COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

PUBLIC LAW DIVISION

2016/PUB/con/00016

IN THE MATTER OF ARTICLES 15, 20, 21, 23 & 28 OF THE CONSTITUTION OF THE COMMONWEALTH OF THE BAHAMAS

BETWEEN

COALITION TO PROTECT CLIFTON BAY

1st Applicant

AND

ZACHARY HAMPTON BACON III

2nd Applicant

AND

THE HON. FREDERICK A. MITCHELL MP
(Minister of Foreign Affairs and Immigration)

1st Respondent

AND

THE HON. JEROME FITZGERALD MP
(Minister of Education, Science and Technology)

2nd Respondent

AND

THE ATTORNEY GENERAL OF THE COMMONWEALTH OF THE BAHAMAS

3rd Respondent

Before: The Hon. Madam Justice Indra H. Charles

Appearances: Mr. Frederick Smith QC with him Mr. Ferron Bethell, Ms. Camille Cleare, Mr. Dawson Malone, Mr. Adrian Gibson and Ms. Leandra Esfakis for the Applicants

Dr. Lloyd Barnett OJ, Mr. Loren Klein, Mr. Franklyn Williams, Mrs. Darcel Smith-Williamson and Ms. Hyacinth Smith for the Respondents

Hearing Dates: 18, 19, 20, 26, 27 May 2016

CATCHWORDS:

Constitutional Originating Motion – Jurisdiction – Exclusive competence of Supreme Court to adjudicate on constitutional breaches under Article 28(2) - Separation of Powers – Independence of the Judiciary under Article 20(8)

Doctrine and scope of Parliamentary Privilege – Principle of Non-Intervention - Internal Affairs of Parliament – Private and confidential e-mails of non-profit incorporated environmental lobby group disclosed during Parliamentary proceedings by a Member of Parliament and Minister of Government — Reference made to email by other Members of Parliament and Ministers of Government during debate – Emails referred to environment group's financial information and the payments of specific sums to persons engaged by group - source of email not disclosed or explained – s. 4, Power and Privileges (Senate and House of Assembly) Act – Interpretation— Whether parliamentary privilege grants absolute immunity to words spoken or things done in Parliament

Constitution – Applicants alleged breach of fundamental rights - Liberal and generous approach in construing constitution – Whether acts of Ministers attributable to Government - Executive acts –Whether doctrine of parliamentary privilege subordinated to fundamental rights claims -- Enforcement of Fundamental rights -- Article 21 of Constitution – Right to Protection of privacy of home and other property – Article 23 of Constitution – Freedom of Expression – Article 15 of Constitution – Whether Article 15 creates freestanding justiciable rights -- Article 28 – Redress for breaches of fundamental rights -- Damages for breach of fundamental rights – Compensatory and Vindicatory Damages – Order for delivery up of private and confidential emails – Whether emails private and confidential – Whether Disclosure in the Public Interest - Savings Clause in Article 30 – Locus standi – "relevant interest" in constitutional matters. Evidence—Whether evidence to substantiate claim that private and confidential material illegally or unlawfully obtained and/or disclosed –

Statements made outside of Parliament -– Not covered by parliamentary privilege – Constitutional remedies are remedies of last resort – Alternative remedies – Injunction – Damages including vindicatory damages – Order for delivery up.

Interlocutory injunction – Whether maintainable against Members of Parliament to prevent exercise of parliamentary functions – Representation of Parties – Whether AG may represent Members of Parliament and Ministers with regard to actions arising out of parliamentary proceedings

The 1st Applicant is a non-profit incorporated environmental group ("Coalition to Protect Clifton Bay"), popularly called "Save the Bays". The 2nd Applicant is a named individual affiliated with the Coalition. They brought a constitutional motion challenging the disclosure of private and confidential emails said to belong to them. The motion named

the Minister of Foreign Affairs and Immigration and the Minister of Education, Science and Technology, both Members of Parliament and Ministers of the Government, as the 1st and 2nd Respondents respectively. The 3rd Respondent is sued in her capacity as the Attorney General.

The emails were disclosed in unconnected Parliamentary Proceedings by the 2nd Respondent and referred, inter alia, to the Coalition's financial information and to specific sums of monies paid to persons engaged by the Coalition for various purposes. The source of the emails was never disclosed or fully explained. The Applicants obtained an interlocutory injunction preventing further disclosures pending trial, and the Court in effect extended this by ordering the status quo ante maintained after the interlocutory injunction expired prior to the trial of the action.

The Applicants claimed that the disclosure of the emails violated their Constitutional rights, including Article 21 (Right to Protection of home and other property) and Article 23 (Freedom of Expression). The Applicants also relied on Article 15 to buttress their claim and Article 28 (the redress provision) to claim various relief including compensatory and vindicatory damages, as well as an order for delivery up and a perpetual injunction.

The Respondents appeared by the Attorney General and defended the application on various grounds, including the contention that the Applicants did not factually establish that the email correspondence was confidential and privileged, that disclosure was not in the public interest, and that the Respondent(s) had obtained the material by illegal or unlawful means. The Respondents also relied on the doctrine of Parliamentary Privilege and contended that as result of that doctrine the Court should decline making orders that impinged on the ability of Members of Parliament to exercise their parliamentary functions. Further, the Respondents argued that the Applicant(s) had not made out any of the constitutional breaches claimed, and that in any event Article 15 of the Constitution did not create any freestanding justiciable rights.

HELD:

1. The Courts are given an exclusive jurisdiction to adjudicate on and to supervise breaches of the Constitution by the Executive and the Legislature. Parliament cannot change the scope or divest the Court of its "original jurisdiction" by legislation. In addition, it is for the Court and not Parliament to decide on the scope and application of parliamentary privilege: **R v Chaytor et al** [2010] UKSC 52 at [15] – [16].

2. When exercising its original jurisdiction under the Constitution, it is paramount for the judiciary to be independent and free from interference by the Executive and Legislature: **Ponoo v Attorney General** [2012] 5 LRC 305 at [68]. See also: **R v Jones** [2008] 1 LRC 1 at [9] – [10].

3. The Government cannot rely on the shield of parliamentary privilege to oust the jurisdiction of the Court when a person alleges breaches of the Constitution. Any attempt to do so would amount to a breach of Article 20(8) and Article 15(A) of the Constitution.

4. As a general rule, the Court should not meddle in the internal affairs of Parliament and should leave it to regulate its own internal affairs. The Court also recognises that the authority and dignity of Parliament would be seriously compromised if it were to interfere arbitrarily in the internal procedures of Parliament. But if a person alleges that his/her constitutional rights have been or are being infringed, in order to establish that infringement, the Court would be entitled to carry out an inquiry to determine whether there was indeed a breach: **Bahamas District of the Methodist Church in the Caribbean and the Americas and Others v The Hon. Vernon J. Symonette M.P. Speaker of the House of Assembly and 7 Others** [2000] UKPC 31; **Toussaint v AG of St. Vincent and the Grenadines** [2007] 1 WLR 2825; **Hon. Mark Brantley (Leader of the Opposition) et al v Hon. Curtis Martin (Speaker of the House of Assembly)** Claim No. SKBHCV2013/0090.

5. In the Bahamas, the Constitution is the supreme law of the land and the Court is the guardian of the Constitution. Parliamentary privilege is trumped by breaches of the Constitution and although Parliament is supreme, it is not as supreme as the Constitution. Therefore, Parliament cannot use its privileges to trample on the constitutional rights of an individual.

6. In construing constitutional provisions a broad and generous approach is required to give individuals the full measure of the rights and freedoms referred to in the Constitution: **Minister of Home Affairs v Fisher** [1980] AC 319 - per Lord Wilberforce at pp.328-329; **AG v Whiteman** (1991) 39 W.I.R. 397 at p. 412, and **Benjamin v Minister of Information and Broadcasting** [2001] UKPC 8; 58 W.I.R. 171.

7. The acts and statements made by the 1st and 2nd Respondents are attributable to the Government. The concept of "Government" or "Executive" is a legal fiction since it can only act through the Prime Minister and the Members of the Cabinet: see Article 72 of the Constitution.

8. Article 15 is a preambulatory section and is not given enforceability status by Article 28, which effectively provides for the enforcement of fundamental rights: **Grape Bay Ltd v Attorney General** [1999] UKPC 43 and **Newbold v Commissioner of Police**[2014] 4 LRC 684. Therefore Article 15 creates no free-standing rights under the Constitution.

9. As a condition precedent to asserting a claim for constitutional protection and redress, an applicant has to make good his factual allegations of constitutional abuse.

10. In analyzing the case against each Respondent separately, the Applicants have failed to make out a case against the 1st Respondent for any breaches of their fundamental rights either under Article 21 and/or Article 23 of the Constitution.

11. The Applicants have made out a case against the 2nd Respondent. The 2nd Respondent has acted in breach of Article 23 of the Constitution – which contains an inextricable link between freedom of expression and privacy, **per Newbold v. Commissioner of Police** [2014] UKPC 12 at [26] – by obtaining, possessing, reviewing and subsequently making disclosures from the Applicants' Private and Confidential Disclosures both inside and outside of Parliament. The savings provision at Article 23(2) does not justify these interferences since they were not made "*under the authority of any law*", the 2nd Respondent not having put forward any potential legal basis for the seizure and review of the private and confidential documents.

12. The 2nd Respondent has breached Article 21 of the Constitution which prohibits, *inter alia*, the search of any legal or natural person's property without that person's consent except where this is being done under the authority of law: *per* **Attorney General of Jamaica v. Williams** [1988] AC 351 at [355]. In the present case the Applicants consent had at no stage been given for transmission to third parties let alone publication and the 2nd Respondent had not provided any argument or evidence at trial that they had obtained the private and confidential documents as a consequence of a search "*justified by law*". As such, all of the 2nd Respondent's dealings with the Applicants' correspondence, including their search and seizure or obtaining possession and perusal thereof, was in breach of the Applicants' right to protection from search and seizure of their property as guaranteed by Article 21 of the Constitution.

13. The savings clause at Article 30 of the Constitution does not save the Powers and Privileges (Senate and House of Assembly) Act 1969 ("the PPA"). On any view, the PPA only applies to what was said in Parliament and has no applicability to what was said outside of Parliament: **Buchanan v Jennings (Attorney General of New Zealand intervening)** [2005] 1 AC 115.

14. The 1st Applicant has standing. A person includes a legal entity like a company: **Maycock v The Attorney General and Another** [2010] BHS J No. 73; **Attorney General of Antigua v Antigua Times** [1976] AC 16. The 2nd Applicant is a person with a "relevant interest" and not a meddlesome busybody.

15. It is well established that the right to apply to the Supreme Court pursuant to Article 28 of the Constitution should be exercised only in exceptional cases where there is a parallel remedy. See: **Thakur Persad Jaroo v The Attorney General of Trinidad and Tobago** [Privy Council No. 54 of 2000]; **Harrikissoon v Attorney General of Trinidad and Tobago** [1980] AC 265; **Chokolingo v Attorney General of Trinidad and Tobago [**1981] 1 WLR 106 at pp. 111-112

and **Hinds v The Attorney General** [2001] UKPC 56. The mere existence of an alternative remedy does not automatically warrant excluding constitutional proceedings under the proviso to Article 28(2). The crux is their adequacy. The power to decline jurisdiction arises only where the alternative means of redress is considered to be adequate. The Court finds that the bringing of this constitutional motion is not an abuse of the process as no parallel adequate remedy is available to the Applicants.

16. Given the findings that the 2nd Respondent has committed breaches of the Constitution under Articles 21 and 23, this Court orders:

    (a) The grant of a permanent injunction against the 2nd Respondent that prohibits the further release or publication of any information contained in the private and confidential documents;

    (b) An Order for the permanent destruction and/or deletion of all electronic files or records as well as the destruction of hard copies of all documents within 14 days (along with an affidavit of compliance to be filed within 14 days); and

    (c) Vindicatory damages to the Applicants in the sum of $150,000 to be paid by the Respondents, this level of quantum being appropriate taking into account (i) the egregious breaches of the Constitution **(Tamara Merson v. Drexel Cartright** [2005] UKPC at [18]) and (ii) that the Government had sought to avoid constitutional scrutiny of its actions by trying to hide behind the cloak of parliamentary privilege, and (iii) to deter similar breaches in the future (Privy Council in **Inniss v. Attorney-General** [2008] UKPC 42 at [25]).

JUDGMENT

Introduction

[1] The Coalition To Protect Clifton Bay (known as “Save The Bays”) and Mr. Zachary Hampton Bacon III (“the Applicants”) brought a constitutional action commenced by an Amended Originating Notice of Motion (“the constitutional motion”) seeking a litany of declarations and orders including a permanent injunction to restrain two Cabinet Ministers from referring to, making use of, repeating or relying upon any of the information contained in the Applicants’ email correspondence within or outside of Parliament. The Applicants further seek a permanent injunction to restrain the Ministers from any further breaches of their constitutional rights as guaranteed by various Articles of the Constitution

of the Bahamas ("the Constitution") as well as damages including vindicatory damages.

[2] Unquestionably, this case has sparked national and regional interest because it raises, among other things, complex and grave issues as to the scope of the powers, privileges and immunities of Parliament vis-à-vis the Constitution. It has also brought to the fore some tension between Parliament and the Courts with respect to the privileges of Parliamentarians. This area of possible conflict has its genesis in the historical efforts of Parliament to assert its right to self-governance and independence against an absolute monarch which resulted in the enactment of the 1689 Bill of Rights.

[3] The Respondents challenged the constitutional motion on a number of grounds, principally (i) that the use or disclosure of the email correspondence during parliamentary proceedings did not breach any of the Applicants' rights or rights under the Articles of the Constitution which have been invoked; (ii) the Court does not have jurisdiction to adjudicate on matters occurring within the sacred walls of Parliament or make orders purporting to impinge on the conduct or speech of Members of Parliament and (iii) it is not appropriate for the Court to further intervene when the House has taken steps to regulate its own proceedings and a super-injunction remains extant.

The parties

[4] The 1st Applicant is a non-profit company incorporated under the Companies Act with its stated purpose of working to preserve and protect the Bahamian environment through proactive policy change, education, legal action and advocacy. Mr. Joseph Darville ("Mr. Darville") is the chairman and a director of Save the Bays. He swore an extensive affidavit on 21 April 2016 in these proceedings.

[5] The 2nd Applicant is Mr. Zachary Bacon III ("Mr. Zack Bacon"). He is the brother of Mr. Louis Bacon, who is a founding member and director of Save the Bays.

Together, the 1st Applicant and the 2nd Applicant will be referred to as "the Applicants".

[6] The 1st Respondent, The Honourable Frederick A. Mitchell, is the Minister of Foreign Affairs and Immigration.

[7] The 2nd Respondent, The Honourable Jerome Fitzgerald, is the Minister of Education, Science and Technology. They are both Members of Parliament and Cabinet Ministers. Interchangeably and conveniently, they will be referred to by their names or as the 1st or 2nd Respondent. The Third Respondent is the Attorney General (together "the Respondents").

Procedural history

[8] On 21 April 2016, the Applicants applied by way of *Ex parte* Summons for an urgent interlocutory injunction. The Summons was supported by the affidavit of Mr. Darville of the same date. The Applicants alleged that the application was urgent as the disclosure of more emails was imminent. Nonetheless, the Court requested Learned Queen's Counsel, Mr. Smith who appeared for the Applicants, to serve and/or notify the Respondents of the hearing.

[9] At the commencement of the hearing for the urgent interlocutory injunction on 22 April 2016, Mr. Smith QC informed the Court that the Applicants served the Office of the Attorney General with the unfiled relevant documents and when it was filed, that Office was served again. He also stated that he spoke with Mr. Loren Klein and Mr. David Higgins, both senior counsel in the Attorney General's Chambers; the latter directing him to the Director of Legal Affairs, Ms. Antoinette Bonamy. In her affidavit filed on 29 April 2016, Ms. Bonamy acknowledged that the Office of the Attorney General ("OAG") was notified of the application – see [9]. However, she does not accept that the OAG received proper or adequate notice of the action. It is true that the notice was short but it is not uncommon for urgent applications to be heard at short or abridged notice.

[10] The ex parte injunction with notice sought to prohibit the 1st and 2nd Respondents from disclosing further private and confidential correspondence of the Applicants in and outside Parliament until the return date of Thursday, 12 May 2016. Paragraph 2 of the Order gave liberty to the Respondent to vary or discharge the injunction upon three (3) clear days' notice to the Applicants.

[11] Also, on 21 April 2016, the Applicants commenced this constitutional motion. The Motion was amended with leave when the parties appeared on 12 May 2016. The Applicants made further amendments. Given the urgency of the hearing of this motion, the Court permitted the amendments.

The undisputed facts

[12] The facts are taken from the Applicants' Statement of Facts and Issues filed on 17 May 2016 and the Respondents' Statement of Facts and Issues filed on 17 May 2016. The facts are largely uncontroverted and I gratefully adopt them.

[13] During parliamentary proceedings on 15 and 17 March 2016, the 1st and 2nd Respondents read from and referred to private and confidential emails and other documents belonging to the Applicants. This included the following statements made during parliamentary proceedings:

(1) Minister Fitzgerald stated on 17 March 2016:

> **"Mr. Speaker, many of us have gone on a course of inquiry, Mr. Speaker" and "I don't want to be cautious because I have facts. I didn't come in there talking out of my head, Mr. Speaker. I am going to read some emails I have with these peoples name on it…I will let you know right now. I am going to read emails, I will read whose names are on it and I am going to show Mr. Speaker what is going on here."**

(2) After alleging that the 1st Applicant was nothing but a political organization, Minister Fitzgerald stated on 17 March 2016:

> **"I am going to read the emails Mr. Speaker to show my point. And to show how serious this is, I am going to read all the names that are on the email, I am going read what it is they are trying to do, Mr. Speaker. They even**

talked about the Commissioner of Police, Mr. Speaker. I am going to read all of that. You all just hold on."

(3) On 17 March 2016, Minister Fitzgerald referred to the financial information of the 1st Applicant. He stated:

> **"Now where is this money coming from?"** and **"We know that millions of dollars have come down to fund this"** and **"I am going to tell you who preparing the graphic, I've got that email too"** and **"I am following the money. I have been around a long time. I had to call New York this morning to get one or two things cleared up on Wall Street.[…] I know people all over this world in very high places. […] I have access to things that ordinary people would not be able to access, Mr. Speaker. I said before, Mr. Speaker, that I didn't come in this Parliament for this. But since the Leader of the Opposition got up, Mr. Speaker, and brought my character and the character of my Cabinet, my Prime Minister, my Deputy Prime Minister, into this sordid affair …. Let me go to the emails."**

(4) Minister Fitzgerald stated on 17 March 2016:

> **"I have a set of emails that I am going to read. One is called 'Final No More Secret. Punch Colour two page …. This goes from Fred Smith to Zack Bacon, that's Louis Bacon brother, Anne Colery, the lady who I mentioned … Jeremy Atlee. CC. now we go to the CC. Adrian Gibson, Charlton Romer, Colin Callender [and so on]."**

(5) Minister Fitzgerald also stated on 17 March 2016:

> **"Zack Bacon responded and he is responding to the part about the letter addressed to the Commissioner of Police, because in here is a letter addressed to the Commissioner of Police as well. He says** [and here the Minister quotes directly from this private correspondence] **'Let's do it, let's do it, but I'm told unequivocally that Greenslade is deeply entrenched in the PLP'. Mr. Speaker, I want you to know the Bahamians on this list. In this you have** [and he then reads out names]**."**

(6) Minister Fitzgerald read out from a private and confidential email from Diane Philips on 17 March 2016:

> **"Now Diane Philips says, and she include all of them back in, but she includes Sarah Coleby and Sam Duncombe and Adrian Gibson, all of them. … So, Mr. Speaker, Diane Philip then said** [and again the Minister quotes directly from the private email] **'Should we not wait until tomorrow given the fact that the Commissioner said he would have some word for us today'."**

[14] Reference was made in the course of the 1st and 2nd Respondents' speeches to other emails and financial information which did not appear in the Tabled Documents. For example, specific and repeated reference was made in Parliament to sums of money paid on behalf of Save the Bays to various individuals working for Save the Bays and to there being relevant emails, wire transfers and bank statements in the 2nd Respondent's possession or control ("**the Undisclosed Documents**").

