Michaelmas Term
[2020] UKPC 30
Privy Council Appeal No 0072 of 2020

JUDGMENT

Attorney General of the Turks and Caicos Islands (Respondent) *v* Misick and others (Appellants)

From the Court of Appeal of the Turks and Caicos Islands

before

Lady Black
Lord Lloyd-Jones
Lord Briggs
Lord Hamblen
Lord Stephens

JUDGMENT GIVEN ON

13 November 2020

Heard on 4 November 2020

Appellant
Edward Fitzgerald QC
Daniella Waddoup
Ariel Misick QC
Selvyn Hawkins
(Instructed by Simons Muirhead & Burton LLP)

Respondent
Andrew Mitchell QC
Quinn Hawkins
Katherine Duncan
Latisha Williams
(Instructed by Andrew Mitchell QC Agent/Litigator)

LORD HAMBLEN AND LORD STEPHENS: (with whom Lady Black, Lord Lloyd-Jones and Lord Briggs agree)

Introduction

1. The Covid-19 pandemic has presented many challenges to justice systems around the world. Whilst it is essential to ensure that justice can continue to be both administered and accessed, means need to be found to enable this to be done safely and without endangering public health. The present appeal concerns the lawfulness of subsidiary legislation made under emergency powers by the Governor of the Turks and Caicos Islands ("TCI" or "the Islands") to enable court sittings to be carried out remotely, with the judge located outside the TCI. It also concerns the fairness of allowing a part heard criminal trial to continue in this manner.

2. The appellants are seven of nine defendants in criminal proceedings ("the criminal proceedings") in the Supreme Court of the TCI which commenced on 18 January 2016. The trial is being conducted by Harrison J, without a jury. Harrison J is a retired President of the Court of Appeal of Jamaica. He resides in Jamaica and has adopted the practice of travelling to the TCI for three weeks of court sittings, followed by a one week break. To date the trial has occupied 490 sitting days, with the prosecution closing its case on 20 September 2018.

3. On 12 March 2020, Harrison J adjourned the proceedings following the declaration made by the World Health Organisation ("WHO") the previous day that Covid-19 was a global pandemic.

4. On 20 March 2020, the Governor of the TCI issued an Emergency Proclamation in relation to the Covid-19 pandemic for the purpose of preventing, controlling and containing the spread of the virus.

5. On 17 April 2020, the Governor made the Emergency Powers (Covid-19) (Court Proceedings) Regulations 2020 ("the Regulations") to provide for remote hearings of civil and criminal proceedings. Regulation 4(6) provides that in the context of remote sittings, the courtroom "shall include any place, whether in or outside of the Islands, the Judge… elects to sit to conduct the business of the court".

6. The appellants contend that Regulation 4(6) purports to allow the Supreme Court to sit outside the TCI and is ultra vires as the TCI Constitution ("the Constitution") does not allow it to do so ("the ultra vires issue").

7. The appellants also contend that the application of Regulation 4(6) to their trial would create an impermissible inequality of arms, contrary to sections 1(a) and 6 of the Constitution. The prosecution case was conducted in the 'ordinary' way with the trial judge physically present in a courtroom in the TCI. The appellants contend that for the defence case to be conducted remotely, with the trial judge sitting in Jamaica and connected to a physical courtroom in the TCI via a video link, would risk placing the appellants at a substantial disadvantage and giving rise to a perception of unfairness on their part ("the inequality of arms issue").

8. The appellants' case on the ultra vires issue succeeded before Lobban-Jackson J in the TCI Supreme Court, but failed on all other grounds of challenge, including in relation to the inequality of arms issue. The TCI Court of Appeal allowed the respondent's appeal and dismissed the appellants' appeal. The appellants appeal to the Privy Council against the Court of Appeal's decision on the ultra vires and inequality of arms issues. The trial remains adjourned pending the outcome of this appeal, which was heard on 4 November 2020. In the light of the urgency of the matter, the Board communicated its decision to the parties shortly following the hearing, with reasons to follow.

Factual Background

9. Section 3 of The Emergency Powers Ordinance ("the Ordinance") and Article 5 of the Emergency Powers (Overseas Territories) Order 2017 ("the Order") authorise the Governor to make a Proclamation of Emergency during a public emergency. Under section 4 of the Ordinance and article 6 of the Order the Governor may make regulations to prevent, control or mitigate the effects of the public emergency.

10. On 20 March 2020, the Governor of the TCI issued a Proclamation of Emergency (Proclamation 1 of 2020) pursuant to section 3(1) of the Ordinance to prevent and control or contain the spread of Covid-19.

11. On 25 March 2020, the Premier of the TCI outlined to the nation the Turks and Caicos Islands Emergency Powers (COVID-19) Regulations which included a period of lockdown.

12. On the same day, the then Acting Chief Justice issued Covid-19 Practice Direction No. 2 of 2020 ("PD2.20") which suspended all Supreme Court criminal trials

until further notice, except for those matters determined to be urgent by the judge in any particular case. The criminal proceedings, which had been adjourned on 12 March 2020, were further adjourned administratively at the direction of Harrison J to 22 June 2020.

13. On 17 April 2020, the Governor acting under section 4(1) of the Ordinance made the Regulations, which came into force on 20 April 2020. The Regulations are due to expire on 31 December 2020 or such other date as the Governor appoints by Notice published in the *Gazette*, whichever occurs sooner. The Regulations made provision for the remote sitting of criminal and civil proceedings by courts of the TCI. When made, regulations cease to be of effect unless approved by the House of Assembly within thirty days. The Regulations were approved by the House of Assembly on 23 April 2020.

