COURT OF APPEAL
TURKS AND CAICOS ISLANDS
CIVIL

CL-AP 6/20

BETWEEN:
ATTORNEY GENERAL OF THE TURKS AND CAICOS ISLANDS

APPELLANT

AND

MICHAEL EUGENE MISICK, FLOYD BASIL HALL, MCALLISTER EUGENE HANCHELL, LILLIAN BOYCE, JEFFREY CHRISTOVAL HALL, CLAYTON STANFIELD GREENE, THOMAS CHALMERS MISICK, LISA MICHELLE HALL AND MELBOURNE ARTHUR WILSON

RESPONDENTS

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CL-AP 7/20

BETWEEN:
MICHAEL EUGENE MISICK, FLOYD BASIL HALL, MCALLISTER EUGENE HANCHELL, LILLIAN BOYCE, JEFFREY CHRISTOVAL HALL, CLAYTON STANFIELD GREENE, THOMAS CHALMERS MISICK, LISA MICHELLE HALL AND MELBOURNE ARTHUR WILSON

APPELLANTS

AND

ATTORNEY GENERAL OF THE TURKS AND CAICOS ISLANDS

RESPONDENT

BEFORE:	**Sir Elliott Mottley**	**President**
	The Hon. Mr. Justice Stollmeyer	**Justice of Appeal**
	The Hon. Mr. Justice Adderley	**Justice of Appeal**

APPEARANCES:
CL-AP 6/20
Andrew Mitchell, Q.C; Quinn Hawkins; Kate Duncan; Latisha Williams for the Appellants
Ariel Missick, Q.C; Selvyn Hawkins for the Respondents

CL-AP 7/20
Ariel Missick, Q.C; Selvyn Hawkins for the Appellants
Andrew Mitchell, Q.C; Quinn Hawkins; Kate Duncan; Latisha Williams for the Respondents

HEARD: 21, 22, 23, 24 and 27 July, 2020
DELIVERED ON: 31 August, 2020

JUDGMENT

Mottley P:

1. In these appeals the appellant in Civil Appeal 6/20 and the respondent in Civil Appeal 7/20 is referred to as "Attorney General". The respondents in Civil Appeal 6/20 and the appellants in Civil Appeal 7/20 are referred to as "Misick et al". In so doing, I mean no disrespect either to Mr. Michael Misick or any of the other respondents/appellants but do so for the sake of convenience in referring to the respondents/appellants in these appeals.

2. Civil Appeal 7/20 was heard at the conclusion of Civil Appeal 6/20. These appeals arose out of the judgment of Madam Justice Lobban-Jackson given on 18 June 2020, following a trial which lasted 9 days. The judge declared and ordered as follows:

    1. *That Regulation 4(6) of the Emergency Powers (COVID-19) (Court Proceedings) Regulations 2020 is ultra vires the Governor's powers under the Constitution of the Turks and Caicos Islands, the Emergency Powers Ordinance and the Emergency Powers 2017 Order, to the extent that it purports to confer power on a judge of the Supreme Court to conduct proceedings while sitting outside of its territorial boundaries.*
    2. *That the said Regulation 4(6) is of no legal effect.*

    The judge declined to make any of the other declarations sought by the applicants.

3. In the Amended Originating Summons re-dated 15 May 2020, Misick et al sought the following relief:

    1. *A declaration that Regulation 4(6) of the Regulations constitutes an unlawful infringement by the Governor with the Plaintiffs' right to protection of the*

law, including their right to a fair hearing in the Proceedings and the right against irrational, unreasonable and arbitrary exercise by the Governor of his powers under the Constitution, the Ordinance, and the Order.

2. *A declaration that Regulation 4(6) contravenes the principle of separation of powers as it is specifically directed at the Proceedings and made for the purpose of directing and/or enabling, permitting, soliciting, and encouraging the judge in the Proceedings to conduct the proceedings from Jamaica during the period that the Regulations are in force.*
3. *A declaration that Regulation 4(6) is ultra vires the Governor's powers under the Constitution, the Ordinance and the Order in that it purports to confer power on the Supreme Court to conduct proceedings outside of its territorial boundaries.*
4. *A declaration that Regulation 4(6) violates international law and the territorial jurisdiction of Jamaica, a sovereign State, by purporting without the consent of the Parliament of Jamaica to establish a court/courtroom of the Supreme Court of the Turks and Caicos Islands ("TCI") in Jamaica.*
5. *A declaration that to the extent that Regulation 4(6) seeks to direct and/or enable the judge in the Proceedings to revisit his decision to adjourn the trial to 22nd June 2020 or by further order of the judge himself, it violates the Plaintiffs' rights to due process and/or their legitimate expectation that the Proceedings would not be resumed save by orders competently made by the Judge seised of the conduct of the Proceedings and sitting in the TCI.*
6. *A declaration that to the extent that Regulation 4(6) seeks to direct and/or enable the judge in the Proceedings to resume sitting in the Proceedings outside of the territorial boundaries of the TCI it violates the Plaintiffs' rights to due process and equality of treatment, and/or their legitimate expectation that they would be able to present their evidence and case in the same way as the prosecution and its witnesses.*
7. *Such Orders and Directions as the Court may think appropriate in this particular case.*

8. *That the costs of and incidental to this application be paid by the Defendant.*

4. Subsequent to the making of the Declarations set out in paragraph 2 above, the Attorney General on 20 June 2020, filed a Notice and Grounds of Appeal (Civil Appeal 6/20). The Grounds of Appeal are set out below:

1. *The judge failed to consider or explain, having been invited to do so, why the principles set out in the persuasive (but not binding) decision of the Court of Appeal of British Colombia in the case of Endean v Attorney General did not apply in the Turks and Caicos Islands, indeed the judge erred in not referring to the relevant parts of the decision in her judgment at all;*
2. *The judge failed to consider and apply the purposive principle of statutory interpretation to the said Regulations, having been invited to do so, consistent with the state of public emergency and the clear intentions as expressed by the Chief Justice in her note to the Honourable Attorney General when expressing the need for regulatory assistance to enable the courts to operate;*
3. *The judge failed to consider and apply the mischief rule, when considering the application of Regulation 4(6) having been invited to do so;*
4. *The judge held, contrary to the clear intention of regulation 4(6) read as a whole, that the intention of the regulation was to create a court outside the Turks & Caicos Islands, yet when read as a whole the purpose and intent of the regulation is to enable a judicial officer to "sit" only when linked to the recording system in the court in the Turks & Caicos Islands and therefore only when so linked to have the authority of the Court in the Turks and Caicos Islands.*

5. The Notice and Grounds of Appeal filed on behalf of Misick et al (Civil Appeal No. 7/20) contained the following Grounds of Appeal:

(a) A declaration that Regulation 4(6) of the Emergency Powers (COVID-19) (Court Proceedings) Regulations 2020 ("the Regulations") constitutes an unlawful infringement by the Governor with the Plaintiffs' right to

protection of the law, including their right to a fair hearing in the Proceedings and the right against irrational, unreasonable and arbitrary exercise by the Governor of his powers under the Constitution, the Ordinance, and the Order.

(b) A declaration that Regulation 4(6) contravenes the principle of separation of powers as it is specifically directed at the Proceedings and made for the purpose of directing and/or enabling, permitting, soliciting, and encouraging the judge in the Proceedings to conduct the proceedings from Jamaica during the period that the Regulations are in force.

(c) A declaration that Regulation 4(6) violates international law and the territorial jurisdiction of Jamaica, a sovereign State, by purporting without the consent of the Parliament of Jamaica to establish a court/courtroom of the Supreme Court of the Turks and Caicos Islands ("TCI") in Jamaica.

(d) A declaration that to the extent that Regulation 4(6) seeks to direct and/or enable the judge in the Proceedings to resume sitting in the Proceedings outside of the territorial boundaries of the TCI it violates the Plaintiffs' right to due process and equality of treatment, and/or their legitimate expectation that they would be able to present their evidence and case in the same way as the prosecution and its witnesses.

Para C was abandoned.

6. The Governor of the Turks and Caicos Islands on 20 March 2020, on the advice of the Cabinet exercised the powers conferred on him by section 3(1) the Emergency Powers Ordinance ("EPO"). Section 3(1) of the EPO provides as follows:

Proclamation of Emergency

3. (1) If the Governor is satisfied that a public emergency has arisen as a result of the occurrence of any earthquake, hurricane, flood, fire, outbreak of pestilence, outbreak of infectious disease, or other calamity whether similar to the foregoing or not, or that any action has been taken or is immediately threatened by any person or body of persons of such a nature

and on so extensive a scale as to be likely to endanger the public safety or to deprive the community or any substantial part of the community of supplies or services essential to life, the Governor may by proclamation (hereinafter called a Proclamation of Emergency) declare that a state of emergency exists.

The Governor made the declaration for the purpose of preventing, controlling or containing the spread of COVID-19 in the Turks & Caicos Islands.

7. The Proclamation of Emergency, which was made on 20 March 2020, was to take effect on 24 March 2020, at midnight. The Proclamation stated:

"PROCLAMATION OF EMERGENCY

(Proclamation 1 of 2020)

(Legal Notice 16 of 2020)

WHEREAS section 3(1) of the Emergency Powers Ordinance provides that if the Governor is satisfied that a public emergency has arisen as a result of the occurrence of any earthquake, hurricane, flood, fire, outbreak of pestilence, outbreak of infectious disease, or other calamity whether similar to the foregoing or not, or that any action has been taken or is immediately threatened by any person or body of persons of such a nature and on so extensive a scale as to be likely to endanger the public safety or to deprive the community or any substantial part of the community of supplies or services essential to life, the Governor may by proclamation (hereinafter called a Proclamation of Emergency) declare that a state of emergency exists;"

8. Although a number of Regulations were issued, this appeal deals with the Emergency Powers (COVID-19) Court Proceedings Regulations 2020. This was contained in Legal Notice 32 of 2020 and was made by the Governor on 17 April 2020, having consulted the Cabinet under section 4(1) of the Emergency Powers Ordinance and article 6(1) of the Emergency Powers (Overseas Territories) Order 2017 (S.I. 2017 No/ 181).

9. Regulations 1, 2, 3 and 4 which deal with Citation, Commencement and Expiry, Interpretation, Purposes of Regulation, Remote Sitting respectively are set out in detail below:

> ***TURKS AND CAICOS ISLANDS***
>
> ***EMERGENCY POWERS (COVID-19) (COURT PROCEEDINGS) REGULATIONS 2020***
>
> *(Legal Notice 32 of 2020)*
>
> ***MADE*** *by the Governor under section 4(1) of the Emergency Powers Ordinance and article 6(1) of the Emergency Powers (Overseas Territories) Order 2017 (S.I. 2017 No. 181), having consulted the Cabinet.*
>
> ***Citation, commencement and expiry***
>
> ***1.*** *(1) These Regulations may be cited as the Emergency Powers (COVID-19) (Court Proceedings) Regulations 2020 and shall come into operation on 20th April 2020.*
>
> *(2) These Regulations shall expire on 31st December 2020 or on such date as the Governor appoints by Notice published in the Gazette, whichever is sooner.*
>
> ***Interpretation***
>
> ***2.*** *In these Regulations—*
>
> *"court" means the Magistrate's Court, the Supreme Court or the Court of Appeal;*
>
> *"Covid-19 means the novel Coronavirus (2019-n CoV);*
>
> *"video and audio link" means facilities (including closed circuit television), having recording capability, that enable audio and visual communication between persons at different places and includes video media such as Microsoft Teams, Zoom, Skype or other such media with recording capability approved by the court.*
>
> ***Purposes of Regulations***
>
> ***3.*** *These Regulations put measures in place during the Covid-19 pandemic to ensure that the administration of justice, including enforcement of orders, and access to justice is carried out so as not to endanger public health.*

Remote sitting

4. *(1) During the period in which these Regulations are in force, the Chief Justice may make Rules and issue such order or direction as deemed necessary notwithstanding anything contained in section 16 of the Supreme Court Ordinance to ensure—*

(a) full criminal trials are conducted by video and audio link;

(b) the adjournment of all trials;

(c) all civil trials are conducted by video and audio link;

(d) all pre-trial procedures such as sufficiency hearings and plea and direction and readiness hearings are conducted remotely;

(e) accused persons as well as persons ordered to be produced in habeas corpus proceedings appear remotely by video and audio link;

(f) all witnesses including expert witnesses testify/give evidence remotely in the remote manner set up by the court;

(g) all processes, including proposed exhibits are scanned by parties/counsel and filed along with pleadings by email.