[15] In the course of the Parliamentary proceedings on 17 March 2016, Minister Fitzgerald continued:

> **"If he wants me to table it, I will table it. I mean, I ain't got no problem with that. I will tell the police the source...I will turn over wire transfers, I will turn over the banks...I'll turn over everything, Mr. Speaker. Mr. Speaker, I didn't read all of the emails. Remember I told you, Mr. Speaker, that I am going to talk some and keep some. I didn't read all of these, Mr. Speaker. There's is plenty more. I didn't read all of them. Mr. Speaker, this is so serious, Mr. Speaker, that we will get to the bottom of this very soon, and all will (sic) revealed. All will be revealed, Mr. Speaker."**

[16] In attempting to resist tabling the emails, Minister Fitzgerald on 17 March 2016 stated:

> **"Sorry, I have now been informed that I really should not table it, and that I should hand it to the police and I have informed them that I will hand it over to them and let them … because there is other information in here that will lead to other things that I did not actually read out."**

[17] Nonetheless, the Speaker ordered that these emails be tabled.

[18] The Speaker subsequently refused to release these tabled documents despite requests by the Applicants.

[19] On Sunday, 15 May 2016, Dr. Andre Rollins, MP, provided the tabled documents to the Applicants.

[20] On 18 March 2016, the Applicants and Mr. Frederick Smith, QC, commenced proceedings against "Persons Unknown" (2016/CLE/gen/00387) and applied for

and obtained an injunction against "persons unknown", to prevent further disclosure of documents including, but not limited to, bank statements relating to and/or belonging to Save the Bays and/or its Directors and/or Mr. Frederick Smith, QC and/or Mr. Zack Bacon which had been taken without their consent or permission.

[21] On 21 March 2016, during parliamentary proceedings, Minister Mitchell stated the following:

> **"The point is made that these .... the emails that has now become the subject of discussion, were obtained contrary to the Data Protection laws. Now, you know, this is amazing. This is what their mantra is: Transparency in Politics, that's their mantra. Now transparency means they want to see everything. Now the people who want to see everything ……. but you know, you want to run to court and say, 'Oh my, these people looking in my bank account; they've got my emails; how they got to thief this.' You know, they are not denying that the money actually changed hands. They just say, 'How you get that, who told you that, Stop talking about it. Don't spread it. So on and so forth.' The problem with that is that of all the possibilities which exist, the one thing they don't allow for is the fact that it might have been authorized. How about that? It could have been unauthorized, that's true. It could have been hacked, it could have been stolen, but it might have been authorized. But nobody counts that possibility. But yet an allegation is being made against a Minister of the Government that he in effect, stole documents from a private citizens. That's a serious allegation. So that's our case."**

[22] Subsequent to speeches in the House of Assembly on 15 and 17 March 2016, the 1st and 2nd Respondents issued press releases/ made comments to the press in which they have expressly stood by and reiterated their comments in relation to the Tabled Emails and Undisclosed Documents.

[23] Minister Fitzgerald issued a statement on 21st March 2016 stating:

> **"I stand by my statements! I have handed what I have over to the police on Friday past (18th March, 2016) it appears that all of the individuals are more concerned about how I came about the information as opposed to the damning information contained in these documents."**

[24] Ministers Fitzgerald and Mitchell issued the **"Mitchell-Fitzgerald Joint-Statement in Response to Data Commissioner"** published on the *bahamasweekly.com* website on 28 March 2016 in which they stated:

> **"We merely point out to the public this matter is not about unauthorized [access to] emails. As we said in Parliament, this matter is about a well-funded environmental organization that is not about the environment, but Save the Bays is about politics and destabilizing the government of The Bahamas and has spent millions of dollars to do so. … Let the public be assured that neither of us is a party to any 'unauthorized' access to e-mails. This particular matter now rests with the Police …. We remain focused on keeping Save the Bays honest and transparent and will do so in any forum we deem necessary."**

[25] The Speaker himself in a Communication dated 25 April 2016 stated in terms that Minister Fitzgerald had **"during his contribution … tabled a private email between individuals in the Save the Bays organization."**

[26] The documents tabled as a response to the Speaker's earlier ruling on 17 March 2016 comprise:

a. An email sent on 9 May 2015 by Mr. Frederick Smith QC in his capacity as director, spokesperson and legal counsel to Save the Bays to the 2nd Applicant and to, inter alia, other directors, employees, advisers and attorneys of Save the Bays in which he forwarded for consideration and advice by the team a draft advertisement prepared and sent to him by Barefoot Marketing, a company employed by Save the Bays. Each and every recipient of this email was bound by obligations of confidentiality in relation thereto.

b. Two emails entitled: '**RE: Directors and Interest [sic] Parties of STB's Police Complaint against perpetrators of Hate Rallies – follow up to Complaint lodge** [sic] **on 27th February 2015**': one sent on 6 May 2015 by the 2nd Applicant, Mr. Zack Bacon to Mr. Smith QC, Ms. Diane Phillips (then a director of Save the Bays) and other directors, attorney, employees and advisers of Save the Bays in response to an earlier email of the same date and title from Ms. Phillips.

   This email exchange related to a police complaint which had been made by Callenders & Co on behalf of Save the Bays and its directors including, inter alia, Ms. Phillips and Mr. Zack Bacon's brother, Louis Bacon, on 27 February 2015 in relation to abuse and intimidation of Callenders & Co's

clients at a Save the Bays event in early December 2014 and at organised 'hate rallies' earlier in 2014.

The email exchange was about whether Callenders & Co ought to send a follow-up letter to the Commissioner that day regarding that complaint or first await the Commissioner's response which he (the Commissioner) had promised to provide that day. Each and every recipient of this email was bound by obligations of confidentiality in relation thereto.

c. An email entitled: "**2015 03 04 CCO Letter to Archdeacon Bain re the Hate Rallies"** from Mr. Smith QC in his capacity as director, spokesperson and legal counsel to Save The Bays sent on 25 March 2015.

   The email attached draft correspondence (which has not been tabled) prepared by Callenders & Co as attorneys for Save the Bays and its directors requesting the support of Archdeacon Bain for support (in particular, to call upon the Government to take action) in relation to the harassment of Save the Bays directors and associates at a Save the Bays event and at hate rallies.

   In the email Mr. Smith QC invited comments on the draft letter from the Save the Bays' advisers and attorneys copied.

   Each and every recipient of this email was bound by obligations of confidentiality in relation thereto.

d. An email from Mr. Smith QC (in his capacity as President of the Grand Bahama Human Rights Organization (**GBHRA)**) sent on 24 February 2016 to the Leader and Chairman (and Senator) of the Official Opposition and copied to the Secretary and Vice-President of GBHRA briefing the Leader and Chairman/Senator of the Official Opposition on issues of human rights in the context of the Immigration Act in preparation for an upcoming debate which Chairman/Senator Pintard was going to be involved in the Senate. This email has nothing to do with the Applicants.

("**The Tabled Documents**")

[27] A resolution was passed in the House stating as follows:

> **"all matters delineated in the morning session by the Member of Parliament for Fox Hill (Minister Mitchell) in today's session, 21 March, be referred forthwith to the Committee of Privileges for the examination thereof including but not limited to, the allegations re: the allegations that the MP of Fox Hill misled the House on the matters related to the release of two Cuban nationals and the**

allegations with regard to the Member of Marathon as reported in the Tribune and the Nassau Guardian at even date, in the Tribune's editorial and in reporting the statements attributed to one Louis Bacon. So it would be those two statements."

[28] The Applicants also placed great reliance on the affidavit evidence of Martin Lundy II, Joseph Darville, Romauld Ferreira sworn to on 20 May 2016 and Francisco "Paco" Nunez filed on 17 May 2016 for a complete account of all statements by the Respondents in and outside of Parliament.

[29] The Respondents raised several objections to the Nunez affidavit which they alleged contained opinions on behalf of the 1st Applicant. They say that he is not a director but only the "Communications Director" and therefore not be expressing policy positions on behalf of the 1st Applicant. They submitted that Mr. Nunez stated that he is authorized by the 2nd Applicant, who is also not a director and therefore has no proprietary claim to the alleged confidential correspondence which is the subject matter of this claim. It is also alleged that he exhibited documents marked FN1, which are copies of newspaper advertisements purportedly by the 1st Applicant, the source of which has not been properly identified and the relevance of which is not established.

[30] Briefly put, at [10] of his affidavit, Mr. Nunez stated "I know this because before becoming a **'Director' of Save The Bays**, I was employed as a journalist and was the News Editor for the Tribune newspaper…" So, he is a Director of the 1st Applicant. The Court will determine what weight, if any, it should give to newspaper publications. Other issues surrounding the Nunez Affidavit will be addressed at the appropriate time.

The Constitutional Motion

[31] On 21 April 2016, the Applicants filed this Constitutional motion seeking the following relief:

1. A Declaration that the Respondents have breached the Applicants' rights under Articles 15 (c), 21(1) and/or 23(1) of the Constitution to ensure that

they enjoy freedom from interference with their correspondence and/or their property;

2. A Declaration that the Respondents' search and/or obtaining possession, custody, control and/or use of the Applicants' correspondence is a breach of the Applicants' rights under Articles 15(c), 21(1) and/or 23(1) of the Constitution;

3. A Declaration that the Respondents' publication or disclosure of the contents of the Applicants' correspondence in Parliament or otherwise is a breach of the Applicants' rights under Articles 15(c) and/or 23(1) of the Constitution;

4. A Declaration that the provisions of the Powers and Privileges (Senate and House of Assembly) Act 1969 (the "PPA") are to be construed as being subject to the supremacy of the Constitution (in particular Chapter III - the fundamental rights and freedoms provisions;

5. A Declaration that to the extent that the Government and/or the Speaker of Parliament [not a party to the action] seek to rely on the PPA to prevent the Court from adjudicating on a breach of Article 15(a) and Article 20(8) of the Constitution; then this represents a breach of Article 15(a) and Article 20(8) of the Constitution;

6. A Declaration that section 4 of the PPA is of no application or effect in the present case since the constraint on the Government imposed by Articles 15(c), 21(1) and/or 23(1) of the Constitution constitute an exception to parliamentary privilege; and consequentially

7. A Declaration that in the circumstances of this matter; the 1st and 2nd Respondents are not immune from constitutional, civil or criminal proceedings which may be brought by the Applicants; and

8. A Permanent Injunction to restrain the Respondents from any further breaches of the Applicants' Constitutional rights as guaranteed by Articles 15(a) and (c); 20(8), 21(1) and/or 23(1) specifically:

    1) An Order for delivery up of the Applicants' correspondence in the possession, custody or control of the Respondents and for the permanent destruction or deletion of all electronic files or records within 7 days or such other time as fixed by the Court (along with an affidavit of compliance to be filed within 3 days);

    2) An Order for discovery under oath as "to when and to whom" the Applicants' correspondence may have been shared;

3) A Permanent Injunction restraining the Respondents (and their agents) from referring to, making use of, repeating or relying upon any of the information contained in the Applicants' correspondence; and

4) Damages and/or vindicatory damages and

5) Costs.

[32] The Applicants set out eighteen grounds (listed as ("(a) to (r)") in support of the application in the motion. In my opinion, the gravamen of the Applicants' complaint can be discerned from the following grounds:

> **"(a) The Government (acting through two senior Cabinet Ministers the Minister of Foreign Affairs and Immigration Frederick Mitchell MP and the Minister of Education Jerome Fitzgerald MP searched and/or obtained private and confidential correspondence (emails and attachments) belonging to the Applicants and disclosed private and confidential information contained in this correspondence during the course of Parliamentary proceedings on 15 and 17 March 2016, these proceedings being broadcast live by the media ("Parliamentary disclosures")."**
>
> **(b) All of the information contained in the correspondence was private and confidential in nature; moreover, some of the information was of a financial nature and some were private and privileged correspondence between directors and attorneys for the 1st Applicant and the 2nd Applicant in relation to contemplated and extant legal proceedings between the 1st Applicant and the Government. The Respondents read out the names, the content of emails and financial information relating to salaries of and/or payments to the 1st Applicant's directors, contractors, employees and attorneys.**
>
> **(c) In subsequent media statements <u>outside of Parliament</u>, the Respondents have made it clear that the documents referred to were just some examples drawn from a larger cache of private correspondence belonging to the Applicants that is in the possession of the Respondents or to which the Respondents clearly have access. They have indicated by way of explicit threats, their intention to make further disclosure from this cache.** (Emphasis added)
>
> **(d) ……..**
>
> **(e) While the precise source from which the Government obtained these private and confidential emails is not at present clear, what is clear,**

however, is that the Government did obtain these documents either by search and seizure or by some other means of obtaining possession of this private and confidential correspondence of the Applicants. The Government has not provided any legal justification for the seizure or other means by which it obtained these private and confidential emails.

(f) Only the Applicants and their agents, officers and employees were and are entitled to see the correspondence in question and its contents including the attached documents and data. No distribution of correspondence and financial information to the Respondents or any other outside party has been authorized.

(g) Accordingly, all of the Respondents' dealings with the Applicants' private correspondence, including their search and seizure or obtaining possession and perusal thereof, was unauthorized and non-consensual, a trespass to the Applicants' private and confidential correspondence and in clear breach of the Applicants' rights (i) to privacy and freedom from interference with its correspondence enshrined in Articles 15(c) and 23 of the Constitution, and (ii) that their property shall not be searched and seized as guaranteed by Article 21 of the Constitution."

[33] The motion is so contentious that the parties could not even agree on the issues to be determined by the Court. Therefore, I shall endeavour to crystallize what, in my opinion, are the issues. They are as follows:

1. (a) Is it the Supreme Court or Parliament that should decide whether the Supreme Court's original jurisdiction under the Constitution to adjudicate and decide on breaches of the fundamental rights is somehow ousted in the present case by operation of the Powers and Privileges (Senate and House of Assembly) Act 1969 ("the PPA")?

   (b) If it is the Supreme Court, then what would its decision be in the present motion? Specifically, should the application of parliamentary privilege under the PPA be made subject to the fundamental rights contained in Chapter III of the Constitution and if so, what are the consequences?

2. To what extent is the reliance by the Government on the PPA to prevent the court from adjudicating on a breach of the Constitution a separate breach of Article 15(a) and/or Article 20(8) of the Constitution?

3. Whether the doctrine of parliamentary privilege attaches to the alleged disclosure and use of the material and therefore preclude any civil (or for that matter criminal) proceedings founded on the same?

4. Whether or not this is a case in which the Court will adjudicate on matters occurring within Parliament or make orders affecting the conduct of Members of Parliament or controlling the speech of Members of Parliament in Parliament?

5. (a) Whether the Parliamentary disclosures have breached any of the Applicants' rights or rights under the Constitutional Articles which have been invoked namely: articles 15(c), 21(1) and 23(1)?

   (b) Following from (i), whether the emails or correspondence complained of are confidential in nature or have been received in circumstances which impose an obligation of confidentiality; and whether the public interest in disclosure would override such confidentiality?

6. Should the Court make any order which places further restrictions on the Constitutional rights and freedom of speech or members of the House and the rights of the House of Assembly to regulate its own proceedings in circumstances where (i) the Speaker of the House has made a ruling which severely restricts members from disclosing private emails and takes into account the rights of third parties and (ii) where the 1st Applicant has already obtained an injunctive order against 'persons unknown' to prevent further disclosure of the documents in question?

7. If the Court finds that the Government is in breach of the Constitution, then: (a) should vindicatory damages be awarded to the Applicants; (b) If so, what quantum of vindicatory damages should be awarded; and (c) should a permanent injunction be granted or not?

[34] Before the issues can be directly addressed it is useful to set out the constitutional framework in some detail.

Constitutional Framework

[35] Article 1 of the Constitution declares that the Commonwealth of The Bahamas is a "sovereign democratic state". Article 2 proclaims that its Constitution is the supreme law and "*if any other law is inconsistent with it that other law shall, to the extent of the inconsistency, be void*". The supreme law clause articulates the supremacy of the Constitution over Acts of Parliament, actions of the Executive and decisions of the Judiciary which is inextricably interwoven into the entrenchment provisions of the Constitution.

[36] The structure of the Constitution is important. Chapter III (Articles 15 - 31) spells out various provisions for the protection of fundamental rights and freedoms of the individual. Having dealt with the special position of the Governor-General in Chapter IV, the Constitution makes general provision for the powers of the executive in Chapter VI. This Chapter provides for the exercise of executive authority. Chapter V deals with Parliament. Chapter V Part IV provides for the powers and procedure of Parliament. Subject to the provisions of the Constitution, Parliament may make laws for the peace, order and good government of The Bahamas: Article 52 (1). Parliament may only alter the Constitution in accordance with the manner and form prescribed in Article 54. Chapter VII deals with the judicature. The Constitution entrusts the Supreme Court with original jurisdiction to hear and determine any application made by any person who alleges that any of the fundamental rights provisions of Articles 16 -27 (inclusive) has been, is being or is likely to be contravened: Article 28. The independence of the Court is protected by provisions relating to the appointment and tenure of the judges: Article 96 (1) and (2).

[37] From these provisions the following propositions can be deduced. First, The Bahamas is a representative parliamentary democracy based on the Westminster model: **Hinds v The Queen** [1977] AC 195, 212B-213H; **Ahnee v Director of Public Prosecutions** [1999] 2 AC 294, 302-303. Secondly, subject to its specific provisions, the Constitution entrenches the principle of the separation of powers between the legislature, the executive, and the judiciary. Under the Constitution one branch of government may not trespass upon the province of any other. Thirdly, the Constitution gave to each arm of government such powers as were deemed to be necessary in order to discharge the functions of a legislature, an executive and a judiciary.

[38] Respect for the Rule of Law and the belief in the Fundamental Rights and Freedoms of the Individual are enshrined in the preamble to the Constitution which provides as follows:

> **"WHEREAS Four hundred and eighty one years ago the rediscovery of this Family of Islands, Rocks and Cays heralded the rebirth of the New World;**
>
> **AND WHEREAS the People of this Family of Islands recognise that the preservation of their Freedoms will be guaranteed by a national commitment to Self-discipline, Industry, Loyalty, Unity and an abiding respect for Christian values and the Rule of Law;** (Emphasis added)
>
> **NOW KNOW YE THEREFORE:**
>
> **We the inheritors of and Successors to this Family of Islands, recognising the Supremacy of God and believing in the Fundamental Rights and Freedoms of the Individual DO HEREBY PROCLAIM IN SOLEMN PRAISE the Establishment of a Free and Democratic Sovereign Nation founded on Spiritual Values and in which no Man, Woman or Child shall ever be Slave or Bondsman to anyone or their Labour exploited or their Lives frustrated by deprivation, AND DO HEREBY PROVIDE by these Articles for the indivisible Unity and Creation under God of the Commonwealth of The Bahamas."** (Emphasis added)

[39] These hallowed words also proclaim the establishment of a "Free and Democratic Sovereign Nation" in which "no Man, Woman or Child shall ever be Slave or Bondsman to anyone or their Labour exploited.' Implicit in these hallowed words is that everyone is equal and no one is above the law regardless of personal circumstances.

Issue 1(a) - Jurisdiction/Doctrine of Separation of Powers

[40] Issue 1(a) is considered under this sub-head. At this hearing, one of the concessions made by the Respondents is that the Supreme Court has exclusive competence to adjudicate and decide on breaches of the Constitution. This is provided for in Article 28(2) of the Constitution which gives to the Supreme Court an "original jurisdiction" to hear and determine matters by persons seeking redress. It states that "[I]f any person alleges that any of the provisions of Articles 16 to 27 (inclusive) of this Constitution has been, is being, or is likely to be contravened in relation to him then that person may apply to the Supreme Court for redress.

