`EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

Claim No. BVIHCV 2014/0151

IN THE MATTER OF THE CONSTITUTION OF THE BRITISH VIRGIN ISLANDS

-AND-

IN THE MATTER OF AN APPLICATION BY PARTNERSELSKABET PARSIFAL ALLEGING THE INITIAL BREACH OF THE CONSTITUTION OF THE BRITISH VIRGIN ISLANDS, 1976 AND THE CONTINUED BREACH OF THE CONSTITUTION OF THE BRITISH VIRGIN ISLANDS, 2007 (HEREINAFTER "THE SAID CONSTITUTION") UNDER THE PROVISIONS OF THE SAID CONSTITUTION PROTECTING ITS FUNDAMENTAL RIGHTS AND FREEDOMS ENSHRINED THEREIN AND IN PARTICULAR SECTIONS 16 AND 25 HAVE BEEN AND ARE BEING AND ARE LIKELY TO BE CONTRAVENED IN RELATION TO IT FOR REDRESS IN ACCORDANCE WITH SECTION 31 OF THE SAID CONSTITUTION OF SECTIONS 16 AND 25 OF THE SAID CONSTITUTION SECTIONS AND/OR THE INHERENT JURISDICTION OF THE COURT

BETWEEN:

PARTNERSELSKABET PARSIFAL

Claimants

-AND-

THE ATTORNEY GENERAL OF THE BRITISH VIRGIN ISLANDS

Respondent

Appearances: Mr. Gilbert Peterson and Mrs. Hazel-Ann Hannaway-Boreland, Counsel for the Claimants
Mr. Baba Aziz and Ms. Maya Barry and Ms. Vareen Vanterpool, Counsel for the Respondent

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2018: January 12

JUDGMENT

[1] **Ellis J.:** On or about 2nd January 2013, the Claimant's vessel, Parsifal III ran aground at Carrot Shoal, near Peter Island, in the Territory of the Virgin Islands. As a result, the keel was damaged and approximately 30 tons of lead shot spilled onto and around the reef at Carrot Shoal.

[2] The local authorities became aware of the spill in late February of the same year and commenced investigations. These investigations eventually revealed that the yacht, Parsifal III was the source of the spill. The captain of that vessel eventually reported the incident to the authorities in the Virgin Islands on 28th February 2013.

[3] On 31st July 2013, the Applicant filed a limitation claim seeking to limit its liability of all claims arising out of the grounding to the equivalent of 167,000 special drawing rights i.e. US$250,000.00 prescribed by section 396 (b) (ii) of the Merchant Shipping Act 2001 which prescribes that:

> "396. **The limits of liability for claims other than those provided for in section 401, arising on any distinct occasion shall be calculated as follows**:
>
> (a) in respect of claims for loss of life or personal injury,
>
> (i) 166,667 special drawing rights for a ship with a tonnage not exceeding 300 tons;
>
> (ii) 333,000 special drawing rights for a ship with a tonnage from 301 tons to 500 tons; or
>
> (iii) for a ship with a tonnage in excess of 500 tons, the following amount in addition to that mentioned in sub paragraph (ii):
>
> (aa) for each ton from 501 to 3,000 tons, 500 special drawing rights;
>
> (bb) for each ton from 3,001 to 30,000 tons, 333 special drawing rights;
>
> (cc) for each ton from 30,001 to 70,000 tons, 250 special drawing rights; and
>
> (dd) for each ton in excess of 70,000 tons, 167 special drawing rights.,
>
> (b) **in respect of any other claims,**
>
> (i) 83,333 special drawing rights for a ship with a tonnage not exceeding 300 tons;
>
> (ii) **167,000 special drawing rights for a ship with a tonnage from 301 tons to 500 tons;**
>
> (iii) for a ship with a tonnage in excess of 500 tons, the following amount in addition to that mentioned in sub-paragraph (ii):
>
> (aa) for each ton from 501 to 30,000 tons, 167 special drawing rights;

(bb) for each ton from 30,001 to 70,000 tons, 125 special drawing rights; and
(cc) for each ton in excess of 70,000 tons, 83 special drawing rights." Emphasis mine

[4] The Respondent opposed this limitation claim and submitted that in any event the amount of special drawing rights was no longer applicable based on the United Kingdom Merchant Shipping (Convention on Limitation of Liability for Maritime Claims) (Amendment) Order 1998[1] (**the "1998 Order"**) which increased the amount from 167,000 to 1,000,000 special drawing rights. This Order was purportedly incorporated into law of this Territory by the BVI Merchant Shipping (Adoption of United Kingdom) Enactments Order 2005 (**the "2005 Order"**).

[5] The relevant legislative history is therefore critical to the determination of this Claim. The framework commences with section 464 of the Merchant Shipping Act 2001 which provides as follows:

> "464. (1) The Governor in Council may, after consultation with the Secretary of State for Transport of the United Kingdom, by Order apply to the Virgin Islands as part of the law of the Virgin Islands, subject to such exceptions, adaptations and modifications as may be specified in the Order, any enactment of the United Kingdom to which this section applies.
>
> (2) An Order under subsection (1) may include provisions repealing or amending any provision of any enactment, other than this section, including an enactment which applies or enables the application of any enactment of the United Kingdom relating to merchant shipping, which is inconsistent with, or is unnecessary or requires modification in consequence of this section, the Order or any enactment of the United Kingdom applied to the Virgin Islands by the Order.
>
> (3) The Minister shall, as soon as is practicable after the coming into operation of an Order under subsection (1), cause a text to be prepared of the enactment of the United Kingdom applied by the Order incorporating the exceptions, adaptations and modifications specified in the Order."

[6] By the 2005 Order, the Governor purported to exercise this delegated power to incorporate the named United Kingdom enactments into the Virgin Islands pursuant to section 464. The 2005

[1] United Kingdom Statutory Instrument No. 1258 of 1998

Order was executed by the Clerk of the Executive Council and is subsidiary legislation designed to complement the Merchant Shipping Act, 2001. This statutory instrument came into operation on 26 May 2005 and the effect was to adopt United Kingdom legislation which included 5 United Kingdom Acts, 189 pieces of subordinate legislation and 3 statutory codes of practice. For the purpose of this action, the relevant enactments incorporated by the 2005 Order include the 1998 Order and the Merchant Shipping (Accident Reporting and Investigation) Regulations 1999[2] (**the "1999 Regulations"**).

[7] Section 1 of the 1998 Order provides that it will come into force on the date on which the Protocol of 1996 to amend the Convention on Limitation of Liability for Maritime Claims 1976 (**the Convention**) enters into force in respect of the United Kingdom. It effectively increased the limitation provisions prescribed by the Convention and which had been applied in section 396 (b) (ii) of the Merchant Shipping Act 2001. Section 4 of the 1998 Order provides as follows:

> "**Limits of Liability**
> 4. In the text of the Convention as set out in Part I of Schedule 7 to the Act, in Chapter II -
> (a) for paragraph 1 of Article 6 there shall be substituted -
>
> " 1. **The limits of liability for claims other than those mentioned in Article 7, arising on any distinct occasion, shall be calculated as follows**:
> (a) in respect of claims for loss of life or personal injury,
> (i) 2 million Units of Account for a ship with a tonnage not exceeding 2,000 tons,
> (ii) for a ship with a tonnage in excess thereof, the following amount in addition to that mentioned in (i):
> for each ton from 2,001 to 30,000 tons, 800 Units of Account;
> for each ton from 30,001 to 70,000 tons, 600 Units of Account; and
> for each ton in excess of 70,000 tons, 400 Units of Account,
>
> (b) **in respect of any other claims,**
> (i**) 1 million Units of Account for a ship with a tonnage not exceeding 2,000 tons**,
> (ii) for a ship with a tonnage in excess thereof the following amount in addition to that mentioned in (i):
> for each ton from 2,001 to 30,000 tons, 400 Units of Account;
> for each ton from 30,001 to 70,000 tons, 300 Units of

[2] United Kingdom Statutory Instrument No. 2567 of 1999

Account; and
for each ton in excess of 70,000 tons, 200 Units of Account…" Emphasis mine

[8] The 1999 Regulations on the other hand are not intended to apportion or limit liability. Instead, the Regulations are intended to prescribe procedures for the investigation of marine accidents. The fundamental purpose of investigating an accident under these Regulations is to determine its circumstances and the causes with the aim of improving the safety of life at sea and the avoidance of accidents in the future.

[9] By this Constitutional Motion filed on 23rd May 2014, the Claimant contends that the adoption of the 1998 Order is unconstitutional on the basis that the increase in the special drawing rights had been effected by delegation of legislative power which is contrary to the principle of separation of powers. In an Amended Motion filed on 2nd October 2014, the Claimant also contends that (1999 Regulations) are also unconstitutional, null and void.

[10] The basis of the Claimant's claims of unconstitutionality is that section 464 of the Merchant Shipping Act 2001, purports to grant the Governor legislative power in breach of the Constitution and the doctrine of separation of powers and is therefore null and void.

[11] Alternatively, the Claimant argues that even if section 464 of the Merchant Shipping Act 2001 is itself constitutional, the method chosen by the Governor to implement its usage by the 2005 Order was unconstitutional, void and of no effect being an executive rather than legislative act.

[12] By way of further alternative, the Claimant contends that section 464 entitles only the application of "any enactment of the United Kingdom" to the Territory. The Claimant contends that the 1998 Order and the 1999 Regulations are not enactments and so any purported incorporation would be ultra vires section 464 and of no effect.

[13] Finally, the Claimant asserts that the 2005 Order does not effectively amend or repeal any part of Merchant Shipping Act 2001, particularly Part XV thereof which remains in full force and effect as originally enacted. The Claimant also asserts that for such an amendment to take effect, it would

have to be included in the 2005 Order pursuant to section 464 (2) of the Merchant Shipping Act 2001.

[14] The Claimant therefore seeks the following relief:

i. A declaration that section 464 of the Merchant Shipping Act is unconstitutional and in breach of the Claimant's right under sections 16 and 25 of the Constitution and therefore void and of no effect.

ii. A declaration that the application to the Virgin Islands of the 1998 Order and the 1999 Regulations by the 2005 Order is in breach of the Constitution, in particular in breach of the Claimant's rights under section 16 and 25 of the Constitution and is therefore null and void and of no effect.

iii. A declaration that the purported application to the Virgin Islands of the 1998 Order and the 1999 Regulations by the 2005 Order is ultra vires section 464 of the Merchant Shipping Act and incompatible with the provisions of the Constitution; alternatively

iv. A declaration that the 1998 Order and the 1999 Regulations and the 2005 Order are ineffective to either amend or repeal any part of the Merchant Shipping Act as originally enacted and in particular section 396 thereof; and

v. A declaration that the proper limitation amount for the Claimant's vessel is 167,000, special drawing right as provided for by 396 of the Merchant Shipping Act.

vi. Such further and other relief.

vii. Costs.

