[2020] CCJ 9 (AJ) BZ

IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction

ON APPEAL FROM THE COURT OF APPEAL OF BELIZE

CCJ Civil Appeal No BZCV2019/003
Belize Court of Appeal No 36 of 2016

BETWEEN

BELIZE INTERNATIONAL SERVICES LIMITED **APPELLANT**

AND

THE ATTORNEY GENERAL OF BELIZE **RESPONDENT**

Before the Honourables **Mr Justice J Wit, JCCJ**
Mr Justice W Anderson, JCCJ
Mme Justice M Rajnauth-Lee, JCCJ
Mr Justice A Burgess, JCCJ
Mr Justice P Jamadar, JCCJ

Appearances

Mr Eamon Courtenay SC and Ms Priscilla Banner for the Appellant

Mr Justin Simon QC and Mrs Samantha Matute-Tucker for the Respondent

JUDGMENT OF THE COURT
Containing the judgments of
The Honourable Mr Justice Wit

and

The Honourable Mr Justice Anderson and the Honourable Mme Justice Rajnauth-Lee
Delivered by the Honourable Mr Justice Anderson

and

The mutually concurring Judgments of
The Honourable Mr Justice Burgess
and
The Honourable Mr Justice Jamadar
on the 30th day of June 2020

JUDGMENT OF THE HONOURABLE MR JUSTICE WIT, JCCJ:

[1] I have read the reasons for judgment written by Mr Justice Anderson (with whom Madam Justice Rajnauth-Lee agrees), as well as the separate and mutually concurring reasons for judgment of Mr Justice Burgess and Mr Justice Jamadar. They have all reached the same conclusion and I too agree with that conclusion: the appeal must be allowed, and the case must be remitted to the Supreme Court for the assessment of damages. There are no differences on the facts of this case, and I therefore adopt the statement of facts as set out in those reasons. There are, however, some important differences in the legal reasoning leading to our common conclusion. Although I agree with several parts of the reasoning, I look at this case somewhat differently. For this reason, I wish to state my own views, albeit succinctly if only to avoid unnecessary repetition.

[2] This case can be summarized as follows. In 1993 the Appellant, Belize International Services Limited ('BISL'), and the Government of Belize entered into a written agreement. BISL would, basically, develop and manage two registries established by the Government, the International Merchant Marine Registry of Belize ('IMMARBE') and the International Business Companies Register ('IBCR'). These Registries, statutory bodies, were established pursuant the Merchant Shipping Act (IMMARBE) and the International Business Companies Act (IBCR).

[3] The Government agreed to share with BISL "the income to be collected on behalf of the Government in relation to IMMARBE and the IBCR from [their] activities in the form of fees, penalties and taxes for the registration of vessels and the operation if the IBCR in the following proportions:

> (a) The first 40% of the income in any given year will be used to cover all the operational expenses of IMMARBE and IBCR in that year;
>
> (b) After deducting the said 40% of the income, the remaining amount will be shared in the following proportions:

i. 60% for the Government; and

ii. 40% for the Company."

[4] The moneys thus raised and received "on behalf of the Government" were to be deposited in several IMMARBE and IBCR escrow accounts. From there the moneys mentioned under (a) and (b)(ii) would be transferred to BISL bank accounts and the moneys destined for the Government would be transferred to the Government who would then pay the moneys into the Consolidated Revenue Fund. This arrangement was thus designed "in order to facilitate the management and distribution of fees, penalties and taxes to be collected and pro-rated under this Agreement." It is true that it gave BISL to a great extent control over the moneys raised by the two Registries, but this control was neither unlimited nor unregulated.

[5] Importantly, the Agreement provided a multitude of checks on BISL: several accounting and auditing requirements, such as an obligation to permit audits of its accounts and operations on the part of the Auditor General. BISL was also obligated to allow authorities of Belize "whenever it is deemed necessary" to inspect the records of the company directly related to the income derived from the activities of IMMARBE and IBCR. BISL never failed to comply with these requirements.

[6] The term of the 1993 Agreement was ten years with an option for BISL to renew for an additional period of ten years. BISL exercised this option in 2003. The Agreement would therefore end in 2013. However, in 2005 the Government and BISL agreed to extend the Agreement until 2020 for which extension BISL paid the Government US$ 1.5M as consideration. In May 2013, the Government wrote BISL that the Agreement would expire in June 2013. Although BISL pointed out to the Government that there was an extension agreement signed by both parties in 2005 and despite the offer made on its behalf to discuss the matter with the Government, the latter did not respond and forcibly took possession of the Registries on 14 June 2013. As a result, BISL sued the Government to recover damages for breach of contract.

[7] The defence of the Government was that the 2005 extension was unlawful because: (1) it was not put out to tender in compliance with the Financial Orders 1965, (2) the Executive did not have the authority to lawfully approve and bind the Government to the 2005 extension, and (3) the 2005 extension, as far as it continued the 1993 Agreement, was inconsistent with section 114 of the Constitution and section 4 of the Finance and Audit Act ('FAA'). In the courts below this defence proved to be successful. Not so in this Court.

[8] The first two submissions have been firmly rejected by both Justice Anderson[1] and Justice Burgess.[2] I agree with the reasons they have given for that rejection and have nothing to add to that. As to the third and most important submission, both Justices have written lengthy, erudite, and fascinating opinions. They both conclude that although the 1993 Agreement, and *ipso facto* the 2005 extension, was tainted with illegality, there was a breach of contract that should result in awarding damages. They differ strongly, however, on the test or approach that should be used to reach that conclusion. On the one hand, there is the more traditional, although updated, proportionality test applied by Justice Anderson (following Singaporean jurisprudence). On the other hand, there is the more "revolutionary" range of factors test applied by Justice Burgess as obviously inspired by the majority decision of the UK Supreme Court in *Patel v Mirza*.[3] Both opinions are learned and valuable and provide sufficient food for thought; each is supported by another Judge. In this panel of five, the choice could therefore be mine to cast the deciding vote on this particular issue. But I will not do so for the following reasons.

[9] First, as will soon be clear, I do not need to make a choice between these two approaches as I decide the case along a different route. I also note that the difference in approach, when correctly applied, does not appear to produce a different result, at least not in this matter. Second, the proper approach to an illegality defence was hardly if at all discussed in the courts below. *Patel*, although a revolutionary

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[1] See [86]-[89] and [90]-[95].
[2] See [287]-[292]
[3] [2016] UKSC 42

majority decision with strong, authoritative dissents, was simply applied in the Court of Appeal as if it were part of the law of Belize, which it was not. The impressive Singaporean jurisprudence, favoured by Justices Anderson and Rajnauth-Lee at least for now, was not discussed at all in those courts. Given this background and given the importance of this difficult area of the law, with which all jurisdictions that I know, both civil law and common law, are still grappling, I do not think this is the proper case to create a precedent. I am hopeful that soon there will be a better case to do so and I think that that case should be dealt with by the full bench of this Court, not by a bench of five. I now turn to the case itself.

[10] The first issue that needs to be resolved is whether the Agreement was a valid one or one "tainted with illegality." It is clear that that part of the Agreement, summarized above under [4] does not strictly comply with section 114(1) of the Belize Constitution which prescribes that **"All revenues or other moneys** raised or received by Belize **shall be paid into** and form one **Consolidated Revenue Fund.**" Section 114 (2)-(4) of the Constitution also makes clear that withdrawals from the Fund ('CRF') must be authorized by the National Assembly. In short, the Constitution seems to tell us that, strictly (and formally) speaking, the moneys received by the Registries should have been paid directly into the CRF, after which BISL's expenses (40% of the total income) and its 40% share of the total net income would then be paid by the Government to BISL with authorization by the National Assembly, however unpractical, commercially ineffective and burdensome this procedure may be.

[11] Section 2 of the Belize Constitution states that it is the supreme law of Belize and if any other law (and, I suppose, other legal instruments as a contract) is inconsistent with this Constitution that other law (or instrument) shall, to the extent of the inconsistency, be void. If we apply this to a contract, the Agreement in this case, we have to ask the question if it is inconsistent with section 114 of the Constitution, and if it is, to what extent (as it can only be void to that extent).

[12] But what do we mean with something being "inconsistent with the Constitution"? In this case it is clear that parts of the Agreement are inconsistent with the letter of section 114 of the Constitution (although, strictly speaking, with the letter of that section *as understood against the total structure, written and unwritten, of the Belize Constitution*). But is that what is needed to conclude that there really is "inconsistency"? Mr Courtenay called this a "technical non-compliance" and he submitted that nonetheless there was "substantial compliance" with what section 114 of the Constitution (as well as section 4 of the Finance and Audit Act) requires. This was so because the purpose of that section, he argued, is "to ensure accountability. There should at all times be effective accounting and auditing of Government's moneys." He further argued that the provisions of the Agreement ensured that the purpose of the Constitution and the FAA were effectively achieved, and that for twenty years BISL had satisfactorily performed the Agreement. Translated into my own words, the argument was that the Agreement may have been in part inconsistent with the letter but overall, not with the spirit of the Constitution.

[13] I agree with this submission. Avoiding repetition, I would simply refer to the ample reasons given by Justice Burgess in [254]-[264] and [273] of his judgment. As he rightly remarks: "There were provisions in the agreement which sought to bring it within the spirit of the Constitution." Given the underlying purpose of section 114 of the Constitution, which is to enable Parliament to exercise proper control over expenditure and the raising of public revenue. I would venture to take this remark one step further: the provisions requiring accounting and auditing, especially by the Auditor General, and the obligation to allow inspection of records at any time deemed necessary by the Government on the one hand, and the consistent manner in which these provisions have been applied during twenty years on the other, did indeed bring the agreement (and its execution) within the spirit and intent of the Constitution. After all, the Constitution, however elevated or sacred we may consider it to be, is neither meant to be esoteric nor a straitjacket. It is a qualitative, normative and value laden instrument that should firmly guide society.

[14] At this point, I would seek support in the rule expressed by the Supreme Court of the Philippines in *Tañada v Cuenco*:[4] "As a general rule of statutory construction, the spirit or intention of a statute prevails over the letter thereof, and whatever is within the spirit of the statute is within the statute although it is not within the letter, while that which is within the letter, but not within the spirit of a statute, is not within the statute." Whether this rule – not an absolute one, for sure - would have general application with respect to statutory interpretation as we know it in the Commonwealth Caribbean is probably debatable if not questionable, but it would fit quite well in our (in any event my) views on constitutional interpretation, certainly where the Constitution in our part of the world is generally seen as a principle-based living instrument. My general conclusion is thus: whatever is in the spirit of the Constitution is within the Constitution, although it is not in the letter of the Constitution, while that which is within the letter, but not within the spirit of the Constitution, is not within the Constitution. It is on those grounds that I have reached the, in the eyes of some probably bold, conclusion that the agreement as executed was not inconsistent with the Constitution and therefore not void or unenforceable.[5]

[15] If I am wrong, though, and there would be inconsistency with section 114 of the Belize Constitution, as my colleagues have concluded, then I would have to ask myself, to which extent the agreement is inconsistent with that section as it is only to that extent that the agreement could be void. This would come down to the issue of severance. In my view, this is a very simple matter. As the courts below have already found, the agreement as such was lawful. BISL was to manage the two Registries for the Government and would share in the income produced by those registries as stipulated in the Agreement establishing *how much* each of the parties would get out of it. Nothing was wrong or illegal about that. What would be unlawful, and therefore void, is that part of the Agreement that stipulated *how* the parties would get the moneys. The "how" does not interfere with, and is not

[4] 103 Phil. 1051 (1957)
[5] To be clear, the Deed of Settlement that was the subject of this Court's adjudication in *BCB Holdings Limited and the Belize Bank Limited v Attorney General of Belize* [2013] CCJ 5 (AJ), a case heavily relied on by the Government and the courts below, was obviously in violation of both the letter and the spirit of the Constitution.

dependent of the “how much” of this contract, and is therefore severable. As we are here not dealing with specific performance of the agreement, which would involve the “how” of the payment, but with the enforcement of the contract through an award of damages, that only concerns the “how much” question, there can be no realistic problem in allowing such an award. As already indicated, it also does not require me to consider the proper illegality defence test or approach. What will be enforced is what remains after simple legal surgery: a valid and healthy agreement that can soundly result in damages for its breach.

[16] But what if what remains of the contract is so inextricably bound up with the part declared invalid that what remains cannot independently survive? In such a case the exercises developed by Justices Anderson and Burgess may become necessary. However, there is alternative route. At that point I would have explored the very interesting and far reaching reasoning developed by Justice Jamadar in his judgment in this case. As he sets out, the State is indeed under the Constitution obliged to treat with contracting parties in accordance with the rule of law, not understood as a mechanical but as a rich and normative principle, and, flowing therefrom, the principle of good governance. As indicated, the Constitution is a qualitative and normative instrument primarily containing directions and instructions for the State and its agents. Good governance is down to earth fairness and reasonableness in the public domain. And in contract law, the duty of the Government implies treating with contracting parties fairly, honestly, openly, in short - in good faith.

[17] I note that this perspective is not unknown in civil law jurisdictions. For example, it has since long been established in Dutch private law, first by the courts and subsequently by the legislature. Article 14 of Book 3 of both the Dutch and the Dutch Antillean/Aruban Civil Code expresses it thus: “ A right to which a party is entitled pursuant to private law, may not be exercised contrary to the written or unwritten rules of public law.“ Part of these rules are the principles of good or proper governance. The cited provision is quite remarkable because of the fact that private and public law in civil law jurisdictions are usually strictly separated (even

administered by different courts), while in common law jurisdictions both private and public law are part of the same common law and administered by the same courts.

[18] What this new perspective would imply in a general sense is at this stage of the law difficult to say, but in this particular case it seems pretty clear. Given the circumstances, and assuming (but not conceding) that severance would not have been possible and changes or amendments should have been made to the agreement to make it fully compliant with the constitutional and legislative imperatives, the Government should have followed the path indicated by Justice Jamadar: given the background of this case, it had a good faith duty to enter into negotiations with BISL with the aim of amending the Agreement so as to achieve the required compliance. Having flouted that duty, the Government would be liable to pay the damages caused by its breach of contract despite the taint of illegality on that contract. In such a case, legal logic would justifiably be caught up by justice and fairness: *nemo turpitudinem suam allegans auditur* (nobody shall derive rights from his own wrongful behaviour)!

[19] In closing, I have come to the same conclusion as my colleagues. I would therefore dispose of this matter as suggested by them.

JUDGMENT OF THE HONOURABLE MR JUSTICE ANDERSON, JCCJ:

Introduction

[20] This appeal raises important issues in a notoriously difficult area of the law: the defence of illegality in contract law. The illegality defence arises when a defendant argues that the claimant ought not to be entitled to the normal private law rights or remedies because the claimant had been involved in illegal conduct linked to the claim. In this way there is an overlap between private law and public law. If the court attempts to vindicate the public law by accepting the illegality defence, an unjustified windfall might thereby accrue to the defendant who may be equally implicated in the illegality. But to refuse the illegality defence and to uphold the

claim may be seen to be helping a claimant to profit from his or her own illegal conduct.

[21] The illegality defence has given rise to great complexity because of the widely different contexts in which it may arise and because of the need to fashion a juridical response that meets the varying degrees of the claimant's legal turpitude. The defence may become critical in a broad spectrum of private law subjects: contract, tort, unjust enrichment, property rights or trusts law; and the illegal conduct may be integrally linked to the claim (such as a contract to commit a crime) or may be just one of many background facts (as where the speed limit is broken in the performance of a contract for carriage of goods).[6]

[22] The circumstances in which the illegality defence arose in the present appeal may be briefly sketched as follows. On 28 October 2016, Madame Justice Arana in the High Court of Belize dismissed a claim for breach of contract against the Government of Belize on the ground that the contract was "unconstitutional, illegal, and invalid." This decision was upheld in a well-reasoned judgment by Campbell JA in the Court of Appeal delivered on 15 March 2019. The Court of Appeal appeared to have accepted, or at least did not demur from, the recent decision of the UK Supreme Court in *Patel v Mirza*,[7] which, by majority, introduced a 'range of factors test' to determine whether an illegal contract may be enforced by the courts. The appeal to this Court is against that decision of the Court of Appeal, and by implication, the 'range of factors test' on which it apparently relied.

[23] We have determined that the appeal should be allowed and that the claim for breach of contract should be sustained. To the extent that the decision in *Patel v Mirza* would have dictated otherwise, we would, respectfully, refuse to follow it. However, as will be evident in what follows, we do not need to decide~~,~~ and we do not decide, now, whether to follow *Patel v Mirza* in relation to much broader issues of the illegality defence in contracts, or in relation to the broad spectrum of private

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[6] Examples drawn from the English Law Commission (Law Com No 320): The Illegality Defence, 16 March 2010, at vi.
[7] [2016] UKSC 42, [2017] AC 467 SC (E).

law subjects in which the illegality defence may arise. That decision is left for another day.

Background

[24] In the early 1990s, the Government of Belize ('the Government') decided to pursue the offshore industry as a developmental strategy for Belize. The Government had little or no expertise in the international ships registration industry or in the international business companies' registry industry. Accordingly, by a Management Services Agreement made between the Government and Belize International Services Limited ('BISL'), dated 11 June 1993 ('the Original Agreement'), the Government contracted BISL to assist it with the development and management of the Government owned International Business Companies Registry ('IBCR') and the International Merchant Marine Registry of Belize ('IMMARBE').

[25] The Original Agreement was for a term of ten years with an option for BISL to renew the Management Services Agreement for a further ten years. This option was exercised by BISL on 9 May 2003 and the Original Agreement was duly renewed for a further term of ten years, to June 2013 ('the Renewal Agreement'). Subsequently, on 24 March 2005, the parties amended the Original Agreement and extended its term to 11 June 2020 ('the Extension Agreement'). In consideration of this extension, BISL paid US$1.5 Million to the Government. It is this Extension Agreement that is the subject of this litigation.

[26] It seems fair to say that, pursuant to the Management Services Agreement, BISL assisted the Government with the management and development of the Registries, and as a result, the Government received substantial income throughout the years of the Original Agreement and the Renewal Agreement. However, in 2013, the Government took the position that the Extension Agreement was unlawful and, consequently, that the Management Services Agreement would expire on 10 June

2013. On 11 June 2013, the Government, without a court order, forcefully took possession of both IBCR and IMMARBE.

[27] BISL sued the Government, arguing that as a direct result of their actions, BISL was deprived of its share of the income that it would have received between June 2013 and June 2020, and therefore suffered substantial loss and damages to the tune of US$45m. The Government's defence to BISL's claim was that the Extension Agreement was unlawful in three respects, namely, that: (a) the Extension Agreement circumvented the Constitution, the Finance and Audit Act and the Financial Orders and Stores Orders; (b) the Executive did not have the authority to lawfully approve, and to bind the Government to, the Extension Agreement; and (c) the Extension Agreement was not put out to tender in compliance with the Financial Orders and the Stores Orders and was, consequently, unlawful. On 28 October 2016, Madame Justice Arana delivered her decision. She dismissed the claim by BISL on the ground that the Extension Agreement was unconstitutional, illegal, and invalid. Costs were ordered on the prescribed basis in favour of the Government.

[28] Being dissatisfied with the decision, BISL appealed to the Court of Appeal. However, by a decision dated 15 March 2019, the Court of Appeal, speaking through the judgment of Campbell JA, dismissed the appeal and affirmed the decision of Madame Justice Arana that the Extension Agreement was unconstitutional, illegal, and unenforceable. That court also awarded costs to the Government to be agreed or taxed.

[29] The Appellant appealed the decision of the Court of Appeal to this Court on grounds that challenge: (i) the finding that the Extension Agreement was illegal; (ii) the decision that severance of any offending clauses was not appropriate; and (iii) the failure to award damages. The Appellant sought from this Court: (a) an order setting aside the decision of the Court of Appeal; (b) a Declaration that on 11 June 2013 the Government breached the Extension Agreement; and (c) Damages, including exemplary and/or aggravated damages, interest and costs.

[30] The grounds of appeal put forward by the Appellant are examined below in the order in which they were argued before us.

Was the Extension Agreement Illegal and Unenforceable?

[31] The Extension Agreement was held by the courts below to be illegal because those courts considered that the agreement breached the Constitution, legislation, and regulations. The particulars of the breaches found by the courts are detailed below. Those alleged breaches must be judged against the applicable law. We apprehend that, prior to *Patel v Mirza*, about which more is said later, the statement of the applicable law, culled from the relevant common law precedents (many of which were examined in great depth by Leong JA in *Ochroid Trading Ltd v Chua Siok Lui*[8] (‘*Ochroid Trading'*)), and which are reflected in the First and Second American Restatements of the Law of Contracts,[9] may be set forth in four propositions. These propositions are set out hereunder and discussed, so far as they are determinative of the issues involved in this case. The four propositions are these:

i. A contract that is prohibited by law will not be enforced by the courts.

ii. A contract that is not prohibited by law, but which is nonetheless otherwise tainted with illegality, may be enforced by the courts if to refuse enforcement would be disproportionate to the degree of illegality involved.

iii. The prohibition by law of a contract does not prevent the return of moneys or other property or benefit transferred under the contract if such restitutionary relief does not entail the enforcement of the contract.

iv. The return of moneys or other property or other benefit transferred under the contract will be denied, even where no enforcement of the contract is involved, if such restitutionary relief would lead to the stultification of the law prohibiting the contract.

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[8] [2018] SGCA 5 [28].

[9] See: *Restatement of the Law of Contracts of the American Law Institute*, Sections 512-525, (1933) Volume 18 Issue 4, St Louis Law Review 270; *The Restatement of the Law of Contracts of the American Law Institute*, (2nd..1981), Sections 178-198.

[32] It is important to be clear, at the very outset, on the distinctions between these propositions. In relation to Proposition 1, a contract may be prohibited by either statute law or the common law. Statutory law, in this context, means the Constitution, legislation, and regulations. Whether a contract is prohibited by statute law is, necessarily, a question of statutory interpretation: *Nelson v Nelson.*[10]

[33] The lack of enforcement of an illegal contract may not necessarily be the main concern of the parties, especially where there is a real possibility of the application of criminal sanctions. In the classical case of *Everet v Williams*,[11] the ill-advised attempt to enforce a contract on the apportionment of the proceeds of several highway robberies culminated in the hanging of the parties for the underlying crime of highway robbery. Indeed, the existence of the illegal contract usually points way to enhanced sanctions for criminal conspiracy.

[34] Consistency in the fabric that weaves the criminal and the civil law into a single institution has certain inherent consequences. Respect for such consistency means that for the courts to criminally punish conduct with the one hand while civilly rewarding the same conduct with the other, would, as McLachlin J eloquently explained in *Hall v Herbert,*[12] be to "create an intolerable fissure in the law's conceptually seamless web." Or, as Lord Hughes colourfully put it in *Hounga v Allen*:[13] "the law must act consistently; it cannot give with one hand what it takes away with another, nor condone when facing right what it condemns when facing left." This self-evident truth is bound up in the modern notion that to enforce a prohibited contract by law would be contrary to public policy. But more on that later.

[35] Following Proposition 2, a contract that is not prohibited by law, but which is, nonetheless, otherwise tainted with illegality, may, if the principle of

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[10] (1995) 132 ALR 133 at 144-148. See also: *Lennox Phillip also known as Yasin Abu Bakr v Attorney General of Trinidad and Tobago* [2009] UKPC 18.
[11] *Everet v Williams* [1725] (also known as the "Highwayman's Case". Best reported in Robert Pothier, *A Treatise on the Law of Obligations or Contracts*, Volume II (1802) at p. 3.
[12] [1993] 2 SCR 159 at page 176.
[13] *Hounga v Allen* [2014] 1 WLR 2889, at para 55; a dissenting judgment but not on this point.

proportionality allows, be enforced by the courts. For example, a contract to ship grain from the United States to the United Kingdom is clearly not prohibited by law. However, the shipper may intend to, and does in fact, carry out the contract in a way which breaches the law; for example, by loading the ship beyond its safe carrying capacity as indicated by its load line. The contract for carriage thus becomes tainted with illegality but this does not necessarily mean that the shipper will not be able to enforce his rights under the contract: *St John Shipping Corporation v Joseph Rank Limited*.[14] To take another illustration, the parties may have entered into a perfectly lawful contract for the claimant to install an automatic parking system at the defendant's business premises and be compensated by retaining the "fines" collected from the defendant's customers who overstay their free parking time. If it was later found that the claimant committed the tort of deceit by deliberately inserting falsehoods in the demand letters sent by the claimant to the defendant's customers, this falsehood would not necessarily bar the contractual claim by the claimant if disallowing the claim would be a disproportionate response to the illegality: *Parking Eye Ltd v Somerfield Stores Ltd.*[15] Judicial enforcement of a contract tainted with illegality requires that the court deals with the illegality through, for example, severance of offending clauses[16] or, where appropriate, requiring the party in default to make restitution.[17]

[36] These first two Propositions must be kept distinct from the third which involves a claim for return of money paid or other property or other benefit transferred under the contract. Proposition 3 is that where money has been paid, or other property or other benefit has passed under a contract prohibited by law, that prohibition does not necessarily prevent the recovery or restitution of the property or benefit. This is so because such recovery does not involve the enforcement of the contract; quite the opposite, it involves the *unwinding* of the contract, and the restoration of the parties to the *status quo ante*. For example, an investor may have transferred

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[14] [1957] 1 QB 267 (QB).

[15] [2013] 2 WLR 939 (CA).

[16] *Carney v Herbert* [1985] AC 301; *Attwood v Lamont* (1920) 3 KB 571.

[17] *Nelson v Nelson* (1995) 132 ALR 133.

£620,000 to a broker to purchase stocks using insider information, and the parties may have the contractual expectation that the investment will produce a total return (capital and profit) of £1m. If the contract is prohibited by law (for example, as being an agreement to commit a crime) the investor will not be able to recover the £380,000 in anticipated profits because that would be to enforce the contract. However, the investor may be able to compel the return of the £620,000 since this does not enforce the contract. This restitution will be allowed if it does not involve enforcing the contract; or, in the language of English common law prior to the decision of *Patel v Mirza,* if the claimant for restitution need not "rely" on the illegal contract.

[37] Notwithstanding that the claim for restitution does not entail the enforcement of the contract, or involves any reliance on the contract, Proposition 4 states that the claim will fail, and the defence of illegality will succeed, if the restitution would result in the stultification of the law. The law will not be mocked. Consistency in the administration of justice cannot accommodate intolerable fissures in the law's seamless web or permit the law to condone when facing right what it condemns when facing left: see above, para [34]. A man may have paid money to an assassin to eliminate an enemy. If the man repents of the enterprise and demands the return of his money, it is most unlikely, contrary to the leading minority judgment in *Patel v Mirza*,[18] that a court of law in the Caribbean would assist him. To render such assistance would undermine and stultify the objective of the criminal law to prevent and discourage the high crime of murder.

[38] With these distinctions and considerations steadfastly in mind, we will now examine the four Propositions in greater depth, applying them to the facts of the present case to the extent necessary to decide the appeal before us.

[18] [2016] UKSC 42, [2017] AC 467 SC (E). [254] (Lord Sumption). But see Andrew Burrows, 'Illegality after *Patel v Mirza*' (2017) 70 *Current Legal Problems* 55-71.

(i) **Proposition 1: A Contract Prohibited by Law is Unenforceable**

[39] A contract prohibited by law is unenforceable. There can be no recovery at all under such an illegal contract. The rationale for this prohibition is captured in the classical words of Lord Mansfield CJ in *Holman v Johnson*:[19]

> The objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this: *ex dolo malo non oritur actio*. No Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, there the Court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally in fault, *potior est conditio defendentis*.

[40] Lord Mansfield spoke in the language of his day and for nearly two hundred and fifty years, the absolute refusal by common law courts to enforce a contract prohibited by law, and therefore the courts' refusal to assist a claimant whose claim was based on an illegal contract, became reified in the maxim *ex turpi causa non oritur actio*. Nowadays, the same truth is expressed by saying that enforcement of a claim based on an illegal act would be contrary to public policy for creating a fracture in the unified field of the law. However, it is expressed, the iron rule of non-enforcement was not, as Lord Mansfield was at pains to point out, meant to achieve justice between the parties; indeed, frequently it produced an injustice as between the parties. Rather, the rule was meant to secure the broader public policy objective of protecting and preserving the integrity of the courts and the legal system.

[19] (1775) 1 Cowp 341, 343; 98 ER 1120.

[41] The *ex turpi causa* rule (now the rule of public policy) has stood the test of time because it represents a core philosophical truth of the relationship between private law and public law. Classical contract law theory going back to Greek and Roman times held that the parties to a contract created a private law which was binding between themselves. If one party did not obey that law the other party could go the courts of the land to enforce it. It followed that the only reason the contract worked as law (and became the foundation for commerce and cooperation among members of society)[20] was that the law of the land - public law – supported it. Were the courts to refuse to enforce contracts there would hardly be a private law of contract anymore because there would be no state machinery for their enforcement. All of this must mean that society has a stake in the nature of the bargains it is being asked to enforce. It hardly seems reasonable for parties to contracts to rely upon the courts of the land to enforce their contracts if the contracts are completely antithetical, and unlawful as being contrary, to the law of the land.

Statutory Illegality

[42] Statutory illegality occurs where the legislative intent is to prohibit the contract and not merely to prohibit the illegal way in which it was carried out, or the unlawful purpose entertained by one or both of the parties in making it. In the landmark case of *St John Shipping Corporation v Joseph Rank Ltd*,[21] Devlin J, (as he then was) declared that "the court will not enforce a contract which is expressly or impliedly prohibited by statute." Where the statute uses clear words, there is a case of 'express' prohibition; there may also be 'implied' prohibition but only where there is a 'clear implication' or 'necessary inference' that this was what the statute intended. The reason for the court's reluctance to find a case of 'implied' prohibition was commendably explained by Leong JA in *Ochroid Trading*[22] as follows:

[20] Destutt De Tracy, *A Commentary on Montesquieu's Spirit of Laws*, (The Law Book, 1811) at pp. 206, 207.
[21] [1957] 1 QB 267 at 283.
[22] [2018] SGCA 5 [28].

> Judicial reticence in this particular regard is warranted as *statutory illegality generally takes no account of the parties' subjective intentions or relative culpability* and could render contracts unenforceable even where the infraction was committed unwittingly. The restricted approach to implied prohibition is also justified given the proliferation of administrative and regulatory provisions in modern legislation (see *Ting Siew May* at [111]). At the same time, any concern that contracts involving statutory contraventions might go unpunished will be addressed by the common law principles on contractual illegality…[23]

[43] The approach of seeking out the legislative intention to determine whether the contract was prohibited has been applied time and again in several cases including English, Irish and Caribbean cases, inclusive of cases decided by this Court.

[44] In *Cope v Rowlands,*[24] Parke B stated that:

> . . . where the contract which the plaintiff seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common or statute law, no court will lend its assistance to give it effect. It is equally clear that a contract is void if prohibited by a statute, though the statute inflicts a penalty only, because such a penalty implies a prohibition.

[45] In more fulsome terms Clarke J (now Chief Justice of Ireland) said in the Supreme Court in *Quinn v Irish Bank Resolution Corporation Limited (In Special Liquidation) & ors*,[25] that:

> [1] The first question to be addressed is as to whether the relevant legislation expressly states that contracts of a particular class or type are to be treated as void or unenforceable. If the legislation does so provide then it is unnecessary to address any further questions other than to determine whether the contract in question in the relevant proceedings comes within the category of contract which is expressly deemed void or unenforceable by the legislation concerned.
>
> [2] Where, however, the relevant legislation is silent as to whether any particular type of contract is to be regarded as void or unenforceable, the court must consider whether the requirements of public policy (which suggest that a court refrain from enforcing a contract tainted

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[23] Ibid [28]. Italics reproduced from the original.
[24] (1836) 150 ER 707 at 710
[25] [2015] IESC 29 (27 March 2015) at para. 8.9.

> by illegality) and the policy of the legislation concerned, gleaned from its terms, are such as require that, in addition to whatever express consequences are provided for in the relevant legislation, an additional sanction or consequence in the form of treating relevant contracts as being void or unenforceable must be imposed. For the avoidance of doubt it must be recalled that all appropriate weight should, in carrying out such an assessment, be attributed to the general undesirability of courts becoming involved in the enforcement of contracts tainted by illegality (especially where that illegality stems from serious criminality) unless there are significant countervailing factors to be gleaned from the language or policy of the statute concerned.

[46] In the case of *Lennox Phillip also known as Yasin Abu Bakr v Attorney General of Trinidad and Tobago*,[26] the Judicial Committee of the Privy Council concluded that the contract before it was illegal by reference to section 3 of the Prevention of Corruption Act 1987. Later in the judgment, the Board reiterated its "conclusion on statutory illegality."