[41] Thus, the Courts are given an exclusive jurisdiction to adjudicate on and to supervise breaches of the Constitution by the Executive and the Legislature. Parliament cannot change the scope or divest the Court of its "original

jurisdiction" by legislation. In addition, it is for the Court and not Parliament to decide on the scope and application of parliamentary privilege. In the landmark case of **R v Chaytor et al** [2010] UKSC 52, the UK Supreme Court considered the doctrine of parliamentary privilege and held, dismissing the appeals that it was for the court, paying regard to the views of Parliament and other authoritative bodies, **but not Parliament itself, to determine the scope of parliamentary privilege whether under article 9 of the Bill of Rights (1689) or the exclusive cognizance of Parliament**. Lord Phillips of Worth Matravers PSC, delivering the leading judgment stated at [15] - [16]:

> **"15. It is now accepted in Parliament that the courts are not bound by any views expressed by parliamentary committees, by the Speaker or the House of Commons itself as to the scope of parliamentary privilege…**
>
> **16. Although the extent of parliamentary privilege is ultimately a matter for the court, it is one on which the court will pay certain regard to any views expressed in Parliament by either House or by bodies or individuals in a position to speak on the matter with authority."**

[42] In this regard, the Applicants' submission is of even greater force given the existence of a written Constitution that provides in terms for an "original jurisdiction" for the Supreme Court to adjudicate on and supervise breaches of the Constitution and that the Constitution prevails over inconsistent statutes.

[43] In the present case, the Applicants have brought a constitutional motion against the Government on the basis of its breach of various articles in Chapter III of the Constitution. On that basis, the Applicants have sought and obtained an interlocutory injunction to prevent further alleged breaches. As I understand it, they are not challenging the "legislative process" or the internal workings of Parliament. They are challenging the actions of the Executive through two Cabinet Ministers. They are not seeking to intervene in the legislative process or asking the Court to overstep the boundaries relating to the separation of powers as delineated by the Constitution. There is a wealth of judicial authority which emphasize that breaches of the Constitution by the Government and its Cabinet

Ministers when in Parliament is clearly a matter for the Court and not for Parliament to decide.

[44] That said, the Court acknowledged that, as a general rule, it should not meddle in the affairs of Parliament but leave it to regulate its own internal affairs. At the ex parte on notice hearing on 22 April 2016, the Court reverberated this general rule when it cited with approval the dictum of Ramdhani J (Ag.) in the case of **Hon. Mark Brantley (Leader of the Opposition) et al v Hon. Curtis Martin (Speaker of the House of Assembly)** Claim No. SKBHCV2013/0090. The judge stated at [65]:

> **"Thus in the normal case, the Court has no right to insert itself within the sacred walls of Parliament to dabble with the internal affairs of Parliament. The Court has no business there…** [Emphasis added]

[45] This is so, because the Bahamas Constitution, a Westminster model constitution, has a distinct feature which inheres in Constitutions based on that model which is the separation of the three branches of government, namely the Executive, the Legislature and the Judicature. The significance and effect of this doctrine have been examined in a number of cases in the Caribbean region starting with **Hinds v The Queen** [1976] 24 W.I.R. 326. It was held:

> **"Even though the Constitution does not expressly provide for Separation of Powers of the Executive, Legislature and Judicature, it is necessary by implication that the basic principle of separation of powers will apply to the exercise of their respective functions by these three organs of government. Thus even though the Constitution does not contain any express prohibition upon the exercise of legislation powers by the Executive or of judicial powers by either the Executive or Legislature, the doctrine of separation of powers still applies.**
>
> **It is a well-established rule of construction applicable to constitutional instruments such as the Jamaican Constitution that the absence of express words to that effect does not prevent the legislature, the executive and the judicial powers of the state being exercisable exclusively by the Legislature, by the Executive and by the Judicature respectively."**

[46] This Court does not underrate that the separation of powers doctrine is one of the "'immutable imperatives' guiding the elaboration of a Westminster model

constitution, and that the 'separation of powers is considered to be the backbone of any constitutional democracy': per Pollard J in **AG for Barbados v Joseph and Boyce** (2006) 69 WIR 104 at [58].

[47] This issue is significant because the Respondents seemed to imply that the Court's ability to deal with breaches of the Constitution is somehow precluded by the doctrine of the separation of powers. This, in my respectful opinion, is wrong. For example, in **Keke and Others v Scotty and Others (No. 2)** [2013] 5 LRC 580, one of the key questions which arose for determination before the Supreme Court of Nauru was whether parliamentary privilege protected the Speaker's actions from judicial scrutiny. Eames CJ in his judgment cited the decision by the High Court of Australia when he stated at [11]:

> **"The first question to address is whether the conduct of the Speaker is immune from scrutiny by virtue of parliamentary privilege. In my respectful opinion, the correct position is stated by Barwick CJ in *Cormack v Cope* [1974] HCA 28, [1974] 131 CLR 432 at [21], who held that –**
>
> > **"it is not the case in Australia, as it is in the United Kingdom, that the judiciary will restrain itself from interference in any part of the law-making process of the Parliament. Whilst the Court will not interfere in what I have called the intra-mural deliberative activities of the House, including what Isaacs J called "Intermediate procedure" and the "order of events between the Houses" [*Osbourne v Commonwealth*] (1911) 12 CLR at p 363, there is no parliamentary privilege which can stand in the way of this Court's right and duty to ensure that the constitutionally provided methods of law-making are observed."**

[48] Eames CJ went on to state at [28]:

> **"The power to 'determine' any question as to the 'effect' of a provision of the Constitution must carry with it the power, in appropriate circumstances, to intervene when the effect of an incorrect interpretation would be to deny a constitutional right to a person. The remedies sought in this case are discretionary, but whilst the court might be slow to impose them in cases where the constitutional boundaries between legislative and judicial powers are uncertain, that is not this case."** [Emphasis added]

[49] Additionally, Mr. Smith QC persuasively asserted that this Court should not, in relation to constitutional proceedings, fetter unnecessarily its competence to

hear such cases. He referred to **Durity v Attorney General of Trinidad and Tobago** [2003] 1AC 405. In that case, Lord Nicholls of Birkenhead, in delivering the judgment of the Board, had this to say at [30]:

> **"… At the forefront of the Constitution is a resounding declaration of fundamental human rights and freedoms. It is axiomatic that these rights and freedoms, expressly declared, are not to be cut down by other provisions in the Constitution save by language of commensurate clarity. The Constitution itself so declares….Clearly, the inherent jurisdiction of the High Court to prevent abuse of its process applies as much to constitutional proceedings as it does to other proceedings. And the grant or refusal of a remedy in constitutional proceedings is a matter in respect of which the court has a judicial discretion. These limitations on a citizen's right to pursue constitutional proceedings and obtain a remedy from the court are inherent in the High Court's jurisdiction in respect of alleged contraventions of constitutional rights and freedoms. But the Constitution itself contains no express limitation period for the commencement of constitutional proceedings. The court should therefore be very slow indeed to hold that by a side wind the initiation of constitutional proceedings is subject to a rigid and short time bar. The very clearest language is needed before a court could properly so conclude. Such language is noticeably absent in the present case."**

[50] When exercising its original jurisdiction under the Constitution, it is paramount for the judiciary to be independent and free from interference by the Executive and Legislature. The Applicants emphasized this point because of certain events that transpired after the grant of the interlocutory injunction on 22 April 2016. Those events climaxed during the hearing of this constitutional motion when the 1st Respondent issued a statement to BIS on 19 May 2016 mirroring what he had said in Parliament the day before. This is unfortunate. An extract from the case of **Raja Ram Pal v The Honourable Speaker Lok Sabha** (Judgment delivered on 10 January 2007) superbly captured a similar situation. Under the sub-heading Expulsion of Members and Courts, the Supreme Court of India had this to say:

> **"…In coming to the conclusion that the content of Art. 194(3) must ultimately be determined by courts and not by the legislatures, we are not unmindful of the grandeur and majesty of the task which has been assigned to the Legislatures under the Constitution. Speaking broadly, all the legislative chambers in our country today are playing a significant role in the pursuit of the ideal of a Welfare State which has been placed by the**

Constitution before our country, and that naturally gives the legislative chambers a high place in the making of history today. The High Courts also have to play an equally significant role in the development of the rule of law and there can be little doubt that the successful working of the rule of law is the basic foundation of the democratic way of life. In this connection it is necessary to remember that the status, dignity and importance of these two respective institutions, the Legislatures and the Judicature, are derived primarily from 'the status dignity and importance of the respective causes that are assigned to their charge by the Constitution. These two august bodies as well as the Executive which is another important constituent of a democratic State, must function not in antinovel nor in a spirit of hostility, but rationally, harmoniously and in spirit of understanding within their respective spheres, for such harmonious working of the three constituents of the democratic state alone will help the peaceful development, growth and stabilization of the democratic way of life in this country…."

But when, as in the present case, a controversy arises between the House and the High Court, we must deal with the problem objectively and impersonally. There is no occasion to import heat into the debate or discussion and no justification for the use of strong language. The problem presented to us by the present reference is one of construing the relevant provisions of the Constitution and though its consideration may present some difficult aspects, we must attempt to find the answers as best as we can. In dealing with a dispute like the present which concerns the jurisdiction, the dignity and the independence of two august bodies in a State, we must remember that the objectivity of our approach itself may incidentally be on trial. It is, therefore, in a spirit of detached objective enquiry which is the distinguishing feature of judicial process that we propose to find solutions to the questions framed for our advisory opinion…."

[51] I return to the independence of the Judiciary which I shall address briefly. In **Ponoo v Attorney General** [2012] 5 LRC 305, the Court of Appeal of the Seychelles stated at [68]:

"The most important aspect of the separation of powers is the absolute independence of the judiciary. There may be some form of confusion existing at the level of the executive and the legislature on the interrelation between their powers. But that cannot be allowed in the independence of the judiciary. As Lord Steyn stated in *Khoyratty [2006] 4 LRC 403 at [13] (quoting DPP v Mollison (No. 2) [2003] UKPC 6, [2003] 2 LRC 756 at [13] per Lord Bingham of Cornhill):*

> ***'…* the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the law of law itself."**

[52] In the Bahamian case of **R v Jones** [2008] 1 LRC 1, Allen SJ (as she then was) dealing with the constitutional principle of the independence of the judiciary said at [9] – [10]:

> **"[9] The principle that the judiciary must be free from interference and influence and that judges are accountable to the Constitution and the law, which they must apply honestly, independently and with integrity, is broadly accepted in all democratic societies and approved in the Commonwealth (Latimer House) Principles by the Commonwealth Heads of Government meeting in Abuja in 2003.**
>
> **[10] Judicial independence has two dimensions, an individual dimension, which embodies the independence of a particular judge, and an institutional dimension, which is the relationship of the judiciary to the other branches of government. It also has three essential characteristics, namely, security of tenure, security of salary and pension and administrative independence which in The Bahamas is limited to matters of administration bearing directly on the exercise of the court's judicial functions such as the assignment of judges, the sitting of the court and the preparation of court lists."**

[53] Allen SJ continued at [12] "…*judicial independence must be jealously safeguarded and any incursions or assaults on it must not be tolerated*."

[54] Similar sentiments were expressed by Lyons J in the case of **Bahamian Outdoor Adventurer Tours Ltd v R** [2000] BHS J. No. 17. At [2], his Lordship stated:

> **"Crucial to our Constitution and the very fabric of our Bahamian society is the Doctrine of the Separation of Powers. This doctrine seeks to ensure the independence of the three arms of Government, the Legislature, the Executive and the Judiciary so that, through the processes of accountability, our precious democracy is maintained and protected."**

[55] I adopt the dicta of these eminent jurists. For my part, judicial independence is a key element of modern constitutionalism and operates side by side with the doctrine of separation of powers and the rule of law. It is an indispensable element of the right to due process, the rule of law and democracy. In addition, judicial independence means that judges must be free to interpret laws independently, impartially and objectively without any undue external pressure

from anyone; be it the police, government ministers, public opinion or any other interested body or person in order for justice to be performed. .

[56] Indubitably, the Judiciary is the bastion of any civilized society. It is therefore the duty of all governmental and other institutions to respect and observe the independence of the Judiciary. Courts must play an active role in ensuring that other arms of government do not transgress or exceed their lawful powers. Courts therefore cannot and must not abdicate any part of their judicial function to the legislature.

[57] To recapitulate, the Supreme Court, which has the exclusive competence to decide on breaches of individual rights, should remain entirely independent and impartial in the exercise of its original jurisdiction under the Constitution. The function of the Court to police breaches of the Constitution by the legislature and the executive is universally recognised as a cardinal feature of the modern democratic state and it is the cornerstone of the rule of law itself.

Issues 1(b) to 4 - Parliamentary Privilege, Principle of Non-Intervention and Constitutional Supremacy

[58] Issues 1(b) to 4 may be subsumed under this broad sub-head. I start off by dealing with the doctrine of parliamentary privilege in some detail because the Respondents sought to rely on it to oust the jurisdiction of the Court in the present case.

[59] The origins of parliamentary privilege date back to the English Civil War (1642-1651) when Parliament was fighting King Charles II for supremacy. In those days, the King considered himself supreme in the realm, and Parliament was seeking to free itself from interference from him. Parliament argued that Members of Parliament (MP's) were subject only to the strict rule of Parliament, which ran synchronously with the criminal and civil law. They argued that it was the rule of parliament that was supreme. The result of this was the Glorious Revolution of 1688, when Parliament expelled James II who fled the country.

Parliament then offered the Crown to his daughter Mary, instead of his son, James Francis Edward Stuart. Mary refused the offer, and instead William and Mary ruled jointly, with both having the right to rule alone on the other's death. As part of the compromise in allowing William to be King—called the Glorious Revolution—Parliament was able to have the 1689 Bill of Rights enacted.

[60] The statutory basis of parliamentary privilege is article 9 of the Bill of Rights which states that **"the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament."** The privileges enjoyed included the right of the Houses of Parliament to determine questions of membership, the right to regulate their own proceedings, freedom of speech in Parliament and freedom from arrest within the precincts of Parliament.

[61] A seminal case giving full recognition to the privilege in the United Kingdom is **Bradlaugh v Gossett** (1884) 12 QBD 271. Bradlaugh, though duly elected Member for a Borough, was refused by the Speaker to administer the oath and was excluded from the House by the Sergeant at Arms. He challenged the action. It was held that the matter related to the internal management of the House of Commons and the Court had no power to interfere. Lord Coleridge said: "There is another proposition equally true, equally well established, which seems to me decisive of the case before us. **What is said or done within the walls of Parliament cannot be inquired into a Court of law"**. On this point all the judges in the two cases which exhausted the learning on the subject – **Burdott v Abbott** (1811) 14 East 1 and **Stockdale v Hansard** (1839) 9 Ad & El 1 – were agreed, and were emphatic. The jurisdiction of the Houses over their own members, their right to impose discipline within their walls, is absolute and exclusive.

[62] The learned author, Erskine May, in his treatise '**Parliamentary Practice', 22nd Ed.** at p. 83 states the following:

> **"Subject to the rules of order in debate …a Member may state whatever he thinks fit in debate, however offensive it may be to the feelings, or injurious to the character of, individuals, and he is protected by his privilege from any action for libel, as well as from any other question or molestation."**

[63] The wide scope of parliamentary privilege was discussed again in **Prebble v Television New Zealand Ltd** [1995] 1 AC 321. Learned Counsel Dr. Barnett correctly stated that it is also clear that the privilege goes beyond questioning or asserting legal consequences against the maker of the statement in legal proceedings, or in proceedings brought by the Member of Parliament making the statement. For example, Lord Brown Wilkinson stated that the "basic concept" of the doctrine was that members of the House and witnesses before committees can (at p. 334):

> **"speak freely without fear that what they say will later be held against them in the courts. The important public interest protected by such privilege is to ensure that the member or witness *at the time he speaks* is not inhibited from stating fully and freely what he has to say. If there were any exceptions which permitted his statements to be questioned subsequently, at the time when he speaks in Parliament he would not know whether or not there would subsequently be a challenge to what he is saying."**

[64] It is however well established that article 9 does not of itself provide a comprehensive definition of parliamentary privilege. In **Prebble**, Lord Brown Wilkinson, stated at p. 332:

> **"In addition to article 9 itself, there is a long line of authority which supports a wider principle, of which article 9 is merely one manifestation, viz. that the courts and Parliament are both astute to recognise their respective constitutional roles. So far as the courts are concerned they will not allow any challenge to be made to what is said or done within the walls of Parliament in performance of its legislative functions and protection of its established privileges: *Burdett v Abbot (1811) 14 East 1; Stockdale v Hansard (1839) 9 Ad. & El. 1; Bradlaugh v Gossett (1884) 12 Q.B.D. 271; Pickin v British Railways Board [1974] A.C. 765; Pepper v Hart [1993] A.C. 593.* As Blackstone said in his *Commentaries on the Laws of England, 17th ed. (1830), vol. 1, p. 163:***
>
> > **"the whole of the law and custom of Parliament has its origin from this one maxim, 'that whatever matter arises concerning either House of Parliament, ought to be examined, discussed, and adjudged in that House to which it relates, and not elsewhere.'"**

[65] Their Lordships in **Prebble** disapproved the New South Wales decision in **R v Murphy** (1986) 64 ALR 498 because it sought to limit parliamentary privilege so as to cover only cases where makers of statements in Parliament were sought to be made legally liable: see p. 334.

[66] Learned Counsel Dr. Barnett acknowledged that although the scope of parliamentary privilege is wide, the Courts have drawn limits to the doctrine. For example, notwithstanding what is sometimes referred to as the *lex et consuendo Parliamenti* (the so-called laws and customs of Parliament) in which the Courts will not interfere, the existence and extent of any privilege claimed that may arise in a case are a matter of common law and as such within the cognizance of the Court: **Stockdale v Hansard** (1837) 7 CAR. & P. 730; and **Jagan and Others v Gajraj** [1963] 5 W.I.R. 333. In the latter case, the question was whether the Speaker of the British Guiana Legislative Assembly had the power to order the suspension of four members (including the Plaintiff) for acts which he adjudged to be behaviour disgraceful and shameful and alleged that breaches of privileges and acts of contempt had been committed by them. They sued for various declarations and damages, including an injunction to restrain the Speaker and his agents from taking any action to prevent the plaintiffs from sitting and participating in the proceedings and activities of the Legislative Assembly. It was held that the Supreme Court had the jurisdiction to enquire into the existence and extent of any privilege or power claimed by the Legislative Assembly, but that the Assembly had power to regulate its own proceedings and this can include the power to remove and suspend the plaintiffs for a limited period and the Supreme Court could not interfere in or enquire into the mode or exercise of that power.

[67] Also, in **Prebble**, Lord Brown Wilkinson acknowledged that of the three competing interests that usually manifest itself in cases involving privilege – the need to ensure that the legislature can exercise its powers freely, the need to protect freedom of speech and the interests in justice in ensuring that all relevant evidence is available to the Courts – the first must prevail. However, he

added that their Lordships wanted to clarify that the principle did not exclude all references in court proceedings to what has taken place in the House. At p. 337, Lord Brown-Wilkinson stated:

> **"…But their Lordships wish to make it clear that if a defendant wishes at trial to allege an occurrence of events or the saying of certain words in Parliament without any accompanying allegation of impropriety or any other questioning there is no objection to that course."**

[68] Other cases which emphasized the limits to this doctrine include **Buchanan v Jennings (Attorney General of New Zealand intervening)** [2005] 1 AC 115. It was held that mere reference to or production of a record of what was said in Parliament did not infringe article 9 of the Bill of Rights. Further, the need to protect freedom of speech in Parliament and the right of Parliament to govern its own proceedings did not preclude a claimant from relying on such a record as evidence in support of an action against an MP based on what was said outside the House. In **Hamilton v Al Fayed** (1999) 1 WLR 1569, the Court of Appeal permitted a former MP to pursue proceedings for defamation against the defendant for allegations that the MP had sought and accepted cash for asking questions on behalf of the defendant in the House, notwithstanding that a House Committee had considered and ruled on the matter.

[69] It is worth mentioning that in analyzing the above cases, one must be mindful that they originate from jurisdictions which have no written constitutions and as such, Acts of Parliament are sovereign. In the case of **Jagan and Others v Gajraj** (1963) [supra], it predated independence in 1966 and constitutional reform in Guyana.

