[2024] JMCA Civ 47

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MISS JUSTICE STRAW JA
THE HON MRS JUSTICE V HARRIS JA
THE HON MR JUSTICE LAING JA (AG)

SUPREME COURT CIVIL APPEAL NO COA2024CV00055

BETWEEN	**THE ATTORNEY GENERAL OF JAMAICA**	**APPELLANT**
AND	**PHILLIP PAULWELL**	**1ST RESPONDENT**
AND	**PETER BUNTING**	**2ND RESPONDENT**
AND	**PAULA LLEWELLYN**	**INTERVENER**

Allan Wood KC, Ransford Braham KC, Neco Pagon, Ms Kathryn Williams, and Stephen Nelson instructed by Livingston, Alexander & Levy for the appellant

B St Michael Hylton KC, Kevin Powell, Duane Allen, and Ms Timera Mason instructed by Hylton Powell for the respondents

Douglas Leys KC and Ms Samoi Campbell instructed by Samoi Campbell for the intervener

24, 25, 26, 27, 28 June and 20 December 2024

Constitutional law - Construction and interpretation of the Constitution - Procedure for amending the Constitution - Amendment increasing the retirement age of the Director of Public Prosecutions - Extension of the term of office of the Director of Public Prosecutions - Role of underlying principles of the Constitution - Whether the "basic 'deep' structure" doctrine is applicable to the Constitution - Separation of Powers principle - Whether the amendment to the Constitution was made for an improper purpose - Whether the amendment to the Constitution breached the supremacy clause - Whether the amendment to the Constitution was applicable to the incumbent Director of Public Prosecutions - Whether the amendment to the Constitution should be read down - Use of external aids to construction - Constitution (Amendment of Sections 96(1) and 121(1)) Act, 2023, section 2 - Constitution of Jamaica, sections 2, 49(4), 94(6), 95(1) and 96(1)

STRAW, V HARRIS JJA AND LAING JA (AG)

Introduction

[1] By notice of appeal filed on 23 April 2024, the appellant, the Attorney General of Jamaica, sought to have this court overturn the decision of the Full Court of the Supreme Court ('the Full Court'), given on 19 April 2024, whereby it struck down section 2(2) of the Constitution (Amendment of Sections 96(1) and 121(1)) Act, 2023 ('the amending Act').

[2] On 29 April 2024, Messrs Phillip Paulwell and Peter Bunting, the 1st and 2nd respondents, respectively, filed a counter-notice of appeal, asking this court to overturn the finding of the Full Court that section 2(1) of the amending Act is a valid constitutional amendment. By their counter-notice of appeal, they also asked this court to affirm the decision of the Full Court striking down section 2(2) of the amending Act.

[3] At a case management conference, held on 28 May 2024, permission was given to Miss Paula Llewellyn KC, the Director of Public Prosecutions at the time of the enactment of the amending Act ('the incumbent DPP') (who is directly affected by this appeal), to intervene and make submissions before this court.

Background

[4] The 1st and 2nd respondents, who were the claimants before the Full Court, are both members of the opposition party, the People's National Party, and members of the House of Representatives ('the House') and the Senate, respectively. By way of fixed date claim form, filed 8 August 2023, they sought declarations that section 2 of the amending Act was inconsistent with the Constitution of Jamaica ('the Constitution') and null and void. They asserted that section 2 of the amending Act was enacted for an improper purpose, breached the separation of powers doctrine, and circumvented, undermined, and/or contradicted the constitutionally mandated process for the extension of the term of office of the Director of Public Prosecutions ('DPP'). Alternatively, an order was sought for

section 2(1) of the amending Act to be construed as being inapplicable to the incumbent DPP and that section 2(2) of the amending Act be struck out.

[5] The circumstances that led to the commencement of the dispute were detailed in various affidavits filed by or on behalf of the parties to the claim. From those affidavits, we have accepted the following as being undisputed. The incumbent DPP assumed office in March 2008. On 14 January 2020, she wrote to the Public Service Commission advising, among other things, that in September 2020 she would attain the age of retirement, that being 60 years of age. She expressed that, notwithstanding, she was prepared to continue in the capacity of DPP beyond her retirement age on "mutually agreed terms". The incumbent DPP relied on section 96(1) of the Constitution, which enables the Governor-General, acting on the recommendation of the Prime Minister, in consultation with the Leader of the Opposition, to extend the tenure of a DPP beyond the age of 60 years and up to the then maximum age of 65 years. Accordingly, she requested that her letter be conveyed through the relevant channels in order to facilitate a recommendation for the extension of her tenure.

[6] By letter dated 7 February 2020, the Prime Minister, Mr Andrew Holness, wrote to the then Leader of the Opposition, Dr Peter Phillips, enclosing the incumbent DPP's letter and proposing an extension of her tenure to age 65. Dr Phillips objected to the extension in his letter dated 2 March 2020 and cited several reasons for doing so. Nevertheless, the incumbent DPP's tenure was extended for three years, up to age 63, and notice of this was given in the Jamaica Gazette dated 26 August 2020. Although not detailed in any of the affidavits, it should be noted that this extension of the incumbent DPP's tenure was the subject of a challenge before the Full Court and in a decision delivered on 31 July 2023, it was found to be valid (see **Mervin Cameron v Attorney General of Jamaica** [2023] JMFC Full 2).

[7] On 6 February 2023, the incumbent DPP again wrote to the Public Service Commission, requesting a further extension of her tenure, noting that her previously extended tenure would conclude on 21 September 2023. In a response, dated 26 May

2023 from the Chief Personnel Officer of the Public Service Commission, she was advised that the Prime Minister, having considered the applicable constitutional provision and taken legal advice, would not grant a further extension of her tenure.

[8] Two months later, on 25 July 2023, a Bill entitled "An Act to Amend the Constitution of Jamaica to provide for an increase in the retirement age of the Director of Public Prosecutions and the Auditor General, and for connected matters" ('the amending Bill'), was tabled and passed in the House. The justification proffered by the proponents of the amending Bill was that the retirement ages of the DPP and the Auditor General ('Au-G') were five years shorter than that of other public officers under the updated Pensions (Public Service) Act, 2017 ('the Pensions Act').

[9] The amending Bill was introduced in the House on 25 July 2023 and passed on the same day. On 28 July 2023, three days after the amending Bill was passed in the House, it was tabled in the Senate and also passed on the same day. Following that, on 31 July 2023, the Governor-General gave his assent, and the amending Bill was gazetted and given force of law.

[10] Aggrieved by the enactment of the amending Bill, which then became the amending Act, the respondents proceeded to file their claim on 8 August 2023, challenging its constitutionality (as detailed at para. [4] above).

[11] On 15 August 2023, the incumbent DPP wrote to the Chief Personnel Officer of the Public Service Commission to indicate that she had elected to remain in office until age 65. In response, by letter dated 21 September 2023, the Chief Personnel Officer advised her that, in light of the amending Act, the Public Service Commission agreed, with the approval of the Governor-General, to allow her to continue in office for two additional years.

The decision of the Full Court

[12] The Full Court identified six issues for determination in the matter, as follows (at para. [58] of its judgment):

> "1. Whether Section 2 of [the amending Act] was enacted for an improper purpose.
>
> 2. Whether the enactment of section 2 of [the amending Act] breaches the separation of powers principle and renders the amendment unconstitutional.
>
> 3. Whether enacting Section 2 circumvents the process for the extension of the [DPP's] term in office.
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> 4. Whether Parliament should have proceeded as if section 96(1) was an unentrenched or an entrenched provision.
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> 5. Whether the Amendment properly applies to the incumbent office holder.
>
> 6. Whether the Court should read down the impugned provisions."

[13] In addressing the first issue as to whether the amending Act was enacted for an improper purpose, the Full Court took account of the relevant Hansard Reports, the report of the Joint Select Committee of Parliament, the Green Paper, the White Paper, the long title of the amending Act, and the Memorandum of Objects and Reasons in both the 2017 Pensions (Public Service) Bill and the amending Bill. In so doing, the Full Court concluded that the respondents failed to demonstrate that the amending Act was enacted for an improper purpose. It was found instead that the objective of section 2 of the amending Act was simply to amend the Constitution to provide for an increase in the DPP's retirement age. This was found to be consistent with Parliament's overall intent to increase the retirement age of public officers throughout the public sector and thereby provide a more efficient pension system (see paras. [78] to [83] of the judgment).

[14] The Full Court made short shrift of the question of whether the amending Act breached the doctrine of separation of powers. The learned judges found that section 2 of the amending Act did not remove the powers conferred upon the Prime Minister, Leader of the Opposition, and the Governor-General in section 96(1)(b) of the Constitution and confer such powers upon the Legislature.

[15] The mechanism by which the Constitution could lawfully be amended was also examined. The learned judges found that the Constitution could not be construed as "impervious to change or immutable". Having noted that section 96(1) is not an entrenched provision (as opposed to sections 96(2) to (7), which were entrenched), the Full Court concluded that it was amended in accordance with the required mechanism.

[16] The Full Court considered the cases of **Independent Jamaica Council for Human Rights v Marshall-Burnett** [2005] 2 WLR 923 ('**Marshall-Burnett**') and **Hinds v The Queen** [1976] 1 All ER 353 ('**Hinds**') and found that they supported the respondents' contention that the amending Act was ordinary legislation that purported to amend the Constitution but found those cases to be distinguishable.

[17] The Full Court further distinguished the protection of the Judiciary afforded in the Constitution from the protection afforded to the office of the DPP and determined that the Constitution allowed Parliament to change the terms and conditions of service of the DPP. The Full Court disagreed with the respondents' submission that if the amending Act were found to be valid, there would be a risk to the independence of the office of the DPP. They further disagreed that section 96(1) was so linked to section 94(6) of the Constitution (which stipulates that the DPP shall not be subject to the direction or control of any other person or authority) or could undermine section 94(6) such that section 96(1) should have been altered under the mechanism required for alteration of an entrenched provision. It was accordingly found that the amending Act was validly passed and resulted in an amendment to section 96(1) of the Constitution.

[18] With respect to section 2(2) of the amending Act, however, the Full Court found that it was inconsistent with its stated objectives and that it sought to allow for an action to be done that was not previously permissible under the Constitution. According to the Full Court, it "added the DPP's election as a procedural step in the retirement process". Whereas the DPP's retirement was previously automatic and determined by age. Further, it gave rise to an interpretation that the incumbent DPP could be permitted a second

extension. The Full Court determined that section 2(2) was inconsistent with section 2(1) and stated:

> "[162] … As section 2(1) of the [amending Act] has been passed for the retirement age to be increased to sixty-five then the need for section 2(2) which provides an election for a DPP to retire after age sixty would be inconsistent with section 2(1) which is the section that extends the age a DPP can remain in office after age sixty-five.
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> [163] In our view, the addition of the words *notwithstanding* or *election* to subsection [sic] 2(2) do [sic] not address a need or desire to retire for an office holder who is under age sixty five [sic]." (Italics as in the original)

[19] The Full Court viewed section 2(2) as "a material addition" to section 96 of the Constitution and that no reason was provided for its inclusion. Furthermore, Parliament sought to confer a power on the incumbent DPP that was never contemplated by the framers of the Constitution. In the result, section 2(2) could not allow the incumbent DPP to remain in office until age 65. The Full Court stated:

> "[172] Having found that the [amending Act] was passed using the proper procedure laid down in the Constitution can its provisions be applied to the incumbent DPP? The incumbent [DPP] had already attained the (pre-amendment) age of retirement and at the time of the amendment was nearing the completion of the period of extension. The provisions of section 2(2) cannot be lawfully applied to lead to a further extension in office by way of an election on the part of the incumbent [DPP]."

[20] It was stated (at para. [181]) that any extension of tenure under section 2(1) (beyond age 65) would need to follow the original process, that is, extension by the Governor-General on the advice of the Prime Minister, following consultation between the Prime Minister and the Leader of the Opposition. However, no express determination was made by the Full Court as to whether section 2(1) would enable the incumbent DPP to remain in office until age 65.

[21] The Full Court concluded that section 2(2) of the amending Act ought to be struck down as being inconsistent with the supremacy clause of the Constitution.

Grounds of appeal

[22] The grounds of appeal advanced by the appellant are as follows:

> "i. The Full Court erred in its interpretation of section 2(2) of the [amending Act] as having the effect of giving [the incumbent DPP] a right to extend her term of office beyond the retirement age whereas, on its plain and unambiguous language, section 2(2) preserved the right to retire where the incumbent in office had reached the pre-amendment retirement age of 60. Section 2(2) could not properly be interpreted as giving [the incumbent DPP] a right to extend her term of office by electing not to retire. Any extension or continuation of her term of office occurred by operation of law by the amendment effected by section 2(1) which increased the retirement age for the holder of the office from 60 to 65.
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> ii. The Full Court erred in failing to appreciate that the provision regarding the retirement age and extension in office upon reaching the retirement age contained in section 96(1) of the Constitution had been validly amended by section 2(1) of the amending Act in that the retirement age under that section had been altered from 60 to 65 and also the power to grant extension in office to age 70 after the office holder reached the retirement age of 65.
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> iii. The Full Court erred in that it applied the pre-amendment provision of section 96(1) as continuing to govern section 2(1) and 2(2) [sic] of the amending Act and by treating section 2(2) as giving [the incumbent DPP] the right to a second extension to her tenure by providing that 'Notwithstanding anything in sub-section (1), a person who is Director of [Public] Prosecutions at the commencement date of this Act may, by memorandum in writing given to the Governor-General, elect to retire any time after attaining the age of sixty years'.

iv. The Full Court erred in finding –

a. that [the incumbent DPP] having obtained an extension to hold office to age 63 prior to the promulgation of the amending Act, the original unamended provisions of section 96(1) of the Constitution regarding extension in office upon reaching age 60 continued to apply and not the amendment effected by section 2(1) of the amending Act, and
b. that the notification from her that, consequent on the promulgation of the amending Act, she would remain in office to age 65 amounted to a second extension that breached the provisions for obtaining an extension contained in section 96(1) of the Constitution.

v. The Full Court erred in failing to appreciate that [the incumbent DPP's] term of office was increased to age 65 by the amendment which was effected by section 2(1) which altered the retirement age in section 96(1) of the Constitution from 60 to 65. That provision having been validly enacted in accordance with the procedure stipulated in section 49(4) of the Constitution, could not properly be interpreted as being of limited application to exclude a holder who remained in the office by virtue of an extension which had been granted prior to the promulgation of the amendment. Such an interpretation amounted to a judicial re-writing of the provision, which was not permissible. Equally the interpretation of the amendment effected by section 2(2) to preserve the right of the holder of the office to retire if she had reached the pre-amendment age of retirement could not be properly interpreted as giving an election to extend the term of office and the interpretation given to section 2(2) by the Court amounted to a judicial re-writing of the provision, which was not permissible.

vi. The Full Court erred in treating [the incumbent DPP's] notice that she would be continuing in office until age 65 as meaning that she was electing to give herself a second extension to hold the office thereby bypassing

the process of extending tenure where the office holder had reached the retirement age. The retirement age had been changed by the amendment to age 65 and the process for seeking extension would only arise upon the holder of the office reaching the retirement age of 65.

vii. The Full Court erred in using the Memorandum of Objects and Reasons of the amending Act to alter the plain and unambiguous language of the amending Act.

viii. The Full Court erred in finding that [the incumbent DPP] remained in office by virtue of section 2(2) of the amending Act when she in fact remained in office by the operation of section 2(1) which had increased the retirement age for the holder of the office to 65.

ix. The Full Court erred in that it failed to appreciate that the provisions for extension of office after [the incumbent DPP] reached retirement age was part of the provisions of section 96(1) which was not entrenched. Accordingly, there was nothing prohibiting the amendment to that section to include section 2 (2) to preserve the right to retire if the holder had reached the pre-amendment retirement age of 60 when the amending Act was promulgated nor did section 2(2) conflict with section 2(1) of the amending Act. Having been promulgated in accordance with section 49(4) of the Constitution, the amending Act, inclusive of section 2(2), was not ordinary legislation but formed part of the Constitution itself as an amendment to an unentrenched provision.

x. The Full Court erred in failing to appreciate that the provisions in section 96(1) regarding the extension of the tenure of the Director of Public Prosecutions office after reaching the stipulated age of retirement were not entrenched and therefore were altered by the amending Act promulgated in accordance with section 49(4) of the Constitution.

xi. The Full Court erred in its interpretation of section 2(2) of the amending Act, which is, that the effect of section 2(2) was to give [the incumbent DPP] a right which she did not have before and that the said amendment gave

[the incumbent DPP] the ability to elect to remain in office by way of an (additional) extension of tenure, for the following reasons that:

a) the Full Court failed to appreciate the fact that section 2(1) of the [amending Act] automatically increased [the incumbent DPP's] tenure in office by way of operation of law.

b) the Full Court failed to have any or any sufficient regard to section 95 of the Constitution, which provides that the 'terms and conditions of service of the Director of Public Prosecutions… shall not be altered to [her] disadvantage during [her] continuation in office'.

c) the Full Court failed to appreciate that the proper interpretation to section 2(2) of the amending Act was that it preserved the rights of [the incumbent DPP's] terms and conditions of service, relative to age of retirement, in a manner which was not to her disadvantage.

d) the Full Court placed improper weight on the correspondences of [the incumbent DPP], the Public Service Commission and the Governor General as regards the continuation of [the incumbent DPP] in office, thereby erroneously concluding that [the incumbent DPP's] continuation in office until the age of 65 years was in effect an election by her to grant herself a second extension to her tenure in office under section 2(2) of the amending Act thereby circumventing the pre-amendment process for obtaining an extension.

e) the Full Court erred by interpreting the amending Act and particularly section 2(2) by using or relying on the fact that [the incumbent DPP] had attained the pre-amendment age of

retirement and was continuing in office pursuant to an extension of tenure pursuant to section 96(1)(b) of the Constitution.

f) The Full Court was plainly wrong to have concluded that the interpretation to be given to the amending Act was to give [the incumbent DPP] a second extension in office.

xii. The Full Court erred in failing to appreciate that section 96(1) of the Constitution, as amended, delimits the term of the office holder and by the amendment effected by section 2(1) of the amending Act the term of the office was altered to age 65.

xiii. The Full Court erred in finding that section 2(2) of the amending Act was inconsistent with section 2(1).

xiv. The Full Court fell into error by applying an incorrect test to invalidate section 2(2) of the amending Act as being inconsistent with the provisions of section 96(1) of the Constitution, having correctly accepted that:

a. The amending Act (inclusive of section 2(2) of the Act) was validly passed by Parliament consistent with the provisions of section 49 of the Constitution which gives Parliament the power '*by an Act of Parliament passed by both Houses [to] alter any provisions of this Constitution*',
b. The amending Act did not offend the principle of separation of powers, and
c. the amending Act was passed for a proper purpose.

The test created by the Full Court is incorrect and contrary to the clear language of section 2 of the Constitution. The Full Court stated the test at para [148] of the judgment as '*whether the Act as ordinary legislation is in substance different from that which was originally contemplated by the drafters of section 96(1) or whether it alters what section 96(1) had originally*

said in the Constitution'. Whereas section 2 of the Constitution provides '*Subject to the provisions of sections 49 and 50 of this Constitution, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void*'. The correct test was whether section 96(1) of the Constitution, being an unentrenched provision, had been amended by the law promulgated in accordance with the procedure set out in section 49(4) of the Constitution.

xv. The Full Court abdicated its duty to give the parties a reasonable opportunity to make representations insofar as it concerns the question of whether section 2(2) of the amending Act gave a power to grant [the incumbent DPP] an extension of her term in office and was for that reason inconsistent with the scheme in the Constitution. This failure on the part of the Full Court deprived the Appellant of the ability to make arguments as regards the effect of and the proper interpretation to be given to section 2(2).

xvi. The Full Court was plainly wrong in law in finding that a consultation as required by section 96(1)(b) means an 'agreement' between the Prime Minister and the Leader of the Opposition. The consultation process is set out in section 32(5) of the Constitution which does not require agreement between the Prime Minister and the Leader of the Opposition for the Governor General to act on the recommendation of the Prime Minister.

xvii. The Full Court was plainly wrong in all the circumstances to grant judgment for the Respondents ... and declare that section 2(2) of the amending Act is an invalid constitutional amendment, as a consequence, section 2(2) of the amending Act is severed from the amending Act and is struck down and declared as unconstitutional, null, void and of no legal effect." (Italics as in the original)

[23] Further to those grounds, the appellant has asked us to make a declaration, among other things, that section 2(2) of the amending Act is a valid constitutional amendment.