PRESUMPTION OF CONSTITUTIONALITY/BURDEN OF PROOF

[15] A basic rule in statutory interpretation is that legislation which is promulgated is presumed to be constitutional. This presumption of constitutionality assumes that the legislature does not Act arbitrarily or ultra vires its powers. Within the Caribbean region, there have been a number of cases in which this presumption has been applied. In **Faustin v Attorney General of Trinidad and Tobago**[3] Kelsick JA stated:

> "Nullification of enactments and confusion of public business are not lightly to be introduced. **Unless, therefore, it becomes clear beyond reasonable doubt that the legislation in question transgresses the limits laid down by the organic law of the**

[3] [1978] 30 WIR 351

Constitution, it must be allowed to stand as the true expression of the national will." Emphasis mine

[16] In **Mootoo v Attorney General of Trinidad and Tobago**[4] the Board relied on the test laid down in **Attorney General *v* Antigua Times Ltd**[5] in these terms:

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

[17] In that case, the Board reiterated that the burden cast upon an appellant to prove invalidity is a heavy one. The remit of this burden has also been reiterated in the judgments of **Re Mc Leod**[6]**; King v Attorney General**[7]**; and Nyambirai v National Social Security Authority**[8]**.**

[18] In **Attorney General v Caterpillar Americas Co.**[9] the Court stated the following:

> "…the Court will not be astute to attribute to the Legislature motives or purposes or objects which are beyond its powers. It must be shown affirmatively by the party challenging a statute, which is, on the face of it intra vires, that it was enacted as part of a plan to effect indirectly something which the Legislature had no power to achieve directly."

[19] The function and responsibility of a court considering such a claim was clearly set out by Marshall CJ in **Fletcher v Peck**[10] in the following terms:

> "The question whether a law be void for its repugnancy to the Constitution is at all times a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case. The Court when impelled by duty to render such a judgment would be unworthy of its station could it be unmindful of the solemn obligation which that station imposes, but it is not on slight implication and vague conjecture that the legislation is to be pronounced to have transcended its powers and its acts to be considered as void. **The opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other."** Emphasis mine

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[4] [1979] 3 WIR 411
[5] (1975) 21 WIR 560
[6] [1978] Civil Suit No. 1501 of 1978 at pages 17, per Bernard J.
[7] [1992] 44 WIR 52 at pages 66-67, per Sir Denys Williams CJ
[8] (1996) 1 LRC 64
[9] (2000) 62 WIR 135 at 148
[10] (1809) 6 Cranch 128

[20] This Court is guided by these dicta. With these principles in mind the Court will now turn to consider the issues which arise in this Motion. First, the Court must consider the appropriate constitutional context in which these issues are to be ventilated. In his written submissions to this Court, Counsel for the Claimant relied on the provisions of the Virgin Islands 1976 Constitution. When this was challenged by the Respondent, Counsel for the Claimant submitted that the relevant powers, rights and obligations are the same under the 1976 and the 2007 Constitution. In light of this concession, this Court has some difficulty in understanding the utility of referencing the earlier constitutional provisions. In this judgment, the Court has therefore referenced the 2007 constitutional provisions.

WHETHER SECTION 464 OF THE MERCHANT SHIPPING ACT AND/OR THE 2005 ORDER IS IN BREACH OF THE CONSTITUTION?

[21] Under this Ground, the Claimant contends that section 464 of the Merchant Shipping Act is unconstitutional because it breached the separation of powers doctrine. This doctrine is implied in constitutions based on the Westminster model. Counsel for the Claimant submitted to the Court that under this doctrine, each branch of government (the legislature, executive and judiciary) exercises the authority given to it under the Constitution exclusively and without interference from the other branches of government. The Claimant relied on the following dictum of Diplock LJ in **Hinds v The Queen**[11].

> "It is taken for granted that the basic principle of separation of powers will apply to the exercise of their respective functions by these three organs of government. Thus the constitution does not normally contain any express prohibition upon the exercise of legislative powers by either the executive or the legislature…Nonetheless, it is well established as a rule of construction applicable to constitutional instruments under which this governmental structure is adopted that the absence of express words to that effect does not prevent the legislative, the executive and the judicial powers of the new state being exercisable exclusively by the legislature , by the executive and by the judicature respectively."

[11] [1975] UKPC 22 per Diplock LJ

[22] In demonstrating this principle, Counsel for the Claimant pointed to section 71 of the Constitution which mandates that the lawmaking function is vested in the Legislature. That section provides that:

> "Subject to this Constitution, the Legislature shall have power to make laws for the peace, order and good government of the Virgin Islands."

[23] In written submissions to the Court, Counsel for the Claimant made repeated references to the office of Governor (established under section 35 of the Constitution) in drawing a distinction between legislative and executive authority. When Counsel for the Respondent pointed out that the legislative provision in issue (i.e. section 464 of the Merchant Shipping Act) refers to the Governor in Council and not the Governor, Counsel for the Claimant blithely asserted that the reference to the Governor in Council is to the Governor in his executive capacity and so this would not affect the submissions advanced.

[24] The Court is satisfied that under the BVI Interpretation Act the references to "Governor" and "Governor in Council" are not interchangeable. Moreover, for reasons which follow, the Court is satisfied that this distinction does in fact have a significant bearing on the case at bar. Section 43 of the Interpretation Act provides clearly that:

> *"In an enactment, the expression "Governor in Council" means the Governor acting with the advice of the Executive Council of the Territory*".[12]

[25] Section 47 (3) of the Constitution provides that:

> "The Cabinet shall have responsibility for the formulation of policy, including directing the implementation of such policy, insofar as it relates to every aspect of government, except those matters for which the Governor has special responsibility under section 60, and the Cabinet shall be collectively responsible to the House of Assembly for such policies and their implementation."

[26] Moreover, section 46 of the Constitution provides as follows:

> "46. (1) The executive authority of the Virgin Islands shall be vested in Her Majesty.

[12] Under Section 47 of the Constitution, the Executive Council is now the Cabinet.

(2) Subject to this Constitution, the executive authority of the Virgin Islands may be exercised on behalf of Her Majesty by the Governor, either directly or through officers subordinate to him or her.

(3) Nothing in subsection (2) shall operate so as to prejudice any law for the time being in force in the Virgin Islands whereby functions are, or may be, conferred on persons or authorities other than the Governor."

[27] Counsel submitted that as a member of the executive, the Governor in Council is not vested with the authority to make or amend legislation under the Constitution. He argued that any purported exercise of legislative authority by the Governor in Council without the participation of the Legislature is a violation of the principle of separation of powers and in breach of the Constitution.

[28] Counsel argued that section 464 of the Merchant Shipping Act is unconstitutional because it purports to give the Governor the authority to legislate for the Territory by the application of the UK enactments without the oversight or approval of the Legislature. He submitted that the Legislature is not permitted under the Constitution to delegate its legislative power because under the BVI Constitution, only the Legislature and Her Majesty have power to make or amend the laws of the Virgin Islands.

[29] In support of this contention, Counsel relied on the case of **J. Astaphan & Co. (1970) Ltd. v The Comptroller of Customs et al.**[13] In that case, the appellant applied for declarations and orders predicated on the unconstitutionality and invalidity of certain provisions of the Customs (Control and Management) Act. The Eastern Caribbean Court of Appeal held that an unfettered power to impose a tax vested in the comptroller of customs by legislation was a violation of the principle of separation of powers, in that the imposition of tax was a legislative and not an executive function.

[30] The following excerpt from Sir Vincent Floissac CJ's judgment is instructive:

> "The power to impose taxes and duties is inherently a legislative power constitutionally vested in the legislature. If the 'further sum' which section 27 (4) of the Customs (Control and Management) Act has authorised the proper officer to demand is a tax or a duty, the legislature of Dominica has delegated or transferred its legislative power of taxation to the executive (i.e. the proper officer). The question thus arises as to whether such delegation or transfer of legislative power offends the basic principle of separation of powers.

[13] (1996) 54 WIR 153

> I concede that the delegation or transfer of legislative power by the legislature to the executive is not per se inconsistent with the principle of separation of powers. There is no such inconsistency if the legislature retains effective control over the executive in the latter's exercise of the delegated or transferred legislative power. Such effective control may be retained by circumscribing the power or by prescribing guidelines or a policy for the exercise of the power.
>
> I also concede that the legislature reserves the right to repeal its own legislation and to revoke any legislative power which it has delegated or transferred to the executive. To that extent, the legislature retains ultimate control over the executive in relation to the exercise by the executive of delegated or transferred legislative power. But this ultimate control is not effective after the power has been exercised in an individual case or if and when the power has already been abused by the executive. If the basic principle of separation of legislative and executive powers is intended to be meaningful and effective, the basic principle should not be deemed to have been observed merely by reason of the existence of an ultimate control which operates ex post facto. There must be some parliamentary control at the time of the exercise of the power.
>
> For these reasons, I am firmly of the opinion that if the legislature delegates or transfers its legislative power to the executive and does so without circumscribing the power or without prescribing guidelines or a policy for its exercise, the legislature should be deemed to have surrendered or abdicated the power. In that event, the delegation or transfer of legislative power is inconsistent with the basic principle of separation of powers."

[31] Counsel for the Claimant submitted that section 464 purports to give the Governor the authority to legislate for the Virgin Islands by incorporating United Kingdom enactments, without the oversight or approval of the BVI Legislature. Moreover, he submitted that this power is not circumscribed and there are no guidelines or policy prescribed for its exercise.

[32] The Respondent contends that this Claim is entirely misconceived because it wrongly assumes that a strict separation of powers model applies in the BVI Constitution. Counsel submitted that in this Territory, the separation of legislative and executive powers is qualified by the doctrine of responsible government where ministers of government are drawn from the legislature and are accountable to it. Counsel further argued that the doctrine is further qualified by the common practice of delegating legislative power to the executive to make regulations and other legislative instruments.

[33] Counsel indicated that this lack of rigidity and overlap has been acknowledged and recognized by the English courts. He referred the Court to paragraph 39 of **R v Secretary of State for the Home Department ex parte Anderson**[14] in which Lord Steyn stated:

> "Our constitution has, however, never embraced a rigid doctrine of separation of powers. The relationship between the legislature and the executive is close. On the other hand, the separation of powers between the judiciary and the legislative and executive branches of government is a strong principle of our system of government."