[70] The Applicants, on the other hand, insisted that any reliance by the Respondents on parliamentary privilege to oust the jurisdiction of the Court is in itself a breach of Article 20(8) of the Constitution in conjunction with the right to protection of the law afforded by Article 15(A). Reliance was placed on the case of **Brantley and others v Constituency Boundaries Commission and others**

[2015] UKPC 21 to fortify this argument. Lord Hodge, in delivering the judgment of the Board, in dealing with the structure of the Saint Christopher and Nevis Constitution and the separation of powers doctrine said at [31] - [32]:

> **"31….That conclusion does not answer the hypothetical question the Board is addressing, which is the constitutionality of a deliberate attempt to exclude the opportunity of access to the High Court for constitutional redress. It gives a clearer pointer towards the answer.**
>
> **32. In the Board's view there is at least a strongly arguable case that a deliberate attempt by one branch of government, in the control of the governing party, to prevent individuals from obtaining access to the High Court for a constitutional adjudication under section 96 would be unconstitutional as it would deny the protection of the law contrary to section 3(a)."**

[71] Therefore, the Government cannot rely on the shield of parliamentary privilege to oust the jurisdiction of the Court when a person alleges breaches of the Constitution. Another significant consideration relates to the fact that by virtue of section 12 of the Crown Proceedings Act, the Attorney General is made a party to these proceedings on behalf of the Government. At the outset, it appeared uncertain and somewhat confusing whether the Attorney General represented herself and not the 1st and 2nd Respondents in their capacity as Ministers of the Government. But as the case progressed, it became evident that the Attorney General acts for the Respondents. It follows that this is a representation on behalf of the Executive branch of Government.

[72] As correctly postulated by the Applicants, since parliamentary privilege only provides protection to Parliament and/or individual MPs, then it cannot be used to prevent reliance on statements made in Parliament in relation to a constitutional motion against the Government. The ability to claim privilege in The Bahamas is limited to Parliament and/or MPs. The Applicants maintained that this is quite apart from and without prejudice to the fundamental point that parliamentary privilege in the Bahamas is subject to the fundamental rights of persons enshrined in Chapter III of the Constitution.

[73] The Applicants correctly contended that the Government cannot have it both ways: it cannot claim that the acts and statements by the 1st and 2nd Respondents are not attributable to it and at the same time claim that the constitutional motion against it for breaches of various articles of the Constitution cannot proceed since it is based on "privileged" statements made by the 1st and 2nd Respondents.

[74] To conclude, any attempt by the Government or Parliament to rely on parliamentary privilege to oust the jurisdiction of the Court would amount to a breach of Article 20(8) and Article 15(A) of the Constitution. In any event, the Government cannot rely on parliamentary privilege for reasons stated above.

Constitutional Incursions and Supremacy

[75] The ancient doctrine of parliamentary privilege has been given constitutional imprimatur and statutory protection in The Bahamas. Article 53 of the Constitution provides as follows:

> **"(1) Without prejudice to the generality of Article 51(1) of this Constitution and subject to the provisions of paragraph (2) of this Article, Parliament may by law determine the privileges, immunities and powers of the Senate and the House of Assembly and the members thereof.**
>
> **(1) No process issued by any court in the exercise of its civil jurisdiction shall be served or executed within the precincts of the Senate or the House of Assembly while it is sitting, or through the President or the Speaker, the Clerk or any other officer of either House."**

[76] The legislative framework which provides for the privileges and immunities of Members of Parliament is the Powers and Privileges (Senate and House of Assembly) Act, Ch. 8. For present purposes, sections 3 – 4 are relevant.

> **"3. Senators and Members shall have the like privileges and immunities as are enjoyed for the time being in the United Kingdom by members of the Commons House of Parliament, and without derogation from the generality of the privileges and immunities conferred by this section, in particular shall have such privileges and immunities as are provided hereafter in this Act.**

> **4. No civil or criminal proceedings may be instituted against any Senator or Member for words spoken before, or written in a report to, the Senate or the House respectively or a committee, or by reason of any matter or thing so brought by him by petition, bill, motion or otherwise."**

[77] Generally speaking, a court does not insert itself within the sacred walls of Parliament since it is recognised that Parliament has exclusive control of its own affairs. This is provided for in Article 55 (1) of the Constitution which states:

> **"Subject to the provisions of this Constitution, each House may regulate its own procedure and for this purpose may make rules of procedure."**[Emphasis added]

[78] This principle was restated and crystallized in the case of **Bahamas District of the Methodist Church in the Caribbean and the Americas and Others v The Hon. Vernon J. Symonette M.P. Speaker of the House of Assembly and 7 Others** [2000] UKPC 31**("Bahamas Methodist Church")**, Lord Nicholls of Birkenhead, in delivering the judgment of the Board stated at [27]:

> **"The second general principle is that the courts recognise that Parliament has exclusive control over the conduct of its own affairs. The courts will not allow any challenge to be made to what is said or done within the walls of Parliament in performance of its legislative functions: see *Prebble v Television New Zealand Ltd* [1995] 1 AC 321,332, where some of the earlier authorities are mentioned by Lord Browne-Wilkinson. The law-makers must be free to deliberate upon such matters as they wish. Alleged irregularities in the conduct of parliamentary business are a matter for Parliament alone. This constitutional principle, going back to the 17th century, is encapsulated in the United Kingdom in article 9 of the Bill of Rights 1689: "that …proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament". The principle is essential to the smooth working of a democratic society which espouses the separation of power between a legislative Parliament, an executive government and an independent judiciary. The courts must be ever sensitive to the need to refrain from trespassing, or even appearing to trespass, upon the province of the legislators: see *Reg. v Her Majesty's Treasury, Ex parte Smedley [1985] 1 Q.B. 657, 666, per Sir John Donaldson M.R."*** [Emphasis added]

[79] Therefore, there is no demur with the Respondents' submission that "*although parliamentary privilege is something of a protean concept, the essence of the doctrine is that what is said or done within the walls of Parliament in*

performance of parliamentary functions are absolutely privileged and may not give rise to a cause of action…This does not totally oust Parliamentary conduct from the scrutiny of the Courts".

[80] As reiterated earlier, the general rule is that the Court should not interfere in the affairs of Parliament. To this general rule there is at least one exception, which even section 55(1) of the Constitution recognizes, and which is also the necessary consequence of the overriding 'supremacy of the Constitution." In **Bahamas Methodist Church**, the Privy Council affirmed the supremacy of the Constitution over Parliament. At [29], Lord Nichols stated

> **"…<u>In other common law countries their written constitutions, not Parliament are supreme. The Bahamas is an example of this.</u> Article 2 of its Constitution provided that "This Constitution is the supreme law of the Commonwealth of The Bahamas". Article 2 further provided that, subject to the provisions of the Constitution, if any other law is inconsistent with the Constitution, the Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void. Chapter V of the Constitution made provision for a Parliament of The Bahamas comprising Her Majesty, a Senate and a House of Assembly. Article 52 provided that "subject to the provisions of this Constitution" Parliament may make laws for the peace, order and good government of The Bahamas Thus, in The Bahamas the first general principle mentioned above is displaced to the extent necessary to give effect to the supremacy of the Constitution. The courts have the right and duty to interpret and apply the Constitution as the supreme law of The Bahamas. In discharging that function the courts will, if necessary, declare that an Act of Parliament inconsistent with a constitutional provision is, to the extent of the inconsistency, void. That function apart, the duty of the courts is to administer Acts of Parliament, not to question them.**
>
> **30. Likewise, the second general principle** (namely (per Lord Nicholls at [27], that "the courts will not allow any challenge to be made to what is said or done within the walls of Parliament in performance of its legislative functions: see Prebble v Television New Zealand Ltd [1995] 1 A.C. 321, 332"] **<u>must be modified to the extent, but only to the extent, necessary to give effect to the supremacy of the Constitution.</u> Subject to that important modification, the rationale underlying the second constitutional principle remains as applicable in a country having a supreme, written constitution as it is in the United Kingdom where the principle originated."** [Emphasis added]

[81] The Privy Council went on to ascertain at [31] in plain and unambiguous terms that if there is a conflict in The Bahamas between giving **"full effect to the**

Constitution" and parliamentary privilege then **"parliamentary privilege must yield to the courts' duty to give the Constitution the overriding primacy which is its due"**. At [32], their Lordships consider **"that this approach also leads ineluctably to the conclusion that the courts have <u>jurisdiction</u> to entertain a claim"** relating to a proposed contravention of the Constitution.

[82] It cannot be gainsaid that the Bahamian Constitution is silent on the "content" of any parliamentary privilege that MPs enjoy, but Article 53(1) states that **"Parliament <u>may by law</u> determine the privileges, immunities and powers of the Senate and the House of Assembly and the members thereof."**

[83] The Applicants alleged that the permissive nature of the reservation of potential parliamentary privilege in the written Bahamian Constitution construct is fatal to the Respondents' case in two ways. First, the "content" of any privileges and immunities of Parliament and its members is not expressly provided for in the Constitution. Rather, it is provided for in an ordinary statute which in turn is subject to the supremacy of the Constitution. Secondly, the Constitution makes privilege permissive rather than mandatory in its language. It says "Parliament **may** adopt such a law." Therefore, says Mr. Smith QC, it undermines the status of privilege as a constitutional principle in The Bahamas. This is an accurate encapsulation of what I understand the law to be.

[84] Learned Counsel Dr. Barnett accepted the general principle that in common law countries such as the Bahamas, the Constitution is supreme; not Parliament. In analyzing the cases of **Bahamas Methodist Church**, **Toussaint v AG of St. Vincent and the Grenadines** [2007] 1 WLR 2825 and **Brantley** (High Court Decision), Dr. Barnett concluded that these cases are distinguishable based on legal and factual considerations and none of them provide any authority for the injunctive order granted by this Court. He sought to distinguish **Bahamas Methodist Church** on the ground that the challenge was to an apprehended invalid law –which the Courts would clearly be entitled to declare invalid on the basis of Article 2 of the Constitution. He submitted that the real issue in that

case was whether the Bill could be impugned before enactment. According to him, that case is dissimilar from the facts of the present case.

[85] Learned Dr. Barnett also distinguished **Toussaint** from the present case. According to him, the true legal effect of **Toussaint** was stated with great clarity by Stanley Burnton J in the **Federations of Tour Operators** case. [2008] STC 547 and which is reproduced at [44] of the **Office of Government Commerce v Information Commissioner (Attorney General Intervening** [2010] QB 98 as follows:

> **"Toussaint clarifies, and in my view limits, the exclusion resulting from an allegation of impropriety. It establishes that it is proper for a claimant to rely on evidence of what was said by a Minister in Parliament to show what was the motivation of the executive's action outside Parliament, in that case the compulsory purchase of Mr. Toussaint's land. He alleged that the compulsory purchase was discriminatory or illegitimate expropriation: an allegation of impropriety. He was entitled to rely on the minister's statement to show what was the true motivation for the compulsory purchase. It is to be noted that Mr. Toussaint did not allege that the minister had misled Parliament; to the contrary, it was alleged that what he said to Parliament disclosed his true motivation. The allegedly wrongful act in that case was not the statement to Parliament, but the compulsory purchase to which it related: see paras. 19 and 20 of the judgment of the Judicial Committee. Mr. Toussaint was similarly entitled to rely on what the minister said to Parliament in support of his allegation that the purpose stated in the declaration for compulsory purchase was a sham: paragraph 23".** [Emphasis added]

[86] Dr. Barnett also submitted that the judicial pronouncements of Ramdhani J in **Brantley** may be over-broad and are not tested. In any event, he says, the judge was not looking at the particular constitutional and statutory context as pertains in The Bahamas.

[87] Perhaps, I could put what appears to be a tenuous issue to rest. At no point during the hearing of the interlocutory injunction was great reliance placed on **Brantley** or **Toussaint** for similarity of facts. The facts of the present case are unique and are distinguishable from all the cases relied upon by both parties. Its closest counterpart, in my considered opinion, is the case of **Boodram v Attorney General of Trinidad and Tobago** (Action No. 6874 of 1987). Suffice it

to say, both **Brantley** and **Toussaint** emanate from jurisdictions with written constitutions so they are instructive unlike the plethora of authorities that Dr. Barnett relied upon.

[88] As I understand it, learned Counsel Dr. Barnett's primary submission is that section 4 of the PPA applies and is not ousted. He fought hard to assert that parliamentary privilege is absolute. He submitted that, in **Toussaint**, at the Court of Appeal level, Rawlins JA (Ag.) had construed section 4 of the House of Assembly (Privileges, Immunities and Powers Act) of the Laws of St. Vincent and the Grenadines, which is indistinguishable from section 4 of the PPA, to like effect at [35]:

> **"Section 4 of the Act is of no moment in this appeal. It merely protects individual Members from civil and criminal proceedings for any utterances made in the House. In this case, Mr. Toussaint is not seeking to use the statements that the Prime Minister made in the House in an action against him. Section 4 would have prohibited such an action. This section does not speak to the admissibility of statements that are made in the House where a person institutes a case against the State for the infringement of his or her fundamental rights."**

[89] Dr. Barnett submitted that therein lies the fundamental distinction between **Toussaint** and the present case. He asserted that this Constitutional Motion is founded on statements made by the MPs in the House, and specifically and repeatedly impugns and impeaches what has been said, in gross violation of the principle of parliamentary privilege. It is important to note that the Applicants are not relying solely on statements made in Parliament but also, statements which the 1st and 2nd Respondents made outside of Parliament; the latter are not covered by the PPA. This will be discussed in detail later on in the judgment.

Analysis and Findings

[90] The Court accepts that, as a general rule, it should not meddle in the internal affairs of Parliament and should leave it to regulate its own internal affairs. The Court also recognises that the authority and dignity of Parliament would be

seriously compromised if it were to interfere arbitrarily in the internal procedures of Parliament.

[91] That said, from a review of the judicial authorities submitted by both parties, it is manifestly clear that if a person alleges that his/her constitutional rights have been, are being or are likely to be infringed; in order to establish that infringement, the Court would be entitled to look at the words that were spoken in Parliament to determine if there was indeed a breach of the Constitution even if the orators of those words (in this case, the 1st and 2nd Respondents) claim parliamentary privilege. This is because constitutional supremacy requires that the courts should not be thwarted in their quest to find out whether the Constitution is or is not being infringed. **Bahamas Methodist Church, Toussaint** and **Boodram** illustrate this point.

[92] Additionally, in **Hughes v Rogers** AI 2000 HC 1 (CARILAW) January 12, 2000 (HC Ang) because no breach of the constitution was being committed, Saunders J (as he then was) refused to grant an injunction against the Speaker to restrain him from repeatedly adjourning sittings of the House for lack of a quorum. He accepted this exception to the privileges enjoyed by Members of Parliament. After examining a medley of cases from across the globe, he stated:

> **"[38]. A common thread runs through all of these cases. It is this. The Courts are entitled to enquire into the existence and extent of any privilege claimed by the House of Assembly. Moreover, the Courts will interfere where Parliament, or the Speaker, has exceeded its powers, or has claimed for itself powers that it did not have, or has acted in a manner clearly inconsistent with constitutional provisions.**
>
> **[60] It is my considered opinion that what occurred in the Anguilla House of Assembly in August and September 1999 respectively formed part of the internal proceedings of the House. Since I can discern no infringement of the Anguilla Constitution by the Speaker, who was acting intra vires his powers, the Court ought not to embark upon an enquiry into those proceedings or the propriety of the actions of the Speaker. In these circumstances, the House, and by extension the Speaker's decision to adjourn the meetings, is immune from scrutiny by the Courts.**

> **[61]** **Where there is no breach of the Constitution, the High Court cannot be called upon to play the role of the Court of Appeal in respect of rulings by the Speaker that falls within his jurisdiction and authority. To perform any such role would open the Courts to 'a blizzard of applications relating to Parliamentary procedure and invite conflict between the legislature and the judiciary". See: Tong v Takabwebwe Kiribati High Court Civil Case No. 48/88.** (Emphasis added).

[93] Saunders J makes two inter-related points. First, despite the principle of non-interference, the Supreme Court is entitled to enquire into the existence and extent of any privilege claimed. Secondly, the Court will interfere where Parliament or the Speaker has exceeded its/his powers or has acted in a manner clearly inconsistent with constitutional provisions. Implied in Saunders J's interpretation of the applicable principle is that the Supreme Court would be prepared to enquire into the propriety of the actions of Members of Parliament/Speaker where a constitutional right has been infringed. This was the same conclusion that the South African Court of Appeal came to in **Speaker of the National Assembly v DeLille** [Case No. 297/98: Judgment delivered on 26 August 1999]. The issue was whether the National Assembly had the power to suspend the respondent (a Member of Parliament) from Parliament. The Court of Appeal stated at [14]:

> **"This enquiry must crucially rest on the Constitution of the Republic of South Africa. It is Supreme - not Parliament. It is the ultimate source of all lawful authority in the country. No Parliament, however bona fide or eminent its membership, no President, however formidable be his reputation or scholarship and no official, however efficient or well meaning, can make any law or perform any act which is not sanctioned by the Constitution. Section 2 of the Constitution expressly provides that law or conduct inconsistent with the Constitution is invalid and the obligations imposed by it must be fulfilled. It follows that any citizen adversely affected by any decree, order or action of any official or body, which is not properly authorised by the Constitution is entitled to the protection of the Courts. No Parliament, no official and no institution is immune from judicial scrutiny in such circumstances".** [Emphasis added]

[94] In **Sabaroche v Speaker of the House of Assembly of Dominica** (1999) 60 WIR 235, 247, Redhead JA held that:

> **"[T]he Constitution of the Commonwealth of Dominica is the supreme law of the land. The House of Assembly gets its authority from the Constitution; the court being the sentinel of the Constitution must act and has a duty to act when any authority acts in non-conformity with any rules or laws which it derives under the Constitution."**

[95] The Court of Appeal further held that there was no power in the Dominica House of Assembly to punish for contempt and that the Court was entitled to determine whether the House was acting in conformity with the Constitution that established it. The Court awarded damages to the member who had been unlawfully expelled.

[96] Hamel-Smith J in **Boodram** declared that parliamentary privileges are to be exercised **subject to** the Constitution. The learned judge drew an important distinction between a suit brought in private law against a MP and one based in public law against the State (Government). In the case of the latter, the learned judge said that the State cannot take shelter under parliamentary privilege to protect itself from the claims of a citizen complaining about the infringement of his/her constitutional rights. The learned judge stated at pp. 19-20:

> **"…as long as what is said in Parliament by a member does not infringe the provisions of the Constitution, that … immunity is assured. If a motion is filed in Parliament or a house paper is laid by a member and the effect of either is to constitute an infringement of a citizen's fundamental rights then that … immunity is put in jeopardy.**
>
> **A democracy which claims not only to have respect for the fundamental rights of its citizens, but which makes express provision in its Constitution to entrench and preserve those rights, should never appear to entertain the suggestion that members of Parliament are free to do what they like provided it is done within its walls. The oath taken by its members demands of them respect for the Constitution; it casts on them the unparalleled responsibility and obligation to uphold all of the provisions of the Constitution; not some of them, but all and not when it suits members of Parliament, whether they perceive it for the good of the country or not, but at all times."**

[97] This is the same principle that was adumbrated by the Privy Council in **Bahamas Methodist Church**. The Privy Council also made it clear that it is not possible for Senators and Members of Parliament in The Bahamas to enjoy

identical "**privileges and immunities as are enjoyed for the time being in the United Kingdom by members of the Common House of Parliament"**, and that UK parliamentary privilege will be read as being subject to the provisions of the Constitution of The Bahamas, the latter prevailing in cases of conflict.

[98] Speaking extra judicially at the **Third Annual Lloyd Barnett Lecture** held on 2 September 2008, Saunders J, a Justice of the Caribbean Court of Justice, concluded his lecture in this way:

> **"[T]he court must "ensure that a claim of privilege does not immunize from the ordinary law the consequences of conduct by Parliament or its officers and employees that exceed the necessary scope of the category of privilege" or that violates fundamental rights. Constitutional supremacy requires that, in appropriate cases, the judiciary should have the right and the duty ultimately to assess whether a particular claim on privilege should or should not succeed. The reality of the Caribbean is that there is a tenuous separation between the executive and legislative branches of government. In some States, the membership of the Executive branch of government invariably constitutes a majority of the lower house. The judiciary must therefore be particularly astute to ensure that privilege is not used as a means of placing either of these branches or their officers above and beyond the reach of the law."** [Emphasis added]

[99] To conclude, in the Bahamas, the Constitution is the supreme law of the land and the Court is the guardian of the Constitution. The Court is assigned the delicate task of determining what is the power conferred on each branch of Government, whether it is limited and if so, what are the limits. The Court is also tasked to decide whether any action by any branch transgresses such limits. It is therefore incumbent on the Court to uphold the constitutional values and to enforce the constitutional limitations. That is the quintessence of the rule of law. The upshot of this is that parliamentary privilege is trumped by breaches of the Constitution and although Parliament is supreme, it is not as supreme as the Constitution.