(2) A Judge's duty to observe audi alteram partem rule of natural justice is not to be compromised because of the remote sittings.

(3) A Judge's duty to determine matters in a judicial manner in accordance with settled principles of adjudication and in accordance with the Rules of Court and all pertinent Practice Directions is continued.

(4) Rules of evidence shall be adhered to, except where by the agreement of the court, counsel/parties, these will be impracticable, the Judge or Magistrate will then have recourse to judicial discretion in how to proceed.

(5) Court sittings shall be done remotely in the manner provided by Rules or Orders from the Chief Justice.

(6) The courtroom shall include any place, whether in or outside of the Islands, the Judge or Magistrate elects to sit to conduct the business of the court:

Provided always that the video and audio link facility at the said location must be accessible remotely to the court recorder, interpreter in the appropriate cases, parties, counsel and witnesses.

10. On 23 April 2020, Madam Justice Agyemang, Chief Justice, issued Practice Direction No 3 of 2020 in respect of "COVID 19 TEMPORARY PROTOCOL FOR AUDIO-VISUAL COURT HEARING AND RELATED MATTERS". The Practice Direction No. 3 provided *inter alia*, as follows:

PRACTICE DIRECTION NO 3 OF 2020

COVID 19 TEMPORARY PROTOCOLS FOR AUDIO-VISUAL COURT HEARINGS AND RELATED MATTERS

AUTHORITY: This Practice Direction is issued by the Chief Justice acting in conjunction with the Chief Magistrate pursuant to regulations 4 and 9 of the Emergency Powers (COVID-19) (Court Proceedings) Regulations 2020, Legal Notice 32 of 2020, Section 17 of the Supreme Court Ordinance, and section 150 of the Magistrate's Court Ordinance.

INTRODUCTION: This Practice Direction is issued in response to the COVID-19 pandemic, and is aimed at protecting the health and safety of court personnel and court users.

The protocols herein contained establish guidelines and security measures for the conduct of court business electronically, and enable sittings of court remotely.

DURATION: This Practice Direction will be in force from 4th May 2020 until 31st of December 2020, unless sooner varied, revoked or replaced by the Chief Justice.

1. GENERAL MATTERS

1. These directions are not meant to do away entirely with in-person hearings.

2. It is within the sole discretion of the Judge, Magistrate or Registrar having regard to the COVID 19 pandemic and the physical distancing protocols in the Emergency Powers (Covid-19)(No. 3) Regulations 2020 as well as the

health and safety of him or herself, court staff and court users, to require an in-person hearing.

3. A person summoned to appear before the court shall unless otherwise directed by the court, appear by video and audio link as defined by regulation 2 of the Emergency Powers (COVID-19)(Court Proceedings Regulations 2020. Provided that the video and audio link platform must be a place where documents may be uploaded (such as FILES in Microsoft Teams).

4. It is recommended that hearings be held remotely using the Microsoft Teams platform. The choice of platform, including Zoom or Skype Business, is however within the discretion of the Judge, Magistrate or Registrar.

5. The Registrar or the Clerk at the Magistrate's Court (as the case maybe) shall communicate the date and time scheduled for the hearing to all parties/counsel three clear days before the scheduled date unless the time is extended or abridged by the Judge or Magistrate.

6. The Registrar/Court Clerk/Clerk of Court at the Magistrate's Court (as the case may be) shall set up the hearing, allow access into the hearing, end the hearing, and produce a record of the hearing.

7. Parties, counsel, witnesses and any necessary person to the hearing, including an officer from the Department of Social Development, shall be granted access to the hearing.

8. Except where the proceedings are held in camera, the hearing may be accessible to the media and to members of the public upon their application to the Registrar or Clerk of Court (as the case may be).

i. The Registrar/Court Clerk/Clerk of Court at the Magistrate's Court may grant access to members of the media and the public upon their request in writing submitted not less than twenty-four hours before the hearing.

….

4. CRIMINAL CASES

1. All jury trials already commenced are hereby adjourned sine die, until otherwise directed.

2. No new jury trials shall take place within the period of this Practice Direction.

3. New criminal trials may be heard by Judge alone where determined appropriate, in accordance with section 58 of the Criminal Procedure Ordinance, provided that a defendant may opt for a jury trial at a later date of no more than six months.

4. Every defendant whether or not in custody, and whether or not represented, shall appear for every pre-trial proceeding as well as the conduct of his or her trial by video link.

i. For the avoidance of doubt, a trial includes a sentencing procedure by video link.

5. It is the responsibility of counsel to ensure such appearance by a represented person by video link at trial.

6. Every defendant in Police custody shall appear before the court remotely from the Police Station in the presence of not less than two (2) Police Officers.

7. Every defendant in Her Majesty's Prison shall appear before the court remotely from the correctional facility.

8. The Superintendent of Prisons shall ensure that counsel shall, if such request is made, have access to the place the defendant testifies from.

11. Under the caption CIVIL CASES in the Practice Directions, it is provided that:

3. CIVIL CASES

1. The Registrar shall list the cases for hearing and serve the parties and counsel by electronic means: email.

2. Any party objecting to having his or her matter heard remotely may bring an application three clear days before the return date, to oppose the hearing.

3. If the other side opposes the application, the judge will hear arguments on the date scheduled for hearing, and give his or her ruling on the application.

4. If the opposing side also opposes hearing, the Registrar may be notified to adjourn the case to a date no later than sixty days.

5. After the sixty days, it will be in the discretion of the Judge or Magistrate whether or not to conduct the hearing remotely.

12. In para 6 of her judgment, Madam Justice Lobban-Jackson in setting out the factual background listed the history of events leading to the constitutional challenge by Misick et al. Inasmuch as no issue was taken by either side with this statement, I adopt what is contained in that paragraph and see no need to set this out again in detail.

Civil Appeal 6/20

13. In Civil Appeal 6/20, the issue is whether the declaration of the judge that Regulation 4(6) is *ultra vires* the Governor's powers under the Constitution, the Emergency Powers Ordinance and the Order in that it purports to confer powers on the Supreme Court to conduct proceedings outside of its territorial boundaries, is correct.

14. In her judgment, the judge stated the following:

"[38] It is against the legislative framework set out above that the court must consider the constitutional validity of Regulation 4(6). Under s.21(1) of the Constitution, if a person alleges that any of his fundamental right has, is being or is likely to be contravened in relation to him or her, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress. In the circumstances the Plaintiff's challenge is not premature.

[39] The legislative scheme that applies to the Supreme Court is not the same as that of the Court of Appeal, the clear words of s.80(2) of the Constitution state that the Court of Appeal may sit either in the Islands or in such places outside the Islands as the President may from time to time direct. No similar provisions exist in the Constitution in relation to the

Supreme Court. The parameters of the court's jurisdiction are then set out in s.3 of the Supreme Court Ordinance. The wording of this section must be given its plain and ordinary meaning when it says that in addition to any jurisdiction previously, by it or conferred upon it by this Ordinance or any other law the court, shall have "within the Islands" the jurisdiction vested in the High Court of Justice in England. When one looks at s 71(1) of the Senior Court Act of 1981, it says that the sittings of the High Court may be held at any place in England and Wales…"

15. The judge later returned to the question of the constitutional validity of Regulation 4(6) and stated:

"[35] Returning to the question of the constitutional validity of Regulation 4(6) which states that the courtroom, shall include any place, whether in or outside the Islands, the Judge or Magistrate elects to sit; the argument presented by the Defendant that the Judge sitting outside the jurisdiction would be "beamed into" the courtroom set up in the Turks and Caicos Islands via electronic means, would not suit the wording of the Regulation. The courtroom is wherever the Judge or Magistrate elects to sit.

[36] Given the legislative frame work previously outlined, Regulation 4(6) ought not to attempt to alter the existing law, where there is no evidence to suggest that it was necessary, proportionate to the threat of the pandemic or urgent to do so, as required by Article 7 of the 2017 Order or indeed reasonably justifiable as required s. 20 of the Constitution.

[37] The Regulation makes no mention of any particular territory, and is worded in such a way as to be of general application both in the Supreme Court and the Magistrate's Court. To say that it was targeted solely at the proceedings and Learned Judge in Jamaica, would be to agree with the submission of Queen's Counsel for the Plaintiff's that the legislation was ad hominem, which I do not. The Learned Judge in the proceedings remains at liberty to conduct the trial in a manner he deems fit.

[It is to be observed that these paras 35, 36 and 37 appear to be numbered out of sequence.]

16. Having referred to what was said by Goepel J in the Court of Appeal in British Columbia in the case of *Endean v. British Columbia,* 2014 BCCA 61 that "*the English common law did not allow English Judges to sit outside their territorial boundaries",* the judge concluded that *"Because of the legislative scheme outlined above… the Turks and Caicos Islands are wedded to the restrictions"*.

17. On the question of the constitutional validity of Regulation 4(6), the judge declared that:

> *[39] For the reasons given in the forgoing discussion, I declare that Regulation 4(6) is ultra vires the Governor's powers under the Constitution, the Emergency Powers Ordinance and the 2017 Order, only to the extent that it purports to confer power on the Supreme Court to conduct proceedings outside of its territorial boundaries.*

18. In arriving at that conclusion, it would appear that the judge accepted that Regulation 4(6) purported to confer power on the Supreme Court to conduct proceedings outside of the territorial boundaries of the Turks and Caicos Islands.

19. In placing that construction on Regulation 4(6), it does not appear that the judge considered placing a purposive construction on Regulation 4(6). Nor did she consider applying the mischief rule to the construction of Regulation 4(6).

20. In my view, the judge ought to have approached the construction of Regulation 4(6) by placing the plain meaning rule. If this construction did not provide an adequate or proper meaning, she was required to adopt a purposive construction.

21. It is stated in the most recent edition of Bennion on Statutory Interpretation (7th Ed.), section 22.1 that:

“(1) The starting point in statutory interpretation is to consider the ordinary meaning of a word or phrase, that is its proper and most known signification.”

However, it is stated that the context may require an alternative meaning to be adopted. In **R (The Good Law Project) v Electoral Commission** [2017] EWHC 2414 at [33], Leggatt LJ said:

"The basic principles are that the words of the statute should be interpreted in the sense which best reflects their ordinary and natural meaning and accords with the purposes of the legislation."

22. The rule relating to the purposive construction is set out in Bennion on Statutory Interpretation at section 11.1 where it is stated:

“Presumption that enactment to be given a purposive construction
(1) In construing an enactment the court should aim to give effect to the legislative purpose.
(2) A purposive construction of an enactment is a construction that interprets the enactment's language, so far as possible, in a way which best gives effect to the enactment's purpose.
(3) A purposive construction may accord with a grammatical construction, or may require a strained construction.”

23. In **DPP v Schildkamp** [1969] 3 All ER 1640, [1971] AC 1, Lord Upjohn observed that:

“The task of the court is to ascertain the intention of Parliament; one cannot look at a section, still less a subsection, in isolation, to ascertain that intention; one must look at all the admissible surrounding circumstances before starting to construe the Act. The principle was stated by Viscount Simonds in A-G v H R H Prince Ernest Augustus of Hanover ([1957] 1 All ER 49 at p 53; [1957] AC 436 at p 461):

"For words, and particularly general words, cannot be read in isolation; their colour and content are derived from their context. So it is that I conceive it to be my right and duty to examine every word of a statute in its context, and I use context in its widest sense which I have already indicated as including not only other enacting provisions of the same statute, but its preamble, the existing state of the law, other statutes in pari materia, and the mischief which I can, by those and other legitimate means, discern that the statute was intended to remedy."

24. Lord Nicholls stated in **R v Secretary of State for the Environment, Transport and the Regions and another, ex parte Spath Holme Ltd** [2001] 1 All ER 195:

"Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context. The task of the court is often said to be to ascertain the intention of Parliament expressed in the language under consideration. This is correct and may be helpful, so long as it is remembered that the 'intention of Parliament' is an objective concept, not subjective. The phrase is a shorthand reference to the intention which the court reasonably imputes to Parliament in respect of the language used. It is not the subjective intention of the minister or other persons who promoted the legislation. Nor is it the subjective intention of the draftsman, or of individual members or even of a majority of individual members of either House. These individuals will often have widely varying intentions. Their understanding of the legislation and the words used may be impressively complete or woefully inadequate. Thus, when courts say that such-and-such a meaning 'cannot be what Parliament intended', they are saying only that the words under consideration cannot reasonably be taken as used by Parliament with that meaning. As Lord Reid said in Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG [1975] 1 All ER 810 at 814, [1975] AC 591 at 613: 'We often say that we are looking for the intention of Parliament, but that is not quite accurate.