14. The purpose of the Regulations is set out in Regulation 3 as follows:

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

15. Regulation 4 addresses remote sittings and provides so far as material:

> "Remote sitting
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> 4. (1) During the period in which these Regulations are in force, the Chief Justice may make Rules and issue such order or direction as deemed necessary notwithstanding anything contained in section 16 of the Supreme Court Ordinance to ensure -
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> (a) full criminal trials are conducted by video and audio link;
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> ….
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> (5) Court sittings shall be done remotely in the manner provided by Rules or Orders from the Chief Justice.

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

16. On 23 April 2020, Chief Justice Agyemang issued Practice Direction No. 3 of 2020 ("PD3.20"), which was headed Temporary Protocols for Audio-Visual Court Hearings and Related Matters. Under paragraph 4 of PD3.20, all jury trials already commenced were adjourned *sine die*, and no new jury trials were to occur during the period of PD3.20. The adjournment was not extended to Supreme Court criminal trials heard by a judge alone. PD3.20 came into effect on 4 May 2020, at which point PD2.20 was revoked. On 30 September 2020 Practice Direction No. 4 of 2020 ("PD4.20") was issued, to take effect from 15 October 2020. It provides for "the gradual transitioning from remote to in-person court business". It allows for in-person and 'hybrid' court hearings to take place provided that all participants observe the social distancing and protective protocols and directives set out in paragraphs 3 and 4 of that direction.

17. Also on 23 April 2020, the Crown submitted to the Registrar of the Court, a proposal for the resumption of the trial prior to 22 June 2020. The proposal stated that it was "possible, desirable, and even to be encouraged pursuant to the Emergency Powers (COVID-19) (Court Proceedings) Regulations 2020, that the current trial resume as soon as possible, following the making of rules by the Chief Justice."

18. On 24 April 2020, the appellants (and two others who are not parties to this appeal) filed an Originating Summons in the Supreme Court applying for declarations that Regulation 4(6) was unlawful on various grounds.

The TCI Constitution

19. The current 2011 Constitution is made under powers granted by the West Indies Act 1962 and is contained in Schedule 2 to the Turks and Caicos Islands Constitution Order 2011, as amended. The TCI has had its own written constitution since at least 1959; it has been replaced in 1962, 1965, 1976, 1988, 2006 and 2011.

20. Under section 1(a) of the Constitution every person is entitled to "the protection of the law". Section 6 sets out provisions to secure the protection of law.

21. Part V of the Constitution sets out constitutional provisions relating to the Supreme Court and the Court of Appeal. Section 77(1) of the Constitution provides:

> "There shall be a Supreme Court for the Turks and Caicos Islands which shall have such jurisdiction and powers as may be conferred on it by this Constitution and any other law."

22. Section 80(1) establishes the Court of Appeal in parallel terms. Whilst section 77 is silent as to where the Supreme Court may sit, section 80(2) provides:

> "For the purposes of hearing and determining appeals the Court of Appeal may sit either in the Islands or in such places outside the Islands as the President of the Court may from time to time direct."

23. This reflects the historical context. Prior to 1976 the Court of Appeal of Jamaica and then the Court of Appeal of The Bahamas operated as the Court of Appeal of the TCI. These courts sat in Jamaica and The Bahamas respectively, and could also do so when hearing appeals from the TCI. Their constitutions make express provision for the conferral of this jurisdiction.

24. The present Court of Appeal of the TCI was first established under section 52(1) of the 1976 Constitution, with section 52(2) (the equivalent of section 80(2) of the 2011 Constitution) making provision for the Court of Appeal to "sit either in the Islands or in such places outside the Islands as the President of the Court may from time to time direct". The judges initially appointed were the same as those that sat in The Bahamian Court of Appeal.

25. There is no previous practice of the Supreme Court sitting abroad. The Supreme Court was established in 1904. In its early days, the Supreme Court was constituted by a single itinerant judge who lived abroad and came to the Islands periodically to try cases. The first time there was a resident Supreme Court judge was when the office of Chief Justice was created in 1985. The Court now consists of four judges, all of whom are foreign nationals, as is the Chief Justice. Three of the judges are full-time residents. The fourth, Harrison J, is non-resident and is assigned exclusively to the criminal proceedings.

26. As envisaged by the reference to "any other law" in section 77(1) of the TCI Constitution, further provision regarding the Supreme Court's jurisdiction is made by section 3 of the Supreme Court Ordinance (Laws of the Turks and Caicos Islands (1998 Revision) Cap. 11 as follows:

> "(1) The [Supreme] Court shall be Superior Court of Record which, in addition to any jurisdiction previously exercised by it or conferred upon it by this Ordinance or any other law, shall have within the Islands the jurisdiction vested in the following Courts in England—
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> (a) the High Court of Justice; and
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> (b) the Divisional Court of the High Court of Justice as constituted by the Supreme Court of Judicature [Consolidation] Act, 1925, and any Act of the Parliament replacing that Act."