The Claims for Constitutional Redress

[100] Having found that Parliament cannot use its privileges to trample on the constitutional rights of an individual, the sole remaining question is whether

there is a viable allegation that the constitutional rights of the Applicants were infringed by the actions of the 1st and 2nd Respondents in and outside of Parliament.

Liberal and generous approach in construing Constitution

[101] In construing constitutional provisions a broad and generous approach is required to give individuals the full measure of the rights and freedoms referred to in the Constitution: **Minister of Home Affairs v Fisher** [1980] AC 319 - per Lord Wilberforce at pp.328-329. In **AG v Whiteman** (1991) 39 W.I.R. 397 at p. 412, Lord Keith of Kinkel, in delivering the opinion of the Board said:

> **"The language of a Constitution falls to be construed, not in a narrow and legalistic way, but broadly and purposively, so as to give effect to its spirit, and this is particularly true of those provisions which are concerned with the protection of human rights."**

[102] Also, in **Benjamin v Minister of Information and Broadcasting** [2001] UKPC 8; 58 W.I.R. 171, the Board endorsed a generous interpretation of the right to freedom of expression. Mr. Benjamin, an Attorney-at-law, hosted a radio programme on Radio Anguilla, a government-owned and controlled station. He was responsible for the format and getting sponsorship. In 1997, the programme was summarily suspended by the government after it dealt with the contentious political matter of the lottery. The Board examined section 11 of the Anguilla Constitution which defines freedom of expression as including the right not to be hindered in the enjoyment of his or her freedom of expression and the freedom to receive and impart ideas without interference. At [28], Lord Slynn of Hadley said:

> **"Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms with a statement of which the Constitution commences."**

[103] Lord Slynn continued at [29]:

> **"Lord Wilberforce said at page 328:-**
>
> > **These antecedents, and the form of Chapter I itself, call for a generous interpretation avoiding what has been called 'the austerity of tabulated legalism', suitable to give to individuals the full measure of the fundamental rights and freedoms referred to."**

[104] At [30], Lord Slynn referred to a dictum of Lord Diplock in **Attorney General of The Gambia v. Momodou Jobe** [1984] AC 689 at p.700H:

> > **"A constitution, and in particular that part of it which protects and entrenches fundamental rights and freedoms to which all persons in the state are to be entitled, is to be given a generous and purposive construction."**

[105] Dr. Barnett correctly submitted that this interpretive principle does not free an applicant from the requirement of substantiating his claim both in law and fact to prove a breach. Thus, an applicant who alleges a breach must demonstrate that there has been a violation of the constitutional principle in respect to him. Specifically, he must demonstrate the following:

- That the right which is being asserted is protected by the constitutional provision (s) relied on;
- That the impugned action or activity violates the constitutional right in relation to him; and
- That the interference with the right is not covered by any of the provisos to the right and/or is not reasonably necessary in a democratic society.

See: **Neil Wells v Attorney General** No. 1791 of 1991- (Bahamas Supreme Court, unreported); and **Smith (Frederick) v Commissioner of Police and another** (1984) 50 WIR 1).

Acts of Respondents attributable to Government

[106] An important sub-issue which arises is whether the acts of the 1st and 2nd Respondents are attributable to the Government. In the affidavit of Ms. Bonamy at [32], she stated:

"[W]hatever allegations may have been leveled against individual MPs or other persons, there is no evidence to indicate that the Government, as a collective entity, has in any way obtained, reviewed or disclosed private and confidential information which belongs to the Applicants or any of them."

[107] Learned Counsel Dr. Barnett argued that there is not a shred of evidence to support this allegation. He submitted that the 2nd Respondent made two statements as to how he obtained the emails in question, neither of which was a Government operation or resulted from Cabinet policy. According to Dr. Barnett, it appears that the 1st and 2nd Respondents were acting in their capacity as Members of Parliament and no one alleged that it was a Government initiative.

[108] It is plain that the Government is seeking to dissociate itself from the acts and statements of its very own Cabinet Ministers including statements made in Parliament.

[109] Mr. Smith QC submitted that this argument is unfounded and should be dismissed for the following reasons:

1. The concept of "Government" or "Executive" is a legal fiction since it can only act through the Prime Minister and the Members of the Cabinet: see Article 72 of the Constitution;

2. Arguing by analogy to the field of judicial review, this is an area which is replete with decisions by individual Ministers that are considered to be decisions of government and are thus subject to judicial review by the Court;

3. The Speaker in a Communication dated 25 April 2016 (at p.3 of Bonamy Affidavit) pointed out that there are different rules that apply to statements made by Ministers in Parliament as opposed to regular Members of Parliament, in that context relating to when to table documents referred to in a speech: see Rules 82 and 30; so clearly a distinction is made between a Minister and an MP; and

4. In the case of Hon. Minister Mitchell, who is Minister of Foreign Affairs, his acts and statements can, as a matter of international law, bind the State, e.g. if he signs a treaty on behalf of The Bahamas.

[110] I accept the submissions made by Mr. Smith QC that the acts and statements made by the 1st and 2nd Respondents are attributable to the Government and I so find.

Issue 5(a): Whether the parliamentary disclosures have breached any of the Applicants' constitutional rights?

Claim under Article 15 (c)

[111] The Applicants alleged that the 1st and 2nd Respondents breached their constitutional rights to privacy of their property (the private and confidential correspondence of the Applicants (Tabled Documents and/or Undisclosed Documents) as guaranteed by Article 15(c) of the Constitution.

[112] Article 15 provides as follows:

> **"15 -Whereas every person in The Bahamas is entitled to the fundamental rights and freedoms of the individual, that is to say, has the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely-**
>
> **a) life, liberty, security of the person and the protection of the law;**
>
> **b) freedom of conscience, of expression and of assembly and association; and**
>
> **c) <u>protection for the privacy of his home and other property</u> and from deprivation of property without compensation,**
>
> **the subsequent provisions of this Chapter shall have effect for the purpose of affording protection to the aforesaid rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest."**

[113] The Applicants argued that Article 15 confers a free-standing right which is enforceable by its own terms. Learned Counsel Mr. Smith QC fortified his argument by relying on two Bahamian decisions namely **Wells v Attorney General** [1992] BHS J No. 16 and **Bahamas Entertainment Ltd v Koll** (1996) 2 LRC 45 ("**Harbour Lobster**").

[114] According to Mr. Smith QC, **Wells** was the first case in the Bahamas to recognise Article 15 as a fundamental unenumerated right. At [17] - [18] of the judgment, Hall J (as he then was) stated:

> **"17. While Article 15(c) speaks of the existence of a right of the "privacy of his home and other property", the word "privacy" does not appear in the remainder of the fundamental rights section of the Constitution again but only in the marginal note to Article 21.**
>
> **18. I have elsewhere (*in The Matter of the Application of Fitzroy Forbes CL 498/1990)* expressed the view (which I still hold) that Article 15 is both a preamble and an enacting section. As the ratio in one of the cases referred to in that decision holds, where a provision such as Article 15 is accorded the same high degree of entrenchment as the other fundamental rights provisions (vide Article 54(3) it is no mere preamble. Of course, "enacting" here does not bear its ordinary meaning of conferring because if the proposition were that the Constitution conferred rights it could as readily remove them. Instead, the effect of Article 2, Article 15 through 27 and Article 54(3) of the Constitution is that the Constitution declares and clothes with its protection the rights enumerated in Articles 16 through 27 and other unenumerated rights. The difference between the enumerated and unenumerated rights is that, by Article 28, the former are justiciable by the broad procedure created by that Article which specifies its limit to Articles "16 to 27". Therefore, in the present case, had the challenge before the magistrate been limited to Article 15, the matter of reference to the Supreme Court under Article 28(3) would not have arisen."**

[115] Mr. Smith QC next referred to the **Harbour Lobster** case. The brief facts are that in 1993, the government passed a law that required stamp duty to be paid on the filing of any writ or originating summons in the Supreme Court. The amount of stamp duty that was to be paid was a percentage of the amount claimed. The applicants sought to file a defence and counterclaim (for a sum of $670,769) at the registry. The registry clerk sought to extract the sum of $5,360 which the applicants refused to pay and the documents remained unfiled. The

applicants sought a declaration that the 1993 Act was in contravention of Articles 15, 20(8), 26 and 27 of the Constitution on the ground that it hindered them from exercising their 'absolute' right of access to the Supreme Court.

[116] Sawyer J (as she then was) held that Article 15 of the Constitution has **"some declaratory force"** (p.72g) and by way of example, ought to be read together with Article 26 in order to import into Article 26 a prohibition on discrimination on the basis of gender (gender-based discrimination is expressly provided in Article 15 but not listed in Article 26 as a prohibited type of discrimination (p.72e)).

[117] Sawyer J held, after considering the authorities of **Olivier v Buttigieg** (1967) AC 115; **AG of Trinidad and Tobago v Whiteman** [supra]; **Thornhill v AG of Trinidad and Tobago** [1981] AC 61; and **Société United Docks v Government of Mauritius/ Marine Workers Union et al v Mauritius Marine Authority** (1985) 1 AC 885, as follows at (p. 63d):

> **"In my view, art.15 of the Constitution, when read in the light of Magna Carta 1297 Ch 29 and the statute of 7 Henry 4 Ch 1 and s 4 of the Declaratory Act, preserves and declares those rights, liberties, privileges whether de facto or de jure which pre-existed the 1963 Constitution of the Bahama Islands so that to the extent possible litigants in civil matters are prima facie entitled to have access to the courts of this country established by law for the determination of the existence or extent of their civil rights and obligations. But that right, as I understand it, was never an absolute one, for it was it would not have been necessary for the Constitution to enact art 27(2) or art 28: see also *DPP v Nasralla* [1967] 2 All ER 161 at 164, [1967] 2 AC 238 at 247."**

[118] This decision was upheld by the Court of Appeal in **Harbour Lobster & Fish Co. v Attorney General of the Bahamas** [1998] BHS J. No. 15 ("**Harbour Lobster**"). In his judgment in **Harbour Lobster**, Georges JA stated at [13]:

> **"With respect to counsel's argument to the contrary, Article 20(8) of the Constitution has no direct application to the appellant's case for it assumes the existence of a court to which access is available but does not provide for the means by which such access can be had."**

[119] Georges JA stated at [14] that Article 15 cannot in his opinion be so easily disposed of. At [15], he stated:

> **"Although the use of the word 'whereas' would ordinarily suggest that what follows constitutes a recital and nothing more, the textual material of the article belies such a conclusion. Since the case of *Olivier v Buttigieg (1967) AC 115* the view has gradually crystallised that it also includes positive declarations of rights and a recognition of those rights. (see *Riley v AG of Jamaica (1983) AC 719, and Society (sic) United Docks v Gov't of Mauritius/Marine Workers Union v Mauritius Marine Authority (1985) 1 AC 885).*** (Emphasis added)

[120] Mr. Smith QC submitted that **Harbour Lobster** is clear Court of Appeal authority that although the right to the protection of the law is specifically dealt with in a limited way under Article 20(8), Article 15 is capable of conferring wider freestanding rights on litigants.

[121] Learned Queen's Counsel next argued that the constitutional points (Art 15 and Art 30) in **Newbold v Commissioner of Police** [2014] 4 LRC 684 was raised for the first time at the Privy Council and, Lord Mance, who delivered the judgment of the Board, acknowledged at [17] that the Board was at a disadvantage in not having the benefit of any assistance from the Bahamian Courts below on the point. Lord Mance also noted the shortness of time available for these issues to be researched. The Privy Council nonetheless allowed the issues to be raised.

[122] Mr. Smith QC submitted that the Board's anxieties in this regard turned out to be well-founded because none of the parties drew the Board's attention to the well-reasoned Bahamian Supreme Court and Court of Appeal decisions on Article 15 in **Harbour Lobster**. He also submitted that it is clear that had the Article 15 issue been raised in the Court of Appeal in **Newbold**, the Court would have realized that it was bound by its earlier decision in **Harbour Lobster**.

[123] Finally, Mr. Smith QC argued that **Newbold** is not authority for the proposition that Article 15 is no more than a preamble in all respect and in all cases. He concluded that **Newbold** is only authority for the proposition that "*[T]o the extent*

that the substantive rights relied on in Article 15 can readily be found in Articles 16-27, Article 15 is no more than a preamble and has no independent effect".

[124] Mr. Smith QC contended that, in the present case, the Applicants seek to rely on distinct and independent substantive rights conferred by Article 15 that cannot be found elsewhere in Articles 16-27 namely that Article 15 confers a distinct right to "**protection for the privacy of … property**."

[125] On the other hand, learned Counsel Dr. Barnett submitted that Article 15 is a preambulatory section and is not given enforceability status by Article 28, which effectively provides for the enforcement of fundamental rights: **Grape Bay Ltd v Attorney General** [1999] UKPC 43 and **Newbold.** He next submitted that Article 15 begins with the word "Whereas", which is typical of a preamble and not a substantive provision. After reciting the entitlement to certain rights and fundamental freedoms, Article 15 states **"the subsequent provisions of this Chapter shall have effect for the purpose of affording protection to the aforesaid rights and freedoms**…"It thus expressly indicates that it is the remaining Articles of the Chapter that provides protection for fundamental rights and freedoms.

[126] According to Dr. Barnett, significantly, the marginal note of Article 28 states "Enforcement of fundamental rights", and Article 28 provides that if any person alleges that any of the provisions of **Articles 16 to 27 (inclusive)** of this Constitution has been, is being or is likely to be contravened in relation to him then, … that person may apply to the Supreme Court for redress. Article 28(2) provides that the Supreme Court shall have original jurisdiction to hear and determine any application and may make and grant such reliefs as it considers appropriate for enforcing the provisions of Article 16 (not Article 15) to Article 27 (inclusive). It is manifestly clear, says Dr. Barnett, that the Constitution treats Articles 16-27 as the enforceable provisions.

[127] Dr. Barnett relied on a plethora of authorities to substantiate his argument. In **Bahamas Entertainment Ltd v Koll**, Sawyer J held that Article 15 had some declaratory force but did not go so far as to say that it was in itself enforceable.

[128] In **Olivier v Buttigieg**, the Privy Council held that the corresponding preamble of the Maltese Constitution must be given such declaratory force as it independently possesses. It is an introduction to and explanatory note for the following sections, but was not itself enforceable.

[129] In **Société United Docks v Government of Mauritius**, the Privy Council found that the wording of section 3 was consistent with an enacting section and was not a mere preamble or introduction and the enforcement section 17 referred to a claim "that any of the foregoing provisions of this chapter" has been contravened. Their Lordships distinguished **Olivier Buttigieg** where the wording was dissimilar.

[130] The Court of Appeal in **Harbour Lobster** treated Article 15 as having some positive effects as a declaration and recognition of rights but did not go on to say, as the Applicants contended, that it is capable of conferring wider free standing rights on litigants. The Court of Appeal held that the court fees imposed on litigants did not amount to a deprivation of access to the Court and so, the comments on Article 15 were *obiter.*

[131] In **Responsible Development for Abaco v The Right Hon Hubert Ingraham et al** ("**RDA**") (SCCivApp No. 38 of 2010) the Court of Appeal held that Article 15 provided no separate and enforceable rights: it was only a preamble to use as an aid to construction and may extend or restrict the rights in Articles 16 to 27. The differently-constituted Court of Appeal did not follow the decision in **Harbour Lobster** but instead followed the Privy Council's decision in **Campbell-Rodriques.**

[132] In **Campbell-Rodriques**, the Privy Council held that section 13 of the Jamaican Constitution (which corresponds to Article 15 of the Bahamian Constitution)

does not confer any free standing rights. It further held that on the clear interpretation of the provisions of Chapter 3, the rights and freedoms enforceable under section 25 are to be those set out in sections 14-24 (Inclusive). The Privy Council agreed with Cooke JA who stated that a general and purposive interpretation of the Constitution does not permit distortion of the explicit relevant sections of the Constitution.

[133] **Attorney General v Maycock** [2010] 1 BHS J No. 73 concerned a claim that the right to privacy had been breached by the contravention of Articles 21 and 23 of the Constitution in respect of the interception of telephone conversations under the Listening Devices Act. On appeal to the Privy Council, as **Newbold v Commissioner of Police**, the Board stated that in the Bahamian Constitution, Article 15 is no more than a preamble. Learned Queen's Counsel Mr. Smith submitted that the Board did not have the benefit of any assistance from either of the Bahamian Courts below, but at [17] of the judgment, Lord Mance stated:

> **"…Nevertheless, and after receiving further post-hearing written submissions on the issues, the Board feels able to deal with them and considers it appropriate to permit them to be raised."**

[134] So, it seems highly improbable that such a revered court - the highest in the land - would adjudicate and determine issues without giving full and proper considerations.

Analysis and Findings

[135] In their treatise "**Fundamentals of Caribbean Constitutional Law**" (Sweet & Maxwell), the learned authors, Tracy Robinson, Arif Bulkan and Adrian Saunders at 9-009, pp. 423-425 discussed this very issue under the rubric "**The opening section controversy**". At pp. 424-425, the learned authors opined that "*the proper interpretation of the opening section remains a vexed one in Caribbean constitutional law and much turns on the way the question is posed. Typically the question asked is whether the more expansive guarantee of fundamental rights in the opening section is a "mere preamble" or is it separately*

enforceable?" According to them, a line of authorities (**Newbold** at [31]-[33]; **Campbell-Rodrigues** [2008] 4 L.R.C. 526 (PC Jam) at [12], **AG v Lake AI** 2005 CA 2 (CARILAW) April 4, 2005 (CA Ang) at [39]; **Grape Bay Ltd v AG** (1999) 57 W.I.R. 62 at 71.) conclude that it is the former for two reasons. The first reason given is that the opening sections begin with "[w]hereas", language often associated with preambles. Secondly, the redress clause at the end of each of the bills of rights grants access to the superior courts for breaches of the listed detailed rights excluding in most Caribbean constitutions the opening section.

[136] The learned authors appeared not to be too happy with these reasons because, as they say, first, the opening sections guarantee *more* fundamental rights than the detailed provisions and secondly, the opening sections guarantee the rights *with wider scope* than the detailed provisions. The broadest description of the rights to protection of the law, privacy and property is found in the opening section. In the end, they opined that "*the more dominant view is that there is an "umbilical cord" between the two*".

[137] Like the learned authors, I, too, am prepared to accept that "*to give effect to a detailed right, you must have regard to its roots in the opening section thereby indirectly giving effect to it*". It is fair to say that Article 15 does have some constitutional role and it ought to be read in conjunction with the rights in Articles 16 to 27. Rhetorically, I pose this question: why would the framers of the Constitution include such a detailed preamble if it meant absolutely nothing? Except for Hall J in **Wells**, the learned judges of both courts in **Harbour Lobster** did not elevate Article 15 to the status of conferring free standing rights. Their views harmonised with the opinion of the Privy Council in the cases already discussed above.

[138] In the end, I accept the attractive arguments advanced by Dr. Barnett that Article 15 creates no free standing rights on litigants. Despite the eloquence of Mr. Smith QC, I am afraid that I do not agree with him that to the extent distinct and independent substantive rights conferred by Article 15 cannot be found

elsewhere in Articles 16 – 27, then Article 15 confers such distinct right, for example, the "**protection for the privacy of…property**." Accordingly, the Applicants' claim under Article 15 must fail.

Claim under Article 21(1)

[139] The Applicants alleged that the 1st and 2nd Respondents searched and/or obtained their private and confidential correspondence and other documents (Tabled Documents and/or Undisclosed Documents) and breached their rights to freedom from search of one's property pursuant to Article 21(1) of the Constitution.

[140] The Respondents do not dispute the fact that the correspondence at the heart of this action constitutes "property". However, they say that apart from the general allegation that the private and confidential correspondence "belong to the Applicants," it is not known on what basis the Applicants assert any proprietary rights in the "correspondence'. In fact, the comments of the Respondents, and in particular the 2nd Respondent, only referred to 'emails', and what is therefore disclosed is the information from the emails. According to Dr. Barnett, this may have significance for the legal issues raised and the claims made by the Applicants.