We are seeking the meaning of the words which Parliament used.'

In identifying the meaning of the words used, the courts employ accepted principles of interpretation as useful guides. For instance, an appropriate starting point is that language is to be taken to bear its ordinary meaning in the general context of the statute."

25. Further, Lord Nicholls stated:

"…the courts employ other recognised aids. They may be internal aids. Other provisions in the same statute may shed light on the meaning of the words under consideration. Or the aids may be external to the statute, such as its background setting and its legislative history. This extraneous material includes reports of Royal Commissions and advisory committees, reports of the Law Commission (with or without a draft Bill attached), and a statute's legislative antecedents.

Use of non-statutory materials as an aid to interpretation is not a new development. As long ago as 1584 the Barons of the Exchequer enunciated the so-called mischief rule. In interpreting statutes courts should take into account, among other matters, 'the mischief and defect for which the common law did not provide' (see Heydon's Case (1584) 3 Co Rep 7a at 7b, 76 ER 637 at 638).

Nowadays the courts look at external aids for more than merely identifying the mischief the statute is intended to cure.

In adopting a purposive approach to the interpretation of statutory language, courts seek to identify and give effect to the purpose of the legislation. To the extent that extraneous material assists in identifying the purpose of the legislation, it is a useful tool.

This is subject to an important caveat. External aids differ significantly from internal aids. Unlike internal aids, external aids are not found within the statute in which Parliament has expressed its intention in the words in question."

26. Lord Nicholls made it clear that the judge was required to identify the meaning of the words contained in Regulation 4(6) in the context of the Emergency Order. In order to do this, it was necessary to look at the intention of Parliament (in this case the Governor). His Lordship pointed out, this meant "the intention which the court reasonably imputes to Parliament" (the Governor) in respect to the words contained in Regulation 4(6).

27. In constructing Regulation 4(6) the judge was required to examine all the provisions of the Emergency Regulations which would also shed light on what was the intention of the Governor at the time he made the Regulation. Lord Nicholls also indicated that a judge should look at aids external to Regulation 4(6) "such as its background setting and its legislative history".

28. In **Regina (Quintavalle) v Secretary of State for Health** [2003] 2 AC 687, Lord Bingham at para 8 stated:

> *[8] The basic task of the court is to ascertain and give effect to the true meaning of what Parliament has said in the enactment to be construed. But that is not to say that attention should be confined and a literal interpretation given to the particular provisions which give rise to difficulty. Such an approach not only encourages immense prolixity in drafting, since the draftsman will feel obliged to provide expressly for every contingency which may possibly arise. It may also (under the banner of loyalty to the will of Parliament) lead to the frustration of that will, because undue concentration on the minutiae of the enactment may lead the court to neglect the purpose which Parliament intended to achieve when it enacted the statute. Every statute other than a pure consolidating statute is, after all, enacted to make some change, or address some problem, or remove some blemish, or effect some improvement in the national life. The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of*

the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment.

29. Lord Bingham went on to point out that the dissenting opinion of Lord Wilberforce in the **Royal College of Nursing of the United Kingdom v Department of Health and Social Security** [1981] AC 800 may now be treated as authoritative. Lord Wilberforce stated at p. 822:

In interpreting an Act of Parliament it is proper, and indeed necessary, to have regard to the state of affairs existing, and known by Parliament to be existing, at the time. It is a fair presumption that Parliament's policy or intention is directed to that state of affairs. Leaving aside cases of omission by inadvertence, this being not such a case, when a new state of affairs, or a fresh set of facts bearing on policy, comes into existence, the courts have to consider whether they fall within the Parliamentary intention. They may be held to do so, if they fall within the same genus of facts as those to which the expressed policy has been formulated. They may also be held to do so if there can be detected a clear purpose in the legislation which can only be fulfilled if the extension is made. How liberally these principles may be applied must depend upon the nature of the enactment, and the strictness or otherwise of the words in which it has been expressed. The courts should be less willing to extend expressed meanings if it is clear that the Act in question was designed to be restrictive or circumscribed in its operation rather than liberal or permissive. They will be much less willing to do so where the subject matter is different in kind or dimension from that for which the legislation was passed. In any event there is one course which the courts cannot take, under the law of this country; they cannot fill gaps; they cannot by asking the question "What would Parliament have done in this current case - not being one in contemplation - if the facts had been before it?" attempt themselves to supply the answer, if the answer is not to be found in the terms of the Act itself.

30. Lord Bingham later stated:

> *"On the other hand, the adoption of a purposive approach to construction of statutes generally, and the 1990 Act in particular, is amply justified on wider grounds. In Cabell v Markham (1945) 148 F 2d 737, 739 Learned Hand J explained the merits of purposive interpretation:*
> *"Of course it is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing: be it a statute, a contract, or anything else. But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning."*
> *The pendulum has swung towards purposive methods of construction*."

31. From this guidance, it is my opinion that in seeking to construe Regulation 4(6), the judge was required to consider that at the time there was a pandemic and the effects of that pandemic on the socio-economic conditions in the Turks and Caicos Islands.

32. Based on this observation, the judge in my view, was required to examine the reason why the Emergency Order and in particular Regulation 4(6) were necessary. What was the purpose of publishing the Emergency Order.

33. Civil Appeal 6/20 relates to the declaration made by the judge "that Regulation 4(6) of the Emergency Powers (COVID-19) Court Proceedings was ultra vires the Governor's power under the Constitution, the Emergency Power Ordinance and the 2017 Order, only to the extent that it purports to confer power on the Supreme Court to conduct proceedings outside of its territorial boundaries".

34. The sole issue on Civil Appeal 6/20 is the construction of Regulation 4(6). Was the judge correct in the way she construed Regulation 4(6)? The judge placed an

interpretation that, insofar as the Regulation purports to confer power on the Supreme Court to sit outside of the territorial boundaries of the Turks and Caicos Islands it was *ultra vires* to the power of the Governor under the Constitution, the Emergency Power Ordinance and the Order. The issue therefore, is whether the judge was correct in placing this construction on Regulation 4(6).

35. It is worth, at this stage, repeating Regulation 4(6) which provides:

> *4(6) The courtroom shall include any place whether in or outside of the Islands the Judge or Magistrate elects to sit to conduct the business of the court.*
>
> *Provided always that the video and audio link…. Must be accessible remotely to the court recorder, interpreter in the appropriate cases, parties counsel and witnesses.*

36. In construing Regulation 4(6) it is therefore necessary, in my view, to give it a purposive construction. I begin this exercise by looking at what was the intent in issuing the Regulations. In so doing, I must look at the contents of the Emergency Powers (COVID-19) (Court Proceeding) Regulations 2020. I commence by looking at the Explanatory Note to the Regulation. It is stated that "This Note is not part of the Regulations".

> ***EXPLANATORY NOTE***
>
> *(This Note is not part of the Regulations)*
>
> *These Regulations provide measures to enable remote court trials and for ancillary matters to expand availability of video and audio link in court proceedings.*
>
> *Counsel, parties and all persons accessing court services should bear with the court as they navigate technological challenges which will no doubt improve with time.*
>
> *The measures will enable a wider range of proceedings to be carried out by video, so that courts can continue to function and remain open to the public, without the need for participants to attend in person. This will give judges*

more options for avoiding adjournments and keeping business moving through the courts to help reduce delays in the administration of justice and alleviate the impact on families, victims, witnesses and defendants.

37. In section 24.14 in Bennion on Statutory Interpretation under the rubric Explanatory Notes etc. it is stated *inter alia*:

"(1) Explanatory Notes to an Act may be used to understand the background to and context of the Act and the mischief at which it was aimed."

In **Flora v Wakom (Heathrow) Ltd** [2006] EWCA civ 1103, Lord Justice Brooke, Vice-President stated:

[15] The use that courts may make of Explanatory Notes as an aid to construction was explained by Lord Steyn in R (Westminster City Council) v NASS [2002] UKHL 38 at [2]-[6], [2002] All ER 654, [2002] 1 WLR 2956, see also R (S) v Chief Constable of South Yorkshire Police [2004] UKHL 39 at [4], [2004] 4 All ER 193, [2004] 1 WLR 2196. As Lord Steyn says in the NASS case, Explanatory Notes accompany a Bill on introduction and are updated in the light of changes to the Bill made in the parliamentary process. They are prepared by the Government department responsible for the legislation. They do not form part of the Bill, are not endorsed by Parliament and cannot be amended by Parliament. They are intended to be neutral in political tone: they aim to explain the 4 effect of the text and not to justify it.

[16] The text of an Act does not have to be ambiguous before a court may be permitted to take into account an Explanatory Note in order to understand the contextual scene in which the act is set (NASS, para 5). In so far as this material casts light on the objective setting or contextual scene of the statute, and the mischief to which it is aimed, it is always an admissible aid to construction. Lord Steyn, however, ended his exposition of the value of Explanatory Notes as an aid to construction by saying (at para 6):

"What is impermissible is to treat the wishes and desires of the Government about the scope of the statutory language as reflecting the will of Parliament. The aims of the Government in respect of the meaning of clauses as revealed in Explanatory Notes cannot be attributed to Parliament. The object is to see what is the intention expressed by the words enacted."

38. As stated earlier, the Explanatory Note may be used to understand the background to and context of the Regulations and the mischief at which they are aimed. The Regulations are intended to provide measures to enable remote court trials. In addition, the Regulations were intended to expand the use of technology by making use of video and audio links. The Regulations were intended to enable a **wider** range of proceedings to be conducted by video and audio link. It was intended that the courts would continue to remain open to the public, but function without the need for participants to attend in person.

39. Regulation 3 which has a subheading "**Purposes of Regulations**" provides as follows:

"3. These Regulations put measures in place during COVID-19 pandemic to ensure that the administration of justice including enforcement of orders, and access to justice is carried out not to endanger public health."

The intention is to ensure that during the COVID-19 pandemic, the administration of justice, including trial, continues in a manner that would not endanger public health.

40. By Regulation 4(1), the Chief Justice is empowered to make Rules and issue such orders or directions to ensure that "full criminal trials are conducted by video and audio link." Video and audio link is defined as meaning "facilities (including closed circuit television) having recording capability that enables audio and visual communication between persons at different places. This is a recognition that trial may proceed by video and audio links even though all persons are not physically

in the same place. Traditionally, all persons who are involved in criminal trials were all physically present in the court – courtroom. As technology developed and means of communications (both audio and visual) improved, changes were made to the procedure in criminal trial. Witnesses were permitted to give evidence via video link. (See the provisions of the Audio Visual Link Ordinance Cap 2.08).

41. Regulation 5, for the first time, provided for court sitting to be done remotely in the manner provided by the Rules and Orders made by the Chief Justice. On 23 April 2020, the Chief issued the Practice Direction No. 3 of 2020. In the Preamble it is stated, *inter alia*, that "*it has become necessary to limit, reduce or remove human to human contact in accordance with the physical distancing protocols now in place and the Emergency Powers (COVID-19) (No, 3) Regulation 2020*". Again, it may be inferred that the Regulations are intended to reduce or remove the need for persons to physically attend the court-*courtroom*.

42. Under the caption "GENERAL MATTERS Rule 4" it is recommended that hearings be held remotely. This recommendation suggests that, while in person physical hearings may still take place in a courtroom, it was the recommendation of the Chief Justice that the hearing take place remotely.

43. The Practice Direction is recommending that the hearing be conducted remotely rather than parties and counsel being present in the same courtroom. The object is to prevent the spread of COVID-19 by having people physically present in the courtroom.

44. The overriding intent of the Regulations is to ensure that during the period as specified in Regulation 1, the administration of justice should continue with the changes set out in the Regulations. One reason for these changes is not to endanger public health in the Turks and Caicos Islands. The directions issued by the Chief Justice state that the directions are not meant to do away entirely with in-person hearing. The need for the physical courtroom still remains. A judge has

a discretion to require an in-person hearing but in so doing, he is required to have regard to the COVID-19 pandemic and the physical distancing protocols.

45. The recommendation was that hearings be held remotely using the Microsoft Teams, Zoom, Skype or other such media with recording capability approved by the court. The video and audio link provides for audio and visual communication between persons at different locations. It is however clear from the Regulations that the need for the physical courtroom remains.