Grounds of counter-notice of appeal

[24] In the counter-notice of appeal, the following seven grounds of appeal were proffered for our consideration:

> "(a) The Full Court erred in law by failing to find that section 2(1) of the [amending Act] was unconstitutional.
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> (b) The Full Court erred in fact and in law by finding that section 2 of the [amending Act] was enacted for a proper purpose.
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> (c) The Full Court erred by failing to find that the purpose of enacting section 2 of the [amending Act] was not simply to increase the retirement ages applicable to the offices of Director of Public Prosecutions and Auditor-General, but it was to extend the tenure of the incumbent DPP.
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> (d) The Full Court erred in law by failing to recognise and hold that by enacting section 2 of the [amending Act], the Parliament breached the separation of powers principle. In particular, the Full Court failed to appreciate that the Parliament effectively created a further extension of the incumbent DPP's tenure by enacting section 2 of the [amending Act], and as a result infringed on the powers vested in the executive branch.
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> (e) The Full Court erred in law by failing to recognise and hold that section 2 of the [amending Act] would have the effect of undermining and/or contradicting the constitutionally mandated process for the extension of the term of office of a Director of Public Prosecutions, and is therefore inconsistent with the Constitution, null and void.
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> (f) The Full Court erred in law by failing to find that Parliament's amendment to section 96(1) was effected in a way that breached the 'basic 'deep' structure' of the Constitution.

(g) In the alternative, the Full Court erred in law by failing to order that section 2(1) of the [amending Act] is to be read and construed as not applying to a person who is the Director of Public Prosecutions as at the date of commencement of the Act."

[25] The respondents have sought a declaration that section 2(1) of the amending Act is unconstitutional, null, and void, or, in the alternative, a declaration and order that section 2(1) of the amending Act is to be read and construed as not applying to the incumbent DPP.

The issues

[26] The parties provided the court with an agreed statement of the issues encompassing all the grounds of appeal. We accordingly reviewed this statement of issues and made changes in order to derive the issues that would frame our analysis. The reformulated issues are as follows:

1. Whether section 2(1) of the amending Act is unconstitutional by virtue of a breach of substantive principles of constitutional law. (Ground (a) of the counter-notice of appeal)

    a. Whether the deep structure doctrine is applicable to the Jamaican Constitution and, if so, did the Full Court err in failing to find that the amendment to section 96(1) of the Constitution breached the "basic 'deep' structure" of the Constitution? (Ground (f) of the counter-notice of appeal)

    b. Whether the Full Court erred in finding that Parliament, by enacting section 2 of the amending Act, did not breach the principle of separation of powers between the legislative and the executive organs of Government. (Ground (d) of the counter-notice of appeal)

c. Whether the Full Court erred in finding that section 2 of the amending Act was enacted for a proper purpose. (Grounds (b) and (c) of the counter-notice of appeal)

2. Whether the Full Court erred by ruling that section 2(1) of the amending Act did not circumvent, undermine or contradict the constitutionally mandated process for the extension of the term of office of a DPP. (Ground (e) of the counter-notice of appeal)

3. Whether the Full Court erred in its ruling on the effect of section 2(1) of the amending Act. (Grounds ii, iv (a) and (b), v, viii and xii of the appellant's notice and grounds of appeal)

4. Whether section 2(2) of the amending Act is in breach of the Constitution.

   a. Did the Full Court apply the correct test in determining the constitutionality of section 2(2) of the amending Act? (Ground xiv of the appellant's notice and grounds of appeal)
   b. Did the Full Court err in its interpretation of section 2(2) of the amending Act? (Grounds i, iii, vi and xi of the appellant's notice and grounds of appeal)
   c. Does section 2(2) of the amending Act alter section 96(1) of the Constitution? (Grounds ix and x of the appellant's notice and grounds of appeal)
   d. Is section 2(2) of the amending Act inconsistent with section 2(1)? (Ground xiii of the appellant's notice and grounds of appeal)
   e. Did the Full Court err by using the Memorandum of Objects and Reasons of the amending Act to alter the language of the amending Act? (Ground vii of the appellant's notice and grounds of appeal)

5. Whether section 2(1) of the amending Act should be read down and construed as not applying to the incumbent DPP. (Ground (g) of the–counter-notice of appeal)

6. Did the Full Court give the parties a reasonable opportunity to make representations insofar as it concerns its finding that section 2(2) of the amending Act granted the incumbent DPP the power to give herself an extension of her term in office? (Ground xv of the appellant's notice and grounds of appeal)

7. Does "consultation" as required by section 96(1)(b) of the Constitution mean "agreement" between the Prime Minister and the Leader of the Opposition? (Ground xvi of the appellant's notice and grounds of appeal)

[27] In light of the overarching nature of the issues raised on the counter-appeal, those substantive principles of constitutional law will be considered first, as they will impact the treatment of both sections 2(1) and 2(2) of the amending Act.

[28] The submissions will be set out based on whether the issue discussed is on the appeal or counter-appeal. That is, where the issue is on the appeal, the appellant's submissions will be set out first followed by the intervener's submissions, where applicable, then the respondents' submissions and where on the counter-appeal, the respondents' submissions will be set out first.

1. Whether section 2(1) of the amending Act is unconstitutional by virtue of a breach of substantive principles of constitutional law.

[29] The appellant contended that sections 2(1) and 2(2) of the amending Act were validly passed by Parliament, having been passed in keeping with section 49(4)(b) of the Constitution, and that no constitutional provisions or principles were breached. The respondents did not submit before the Full Court or this court that the amending Act was passed in breach of the procedural requirements under section 49(4)(b) for the amendment of an unentrenched provision of the Constitution. Instead, the respondents

contended that section 2(1) of the amending Act is unconstitutional as it breached constitutional principles in its effect and impact.

[30] The provision under scrutiny in this matter is section 2 of the amending Act, which provides:

> "2. (1) Section 96(1) of the Constitution is amended by –
>
> (a) deleting the words 'sixty years' wherever they appear and substituting therefor in each case the words 'sixty-five years'; and
>
> (b) deleting the words 'not exceeding sixty-five years' where they appear in paragraph (b) of the proviso and substituting therefor the words 'not exceeding seventy years'.
>
> (2) Notwithstanding anything in subsection (1), a person who is Director of Public Prosecutions at the date of commencement of this Act may, by memorandum in writing given to the Governor-General, elect to retire at any time after attaining the age of sixty years."

[31] Prior to that amendment, section 96(1) of the Constitution read as follows:

> "96.- (1) Subject to the provisions of subsections (4) to (7) (inclusive) of this section the Director of Public Prosecutions shall hold office until he attains the age of sixty years:
>
> Provided that-
>
> (a) he may at any time resign his office; and
>
> (b) the Governor-General, acting on the recommendation of the Prime Minister after consultation with the Leader of the Opposition, may permit a Director of Public Prosecutions who has attained the age of sixty years to continue in office until he has attained such later age, not exceeding sixty-five years, as may (before the Director of Public Prosecutions has attained the age of sixty years) have been agreed between them."

[32] There is no issue joined between the parties as to what section 2(1) purports to do. By plain and unambiguous language, it purports to delete the words "sixty years" wherever they appear in section 96(1) of the Constitution and substitute in its place "sixty-five years". It also deletes the words "not exceeding sixty-five years" where they appear in para. (b) of the proviso and substitutes the words "not exceeding seventy years".

[33] The supremacy clause, which is delineated in section 2 of the Constitution, is also pertinent to this discussion. It states:

> "2. Subject to the provisions of sections 49 and 50 of this Constitution, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void."

Section 49 provides for the alteration of the Constitution and section 50 was repealed by section 3 of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011.

[34] Section 49(4) is particularly relevant to this discussion. It provides:

> "49. - …
>
> (4) A Bill for an Act of Parliament under this section shall not be deemed to be passed in either House unless at the final vote thereon it is supported-
>
> (a) in the case of a Bill which alters any of the provisions specified in subsection (2) or subsection (3) of this section by the votes of not less than two-thirds of all the members of that House, or
>
> (b) in any other case by the votes of a majority of all the members of that House."

[35] In determining the answer to the overarching question of whether section 2(1) of the amending Act is unconstitutional, we will now consider the primary issues raised by the respondents in relation to the deep structure doctrine, the separation of powers principle, and improper purpose.

(a) Whether the deep structure doctrine is applicable to the Jamaican Constitution and, if so, did the Full Court err in failing to find that the amendment to section 96(1) of the Constitution breached the "basic 'deep' structure" of the Constitution? (Ground (f) of the counter-notice of appeal)

The submissions

[36] On this issue, Mr Hylton KC submitted for the respondents that the Full Court erred in law in failing to find that section 2 of the amending Act breached the "basic 'deep' structure" of the Constitution. The "basic 'deep' structure" of the Constitution refers to the concept that there are certain requirements or principles that are inherent in the structure and provisions of the Constitution, he argued (citing **Hinds** and **Belize International Services Ltd v The Attorney General of Belize** [2020] CCJ 9 (AJ) BZ). Among these foundational principles are the principles of constitutionalism, separation of powers, the rule of law, an independent and impartial judiciary and, (according to the respondents) the proper purpose principle. Though unstated, the court should consider these fundamental principles inherent in a democracy (reference was made to the case of **Steve Ferguson v The Attorney General of Trinidad and Tobago; Maritime Life (Caribbean) Limited and others v The Attorney General of Trinidad and Tobago; Ameer Edoo v The Attorney General of Trinidad and Tobago** [2016] UKPC 2 ('**Ferguson v AG of T&T**')).

[37] On behalf of the appellant, Mr Wood KC submitted that the amending Act does not breach the "basic 'deep' structure" of the Constitution since it does not alter any entrenched provision. Furthermore, he contended that the tiered system for constitutional amendments has sufficient safeguards to regulate Parliament's power, so there is no need to resort to the "basic 'deep' structure" doctrine. Several cases were cited in support, such as **Hinds**, **Boyce and another v R** [2004] 4 LRC 749 ('**Boyce**'), **Attorney General and others v Ndii and others** [2022] KESC 8, [2023] 1 LRC 1 ('**AG v Ndii**'), a case from the Supreme Court of Kenya, **The Honourable Attorney General v Reverend Christopher Mtikila** [2008] TZCA 57, [2012] 1 LRC 647 ('**AG v Christopher Mtikila**'), a case of the Tanzanian Court of Appeal, and **Teo Soh Lung v Minister for Home Affairs and others** [1990] LRC (Const) 0490, a Singaporean case. King's Counsel

argued that the "basic 'deep' structure" doctrine "is not mature enough to be of universal application and can result in anarchy". To apply the doctrine of "basic 'deep' structure" to certain constitutional provisions in order to make them unamendable would be a judicial re-write of the Constitution, completely disregarding its mechanisms for amendment set out under section 49.

Analysis

[38] The basic structure doctrine (also referred to as the deep structure doctrine and the basic 'deep' structure doctrine) originates from the common law jurisprudence of India, specifically the case of **Kesavananda Bharati v State of Kerala** AIR (1973) SC 1461. In that case, the Supreme Court of India deployed the doctrine to limit Parliament's legislative power to amend certain provisions of the Indian Constitution, such as provisions that enshrine the democratic, federal and republican government, as well as secularism and fundamental rights. Those provisions of the Indian Constitution were deemed immutable. The court also found that every provision of the Indian Constitution could be amended as long as "the basic foundation and structure of the Constitution remain the same". In that vein, the court adopted an evolutionary approach in considering and applying the doctrine. So, while several constitutional features have been characterised as the basic structure of the Indian Constitution, the list or definition of what comprises the basic structure of the Indian Constitution is not exhaustive. This is because the court decides whether a constitutional feature is part of the basic structure on a case by case basis.

[39] In explaining what he describes as the basic 'deep' structure doctrine, Justice Jamadar, a judge of the Caribbean Court of Justice ('JCCJ'), compares the text of the Constitution to a tree that is seen above the ground and the basic 'deep' structure of the Constitution (that is, certain unwritten constitutional principles, features and values) as the roots of that tree "lying mostly, though not entirely, below the surface of the earth and not always readily apparent, but in fact the constitutive superstructure out of which what we see and experience as 'tree' emerges and is sustained" (see "The Basic Structure

Doctrine and its Implications Concerning the Belize Constitution: Interrogating the BISL [**Belize International Services Ltd v The Attorney General of Belize**] Decision", a presentation made by Jamadar JCCJ at the Bar Association of Belize's Annual Law Conference on 14 January 2022).

[40] Jamadar JCCJ had expounded on the basic 'deep' structure doctrine in the case of **Belize International Services Ltd v The Attorney General of Belize**, a decision of the Caribbean Court of Justice ('CCJ'). Citing in support the authority of **Nervais v R; Severin v R** [2018] 4 LRC 545 (also a decision of the CCJ), the learned judge of the CCJ had this to say in his judgment:

> "[320] In effect, the decision in *Nervais and Severin* is monumental in Caribbean jurisprudence, because it establishes that even the literal text of a constitution is not inviolable and is at once subject to certain 'basic underlying principles'. What becomes normative and authoritative, is ultimately not the letter of the text, **but the basic 'deep' structure (certain non-derogable features, principles, and values) that underpins, informs, and constitutes the text as a constitution**." (Italics as in the original) (Emphasis added)

[41] In making this observation, Jamadar JCCJ was remarking on the following majority opinion of the CCJ on constitutional savings clauses in **Nervais v R; Severin v R** written by Sir Byron Dennis, the then President of the court:

> "[59] ...With these general savings clauses, colonial laws and punishments are caught in a time warp continuing to exist in their primeval form, immune to the evolving understandings and effects of applicable fundamental rights. This cannot be the meaning to be ascribed to that provision as it would forever frustrate **the basic underlying principles that the Constitution is the supreme law and that the judiciary is independent**." (Emphasis added)

[42] The basic 'deep' structure doctrine has been considered and applied in several other authorities from the CCJ and regional courts. In **McEwan and others v Attorney General of Guyana** [2019] 1 LRC 608 ('**McEwan v AG of Guyana**'), the CCJ declared

that the rule of law was a core constitutional principle. According to Jamadar JCCJ, this ruling effectively embedded this principle "as a part of the basic 'deep' structure in Caribbean constitutionalism" (see para. [349] of **Belize International Services Ltd v The Attorney General of Belize**). Consequently, the court found that a cross-dressing law in Guyana was unconstitutional because it violated essential aspects of the rule of law.

[43] After referring to the decisions of **Nervais v R; Severin v R** and **McEwan v AG of Guyana**, Jamadar JCCJ made the point, at para. [350] of **Belize International Services Ltd v The Attorney General of Belize**, that:

> "[350] Thus, this court has since its inception sought to solidify its stance that, inherent in the constitutional frameworks of our so-called Westminster-derived constitutions are unwritten constitutional principles; features, principles and values that are constitutive and so form part of the basic 'deep' structure of these constitutions. Of these, one such principle and value is the rule of law, manifesting as a necessary safeguard against irrationality, unreasonableness, unfairness and the abuse and arbitrary exercise of executive power. What was, in [**AG v Joseph** [2007] 4 LRC 199], '… an emerging idea that the rule of law, is a foundational constitutional norm that pervades the entire constitution', has crystallized into a concrete principle."

[44] Accordingly, the learned judge of the CCJ identified concepts such as the separation of powers, independence of the Judiciary, and the rule of law, which embodies principles such as due process, fairness, accountability, and good governance as constitutional elements or features that are part of the basic 'deep' structure of Westminster-based constitutions. Those principles, he opined, are integral and fundamental to the sustainability and durability of constitutionalism, of which the courts are the guardians.

[45] However, as Jamadar JCCJ cautioned, the basic 'deep' structure doctrine is not to be lightly invoked. Resort to the doctrine should be reserved for reviewing government

actions that are "a serious threat to, or undermining of, fundamental and core constitutional values".

[46] Finally, in **Bowen v The Attorney General; Belize Land Owners Association Limited et al v The Attorney General** BZ 2009 SC 2, delivered 13 February 2009, the Supreme Court of Belize used the basic 'deep' structure doctrine to hold that a proposed amendment to the fundamental right to property in the Belizean Constitution was unconstitutional because it "derogated from the essential features and overall identity of Belizean constitutionalism, and the enshrined human rights values". Conteh CJ, in that case, stated that "the basic structure doctrine is at bottom, the affirmation of the supremacy of the Constitution in the context of fundamental rights". He further identified six features of the basic 'deep' structure of Belizean constitutionalism as being: (i) Belize is a sovereign democratic state; (ii) the Constitution is supreme; (iii) enshrined fundamental rights demand protection; (iv) the separation of powers; (v) the limitation of legislative powers; and (vi) the rule of law.

[47] In advancing the respondents' position that the basic 'deep' structure applies to the Jamaican Constitution, Mr Hylton submitted that the notion of certain requirements or principles being inherent in the structure and provisions of the Constitution is nothing new. He referred us to Lord Diplock's dictum in **Hinds**, a decision of the Privy Council in an appeal from Jamaica that was decided almost 50 years ago.

[48] In **Hinds**, at page 359 of the Board's judgment, Lord Diplock emphasised that certain foundational principles were implicit in the structures of Westminster model constitutions:

> "...In seeking to apply to the interpretation of the Constitution of Jamaica what has been said in particular cases about other constitutions, care must be taken to distinguish between judicial reasoning which depended on the express words used in the particular constitution under consideration and **reasoning which depended on what, though not expressed, is nonetheless a necessary implication from the subject-matter and structure of the**

> **constitution and the circumstances in which it had been made**." (Emphasis added)

[49] He continued at page 360 of the judgment:

> "...What, however, **is implicit in the very structure of a constitution on the Westminster Model** is that judicial power, however it be distributed from time to time between various courts, is to continue to be vested in persons appointed to hold judicial office in the manner and on the terms laid down in the chapter dealing with the judicature, **even though this is not expressly stated in the constitution**. …" (Emphasis added)

[50] In that case (**Hinds**), the Board declared certain sections of the Gun Court Act 1974 unconstitutional because those sections of the legislation were inconsistent with the separation of powers principle. The provisions that were struck down purported to transfer from the Judiciary to members of the executive branch of government the discretion to determine the sentence that was to be imposed on a certain class of offenders.

[51] It is clear from the excerpts extracted from **Hinds** that the Board highlighted that the principle of the separation of legislative, executive, and judicial powers, though not expressly mentioned, was implicit in the Jamaican Constitution.

[52] The Board has repeatedly taken this view with respect to constitutions based on the Westminster model. For example, in **Marshall-Burnett** (an appeal from Jamaica), Lord Bingham of Cornhill agreed with Lord Diplock in **Hinds** that "certain **important assumptions** underlie constitutions drafted on what he called the Westminster model" (see para. 9 of that judgment) (emphasis added). Also, Lord Sumption at para. [14] of **Ferguson v AG of T&T** (an appeal from Trinidad and Tobago and an authority relied on by both the appellant and respondents) stated that "[c]onstitutional instruments fall to be interpreted in the light of a number of fundamental principles **which are commonly left unstated but are inherent in a democracy**…" (emphasis added). The learned Law Lord also pronounced, at para. 15 of the judgment, that the separation of powers

principle is "[o]ne of the fundamental principles of the Constitution". Similarly, in **Chandler v State of Trinidad and Tobago** [2022] 3 WLR 39 ('**Chandler**') (another appeal from Trinidad and Tobago on which the appellant relies), Lord Hodge (Deputy President of the Supreme Court of the United Kingdom) indicated that the doctrine of separation of powers "is not an overriding principle that exists independently of a Constitution but is implicit in a Constitution having regard to the powers of the judiciary, the legislature and the executive which are laid down expressly or by implication in a Constitution" (see para. 75 of that judgment).

[53] Based on these authorities, Mr Hylton posited that the Privy Council has stated that the court can find principles in the structure of a Westminster-based constitution that have not been expressly stated therein. He further advanced that the focus of Jamadar JCCJ was on Commonwealth Caribbean constitutionalism when he spoke of the basic 'deep' structure doctrine, and in substance, this doctrine is and has always been a part of the Constitution.

[54] However, Mr Wood submitted that the basic 'deep' structure doctrine is inapplicable to the Constitution, given that our constitutional provisions are not immutable in the light of section 49. That section, counsel further submitted, is the governing provision with respect to constitutional amendments. It sets out a three-tiered system to amend the Constitution's unentrenched, entrenched and deeply entrenched provisions. Also, it provides the mechanism that regulates the legislative power of the Parliament to alter the Constitution (see appendix to this judgment for section 49 of the Constitution).

[55] Counsel directed our attention to the observation of Lord Diplock in **Hinds** at page 361:

> "One final general observation: where, as in the instant case, a constitution on the Westminster model represents the final step in the attainment of full independence by the people of a former colony or protectorate, the constitution provides machinery whereby any of its provision, whether relating to fundamental rights and freedoms or to the structure of

> government and the allocation to its various organs of legislative, executive or judicial powers, may be altered by those peoples through their elected representatives in the parliament acting by specified majorities, which is generally all that is required, though exceptionally as respects some provisions the alteration may be subject also to confirmation by a direct vote of the majority of the people themselves. The purpose served by this machinery for 'entrenchment' is to ensure that those provisions which were regarded as important safeguards by the political parties in Jamaica, minority and majority alike, who took part in the negotiations which led up to the constitution, should not be altered without mature consideration by the parliament and the consent of a larger proportion of its members than the bare majority required for ordinary laws."