[47] In the subsequent case of *Goldfinger v Luxemberg*[27] the Privy Council affirmed the decision of the local courts that a contract for the payment of a commission on a one-off transaction for the sale of property did not amount to the carrying on of a trade business, occupation or profession; or to engaging in any occupation for profit or reward, so as to render the contract illegal within the meaning of the Occupations and Professions Licensing Ordinance 1978 or the Control of Employment Ordinance 1980 of Anguilla. Accordingly, the claim for the commission could not be defeated by the defence of statutory illegality. The Privy Council accepted that:

> The courts below were well placed to take account of the legislative background and purpose of the two Ordinances. They reached the right conclusion as to their effect. To have held that the contract … was illegal and so unenforceable would have been stretching the statutory language and would have produced a harsh result.[28]

[26] [2009] UKPC 18.
[27] [2002] UKPC 60, (2002) 61 WIR 226.
[28] Ibid [25].

[48] The last seven words of the dictum by their Lordships were, perhaps, unfortunate insofar as they might have given the impression that the harshness of the result, by itself, influenced the interpretation of the statutory language. We are not convinced that any such impression was intended. Statutory interpretation is a specialised science that stands apart from what a layperson may perceive to be the harshness of the interpretation. In any event, as evident from *Goldfinger*, a contract that is not expressly or impliedly prohibited by statute, may be enforced by the court even if affected by statutory illegality in some other way. The same result ensued in *St. John Shipping* where there was an illegal act in shipping cargo such that the load line on the ship was submerged. Notwithstanding the illegality, the shipper's claim for commission could not be defeated by the defence of illegality since the Merchant Shipping (Safety and Load Line Conventions) Act 1932 was not intended to prohibit the contract of carriage.

[49] This Court, in *BCB Holdings Limited and the Belize Bank Limited v Attorney General of Belize*,[29] accepted and applied the principles that statutory interpretation determined whether a contract was prohibited by statute. In that case, we refused to enforce an arbitral award on the basis that the promises made by the Minister in the underlying Deed of Settlement were unlawful and unenforceable under Section 95 of the Income and Business Act. The Minister was found to be non-compliant with the requirements imposed under the Act (including the requirement to seek legislative approval), rendering the Agreement illegal, with no binding effect on the State. Saunders JCCJ, (now President of the Court), emphasized that Section 95 had to be interpreted in light of the importance placed by the Constitution on legislation dealing with the imposition, repeal, remission, alteration or regulation of taxation; legislation which the Constitution referred to as a "Money Bill". The learned Justice said:

> [46] … Money Bills are not enacted in the ordinary way. Sections 77, 78 and 79 of the Constitution contain special provisions with respect to the enactment of a Money Bill. In our view, given the extraordinary value the

[29] [2013] CCJ 5 (AJ).

> Constitution attaches to Money Bills, whenever the legislature delegates authority that touches on the powers contained in a Money Bill, the instrument containing the delegation should be construed strictly, narrowly, and the delegation should be accompanied by adequate safeguards to control arbitrary, capricious or illegal conduct. Further, if the power conferred is to be validly exercised, the accompanying safeguards must be scrupulously observed.
>
> [47] Section 95 cannot properly be interpreted as being capable of granting the Minister the power to do what the Deed here purported to do. In particular, we fail to see how, in one fell swoop, the Minister could possibly "remit" tax payable in respect of business activity to be conducted over an indefinite time in the future… In our opinion there is a substantial difference between the remitting tax payable and extinguishing an obligation to pay tax. If the Minister was authorised by section 95 to do the former he certainly had no power whatsoever to promise the latter.
>
> [49] In the exercise of the statutory power to remit, section 95 imposes upon the Minister the obligation to comply with two rather weak safeguards. Failure so to conform would impugn and automatically render void the exercise of the power. Here, the Minister flouted *both* measures…

[50] The learned Justice concluded on the point, thus:

> [51] Finally, as the Constitution clearly suggests, there is a distinction between the imposition, repeal, remission, alteration or regulation of taxation. Even if one assumes that the Minister was entitled, by section 95, to remit tax in respect of future business activity; if one is prepared to assume further that the exercise of "remitting tax payable" includes excusing statutory obligations to pay tax, the jurisdiction exercised by the Minister exceeded each of these dubious ways of exercising the power delegated. The Deed purported to alter and regulate the manner in which the Companies should discharge their statutory tax obligations. The Deed impacted on a host of filing, administrative and other obligations imposed by Parliament's revenue laws. In essence, the framers of the Deed conceptualised and designed a whole new *tax policy* for the benefit of the Companies. This policy was then embodied in the Deed, executed by the parties and implemented with the objective of overriding all current and any future statutes enacted by the National Assembly.
>
> [53] Prime Ministerial governance, a paucity of checks and balances to restrain an overweening Executive, these are malignant tumours that eat away at democracy. No court can afford to encourage the spread of such cancer. In our judgment, implementation of the provisions of the Deed, without legislative approval and without the intention on the part of its makers to seek such approval, is indeed repugnant to the established legal

> order of Belize. In a purely domestic setting, we would have regarded as unconstitutional, void and completely contrary to public policy any attempt to implement this Agreement.

[51] Later in the judgment, Justice Saunders returned to anchor the decision of the Court to reject the legality of the Deed of Settlement in the clear failure to follow the critical legislative requirements in creating the special tax regime for the private entities. He explained:

> [58] This is a case where, as we have noted, it is clear that the Minister had no power to guarantee fulfilment of the promises he gave. It is equally clear that the signatories to the Deed, including the Companies' representatives, had no intention to seek the requisite parliamentary approval. There was nothing in the Deed to suggest any such intention. Implementation of the promises made, far from being suspended pending possible legislative approval, took effect immediately upon execution of the Deed. But even if Parliament had ratified the promises made, not even Parliament could have bound itself to legislation that was 'irrevocable'.

[52] It remains to be stated that statute may itself preserve the validity and enforceability of a contract whose performance requires violation of its provisions. This point was very relevant, even if largely ignored, in *Patel v Mirza*. Section 52 of the Criminal Justice Act 1993 made it an offence for an "individual who has information as an insider" to deal "in securities that are price-affected securities in relation to the information". Lord Toulson made clear that the agreement between the parties amounted to a conspiracy to commit the offence of insider dealing under section 52, and so it probably did. However, section 63 (2) of the same Act provided that: "No contract shall be void or unenforceable by reason only of section 52."[30] Thus, notwithstanding the fact that there had been illegal conduct, and that this illegal conduct had attained the level of a criminal conspiracy, the contract between the relevant parties had not been prohibited. Unfortunately, this point was not a point taken up in *Patel v Mirza* itself. The UKSC was wholly concerned, not with the enforcement of the relevant contract, or the question of whether it was prohibited,

[30] Emphasis added. Cited in *Patel* [2016] UKSC 42, [2017] AC 467 SC (E) 267.

but entirely with the issue of whether there could be restitution of the benefits conferred under the contract.

Common Law Illegality

[53] Common law illegality occurs where the contract runs counter to one of the established heads of common law public policy. One important and relevant head of public policy is that there can be no enforcement of a contract to commit a crime. As we have seen in the 1725 case of *Everet v Williams,*[31] the attempt to enforce a contract to share the proceeds of a series of highway robberies ended badly for the contracting parties; that attempt was considered to be "both scandalous and impertinent". The very presence of the contract increased the likelihood that the parties may have engaged in a criminal conspiracy and thus enhanced criminal penalties.

[54] Under the common law, a contract to commit a crime will often be an agreement to violate established common law principles. The 19th Century case of *Pearce v Brooks*;[32] and the 21st Century case of *Ashton v Pratt (No. 2)*[33] both concerned contracts involving prostitution, among the most enduring of professions, and were duly held to be unlawful and unenforceable. But the category of contracts rendered unenforceable at common law because they involve a pact to commit a crime may easily overlap with the category of contracts that are unenforceable because of statutory illegality. This was made clear in Section 512 of the First American Restatement which provided that a bargain is illegal if "either its formation or its performance is criminal, tortious, or otherwise opposed to public policy." And section 598 stipulated that a party to an illegal bargain "can neither recover damages for breach thereof, nor by rescinding the bargain, recover the performance that he has rendered thereunder or its value"; though both Sections 512 and 598 must now be read in light of Section 178 of the Second Restatement. It will be recalled that the agreement in *Patel v Mirza* amounted to a conspiracy to commit the offence of

[31] Best reported in Robert Pothier, *A Treatise on the Law of Obligations or Contracts*, Volume II (1802) at p. 3.
[32] (1865) LR 1 Ex 213.
[33] [2012] NSWSC 3, following *Pearce v Brooks* (1865) LR 1 Ex 213.

insider dealing under the 1993 Criminal Justice Act, albeit their Lordships did not focus on the further statutory provision which preserved the validity and enforcement of the contract.

[55] Further, the contract may be illegal and unenforceable at common law, even where it is not expressly or implicitly prohibited by a statute, if it requires conduct that otherwise constitutes a violation of statutory law. The circumstances in which this may occur were explained by Devlin J in *St John Shipping Corporation v Joseph Rank Ltd*,[34] and we refer to them later [113]. The following passage from McHugh J. in *Nelson v Nelson* is also illustrative:[35]

> Difficult questions may arise in relating the alleged illegality in the constitution or performance of the trust to what, upon its true construction, is the operation of the statute in question. Authorities in contract law such as *Vita Food Products, Inc v Unus Shipping Co* and *Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd* suggest the drawing of a distinction between (i) an express statutory provision against the making of a contract or creation or implication of a trust by fastening upon some act which is essential to its formation, whether or not the prohibition be absolute or subject to some qualification such as the issue of a licence; (ii) an express statutory prohibition, not of the formation of a contract or creation or implication of a trust, but of the doing of a particular act; an agreement that the act be done is treated as impliedly prohibited by the statute and illegal; and (iii) contracts and trusts not directly contrary to the provisions of the statute by reason of any express or implied prohibition in the statute but which are "associated with or in furtherance of illegal purposes"…
>
> Examples in the third category include cases where the mode of performance adopted by the party carrying out the contract contravenes statute, although the contract was capable of performance without such contravention. In this last class of case, the courts act not in response to a direct legislative prohibition but, as it is said, from "the policy of the law". The finding of such policy involves consideration of the scope and purpose of the particular statute. The formulation of the appropriate public policy in this class of case may more readily accommodate equitable doctrines and remedies and restitutionary money claims than is possible where the making of the contract offends an express or implied statutory prohibition.

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[34] [1957] 1 QB 267.
[35] [1995] 4 LRC 453 at page 471.

[56] There are multiple other categories of contracts that are illegal at common law as, also, being contrary to public policy. These include[36] contracts prejudicial to the administration of justice; contracts to deceive public authorities; contracts to oust the jurisdiction of the courts; contracts prejudicial to the status of marriage, contracts promoting sexual immorality; contracts liable to corrupt public life; and contracts restricting personal liberty. In *Lennox Phillip also known as Yasin Abu Bakr v Attorney General of Trinidad and Tobago,*[37] the Privy Council appeared to have accepted that the contract was illegal as being contrary to public policy and tending to corruption in the administration of the affairs of the nation. However, the Privy Council noted that it did not need to decide the point definitively, given its holding that the contract was illegal under statute.

Is there a Sustainable Distinction Between Statutory and Common Law Illegality?

[57] In the landmark decision of the UK Supreme Court in *Patel v Mirza*[38] a bare majority of their Lordships (Lord Neuberger appears to have sided with the minority of three on this point)[39] introduced a distinction between the enforcement of contracts prohibited by statute as opposed to those prohibited by common law. In that case, the parties had made a contract under which the claimant transferred sums totalling £620,000 to the defendant for investment in shares using insider information that the defendant expected to receive. However, no insider information was received, and no shares were bought. The defendant failed to repay the money given to him by the claimant who advanced a claim for unjust enrichment. The defendant advanced the defence of illegality, which was rejected by all nine members of coram, but for radically different reasons.

[58] For present purposes, it suffices to observe that, in the course of his judgment, Lord Toulson, who gave the leading judgment for the majority, made clear that the

[36] List drawn from *Ochroid*, [2018] SGCA 5 at [29], reproducing Ch 13 of *The Law of Contract in Singapore*, edited by Leong JA.
[37] [2009] UKPC 18.
[38] *Patel* [2016] UKSC 42, [2017] AC 467 SC (E).
[39] See esp. [152]-[156] where Lord Neuberger appears to accept application of the 'range of factors' test only in relation to claims for restitution, and not where the contract is prohibited by law.

policy-based 'range of factors' test, used to decide upon enforcement of illegal contracts, would apply *only* to common law illegality, and not, that is, to statutory illegality since, as he put it: "The courts must obviously abide by the terms of any statute…"[40] This is similar to the *Second Restatement of the Law of Contract* which provides that, "a promise or other terms of agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable…"[41]

[59] It must be entirely clear that a contract prohibited by statute is unenforceable because a court of law is bound to give effect to the terms of the statute. Where a statute prohibits a contract (whether expressly or by implication) it cannot lie in the mouth of any court to give effect to such a contract (in the absence of legislative provision such as that in section 62 of the UK Criminal Justice Act 1993) by reference to the "range of factors test". That would necessarily be perverse and a threat to the rule of law. It would raise profound philosophical considerations going to separation of powers and democratic rule. Where the contract is rendered illegal and void by statute there is nothing to enforce and that is the end of the matter.

[60] But there is no obvious reason that there should be a major or substantive difference where the contract is prohibited, not by statute but under the common law. Where a contract is prohibited under an established head of the common law of public policy it would be a contradiction in terms *not* to find that that contract is, in consequence, void and unenforceable. As Leong JA suggested in *Ochroid Trading*, to hold otherwise would render the whole doctrine of common law illegality entirely nugatory as well as illusory.[42] Thus, English Law Commissioners in *Illegal Transactions (1999)* expressly recommended that the courts should *not* have a discretion to enforce contracts which are contrary to public policy. The Law Commissioners noted:[43]

> … The issue becomes more difficult where the contract is one which the court has declared to be otherwise contrary to public policy. The difficulty

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[40] Ibid [109]; see, also [110].
[41] Section 178, Second Restatement.
[42] Ibid [118].
[43] *Ochroid* [2018] SGCA 5 [28] at [117].

> is that one cannot here separate the question as to whether the contract is contrary to public policy from the idea of giving the courts a discretion to refuse to enforce the contract as against the public interest. These are two sides of the same coin. In deciding whether or not a contract is contrary to public policy, the court is already effectively asking the question - would it be against the public interest to enforce the contract? Put another way, there is simply no scope for a discretion as regards enforceability which operates once the court has decided that a contract is contrary to public policy.

[61] We do not consider that it is an answer to this critical concern to reference the fact that courts create the common law. That is undoubtedly so, but creation and development of the common law must be logical and orderly. To preserve the integrity of the doctrine of common law illegality it would appear, as Leong JA states, that "if a particular court is of the view that a contract ought not to be prohibited pursuant to the common law category in question, then perhaps the appropriate way forward might, instead, be to reconsider that particular category altogether."[44] We agree and for these reasons, we would adhere to the law which existed prior to *Patel v Mirza,* and not follow that decision insofar as it directs that a 'range of factors test' determines whether to enforce a contract prohibited by the common law.

<u>Application of Law to Present Case</u>

[62] Turning now to the application of the law to the present facts, it will be immediately obvious that the 'range of factors test' can have no applicability to the first issue in this case as concerns allegations that the Extension Agreement was itself prohibited by the constitution, legislation, and regulations. These are allegations of statutory illegality and in these circumstances, as the Privy Council and this Court have affirmed, and as Lord Toulson himself conceded, the rules of statutory interpretation determine whether the contract is prohibited. If the contract was thus prohibited, it cannot be enforced by the courts.

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[44] Ibid [118] per Leong JA.

Was the Extension Agreement Prohibited by Statute?

[63] The case for the Government was that the moneys collected by the Appellant in respect of the two registries managed by the Appellant were moneys collected for the Government of Belize. The moneys were therefore Government funds which the Constitution and the Financial Audit Act ('FAA') obliged must be paid into the Consolidated Revenue Fund. In respect of the International Business Companies Registry, the International Business Companies Act specifically directed payment to be made into the Consolidated Revenue Fund. The Constitution and the FAA prohibited disbursements from the Consolidated Revenue Fund without specific legislative or other legal approval. For the Extension Agreement to permit the moneys collected by the Appellant to be deposited in escrow accounts and then its own bank accounts, and to allow the Appellant to withdraw and disburse from those accounts in accordance with the various prescribed percentages agreed in the Extension Agreement, including the percentage of the moneys to be paid to the Government, was contrary to the Constitution and to statute and was therefore illegal, null and void.

In order to give context to these allegations, the relevant constitutional and legislative provisions must be outlined and placed against the arrangements provided for in the Extension Agreement for the collection and disbursement of moneys by BISL in respect of two registers maintained by it, prior to their being taken over by the Government.

[64] Section 114 of the Constitution of Belize provides that:

> 114.-(1) All revenues or other moneys raised or received by Belize (not being revenues or other moneys payable under this Constitution or any other law into some other public fund established for a specific purpose) shall be paid into and form one Consolidated Revenue Fund.
>
> (2) No moneys shall be withdrawn from the Consolidated Revenue Fund except to meet expenditure that is charged upon the Fund by this Constitution or any other law enacted by the National Assembly or where

the issue of those moneys has been authorised by an appropriation law or by a law made in pursuance of section 116 of this Constitution.

(3) No moneys shall be withdrawn from any public fund other than the Consolidated Revenue Fund unless the issue of those moneys has been authorised by a law enacted by the National Assembly.

(4) No moneys shall be withdrawn from the Consolidated Revenue Fund or any other public fund except in the manner prescribed by law.

[65] In broadly similar terms, section 4 of the FAA provides:

4.-(1) All revenue or other moneys raised or received by Belize (not being revenues or other moneys payable under the Constitution or any other law, in some other public fund established for a specific purpose) shall be paid into and form one Consolidated Revenue Fund .

(2) No moneys shall be withdrawn from the Consolidated Revenue Fund or other public funds of Belize except upon the authority of a warrant under the hand of the Minister or under the hand of some person authorised by him in writing. No such warrant shall be issued for the purpose of meeting any expenditure other than statutory expenditure unless that expenditure has been authorised by an Appropriation Act for the financial year during which the withdrawal is to take place or except in accordance with any of the subsequent provisions of this Act.

(3) Subject to the provisions of subsection (4) money at the credit of the Consolidated Revenue Fund shall, except for day-to-day cash requirements, be kept in an account at such bank or banks as the Minister may approve.

(4) Moneys standing to the credit of the Consolidated Revenue Fund may be invested with a bank or banks either at call or subject to notice, or with the Joint Consolidated Fund administered by the Crown Agents, or in any of the investments authorised by law for the investment of trustee funds. Such investments together with any interest received therefrom shall form part of the Consolidated Revenue Fund.

[66] The International Merchant Marine Registry of Belize ('IMMARBE') was established under section 3(1) of the Registration of Merchant Ships Act ("the RMS Act"):[45]

[45] Cap 236.

> 3.-(1) There is hereby established an “International Marine Registry of Belize” (hereinafter called “IMMARBE”) for the registration under the flag of Belize of vessels of any type, class, size or weight engaged in any kind of trade, service or international maritime activity, including pleasure vessels.

[67] There was no provision in the RMS Act which establishes that the fees collected should be paid into the Consolidated Revenue Fund. Rather, sections 9, 12, 16, and 37 of the Merchant Ships Registration Act (“the MSR Act”) provide that fees collected pursuant to the Act were to be paid to IMMARBE.

> Section 9 provided that:
>
> There shall be paid to IMMARBE the several fees set out in the First Schedule to this Act for the registration of vessels and for the maintenance of such vessels in good standing under the flag of Belize.”
>
> Section 12 provided that:
>
> There shall be paid to IMMARBE the several fees set out in the First Schedule to the Act for the registration of vessels and thereafter at annual intervals for the continued maintenance of such vessels as Belizean vessels.
>
> Section 16 provides that:
> There shall be paid to IMMARBE the several fees set out in the Second Schedule to this Act for the preliminary and permanent registration of every document pursuant to sections 14 and 15 above.
>
> Section 37 provides that:
>
> There shall be paid to IMMARBE the several fees set put in the Second Schedule to this Act for the preliminary and permanent registration of every document pursuant to sections 35 and 36 above.

[68] The Extension Agreement appeared to be consistent with this statutory scheme. It provided that the sums collected were to be paid into a bank account held in the name of IMMARBE. Clause 8 (3) provided, in part that, “any fee or charge already contemplated in the legislation [that is the Merchant Shipping Act or the IBC Act] or to be enacted in the future… shall be directed to a special account IMMARBE Escrow Bank Account B…and shall not be prorated with the Government and will be disbursed or be for the exclusive benefit to the Company [the Appellant] and its

affiliated companies." Clause 9 (b) provides that "all funds actually collected for the Annual Inspection Tax and any other taxes or fees collected referred to in Clause 8 (3) shall be remitted by the Designated Officers of the Company [the Appellant] directly to IMMARBE Escrow Bank Account B and there will be no payments to the Government out of this account."

The International Business Companies Registry of Belize

[69] There is a clear provision in the Act establishing the Register of International Business Companies in Belize for funds collected to be paid into the Consolidated Revenue Fund. Section 118 of the International Business Act provides that, "All fees, licence fees and penalties paid under this Act shall be paid by the Registrar into the Consolidated Revenue Fund."

[70] The Government contended that the moneys collected from the Appellant in respect of both IMMARBE and IBCR were obliged, under section 114 (1) of the Constitution, to be paid into the Consolidated Revenue Fund. Additionally, in respect of moneys paid under the IBCR, section 118 of the IBC Act itself directed payment to be made into the Consolidated Revenue Fund. Withdrawal from the Consolidated Revenue Fund must be in strict accordance with section 114 (2), (3), and (4) of the Constitution and section 4 (2) (3) and (4) of the FAA.

[71] The Government pointed to the fact that the Extended Agreement placed the moneys collected, pursuant to IMMARBE and IBCR, under the control of the Appellant who was permitted to deposit those moneys in its own bank accounts, and then withdraw and disburse from those accounts various prescribed percentages. Specific attention was drawn to Clause 5 of the Agreement which stated:

> The Company [the Appellant] shall have the authority to manage the financial aspects of the operations for the establishment and development of IMMARBE and the IBCR and is duly authorized by the Government to receive payment from third parties on account of taxes, penalties and fees

deriving from this activity and to make payments to the Government in accordance with Clauses 8, 9, and l0 below.

[72] The Government argued that, for the Extension Agreement to permit the moneys collected by the Appellant in respect of the two registers to be deposited in its own bank accounts was contrary to the Constitution and statute and was therefore illegal. Furthermore, the provisions in the Agreement to allow the Appellant to withdraw and disburse from those accounts rendered the Agreement null and void for contravention of the Constitution and statute.

[73] We consider that this argument raises two critical questions of statutory interpretation. The first is whether the sums collected under the two registries were "… revenues or other moneys raised or received by Belize…" and so subject to the obligation of being paid into the Consolidated Revenue Fund. The second is whether, regardless of if they fell within the wording of the Constitution and the FAA, the sums collected under the registries were otherwise statutorily obliged to be paid into the Consolidated Revenue Fund. These questions are considered in turn.

(a) **Were the Sums Collected 'Revenue or Other Moneys Raised or Received by Belize'?**

[74] The Government argued that the moneys received by IMMARBE from third parties for the maintenance of vessels engaged in trade, service, or international marine activity "under the flag of Belize" constitute revenues or moneys raised or received by Belize, and that those moneys by law should, therefore, be paid into the Consolidated Revenue Fund.

[75] There is no definition of "revenue" in either the Constitution or the FAA. Further, the overall nature of contractual enterprise contemplated by the Management Services Agreement and embodied in the Original Agreement, and which continued into the Extension Agreement, viewed by itself and without reference to particular

contractual provisions, could also render it problematic to say that the sums collected by the registries were "raised or received by Belize".

[76] This difficulty, or apparent difficulty, was seized upon by Mr Courtenay SC, for the Appellant. Senior Counsel Courtenay referenced the fact that the constitutional and legislative requirements were to be interpreted against the broader statutory and policy framework applicable on the facts. Neither IMMARBE nor IBCR was not established within the Government. IMMARBE was established under the RMS Act 1989 (later, the MSR Act); not as a Department of Government, but as a statutory body "for the registration under the flag of Belize of vessels of any type … engaged in any kind of trade … including pleasure vessels." Applications for registration were to be made to IMMARBE. The MSR Act envisaged that the Government could outsource the management of IMMARBE in that it provided that Deputy Registrars would manage IMMARBE and the Senior Deputy Registrar, appointed by the Registrar (who is the Director General of the International Financial Services Commission). The Registrar was also competent to designate a head office for IMMARBE. The day-to-day operations of IMMARBE were conducted by the Head Office and the Senior Deputy Registrar, who has the authority to pass resolutions and issue circular letters to facilitate the implementation of the provisions of the MSR Act. Records were maintained by the Deputy Registrars, who also ran the day-to-day operations of IMMARBE.

[77] Mr Courtenay was right to point out that the view taken in the Court of Appeal that "only states can raise moneys from vessel registration" and that "IMMARBE has evidenced no sovereign flag, to offer any ship" does not do complete justice to public/private partnership that the development of modern industries, such as the offshore industry, represent. Senior Counsel Courtenay correctly emphasized that that approach: (a) failed to consider the fact that IMMARBE did not need to be the possessor of a sovereign flag in order for it to be empowered by statute; (b) paid insufficient attention to the language of the MSR Act which expressly provides for IMMARBE *qua* statutory body to process applications for registration and to collect the several fees for the registration of vessels; and (c) the 2005 Extension

Agreement is itself consistent with the scheme of the MSR Act which makes provision for payment to IMMARBE.

[78] Mr Courtenay made a similar argument in respect of the IBCR. Under the IBC Act, the Minister appoints a person to be Registrar of International Business Companies, who may in turn appoint a person to be a Deputy Registrar. The Registrar is responsible for registering companies and administering the IBCR. However, where a Deputy Registrar has been appointed, it is the Deputy Registrar who undertakes these crucial tasks in order to raise revenue for the Registry. Thus, again, it was argued, the Fees were raised by the IBC registry rather than Government and therefore fell outside section 114 of the Constitution and sections 2 and 4 of the FAA.

[79] These are powerful arguments in general policy. However, we consider that they were ably met and, indeed, eventually, overtaken by the even more formidable position advanced by Mr Justin Simon SC for the Government. Senior Counsel Simon pointed out that section 2 of the FAA defines "public moneys" to mean:

> (a) all revenues or other moneys raised or received by Belize referred in section 114 (1) of the Belize Constitution,
>
> (b) any other moneys held, whether temporarily or otherwise, by any person, for and on behalf of the Government.

[80] Section 2 would therefore appear to render otiose considerations of the definition of "revenue" and whether "revenue or other moneys" were received by Belize in respect of the registers. The statutory definition of "public moneys" is cross-referenced to section 114 (1) of the Constitution and expressly includes revenues and other money. The statutory provision does not require that these moneys must have been "raised or received by Belize". These moneys are impressed with obligation of being paid into the Consolidated Revenue Fund on the simple condition of being held "by any persons for and on behalf of the Government". Mr Simon urged as self-evident, that sums collected by the Appellant for registration

on the register of the Government were, *ipso facto*, sums collected for and on behalf of the Government.

[81] We do not regard it as self-evident that sums collected under registers such as those in issue must always and necessarily be collected "for and on behalf of the Government" within the meaning of the section 2 of the FAA. Such a literal interpretation could lead to the stultification of foreign investment and retardation of the development of modern industries such as the offshore industry. Given the involvement of Government in these activities (it must be remembered that the Government took no issue with the Original Agreement or the Renewal Agreement), it may be problematic to infer that governmental proposals to parliament for legislation were intended to necessarily be given such a narrow and literal interpretation. So that where the agreement is made openly in the sense that there are no issues of lack of transparency; and where there are sufficiently stringent oversight procedures to account for the accuracy of collection and disbursement, it may be, but we do not decide the point here, that sums collected in respect of new industries, developed by private entrepreneurs who are empowered so to do by statute, may not fall within the statutory definition of moneys collected "for and on behalf of the Government" in section 2 of the FAA.

[82] However, on the facts of this case, we do find that the specific contractual provisions in the Original Agreement, which continued through the Renewal Agreement and into the Extension Agreement, make it clear that the funds collected under the IMMARBE and IBC Registers were collected for and on behalf of the Government of Belize. The Management Services Agreement, at Clause 1, makes clear that BISL was contracted, as part of its function, "to assist in the development of IMMARBE", and to collect taxes etc. Clause 8 stated, that the Company was duly authorized by the Government to receive payment from third parties on account of taxes, penalties and fees deriving from this activity and to make payments to the Government in relation to clauses 8, 9 and 10. Crucially, Clause 8 also stated that the Appellant "was to collect, on behalf of the government".

[83] We therefore consider that the Agreement, by providing for the moneys collected to be paid into escrow, and not directly to the Consolidated Revenue Fund, was not in compliance with section 114 of the Constitution and section 4 of the FAA.

(b) **Was There Another Statutory Basis for Paying the Moneys Collected into the Consolidated Revenue Fund?**

[84] Apart from the Constitution and the FAA there is no other statutory provision that could be argued as requiring the funds collected pursuant to IMMARBE to be paid into the Consolidated Revenue Fund. There is no such provision in the MSR Act. By way of contradistinction, there is such a provision in the relation to funds collected pursuant to the IBC Register. As we have seen, section 118 of the IBC Act requires that all fees, licence fees and penalties collected pursuant to the IBC Register must be paid by the Registrar into the Consolidated Revenue Fund.

[85] Mr Courtenay argued that under section 118 the meaning of "fees and penalties" payable by the Registrar into the Consolidated Revenue Fund should not be interpreted as referring to the entirety of the fees and penalties collected but only the sum remaining after the deductions made first for operational costs and remuneration of the Appellant. We cannot accept this argument. Unlike section 114 of the Constitution and section 4 of the FAA, which may allow some leeway for such interpretation, section 118 is pellucid. The fees and penalties collected by the Registrar were obliged to be paid into the Consolidated Revenue Fund. We do not consider that there is any interpretational pathway around the clear wording of section 118. Accordingly, to the extent that the Extension Agreement provided for the fees and penalties collected by the Registrar of the IBC Register, to be deposited into accounts other than the Consolidated Revenue Fund, the Agreement was tainted with illegality. The nature and effect of this illegality are considered shortly.

Did the Executive have the Authority to Conclude the Extension Agreement?

[86] The second ground for arguing that the Extension Agreement was unlawful concerned the authority of the Executive to make it. The Government did not

develop its argument that the Executive had no authority to enter into the Extension Agreement beyond the contention that the funds collected was statutorily required to be paid into the Consolidated Revenue Fund and that payment from the Consolidated Revenue Fund required parliamentary approval. The Government argued that insofar as the Extension Agreement provided otherwise for the collection and deductions of moneys under the IMMARBE and IBC Registers, the Executive had no authority to enter into the Agreement, and the Agreements were therefore void.

[87] For present purposes, we put aside consideration of the paradoxical fact that the argument of the Government was, in effect, that that Government did not have authority to enter a contract which operated for an uncontested twenty years and as a result of which the Government received substantial income. We do not consider that it can be reasonably argued, nor do we understand counsel for the Government to argue, that the Executive lacked authority to enter into these types of agreements. The Government clearly had the apparent or ostensible authority to enter into these types of agreements. The Prime Minister, acting as a Minister of the Crown and head of government administration, and in this case the Head of Finance, must be assumed to speak with the authority of the Government and intention to bind the Government. The Prime Minister is expressly recognised by the Constitution as the senior minister of government.[46] The Governor General, acting on the advice of the Prime Minister may assign to the Prime Minister or any other Minister, responsibility for any business of Government.[47] In the present case, the Prime Minister was assigned the role of Finance Minister and was thus in charge of the conducting of the business of finance for the Government. The Prime Minister was thereby "clothed" with authority to make contracts relating to the business of government policy.

[88] Section 36 (1) of the Constitution also confers a common law prerogative to enter into contracts, which is exercised by the Ministers on behalf of the Crown. The

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[46] Belize Constitution Act ss 37-41.
[47] Ibid s 41.

Extension Agreement was signed by the Attorney General who has responsibility for the administration of legal affairs in Belize. Accordingly, in signing the Extension Agreement, the Prime Minister and Attorney General both represented that the Government had the power to enter into that Agreement. The Government is bound by apparent or ostensible authority.

[89] It follows that we do not consider the argument that the Executive had no authority to bind the Government to the Extension Agreement, to be an independent ground of appeal. The argument stands or falls with consequence of contract being tainted with illegality because the funds were not paid into the Consolidated Revenue Fund as required, respectively, by the Constitution, the FAA, and the IBC Act. It is to a consideration of this issue that we must now turn.

Did the Failure to put the Extension Agreement to Tender Render it Unlawful?