[34] This general position has also applied in Caribbean constitutions based on the Westminster model. In support of this, Counsel cited the judgment of Lord Sumption in **Ferguson v Attorney General of Trinidad and Tobago**[15]:

> "One of the fundamental principles of the Constitution is the qualified separation of powers. It is qualified because the "Westminster model" has never required an absolute institutional separation between the three branches of the state. But the relations between them are subject to restrictions on the use of its constitutional powers by one branch in a manner which interferes with the exercise of their own powers by the others."

[35] Counsel for the Respondent then went on to dismiss the plethora of judicial authorities cited by the Claimant. He asserted that they are not analogous to the case at bar because the separation of powers doctrine was considered within a context where role of the judiciary was in issue. He submitted that the authorities do not address the fundamental issue of whether the legislature had the power to delegate its law making power to the Governor in Council.

[36] Counsel submitted that under section 71 of the Constitution, the BVI Legislature has wide plenary powers to make laws for the peace, order and good government of the Territory. Incidental to this authority is the power to delegate its lawmaking power to the executive. Counsel relied on the Privy Council decision in **Hodge v R**[16]**:**

> "… it was further contended that the Imperial Parliament had conferred no authority on the local legislature to delegate those powers to the License Commissioners, or any other persons. In other words, that the power conferred by the Imperial Parliament on the local legislature should be exercised in full by that body, and by that body alone. The maxim delegatus non potest delegare was relied on.

[14] (2002) UKHL 46
[15] (2016) UKPC 2
[16] (1883) UKPC 59

> It appears to their Lordships, however, that the objection thus raised by the appellants is founded on an entire misconception of the true character and position of the provincial legislatures. They are in no sense delegates of or acting under any mandate from the Imperial Parliament. When the British North America Act enacted that there should be a legislature for Ontario, and that its legislative assembly should have exclusive authority to make laws for the Province and for provincial purposes in relation to the matters enumerated in section 92, it conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by section 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow. Within these limits of subjects and area the local legislature is supreme, and has the same authority as the Imperial Parliament, or the Parliament of the Dominion, would have had under like circumstances to confide to a municipal institution or body of its own creation authority to make by-laws or resolutions as to subjects specified in the enactment, and with the object of carrying the enactment into operation and effect.

[37] The Respondent submitted to the Court that there is nothing in the Constitution which prevents the Legislature of the Virgin Islands from adopting any Act of the United Kingdom Parliament or Order in Council or any legislative instrument made thereunder. He also submitted that there is no provision in the BVI Constitution which precludes the Legislature from delegating to the executive of the power to adopt such legislation.

Discussion and Conclusion

[38] This Court finds much force in the Respondent's arguments. The 'pure' doctrine of the separation of powers prescribes that the functions of the three arms of government be clearly and institutionally separated. One justification of this is to prevent the concentration of too much power in, and consequent abuse of power, by a single arm of government. The separation of powers ensures that the three arms of government check each other and keep them in balance, ultimately protecting the citizenry.

[39] However, a cursory review of the relevant judicial authorities reveals that courts are more likely to insist on a strict separation of "judicial power".[17] In the case of legislative and executive powers, the position is somewhat less rigid. From an institutional perspective, it cannot be denied that lawmaking powers can be exercised by a properly delegated executive. Indeed, as was made

[17] Hinds v The Queen [1977] AC 195, 212-213 per Lord Diplock

clear in **Hinds v R**, "…*the constitution does not normally contain any express prohibition upon the exercise of legislative powers by the executive or of judicial powers by either the executive or the legislature*." There is no such prohibition in the BVI Constitution. Moreover, within the region, the doctrine is further compromised because ministers who exercise an executive function are required to be members of the legislature in which they have a prevailing role in the legislative process. It is clear that in practice, both in its institutional and personnel form, institutions regularly exercise functions from one or more of the defined categories (legislature, executive and judiciary). The executive is not only physically part of the legislature, but the legislature can also allocate it some of its powers, such as of the making of regulations under an Act passed by Parliament. Similarly, the legislature could restrict or over-rule some powers held by the executive by passing new laws to that effect.

[40] Moreover, it cannot be disputed that a legislature's power to delegate is a necessary corollary to its plenary legislative powers. The necessity and convenience which it affords cannot be overemphasized. The court in **Hodge v R** described the position in this way:

> **"**It is obvious that such an authority is ancillary to legislation, and without it an attempt to provide for varying details and machinery to carry them out might become oppressive, or absolutely fail. The very full and very elaborate judgment of the Court of Appeal contains abundance of precedents for this legislation, entrusting a limited discretionary authority to others, and has many illustrations of its necessity and convenience. It was argued at the bar that a legislature committing important regulations to agents or delegates effaces itself. That is not so. It retains its powers intact, and can, whenever it pleases, destroy the agency it has created and set up another, or take the matter directly into his own hands. How far it shall seek the aid of subordinate agencies, and how long it shall continue them, are matters for each legislature, and not for Courts of Law, to decide."

[41] In the Court's judgment, section 464 of the Merchant Shipping Act is a clear acknowledgment of this principle. In circumstances where the Claimant has failed to identify any legislative or common law bars to the exercise of this power, the Court cannot conclude that the section is unconstitutional merely on the basis that it conflicts with the separation of powers doctrine.

[42] However, Counsel for the Claimant posited an alternative challenge to the legislation. He submitted that enacting section 464 of the Merchant Shipping Act the BVI legislature employed a legislative tool known as a "**Henry VIII Clause**" which should be avoided in countries governed by written

constitutions based on the Westminster model because they are a clear breach of the principle of separation of powers.

HENRY VIII CLAUSES

[43] Historically, delegated legislation can and has been used to amend or repeal primary legislation. Enabling provisions which confer this unusual power on delegates have been labeled "Henry VII clauses" after the renowned autocratic English sovereign. The utility of this legislative tool stems largely from the legislature's need to effect the fine-tuning of the enabling legislation without the need return to an overburdened legislature with a bill.

[44] In the case of section 464, the relevant Henry VIII clause is set out at subsections (1) and (2) which invites the amendments, repeal and replacements of existing legislation by means of the application of external legislative provisions subject to certain "exceptions, adaptations and modifications". The section provides that:

> (2) An Order under subsection (1) may include provisions repealing or amending any provision of any enactment, other than this section, including an enactment which applies or enables the application of any enactment of the United Kingdom relating to merchant shipping, which is inconsistent with, or is unnecessary or requires modification in consequence of this section, the Order or any enactment of the United Kingdom applied to the Virgin Islands by the Order.

[45] Counsel for the Claimant argued that in countries which have written constitutions based on the Westminster model, a legislature would have no power to ignore the conditions for law making granted under these constitutions. In developing this argument, Counsel referred the Court to several Indian cases in which the courts have confronted issues arising from an excessive delegation of legislative functions, and the delegation of the powers to make laws under the guise of administrative discretion.

[46] In **Heera Lal Umar and Anor v The State of U.P**.[18] the High of Court of Judicature took pains to conduct an extensive review of court decisions dealing with legislative delegation. One of the decisions cited was **Raj Narain Singh v Chairman, Patna Administration Committee.**[19] In that

[18] [2006] INAHHC 2698
[19] A.I.R. 1954 S.C. 569

case, the Supreme Court held that the action of the Governor in subjecting the residents of Patna to municipal taxation without observing the formalities imposed by sections 4, 5 and 6 of the Bihar and Orissa Municipal Act of 1922, cuts across one of its essential features touching a matter of policy. In that Court's judgment, one of the essential features of the 1922 Act was that no municipality competent to tax should be thrust upon a locality without giving its inhabitants a chance of being heard or an opportunity to object. Sections 4, 5 and 6 of the Act afforded a statutory guarantee to this effect. The Court therefore observed that the Local Government had a statutory duty imposed by the Act in mandatory terms to listen to the objections and take them into consideration before reaching a decision. This was a matter of policy imposed by the Legislature.

[47] The Court concluded that it was not open to the executive authority to ignore this guarantee in disregard of this expressed mandate because to do so would be to change the policy of the law. The Court held that the Notification therefore effected a radical change in the policy in the Act, beyond the authority conferred by section 3 (1) (f) and was therefore ultra vires.

[48] Critically, the Court also held that while an executive authority can be authorized to modify either existing or future, it cannot purport to modify an essential feature. The Court observed that what constitutes an essential feature cannot be enunciated in general terms. The case of **Avinder Singh v The State of Punjab**[20] however, does provide some clarity. At paragraph 17 of that judgment, the court stated:

> "While what constitutes an essential feature cannot be delineated in detail it certainly cannot include a change of policy. The legislature is the master of legislative policy and if the delegate is free to switch policy it may be usurpation of legislative power itself. So we have to investigate whether the policy of legislation has been indicated sufficiently or even change of policy has been left to the sweet will and pleasure of the delegate in this case."

[49] In **Avinder Singh v The State of Punjab** the court went on to lay down the following tests for valid delegation of legislative power:

> "These are - "(1) the legislature cannot efface itself - (2) it cannot delegate the plenary or the essential legislative function; (3) even if there be delegation, Parliamentary control over delegated legislation should be a living continuity as a constitutional necessity."

[20] (1979) 1 SCC 137

[50] Counsel for the Claimant argued that the authority of the legislature to delegate is limited to delegating authority to implement the policy of the enacted legislation. He submitted that it cannot and does not extend in any measure to amending, repealing or replacing the primary legislation. Counsel noted the very wide terms of section 464 which purports to delegate unbridled authority to the Governor in Council to amend, repeal and replace "*any provision of any enactment which is inconsistent with or is unnecessary or requires modification in consequence of this section with, or is unnecessary or requires modification in consequence of this section, the Order or any enactment of the United Kingdom applied to the Virgin Islands by the Order.*"

[51] Counsel argued that the Court should find little comfort in the fact that there is still authority vested in the Legislature to control the authority given to the Governor in Council through the exercise of repeal. He referred the Court to the following dictum from **Gwalior Rayon Silk MFG Co. Ltd. v the Assistant Commissioner of Sales Tax and Ors.**[21]

> "It is not possible to subscribe to the view that if the legislature can repeal an enactment, as it normally can, it retains enough control over the authority making the subordinate legislation and, as such, it is not necessary for the legislature to lay down legislative policy, standard or guidelines in the statute. The acceptance of this view would lead to startling results."