[56] The basic structure doctrine was rejected as being applicable to the Constitution of Kenya in the case of **AG v Ndii** for this same reason. The court found in that authority that Chapter 16 of the Constitution of Kenya allowed its citizens to amend the Constitution through a "highly participatory process". Koome CJ at para. 210 of the judgment (referring to the basic structure doctrine and Chapter 16 of the Constitution of Kenya) stated as follows:

> "210 In other words, denying people an opportunity to amend their Constitution through a judicially-created ultra-rigid process undermines democratic constitutionalism and self-government by stifling the voice of the present and future generations in governance. It is on this premise that I hold that where the amendment processes incorporate a 'tiered' process and the core or fundamental commitments of the Constitution can only be amended through an onerous process; that is, multi-staged, involving different institutional actors, deliberative, inclusive and participatory process, and involves ratification by the people in a democratically conducted referendum; then a court ought not to import the idea of a judicially-created basic structure doctrine. This is informed by the view that, in a context like Kenya, the Constitution has an explicitly in-built structure to discourage hyper-amendments and tame likely abuses of the amendment process by stealth or subterfuge."

[57] The appellant also placed reliance on the opinion of Lord Hoffman at para. 29 of the Board's decision in **Boyce**, an appeal from Barbados, to reinforce their position that the basic 'deep' structure is inapplicable to "our [constitutional] reality":

> "29 All this is trite constitutional doctrine. But equally trite is the proposition that not all parts of a Constitution allow themselves to be judicially adapted to changes in attitudes and society in the same way. Some provisions of the Constitution are not expressed in general or abstract terms which invite judicial participation in giving them practical content. They are concrete and specific. For example, s 63 of the Constitution [at the time of the decision] says that the executive authority of Barbados shall be vested in Her Majesty the Queen. It would not be an admissible interpretation for a court to say that this meant that it should be vested in a head of state who was appointed or chosen in whatever way best suited the spirit of the times; that the choice of Her Majesty in 1966 reflected the society of the immediate post-colonial era and that having an hereditary head of state who lived in another country was out of keeping with a modern Caribbean democracy. All these things might be true and yet it would not be for the judges to give effect to them by purporting to give an updated interpretation to the Constitution. **The Constitution does not confer upon the judges a vague and general power to modernise it**. The specific terms of the designation of Her Majesty as the executive authority make it clear that **the power to make a change is reserved to the people of Barbados, acting in accordance with the procedure for constitutional amendment. That is the democratic way to bring a Constitution up to date**." (Emphasis added)

[58] It is observed that the Full Court did not specifically pronounce that the basic deep structure was applicable to the Constitution. However, that court found that "[b]y necessary implication and unwritten law, the Constitution contains within its four corners, the principles of constitutionalism, the separation of powers, the rule of law, an independent and impartial judiciary and … the protection of the people of Jamaica within the meaning of the word 'law'" (see para. [133] of that judgment). In the light of the relevant legal principles discussed above, it was proper for the Full Court to make this assertion. It is quite evident from the authorities that unwritten constitutional principles

and values, such as the separation of powers, the independence of the Judiciary and the rule of law, have always been and remain implicit in the Constitution.

[59] The Full Court was also correct in finding that any provision of the Constitution can be amended in view of section 48(1) (which empowers Parliament to make laws "for the peace, order and good government of Jamaica"), provided that the procedural requirement under section 49 is adhered to, subject, of course, to the caveat that the amendments do not run afoul of the previously mentioned unwritten constitutional principles and values that are inherent in the structure of the Constitution.

[60] Since it is not clear that this was all that was encapsulated in Jamadar JCCJ's basic 'deep' structure doctrine, given his reliance on **Kesavananda Bharati v State of Kerala**, we are not prepared to say that the doctrine, as he expressed it, is applicable to the Constitution. In other words, given the decisions from the Privy Council (particularly **Hinds**, which is binding on this court), in the absence of clarity about whether the basic deep structure advocates (or not) that certain provisions of the Constitution can never be changed or amended, we are not inclined to endorse it in respect of the Constitution. We find that Koome CJ's opinion on Chapter 16 of the Constitution of Kenya (as expressed at para. 210 of **AG v Ndii**) is relevant to section 49 of the Constitution, given the similarity of the respective provisions. Having considered his analysis and for the reasons he has expressed, we agree that the basic structure doctrine is equally unsuitable for our Constitution. We conclude that the Full Court did not err in failing to find that section 2 of the amending Act breached the basic 'deep' structure of the Constitution.

[61] Ground of appeal (f) of the counter-notice, therefore, fails.

(b) Whether the Full Court erred in finding that Parliament, by enacting section 2 of the amending Act, did not breach the principle of separation of powers between the legislative and the executive organs of Government. (Ground (d) of the counter-notice of appeal)

The submissions

[62] Mr Hylton contended that the principle of separation of powers is implicit in the structure of the Constitution, so where it grants a power to specified persons, it cannot be exercised by other persons (**Hinds** was cited in support). Under section 96(1) of the Constitution, the Executive was vested with the power to extend the tenure of the office of the DPP. However, through the amending Act, the Legislature effectively granted the incumbent DPP a second extension (which was not originally permissible under section 96(1)). By doing so, Parliament infringed on the Executive's powers by exercising a power reserved for the Executive. The enactment of the amending Act, therefore, constituted a breach of the separation of powers principle. That breach is an independent basis on which it is sufficient to find that section 2 of the amending Act be struck down as unconstitutional.

[63] Conversely, the appellant took the position that the Full Court correctly found that the amending Act did not breach the principle of separation of powers. Citing the Privy Council decision of **Chandler**, Mr Wood contended that the separation of powers principle "is not an overriding principle that exists above and independently of the provisions of the Constitution" (reliance was also placed on **Hinds** and **Ferguson v AG of T&T**). Where executive powers derive from legislation, as in this case, it is entirely within the competence of Parliament to enact further legislation to alter the Constitution, which does not breach the principle of separation of powers. In so arguing, the case of **Watt v Prime Minister and another** (2013) 85 WIR 289 ('**Watt**') was cited.

[64] Mr Wood further submitted that there is no "strong separation" between the legislative and executive power in Westminster model constitutions. The case of **Matthew v State of Trinidad and Tobago** [2005] 1 AC 433 ('**Matthew**') was relied on for the argument that the structure of our Constitution creates an overlap between

the different arms of government. Additionally, the Privy Council decision in **Director of Public Prosecution v Mollison (Kurt)** (2003) 64 WIR 140 ('**Mollison**') made the point that in constitutions under the Westminster model, the legislative and executive powers overlap while there is "total separation" between those arms of government and the Judiciary. In any event, counsel submitted, there is no basis to strike down an amendment because it changes the function between the Executive and Legislature.

[65] It was further submitted that section 48 of the Constitution gives Parliament the power to make laws. By virtue of section 49(4), a Bill that does not alter an entrenched provision can be passed by a majority of the Members of Parliament. Section 96(1) of the Constitution is not entrenched, and so Parliament had the power to alter or remove that section in the manner that it did. Mr Wood argued that the framers of the Constitution always intended to give Parliament control over this process. Since the amendment was in keeping with section 49(4) of the Constitution, it does not amount to a breach of the separation of powers principle.

Analysis

[66] In general, central to the separation of powers doctrine is that, while co-equal, each branch of government is separate, and each branch is required to exercise its respective powers exclusively. In other words, the Executive should not exercise legislative or judicial powers, the Legislature should not exercise executive or judicial powers, and the Judiciary should not exercise executive or legislative powers.

[67] As indicated at para. [14] above, the Full Court found that section 2 of the amending Act did not breach the separation of powers doctrine since it did not "alter, amend or remove" the powers given to the Prime Minister, Leader of the Opposition, and the Governor-General in section 96(1)(b) of the Constitution (to extend the time that the DPP remains in office after attaining the age of retirement) and confer those powers upon the Legislature. What the Full Court found was that in the amending Act, the power or mechanism to extend the DPP's tenure in office remained exclusively with the Executive.

[68] The respondents complained that this finding reflects a misunderstanding of their submission on this point. The submission is a bit more nuanced. The respondents' position, Mr Hylton posited, was not hinged on section 2(2) but rather was that, by enacting section 2, the Government effectively granted the incumbent DPP a second extension in circumstances where, had the amending Act not been passed, she would have retired in September 2023. Consequently, the Legislature infringed on the powers reserved only for the Executive branch. The argument, as we understand it, is that on account of the Executive being constitutionally unable to grant the incumbent DPP a further extension in office, the Legislature did so by enacting the amending Act, thereby infringing on a power exclusively conferred on the Executive.

[69] The appellant has sought to establish that under constitutions based on the Westminster model, there is no strong separation between legislative and executive powers, while there is a total separation between legislative and executive powers on the one hand and judicial power on the other. However, we do not find the authorities relied on (**Matthew** and **Mollison**) particularly helpful on this subject since there is no debate (nor could there be) that by virtue of section 96(1)(b) of the Constitution, an extension of the DPP's tenure in office after attaining the constitutionally mandated age of retirement can only be granted by the Executive (the Governor-General acting on the recommendation of the Prime Minister after consultation with the Leader of the Opposition).

[70] So, in the context of section 96(1)(b) of the Constitution, the pronouncement of Lord Diplock in **Hinds** on the separation of legislative, executive, and judicial powers is apt. At pages 359 and 360 of the judgment, the learned Law Lord observed:

> "... It is taken for granted that the basic principle of separation of powers will apply to the exercise of their respective functions by these three organs of government. Thus the constitution does not normally contain any express prohibition on the exercise of legislative powers by the executive or of judicial powers by either the executive or the legislature… **Nevertheless it is well established as a rule of**

> **construction applicable to constitutional instruments under which this governmental structure is adopted that the absence of express words to that effect does not prevent the legislative, the executive and the judicial powers of the new state [Jamaica] being exercisable <u>exclusively by the legislature, by the executive and by the judicature respectively</u>.**" (Emphasis added)

[71] However, there is more force in the appellant's assertion that where executive powers, as in this case, are derived from legislation, then it is entirely within Parliament's province to "effect alteration by further legislation and that does not involve any breach of the principle of separation of powers". The dictum of Mitchell JA (Ag) at para. [22] of **Watt**, a decision of the Court of Appeal of the Eastern Caribbean Supreme Court, is instructive:

> "... Subject to a finding of contravention of a provision of the Constitution, no court can challenge Parliament's right to enact any legislation that it deems appropriate for the good government of the country. Parliament is free to amend any Act that it has previously made without any concern that any court will presume to intervene to judge the merits of the legislation. Indeed, it is in my view constitutionally impossible, as being contrary to the doctrine of the separation of powers, for this court to hold that an Act of Parliament, not in breach of any provision of the Constitution, procedurally properly passed through the legislature and brought into effect was not a valid Act … ."

[72] As already indicated, under section 48 of the Constitution, the Legislature is given the power to make laws "for the peace, order and good government of Jamaica". Additionally, once the constitutionally mandated procedure under section 49 of the Constitution is followed, the Legislature can make amendments to the Constitution. It is recognised that this legislative power is not absolute, as amendments to the Constitution are subject to the supremacy clause and may be invalidated by the courts if they violate the abovementioned unwritten constitutional principles.

[73] Nonetheless, as attractive as the respondents' argument may appear, the Full Court was correct, in principle, that there was no infringement of the doctrine of separation of powers. By adopting the constitutionally mandated procedure under section 49(4) for amending section 96(1), the Legislature increased the DPP's retirement age from 60 to 65 years, as it had the power to do. By enacting section 2 of the amending Act, Parliament did not usurp the Executive's power and grant the incumbent DPP a "second or further extension" in office in breach of the separation of powers doctrine. Instead, the retirement age of the DPP (and the Au-G) was increased by operation of law. This is discussed in greater details below (see paras. [159] to [164]).

[74] Ground of appeal (d) on the counter-notice of appeal, therefore, fails.

(c) Whether the Full Court erred in finding that section 2 of the amending Act was enacted for a proper purpose (Grounds (b) and (c) of the counter-notice of appeal)

The submissions

[75] In setting the framework and context for the submissions, the respondents noted that the DPP is given tremendous powers under the Constitution. King's Counsel indicated that no suggestion was being made about dishonesty or that the Government acted immorally, but rather that they acted for an external purpose. He asserted that the amending Act was brought at a time and in a way to benefit the incumbent DPP. This was in the context where she had already received an extension of her tenure and in circumstances where the Constitution provides a separate regime and process for an extension, which is administered solely by the executive branch of government.

[76] Mr Hylton asserted that the "proper purpose" principle forms part of the basic deep structure of constitutions based on the Westminster model and that section 48(1) of the Constitution identifies the purposes for which Parliament can legislate. The case of **Eclairs Group Ltd v JKX Oil & Gas Plc; Glengary Overseas Ltd and another v JKX Oil & Gas plc** [2016] 3 All ER 641 ('**Eclairs**') was referenced, in stating the historical origins of the proper purpose principle. In explaining the principle broadly, Mr Hylton

declared that under the proper purpose principle, persons or bodies endowed with powers must exercise those powers for a proper purpose. He utilised the cases of **Liyanage and others v The Queen** [1967] 1 AC 259 ('**Liyanage**') and **Julian J Robinson v The Attorney General of Jamaica** [2019] JMFC Full 04 ('**Julian Robinson**') in contending that the courts have indicated on several occasions that the proper purpose doctrine also applies to legislation. Reliance was also placed on **Vatcher and others v Paull and others** [1915] AC 372 ('**Vatcher v Paull**') and **European Commission v Republic of Poland** ('**EC v Poland**') in seeking to demonstrate what constitutes an "improper purpose" as well as the requirement for legislation to conform to the principles of constitutionalism.

[77] Mr Hylton posited that the Government is required to comply with the Constitution and that the Constitution cannot be properly or lawfully amended to benefit or disadvantage a specific individual. Further, based on the cases of **Liyanage** and **Ferguson v AG of T&T** the court must look not only to the Memorandum of Objects and Reasons and the long title of an Act, but also to the evidence and the background circumstances to determine the true purpose of legislation.

[78] In expanding on this point, Mr Hylton stated that the Government's dominant purpose in enacting section 2 of the amending Act was to extend the tenure of the incumbent DPP and that this was not a proper purpose. He accepted that the amending Act served the purpose of harmonising the retirement ages of the DPP and Au-G with the rest of the public sector. He, however, contended that no explanation was proffered for the six-year delay between the passing of the 2017 Pensions Act and the amending Act in 2023, particularly in circumstances where there was no change of administration. He asserted that no reason was given for the sudden and extreme urgency in the passing of the amending Act, or for "the incredibly condensed process that divested the Opposition of any opportunity to meaningfully perform their constitutional duty of scrutinising legislation and holding the majority accountable". King's Counsel also spoke to the sequence of events, particularly that the incumbent DPP requested a second extension in May 2023, which was refused, after which, in July 2023, the amending Act was "rushed

through parliament" with one Government Senator "scolding the Opposition Senators for 'arguing against outstanding Jamaicans who are in the early 60s …'".

[79] The Government's purpose in promoting and enacting section 2 of the amending Act "at the time and in the way they did" was, therefore, a question of fact that depended on all the circumstances of the case, King's Counsel argued. He contended further and significantly that the witnesses on behalf of the Government did not contradict any of the statements of fact made by the respondents or the witnesses that deposed on their behalf as to what took place between 25 and 31 July 2023.

[80] Mr Hylton also highlighted the fact that the Full Court did not refer to any of the "undisputed evidence". Instead, they relied on the Memorandum of Objects and Reasons and the evidence filed on behalf of the Attorney General detailing the history of the Pensions Act and the previous and long-held intention to increase the retirement ages of the DPP and Au-G. It was submitted that the evidence, as a whole, did not support the Full Court's conclusion that the amending Act was not enacted for an improper purpose and that on the undisputed evidence before the court, the Government's real purpose was to extend the tenure of the incumbent DPP so that she would not have to vacate office.

[81] Learned King's Counsel continued his criticism of the Full Court's decision and asserted that the judgment of the court failed to demonstrate any consideration, assessment, or application of the authorities submitted on behalf of the respondents and that had the learned judges applied the authorities, they would have concluded that section 2 of the amending Act was enacted for an improper purpose.

[82] In the round, Mr Hylton maintained that using the legislative power to amend the Constitution to extend the tenure of the incumbent DPP was outside the intent of the Constitution.

[83] On the contrary, Mr Wood submitted that there was nothing "inherently improper" about the Government passing legislation to increase the retirement age of an office

holder, especially where it was the declared Government policy to extend the retirement age of all public officers to age 65. Further, the Government's policy to increase the retirement age was not formulated for the incumbent DPP but applied to all office holders.

[84] More fundamentally, however, Mr Wood asserted that although the Full Court was correct to find that the amending Act was enacted for a proper purpose, it erred in finding that, as a general principle, the court can enquire into the purposes for which legislation was enacted and strike down legislation on that basis. Reference was made to sections 34, 48(1) and (2), and 51(1) of the Constitution, the case of **Methodist Church in the Caribbean and the Americas (Bahamas District) and others v Symonette and others; Poitier and Others v Methodist Church of the Bahamas and Others** (2000) 59 WIR 1 ('**Symonette**'), as well as the Halsbury's Laws of England, Fifth Edition (Volume 78) 2010, at para. 1081. These authorities were relied upon in support of the contention that Parliament has exclusive control over the conduct of its affairs, and further that the court will not permit any challenge to what is said or done within Parliament in the performance of legislative functions.

[85] Reference was also made to several other cases, including **Prebble v Television New Zealand Limited** [1994] 3 All ER 407 ('**Prebble**') and **British Railways Board v Pickin** [1974] AC 765, in emphasising the position that a court cannot inquire into Parliament's internal process in the enactment of legislation. Mr Wood asserted that the Full Court was wrong to distinguish the cases on the basis that they support the United Kingdom's position of parliamentary sovereignty, as the principles outlined in the above cases are implicit in the Constitution. Learned King's Counsel maintained that it is a fundamental principle that it is impermissible to use evidence of parliamentary process to seek to impute an improper motive to Parliament.

[86] Mr Wood also highlighted the cases of **Toussaint v Attorney General of St Vincent and the Grenadines** [2007] UKPC 48 ('**Toussaint v AG**'), **Ferguson v AG of T&T**, **Sanft and another v Fotofili and others** [1988] LRC (Const) 110 and **Watt**, to submit that parliamentary privilege does not operate as a bar to statements made in

Parliament being relied on to explain executive action and to enable its judicial review. He, therefore, made a distinction between the review of executive action as opposed to the review of the actions of legislators.

[87] King's Counsel reiterated that Parliament's power to make law is subject only to the Constitution and that unless there is a breach of the provisions of the Constitution, the court is obligated to give effect to laws passed by Parliament. Further, if a court could invalidate a constitutional amendment that was validly passed, it would be in breach of the separation of powers principle.

[88] It was submitted in the alternative that, should this court determine that the Full Court's position was correct, it should also find that the Full Court was correct in finding that there was no improper purpose. Mr Wood likened the respondents' allegation of an improper purpose to that of a conspiracy. He submitted that it was incumbent on them to demonstrate that every member of Parliament had an improper motive, which they failed to do. In this regard, reliance was placed on **Arorangi Timberland Limited and others v Minister of the Cook Islands National Superannuation Fund** [2016] UKPC 32.

[89] In addition, Mr Wood stated, there was no evidence that the amending Act was passed for the benefit of the incumbent DPP and further no evidence that the correspondence between the Prime Minister and the Leader of the Opposition regarding the extension of tenure of the incumbent DPP was brought to the attention of the Members of Parliament. The fact that the incumbent DPP had applied for a second extension was not a matter of public knowledge. He stated that the evidence supported the position that the amending Act was passed in accordance with the Government's policy to extend the retirement age of all public officials to 65 years.

Analysis

[90] Constitutional supremacy exists in Jamaica under section 2 of the Constitution (see para. [33] above). Section 2 is, however, subject to the provisions of section 49, which

sets out the procedure by which various provisions of the Constitution can be amended. In **Hinds**, Lord Diplock recognised that fundamental provisions of Westminster model constitutions could be amended by following the proper procedure (such as under section 49 of the Constitution). We referred to this at para. [55] above.

[91] In dealing with constitutional amendments, therefore, the court's first duty is to examine whether an amendment has been passed in keeping with the constitutional provisions. Even if the proper procedure is followed in respect of an unentrenched provision (such as was done in relation to the amending Act), an amendment could be invalidated if it affects an entrenched provision and the procedure for the amendment of entrenched provisions was not engaged. This was the stance taken by the Privy Council in **Marshall-Burnett**. An assessment of whether the amending Act should have been enacted using the procedure for an entrenched provision is undertaken at paras. [165] to [182] below.

[92] An amendment could also be invalidated if it breached the principle of the separation of powers, as discussed in **Hinds**. We have already considered this issue and concluded that there was no such breach (see paras. [66] to [74] above).