[90] The third and final ground for arguing that the Extension Agreement was unlawful is the argument that the contract should have been put to tender. The Government contended that the Extension Agreement was entered into in breach of the Financial Orders because of the failure of the Executive to submit the contract for the providing of services of managing the registers, to tender. Clause 701 of the Financial Orders provides that: "*Verbal contracts may be made for works and services under $300. Tenders shall be invited for contracts over $10,000.*" The Government argued that as there was no tender when the Agreement was amended on 24 March 2005, the amendment was entered into in breach of the Financial Orders.

[91] The Government relied on the decision of Conteh CJ in *The Queen on the application of the Belize Printer's Association and BRC Printing Ltd v The Minister of Finance and Home Affairs, ('The Printer's case')*[48] which held that the Financial Orders were grandfathered and incorporated into the body of subsidiary legislation made pursuant to section 23 of the FAA of the Laws of Belize. Accordingly, Clause

[48] No. 198 of 2004 (Supreme Court of Belize,) [8].

701 was not to be interpreted as an executive instruction for the guidance of public officers but was of binding effect on all public officers as it addressed their duty in respect of the accounting for and the management of public moneys. The Government referenced the finding of Campbell JA in the Court of Appeal in the present case where the learned Justice of Appeal stated:

> The Extension Agreement should have invited public tenders. Public tender would have provided an opportunity to assess the expertise, cost and expense of each bid. Public tender would lend itself to competition, thereby driving down cost and ensuring that the Government gain access to the best expertise available. The Agreement as signed, is notable for its lack of any performance criteria of standard against which BISL's management operations can be assessed….[49]

[92] Mr Courtenay argued that the Financial Orders are administrative instructions to public officers and do not have the force of law because the Financial Orders were not issued pursuant to a legislative power; and that if the Financial Orders were so issued, they were not intended to have legislative effects; and that even if the Financial Orders were so issued, they were not published in the *Gazette,* as would be required to make them binding.

[93] There was a fine and fascinating discourse in the judgment of Campbell JA in the Court of Appeal asserting the correctness of the decision by Conteh CJ in *The Printer's case.*[50] We do not consider it necessary to rule on the correctness of the *Printers Case,* and we do not do so, for two reasons. First, the truth of the matter is that if Clause 701 is binding and applies to the Extension Agreement, that fact could scarcely avail the Government. The putting of the contract to tender would naturally have been the obligation of the Government. In the absence of proof by the Government that the contract had not gone to tender, a fact that would have implicated the Government in irregularity or, possibly, illegality, the presumption of regularity '*omnia praesumuntur rite essa acta*' must apply: *Harris v Knight.*[51]

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[49] *Belize International Services Limited v The Attorney General* (Civil Appeal No 36 of 2016) (Court of Appeal. of Belize, 15 March 2019) [100].
[50] *The Printer's case* No. 198 of 2004 (Supreme Court of Belize,) [8].
[51] (1890) 15 PD 170, 179.

[94] But, secondly, we are not at all convinced that Clause 701 was applicable. To the contrary. The Extension Agreement was an amendment to the Original Agreement which had been renewed in Renewal Agreement. That being the case, Clause 701 of the Financial Orders was not applicable to the amendment of the contract. The applicable clause of the Financial Orders was Clause 720 which provides:

> Contracts, once entered into, shall on no account be altered, assigned or sub-let without the authority of the Ministry obtained through the Tenders Committee, unless the Contract provides otherwise.

[95] Evidently, then, Clause 720 required that any alternation of the contract must receive the authority of the Ministry obtained through the Tenders Committee: "unless the contract otherwise provides." Clause 20 (1) of the Agreement provided otherwise. And the Management Services Agreement does provide otherwise. It provides that the agreement may be amended by written agreement of the parties. The Extension Agreement was agreed to in writing pursuant to Clause 20 (1). Clause 720 is therefore the applicable clause and, in the circumstances, must be treated as having been complied with by the Government: *omnia praesumuntur rite essa acta*.[52]

Did the Illegality Render the Contract Illegal, Null and Void?

[96] We have found that the plain wording of the IBC Act required that sums collected by the Registrar pursuant to the IBC Register be paid into the Consolidated Revenue Fund. We have also found that the contractual arrangements, continued in the Extension Agreement, required that the funds collected pursuant to the IMMARBE and IBC Registers were to be paid into escrow whereas the Constitution and the FAA required their payment into the Consolidated Revenue Fund. The question must then be confronted: did these illegalities locate the contract into the category of contracts prohibited by statute. In short, did these illegalities render the contract illegal, null and void?

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[52] *Harris v Knight* (1890) 15 PD 170.

[97] The Government contended that they did. In so contending, the Government, relied heavily, as did the courts below, on the decision of this Court in the *BCB Holding Limited and The Belize Bank Limited v The Attorney General of Belize ('BCB Holding case')*.[53] The Trial Judge, Arana J., stated the following:

> In finding that this Agreement was unconstitutional and void contrary to public policy, I rely on Saunders J's reasoning as stated in *BCB Holding The Belize Bank Limited v The Attorney General of Belize.* In deciding that the application to enforce the administrative award should be refused as it would be contrary to public policy, His Lordship considered the legality of a Settlement Deed which purported to create and guarantee to certain companies a unique tax regime which was unalterable by Parliament. Saunders J acknowledged that while a Minister has wide prerogative powers to enter into agreements and may do so even when these agreements require legislative approval before they become binding on the State, the making of a Government contract may be a matter quite distinct from its enforceability against the State (as in the *AG v Francois*). In my view His Lordship's deliberations concerning the Executive lack of legal authority to unilaterally waive or circumvent the laws of Belize in the Settlement to suit the Claimant Companies in that case are just as applicable to the case at bar, where the Executive sought to authorize the payment of government revenue into private accounts of the IBCR and IMMARBE, solely controlled by BISL, instead of into the Government's Consolidated Revenue Fund. I take particular note of Saunders J's statement that 'In a purely domestic setting, we would have regarded as unconstitutional, void and completely contrary to public policy any attempt to implement this Agreement.[54]

[98] For its part, the Court of Appeal held the Extension Agreement to be void on two main grounds, both of which relied on the *BCB Holdings Case*. Campbell JA decided that the Agreement was void for failure to comply with section 114 of the Constitution and section 2 of the FAA. The learned Justice of Appeal also held that because the Agreement was inconsistent with the Constitution and the FAA, the Prime Minister had no authority to bind the government by entering into it. He stated:

> [86] All that the common law requires to void the contract for illegality is a breach of a prohibition set in place by the statute. This prohibition may be

[53] *BCB Holdings* (n11)
[54] Claim No 698 of 2013 (Supreme Court of Belize, 12 March 2015)

> express or implied. There is no express prohibition in s 114 of the Constitution against entering into a contract to deposit public moneys, other than into the Consolidated Revenue Fund. However, it is clear to do so will contravene the legal sanctity of the Constitution, and render the contract illegal. there has to be a determination as to whether enforcement would be contrary to public policy. The CCJ in *BCB Holdings Ltd* was of the view that whether the Minister had authority was an important test of the legality of the contract. It is also clear that the prohibition by a statute or legislative instrument taints a contract with illegality. Chitty on Contract, 29th Edition (2004) at p. 17

[99] And again:

> [90] As a creature of statute, the Minister, is constituted to those statutory powers, those ascribed to his office by the Constitution, legislation and the common law prerogative powers. It clear that the Minister had no authority to contract outside the provisions of the Constitution, and the FAA. This court has not been pointed to any constitutional exemption, that the Minister could claim.
>
> [93] Having heard and considered the contending views, on the question of ministerial authority. It is apposite, that the impugned instruments in *Francois* and *BCB Holdings*, were not illegal for being prohibited by statute or legislative instrument…
>
> [96] The CCJ applied the decision of the Court of Appeal in St. Lucia, in *Francois v Attorney General*, where a citizen brought a complaint and sought review of the Governments actions, after the government gave a guarantee in the absence of parliamentary approval, and the government made good the guarantee. The court held that nothing prevented the Minister from giving the Guarantee but the State only became bound after Parliament had given the funds necessary to discharge the debt.[55]

[100] These are, if we may say so respectfully, powerful and insightful observations. Further, we agree with the general approach to determining the nature and effect of illegality adopted by the learned Justice of Appeal, of using the tools of statutory interpretation to divine the intent of the legislature. This appears to us preferable and, indeed, required, as opposed to ignoring entirely the question of illegality and going directly to the issue of enforceability by reference to an indeterminate range of factors. In this regard it is unfortunate that Justice of Appeal Campbell cited,

[55] Civil Appeal No 36 of 2016 (Court of Appeal Belize, 15 March 2019).

without adverse comment, the argument made before him by Counsel that the applicable test was that "propounded in *Patel v Mirza"*.[56]

[101] Nevertheless, we find ourselves in respectful disagreement with the conclusion reached by Campbell JA. We agree that the agreement between the Government and BISL was tainted with illegality in as much as it provided for the payment of public moneys into an escrow account and not into the Consolidated Revenue Fund as required by the Constitution and legislation. We also agree that it is not necessary that the legislation contravened must have provided a sanction for its breach in order that the offending contract be voided. Nor need there be a specific finding of criminal conduct on the part of either or both parties. What is critical, in our view, is whether the contract, looked at as a whole, can fairly be said to be prohibited by the relevant legislative instrument.

[102] In our view, the Management Services Agreement, whose terms continued into the Extension Agreement, cannot reasonably be said to have been prohibited by the Constitution, the FAA or the IBC Act. An important aspect of the agreement, the payment of sums collected under the two Registers was, indeed, inconsistent with two statutory instruments. However, this inconsistency was not central to the pith and substance of the agreement. The core of the Management Services Agreement was that BISL would assist with the development of the Merchant Marine Registry and International Business Companies Registry, by, attracting and securing business and taking over responsibility for the collection of taxes, fees and other charges payable by vessels or companies respectively. That involved significant rights and obligations on both sides quite separate and apart from the method of payment and distribution of sums collected from those registers.

[103] Inasmuch as we do not consider the contract, taken as a whole, to have been prohibited by statute, it follows that we do not accept that the illegality with which it was tainted, rendered the Prime Minister incompetent to conclude it. For the

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[56] *Patel* [2016] UKSC 42, [2017] AC 467 SC (E). [48].

reasons encountered earlier, the Prime Minister clearly had actual and ostensible authority to enter into the agreement on behalf of the Government of Belize.

[104] For the foregoing reasons, we consider that the reliance placed on our decision in the *BCB Holding case* was not warranted in the circumstances of the present case. In the *BCB Holding case* this Court considered that the enforcement of a foreign arbitral award would be contrary to the public policy of Belize. The award determined that Belize should pay damages for breach of a Settlement Deed which provided that certain entities should enjoy "a tax regime specially crafted for them and at variance with the tax laws of Belize".[57] This Court conducted a thorough examination of the terms of the Settlement Deed alongside the relevant legislative provisions. That examination led to the inescapable conclusion that the Settlement Deed breached specific sections of the Income and Business Tax Act and involved serious violations of the doctrine of separation of powers embedded in the Constitution. In these circumstances, to enforce the award made pursuant to the Settlement Deed would be "to disregard the Constitution and attempt to set back, over 300 years, the system of governance Belize has inherited and adopted."[58]

[105] These observations remain relevant and binding. However, the courts below, with great respect, failed to appreciate that the *BCB Holding case* was significantly different from the case at bar. The present case does not involve an agreement to circumvent the tax laws, or indeed, any laws of Belize. The agreement was consistent with the legislation establishing the two registers. As was astutely observed by Campbell JA, the issue of whether the legislation was inconsistent with the Constitution was never ventilated before the court.[59]

[106] There was, indeed, an irregularity or illegality in that the moneys due to the Government were not paid directly into the Consolidated Revenue Fund, but the route of the payment was not central and did not go to the pith and substance of the

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[57] *BCB Holdings* (n 11) [1].
[58] Ibid [44].
[59] Ibid [66].

contract. As in *Parking Eye Ltd v Somerfield Stores Ltd*[60] the offending clause (mode of payment) was not central to the contract. The underlying purpose of the agreement was not to violate or circumvent the Constitution or legislation; it was to obtain offshore business and properly manage the registers for the Government of Belize. Complaints of mismanagement of the Registers were withdrawn at the trial and are no longer live matters. Accordingly, there was no existing allegation of mismanagement or misappropriation of funds. Indeed, even if there were, such allegations would not necessarily have implicated the legality of the contract *per se* but would, rather, have involved other causes of action and remedies.

[107] The Government does not contend that the substantive or underlying contract was unlawful or designed by the parties to achieve an unlawful purpose. Indeed, the trial judge expressly made the finding that the underlying Agreement was not unlawful, and this decision has not been appealed. Given the relatively peripheral role played in the overall agreement by the route of payment provisions, we do not consider that, properly construed, the purpose of the Constitutional and legislative provisions was to prohibit the underlying contract between the Government and BISL.

[108] We therefore conclude that whilst the Extension Agreement between the Government and BISL was tainted with illegality insofar as it authorized payment of moneys due to the Government into escrow accounts whereas those moneys should have been paid into the Consolidated Revenue Fund, that illegality was not such as to render the agreement illegal and therefore unenforceable.

(ii) **Proposition 2: A Contract not Prohibited by Law but Otherwise Tainted with Illegality is Enforceable Subject to the Doctrine of Proportionality**

[109] The common law experienced significant difficulties where, as in the current case, a contract was not itself prohibited by law, but was otherwise tainted with illegality. The first impulse of the courts was to refuse to enforce such a contract on the basis

[60] [2013] 2 WLR 939 (CA).

that it involved unlawful conduct or the commission of a legal wrong. The *ex turpi causa* maxim enunciated by Lord Mansfield was considered as holding sway in this area of the law, no less that in the category of prohibited contracts. What largely went unappreciated was that Lord Mansfield had, in fact, held that the facts of *Holman v Johnson* did not fall within the principles on illegality which he propounded. In that case a buyer was sued for the price of tea under a contract made in France for sale and delivery of the tea in that country. The buyer's defence was that the tea was to be smuggled into England without payment of duty and that the seller had been aware of this. However, neither the making nor the performance of the contract was directly contrary to the provisions of English statutory law. Lord Mansfield therefore held, and his brothers agreed, that there had been no contravention of the relevant English laws so as to disallow the seller's claim. The seller had no concern in the smuggling scheme and the seller's knowledge of the illegal purpose of the defendant, in buying the tea from him, did not render the contract sufficiently associated with, or in furtherance of, that illegal purpose. Recovery was therefore allowed to the seller.[61]

[110] *Holman v Johnson,* therefore, contained the seeds of what eventually became the test of proportionality: the claimant's knowledge of the defendants' illegal intent was not sufficiently connected with that illegality to warrant refusing to enforce his claim. The Second Restatement of the Law of Contracts also makes implicit reference to the concept of proportionality. Having established that a contract is unenforceable if legislation so provides, section 178 of the Second Restatement goes on to make the alternative provision, namely, that the contract will also be unenforceable if, "the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms." Various factors are then stipulated to assist in weighing the interest in the enforcement of a term, and in weighing a public policy against enforcement of a term.

[61] As Professor Palmer points out in The Law of Restitution (1978), vol. 2, para. 8.4.

[111] However, it took some time after *Holman v Johnson* for the idea of proportionality to take root. In the first half of the Twentieth Century the prohibition on enforcement of a contract tainted with illegality was pronounced in clear terms in the English Court of Appeal decision of *Alexander v Rayson.*[62] In that case, the relevant contract consisted of a lease (with the benefit of certain services) at a rent of £450 per annum, and a second and separate document requiring payment of £750 per annum for the provision of various services. Basically, the second document covered essentially the *same* services as those embodied in the first document. The object of this "double-document arrangement" was to reduce the amount of tax payable and thus defraud the revenue authorities. The court held that the contract was illegal and void. Further, the court held that it would refuse to enforce a contract both where the *subject matter* of that contract was intended to be used for an unlawful purpose, and equally where the *contract* itself (*i.e.*, here the documents) was intended to be used for an unlawful purpose. Drawing upon the *ex turpi causa non oritur actio* maxim, the following principles of law were enunciated:[63]

> It is settled law that an agreement to do an act that is illegal or immoral or contrary to public policy, or to do any act for a consideration that is illegal, immoral or contrary to public policy, is unlawful and therefore void. But it often happens that an agreement *which in itself is not unlawful is made with the intention of one or both parties to make use of the subject matter for an unlawful purpose*, that is to say a purpose that is illegal, immoral or contrary to public policy. The most common instance of this is an agreement for the sale or letting of an object, where the agreement is unobjectionable on the face of it, but where the intention of both or one of the parties is that the object shall be used by the purchaser or hirer for an unlawful purpose. In such a case any party to the agreement who had the unlawful intention is precluded from suing upon it. *Ex turpi causa non oritur actio*. The action does not lie because the Court will not lend its help to such a plaintiff…

[112] According to Professor Furmston[64] the contract in *Alexander v Rayson* was illegal *not* because it was a contract to defraud the revenue (it did not require any party to do anything which involved a fraud on the revenue and indeed could have been

[62] [1936] 1 KB 169.
[63] Ibid 182.
[64] See M P Furmston, "The Analysis of Illegal Contracts" (1965-1966) 16 *U Toronto LJ* 267. See, too, Michael Furmston, Recent Developments in Illegal Contracts in Rob Merkin, James Devenney (eds) *Essays in Memory of Professor Jill Poole: Coherence, Modernisation and Integration in Contract, Commercial and Corporate Laws* (Routledge 2019).

performed without any such fraud). Instead, it was illegal because of the plaintiff's *intention* to use the contractual documents to assist in misleading the revenue authorities.[65] From this the professor extrapolated that contracts which on their face are harmless, and which can be performed without infringing any legal rule, may still nonetheless be held illegal. However, the transaction does not *actually* involve an illegal contract as such, although public policy may require that the transaction be treated *as if* the contract itself were illegal.

[113] This broad category of contracts illegal at common law by reason of the intention of a party or both parties to use the transaction for an illegal purpose, or otherwise to perform the contract in an illegal way was addressed twenty years later by Devlin J in *St John Shipping Corporation v Joseph Rank Limited*.[66] The learned judge suggested that the court would refuse to enforce a contract which, though in itself was not unlawful, was made with the intention to carry out a legal wrong. He stated:

> There are two general principles. The first is that a contract which is entered into with the object of committing an illegal act is unenforceable. The application of this principle depends on proof of the intent, at the time the contract was made, to break the law; if the intent is mutual the contract is not enforceable at all, and, if unilateral, it is unenforceable at the suit of the party who is proved to have it... The second principle is that the court will not enforce a contract which is expressly or impliedly prohibited by statute. If the contract is of this class it does not matter what the intent of the parties is; if the statute prohibits the contract, it is unenforceable whether the parties meant to break the law or not. A significant distinction between the two classes is this. In the former class one has only to look and see what acts the statute prohibits; it does not matter whether or not it prohibits a contract; if a contract is deliberately made to do a prohibited act, that contract will be unenforceable. In the latter class, one has to consider not what acts the statute prohibits, but what contracts it prohibits; but one is not concerned at all with the intent of the parties; if the parties enter into a prohibited contract, that contract is unenforceable.[67]

[114] It will be noticed that both *Alexander v Rayson* and *St John Shipping Corporation v Joseph Rank Limited* allowed for the possibility that a contract that was not itself

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[65] Ibid 287.
[66] [1957] 1 QB 267.
[67] Ibid 283.

unlawful (in the sense of Proposition 1 i.e., being prohibited by law), but which nonetheless was tainted with illegality, could be enforced in some circumstances. The example given in both cases was of a contract which one of the parties intended to use or carry out in an unlawful way. In such a case the party with the unlawful intention would be precluded from suing upon it but the party who had no unlawful intention would be able to enforce it. The two cases therefore support an aspect of Proposition 2.

[115] However, they did not go far enough. For even in respect of the party with the guilty intention, or who had committed the unlawful act, the broad and indiscriminate embargo on enforcement came to be seen as undesirable. The broad proscription rendered unenforceable a great many agreements, not prohibited by law, without any interrogation of the degree of culpability of the party seeking to enforce the agreement. Accordingly, in the over sixty years since *St. John Shipping*, the courts adopted various tests to alleviate this difficulty, as part of the approach to the doctrine of the illegality defence and public policy. In this way, the test of proportionality, first seeded by Lord Mansfield in *Holman v Johnson*, re-emerged. In the colourful words of Bingham LJ (as he then was) in *Saunders v Edwards:*

> Where issues of illegality are raised, the courts have (as it seems to me) to steer a middle course between two unacceptable positions. On the one hand it is unacceptable that any court of law should aid or lend its authority to a party seeking to pursue or enforce an object or agreement which the law prohibits. On the other hand, it is unacceptable that the court should, on the first indication of unlawfulness affecting any aspect of a transaction, draw up its skirts and refuse all assistance to the plaintiff, no matter how serious his loss nor how *disproportionate* his loss to the unlawfulness of his conduct.[68]

[116] Whilst the concept of proportionality was not referenced in terms, we consider that this notion may well have motivated Bernard JA (later, a Judge of this Court) in *Ambrose v Boston*[69] to say:[70]

[68] [1987] 1 WLR 1116 (CA). Emphasis added.
[69] (1993) 55 WIR 184.
[70] Ibid [195].

> There can be no hard-and-fast rule in determining the degree of moral turpitude in infringing the provisions of a statute, and the facts of each case must be scrutinised before the court turns a blind eye to a contract tainted with illegality. A court must not be seen to be indirectly encouraging breaches of law enacted by Parliament for the protection of public at large in order to protect the narrow personal interests of individuals. One has to guard against sending the wrong signals. However, a court cannot be unmindful of the realities of the society in which it functions and ought not to be seen to be stultifying business transactions of individuals by adhering rigidly to statutes.

[117] The Australian case of *Nelson v Nelson*[71] fits easily within this category. The claimant was not asking the court to enforce an illegal contract but rather to enforce a resulting trust in her favour that was tainted with illegality. Denial of enforcement of the trust would have been out of all proportion to the seriousness of her unlawful conduct when that conduct was judged against the specific policies underlying the defence of illegality.[72] The joint judgment of Deane and Gummow JJ referenced the principle of "disproportionality" on the way to holding that the general principle that no court will lend its aid to a man who founds his cause of action upon an immoral or illegal act was not determinative of the facts before them. And McHugh J expressed the opinion that:

> courts should not refuse to enforce legal or equitable rights simply because they arose out of or were associated with an unlawful purpose unless the statute disclosed an intention that those rights should be unenforceable in all circumstances; or sanction of refusing to enforce those rights was not disproportionate to the seriousness of the unlawful conduct. [73]

[118] Specific policy factors to be considered in applying the proportionality test were spelt out in the Law Commission of England and Wales.[74] The Commission recommended a balancing exercise to be decided whether depriving the claimant of his or her rights would be a proportionate policy response. The policy factors include (a) furthering the purpose of the rule which the illegal conduct has

[71] [1995] HCA 25; (1995) 184 CLR 538.
[72] Ibid 570-571 (Deane and Gummow JJ), 590-591 (Toohey J), 616-617 (McHugh J).
[73] [1995] 4 LRC 456 (McHugh J).
[74] Provisional Recommendations in the Consultative Report by the Law Commission of England and Wales. Law Commission, *The Illegality Defence* (Law Com No 189,2009) paras 3.142–3.144.

infringed; (b) consistency; (c) that the claimant should not profit from his or her own wrong; (d) deterrence; and (e) maintaining the integrity of the legal system. In approaching the matter, the court should ask whether the particular claimant, in the circumstances which have occurred, should be denied his or her usual relief in respect of the particular claim.

[119] The English High Court decision of *21st Century Logistical Solution v Madysen*[75] appears to have preferred the notion of 'remoteness' to that of proportionality. In that case the plaintiff purchased a consignment of goods from Luxembourg without VAT, and then contracted to sell the goods (with VAT) on to the defendants. The defendants refused to make payment and contended that the contract was unenforceable for illegality. Field J held that the fraudulent intention of the plaintiff at the time of the contract did not render the contract illegal because it was too remote from the contract; there was not "a sufficient proximity between [the plaintiff's] fraudulent intention and the contract for the contract to be vitiated by illegality".

[120] There is significant overlap between the tests of 'proportionality' and 'remoteness' and Field J could just as easily have said that to deny payment would have been disproportionate to the illegality. It is certainly the case that where the illegal conduct is too remote from the contract it could also be said that to find that the illegality rendered the contract unenforceable would be disproportionate. But the principle of proportionality is broader than remoteness; additionally, it includes such considerations as the degree of seriousness of the illegality, and the relative effects on the parties of holding the contract to be unenforceable.

[121] For reasons of simplicity and adaptability, proportionality became the preferred test in determining whether to enforce this category of contracts tainted by illegality. The place of the proportionality test was emphasized in the English Court of Appeal decision of *Parking Eye Ltd v Somerfield Stores Ltd.*[76] The plaintiff contracted to

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[75] [2004] 2 Lloyd's Rep 92, esp. [21].
[76] *Parking Eye* [2013] 2 WLR 939 (CA).

supply the defendant with an automated parking system at some of its supermarket car parks. Under this contract, the plaintiff received no payment from the defendant but instead retained all the "fines" collected from the defendant's customers who overstayed their free parking time in the car park. In response to the plaintiff's claim for damages for repudiatory breach of the contract, the defendant raised an illegality defence based on false representations made in the demand letters sent by the plaintiff to the defendant's customers. The demand letters had been drafted by the plaintiff and approved by the defendant before the contract was made.

[122] The trial judge found that the plaintiff had committed the tort of fraud or deceit by deliberately inserting falsehoods into some of the demand letters but that the contract was not tainted by illegality because the approval of the form of the demand letters was *collateral* and *distinct* from the main contract. The English Court of Appeal held that the trial judge had rightly rejected the illegality defence since the illegality was neither central to nor necessary for the performance of the contract and to disallow the claim would "not be a just and proportionate response to the illegality".[77] The court expressly endorsed the policy considerations to determine proportionality outlined by the Law Commission.[78]

[123] It is important to recognize that the 'range of factors test' propounded by Lord Toulson[79] includes proportionality. According to his Lordship, the three main factors to decide whether to permit enforcement of an "illegal" contract were: (i) whether the underlying purpose of the prohibition would be enhanced by refusal of the claim; (ii) whether there were any other relevant public policies on which the refusal of the claim could have an impact; and (iii) whether refusal of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts. In respect of the latter factor of proportionality, Lord Toulson noted that several matters may be relevant, some of which repeated the factors identified by the Law Commission which were mentioned in this

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[77] Ibid [79].
[78] *Patel* [2016] UKSC 42, [2017] AC 467 SC (E) (Lord Toulson).
[79] Ibid [120].

judgment earlier (*supra*, [118]). For purposes of the present case, it is important to emphasize Lord Toulson's acceptance that:

> In considering whether it would be disproportionate to refuse relief to which the claimant would otherwise be entitled, as a matter of public policy, various factors may be relevant… I would not attempt to lay down a prescriptive or definitive list because of the infinite possible variety of cases. Potentially relevant factors include the seriousness of the conduct, its centrality to the contract, whether it was intentional and whether there was marked disparity in the parties' respective culpability.[80]

[124] On the other hand, it is also important to recognize that the 'range of factors test' differs from the proportionality test that existed prior to *Patel v Mirza* in at least two important regards. First the majority, led by Lord Toulson, applied the balancing exercise across the board to all cases of illegality at common law (albeit not to statutory illegality) whereas the previous law applied proportionality only to the narrow range of contracts described in Proposition 2, i.e., contracts not prohibited *per se* but which had been concluded with the object of committing an illegal act or which was otherwise tainted by illegality in some peripheral way. Secondly, the pre-*Patel v Mirza* law, where proportionality was applicable, limited the relevant factors, mainly to those identified in the Law Commission Report, whereas under the law in *Patel v Mirza*, proportionality is simply one of the three main categories of the 'range of factors' to be considered. The other two categories of factors also apply.

[125] Proportionality has been strongly affirmed by two seminal cases decided by the apex court of Singapore: *Ting Siew May v Boon Lay Choo and another ('Ting Siew May')*[81] and *Ochroid Trading*[82] Both judgments were written by Leong JA. In the more recent of the two cases, *Ochroid Trading*, the learned Justice of Appeal summarised the Singaporean rulings on the doctrine of the illegality defence and public policy in the following terms:

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[80] Ibid [107].
[81] [2014] 3 SLR 609.
[82] *Ochroid Trading* [2018] SGCA 5 [28].

> … The 'range of factors' test adopted by the majority in *Patel* is not a part of Singapore law, and the present law on the question of whether the contract is prohibited which arises at the first stage of the inquiry remains unchanged. At this stage, the court will have to ascertain whether the contract is prohibited either pursuant to a statute (expressly or impliedly) and/or an established head of common law public policy. If the contract is indeed thus prohibited, there can be no recovery pursuant to the (illegal) contract. This is subject to the caveat that, in the general common law category of contracts which are not unlawful per se but entered into with the object of committing an illegal act (and only in this category), the proportionality principle laid down in *Ting Siew May* ought to be applied to determine if the contract is enforceable...[83]

Application of Proportionality to Present Case

[126] In applying the proportionality principle to the facts of the present case, we are driven to the decision that it would be grossly disproportionate to deny enforcement of the Extension Agreement. The following are some of the considerations that have drawn us irresistibly to that decision: (a) Neither the Original Agreement nor Renewal Agreement nor the Extension Agreement was entered into with a criminal objective or illegal intention, as confirmed in the judgment of Arana J; (b) the obligation for ensuring compliance with its Constitution and legislation was primarily that of the Government; (c) the financial structure provided in the Extension Agreement facilitated significant oversight and transparency for the Government; (d) all complaints of mismanagement were withdrawn at the trial; (e) the core of the contract was to provide services to the Government, including the collection of fees and taxes, which was not prohibited by statute; (f) the Appellant had been fulfilling its obligations under the contract for over twenty years; and (g) the irregularity or illegality in the Extension Agreement reflected the statutory scheme for the collection of moneys under the two registers and the constitutionality of the scheme was never put into issue.

[127] The Appellant does not seek specific performance of the contract but, rather, damages for breach of contract. This is significant because a court cannot condone a continuing illegality by ordering specific performance of a contract affected by

[83] Ibid [176].

illegality. But as the Appellant does not seek specific performance, there is no need in the present circumstances for us to decide whether the offending provisions in the agreement may be severed. What the Appellant seeks is a declaration that the termination of the Agreement by the Government of Belize constituted a breach of contract for which they are entitled to damages. We are content to find that the Appellant has succeeded in making out its case for this relief.

(iii) **Proposition 3: The Prohibition of a Contract does not Prevent Recovery of Moneys or Other Property if this does not Entail the Enforcement of the Contract.**

[128] Bearing in mind the decision we have reached it is not strictly necessary to decide whether, had enforcement of the Extension Agreement been denied on grounds of proportionality, the Appellant would nonetheless have been entitled to restitution of the US$1.5 million paid as consideration for the contract. The matter also does not arise for the quite separate reason that the Government had undertaken to return this sum in any event.

[129] We would only add that we do not easily see how restitution could have been denied because such a remedy would not have involved enforcement of the Extension Agreement. Whatever may have been revealed by such adventitious procedural matters, such as the rules of pleading or the burden of proof as regards the irregularity or illegality of the arrangements for payment of the sums collected under the register, the claim for restitution could hardly have been said to "rely" on the Extension Agreement in any substantive or normative sense, or to be tantamount to the enforcement of that agreement: cf. *Tinsley v Milligan;*[84] *Ting Siew May;*[85] *Patel v Mirza;*[86] and *Ochroid Trading*.[87]

[130] In *Ochroid Trading* Leong JA assessed the law prior to decision of the majority in *Patel v Mirza* to mean that a party who had transferred benefits pursuant to an

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[84] [1994] 1 AC 340.
[85] *Ting Siew* [2014] 3 SLR 609 [125] – [138] (Leong JA.)
[86] *Patel* [2016] UKSC 42, [2017] AC 467 SC (E) at [199], (Lord Mance) [233]; [250] and [268], (Lord Sumption).
[87] *Ochroid* [2018] SGCA 5 [28] at [128] – [138] (Leong JA).

illegal contract may be able to recover those benefits on a restitutionary basis (as opposed to recovery of full contractual damages) via three possible legal avenues: (i) where the parties are not *in pari delicto*; (ii) where the doctrine of *locus poenitentiae* applies because there has been timely repudiation by the claimant of the illegal contract; and (iii) where the claimant brings an independent cause of action for the recovery of the benefits conferred under the illegal contract which does not allow the plaintiff to enforce the contract. The continued retention of these bases is for further consideration on another occasion. But, for present purposes, following this existing approach, and based on the foregoing, it could reasonably be argued that the parties were not equally blameworthy in respect of the non-compliance with the constitutional, legislative and regulatory requirements relating to payment of the sums collected under the registers into the Consolidated Revenue Fund.