27. The Supreme Court of Judicature (Consolidation) Act 1925 has been replaced by the Senior Courts Act 1981. Section 71 provides for sittings of the High Court in the following terms:

> "(1) Sittings of the High Court may be held, and any other business of the High Court may be conducted, at any place in England or Wales.
>
> (2) Subject to rules of court—
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> (a) the places at which the High Court sits outside the Royal Courts of Justice; and (b) the days and times when the High Court sits at any place outside the Royal Courts of Justice, shall be determined in accordance with directions given by the Lord Chancellor."

The judgments of the Supreme Court and the Court of Appeal

28. In her judgment of 18 June 2020 Lobban-Jackson J declared Regulation 4(6) ultra vires the Governor's powers to the extent that it purported to confer power on the Supreme Court to conduct proceedings outside the TCI.

29. The judge held that there was no provision in the Constitution or any other law that enabled the Supreme Court to sit outside the TCI, in contrast to the position in relation to the Court of Appeal. The judge further held that Regulation 4(6) purported to allow the Supreme Court to do so because "the courtroom is wherever the Judge or magistrate elects to sit" and the Regulation allowed him or her to elect to sit "outside of the Islands".

30. The Court of Appeal allowed the appeal against this decision. Judgments were given by all three members of the court, Sir Elliot Mottley, President, Stollmeyer JA and Adderley JA.

31. The President disagreed with the judge's interpretation of Regulation 4(6). He held that it did not purport to allow a court to sit outside the TCI, stating as follows:

> "50. It follows from what I have stated that I do not consider that Regulation 4(6) created any court to sit outside the Turks and Caicos Islands. The Regulation 4(6) in my view permits a judge while outside the territorial limits of the Turks and Caicos Islands to sit and preside over a trial, which is taking place in a courtroom within the territorial boundaries of the Turks and Caicos Islands. In so doing, the judge in my view, is doing nothing more than making use of modern technology. The coercive powers of the judge may at all times be enforced within the courtroom. Further, there is but one courtroom and the judge who sits outside the territorial boundary of the Turks and Caicos Islands is conducting one trial which is taking place within the territorial boundaries of the Turks and Caicos Islands.
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> ….
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> 53. Regulation 4(6) declares that wherever the judge sits outside of the territorial limits is part of the "courtroom" where the trial is being conducted. Regulation 4(6) is clearly designed to ensure that at all times, there is a video and audio link between where the judge is sitting and the recorder, parties, counsel and witnesses. Put another way, there must always be a video and audio link between where the judge is sitting (part of the Courtroom) and the recorder, parties, counsel and witnesses (the physical courtroom) in Turks and Caicos Islands.
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> 54. The effect of Regulation 4(6) is that, while the court may be physically split, for all intents and purposes, it is a single courtroom within the territorial boundaries of the Turks and Caicos Islands. In my view, Regulation 4(6) is intended to make clear that there is in fact **one courtroom**. The judge's ability to make coercive orders is in no way compromised because the judge is sitting remotely. The judge's power to punish for contempt in the face of the court is not in my view affected. Even though the judge sits remotely, he is required to observe all the rules of natural

> justice and to comply at all times with the requirement of the Constitution of Turks and Caicos Islands." (emphasis original)

32. Adderley JA's judgment was to similar effect. He held that Regulation 4(6) deemed the place where the judge sits physically to be part of the courtroom in the TCI. As he stated:

> "180. In the context in which Regulation 4(6) is to be construed the "video and audio link" is undoubtedly administered by the Registrar/Court Clerk/Clerk of the Magistrate's Court and Recorder at a location in the Turks and Caicos Islands. That place may be one of the regular courtrooms designated by the Chief Justice, or another place in the Islands elected by the judge. If the judge is "sitting" physically outside the Islands, by the wording of in Regulation 4(6) the legal draftsman transports that place where the judge is physically located into the physical courtroom by including it as part of the courtroom in the Turks and Caicos Islands, so that the judge virtually "sits" in that courtroom to conduct business even while physically outside the Islands. The provision really amounts to deeming the place where the judge sits physically whether that place is inside or outside the Turks and Caicos Islands to be part of the courtroom in the Turks and Caicos Islands.
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> 181. Regulation 4(6) does not say that the place is the courtroom or an additional courtroom by virtue of the fact that the judge or magistrate elects it. If that were intended Parliament could easily have stated that wherever the Judge or magistrate elects to sit "shall be" the courtroom instead of "shall include…"

33. Stollmeyer JA considered that Regulation 4(6) was "on the face of its wording" ultra vires because "it provides that a courtroom can be a place outside the Islands where the judge elects to sit", but held it to be intra vires because "the common law permits a judge to remain outside the jurisdiction and conduct a trial taking place within it".

The ultra vires issue

(a) The parties' submissions

34. On behalf of the appellants Mr Fitzgerald QC submitted that the location of a trial judge conducting a criminal trial is co-existent with the location of the court. It was

asserted in broad terms that "where the judge is, there the court is" so that if the judge was in Jamaica the court would be in Jamaica. The appellants contended that an interpretation of Regulation 4(6) that a judge located outside the Islands trying the case remotely would in effect be "virtually present" in a physical courtroom in the Islands was incorrect as it runs contrary to the plain meaning of the impugned regulation. The appellants referred to Regulation 4(5) which provides that "court sittings shall be done remotely" and to Regulation 4(6) which provides that the "courtroom shall include any place, whether in or outside of the Islands, the Judge … elects to sit to conduct the business of the court." The appellants contended that the words "outside the Islands" would serve no purpose if a judge connected remotely was virtually sitting in the Islands. The appellants also relied on the express reference in Regulation 4(6) to the Judge electing to "sit." It was asserted that the Court of Appeal's interpretation would lead to the result that in circumstances where video technology is used to connect a Judge to a TCI trial (i) only the Supreme Court and not the Judge is sitting which is contrary to the express wording of the provision, or (ii) both the Judge and the Supreme Court are sitting, but only the Supreme Court is sitting in the Islands. The appellants asserted that where a judge located abroad is to hear evidence from a range of witnesses, make legal rulings, exert coercive power if necessary, hear speeches, and act as adjudicator of both fact and law, it would be a very strained interpretation which would lead to the conclusion that the court in so doing was not also sitting abroad.