[52] Counsel argued that section 464 lays down no guidelines or parameters and reserves no oversight or control. There is neither a requirement as to the outcome of the purported "consultation with the United Kingdom Secretary of State, nor any policy requirements as to the extent or content of such consultation. He argued that section 464 represents a wholesale abdication of the legislative authority in favor of the executive. In support of this contention he cited the Indian case of **Shama Rao v Union Territory of Pondicherry**[22] in which the Supreme Court struck down the Pondicherry Act on the basis that it was void and could not be revived. The Court observed:

> "The question then is whether in extending the Madras Act in the manner and to the extent it did under sec. (2)(1) of the Principal Act the Pondicherry legislature abdicated its legislative power in favour of the Madras legislature. **It is manifest that the Assembly refused to perform its legislative function entrusted under the Act constituting it. It may be that a mere refusal may not amount to abdication if the legislature instead of going through the full formality of legislation applies its mind to an existing statute**

[21] [1973] INSC 257
[22] 1967 AIR 1480

> **enacted by another legislature for another jurisdiction, adopts such an Act and enacts to extend it to the territory under its jurisdiction. In doing so, it may perhaps be said that it has laid down a policy to extend such an Act and directs the executive to apply and implement such an Act. But when it not only adopts such an Act but also provides that the Act applicable to its territory shall be the Act amended in future by the other legislature, there is nothing for it to predicate what the amended Act would be. Such a case would be clearly one of non-application of mind and one of refusal to discharge the function entrusted to it by the Instrument constituting it.** It is difficult to see how such a case is not one of abdication or effacement in favour of another legislature at least in regard to that particular matter." Emphasis mine

[53] Counsel argued that under section 464, the BVI Legislature had essentially "washed its hands". He pointed out that the blanket authorization which it affords, gives the Governor in Council the power to enact amendments of any character; essential or otherwise in conjunction with the adoption of U.K. legislation, without further parliamentary scrutiny. He further argued that here is nothing that would suggest that the executive be required to give considered thought to the amendments and the ramifications thereof that may be ushered in by the UK legislation.

[54] According to the Claimant, the point which is most fatal to section 464 is that it makes no distinction between enactments which pre-date and enactments which post-date the purported delegation. Moreover, since the legislature at that stage could not anticipate that any potentially relevant UK legislation would not be amended nor whether it would be suitable in the Virgin Islands, section 464 constitutes a total surrender by the Legislature in favour of an uncertain blend of legislation promulgated by the United Kingdom Parliament and the BVI Governor in Council acting in an executive capacity.

[55] Counsel submitted that the tests prescribed in the Indian case law are directly relevant and applicable in this Territory since they are predicated upon the separation of powers doctrine and the accountability of the legislators which forms part of our constitutional framework. He concluded that if the tests prescribed in **Avinder Singh** are applied, section 464 is void and should be struck down.

[56] Not surprisingly, Counsel for the Respondent trenchantly opposed the contention that the Indian jurisprudence has any application of binding force in this Territory. First, he submitted that the

constitutional structure in India is wholly distinct from that of the Virgin Islands which is a British overseas territory. He also submitted that all of the cases cited by the Claimant lack direct relevance because they post-date India's independence from the United Kingdom. Instead, Counsel commended to the Court, the Indian case of **R v Burah**[23] and **Croft v Dunphy**[24] where at 165 the Privy Council stated that:

> "*When a power is conferred to legislate on a particular topic it is important in determining the scope of the power, to have regard to what is ordinarily treated as embraced within that topic in legislative practice and particularly in the legislative practice of the State which has conferred the power.*"

[57] In light of this, the Respondent argued that the appropriate context is not post-colonial India but rather the legislative practice in United Kingdom imperial parliament. That context reveals that under sections 185 (2A) and (2C) of the United Kingdom Merchant Shipping Act 1995, the executive is empowered to make such amendments as appear appropriate for the purpose of giving effect to any amendments of the relevant limitation amount adopted in accordance with Article 8 of the 1996 Protocol which amended the Convention on Limitation of Liability for Maritime Claims of 19 November 1976.

[58] The Respondent further argued that there is nothing in the BVI Constitution which prescribes against the USE of Henry VIII clauses. He pointed out that such legislative tools are not out of step with the United Kingdom Parliament which regularly utilizes such clauses. By way of example he referenced, sub-section 185 (2A) and (2C) of the United Kingdom Merchant Shipping Act 1995 which similarly provides as follows:

> (2A). Her Majesty may by Order in Council make such modifications of Parts I and II of Schedule 7 as She considers appropriate in consequence of the revision of the Convention by the Protocol of 1996 amending the Convention (in this section referred to as "the 1996 Protocol").
>
> (2C). The Secretary of State may by order make such amendments of Parts I and II of Schedule 7 as appear to him to be appropriate for the purpose of giving effect to any amendment of a relevant limit which is adopted in accordance with article 8 of the 1996 Protocol.

[23] (1883) 3 App. Cas. 889
[24] 1933) A.C. 156

[59] Counsel argued that the Claimant has failed to demonstrate that Henry VIII clauses are not permissible in the BVI and has provided no authority for such a contention. On the contrary Counsel relied on the **Mootoo** Judgment to support the contention that this legislative tool is in fact not inconsistent with Westminster type constitutions. At page 5 of the judgment, the Board stated:

> "Under section 19 of the Act, the Governor-General is empowered to make regulations for giving effect to the Act, **and in particular for prescribing anything by the Act required to be prescribed, including the amending of the rates of levy fixed in section 7. Such a delegation is not inconsistent with the underlying structure of the Constitution,** although such a delegation would offend against the American constitutional principles as Dixon J. pointed out in *Victorian Stevedoring and General Contracting Co. Pty. Ltd. v Dignan* (1931) 46 C.L.R. 73: see also *Cobb & Co. Ltd. v Kropp* [1967] A.C. 141." Emphasis mine

DISCUSSION AND CONCLUSION

[60] A statutory provision in an enabling Act which confers power on a delegate to amend the enabling Act itself or any other Act is known as a Henry VIII clause. It has been said that this designation evokes a history of unaccountable executive power. Although it is not uncommon for modern legislation to give the power to amend or repeal principal acts by delegated legislation, it is considered *the* most drastic form of delegation. Some legal scholars and jurists consider such clauses to be wholly inconsistent with the separation of powers doctrine and an affront to parliamentary sovereignty and have suggested that it should be used only for limited purposes e.g. bringing an Act into operation. However, their popularity has not diminished and in the United Kingdom they have been used to increase the amount of fines imposed by Acts and as in the case at bar, they have been used to amend monetary limits in Acts.[25]

[61] Notwithstanding their popularity, these clauses are generally viewed with suspicion and there is judicial authority which counsels that they are inherently unconstitutional because they breach the separation of powers doctrine. However, within the United Kingdom, the English courts have chosen to approach this legislative tool with much caution, prescribing that such provisions are to

[25] Consumer Credit Act 1974 section 181

be "narrowly and strictly construed."[26] In **Mc Kiernon v Chief Adjudication Officer**, Donaldson MR stated:

> "Although primary and subordinate legislation can be equally effective in determining the rights, duties and liabilities of all those who fall within their scope, the character of each is fundamentally different. Primary legislation represents the expression of the will of Parliament after full debate with considerable opportunities for amendment. Subordinate legislation, at any rate when subject to the negative resolution procedure, represents the will of the Executive exercised within limits fixed by primary legislation. …**The duty of the courts being to give effect to the will of Parliament, it is, in my judgment, legitimate to take account of the Act that a delegation to the Executive of power to modify primary legislation must be an exceptional course and that, if there is any doubt about the scope of the power conferred on the Executive or on whether it has been exercised, it should be resolved by a restrictive approach…** Emphasis mine

[62] This Court respectfully adopts this reasoning and approach. In the Court's judgment, there is much danger in adopting an indiscriminate embargo because ultimately a court should be reluctant to interfere with the will of the Legislature and it is apparent that the Henry VIII clause is a legislative tool which may be employed by the Legislature for any number of valid and useful reasons.

[63] Counsel for the Respondent has urged this Court to reject the Claimant's attempt at what he termed the "*indianisation*" of Virgin Islands jurisprudence. However, the Court does not accept that the Indian authorities reflect any different approach to that applied by the English courts. The Indian Constitution does not prohibit the delegation of powers; in fact, there are specific provisions by which the executive is vested with legislative power.[27] Instead, the Indian authorities merely reflect the anxious scrutiny with which these courts have regarded such legislative provisions. Overall, the judicial authorities make it clear that it is generally not constitutionally improper for delegated legislation to amend acts of Parliament.

[64] The principle which emerges from the judicial authorities is that the power to make subsidiary legislation may be entrusted by the legislature to another body of its choice, but the legislature should, before delegating, enunciate either expressly or by implication, the policy and the principles for the guidance of the delegate. The delegate which has been so authorized has to work within the

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[26] R v Secretary of State for Social Security ex p. Britnell [1991] 1 WLR 198 at 204 applied in McKiernon v Chief Adjudication Officer (1989) Times 1 Nov; Bairstow v Queens Moat Houses plc. [1998] 1 All ER 343 at pages 353 - 354

[27] Articles 123 and 240 of the Constitution of India 1949

scope of its authority and cannot widen or constrict the scope of the Act or the policy laid down thereunder. The delegate therefore has to restrict itself to the mode of implementation of the policy and purpose of the Act. The case law therefore recognizes that an essential legislative function is the determination of legislative policy and that the legislature should not abdicate its essential legislative function in favour of another.

[65] The cases in which the courts have intervened are those where the legislature can be said to have abdicated its role by delegating its function of prescribing legislative policy to the executive. As long as the policy is made clear and the limits are laid down, there is nothing unconstitutional or wrong in permitting the executive to make subordinate rules within prescribed limits.

[66] Admittedly, Henry VIII clauses are a controversial form of delegation because they enable the amendment or repeal of primary statutes. In the Court's view, this inherently demands anxious scrutiny more so in circumstances where, as in the case at bar, the Henry VIII clause is stated in such wide terms. The clause is not confined to a particular area in the legislation. It does not purport to confine or define the range of enactments and it appears to create a power to change legislation passed after the empowering Act.

[67] In the Court's judgment, Henry VIII clauses should receive a narrow construction, with any doubt as to the scope of their subject matter being resolved restrictively. The Court is guided by the following dictum in **Re Palmer (A debtor)**[28] where at page 342 Balcombe J stated:

> "So I turn to the provisions of the Order of 1986 bearing in mind that it should be construed, if possible, in such a way as not to render it ultra vires section 421 and also by the rule that where subordinate legislation modifies provisions contained in primary legislation, it should be construed restrictively: see *McKiernon v. Chief Adjudication Officer*, The Times, 1 November 1989; Court of Appeal (Civil Division) Transcript No. 1017 of 1989."

[68] While the Court is satisfied that section 464 should be cautiously interpreted, the Claimant has done little to satisfy the Court that Henry VIII clauses intrinsically violate this Territory's constitutional framework. The Claimant has stressed the fact that under section 464, there is no

[28] [1994] Ch. 316

requirement that the UK legislation to be adopted should pre-date the enabling Act. He submitted that this is fatal. However, he provided no legal or other authority in support of this contention.