(iv) **Proposition 4: Recovery of Moneys or Property paid under the Contract will be Denied if such Restitutionary Relief would lead to the Stultification of the Law.**

[131] A decision on Proposition 4 is also not necessary but based on the foregoing, we must again say that we do not easily see how it could reasonably be said that restitution would lead to the stultification of the law: *Boissevain v Weil;*[88] *Hall v Hebert;*[89] *American Third Restatement;*[90] *Equuscorp Pty Ltd v Haxton;*[91] *and Ochroid Trading Ltd v Chua Lui.*[92]

[132] Importantly, acceptance of stultification as a limiting principle was evident, and its relationship to ensuring the coherence of the law supremely articulated, in *Hall v Hebert.*[93] There McLachlin J said the following:

> There may be cases where the principle of *ex turpi causa* should be invoked to prevent tort recovery which do not fall under the category of profit from

[88] [1950] 1 AC 327 (HL) 341.
[89] [1993] 2 SCR 159.
[90] A Kull, *Restatement of the Law Third, Restitution and Unjust Enrichment* (American Law Institute, 2011)) 32(2) [38].
[91] [2012] HCA 7 [37].
[92] Ochroid [2018] SGCA 5 [28] at [143] – [159] (Leong JA). See also, Peter Birks, "Recovering Value Transferred Under an Illegal Contract" (2000) 1 Theoretical Inquiries in Law 155.
[93] [1993] 2 SCR 159.

illegality. Professor Weinrib … suggests that the defence of *ex turpi causa* may properly be invoked to prevent the "stultification of the criminal law" or "evasion of the consequences of the criminal law": … He gives the example of a burglar who, due to his partner's negligence, is caught and required to pay a fine. Such a person, he suggests, should be barred from recovering damages for the fine from his partner. Weinrib states that this result could be justified either by saying that one criminal owes no duty to another, or by recourse to the maxim *ex turpi causa non oritur actio*. He adds, at p. 51:

> However the conclusion is expressed, few would quarrel with it. B has deliberately chosen to violate the criminal law by attempting the burglary, and he has been visited with the consequences of that choice. Conviction and sentencing by a criminal court is the law's method of ascribing to B the responsibility for his action. The assessment of the penalty is largely, though not exclusively, a reaction to the criminal's own process of decision, and it reflects both the blameworthiness of the criminal in choosing to act as he did and the amount of admonishment sufficient to influence him in his future choices. It would make no sense at all if B were able to utilize tort law's mechanism of shifting losses in order to avoid the very consequences which criminal law has imposed upon him for his intentionally culpable conduct.

Emphasis added.

See also the similar facts which arose for consideration in *Colburn v. Patmore* (1834), 1 C.M. & R. 73, 149 E.R. 999 (Exch.)

While this example cannot be explained in terms of profit, since the claim is one of compensation for a fine incurred, it does accord with what I have called the more fundamental rationale for the defence of *ex turpi causa*, that based on the need to maintain internal consistency in the law, in the interest of promoting the integrity of the justice system. Again, we have a situation where permitting recovery in tort would amount to the law's giving with one hand what it takes away with the other. Again, it can be said that to permit the claim would be to create 'an intolerable fissure in the law's conceptually seamless web.'

[133] For reasons encountered in deciding that the agreement was not prohibited by statute, (*supra* [63] – [108]) we are of the view that restitution of the US$1.5m, had this been the remedy sought, would probably not have undermined or stultified the objective and purpose of the Constitution and legislation regarding the payment of public funds into the Consolidated Revenue Fund.

Postscript on *Patel v Mirza*

[134] The final two propositions have been upended by the controversial ruling of the specially convened nine-judge *coram* of the UK Supreme Court in *Patel v Mirza.* It is probably just as well that our decision on these two propositions was not necessary for resolving this appeal, since it probably would be appropriate that a Full Bench of this Court decides whether this Court should follow the majority in *Patel v Mirza* in respect to these propositions. We note that the admirable intent behind the majority decision is to do justice as between parties to an illegal contract. But we are concerned, as was the apex court in Singapore in *Ochroid Trading Ltd*[94] that the *Patel v Mirza* decision to apply the 'range of factors test' to decide on enforceability of all aspects of claims tainted with illegality may have introduced significant and unnecessary uncertainty into an area of the law that requires clear rules.

[135] We would note too, that some cases cited in support of expanding judicial discretion in this area are, at best, ambiguous on the point. It has been shown that the Australian case of *Nelson v Nelson* could be taken as supporting Propositions posited in the judgment. So, too, the Canadian case of *Hall v Herbert*. Indeed, in the latter, McLachlin J expressly disagreed with the suggestion that the doctrine of *ex turpi causa non oritur actio* should be replaced with a power vested in the courts to reject claims on "considerations of public policy".[95]

[136] Nevertheless we are prepared to leave, and we do leave, for another occasion, the decision on whether the uncertainty inherent in the "range of factors test" can be justifiably accommodated in our law on the basis of the overall objective intention of attempting to ensure justice as between the parties to a contract affected by illegality.

[94] [2018] SGCA 5.
[95] Ibid 168.

Disposal

[137] The Appellants have succeeded in the claim for breach of contract. However, the issue of damages was not considered in the courts below because of the finding by those courts that there had been no breach of contract. The Appellants did present extensive submissions on the question of damages, but the Government did not treat with this issue at all in its submissions. In the circumstances, we consider it appropriate to remit the case to the Supreme Court for assessment of the damages due to BISL for breach of the Extension Agreement.

Costs

[138] As we see no reason to depart from the fundamental rule that cost should follow the event, we order that costs be awarded to the Appellant in this Court and in the courts below, to be assessed if not earlier agreed.

Tribute to Counsel

[139] We wish to express our deep gratitude to counsel, on both sides, for the industry, skill, and scholarship they brought to bear on this difficult matter and upon which this judgement has relied heavily.

JUDGMENT OF THE HONOURABLE MR JUSTICE BURGESS, JCCJ:

Introduction

[140] Lord Mansfield's maxim enunciated in *Holman v Johnson*[96] that "[n]o court will lend its aid to a man who founds his cause of action upon an immoral or illegal act". This maxim is the foundation stone of the illegality defence, also called the *ex turpi causa* maxim, which is at the core of the appeal before this Court. This notoriously knotty area of the law arises here because the respondent, the Government of Belize (the Government), seeks to invoke the illegality defence to defeat the claim by the

[96] [1775-1802] All ER Rep 98; (1775) 1 Cowp 341

appellants, Belize International Services Ltd, (BISL), a private citizen, against the Government for breach of a management service contract it had with the Government.

[141] Arana J in the Supreme Court held, in effect, that the Government could invoke the illegality defence to defeat BISL's claim because the contract on which that claim was based was "unconstitutional, illegal and invalid". The Court of Appeal upheld that decision.

[142] BISL now appeals the Court of Appeal's decision to this Court.

[143] The appeal before us is particularly important as it raises for the first time in this Court the question of what test or approach would best advance the public policy principle which underlies the common law illegality defence in the context of the constitutional system of Belize and arguably that of other common law Caribbean Community states with similar constitutional arrangements as Belize.

[144] In the courts below, the decision of this Court in *BCB Holdings Ltd and The Belize Bank Ltd v The Attorney General of Belize*[97] was cited as authority on the application of the illegality defence. That case concerned a question as to whether the public policy exception could be invoked to render unenforceable an international arbitral award in respect of a deed executed by members of the executive which varied the tax laws of Belize to apply a special tax regime to the appellants. This Court held that in all the circumstances of that case the public policy exception would be invoked, and enforcement of the arbitral award denied. So that, I feel bound to observe with utmost respect, that the common law illegality defence was not raised nor considered by this Court in the *BCB Holdings* case.

[145] Accordingly, this appeal affords this Court an opportunity, consistent with its mandate, to review and clarify the operation of the common law illegality doctrine in the jurisprudence of Belize and in other Caribbean courts which fall within this

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[97] [2013] CCJ 5 (AJ)

Court's appellate jurisdiction. The appeal also affords an opportunity for this Court to fully explore the availability of the common law illegality defence to the Government on basis of the unconstitutionality of a contract between the Government and a private person. In both regards, it is extremely useful to recall the joint judgment of de la Bastide PCCJ and Saunders JCCJ (now PCCJ) in *AG and Others v Joseph and Boyce*,[98] where they identified the mandate of this Court as follows:

> The main purpose in establishing this court is to promote the development of a Caribbean jurisprudence, a goal which Caribbean courts are best equipped to pursue. In the promotion of such a jurisprudence, we shall naturally consider very carefully and respectfully the opinions of the final courts of other Commonwealth countries and, particularly, the judgments of the JCPC which determine the law for those Caribbean States that accept the Judicial Committee as their final appellate court.[99]

I would respectfully add to this that, in developing a Caribbean jurisprudence, this Court must do so while adopting a disciplined approach to the doctrine of judicial precedent as well as an approach which actively seeks to promote, as far as possible, coherence in the law developed by this Court and the law in those common law Caribbean Community states that have not as yet acceded to the jurisdiction of this Court.

[146] With that firmly in mind, I turn to addressing this appeal.

Factual Background

The Prologue

[147] In the late 1980s/early 1990s, the Government, desirous of developing an offshore industry in Belize, enacted two pieces of legislation. These were the *Registration of Merchant Ships Act* Cap 196C (RMSA) enacted in 1989 and the *International Business Companies Act* (IBCA) in 1990. *Section 3* of the *RMSA* Act provided for

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[98] (2006) 69 WIR 104; [2006] CCJ 3 (AJ)
[99] Ibid 236; [18]

the establishment of the International Merchant Marine Registry of Belize ("IMMARBE") and *section 122* of the IBCA for the development of an International Business Companies Register ("IBCR").

[148] On 13 June 1990, the Government and Belize Holdings PLC (later called Belize Holdings Inc) entered into an agreement under which Belize Holdings Inc agreed to establish and develop the IBCR. Meanwhile, pursuant to an agreement dated 19 April 1991 between the Government and BISL, BISL agreed to develop and establish IMMARBE.

[149] Both agreements were replaced in their entirety and superseded by an agreement dated 11 June 1993 between the Government and BISL (the 1993 agreement). This agreement which was subsequently renewed in 2003 and then extended in 2005 is at the heart of this appeal.

The 1993 Agreement

[150] The preamble to the 1993 agreement recites that, pursuant to *section 23* of the *RMSA* and *section 122 (3)* of the *IBCA*, the Attorney General of the Government had appointed BISL "to develop and manage" IMMARBE and "to assist in the development of the IBCR". The scope of the management and assistance function of BISL is extensively set out in respect of IMMARBE in clause 1 (1) and (2) and in respect of the IBCR in clause 2 (1) and (2) of the agreement. In in order to fulfil those functions, clause 1 (3) and clause 2 (3) confer on BISL power to and responsibility for nominating for appointment by the Shipping Registrar and the IBC Registrar such Deputy Registrars as provided for in RMSA and the IBCA respectively.

[151] The provisions in the agreement on the financial management of BISL's operations are of especial importance in this case. In this regard, clause 5 confers authority on BISL "to manage the financial aspects of the operations for the development of IMMARBE and the IBCR", "to receive payment from third parties on account of

taxes, penalties and fees" and "to make payments to the Government in accordance with clauses 8, 9 and 10."

[152] Clause 8 makes provision for the distribution of income. It states that the Government agrees to share with BISL the income to be collected on behalf of the Government in relation to IMMARBE and IBCR "in the form of fees, penalties and taxes for the registration of vessels and the operation of the IBCR". The income was to be shared in the following proportions:

> (a) the first 40% in any given year to be used to cover all operational expenses of IMMARBE and IBCR in that year;
>
> (b) after deducting the 40%, the remaining amount to be shared 60% for the Government and 40% for BISL.

[153] Clause 9 provides for payments to the Government relating to IMMARBE. Clause 9 (1) provides that payments to Government be made "in accordance with the written instructions of the Government". Clause 9 (2) is important. It stipulates:

> In order to facilitate the management and distribution of fees, penalties and taxes to be collected and pro-rated under this Agreement relating to IMMARBE, the Company shall keep the following three bank accounts at The Belize Bank Limited in Belize City:
>
> (a) (i) all fees and taxes actually collected and related to the registration of vessels … save that the Annual Inspection Tax, must be remitted…directly to IMMARBE Escrow Bank Account A;
>
> (ii) on a weekly basis, (each Monday) 40% of the amounts deposited in this account…shall be transferred to the Company's operating bank account referred in sub-clause (c) below which is for the operational expenses of IMMARBE's head office…;
>
> (iii) payments to the Government of the 60% of the remaining amount, should be made on a monthly basis during the first five days of each month.
>
> (b) all funds actually collected for the Annual Inspection Tax and any other taxes or fees collected…shall be

remitted…directly to IMMARBE Escrow Account B and there will be no payment to the Government out of this account.

(c) Company's IMMARBE operating account will be used for the operational expenses and transactions related to the activities of IMMARBE's Head Office and the 40% of all fees, penalties and taxes actually collected as mentioned in subclause (a) of this clause, will be deposited on a weekly basis to this operating account.

[154] Clause 10, which governs payments to the Government relating to the IBCR, is similar to clause 9 except that it is tailored to facilitate the management and distribution of fees, penalties and taxes derived from the IBCA. Accordingly, the clause stipulates that such fees, penalties and taxes must be remitted by BISL directly to IBCR Escrow Account A on a weekly basis and that 40% of the amounts deposited in this account be transferred to BISL's bank account for operational expenses. 60% of the remaining amount was to be paid to the Government on a monthly basis during the first five days of each month. The clause also provides for funds collected for the Annual License Fees payable under the IBCA to be remitted by BISL directly to IBCR Escrow Bank Account B and that payments to the Government out of this account to be effected every year after deducting 40% for the operating expenses of the IBCR and 40% as BISL's compensation for its services.

[155] Clauses 6 and 7 are also of pivotal importance in this case. Clause 6 deals with the auditing requirements. It places an obligation on BISL to hire an independent accounting company of "international repute" agreed upon by the Government and BISL to audit the operations of BISL; to keep and prepare its financial statements in accordance with internationally accepted accounting; in relation to IMMARBE, to permit the accounts and operations of BISL to be audited by the Auditor General; and to keep separate accounting records for all designated offices in order to ensure that at any time the records of the operations of IMMARBE be "totally independent" from the accounting records of any other operations handled by the designated office and further, that all accounting records of any other operations be

kept separate and independent from the accounting records of any other operations of BISL.

[156] Clause 7 contains provisions for the inspection of the records of BISL. Under that clause, BISL is obligated to permit “the authorities of Belize or any other designated organization” to examine “whenever it is deemed necessary, any file, report, account, or other document” of BISL that is directly related to the income derived from the activities of either IMMARBE or the IBCR. Under this clause, BISL is also under an obligation to establish the necessary controls and organization needed to provide centralized and permanent information on vessels registered, the collection of taxes by the Deputy Registrars and to permit “the Belizean authorities” to examine the fees and penalties and the corresponding records whenever they may deem it necessary.

The 2003 Renewal of the 1993 Agreement

[157] Clause 15 of the agreement provides that the agreement was for a term of ten years. However, under that same clause, BISL is given an option to “… to renew the same under the same terms and conditions for an additional period of ten years”.

[158] On the 9th May 2003, BISL exercised the option to extend the term of the 1993 agreement. By the exercise of the option, the life of the agreement was extended to 13 June 2013.

[159] I would add here, parenthetically, that neither at trial, nor indeed in this appeal, has there been any challenge to the exercise of the option. I would also emphasize that up until the exercise of the option by BISL there is no evidence of any complaint by the Government on BISL’s management of the registries.

The 2005 Extension of the 1993 Agreement

[160] The 1993 agreement also contains provision in clause 20 for the agreement to be amended or supplemented by agreement in writing between the parties.

[161] By written agreement dated 24 March 2005, the parties amended the 1993 agreement so as to extend "the duration of the Agreement to 11 June 2020". The written agreement was signed by the Prime Minister and the Attorney General on behalf of the Government and by BISL. I refer to this as the 2005 extension agreement. Under that extension agreement, BISL agreed to pay the Government US$1.5 million as consideration for this extension. This money was paid to and kept by the Government.

[162] I consider it important to underline here that it is the 1993 agreement as incorporated in the extension agreement which is challenged by the Government of Belize in this appeal.

Events Leading Up to the Government's Termination of the Agreement

[163] On 9 June 2003, shortly after the 2003 renewal of the 1993 agreement, Mr Gian Ghandi, Legal Counsel at the time in the Ministry of Finance, wrote to BISL on behalf of the Government of Belize complaining that there was "a fundamental change of circumstances since the Agreement was signed in 1993 and that this affects the continued validity of the Agreement". In that letter of complaint, the Government set out an extensive list of allegations which it considered to be "fundamental" and which "affect[ed] the continued validity of the Agreement". Notably, the Government did not include in that list any allegation that the agreement was in violation of the Constitution or any relevant financial laws or Orders.

[164] BISL rejected the allegations and had meetings with the Government on the issues.

[165] In due course, the Government wrote to BISL confirming that the issues had been resolved to the Government's satisfaction. Indeed, at trial, the Financial Secretary testified that the issues had been resolved and that there were no unresolved issues.

[166] Based on Government's satisfaction with BISL's performance and "in order to procure the continued and effective operation of the registries under concession", the Government decided to grant the 2005 Extension.

[167] A new government was installed in 2008.

[168] On 26 June 2009, Legal Counsel in the Ministry of Finance, wrote BISL stating that the 1993 agreement had expired on 10 June 2003 and enquired whether there was a new agreement.

[169] On 11 February 2009, BISL confirmed that the 1993 agreement was extended to 11 June 2020.

[170] On the 6 May 2013, Mr Waight, the Financial Secretary, wrote to BISL noting that BISL had exercised its option, for an additional period of ten years, from 11 June 2003 expiring 10 June 2013, and stating that the government had no record of any further extension. BISL responded by sending a copy of the extension agreement purporting to extend the 1993 agreement to 2020 by way of an amendment effected on the 24 March 2005.

[171] On the 4 June 2013, the Financial Secretary, wrote to BISL acknowledging receipt of the extension agreement. The letter stated that, insofar as the document purports to extend the agreement beyond 2013, it was 'wholly invalid', as it was patently contrary to applicable laws. The letter also intimated that the renewal agreement would expire on the 10 June 2013, and that the Government would assume control of the Registries with effect from 11 June 2013.

[172] On the 8 June 2013, an Order was gazetted by the Registrar of Merchant Shipping. It appointed a public official to assume control of the Head Office of IMMARBE subject to the control of Mr Gandhi. The Order revoked any previous appointment to that post. There was a press release informing the public of the Government's assumption of control of the Registries.

[173] On the 11 June 2013 the Government forcefully took possession of both IBCR and IMMARBE.

Judicial History

[174] BISL in Claim Form and Statement of Claim both dated 26 March 2015, commenced an action in the Supreme Court of Belize against the Government for breach of contract claiming damages for breach of contract. The Government's defence to BISL's claim was that the 2005 extension was illegal and that consequently the 1993 agreement expired on the 11 June 2013. The Government's defence rested on three distinct arguments. These were (i) that the 2005 Extension circumvented section 114 of Cap 4, the Constitution; section 4 of the Finance and Audit Act Cap 15 (which is *ipsissima verba* of section 114); and the Financial Orders 1965; (ii) that the 2005 extension was not put out to tender in compliance with the Financial Orders 1965 and was consequently unlawful; and (iii) that the Executive did not have the authority to lawfully approve and to bind the Government to the 2005 Extension.

Decision of the Supreme Court

[175] Arana J, in the Supreme Court, purporting to rely on the judgment of Saunders JCCJ (as he then was) in *BCB Holdings Ltd and The Belize Bank Ltd v Attorney General of Belize,*[100] held that the 2005 extension was "unconstitutional, illegal and invalid" and so dismissed BISL's claim. The foundation of the judge's reasoning was that the effect of section 114 of the Constitution was to impose a mandatory requirement that all revenue or other moneys raised or received by Belize be paid into the consolidated revenue fund provided for in the Constitution and that the Finance and Audit Act and Financial Orders 1965 contained specific safeguards to forestall unauthorized and unconstitutional private control of public monies. According to the judge, the agreement as incorporated in the 2005 extension was not in compliance with section 114 of the Constitution and the FAA and that the extension itself was made in breach of the Financial Orders since it was not put out to tender as required by those Orders. Both the agreement and the extension were

[100] [2013] CCJ 5 (AJ)

consequently unconstitutional, illegal and as such unenforceable. In those premises, the judge did not find it necessary to consider BISL's claim for damages.

Decision of the Court of Appeal

[176] BISL appealed this decision to the Court of Appeal. That Court dismissed the appeal and affirmed the decision of Madam Justice Arana that the 2005 extension was "unconstitutional, illegal and unenforceable". On the question whether the 2005 extension was enforceable, Campbell JA at para [87] of his judgment, without expressly saying so, applied the range of factors test declared in *Patel v Mirza*[101] to the case before him and held that BISL could not enforce the 2005 extension.

Issues in this Appeal

[177] Three main grounds are contained in BISL's notice of appeal. The first is that the Court of Appeal erred in law in holding that the 2005 extension of the contract was unconstitutional, illegal and invalid and therefore unenforceable since it circumvented the Constitution, the FAA and the Financial Orders and was not put out to tender as required by the Financial orders. The second is that the Court of Appeal erred in law in holding that severance was not appropriate in this case. The third is that the Court erred in failing to consider an award damages to BISL in the sums claimed and in awarding prescribed costs to the Government.

[178] Those grounds of appeal and the written submissions to, and oral arguments of counsel before this Court make it plain that the pivotal issue in this appeal is whether the Government can avoid liability for breach of their contract with BISL on the basis that the 1993 agreement as incorporated in the 2005 extension agreement was unconstitutional, illegal and unenforceable. If the answer to this question is yes, then that is the end of the matter. If the answer is no, then consideration of what damages are available to BISL for breach of contract arises

[101] 2016] UKSC 42.

for our decision. Consideration of the subsidiary issue of severance, so extensively explored by Mr Courtenay SC, also depends on the fate of the illegality defence.

[179] At para [58] of the judgment of the Court of Appeal, Campbell JA opined that the starting point in this case is the Constitution. The learned justice of appeal then essayed an exploration of the effect of the Belizean Constitution on private contracts. This aspect of the appeal to this Court is more fully addressed in the judgment of Jamadar JCCJ, whose analysis and conclusions I support.

Can the Government Invoke the Illegality Defence?

First principles – The *ex turpi causa* maxim

[180] The common law doctrine of illegality, which, as noted above, is often expressed in the *ex turpi causa* maxim, asserts that no cause of action can arise on a contract that is illegal. This maxim applies equally where a contract is illegal at common law on grounds of public policy: see e.g. *Upfill v. Wright*[102] as well as where the contract is illegal because it is prohibited by statute: see e.g. *Re Mahmoud and Isphani*.[103]

[181] The doctrine at common law has a rather colourful history. It is said to have its origins in the 1725 unreported case of *Everet v. Williams*.[104] In that case, a highwayman brought an action in equity to obtain an accounting against his partner. Not only was the suit rejected, but the plaintiff's lawyers were allegedly held in contempt of court, fined and committed to Fleet prison pending payment of the fine: see Notes, "The Highwayman's Case (*Everet v. Williams*)".[105]

[182] The judicial explanations of the principle which underlies the doctrine have historically been no less colourful. Thus, for example, in *Collins v Blantern,*[106] Lord Chief Justice Wilmot's *cri de coeur* was that "no polluted hand shall touch the pure

[102] [1911] 1 KB 506
[103] [1921] 2 KB 716
[104] Cited in [1899] 1 QB 826, 68 LJQB 549
[105] (1893), 9 L.Q. Rev. 197
[106] Collins v Blantern (1767) 2 Wils KB 341 at 350; 95 ER 847 at 852

fountains of justice" and in *Lowry v Bourdieu,*[107] Lord Mansfield offered that a plaintiff needed to "draw [his] remedy from pure fountains." Be that as it may, the generally accepted rationale of the illegality doctrine is to be found in the statement enunciated by Lord Mansfield in *Holman v. Johnson*:

> The objection, that a contract is immoral or illegal as between the plaintiff and the defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may say so. The principle of public policy is this: *ex dolo malo non oritur actio*. No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, then the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So, if the plaintiff and the defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally in fault *potior est conditio defendentis.*[108]

[183] Thus, Lord Mansfield's dictum established the general principle that a contract can be rendered unenforceable, not void *ab initio*, on the basis that it is contrary to public policy. According to Prof. JK Grodecki in his leading article "*In Pari Delicto Potior est Conditio Defendentis*",[109] Lord Mansfield was conscious that if his principle was to be of assistance to the just application of the law it should not become inflexible. Notwithstanding, and until recently, case law subsequent to *Holman* has firmly established a strict jurisprudence of unenforceability of a transaction tainted with illegality.

[184] Meanwhile, case law has established equally firmly based on *Holman* that a contract which is expressly or impliedly prohibited by statute is illegal and void and

[107] Lowry v Bourdieu (1780) 2 Doug 468 at 470; 99 ER 299 at 300
[108] (1775) 1 Cowp. 341 at 343
[109] (1955) 71 L.Q. Rev. 254, at page 258

thus unenforceable. So, in *Cope v. Rowlands,*[110] the *locus classicus* on statutory illegality, Parke B stated what he considered to be settled law:

> . . . where the contract which the plaintiff seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common or statute law, no court will lend its assistance to give it effect. It is equally clear that a contract is void if prohibited by a statute, though the statute inflicts a penalty only, because such a penalty implies a prohibition.

[185] As this case concerns statutory illegality, it may be useful to quickly repeat here some basic principles applicable to statutory illegality which affect determination of this case. These are that where a statute expressly or impliedly prohibits a contract, its illegality is undoubted. However, whether the prohibition of a contract is to be implied depends upon the construction of the statute. Then, according to *Rowlands*, what must be ascertained is whether the object of the legislature is to forbid the contract. Nonetheless, there are instances where such a prohibition cannot be implied. As regards this, Devlin J cautioned in *St. John Shipping Corpn. v. Rank (Joseph) Ltd.*[111] that: "the courts should be slow to imply the statutory prohibition of contracts and should do so only when the implication is quite clear." These principles, it should be added, underscore the strict *Holman* jurisprudence of the courts' hands-off approach to contracts tainted with illegality.

[186] Finally, a dictum of McHugh J on *Holman* and statutory illegality in the High Court of Australia case of *Nelson v Nelson*[112] bears repetition here. He said at pg 611 of that case:

> The doctrine of illegality expanded in *Holman* was formulated in a society that was vastly different from that which exists today. It was a society that was much less regulated. With the rapid expansion of Regulation, it is undeniable that the legal environment in which the doctrine of illegality operates has changed. The underlying policy of *Holman* is still valid today — the courts must not condone or assist a breach of statute, nor must they help to frustrate the operation of the statute… However, the *Holman* rule, stated in the bald dictum : 'No court will lend its aid to a man who founds

[110] (1836) 150 ER 707 at 710
[111] [1956] 3 All E.R. 683 (Q.B.)
[112] (1995) 184 CLR 538.

> his cause of action upon an immoral or an illegal act' is too extreme and inflexible to represent sound legal policy in the late twentieth century even when account is taken of the recognised exceptions to this dictum.

The Reliance Test

[187] The reliance test or approach is the test by which traditionally it was determined whether the *ex turpi causa* doctrine applied both in respect of common law and statutory illegality. Basically, that test proposes that a claim based on an illegal contract or illegal conduct can succeed if, and only if, in proving the elements of the claim there is no reliance on the illegal act. In *Patel v Mirza,*[113] Lord Sumption described the test at para [234] as follows:

> The test which has usually been adopted for determining whether the principle applies is the reliance test. The question is whether the person making the claim is obliged to rely in support of it on an illegal act on his part. The reliance test is implicit in Lord Mansfield's statement of principle, which assumes that the plaintiff's action is "founded on" his illegal act. But the modern origin of the test is the decision of the Court of Appeal in *Bowmakers Ltd v Barnet Instruments Ltd [1945] 1 KB 65* which concerned a hire purchase agreement illegal under wartime regulations. When the hirer disposed of the goods, the owner was held entitled to damages for conversion notwithstanding the illegality, because his right of action was based on his ownership. The reliance test was subsequently approved by the Privy Council in *Singh v Ali [1960] AC 167* and *Chettiar v Chettiar [1962] AC 294* and by the House of Lords in *Tinsley v Milligan [1994] 1 AC 340.*

[188] *Tinsley v Milligan* is widely regarded as the *locus classicus* on the reliance test. In that case, Ms. Tinsley and Ms. Milligan made contributions to the purchase of a home together. However, the legal title was conveyed to Ms. Tinsley alone, in order to enable Ms. Milligan to make fraudulent claims for Social Security benefits to cover fictitious rent payments. Ms. Tinsley and Ms. Milligan later fell out and Ms. Milligan claimed entitlement to a beneficial share in the property. The Court of Appeal rejected Ms. Milligan's claim on the basis that it would be an affront to the public conscience. The House of Lords unanimously rejected that basis for denying her claim but, by a majority of 3 to 2, allowed it on different grounds.

[113] [2016] UKSC 42

[189] The majority decision was erected on an extremely technical reliance test approach. Lord Browne-Wilkinson, who delivered the majority decision held that Miss Milligan could establish a presumed resulting trust without relying on the illegality. He reasoned:

> Miss Milligan established a resulting trust by showing that she had contributed to the purchase price of the house and that there was common understanding between her and Miss Tinsley that they owned the house equally. She had no need to allege or prove why the house was conveyed into the name of Miss Tinsley alone, since that fact was irrelevant to her claim: it was enough to show that the house was in fact vested in Miss Tinsley alone. The illegality only emerged at all because Miss Tinsley sought to raise it. Having proved these facts, Miss Milligan had raised a presumption of resulting trust. There was no evidence to rebut that presumption. Therefore, Miss Milligan should succeed.

[190] In *Patel v Mirza*, Lord Sumption expressed that the reliance test was not applied correctly in *Tinsley v Milligan*. According to Lord Sumption, on the facts of the case, there was no need for Miss Milligan to "depend on adventitious procedural matters, such as the rules of pleading, the incidence of the burden of proof and the various equitable presumptions"[114] as she did not have to rely on the illegality to establish her equitable title. It was enough for her to show that she had paid half the purchase price which she did not intend to be a gift to Miss Tinsley. That way, it was not necessary for Miss Milligan to rely on the illegality and so illegality could not be a defence to her claim to half the house.

[191] It is to be noted that there are, what Lord Sumption called in *Patel v Mirza* at para [241], "significant exceptions" to the reliance test. One such exception is the withdrawal principle often stated as *locus poenitentiae* where a claimant can succeed if he or she has effectively withdrawn from performing any part of the illegal transaction. (See, e.g., *Taylor v Bowers*[115] and *Tribe v Tribe*[116]). Another exception arises in relation to the maxim *in pari delicto potior est conditio defendentis* (where the parties are equally at fault, the position of the defendant is

[114] At para [237]
[115] (1876) 1 QBD 291
[116] [1996] Ch 107

the stronger one). In this context, a claim can succeed if it can be shown that the claimant is less responsible for the illegality than the defendant: see, e.g., *Mohamed v Alaga and Co.*[117] And yet another arises where "the application of the illegality principle would be inconsistent with the rule of law which makes the act illegal."[118] An illustration of the operation of this exception is to be found in *Kiriri Cotton Co Ltd v Dewani*[119] where a tenant was held entitled to recover an illegal premium paid to the landlord, notwithstanding that his payment of it involved participating in a breach of an ordinance regulating tenancies on the basis that the duty of observing the law was placed on the ordinance on the landlord for the protection of the tenant.

[192] There has been considerable academic and judicial criticism of the way in which the reliance principle and the exceptions to that principle have been dealt with by the courts. Recently, serious differences arose in the United Kingdom Supreme Court regarding the approach to the illegality defence in *Hounga v Allen;*[120] *Les Laboratories Servier v Apotex Inc;*[121] and *Bilta (UK) Ltd v Nazir (No. 2)*[122] where in the latter case, Lord Neuberger expressed the need for the differences to be addressed as soon as appropriately possible and by a panel of nine Justices. That opportunity came in *Patel v Mirza*. The decision in that case is undoubtedly an irresistible point of departure on the common law defence of illegality.

Patel v Mirza and the Adoption of a "Range of Factors" Test

[193] The facts in this case are reasonably straightforward. Mr Patel, the plaintiff, transferred £620,000 to Mr Mirza, the defendant, on the basis that the money would be used to bet on share price movements of the Royal Bank of Scotland using advance insider information about a government announcement which Mr Mirza expected to obtain through contacts at the Bank. The agreement amounted to a conspiracy to commit the offence of insider dealing contrary to s 52 of the Criminal Justice Act 1993. The expected insider information was not forthcoming, and the

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[117] [2000] 1 WLR 1815
[118] per Lord Sumption in *Patel v Mirza* at [243]
[119] [1960] AC 192
[120] [2014] UKSC 47
[121] [2014] UKSC 55
[122] [2015] UKSC 23

bets were never placed. Mr Patel asked for restitution of his money on the ground that Mr Mirza had been unjustly enriched as the basis upon which the money was paid had failed. Mr Mirza replied that Mr. Patel should be refused restitution as the agreement was tainted by illegality and that Mr. Patel would have to prove the illegal agreement under which the money was paid in order to prove that the purpose of the agreement had failed.