[141] Learned Counsel Dr. Barnett relied on the case of **Fairstar Heavy Transport NV v Philip J. Adkins and another** [2012] EWCH 2952 to support this point. The facts of **Fairstar** were unusual. The CEO had been engaged by the claimant through his own company, and so was a consultant rather than an employee. Following the termination of his employment, he refused (for reasons which are not clear) to comply with the company's request for copies of all the work-related emails held on his own computer. The company then applied for an order for inspection of the content of the relevant emails. Significantly, there was no claim by the company that the contents of the emails were confidential or amounted to trade secrets.

[142] At first instance, the matter proceeded by way of an agreed issue, namely: did the company have "an enforceable proprietary claim to the content of the emails". That being the issue before him, Edwards-Stuart J at first instance concluded that the content of the emails to which the company claimed a proprietary right was "information"; that according to the authorities there can be no property in mere information; and that the company therefore did not have the proprietary right on which it based its claim.

[143] Mummery LJ (giving the only substantive judgment in the Court of Appeal) decided that the parties had asked the court to answer the wrong question. For Mummery LJ, the key point was that Mr. Adkins had, in his CEO role, been an agent of Fairstar. He cited the long line of authority illustrating the rule that a principal or employer is entitled to delivery up of original documents retained or removed by an agent or employee relating to transactions undertaken on the principal's behalf. Although emails are electronic documents, they are documents nonetheless, and the same rule should apply to them.

[144] The appeal was therefore allowed, with Mummery LJ deprecating the arid debate below as to whether an email contained only "information" and as to whether "information" can ever be "property". He specifically declined, however, to endorse the proposition that there can *never* be property in information: "*Some kinds of information, such as non-patentable know-how, are more akin to property in their specificity and exclusivity than, say, personal information about private life*".

[145] The question in **Fairstar** was whether the claimant could restrain the use of the information.

[146] In the present case, all that the Applicants need to show, is that their emails (not disputed) are their property for the purposes of Article 21 of the Constitution. This, to my mind, is a much lower hurdle and one for which, the first instance judgment in **Fairstar** provides no assistance to the Court.

[147] The Respondents also relied on **Newbold** to construe Article 21 as not applying to email correspondence. They argued that Article 21 gives recognition to *"certain privacy rights in respect of a person's dwelling place or his person"*.

[148] Learned Queen's Counsel Mr. Smith submitted that, in **Newbold**, the Privy Council noted that "*there is therefore some powerful material to support the view that article 21 of the Bahamian Constitution should be given a generous interpretation. Nevertheless, the Board doubts whether it would be right to treat it as going so far* [as telephone communications]."

[149] Mr. Smith QC correctly submitted that the comment in **Newbold** simply does not apply here because in this case, the Court is not dealing with the interception of telephone communications but with searching and taking copies of emails which do have a physical subject matter. In **Newbold**, it was held that telephone communications were not covered by Article 21 because "*article 21 of the 1973 Constitution, was deliberately restricted to a physical subject matter"* (at [24]) however emails are physical subject matter in a way that telephone conversations are not. **Newbold** says nothing about emails in the context of Article 21.

[150] According to Mr. Smith QC, emails are physical subject matter in a way that telephone conversations are not for the following reason. If a telephone conversation is recorded, the content of the call is recorded but the recording itself is a material object which has been created by the person intercepting the conversation so it cannot be considered the property of the person involved in the call. On the other hand, where emails are involved, a document is created by the sender when the email is sent and the person intercepting or interfering is making a copy of that document. In the latter case, the physical subject matter was created by the victim of the breach; in the former case, there was no physical subject matter until the conversation was recorded. To my mind, this makes good sense and I agree with it.

[151] The Respondents also submitted that one of the possibilities is "if someone captured the transmission of emails in cyberspace; this would have nothing to do with the physical entry or search of property. This is a voluntary projection of the data in public space, where those with the capacity may capture the data."

[152] This cannot be correct. Otherwise, it means that when someone posts a letter because it is in "public hands" i.e. the postal service, this means that the Government can intercept and open the letter and read/disclose its contents. According to Mr. Smith QC, the Respondents ignores the "property" element of the protection in Article 21 and seeks to insert a non-existent condition precedent that the "property" must be held by the person at all times with no risk of an internet security breach for it to enjoy protection under Article 21.

[153] I agree with Mr. Smith QC that with the development of computer/associated data storage and transmission, electronic forms of correspondence and storage must be included within the concept of a person's "papers." Otherwise, it would be utter nonsense if the law only protected the printed version of a person's email and not the electronic version held in a computer, especially given Lord Hoffman's primordial adage in **Attorney-General of Jamaica v Williams and Another** [1998] A.C.351 at [355] that "**papers are often the dearest property a man can have**".

Analysis and Findings

Applicable legal principles

[154] Article 21(1) of the Constitution provides that "[**E]xcept with his consent, no person shall be subjected to the search of his person or his property of the entry by others on his premises"**.

[155] A good starting point on the importance of the right under Article 21 is the dictum of Lord Hoffman in **Attorney-General of Jamaica v Williams and Another** [1998] A.C.351. Lord Hoffmann said at pp. 354-355:

"The fundamental human right to protection against unlawful searches and seizures is part of the English common law. In *Entick v Carrington* (1765) 2 Wils. 275 the King's Messengers entered the plaintiff's house and seized his papers under a warrant issued by the Secretary of State, a Government minister. Lord Camden C.J. said, at p. 291:

> **our law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave; if he does he is a trespasser, though he does no damage at all; if he will tread upon his neighbour's ground, he must justify it by law…we can safely say there is no law in this country to justify the defendants in what they have done; if there was, it would destroy all the comforts of society; for papers are often the dearest property a man can have.**
>
> **From the common law this right has passed into the Fourth Amendment to the Constitution of the United States and into the Constitutions of countries throughout the world. In Jamaica it appears in section 19(1) of C of Constitution: 'Except with his own consent, no person shall be subject to the search of his person or his property or the entry by others on his premises.' But the right is not absolute. As Lord Camden C.J. said, the search must be justified in law."**

[156] In **Maycock v The Attorney General and another** [2010] 1 BHS J No. 73, The Court of Appeal stated at [63]:

> **"Section 21(1) of the Constitution prohibits the search of any person (which includes a legal entity like a company - see *Attorney General of Antigua v Antigua Times* [1976] AC 16) or a person's property or the entry by others on a person's property except with that person's consent."**

[157] With respect to Article 21, the Applicants must establish that the 1st and 2nd Respondents searched or threatened to search their property without their consent.

[158] What does "search" mean? The Concise Oxford Dictionary 10th Ed. defines it as *"1. Try to find something by looking or otherwise seeking carefully and thoroughly –examine thoroughly in order to find something, 2. Scrutinizing thoroughly especially in a disconcerting way"*.

[159] Contrary to what the Respondents contended, in order for a breach of Article 21 to be made out, the Applicants are not required to show "physical intrusion"

upon their property beyond what is required for property to be searched. Seizure is not part of Article 21.

Need for facts to prove allegations of constitutional breaches

[160] It is common ground that as a condition precedent to asserting a claim for constitutional protection and redress, the applicant has to make good his factual allegations of constitutional abuse. In **Danson v Ontario (Attorney General intervening)** [1990] 2 S.C.R. 1086 at p.1088, the Canadian Supreme Court held:

> **"A proper factual foundation must exist before measuring legislation against the provisions of the *Charter*, particularly where the effects of impugned legislation are the subject of the attack. A distinction must be drawn between two categories of facts in constitutional litigation: "adjudicative facts" and "legislative facts". Adjudicative facts are those that concern the immediate parties. They are specific and must be proved by admissible evidence. Legislative facts are those that establish the purpose and background of legislation, including its social, economic and cultural context. Such facts are of a more general nature, and are subject to less stringent admissibility requirements."** [Emphasis added]

[161] In **HMB Holdings Ltd v Cabinet of Antigua and Barbuda** [UKPC 37], the Privy Council struck out a constitutional challenge alleged to be based on discrimination on the grounds of race or colour contrary to s. 14 of the Constitution of Antigua and Barbuda. The Privy Council found that there was no evidence that the impugned decision was based on grounds which could be described as discriminatory: see [42]. **In Maurice Glinton and Leandra Esfakis v Rt. Hon. Hubert A. Ingraham et al** [2007] 1 WLR 1. Lord Brown of Eaton-Under-Heywood, in delivering the Judgment of the Board said at [11] - [12]:

> **"Their Lordships have difficulty with this reasoning. It could be said equally of actions for breach of statutory duty that they too do not arise at common law. But surely no one doubts that those causes of action are amenable to the courts' strike-out jurisdiction. Of course, the Court of Appeal was right to direct itself that claims should only be struck out in plain and obvious cases and, of course, courts should look with particular care at constitutional claims, constitutional rights emanating from a higher order law. But constitutional claims cannot be impervious to the strike-out jurisdiction and it would be most unfortunate if they were. It cannot be right**

that anyone issuing proceedings under article 28 of the Constitution is guaranteed a full hearing of his claim irrespective of how ill-founded, hopeless, abusive or vexatious it may be.

Take this very case. Sir Burton Hall CJ was surely right to characterise the disputed paragraphs of the claim as he did. They were argumentative and political and quite incapable of giving rise to the legal declarations sought. The case for a strikeout was in their Lordships' view perfectly plain and obvious. If ever a claim was foredoomed to fail this was it."

[162] Briefly put, the Applicants' case is that the 1st and 2nd Respondents searched and/or obtained the private and confidential correspondence and other documents of the Applicants (Tabled Documents and/or Undisclosed Documents) and breached the Applicants' rights to freedom from search of one's property pursuant to Article 21(1) of the Constitution.

[163] It is therefore necessary to look at the facts in respect of each respondent separately and not to "lump" them together. In the realm of criminal law, when there are two defendants, judges admonished juries that "they must consider the case against and for each defendant separately. The evidence is different and therefore the verdicts need not be the same". I shall employ the same approach here.

[164] The 1st Respondent made one statement in Parliament on 21 March 2016 and two statements outside of Parliament on 28 March and 11 April 2016 respectively: see The Undisputed Facts – [21] and [24] of this judgment as well as the Applicants' Table at Appendix A. For convenience, I reproduced them again.

[165] On 21 March 2016, the 1st Respondent stated in Parliament:

"The point is made that these ....the emails that has now become the subject of discussion, were obtained contrary to the Data Protection laws. Now, you know, this is amazing. This is what their mantra is: Transparency in Politics, that's their mantra. Now transparency means they want to see everything. Now the people who want to see everything ……. but you know, you want to run to court and say, 'Oh my, these people looking in my bank account; they've got my emails; how they got to thief this.' You know, they are not denying that the money actually changed hands. They just say,

'How you get that, who told you that, Stop talking about it. Don't spread it. So on and so forth.' The problem with that is that of all the possibilities which exist, the one thing they don't allow for is the fact that it might have been authorized. How about that? It could have been unauthorized, that's true. It could have been hacked, it could have been stolen, but it might have been authorized. But nobody counts that possibility. But yet an allegation is being made against a Minister of the Government that he in effect, stole documents from a private citizens. That's a serious allegation. So that's our case.

[166] On 28 March 2016, Ministers Mitchell and Fitzgerald issued a joint statement outside of Parliament in which they stated:

> **"We merely point out to the public this matter is not about unauthorized [access to] emails. As we said in Parliament, this matter is about a well-funded environmental organization that is not about the environment, but Save the Bays is about politics and destabilizing the government of The Bahamas and has spent millions of dollars to do so. … Let the public be assured that neither of us is a party to any 'unauthorized' access to e-mails. This particular matter now rests with the Police …. We remain focused on keeping Save the Bays honest and transparent and will do so in any forum we deem necessary."**

[167] On 13 April 2016, the 1st Respondent said the following outside of Parliament: See No. 29 at p. 39 of the Applicants' Table at Appendix A.

> **"A smokescreen has been thrown up first by Mr. Smith and then Save The Bays <u>to avoid their exposure in this matter and their responsibility. The allegation is that money was paid to Save The Bays by a rich white expatriate which money was being used not for charitable purposes but purely political purposes. That too has not been disproved</u>.**
>
> **Instead, the FNM and Fred Smith start crying afoul about privacy and emails essentially contradicting themselves…"**
>
> **The allegation made in the House against Fred Smith and Save The Bays are serious. <u>In the ultimate result, when the proof fully emerges, it will tell a sad story about their lack of patriotism and how they were willing to throw constitutional rights against wealth out with bath water just to achieve political power. They have now been exposed and caught red-handed. They will have to answer for their perfidy before the Bahamian people</u>"**. (Emphasis added)

[168] Do these statements by the 1st Respondent, whether in or outside of Parliament, amount to a search and/or obtaining of the private and confidential

correspondence of the Applicants? The answer is an unequivocal 'no'. There is not a shred of evidence that the 1st Respondent searched or threatened to search the Applicants' correspondence.

[169] Accordingly, I find that the 1st Respondent, Hon. Minister Mitchell has not breached the Applicants' fundamental right under Article 21 of the Constitution. The claim against him is misconceived and must fail.

[170] Now, to the 2nd Respondent. From the Hansard extracts in Mr. Darville's affidavit, it is clear that the 2nd Respondent had looked at, examined, read, scrutinized, sifted, and rummaged through the Applicants' private correspondence with the intention of trying to find some smoking gun to support his allegations that Save The Bays is a disguised political organization created for the purpose of destabilizing the Government.

[171] The evidence of Mr. Nunez which exhibited the Tabled Documents clearly illustrates that the said correspondence/property belongs to the Applicants. The Tabled Documents (with the exception of the GBHRA papers) comprise private and confidential exchanges between Save The Bays' attorneys, directors and associates.

[172] The Applicants correctly submitted that, as in this case, (see the 2nd Respondent's repeated assertions to this effect), the 2nd Respondent had at his disposal a cache of the Applicants' emails and perused this cache in order to select emails to be read out in Parliament and emails to hold back for a future date (as promised and threatened by the 2nd Respondent), then that is sufficient to establish that the Applicants' emails have been "searched" by the 2nd Respondent. Put another way, in order to have selected the emails that he read in Parliament from a larger collection of emails, the 2nd Respondent had to have searched and considered the cache of emails. And it matters not by what means (and by and from whom) this cache of emails was obtained.

[173] Although the Respondents maintained that they had not been "*a party to unauthorised access to emails*", the 2nd Respondent stated on 21 March 2016 in Parliament that he had obtained the documents with the assistance of "*a couple of friends*" in the U.S. The 2nd Respondent was quoted as saying that he "*never hacked any email"* and "*I found them in my political garbage can where I find information almost every day*." He defined his "*political garbage can"* as a place *where people send him information."*

[174] It is uncontroverted that only the Applicants and their agents, officers and employees were and are entitled to see their correspondence. And very importantly, the respective affidavits of Mr. Darville and Mr. Nunez state that the 2nd Respondent's search and disclosure of the Applicants' private and confidential information was without the Applicants' consent.

[175] I therefore find that the 2nd Respondent's dealing with the Applicants' private correspondence, including his search and seizure or obtaining possession and perusal thereof, was unauthorised and non-consensual. This, to my mind, was a flagrant breach of Article 21 of the Constitution. The onus now lies on the 2nd Respondent to establish that his action was done with the consent of the Applicants or, if not, that it was justified pursuant to Article 21(2).

[176] Article 21(2) provides as follows:

> **"Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this Article to the extent that the law in question makes provisions-**
>
> **a) which is reasonably required-**
>
> > **i) in the interests of defence, public safety, public order, public morality, public health, town and country planning, the development of mineral resources, or the development of utilisation of any other property in such a manner as to promote the public benefit ; or**
> >
> > **ii) for the purpose of protecting the rights and freedoms other persons ;**
>
> **b) …**

and except so far as that provisions or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society."

[177] The 2nd Respondent has failed to discharge this burden.

Claim under Article 23(1)

[178] The Applicants alleged that the 1st and 2nd Respondents obtained and made disclosures in Parliament from their private and confidential correspondence thereby breaching their rights to privacy of property and/or freedom from interference with correspondence pursuant to Article 15(c) **and/or** 23 (1) of the Constitution.

[179] Learned Counsel Dr. Barnett submitted that the Applicants' reliance on **Newbold** and the statement by the Privy Council that the boundaries between privacy and freedom of expression cannot be so neatly drawn, in which their Lordships found that the interception of telephone conversation fell within the concept of "interference with correspondence" within Article 23 and its predecessors is tenuous since the facts in **Newbold** are very different from the facts of the present case. Dr. Barnett next submitted that it is clear from their Lordships' analysis in [25] – [26] that they were speaking about the potential interference and hindering of a person's entitlement to free speech by real-time "electronic surveillance" of a person's telephone conversations (even if not perceived at the time). Dr. Barnett opined that this is very different from the disclosure of information from an email which is happened upon fortuitously.

[180] Dr. Barnett next submitted that even apart from the factual and other issues which they raised, the Applicants have not shown how such Parliamentary disclosures rise to a breach of Article 23, and in particular, how they constitute an interference with their correspondence.

[181] Article 23(1) of the Constitution provides as follows:

"Except with his consent, no person shall be hindered in the enjoyment of his freedom of expression, and for the purposes of this Article the said

> **freedom includes freedom to hold opinions, to receive and impart ideas and information without interference, and freedom from interference with his correspondence."**

[182] Learned Queen's Counsel Mr. Smith submitted that taking into account an important purpose of Article 23 - as stated by Article 15(c) of the Constitution – that there should be "**protection for the privacy"** of a person's **home and other property"**, the meaning to be given to Article 23 is that it protects a person's **privacy** in relation to his/her correspondence.

[183] Mr. Smith QC next submitted that on the linkage between privacy and correspondence, it was precisely this type of approach that was adopted by the Privy Council in **Newbold**. According to him, the Privy Council propounded a close linkage between a person's correspondence (as part of the right to freedom of expression) and privacy when it rejected an argument that sought to distinguish freedom of expression from privacy: "**The Board does not consider that the boundaries between privacy and freedom of expression can be so neatly drawn"** at [26]. The Privy Council went on to establish an inextricable link in certain cases between freedom of expression and privacy when it continued at [26]:

> **"The very efficacy of electronic surveillance is such that it has the potential, if left unregulated, to annihilate any expectation that our communications will remain private", as La Forest J said in *R v Duarte*, p.44. <u>But by the same token, human enjoyment of and willingness to exercise our freedom of expression, by receiving and imparting ideas and information, will certainly be hindered and so interfered with if we are conscious that anything we write or say may be the subject of unregulated surveillance</u>. The more difficult to detect that surveillance is at the time, the more inhibiting its effect. Accordingly, the Board considers that interception of telephone conversations falls within the concept of "interference with correspondence" within article 23 and its predecessors.**

Analysis and Findings

Applicable legal principles

[184] Under Article 23 of the Constitution, the onus is on the Applicants to establish that the 1st and 2nd Respondents interfered with their correspondence without their consent.

[185] There is no requirement that the Applicants must establish that the correspondence was confidential in nature in order for there to be a breach of Article 23. The wording of Article 23 is clear: “interference with correspondence”. It does not state “interference with ‘private or confidential’ correspondence”. As Dr. Barnett correctly alluded to earlier, a general and purposive interpretation of the Constitution does not permit distortion of the explicit relevant sections of the Constitution: see **Campbell-Rodrigues** at [12].