35. The appellants also relied on section 77(1) of the Constitution and the fact that it provides that the Supreme Court "… shall have within the Islands the jurisdiction vested in the …" the High Court of Justice in England. Under section 71(1) of the Senior Courts Act 1981 "sittings of the High Court may be held, and any other business of the High Court may be conducted, at any place in England and Wales." The appellants submitted that although section 71(1) does not in terms prohibit sittings of the High Court outside England and Wales there would be no point in the reference to "any place in England or Wales" if the Court was free to sit in any part of the world. As a consequence it was asserted that all "sittings" of the High Court must take place within the boundaries of England or Wales and therefore by reference to section 77(1) of the Constitution all the sittings of the Supreme Court must take place within the Islands.

36. On behalf of the respondent Mr Mitchell QC acknowledged that the Constitution was silent as to whether the Supreme Court could sit outside the Islands but contended that this silence is not to be read as excluding a judge who is *outside* the territory from exercising the jurisdiction of the court *in* the territory. He asserted that it was wholly unnecessary for the Constitution to dictate to a judge where he/she must be, rather than, as it does, set out the reach of the exercise of the jurisdiction of the Supreme Court. Mr Mitchell relied on a contextual and purposive interpretation of the Regulations which it was stated could not have been made to establish a jurisdiction outside the territory, but rather, provided through audio visual technology for the judge to exercise his jurisdiction and authority in the territory. He submitted that by remotely connecting to the Court, a judge is sitting virtually in the court in which they are exercising their jurisdiction. He added that the judge outside the territory is not conducting the business

of the court outside the territory, but rather, through the medium of video and audio link to the Court, the Registrar and the Court recorder (including the parties, the public and the press) conducting the business of the court in the Islands. He added that the meaning of the word "sit" is not settled, as a matter of law, and the argument that "sit" must be read as meaning where the judge is physically located ignores new technologies, does not permit of change and ignores the imperative that the jurisdiction of the judge is only exercisable where he/she has their authority. In this way Mr Mitchell submitted that the definition of "sit" should focus on where the jurisdictional authority sits.

(b) The Constitutional position if the Supreme Court sits outside the Islands

37. Mr Mitchell conceded that sittings of the Supreme Court are required to take place within the Islands. The Board considers that he was correct to make that concession. The Constitution draws a clear distinction between the Supreme Court and Court of Appeal as to where each of those courts may sit. Whilst section 80(2) expressly states that for the purposes of hearing and determining appeals the Court of Appeal may sit either in the Islands or in such places outside the Islands as directed by the President of the Court, no such equivalent provision is made in section 77(1) in respect of the Supreme Court. The clear implication, as Lobban-Jackson J held at first instance, is that the Supreme Court may sit only within the territory of the TCI. The significance of this concession is that section 1 of the Constitution provides that certain rights are afforded protection which include the right to the protection of the law. Section 6 under the rubric "Provisions to secure protection of law", in so far as relevant provides that "if any person is charged with a criminal offence, then, …, the case shall be afforded a fair hearing … by an independent and impartial court *established by law*" (emphasis added). If Regulation 4(6) enabled the Supreme Court to sit outside the territory of the TCI then to that extent Regulation 4(6) would be unlawful.

(c) Approach to the interpretation of Regulation 4(6)

38. In interpreting Regulation 4(6) the first question is what is the natural or ordinary meaning of the particular words or phrases in their context in the Regulations. It is only when that meaning leads to some result which cannot reasonably be supposed to have been the intention of the Governor when making or of the House of Assembly when approving the Regulations that it is proper to look for some other possible meaning of the word or phrase, see *Pinner v Everett* [1969] 1 WLR 1266 at 1273. In performing that exercise the text of Regulation 4(6) has to be read in its context in its widest sense, to include the context of the Regulations as a whole, and the legal, social and historical context, see *R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* [2001] 2 AC 349 at 396; *R (Westminster City Council) v National Asylum Support Service* [2002] 4 All ER 654 at [5]; *Attorney-General v Prince of Hanover* [1957] 1 WLR 436 at 460–461. As stated in *Bennion on Statutory Interpretation* (7th edition) at para 9.2 context "is relevant not simply for resolving

ambiguities and other uncertainties, but for ascertaining meaning (whether or not there is an ambiguity or other uncertainty), and indeed for identifying whether something is (or is not) ambiguous or uncertain in the first place."

39. The legal context includes the Constitution and a court would not lightly infer that Regulation 4(6) is intended to override or displace basic tenets of the Constitution - see *Bennion* at para 25.1.

40. Also of potential relevance is the principle of effectiveness – ie where possible, an enactment will be construed so that its provisions are given force and effect rather than rendered nugatory - see *Bennion* at para 9.8.