[194] A panel of nine justices of the UK Supreme Court was convened to hear this appeal. The panel unanimously held that Mr Mirza should make restitution of the money despite the taint of illegality arising from the insider dealing conspiracy. However, there was, in the words of Lord Sumption, a "judicial schism" in the approach adopted in dealing with the illegality defence. The majority judgment delivered by Lord Toulson, with whom Lady Hale, Lord Kerr, Lord Wilson and Lord Hodge agreed, rejected the reliance test espoused in *Tinsley v Milligan* and other cases and adopted a new flexible approach by reference to a set of policy considerations.

[195] This new approach, commonly referred to as a "range of factors" approach, is, according to Lord Toulson at para [120], predicated on the premise that the essential rationale of the illegality doctrine is that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system. Lord Toulson continued there that, in assessing whether the public interest would be harmed, it is necessary to consider three principal factors. These are: (1) the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim; (2) any other relevant public policy on which the denial of the claim may have an impact; and (3) whether denial of the claim would be a proportionate response to the illegality. Within that framework, and in particular in considering whether it would be disproportionate to refuse relief, various factors might be relevant which include the seriousness of the conduct, its centrality to the conduct, whether it was intentional and whether there was a marked disparity in the parties' respective culpability.

[196] Applying that test to the appeal before that Court, the majority held that Mr Patel, although seeking to recover money paid for an unlawful purpose, had satisfied the requirements of the new approach. In that regard, they held that there were no circumstances suggesting that the enforcement of Mr Patel's claim would undermine the integrity of the justice system. Mr Patel was therefore entitled to restitution of the money.

[197] The minority of Lord Sumption, Lord Clarke and Lord Mance, like the majority, dismissed the appeal and held for Mr. Patel. However, they disagreed with the range of factors approach by the majority and applied instead the reliance test albeit disagreeing with how that test was applied in *Tinsley*. They lamented that the range of factors approach converted the rule-based approach in *Tinsley* into an exercise of discretion, requiring the courts to make value judgments about the respective claims of the litigants.

[198] It is quite evident that what lies at bottom of the difference in approach between the *Tinsley* reliance approach and the *Mirza* range of factors approach is the tension between the search for legal certainty and that for fairness. Indeed, the chorus of all three dissenting justices in *Patel v Mirza* was that justice is dependent on a high degree of predictability, and that this was absent in the balancing approach of the range of factors adopted by the majority.

[199] Lord Mance denounced replacing the law with an "open and unsettled range of factors". He said of the range of factors approach:

> What is apparent is this approach would introduce not only a new era but entirely novel dimensions into any issue of illegality. Courts would be required to make a value judgment, by reference to a widely spread melange of ingredients, about the overall merits or strengths, in a highly unspecified non-legal sense, of the respective claims of the public interest and of each of the parties.

[200] Lord Clarke expressed a similar doubt. He opined that the way to address the problem was to apply a framework of principles which accommodates legitimate

concerns about the reliance approach rather than having an approach with an open-ended discretionary jurisdiction which would be "far too vague and potentially far too wide" to determine the legal rights of the parties.

[201] Lord Sumption was even more strident. He characterized the range of factors approach as "converting legal principle into an exercise of judicial discretion, in the process exhibiting all the vices of complexity, uncertainty, arbitrariness and lack of transparency" attributed to the reliance approach. At para [262], he stated:

> The reason why the application of the "range of factors" test on a case by case basis is unprincipled is that it loses sight of the reason why legal rights can ever be defeated on account of their illegal factual basis.

And he continued his complaint against the range of factors test at para [263] as follows:

> An evaluative test dependent on the perceived relevance and relative weight to be accorded in each individual case to a large number of incommensurate factors leaves a great deal to a judge's visceral reaction to particular facts. Questions of how illegal is illegality would admit of no predictable answer, even if the responses of different judges were entirely uniform. In fact, it is an inescapable truth that some judges are more censorious than others. Far from resolving the uncertainties created by recent differences of judicial opinion, the range of factors test would open a new era in this part of the law. A new body of jurisprudence would be gradually built up to identify which of a large range of factors should be regarded as relevant and what considerations should determine the weight that they should receive. No one factor would ever be decisive as a matter of law, only in some cases on their particular facts.

Does the *Patel v Mirza* Range of Factors Test Apply to Statutory Illegality?

[202] In the decision of *Ochroid Trading Ltd v Chua Siok Ltd*,[123] by the Court of Appeal of Singapore, Andrew Phang Boon Leong JA stated at para [84] of his judgment that Lord Toulson in *Patel v Mirza* "made clear that this discretionary approach only applied to common law illegality as '[t]he courts must obviously abide by the terms of the statute'". This has led some to suggest that the range of factors test

[123] *[2018] SGCA 5*

adopted in *Patel v Mirza* does not apply in cases of statutory illegality. In my respectful view, Andrew Phang Boon Leong JA's conclusion is based on what appears to be a transposition by him of Lord Toulson's statement at para [109] of the judgment in *Patel v Mirza*. Lord Toulson in fact said there:

> The courts must obviously abide by the terms of any statute, but I conclude that it is right for a court which is considering the application of the common law doctrine of illegality to have regard to the policy factors involved and to the nature and circumstances of the illegal conduct in determining whether the public interest in preserving the integrity of the justice system should result in denial of the relief claimed. I put it that way rather than whether the contract should be tainted by illegality, because the question is whether the relief claimed should be granted.

[203] Plainly, this statement is directed to the application of "the common law doctrine of illegality" and not to "common law illegality" as claimed by Andrew Phang Boon Leong JA. This conclusion is not only inescapable from the language of the statement, but also from the context of the case and the syntax of the paragraph in which the statement was made. *Patel v Mirza* concerned illegality based on a contravention of the Criminal Justice Act 1993. It would be strange, therefore, if Lord Toulson would adumbrate such a consequential limitation on his newly minted range of factors test *en passant* in a statement like that in para [109]. Perchance Lord Toulson in this statement intended that the range of factors test was not to apply in the context of statutory illegality, however, I would agree with Andrew Phang Boon Leong JA's observation at para [70] of his judgment that this would result "in a rather anomalous situation since, *ex hypothesi*, if a contract is prohibited, it ought not, in principle, to matter whether that prohibition is by way of statute or the common law".

[204] I wish to underline my understanding that the range of factors test adopted in *Patel v Mirza* applies, subject to the obligation on the court "to abide by the terms of any statute", to both statutory illegality and common law illegality. There is no reason in principle why a distinction should be drawn between common law illegality and

statutory illegality for purposes of applying the range of factors test. Such a distinction was never drawn in the application of the reliance test.

<u>The Proper Test</u>

(i) ***Patel v Mirza* in the Belize Court of Appeal**

[205] *Patel v Mirza* is a decision in the law of unjust enrichment. Be that as it may, the range of factors test laid down in that case was stated as applicable generally to illegality in civil actions including illegal contract actions. That case was not raised before Arana J but was raised for the first time before the Court of Appeal. Campbell JA, delivering the judgment of the Court of Appeal, appears to have accepted and applied the *Patel v Mirza* range of factors test at para [87] of his judgment to the question of whether the 2005 extension was enforceable.

[206] I agree with the Court of Appeal that a range of factors test such as the one announced in *Patel v Mirza* is the correct test to be applied in Belize. I feel bound to emphasize, however, that my opinion is not based on any notion that that court, being subject to the jurisdiction of this Court, was in any sense bound by the decision of the UK Supreme Court in *Patel v Mirza*. As Anderson JCCJ observed on the precedential value of House of Lords (and by implication UK Supreme Court) decisions in *Marin V Attorney General for Belize* [2011] CCJ 9 at para [127] "this Court attaches significant persuasive value to relevant decisions of the House of Lords" [now UK Supreme Court]. However, as that learned Justice opined at para [118], when "faced with a novel point of law on which there is no controlling authority, the matter must be approached from the point of view of the guiding principles of logic, doctrine, and legal policy".

[207] The guiding principles of logic, doctrine and legal policy which underpin my opinion follows.

(ii) **The Reliance Test and the Range of Factors Test in Private Law Adjudication Theory**

[208] The rule-based reliance test and the policy-based range of factors test are opposed adjudicative methods for dealing with the substantive illegality problem in the common law. Lord Neuberger made this clear in *Bilta (UK) Ltd v Nazir (No. 2)*[124] where he characterized these two differing approaches as "epitomizing the familiar tension between the need for principle, clarity and certainty in the law with the equally important desire to achieve a fair and appropriate result in each case".[125] In my judgment, the implications of these two approaches for adjudicating the *ex turpi causa* defence are best understood when viewed through the lens of the jurisprudence of private law adjudication.[126]

[209] The rule-based approach is the quintessential adjudicative method in classical contract law adjudication. This approach favors the use of clearly defined, highly administrable, general rules and, with the aim of achieving certainty in the law, eschews consideration of the effect of the application of a rule in an individual case. That approach purports not to make any concession to achieving equitable and just results in individual cases. Thus, in *Tinsley v Milligan*, Lord Goff in disagreeing with the majority, noted that even though it may appear "particularly harsh not to assist the respondent to establish her equitable interest in the house",[127] the rule-based reliance test approach should still be applied because:

> … it is a principle of policy whose application is indiscriminate and so lead to unfair consequences as between the parties to litigation. Moreover, the principle allows no room for the exercise of any discretion by the court in favour of one party or the other.[128]

Lord Sumption, in *Les Laboratoires Servier v Apotex Inc*,[129] expressed a similar view. He emphasized that the reliance test approach was grounded on general rules of law and was not a mere discretionary power that involved fact-based evaluations of the effect of the rules in individual cases.

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[124] [2015] UKSC 23.
[125] Ibid [13].
[126] I have relied heavily on Prof Duncan Kennedy's monumental article, "Form and Substance in Private Law Adjudication" (1976) Harv L Rev 1685 for this analysis.
[127] [1994] 1 AC 340 at 362
[128] Ibid 355
[129] [2014] UKSC 55 [13], [22]

[210] The policy-based approach has only featured sparingly in classical contract law adjudication. In contradistinction to the rule-based approach, it involves the use of equitable standards producing decisions with relatively little precedential value and so does not emphasise certainty. It requires the judge both to discover the facts of a particular situation and to assess them in terms of the purposes or public policy values embodied in the standard. Policy-based adjudication is therefore flexible and allows for the court to arrive at just and equitable results. This is the reason why the majority in *Patel v Mirza* were in support of the range of factors approach.

[211] To us, adjudication of public policy in the illegality defence is far more congruent with the policy-based approach than the rules-based approach. As noted above, the common law illegality doctrine is rooted in Lord Mansfield's maxim in *Holman* that the general principle is that contracts can be rendered unenforceable on grounds that they are contrary to public policy. As Lord Hoffmann stated in *Gray v Thames Trains Ltd,*[130] public policy adjudication "is not based upon a single justification but on a group of reasons, which vary in different situations." It involves an analysis of moral precepts and consideration of conduct which is deemed injurious to the public good. It is therefore quintessentially appropriate to apply a range of factors test, if the objective is a fair and just outcome.

[212] In the Australian High Court case of *Nelson v Nelson,*[131] Toohey J observed that public policy is "a rather shadowy world" and that "broad considerations" are "necessarily involved in questions of public policy". Clearly then, public policy adjudication does not comport with the application of general rules of law. This is the import of Toulson LJ's (now Lord Toulson) statement at para [54] in *Parkingeye Ltd v Somerfield Stores Ltd*[132] that:

> In some parts of the law of contract it is necessary in the interests of commercial certainty to have fixed rules, sometimes with exceptions. But in the area of illegality, experience has shown that it is better to recognise that there may be conflicting considerations and that the rules need to be

[130] [2009] UKHL 33 [30]
[131] [1995] 184 CLR 538 at 595-597
[132] [2012] All ER (D) 169 (Oct)

> developed and applied in a way which enables the court to balance them fairly.

(iii) **The Reliance Test, Just Results, and the Illusion of Certainty**

[213] As has been seen, two major justifications are advanced in support of the reliance test. These are, first, that it conduces to certainty, while preserving flexibility and mitigating injustices and, second, that it accords with principle.

[214] As to the first, Lord Sumption said at para [264] in *Patel v Mirza*:

> When the law of illegality is looked at as a whole, it is apparent that although governed by rules of law, a considerable measure of flexibility is inherent in those rules. In particular, they are qualified by principled exceptions for (i) cases in which the parties to the illegal act are not on the same legal footing and (ii) cases in which an overriding statutory policy requires that the claimant should have a remedy notwithstanding his participation in the illegal act. Properly understood and applied, these exceptions substantially mitigate the arbitrary injustices which the illegality principle would otherwise produce. At the same time, the wider availability of restitutionary remedies which will result from the present decision will do much to mitigate the injustices which have hitherto resulted from the principle that the loss should lie where it falls.

[215] As to the second, he said at para [239]:

> [T]he reliance test accords with principle. First, it gives effect to the basic principle that a person may not derive a legal right from his own illegal act. Second, it establishes a direct causal link between the illegality and the claim, distinguishing between those illegal acts which are collateral or matters of background only, and those from which the legal right asserted can be said to result. Third, it ensures that the illegality principle applies no more widely than is necessary to give effect to its purpose of preventing legal rights from being derived from illegal acts. The reliance test is the narrowest test of connection available. Every alternative test which has been proposed would widen the application of the defence as well as render its application more uncertain.

[216] In my view, these rationalisations are unpersuasive. As Lord Toulson observed at para [23] of *Patel v Mirza*, the UK Law Commission consultation paper on "The Illegality Defence" commented that on the whole, "the case law illustrated the

judges threading a path through the various rules and exceptions in order to reach outcomes which for the most part would be regarded as fair between the parties involved, although there were instances of results which the Commission considered to be unduly harsh, for example in unlawful employment cases. Generally, the courts managed to avoid unnecessarily harsh decisions either by creating exceptions to the general rules or by straining the application of the relevant rules on the particular facts so as to meet the justice of the case. Seldom was there an open discussion in the judgments of the considerations which led the court to its decision." To me, those comments admirably reflect my reading of the reliance test case law. Certainty and adherence to principle are illusory.

[217] As my analysis above has sought to demonstrate, the rule-based reliance approach is inherently unsuited to adjudicating illegality cases. It is my opinion that it is because of the incongruity of the rule-based approach with just results in particular cases that the "significant exceptions" to the reliance principle noted by Lord Sumption have been developed by the courts over time. These "significant exceptions" are essentially stratagems to mitigate perceived harsh and unjust effects of the application of the reliance principle in certain cases and resort to them has very often been at the expense of certainty and predictability. In *Tinsley v Milligan*, Lord Goff expressed a similar view on the invention of the presumption of resulting trust exception as representing an attempt to avoid the harsh consequences of the strict application of the reliance test in that case. Similarly, in the Canadian Federal Court of Appeal decision of *Still v Minister of National Revenue*,[133] Robertson JA opined that the exceptions to the reliance test arose from "the legal manoeuvring that must take place to arrive at what is considered a just result."

<u>The Caribbean Objective of Just Results and Modern Approaches in Some Common Law Jurisdictions</u>

[218] This Court has on numerous occasions stated that it considers that the role of our courts cannot be limited to determining the rights of the parties and not be troubled

[133] (1997) 154 DLR (4th) 229

about whether a just outcome is reached on the facts. In this Court's view, that would be to hark back to a bleak period in our history and would be inimical to developing and maintaining the integrity our Caribbean legal system. For this reason, I agree with the proposition of Lord Toulson in *Mirza v Patel* that an approach consistent with upholding the integrity and harmony of the law must be adopted. Such an approach must have as a fundamental objective achieving equitable and transparent results in individual cases even if it may be said that the precedential value of those cases may be limited.

[219] The complicated law on the *ex turpi causa non oritur actio* maxim has been widely examined in a number of common law jurisdictions and modern approaches to that maxim developed. As suggested by de la Bastide PCCJ and Saunders JCCJ (now PCCJ) in *AG and Others v Joseph and Boyce*,[134] a review of the jurisprudence and approaches which have emerged in some of these jurisdictions may be beneficial to this Court in developing an approach to the application of that maxim which produces just results in individual cases, which does not unduly sacrifice certainty and which would not be harmful to the Caribbean legal system or public morality.

(a) **Guyana – Public Conscience Test**

[220] The quest towards vindicating such an objective in Caribbean jurisprudence is particularly evident in the Guyana Court of Appeal case of *Ambrose v Boston*.[135] The facts of that case are that the appellant and the respondent entered into an agreement for the sale of real property situated in Guyana. The agreement was not on its face illegal, but when the respondent sought specific performance of the contract the appellant claimed that the respondent had, contrary to the Exchange Control Act, paid the deposit in a foreign currency and that the contract was thus tainted by illegality in respect of its performance and unenforceable. The trial judge found that the deposit had been paid in a foreign currency, but nevertheless found for the respondent. The appellant appealed to the Court of Appeal.

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[134] (2006) 69 WIR 104; [2006] CCJ 3 (AJ)
[135] (1993) 55 WIR 184

[221] The Court of Appeal dismissed the appeal. The court applied "the public conscience test" enunciated by Hutchison J in *Thackwell v Barclays Bank plc.*[136] That test required:

> … the court looking at the quality of the illegality relied on by the defendant and all the surrounding circumstances, without fine distinctions, and seeking to answer two questions; first, whether there had been illegality of which the court should take notice and, second, whether in all the circumstances it would be an affront to the public conscience if by affording him the relief sought the court was seen to be indirectly assisting or encouraging the plaintiff in his criminal act.[137]

Applying that test to the case before it, the Court of Appeal held that the respondent did not base his claim on an illegality; illegality was asserted by the appellant and in the light of the contemporary approach to issues of illegality it would be an affront to the public conscience to deny the respondent the relief which he sought.

[222] Two passages from the judgment of Bernard JA (as she then was) in *Ambrose v Boston*[138] are telling. The first is at p.195 where she said:

> There can be no hard-and-fast rule in determining the degree of moral turpitude in infringing the provisions of a statute, and the facts of each case must be scrutinised before the court turns a blind eye to a contract tainted with illegality. A court must not be seen to be indirectly encouraging breaches of law enacted by Parliament for the protection of public at large in order to protect the narrow personal interests of individuals. One has to guard against sending the wrong signals. However, a court cannot be unmindful of the realities of the society in which it functions and ought not to be seen to be stultifying business transactions of individuals by adhering rigidly to statutes.

[223] The second is at 196, where she continued:

> In deciding whether the respondent ought to be granted relief one also has to consider his conduct in launching the proceedings, i.e. whether he based his case on his own illegality and needed to rely on it to establish his claim. In earlier times he would have been denied any favourable consideration by the courts, particularly in view of the fact that his claim is for equitable

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[136] [1986] 1 All ER 676
[137] Ibid 687
[138] (1993) 55 WIR 184

> relief; he would have been met with the maxim, 'he who comes to equity must come with clean hands'. In *Shaw v Shaw* [1965] 1 All ER 638 Lord Denning MR stated that it has been long settled that no person can found a cause of action on his own illegal act, following his own *dicta* in *Chettiar v Chettiar* [1962] 1 All ER 494.
>
> However, modern thinking tends towards a more flexible approach in relation to a person whose hands are soiled with fraud.

[224] In the later case of *Husbands v Caesar*,[139] the Guyana Court of Appeal had to consider the decision in *Ambrose v Boston*. It upheld this decision as being good law in Guyana notwithstanding the House of Lords decision in *Tinsley v Milligan* which suggested the contrary. Kennard C, who delivered the judgment of the court, stated:

> Even though the House of Lords in *Tinsley v Milligan* [1994] 1 AC 340 held that the 'public conscience' test has no place in determining the extent to which rights created by illegal transactions should be recognized, nonetheless this court in *Ambrose v Boston* (1993) 55 WIR 184 adopted that test.

For completeness, it is to be noted that Kennard C also applied *Tinsley v Milligan* as it did not make any difference to the outcome of the case applying the *Ambrose v Boston* test.

(b) **Trinidad and Tobago – *Patel v Mirza* Range of Factors Approach**

[225] The Trinidad and Tobago Court of Appeal accepted and applied the *Patel v Mirza* range of factors test in *First National Credit Union Co-operative Society Ltd v Trinidad and Tobago Housing Development Corporation and Doc's Homes Ltd*.[140] In that case, the appellant brought a claim against the respondent for monies payable to it, the appellant, pursuant to an assignment to it of funds owed by the respondent to Doc's Homes Ltd under a contract between the respondent and Doc's Homes Ltd. The appellant, a co-operative society registered under the Co-operative Societies Act, had advanced the monies claimed to Doc's Homes Ltd under a loan

[139] (2000) 61 WIR 271
[140] Civil Appeal No. 11 of 2011

agreement. A defence was raised by the respondent that the loan agreement was made in contravention of section 43 (1) of the Co-operative Societies Act and was therefore illegal and the monies irrecoverable.

[226] Mendonca JA, delivering the judgment of the Trinidad and Tobago Court of Appeal, stated as follows at para [96]:

> In *Patel v Mirza*…, *Tinsley v Milligan* was over-ruled by a majority of a nine-member panel of the Supreme Court of the UK. It was noted by Lord Toulson who gave the leading judgment that *Tinsley v Milligan* had been the subject of much criticism in England and other jurisdictions. He thought it was time to do away with the "reliance test" applicable to the illegality defence as formulated in *Tinsley v Milligan*. The most striking difficulty with the test was that it produced different results according to procedural technicality which had nothing to do with the underlying policies that justifies that (sic) the existence of the defence."

Mendonca JA concluded at para [101] the law in Trinidad and Tobago to be as follows:

> For the reliance test…there has been substituted a multifactor test for how the courts should treat with claims that are founded on or include some aspect of illegal conduct. It is now necessary to consider the following factors: (a) the underlying purpose of the prohibition which has been transgressed and whether that purpose will been (sic) enhanced by denial of the claim; (b) any other relevant public policy on which the denial of the claim may have an impact; (c) whether denial of the claim would be a proportionate response to the illegality bearing in mind that punishment is matter for the criminal courts.

Applying this test to the case before the Court of Appeal, Mendonca JA held that the illegality defence failed.

(c) Other Caribbean States Under the Jurisdiction of the Privy Council – *Patel v Mirza* Range of Factors

[227] Apart from the Trinidad and Tobago Court of Appeal case of *First National Credit Union Co-operative Society Ltd v Trinidad and Tobago Housing Development*

Corporation[141], the *Patel v Mirza* range of factors test has not been applied in any Caribbean courts still under the jurisdiction of the Privy Council. However, the case itself was noted by McDonald-Bishop JA in the Jamaica Court of Appeal in *Alexander House Ltd v Reliance Group of Companies*,[142] and by Adderley J in the Eastern Supreme Court case of *Ng Man Sun v Peckson Ltd and Chen Mei Huan*[143] without comment on the authority of *Patel v Mirza*.

[228] *Patel v Mirza* has been cited in the Privy Council in two cases from Caribbean jurisdictions. It was cited in the St. Lucian Privy Council case of *Cenac v Schafer*,[144] it was noted that the judgment of *Patel v Mirza* had been delivered two days after arguments in the case before it. In those circumstances, the Privy Council did not opine on the range of factors test adopted in *Patel v Mirza*. It was also cited in the later Cayman Islands appeal of *DD Growth Premium Fund v RMF Market Neutral Strategies Ltd*.[145] In this case, the Privy Council applied the *Patel v Mirza* principle on claims in restitution but had no reason to and did not opine on the *Patel v Mirza* range of factors test.

[229] The foregoing notwithstanding, it is undoubtedly the law that based on settled principles of judicial precedent the *Patel v Mirza* range of factors test applies in Caribbean jurisdictions accepting the jurisdiction of the Privy Council. This is so for two reasons. First, the Privy Council, as acknowledged in *Abbot v R*,[146] regards House of Lords (and by implication UK Supreme Court) decisions as binding on the Privy Council. In the Jamaican case of *King v R*,[147] the Privy Council also viewed a House of Lords decision as binding. The second is that regional courts consider themselves bound by House of Lords decisions even where a Privy Council decision conflicts with a later decision of the House of Lords: see, e.g. *Jamaica Carpet Mills v First Valley Bank*.[148] It is for these reasons that Mendonca

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[141] Civil Appeal No. 11 of 2011
[142] [2018] JMCA Civ 18
[143] CLAIM NO.: BVIHC (COM) 88 of 2012
[144] [2016] UKPC 25
[145] [2017] UKPC 36
[146] [1977] AC 755
[147] (1968) 12 WIR 268
[148] (1986) 45 WIR 278.

JA applied the *Patel v Mirza* test in *First National Credit Union Co-operative Society Ltd v Trinidad and Tobago Housing Development Corporation*[149] without comment.

(d) **Canada – Flexible Approach**

[230] In 1993, the issue of illegality came up for consideration by the Supreme Court of Canada in the seminal case of *Hall v Hebert*,[150] a case arising in tort rather than contract. In that case, the owner of a car allowed a passenger to drive it knowing that the passenger had drunk a large amount of beer. The car overturned and the driver suffered head injuries. The Supreme Court held that the driver's claim against the owner in negligence was not barred by illegality, but that there should be a reduction in damages for contributory negligence.

[231] The judgment of the majority was given by McLachlin J. She stated:

> My own view is that courts should be allowed to bar recovery in tort on the ground of the plaintiff's immoral or illegal conduct only in very limited circumstances. The basis of this power, as I see it, lies in duty of the courts to preserve the integrity of the legal system, and is exercisable only where this concern is in issue. This concern is in issue where a damage award in a civil suit would, in effect, allow a person to profit from illegal or wrongful conduct, or would permit an evasion or rebate of a penalty prescribed by the criminal law. The idea common to these instances is that the law refuses to give by its right hand what it takes away by its left hand. It follows from this that, as a general rule, the *ex turpi causa* principle will not operate in tort to deny damages for personal injury, since tort suits will generally be based on a claim for compensation, and will not seek damages as profit for illegal or immoral acts. As to the form the power should take, I see little utility and considerable difficulty in saying that the issue must be dealt with as part of the duty of care. Finally, I see no harm in using the traditional label of *ex turpi causa non oritur actio*, so long as the conditions that govern its use are made clear.[151]

[232] In a section of her judgment arguing that the underlying rationale concerns the integrity of the judicial process, McLachlin J continued:

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[149] Civil Appeal No. 11 of 2011
[150] [1993] 2 S.C.R. 159
[151] Ibid, 169

> The narrow principle illustrated by the foregoing examples of accepted application of the maxim of *ex turpi causa non oritur actio* in tort, is that a plaintiff will not be allowed to profit from his or her wrongdoing. This explanation, while accurate as far as it goes, may not, however, explain fully why courts have rejected claims in these cases. Indeed, it may have the undesirable effect of tempting judges to focus on the issue of whether the plaintiff is "getting something" out of the tort, thus carrying the maxim into the area of compensatory damages where its use has proved so controversial, and has defeated just claims for compensation. A more satisfactory explanation for these cases, I would venture, is that to allow recovery in these cases would be to allow recovery for what is illegal. It would put the courts in the position of saying that the same conduct is both legal, in the sense of being capable of rectification by the court, and illegal. It would, in short, introduce an inconsistency in the law. It is particularly important in this context that we bear in mind that the law must aspire to be a unified institution, the parts of which – contract, tort, the criminal law – must be in essential harmony. For the courts to punish conduct with the one hand while rewarding it with the other, would be to "create an intolerable fissure in the law's conceptually seamless web"... We thus see that the concern, put at its most fundamental, is with the integrity of the legal system.[152]

[233] *Still v Minister of National Revenue*[153] concerned the applicability of an illegality defence in a claim for breach of contract. Robertson JA in the Federal Court of Appeal, after citing McLachlin J's judgment as providing the rationale for a "modern" approach to the illegality defence in contract law, outlined this approach as follows:

> As the doctrine of illegality rests on the understanding that it would be contrary to public policy to allow a person to maintain an action on a contract prohibited by statute, then it is only appropriate to identify those policy considerations which outweigh the applicant's prima facie right to unemployment insurance benefits [under the Act]. … While on the one hand we have to consider the policy behind the legislation being violated…we must also consider the policy behind the legislation which gives rise to the benefits that have been denied...

(e) Australia – A Policy-Based Approach

[234] The *Tinsley v Milligan* reliance test was rejected by the Australian High Court in *Nelson v Nelson* and a policy-based approach recognised. The jurisprudential

[152] Ibid, 175-176
[153] (1997) 154 DLR (4th) 229

terrain of this case has been well traversed in case law and academic writing. In the context of this judgment, it suffices only to say that that case laid down that the decision to grant relief to a claimant who has participated in an illegal transaction is to be determined by reference to the policy of the statute by which the relevant transaction was found to have been illegal or tainted by illegality. This approach is well captured in the judgment of McHugh J where he said:

> Leaving aside cases where the statute makes rights arising out of the transaction unenforceable in all circumstances, such a sanction can only be justified if two conditions are met.
>
> First, the sanction imposed should be proportionate to the seriousness of the illegality involved. It is not in accord with contemporaneous notions of justice that the penalty for breaching a law or frustrating its policy should be disproportionate to the seriousness of the breach. The seriousness of the illegality must be judged by reference to the statute whose terms or policy is contravened. It cannot be assessed in a vacuum. The statute must always be the reference point for determining the seriousness of the illegality; otherwise the courts would embark on an assessment of moral turpitude independently of and potentially in conflict with the assessment made by the legislature.
>
> Second, the imposition of the civil sanction must further the purpose of the statute and must not impose a further sanction for the unlawful conduct if Parliament has indicated that the sanctions imposed by the statute are sufficient to deal with conduct that breaches or evades the operation of the statute and its policies. In most cases, the statute will provide some guidance, express or inferred, as to the policy of the legislature in respect of a transaction that contravenes the statute or its purpose. It is this policy that must guide the courts in determining, consistent with their duty not to condone or encourage breaches of the statute, what the consequences of the illegality will be. Thus, the statute may disclose an intention, explicitly or implicitly, that a transaction contrary to its terms or its policy should be unenforceable. On the other hand, the statute may inferentially disclose an intention that the only sanctions for breach of the statute or its policy are to be those specifically provided for in the legislation.

(f) Malaysia – *Patel v Mirza* Range of Factors Approach

[235] In *Pang Mun Chung & Anor v Cheong Huey Charn*,[154] the Malaysian Court of Appeal followed the *Patel v Mirza* range of factors approach. More recently, in

[154] [2018] 4 MLJ 594

2019, the Federal Court in *Liputan Simfoni Sdn Bhd v Pembangunan*[155] affirmed the approach of the Court of Appeal and adopted the *Patel v Mirza* test.

(g) **Singapore – A "Proportionality" Approach**

[236] In *Ting Siew May v Boon Lay Choo*,[156] the Singapore Court of Appeal adopted a proportionality test. That court held that for contracts entered into with an illegal or unlawful object, the application of the doctrine of illegality is subject to the limiting principle of proportionality. In deciding whether to grant or refuse relief for contracts affected by illegality, the principle of proportionality was to be considered by reference to factors such as (a) whether allowing the claim would undermine the purpose of the prohibiting rule; (b) the nature and gravity of the illegality; (c) the remoteness or centrality of the illegality to the contract; (d) the object, intent, and conduct of the parties; and (e) the consequences of denying the claim.

(h) **Ireland – A Range of Factors Approach**

[237] The Supreme Court of Ireland decision in *Quinn v Irish Bank Resolution Corporation Limited (In Special Liquidation) & ors*,[157] which was decided before *Patel v Mirza*, is particularly interesting. In this case, the issue before the court was the proper approach which Irish courts should take to the illegality defence. The judgment of the entire court was delivered by Clarke J (now Chief Justice of Ireland). After a wide-ranging analysis of English, Australian and Irish judgments, Clarke J adopted the Australian approach in preference to the *Tinsley v Milligan* approach. Using the Australian approach as a guide, Clarke J set out a list of factors which courts should apply when considering the issue of illegality. Graham Sinclair QC in an article entitled "*The Effect of Illegality since Patel v Mirza*"[158] summarized these as follows:

> [3] The first question to be addressed is as to whether the relevant legislation expressly states that contracts of a particular class or type

[155] [2019] 4 MLJ 141
[156] [2014] SGCA 28
[157] [2015] IESC 29
[158] (2019) East Anglian Chambers Website

are to be treated as void or unenforceable. If the legislation does so provide then it is unnecessary to address any further questions other than to determine whether the contract in question in the relevant proceedings comes within the category of contract which is expressly deemed void or unenforceable by the legislation concerned.