[93] At this juncture, the issue that is to be considered is whether improper purpose is a free-standing construct or (as Mr Hylton describes it) part of the basic 'deep' structure of Westminster model constitutions, which should form part of the court's arsenal in determining the validity of a constitutional amendment.

[94] Mr Hylton referred us to **Eclairs** and **Vatcher v Paull**. The case of **Eclairs** is grounded in company law, and the concept of improper purpose was discussed in the context of statutory powers by company directors. It has to be noted that a particular section of the 2006 Companies Act relevant to that case, spoke to directors using their powers "only for the purposes for which they were conferred". Lord Sumption (at para. 15) stated that the proper purpose principle is "concerned with abuse of power, by doing acts which are within [the] scope [of the instrument creating the power] but done for an

improper reason" and that "[i]t follows that the test is necessarily subjective". He quoted Viscount Finlay, in **Hindle v John Cotton Ltd** (1919) 56 SLR 625 at page 630, who stated, "[w]here the question is one of abuse of powers, the state of mind of those who acted, and the motive on which they acted, are all important".

[95] **Vatcher v Paull** was concerned with whether fraudulent misrepresentation was made in a contract so that it should be set aside. In defining the term "fraud" in the relevant context, Lord Parker of Waddington stated that it did not necessarily denote conduct that could be properly termed dishonest or immoral but merely meant that the power had been exercised for a purpose, or with an intention, beyond the scope or not justified by the instrument creating the power.

[96] While we understand that Mr Hylton is only asking that we consider these authorities to appreciate the concept of improper purpose, the limitations of their usefulness are easily apparent. These authorities are not grounded in constitutional law and do not help us to determine whether a valid constitutional amendment is subject to challenge based on improper purpose.

[97] There was also reliance by counsel on **Julian Robinson**, with *dicta* concerning the function and power of the courts to consider improper purpose in examining the constitutionality of legislation. This case, however, was concerned with breaches of Charter rights. In such cases, if a breach is proven or found to be justiciable, the Government must demonstrate that it is demonstrably justified in a democratic society. Therefore, the purpose of the legislation would be of great importance in determining whether it is justified. Proportionality is the determining factor. Authorities referred to by Mr Wood, such as **Attorney General v Jamaican Bar Association; General Legal Council v Jamaican Bar Association** [2023] 3 LRC 459, and **Observer Publications Ltd v Matthew and others** (2001) 58 WIR 188 fall into the same category and are therefore distinguishable. **Maurice Arnold Tomlinson v The Attorney General of Jamaica and others** [2023] JMFC Full 5, although also concerned with Charter rights,

addressed challenges to the Offences Against the Persons Act and the effect of savings law clauses. It, too, is distinguishable.

[98] A review of other authorities is also useful and relevant in this discourse. The case of **Watt** concerned judicial review proceedings. The Prime Minister of Antigua and Barbuda had made a recommendation to the Governor-General seeking Mr Watt's dismissal as Chairman of the Electoral Commission (which recommendation Mr Watt successfully challenged by way of judicial review). Subsequent to the recommendation, a Bill was passed that, among other things, proposed to dissolve the existing Commission, of which Mr Watt was the Chairman. This Bill became the Representation of the People (Amendment) Act, 2011. Following Mr Watt's successful challenge of the Prime Minister's recommendation for his dismissal, the Prime Minister issued an order bringing the Representation of the People (Amendment) Act into force, with retrospective effect, to a date prior to the judgment of the court in the judicial review proceedings. The principal issue for the Court of Appeal, therefore, was whether the appointment by the Prime Minister of the date for the coming into effect of the Representation of the People (Amendment) Act was a valid exercise by him of the discretion given to him by Parliament.

[99] It was argued by Mr Watt that the Prime Minister's actions (i) were actuated by improper motives and not done in good faith and (ii) amounted to an encroachment by a member of the Executive onto the province of the Judiciary. The court, therefore, scrutinised the exercise of the Prime Minister's discretion. Mitchell JA (Ag), writing on behalf of the court, stated, "[i]n addition to the conventional challenges to the exercise … of a discretion conferred by a statute of 'illegality', 'irrationality', and 'procedural impropriety', we now add 'unconstitutionality'" (see para. [25] of that judgment). The court found that the Prime Minister was obliged to act fairly in exercising his discretion as to the date on which the Act came into effect. His choice of date had been clearly designed to undermine or undercut a judgment given previously in Mr Watt's favour. It was expressed that a minimum standard of fairness required that the Act be brought into force on a date subsequent to the delivery of that judgment (see para. [30] of that judgment). Further, in exercising his discretion, the Prime Minister was required to factor

in only those considerations that were relevant and material (see para. [25] of that judgment).

[100] In **Liyanage**, the retrospective application of legislation was deemed to be improper in circumstances where it was directed to a certain group of prisoners. That case concerned legislation that was declared invalid by the Privy Council, as it infringed on the judicial power of the State, which cannot be reposed in anyone outside of the Judicature. In other words, there was a breach of the separation of powers principle. The legislation in **Liyanage** also contained substantial modifications of the Criminal Procedure Code, including new minimum penalties for various offences, such as the offence of conspiring to wage war against the Queen. The legislation was made retrospective in order to cover an abortive *coup d'etat* in which the appellants had taken part previously. The relevant Act also contained provisions that purported to deprive the appellants of the protection of the earlier laws *ex post facto*. This resulted in evidence that was previously inadmissible being made admissible retrospectively in a bid to secure the appellants' conviction. It is hardly surprising then that the Privy Council declared the impugned provisions *ultra vires* and void.

[101] In **Ferguson v AG of T&T**, the Privy Council dismissed a challenge to legislation passed by the Parliament of Trinidad and Tobago on the basis that it was contrary to the principle of separation of powers, due process and the rule of law and had a retrospective effect. The Privy Council reiterated some important principles. Lord Sumption stated:

> "24 … There is, it is true, a presumption against retrospectivity, **especially where the effect is to abrogate vested rights**. But this is no more than a principle of construction. Once it is established as a matter of construction, mere retrospectivity does not violate the separation of powers or the rule of law, and is not contrary to due process. …" (Emphasis added)

[102] As such, an Act being retrospective is not an indication in and of itself of an improper purpose. Lord Sumption continued:

> "27 How is the court to ascertain a more specific purpose behind an Act of Parliament than its general terms would suggest? Although this question commonly arises in politically controversial cases, **in the Board's opinion the answer does not depend on an analysis of its political motivation. The test is objective. It depends on the effect of the statute as a matter of construction, and on an examination of the categories of case [sic] to which, viewed at the time it was passed, it could be expected to apply.** *Liyanage* itself is the classic illustration. The Board's conclusion in that case was that the legislation applied to a category of persons and cases which was so limited as to show that the real object was to ensure the conviction and long detention of those currently accused of plotting the coup. The reason why in such circumstances as these the statute will be unconstitutional is that the Constitution, like most fundamental law, is concerned with the substance and not (or not only) with the form. There is no principled distinction between an enactment which nominatively designates the particular persons or cases affected, and one which defines the category of persons or cases affected in terms which are unlikely to apply to anyone else. In both cases, it may be said, as Lord Pearce said in *Liyanage* ([page] 290) that 'the legislation affects by way of direction or restriction, the discretion or judgment of the judiciary in specific proceedings'."

[103] The issue of retrospectivity was also addressed in **Watt.** Mitchell JA (Ag) stated:

> "[19] … Parliament may indeed intend an Act to have retrospective effect. In each case, it is a matter of finding out objectively, from the words of the Act, what was the clear intent of Parliament. If the retrospectivity would have an effect that is unfair, the court must look very hard to see if it can be sure that this is what Parliament really intended. Once the unfair effect is clearly what Parliament intended, then the court will not hesitate to give effect to the intention of Parliament. Once such an intent is not clear, then the court may presume that the statute was not intended to have retrospective effect.
>
> …

> [21] … If Parliament intends to give an Act retrospective effect it is free to do so, subject to s 15(4) of the Constitution, by making such an intention clear. ..."

[104] Further, he stated:

> "[27] … The principle of the separation of powers remains paramount in the constitutional documents of the State of Antigua and Barbuda as it is in Anguilla. This court would be loath to assume unto itself the power to hold that the Parliament of Antigua and Barbuda was in any way hobbled in its legislative power to pass an Act, the specific purpose of which, as expressed in s 22, was to bring an end to the holding of office of the existing officers and members of the Commission, including Sir Gerald. If this action of the legislative branch of government resonates with a 'jarring and dangerous note', it is not for the court to enter into a contest which will only produce an increased concatenation of jarring and dangerous notes. **However, the issue is not the power of Parliament or the legality of the Act but the exercise by the Prime Minister of a discretion given to him by Parliament**." (Emphasis added)

[105] Even if it could be argued that the amending Act was retrospective in nature, it would have been the intent of Parliament and the respondents would not have demonstrated any unfairness in its impact. We are of the view, however, that the amending Act was not retrospective as it did not seek to impact past events. The incumbent DPP's retirement age was extended to 63 years prior to the passage of the amending Act.

[106] In **Toussaint v AG**, the claimant bought land in Saint Vincent and the Grenadines from the State's Development Corporation for EC$6,478.50. Following a change in the Government, he was required by the Attorney General to pay an enlarged amount of EC$84,220.50 and stamp duty, as the Attorney General expressed that he had been sold the property at a low price (not reflecting the market value), because of his close relationship with the previous government. The claimant refused. Subsequently, the Prime Minister made a statement during a budget debate in the House of Assembly explaining why the Cabinet had, that day, decided to compulsorily acquire the land. A

declaration was subsequently published in the Government Gazette, stating that the land was required for a public purpose, namely, as a Learning Resource Center. The claimant considered that the Prime Minister's statement during the budget debate showed the true reason for the acquisition of the land, which was political, and that the public purpose alleged in the Gazette was a sham. He brought an action against the government for constitutional relief in respect of alleged discriminatory and/or illegitimate expropriation of property. The issue was whether he could properly rely on statements made in Parliament, as, under section 16 of the House of Assembly (Privileges, Immunities and Powers) Act, no evidence relating to matters, including debates or proceedings in the House, was admissible in any proceedings before a court, unless the court was satisfied that permission had been given by the Speaker of the House.

[107] The Privy Council reiterated the long-established principle set out at common law in **Prebble** that the courts will not allow any challenge to be made to what was said or done within the walls of Parliament, in the performance of its legislative functions and protection of its established privileges (see para. 10 of **Toussaint v AG**). However, they ruled that the particular statement was admissible in support of the claimant's claim, notwithstanding section 16 of the Act, as ministerial statements to Parliament constituted a type of evidence, the importance of which was evident and well-recognised in the context of applications for judicial review (see para. 29 of that judgment).

[108] In giving the judgment of the Board, Lord Mance explained, *inter alia,* that the complaint fell within section 6(2) of that Constitution, as the acquisition was being challenged "as being outside the law ostensibly relied upon because motivated by an improper purpose" (see para. 32 of that judgment). Section 6(1) of that Constitution spoke to acquisition **for public purpose**. Section 6(2) gave the person whose property was being acquired direct access to the court to determine, among other things, "whether that acquisition was duly carried out in accordance with a law authorising it …" (see para. 26 of that judgment). The claimant wanted what was stated in Parliament, as it contradicted the "public purpose". The use of the material linked to establishing improper purpose was, therefore, relevant to a justiciable cause. The appeal was allowed, and the

Prime Minister's statement made during the budget debate was ruled as admissible evidence in support of the claim, notwithstanding section 16 of the House of Assembly (Privileges, Immunities and Powers) Act. Notably, there is no issue in the present appeal concerning the admissibility of evidence geared toward demonstrating an improper purpose and the respondents were, in fact, permitted to rely on the evidence that supported their claim.

[109] Based on the perusal of the aforementioned authorities, we sought to find whether there was any justiciable cause that is relevant to a consideration of improper purpose. We appreciate that, in the round, Mr Hylton is relying on specific factual circumstances in the case at bar to establish such improper purpose. It is his contention that these circumstances would warrant the court's intervention. His argument is grounded on several links in a chain of events. These include the procedure adopted by Parliament during the passage of the amending Bill through both Houses, as well as the historical context and background to the passage of the amending Act (as detailed at paras. [5] to [11] above).

[110] The amending Bill was tabled and rushed through both Houses of Parliament in one sitting of each House (on 25 and 28 July 2023, respectively). In affidavits filed for the respondents by Mr Mikael Phillips, Mr Bunting, and Mr G Anthony Hylton (members of the Opposition), they described the procedure adopted in each House of Parliament and other relevant issues. Affidavits in response for the appellant were sworn by Ms Valrie Curtis, Ms Aisha Wright, and Mr Paul Bailey.

[111] Mr Mikael Phillips, a member of the House of Representatives, was present in Parliament when the amending Bill was introduced. He deposed in his affidavit filed on 8 August 2023 that on that day (25 July 2023), he sat as the Leader of the Opposition Business in the absence of Mr Paulwell. He asserted that prior to the sitting (which was slated to commence at 2:00 pm), three order papers headed "Agenda" were issued to the members by email. It was noted that each subsequent order paper superseded the prior. Mr Phillips, however, inaccurately stated the number of order papers that made

reference to the amending Bill. Three agendas were indeed sent by email at 11:09 am, 12:06 pm, and 12:54 pm, but both the first and second order papers included the amending Bill to be tabled. The final order paper omitted it from the agenda, and so the inference (as asserted by Mr Phillips) is that the Opposition members would have been unaware of the contents of the amending Bill and the fact that it was to be tabled. Nevertheless, the amending Bill (which was brief in form) was tabled, and discussions were centred around objections to it being passed.

[112] Section 51 of the Constitution allows each House to regulate its own procedure, subject to the provisions of the Constitution, and for that purpose, to make Standing Orders. Section 55 states that subject to the provisions of the Constitution and the Standing Orders, Bills are to be debated and disposed of according to the Standing Orders of the relevant House.

[113] **Symonette** involved the challenge to the constitutional validity of an Act passed by the Bahamian Legislature (which also enjoys constitutional supremacy) on the basis that it was passed in breach of procedural rules of the House. It was contended that its passage through Parliament had contravened article 59(1) of the Bahamian Constitution. There was another challenge to whether certain aspects of the Act infringed the protection against the deprivation of property guaranteed by article 27 of the Bahamian Constitution. This latter issue is irrelevant to our consideration as the Privy Council, in any event, remitted that issue to the Supreme Court for a determination.

[114] Article 59(1) of the Bahamian Constitution provides:

> "Subject to the provisions of this Constitution and of the rules of procedure of the Senate or the House of Assembly, as the case may be, any member of either House may introduce any Bill or propose any motion for debate in, or may present any petition to, that House, **and the same shall be debated and disposed of according to the rules of procedure of that House**." (Emphasis added)

[115] The Privy Council determined that article 59(1) had a wide, general application, and its provisions did not found a claim for contravention of their Constitution if the Bill was proposed in breach of the rules of the House. Further, the reference in article 59(1) to the rules of procedure of the two Houses did not deprive either House of the power to regulate its own affairs pursuant to article 55(1) of the Bahamian Constitution (see page 3, para. (2)). Article 55(1) is similarly worded to section 51(1) of Jamaica's Constitution. Save for the contention that the amending Bill was tabled and passed hastily, there has been no contention that an unlawful procedure was adopted. The respondents do not assert that the Standing Orders were not followed or that the procedure required by the Constitution for the amendment of an unentrenched provision was not followed.

[116] The Full Court considered the Memorandum of Objects and Reasons of the amending Bill. Mr Hylton complained that they only considered these documents as well as the long title of the amending Act but failed to speak of the other material exhibited to and detailed in the various affidavits.

[117] The Full Court, at paras. [76] to [78] of its judgment, referred to all the material that was considered to determine the purpose of section 2 of the amending Act. This included Mr Bunting's affidavit (filed on 18 October 2023) exhibiting the Hansard Reports and Ms Wright's affidavit (filed on 9 October 2023) with the documents attached. While they did not specifically mention all the other affidavits, there is nothing to indicate that those other affidavits were not considered. Having examined the affidavits, as well as the Hansard Reports, the Memorandum of Objects and Reasons, and the long title of the Bill, the Full Court at para. [80] accurately set out the purpose of the amending Act as outlined in the Memorandum of Objects and Reasons contained in the amending Bill:

> "[80] The Memorandum of Objects and Reasons contained in the 2023 [amending] Bill exhibited in Ms. Curtis' affidavit is plain, the purpose of the Act is to: (i) amend the Constitution of Jamaica to increase the retirement age of the DPP and the Au-G to sixty five years; and (ii) maintain the extension mechanism currently provided in the Constitution in relation to those offices, but to increase the age to which those

> officers may continue in office, after attaining the retirement age, from sixty-five years to seventy years."

[118] The Full Court had previously concluded:

> "[78] … Upon reviewing of [sic] all of the evidence, the objective of section 2 of the [amending] Act is as its long title suggests, which is to amend the Constitution to provide for an increase in the retirement age of the DPP.
>
> [79] We accept and find that this objective is consistent with Parliament's intent to increase the retirement age of public officers from sixty to sixty-five years old throughout the public sector. The Report of the Joint Select Committee noted that as public offices, such as the DPP were created under the Constitution, increasing the retirement age of that post required amending the Constitution. Following that recommendation, the Ministry of Finance drafted the White Paper which implemented the recommendation to gradually increase the retirement age from sixty to sixty-five years throughout the public sector to provide a more efficient pension system and to harmonize the retirement ages between men and women."

[119] The Full Court also stated:

> "[81] The agreed evidence supports the inference that the [amending] Act was enacted for a proper purpose, which is in furtherance of harmonising the retirement ages of public sector officers throughout the public sector as well as the pursuit of a more efficient pension system, consistent with the powers of the legislature imposed under section 48 of the Constitution."

[120] The affidavit of Mr G Anthony Hylton, a member of the House of Representatives, filed on 8 August 2023, spoke to the Constitutional Reform Committee ('the Committee'). The Committee included the Minister of Legal and Constitutional Affairs, representatives of both major political parties from the House and Senate, and other civic representatives. He exhibited the Terms of Reference for the Committee and averred that the mandate is relevant to considerations surrounding the reforming of Jamaica's constitutional

arrangements. Further to this, he pointed out that the amending Bill had not been referred to the Committee.

[121] A perusal of the Terms of Reference shows three phases for execution as follows:

> "**Phase 1:** (Re)patriation of the Constitution of Jamaica, abolition of the Constitutional Monarchy, establishment of the Republic of Jamaica, and all matters within the deeply entrenched provisions of the Constitution for which a referendum is required to amend.
>
> **Phase 2:** Review other ordinarily entrenched provisions of the Constitution for which amendments are desired and required, including the wordings and provisions of the Charter of Fundamental Rights and Freedoms set out at Chapter III.
>
> **Phase 3:** Full assessment of the nation state's legal and constitutional infrastructure to facilitate putting together a new Constitution of Jamaica."

[122] As is evident from the phases of the mandate set out above, there is no specific reference to a review of unentrenched provisions of the Constitution.

[123] The affidavit of Mr Paul Bailey (filed on 9 October 2023) asserted that before the amending Bill was tabled, the Government's pension reform policy had already been fully considered at a bipartisan level, and it was accepted that the retirement age of all public officers would be gradually increased to 65 years. The DPP and the Au-G were the only public sector officers whose retirement ages had not been increased in line with the Pensions Act, and so the amending Act properly increased their retirement ages to 65 years.

[124] Ms Aisha Wright's affidavit supported those contentions as she outlined the history of the public sector pension scheme, which involved the increase of the age of retirement for all public officers from 60 to 65 years. She also indicated that consultations with various stakeholders from the public and private sectors, including Members of Parliament from both political divides, began as early as 2011. The reform, she stated, received widespread support.

[125] There has been no dispute concerning the contents of Ms Wright's affidavit. The 2017 Pensions Bill and the Memorandum of Objects and Reasons for the 2015 Pensions Bill (the Memorandum of Objects and Reasons remained the same for the 2017 Pensions Bill) were exhibited to her affidavit. The stated objects and reasons included, among others: (i) gradually increasing the retirement age to 65 years; and (ii) harmonising the legislation governing public sector pensions in a single statute and repealing several enactments that previously dealt with pensions.

[126] Also of importance are the copies of two letters exhibited to Ms Wright's affidavit, both dated 13 September 2016, originating from the Ministry of Finance and Public Service and sent to both the incumbent DPP and the Au-G. By these letters, the Financial Secretary advised the office holders of the proposed reformation of the public sector pension system and informed them that the reform proposal would have implications for changes to the sections of the Constitution governing their retirement ages. The letter concluded by requesting a meeting to discuss the reform proposal. These documents and affidavits also support the contention of the appellant that there is no basis to conclude the amending Act was passed for an improper purpose.