46. Regulation 4(5) provides that "*Court sitting shall be done remotely*." In addition, the Chief Justice has recommended that hearings be held remotely. The question arises, 'remotely from where'? The physical courtroom? The definition as set out in paragraph 2 of the regulations is stated that: *"Video and audio link" means facilities (including closed circuit television), having recording capability, that enable audio and visual communication between persons at different places and includes video media such as Microsoft Teams, Zoom, Skype or other such media with recording capability approved by the court."* The proviso to regulation 4(6) states: "*Provided always that the video and audio link facility at the said location must be accessible remotely to the court recorder, interpreter in the appropriate cases, parties, counsel and witnesses.*" In my view, these provisions demonstrate that the physical courtroom is the place from which the court will be connected remotely for the hearing.

47. An accused person who is in custody may appear remotely. What is the position of an accused who is unrepresented by counsel and who does not have access to the facilities for video and audio link? Would such a person be required to attend the physical courtroom or would his trial be adjourned because he does not have the necessary technology to appear remotely?

48. The physical courtroom, in my view, will still have to be used albeit with limited access by the parties, witnesses and the public generally. I therefore approach

the construction of the words "*the courtroom shall include*" with what I have stated above.

49. The proviso to Regulation 4(6) requires that, in order for the place where the judge is sitting to be considered part of the courtroom, certain conditions must be fulfilled. The video and audio link facility which the judge is using must be accessible remotely to the court recorder, parties, counsel and witnesses. In my view, the link must be to the courtroom in order that the place where the judge is sitting be part of the courtroom.

50. It follows from what I have stated that I do not consider that Regulation 4(6) created any court to sit outside the Turks and Caicos Islands. The Regulation 4(6) in my view permits a judge while outside the territorial limits of the Turks and Caicos Islands to sit and preside over a trial, which is taking place in a courtroom within the territorial boundaries of the Turks and Caicos Islands. In so doing, the judge in my view, is doing nothing more than making use of modern technology. The coercive powers of the judge may at all times be enforced within the courtroom. Further, there is but one courtroom and the judge who sits outside the territorial boundary of the Turks and Caicos Islands is conducting one trial which is taking place within the territorial boundaries of the Turks and Caicos Islands.

51. The question that arises in these circumstances is whether a judge who sits outside the territorial limits of the Turks and Caicos Islands, but presides over a trial which is taking place in a courtroom within the Turks and Caicos Islands, offends the English Common Law rule which prevents judges from sitting outside of their territorial boundaries.

52. For the reasons set out below, I am of the view that a judge sitting in the circumstances set out above would not offend the common law rule.

53. Regulation 4(6) declares that wherever the judge sits outside of the territorial limits is part of the 'courtroom' where the trial is being conducted. The proviso to Regulation 4(6) is clearly designed to ensure that at all times, there is a video and audio link between where the judge is sitting and the recorder, parties, counsel and witnesses. Put another way, there must always be a video and audio link between where the judge is sitting (part of the Courtroom) and the recorder, parties, counsel and witnesses (the physical courtroom) in Turks and Caicos Islands.

54. The effect of Regulation 4(6) is that, while the court may be physically split, for all intents and purposes, it is a single courtroom within the territorial boundaries of the Turks and Caicos Islands. In my view, Regulation 4(6) is intended to make clear that there is in fact **one courtroom**. The judge's ability to make coercive orders is in no way compromised because the judge is sitting remotely. The judge's power to punish for contempt in the face of the court is not in my view affected. Even though the judge sits remotely, he is required to observe all the rules of natural justice and to comply at all times with the requirement of the Constitution of Turks and Caicos Islands.

55. Section 6(9) of the Constitution of the Turks and Caicos Islands provides as follows:

> "All proceedings instituted in a court for the determination of the existence or extent of any civil right or obligation or to try any criminal charge including the announcement of the decision of the court; shall be held in public."

56. In my view, the proviso to Regulation 4(6) ensures that at all times there is connection with the physical courtroom within the territorial boundaries of the Turks and Caicos Islands where the parties etc. would appear. Practice Direction No. 3 of 2020 provides for the maintenance of a Record of Proceedings. The Registrar of the Supreme Court or court clerk is charged with the recording of the

proceedings. The recording if not done by the Registrar, shall be turned over to the Registrar at the end of the day's proceeding.

57. The Practice Direction expressly states that except where proceedings are held in camera, the hearing may be accessible to the media and to members of the public upon their application to the Registrar.

58. The provisions which are made by Regulation 4(6) and the Practice Direction ensure that if a judge is presiding outside the territorial boundaries of Turks and Caicos Islands the provision of section 6(9) of the Constitution is not in any way offended.

59. Changes have been made to the common law by the enactment of the Audio Visual Link Ordinance. This Ordinance permits a witness to give evidence by audio and visual links from a remote point in both criminal and non-criminal matters. This is mentioned to show that changes are being made to criminal trials. These changes are taking place having regard to the rapid development of technology such as Microsoft Teams, Zoom, Skype, Webex etc. A developing law must have regard to, and keep pace with the technological developments. I am not suggesting or recommending a change to the long existing common rule relating to sitting of the court outside the territorial boundaries without the intervention of the legislature. It is the realization of the technological development and the need to make use of such development while at the same time adhering to the common law rule. In Regulation 2, Audio Visual Link is defined as meaning *"facilities (including closed circuit television), having recording capability, that enable audio and visual communication between persons at different places and includes video media such as Microsoft Teams Zoom, Skype or other such media with recording capability approved by the court."*

60. In coming to my conclusion, I find solace in the observations of Goepel J in *Endean v. British Columbia,* 2014 BCCA 61, where he stated:

[79] As noted, the province has no objection to a judge who is outside the province conducting a hearing by video conference or other communication medium as long as the hearing itself takes place in a British Columbia courtroom. If for reasons of convenience or otherwise, a judge determines that a matter is to be heard by telephone, video conference or other communication medium, there is I suggest no reason why the judge, counsel or witnesses necessarily need to be physically present in the province as long as the hearing itself takes place in a courtroom in British Columbia. Witnesses and counsel, of course, will have the right to be present in the courtroom and cannot be compelled to attend to a location other than a courtroom in British Columbia.

[80] Such a hearing in my view would not offend the common law rule that prohibits judges from conducting hearings outside of British Columbia; although the judge may be located elsewhere, he or she would be exercising his or her jurisdiction and authority in a hearing taking place in British Columbia. The hearing would respect the open court principle as interested members of the public and media would be able to observe the proceedings in a British Columbia courtroom.

[81] It will be up to the individual judge to determine when it is appropriate to conduct a hearing while outside the province. Such hearings I expect would be rare and only arise in exceptional circumstances.

61. For the reasons set out above, I am the of the view that the appeal should be allowed. Consequently, I order that the declaration made by the judge should be set aside.

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62. In their first ground of appeal, the appellants, Misick et al, raised the issue of the '*right to protection of law'*. They alleged that the protection meant that they were

entitled as of right to be protected against irrational, unreasonable and arbitrary exercise by the Governor of his power.

63. In her judgment, Madam Justice Lobban-Jackson stated at paragraph 32:

> *"Whereas, the plaintiff alleges that their right to protection of law under section 6 of the Constitution is likely to be infringed by the Regulation 4(6) on one view, it provides an avenue to secure another right under same section; that of a fair hearing within a reasonable time by an independent and impartial court established by law. But this does not dilute the requirement by s.20 of the Constitution that the Regulation passed during periods of public emergency be justifiable in the circumstances."*

64. Counsel for Misick et al contended that Regulation 4(6) contravenes their constitutional right to be tried by a judge sitting in the Turks and Caicos Islands as per the supreme law of the land. It was submitted that the protection of the Law including due process requires the judge to sit only in the Turks and Caicos Islands.

65. In response, counsel for the Attorney-General submitted that the protection of section 6 continues to apply to Misick et al for periods of public emergency (See section 20). Further, counsel said that nothing contained in the Regulations, or the Practice Directions undermined the rights set out in section 6 of the Constitution. Counsel argued that there is nothing unreasonable or unjustified in a judge, in the exercise of his discretion, deciding to utilize the available technology to manage the trial process and continue a trial especially when he takes public health issues into consideration.

66. For my part, I accept and agree with the submission of counsel for the Attorney General that the Regulations are not irrational, unreasonable or fundamentally unfair and do not offend against the general proposition of the protection of law. The Regulations and the Practice Direction No. 3 of 2020 are to be viewed in the

light of the worldwide pandemic and the requirements of public health-social distancing, the wearing of masks in public and the washing of hands.

67. As regards to Ground 2 of Civil Appeal 7/20, counsel for Misick et al submitted that the judge ought to have analysed the circumstances surrounding the promulgation of Regulation 4(6). Had the judge done so, she would have found that the only proceedings to which Regulation 4(6) could have applied was the criminal case involving Misick et al. Further, that Mr. Justice Harrison was the only judge who could invoke the provisions of Regulation 4(6). Counsel further submitted that Regulation 4(6) was not necessary to achieve the legislative object set out in the Regulations. Counsel contended that Regulation 4(6) would have no national purpose if not directed at the appellants and further that Regulation 4(6) was retrospective in relation to Misick et al.

68. Counsel for the Attorney General stated that Misick et al are entitled to protection from legislation that is personalized, targeted and designed to direct a court to exercise judicial authority or apply a "new" law in a particular way.

69. The question to be asked is how does the court ascertain a more specific purpose of the Regulations. Applying an objective test- what is the effect of the Regulation 4(6)? Counsel for the Attorney General submitted that no new law was passed redefining the criminal conduct, the admissibility of evidence or the nature of sentences to be passed in the event of conviction.

70. The issue of ad hominem was dealt with by the Judicial Committee of the Privy Council in **R v Liyanage** [1967] 1 AC 259. In delivering the opinion of the Board, Lord Pearce observed:

> *"That the alterations in the law were not intended for the generality of the citizens or designed as any improvement of the general law is shown by the fact that the effect of those alterations was to be limited to the participants in the January coup and that, after these had been dealt with by the judges, the law should revert to its normal state.*

But such a lack of generality in criminal legislation need not, of itself, involve the judicial function, and their Lordships are not prepared to hold that every enactment in this field which can be described as ad hominem and ex post facto must inevitably usurp or infringe the judicial power. Nor do they find it necessary to attempt the almost impossible task of tracing where the line is to be drawn between what will and what will not constitute such an interference. Each case must be decided in the light of its own facts and circumstances, including the true purpose of the legislation, the situation to which it was directed, the existence (where several enactments are impugned) of a common design, and the extent to which the legislation affects, by way of direction or restriction, the discretion or judgment of the judiciary in specific proceedings. It is therefore necessary to consider more closely the nature of the legislation challenged in this appeal."

71. His Lordship went on to observe:

"In their Lordships' view that cogent summary fairly describes the effect of the Acts. As has been indicated already, legislation ad hominem which is thus directed to the course of particular proceedings may not always amount to an interference with the functions of the judiciary. But in the present case their Lordships have no doubt that there was such interference; that it was not only the likely but the intended effect of the impugned enactments; and that it is fatal to their validity. The true nature and purpose of these enactments are revealed by their conjoint impact on the specific proceedings in respect of which they were designed, and they take their colour, in particular, from the alterations they purported to make as to their ultimate objective, the punishment of those convicted. These alterations constituted a grave and deliberate incursion into the judicial sphere.

Quite bluntly, their aim was to ensure that the judges in dealing with these particular persons on these particular charges were deprived of their normal discretion as respects appropriate sentences. They were compelled to

sentence each offender on conviction to not less than ten years' imprisonment, and compelled to order confiscation of his possessions, even though his part in the conspiracy might have been trivial."

72. The issue of ad hominem legislation again engaged the attention of the Judicial Committee in **Ferguson v The Attorney General of Trinidad et al** [2016] UKPC2.

73. In giving the judgment of the Board, Lord Sumption pointed out that:

"[23]...Direct interference with judicial proceedings is usually inherently contrary to the separation of powers and the rule of law. It is also a denial of due process."

74. His Lordship continued at para 25 of the judgment:

"[25] Legislation which alters the law applicable in current legal proceedings is capable of violating the principle of the separation of powers and the rule of law by interfering with the administration of justice, but something more is required before it can be said to do so. The "something more" is that the legislation should not simply affect the resolution of current litigation but should be ad hominem, ie targeted at identifiable persons or cases.