[4] Where, however, the relevant legislation is silent as to whether any particular type of contract is to be regarded as void or unenforceable, the court must consider whether the requirements of public policy (which suggest that a court refrain from enforcing a contract tainted by illegality) and the policy of the legislation concerned, gleaned from its terms, are such as require that, in addition to whatever express consequences are provided for in the relevant legislation, an additional sanction or consequence in the form of treating relevant contracts as being void or unenforceable must be imposed. For the avoidance of doubt it must be recalled that all appropriate weight should, in carrying out such an assessment, be attributed to the general undesirability of courts becoming involved in the enforcement of contracts tainted by illegality (especially where that illegality stems from serious criminality) unless there are significant countervailing factors to be gleaned from the language or policy of the statute concerned.

[5] In assessing the criteria or factors to be taken into account in determining whether the balancing exercise identified at 2 requires unenforceability in the context of a particular statutory measure, the court should assess at least the following matters: -

(a) Whether the contract in question is designed to carry out the very act which the relevant legislation is designed to prevent.

(b) Whether the wording of the statute itself might be taken to strongly imply that the remedies or consequences specified in the statute are sufficient to meet the statutory end.

(c) Whether the policy of the legislation is designed to apply equally or substantially to both parties to a relevant contract or whether that policy is exclusively or principally directed towards one party. Therefore, legislation which is designed to impose burdens on one category of persons for the purposes of protecting another category may be considered differently from legislation which is designed to place a burden of compliance with an appropriate regulatory regime on both participants.

(d) Whether the imposition of voidness or unenforceability may be counterproductive to the statutory aim as found in the statute itself

[6] However, the following further factors may well be properly taken into account in an appropriate case: -

(a) Whether, having regard to the purpose of the statute, the range of adverse consequences for which express provision is made might be considered, in the absence of treating relevant contracts as unenforceable, to be adequate to secure those purposes.

(b) Whether the imposition of voidness or unenforceability may be disproportionate to the seriousness of the unlawful conduct in question in the context of the relevant statutory regime in general.

[7] Doubtless other factors will come to be defined as the jurisprudence develops.

<u>Conclusion on the Proper Approach</u>

[238] The "the public conscience test" applied in *Ambrose v Boston* and *Husbands v Caesar* has been correctly castigated as being at large and conducive to uncertainty and inconsistency. However, the foregoing review reveals that, to avoid such uncertainty and inconsistency, the modern approach in common law jurisdictions towards greater flexibility is to provide a coherent analytical structure as to how the illegality defence is to be applied to the facts and circumstances in individual cases. The *Patel v Mirza* "range of factors" approach is an example of such an approach. There are others, as demonstrated above. They apply to both common law and statutory illegality. It is my judgment that adaptation of that *Patel v Mirza* structure to the common law Caribbean context will go some distance in mitigating against uncertainty and inconsistency with the advantage that our courts would be spared, as Lord Kerr puts it, from having to "devise piecemeal and contrived exceptions to previous formulations of the illegality rule".

[239] As has been noted, the *Patel v Mirza* range of factors approach is the law in Caribbean jurisdictions still accepting the Privy Council. Adaptation of *Patel v*

Mirza would have the advantage of ensuring coherence in the approach to the illegality defence within the common law Caribbean Community.

[240] To begin with, I agree with Lord Toulson in *Patel v Mirza* on the essential rationale of the illegality doctrine, including statutory illegality. It is, as was propounded by McLachlin J in *Hall v Herbert*, that that rationale resides in the duty of the courts to preserve the integrity of the legal system and that it is exercisable only where that concern is in issue.

[241] Based on the review of the recent case law in common law jurisdictions, three steps are to be followed in assessing whether the integrity of the legal system would be harmed in enforcing a contract which is rendered illegal by a statute. These are what may be called (i) the interpretation step; (ii) the public policy analysis step, and (iii) the proportionality analysis step.

[242] In my view, a dictum of Kirby J in the High Court of Australian decision in *Fitzgerald v. F.J. Leonhardt Pty Limited* [1997] 189 C.L.R. 215 best explains step I, the interpretation step. Kirby J said there at p 242:

> The first task of a court is to ascertain the meaning and application of the law which is said to give rise to the illegality affecting the contract. The law in question may be a rule of the Common Law but nowadays it is much more likely to be a provision of legislation. The substantial growth of legislative provisions affecting all aspects of the society in which contracts are made presents a legal environment quite different from that in which the doctrine of illegality was originally expressed. Courts, in this area, are faced with a dilemma. They do not wish to deprive a person of property rights, e.g. under a contract, least of all at the behest of another person who is also involved in a breach of the applicable law. On the other hand, they do not wish to 'condone or assist a breach of statute, nor must they help to frustrate the operation of a statute.' That is why the first function of the court, where a breach of a legislative provision is alleged, is to examine the legislation so as to derive from it a conclusion as to whether a relevant breach is established and, if so, what consequences flow either from the express provisions of the legislation or from implications that may be imputed to the legislators. Little, if any, assistance will be derived for the ultimate task of a court from examination of the terms of other statutes or judicial classifications of them or by reference to their meaning as found.

[243] Kirby J. further explained that, in most cases, the relevant legislation "does not expressly deal with the consequences of conduct in breach of its terms upon a contract which has been fulfilled in some way in breach of a provision of the law". Where this is the case, the question becomes whether the legislation "impliedly prohibits such conduct and renders it illegal"? Here, according to him, the courts should be slow to imply a prohibition which interferes with the rights of the parties under contract law in situations in which the legislation does not expressly provide for a remedy. Notwithstanding, "the duty of courts remains, where legislation is involved, to give meaning to the imputed purpose of Parliament as found in the words used". Therefore, "[i]t would be artificial to expel implications from the task of legislative construction where they remain an established feature of the interpretation and application of legislation generally".

[244] It is noteworthy that the interpretation step was not explored as such in the *Patel v Mirza*. The second step, the public policy analysis step, was extensively considered there. However, as Kirby J observed in *Fitzgerald v. F.J. Leonhardt Pty Limited*:

> It is important to keep the interpretation and public policy questions separate. Logically, the interpretation question arises first. This is because if, as a matter of interpretation, the contract is illegal as formed, or as performed, it is void as to those parts affected by the illegality. The secondary question of unenforceability for public policy reasons does not then arise. The contract is unenforceable but that is because it is void in law.

[245] In *Patel v Mirza*, Lord Toulson observed that public policy analysis involves consideration of (a) the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim and (b) any other relevant public policy on which the denial of the claim may have an impact. In *Still v Minister of National Revenue*, Robertson JA explained the jurisprudential basis of public policy analysis to be the fact that the doctrine of illegality rests on the principle that it would be contrary to public policy to allow a person to maintain an action on a contract prohibited by statute. He suggested that, given this, it is only appropriate to identify those policy considerations behind the Act being violated and other legislation which impact on denial of the claim under the contract.

[246] The case law in all the common law jurisdictions reviewed agree that the third step, the proportionality analysis step, is of fundamental importance. This step involves an analysis of whether the imposition of voidness or unenforceability may be disproportionate to the seriousness of the unlawful conduct in question in the context of the relevant statutory regime in general.

[247] These three steps constitute the core of any relevant Caribbean range of factors approach to the issue of illegality, whether based on common law or statutory illegality. In the sections that follow, I examine in detail the relevant aspects of the range of factors that need to be considered to resolve this case; noting here that these are not prescriptive. Ultimately, a range of factors approach is in service of a fair and just outcome in the circumstances of each case. However, in my opinion, the interpretation step, the public policy analysis step, and the proportionality analysis step together constitute the essential framework for this kind of analysis.

<u>Resolving this Appeal</u>

[248] As already noted, the Government has hinged its illegality defence on three propositions. These are (i) that the 1993 agreement as incorporated into the 2005 extension contravened section 114 of the Constitution (and consequently of section 4 of the Financial Audit Act Cap 15 which is *ipsissima verba* of section 114); (ii) that the 2005 extension contravened the Financial Orders 1965; and (iii) that the 2005 extension was made without proper authority. I consider each of these in turn hereafter.

(i) **Did the 1993 Agreement as Incorporated into the 2005 Extension Contravene Section 114 of the Constitution and was thereby Rendered Unenforceable?**

The Interpretation Step

[249] Mr. Simon QC, for the Government, has argued before us that the monies collected by BISL were public funds within the meaning of section 2 of Cap 15 and that, consequently, those monies should have been dealt with in accordance with section

114 of the constitution as repeated in section 4 of Cap 15. But, Mr. Simon QC argued, clauses 8, 9 and 10 of the 1993 agreement provided for those monies to be dealt with in a manner contrary these provisions and they were in fact so dealt with. This, according to him, rendered the agreement unconstitutional, illegal and *ipso jure* unenforceable by BISL. In fact, this view of the law seems to have found favour with the courts below in this case.

[250] With utmost respect, that view of the law does not make full contact with settled law. Mr Simon QC's argument would only avail if section 114 or some other provision in the Constitution expressly or impliedly declared a contract like the 1993 agreement as incorporated into the 2005 extension void or unenforceable. As Campbell JA held in the Court of Appeal, section 114 does not expressly so provide nor does any other provision in the Constitution. The question therefore becomes whether such a declaration can implied.

[251] In approaching this question, it is important to recall Devlin J's caution in *St. John Shipping Corpn. v. Rank (Joseph) Ltd.* [1956] 3 All E.R. 683 (Q.B.) that "the courts should be slow to imply the statutory prohibition of contracts and should do so only when the implication is quite clear." Section 114 of the Constitution of Belize provides that:

> 114. - (1) All revenues or other moneys raised or received by Belize (not being revenues or other moneys payable under this Constitution or any other law into some other public fund established for a specific purpose) shall be paid into and form one Consolidated Revenue Fund.
>
> (2) No moneys shall be withdrawn from the Consolidated Revenue Fund except to meet expenditure that is charged upon the Fund by this Constitution or any other law enacted by the National Assembly or where the issue of those moneys has been authorised by an appropriation law or by a law made in pursuance of section 116 of this Constitution.
>
> (3) No moneys shall be withdrawn from any public fund other than the Consolidated Revenue Fund unless the issue of those moneys has been authorised by a law enacted by the National Assembly.

> (4) No moneys shall be withdrawn from the Consolidated Revenue Fund or any other public fund except in the manner prescribed by law.

[252] In my view, there is no clear implication in this section, or for that matter, any other provision of the Constitution, prohibiting the 1993 agreement as incorporated into the 2005 extension. Accordingly, there should be no such implication.

[253] All that said, the 1993 agreement as incorporated into the 2005 extension is in form undeniably in conflict with section 114 and as such is to be regarded as tainted with illegality by virtue of that conflict. Given this taint, the question therefore now becomes, given that the contract on which BISL's claim was based was illegal, would enforcing that claim be contrary to the public interest in that to enforce it would be harmful to the integrity of the legal system of Belize?

The Public Policy Analysis Step

[254] To answer this question, I turn to the public policy analysis step and to the questions: what is the underlying purpose of section 114 of the Constitution (and accordingly of section 4 of Cap 15)? And, will that purpose be enhanced by the denial of BISL's claim.

[255] The consolidated revenue fund referred to in section 114 of the Constitution, like its counterpart provisions in other Commonwealth Caribbean Constitutions, has its provenance in the British Consolidated Fund which was first created by the British Consolidated Fund Act 1818. The British Consolidated Fund was so named because it consolidated a number of existing public accounts into one fund. Thus, it was defined as "one fund into which shall flow every stream of public revenue and from which shall come the supply of every service". The purpose of creating the consolidated fund was to facilitate proper parliamentary oversight of the spending of the executive. In practical terms, such oversight was achieved because the consolidated fund was subject to examination and supervision by the Auditor General who was by law required to report the results of his examination to Parliament.

[256] As Dr. Francis Alexis intimates in his leading treatise "Changing Caribbean Constitutions",[159] the purpose of a provision like that in section 114, like its British progenitor, is to ensure "accountability and transparency regarding the raising, collecting, keeping and spending or other disbursing of all finances, monies, funds or other revenues due to and received by the state." To achieve this purpose, section 114 (1) provides for payment of all revenues or other monies raised or received by Belize into a consolidated revenue fund unless paid into some other funds established by law for a specific purpose; section 114 (2), that monies shall only be withdrawn from or charged to the consolidated revenue fund by a law enacted by the National Assembly; and, section 114 (3), that no moneys shall be withdrawn from other public funds unless authorized by the National Assembly. In all such cases, withdrawals must be made in the manner prescribed by law - whether by way of financial year estimates of expenditure, or authorization in advance of the appropriation law, or the introduction of a supplementary appropriation bill.

[257] Plainly, then, section 114 has the same purpose as its progenitor, the British Consolidated Fund. This is to have all monies and revenue in a central fund, the consolidated revenue fund, or other public fund, so as to enable the National Assembly to exercise control over public revenue raised and received and expenditure of such revenue. Parliamentary control over this fund is achieved through the agency of the Auditor General who has constitutional control of the fund and who must report annually to the National Assembly on the fund.[160]

[258] The statement of Smith CJ in *Revere Jamaica Alumina Ltd v A.G*,[161] in relation to the provision in the Jamaican Constitution *in pari materia* with section 114, provides a succinct explanation of the process:

> Apart from convenience for checking, having all revenue in a central fund, the Consolidated Fund enables Parliament to exercise control over expenditure of public revenue and it also controls the raising of revenue. This is enforced by having the fund subject to the control of the Auditor

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[159] Francis Alexis, *Changing Caribbean Constitutions* (2nd edn, Caribbean Research & Publications Inc, 2015).
[160] Ibid [14.65]
[161] (1977) 26 WIR 486

> General, who is independent of Executive control and reports to the House of Representatives. Payment of an exaction into the Consolidated fund satisfies the public purpose element because of Parliamentary control over it. They will not approve of any payment from the fund which is not for public purpose.

[259] Given the underlying purpose of section 114, it is my judgment that that purpose would not be enhanced by denial of BISL's claim for breach of contract since the terms of the 1993 agreement appear to be aimed at furthering the underlying purpose of that section. This is clearly seen when the provisions of the agreement relating to payments into IMMARBE and IBCR escrow accounts are examined separately.

[260] First, the IMMARBE escrow account. IMMARBE is a statutory body established under *section 3* of the RMSA "for the registration under the flag of Belize of vessels of any type, class, size or weight engaged in any kind of trade, service or international maritime activity, including pleasure vessels." Section 8 of that Act provides that:

> There shall be paid to IMMARBE the several fees set out in the First Schedule to this Act for the registration of vessels and for the maintenance of such vessels in good standing under the flag of Belize.

Section 12 further provides that:

> There shall be paid to IMMARBE the several fees set out in the First Schedule to the Act for the registration of vessels and thereafter at annual intervals for the continued maintenance of such vessels as Belizean vessels.

And, section 16 that:

> There shall be paid to IMMARBE the several fees set out in the Second Schedule to this Act for the preliminary and permanent registration of every document pursuant to sections 14 and 15 above.

Finally, section 37 provides that:

> There shall be paid to IMMARBE the several fees set put in the Second Schedule to this Act for the preliminary and permanent registration of every document pursuant to sections 35 and 36 above.

[261] It is to be noted that, in all of these sections of the RMSA, the obligatory word "shall" is used. Thus, by express statutory stipulation, the fees raised or received under that Act must be paid to IMMARBE. The provisions in the 1993 agreement for payment of fees raised or received under the RMSA are entirely compliant with the RMSA in that they provide that such fees are to be paid into an escrow bank account held in the name of IMMARBE.

[262] There has been no argument and no suggestion in the courts below nor in this Court that any of the provisions in the RMSA are unconstitutional. It is therefore difficult to understand how an agreement which is fully compliant with that Act can be castigated as not furthering the purpose of the constitution when that Act is not determined to be unconstitutional and as such, on well settled law, must be presumed to be constitutional (see e.g. *Cane Farmers etc.* v. *Seereram*;[162] *Mootoo* v *AG*[163]). In any event, the agreement makes express provision for oversight and accountability by the Auditor General over the moneys paid into IMMARBE escrow account. This is the kind of oversight over public moneys envisaged by section 114 of the Constitution and section 4 of Cap 15.

[263] The position with the IBCR escrow account is slightly different. *Section 118* of the IBCA states that: "All fees, licence fees and penalties paid under this Act shall be paid by the Registrar into the Consolidated Revenue Fund." The language in this provision is quite definitive. It places an obligation on the Registrar of the IBCR to pay "all" fees and penalties paid under the IBCA into the consolidated revenue fund. Consequently, the provisions in the 1993 agreement for payment of such fees and penalties into an IBCR escrow account are in direct conflict with section 118 of the IBCA and technically with *section 114* of the Constitution. However, as with the IMMARBE account, express provision is made in the agreement for the oversight of, and accountability to, the Auditor General in respect of the moneys paid into IBCR escrow account.

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[162] (1976) 27 WIR 32
[163] (1976) 28 WIR 304

[264] The provisions in the 1993 agreement for control of the IMMARBE and IBCR escrow accounts by the Auditor General is one reason why, in my view, denying BISL's claim would not enhance the underlying purpose of section 114. Those provisions sought to ensure that in the private management of public funds by BISL the kind of accountability and transparency contemplated in section 114 was observed.

[265] Another reason why denying BISL's claim would not enhance the purpose of section 114 is that that section on its plain language is not intended to regulate BISL's conduct, nor to impose any duty on BISL. The responsibility to ensure that there is compliance with that section is placed squarely on the shoulders of the Government. Yet, in the teeth of its responsibility, the Government contracted BISL and agreed for the monies to be collected by BISL and paid into the two sets of escrow bank accounts rather than into the consolidated revenue fund. To deny BISL's claim would be to undermine, rather than enhance, the underlying purpose of section 114 in that the Government would be rewarded for its breach of its undeniable constitutional obligation and thereby encouraged to ignore that obligation.

[266] A final reason why denying BISL's claim would not enhance the purpose of section 114 is that section 114 does not expressly impose, or impliedly contemplate, any criminal or civil sanctions on private persons for non-compliance with that section. As such, I do not see how the underlying purpose of that section would be enhanced by this Court in effect imposing its own sanction by denying BISL's claim for breach of contract where Parliament has refused to do so.

[267] Turning next to the question of whether there is any other relevant public policy on which the denial of the claim may have an impact, I would add here parenthetically that this question is also fully explored in the judgment of Jamadar JCCJ from an overarching rule of law perspective which I commend, and which in our view, is also an eloquent rebuttal of the reliance test.

[268] In approaching this matter, I find significant guidance in the much-cited dictum of McLachlin J in the Supreme Court of Canada case of *Hall v Hebert*[164] on the court's power to bar recovery in tortious claims on the ground of illegality. She stated:

> The basis of this power, as I see it, lies in the duty of the courts to preserve the integrity of the legal system, and is exercisable only where this concern is in issue. This concern is in issue where a damage award in a civil suit would, in effect, allow a person to profit from illegal or wrongful conduct, or would permit an evasion or rebate of a penalty prescribed by the criminal law. The idea common to these instances is that the law refuses to give by its right hand what it takes away by its left hand.

[269] In my judgment, a systematic analysis of the relevant circumstances in this case in the context of McLachlin J's statement will allow for a determination of whether there is another relevant public policy on which the denial of BISL's claim may have an impact. This means that the questions which I must address in this case are whether upholding the 1993 agreement would (i) be allowing BISL to profit from its wrongful conduct? or (ii) be permitting the evasion or rebate of a penalty prescribed by the criminal law? or (iii) be compromising the integrity of the legal system by appearing to encourage individuals or companies to enter into illegal contracts? or (iv) conversely, be compromising the integrity of the legal system by appearing to encourage the Government of Belize to enter into illegal contracts? or, (v) be undermining the integrity of the legal system by not holding the Government of Belize to its rule of law obligations in a case such as this one?

[270] I am of the view that the question of whether upholding the agreement would be allowing BISL to profit from its wrongful conduct must be answered in the negative. As has been seen, BISL was engaged by the Government to assist in the development of the IMMARBE and the IBCR in furtherance of the Government's objective of diversifying the Belizean economy. The trial Judge found that this was the objective of the 1993 agreement and that that agreement was for a lawful purpose. That finding was upheld by the Court of Appeal. As such, any wrongful conduct on the part of BISL could only have been incidental to that lawful purpose.

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[164] [1993] 2 SCR 159 at 169

[271] So, what then was BISL's wrongful conduct, if any? As I have observed, section 114 of the Constitution places the obligation to pay public moneys into the consolidated revenue fund on the Government; not on BISL. No evidence has been adduced that the escrow bank account clauses in the agreement were intended by BISL to undermine section 114 of the Constitution. Rather, the evidence is that, in its dealings with the Government, BISL endeavoured to comply with all legal requirements and that, at all material times, BISL complied with the terms of the agreement which was admittedly for a lawful purpose. The upshot of the foregoing is that there was no wrongful conduct on the part of BISL from which to profit.

[272] I have already determined that the provisions in the agreement providing for oversight of the escrow accounts by the Auditor General were in pith and substance consonant with the underlying purpose of section 114 of the Constitution. Accordingly, upholding BISL's claim would not be permitting the violation of the Constitution. Nor would it be permitting the evasion of a penalty prescribed by the criminal law since there was no such penalty in the laws of Belize brought to the notice of this Court.

[273] Nor do I think that permitting BISL's claim would be compromising the integrity of the legal system by appearing to encourage individuals or companies to enter into illegal contracts. BISL's agreement with the Government was undeniably for a lawful purpose. There were provisions in the agreement which sought to bring it within the spirit of the Constitution. There is no suggestion of wrongful conduct on the part of BISL in the performance of the contract. Given these facts, it is not easy to see how allowing the agreement to be upheld would compromise the integrity of the legal system by appearing to encourage an individuals or companies to enter into illegal contracts.

[274] In this regard, a statement of the learned authors of *Chitty on Contracts*[165] is worth noting:

[165] Chitty on Contracts, Vol. 1 – General Principles, Chap. 16, Illegality and Public Policy, 29th Ed (2004) at [16-012]

> But where the contract is not unlawful on its face and is capable of performance in a lawful way and the parties merely contemplate that it will be performed in a particular way which would be unlawful, the parties, through ignorance of the law, failing to appreciate that fact, the contract may be enforced on the ground that there was never a "fixed intention" to do that which was later discovered to be lawful and that while the parties "contemplated" such unlawful act, they did not "intend" to do it. In other words, knowledge of the law is of evidential significance with respect to the parties' intended mode of performance.

[275] Conversely, not upholding BISL's claim would be compromising the integrity of the legal system by appearing to encourage the Government of Belize to enter into illegal contracts. Both BISL and the Government enjoyed the benefits of the 1993 agreement. BISL invested considerable time, resources and finances in the management of IMMARBE and IBCR. If the Court were to accept the Government's defence of illegality and decline to compensate BISL for the Government's breach, the Government may, in future, carelessly enter into such arrangements, reap the benefits, and withdraw from them with impunity and with no regard for the interests of other parties. For this reason, the integrity of the legal system may be compromised by allowing the government to enjoy immunity from its own wrongdoings.

[276] The Belize Court of Appeal decision in *Attorney General & Kendall Mendez v Barefoot Management Ltd*[166] lends some support to the foregoing conclusion. In that case, the trial Judge dismissed the respondent's claim for breach of contract found by the judge to be illegal but upheld his claim for misrepresentation. On appeal, it was argued by the appellants that the finding of illegality in the contract made it improper for wasted costs and damages to be awarded against the Government.

[277] In dismissing the appeal, the Court of Appeal cited with approval the statement of Bingham LJ in *Saunders et al v Edwards et al*[167] that:

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[166] Civil Appeal No. 5 of 2014

[167] 1987 2 All ER 651

> Where issues of illegality are raised, the courts have (as it seems to me) to steer a middle course between two unacceptable positions. On the one hand, it is unacceptable that any court of law should aid or lend its authority to a party seeking to pursue or enforce an object or agreement which the law prohibits. On the other hand, it is unacceptable that the court should, on the first indication of unlawfulness affecting any aspect of a transaction, draw up its skirts and refuse all assistance to the plaintiff, no matter how serious his loss or how disproportionate his loss to the unlawfulness of his conduct.[168]

The Court of Appeal upheld the trial judge's finding that the Government had made numerous false and dishonest representations regarding the proposed sale of lands in a forest reserve and in those circumstances, held that the Government should not be "left to enjoy the fruits of its deceit."

[278] On the question of whether upholding the agreement would be undermining the integrity of the legal system by not holding the Government of Belize to its rule of law obligations in a case such as this one; I am content to rely on the arguments advanced by Jamadar JCCJ in his opinion. I consider these to be sufficient to show that the integrity of the legal system may also be compromised by allowing the government to enjoy exemption from its failure to comply with its rule of law obligations in this case.

The Proportionality Analysis Step

[279] And so, I turn to the third limb of the proposed test, the question of whether denial would be a proportionate response to the illegality. In the High Court of Australia case of *Nelson v Nelson*, McHugh J explained the importance of this factor as follows:[169]

> It is not in accord with contemporaneous notions of justice that the penalty for breaching a law or frustrating its policy should be disproportionate to the seriousness of the breach. The seriousness of the illegality must be judged by reference to the statute whose terms or policy is contravened. It cannot be assessed in a vacuum. The statute must always be the reference point for determining the seriousness of the illegality.

[168] Ibid 665 – 666
[169] [1995] 184 CLR 538 [36]

This statement was cited with approval by a majority of the High Court of Australia in *Fitzgerald v FJ Leonhardt Pty Ltd*.[170]

[280] In *Patel v Mirza*, Lord Toulson identified four considerations which appear to me to be very useful in making our determination as to whether granting the relief sought by BISL would be proportional in the circumstances of this case. These considerations include, in the word of Lord Toulson, "the seriousness of the conduct, its centrality to the contract, whether it was intentional and whether there was marked disparity in the parties' respective culpability."

[281] In relation to the seriousness of the conduct and its centrality to the contract, the evidence shows that any wrongful conduct on the part of BISL was at its highest an innocent breach of section 114. That conduct was neither criminal nor otherwise serious, nor was it "central" to the contract. As has been seen, the illegality alleged is that the fees were paid into accounts other than the central revenue fund. In this regard, there is no doubt that the contract could have been performed without BISL first depositing the fees collected into the IMMARBE escrow account and the IBCR escrow account as provided for in the agreement and so was not central to the contract.

[282] As to whether any wrongful conduct on the part of BISL was intentional, it is my judgment that it was not. In the first place, there is no allegation by the Government, nor has any evidence been adduced, that BISL entered into the agreement with the intention of engaging in any unlawful conduct. Secondly, the Government's course of conduct was such as to give rise to the reasonable belief in BISL that BISL was at all times acting lawfully in performing the management services for the Government. In consequence, it is evident that it would be "disproportionately severe", and that no public interest would be served by refusing to enforce the agreement, especially considering BISL's substantial investment in the good management of IMMARBE and IBCR over a period of twenty years.

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[170] (1997) 189 CLR 215

[283] With respect to the parties' respective culpability, the evidence is that BISL acted in scrupulous compliance with the terms of the agreement. The monies raised and received by IMMARBE and IBCR were fully accounted for and dealt with in accordance with the agreement. It is to be noted also that, at trial, the Government unconditionally withdrew all allegations of mismanagement on the part of BISL. To the extent then that BISL was in contravention of section 114 of the Constitution, BISL's conduct was largely blameless and inadvertent.

[284] Like BISL, the Government entered into an agreement for a lawful purpose. It agreed to permit the monies raised by IMMARBE and IBCR to be handled and accounted for in a manner which it now argues was inconsistent with section 114 of the Constitution. As has been already decided, the Constitution makes clear that it is the Government's responsibility to ensure that the legal requirement that public funds are paid into the consolidated revenue fund. Any culpability for failure to comply with such legal requirement must therefore be ascribed to the Government and not BISL.

[285] In sum, the clauses 8, 9 and 10 of the 1993 agreement may have been technically in contravention of section 114 of the Constitution and by parity of reasoning section 4 of Cap 15 and may therefore have been formally illegal. But such illegality by itself was not determinative of whether BISL would be denied enforcement of that agreement. The fundamental determinant of that question is whether to enforce BISL's claim would be harmful to the integrity of the legal system of Belize. For the reasons just outlined, I am of the view that it would not. Accordingly, the Government cannot invoke the illegality defence to defeat BISL's claim on this basis.

[286] And so, I turn to the Government's argument that the 2005 extension contravened the Financial Orders 1965.

(ii) **Did the 2005 Extension Contravene the Financial Orders 1965?**

[287] In advancing its argument that the 2005 extension contravened the Financial Orders *1965*, the Government relied principally on *Order 701* of the Financial Orders. This

order provides that, “Verbal contracts may be made for works and services under $300. Tenders shall be invited for contracts over $10,000.”

Mr. Simon QC for the Government argues that as there was no tender when the agreement, which was for over $10,000, was amended on 24 March 2005, the amendment was entered into in breach of Order 701.

[288] I agree with Mr Courtenay SC for BISL that that argument should not be upheld. Order 701 is not applicable to the making of a contract by the amendment of a subsisting contract as was the case with the 2005 Extension. Order 720 on its express language is the order which applies to the making of such a contract. Order 720 provides as follows:

> Contracts, once entered into, shall on no account be altered, assigned or sub-let without the authority of the Ministry obtained through the Tenders Committee, unless the Contract provides otherwise.

[289] The 2005 extension was an “alteration” of a contract “entered into” in 1993. Thus, the 2005 extension was plainly governed by Order 720 and not Order 701. Consequently, the only question was whether the 1993 agreement contained provision for its alteration. There is no doubt that it did. Clause 20(1) of that agreement provided for its amendment “by written agreement of the parties to that agreement”.

[290] The undisputed facts are that the 2005 extension was agreed to in writing by the Government and BISL pursuant to clause 20 (1). Under that extension agreement, BISL agreed to pay, and paid, the Government US$1.5 million as consideration for this extension. In these premises, the 2005 extension did not contravene the Financial Orders and was not illegal for so doing.

[291] I would add that, were it found that Order 701 applied to the 2005 extension, as the party alleging illegality, the onus would be on the Government to prove that there was no tender. No such evidence was adduced by the Government. As was held by the Guyana Court of Appeal in *Ambrose v Boston*, in the absence of evidence from

the Government to the contrary, the principle of regularity: '*omnia praesumuntur rite essa acta*' would apply.

[292] For the foregoing reasons, it is unnecessary to consider Mr Courtenay SC's extensive argument that the Financial Orders 1965 did not have legislative effect and were merely administrative instructions. Accordingly, I turn to the Government's argument that the 2005 extension was made without proper authority.

(iii) **Was the 2005 Extension Made Without Proper Authority?**

[293] The Court of Appeal held that the Prime Minister and Attorney General did not have authority to sign the 2005 extension since the agreement on which that extension was based contravened section 114 of the Constitution and section 4 of Cap 15. Campbell JA, delivering the judgment of the Court, referred to the statement of Saunders JCCJ in *BCB Holdings Ltd and The Bank of Belize* that:

> [T]he Minister does indeed possess wide prerogative powers to enter into agreements. The Executive may do so even when those agreements require legislative approval before they can become binding on the State. This was also the opinion of the Eastern Caribbean Court of Appeal in the Saint Lucian case of *The Attorney-General v. Francois*, an authority cited by the Tribunal.

However, Campbell JA opined that this statement of the law only applied to agreements which were legal but did not apply to agreements, like the one in question, which he held to be illegal and void.

[294] The learned Justice of Appeal did not cite any authority to support his view of the law. But, in any event, even if such a distinction is justified in some circumstances, it is not justified in a case like this where the agreement is made for a lawful, legitimate purpose and in the national economic interest of Belize. In my judgment, the dictum of Saunders JCCJ in *BCB Holdings Ltd and The Bank of Belize* should be applied in this case and the Prime Minister and the Attorney General should be

held to have the authority to sign the 2005 extension. Accordingly, I hold that the 2005 extension was made with proper executive authority.

Severance

[295] Mr. Courtenay SC argued before us and in the courts below that BISL submits that, if clauses 8, 9 and 10 which provide for the fees to be paid into the bank accounts of IMMARBE and the IBCR are found to be illegal, then those clauses can be severed from the agreement in accordance with the applicable principles governing severance. Given my conclusion on the question of illegality, the question of severance has become moot.

Award of Damages

[296] Because of the decision reached on illegality, the learned trial Judge and the learned Justices of Appeal did not treat with the issue of damages for breach of contract. In view of my conclusion that the illegality defence was not available to the Government, BISL is entitled to claim damages for breach of the 1993 agreement as extended by the 2005 extension. Accordingly, I would remit this case to the Supreme Court for the assessment of those damages.

Disposition

[297] For the foregoing, I agree with the orders of the Court.