[69] Counsel for the Claimant also contends that section 464 has conferred a blanket authorization on the Governor in Council without the benefit of parliamentary guidance and scrutiny. They contend that there is nothing to suggest that the Governor in Council is required to give considered thought to the amendments or ramifications of the UK Legislation. The Claimant commends to the Court the tests of constitutional validity enunciated in the Indian jurisprudence and relies on the dictum of Sir Vincent Floissac CJ in **J. Astaphan & Co. (1970) Ltd. v The Comptroller of Customs and Another[29].** In that case, the Eastern Caribbean Court of Appeal found that the imposition by a customs officer of a sum in excess of the estimated duties on goods was "*inconsistent with the basic principle of separation of powers in that the imposition of tax was a legislative function and not an executive function*".

The learned Chief Justice stated:

> "The power to impose taxes and duties is inherently a legislative power constitutionally vested in the legislature. If the 'further sum' which section 27(4) of the Customs (Control and Management) Act has authorised the proper officer to demand is a tax or a duty, the legislature of Dominica has delegated or transferred its legislative power of taxation to the executive (i.e. the proper officer). The question thus arises as to whether such delegation or transfer of legislative power offends the basic principle of separation of powers.
>
> I concede that the delegation or transfer of legislative power by the legislature to the executive is not per se inconsistent with the principle of separation of powers. There is no such inconsistency if the legislature retains effective control over the executive in the latter's exercise of the delegated or transferred legislative power. Such effective control may be retained by circumscribing the power or by prescribing guidelines or a policy for the exercise of the power.
>
> I also concede that the legislature reserves the right to repeal its own legislation and to revoke any legislative power which it has delegated or transferred to the executive. To that extent, the legislature retains ultimate control over the executive in relation to the exercise by the executive of delegated or transferred legislative power. But this ultimate control is not effective after the power has been exercised in an individual case or if and when the power has already been abused by the executive. If the basic principle of separation of legislative and executive powers is intended to be meaningful and effective, the basic principle should not be deemed to have been observed merely by reason of the existence of an ultimate control which operates ex post facto. There must be some parliamentary control at the time of the exercise of the power.

[29] (1996) 54 WIR 153

For these reasons, I am firmly of the opinion **that if the legislature delegates or transfers its legislative power to the executive and does so without circumscribing the power or without prescribing guidelines or a policy for its exercise, the legislature should be deemed to have surrendered or abdicated the power. In that event, the delegation or transfer of legislative power is inconsistent with the basic principle of separation of powers**." Emphasis mine

[70] Counsel submitted that the lack of oversight, guidelines and boundaries and the wide terms in which section 464 is couched, means that any exercise of legislative authority would be a blatant violation of the Constitution.

[71] The Respondent on the other hand, urged this Court to disregard the J. Astaphan authority on the basis that it conflicts with the Privy Council decision in **Cobb & Co. Ltd. v Kropp**[30] in which he contends that the Board imposed few legal limits and controls on the power of the legislation to delegate its law-making function to the Executive. The Respondent submitted that the Board observed that the only legal limitation is the legislature must always retain the capacity to revoke the delegated power and assume the power.

[72] However, Counsel for the Claimant submitted that the **Cobb** judgment does not at all advance the Respondent's case because the applicant in that case had sought to argue that there could be no delegation at all. That argument was clearly doomed to fail. Instead, the critical distinction is found in the actual statutory framework in that case. Counsel argued that the relevant legislation (the State Transport Acts) set out clear boundaries and perimeters for the exercise of that delegated power. He submitted that the Queensland legislation sets out an elaborate framework of guidelines which are absent in the case at bar. The Board relied on the following dictum from the first instance judge who noted:

> "Obviously Parliament cannot directly concern itself with all the multitudinous matters and considerations which necessarily arise for daily and hourly determination within the ramifications of a vast transport system in a great area in the fixing of and collection of licensing fees. So, as I see it on the face of the legislation, Parliament has lengthened its own arm by appointing a commissioner to attend to all these matters, including the fixing and gathering of the taxes which Parliament itself has seen fit to impose… The commissioner has not been given any power to Act outside the law as laid down by Parliament. Parliament has not abdicated from any of its own power. **It has laid down a**

[30] (1967) 1 AC 141

framework, a set of bounds, within which the person holding the office created by Parliament may grant, or refrain from granting licences, and fix, assess, collect or refrain from collecting fees which are taxes."

[73] Counsel for the Claimant agreed that in that case, the Court could make no finding that the Queensland Parliament had abdicated its legislative role.

[74] The Respondent insisted that the reasoning in **Cobb** is a complete answer to the **J. Astaphan case**. He submitted that Sir Vincent's dictum regarding the need for guidelines and ring-fencing did not impose a legal requirement and to the extent that it did, it was *per incuriam* in light of the authoritative Privy Council decision. Counsel pointed out that nowhere in that judgment is there any reference to the relevant Privy Council decisions. The Respondent argued that the critical part of the **Cobb** judgment which is overlooked by the Claimant, clearly sets out the Board's ratio:

> "The legislature was entitled to use any agent or any subordinate agency or any machinery that they considered appropriate for carrying out the objects and purposes that they had in mind and which they designated. They were entitled to use the Commissioner of Transport as their instrument to fix and recover the licence and permit fees. They were not abrogating their power to levy taxes and were not transferring that power to the commissioner. **What they created by the passing of the Transport Acts could not reasonably be described as a new legislative power or separate legislative body armed with general legislative authority (see *R v Burah)*. Nor did the Queensland legislature "create and endow with its own capacity a new legislative power not created by the Act to which it owes its own existence" (see *Re Initiative and Referendum Act*[31]. In no sense did the Queensland legislature assign or transfer or abrogate their powers or renounce or abdicate their responsibilities. They did not give away or relinquish their taxing powers. All that was done was done under and by reason of their authority. It was by virtue of their will that licence and permit fees became payable. Nor was there any alteration of the legislature "in the direction of providing for the restoration and/or constitution and/or establishment of another legislative body (whether called 'the legislative council' or by any other name or designation in addition to the legislative assembly)"** (see section 3 of the Constitution Act Amendment Act of 1934)." Emphasis mine

[75] The Respondent also noted the Board's reliance on another Privy Council decision, **Powell *v* *Apollo Candle Co Ltd*[32].** He argued that in that case there were no guidelines prescribed or other rules which circumscribed these powers and yet the Board found that the delegated power was valid. In the course of the judgment, the Board stated at p 291:

[31] [1919] AC 935 at p 945
[32] (1885), 10 App Cas 282

> "It is argued that the tax in question has been imposed by the governor, and not by the legislature, who alone had power to impose it. **But the duties levied under the Order in Council are really levied by the authority of the Act under which the order is issued. The legislature has not parted with its perfect control over the governor, and has the power, of course, at any moment, of withdrawing or altering the power which they have entrusted to him."** Emphasis mine

[76] Counsel also relied on the judgment in **Victorian Stevedoring and General Contracting Company Pty Ltd v Dignan**[33] in which the Australian High Court upheld that a strict division of powers between the executive and legislature was not practical, and re-affirmed that the Australian Constitution allows for the conferring of legislative power on the executive under special conditions, determined by the legislative branch. Dixon J opined that it was impossible and consistent with the British tradition, to insist upon a strict separation between legislative and executive powers. The learned judge upheld the validity of the Waterside Employment Regulations made as under sec. 3 of the Transport Workers Act 1928-1929 by the Governor-General in Council on 26th June 1931 (S.R. No. 77 of 1931). The validity of this provision was attacked on the ground that it was an attempt to grant to the executive, a portion of the legislative power vested by the Constitution in the Parliament, inconsistent with separation of powers doctrine.

[77] Dixon J noted the 'logical difficulties of defining the power of each organ of government, and the practical and political consequences of an inflexible application of their delimitation. Dixon J applied the ratio in the important case of **Roche v Kronheimer**[34] in which the High Court of Australia held that a statute conferring upon the executive a power to legislate upon some matter contained within one of the subjects of the legislative power of the Parliament is a law with respect to that subject, and that the distribution of legislative, executive and judicial powers in the Constitution does not operate to restrain the power of the Parliament to make such a law.

[78] The Court is guided by the ratio in these authorities. Delegation of law making power is a necessary feature of modern government. If the exercise of legislative power is not to become a quagmire, it is clear that legislators cannot be required to wallow in the details. Moreover, the

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[33] (1931) 467 CLR 73; applied in Capital Duplicators Pty. Ltd v Australian Capital Territory No. 1(1992) HCA 51
[34] 29 CLR 329

topics or subjects of legislation are such that they require expertise, technical knowledge and a degree of adaptability to changing circumstances which legislators might not possess.

[79] In the case at bar, the Respondent is of the view the delegation does not amount to an abdication because the legislature has reserved to itself control over the Governor in Council and has not "withdrawn from the field" or surrendered its responsibility. While not conceding that the Legislature has "remained in the field", the Claimant contends that the Legislature has entrusted law making powers to the Governor in Council which effectively permits the formulation of policy without the benefit of a clear defined standard or purpose being laid down.

[80] In the Court's judgment, a legislature would be wise to avoid falling afoul of either criticism. Although it has been deemed a necessary evil, the acceptance of the practice of delegated legislation is not unqualified. In **Victorian Stevedoring and General Contracting Company Pty Ltd v Dignan**, Dixon J warned that it did not mean that a delegation would be valid "*however extensive or vague the subject matter may be*", and added that: "*There may be such a width or such an uncertainty of the subject matter to be handed over that the enactment attempting it is not a law with respect to any particular head or heads of power.*" He made it clear that whether constitutionally valid or not, a 'wide' and 'uncertain' delegation of legislative power may not be appropriate.

[81] Applying the principles arising out of the referenced case law, the Court is of the view that the delegation of legislative functions can be made to executive authorities within certain limits. The authorities make it clear that legislators are prohibited from conferring arbitrary power upon a subordinate body without reserving to themselves control over that body. In particular, the Indian authorities cited by the Claimant, all agree on one principle: where there is abdication or effacement, the legislature concerned acts contrary to the instrument which constituted it and the statute in question would be void. [35] The legislature cannot abdicate its essential function.

[82] The Court has also considered whether section 464 mandates a delegation of the Legislature's plenary or essential legislative functions. It is not disputed that the Legislature's essential function remains intact to the extent that it could at any time repeal the legislation and withdraw the

[35] Shama Rao v Union Territory of Pondicherry

authority and discretion vested in the Governor in Council. If the legislature can repeal the legislation, there can be no irrefutable complaint that the legislature has abdicated its legislative function.

[83] However, this is not a complete answer to the Claimant's case. As in **Gwalior Rayon Silk MFG Co. Ltd. v the Assistant Commissioner of Sales Tax and Ors,** this Court is unable to subscribe to the view that "*if the legislature can repeal an enactment, as it normally can, it retains enough control over the authority making the subordinate legislation and, as such, it is not necessary for the legislature to lay down legislative policy, standard or guidelines in the statute*".