75. Lord Sumption observed:

"[26] Legislation may be framed in general terms as an alteration of the law and yet be targeted in this way. The legislation considered in Liyanage was framed in general terms. It would have been valid if its operation had been wholly prospective. What made it invalid was the combination of three factors: (i) it influenced or determined how inherently judicial functions would be exercised, notably in the matter of the admission of evidence and the minimum sentence; (ii) it was retrospective in the sense that it applied to current judicial proceedings; and (iii) the sunset clause and the fact that the legislation dealt with specific issues in the criminal proceedings against

the plotters of the coup. The critical factor was the third, without which the first two might have been unobjectionable. This was because it showed that the statute was directed at identifiable people or groups of people. The Board considers that targeting of that kind is the least that must be shown if it is contended that a statute which merely alters the law violates the principle of the separation of powers or the rule of law by impinging on the judicial function."

76. In setting out the test to be applied to ascertain whether the legislation is ad hominem, Lord Sumption stated:

"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 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 (p 290) that "the legislation affects by way of direction or restriction the discretion or judgment of the judiciary in specific proceedings".

77. In deciding whether the Regulation 4(6) is ad hominem, it is necessary to examine the circumstances which led to the Regulation being made, the purpose of the Regulation and whether and to what extent the Regulation affected any discretion or judgement of the judge in the criminal case involving Misick et al. Misick et al were the defendants in criminal proceedings which commenced on 7 December 2015. Mr. Justice Harrison, sitting without a jury, is presiding over the trial. Mr. Justice Harrison is ordinarily resident in Jamaica and travels to the Turks and Caicos Islands to preside over the trial.

78. On 11 March 2020, the World Health Organization declared that a global pandemic COVID-19 existed. On 12 March 2020, the proceedings in the criminal trial were adjourned until 20 April 2020. On 25 March 2020, the Premier of the Turks and Caicos Islands outlined the Emergency Powers (COVID-19) Regulations under which the Islands would be governed including a period of lockdown.

79. The Governor issued the Emergency Powers (COVID-19) Court Proceedings Regulations 2020, which came into force on 20 April 2020 and is scheduled to expire on 20 December 2020. Regulation 3 stated that the Regulations were putting measures in place during COVID-19 to ensure that the administration of justice, including enforcement of orders and access to justice were carried out in a manner not to endanger public health.

80. In my opinion, the purpose of the Regulations was to ensure that during the COVID-19 emergency Supreme Court, Magistrate Court and Court of Appeal would continue to operate and to do so in a manner which gave maximum protection to those involved in the administration of justice and indeed to the public generally.

81. Regulation 4(1)(a) provided for criminal trials to be conducted by video and audio link. Regulation 4(1)(c) makes similar provisions for proceedings in civil trials. Regulation 4(5) stipulates that the court sitting shall be done remotely in the manner provided for by Rules and Orders from the Chief Justice. The Chief Justice issued Practice Directions No. 3 of 2020 on the 23 April 2020. These Practice Directions related to both civil and criminal trials in addition to other administrative matters.

82. In my opinion, the Regulations including Regulation 4(6) were made to ensure that the administration of justice would continue during the period of emergency and that those involved would have the maximum protection from COVID-19. Regulation 4(6) enables judges to decide whether to continue a trial remotely (civil or criminal) from wherever the judge is, whether in the Turks and Caicos Islands or outside and to do so by video link to the Supreme Court (as set out above) within the Island.

83. Regulation 4(6) is entirely prospective in the sense that it relates to the future conduct of all trials.

84. Even if it may be said that Regulation 4(6) applies to the criminal trial of Misick et al, it does not interfere with the exercise of any discretion which the judge has or will have in the future.

85. It follows from what I have said, this ground of appeal is rejected.

86. The final ground of appeal in Civil Appeal 7/20 deals with the issue of '*equal treatment of the law'*. Reference is made to section 7(1) of the Constitution which provides:

> *"7(1) Everyone is equal before the law and has the right to equal protection of the law."*

87. Counsel for Misick et al contended whether the Regulation 4(6) was directed to the appellants or not, Regulation 4(6) would apply to them in a way that it could not and would not apply to any other criminal defendants. Counsel suggested that this is so even if Regulation 4(6) were held not to be unconstitutional. He submitted that his clients' rights to equality are being infringed.

88. Counsel argued that there was no evidence at trial to show that there was another criminal trial, that was part heard at the time of the making of the Regulation, in which the judge presiding over the trial was abroad and in which the prosecution had concluded its case before the judge sitting in the same location as the defendants and counsel. Counsel contended that no other defendant in a criminal case would be faced with the situation in which the appellants find themselves in the criminal case.

89. For the Attorney General, counsel submitted that the question of inequality is to be judged objectively by a standard of reasonable justification. Counsel suggested that the question which is required to be answered is whether it is reasonably justified for an enabling provision to permit a judge to decide whether or not he might hear evidence whilst linked to the court from another place.

90. In **DeFreitas v P.S. Ministry of Agriculture** [1999] AC 69, the Privy Council stated that in determining whether legislation which would otherwise contravene fundamental rights of an individual is reasonably justifiable, the questions which are to be asked are:

> *"Whether; (i) the legislation objective is sufficiently important to justify limiting a fundament right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective".*

91. In answering these questions, the Court has to determine whether a fair balance was struck between objectives of the legislation and the general interest of the public and the protection of the fundamental right of the individual. See **Sporong v Sweden** [1982] ECHR 5.

92. Counsel for the Attorney General submitted that the issue of whether the criminal trial may properly proceed is a matter for the trial judge. Counsel contended that a Regulation which enables a court to decide whether to do something or not, cannot violate upon the mental rights unless that right is to have a judge sit within the territorial boundaries of the Turks and Caicos Islands. He submitted further that it is unclear where such a constitutional right is enshrined in the Constitution. In my view, if such a right exists, it ought to fall within the Constitutional provision which deals with the protection of law which includes due process. See **Nevillle v Lewis** [2001] 2AC 15.

93. In answering the question posed in **DeFreitas**, the starting point is the declaration by the World Health Organization on 11 March 2020, that COVID-19 was a global pandemic. On 12 March 2020, Justice Harrison adjourned the proceedings in the criminal case involving Misick et al until the 20 April 2020. On 20 March 2020, the Governor, acting on the advice of the Cabinet, declared a State of Emergency existed in the Turks and Caicos Islands. The Proclamation of the State of Emergency took effect on 24 March 2020 at midnight. The purpose of the declaration of the State of Emergency was to prevent, control and/or contain the spread of COVID-19. On the 25 March 2020, the Premier of the Turks and Caicos Islands outlined the contents of the Turks and Caicos Islands Emergency Powers (COVID-19) Regulations which included an imposition of a period of lockdown. On 17 April 2020, the Governor made the Emergency Powers (COVID-19) (Court Proceedings) Regulations, which included Regulation 4(6).

94. On 23 April 2020, Counsel who represented the Crown in the criminal proceedings, submitted to the Registrar proposals for the resumption of the criminal trials of Misick et al prior to the 22 June 2020.

95. Regulation 4, in addition to permitting the judge to sit remotely, expressly stated that a judge is required to observe the *'audi alteram partem'* rule of natural justice.

96. The use of technology by the judge who is presiding over the trial is in my view necessary to assist in the administration of justice and to ensure that any outstanding trials are not delayed unreasonably. Having stated that, it must be remembered that in Civil Appeal 6/20, I held that Regulation 4(6) is not unconstitutional.

97. For the reasons set out above, Civil Appeal 7/20 is dismissed.

Stollmeyer JA:

98. I have had the advantage of reading the draft judgments of Mottley P and Adderley JA and agree that appeal 6 of 2020 ("the Attorney General's Appeal") should be allowed. I agree also that Regulation 4(6) must be viewed using the purposive construction/informed interpretation rules, as they have. They have dealt with this comprehensively and I do not wish to add anything. We also heard Counsel on the interpretation rules relating to "Regard to the consequences" (Bennion on Statutory Interpretation 7th Edition at section 9.6) and "Avoiding an impractical or unworkable result" (Bennion at section 12.2), either of which may have a bearing on the outcome of the appeal, but I do not think it necessary to explore those submissions.

99. There is, however, another aspect to the matter and I have also come to my conclusion by a somewhat different line of reasoning.

100. The facts are as Mottley P and Adderley JA have set them out and I need add nothing to what they have said.

101. On the face of its wording Regulation 4(6) is ultra vires. No matter how it is parsed it is clear that it provides that a courtroom can be a place outside the Islands where the judge elects to sit for the purpose of conducting the case. Applying the appropriate interpretation rules, however, produces a different result requiring as it does an examination of the context and the intention.

102. The context is the worldwide pandemic and, among other things, the closing of borders. The intention of the Regulations is to provide for the Supreme Court to continue functioning. Regulation 3 sets out the stated purpose namely to "… put measures into place during the COVID-19 pandemic to ensure that the administration of justice, including enforcement of orders, and access to justice is carried out so as not to endanger public health …".

103. Regulation 4 does not create a court outside of the Turks and Caicos Islands ("the Islands"), nor does it require a judge to sit outside of the Islands and conduct, or preside over, the proceedings of a court sitting within the Islands. It only provides that the Chief Justice may put into place the procedures for a court to sit during the existence of the State of Emergency which was first declared on 20 March 2020.

104. Regulation 4(1) provides that "…the Chief Justice may make Rules and issue such order or direction as deemed necessary notwithstanding anything to the contrary in section 16 of the Supreme Court ordinance to ensure … that certain objectives are fulfilled." Those objectives are in Regulations 4(2)-4(6). It was for the Chief Justice to set out the procedure to be observed, not Regulation 4. Regulation 4 only enabled the Chief Justice to do so.

105. The Chief Justice subsequently issued the Practice Direction in question and it is this Practice Direction that sets out how, where, when and by whom justice is to be administered. That Practice Direction gives no cause for concern. It does not contain any provision which mirrors or reflects Regulation 4(6), nor does it raise any issue of a trial judge being physically present outside the Islands and holding court extra-territorially.

106. It is agreed that no issue arises if a judge is physically within the Islands when a trial is taking place and it is being held within the Islands. It is only if a judge happens to be physically in another jurisdiction that the contention arises. In that setting, the words "courtroom" and "sit" are said on behalf of the Respondents to mean that: "courtroom" is wherever the judge may happen to sit; "sit" is the place where the judge is physically, so that if the judge happens to be in Antarctica, for arguments sake, that is where he sits and that is where the courtroom is, and that offends the long established common law in this regard. The parties are agreed that the common law does not permit this.

107. That, however, is not the intention of the Practice Direction and it is the Practice Direction to which regard must be had. Para 11.3 of the Practice Direction provides that the judge " … may operate from the courtroom … or from any place the judge … elects to hold the hearing." Clearly, the judge can choose to hold a hearing in a place other than a traditional or prescribed courtroom. Further, it leaves it open to the judge to direct where the hearing will be held. There is nothing that requires the judge to be physically present in the same place where the hearing is taking place. Yet further, there is nothing in the Practice Direction setting out the procedure for taking evidence in such a place, unlike the provisions of Para 11.5, which sets out how this is to be done when the hearing is taking place in a courtroom. In short, it is for the judge to decide how, in all the circumstances, the hearing should proceed, subject of course, to observing the rules of natural justice, applicable court Rules and open justice being readily available. The Practice Direction does not require the judge to be physically in the

place where the trial is taking place whether within or outside the Islands, although it may permit the judge to be outside the Islands.

108. Clearly also, if justice requires that a trial take place, or an existing trial continue, with a reasonable measure of expedition and the judge cannot be physically present in Islands then a means of ensuring access to justice must be found, if it is possible to do so. Ultimately, it is for the trial judge to decide whether in all the circumstances of the case all the interests of justice and the parties to it will be properly and effectively served by proceeding while some of those involved are not all in the same physical place at the same time. Indeed, there is nothing to require that any one person (whether a "necessary person" as defined in the Practice Direction or otherwise) be in the same place as any other person. What is important is that the judge specify the place within the Islands where the proceedings are deemed to be held.

109. The common law is clear that a judge cannot commence a trial in another jurisdiction, or transfer to another jurisdiction the hearing of a part-heard trial, which falls for determination within the Islands under the provisions of section 3 of the Ordinance. The parties are agreed on this. The common law, however, does not proscribe a judge being physically in one place and presiding over a trial being heard in another place.