Letters and correspondence

[127] The respondents have also relied on certain letters and correspondence, both preceding and subsequent to the tabling of the amending Bill. These included:

1. Letter, dated 6 February 2023, from the incumbent DPP to the Chairman of the Public Service Commission (requesting a second extension);

2. Letter, dated 26 May 2023, from the Chief Personnel Officer of the Public Service Commission to the incumbent DPP (informing that a further extension would not be granted, the Prime Minister having taken legal advice);

3. Letter, dated 27 July 2023, from a Senior Deputy DPP to the Prime Minister and the Minister of Justice;

4. Letter, dated 28 July 2023, from Hylton Powell, attorneys-at-law, to the Governor-General and the Attorney General;

5. Press release, dated 28 July 2023, from the incumbent DPP in response to the letter of the Senior Deputy DPP;

6. Letter, dated 15 August 2023, from the incumbent DPP to the Chief Personnel Officer of the Office of the Services Commission (electing to remain in the post until age 65, the amending Act having been gazetted); and

7. Letter, dated 21 September 2023, from the Chief Personnel Officer to the incumbent DPP, indicating that further to the amendment to section 96(1) of the Constitution, the Public Service Commission agreed to her request to continue in office for an additional period of two years and that the Governor-General approved it.

[128] A perusal of these documents reflects legal and administrative processes relevant to the application of the incumbent DPP to remain in office up to 65 years, before and after the amending Act was passed. They do not provide any evidential or legal basis to assert that Parliament acted for an improper purpose in passing the amending Act. The letters of the Senior Deputy DPP and the incumbent DPP, dated 27 and 28 July 2023, respectively, reflect internal contentions in the office of the DPP and are of no import in these circumstances in determining the constitutional validity of the amending Act.

[129] In **Symonette**, Lord Nicholls of Birkenhead discussed the relationship of the courts and Parliament and spoke to two separate but related common law principles of high constitutional importance (see page 13b – h). The first principle relates to Parliamentary sovereignty, which is not relevant to the Jamaican and Bahamian Constitutions. Lord Nicholls expressed the second principle as follows:

> "... [T]he courts recognize 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* …. 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. .... 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 *R v Her Majesty's Treasury, ex parte Smedley* [1985] QB 657 at 666, per Sir John Donaldson MR."

[130] Further (on page 14b), he stated that the first general principle is displaced to the extent necessary to give effect to the supremacy of the Bahamian Constitution. In elucidating this point, he opined that:

> "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."

[131] Lord Nicholls spoke to the necessity for modification of the second principle, but only to the extent necessary to give effect to the supremacy of the Bahamian Constitution. He stated that "[s]ubject 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" (see page 14d – e).

[132] The court's intervention in parliamentary procedure must, therefore, be based on some unconstitutionality that would appear to conflict with the constitutional provisions. An example of the court's role is seen in the case of **Hughes v Rogers** (unreported), High Court, Saint Christopher, Nevis, and Anguilla, Civil Suits Nos 99 & 101 of 1999, judgment delivered 12 January 2000. The High Court of Saint Christopher, Nevis, and

Anguilla had to determine (i) what constituted a quorum in Parliament relevant to section 52(2) of the Constitution of Anguilla; (ii) whether the Speaker of the House could declare the absence of a quorum; and (iii) whether the court could enquire into a decision made by the Speaker regarding internal proceedings of the House. Saunders J (as he then was) ruled on the issue of the number required to form a quorum based on the Constitution. With respect to the Speaker's ruling on an internal issue, he stated that "[w]here there is no breach of the Constitution, the High Court cannot be called upon to play the role of a court of appeal in respect of rulings by the Speaker that fall within his jurisdiction and authority" (see para. 61). After reviewing some authorities on the inherent power of the House to regulate its internal proceedings, he concluded as follows:

> "38. ... The courts are entitled to enquire into the existence and extent of any privilege claimed by the House of Assembly. Moreover, the courts will intervene 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."

[133] If the court is to supervise what is done in Parliament, which is generally not justiciable, it can only do so if some unconstitutionality can be determined. No justiciable cause has arisen in the case at bar to sustain the contention of the respondents. Further, on the face of the affidavits and documents exhibited, there is no denial that the intention, at least from 2016, was to harmonise the retirement ages for public servants, including the office of the DPP and the Au-G. While it can be inferred that there was an intention to allow the incumbent DPP to benefit from the increase in the age of retirement, there must be something more to urge the court to interfere with the legislation if it was validly passed. The fact that the incumbent DPP could be said, in essence, to benefit from the amending Act at that crucial time, would not be sufficient for the court's intervention. There is an absence of any abrogation of rights of any individual or class of individuals as in **Liyanage**. Further, the authorities do not support the contention that it is improper or unlawful for Parliament to pass legislation for the benefit of a class of persons (in this instance, the incumbent DPP and Au-G). Even by the standards expressed in **Vatcher v**

Paull, the amendment, if validly passed, was not "beyond the scope of or not justified" by the powers granted to Parliament (see page 378).

[134] Ultimately, there is nothing contained in the above documents and historical context that could justify the court's interference once the amending Act was validly passed. We agree with the assessment of the Full Court and find that the documents presented to the court and the relevant sequence of events do not reflect that the amending Act was passed for an improper purpose.

Does section 48(1) of the Constitution assist the arguments of the respondents any further?

[135] Section 48(1) states that "[s]ubject to the provisions of this Constitution, Parliament may make laws for the peace, order and good government of Jamaica". Apart from this broad definition, it does not limit the power of Parliament to make laws. In **Liyanage**, Lord Pearce, on behalf of the Board, stated that those words, "peace, order and good government", in section 29(1) of the Ceylon Constitution (equivalent to our section 48(1)), have habitually been construed in their fullest scope (see page 289). Mr Hylton contended that the Constitution of Ceylon is based on parliamentary supremacy. This is contested by Mr Wood. However, this court does not think it is necessary to opine on the point in the circumstances. The issue is, how are these words to be understood?

[136] In **Ibralebbe and another v The Queen** [1964] AC 900 ('**Ibralebbe**'), also an appeal from the Supreme Court of Ceylon to the Privy Council, Viscount Radcliffe referred to section 29 of its Constitution that confers power upon Parliament to make laws for the peace, order and good government of Ceylon, subject to certain protective reservations for the exercise of religion and the freedom of religious bodies. He stated that the words connoted "in British constitutional language, the widest law-making powers appropriate to a Sovereign" (see page 923). In the Jamaican context, it would connote the widest law-making powers appropriate to Parliament subject to the supremacy of the Constitution.

[137] In the Australian case of **Union Steamship Co of Australia Pty Ltd v King** (1988) 82 ALR 43, the High Court of Australia (speaking *per curiam*) stated that "[w]ithin the limits of the grant, a power to make laws for the peace, order and good government of a territory is as ample and plenary as the power possessed by the Imperial Parliament itself". It was expressed that the words are not words of limitation and do not confer on the court jurisdiction to strike down legislation on the ground that, in the opinion of a court, the legislation does not promote or secure the peace, order and good government of the State. Reference was also made to Viscount Radcliffe's statement in **Ibralebbe** quoted above. Again, Mr Hylton complained that Queensland's Constitution is based on parliamentary supremacy.

[138] In our view, there must be some cogent basis for the court to determine that the amending Act falls outside the ambit of Parliament's law-making powers. What is the basis for any limiting interpretation by this court? Any challenge to whether the amending Act was calculated to promote peace, order and good government must be connected to a justiciable cause or a basis for a breach of constitutional principles. Otherwise, the result would be a policing of the Parliament by the Judiciary, "... as to whether something was good for the country or not, and the whole machinery of justice was not appropriate for that..." (see **Liyanage** at page 267). Any such approach would breach the separation of powers principle.

[139] Mr Hylton referred us to the United Kingdom case of **R (on the application of Miller) v Prime Minister**; **Cherry and others v Advocate General for Scotland** [2019] UKSC 41 ('**Miller**'), where the court intervened to declare that the actions of the Prime Minister were unlawful and that this was within the context of parliamentary supremacy. However, the circumstances in that case are extremely fact-sensitive and, as stated by the United Kingdom's Supreme Court, were of a kind unlikely to reoccur. The issue was whether the advice given by the Prime Minister to Her Majesty the Queen (on 27 or 28 August 2019), that Parliament should be prorogued from a date between 9 and 12 September until 14 October 2019, was lawful. Prorogation of Parliament brings the current session to an end, so neither House can meet, debate and pass legislation.

Parliament does not decide when it should be prorogued. The Government of the day advises the Crown to prorogue, and that request is acquiesced to. The court had to decide whether the decision to challenge the advice was justiciable. It was alleged that the advice given to the Queen was motivated by the improper purpose of stymying parliamentary scrutiny of the Executive at a time when issues relating to Brexit had to be considered by Parliament within a particular time frame.

[140] In assessing the issue of justiciability, the United Kingdom's Supreme Court expressed that the situation placed on the Prime Minister "a constitutional responsibility, as the only person with power to do so, to have regard to all relevant interests, including the interests of Parliament" (see para. 30 of **Miller**). The point was made that the courts have exercised supervisory jurisdiction over the decisions of the Executive for centuries. The court considered the effect of the prorogation in that it prevented the operation of ministerial accountability to Parliament during the period when Parliament stands prorogued. It was noted that:

> "33. … if Parliament were to be prorogued with immediate effect, there would be no possibility of the Prime Minister's being held accountable by Parliament until after a new session of Parliament had commenced, by which time the Government's purpose in having Parliament prorogued might have been accomplished. … The fact that the minister is politically accountable to Parliament does not mean that he is therefore immune from legal accountability to the courts…"

[141] The court quoted from Lord Lloyd of Berwick in **R v Secretary of State for the Home Department, Ex p Fire Brigades Union** [1995] 2 AC 513, where he stated, *inter alia*, quoting from Lord Diplock, that officers or departments of central government are accountable "to a court of justice for the lawfulness of what they do". As a further point, the court noted that if the issue before it is justiciable, its decision would not offend the separation of powers (see para. 34 of that judgment).

[142] On the question of whether the issue raised in the appeals was justiciable, the court expressed (at para. 42) that "[t]he sovereignty of Parliament would … be

undermined as the foundational principle of our constitution if the executive could, through the use of the prerogative, prevent Parliament from exercising its legislative authority for as long as it pleased …". Accordingly, it was concluded that there must, of necessity, be a legal limit upon the power to prorogue Parliament. It was stated that "[a]n unlimited power of prorogation would therefore be incompatible with the legal principle of Parliamentary sovereignty".

[143] The circumstances of the present case are distinguishable. In **Miller**, the action of the Executive had the effect of potentially circumventing legislative power. This brings us back to a consideration of constitutional principles. What has been breached by the exercise of the power in the present circumstances? There was no breach of a constitutional right or a Minister's irrational or illegal exercise of discretion. There was no breach of the principle of separation of powers, due process or rule of law. The amending Act is a short one and is expressed in clear terms, along with its Memorandum of Objects and Reasons. Further, the members of both Houses were not prevented in any manner from exercising their responsibilities whether to acquiesce or object to the amending Bill being passed. They were able to debate and vote for or against the passage of the amending Bill.

[144] The only matter left for consideration relevant to this issue is whether the right given to the incumbent DPP to remain in office until 65 years under the circumstances in which it was effected would affect the independence and impartiality of the office. The respondents have referred to the observation of the court in **EC v Poland** as follows:

> "108. As pointed out in paragraphs 72 to 74 above, the guarantees of the independence and impartiality of the courts require that the body concerned exercise its functions wholly autonomously, being protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions, with due regard for objectivity and in the absence of any interest in the outcome of proceedings. The rules seeking to guarantee that independence and impartiality must be such that they enable any reasonable doubt in the minds of individuals as to the

> imperviousness of that body to external factors and its neutrality with respect to the interests before it to be precluded."

[145] It was submitted that the question is not only whether there is a risk to the independence of the office of the DPP but also, in keeping with **EC v Poland**, whether the amending Act creates a situation in which any reasonable doubt in the minds of individuals as to the independence of the office of the DPP is precluded.

[146] Mr Hylton contended that the amending Act tends to affect the public perception of the independence of the office of the DPP. He further argued that the public may also question the motive behind this appeal since the claimed purpose of the amending Act was to regularise the retirement age of the DPP and the Au-G with other public officers, and this has been achieved with the current form of the amending Act (without section 2(2) as determined by the Full Court).

[147] King's Counsel persisted in his argument, making the point that, given all that has transpired in this case, such as the initial rejection of the incumbent DPP's application for an extension for the full period that she requested, the question was raised as to whether the public could have a reasonable doubt concerning the independence of the office of the DPP. It is noted, however, that the respondents have not suggested that the amending Act may bring into question the independence of the office of the DPP in the future when the successor to the incumbent DPP is appointed. The concern relates only to the incumbent DPP and is connected to a lightly veiled reference to the possibility that some members of the public may speculate that the incumbent DPP was obtaining favour from the Government, or the Government may have a special interest in extending her tenure. It is argued that this would impact the perception of her independent status.

[148] In **Attorney General of Grenada v The Grenada Bar Association** (unreported), Court of Appeal, Grenada, Civil Appeal No 8 of 1999, judgment delivered 21 February 2000 ('**AG v Grenada**'), President Byron in examining the Constitution of Grenada (which has similar provisions as the Jamaican Constitution with respect to the

office of the DPP) expressed that the office of the DPP is required to be endowed with the same qualities of independence as the Judiciary, to ensure that the criminal justice system is independent of political and other improper influences. We fully agree with his observation, however, based on an objective analysis, the amending Act has not altered or affected the independence of the office of the DPP. It has not created a new risk that the DPP will be subject to the direction or control of any other person or authority.

[149] What is important as far as the DPP is concerned, is that, in the exercise of her powers, the office holder "shall not be subject to the direction or control of any other person or authority". Dr Barnett, in his book, The Constitutional Law of Jamaica (1977), at page 145, emphasised that in order to reinforce the independence of the office, certain emoluments, terms and conditions are not to be altered to the disadvantage of a particular office holder during the continuance in office (see sections 94(6) and 95(1) of the Constitution referenced at para. [165] below and in the appendix to this judgment). What we have, as Dr Barnett expressed (at page 146), is the "constitutional insulation of the [DPP] from political pressure". The Full Court held that the issue of improper purpose did not arise as there was no evidence of the incumbent DPP's independent status being threatened or evidence of such a likelihood in the future. We agree with their reasoning wholeheartedly. The contention that there could be an impact on public perception of the incumbent DPP's independent status adds no weight to this debate in these particular circumstances. In concluding our deliberations on this issue, we reiterate what Lord Diplock espoused in **Hinds** (at page 9), that in determining whether the provisions of a law passed by the Parliament of Jamaica are inconsistent with the Constitution, neither the Board nor the courts are concerned "with the propriety or expediency of the law" impugned. The authorities do not support Mr Hylton's contention on this matter.

[150] We see no evidence of unconstitutionality in the parliamentary process that would require the court's intervention. Based on the foregoing, we find that the Full Court was correct in its conclusion that there was no basis to strike down the amending Act on the premise of improper purpose. Grounds (b) and (c) of the counter-notice of appeal, therefore, fail.

[151] Additionally, having considered all the above (including whether there was a breach of the basic 'deep' structure of the Constitution and the separation of powers principle) we are of the view that the Full Court did not err in its conclusion that section 2(1) of the amending Act was not unconstitutional by breaching principles of constitutional law. Ground (a) of the counter-notice of appeal, therefore, also fails.

2. Whether the Full Court erred by ruling that section 2(1) of the amending Act did not circumvent, undermine or contradict the constitutionally mandated process for the extension of the term of office of a DPP (Ground (e) of the counter-notice of appeal)

The submissions

[152] Mr Hylton argued that the Full Court failed to appreciate the extent to which section 2 undermined and contradicted the constitutionally mandated process for the extension of the term of office of a DPP and, in turn, its unconstitutionality.

[153] King's Counsel contended that the amending Act circumvented the constitutionally mandated process for the extension of a sitting DPP's term of office (which is set out in the proviso to section 96(1) of the Constitution) on two bases. Firstly, by excluding the Leader of the Opposition and the Governor-General whose involvement was required. Secondly, because an amendment to section 96(1) affects section 94(6) of the Constitution, which is an entrenched provision. As a result, section 96(1) should have been amended using the procedure appropriate for amending an entrenched provision.

[154] Mr Hylton further opined that the extension regime for the DPP's term in office and the amendment regime by which section 96(1) of the Constitution could be changed, were entirely separate and to be exercised in different circumstances and by different persons. He submitted that Parliament was not able to and should not be allowed to evade the constitutional restrictions imposed by section 96(1) for extension of the tenure of the DPP by simply deciding to enact the amending Act.

[155] The essence of the appellant's submission countering this point was that the procedural requirements for the implementation of section 2(1) had been followed

because section 96(1) is not an entrenched provision, and it was within the competence of Parliament to amend section 96(1) to substitute the age of 65 years for the age of 60 years. Mr Wood submitted that the drafters of the Constitution, by making section 96(2) to (7) entrenched but section 96(1) unentrenched, demonstrated their clear intention and that their actions were deliberate and not an oversight.

[156] Mr Wood also argued that the amendments effected by section 2 of the amending Act did not in any way undermine the process for the extension of the term of office of a DPP as that process remained in the Constitution, but would only now arise when the office holder attains the age of 65, which is the new retirement age effected by section 2(1) of the amending Act.

[157] Mr Braham KC, supporting Mr Wood, in addressing this issue argued that the entire process of implementing the amending Act was within the control of Parliament, it having been given the power by the Constitution to alter the age of retirement and any further extension if so required. He submitted that accordingly, since Parliament exercised a right given to it by the Constitution, it could not be said that it circumvented the executive process.

[158] In response to the argument that section 96(1) was entrenched by infection from section 94(6), which is an entrenched provision, Mr Braham maintained the position that Parliament had the power to amend section 96(1) in the manner it did and relied on the case of **Attorney General of Trinidad and Tobago v McLeod** [1984] 1 All ER 694 in which the Privy Council rejected the argument in favour of entrenchment by infection.

Analysis

[159] The parties did not dispute that the process by which the DPP may be permitted to continue in office beyond the retirement age is provided for by section 96(1) of the Constitution and that the procedure for the amendment of that section as provided for by the Constitution is set out in section 49(4)(b). It is clear from those provisions that the

extension regime and the amendment regime are entirely separate and to be exercised in different circumstances and by different persons.

[160] It must be appreciated that it is the extension regime created by the proviso to section 96(1), which allows for the DPP to be granted an extension by the Governor-General acting on the recommendation of the Prime Minister after consultation with the Leader of the Opposition. The weakness in the respondents' argument that section 2(1) of the amending Act circumvented the consultation requirements between the Prime Minister and the Leader of the Opposition is based on their mischaracterisation of the additional time that the incumbent DPP will be permitted to remain in office by section 2(1), that is, up to age 65, as an extension.

[161] The incumbent DPP attained the age of 60, and consequently, she would have had to demit office if she did not receive an extension of her term under the proviso to section 96(1). She received a constitutionally permitted extension under that proviso, to age 63. This meant that without the amending Act coming into effect, she would have been validly in office only up to 21 September 2023. However, by employing the section 49 amendment regime, the amending Act was promulgated and came into effect on 31 July 2023 (before the incumbent DPP was required to demit office). Accordingly, the incumbent DPP obtained the benefit of having her tenure continue until 21 September 2025, up to the age of 65, by virtue of the operation of section 2(1) of the amending Act. The effect of section 2(1) of the amending Act is that the new retirement age of 65 will, automatically, apply to and be in effect for every future DPP whose tenure follows the incumbent DPP.

[162] The amending Act, by legislative intervention, increased the retirement age. It also revised the age to which an extension may be granted (as provided for in the proviso to section 96(1)). The incumbent DPP was validly in office at the time the amending Act came into effect. Although the effect of the amending Act was to extend her tenure to the age of 65 years, it is misleading and creates confusion to refer to the additional period from the end of her extension at the age of 63 years to the new retirement age of 65

years, as a second extension. This is because the additional period is not by way of a second extension pursuant to the extension regime (under the proviso to section 96(1)), it is a result of a change in her statutory retirement age by operation of specific legislation, namely section 2(1) of the amending Act. Although, in theory, the amending Act has had a similar effect as if the incumbent DPP had obtained a second extension, as a practical matter, there was no application of the extension regime by the Prime Minister to give the incumbent DPP a second extension.

[163] The Full Court appreciated this distinction, at para. [181] of the judgment, where it observed that:

> "Section 2(1) as it is drafted has only increased the retirement age. Any extension of tenure sought under this section will have to follow the identical process as had been laid down in section 96(1)(b) which remains unchanged."

[164] As we have already stated, section 96(1) is not entrenched, and consequently, it could have been validly amended by following the procedure required by section 49(4)(b). The process of amendment by legislation to change the retirement age of the DPP by implementing the amending Act is entirely different from increasing the length of her tenure pursuant to section 96(1). This statutory amendment does not require the consultative process outlined in the proviso to section 96(1). Accordingly, there is no merit in the brief submission by the respondents that the legislative process of enacting the amending Act circumvented the process for extension, which they asserted required the agreement between the Leader of the Opposition and the Governor-General.

