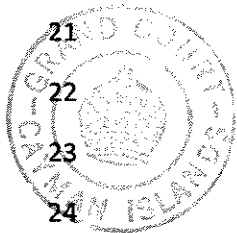
10
11 *"This means that any person(s) can begin a referendum by presenting to Cabinet*
12 *a petition signed by 25% of the electorate seeking a decision of the people on a*
13 *matter or matters of national importance. Cabinet is the part of the executive*
14 *body of government responsible for (i) creating policies regarding all aspects of*
15 *government business, and (ii) implementing such policies. If the petition is valid,*
16 *the Cabinet is then responsible for finalising the wording of the referendum*
17 *question and deciding a date for the referendum vote. The purpose of Cabinet's*
18 *involvement regarding the wording of the referendum question is to ensure that*
19 *the question is clearly stated on the ballot and not misleading to the qualified*
20 *electors voting on the matter(s). It is essential that the process for designing*
21 *the question is clear, and is adhered to. Details of the process would be*
22 *included in any legislation formulated to govern referendums.*

23 *Ultimately, the matter being petitioned forms the foundation for a referendum*
24 *question in relation to the matter, which is put to the electorate for a vote. It is*
25 *crucial that the question is stated clearly, simply and neutrally so that the voters*
26 *understand it and can be confident that they have voted in the way that they*
27 *intended to. The referendum becomes legally binding on the government when*
28 *more than 50% of the electorate vote in favour of the referendum question. If*
29 *less than 50%, it may be considered advisory and taken into consideration by*
30 *the government in its decision making process as is done in other jurisdictions.*
31 *This would also be a matter to include in the referendum legislation."*
32 (emphasis added)
33
34

35 62. The views of the Constitution Commission are not of course determinative but in my
36 judgment the Commission was right to conclude that a framework law to provide
37 legal authority for the administration of people-initiated referendums was a
38 necessary consequence of the enactment of s.70 of the Constitution. Absent such a
39 law, the pre-Petition process lacked clarity or legal support in terms of any and all

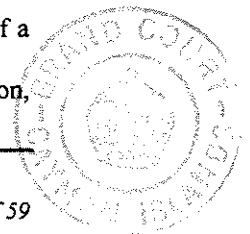
1 matters relevant to the pre-Petition process and which the Commission had identified
2 in 2011 as - standardised petition forms; topics able to be decided on (or not) by
3 referendum; petition process clearly defined; notification of initiating a petition;
4 Gazette publication following approval. I do not suggest that all such matters had to
5 be included in a framework law but a law which authorised and explained the pre-
6 Petition process and the subsequent collection of signatures, as well as the process
7 for verifying signature and certifying the Petition, was in my view necessary to
8 ensure a sound, transparent, fair and above all legal basis for any people-initiated
9 referendum. It follows that I accept the Plaintiff's central argument that the "law"
10 required by s.70 must be a general or framework law because it must cover the
11 process of collecting and verifying a petition and any such law must necessarily be
12 general in character.

13
14 63. Paragraph 5(d) of the CIG's Skeleton Argument states that "in fact the CIG
15 recognises policy reasons favouring a general law, including considerations of legal
16 certainty and consistency". It was clear from Mr Shaw's oral submissions that this
17 reference to "policy choices" meant that, in the view of the CIG, these were matters
18 solely for the Legislature to determine, free from Court interference. In my view,
19 questions of legal certainty, consistency and fairness are plainly matters for a Court
20 to determine. They are not merely policy considerations for the Legislature. A
21 framework law was necessary to enact in response to s.70 because, as Lord Clyde
22 observed in *de Freitas v. Ministry of Agriculture* in the context of a case concerning
23 the fundamental right of civil servants to freedom of speech, "where the line is to be
24 drawn is a matter which cannot in fairness be left to the hazard of individual
25 discretion". In relation to the Petition process, a procedure was plainly required to
26 determine the validity of petition signatures and was something which had to be
27 prescribed by law rather than, as Mr Shaw suggested, a matter which could be left



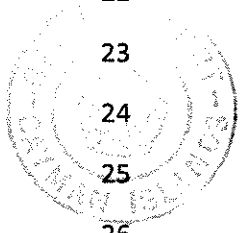
1 to the common sense of a civil servant to devise, in effect, on the hoof. Although it
2 made no difference in the instant case because the Petition was ultimately certified,
3 the decision of the Elections Office to discount signatures on the basis that an
4 individual had not signed a second declaration or to allow signatures to be removed
5 interfered with the right to petition under s.70. Such restrictions may or may not be
6 justified but I accept Mr Buttler's submission that the rule of law requires that
7 limitations on the right to petition must be prescribed by law rather than left to the
8 individual discretion of the Elections Officer.