41. Finally, the weight to be attached to the grammatical meaning, though still significant, is reduced if the Regulations bear the hallmark of imprecise drafting - see *Bennion* at para 9.4.

(d) The context to the making of the Regulations

42. There are a number of admissible and relevant contextual features.

43. The general context includes the fact that Regulation 4(6) is concerned with where the judge's jurisdiction and authority is to be exercised.

44. The specific context is that the Regulations were made under section 4(1) of the Ordinance and article 6(1) of the Order. They were made as a temporary measure in response to the coronavirus global pandemic after the Governor had proclaimed a state of emergency and in circumstances where by virtue of PD2.20 all Supreme Court criminal trials had been suspended until further notice, except for those matters determined to be urgent by the judge in any particular case. This gave rise to a clear need to devise methods of resuming the administration of justice.

45. Another important aspect of the legal context is the Constitution which by clear implication provides that the Supreme Court may sit only within the territory of the TCI.

46. Another aspect of context is that the physical courtroom is in the Islands. It is obvious that the courtroom will be used after the pandemic. However even during the pandemic the need for a physical courtroom remains given that PD3.20, made on the same day as the Regulations were approved by the House of Assembly, provides that "it is within the sole discretion of the Judge, Magistrate or Registrar having regard to

the COVID 19 pandemic and the physical distancing protocols in the Emergency Powers (Covid-19)(No.3) Regulations 2020 as well as the health and safety of him or herself, court staff and court users, to require an in-person hearing." That in-person hearing would take place within the physical courtroom. The context also includes the Supreme Court administrative staff. Prior to the pandemic the Registrar who was physically in the courtroom was responsible for the administration of the proceedings. Again PD3.20 maintains that administrative role by providing that "the Registrar/Court Clerk/Clerk of Court at the Magistrate's Court (as the case may be) shall set up the hearing, allow access into the hearing, end the hearing, and produce a record of the hearing." In this way the courtrooms and all the administrative control of hearings remain located within the Islands.

47. Finally in relation to context all the powers of the judge would be exercised solely in the Islands which means that there would be no breach of international law or of international comity as the judge would not be exercising any powers affecting a foreign State. There is no threat to the sovereignty of the jurisdiction of any such State. There are no concerns about the extra-territorial exercise of coercive powers.

(e) The proper interpretation of the Regulation

48. The Board accepts, as did Mr Mitchell, that the Regulations are not clearly drafted. He contended that some latitude should be afforded to these emergency temporary regulations given the haste with which they were drafted. The Board considers that there is some force in that submission based on an examination of the wording of the Regulations which betray some lack of grammatical precision. Regulation 4(5) states that court sittings "shall be done" as opposed to "shall be conducted". The Board also notes that the Regulations apply not only to the Supreme Court and to the Magistrate's Court which are not permitted to sit outside the Islands but also to the Court of Appeal which is permitted to do so. On this basis the Board considers that the weight to be attached to a strict grammatical meaning is reduced as the Regulations themselves bear the hallmark of a degree of grammatical imprecision and purport to make provision for some courts which are not and some courts which are permitted to sit outside the Islands.

49. The Board considers that, particularly when considered in context, the proper interpretation is that preferred by the majority of the Court of Appeal.

50. The first part of Regulation 4(6) provides that the "courtroom shall *include* any place, whether in or outside of the Islands, the Judge or Magistrate elects to sit to conduct the business of the court:" (emphasis added). This does not provide that the courtroom "is" or "shall be" any place where the Judge elects to sit**,** contrary to the appellants' submission that where "the judge is, there the court (or courtroom) is."

51. Regulation 4(6) gives prominence to the "courtroom". It starts by referring to the courtroom and thereafter focuses on what that is to include. As the proviso makes clear, the courtroom is the place within the Islands at which the video and audio link facility is to be accessible to the court recorder, parties, counsel and witnesses. Generally, that will be a courtroom but, as Adderley J observed at para 180, it may be another place in the Islands elected by the judge. That courtroom will "include" wherever the judge is connecting remotely from, whether that be in or outside of the Islands. There is only one courtroom, that courtroom is in the Islands and the remote place where the judge is located is deemed to be part of that courtroom. "Sit" in the context of Regulation 4(6) does not mean where the court is formally sitting or exercising jurisdiction, but simply where the judge is hearing the case, which place is deemed to be included in the physical courtroom in the Islands. The Board agrees with Mottley P, who stated at para 50: "there is but one courtroom and the judge who sits outside the territorial boundary of the Turks and Caicos Islands is conducting one trial which is taking place within the territorial boundaries of the Turks and Caicos Islands." Similarly, as Adderley JA stated at para 180: "The provision amounts to deeming the place where the judge sits physically whether that place is inside or outside the Turks and Caicos Islands to be part of the courtroom in the Turks and Caicos Islands."

52. The Board also considers that this interpretation is borne out by a consideration of the contextual features to the making of the Regulations.

53. In relation to the general context, the only place in which a judge of the Supreme Court can exercise his authority and jurisdiction is in the TCI. As Mr Mitchell submitted, to construe Regulation 4(6) as purporting to permit him to do otherwise involves the absurdity of a judge of the Supreme Court of the TCI not exercising authority in the TCI but at a location where that authority would not be recognised. In relation to the specific context this interpretation enables the Regulation to take its place in the wider scheme of the Constitution and of the Supreme Court Ordinance. It is also consistent with PD3.20.