[186] Now, what does “interference with correspondence” mean? There is a dearth of authority on the subject. However, article 8 of the European Convention of Human Rights provides some assistance. It states:

> **“1. Every person has the right to respect for his….Correspondence.**
>
> **2. There shall be no interference with the exercise of this right except such as is in accordance with the law and as is necessary in a democratic society in the interests of national security, public safety or the economic well being of the country for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedom of others.”**

[187] In large measure, article 8 speaks to the same fundamental rights and freedoms of the individual enshrined in Article 23 of the Constitution. Article 8 was considered in **R v Secretary of State for the Home Department, ex parte Daly** [2001] 2 WLR 1622 where the appellant (a prisoner) challenged a policy by the Home Secretary authorizing prison officials to examine legally privileged documents in the absence of a prisoner. Lord Bingham at [21] stated:

> **“In *Ex p Main* [1998]2 All ER 491, [1999] QB 349 and again *in* the present case, the Court of Appeal held that the policy represented the minimum intrusion into the rights of prisoners consistent with the need to maintain security, order and discipline in prisons. That is a conclusion which I respect but cannot share. In my opinion the policy provides for a degree of intrusion into the privileged legal correspondence of prisoners which is greater than is justified by the objectives the policy is intended to serve, and so violates the common law rights of prisoners….I would accordingly declare paras 17.69 to 17.74 of the Security Manual to be unlawful and void in so far as they provide that prisoners must always be absent when privileged legal correspondence held by them in their cells is examined by prison officers.”**

[188] Lord Bingham continued at [23h]:

> **"…But the same result is achieved by reliance on the European Convention. Article 8(1) gives Mr. Daly a right to respect for his correspondence. While interference with that right by a public authority may be permitted if in accordance with the law and necessary in a democratic society in the interests of national security, public safety, the prevention of disorder or crime or for protection of the rights and freedoms of others, the policy interferes with Mr. Daly's exercise of his right under art. 8(1) to an extent much greater than necessity requires. In this instance, therefore, the common law and the Convention yield the same result. But this need not always be so. In *Smith and Grady v UK* (1999) 29EHRR 493, the European Court held that the orthodox domestic approach of the English courts had not given the applicants an effective remedy for the breach of their rights under art 8 of the convention because the threshold of review had been set too high. Now, following the incorporation of the convention by the Human Rights Act 1998 and the bringing of that Act fully into force, domestic courts must themselves form a judgment whether a convention right has been breached (conducting such inquiry as is necessary to form that judgment) and, so far as permissible under the Act, grant an effective remedy. On this aspect of the case, I agree with and adopt the observations of my noble and learned friend Lord Steyn which I had the opportunity of reading in draft."**

[189] In **Daly**, the House of Lords found that the Applicant's right to respect of his correspondence was violated by the mere existence of the impugned policy (which authorised the executive to examine prisoners' privileged correspondence in their absence). Mr. Daly did not have to prove that the executive had acted pursuant to the policy, or as Mr. Smith QC argued, in this case, read the emails.

[190] I agree with Mr. Smith QC that taking into account an important purpose of Article 23 - as stated by Article 15(c) of the Constitution - that there should be "**protection for the privacy"** of a person's **home and other property"**, the meaning to be given to Article 23 is that it protects a person's **privacy** in relation to his/her correspondence.

[191] It is difficult to argue that emails are not "private" correspondence. If they are not, we would not be using passcodes to secure them. It is the privacy that we attach to our emails. While there is no overt right to privacy in the Constitution,

this right is implicit in the other fundamental rights expressly enshrined in the Constitution.

[192] In **Newbold**, the Privy Council found that the interception of telephone conversations fell within the concept of "interference with correspondence". In like manner, emails would also fall within the concept of "correspondence" and as such, any **interception** by the Government of the correspondence of the Applicants would constitute 'interference with correspondence" in breach of the Applicants' rights otherwise guaranteed by Article 23(1) of the Constitution.

[193] In addition, given the inseparable link made by the Privy Council in **Newbold** between freedom of expression in correspondence and privacy, the Government's possession and subsequent disclosures in Parliament of the Applicants' correspondence would also constitute an "interference with correspondence" in breach of Article 23.

[194] It seems to me that, on any view, if it is found that the Government through the 1st and 2nd Respondents "interfered" with the Applicants' correspondence, that would amount to a breach of Article 23.

[195] Briefly put, the Applicants' case is that the 1st and 2nd Respondents interfered with their email correspondence without their consent and therefore, were in breach of Article 23(1) of the Constitution.

[196] Again, I will treat the statements made by each Respondent in Parliament and outside of Parliament separately.

[197] There is no evidence that the 1st Respondent seized/searched/ obtained/possessed/intercepted/ read any emails of the Applicants in or outside of Parliament. The only evidence is that the 1st Respondent commented on emails and other matters regarding Save The Bays and Mr. Smith. Put at its highest, the statements appear to be pure political rhetoric and do not rise to the level of "interference with correspondence". Accordingly, I find that the 1st

Respondent has not breached the Applicants' fundamental right under Article 23 of the Constitution.

[198] With respect to the 2nd Respondent, the evidence is different. As outlined in [12] to [28] of The Undisputed Facts and the Applicants' Table at Appendix A, the statements made by the 2nd Respondent were overwhelmingly numerous.

[199] By publicly reading from and referring to the Applicants' private and confidential information without their consent is clearly a breach of the Applicants' rights of their correspondence. How the 2nd Respondent ("the Executive") obtained the Applicants' correspondence is not a matter for the Applicants to prove.

[200] The onus is upon the 2nd Respondent to demonstrate that his action was with the consent of the Applicants or, if not, that his action was justified in law pursuant to Article 23(2). He has failed to do so. There is no legal basis whatsoever for this breach and as such it was done outside the "**authority of any law.**"

[201] I therefore find the 2nd Respondent to be in breach of the Applicants' right under Article 23(1) of the Constitution.

Issue 5 (b) - Protection of Confidential Information

[202] The Respondents contended that in addition to the alleged breaches of the constitutional provisions, the Applicants also made allegations that their private and confidential information had been disclosed. In [2.34] to [2.38] of the Respondents' Skeleton Argument, the Respondents set out what is required for the protection of confidential information namely:

1. Firstly, the information must be confidential in nature. If the information has entered the public domain, it can no longer be confidential: **Woodward v Hutchins** [1977] 1 W.L.R. 760. The Respondents maintained that the evidence is unclear as to how the correspondence

which the Applicants complained had been disclosed came to be in the public domain.

2. Secondly, the information must have been communicated in circumstances imparting an obligation of confidence on the part of the 2nd Respondent. Examples of cases relating to claims for damages for private breaches of duty of confidence were cited. Unfortunately, these cases do not assist as we are dealing with a matter of public law - alleged breaches of fundamental rights by the Government.

3. Thirdly, there must be unauthorised use of information. This requires the demonstration of some duty on the part of the 2nd Respondent not to use the information because by reason of a relationship with the Applicants or some binding contractual provision they can only disclose the information with the authority of the Applicants.

[203] As the Applicants correctly submitted, there is no requirement that the Applicants must establish that the correspondence was confidential In order for there to be a breach of Articles 21 or 23. There is a fundamental distinction between privacy and confidentiality in relation to documents as explained by Lord Nicholls of Birkenhead in **OBG Ltd and another v Allan and others Douglas and others v Hello! Ltd and others (No. 3)** [2007] UKHL 21. At [255] Lord Nicholls stated that "**information may be in the public domain, and not qualify for protection as confidential, and yet qualify for protection on the ground of privacy.**"

[204] In **PJS v News Group Newspapers Ltd** [2016] UKSC 26, at p. 16 under the rubric *"The distinction between rights of confidence and privacy rights",* and at p.30 at [58], Lord Mance stated:

> **"However, claims based on respect for privacy and family life do not depend on confidentiality (or secrecy) alone. As Tugendhat J said in *Goodwin v News Group Newspapers Ltd* [2011] EMLR 502, para.85, "[t]he right to respect for private life embraces more than one concept". He went**

on to cite with approval a passage written by Dr Moreham in *Law of Privacy and the Media* (2nd ed (2011), edited by Warby, Moreham and Christie), in which she summarized "the two core components of the rights to privacy" as "unwanted access to private information and unwanted access to [or intrusion into] one's …personal space" – what Tugendhat J characterised as "confidentiality" and "intrusion".

[205] So, it matters not whether the correspondence is private or confidential although if it is, any breach is aggravated. Thus, the Respondents' submission on protection of confidential information is misconceived.

Public interest Justification

[206] For completeness, I will address this issue again but I have already ruled that public interest does not arise in this constitutional motion. The Respondents argued that for the Applicants to succeed, they must establish that the disclosure could not be in the public interest or there is no legal duty to disclose: **Tournier v National Provincial Bank** [1924] 1 K.B. 461 at p. 473.

[207] Learned Counsel Dr. Barnett submitted that there is nothing to substantiate the claim that there was a breach of confidentiality by the Parliamentary disclosures, and in any event, public interest would override any confidence in this matter.

[208] According to the Applicants, the Respondents have astonishingly argued for a public interest justification for the disclosure.

[209] Like the Applicants, I opined that there is no available justification of "public interest" or "legal duty" because this is not a private law breach of duty of confidence case. This is a public law action in which the Applicants alleged breaches of their rights to freedom from interference with their property and correspondence enshrined in Articles 21 and 23 of the Constitution.

[210] I also agree with the Applicants that the very general and vague notion of public interest invoked by the Respondents does not justify unauthorised disclosure of private correspondence in breach of Articles 21 and 23. In order for the interference to be justified , the three criteria listed in article 23(2) (and in 21(2)

where a breach of Article 21 is concerned) must be satisfied and, in this case, they are not, for the following reasons:

1. Whatever the supposed justification for it (and irrespective of whether or not it was justified), the 2nd Respondent's unauthorized dealings with the Applicants' private correspondence was not **"under the authority of any law"**. The onus is on the Government to demonstrate that the correspondence was lawfully obtained and that a further disclosure whether inside Parliament or outside was under the authority of the law.

2. Even if the 2nd Respondent's unauthorized dealings and disclosures of the Applicants' private correspondence was **"under the authority of any law"**, the interference with private correspondence would need to be a provision: "(a) which is reasonably required - (i) in the interests of defence, public safety, public order, public morality, public health; or (ii) for the purpose of protecting the rights, reputations and freedoms of other persons, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts, or regulating telephony, telegraphy, posts, wireless broadcasting, television, public exhibitions or public entertainment; or (b) which imposes restrictions upon persons holding office under the Crown or upon members of a disciplined force)" – Article 23(1). The Respondents have produced no evidence to support this bare allegation.

3. Even if the 2nd Respondent's dealings with the correspondence was both (i) **"under the authority of any law**" and (ii) satisfied one of the conditions at Article 23(2), the manner in which the 2nd Respondent has dealt with the Applicants' private correspondence is and was not **"justified in a democratic society"** as required in order for Article 23(2) to apply because the interference did not fulfill any legitimate objective. In any event, such interference was disproportionate given the damaging effect on the Applicants, particularly the 1st Applicant, a non-profit

environmental company working to preserve and protect the Bahamian environment.

Savings Law Clause – Article 30

[211] Savings law clauses operate to negate the guaranteed fundamental rights. This clause immunizes laws that were in operation at the date the constitution came into effect from a judicial challenge that the law infringes a guaranteed right. In the Saint Lucian case of **R v Hughes** [2002] UKPC 12, the Privy Council stated that since general and special savings law clauses have the drastic effect of entirely shutting out judicial review on bill of rights grounds, they are to be given a narrow interpretation.

[212] At [35], their Lordships stated:

> **"Paragraph 10 (mirrors Article 30(1) of the Bahamian Constitution) introduces these exceptions to the rights and protection which people would otherwise have under the Constitution, it must be construed like any other derogation from constitutional guarantees. In *State v Petrus* [1985] LRC (Const) 699, 720D-F in the Court of Appeal of Botswana, Aguda JA referred to *Corey v Knight* (1957) 150 Cal App 2d 671 and observed that**
>
> > **"it is another well-known principle of construction that exceptions contained in constitutions are ordinarily to be given strict and narrow, rather than broad, constructions."**
>
> **In case of doubt paragraph 10 should therefore be given a strict and narrow, rather than a broad, construction."**

[213] Conscious of this, I am still persuaded by the Applicants' submission that the Government cannot rely on the PPA to avoid being sued under Article 28 and Article 30 does not save the PPA.

[214] Article 30(1) provides as follows:

> **"Nothing contained in or done under the authority of any written law shall be held to be inconsistent with or in contravention of any provision of Article 16 to 27 (inclusive) of this Constitution to the extent that the law in question was enacted or made before ….1973."**

[215] According to the Applicants, there are four reasons why Article 30 does not assist the Government to use the PPA to escape the strictures of the Constitution. These are:

1. First, the Applicants' case is that the PPA is inconsistent with the Applicants' constitutional rights pursuant to Article 28(1) to apply to the Supreme Court for redress in relation to the contraventions of Articles 21; 15 in conjunction with Article 23 for the following reasons:

    a) The PPA by itself does not contravene nor is it inconsistent with the Applicants' rights under Articles 21, 15 in conjunction with Article 23;

    b) Parliamentary Privilege is being employed in the present case to oust the Court's jurisdiction from invoking Article 28 in order to adjudicate on breaches of Articles 21, 15 in conjunction with Article 23; and

    c) Under Article 30 the "savings provision' simply has no application to Article 28 and as such, Article 30 does not allow the PPA to oust the Court's exercise of its original jurisdiction.

2 Secondly, in any event, the PPA does not provide an authority to the Government to act in contravention of Articles 21, 15 in conjunction with Article 23 because:

    a) The interference with the Applicants' correspondence cannot be said to have been done "under the authority of" the PPA;

    b) Section 4 of the PPA is an "immunity from suit" clause. The PPA is not a law that confers an authority on the Government to search, examine and disclose the Applicants' private correspondence and bank statements/financial information;

c) The PPA is not, for example, like the Listening Devices Act, a law that does confer an authority on the Government to, for example, intercept and record telephone calls;

d) The interference/searches are still a breach of Articles 21, 15 in conjunction with Article 23 irrespective of section 4 of the PPA. Section 4 simply purports to prevent legal action being taken against the individual Members of Parliament as a result of the interference /searches/breach and;

e) In the same way, for example, that a diplomat who commits a crime knowing that he can escape retribution cannot be said to have done so "under the authority" of the statute that grants diplomatic immunity because that statute does not authorize illegality.

3 Thirdly, in any event, the interference was carried out by the executive branch of Government through the acts of one Cabinet Minister and was therefore an 'executive act' for the purposes of Article 30(3) and as such, Article 30(1) does not apply. Article 30(3) expressly excludes from Article 30(1) "executive acts done", after 9 July 1973 under the authority of any such law as is mentioned in paragraph (1) of this Article.

4 Fourthly, on any view the PPA only applies to what is said within Parliament and it has no applicability to what was said outside of Parliament: **Buchanan v Jennings**. This was acknowledged by the Respondents themselves at [2.52] of their Skeleton Argument. This means that:

a) Parliamentary Privilege is wholly irrelevant to the 2nd Respondent's acts outside of Parliament in searching, seizing

and obtaining the correspondence and bank/financial records of the Applicants and

b) Parliamentary Privilege is also wholly irrelevant to the Government's acts through the 2nd Respondent in his capacity as a Minister making unauthorised disclosures outside of Parliament by a number of statements made to the Press.

[216] I agree with all of these reasons.

Statements made outside of Parliament

[217] **Erskine May** in "**Parliamentary Practice, 22nd Ed.**", under the sub-head "Publication outside Parliament of Proceedings and Debates in Parliament" wrote:

> **"<u>Although the privilege of freedom of speech protects what is said in debate in either House, this privilege does not to the same degree apply to the publication of debates or proceedings outside Parliament</u>. But the publication, whether by order of the House or not, of a fair and accurate account of a debate in either House is protected by the same principle as that which protects fair reports of proceedings in courts of justice, that the advantage of publicity to the community at large outweighs any private injury resulting from the publication unless malice is proved. This is a matter of common law, rather than of parliamentary privilege."**{Emphasis added]

[218] Learned Counsel Dr. Barnett in quoting from the New Zealand case of **Buchanan** submitted that parliamentary privilege "**did not preclude a claimant from relying on such a record as evidence in support of an action against an MP based on what was said outside the House."**

[219] With respect to the 1st Respondent, I found that the statements he made outside of Parliament did not meet the requirements of Articles 21 and 23 of the Constitution: see [168] – [169] and [197] of this judgment [supra].

[220] With respect to the 2nd Respondent, I found that his statements in and outside of Parliament breached the fundamental rights of the Applicants under Article 21

and 23 of the Constitution. He made the following statements **outside** of Parliament namely:

1) Statement made on 21 March 2016 – Table at Appendix A. The 2nd Respondent stated:

   "I have read with interest the various public statements either on social media or the printed press by persons I mentioned in the House of Assembly on Thursday past. I stand by my statements! I have handed what I have to the police on Friday past."

2) **"Mitchell-Fitzgerald Joint-Statement in Response to Data Commissioner"** published on the *bahamasweekly.com* website on 28 March 2016. Both Respondents reaffirmed what they said in Parliament.

   "We merely point out to the public this matter is not about unauthorized [access to] emails. As we said in Parliament, this matter is about a well-funded environmental organization that is not about the environment, but Save the Bays is about politics and destabilizing the government of The Bahamas and has spent millions of dollars to do so. … Let the public be assured that neither of us is a party to any 'unauthorized' access to e-mails. This particular matter now rests with the Police …. We remain focused on keeping Save the Bays honest and transparent and will do so in any forum we deem necessary."

3) Statement made on 6 April 2016 – Table at Appendix A. It is necessary for me to reproduce this statement which will become useful when I address the relief sought by the Applicants.

   "As far as worrying about out where I got the information from and who gave it to me, right now that's really the least of their problems. They have some serious, serious issues to be concerned with. Mr. Bacon has to be concerned about the IRS, Mr. Fred Smith has to be concerned about his professional career. Callenders & Co., because of Mr. Smith's actions may have been brought down. A very reputable law firm and there's no doubt to me today that Colin Callender has turned over in his grave with the revelation of what I have been able to uncover."

   "If I were them, I would batten down because a hurricane is coming and it's a category five hurricane. They just need to hold on. It makes no sense worrying about me right now. The emails are already out. The cat is already out of the bag and there's more to come. When it comes to a member's privilege there is no bounds to which we cannot go to protect our privilege. And so I would read every single email. I would table every single bank statement. I will table every single wire transfer if I have to if it comes to my integrity and my privilege."

[221] It is well established that parliamentary privilege even in its absolute form cannot apply to what a Member of Parliament/Cabinet Minister says outside of Parliament.

[222] Even if the savings clause immunizes the 2nd Respondent from what he said in Parliament, it has no applicability to what he said outside of Parliament.

Standing of the Applicants

[223] The Respondents challenged the standing of the Applicants. They submitted that the Applicants need to show that the breaches were "in relation to him" [the Applicants].

[224] Learned Counsel Dr. Barnett submitted that the machinery for enforcing fundamental rights is found in Article 28(1) of the Constitution which provides:

> **"If any person alleges that any of the provisions of Articles 16 to 27 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress."**

[225] Dr. Barnett submitted that the effect of this is that an application may only be brought by a person who satisfies the article's special pre-conditions, namely: that he alleges that any of the provisions of Articles 16 – 27 (inclusive) has been, is being or is likely to be contravened "**in relation to him**": **Mirbel & Ors v The State of Mauritius & Ors** [2010] UKPC 16; **Bahamas Bar Council v Christie and Others** [2006] CLE/gen/1148 (unreported) at [25].

[226] In **Mirbel**, Lord Phillips stated at [26]:

> "**Section 17(1) of the Constitution is designed to afford an additional or alternative remedy for someone who contends that one or more of the fundamental rights that he enjoys under Chapter II of the Constitution have been, or are likely to be, infringed. The section provides a personal remedy for personal prejudice. It is not an appropriate vehicle for a general challenge to a legislative provision or an administrative act, brought in the public interest. This is made clear by the phrase "in relation to him" in section 17(1)."**

[227] According to the Respondents, even if Mr. Darville's affidavit could speak of the interest of the 1st Applicant, there is no evidence at all before the Court with respect to the 2nd Applicant. They contended that it is not even clear on what basis he is asserting a claim for breach of constitutional rights. They say that the capacity in which he is suing is not readily apparent, as it is not disclosed whether he is a member or director of the 1st Applicant. Dr. Barnett pointed out that a personal stake is required to assert constitutional rights and there is no ability to sue in a representative capacity. He submitted that the only reference to the 2nd Applicant appeared in the statement of the 2nd Respondent, as reported in the Hansard of Official Proceedings of 17 March 2016, as follows:

> **"Mr. Speaker, I have a set of emails that I am going to read. […] This goes from Fred Smith to Zack Bacon, that is Louis Bacon's brother…"**

[228] According to learned Counsel Dr. Barnett, this is certainly not a basis on which to establish any rights of ownership in whatever emails are alleged to have been disclosed, to the extent that such material is capable of ownership rights at all.