[84] Counsel for the Claimant submitted that in order to be constitutional valid, section 464 must have appropriate ring-fencing measures in place which could militate against a finding that the Legislature had surrendered its essential function. He submitted that the mere procedural step of consulting with the secretary of state is not enough because it affords the Legislature no effective control. The section is wide enough to allow the legislative function to go anywhere and it is this lack of restriction which leads to the conclusion that the Legislature has surrendered its function. Counsel suggested that an appropriate ring-fencing measure would be to lodge the imported legislation before the legislature for its affirmative resolution. This parliamentary procedure would make the statutory instrument laid, subject to the formal approval of the Legislature before it becomes law.

[85] The Court has no doubt that this would also be an appropriate measure which would preclude any contention of effacement or abdication. In that regard, the Court found section 179 of the Bermuda Merchant Shipping Act 2002 to be instructive. That section prescribes that the Convention relating to the Carriage of Passengers and their Luggage by Sea shall have the force of law in Bermuda and subsection 179(3) provides that:

> "If it appears to the Minister that there is a conflict between the provisions of this section or of Part I or II of Schedule 5 and any provisions relating to the carriage of passengers or luggage for reward by land, sea or air in—
>
> (a) any convention which has been signed or ratified by the United Kingdom on behalf of Bermuda before 4th April 1979 (excluding the Convention); or

(b) any enactment of the Legislature of Bermuda giving effect to such a convention; he may by order make such modifications of this section or that Schedule or any such enactment as he considers appropriate for resolving the conflict."

Subsection 179 (7) then clearly provides that:

"An order made under this section shall be subject to affirmative resolution procedure."

[86] The section 464 of the BVI Merchant Shipping Act does not set out a similar provision. However, the argument that the legislature has effaced itself must be considered in light of section 467 of the Act which makes it clear that any regulations made by the Governor in Council under this Act shall be subject to negative resolution of the Legislature. In the Court's judgment this section should have set out in clear and unambiguous terms that any **order and regulations** made under section 464 would be subject to negative resolution procedure.[36] This requires the instruments to be laid before the legislature in draft or before it comes into force. The statutory instrument would then become law unless they are rejected by resolution within a prescribed time frame. This would make it clear that the Legislature's control over the delegated legislation is a living continuity. In the Court's judgment a cautious construal of this Henry VII Clause demands the application of such a provision.

[87] The Court concurs that section 464 is drafted in very wide terms. On the strict reading of this provision, it is clear that section 464 delegates power to the Governor in Cabinet with certain prescribed conditions. First, the Legislature has mandated that the Governor in Council must consult with the Secretary of State for Transport in the United Kingdom. Incidentally, this provision is repeated at section 465 of the Act which provides that:

"Any Order, rules or regulations made under this Act shall be made after consultation with the Secretary of State for Transport of the United Kingdom."

[88] Second, the Legislature clearly mandates that the adoption of the United Kingdom enactments should not be wholesale but subject to such exceptions, adaption and modifications as may be specified. Third, section 464 (3) of the Act mandates transparency. It provides that:

"464. (3) The Minister shall, as soon as is practicable after the coming into operation of an Order under subsection (1), cause a text to be prepared of the enactment of the United Kingdom applied by the Order incorporating the exceptions, adaptations and modifications specified in the Order."

[36] Section 178 B (6) of the Bermuda Merchant Shipping Act 2002

[89] It is apparent that some effort has been made to regulate the exercise of the delegated power but the very broad terms of section 464 leads to the inevitable conclusion that the Virgin islands executive along with the United Kingdom executive are left with broad, unlimited and unchecked legislative powers which could effectively see a complete change in legislative policy. While the Defendant's trenchant submissions proved invaluable to the Court, he stopped short of addressing this contention. Counsel could only reiterate that the Virgin Islands Legislature has plenary legislative power to delegate any of its powers to any functionary. He submitted that this power is limited only by the fact that it cannot abdicate its powers and such abdication only arises where it has no power to revoke any power once given. He further submitted that the power to delegate is also limited in the sense that it cannot create a new legislative body and confer on it such legislative power.

[90] The Court has some difficulty in reconciling these submissions with the Respondent's authority of **Victorian Stevedoring and General Contracting Company Pty Ltd v Dignan**, **Victorian Stevedoring and General Contracting Company Pty Ltd v Dignan** and the very wide terms of section 464 and the provisions of the 2005 Order which prescribes the automatic application of certain repealing and amending enactments having effect in the United Kingdom. The danger lies in the loss of the public scrutiny and accountability for policy decisions that would usually occur when primary legislation is made by Parliament. In other words, it is possible that matters of policy could be determined by the executive without the effective scrutiny of the legislature.

[91] In the Court's view, the particular legislative context of this case is relevant. The Respondent drew the Court's attention to the **Colonial Laws Validity Act 1865**. The extent of the application of section 2 of that Act is that where imperial legislation whether by act of parliament or subordinate legislation conflicts with local legislation, the imperial legislation would supersede. He submitted that the importation of the legislation adopted by the 2005 Order is necessary and to the extent that they conflict with section 396 of the BVI Merchant Shipping Act, the later in time will apply. Counsel submitted that this shows that there is really no difference between the extension to the BVI of legislation enacted by the Imperial Parliament and the BVI itself adopting legislation which has been enacted by the Imperial Parliament.

[92] In the Court's judgment this submission was not particularly persuasive and the Court is forced to agree with Counsel for the Claimant contention that the Colonial Validity Act does not advance the Respondent's case. Counsel for the Claimant submitted that under the BVI Constitution, the Queen reserved to Herself powers to make laws for the peace order and good government of the Virgin Islands. Over the course of time, issues would arise where such laws would be repugnant to local laws. The Colonial Validity Act was intended to clarify the position and to resolve such inconsistencies. Counsel for Claimant referred the Court to, the Merchant Shipping (Limitation of Liability for Maritime Claims) (Overseas Territories) Order, UK Statutory Instrument No.2579 of 1997 which expressly extends the Convention to certain overseas territories not including the BVI. This course was not adopted in this case; instead, the Governor in Council chose to adopt the 1998 Order.

[93] Although maritime affairs fall within the ambit of the elected government of this Territory, the United Kingdom Government has the sole responsibility to deal with defence and international relations matters in all of its dependencies and overseas territories. Like all other overseas territories, the BVI is not on its own a member of the International Maritime Organization and cannot be a signatory to the relevant international conventions. These conventions are signed by the United Kingdom government and extended to these territories and given effect through local legislation or adaptation of the relevant English legislation. The peculiar context therefore touches and concerns matters of broader international obligations and the obvious need for confidence based on a uniformity of approach in matters of international maritime law.

[94] It is clear that the entire purpose of this express provision is to speedily bring into force under section 464 legislative developments which post-date the Act hereby keeping it up to date, without the necessity of engaging the normal parliamentary process.

[95] The Court notes that the limitation amount of 167,000 special drawing rights prescribed in section 396 (b) (i) of the Act is drawn from the 1976 **Convention on Limitation of Liability for Maritime Claims**[37]. Article 21 of that Convention makes provision for the alteration of the limitation amounts on the basis of a significant change in their real value. Article 6 of the Convention was amended

[37] Article 6 of the Convention on Limitation of Liability for Maritime Claims

by a 1996 Protocol which increased the varied the amount. The revised Article 6 (b) (i) was given effect in the United Kingdom Statutory Instrument No. 1258 of 1998 (the 1998 Order) which has been adopted by the BVI in the 2005 Order.

[96] The obvious melding is also evident from the fact that the BVI is a member of the Red Ensign Group Registration (REG) in which the secretary of state for transport has general superintendence of all matters relating to shipping and seamen within this Territory. Ultimately the secretary of state also has the responsibility to ensure that all REG Registers maintain the highest international maritime standards in accordance with their obligations under the Conventions and in accordance with UK maritime policy. This Agency also represents the interests of each member in such international organizations as the International Maritime Organization.

[97] The melding is further evidenced in the United Kingdom Merchant Shipping Act 1995 which provides that any vessel registered in a crown dependency or overseas territory, is considered as a "British ship" like those registered in the UK, and is entitled to fly the Red Ensign flag with all British support including consular services throughout the world, notwithstanding that it is under the separate jurisdiction of the individual territory's maritime administration.

[98] This is relevant in the context of the BVI Merchant Shipping Act which provides a comprehensive scheme for the registration of ships under this Territory's flag and which regulates ships so registered. Important amendments must continuously be made to this legislation in order to keep abreast of the changing industry and inter-governmental needs. The BVI Merchant Shipping Act is modeled on United Kingdom legislation and is supplemented by schedules of applied regulations that in most cases consist of regulations adopted by UK authorities. As new or amended UK Regulations are adopted, the Governor in Council may choose to make them applicable to the Merchant Shipping Act.

[99] Counsel for the Claimant has submitted that if the BVI Legislature wished to adopt the 1996 Protocol, it should have followed its earlier approach of adopting the specific wording from the Protocol into the primary text of the Act. While that may well have been a more appropriate option, the Claimant has not satisfied the Court that a delegated Henry VIII power would be inherently invalid. Indeed, the unique legislative context gives rise to strong policy and practical

considerations which would mandate the use of this radical legislative tool. No doubt this explains why it has found its way into maritime legislation in other overseas territories.[38]

[100] The peculiar maritime context was also considered in the case of **The Owners of the Vessel "Alam Selaras" v The Owners of the Vessel "Diamond Cay."**[39] Remarkably in that case the Court was asked to consider whether the quantum of liability for damage to property if it was to be calculated under the formula set out under s.359 of the Shipping Act, approximately USD 36,557.00. or whether effect is to be given to s.410 of the Shipping Act by virtue of which the provisions of the Convention on the Limitation of Liability for Maritime Claims, there would be a substantial increase to approximately USD 260,000.00. Section 410 of the Act provided that:

> "Where an international convention or other international instrument applies to Trinidad and Tobago and a provision of that convention or instrument and a provision of this act conflict in any manner, the provision of the convention or instrument shall prevail unless the Minister otherwise provides."

[101] The Claimant contended that this section breached section 53 of the Trinidad Constitution which vests the power to make laws in the Parliament and not in the executive and section 61 of the Constitution which prescribes the means by which legislative power is to be exercised. The High Court found that this section to be an unconstitutional delegation of legislative power to the executive and declared that section to be void. At paragraph 18 of the judgment Gobin J, opined:

> "There could be few better examples of a provision for a special class of case. The Act makes provision for the registration and licensing of ships, matters relating to crews, safety of lives at sea and matters incidental thereto. In so far as S.410 is concerned, its scope is even more limited in applicability in that it fixes limitation of liability in maritime collisions. It is also a class of case which touches and concerns matters of broader international obligations because of the nature of the shipping business and the obvious need for confidence based on a uniformity of approach in matters of international maritime law and international trade."