54. On one view it may be said that there is a degree of ambiguity in Regulation 4(6). A possible interpretation of the word "*include*" in Regulation 4(6) is that if the Judge elects to physically sit outside of the Islands then the courtroom *extends to* the place where the Judge elects to sit. On this basis, if the judge elected to remain in Jamaica connecting remotely to the courtroom in the Islands, then contrary to the Constitution Regulation 4(6) would have impermissibly created in Jamaica one of the places where there was a courtroom of the Supreme Court.

55. The Board considers that any such ambiguity is clearly resolved on a purposive approach to the interpretation of the Regulations.

56. In adopting a purposive approach it is necessary first to identify the purpose of the Regulations and thereafter to seek to give effect to that purpose.

57. The purpose of the Governor in making and of the House of Assembly in approving the Regulations is set out in Regulation 3 as being to "put measures in place during the Covid-19 pandemic to ensure that the administration of justice, including enforcement of orders and access to justice is carried out so as not to endanger public health". The purpose can also be summarised as ensuring that during the Covid-19 pandemic the administration of justice, including trials continues in a way that would not endanger public health, the health of litigants, witnesses, court officials and judges by reducing the need for persons physically to attend the courtroom by utilising video and audio links. Mottley P stated at para 44 that "the overriding intent of the Regulations is to ensure that (for a temporary period) the administration of justice should continue with the changes set out in the Regulations." Relying on the Explanatory Note to the Regulations the President stated at para 38 that they were "to provide measures to enable remote court trials." In that paragraph the President continued that "the Regulations are intended to expand the use of technology by making use of video and audio links" so as to "enable a wider range of proceedings to be conducted by video and audio link." The Board considers that the purpose was not to permit the Supreme Court to sit outside the Islands but rather the defect or mischief which was sought to be corrected was that the administration of justice had come to a halt so that the limited purpose was to use technology to allow the administration of justice to resume.

58. In determining that this was a limited purpose it is instructive to contrast the detailed provisions applicable to the Court of Appeal sitting outside the Islands with the lack of any equivalent provision in the Regulations. The Court of Appeal Ordinance provides that the "hearing of an appeal may take place either within the Islands or at such other venue as the President of the Court may appoint, having regard to all the circumstances relating to the appeal and any representations made by the parties." There are then provisions as to how that will be achieved. In relation to legal representation it is provided that when the appeal is heard outside the Islands the parties may be represented by counsel and attorneys admitted to practise before the Supreme Court of the territory in which the appeal is heard. Provision is also made in respect of the duties of the Registrar of the Court of Appeal which also depend on whether the appeal is to be heard elsewhere than in the Islands. If the appeal is to be heard elsewhere then provision is made for the TCI Court of Appeal Registrar to forward the Record of the appeal to the Registrar of the Court of Appeal in the territory in which the appeal is to be heard. It is then provided that "all further acts in connection with the setting down of the appeal for hearing, and the hearing itself, shall be performed by the Registrar of the Court of Appeal at which the appeal is to be heard." The Court of Appeal may be sitting outside the Islands but in respect of those duties to be performed elsewhere the TCI Registrar cedes authority to the Registrar of the other territory. These provisions in relation to the Court of Appeal are a part of the legal context to the Regulations and if the intention of the Governor or of the House of Assembly when the Regulations were approved was to permit a sitting of the Supreme Court or to permit a courtroom of the

Supreme Court to be created outside the Islands then one would have expected that similar provisions would have been included in the Regulations in relation to legal representation and as to the limited function of the TCI Registrar. There are no such provisions which indicates that the intention of the Governor and of the House of Assembly when the Regulations were approved was not to permit the Supreme Court to be conducted outside the Islands.

59. Consideration of the purpose of the Regulation supports the interpretation that the word "include" in the first part of Regulation 4(6) is a deeming provision so that wherever the court is assembled the judge should be deemed to be considered to be in that place. This interpretation is reinforced by the proviso in the second part of Regulation 4(6). The proviso is in the following terms:

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

The proviso governs the first part of Regulation 4(6) and it only operates in the context that there is more than one place. One of those places by virtue of the words "said location" refers back to the first part of Regulation 4(6) and is the "place, whether in or outside of the Islands, the Judge … elects to sit to conduct the business of the court". The purpose of the proviso is to ensure that if the judge elects to be physically present elsewhere, whether inside or outside of the Islands, then the place where he is physically is connected to and is part of the courtroom in the Islands which is where he exercises his authority and jurisdiction. In this way the location of the courtroom in the Islands is not altered but rather there is a connection to that courtroom from elsewhere, potentially Jamaica. The intention is to allow a judge who is not physically in the courtroom in the Islands to be remotely connected to the courtroom so as to take part in the court proceedings in the Islands. This interpretation of Regulation 4(6) gives effect to the limited purpose of the Regulations as it does not take the jurisdiction of the court offshore. The Board considers that the meaning is clear having regard to the purpose of the Regulations.

60. The Board also rejects the alternative interpretation as it would mean that Regulation 4(6) was intended to create a courtroom of the Supreme Court in a foreign State. The Constitution is a part of the legal context and creating a courtroom of the Supreme Court in a foreign State would override basic tenets of the Constitution together with principles of international law or international comity. That is a consequence which should not lightly be inferred. If necessary, the Board would also reject the alternative interpretation on the basis of the principle of effectiveness as it would mean that Regulation 4(6) was to a significant extent rendered nugatory as being in breach of the Constitution and ultra vires. The Board does not have to resort to any

strained interpretation to make Regulation 4(6) effective, but if such an interpretation was required then the Board would have resorted to it.