110. That, however, is not the end of the matter.

111. The common law develops, if only incrementally and perhaps in a narrow way, over time to meet the changing needs of society, to fill a gap in the law or provide a remedy where none exists otherwise. This may require innovation on occasion. Equity requires this. In the context of a worldwide pandemic such as the one now affecting just about every country on planet earth, there is an obvious need to ensure that justice continues to be administered. It must remain available to

everyone, and the courts must ensure that, among other matters, the requirements of open justice continue to be realised.

112. Given that continuity of development and in the context of the current pandemic, particularly as matters were at the time when the Regulations and the Practice Direction came into existence, there is every good reason to move forward and fashion ways and means which permit judges and other judicial officers to carry out their functions.

113. There is no dispute that the pandemic required drastic measures be taken to protect the health and safety of the people of the Islands. No fault has been found, for the purposes of this case at any rate, with the declaration of the state of emergency and the Regulations put into place thereafter, except for Regulation 4(6). On the face of it, the administration of justice had come to halt and that could not be allowed to continue, particularly given the constitutional rights to access to and protection of the law. A means had to be found by which those rights were to be preserved and made available. Perhaps ironically, what the Regulations and Practice Direction, and Regulation 4(6) in particular, would accomplish is facilitating the expeditious progress of the Respondents' trial which had come to a standstill.

114. The use of audio and video-conferencing facilities has become an everyday accepted feature of life both socially and commercially, as well as judicially. It is difficult to find a court system today which has those facilities available and does not use them. Virtual courtrooms and remote hearings are the order of the day. It is beyond any doubt that they provide the tools by which justice be administered, and administered efficiently and fairly. Indeed, that has been so in certain jurisdictions for some time.

115. There is nothing to prevent, and everything to be gained, by courts making use of the technology. Most important, it ensures that justice continues to be

administered in the manner it should, and must, be administered. It does not diminish, infringe or take away the enshrined and time honoured rights of the litigant.

116. Consequently, I can find no good reason to say that a judge should not, or cannot, be physically outside of jurisdiction A and join proceedings taking place there by audio or video link.

117. I find support in coming to this view when regard is had to the passages in **Endean v British Columbia**[1] referred to by Adderley JA. What is said there may have been obiter, but was not subject to criticism when the decision of the Court of Appeal of British Columbia was reversed by the Supreme Court of Canada[2]. What was said there was based on circumstances, which had nothing to do, or compare with, the present pandemic and is therefore all the more persuasive.

118. In the event, I have also concluded that Regulation 4(6) is intra vires and effective, even if unhappily formulated. The trial judge did not give full consideration to the law on the interpretation of statutes and thus fell into error, but in all fairness to the trial judge it must be noted that she did not have the benefit of being fully addressed on this issue, although Counsel did address comprehensively on the position in common law and the Endean judgments. The record reflects that there was no more than the briefest passing reference to this issue in both the written and oral submissions to her. On appeal, however, Grounds 2 and 3 raised these issues and this court specifically requested Counsel to address this issue because of its importance and they did so in detail.

119. Further, I have also concluded that the common law permits a judge to remain outside the jurisdiction and conduct a trial taking place within it. The trial judge also fell into error in her analysis of **Endean** when she restricted her reasoning to

[1] 2014 BCCA 61
[2] 2016 SCC 42

the statutory and constitutional federal framework of Canada. It is the common law and the President's Practice Direction 1 of 2020 issued on 9 June 2020, at paragraph 1, that allows this court to sit as it has, to hear this appeal[3].

120. Additionally, I agree that Civil Appeal 7/20 (the "Misick et al appeal") must fail and that it should be dismissed for the reasons given by Mottley P.

121. I also agree with the order for costs proposed by Adderley JA.

Adderley, JA:

122. I have had the benefit of reading in draft the judgment of the learned President ("the President's Judgment") and that of Stollmeyer JA. I agree that Appeal Civil Appeal 6/20 should be allowed for the reasons given by them. I also agree that Civil Appeal 7/20 which raises the constitutional issues of breach of the right to protection of the law and *ad hominem* legislation should be dismissed.

123. However, I wish to add some views of my own which I trust will further elucidate the reasons.

124. As stated, the appeal concerns the construction of Regulation 4(6) of the **Emergency Powers (Covid-19) (Court Proceedings) Regulations 2020** ("the Regulations"). It reads as follows:

[3] "1. The President and Justices of Appeal will appear and preside together in the courtroom where the Court of Appeal will be convened on Providenciales, Turks and Caicos Islands remotely by video-links from the locations of the President and Justices of Appeal in Barbados, the Commonwealth of the Bahamas and the Republic of Trinidad & Tobago, respectively. The choice of platform, such as Microsoft Teams, Zoom or Skype Business, is however within the discretion of the President."

"(6) The courtroom shall include any place, whether in or outside of the Islands, the Judge or magistrate elects to sit to conduct the business of the court.

Provided always that the video and audio link facility at the said location must be accessible remotely to the court recorder, interpreter in the appropriate cases, counsel and witnesses."

125. The learned Judge by Order dated 22 June 2020 declared Regulation 4(6) ultra vires the Governor's powers under the constitution of the Turks and Caicos Islands, the **Emergency Powers Ordinance**, and the **Emergency Powers 2017 Order**, to the extent that it purports to confer power on a judge of the Supreme Court to conduct proceedings while sitting outside its territorial boundaries, and declared it void and of no effect.

126. The Attorney General appeals that finding.

Factual Background

127. The learned Judge helpfully set out the factual background. For ease of reference, I will give a summary and hope I do no violence in the process. In summary, on March 11, 2020, the World Health Organization declared the novel coronavirus (COVID-19) outbreak a global pandemic. The virus had spread to all continents and countries in the world including the Caribbean. It is highly contagious and can result in death. A major preventative mechanism for slowing the spread is the wearing of masks in public and social distancing by maintaining a recommended distance of 6 feet from other persons and washing hands regularly. In that environment it is a serious risk to public health to have in-person hearings without increasing the risk of transmitting the virus to those in a courtroom.

128. Hence, on 20 March 2020 The Governor, acting on the advice of the Cabinet and in the exercise of powers conferred upon him by s.3(1) of the **Emergency Powers Ordinance** ("EPO"), "for the purpose of preventing, controlling or containing the spread of COVID-19 in the Islands", declared a state of Emergency for the Turks and Caicos Islands. In other words, the purpose was to stem the incidence and spread of Covid-19. The Proclamation took effect on 24 March 2020. On the same date the Governor acting on the advice of the Cabinet and pursuant to s.3(1) of the EPO, made the **Emergency Powers (COVID-19) Regulations 2020**. These regulations dealt, among other things, with the closure of the airports and seaports and restrictions on the size of gatherings.

129. At the request of the Chief Justice, the Attorney General sought to put in place legislation to ameliorate the danger to public health, while allowing access to justice to continue. The response to this was the passage of the Regulations. This made provision for remote hearings and other related matters which are discussed later. The stated objective of the Attorney General by way of evidence filed on her behalf was to have a system similar to that of the Cayman Islands under Order 33, rule 1, whereby court proceedings could be conducted by way of audio visual remote hearings elsewhere in the Island other than in Grand Cayman and also in any place outside the Islands.

130. I shall refer to the Regulations together with the **Practice Direction No. 3 of 2020 Covid 19 Temporary Protocols for Audio-Visual Court Hearings and Related Matters,** made under the Regulations, as "the 2020 Regulations and Practice Directions".

131. Specifically, the purpose of Regulation 4(6), which is the subject matter of this appeal, was to allow the trial judge to hear Turks and Caicos cases in the Turks and Caicos Islands while sitting physically either in the Islands or from a place outside the Islands wherever he happened to be located at the time.

132. The short question was whether Parliament intended to breach the common law rule that a judge of the Supreme Court does not have jurisdiction to sit and adjudicate cases from outside the geographical boundaries of his court, not having been expressly empowered by the Constitution, as are Court of Appeal Judges (s 80(2)) to sit at any venue whether inside or outside the Turks and Caicos Islands.

133. The whole case, as it was submitted in the opening of the appeal, boils down to whether the physical place of the judge is determinative of where his jurisdiction and authority is being exercised or whether the place where the judge elects to be located outside the Turks and Caicos Islands is "beamed into" by a regulated court administered and organized video and audio link, accessible to the "court recorder" and the public, is the place where the jurisdiction and authority is being exercised so that, by way of audio visual technology, he is virtually present and "sitting" in the Turks and Caicos Islands conducting the hearing. The Respondents submit that if the judge is physically outside the Turks and Caicos Islands, that is where his jurisdiction and authority is being exercised and is a jurisdiction which has not been conferred by the constitution, and is also contrary to the common law.

134. Whereas s.80(2) gives to the Court of Appeal judges jurisdiction to sit inside or outside the Islands, the constitution is silent on that issue in relation to judges of the Supreme Court and Magistrates, and under section 3 of the Supreme Court Ordinance the Supreme Court has no jurisdiction to sit outside the Turks and Caicos Islands. Its jurisdiction must be exercised "*within the Islands*" which means within the Turks and Caicos Islands. It states:

> *"3(1) the Court [Supreme Court] shall be a Superior Court of Record which, in addition to any jurisdiction previously exercised by it or conferred upon it by this ordinance or any other law, shall have <u>within the Islands</u> the jurisdiction..."* (emphasis added)

135. The Respondents contend that the omission by Parliament to give jurisdiction to Judges of the Supreme Court and Magistrates to sit outside the Islands was deliberate because the omission has been repeated in successive constitutions over the years. The historic position, that the Turks and Caicos once had its Court of Appeal located in The Bahamas comprising non-resident judges from various countries, had led to the necessity at the time to give Court of Appeal judges that jurisdiction to sit outside the Turks and Caicos Islands.

136. In reaching her decision the learned Judge summarized the reasons at paragraph 35 of the judgment as follows:

> *"35. Returning to the question of the constitutional validity of Regulation 4(6) which states that the courtroom, shall include any place, whether in or outside the Islands, the Judge or magistrate elects to sit; the argument presented by the Defendant that the judge sitting outside the jurisdiction would be "beamed into" the courtroom set up in the Turks and Caicos Islands via electronic means, would not suit the wording of the Regulation."*

137. The learned Judge concluded at paragraph 36 of her judgment that wherever the Judge elects to sit is "the" courtroom.

138. In paragraph 36 she opined that "*given the legislative frame work, Regulation 4(6) ought not to attempt to alter the existing law, where there is no evidence to suggest that it was necessary, proportionate to the threat of the pandemic or urgent to do so, as required by Article 7 of the 2017 Order or indeed justifiable as required [by] s.20 of the constitution*." She set out the relevant provisions of Article 7 in paragraph 37.

139. However, although the judge implied that Regulation 4(6) attempted to alter the existing common law without meeting the requirements under Article 7, or meeting the requirement of reasonable justifiability under the constitution (s.20), she did not make an express finding to that effect nor was it the subject matter of appeal. It was therefore not necessary for the Court to deal with it.

140. The learned judge did not set out an analysis of the wording of the Regulation 4(6) or the proviso thereto nor did she state on which rules of statutory interpretation she relied to assist her in reaching her decision.

Statutory Interpretation

141. It is well known that in order to discern the true meaning of words in a statute, aids to statutory interpretation serve as a useful tool. The overarching objective is that the court should construe the words in such a way as to give effect to the intention of parliament. Bennion is a helpful resource in that exercise.

142. There are numerous authorities on which to draw. The President's Judgment has provided ample authorities on the interpretation of statutes at paragraphs 21-30 and 37. I hereby adopt them.

143. Among them I am drawn to Lord Reid's statement in the simple traffic case of **Pinner v Everett** (1969) 3 ALL ER 257at 258, House of Lords where he said:

> *"In determining the meaning of any word or phrase in a statute the first question to ask always is what is the natural or ordinary meaning of the word or phrase in its context in the statute. It is only when the meaning leads to some result which cannot reasonably be supposed to have been the intention of the legislator that it is proper to look for some other possible meaning of the word or phrase."*

144. This is the plain meaning rule referred to in Section 9.9 of Bennion 7th – edition (Lexis-Nexis) where it is said to apply:

1) where in relation to the facts of the case:

(a) The enactment in question is grammatically capable of one meaning only, and

(b) On an informed interpretation of that enactment, the interpretative criteria raise no real doubt as to whether that grammatical meaning is the one intended by the legislator

145. The question is not whether the enactment, read literally, contains a plain meaning; the question referred to in 1)(b) is whether on an informed interpretation, there is no real doubt that the grammatical interpretation is that intended by the Parliament.