Does an amendment to section 96(1) affect section 94(6)?

[165] The respondents have raised the matter of entrenchment by infection which was briefly addressed under issue 2(c). We agree with their submission that the Constitution protects the independence of both the Judiciary and the office of the DPP. This is evident from section 94(6) of the Constitution, which reads:

> "In the exercise of the powers conferred upon him by this section the Director of Public Prosecutions shall not be subject to the direction or control of any other person or authority."

[166] We also accept as apt the opinion of President Byron in **AG v Grenada**, at para. [12] as follows:

> "I am satisfied that the context of the Constitution does demonstrate that the office of Director of Public Prosecutions is required to be endowed with the same qualities of independence as the judiciary to ensure that the criminal justice system is independent of political and other improper influences and operates on the lofty principles of equality before the law. Thus the general picture of the Constitution of Grenada depicts the judiciary as being independent and impartial, in a state based on the separation of powers. Under the umbrella of the judiciary stands the Director of Public Prosecutions as one of the guardians, being independently responsible for the institution and conduct of criminal proceedings, according to the same high standards of equality before the law, fairness and freedom from political or other improper influences. …"

[167] The entrenchment of section 94(6) underlies the importance of ensuring the independence of the DPP. Accordingly, the courts must guard against the erosion of this protection by acknowledging the principle of entrenchment by infection where the amendment of other unentrenched provisions may have that effect.

[168] The learned authors, Tracy Robinson, Arif Bulkan, and Adrian Saunders, in their work, Fundamentals of Caribbean Constitutional Law, second edition at page 206, chapter 4-015, accurately capture the concept of entrenchment by infection as follows:

> "Entrenchment by infection occurs when a change to a provision entrenched at a lower level has implications for a constitutional provision that is entrenched at a particularly high level. As a result, the former becomes more deeply entrenched by the infection of the latter. This may occur because of the way that the two provisions are closely interwoven…."

[169] The rules governing the requirements for amending various provisions of the Constitution, depending on their level of entrenchment, were discussed by the Privy Council in **Marshall-Burnett** as follows:

> "10. To alter some provisions of the Constitution, which may be described as 'deeply entrenched', section 49(3) and (4) of the Constitution require the Bill effecting the alteration to be introduced in the House of Representatives, require a period of at least six months to elapse between the introduction of the Bill into the House and its passing by that House, require the Bill to be passed in each House by the votes of not less than two-thirds of all the members of that House and require the Bill to be approved by a majority of the electorate. These deeply entrenched provisions are listed in section 49(3). They include section 49 itself, section 2 (quoted above), section 34, providing that there shall be a Parliament of Jamaica consisting of Her Majesty, a Senate and a House of Representatives, sections 35 and 36, governing the composition of the Senate and the House of Representatives, and sections 63(2) and 64(2) governing the frequency of parliamentary sittings and the duration of Parliaments.
>
> 11. A much larger class of sections and subsections of the Constitution, listed in section 49(2), have been described as 'entrenched' but not 'deeply entrenched'. To amend one of these provisions, section 49(2) and (4) require the same procedure to be followed as in the case of a deeply entrenched provision, save that the measure need not be submitted to the electorate. All other provisions of the Constitution, neither deeply entrenched nor entrenched, may be amended if supported by the votes of a majority of all members of each House: section 49(4)(b). But even these provisions enjoy some special protection, since all questions not involving any alteration of the Constitution are determined by a majority of the votes of the members present and voting (section 54(1)) and not a majority of all members."

[170] Relying on **Marshall-Burnett**, the respondents have adopted the words of Lord Bingham of Cornhill in that case in support of their argument that the amending Act would "have the effect of undermining the protection given to the people of Jamaica by entrenched provisions".

[171] In **Marshall-Burnett**, at issue was whether three Acts that sought to abolish the unentrenched right of appeal to Her Majesty in Council provided by section 110 of the Constitution and to substitute a right of appeal to the Caribbean Court of Justice ('CCJ') were constitutionally objectionable because they impliedly altered entrenched provisions in Chapter VII of the Constitution. Chapter VII of the Constitution, entitled "the Judicature", is divided into four parts and addresses, *inter alia*, the tenure of judges of the Supreme Court and the Court of Appeal. The Board found that although section 110, which forms Part 3 of Chapter VII of the Constitution, is an unentrenched provision, the CCJ would enjoy none of the entrenched protections afforded to the Supreme Court and the Court of Appeal, and the legislation had "the effect of undermining the protection given to the people of Jamaica by entrenched provisions of Chapter VII of the Constitution". Accordingly, the Board concluded that the procedure appropriate for amending an entrenched provision of the Constitution should have been followed. Section 49(2) of the Constitution sets out the procedure for implementing legislation that alters entrenched provisions of the Constitution, and in respect of the identified entrenched provisions, including section 94, it states that:

> "… a Bill for an Act of Parliament under this section shall not be submitted to the Governor-General for his assent unless a period of three months has elapsed between the introduction of the Bill into the House of Representatives and the commencement of the first debate on the whole text of that Bill in that House and a further period of three months has elapsed between the conclusion of that debate and the passing of that Bill by that House."

[172] The essence of the position advanced by the Solicitor General on behalf of the State in **Marshall-Burnett** was that the agreement that provided for the establishment of the CCJ ('the CCJ Agreement') provided protections to its judges that were similar to those protections contained in the Constitution to protect the independence of the higher Judiciary. The Board's analysis is encapsulated as follows:

> "21. The three Acts do not, singly or cumulatively, weaken the constitutional protection enjoyed by the higher judiciary

> of Jamaica. The question is whether, consistently with the constitutional regime just described, a power to review the decisions of the higher courts of Jamaica may properly be entrusted, without adopting the procedure mandated by the Constitution for the amendment of entrenched provisions, to a new court which, whatever its other merits, does not enjoy the protection accorded by the Constitution to the higher judiciary of Jamaica. **In answering this question the test is not whether the protection provided by the CCJ Agreement is stronger or weaker than that which existed before but whether, in substance, it is different, for if it is different the effect of the legislation is to alter, within the all-embracing definition in section 49(9)(b), the regime established by Chapter VII.** The Board has no difficulty in accepting, and does not doubt, that the CCJ Agreement represents a serious and conscientious endeavour to create a new regional court of high quality and complete independence, enjoying all the advantages which a regional court could hope to enjoy. But Dr Barnett is correct to point out that the Agreement may be amended, and such amendment ratified, by the governments of the contracting states, and such amendment could take effect in the domestic law of Jamaica by affirmative resolution. **The risk that the governments of the contracting states might amend the CCJ Agreement so as to weaken its independence is, it may be hoped, fanciful. But an important function of a constitution is to give protection against governmental misbehaviour, and the three Acts give rise to a risk which did not exist in the same way before**…." (Emphasis added)

[173] The respondents submitted that the Board in **Marshall-Burnett** recognised that a final appellate court that enjoyed less protection than the Supreme Court and the Court of Appeal resulted in a "risk to the independence of the final appellate court and a consequent risk to the people of Jamaica". The respondents highlighted the finding by the Board of this risk and advanced the following position in their written submissions:

> "134. That is the crux of the decision and is the exact governmental misbehaviour that the Respondents argue should be prevented in the instant case. By allowing Parliament to arbitrarily increase the retirement age, the

> security of tenure of the DPP will ultimately be affected. This has the potential to cause improper influence on the office of the DPP.
>
> 135. Therefore, by declaring the Act constitutional, the Full Court has effectively said that Parliament can choose at any time, now or in the future, to increase the retirement age of the DPP without any prospect for retirement."

[174] Accordingly, the respondents criticised the Full Court's observation that "there is no evidence upon which to make a finding that [a risk to the independence of the DPP] currently exists or will exist in the future" (see para. [139] of the judgment). The respondents argued that the Full Court missed the point of **Marshall-Burnett** by failing to appreciate that the case supports their argument that the independence of the office of the DPP would be affected by section 2(1) of the amending Act.

[175] In the case of **EC v Poland**, relied on by the respondents, the legislation lowered the retirement age of the judges appointed to the Supreme Court of Poland before 3 April 2018. It gave the President of the Republic the discretion to extend the period of judicial activity of those judges beyond the new retirement age. The Commission held that the member state had infringed the principle of judicial independence. However, even in the absence of evidence that the legislation would affect the independence of judges in that case, it is not difficult for us to perceive that there may have been such a risk, especially with respect to those judges who may have wished to have their period of service extended.

[176] We agree that where there is a real risk of a threat to the independence of an office holder, such as the incumbent DPP in this case, by legislation that achieves constitutional amendment, this court needs to be vigilant to guard against such incursions. The respondents have used the example of a risk that Parliament might increase the retirement age of the DPP and/or the Au-G without any prospect of their retirement. In the circumstances, we are not persuaded that such a risk is created by the amendment.

[177] Further, in our view, it is inaccurate for the respondents to suggest that the amending Act evidenced an arbitrary increase in the retirement age of the DPP and the Au-G. In order to pass the test of constitutionality, and in assessing whether any amendment to the Constitution is arbitrary, each piece of legislation passed by Parliament must be considered in the context of the cultural, social, and/or political environment that exists at the relevant time. There is no disputing the evidence that there was an anomalous position concerning the retirement age of the DPP and the Au-G arising from Parliament addressing the issue of the working age of other public officers and the resulting increase in the retirement age of those officers by the Pensions Act. We have accepted that the purpose of the amending Act was to address the anomaly which had persisted for a period of six years between the passing of the Pensions Act in 2017 and the amending Act in 2023, and that the amending Act was for a proper purpose and, therefore, not arbitrary.

[178] Conceivably, there are other potential amendments to the retirement provisions concerning these public officers that could be to their detriment, and which might not survive a constitutional challenge. However, each case must be judged on its facts, and it is erroneous to suggest that the Full Court's finding, in this case, provides a licence for those theoretical amendments which are of academic interest only, or for any amendments other than those effected by the amending Act. In our view, the existence of such remote possibilities cannot provide a proper basis for this court to rule that section 2(1) of the amending Act is unconstitutional. The protection provided by the courts will remain available if further constitutional challenges arise in the future.

[179] Employing the **Marshall-Burnett** analysis, it is our view that the ultimate question is whether the amending Act has caused the protection afforded by section 94(6) to be different, that is to say, whether it has altered the regime established by Chapter VI. We do not accept that contention.

[180] We accept, as settled, the principles enunciated in **Marshall-Burnett** regarding the requirement that the procedure appropriate for the amendment of an entrenched

provision is to be followed where the amendment of an unentrenched provision impacts an entrenched provision. However, we have concluded that, unlike that case, the amending Act has not altered section 94(6), nor has it had the effect of "undermining the protection given to the people of Jamaica by entrenched provisions of [Chapter VI] of the Constitution".

[181] Therefore, we find that the Full Court was correct in its analysis of this issue. We concur with its conclusion that there is no merit in the position advanced by the respondents that the amending Act should have been passed using the procedure required for that entrenched provision because the unentrenched section 96(1) was entrenched by infection as a result of its connection with the entrenched section 94(6).

[182] Ground of appeal (e) of the counter-notice of appeal, therefore, fails.

3. Whether the Full Court erred in its ruling on the effect of section 2(1) of the amending Act. (Grounds ii, iv (a) and (b), v, viii and xii of the appellant's notice and grounds of appeal)

The submissions

[183] It was Mr Wood's contention that by operation of section 2(1), the DPP's retirement age was increased from age 60 to 65 years, and it also allowed for a grant of an extension from age 65 to 70 years. He submitted that it was the amendment effected by section 2(1), which continued the right of the incumbent DPP to hold office until she attained 65 years of age. Accordingly, the Full Court erred in finding that the incumbent DPP remained in office by virtue of section 2(2) of the amending Act.

[184] Mr Leys KC, for the intervener, agreed that section 2(1) operated to extend the DPP's tenure to 65 years. He argued that the purpose of section 2(2) was to preserve the incumbent DPP's right to pursue early retirement because she would have passed the date for early retirement if she sought to utilise provisions of the Pensions Act.

[185] The respondents in their written submissions conceded that "[w]hen sections 2(1) and 2(2) of the [amending Act] are read together, it is evident that section 2(1) was

intended to make textual amendments to section 96(1) of the constitution". However, Mr Hylton explained, the crux of their challenge was not that section 2(1) would have had the effect of increasing the retirement age of the DPP if it were validly passed. What the respondents were contending was that the Full Court erred in finding that section 2(1) of the amending Act was a valid constitutional amendment.

Analysis

[186] Unless declared null and void, or read down by this court, the effect of section 2(1) of the amending Act is to extend the tenure of the incumbent DPP by increasing her retirement age to 65 years.

[187] The Full Court did not expressly state whether section 2(1) applied to the incumbent DPP. However, it may be inferred from its reasoning that the Full Court concluded that section 2(1) did not apply to the incumbent DPP as she had previously received an extension under section 96(1) prior to its amendment. The Full Court would, therefore, have erred in limiting the applicability of section 2(1) of the amending Act, by restricting it from applying to the incumbent DPP.

[188] Accordingly, we find that there is merit in grounds ii, iv (a) and (b), v, viii and xii of the notice of appeal.

4. Whether section 2(2) of the amending Act is in breach of the Constitution.

(a) Did the Full Court apply the correct test in determining the constitutionality of section 2(2) of the amending Act? (Ground xiv of the appellant's notice and grounds of appeal)

(b) Did the Full Court err in its interpretation of section 2(2) of the amending Act? (Grounds i, iii, vi and xi of the appellant's notice and grounds of appeal)

(c) Does section 2(2) of the amending Act alter section 96(1) of the Constitution? (Grounds ix and x of the appellant's notice and grounds of appeal)

(d) Is section 2(2) of the amending Act inconsistent with section 2(1)? (Ground xiii of the appellant's notice and grounds of appeal)

The submissions

[189] In submitting that the Full Court applied the incorrect test in determining the constitutionality of the amending Act, Mr Wood pointed to para. [148] of the judgment where it was stated that the correct test is "whether the [amending Act] as ordinary legislation [was] in substance different from that which was contemplated by the drafters of section 96(1) or whether it alter[ed] what section 96(1) had originally said". Learned King's Counsel contended that no authority was cited in support of that test and further that the test was based on an incorrect premise, that is, that the amending Act was "ordinary legislation". Mr Wood stated that the Full Court failed to appreciate that the amending Act formed part of the Constitution itself, the amendment having been done in accordance with section 49 of the Constitution.

[190] He also criticised the test the Full Court used because its application would mean that Parliament could never amend the Constitution to say something different from what it originally said. This would mean that the retirement age of office holders such as the DPP, Au-G and judges, could never be increased.

[191] Mr Wood asserted that the correct test was whether section 96(1) had been amended in accordance with the procedure stipulated in section 49(4)(b) of the Constitution. Based on section 49, he stated that the provisions of the Constitution are not immutable (including the supremacy clause) and that it was recognised by the framers of the Constitution that alterations to the Constitution would sometimes be necessary. He maintained that the Full Court, in applying the wrong test, fell into error in finding that section 2(2) of the amending Act was unconstitutional.

[192] As a corollary to that point, Mr Wood noted that the Full Court invalidated section 2(2) of the amending Act on the basis that it breached the supremacy clause of the Constitution (section 2). He stated that the Full Court would have been wrong to do so, as the supremacy clause states that it is subject to sections 49 and 50 of the Constitution. The case of **Phyllis Mitchell v Abraham Dabdoub and others** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 95/2001, judgment delivered 25 October

2001 was used to define the term "subject to". Further, he submitted that the supremacy clause is to be read as being governed by section 49 (noting that section 50 was repealed).

[193] It was the appellant's position that section 2(2) of the amending Act cannot be considered inconsistent with section 2(1). Whereas section 2(1) increased the retirement age of the DPP, the purpose of section 2(2) was to preserve the incumbent DPP's right to retire after attaining the age of 60 years, it did not give her a right to extend her term.

[194] Additionally, counsel argued the insertion of section 2(2) could not be impugned since Parliament has the power to alter section 96(1) of the Constitution to insert section 2(2) by virtue of section 49(4)(b) of the Constitution (reliance was placed on **Hinds, Marshall-Burnett** and **Attorney General v McLeod** [1984] 1 All ER 694). Moreover, section 49(4)(b) of the Constitution allows for the introduction of an entirely different provision when making such an alteration.

[195] Mr Leys also sought to challenge the decision of the Full Court. He submitted that the intent of section 2(2) of the amending Act was to ensure that despite the increase in the tenure of the office of the DPP, the "terms and conditions of service of the DPP" were not altered to her disadvantage while in office (pursuant to section 95 of the Constitution). He contended that Parliament inserted that section to preserve the incumbent DPP's right to early retirement at 60 years old, a right that other public officers benefit from under the Pensions Act. Otherwise, the retirement age for the incumbent DPP would have been increased to 65 years old without a guaranteed provision for early retirement. King's Counsel also argued that in those circumstances, section 2(2) did not interfere with the extension mechanism created by section 96(1)(b) of the Constitution (and amended by section 2(1) of the amending Act).

[196] Mr Hylton, in seeking to refute the submissions that the amending Act was not "any other law" and that it formed part of the Constitution itself (upon promulgation and the assent of the Governor-General), asserted that those submissions made a mockery

of the supremacy clause, effectively replacing constitutional supremacy with parliamentary sovereignty.

[197] He compared those submissions to the argument that "the Full Court ought only to have been concerned with whether the amendment complied with section 49 of the Constitution" and stated that it reduces the court to a "mere referee" and denies the court's true role as guardian of the Constitution. Reliance was placed on the **Marshall-Burnett** case in positing that when considering the constitutionality of legislation that purports to amend the Constitution, the court cannot simply consider whether the Legislature complied with the requirements of section 49.

[198] Contrary to the appellant's explanation of the meaning and purpose of section 2(2), Mr Hylton argued that clearly, it was not designed to form part of section 96(1) as it "does nothing". The pre-amendment retirement age of 60 years old was obligatory, not a right, so there can be no need to preserve that "right" with section 2(2) of the amending Act.

[199] By expressly allowing the incumbent DPP to elect to retire after attaining the age of 60 years old (the pre-amendment age of retirement), section 2(2) also implicitly gave her the option to "elect" to remain in office until the age of 65 years old (the amended age of retirement). By doing so, the incumbent DPP would no longer need a recommendation (in accordance with section 96(1)) to continue in office. It is on that basis that the incumbent DPP expressed her election to remain in office until the age of 65, counsel argued. It was further submitted that section 2(2) is not "plain and unambiguous" because it clearly disregards the new retirement age of 65 years old and affords the incumbent DPP an unlimited opportunity to extend her tenure.

[200] Mr Hylton asserted that the introduction of section 2(2) creates a second "extension regime" in addition to the process outlined in section 96(1)(b), which was patently unconstitutional. It is plain, he said, that section 2(2) only applies to the

incumbent DPP, so by its insertion in the Constitution, it "would be enshrined in the text of the supreme law of the land" for the purpose of benefitting a single individual.

[201] It was also contended that without section 2(2), section 2(1) would not be applicable to the incumbent DPP, who had already attained the pre-amendment retirement age. Section 2(2) made it clear that the amendments in section 2(1) were retrospective and applied to the incumbent DPP. Accordingly, in seeking to exercise her "right" under section 2(2), the incumbent DPP wrote to confirm that she would not be retiring. The cases of **Phillips v Eyre** (1870) LR 6 QB 1 and **Ferguson v AG of T&T** were cited on this point.

[202] The respondents contended that while section 2(1) intended to make textual amendments to section 96(1), section 2(2) did not seek to amend any part of section 96. Issue was also taken with the form of the amendment, specifically that the words "[n]otwithstanding anything in subsection (1)" mean that section 2(2), when inserted in the amendment of section 96(1), would cause that provision to refer to itself in the third person. This insertion, he said, offends section 11(1)(d) and (e) of the Law Revision Act.

Analysis

[203] We have already determined that section 2(1) of the amending Act did not circumvent the extension process for the incumbent DPP. This issue (as it relates to ground xiv in particular) is really a challenge to the Full Court's determination of the validity of section 2(2). However, the test formulated by the Full Court related to the whole of section 2 as set out at para. [148] of that judgment:

> "The correct test is whether the [amending Act] as ordinary legislation is in substance different from that which was originally contemplated by the drafters of section 96(1) or whether it alters what section 96(1) had originally said in the Constitution."

[204] This formulation appears to have been lifted from the Board's analysis in **Marshall-Burnett** (see para. [172] above). In **Hinds**, Lord Diplock, in assessing the

validity of the impugned legislation, stated that the present question must be approached as one of substance, not form. This approach was adopted and applied in **Marshall-Burnett** (see para. 19 of that judgment).