9
10 64. Another powerful factor in favour of the need for a framework law governing
11 people-initiated referendums is the clear policy which underpins the enactment of
12 s.70, namely the promotion of the exercise of effective, direct democratic rights with
13 a view to increasing the checks and balances on Executive action. Section 70 of the
14 Constitution confers a direct democratic right on the people to veto the policy
15 choices of their democratic representatives. One may reasonably argue about the
16 logic and wisdom of inserting such a right into a Westminster model of
17 representative democracy and question whether it is sensible that a minority of some
18 25% of electors can trigger a binding referendum on a matter which has been a
19 prominent manifesto commitment of the governing Party for many years and which
20 was recently elected to power on such a commitment. But the simple reality is that
21 that is what the Constitution provides. The very fact that it is highly likely that the
22 Government will have a strong view on whatever matter of national importance
23 triggers a binding referendum – and in the case of the port referendum, the
24 Government is strongly in favour of a Yes vote – is in my view a powerful reason in
25 favour of the need for a general law setting out the ground rules for the conduct of
26 all referendums rather than proceeding by way of specific, *ad hoc* enactment of a
27 new law each time a s.70 referendum is triggered. I accept Mr Buttler's submission,



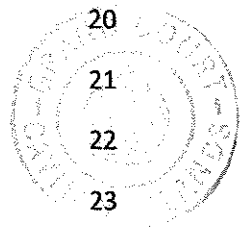
1 as reflected in his Amended Ground 4, that allowing the democratic representatives
2 to change the ground rules every time there is a referendum risks the rules being
3 changed to promote their policy choice thereby undermining the effectiveness of the
4 people's direct democratic right freely to question that policy choice via a fair and
5 effective vote in a people initiated referendum. And the evidence before the Court in
6 the instant case does in my view provide considerable support for the argument that
7 the way the referendum question was originally formulated and the date chosen; the
8 linking of eligibility to vote with the Elections Law so that persons not already
9 registered could not qualify to vote by the chosen referendum date; the absence of
10 any campaign finance rules or any rules governing political broadcasting; and the
11 absence of any rules governing the provision of objective information to voters all
12 combined to create an unequal playing field which was heavily stacked in favour of
13 the Government side to an extent which endangered the right to a fair and effective
14 vote. Enacting a general law, while not necessarily eliminating the risk that the odds
15 may be stacked against those seeking to veto a particular Government policy, is
16 bound in my view to reduce that risk. I consider that the inevitable tension between
17 direct and representative democracy is an important factor when construing s.70 of
18 the Constitution and deciding which form of legislative response best ensures that
19 the policy which underpins it is furthered.

20
21 65. As the Court was informed, for reasons of legal certainty and consistency (as well,
22 apparently, as other unspecified reasons) the Government is currently engaged in the
23 process of drafting a general referendum law and anticipates being able to lay it
24 before the Legislative Assembly in the second half of 2020. Mr Shaw cautioned me
25 that I should not pre-empt that legislative process and I made clear in the course of
26 the argument that whatever view I formed on the compatibility of the Referendum
27 Law with the Constitution I had no intention of embarking on the exercise of drafting



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a model framework law. That is plainly not the Court’s task. Equally I do not intend to rule on whether the absence of a general law has resulted in substantive unfairness in the context of the campaign to date. The Plaintiff’s amended Ground 4 contends that the Referendum Law as enacted failed effectively to guarantee the right of voter registration; there are no rules on campaign financing; the rules on party political broadcasting are unclear and inadequate; there are no rules on formulating the referendum issue; and there are no rules on the provision of objective information to voters. All of these are matters which will no doubt have to be addressed in the context of drafting the general referendum law which is currently being considered. On the basis of the materials presented to the Court (and particularly the Venice Code of Good Practice 2007, Article 25 ICCPR: General Comment 25 and the Report of the Independent Commission on Referendums, July 2018) there is clearly a range of measures which may be considered for inclusion in a general referendums Bill in order to ensure a fair and effective right to vote. But there is no obvious consensus on what these must be, still less a standard blueprint which is required to pass muster in constitutional terms. Ultimately it must be for the Legislature to decide what a general Cayman Referendums Law should contain to guarantee a fair and effective right to vote in a s.70 referendum, no doubt informed by the advice of the Constitutional Commission in discharge of its s.118 Constitutional function to advise the Government on constitutional development in the Cayman Islands. It is, in my view, unfortunate that apparently no Government has seen fit since the Commission published its thoughtful and well-reasoned Research Paper in 2011 to respond to the Commission’s views on what it clearly felt was the obvious need for a general referendum law. It is also surprising that the Government made no response to the Commission’s strong recommendation in October 2014 that a Committee be established to consider the issue of what form of law was necessary to enact in response to the enactment in 2009 of s.70 of the Constitution. Had this



1 matter been addressed earlier, the uncertainty and ultimately, as I have found, the
2 incompatibility of the Referendum Law 2019 with the Constitution might well have
3 been avoided.

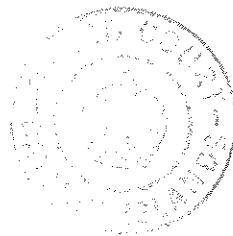
4 **Conclusion**

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6 66. For reasons of legality and on the basis that such a law will best guarantee the
7 constitutional right to a fair and effective vote in a people-initiated, binding
8 referendum, I find that the Referendum Law 2019 is incompatible with s.70 of the
9 Constitution because it fails to satisfy the requirement for a general law governing
10 all s.70 referendums and is itself not in accordance with such a law. I will hear further
11 argument on the appropriate relief.

12
13 67. I wish to express my thanks to all the legal teams who prepared this important case
14 at short notice and in a way which enabled the Court to assimilate a considerable
15 amount of materials in an effective way. I also pay tribute to Mr Shaw QC, Mr
16 Buttler and Mr Lowe QC for their excellent oral submissions which greatly assisted
17 my understanding of the issues raised by this claim.

18

19 **Dated this 19th day of February 2020**



20

21 **Honourable Mr. Justice Tim Owen Q.C. (Actg.)**
22 **Acting Judge of the Grand Court**