[298] In concluding, I wish to acknowledge my significant debt in getting through this difficult case to counsel on both sides. Their industry and admirable skill have contributed in no small way to this judgment.

CONCURRING JUDGMENT OF THE HONOURABLE MR JUSTICE JAMADAR, JCCJ:

Introduction

'WHEREAS the people of Belize -' [171]

[299] There can no longer be credible debate disputing the widespread juridical acceptance of an essential basic 'deep' structure that is the foundation of, confers integral identity to, and constitutes the essential core of, democratic participatory constitutionalism in Caribbean states such as Belize.[172] The extent to which these basic features, principles and values are constitutive of what is considered the 'sovereign democratic State' of Belize,[173] ultimately sounds in whether they can be undermined, altered, or removed without radically changing what it means to be Belizean.[174] In this discovery, there are also implications for accountability.

[300] This is because the State of Belize is constituted by its Peoples. It is their consent to be governed, and to be governed in a particular context and way, that brings into being what is agreed to, accepted, and recognised nationally and internationally, internally and externally, as the State of Belize. It is this consent that bestows integrity, legitimacy, and identity to what is understood to be Belize. Hence, the Constitution of Belize commences with a Preamble, that begins: 'WHEREAS the people of Belize-'.

[301] The shapes, contours, textures, and contents of that agreed context and way are what underpin and inform the Constitution of Belize. Thus, the Constitution emerges from and arises out of these *a priori* basic features, principles, and values. Features, principles, and values, that in turn evolve out of the history, cultures, traditions, and experiences of Belizeans. Some of which were and are unwritten.

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[171] The Preamble of the Constitution of Belize, Cap. 4.
[172] Arif Bulkan, 'The Limits of Constitution (Re)-making in the Commonwealth Caribbean: Towards the Perfect Nation' (2013) 2:1 Can J Hum Rts 81; The Rt Hon Beverley McLachlin, 'Unwritten Constitutional Principles: What is Going On?' Address given at the 2005 Lord Cooke Lecture Wellington, New Zealand 1 December 2005; Dr Justice B S Chauhan, 'Doctrine of Basic Structure: Contours'; V.R. Jayadevan, 'Basic Structure Doctrine and its Widening Horizons', published in CULR, Vol. 27 March 2003, p.333.
[173] Section 1 (1) of the Constitution of Belize states, "Belize shall be a sovereign democratic State of Central America in the Caribbean region…"
[174] Apart, arguably, from constitutionally legitimate and inclusive popular mandate, or by broad-based popular revolution.

To this extent they, together, form the essential foundation, framework, and superstructure of Belizean constitutionalism. They are discoverable. And, until changed legitimately, they are non-negotiable. Moreover, they form and inform the standards and lenses through which, generally, all governmental, legislative, executive, and public administrative actions are to be judged and held accountable.

[302] It may be helpful to ground this introduction, which can read as both lofty and abstract, in a supporting evidential matrix. First, the Preamble to the Constitution of Belize reveals some of the basic principles and values that have been averred to above. Indeed, the first clause 'affirms that the Nation of Belize **shall be founded upon principles** …'. Some of these fundamental principles are explicitly stated in that first clause, including human rights, freedom, dignity, and equality. As one progresses through the Preamble, one discovers many others, such as social justice,[175] participatory democracy,[176] freedom based on moral/spiritual values and the rule of law,[177] state unity and sovereignty, territorial integrity,[178] non-discrimination,[179] social security and welfare,[180] protection of the environment,[181] and, respect for (and co-operation with) other nations, as well as for international law and treaty obligations (fundamental international values).[182]

[303] These preambular principles and values have been widely recognised and accepted as having jurisprudential functions, both interpretatively and substantively.[183] In fact, in reading the Constitution as a whole, the Preamble adds essential context to and informs the meaning, intention and purpose of the entire constitutional text. To disassociate the two, is to ignore a basic principle of statutory interpretation, that

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[175] Clauses (b) and (e), Cap. 4.
[176] Clause (c), Cap. 4.
[177] Clause (d), Cap. 4.
[178] Clause (e), Cap 4.
[179] Ibid.
[180] Ibid.
[181] Ibid.
[182] Ibid.
[183] *Nervais v The Queen and Severin v The Queen* [2018] CCJ 19 (AJ) [22], [37]; *Maya Leaders Alliance v Attorney General of Belize* [2015] CCJ 15 (AJ); *Lucas v The Chief Education Office et al* [2015] CCJ 6 (AJ); *The Attorney General of Barbados et al v Joseph and Boyce* [2006] CCJ 3 (AJ) [18], (2006) 69 WIR 104; *Dumas v Attorney General* Civ. App. No. P 218 of 2014; *Mohammed v Warner* Civil Appeal No. 252 of 2014; *Peters (Winston) v Attorney-General and Another, Chaitan (William) v Attorney-General and Another* (2001) 63 WIR 244 (CA TT). Tracy Robinson, Arif Bulkan and Adrian Saunders, 'Fundamentals of Caribbean Constitutional Law', Sweet & Maxwell, (2015) [6-006].

the text is to be read, understood and interpreted in its entire context.[184] Dissociating the two, therefore, disembowels the substantive text of its integrity and authoritative functionality. Doing so deprives the interpretative responsibility of the *raison d'etre* for the text. To avoid any such 'sleight of hand', the People who constituted the Constitution as text, mandated by the Preamble, in its ultimate clause, 'that their Constitution should therefore enshrine and make provisions for ensuring the achievement of the same in Belize.'[185] That is, the achievement of what the People of Belize declared, in their preamble, to be the basic and fundamental features, principles, and values that are constitutive of Belizean constitutionalism.[186]

[304] Second, clues as to what is constitutive of the basic and fundamental features, principles, and values of Belizean constitutionalism, are not limited to the literal content of the Constitution as text *per se*. Some are predictably unwritten, to be discerned from overall structure, context, and content,[187] albeit of the Constitution itself, as well as from broader historical, cultural, and socio-legal contexts. Constitutional common law, as developed by independent Caribbean Judiciaries (as the third arm of Government) and elsewhere, has also discovered and revealed structural and substantive features and values that constitute this basic 'deep' structure. Three are now uncontroversial[188] – the separation of powers,[189] the rule of law (as including both due process and protection of the law),[190] and, the independence of the judiciary (with the associated power of judicial review in relation to both constitutional and administrative actions).[191]

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[184] *Persaud et al v Nizamudin* [2020] CCJ 4 (AJ) (GY) at [7]; *International Environments Ltd v Commissioner of Income Tax* [2019] CCJ 18 (AJ) at [20]. Tracy Robinson, Arif Bulkan and Adrian Saunders, 'Fundamentals of Caribbean Constitutional Law', Sweet & Maxwell, (2015) [6-006].

[185] Clause (f), Cap. 4.

[186] Tracy Robinson, Arif Bulkan and Adrian Saunders, 'Fundamentals of Caribbean Constitutional Law', Sweet & Maxwell, (2015), at [6-006], 'The preambles to Caribbean constitutions express the political values and aspirations of the people and nation.'

[187] See Tracy Robinson, 'Our Inherent Constitution', in David Berry and Tracy Robinson (eds), *Transitions in Caribbean Law: Law-making, Constitutionalism and the Convergence of National and International Law*, Caribbean Law Publishing, 2013, p.248.

[188] Arif Bulkan, 'The Limits of Constitution (Re)-making in the Commonwealth Caribbean: Towards the Perfect Nation' (2013) 2:1 Can J Hum Rts 81.

[189] See *BCB Holdings Ltd v Attorney General of Belize* [2013] CCJ 5 (AJ) at [44] and [59]; *Joseph and Boyce v Attorney General* [2006] CCJ 3 at [41], (2006) 69 WIR 104; See in relation to the Constitution of Jamaica the judgment of Harrison JA in *Independent Jamaica Council for Human Rights and others v The Attorney General* Civil Appeals Nos 36-39 of 2004 at pages 11-13.

[190] See *McEwan, Clarke, Fraser, Persaud and SASOD v Attorney General of Guyana* [2018] CCJ 30 (AJ); *Maya Leaders Alliance v Attorney General of Belize* [2015] CCJ 15 (AJ); Per Saunders JCCJ (as he then was), *Lucas v The Chief Education Officer et al* [2015] CCJ 6 (AJ); *Dumas v The Attorney General* Civil Appeal No. P 218 of 2014.

[191] See *Nervais v The Queen and Severin v The Queen* [2018] CCJ 19 (AJ); *Lucas et al v The Chief Education Office et al* [2015] CCJ 6 (AJ), [2016] 1 LRC 384; *Suratt and others v Attorney General of Trinidad and Tobago* [2008] UKPC 38.

[305] Of all these potentially basic 'deep' structures, the two that are most relevant to this case are judicial review and the rule of law. The intent of this opinion is to interrogate how these elements of Belizean constitutionalism impact governmental and administrative action in the circumstances of this case. In the final analysis, it is suggested that, as a general principle, the executive and all state and public agencies and authorities are subject to the standards of accountability and good governance that the constitutional imperative of the rule of law demands, in all of their dealings with private enterprise third parties, including in the making, changing, and breaking of commercial contracts. The courts, as guardians of the Constitution,[192] are also guardians of Belizean constitutionalism, and as such, the agents of the People. This 'constitutional species' of judicial review of legislative and executive actions, is the means by which this standard-keeping and accountability is rendered.[193]

[306] In my opinion, the Government has not met or satisfied the minimum standards that the rule of law demands of it, in its dealings with the appellant, in the circumstances of this case. For these shortcomings, the law can demand some form of accountability. The jurisdiction of the courts to supervise State actions through judicial review, is apposite. I will therefore develop this opinion as follows. First, I will explore the idea and existence of a basic 'deep' structure that is constitutive of Belizean constitutionalism. Second, I will examine the standards demanded of the State by the rule of law, and in particular by the requirements of fairness, good faith, accountability, and good governance. Third, I will consider whether the actions of the State in this matter were contrary to the basic 'deep' structure requirements of the rule of law in Belizean constitutionalism. Fourth and finally, I will conclude with what remedies these interrogations demand.

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[192] *BCB Holdings Ltd v Attorney General of Belize* [2013] CCJ 5 (AJ) at [42]; See per Wit JCCJ, *The Attorney General of Barbados et al v Joseph and Boyce* [2006] CCJ 3 (AJ) [45]; *Bahamas Methodist v Symonette* (2000) 59 WIR 1 at 14, (2000) 5 LRC 196 (PC Bah) at 208; *Hinds v R* (1976) 24 WIR 326, [1977] AC 195 (PC Jam); *Collymore v Attorney General* (1967) 12 WIR 5 (CA TT) 9 (Wooding CJ).

[193] Tracy Robinson, Arif Bulkan and Adrian Saunders, 'Fundamentals of Caribbean Constitutional Law', Sweet & Maxwell, (2015), at [4-005], [5-001 to 5-002]; 'Judicial review is both a power and a duty exercised by ... courts to review laws and governmental action to ensure their consistency with the constitution'.

[307] To be clear, the approach that I take is grounded in a consciously inclusive democratic approach to constitutionalism, as reflected in constitutive texts and contexts; and not in more culturally embedded pre-independence, neo-colonial, elitist attitudes and ideologies, historically experienced in the Caribbean and elsewhere as 'Crown Colony' models of governance.[194] For me, all Belizean lives matter, because it is these lives that are constitutive of the State. In Belize, the preambular values and the principles of constitutional sovereignty and supremacy confirm this view.[195]

[308] In the end, it will become apparent that the outcomes I advocate for are in effect no different from those that Burgess JCCJ has proposed.[196] This opinion also does not intend to derogate from the essence of what he has written. Indeed, I agree with the core theses in his analysis and with his essential conclusions, and will draw upon these in this discussion. The breadth and depth of his exploration, the trustworthiness of its integrity and insight, and his eventual synthesis is, at least in my judgment, a significant contribution to the development of Caribbean jurisprudence in this area of the law. This opinion is therefore supportive of and can be read together with his.

[309] I appreciate the alternative approach taken by Wit JCCJ and could also support his constitution-centric reasoning – as in this general approach we are like-minded. In fact, his opinion is not in conflict with those of either Burgess JCCJ or Anderson JCCJ, but a different path to the same outcome. Finally, I acknowledge the Singaporean argumentation favoured by Anderson JCCJ and Rajnauth-Lee JCCJ, and recognise that the context for exploring it is similar to mine,[197] but for myself do not readily consider it, at this time, best suited for Caribbean contexts.

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[194] Kirk Meighoo and Peter Jamadar, 'Democracy & Constitution Reform in Trinidad and Tobago', Ian Randle, (2008), chapters 1, 2 and 3. See also, Se-shauna Wheatle & Yonique Campbell (2020): Constitutional faith and identity in the Caribbean: tradition, politics and the creolisation of Caribbean constitutional law, Commonwealth & Comparative Politics, DOI: 10.1080/14662043.2020.1773637, at page 5, 'The exported ('Westminster-Whitehall') parliamentary model … produced a tendency towards domination in governance'; and at page 6, 'The written constitutions cemented in perpetuity the traditions and power balances of the colonial past.'

[195] Constitution of Belize, Cap. 4. Sections 1 and 2.

[196] And in fact, they are also no different from those of all members of this Panel.

[197] Relevant to the issues, though neither directly addressed nor argued.

Background Facts

[310] The background facts are comprehensively and accurately set out at paragraphs [147] to [173] of the opinion of Burgess JCCJ. There is therefore no need to repeat them here, except for the most general of summaries. By a Management Services Agreement dated 11 June 1993, the Government contracted with Belize International Services Limited (BISL) to assist with the development and management of the Government owned International Business Companies Registry (IBCR) and the International Merchant Marine Registry of Belize (IMMARBE). The 1993 Agreement was for a term of ten years, with an option to BISL to renew the Agreement for a further ten years.

[311] On the 9 May 2003, BISL exercised the option and the 1993 Agreement was duly renewed for a further term of ten years, to June 2013 (the 2003 Renewal). Neither at the trial, nor before this court, has there been any challenge to the exercise of this option. Indeed, there has been no complaint pursued before this court by the Government in relation to the general management of the Registries.

[312] On the 24 March 2005, in consideration of US$1.5 Million paid by BISL to the Government, the parties amended the 1993 Agreement and extended its term to the 11 June 2020 (the 2005 Extension). Throughout, BISL assisted the Government with the management and development of the Registries, and the undisputed evidence is that as a result the Government received substantial income over the years from the 1993 Agreement, the 2003 Renewal, and the 2005 Extension. This was a mutually beneficial commercial agreement, at the heart of which was the establishment and running of these shipping Registries.

[313] Indeed, in 2003 there had been some queries about the 1993 Agreement by the ‘then’ Government, which resulted in meetings between the parties. At no time was it raised that the 1993 Agreement was in violation of the Constitution, or of any State financial laws, orders, or regulations. In fact, the Government eventually wrote to BISL prior to the 2005 Extension, confirming that all issues had been

resolved to its satisfaction. This was confirmed by the oral testimony of the Financial Secretary at the trial. It is fair to say, on the basis of the undisputed documentary evidence, that it was because of the Government's satisfaction with BISL's performance and in order to continue to benefit from the "effective operation of the registries under concession",[198] the 2005 Extension was granted.

[314] However, in 2013, the 'new' Government (that had been installed in 2008) took the position that the 2005 Extension was unlawful. On the 4th June 2013, what was formally asserted by this new Government,[199] was that the Extension was 'wholly invalid', that the 2003 Renewal would expire on the 10 June 2013, and that the Government would assume control of the Registries on the 11 June 2013, that is, in seven days' time. On the 8 June 2013, an Order was gazetted by the Registrar of Merchant Shipping. This official state action effectively gave the Government control of the Head Office of IMMARBE. And then, on the 11 June 2013 the Government forcefully took possession of both IBCR and IMMARBE. A governmental and administrative *coup d'etat* of the Registries had been effected - BISL had been thrown out of the Registries.

[315] The consequence of the State's action was litigation commenced by BISL for breach of contract and for damages. The eventual and essential response and defence of the State, its justification for its actions, was that the 1993 Agreement itself was contrary to essential constitutional requirements, and so illegal and void, and in that any event, the term of the 1993 Agreement would have expired on the 10 June 2013 (because of the illegality of the 2005 Extension). Both the trial judge and the Court of Appeal agreed with the Government. Both formed the view that the 1993 Agreement and in consequence the 2005 Extension were unconstitutional, illegal, and so invalid and unenforceable. The courts' justification lay in alleged breaches of section 114 of the Constitution, and of various provisions of the Finance and Audit Act,[200] as well as of the Financial Orders 1965.

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[198] Page 2947 of the record of appeal, Written Submissions of the Appellants filed on 4 October 2019 at [28].
[199] By letter from the Financial Secretary, Mr Joseph Waight, dated 4 June 2013.
[200] Cap 15.

[316] Burgess JCCJ has identified that: 'the pivotal issue in this appeal is whether the Government can avoid liability for breach of their contract with BISL on the basis that the 1993 Agreement as incorporated in the 2005 extension agreement was unconstitutional, illegal and unenforceable.'[201] He has also comprehensively set out and analysed the relevant facts and law in relation to all contractual aspects of this issue based on the State's defence of statutory illegality, that have arisen for consideration and determination by this court. In particular, he has dealt with and determined the following:

(a) That the 1993 Agreement as incorporated into the 2005 Extension did not substantively contravene section 114 of the Constitution.[202]

(b) That the 2005 Extension did not contravene the Financial Orders 1965.[203]

(c) That the 2005 Extension was made with proper authority.[204]

[317] As already stated, I agree with and support his core analysis and essential conclusions on all these issues. However, what I propose is to take one further step and to interrogate the State's accountability under its public law duties pursuant to the Constitution and the rule of law. This court is entitled to undertake this review, because at the heart of this matter is an issue (raised by the State and argued extensively before this court, and in the courts below) that is premised on constitutional propriety and compliance.[205] An issue that therefore opens for review all relevant questions of like nature. In any event, this court is entitled to consider the constitutional correctness of State actions in all circumstances when it is appropriate, fair, and just to do so, as it is in this case. This review is also appropriate because, as Burgess JCCJ explains, in a Caribbean range of factors test (where statutory illegality based on the text of the Constitution is the defence

[201] At [178].
[202] At [248] to [285].
[203] At [287] to [291].
[204] At [293] to [294].
[205] Per Campbell JA, *BISL v The AG*, Civ. App. No. 36 of 2016, [58], 'The starting point is the Constitution'; [59] 'The Constitution is a standard for judicial review of … government action to determine their consistency with the Constitution'.

raised), constitutional propriety can be a relevant consideration. And in particular, it is relevant in this latter context since, a) the overall goal is a fair and just outcome, b) constitutional propriety can be a public policy consideration for testing the defence of illegality, and c) the ultimate analytical lens for this determination is the preservation of the integrity of the legal system.[206] Furthermore, the underpinning factual matrix is undisputed. And Burgess JCCJ, Anderson JCCJ and Wit JCCJ, in their respective opinions, all agree on the outcome that the State's case is unmeritorious. The arguments advanced in this opinion can therefore arguably stand on their own, even as they are presented as complementary to the opinion of Burgess JCCJ.

A Basic 'Deep' Structure

(a) CCJ Pointers

[318] In 2018, the then President of this court, Sir Dennis Byron, writing for the majority in *Nervais and Severin,*[207] had this to say (albeit in the context of constitutional savings clauses):

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

[319] This reference to 'the basic underlying principles' of a constitution, is what I wish to explore. It points to the existence of a basic 'deep' structure, that underpins, informs and constitutes certain non-derogable features, principles, and values of Belizean constitutionalism, that are so foundational and essential to the identity and

[206] As per Burgess JCCJ, [240], [241], '… three steps are to be followed in assessing whether the integrity of the legal system would be harmed in enforcing a contract which is rendered illegal by a statute. These are what may be called (i) the interpretation step; (ii) the public policy analysis step, and (iii) the proportionality analysis step.' See also [247], 'Ultimately, a range of factors approach is in service of a fair and just outcome in the circumstances of each case. … in my opinion, the interpretation step, the public policy analysis step, and the proportionality analysis step together constitute the essential framework for this kind of analysis.'

[207] [2018] CCJ 19 (AJ) at [59]

nature of the State of Belize, that the Constitution itself as text, and all executive, legislative and state administrative actions can be subject to it.

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

[321] This is clear, because in *Nervais and Severin* the general savings clause that was whittled away and considered subordinate to the unwritten and/or preambular value of the rule of law, was a part of the Constitution itself. Thus, even though the Constitution as the explicitly avowed supreme law contained a general savings clause, that specific clause was deemed subject to this 'basic underlying principle' of the rule of law, which was ultimately considered to be the (more) supreme constitutional principle (law). It is therefore this basic 'deep' structure that constitutes a written constitution as such, and not the other way around, even as the enactment of the text is also constitutive.[208]

(b) **Indian Origins**

[322] This idea of a basic 'deep' structure is not new. In the common law, post-colonial era, the Basic Structure doctrine emerged most notably as an Indian judicial principle. The Indian doctrine emanated from the seminal case of *Kesavananda Bharati & Ors. v. State of Kerala & Anr.*,[209] and several other cases, where the Supreme Court of India emphasised that the essence of the basic 'deep' structure lies in the inherent and essential features, principles and values, that give identity, coherence and durability to a constitution, and by which all amendments to a

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[208] *Nervais v The Queen and Severin v The Queen* [2018] CCJ 19 (AJ) at [43] to [45]. See also, Anderson JCCJ at [113], "National constitutions and laws are subservient to norms of *jus cogens* and courts everywhere are obliged to uphold and enforce such fundamental international principles."
[209] AIR 1973 SC 1461.

constitution, legislative changes, and administrative actions are to be assessed and judged.

[323] In India, the Basic Structure doctrine was the result of judicial innovation and is used to curb what is judicially evaluated as being constitutionally unlawful legislative and administrative action. One early aspect of the Basic Structure that the Indian courts insisted upon, was the existence of an independent judiciary with the power of constitutional review.[210] In this regard, Sir Dennis' statement in *Nervais and Severin* about an independent judiciary as part of the constitutional basic 'deep' structure, is in alignment with the Indian jurisprudence. In India, the doctrine continues to be an evolving principle.

(c) **Belizean Leadership**

[324] *Nervais and Severin* is therefore authority for the proposition that in Belize, the task of discovering whether there are basic 'deep' structure features, principles and values that can impact the outcome of this appeal, is a live issue; because this basic 'deep' structure can be used to determine whether the Government's actions in this case met acceptable standards of constitutionalism. For the moment one such feature is beyond question, and it is the power of an independent judiciary to exercise judicial review over both legislative and governmental action.[211]

[325] Indeed, in *Bowen v AG*,[212] the Supreme Court of Belize made use of this basic 'deep' structure doctrine, placing reliance on *Kesavananda Bharati v State of Kerala,* to hold that a proposed amendment to the fundamental right to property in the Belizean Constitution was unconstitutional. Essentially, Conteh CJ upheld the idea that any amendment to the Constitution was invalid if it derogated from the essential features and overall identity of Belizean constitutionalism, and the

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[210] *Ganpatrao v Union of India* AIR 1993 SC 1267; *Minerva Mills Ltd. & Ors. v. Union of India & Ors.* AIR 1980 SC 1789; *Indira Gandhi v. Raj Narain* 1975 Supp. S.C.C. 1; *Smt. Indira Nehru Gandhi v. Raj Narain* AIR 1975 SC 2299; Dr Justice B S Chauhan, 'Doctrine of Basic Structure: Contours'; V.R. Jayadevan, 'Basic Structure Doctrine and its Widening Horizons', published in CULR, Vol. 27 March 2003, p.333; Arif Bulkan, 'The Limits of Constitution (Re)-making in the Commonwealth Caribbean: Towards the Perfect Nation' (2013) 2:1 Can J Hum Rts 81 at pages 87 – 91.

[211] Robinson, Bulkan, Saunders, 'Fundamentals of Caribbean Constitutional Law', Sweet & Maxwell, (2015), at [5-001] to [5-004].

[212] *Bowen v AG* (13 February 2009) BZ 2009 SC 2 (Bze).

enshrined human rights values. As he explained: 'the basic structure doctrine is at bottom the affirmation of the supremacy of the Constitution in the context of fundamental rights'.[213] He identified six features of the basic 'deep' structure of Belizean constitutionalism, to wit, Belize is a sovereign, democratic state, the Constitution is supreme, enshrined fundamental rights demand protection, the separation of powers, the limitation of legislative powers, and, most importantly, the rule of law. He grounded his analysis in the fundamental principle of constitutional supremacy.[214] In all of this Conteh CJ was refreshingly prescient.

[326] *Bowen* has been followed at least twice in Belize, both times by Legall J. In *British Caribbean Bank Ltd. v AG*,[215] an Act which purported to amend the supreme law clause in the Constitution to prevent the courts from declaring void amendments passed in conformity with the procedural requirements, was struck down:

> [E]very provision of the Constitution is open to amendment, provided the foundation or basic structure of the Constitution is not removed, damaged or destroyed. The basic structure includes … the rule of law, judicial review … all of which are protected and safeguarded by the Preamble.[216]

[327] In *Bar Association of Belize v Ag*,[217] Legall J held that amendments that undermined the independence of the Judiciary were void. This he held, was because the independence of the judiciary was protected by the rule of law, and as such, a part of the basic 'deep' structure of Belizean constitutionalism.

(d) Caribbean Academic Assistance

[328] Are there other features, principles, values of this basic 'deep' structure? And if so, how are they to be discovered? Arif Bulkan, writing in 2013,[218] undertakes an expansive survey of the Commonwealth and Caribbean case law partially in search of such pointers, and suggests the following:

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[213] Ibid [119].
[214] Ibid [131]; 'The basic structure doctrine or principle is, … at bottom, about the supremacy of the Constitution … in contradistinction to … 'Parliamentary supremacy', an outmoded concept in a country with a written constitution.'
[215] (11 June 2012) BZ 2012 SC 26 (Bze).
[216] Ibid [45].
[217] (Unreported) (19 April 2013) (SC Bze)
[218] Arif Bulkan, 'The Limits of Constitution (Re)-making in the Commonwealth Caribbean: Towards the Perfect Nation' (2013) 2:1 Can J Hum Rts 81.

(a) Reading a Constitution's substantive provisions holistically and functionally as guideposts, in their historical and legal contexts, to discover common values and a consistent or coherent vision, an essential identity shaped by the totality of its provisions, that manifest its overall (constitutional) philosophy and morality;[219]

(b) Discovering the root history, values and culture of a state from a constitutional perspective, which includes a consideration of the essential and organising underlying principles identified in preambular clauses, that constitute the most vital assumptions upon which the constitutional text is based;[220]

(c) Developing a theory of the nature of law, which distinguishes between constituent and constituted law making powers, and placing constitutionalism and constitution making and amending in the category of 'higher order' constituent law making power (as compared to constituted powers – such as those exercised by the legislature and the executive);[221] and finally,

(d) Applying the 'principle of integrity as the most appropriate interpretative technique', whereby '[w]ritten constitutions, as an exercise of constituent power, represent an original commitment by the people to be governed by certain fundamental laws and (to) live within a certain juridical structure.'[222]

[329] Robinson, Bulkan and Saunders[223], in what is essentially a commentary on the Belizean jurisprudence, warn however that: 'What the Belizean cases fail to do is offer clear guidance and restraints on when this exceptional power of judicial

[219] Ibid 89 – 90.
[220] Ibid 91 – 93.
[221] Ibid 94 – 96.
[222] Ibid 97.
[223] Tracy Robinson, Arif Bulkan, and Adrian Saunders, 'Fundamentals of Caribbean Constitutional Law', Sweet & Maxwell, (2015), [4-022] - [4-023].

review will be exercised; in other words, what is the threshold for the doctrine?'[224] (In the context of striking down constitutional amendments that satisfy procedural requirements but run afoul of the basic structure.) In this specific context, they seem to suggest that the basic 'deep' structure doctrine should only be invoked if a constitutional amendment 'amounts to a substantial threat' to these basic 'deep' structure constitutional values and principles. While that may be true in such instances, this is not a case of constitutional amendments. However, their caveat is important; the use of the basic 'deep' structure to review governmental action ought not to be lightly invoked, and is most justifiable when what is at stake is a serious threat to, or undermining of, fundamental and core constitutional values and principles.

(e) **Canadian Counsel**

[330] In the Canadian context, a similar interrogation has been undertaken by former Chief Justice Beverly McLachlin in the specific setting of unwritten basic 'deep' structure features, principles, and values.[225] Her answer is philosophically encapsulated by the following:[226]

> The contemporary concept of unwritten constitutional principles can be seen as a modern reincarnation of the ancient doctrines of natural law. Like those conceptions of justice, the identification of these principles seems to presuppose the existence of some kind of natural order. Unlike them, however, it does not fasten on theology as the source of the unwritten principles that transcend the exercise of state power. It is derived from the history, values and culture of the nation, viewed in its constitutional context.
>
> It rests on the proposition that there is a distinction between rules and the law. Rules and rule systems can be good, but they can also be evil. Something more than the very existence of rules, it is argued, is required for them to demand respect: in short, to transform rules into law. The distinction between rule by law, … and rule of law, … succinctly captures the distinction between a mere rules system and a proper legal system that is founded on certain minimum values. The debate about unwritten

[224] Ibid [4-023].
[225] The Rt Hon Beverley McLachlin, 'Unwritten Constitutional Principles: What is Going On?' Address given at the 2005 Lord Cooke Lecture Wellington, New Zealand 1 December 2005.
[226] Ibid 4 – 6.

constitutional principles can thus be seen as a debate about the nature of the law itself and what about it demands our allegiance.

[331] McLachlin also offers practical and concrete advice, like Bulkan, after surveying a corpus of case law, for identifying this basic 'deep' structure of unwritten constitutional principles: 'At least three sources of unwritten constitutional principles can be identified: customary usage; inferences from written constitutional principles; and the norms set out or implied in international legal instruments to which the state has adhered.'[227] Together, Bulkan and McLachlin offer a pragmatic framework that can serve as a guide to discovering which features, principles and values may constitute the basic 'deep' structure of Caribbean constitutions.

(f) **Rule of Law – Basic 'Deep' Structure**

[332] Based on the common themes in these criteria, which I consider apposite, and on the basis of the wealth of relevant case law, it is proper to assert that in Belize the rule of law, and in particular its requirements of fairness, good faith, accountability, and good governance, are part of the basic 'deep' structure of Belizean constitutionalism that appropriately sets the standards for evaluating the State's actions in this matter. The rule of law is essential to the integrity of the legal system in Belize.

[333] Reliance on *Nervais and Severin,* as precedent, is sufficient to legitimise my undertaking this evaluation. However, because this basis of review is grounded in an approach that is developing in Caribbean constitutional approaches to and applications of the rule of law, I thought it necessary to be transparent about my reasoning on the approach. I have therefore sought to ground this analysis in text, precedent, intent, custom, and policy. No doubt, over time the limitations of and opportunities for using the basic 'deep' structure doctrine as an instrument for judicial review of executive action will be refined and nuanced, including my own understandings. Law is both dialogical and evolutionary. It develops and unfolds

[227] Ibid 16.

over time. It aspires to do so responsibly and responsively. In that spirit, this opinion is very much intended to further advance this conversation, one that I consider especially important in Caribbean contexts.

Standards Demanded by the Rule of Law: Fairness, Good Faith, Accountability, and Good Governance

[334] In its most obvious configuration, the rule of law requires that all persons must obey the law, including public authorities bearing coercive powers. It means moreover that the exercise of those coercive powers must have a foundation in law. In the British common law traditions, the rule of law is considered to have been first codified in the Magna Carta, in 1215, when English nobles demanded that King John's powers to arbitrarily arrest or imprison them be curtailed.[228] Arbitrariness has always been considered anathema to the rule of law.

(a) Further Insights: Good Governance in Commercial Dealings

[335] As already alluded to, Canadian jurisprudence has recognised and validated this notion of rule of law as a basic 'deep' structure in written constitutions. Their Supreme Court jurisprudence sets out constitutional principles (including unwritten ones) that can be used to invalidate legislation and executive actions. Their courts have also invoked 'fundamental norms to trump written laws' and done so 'even if these "deep rights" were not in written form'. As explained, chief among these principles are the independence of the judiciary, constitutional review of executive action, and the rule of law.[229]

[336] As early as 1959, the Canadian Supreme Court had recourse to unwritten and presumed principles of fairness and good faith as bases for reviewing governmental action against private citizens that impacted commercial activity. Rand J explained: '[i]n public regulation of this sort there is no such thing as absolute and

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[228] The charter states that even the King had to follow the law: "No free man shall be taken, imprisoned, disseized, outlawed, or banished, or in any way destroyed, nor will he proceed against or prosecute him, except by the lawful judgment of his peers and the Law of the Land." William F. Swindler, 'Magna Carta: Legend and Legacy' Indianapolis: Bobbs-Merrill Co., 1965.