[205] At para. [150], the Full Court concluded that "[t]here [was] no evidence on an objective test that [could] be viewed as an assail on the protections accorded to that office by the Constitution". They found that the amending Act was validly passed (although it seems that in substance, they found that only section 2(1) was validly passed). We have determined that the Full Court was right concerning section 2(1), in the circumstances.

[206] The Full Court applied the same test they formulated to section 2(2) of the amending Act and stated at para. [161]:

> "In applying the test to the addition of section 2(2) on an objective standard: whether the [amending Act] is in substance different from that which was originally contemplated by the drafters of section 96(1) the answer is yes; or whether the [amending Act] alters what section 96(1) had originally said in the Constitution the answer is also yes."

[207] The Full Court concluded at para. [168] that "Parliament has sought ... to confer a power on the incumbent DPP which was never contemplated by the drafters of the Constitution …". Further at para. [169]:

> "Parliament is empowered by the Constitution to alter the Constitution under section 49(9)(b) once it is lawfully done. We are not satisfied that the power to enlarge the terms and conditions of service or the retirement age of the DPP can be conferred upon the DPP by way of an election, as there is no right to remain in office beyond the prescribed age of retirement. An election suggests that such a right had previously existed, whereas in our view there was no such right."

[208] The test formulated by the Full Court is problematic. Lord Diplock, at page 359 of **Hinds**, spoke to the context in which the Constitution of Jamaica should be interpreted in the following terms:

> "Nevertheless all these constitutions have two things in common which have an important bearing on their interpretation. They differ fundamentally in their nature from ordinary legislation passed by the parliament of a sovereign state. They embody what is in substance an agreement reached between representatives of the various shades of political opinion in the state as to the structure of the organs of government through which the plenitude of the sovereign power of the state is to be exercised in the future."

[209] An important consideration, therefore, is the machinery established for amendment within a Constitution such as Jamaica's based on constitutional supremacy. This machinery was examined in **Hinds** as well as in **Marshall-Burnett**. The rules for amending various provisions of the Constitution pursuant to section 49 are, as stated previously, generally referred to as entrenched, deeply entrenched and unentrenched provisions.

[210] Lord Diplock expressed in **Hinds** the purpose of entrenched provisions (see para. [55] above). The issue in that case was the Gun Court Act 1974. Lord Diplock commented that it had not been preceded by legislation passed under the special procedure prescribed by section 49 of the Constitution to alter provisions of the Constitution, nor did the Gun Court Act itself contain any express amendment of those provisions. It had to be considered whether that Act was consistent with other provisions in the Constitution bearing in mind the supremacy clause (section 2), that subject to section 49, "… if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void". The Privy Council found that portions of the Act conflicted with Chapter VII of the Constitution (dealing with the Judicature) since it was attempting to set up a new court to exercise part of the jurisdiction that was being exercised by the higher Judiciary (at the time the Constitution came into force). The members of the new court should, therefore, have been appointed

in the same manner and entitled to the same security of tenure as members of the higher Judiciary. Accordingly, those provisions were declared void under section 2 of the Constitution. It is within that context that Lord Diplock expressed (at page 361) that it is the substance of the law that must be regarded, not the form.

[211] It is indisputable, therefore, that Parliament has the power to amend the Constitution by following the provisions set out in section 49. The court's function is to ensure that there has been no breach of constitutional provisions or unconstitutionality in the process and outcome. It follows that any interpretation of a constitutional amendment must be considered within that context.

[212] The duty of the court is to assess the effect of the amending Act just as the Privy Council did in **Hinds** and **Marshall-Burnett**. The question is, firstly, what do the words in section 2(2) mean? Having decided that, the court would then consider whether Parliament effected the amendment in keeping with sections 2 and 49 of the Constitution. Section 2, as previously indicated, is the supremacy clause (see para. [33] above) and section 49 sets out the mechanism for amending the Constitution.

[213] In **Marshall-Burnett**, the Board referred to section 49(9)(b) of the Constitution, which defines "alter" as follows:

> "'alter' includes amend, modify, re-enact with or without amendment or modification, make different provision in lieu of, suspend, repeal or add to."

[214] The Board accepted, as was held in **Mohamed Samsudeen Kariapper v S Wijesinha and another** [1968] AC 717 ('**Kariapper v Wijesinha**') at page 743, that the words "amend or repeal" cover an alteration by implication.

[215] In examining the issue of constitutional interpretation in **Day v The Governor of the Cayman Islands and another** [2022] 3 LRC 557 ('**Day v The Governor**'), the Board, at para. 34, quoted from its judgment in **Matadeen v Pointu** [1998] 3 LRC 542 in which Lord Hoffman stated as follows:

> "… [C]onstitutions are not construed like commercial documents. This is because every utterance must be construed in its proper context, taking into account the historical background and the purpose for which the utterance was made. The context and purpose of a commercial contract is very different from that of a constitution. The background of a constitution is an attempt, at a particular moment in history, to lay down an enduring scheme of government in accordance with certain moral and political values. Interpretation must take these purposes into account. … What the interpretation of commercial documents and constitutions have in common is that in each case the court is concerned with the meaning of the language which has been used."

[216] Similar views were expressed by Lord Diplock in **Hinds** (at pages 359 and 360). At page 360, Lord Diplock stated:

> "To seek to apply to constitutional instruments the canons of construction applicable to ordinary legislation in the fields of substantive criminal or civil law would … be misleading..."

[217] It is our judgment that where the Full Court fell into error was the interpretation of the effect of section 2(2), bearing in mind their acceptance that the amending Act was validly passed and there was no breach of the separation of powers and no improper purpose.

[218] At paras. [162], [163] and [164], the Full Court stated as follows:

> "[162] We find that the [amending Act] has added the DPP's election as a procedural step in the retirement process. A DPP had no need to elect to retire before the [amending Act] was passed, retirement at sixty was automatic. As section 2(1) of the [amending Act] has been passed for the retirement age to be increased to sixty-five then the need for section 2(2) which provides an election for a DPP to retire after age sixty would be inconsistent with section 2(1) which is the section that extends the age a DPP can remain in office after age sixty-five.
>
> [163] In our view, the addition of the words *notwithstanding or election* to subsection 2(2) [sic] do not [sic] address a need

> or desire to retire for an office holder who is under age sixty five.
>
> [164] … Parliament has legislated for the retirement of the DPP in a way that lends itself to the interpretation that it has permitted a second extension for the incumbent." (Italics as in the original)

[219] We disagree entirely with this assessment. If there is an issue about the meaning of the enacted law, the court must interpret the Constitution to decide whether the enacted law is incompatible with it or not (see **Day v The Governor** at para. 35, quoting Lord Bingham of Cornhill in **Reyes v R** [2002] UKPC 11). In **Pepper (Inspector of Taxes) v Hart** [1993] AC 593 ('**Pepper v Hart**'), at page 617E - F, Lord Griffiths opined:

> "The object of the court in interpreting legislation is to give effect so far as the language permits to the intention of the legislature. If the language proves to be ambiguous I can see no sound reason not to consult Hansard to see if there is a clear statement of the meaning that the words were intended to carry. … The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears upon the background against which the legislation was enacted."

[220] And further at page 639A:

> "Hansard has frequently been referred to with a view to ascertaining whether a statutory power has been improperly exercised for an alien purpose or in a wholly unreasonable manner. In *Reg v Secretary of State for the Home Department, Ex parte Brind* [1991] 1 A.C. 696 … the Crown … invited the court to look at Hansard to show that the Minister in that case had acted correctly. The House attached importance to what the Minister had said. …"

[221] In **Whitfield v Attorney General** (1989) 44 WIR 1 ('**Whitfield**'), Gonsalves-Sabola J, at page 17b of his judgment, referred to the following extract from Halsbury's Laws of England, Fourth Edition, Volume 44, para. 896, on the interpretation of statutes:

> "If the language of a statute is ambiguous so as to admit of two constructions, the consequences of the alternative

> constructions must be regarded, and that construction must not be adopted which leads to manifest public mischief, or great inconvenience, or repugnance, inconsistency, unreasonableness or absurdity, or to great harshness or injustice. However, this is a doctrine which must be applied with great care, and, if the words are plain and unambiguous, the court is bound to construe them in their ordinary sense, and may not modify or bend their meaning simply to avoid absurdity, mischief or injustice."

[222] In the present case, the Full Court reviewed the Hansard Report (as to the debate in the Houses of Parliament), the Memorandum of Objects and Reasons of the amending Act and other background material. These aspects of the evidentiary material were considered above in relation to the issue of improper purpose. Suffice it to say that the Hansard Report, as well as the Memorandum of Objects and Reasons, did not reveal any intention of Parliament to allow the incumbent DPP to apply for a second extension. Parliament had the power to extend the age of retirement of the DPP, which they did.

[223] It is accepted that the addition (which is included in the meaning of alter in section 49(9)(b)) of section 2(2) was something new. King's Counsel, Mr Leys, has submitted that adding section 2(2) was necessary to protect the incumbent DPP's constitutional rights under section 95 of the Constitution, which speaks to her emoluments and conditions of service, as her previous retirement age was 60 years. He submitted that the objective and intention of the Legislature was to protect those constitutionally protected rights and to give her the "election" to retire before the age of 65.

[224] Whereas early retirement is arguably not a "right" in the sense of an enforceable legal entitlement, it is a benefit. In that regard, the "elect to retire" as used in section 2(2) is to be construed to mean to elect to apply for early retirement. We do not find it necessary for the purposes of this judgment to determine the correctness of Mr Leys' submission that the option for the incumbent DPP to opt for early retirement was lost with the repeal of the Pensions Act 1947. This is because, even if it was not, and the benefit of early retirement subsisted prior to and independently of section 2(2), the

provision would be superfluous and its insertion, without more, does not render it unconstitutional.

[225] However, there is merit in the submission of Mr Leys that the incumbent DPP was entitled to early retirement under the now repealed Pensions Act of 1947, and we accept that it is at least arguable that on its repeal, the entitlement of the incumbent DPP to this benefit became uncertain, thereby necessitating its preservation, in light of the increased retirement age.

[226] As we have found, the incumbent DPP had previously received the benefit, by virtue of a prior extension, to continue her tenure up to the age of 63. When the amending Act was promulgated, she automatically became the beneficiary of the increased age for retirement. Section 2(2) added nothing to that benefit. It also did not alter the substance of section 2(1).

[227] The Full Court set out the definition of the words "notwithstanding" and "election", used in section 2(2), at para. [151] of its judgment, to which we will refer as follows:

> "[151] **Section 2(2) of the Act**
>
> '*(2) Notwithstanding anything in subsection (1), a person who is Director of Public Prosecutions at the date of the commencement of this Act may, by memorandum in writing given to the Governor General, elect to retire at any time after attaining the age of sixty years.'*
>
> *'Notwithstanding' is defined as despite; in spite of. Not opposing; not availing to the contrary.*
>
> *'Election' is defined as 1. The exercise of a choice., esp., the act of choosing from several possible rights or remedies in a way that precludes the use of other rights or remedies. 2. The doctrine by which a person is compelled to choose between accepting a benefit under a legal instrument and retaining some property right to which the person is already entitled; an obligation imposed on a party to choose between alternative rights or claims, so that the party is entitled to*

enjoy only one. 3. The process of selecting a person to occupy an office.'" (Emphases as in original)

[228] The use of the phrase "notwithstanding" cannot and does not change the process for the extension set out in section 2(1). One of its meaning is "not opposing". Any supposed ambiguity should have been interpreted in line with Parliament's intention, which was, as disclosed by the Memorandum of Objects and Reasons and the Hansard, to increase the retirement age of the DPP and the Au-G to 65 years whilst maintaining the mechanism for the extension of their term in office beyond the retirement age. Section 2(2) is a transitional provision concerning the incumbent DPP. A proper understanding could have reflected the meaning "notwithstanding that her retirement age has been increased to 65 years, she may choose or elect to retire at any time after attaining the age of 60 years". Section 2(2) seeks to capture the unique position of the incumbent DPP. She was free to remain until 65 years or choose to retire before that age, having passed the 60-year mark prior to the passing of the amending Act. Any further extension of the incumbent DPP's tenure after 65 years would have to be obtained through the mechanism set out in section 2(1). Section 2(2) of the amending Act did not alter section 96(1) of the Constitution, in substance or effect. It is, therefore, not inconsistent with section 2(1) of the amending Act.

[229] Mr Wood has complained about the Full Court's description of the amending Act as ordinary legislation. In **Hinds**, the Act under review was ordinary legislation that affected constitutional provisions without any proper amendments being made to those provisions, pursuant to section 49. In **Marshall Burnett**, the Board expressed that constitutional provisions differ fundamentally in their nature from ordinary legislation since even the unentrenched provisions are provided with some special protection. The comparison was made with all other laws passed by Parliament that only require a bare majority (see para. [169] above). However, in **Marshall-Burnett**, one of the three Acts was actually a constitutional amendment relevant to section 110 of the Constitution. The issue, as discussed previously, was not whether Parliament had the power to enact those

pieces of legislation, but the effect of the amendments, including the constitutional amendment, based on the supremacy clause.

[230] There is an interesting discourse in the case of **AG v Christopher Mtikila** from the Court of Appeal in Tanzania, where the court considered whether a law affecting a constitutional amendment, according to article 98(1) (which allows Parliament to alter any provision of the Tanzanian Constitution in accordance with certain principles), is like any other law passed by Parliament. The court had regard to a definition of the word "law" in article 13(2) of the Tanzanian Constitution (see page 23). They concluded that it did not include an amendment to the Tanzanian Constitution but had reference to ordinary pieces of legislation. Ordinary legislation can be enacted by a simple majority of Parliament. However, a constitutional amendment required a specific number of votes (two-thirds of all Members of Parliament, not just those sitting and voting). The point was made that an ordinary law is not subject to this stringent requirement.

[231] While this same principle may appear to apply to the Jamaican Constitution, it seems to us that any such conclusion should await further submissions in an appropriate case, as it is not required in the present circumstances. Regardless of the classification to be ascribed to the amending Act, the issue in these circumstances is the same as demonstrated in both **Hinds** and **Marshall-Burnett**. Is there a breach of the Constitution in its effect or implications? Is it inconsistent with Parliament's powers or the constitutional provisions? We have answered both questions in the negative.

[232] The Full Court, therefore, erred in finding that section 2(2) of the amending Act was invalid and to be struck down as unconstitutional, null, void and of no legal effect. In relation to the challenges mounted and subsumed under this issue, we find merit in the appellant's grounds i, iii, vi, ix, x and xi, xiv.

(e) Did the Full Court err by using the Memorandum of Objects and Reasons of the amending Act to alter the language of the amending Act? (Ground vii of the appellant's notice and grounds of appeal)

The submissions

[233] The appellant has asserted that the Full Court incorrectly used the Memorandum of Objects and Reasons of the amending Act to arrive at a flawed construction.

[234] Mr Wood acknowledged that the Memorandum of Objects and Reasons of the amending Act was brought to the Full Court's attention with respect to the issue of improper purpose but not to aid in the interpretation of the amending Act. He submitted that the Full Court relied on the Memorandum of Objects and Reasons of the amending Act to conclude that section 2(2) could not amend the extension mechanism under section 96(1). He argued that this was contrary to the plain language of that section and amounted to a judicial re-writing of the section, which was impermissible. King's Counsel further argued that the Full Court in ruling as it did, had essentially used the Memorandum of Objects and Reasons of the amending Act to alter the meaning of the section contrary to the principle emanating from **Pepper v Hart,** which states that ministerial statements may only be used as an aid to the construction of legislation which is ambiguous. Therefore, he submitted, the Memorandum of Objects and Reasons of the amending Act ought not to have been used to change the plain language of an Act, which is clear and unambiguous.

[235] Alternatively, he submitted that the approach the Full Court ought to have taken if it thought the amending Act, particularly section 2(2), was ambiguous and lent itself to more than one interpretation, was to adopt an interpretation of section 2(2) that saves the validity of the law, namely, that it preserved the right of the incumbent DPP to retire after 60 years and before 65 years.

[236] The respondents, in their submissions in reply, albeit not specifically on the issue of the use of the Memorandum of Objects and Reasons of the amending Act, submitted that section 2(2) is anything but plain and unambiguous. It was posited that a clear

indication of this is that "it commences with '**Notwithstanding anything in subsection (1)** …', which effectively disregards the new retirement age of 65 and therefore affords the incumbent DPP an open-ended opportunity to extend her tenure" (emphasis as in the original). An alternative construction was acknowledged, which is that the incumbent DPP is indeed subject to the mandatory retirement age of 65 years, but the question was raised as to why "Notwithstanding" was preferred to "Subject to". Implicit in these submissions was a tacit acknowledgment that the Memorandum could be used to ascertain the intention of Parliament. However, the focus of the respondents' submission was that the Full Court was correct in finding that section 2(2) purported to give the incumbent DPP a right she did not have prior to the amending Act and should not be allowed to stand.

Analysis

[237] This issue is closely related to the question of the proper interpretation to be given to section 2(2) of the amending Act, which has been addressed elsewhere in this judgment (see para. [228] above).

[238] The authors of Bennion, Bailey and Norbury on Statutory Interpretation, 8th edition second supplement at section 24.1, accurately observed that:

> "The courts have traditionally been cautious about relying on external aids to construction, especially material relating to the passage of a Bill through the legislature. Subject to continuing restrictions on the use of parliamentary material, the courts tend these days to allow most external aids to be used."

[239] The case of **Pepper v Hart** has largely been responsible for the shift in the court's approach. The general rule that references to parliamentary material outside of the statute as an aid to the construction of the statute itself was reflected in cases such as **Hadmor Productions Ltd v Hamilton** [1983] 1 AC 191. The Memorandum is a document which, as its name suggests, explains the purpose and objectives of a Bill when

it is introduced in Parliament. It is an aid to construction that is external to the statute itself and is capable of clarifying legislative intent, as are other aids such as Hansard.

[240] However, it is important to note that while **Pepper v Hart** expanded the use of external aids to construction, this was subject to certain restrictions. These can be found in the leading judgment of Lord Browne-Wilkinson at page 634D:

> "My Lords, I have come to the conclusion that, as a matter of law, there are sound reasons for making a limited modification to the existing rule (subject to strict safeguards) unless there are constitutional or practical reasons which outweigh them. In my judgment, subject to the questions of the privileges of the House of Commons, reference to Parliamentary material should be permitted as an aid to the construction of legislation which is ambiguous or obscure or the literal meaning of which leads to an absurdity. Even in such cases references in court to Parliamentary material should only be permitted where such material clearly discloses the mischief aimed at or the legislative intention lying behind the ambiguous or obscure words. In the case of statements made in Parliament, as at present advised I cannot foresee that any statement other than the statement of the Minister or other promoter of the Bill is likely to meet these criteria."

[241] The restrictive rule was a judge-made common law construct, and **Pepper v Hart**, although of persuasive authority only, reflects a position that makes eminent good sense. If the test as formulated by Lord Browne-Wilkinson is adopted and applied to the facts of the instant case, it can be reasonably concluded that the alternative construction being advanced by the parties is evidence that section 2(2) is arguably "ambiguous or obscure or the literal meaning of which leads to an absurdity". This reason, coupled with the information contained in the Memorandum of Objects and Reasons of the amending Act, in our view, satisfies the required enquiry suggested in **Pepper v Hart** and justifies its use as an aid to the interpretation of section 2(2).

[242] We have referred to paras. [78], [79] and [81] of the judgment in which the Full Court accepted that the purpose of the amending Act was as stated in the Memorandum of Objects and Reasons of the amending Act. There was no objection by the appellant to

the use of the Memorandum of Objects and Reasons of the amending Act in that regard, since it is conceded that that was the purpose for which it had been provided to the court.

[243] The objection raised by the appellant was that the Memorandum of Objects and Reasons of the amending Act was incorrectly used to construe section 2(2). However, although the Full Court referred to the Memorandum of Objects and Reasons of the amending Act, in our opinion, it is not clearly apparent that it was used as an aid to construe this section.

[244] Having accepted that the Memorandum of Objects and Reasons of the amending Act confirmed the intention of Parliament to retain the existing extension mechanism for the DPP and Au-G, the Full Court then embarked on a determination of whether section 2(2) "...sought to amend the existing extension mechanism". As a part of this process, the Full Court had to construe section 2(2) to determine the effect of the words "elect to retire at any time after attaining the age of sixty years". The Full Court concluded that section 2(2) effectively bestowed upon the incumbent DPP the power to elect to retire after attaining the age of 60 years. That power did not exist prior to the amending Act, nor was it necessary. However, if the Full Court's construction were correct, section 2(2) would be inconsistent with section 2(1), which extends the retirement age of the DPP to 65 years. We do not agree with that position (see para. [228]).

[245] Based on the analysis of the Full Court, there is nothing to suggest that its conclusions as to the meaning of section 2(2) were shaped or influenced by the Memorandum of Objects and Reasons of the amending Act. It appears that its conclusions were based solely on the flawed interpretation of the nature of the "election" which was conferred on the incumbent DPP.