146. **Bennion on Statute Law, Part II - Statutory Interpretation** as far back as the 1990 edition in chapter nine entitled "Guides to Legislative Intention I: Rules of Construction" explains the Informed Interpretation rule at page 105 as follows:

> "Next it is a rule of law that the interpreter is to infer that the legislator, when settling the wording of an enactment, intended to give a fully informed, rather than a purely literal, interpretation. Accordingly, the court does not decide whether or not any real doubt exists as to the meaning of a disputed enactment until it has first discerned and considered, in the light of the guides to legislative intention, the overall context of the enactment, including all such matters as may illuminate the text and make clear the meaning intended by the legislator in the factual situation of the instant case.
>
> "In interpreting an enactment, a two-stage approach is necessary. It is not simply a matter of deciding what doubtful words mean. It must first be decided, on an informed basis, whether or not there is a real doubt about the legal meaning of the enactment. If there is, the interpreter moves on to the second stage of resolving the doubt…", and at p 106
>
> "The informed interpretation rule is to be applied no matter how plain the statutory words may seem at first glance. Indeed the plainer they seem, the more the interpreter needs to be on guard. A first glance is not a fully-informed glance. Without exception, statutory words require careful

assessment of themselves and their context if they are to be construed correctly"

147. The importance of the informed interpretation rule was what Viscount Simonds in **A-G v Prince Ernest Augustus of Hanover** [1957] AC 436 stressed when he said, *"…it must often be difficult to say that any terms are clear and unambiguous until they have been studied in their context…the elementary rule must be observed that no one should profess to understand any part of a statute…before he has read the whole of it. Until he has done so he is not entitled to say that it or any part of it is clear and unambiguous."*

148. The word "context" was used in the widest possible sense to include the Act as a whole and the legal, social, historical, and common law context including the purpose for which the legislation was enacted and the mischief it was meant to remedy. Viscount Simmons put it this way:

" ..and I use "context" in its widest sense, which I have already indicated including not only enacting provisions of the same statute, but preamble, the existing state of the law, other statutes in para materia, and the mischief which I can by those and other legitimate means, discern the statute was intended to remedy…."

149. Taking these principles into account as supported by the numerous authorities cited in the President's Judgment, should assist us in discovering the intention of Parliament in enacting Regulation 4(6).

The Legislative Context of the Regulations

150. Before construing the intention behind the words used in Regulation 4(6) we must take into consideration the purpose for which the regulation was passed, the mischief it intended to remedy, the mandatory duties imposed by the Regulations

on the Recorder, the Registrar, or Clerk of the Magistrate as the case may be, and the statutes *in para materia,* if any.

Mandatory Involvement of Registrar and Recorder

151. The mandatory duties imposed by the Regulations on the Recorder, the Registrar, or Clerk of the Magistrate is apparent from an analysis of the Regulations.

Emergency Powers (Covid-19) (Court Proceedings) Regulations 2020

152. The Regulations came into operation 20 April 2020 and expires 31 December 2020. It contains 9 regulations.

153. Regulation 3 sets out the purposes of the Regulations:

> "**Purposes of Regulations**
>
> 3. *These Regulations put measures in place during the Covid-19 pandemic to ensure that the administration of justice, including enforcement of orders, and access to justice is carried out so as not to endanger public health."*

154. Under the general heading "*Remote Sitting*", Regulation 4(1) empowered the Chief Justice to provide for remote sittings. Regulation 4(1) reads as follows:

> *"During the period in which these Regulations are in force, the Chief justice may make Rules and issue such order or direction as deemed necessary notwithstanding anything contained in section 16 of the Supreme Court Ordinance to insure-*
>
> *(a) Full criminal trials are conducted by video and audio link;*

(b) The adjournment of trials;

(c) All civil trials are conducted by video and audio link…"

155. Regulation 2 defines "Video and audio link" as "*facilities (including closed circuit television), having recording capability, that enable audio and visual communication between persons at different places and includes video media such as Microsoft Teams, Zoom, Skype or other such media with recording capability approved by the court".*
"Court" means "*the Magistrate's Court, the Supreme Court or the Court of Appeal".*

156. After setting out in Regulation 4(2) through 4(4) the requirement for the judge to determine matters in a judicial manner in accordance with the settled principles of adjudication including the *audi alteram partem* rule, the rules of evidence, and in accordance with the rules of Court and all pertinent Practice Directions, it sets out in Regulation 4(5) that Court sittings shall be done remotely "*in the manner provided by Rules or Orders from the Chief Justice*".

Practice Direction No. 3 of 2020

Covid 19 Temporary Protocols for Audio-Visual Court Hearings and Related Matters

157. Pursuant to that Regulation 4 and 9, section 17 of the Supreme Court Ordinance, and section 150 of the Magistrate's Court Ordinance, Directions were issued by the Chief Justice in the form of **Practice Direction No. 3 of 2020,** which was issued on 23 April, 2020 and come into force 4 May, 2020 to last until 31 December, 2020. To appreciate the authority (in addition to Regulation 4) under which Practice Direction No 3 was issued, their provisions are set out below:

(i) Regulation 9 provides that the Chief Justice may, for the purposes of the Regulations, make rules of court under s.16 of the Supreme Court Ordinance or give direction for regulating the practice, procedure and matters relating to the conduct of civil and criminal business in the court, the execution of the process of the court, and the practice and procedure to be observed by officers of the Court

(ii) Section 17 of the Supreme Court Ordinance vests authority in the Chief Justice to give directions for the practice and procedure of the Supreme court

(iii) Section 150 of the Magistrate's Court Ordinance vest power in the Magistrate to make rules for the effective execution of court business

158. In the introduction it is stated that the Practice Direction is issued in response to the COVID-19 pandemic, and is aimed at protecting the health and safety of court personnel and court users. It states that the protocols established guidelines and security measures for the conduct of court business electronically, and enable sittings of court remotely. It recites that it has become necessary to limit, reduce, or remove human to human contact in accordance with physical distancing protocols in place under the Emergency Powers (Covid-19) Regulations 2020, and that the directions are made for the electronic conduct of court business to enable remote hearings by all the courts in the Turks and Caicos Islands.

159. Practice Direction No 3 sets out comprehensive protocols to deal with all aspects of proceedings in the courts, which may be done remotely or in person for criminal and civil proceedings in the Supreme Court and Magistrates' Courts in the Turks and Caicos Islands. The President's Judgment at paragraph 10 provides extensive quotations from the Directions to which reference should be made.

160. After a careful review, which we do later, a fair summary would be that on a true reading of the Practice Direction, the Chief Justice has mandated that the facilities

that enable audio and visual communication between different persons at different places be managed in the Turks and Caicos Islands by the Registrar or Clerk of the Magistrate's Court, as the case may be, on a platform approved by the Court, which is defined as the Magistrate's Court, the Supreme Court, or the Court of Appeal.

Audio Visual Link Ordinance

161. Among interpretive tools are statutes which are *in para materia*. No mention was made of the Audio Visual Link Ordinance in the 2020 Regulations and Practice Directions. Regulations 2 defines "video and audio link" and Practice Direction protocol 4 under **"General Matters"** and 11.3 under **"Conduct of Hearings"** set out how hearings are to be held remotely. Regulation 2 and the Practice Direction in protocol 4 and 11.3 impose a completely different audio and visual regime for remote hearings by introducing platforms such as Microsoft Teams, Zoom, or Skype Business in the discretion of the Judge or Magistrate.

162. Nevertheless, as a statute *in para materia*, it can inform an interpretation of Regulation 4(6). It supports by its definitions the view that in a remote hearing a differentiation should be made between the Court, the court point, and the remote point. The "Court" means "any court having jurisdiction pursuant to any Ordinance of the Turks and Caicos Islands". The court is therefore represented by the Judge of the Supreme Court, magistrate, or judge of the Court of Appeal, as the case may be. The "court point" means "the courtroom". The "remote point" means "any place other than the courtroom".

163. The courtroom is where the hearing takes place. The judge's ruling in paragraph 35 of her judgment, that wherever the Judge sits is "the courtroom", does not maintain the distinction drawn in the Ordinance, and is not consistent with the wording of Regulation 4(6). The ruling does not appear to make room for the virtual sitting by the representative of the Court at a remote hearing as a separate

entity from the courtroom itself where the hearing takes place. The courtroom is a physical place, and by so doing the ruling seems to preclude the existence of a courtroom unless the representative of the court (the judge or magistrate) is physically present.

Court of Appeal Ordinance and Court of Appeal (Practice and Procedure) Rules

164. The **Court of Appeal Ordinance** may not be strictly *in para materia* but it deals with sittings outside the geographical boundaries of the Turks and Caicos Islands. S.80(2) of the constitution provides: "*For the purposes of hearing and determining appeals the Court of Appeal may sit either in the Islands or in such places outside the Islands as the President of the court may from time to time direct.*"

165. How those sittings are to take place outside the Turks and Caicos Islands is set out by the **Court of Appeal (Practice and Procedure) Rules**. Under the rubric "Venue", s3 of the rules sets out how the venue is chosen. It states:

> *"The hearing of an appeal may take place either within the Islands or at such other venue as the President of the court may appoint, having regard to all the circumstances relating to the appeal and any representation made by the parties."*

166. When the rules were written 45 years ago back in 1975 Parliament must have intended that the judges would "sit" physically at the same location because there was no capability for remote hearings. That means that one venue may be chosen at a time, not several venues simultaneously. At that chosen venue all the judges may sit physically at the same time to do the Court's business.

167. The **Court of Appeal (Practice and Procedure) Rules** does not authorize the Registrar of the Turks and Caicos Islands to administer a hearing taking place

physically outside the Turks and Caicos Islands. Section 6 requires the Registrar to forward the Record of Appeal to the Registrar of the Court of Appeal in the territory in which the appeal is to be heard. It provides that:

> *"All further acts in connection with the setting down of the appeal for hearing [outside the Turks and Caicos Islands], and the hearing itself, shall be performed by the Registrar of the Court of Appeal at which the appeal is to be heard".*

168. If under Practice Direction 3 Parliament intended to give a judge jurisdiction to hold hearings abroad under the 2020 Regulations and Practice Directions, one would have expected a similar provision prescribing what role the Registrar would play. There are no such provisions. That must be considered a deliberate omission by the legislature. Instead the epicenter of the conduct of the hearings are in the Turks and Caicos Islands administered by the Registrar/Clerk/Recorder.

Discussion

169. Both parties agree that at common law a judge does not have jurisdiction to sit and determine matters outside the juridical boundaries of the place where his court is established. This derives from the Senior Courts Act of England which is incorporated into the laws of the Turks and Caicos Islands by virtue of s.3 of the Supreme Court Ordinance.

170. At paragraph 36 the learned Judge stated that "*Regulation 4(6) ought not to attempt to alter the existing law…*". Even though no express finding to that effect was made, the clear implication is that Regulation 4(6) is contrary to the common law and inconsistent with the constitution.

171. Whether Parliament intended to override or displace the common law is a matter of construction. As part of his comprehensive analysis of the principle at

paragraphs 27-34 of **R (on the application of the Child Poverty Action Group) v Secretary of State for Work and Pensions**[4] ("the Child Poverty Action Group Case"), Sir John Dyson SCJ said this:

> "[27] There are many examples of cases where the court has considered whether the provisions of a statute have impliedly overridden or displaced the common law. In each case, it is a question of construction of the statute in question whether it has done so."

It is only where by necessary implication the common law has been displaced or overridden because of Regulation 4(6), or if it is inconsistent with or otherwise in breach of the constitution should Regulation 4(6) be declared ultra vires.

172. There is very little evidence that parliament intended to override the common law or to breach the constitution in the process. A comprehensive set of protocols to govern the operation of all aspects of civil and criminal proceedings and the ancillary processes in the courts are set out in the Direction.

173. On a careful reading especially "1. GENERAL MATTERS", "2. THE RECORD" and "11**.** Conduct of Hearings" it is pellucid that the "hearings" are to take place in the Turks and Caicos Islands. As outlined earlier, participants can take part in those hearings by video link but the Registrar/Court Clerk/ Clerk of the Court (as the case may be) shall list the case for hearing, set up the hearing, allow access into the hearing, end the hearing and produce a record of the hearing. Parties, counsel, witnesses and any necessary person to the hearing, including an officer from the Department of Social Development, shall be granted access to the hearing by the Registrar/ Clerk and to satisfy the constitutional requirement of open justice the Registrar/Court Clerk/ or magistrate's clerk may grant access to members of the media and the public upon their request in writing submitted not less than twenty-four hours before the hearing.