(f) Conclusion in relation to ultra vires

61. On its proper interpretation, Regulation 4(6) is not ultra vires. It provides authority by way of subsidiary legislation for a judge outside the Islands to connect remotely to the courtroom in the Islands.

Inherent jurisdiction

62. The conclusion in relation to the interpretation of Regulation 4(6) determines the outcome of this ground of appeal. However, an issue arose as to whether even in the absence of the Regulation 4(6) a judge exercising the inherent jurisdiction of the Supreme Court to govern its own processes could connect remotely to a courtroom in the Islands from another State. In that respect the Board was referred to the decision of the Court of Appeal for British Columbia in *Endean v. British Columbia* [2014] BCCA 61.

63. In *Endean* the superior courts of the Canadian provinces of British Columbia, Ontario and Québec had each been assigned a supervisory role under the terms of a settlement agreement in relation to class action proceedings on behalf of individuals infected with hepatitis C by the Canadian blood supply between 1986 and 1990. A question arose as to whether the superior courts of those three provinces could sit together in the Canadian province of Alberta to hear a motion which was required to be determined by all three superior courts. Accordingly the issue before the Supreme Court of British Columbia and then on appeal before the Court of Appeal for British Columbia was whether a judge of the Supreme Court of British Columbia may preside over a hearing that is conducted outside British Columbia. The British Columbia Supreme Court held that the inherent jurisdiction allowed it to hold a hearing outside of British Columbia where it is in the interests of justice in the particular case. On appeal to the Court of Appeal for British Columbia it was held, allowing the appeal, that the common law of England and Wales prevented judges from sitting outside of England and Wales and this forms part of the law of British Columbia. It was also held that the superior courts' inherent jurisdiction is a narrow core including only those powers which are essential to the administration of justice and cannot be used to authorise a judge to conduct hearings outside the province. The judgment also stated that if British Columbia judges are going to be authorised to conduct hearings outside the province it is for the legislature to determine. However the Court of Appeal for British Columbia held that there is no objection to a judge conducting a hearing in a British Columbia courtroom by telephone, video conference or other communication medium, even if the judge is not personally present in the courtroom or in the province.

64. Mr Justice Goepel in delivering the judgment of the Court of Appeal considered whether the circumstances of the case were such that it would be appropriate to change, in a broad fashion, the common law to allow a British Columbia judge to conduct a hearing outside the province. He declined to do so but went on to state at para 76 that:

> "the common law is a flexible instrument that can be adapted to meet changing conditions. The judiciary can properly make incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society."

He also observed at para 77 that when "the common law (of England and Wales which prevents judges from sitting outside of England and Wales) became part of the law of British Columbia it was not possible for judges and litigants to communicate with each other except from inside the courtroom." He added that "modern communication technology that allows individuals in different locations to be in contact with one another had yet to be conceived." In the following paragraphs of his judgment he stated that modern technology permitted a judge to be outside the province and outside the courtroom, but the court proceedings would be in the courtroom in the province. He stated:

> "[79] As noted, the province has no objection to a judge who is outside the province conducting a hearing by video conference or other communication medium as long as the hearing itself takes place in a British Columbia courtroom. If for reasons of convenience or otherwise, a judge determines that a matter is to be heard by telephone, video conference or other communication medium, there is I suggest no reason why the judge, counsel or witnesses necessarily need to be physically present in the province as long as the hearing itself takes place in a courtroom in British Columbia. Witnesses and counsel, of course, will have the right to be present in the courtroom and cannot be compelled to attend to a location other than a courtroom in British Columbia.
>
> [80] Such a hearing in my view would not offend the common law rule that prohibits judges from conducting hearings outside of British Columbia; although the judge may be located elsewhere, he or she would be exercising his or her jurisdiction and authority in a hearing taking place in British Columbia. The hearing would respect the open court principle as interested members of the public and media would be able to observe the proceedings in a British Columbia courtroom.

> [81] It will be up to the individual judge to determine when it is appropriate to conduct a hearing while outside the province. Such hearings I expect would be rare and only arise in exceptional circumstances.
>
> [82] In conclusion, I am of the view that British Columbia judges cannot conduct hearings that take place outside the province. Such a major law reform is for the legislature to determine. There is, however, no objection to a judge who is not personally present in the province conducting a hearing that takes place in a British Columbia courtroom by telephone, video conference or other communication medium."

65. The Canadian Supreme Court unanimously allowed an appeal from the Court of Appeal for British Columbia under citation [2016] SCC 42. It was held that in Ontario and British Columbia, superior court judges have discretionary statutory power under s.12 of the Ontario Class Proceedings Act, 1992 and s.12 of the British Columbia Class Proceedings Act (the "Acts") to sit outside their home provinces and that a video link is not mandatory in an extra-provincial hearing. The Supreme Court noted that the Court of Appeal of British Columbia was of the view that it was permissible for a judge, who was not physically present in the province, to conduct a hearing taking place in a British Columbia courtroom by telephone, video conference or other communication medium. It was also noted that the Court of Appeal had concluded that such a hearing — which would involve the judge exercising his or her jurisdiction or authority in a hearing in British Columbia — would not offend the common law prohibition against judges conducting hearings outside British Columbia. It was not necessary for the Supreme Court to rely on this approach, but it did not dissent from it.