[246] In any event, this issue would not be dispositive of the appeal. We have already found that the Full Court's interpretation of section 2(2) of the amending Act was flawed (see paras. [203] to [232] above). However, since we cannot agree that the Full Court

applied the Memorandum of Objects and Reasons of the amending Act in its interpretation, there is no merit in ground vii of the appeal.

5. Whether section 2(1) of the amending Act should be read down and construed as not applying to the incumbent DPP. (Ground (g) of the counter-notice of appeal)

The submissions

[247] The respondents did not deny that section 2(1) increased the age of retirement of the DPP as well as the maximum age for any extension beyond the retirement age. However, it was their submission that this should only apply to a DPP who had not yet attained the pre-amendment retirement age of 60 years at the commencement date of the amending Act. It was argued that nowhere in the wording of section 2(1) does it indicate that its intent or effect was to allow the incumbent DPP, who had already attained the pre-amendment retirement age and who had also benefitted from an extension, to benefit further from the post-amendment retirement age of 65 years.

[248] Additionally, it was submitted that construing section 2(1) to include the incumbent DPP would be inconsistent with the presumption against retrospectivity, and as such, it ought to be given a prospective interpretation. Mr Hylton contended that it was only by the operation of section 2(2) that any retrospective effect could be given to the amendment made by section 2(1).

[249] It was submitted, accordingly, that if section 2(2) is not declared to be null and void, an alternative way in which the court could achieve the objective of interpreting the amending Act in a manner that brings it into conformity with the Constitution is to read and construe section 2(1) as not applying to the incumbent DPP. The respondents relied on the case of **Attorney General of Ontario v G (Attorney General of Canada and others intervening)** (2020) 50 BHRC 422 ('**AG of Ontario v G**') and the principles espoused therein in support of their submission on this point.

[250] In response, Mr Wood submitted that in order to construe section 96(1), as amended, as not being applicable to the incumbent DPP, the court would need to insert

words to the effect that "the amendment is not applicable to the existing holder of the office of DPP by reason of the fact that at the commencement of the enactment she [had] already passed the age of 60". He argued that to do this would involve this court writing words into the provision, which is impermissible.

[251] Mr Leys also shared the opinion of the appellant that there is no scope for reading down the amending Act to exclude the incumbent DPP.

Analysis

[252] The concept of reading down was accurately explained in the case of **AG of Ontario v G** as follows:

> "[113] Reading down is when a court limits the reach of legislation by declaring it to be of no force and effect to a precisely defined extent. Reading down is an appropriate remedy when 'the offending portion of a statute can be defined in a limited manner' (Schachter [1992] 2 SCR 679 at 697) …"

[253] The purpose of reading down or disapplying the reach of a statute is to conform to a constitutional limitation. The applicability of this principle must be considered against the background of the respondents' submission, the essence of which is that section 2(1) would only be valid if it is declared to have a narrower meaning which can be achieved by a construction that excludes the incumbent DPP. However, in our view, the section, when given its ordinary meaning, clearly captures the incumbent DPP and is not unconstitutional by virtue of her inclusion. Further, we are not of the view that section 2 of the amending Act is retrospective. Accordingly, there is no need to reduce the scope of the provision to conform with the Constitution, and reading down would improperly intrude on Parliament's legislative objective.

[254] Ground of appeal (g) of the counter-notice of appeal, therefore, fails.

6. Did the Full Court give the parties a reasonable opportunity to make representations insofar as it concerns its finding that section 2(2) of the amending Act granted the incumbent DPP the power to give herself an extension of her term in office? (Ground xv of the appellant's notice and grounds of appeal)

The submissions

[255] The appellant contended that the interpretation adopted by the Full Court of section 2(2) of the amending Act, as giving the incumbent DPP an election to remain in office beyond the prescribed retirement age, was neither raised nor argued by any party. King's Counsel submitted that the authority of **Sans Souci Limited v VRL Services Limited** [2012] UKPC 6 ('**Sans Souci**') emphasised the duty of the court to give each party a reasonable opportunity to be heard on any relevant matter. He argued that, notwithstanding this requirement, the court did not invite submissions from the parties on the meaning and import to be given to the section.

[256] Mr Powell, for the respondents, agreed that no submission was raised that section 2(2) conferred on the incumbent DPP a power to extend her term of office. However, he submitted that there was every opportunity to address the interpretation of section 2 generally in the Full Court, and the parties did, in fact, make extensive submissions on this, though not from the perspective articulated by the Full Court. Furthermore, he submitted that this point is a non-issue as the parties are nevertheless still able to address the issue before this court, which is the appropriate course of action for a disgruntled, unsuccessful litigant.

Analysis

[257] The essence of the appellant's complaint is that the Full Court arrived at a construction of section 2(2) that was not advanced by any of the parties, and the Full Court did not invite submissions from them regarding the court's interpretation. The respondents did not support this claim and highlighted the fact that the hearing before the Full Court was scheduled for four days and ended in three days. The respondents further noted that the issue of section 2(2) not being applied to allow the incumbent DPP

to extend her tenure was the subject of the relief claimed by the respondents and argued by them in the court below. Accordingly, the appellant had ample opportunity to make submissions on the issue.

[258] The complaint by the appellant that he was not given a "reasonable opportunity to make representations" regarding the Full Court's interpretation of section 2(2) is a complaint relating to the right to be heard, albeit in respect of a very narrow issue.

[259] The right to a fair trial is afforded by the Constitution, and similar rights are protected by the rules of natural justice and the common law. An entitlement to a fair procedure was undoubtedly protected by common law rules in this case, and it may be argued that this was crucial since constitutional issues were being examined. The right to be heard is an integral component of a fair trial. This is undisputed. The case of **Sans Souci** considered this principle but is of very limited assistance because it examined the principle in the context of the right of a litigant to be heard on the critically important issue of costs.

[260] Depending on the nature of a case and the issues raised therein, there may be instances in which it will be appropriate for the court to allow the parties to give submissions on an issue that was not raised by either party and on which the court intends to base its decision. However, we are not aware of, nor have we been directed to any legal authority that supports a general principle that where parties have made submissions on an issue, the court is required to have them comment on any preliminary view it may have of that issue, before it reaches a final position, merely because it was not an argument raised or advanced by a party. The considerations of the court as to when to seek further submissions on a particular issue will vary and be case-specific.

[261] In examining whether the Full Court should have allowed the parties to be heard on the court's interpretation of section 2(2) of the amending Act, it must be appreciated that in the exercise being undertaken by that court, it was tasked with determining what

was constitutionally permissible by the amending Act. Consequently, the Full Court needed to consider the proper interpretation to be given to section 2(2).

[262] In this case, the parties had the opportunity to make oral and written submissions to that court regarding what they thought was the proper construction to be placed on section 2(2). Since the matter was one of construction, each party in advancing his suggested interpretation, also had the right to advance the reason or reasons why any interpretation other than that which was being proposed ought not to be adopted by the Full Court. The fact that the parties did not avail themselves of this opportunity, whether because they did not anticipate the Full Court's interpretation or for any other reason, is not, in our view, a proper ground of complaint.

[263] Where, during the course of a hearing, a court forms the view that a position that either party has not raised may deserve consideration, it is usual that the court will ask counsel to comment on that alternative view. However, it must also be appreciated that the views and conclusions reached by a court, and especially a panel of judges, are usually not arrived at during the cut and thrust of a hearing. They are usually confirmed later, after distilling all the submissions of counsel, the relevant authorities, and consultation between the members of the panel. Except in clear cases where the interests of justice so require, it is undesirable that after the conclusion of a hearing, a court should solicit from the parties their views on any of the court's preliminary opinions before the court has considered all the issues in their entirety.

[264] In our opinion, the right to be heard, applied in the context of the hearing of the issues before the Full Court, was satisfied by the parties having had the opportunity to make submissions to that court regarding what they thought was the proper construction to be given to section 2(2). The court heard their submissions, considered them, and opted for its independent view of the effect of section 2(2).

[265] If a party concluded that the construction applied by the Full Court was wrong, then the solution was to challenge the basis of the court's conclusion and seek an

appropriate remedy, as has been done in this case. Accordingly, the review of the Full Court's conclusion has been properly triggered and was addressed separately.

[266] Ground of appeal xv, therefore, fails.

7. Does "consultation" as required by section 96(1)(b) of the Constitution mean "agreement" between the Prime Minister and the Leader of the Opposition? (Ground xvi of the appellant's notice and grounds of appeal)

The submissions

[267] In reference to the process of granting an extension to the term of the DPP, the appellant took issue with the finding of the Full Court at para. [160] of its judgment that "…[t]he only lawful way to extend the tenure of a DPP is by way of an agreement between the Prime Minister and Opposition Leader". It was submitted that this interpretation is contrary to the consultation process set out in section 32(5) of the Constitution, which does not require an agreement between the Prime Minister and the Leader of the Opposition for there to be an extension. It was posited that the only agreement contemplated within the section is between the Prime Minister and the DPP regarding the terms of the extension. In support of this position, reliance was placed on the case of **Whitfield**, which referred to the recent text of Dr Lloyd G Barnett, The Jamaican Constitution, Basic Facts, Principles and Questions (Second Edition).

[268] On the other hand, the respondents submitted that the Full Court was arguably correct in finding that agreement was required. However, the respondents indicated that they did not advance or rely on that argument before the Full Court or before this court, as it was not necessary for their case. Accordingly, the respondents did not seek to support the correctness of the Full Court's conclusion on this issue with any vigour.

Analysis

[269] Regarding this issue of whether "consultation" as required by section 96(1)(b) of the Constitution means "agreement" between the Prime Minister and the Leader of the Opposition, we have noted with interest the analysis in the case of **Whitfield**. In

Whitfield, the Supreme Court of the Bahamas considered article 96(1) of that State's Constitution, which requires a justice of the Supreme Court to retire at the age of 65 years. The proviso to that section enables the Governor-General, acting on the recommendation of the Prime Minister after consultation with the Leader of the Opposition, to permit a justice who attains that age to continue in office until a later age not exceeding 67 years, as may have been agreed between them.

[270] The facts of that case in summary are that before the Chief Justice attained the retirement age of 65 years, he reached an agreement with the Prime Minister that he would continue until the age of 67. By inadvertence, the Prime Minister did not mention this agreement to the Leader of the Opposition until after the Chief Justice had reached the retirement age of 65 years. The Leader of the Opposition declined to consent to the agreement and advised the Governor-General of his position. That notwithstanding, the Governor-General issued an instrument permitting the Chief Justice to continue in office until his 67th birthday.

[271] Following a general election, an election petition was issued by the Leader of the Opposition, which was listed for hearing in the Election Court comprised of the Chief Justice and another justice of the Supreme Court. The Leader of the Opposition then sought a declaration by an originating summons that the Chief Justice had not been validly permitted to continue in office after attaining the age of 65. Gonsalves-Sabola J, in his consideration of the merits of the case, concluded that the declaration sought by the plaintiff ought not to be granted. The position advanced by the plaintiff was that article 96(1) of the Constitution contemplated that there must be an agreement between the Prime Minister and the Leader of the Opposition concerning the Chief Justice's continuance in office after he attained the age of 65 years. The learned judge rejected this position and opined that where the proviso to article 96(1) referred to the agreement between "them", it contemplated that the persons who must agree to the age at which a justice will continue in office beyond the age of 65 are the Prime Minister and the justice himself. The opinion expressed by the learned first instance judge Gonsalves-Sabola J appears to be in keeping with the construction that the term "consultation" naturally

implies discussion and consideration, but not obligatory agreement. On appeal, the Court of Appeal of the Bahamas found it unnecessary and undesirable to address the issue. This court has not been provided with any authority contrary to the position expressed by Gonsalves-Sabola J.

[272] Although the respondents are not relying on the resolution of this issue to support their position, we accept that the Full Court did state incorrectly at para. [160] of its judgment that there should be an agreement between the Prime Minister and the leader of the Opposition as the Constitution speaks to consultation. Accordingly, we approve the principle set out in **Whitfield** by Gonsalves-Sabola J. This ground of appeal, therefore, succeeds.

Conclusion

[273] It is our determination that the Full Court was correct that section 2(1) of the amending Act was validly passed. It did not breach the separation of powers principle, or any other fundamental tenet of the Constitution, neither did it infringe any of the values (such as the basic structure doctrine) of a Westminster model constitution. It was the product of the lawful exercise by the Legislature pursuant to section 49(4)(b) of the Constitution. No justiciable cause was identified to lead to a reasonable conclusion that it was done for an improper purpose. The incumbent DPP, whose tenure had been previously extended to age 63 using the constitutionally mandated process, was lawfully in office and entitled to all the benefits attendant on such an extension, including the increased age for retirement by virtue of section 2(1). There is no basis to read down section 2(1) as not applying to the incumbent DPP.

[274] Concerning section 2(2), we have determined that the Full Court erred in their interpretation, by their conclusion that its effect was to give the incumbent DPP an improper extension of her tenure. It is a transitional provision that will no longer be relevant once the incumbent DPP leaves office. It merely expressly preserved her right to retire before the age of 65 years. Accordingly, it does not give her an election to remain

in office as she sees fit, and for that reason, it does not contravene the extension mechanism set out in the pre-amendment section 96(1).

[275] The appeal should, therefore, be allowed and the counter-appeal dismissed. We are of the view that having been successful on the appeal and counter-appeal, the appellant is entitled to costs both here and in the court below by virtue of rule 64.6(1) of the Civil Procedure Rules, 2002, which provides that the general rule is to order the unsuccessful party to pay the costs of the successful party. However, if the respondents and/or intervener are of the opinion that a different costs order should be made, they are permitted to file written submissions within 14 days of the date of the orders of the court.

Order

[276] We, therefore, order as follows:

1. The appeal is allowed.
2. It is declared that section 2(2) of the Constitution (Amendment of Sections 96(1) and 121(1)) Act, 2023 is a valid constitutional amendment.
3. Judgment entered for the appellant.
4. The counter-appeal is dismissed.
5. We affirm the decision of the Full Court that section 2(1) of the Constitution (Amendment of Sections 96(1) and 121(1)) Act, 2023 is a valid constitutional amendment.
6. Accordingly, given the failure of the Full Court to so declare in the proceedings below, and for the avoidance of doubt, it is declared that section 2(1) applies to the incumbent DPP.
7. Costs of the appeal and costs below to the appellant to be paid by the respondents and to be agreed or taxed unless the respondents within 14 days of the date of this order file and serve written submissions for a different order to be made in relation to costs. The appellant shall file written submissions in response to the respondents' submissions within seven days of service upon them of the

respondents' submissions. The court will thereafter consider and rule on the written submissions.

8. The court would make no order as to costs concerning the intervener unless within 14 days of the date hereof, the intervener or any other party files submissions for a different costs order to be made.
9. If no submissions are made within the time specified at paras. 7 and 8 above for different costs orders to be made, the orders made herein as to costs shall stand as the final order of the court.

Appendix

Section 49 of the Constitution:

> "49. (1) Subject to the provisions of this section Parliament may by Act of Parliament passed by both Houses alter any of the provisions of this Constitution or (in so far as it forms part of the law of Jamaica) any of the provisions of the Jamaica Independence Act, 1962.
>
> (2) In so far as it alters -
>
> (a) sections 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, subsection (3) of section 48, sections 66, 67, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 94, subsections (2), (3), (4), (5), (6) or (7) of section 96, sections 97, 98, 99, subsections (3), (4), (5), (6), (7), (8) or (9) of section 100, sections 101, 103, 104, 105, subsections (3), (4), (5), (6), (7), (8) or (9) of section 106, subsections (1), (2), (4), (5), (6), (7), (8, (9) or (10) of section 111, sections 112, 113, 114, 116, 117, 118, 119, 120, subsections (2), (3), (4), (5), (6) or (7) of section 121, sections 122, 124, 125, subsection (1) of section 126, sections 127, 129, 130, 131, 135 or 136 or the Second or Third Schedule to this Constitution; or
>
> (b) section 1 of this Constitution in its application to any of the provisions specified in paragraph (a) of this subsection,
>
> a Bill for an Act of Parliament under this section shall not be submitted to the Governor-General for his assent unless a period of three months has elapsed between the introduction of the Bill into the House of Representatives and the commencement of the first debate on the whole text of that Bill in that House and a further period of three months has elapsed between the conclusion of that debate and the passing of that Bill by that House.

(3) In so far as it alters

(a) this section;

(b) sections 2, 34, 35, 36, 39, subsection (2) of section 63, subsections (2), (3) or (5) of section 64, section 65, or subsection (1) of section 68 of this Constitution;

(c) section 1 of this Constitution in its application to any of the provisions specified in paragraph (a) or (b) of this subsection; or

(d) any of the provisions of the Jamaica Independence Act, 1962,

a Bill for an Act of Parliament under this section shall not be submitted to the Governor-General for his assent unless-

(i) a period of three months has elapsed between the introduction of the Bill into the House of Representatives and the commencement of the first debate on the whole text of that Bill in that House and a further period of three months has elapsed between the conclusion of that debate and the passing of that Bill by that House, and

(ii) subject to the provisions of subsection (6) of this section, the Bill, not less than two nor more than six months after its passage through both Houses, has been submitted to the electors qualified to vote for the election of members of the House of Representatives and, on a vote taken in such manner as Parliament may prescribe, the majority of the electors voting have approved the Bill.

(4) A Bill for an Act of Parliament under this section shall not be deemed to be passed in either House unless at the final vote thereon it is supported-

(a) in the case of a Bill which alters any of the provisions specified in subsection (2) or subsection (3) of this section by the votes of not less than two-thirds of all the members of that House, or

(b) in any other case by the votes of a majority of all the members of that House.

(5) If a Bill for an Act of Parliament which alters any of the provisions specified in subsection (2) of this section is passed by the House of Representatives-

(a) twice in the same session in the manner prescribed by subsection (2) and paragraph (a) of subsection (4) of this section and having been sent to the Senate on the first occasion at least seven months before the end of the session and on the second occasion at least one month before the end of the session, is rejected by the Senate on each occasion, or

(b) in two successive sessions (whether of the same Parliament or not) in the manner prescribed by subsection (2) and paragraph (a) of subsection (4) of this section and, having been sent to the Senate in each of those sessions at least one month before the end of the session, the second occasion being at least six months after the first occasion, is rejected by the Senate in each of those sessions,

that Bill may, not less than two nor more than six months after its rejection by the Senate for the second time, be submitted to the electors qualified to vote for the election of members of the House of Representatives and, if on a vote taken in such manner as Parliament may prescribe, three-fifths of the electors voting approve the Bill, the Bill may be presented to the Governor-General for assent.

(6) If a Bill for an Act of Parliament which alters any of the provisions specified in subsection (3) of this section is passed by the House of Representatives-

(a) twice in the same session in the manner prescribed by subsection (3) and paragraph (a) of subsection (4) of this section and having been sent to the Senate on the first occasion at least seven months before the end of the session and on the second occasion at least one month before the end of the session, is rejected by the Senate on each occasion, or

(b) in two successive sessions (whether of the same Parliament or not) in the manner prescribed by subsection (3) and paragraph (a) of subsection (4) of this section and, having been sent to the Senate in each of those sessions at least one month before the end of the session, the second occasion being at least six months after the first occasion, is rejected by the Senate in each of those sessions,

that Bill may, not less than two nor more than six months after its rejection by the Senate for the second time, be submitted to the electors qualified to vote for the election of members of the House of Representatives and, if on a vote taken in such manner as Parliament may prescribe, two-thirds of the electors voting approve the Bill, the Bill may be presented to the Governor-General for assent.

(7) For the purposes of subsection (5) and subsection (6) of this section a Bill shall be deemed to be rejected by the Senate if-

(a) it is not passed by the Senate in the manner prescribed by paragraph (a) of subsection (4) of this section within one month after it is sent to that House; or

(b) it is passed by the Senate in the manner so prescribed with any amendment which is not agreed to by the House of Representatives.

(8) For the purposes of subsection (5) and subsection (6) of this section a Bill that is sent to the Senate from the House of Representatives in any session shall be deemed to be the same Bill as the former Bill sent to the Senate in the same or in the preceding session if, when it is sent to the Senate, it is identical with the former Bill or contains only such alterations as are specified by the Speaker to be necessary owing to the time that has elapsed since the date of the former Bill or to represent any amendments which have been made by the Senate in the former Bill.

(9) In this section-

(a) reference to any of the provisions of this Constitution or the Jamaica Independence Act, 1962, includes references to any law that alters that provision; and

(b) 'alter' includes amend, modify, re-enact with or without amendment or modification, make different provision in lieu of, suspend, repeal or add to."

Section 95(1) of the Constitution:

"The Director of Public Prosecutions shall receive such emoluments and be subject to such other terms and conditions of service as may from time to time be prescribed by or under any law:

Provided that the emoluments and terms and conditions of service of the Director of Public Prosecutions, other than allowances that are not taken into account in computing pensions, shall not be altered to his disadvantage during his continuance in office."