[102] The learned judge was clearly mindful of the potential impact of an adverse finding in this context. At paragraph 19 of the judgment she noted that:

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[38] See: section 468 of the Cayman Islands Merchant Shipping Law (2011 Revision)

[39] CV2008-04598 High Court of Justice Of Trinidad And Tobago per C. Gobin C. Gobin

> "I am mindful that a declaration to this effect may have negative implications for persons engaged in an important sphere of international commercial activity and it may place us, that is, the Government of Trinidad and Tobago in an unfavourable position in so far as our international obligations are concerned. But the situation can very easily be rectified by simply resorting to the procedure set out under the Constitution. This is hardly likely to be a contentious matter. It is not everyday that the government accedes to international conventions. If they are to be meaningfully adhered to, steps must be taken to properly legislate them into effect."

[103] It was argued that s.410 does not in effect delegate law making power to the executive and that this is a simple updating device applicable common to several neighbouring jurisdictions which ensures that in Maritime Affairs, Trinidad and Tobago meets international requirements. However Gobin J concluded that s.410 purports to enact a self-amending device which circumvents the process provided for law making under the Constitution. It was also conceded by the State that s.410 was inconsistent with s.53 and s.61 of the Constitution which are entrenched provisions. In those circumstances the Court was forced to conclude that in the absence of an amendment to the Constitution itself, s.410 could not be construed as altering s.53 and s.61, even for a special class of case. The Court therefore concluded that s.410 of the Shipping Act is null and void and of no effect.

[104] While the particular legislative provision in **Alam Selaras** is not identical to section 464 of the BVI Act, the effect vests in the executive with broad legislative power to amend or repeal provisions of the primary legislation without oversight of the Legislature. This Court accepts the contention that the plenary legislative power includes the power of delegation. In the Court's judgment, the power to delegate is necessary for effective law-making. It is implicit in the power to make laws. The Court has no doubt that under the BVI Constitution the Legislature can pass legislation delegating such legislative functions to other bodies.

[105] In the case at bar, instead of going through the full formality of legislating the changes to the Merchant Shipping regime, the BVI Legislature has adopted an alternative course which directs the Governor in Council to apply his mind to existing and future legislation which is enacted by another legislature for another jurisdiction and adopt and extend it to the Territory subject to any exceptions, adaptations and modifications which are deemed necessary or appropriate. In doing so

the Legislature has clearly laid down a policy which directs the Governor in Council to apply and implement such legislation once he has consulted with the United Kingdom secretary of state.

[106] This legislative tool has been applied in other jurisdictions and its validity has been accepted ever since **R v Burah** where the majority conclusion was that sanctioning the executive to adopt laws passed by another legislature or legislatures including future laws would not per se be invalid. The laws in question were upheld on the ground that they contained a complete and precise policy. Because the legislation was conditional, the Court concluded that the question of excessive delegation would not arise. see: **R v Burah** and **Raj Narain Singh v Chairman, Patna Administration Committee.**[40]

[107] However, in the case at bar, under section 464 of the Act and 2005 Order, the Governor in Council may not only apply as part of the BVI law, any existing enactment of the United Kingdom but also any future or amended enactment. In the absence of an affirmative or negative resolution procedure the Legislature cannot anticipate or establish what amendment or amendments would be carried out or whether they would be of a sweeping policy-changing character or whether they would be suitable in all the circumstances. In the Court's judgment, it could successfully be argued that the BVI Legislature had surrendered its essential function in favour of the executive.

[108] The Legislature has the powers which are prescribed by the Constitution and it is clear that it can do nothing which goes beyond the limit of these powers. When, as in the case at bar, a court is called upon to consider whether the prescribed limits of these powers have been exceeded, a court must consider the terms of the enabling statute which created these legislative powers. In the case at bar, the Virgin Islands Constitution does not expressly empower the local legislature to delegate the power to make laws, nor is it expressly prohibited. However, the Court is persuaded on the basis of constitutional principle considered and applied in numerous judicial decisions that the power to delegate is not un-circumscribed. The Court is satisfied that where the legislative scheme reveals *"such a width or uncertainty of subject matter to be handed over, that the enactment attempting it cannot be a valid law."* [41]

[40] Cited in the Claimant's authority of Shama Rao v Union Territory of Pondicherry
[41] R v Burah

[109] Counsel for the Respondent was unable to sufficiently disgorge the contention that the delegated power could purport to determine principles and policies and for that reason should be regarded as invalid. The Court is therefore persuaded on the Claimant's submissions that as drafted, section 464 of the Act represents an abdication or effacement by the BVI Legislature contrary to the Constitution and is therefore void.

IS SECTION 396 OF THE ACT STILL IN FORCE?

[110] By way of an alternative argument, the Claimant also submitted that even if the Court were to find that section 464 of the Act is constitutional, section 396 of the Act as originally enacted remains in full force and effect because it has not been effectively repealed or amended.

[111] The Claimant contends that although the Governor in Council was purportedly given the power to amend or repeal existing legislation he has not actually done so in the 2005 Order. Counsel submitted that *"subordinate legislation is prima facie ultra vires if it is inconsistent with the substantive provisions of the Act by which the enabling power is conferred, or of any Act, and equally, of course if it purports to affect existing Acts expressly."*

[112] In response, the Respondent submitted that the adoption of the 1998 Order under the 2005 Order had the effect of overriding section 393 of the Act. He grounds this contention on two bases. First, the Respondent relied on the Colonial Validity Act 1865 which prescribes the invalidity of colonial legislation which is inconsistent with imperial legislation.[42] Counsel submitted that the extension of United Kingdom enactments to the colonies under that legislation is indistinguishable from the adoption by the BVI of United Kingdom Acts and subsidiary legislation.

[113] Alternatively, the Respondent contends the 1998 Order impliedly amends section 396 of the Act because it is a validly adopted statute which has force in this Territory and which is later in time than section 396 of the Act and is inconsistent with it on the same subject matter.

[42] British Coal Corporation v R (1935) UKPC 33

[114] Counsel for the Respondent submitted that the test for whether there has been a repeal by implication is whether the provisions of the later law are so repugnant to the provisions of the earlier law. Counsel submitted that in the absence of the express repeal or amendment, a statutory provision could be deemed to have been impliedly repealed or amended. Counsel relied on those learned authors in **Bennion on Statutory Interpretation** in which they state[43]:

> "Where a later enactment does not expressly repeal an earlier enactment which it has power to override, but the provisions of the later enactment are contrary to those of the earlier, the later by implication repeals the earlier, the later by implication amends the earlier so far as is necessary to remove the inconsistency between them."

[115] Counsel for the Respondent also relied on **Re Lamb**[44] in which the Ontario County held that there was an implied repeal based on the inconsistency with earlier statutory provisions which would lead to inconvenient and incongruity. He also relied on the Australian case of **Goodwin v Phillips**[45] in which Issacs J applied the well-established principle that "*The latest expression of parliament will prevail. An express repeal of or exemption from an earlier enactment is not more effectual than if it were created by implication. The only difference is in ascertaining the Act and extent of the implied exemption or repeal."*

[116] This Court sees much force in the Respondent's response to this claim. While, the Court accepts that express provisions setting out the text of the amendment or repeal would certainly have been preferable and more appropriate, the Claimant failed to disgorge the somewhat persuasive argument of implied or indirect repeal or amendment where the later statute is deemed to be constitutional and inconsistent.

[117] As a matter of legal principle, an Act may confer power for the amendments or itself or another Act by delegated legislation. An amendment made by the use of such power is as effective as if made directly by an Act. It is also a matter of legal principle that where "a later enactment does not expressly repeal an earlier enactment which it has power to override, but the provisions of the later enactment are contrary to those of the earlier, the later by implication repeals the earlier."[46] The learned authors in **Bennion on Statutory Interpretation** describe the rationale as a "…*logical*

[43] Fifth Edition at page 304
[44] (1979) Carswell Ont. 786
[45] 7 CLR1
[46] Bennion on Statutory Interpretation Fifth Edition page 293 Section 80 Implied Amendment

necessity, since the two inconsistent texts cannot both be valid without contravening the principle of contradiction."

[118] Within the context of Henry VIII clauses, the Court is also guided by English case of **Thoburn v Sunderland City Council.**[47] In that case, Steve Thoburn was a greengrocer working in Sunderland. He used weighing machines using pounds and ounces in the course of his work. On 16 February 2000, he was warned by an inspector that the machines were not in accordance with the current legislation. He had 28 days to calibrate his machines in metric measures (kilogram), but he did not obey to this and, on 31 March 2000, the inspector removed the imperial measures (pounds and ounces) from the machines. Thoburn continued to use the machine and was prosecuted and convicted for two offences under Section 11(2) & (3) of the Weights and Measures Act 1985. In his appeal, he was joined by other appellants. They claimed that the Weights and Measures Act 1985 was inapplicable as it was inconsistent with Section 2(2) of the European Communities Act 1972. In their point of view, the Weights and Measures Act 1985 had impliedly repealed the European Communities Act. The Weight and Measures Act 1985 and Regulations 1994 stated that the metric and imperial system of weight and measures should be recognized as equal units which impliedly repealed the European Communities Act 1972 which allows ministers to create new secondary legislation regarding the metric system to comply with European Union law (the so-called Henry VIII power).

[119] The Court held that there was no inconsistency between the European Communities Act 1972 and the Weights and Measures Act 1985. Laws J decided that there can be no inconsistency between a provision of an Act granting a Henry VIII power and the terms of legislation adopted in application of that power. The Court further held that the fact that legislation granting Henry VIII power can only apply to legislation already created at the moment of the entry into force of this legislation would be in conflict with Parliament sovereignty.

[120] The Court must apply the relevant legal principles and in doing so, it is clear to the Court that were it not for the declaration of invalidity, the adoption of the 1998 Order by the 2005 Order could

[47] [2002] EWHC 195 (Admin)

operate to amend section 396 by raising the limitation amount in accordance with the 1998 Order. As it stands, the Court is satisfied that the provisions of the section 396 of the Merchant Shipping Act remain in force in the BVI.

[121] Notwithstanding the authorities referenced, the manner in which section 464 is prescribed to operate and the way in which the 2005 Order is drafted illustrates the obvious difficulties which an implied amendment would present to statute users. In failing to specifically include any and all amendments to the 1998 Order as part of the 2005 Order, the Governor in Council has made the task of statutory interpretation particularly challenging. The Court is forced to agree with Counsel for the Claimant that the attempt to replace and overwrite certain legislation without the appropriate clarity is inherently problematic.