[4] [2011]1 ALL ER 729

174. Whereas the Registrar, or the Clerk of the Magistrate's Court may record the proceedings, or the Judge or Magistrate at his or her election, at the end of the day the record must be turned over to the Registrar or the Chief magistrate and they, and no one else, are empowered to produce a certified copy of the Record (Practice direction 2).

The Courtroom

175. The courtroom is where the hearings take place. Mr. Misick QC was astute to point out that under Direction 11.3 the Judge or Magistrate and the Registrar/Court Clerk/Clerk of Court at the Magistrate's Court may operate from the court room observing social distancing protocol, or from any place the judge or magistrate elects to hold the hearing. He suggested that if the Judge/magistrate elects a place outside the Islands that is where the hearing takes place. The short answer to that is that since Parliament has no power to imbue the Registrar/Court Clerk/clerk of the Court with authority to operate outside the Turks and Caicos Islands, 11.3 can only reasonably mean the court room or a place elected in the Islands, not outside the Islands.

176. Direction 11.3 is entirely consistent with the Supreme Court Ordinance which states at s.14:

> *"14. The Supreme Court may hold its sittings at Grand Turk and at such other places as the Chief Justice may from time to time direct."*

Both sides agreed, as does the Court, that this means that sittings can take place anywhere in the Islands even if not in a regular courtroom.

177. Furthermore, Regulation 4(6) provides:

"(6) The courtroom shall include any place, whether in or outside of the Islands, the Judge or magistrate elects to sit to conduct the business of the court…"

The place where the judge *"elects to sit to conduct the business of the Court"* under 4(6) is not necessarily the place under Direction 11.3 where the Judge *"elects to hold the meeting".* On its true construction, having regard to the previous discussion, the latter can only be physically in the Turks and Caicos Islands, but the former can be physically in or outside the Islands.

178. Technology has changed. Nowadays a judge, or anyone else, for that matter, can be present and participate electronically at a meeting in country A even though he/she is physically in Country B. In such cases he/she is appearing at a virtual meeting and, unless there is an agreement or pronouncement to the contrary, prima facie the meeting occurs at the place from where the facilities for the "video and audio link" are being administered during the meeting. The word "sit" does not mean what it meant 45 years ago in the **Court of Appeal (Practice and Procedure) Rules** when judges could only "sit" and conduct the business of the court by being physically present.

179. As in other jurisdictions it is expected that there will be incremental development of the common law to fill what the authorities call the "interstices" that arise from time to time. Considering the state of the development of technology today and the context in which it is used, it is not an exercise of exorbitant judicial legislation to interpret the word "sit" as used in Direction 4(6) in relation to conducting the business of the Court, to include "sit virtually" even though the Judge/magistrate may be sitting physically outside the Islands. The enactment supports this interpretation by Regulation 2 which defines "video and audio link" as "*facilities (including closed circuit television), having recording capability, that enable audio and visual communication between persons at different places…"* It is also consistent with the expressed objectives of the directions "for the conduct of court business electronically".

180. In the context in which Regulation 4(6) is to be construed the "video and audio link" is undoubtedly administered by the Registrar/Court Clerk/Clerk of the Magistrate's Court and Recorder at a location in the Turks and Caicos Islands. That place may be one of the regular courtrooms designated by the Chief Justice, or another place in the Islands elected by the judge. If the judge is "sitting" physically outside the Islands, by the wording in Regulation 4(6) the legal draftsman transports that place where the judge is physically located into the physical courtroom by including it as part of the courtroom in the Turks and Caicos Islands, so that the judge virtually "sits" in that courtroom to conduct business even while physically outside the Islands. The provision really amounts to deeming the place where the judge sits physically whether that place is inside or outside the Turks and Caicos Islands to be part of the courtroom in the Turks and Caicos Islands.

181. Regulation 4(6) does not say that the place is *the* courtroom or an additional courtroom by virtue of the fact that the judge or magistrate elects it. If that were intended Parliament could easily have stated that wherever the Judge or magistrate elects to sit "shall be" the courtroom instead of "shall include". The OECS, for example, dealt with the issue by defining the location of the court. In the current **Eastern Caribbean Supreme Court Practice Direction No. 4 of 2020** issued in response to the Covid-19, where the court is located is declared by Notice. Section 5.2 provides:

> "*The Chief Justice through a published Notice has directed that the location from which a Judge, master, or Registrar conducts a remote hearing pursuant to this Practice Direction shall be declared a court for the purpose of Court proceedings".*

182. Although not part of the Regulations, the explanatory note to them further assists in informing the purpose for and the mischief at which they were enacted. It reads as follows:

"These regulations provide measures to enable remote court trials and for ancillary matters to expand availability of video and audio link in court proceedings.

Counsel, parties and all persons accessing court services should bear with the court as they navigate technological challenges which will no doubt improve with time.

The measures will enable a wider range of proceedings to be carried out by video, so that courts can continue to function and remain open to the public, without the need for participants to attend in person. This will give judges more options for avoiding adjournments and keeping business moving through the courts to help reduce delays in the administration of justice and alleviate the impact on families, victims, witnesses and defendants."

The Canadian Case

183. A strikingly similar issue arose in the Court of Appeal of Canada in **Endean v British Columbia**[5] in the context of whether a judge from British Columbia in Canada could sit and hear a case from his Province while outside its geographical boundaries. While acknowledging that the English common law rule applied and that British Columbian Judges cannot conduct hearings that take place outside British Columbia, in the closing remarks of his judgment Goepel J drew a distinction between circumstances where a judge conducts a hearing outside his Province, and where the hearing was within a court room in the Province, but the judge was conducting the hearing via video link from outside the Province. The pertinent remarks are set out in [79]-[81] of the judgment as follows:

"[79] As noted the province has no objection to a judge who is outside the province conducting a hearing by video conference or other communication

[5] Endean v British Columbia, 2014 BCCA 61 in the Court of Appeal for British Columbia

medium as long as the hearing itself takes place in a British Columbian courtroom. If for reasons of convenience or otherwise, a judge determines that a matter is to be heard by telephone video conference or other communication media, there is I suggest no reason why the judge, counsel or witnesses necessarily need to be present in the provinces long as the hearing itself takes place in a courtroom in British Columbia…

[80] Such a hearing in my view would not offend the common law rule that prohibits judges from conduction hearings outside of British Columbia; although the judge may be located elsewhere he or she would be exercising his or her jurisdiction and authority in a hearing taking place in British Columbia. The hearing would respect the open court principle as interested members of the public and media would be able to observe the proceedings in a British Columbia courtroom.

[81] It will be up to the individual judge to determine when it is appropriate to conduct a hearing while outside the province. Such hearings I expect will be rare and only arise in exceptional circumstances"

184. **Endean** is apposite to this case, because the Supreme Court of Canada in hearing the appeal in **Endean1**[6] on a different issue recited Goepel J's obiter remarks made in the Court of Appeal. One issue which was the subject matter of the appeal was whether the jurisdiction for a judge to hear matters outside the geographical boundaries of his home Province was dependent on the technology available. It was on that point, as I understand it, that they overruled the Court of Appeal, allowed the appeal and set the judgment aside.

185. However, in the process, the Supreme Court of Canada did not overrule or make any adverse remarks on the obiter comments after repeating them in its judgment that a judge outside his jurisdiction could attend a hearing in his home court from

[6] Endean v British Columbia 2016 SCC 42 in the Supreme Court of Canada.

outside the jurisdiction by audio or visual link to his local courtroom without being in breach of the common law. That is evident in this case also for the reasons I have given.

186. As drawn to our attention by Mr. Mitchell QC, the test gleaned from **Endean,** which I adopt, is that it is not from where the judge is exercising authority, power and jurisdiction but "to" where his authority is being exercised and recognized.

187. It ought to be stressed, as was also mentioned in paragraph 81 of **Endean**, that the fact that the Judge or Magistrate is enabled to conduct a hearing from outside the Islands by video and audio link does not mean that he necessarily should do so. It will be up to the individual judge/magistrate under his/her inherent duty to act fairly to exercise his/her discretion to determine whether in so doing would allow a fair trial, and he/she should only do so if having regard to all the circumstances he/she is satisfied that there could be a fair trial.

188. The learned judge in her judgment did not accept that view. She concluded at paragraph 35 that "The courtroom is wherever the Judge or magistrate elects to sit" interpreting the word "shall include" to mean "is". She seemed to have applied the Audio Visual Link Ordinance, which is not mentioned anywhere in the 2020 Regulations and Directions. She also made no reference to [79]-[81] of **Endean**.

189. Furthermore, it was not possible to determine on which rule of statutory interpretation the learned judge relied to reach her conclusion, as she did not deal with the meaning of the proviso to Regulation 4(6), which delimits the circumstances in which the judge or magistrate sitting abroad can join the courtroom in the Turks and Caicos Islands, nor did she fully analyze the context in which the Regulation was drafted.

Summary

190. Applying the informed interpretation rule it is clear from the 2020 Regulations and Practice Directions, by using modern technology to allow for virtual hearings, Parliament intended to enable a Supreme Court Judge to hear matters before the Supreme Court or the Magistrate's Court in the Turks and Caicos Islands from whatever physical location (whether inside or outside the Turks and Caicos Islands) he/she happened to be. However, the mandatory administrative role of the Registrar, Magistrate's Clerk and Recorder directed by the Chief Justice makes it clear that the hearing is intended to take place in the Turks and Caicos Islands. The provisions under "**11. Conduct of Hearings"** are entirely consistent with the intention of Parliament to empower the court to conduct a virtual hearing to stem the incidence and spread of Covid-19. The virtual hearing shall by Regulation 4(6) take place in the physical courtroom administered by the Registrar/ Clerk/Recorder. This could be in a regular courtroom designated by the Chief Justice or in another place in the Turks and Caicos elected by the Judge.

191. Having regard to all the circumstances, in my judgment it would be absurd under this legal regime to conclude that the 2020 Regulations and Practice Directions grant or purport to grant to a Judge of the Supreme Court or magistrate a jurisdiction similar to that given to Judges of the Court of Appeal under s.80(2) to sit outside the Turks and Caicos Islands to conduct the business of the Court. Absolutely no provision was made for the Registrar to deal with any such out of Island hearings, because it was not the intention of Parliament to grant such. At the same time ample mechanisms were put in place for hearings within the Turks and Caicos Islands.

Conclusion

192. Under the 2020 Regulations and Practice Directions Regulation 4(6) does not, by necessary implication, displace or override the common law. The fact that a judge

or magistrate is not physically within the territorial boundaries of the Islands when exercising his jurisdiction to hear matters and conduct the business of the Court in the Islands does not offend the common law, nor is it inconsistent with the constitution.

193. The audio and visual link provided for by the 2020 Regulations and Practice Directions provides for the use of facilities to conduct remote hearings. Viewed in the proper context using an informed interpretation, including, among other things, the purpose of the 2020 Regulations and Practice Directions, it was the intention of Parliament that Regulation 4(6) would provide, and it does provide, the legal mechanism whereby the place where the judge physically sits, whether inside or outside the Turks and Caicos Islands, legally becomes a part of the physical courtroom in the Turks and Caicos Islands. The judge may then, employing the audio and visual technology, remotely have a virtual hearing where he exercises his authority, power and jurisdiction to conduct the business of the court in the Turks and Caicos Islands.

194. In my judgment, the Judge was not engaged by counsel to analyze comprehensively enough Regulation 4(6) and the 2020 Regulations and Practice Directions, and she did not do so, nor did she construe the proviso at all in the context of the surrounding circumstances. She thereby fell into error in arriving at her conclusion.

195. For all the above reasons I would set aside the judgment in Appeal CL-AP 6.20 and allow the appeal.

196. Costs in both appeals are awarded to the Appellant unless within 7 days the Respondent submits short written arguments to the contrary. In such case, the Appellant will have 4 days to respond and the Respondent 2 days to reply, if so advised. The Court will then make a costs order after considering those submissions.

Mottley P:

In relation to the issue of costs of the appeals, I agree with the proposed order set out in the judgment of Adderley JA.

Dated this 31st day of August, 2020

/s/ Sir Elliott Mottley P

/s/ Stollmeyer JA

/s/ Adderley JA