66. The outcome of this ground of appeal depends on the proper interpretation of Regulation 4(6). It is not necessary to determine the proper interpretation of the word "sittings" in section 71(1) of the Supreme Court Act 1981 as a sitting of the TCI Supreme Court outside the Islands in any event would be in contravention of the Constitution. In these circumstances, it is not necessary to decide whether the reasoning of Mr Justice Goepel in *Endean* provides an alternative ground for determining this appeal though the Board recognises that the reasoning has considerable force given evolving technology. This case would certainly amount to "exceptional circumstances" within para 81 though the Board would note that technology continues to evolve so that its use in this way may not be restricted to "rare and exceptional circumstances."

The inequality of arms issue

67. The appellants contended that evidence by video link is 'second best' evidence and that it would create unfairness or at least a perception of unfairness if they were compelled to continue the trial with the judge sitting remotely. This is all the more so in circumstances where the prosecution case has been presented in court in the ordinary way and it is the defence evidence and case which will have to be given remotely.

68. A fundamental difficulty with the appellants' case on this issue is that no decision has yet been made to continue with the trial remotely and, even if one assumes that such a decision will be made, one cannot tell how much of the remainder of the trial will be so conducted. The Covid-19 situation has ameliorated in the TCI, as reflected in PD4.20, and it may further improve. If Harrison J was confident that it would be safe for him to continue with the trial in the TCI then no doubt he would do so.

69. It cannot be said that it would be unfair for any part of the trial to be conducted remotely. Covid-19 has necessarily required court procedures in many countries to be adapted so as to enable courts to continue sitting, and the use of audio visual links has been of great assistance in enabling them to do so. In the UK, for example, many trials have been successfully conducted either wholly or mainly by video link. Whilst jury trials raise distinct issues in relation to the use of such links, there is no intrinsic reason why video links cannot be used in criminal proceedings, and indeed in the UK video evidence has long been used for vulnerable and child witnesses in criminal proceedings. Similar steps are being taken in the TCI as reflected in the Audio-Visual Link Ordinance and the Vulnerable Witness Ordinance. As Mottley P stated at para 59 of his judgment in the present case:

> "Changes have been made to the common law by the enactment of the Audio Visual Link Ordinance. This Ordinance permits a witness to give evidence by audio and visual links from a remote point in both criminal and non-criminal matters. This is mentioned to show that changes are being made to criminal trials. These changes are taking place having regard to the rapid development of technology such as Microsoft Teams, Zoom, Skype, Webex etc. A developing law must have regard to, and keep pace with the technological developments."

70. There may be some cases, or some parts of cases, where there are particular reasons why it may not be appropriate to use video links, but these are matters for a trial judge to determine in the exercise of his discretion on the basis of the particular facts and circumstances before him. As the appellants submitted "much will turn on the specific nature of a particular case and the evidence to be called". There is no proper

basis upon which the Board can or should seek to usurp the trial judge's role by making a pre-emptive ruling. The trial judge can also use his case management powers to ameliorate any issues which may be identified.

71. The appellants acknowledged that they are not in a position to establish by reference to empirical data or otherwise that the conduct of the defence cases over a video link will or is likely to have a detrimental impact on the trial judge's ability to follow and assess the evidence. They nevertheless contended that public confidence in the fairness of criminal trials and the appellants' perception of such fairness would be undermined by the appearance of imbalance if the defence alone was presented remotely. The Board does not accept that any such general assertion is justified. It all depends on the particular facts and circumstances, as they transpire, and these are matters for the trial judge to consider, as and when it may be appropriate to do so.

72. In this particular case, for example, it is of relevance that over 40 prosecution witnesses gave evidence by video link without any adverse comment as to the quality of such evidence. It is also of relevance that the courtroom is so large and the witness box so distanced that both the judge and counsel have had a live feed of the witness evidence to screens in front of them. This is also a trial in which much of the evidence is documentary. No doubt, there are other matters of relevance best known to the trial judge with his long experience of the case.

73. Finally, on the hearing of the appeal Mr Fitzgerald advanced a new but related point to the effect that a defendant in a criminal trial has a right to be in the presence of the judge when evidence is given so that the defendant can see how he reacts and that the evidence must be assessed with the defendant and judge in the same physical space. This is simply another way of stating that no part of a criminal trial should ever be conducted with a judge sitting remotely, a submission which the Board has already rejected. Whilst it will be preferable that the judge be physically present, there may be circumstances in which a remote hearing is justified, and it is a matter for the judge to determine whether and how that is to be done. If, for example, there is a particular concern about being able to note the reaction of the judge, then the parties, at the discretion of the judge might, for instance be provided with a screen view of both the judge and the witness as viewed by the judge. That would be likely to provide a closer and clearer view than in court, especially in a large court.

74. In summary, the Board is effectively being invited to interfere in the trial process by making a preclusive ruling as to the future conduct of the trial. It is neither necessary nor appropriate for the Board to do so.

Disposal

75. The hearing before the Board concluded on 4 November 2020. By letter dated 5 November 2020 the Board informed the parties that it would humbly advise Her Majesty that these appeals ought to be dismissed with the reasons to follow. These are those reasons.