[122] In the case of the 1999 Regulations, the difficulties are even more marked because this Statutory Instrument No. 2567 of 1999 was made pursuant to powers conferred by section 267 United Kingdom Merchant Shipping Act and was drafted to revoke and replace the United Kingdom Merchant Shipping Act (Accident and Investigation) Regulations 1994 which never operated in the BVI.

[123] The provisions regulating inquiries and investigations into marine casualties are found at Part XVII of the BVI Act. They represent the BVI Legislature's policy for such investigations. Section 428. (1) of the Act provides that the Minister may make rules for the conduct of inquiries under section 425, for formal investigations under section 426 and for the conduct of any rehearing under section 427 which is not held by the Court. 428. (1) The Minister may make rules for the conduct of inquiries under section 425, for formal investigations under section 426 and for the conduct of any rehearing under section 427 which is not held by the Court. The Court has some difficulty reconciling this delegation with the attempt made by the Governor in Council to impose the 1999 United Kingdom Regulations.

IS THE 1998 ORDER AN "ENACTMENT" WITHIN THE MEANING OF SECTION 464 OF THE ACT?

[124] In written submissions to the Court Counsel for the Claimant argued that even if section 464 was deemed to be constitutional, under that section, the Governor in Council would only be empowered to legislate by applying enactments of the United Kingdom and not statutory instruments which would be consistent with the existing BVI Legislation. In support of this contention he quoted the following dictum of Ashworth J. in **Rathbone v Bundock**[48].

> "In some contexts the word "enactment" may include within its meaning not only a statute but also a statutory regulation but, as it seems to me, the word does not have that wide meaning in the Act [Road Traffic Act] of 1960. On the contrary, the language used in a number of instances strongly suggests that, in this particular Act, the draftsman was deliberately distinguishing between an enactments and a statutory regulation:…"

[125] Counsel argued that the clear intention of the draftsman is that references to the term "enactment" are to primary legislation alone. He submitted that if it were otherwise, the draftsman would have made this plain. He concluded that the 1998 Order and the 1999 Regulations are not enactments, but rather statutory instruments to which section 464 cannot extend.

[126] However, during the course of his oral submissions to the Court, Counsel for the Claimant indicated that he would not seek to maintain or advance this claim. As a result, the Court would not be required to rule on this issue. In the Court's view, Counsel acted prudently in electing not to pursue this ground. The Court acknowledges this wise concession made by the Claimant's Counsel in the face of the clear definition set out in the BVI Interpretation Act Cap. 136 as amended, which clearly defines the word 'enactment as "*an Act or Statutory Instruments or any provision in an Act or Statutory Instrument.*"

[127] In view of the fact that the Merchant Shipping Act makes no attempt to specifically define the word 'enactment", the Court must have recourse to the provisions of the Interpretation Act. There is nothing in the context of legislative framework which would demand a narrow definition of the term.

[48] [1962] 2 QB 260 at 273

DOES THE 2005 ORDER BREACH THE CLAIMANT'S CONSTITUTIONAL RIGHTS UNDER SECTION 16 OF THE CONSTITUTION?

[128] In the Amended Motion filed on 2nd October 2014, the Claimant also seeks redress pursuant to section 31 of the Constitution. The Claimant contends that its right to protection under the law under section 16 of the Constitution has been breached by the unconstitutional actions of the Governor in Cabinet. Section 16 of the 2007 Constitution provides that:

> **16.**—(1) If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

[129] This Claim was not fully expounded in the Claimant's written submissions and it was not surprising that during the course of his oral submissions to the Court, Counsel for the Claimant indicated that he would not seek to maintain or advance this claim. As a result, the Court would not be required to rule on this issue. In the Court's view, in light of the clear wording of section 16, Counsel acted wisely in electing not to pursue this ground.

DOES THE 2005 ORDER BREACH THE CLAIMANT'S CONSTITUTIONAL RIGHTS UNDER SECTION 25 OF THE CONSTITUTION?

[130] The Claimant also contended that that its rights under section 25 of the Constitution have been breached by the unconstitutional actions of the Governor in Cabinet. Section 25 protects persons against the unlawful deprivation of property. It provides that:

> **25.**— (1) No property of any description shall be compulsorily taken possession of, and no interest in or right to or over property of any description shall be compulsorily acquired, except in accordance with law and where—
>
> (a) the taking of possession or acquisition is necessary or expedient in the interests of defence, public safety, public order, public morality, public health, or the development or utilisation of any property in such manner as to promote the public benefit;
>
> (b) there is reasonable justification for any hardship that may result to any person having an interest in or right to or over the property;

(c) provision is made by a law applicable to the taking of possession or acquisition –

(i) for the prompt payment of adequate compensation; and

(ii) securing to any person having an interest in or right to or over the property a right of access to the High Court, whether direct or on appeal from a tribunal or other authority, for the determination of his or her interest or right, the legality of the taking of possession or acquisition and the amount of compensation to which he or she is entitled, and for the purpose of obtaining prompt payment of that compensation; and

(d) the same rights of appeal as are accorded generally to parties to civil proceedings in the High Court sitting as a court of original jurisdiction are given to any party to proceedings in that Court relating to such a claim.

[131] In support of this contention, the Claimant cited the case of **I.R.C. and A.G v Lilleyman**[49] in which the Guyana Court of Appeal held that "money" constituted "property". The Claimant also relied on **Williams and Ors. v The Attorney General of Dominica**[50], in which the Eastern Caribbean Court of Appeal accepted that "property" included money where it belonged to someone who has an immediate right to it.

[132] In oral submissions before the Court, Counsel for the Claimant argued that in purporting to increase the limitation amount prescribed in section 396 of the Act, the Respondent is in effect depriving the Claimant of property. He argued that in placing a greater liability which constitutes a demand under statute, the Respondent is violating the Claimant's rights because he is effectively compelling the Claimant to increase the deposit established under the limitation provision. He asserted that that his client would have no option but to increase the sums deposited and this would effectively make this a compulsory order which would threaten to deprive him of his money. Counsel however conceded that the deprivation of property would not be immediate but rather a threat of deprivation once the limitation action is determined.

[49] (1964) 7 WIR 496
[50] Civil Appeal No. 29 of 2004

[133] The Respondent trenchantly opposed this claim and he submitted that it is not maintainable for a number of reasons. First, assuming that the Court holds that section 464 is unconstitutional on the basis that it breaches the doctrine of separation of powers, then there would be no increase in the limitation amount which would be payable by the Claimant. Counsel then submitted that if on the other hand, section 464 was deemed to be constitutional, then an increase in the limitation amount would apply. However, he argued that there would be no deprivation because the Act was enacted in 2001 at which point the Claimant had not polluted BVI waters. Also, when the 2005 Order was made, the Claimant had not polluted BVI waters. Counsel submitted that section 25 of the Constitution could therefore have no application in the case at bar.

[134] This Court agrees. It follows that if an objection is to be raised it may as well be raised against the original limitation amount prescribed by section 396 of the Act.

[135] Moreover, the Claimant's argument loses sight of fundamental basis of limitation proceedings in maritime law. It is effectively a means whereby an eventual debtor could limit its liability once the same has been established and pronounced by a court. The right of a party to limit its liability may be either pleaded as a defence to a Claimant's claim or it may form the basis of a separate action for the establishment of a limitation fund. The basis upon which a person may be allowed to limit liability is prescribed in the Convention on Limitation of Liability for Maritime Claims 1976 which has been given force in the BVI Merchant Shipping Act. This prescribes an amount computed by a fixed formula and related to the tonnage of the vessel and the value of special drawing rights of the international monetary fund.

[136] Section 25 of the Constitution protects the person from the state's compulsory acquisition of his property without constitutional authority. Such compulsory acquisition can be justified only under the circumstances and on the grounds specified in section 25 of the Constitution. While a state's compulsory exaction of money from the individual would be a compulsory acquisition of the individual's property within the meaning and intent of section 25, it is clear that a party who chooses to establish a limitation fund does so purely on a voluntary basis. While it is advantageous for a party to do so (since the special drawing rights may fluctuate and the applicable rate is the rate at the time that the fund is created) the Claimant has not contended that

this is compulsory. Once the procedural steps are taken in accordance with the Civil Procedure Rules and there is no dispute as to the Claimant's right to limit liability the court may then make an order limiting the party's liability and fix the amount of the limit. Since there are claims in respect of which limitation is not available, it is entirely possible that the limitation action may be contested and, if it is, then the matter would proceed to trial.

[137] In any event, this Court is satisfied that while the 2005 Order may likely impact the economic interests of the Claimant, the facts do not disclose interference with the Claimant's fundamental rights.

[138] The Claimant has not convinced this Court that the statutory framework actually makes provision for the compulsory taking of possession or acquisition of property, interest or right. The Court is further satisfied that even if it could be concluded that the 2005 Order could amount to a compulsory acquisition, it is clear that any payment would have to follow a court process and that section 25 (3) (vi) would operate to refute any likely claim.[51] The Court therefore finds this claim has not been made out by the Claimant.

COSTS

[139] At the conclusion of the trial, Counsel for the Respondent indicated that in the event that the Respondent was successful, he would not seek his costs. No doubt this position is predicated upon CPR 56.13 (6) which provides that no order for costs may be made against an applicant for an administrative order unless the Court considers that the applicant has acted unreasonably in making the application or his conduct was in some way worthy of censure in bringing it. Counsel for the Claimant however indicated simply that it would seek to have its costs in the event that it was successful.

[51] (3) Nothing in any law or done under its authority shall be held to contravene subsection (1)— to the extent that the law in question makes provision for the taking of possession or acquisition of any property, interest or right— in the execution of a judgment or order of a court.

[140] The Parties have both been partially successful in this Claim. The Court has also taken cognizance of the eleventh hour concessions made by the Claimant in respect of several aspects of this Claim. In the Court's judgment, the way in which the Claimant has chosen to prosecute this Claim unduly aggravated the costs in this case and was inconsistent with its obligations under the overriding objective.

[141] **It is therefore ordered and declared as follows:**

i. **Section 464 of the Virgin Islands Merchant Shipping Act 2001 is declared to be unconstitutional, null and void and of no effect.**

ii. **The purported application to the Virgin Islands of the 1998 Order and the 1999 Regulations pursuant to section 464 of the Virgin Islands Merchant Shipping Act 2001 is null void and of no effect.**

iii. **The liability of the Claimant is limited to the specified amount calculated in accordance with section 396 (b) (ii) of the BVI Merchant Shipping Act 2001 to the equivalent of 167,000 SDR.**

iv. **There will be no order as to costs.**

Vicki Ann Ellis
High Court Judge

[SEAL]

By the Court

Registrar