[229] The Applicants submitted that, quite apart from the Hansard Official Proceedings, reference to the 2nd Applicant appears in the affidavit of Mr. Darville. At [5], Mr. Darville stated:

> **"The 2nd Applicant is Mr. Zack Bacon, the brother of Mr. Louis Bacon. Mr. Louis Bacon is a founding member of Save The Bays. Because of restraints on Mr. Bacon's time, Mr. Zack Bacon often acts as his brother's representative on legal and other matters relating to Save The Bays."**

[230] Learned Counsel Mr. Smith QC submitted that the 2nd Applicant has standing in this constitutional motion because one of the emails dated 6 May 2015 is self-evidently his and the remaining are the 1st Applicant: see FN1. The 2nd Applicant's email was copied to a number of recipients and read as follows:

> **"Lets do but I am told unequivocally that Greenslade is deeply entrenched with the PLP."**

Analysis and Finding

[231] The authorities suggest that the issue of standing should not be decided as a preliminary issue without regard to the evidence and merits of the case. The Court must firstly make a determination on the factual matrix and merits before considering the issue of standing: **Regina v Inland Revenue, ex Parte The National Federation of Self-Employed and Small Businesses Ltd** [1981] UKHL 2. The Commissioners had been concerned at tax evasion of up to £1 million a year by casual workers employed in Fleet Street. They agreed with the employers and unions to collect tax in the future, but that they would not pursue those who had evaded taxes in the past. The Federation challenged the concession. The Revenue said it did not have standing to make the challenge. It was held that it was relevant to consider the strength of the case that the Commissioners were acting beyond their powers. Lord Diplock justified the modern approach to judicial review:

> **'It would, in my view, be a grave lacuna in our system of public law if a pressure group, like the federation, or even a single public-spirited taxpayer, were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped."**

[232] **In Re Blake** (1994) 47 WIR 174, the Court of Appeal canvassed the merits of an application that challenged the appointment of a Prime Minister after inconclusive general elections. The Court found that the application was unmeritorious and therefore, it was unnecessary to consider whether the applicant had standing, either by way of sufficient interest or relevant interest, in the subject matter of the application. In **Spencer v The Attorney General of Antigua and Barbuda** (1999) L.R.C. 1, Sir Dennis Byron, CJ (Ag.), (as he then was) confirmed and commended this approach. The applications in **Spencer** were for declarations under the Constitution.

[233] An applicant for a declaration can have no *locus standi* in an unmeritorious claim. On the other hand, in a meritorious case, it must be necessary to canvass the issues and the facts in order to determine whether there is sufficient nexus

between an applicant and the subject matter of the claim to give him standing. In the Privy Council's decision of **Randolph B Russell and John G. Thompson v The Attorney General of St Vincent and the Grenadines and the Supervisor of Elections** [1997] UKPC 23, the Privy Council was called upon to consider an appeal grounded in sections 33 and 96 of the St. Vincent and the Grenadines Constitution The question of' standing' arose and the Court stated at [34]:

> **"Strictly speaking there is no reason for their Lordships to enter any further into the question of *locus standi*. To minimise future controversy it may however be helpful to observe that a breach of section 33 infringes the constitutional rights of all citizens eligible (or who will become eligible) to vote in the next election. They see no reason to confine the remedy for the grievance thus resulting to any particular category of citizen, and indeed their Lordships have tried in vain to formulate a workable basis on which the right to apply for relief might be limited. The courts will not of course tolerate being swamped with unnecessary or harassing proceedings, but the grant of declaratory relief is always discretionary, and moreover the court has an overriding power to prevent abuse of its process. These should prove sufficient to keep the jurisdiction within proper bounds."**

[234] Having concluded that the Applicants have a meritorious case against the 2nd Respondent, I am of the considered opinion that they both have standing. The Applicants are not and have never claimed to be bringing a general challenge in the public interest but have sought to vindicate and protect their own personal rights.

[235] Much was made of the 2nd Applicant and his standing. He brought this constitutional motion in his personal capacity. The basis upon which he brought his claim for constitutional redress is that at least one email sent by him from his own email account in relation to a police complaint about a campaign of harassment against the 2nd Applicant's brother has been obtained by the Government, read, referred to and tabled in Parliament in breach of his constitutional rights under Articles 21, 15 and 23 of the Constitution.

[236] The general constitutional redress provisions in the Constitution necessitate that an applicant for such redress allege and demonstrate a contravention of the

general part of the Constitution in which he has a**" relevant interest**", that is, a contravention such as "to affect his interests".

[237] Accordingly, I find that the 2nd Applicant is a person with a "relevant interest" and not a meddlesome busybody. Not much challenge had been made to the standing of the 1st Applicant and understandably so. Mr. Darville and Mr. Nunez are both directors of the 1st Applicant and they have filed affidavit evidence in this motion. That said, in **Maycock**, the Bahamas Court of Appeal, quoting **Attorney General of Antigua v Antigua Times** [supra] succinctly extrapolated that a person includes a legal entity like a company.

[238] I therefore conclude that both Applicants have *"locus standi*" in this constitutional motion.

Issue 6

[239] Learned Counsel Dr. Barnett submitted that an injunction is an equitable remedy and therefore is in the discretion of the Court. He submitted that where the defendants give an undertaking not to repeat the action complained of, the Courts will not grant an injunction. A fortiori, the Courts will not grant an injunction where there is a binding or imperative restraint which makes it unlikely that the action complained of or apprehended will occur. Dr. Barnett submitted that in this case, the Speaker has ruled as follows:

> **"Honourable Members, upon reflection, the tabling of private emails on the face of it will NOT be allowed in the future unless the source can be determined and verified."**

[240] Learned Counsel Dr. Barnett also submitted that the Speaker drew attention to Rule 30(24) of the Rules of the House of Assembly which states: "*Any member who desires to refer in debate in the House or in any committee to the character or conduct of any person in his official or public capacity shall deliver to the Speaker written prior notice of the proposed reference. The notice shall set out the facts on which such reference will be based and shall be signed by the*

Member giving it. The Speaker may in his discretion, permit the reference." The Speaker also added that "In the future, members who attempt to table unverified documents would not be allowed unless it satisfies the standard of authenticity and reliability. Additionally, the *sub judice* principle also applies here as per Rule 82.

[241] Dr. Barnett surmised that by virtue of the Speaker's Rulings, it is highly unlikely that there will be any further reference in Parliament to the emails in question. In other words, what has happened in effect is that Parliament has itself exercised its long established constitutional right to control its own internal proceedings and, having done so, it is inconvenient and inappropriate for the Court to issue injunctive relief when Parliament has already dealt with the matter.

[242] If I understand Dr. Barnett well, he seemed to be saying that in effect, the Court has exercised a long-arm jurisdiction reaching inside of Parliament. He submitted that in **Brantley** (High Court decision), the Court held that it had the power, on a proper application being made by any Member of the Assembly, being a person with a relevant interest, to make an "affirmation of constitutional values" with respect to rights given under the constitution. Further, that "In a case involving the section 44(1) power given to Parliament to manage its own internal affairs, **it can only be in the rarest of cases, and only where every other course has failed, that a court may consider the grant of an injunction to preserve the sanctity and dignity of the Constitution"**.[Emphasis added]. To be succinct, the facts of **Brantley** are distinguishable from the facts in the case at bar.

[243] That said, the ruling of the Speaker does not prevent Ministers from referring to the contents of emails and not tabling them. Besides, the Speaker can change his ruling at any time. In addition, the Applicants' own rights have been violated and further violations are promised. The 2nd Respondent threatened the Applicants with the visit of a category 5 hurricane. In any event, the Speaker has no power to order discovery and delivery up.

Alternative Remedies

[244] Dr. Barnett noted that a further element of the equitable jurisdiction of the Court to grant relief which also has constitutional dimensions, has to do with the fact that the 1st Applicant has already obtained an injunction in cognate proceedings: [19] – [21] of Ms. Bonamy's affidavit which already protects the Applicants' position.

[245] The extant injunctive order against 'persons unknown' was granted to prevent further disclosure of the documents in question. The Order is intended to cover 'unknown persons' who may still be in possession of the private and confidential correspondence of the Applicants since to date the source of the correspondence is shrouded in anonymity.

[246] Further, according to the Respondents, there is a long line of Privy Council cases, starting with the oft-cited observations of Lord Diplock in **Harrikissoon v Attorney General** [1980] AC 265, which exemplify that resort to constitutional or fundamental rights for protection where alternative remedies are available (and have been invoked) is an abuse of the process. This is also reflected in Article 28(2) of the Constitution which declares that the Court shall not exercise its powers in respect of the infringement of any of the provisions of Articles 16-27 if it is satisfied that adequate means of redress are or have been available to the person concerned.

Analysis and Findings

[247] It is well established that the right to apply to the Supreme Court pursuant to Article 28 of the Constitution should be exercised only in exceptional cases where there is a parallel remedy. See: **Thakur Persad Jaroo v The Attorney General of Trinidad and Tobago** [Privy Council No. 54 of 2000]; **Harrikissoon v Attorney General of Trinidad and Tobago** [1980] AC 265; **Chokolingo v Attorney General of Trinidad and Tobago [**1981] 1 WLR 106 at pp. 111-112 and **Hinds v The Attorney General** [2001] UKPC 56.

[248] **Harrikissoon** concerned the case of a teacher who was transferred from one school to another. He sought redress under the Constitution. Plainly, no constitutional right was implicated by these facts. The Privy Council was resolute in stating that constitutional redress could not be used as a substitute for judicial control of administrative action. Lord Diplock at p. 268 said:

> **"The notion that whenever there is a failure by an organ of government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by Chapter 1 of the Constitution is fallacious. The right to apply to the High Court under section 6 of the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action. In an originating application to the High Court under section 6(1), the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle an applicant to invoke the jurisdiction of the Court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the Court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom."**[Emphasis added]

[249] In **Jaroo**, the appellant filed a constitutional motion seeking relief for infringement of certain of his rights. The Privy Council held that a parallel remedy was available to the appellant to enable him to enforce his right to the return of the vehicle. He could have pursued an action for delivery in detinue. The Privy Council reverberated its salutary warning that the right to apply to the High Court under the Constitution should be exercised only in exceptional circumstances where there is a parallel remedy.

[250] The mere existence of an alternative remedy does not automatically warrant excluding constitutional proceedings under the proviso to Article 28(2). The crux is their adequacy. The power to decline jurisdiction arises only where the alternative means of redress is considered to be adequate. In this regard, the Courts have offered some guidelines in assessing the requirement of adequacy.

One of these is that where there is a parallel remedy, constitutional relief is only appropriate where some additional "feature" presents itself. The additional feature could be the arbitrarily use of state power – as where an off-duty policeman brutalised the claimant for what was a private dispute between the claimant and the policemen's friend: **Attorney General of Trinidad and Tobago v Ramanoop** [2005] UKPC 2005, or where a lawful visitor to the Bahamas was imprisoned for eight years without charge: **Takitota v AG**. Another additional feature is where there are breaches of multiple rights, for example, in **Belfonte v Attorney General** [1968] W.I.R. 416 (CA TT). Belfonte had been imprisoned for non-payment of a fine, even though his mother had in fact paid the fine by cheque which became lost in the police bureaucracy. During his imprisonment, the applicant's locks were cut and he was forced to eat meat in violation of his religious practices. On these facts an alternative remedy was held to be inadequate given that he had endured multiple breaches, spanning from tortious imprisonment and several violations of his fundamental rights enshrined in the Constitution.

[251] In the present case, the Applicants claim a multiplicity of relief for statements made by two Cabinet Ministers in and outside of Parliament. While an action in defamation may arise for utterances outside of Parliament, this Court found that parliamentary privilege does not apply to statements made in Parliament where the constitutional rights of a person have been trampled upon and therefore, the appropriate remedy is to be found in the Constitution.

[252] Consequently, I find that the bringing of this constitutional motion is not an abuse of the process as no parallel adequate remedy is available to the Applicants.

Issue 7: Damages and Delivery Up

[253] Given the outcome of this constitutional motion, damages and delivery up are consequential remedies. The Respondents argued that nominal damage is adequate in the circumstances. On the other hand, the Applicants asserted that

compensatory damages (in the form of vindicatory damages) in the millions of dollars would adequately meet the justice of this case.

[254] This Court, having found that the Government, through one of its Cabinet Ministers, namely the 2nd Respondent, breached the Applicants' right under Articles 21 and 23 of the Constitution, the Applicants are therefore entitled to vindicatory damages as the following cases demonstrate.

[255] In the Bahamian case of **Tamara Merson v Drexel Cartwright** [2005] UKPC 38, the Privy Council stated at [18]:

> **"These principles apply, in their Lordships' opinion, to claims for constitutional redress under the comparable provisions of the Bahamian constitution. If the case is one for an award of damages by way of constitutional redress – and their Lordships would repeat that "constitutional relief should not be sought unless the circumstances of which complaint is made include some feature which makes it appropriate to take that course" (para 25 in Ramanoop) – <u>the nature of the damages awarded may be compensatory but should always be vindicatory and, accordingly, the damages may, in an appropriate case, exceed a purely compensatory amount.</u> The purpose of a vindicatory award is not a punitive purpose. It is not to teach the executive not to misbehave. The purpose is to vindicate the right of the complainant, whether a citizen or a visitor, to carry on his or her life in the Bahamas free from unjustified executive interference, mistreatment or oppression. The sum appropriate to be awarded to achieve this purpose will depend upon the nature of the particular infringement and the circumstances relating to that infringement. It will be a sum at the discretion of the trial judge. In some cases a suitable declaration may suffice to vindicate the right; in other cases an award of damages, including substantial damages, may seem to be necessary.** [Emphasis added]

[256] Ms. Merson was awarded vindicatory damages. The Privy Council regarded the award of $100,000 by way of vindicatory damages as high but within the bracket of discretion available to the judge.

[257] In the Privy Council case of **Angela Inniss v Attorney General** [2008] UKPC 42, Ms. Inniss was the Registrar of the High Court when her contract was prematurely terminated by the Permanent Secretary of the Establishment Division of the Government without the recommendation of the Judicial and

Legal Services Commission. She commenced proceedings against the Attorney General by way of a constitutional motion in the High Court. She was awarded $100,000 as general and exemplary damages for breach of her constitutional rights. The Court of Appeal reduced that sum to $19,351 as damages for breach of contract and found that there was no breach of her constitutional rights. She appealed to the Privy Council which restored the order of the trial judge.

[258] In the present case, as the Applicants pointed out, the Government sought to affect the Applicants' interests by obtaining the private and confidential correspondence and property and by making disclosures therefrom in Parliament. As Lord Hope stated in **Inniss** at [21]:

> **"The function that the granting of relief is intended to serve is to vindicate the constitutional right. In some cases a declaration on its own may achieve all that is needed to vindicate the right. This is likely to be so where the contravention has not yet had any significant effect on the party who seeks relief. But in this case the contravention was, as the judge said, calculated to affect the appellant's interests and it did so. On the judge's findings it was a deliberate act in violation of the Constitution to achieve what the time consuming procedures of the Commission could not achieve. He rejected the submission that it was an innocuous administrative act. The desire was to get rid of the appellant quickly, and the contract proved to be an expedient vehicle for achieving this."**

[259] The 2nd Respondent publicly stated that he got the correspondence in his "political garbage can". He printed and brought them into Parliament and subsequently read them. These are many deeds and it can be reasonably inferred that the Minister was conscious of what he was doing. The making of these disclosures in Parliament was a deliberate act made to avoid scrutiny by purporting to hide behind the cloak of parliamentary privilege.

[260] In **Angela Inniss**, the Board acknowledged the conceptual difficulties associated with assessing damages for breaches of constitutional rights since that law is not greatly developed. However, the Board hastened to add that sufficient guidance is available from judgments that the Board has given, and they have been assisted also by observations by the judges of the New Zealand

Supreme Court in **Taunoa v AG** [2007] 5 LRC 680. Elias CJ said at [108] that where remedies for other wrongs arising out of the same facts are provided, they may need to be taken into account in considering what is required for an effective remedy of the independent Bill of Rights Act violation. But it was not appropriate to take from this circumstance that the availability of damages for breach of the right was a residual remedy. At [109] she said that it should be limited to what is adequate to mark an additional wrong in the breach and, where appropriate, to deter future breaches. But where a plaintiff had suffered injury through denial of a right, he was entitled to compensation for that injury, which might include distress and injured feelings as well as physical damage. Blanchard J said at [258] that the court should not proceed on the basis of any equivalence with the quantum of awards in tort. **The sum chosen must be enough to provide an incentive to the defendant and other state agencies not to repeat the infringing conduct and also to ensure that the plaintiff does not reasonably feel that the award is trivialising of the breach.** Tipping J said at [317] that the general tenor of the cases gave at least presentational priority to vindication as opposed to compensation. At [319] he stated that considerable care was needed in regard to deterrence as an aspect of the award, and at [321] he said that he would require considerable persuasion that punishment could ever be an appropriate ingredient.

[261] It is axiomatic that, a man's private and confidential correspondence, precious to his heart, should not be the subject of public discussion and scrutiny. The 2nd Respondent made unsubstantiated allegations about the 1st Applicant which he portrayed as a money-laundering organization. These statements are regrettable since it had nothing to do with the Mid-Term Budget Debates which were on-going at the time.

[262] Taking all these factors into account I am of the opinion that an appropriate award for vindicatory damage to the Applicants is $150,000.

Other ancillary issues

[263] The Respondents relied on the Companies (Not profit organisations) Regulations 2014 and the Data Protection Act. I did not find them necessary for consideration.

Declarations and Orders

[264] The Applicants seek a multiplicity of declarations and orders including a perpetual injunction. In constitutional motions, the Supreme Court has granted declarations and other orders including injunctive relief. For example, in **Constituency Boundaries Commission v Baron** (1999) 58 WIIR 158 CA., the Eastern Caribbean Court of Appeal granted an injunctive order restraining the Dominican Constituency Boundaries Commission from submitting to the President of Dominica its report with recommendations for re-aligning certain constituency boundaries where these were breached of the rule against bias and without regard to relevant considerations.

[265] As I see it, nothing precludes this Court from granting a perpetual injunction particularly since the 2nd Respondent had threatened to disseminate/read further correspondence belonging to the Applicants. The 2nd Respondent had publicly stated that he has a cache of the Applicants' emails but he is holding back some for a future date.

[266] The Applicants also seeks an Order for delivery up of the Applicants' correspondence which the 2nd Respondent has in his possession. Instead of making such order, I shall order the permanent destruction and/or deletion of all electronic files or records as well as the destruction of hard copies of all documents within 14 days (along with an affidavit of compliance to be filed within 14 days) in 7(a) below.

Conclusion

[267] In conclusion, the Court makes the following Declarations and Orders:

(1) A Declaration that the 2nd Respondent's search and/or obtaining possession, custody, control and/or use of the Applicants' correspondence is a breach of the Applicants' rights under Article 21(1) of the Constitution;

(2) A Declaration that the 2nd Respondent's publication or disclosure of the contents of the Applicants' correspondence in Parliament or otherwise is a breach of the Applicants' rights under Article 23(1) of the Constitution;

(3) A Declaration that the provisions of the Powers and Privileges (Senate and House of Assembly) Act 1969 (the "PPA") are to be construed as being subject to the supremacy of the Constitution (in particular Chapter III;

(4) A Declaration that to the extent that the Government seeks to rely on the PPA to prevent the Court from adjudicating on a breach of Article 20(8) of the Constitution, then this represents a breach of Article 20(8) of the Constitution;

(5) A Declaration that section 4 of the PPA is of no application or effect in the present case since the constraint on the Government imposed by Articles 21(1) and/or 23(1) of the Constitution constitute an exception to parliamentary privilege;

(6) A Permanent Injunction to restrain the 2nd Respondent from any further breaches of the Applicants' Constitutional rights as guaranteed by Articles 21(1) and/or 23(1) specifically:

(a) An Order for the permanent destruction and/or deletion of all electronic files or records as well as the destruction of hard copies of all documents within 14 days (along with an affidavit of compliance to be filed within 14 days);

(b) A Permanent Injunction restraining the 2nd Respondent (and his agents) from referring to, making use of, repeating or relying upon any of the information contained in the Applicants' correspondence;

(c) Vindicatory Damages to the Applicants in the sum of $150,000 and

(7) There will be no Order as to Costs. This is because the Applicants have been unsuccessful against the 1st Respondent and successful against the 2nd Respondent.

Postscript

[268] Last but not least, I owe a great depth of gratitude to Mr. Smith QC and Dr. Barnett for their immeasurable assistance to the Court.

Dated this 2nd day of August A.D. 2016

Indra H. Charles
Supreme Court Judge