[229] *Roncarelli v Duplessis* [1959] S.C.R. 121; *Reference re Secession of Quebec* [1998] 2 SCR 217; The Rt Hon Beverley McLachlin, 'Unwritten Constitutional Principles: What is Going On?' Address given at the 2005 Lord Cooke Lecture Wellington, New Zealand 1 December 2005.

untrammelled discretion'; and further, that the absence of good faith 'would signalize the beginning of disintegration of the rule of law as a fundamental postulate of our constitutional structure.'[230] Similarly in 1998, albeit in the context of secession by a province, the Canadian Supreme Court affirmed that in relation to certain unwritten core principles (in this case, federalism, democracy, constitutionalism and the rule of law), 'it would be impossible to conceive of our written structure without them', and that these 'fundamental and organising principles of the Constitution' are 'not merely descriptive, but ... also invested with a powerful normative force, and are binding upon both courts and governments.'[231]

[337] Chief Justice Beverly McLachlin has also described the relationship between these fundamental norms and the legitimacy of democratic governance based on principles of good governance, human rights, and the rule of law:[232]

> Thus the legitimacy of the modern democratic state arguably depends on its adhesion to fundamental norms that transcend the law and executive action. This applies to all of the branches of state governance – Parliament, the executive and the judiciary. For example, the *Commonwealth Principles on the Accountability of and the Relationship Between the Three Branches of Government,* which were based on the Latimer House Guidelines of 1998 and endorsed by heads of government in 2003, state in Article 1:
>
> > Each Commonwealth country's Parliaments, Executives and Judiciaries are the guarantors in their respective spheres of the rule of law, the promotion and protection of fundamental human rights **and the entrenchment of good governance based on the highest standards of honesty, probity and accountability.**
>
> Rule of law. Human rights. Good governance. Principles that all branches of government, including the judiciary, must seek to uphold. Principles that may be written down, in some measure in some countries. But **principles that the Commonwealth countries have asserted should prevail everywhere**.[233]

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[230] *Roncarelli v Duplessis* [1959] S.C.R. 121, at 140 and 142.
[231] *Reference re Secession of Quebec* [1998] 2 SCR 217 at [50], [32], [54].
[232] The Rt Hon Beverley McLachlin, 'Unwritten Constitutional Principles: What is Going On?' Address given at the 2005 Lord Cooke Lecture Wellington, New Zealand 1 December 2005 at page 8.
[233] Ibid 9.

[338] Belize, as a sovereign State, has accepted as a core constitutional value, respect for and adherence to internationally accepted norms.[234] Good governance is one such normative standard. Belize has also expressly declared, in its Preamble, the rule of law as a core constitutional principle.[235] The rule of law, as the antithesis of arbitrariness, demands good governance. Turning once again to Chief Justice McLachlin:[236]

> The rule of law signifies that all actors in our society – public and private, individual and institutional – are subject to and governed by law. **The rule of law excludes the exercise of arbitrary power in all its forms.** It requires that laws … are applied consistently to each citizen, without favouritism, thus ensuring the legitimacy of state exercise of power.

(b) **International Norms**

[339] The rule of law is thus a principle of constitutional morality. The arbitrary exercise of constituted state power is therefore subject to this constituent morality. It is an international principle of the highest order for democratic societies. For example, the World Justice Project[237] identifies four core principles of the rule of law, which are intended as measurements of respect for the rule of law. They are as follows:

(a) Accountability - The government as well as private actors are accountable under the law.

(b) Just Laws - The laws are clear, publicized, and stable; are applied evenly; and protect fundamental rights, including the security of persons and contract, property, and human rights.

(c) Open Government - The processes by which the laws are enacted, administered, and enforced are accessible, fair, and efficient.

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[234] Clause (e), Cap. 4.
[235] Clause (d), Cap. 4.
[236] The Rt Hon Beverley McLachlin, 'Unwritten Constitutional Principles: What is Going On?' Address given at the 2005 Lord Cooke Lecture Wellington, New Zealand 1 December 2005, at page 13.
[237] The World Justice Project is an independent, multidisciplinary organization that engages advocates from across the globe and from diverse interests and disciplines, to advance the rule of law worldwide. Its mission is, "To build knowledge, generate awareness, and stimulate action to advance the rule of law." The World Justice Project's original research is grounded in its Rule of Law Index which is considered the world's leading source for original data on the rule of law. The 2020 edition presented a portrait of the rule of law in 128 countries and jurisdictions… The Index is intended to encourage policy reforms, guide program development, and inform research to strengthen the rule of law and have been cited by heads of state, chief justices, business leaders, and public officials, including coverage by more than 2,500 media outlets worldwide: https://worldjusticeproject.org/

(d) Accessible and Impartial Dispute Resolution - Justice is delivered timely by competent, ethical, and independent representatives and neutrals who are accessible, have adequate resources, and reflect the makeup of the communities they serve.

[340] Notice how accountability, equality, and respect for persons, contracts and property, as well as administrative fairness, feature as essential aspects of the rule of law. The rule of law, accountability, and transparency (open government) intersect to produce government that is legitimate. In a democracy, accountability and transparency are essential for public trust and confidence. In a democracy, based on the rule of law, it is now the expectation that all aspects of government ought to be appropriately accountable. This value and principle of accountability can broadly be said to refer to the idea that, generally, state decision makers are accountable for their actions. Thus, the constitutional value and principle of, even the right to, good democratic governance demand accountability of all public institutions and decision makers.

[341] In this regard, the Worldwide Governance Indicators[238] include six key dimensions of governance, of which the rule of law and accountability are two. As well, the United Nations Development Organization (UNDP)[239] has identified eight indicators of good governance, which incorporate the rule of law, accountability, transparency, and equity. These reputable, widely accepted and agreed to international standards, are therefore proper rule of law indicators of and even evaluative measures for State actions.

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[238] The Worldwide Governance Indicators (WGI) are a long-standing research project to develop cross-country indicators of governance. The WGI cover over 200 countries and territories, measuring six dimensions of governance starting in 1996: Voice and Accountability, Political Stability and Absence of Violence/Terrorism, Government Effectiveness, Regulatory Quality, Rule of Law, and Control of Corruption. These aggregate indicators combine the views of a large number of enterprise, citizen and expert survey respondents in industrial and developing countries. They are based on over 30 individual data sources produced by a variety of survey institutes, think tanks, non-governmental organizations, international organizations, and private sector firms: https://info.worldbank.org/governance/wgi/

[239] UNDP assists governments in strengthening their public institutions, to help countries fight corruption and support inclusive participation to ensure that no one is left behind. They support countries across a variety of contexts to enhance inclusive political processes and institutions. Some of their key engagements include: Civic engagement, Disability inclusive development, Electoral cycle support, Empowering youth, Fighting corruption, inclusive of political processes, Indigenous peoples, Parliamentary development and Women's equal political participation: https://www.undp.org/content/undp/en/home/2030-agenda-for-sustainable-development/peace/governance.html

[342] Indeed, section 68 of the Constitution of Belize expressly recognises this constitutional value and principle of good governance (albeit in the context of the legislature). Once it is accepted that a basic 'deep' structure feature of Belizean constitutionalism includes the rule of law as good governance, which incorporates the principles of fairness, good faith, reasonableness, and accountability, these become evaluative lenses for State actions. The concept of good governance therefore invites judicial review: it enables the raising of evaluative questions about proper procedures, the quality and process of decision making, fairness, good faith, and other such matters. In short, good governance demands accountability, and accountability justifies judicial review.

[343] Writing extra-judicially in 2006, Lord Bingham,[240] with whom this court aligned ideologically in *Nervais and Severin,* articulates eight principles that comprise the rule of law. He states, *inter alia*, that '**ministers and public officers at all levels must exercise the powers conferred on them reasonably**, **in good faith, for the purpose for which the powers were conferred and without exceeding the limits of such powers**',[241] and further, that 'adjudicative procedures provided by the state should **be fair'**.[242] Reasonableness, good faith, and fairness are thus normative rule of law good governance standards for review. Of these three, the 'good faith' principle may arguably have the broadest pedigree in relation to international agreements.[243] Indeed, good faith dealings between contracting parties speaks to the sanctity of contracts and is a basic presumption that parties are entitled to expect. It promotes trust and confidence and so facilitates effective, efficient, productive, and reliable commerce. It is an essential aspect of the rule of law in the context of commercial dealings.

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[240] Lord Bingham, 'The Rule of Law' The 6th Sir David Williams Memorial Lecture, Cambridge, 16 November 2006, available at https://www.cpl.law.cam.ac.uk/sites/www.law.cam.ac.uk/files/images/www.cpl.law.cam.ac.uk/legacy/Media/THE%20RULE%20OF%20LAW%202006.pdf [Accessed 14 May 2020].
[241] Ibid 23.
[242] Ibid 26.
[243] The Vienna Convention on the Law of Treaties, 1969, prescribes the ***'pacta sunt servanda'*** – agreements must be kept, principle of observance, as internationally normative for the interpretation and application of treaties. Article 26 states: 'Every treaty in force is binding upon the parties to it and must be performed by them **in good faith**.' It therefore declares and prioritises 'Good Faith' as an international principle and value that is central to and necessary for the due observance of treaties. Indeed, this is considered one of the oldest and most elementary and universal principles of international law. It speaks to the sanctity of contract. See also, David Berry, 'Caribbean Integration Law', Oxford, University Press, (2014), at 39, 215 '… agreements are binding and must be implemented in good faith.', 223 '… undertakings must be kept.'

(c) **CCJ Support**

[344] Douglas Mendes, in a paper presented at the CAJO Conference, Belize, in October 2019, expressed the view that this Court has been able to achieve a revolutionary elaboration of the rule of law concept. And, that it has done so "by infusing established fundamental rights and freedoms with precepts inspired by the rule of law and by establishing the rule of law as a virtual supra-constitutional principle operating along with and indeed in spite of the Bills of Rights."[244] He is right in his analysis.

[345] In the *Attorney General of Barbados v Joseph & Boyce,*[245] Wit JCCJ, writing in 2007, stated that, (in Barbados) the rule of law 'imbued the Constitution with other **fundamental requirements such as rationality, reasonableness, fundamental fairness and the duty and ability to refrain from and effectively protect against abuse and the arbitrary exercise of power**.' Indeed, Wit JCCJ described the Barbados constitution as 'undoubtedly a qualitative and normative' document, the text of which included the preambular value of the rule of law and its corelates (above), which, in his opinion, 'breathe ... life into the clay of the more formal provisions in that document.' [246]

[346] About a decade later, in 2016, in *Lucas v Chief Education Officer,*[247] Saunders JCCJ (as he then was) adopted Justice Wit's formulation of the protection of the law, based upon the precepts of the rule of law, which demands that there be 'access to appropriate avenues to prosecute, and effective remedies to vindicate, any interference with…rights', and also afforded **'adequate safeguards against irrationality, unreasonableness and unfairness or arbitrary exercise of power'**.

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[244] Douglas Mendes, 'The Caribbean Court of Justice and the Rule of Law', Presented at the Caribbean Association of Judicial Officers (CAJO) Conference in Belize City, Belize, on 31 October 2019. This section has drawn appreciatively from this analysis.
[245] *Joseph and Boyce v Attorney General* [2006] CCJ 3 at [20], [2007] 4 LRC 199 at [314].
[246] *Joseph and Boyce v Attorney General* [2006] CCJ 3 at [18], [19]; Tracy Robinson, Arif Bulkan and Adrian Saunders, 'Fundamentals of Caribbean Constitutional Law', Sweet & Maxwell, (2015), at [6-028].
[247] *Lucas v The Chief Education Office et al* [2015] CCJ 6 (AJ), [2016] 1 LRC 384.

[347] Then later that same year, in the *Maya Leaders Alliance* case,[248] the CCJ unanimously approved of Justice Wit's formulation of the protection of the law, which it insisted was 'grounded in fundamental notions of the rule of law.' However, the court went even further to hold that the protection of the law, founded on the rule of law, imports an obligation to adhere to international law commitments.[249]In so holding, the Court referred with some measure of approval to Lord Bingham's delineation of the principles of the rule of law as including compliance with a state's obligations in international law.[250]

[348] While these approvals of Wit JCCJ's reflections on the rule of law were happening, two further developments occurred. In 2014, *BCB Holdings Ltd. v AG*[251] decided that the enforcement of a foreign arbitral award could be denied on the basis that the rule of law, which prohibits the executive branch of government from appropriating the legislature's law-making functions, had been breached. And, in 2017, in *Bar Association of Belize v Attorney General,*[252] the court stated that "unwritten constitutional principles may … limit the power of the (parliament) to amend the Constitution …".

[349] In 2018, this Court gave its decision in *Nervais and Severin*,[253] already referred to above. And in 2019, it delivered the seminal decision in *Mc Ewan v Attorney General*.[254] In Mc Ewan, the Court declared the rule of law to be a core constitutional principle, effectively cementing it as a part of the basic 'deep' structure in Caribbean constitutionalism.[255] This led to the Court rendering a cross-dressing law in Guyana unconstitutional on the ground that it violated core aspects of the rule of law.[256]

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[248] *Maya Leaders Alliance v Attorney General of Belize* [2015] CCJ 15 (AJ), [2016] 2 LRC 414, [47].
[249] Ibid [58].
[250] Ibid [52].
[251] [2014] 2 LRC 81.
[252] *Bar Association of Belize v Attorney General* [2017] CCJ 4 (AJ), [2017] 2 LRC 595 at [50]. Restated in *Nervais v The Queen and Severin v The Queen* [2018] 4 LRC 545 [74].
[253] *Nervais v The Queen and Severin v The Queen* [2018] CCJ 19 (AJ), [2018] 4 LRC 545 [74].
[254] *McEwan, Clarke, Fraser, Persaud and SASOD v Attorney General of Guyana* [2018] CCJ 30 (AJ).
[255] Ibid [51].
[256] Ibid [85].

[350] Thus, this Court has since its inception sought to solidify its stance that, inherent in the constitutional frameworks of our so-called Westminster-derived constitutions are unwritten constitutional principles;[257] features, principles, and values that are constitutive and so form part of the basic 'deep' structure of these constitutions. Of these, one such principle and value is the rule of law, manifesting as a necessary safeguard against irrationality, unreasonableness, unfairness, and the abuse and arbitrary exercise of executive power. What was, in *Joseph*, '… an emerging idea that the rule of law, is a foundational constitutional norm that pervades the entire constitution',[258] has crystallized into a concrete principle.

[351] Mendes appropriately counsels: 'Let us accept then that the CCJ appears headed, if it has not already gotten there, to the acceptance of core constitutional principles rooted in a substantive conception of the rule of law, which stands above the Constitution but is nevertheless an integral part of its supreme architecture.'[259] And Dr. Lee Cabatingan has perceptively observed, 'we can see that the CCJ's work contributes to the rule of law in the region by inviting the region to believe that it has its *own* law, by suggesting that this law should be followed because it is not law from the outside, but *law from the inside*, and, importantly, that this law is, by many measures, worthy of respect and obedience'[260]. In all of this, the CCJ is using the rule of law as 'a tool for building Caribbean constitutional faith and identity'[261], and in so doing forging a truly Caribbean jurisprudence, one that is relevant to the needs and fulfils the aspirations of Caribbean peoples. Indeed, and most recently, it has been said that the CCJ in its rule of law jurisprudence is functioning as a 'decolonizing Instrument', a role judged to be necessary.[262] Considering this, were

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[257] *Bar Association of Belize v Attorney General* [2017] CCJ 4 (AJ), [2017] 2 LRC 595 at [50].
[258] Tracy Robinson, Arif Bulkan and Adrian Saunders, 'Fundamentals of Caribbean Constitutional Law', Sweet & Maxwell, (2015), at [6-028].
[259] Douglas Mendes, 'The Caribbean Court of Justice and the Rule of Law', Presented at the Caribbean Association of Judicial Officers (CAJO) Conference in Belize City, Belize, on 31 October 2019.
[260] Lee Cabatingan., 'Developing Caribbean Jurisprudence', Presented at the Caribbean Association of Judicial Officers (CAJO) Conference in Belize City, Belize, on 31 October 2019.
[261] Se-shauna Wheatle,'The Rule of Law in the Caribbean Court of Justice', Presented at the Caribbean Association of Judicial Officers (CAJO) Conference in Belize City, Belize, on 31 October 2019. See also, Se-shauna Wheatle & Yonique Campbell (2020): Constitutional faith and identity in the Caribbean: tradition, politics and the creolisation of Caribbean constitutional law, Commonwealth & Comparative Politics, DOI: 10.1080/14662043.2020.1773637.
[262] Gabrielle Elliott-Wiliams (2019) The CCJ decolonizing Caribbean constitutionalism, Commonwealth Law Bulletin, 45:4, 742-751, DOI: 10.1080/03050718.2020.1744461.

the actions of the State in this matter contrary to the basic 'deep' structure of the rule of law as embedded in Belizean constitutionalism and as explained above?

Failure to Meet the Standards of Belizean Rule of Law Constitutionalism

(a) State Accountability: The Intersection of Public and Private Law

[352] Two fundamental constitutional principles feature in this aspect of the analysis: the principles of sovereignty and supremacy. The Belizean Constitution affirms in section 1, that Belize is a 'sovereign democratic State', and in section 2, that '[t]he Constitution is the supreme law… and if any other law is inconsistent with (it) that other law shall, to the extent of the inconsistency, be void'.

[353] To understand, interpret and apply the meanings of sovereignty and supremacy, historical context is important. Belize was a former colony. It was ruled from the outside. The assertion of sovereignty is a declaration of internal self-governance in which the People of Belize are sovereign. It is their will alone, their consent freely given, that is determinative of what is constitutive of the State of Belize (supra [300]). The first and paramount non-derogable basic 'deep' structure principle in Belize is thus sovereignty, and sovereignty in the framework of democratic self-governance. The declaration of supremacy, of the Constitution itself, and of Belizean basic 'deep' structure constitutional features, principles, and values, must therefore be fully appreciated in the context of this democratic sovereignty.

[354] However, the real import of the conjoint effect of these two principles, for the purposes of this case, is to deem all law that is inconsistent with both the text and basic structures of Belizean constitutionalism void to the extent of those inconsistencies (*Nervais and Severin*); and, *a fortiori*, all State actions that are similarly inconsistent. In this particular constitutional context, the greater includes the lesser, or put another way, the whole includes its parts. If laws passed by the legislature can be struck down as unconstitutional and outwit constitutional legitimacy, conceivably so can State actions which are always assumed to be premised on legality and lawfulness; that is to say, on constitutional propriety.

Thus, the intersection between public constitutional law and private contract law in a case such as this one.[263]

[355] Albert Fiadoje,[264] has aptly stated:

> In West Indian Public Law, … the rule of law has come to mean the exercise of State power according to law and the subjugation of State power to the constitution. The phrase, 'the rule of law' is thus a useful compendium to define the bundle of citizen's rights or legitimate expectations to hold the State accountable for its actions.

And, Robinson, Bulkan and Saunders have opined:

> Constitutional supremacy is an authoritative statement that both ordinary laws and the administration of the government must be subordinated to the rules and principles of the constitution.[265]

What then of the State's actions in this case?

[356] In this case, the substance of the contract entailed setting up both Registries, IBCR and IMMARBE, which were State businesses and State agencies. In these kinds of dealings, including the formality of entering into, suspending, or terminating, as well as all ongoing relationships arising out of such contracts, the State has a special duty to deal with contracting parties in good faith, fairly, and reasonably. This is because the State is bound to uphold the rule of law as a substantive concept of the basic 'deep' structure doctrine enshrined in our Caribbean democratic constitutions. Thus, the State is obliged to treat with contracting parties fairly, honestly, openly and with full disclosure of pertinent matters – in good faith. This is all in service of the overriding aims of good governance (including in public-private administrative arrangements), which necessitates integrity in governance, and achieving the common good and best interests of the State for the benefit of the People. The Government of Belize is no exception.

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[263] Tacy Robinson, Arif Bulkan, and Adrian Saunders, *Fundamentals of Caribbean Constitutional Law*, Sweet & Maxwell, (2015), at [5-001 to 5-002]; 'Judicial review is an incident of the supremacy of the constitution and in turn it anchors the supremacy of the constitution.'
[264] Albert Fiadjoe, *'Commonwealth Caribbean Public Law'*, New York, NY: Routledge-Cavendish. Third Edition (2008).
[265] Robinson, Bulkan, Saunders, 'Fundamentals of Caribbean Constitutional Law', Sweet & Maxwell, (2015), at [4-003].

(b) **Building on Burgess JCCJ**

[357] Burgess JCCJ has made the following findings that are relevant to this discussion. Firstly, that the State, as it turns out quite ironically, relied on the *ex turpi causa* (illegality) defence – that justice (a court) will not assist a person whose cause of action relies on an immoral or illegal act.[266] This approach to litigation is at heart a public policy position taken by the courts *('ex dolo malo non oritur actio*'),[267] and in this case its basis was in alleged statutory illegality. This principle has been relied on to render unenforceable contracts that are contrary to public policy, and to protect the integrity of the just application of the law.[268] I agree with Burgess JCCJ that in the circumstances of this case, this defence does not benefit the State; and I also agree with Burgess JCCJ, that a suitable 'range of factors' test is an appropriate test for Caribbean jurisdictions.[269] In my opinion, his compelling exposition advances the quest for a relevant and reliable Caribbean jurisprudence in this area of the law, an area that has been in flux for some time throughout common law jurisdictions.

[358] Secondly, that all three arguments advanced by the State to support its illegality defence fail (*supra* [316]).[270] Dealing with each of these three arguments, Burgess JCCJ made the following determinations. First, the 1993 Agreement did not contravene the fundamental intent and purpose of section 114 of the Constitution (though there may have been formal non-compliance with certain requirements). In this regard it was determined that:

(i) The purpose of section 114 was to facilitate proper parliamentary oversight (accountability and transparency) of executive spending, and to do so practically through the agency of the Auditor General. That in the circumstances of this matter, that purpose would not be

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[266] See Burgess JCCJ at [140], [180] - [186].
[267] That is: *'no right of action can have its origin in fraud'*.
[268] *Holman v Johnson* (1775) 1 Cowp. 341 at 343.
[269] See Burgess JCCJ at [238], [240] – [241], [247]. I reserve my own detailed discussion on why this is so and on its justifications for another occasion if that becomes necessary.
[270] See Burgess JCCJ at [248], [285], [290], [294].

enhanced by denying BISL's claim, because, (a) the provisions of the 1993 Agreement placed control of the relevant accounts under the Auditor General and therefore provided the accountability and transparency that section 114 required, (b) the responsibility to ensure compliance with section 114 of the Constitution was with the Government throughout, and to deny BISL's claim would be to reward the Government for any failures to carry out its constitutional obligations, and (c) since section 114 did not impose any sanctions for non-compliance, doing so in relation to BISL would not be aligned with parliamentary policy.[271]

(ii) There was no other public policy that BISL has breached which would undermine the integrity of the legal system. In particular, (a) BISL was engaged by the Government, in furtherance of its objective to diversify the Belizean economy, and that agreement was for a lawful purpose, (b) BISL at all times in its dealings with the Government complied with the terms of the contract, and (c) there was no wrongful conduct established in relation to the performance of the contract on the part of BISL. In the circumstances, there was no undermining of the integrity of the legal system caused by allowing BISL's claim; however, and conversely, denying BISL's claim would compromise the integrity of the legal system, by appearing to encourage the Government to enter into contracts carelessly, reap the rewards, and then withdraw from them with impunity and with disregard for the interests of third parties.[272]

(iii) Denying the contract would be a wholly disproportionate response in the circumstances of this case, because any wrongful conduct by BISL was, (a) at its highest an innocent breach of section 114, (b) in any event neither serious, substantial, or central to the contract, and

[271] See Burgess JCCJ at [259], [262] - [263], [265] - [266].
[272] See Burgess JCCJ at [270] - [271], [273], [275].

(c) indisputably unintentional. In terms of relative culpability, BISL's conduct was faultless and blameless, but the same was not true with respect to the Government's behaviour.[273]

[359] Second, the 2005 Extension did not contravene the Financial Orders 1965. The State's argument was dismissed out of hand as unmeritorious.[274] Further, it was determined positively that the 2005 Extension did not contravene the Financial Orders.[275]

[360] Third, the 2005 Extension was made with proper authority. The State's argument was also dismissed as unmeritorious, in circumstances where the 1993 Agreement was made for a lawful purpose and in the national interest. It was also determined positively that the 2005 Extension was duly executed on behalf of the State by the Prime Minister and the Attorney General.[276]

(c) A Commercial Coup D'état

[361] In this matter the undisputed facts and findings of this court are, that the 2005 Extension was duly agreed to in writing by the Government and BISL, pursuant to clause 20 (1) of the 1993 Agreement, and executed for consideration paid to and received by the State in the sum of US$1.5 million. The 2005 Extension was therefore always an "alteration" of the existing contract duly executed in 1993 for a proper purpose and for the benefit of the State; and which had itself been duly and favourably performed for over a decade, to the mutual benefit of all parties, and with substantial compliance with all relevant laws.

[362] Thus, the legality of the 2005 Extension, pursuant to the express terms of the 1993 Agreement, was always indisputable. Yet the State sought to, (a) terminate the 2005 Extension in a manner that was both arbitrary and high-handed, without any proper basis and by an abuse of executive power (what I have described above as a

[273] See Burgess JCCJ at [281] - [284].
[274] See Burgess JCCJ at [287] - [289].
[275] See Burgess JCCJ at [290].
[276] See Burgess JCCJ at [294].

governmental and administrative *coup d'etat* of the Registries), (*supra* [314]) and (b) in doing so, to effectively ruin BISL's interests and investments in this joint commercial enterprise.

[363] The Government's main argument was premised on section 114 of the Constitution. The essence was that any monies collected by the Government ought to have gone into the Consolidated Revenue Fund (CRF). As Burgess JCCJ explains, this technical failure was not fatal, and in fact the monies were collected and dealt with as agreed, and in substantive compliance with the underlying purposes of section 114. At all material times, the Government had administrative control of the Registries. Further, at all times the Government had, pursuant to the 1993 Agreement, as extended, rights of access over the management and control of IMMARBE and IBCR. Despite this and having regard to the main contract which made provisions for amendments,[277] no approach was made by the Government to BISL to propose any changes that it considered appropriate to achieve this objective of having monies paid directly into the CRF. Indeed, a simple amendment could very likely have rectified this issue regarding where the monies collected ought to be paid if this was in truth and in fact what the Government genuinely wanted to correct.

(d) **Wasted Opportunities**

[364] The Government was always empowered to invoke Clause 20, which made provisions for the 1993 Agreement to be amended or supplemented by an agreement in writing between the parties. The rule of law imperatives of good faith, reasonableness, fairness, and good governance, created a *prima facie* duty on the Government to at the very least enter into full disclosure discussions with BISL, to try and resolve the legal issues that formed the basis of its concerns (and ultimately of this litigation). On the facts before this court, it appears that the issues raised by

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[277] Clause 20 of the 1993 Agreement expressly stated that, *"This Agreement may only be amended or supplemented by agreement in writing between the parties. If any provision of this Agreement is unenforceable or invalid, it shall not affect the enforceability or validity of any of the other provisions."*

the Government were all capable of being resolved with relatively minor changes or amendments, to the existing 1993 Agreement.

[365] In this regard, it is significant that the evidence shows that the Government did not respond to the Morgan & Morgan letter dated 24 May 2013, written by Morgan & Morgan on behalf of BISL to the Prime Minister right before the State's June 2013 takeover of the Registries.[278] By that letter BISL was seeking to meet and treat with the issues raised by the Government and to have them resolved amicably. The point is, to the extent that the Government raised these issues, and the information sought was provided by BISL acting in good faith, that the Government there and then had an opportunity and a duty to extend its hand in mutual good faith and enter into amicable discussions. However, no response from the Government was forthcoming. Instead, there was swift action towards unilateral takeover. It is therefore significant that the Government communicated its intention to take control of the Registries on the 11th June 2013, by letter dated 4 June 2013, disregarding entirely the Morgan & Morgan invitation of the 24th May 2013.

[366] Clause 20 of the 1993 Agreement provided a means to resolve and remedy all the Government's concerns. Instead, the Government sought to use the law as a sword to cut BISL entirely out of the 1993 Agreement; and not have resort to a scalpel, to remedy any concerns it had with respect to the existing legal arrangements for and management of the funds collected by the Registries.

[367] Furthermore, no attempts were made by the Government to invoke Clause 14 of the 1993 Agreement,[279] which provided for arbitration of any dispute arising out of the provisions of the contract. This clause evidences the contractual intention of the parties, to strive to arrive at amicable agreements whenever contractual or other

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[278] The letter referred to was annexed as 'Tab 17' to the Affidavit of Mr Juan David Morgan, dated the 8 June 2015 and filed in this Court on 1 October 2019, (page 1438 of the record). In this letter, at paragraph 2, they wrote, *"…We, at the Morgan and Morgan Group, would welcome the opportunity to meet with you at your earliest convenience to discuss the performance of IBCR & IMMARBE and our ideas for future growth of Belize's offshore industry and shipping register. We know you have a busy schedule, so we can be on stand-by to fly to Belize to meet with you when you are available."* In the said Affidavit, Mr Morgan deposed at paragraph 47 that, *"…No reply was received to this correspondence…"*, (page 1352 of the record).

[279] Clause 14 of the 1993 Agreement stated that, *"Each of the parties to this Agreement agrees that in the event any dispute between them relating to the provisions of this Agreement which remains unresolved for a period of more than 60 days then that dispute shall be settled in accordance with the Arbitration Act of Belize. Arbitration procedures shall be conducted in Belize."*

disputes or issues arose between them. Hence, the intention of the parties was also that recourse to litigation and /or pre-emptive repudiation of the contract (by taking control 'forcefully') ought to have been a last resort and not an anticipatory or unilateral step. Acting in good faith, in furtherance of good governance, would have dictated that the 'new' Government invoke these mechanisms and at the very least ensure that due process was adhered to prior to opting at the very first instance to bring the contract to an end.

(e) **Fatal Omissions**

[368] In these circumstances, the omissions by the Government to take any reasonable steps to try and resolve its issues with BISL collaboratively and amicably, together with its unilateral and high-handed actions to take over the Registries were contextually arbitrary, inconsistent with the standards of good governance, in breach of the duty of good faith, contractually unreasonable, fundamentally unfair, an abuse of State power, and therefore contrary to the rule of law. Taken together these all constitute a serious threat to, and undermining of, fundamental and core constitutional values and principles. They also weaken the integrity of the legal system, especially if the government is permitted to enjoy exemption from its failure to comply with its rule of law obligations in this case. And as well, left unaccounted for they diminish constitutional faith and public trust, and hence democratic legitimacy.[280]

[369] As a direct result of the Government's actions, BISL, through no fault of its own, was deprived of its share of the income that it would have received between June 2013 and June 2020, had the Government not arbitrarily, unreasonably, unlawfully, and forcibly taken control of the Registries. It has suffered great loss and damage. For this the Government must be held accountable. Which raises the question, how so?

[280] See, Se-shauna Wheatle & Yonique Campbell (2020): Constitutional faith and identity in the Caribbean: tradition, politics and the creolisation of Caribbean constitutional law, Commonwealth & Comparative Politics, DOI:10.1080/14662043.2020.1773637.

[370] Using State power arbitrarily, unreasonably, and/or unlawfully in the commercial sphere erodes trust and confidence in doing business with government. Such actions impair the credibility of the State and undermine public, private, and international faith and assurance in the political and economic conditions for doing business in a jurisdiction. They are injurious economically and developmentally.[281]

[371] This is not to say that democratically elected governments are not free to establish their own policies, and to change, or withdraw from existing ones. Indeed, all democratically elected governments have the power to make changes to agreements made by previous governments. If they cannot legitimately do so, then their predecessors can control policy decisions beyond the terms of their democratic and constitutionally legitimate mandates. Such a situation is not consistent with representative democracy. However, the precepts of the doctrine of the rule of law mandate that governments seeking to alter contractual arrangements with third party private entities, are constitutionally bound at all times to do so in good faith, fairly, justly, reasonably, and in keeping with the standards of good governance.

[372] The Government has failed in this regard. It has not met the standards of the rule of law that govern commercial arrangements in a case such as this one. It had at its disposal mechanisms to adequately address the issues complained of about in the 2005 Extension and the 1993 Agreement, without having to resort in the first instance to what has turned out to be a failed legalistic justification for its actions. Actions that have been adjudged also as constitutionally immoral, in the sense that they have failed to meet the standards set for compliance with the basic 'deep' structure principle and value of the rule of law. These failures can sound in concrete remedies, as in this case they should, and as agreed by this entire panel.

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[281] See, Declaration of the High-level Meeting of the 67th Session of the General Assembly on the Rule of Law at the National and International Levels, A/RES/67/1, 30th November, 2012, paragraph 7, 'We are convinced that the rule of law and development are strongly interrelated and mutually reinforcing, that the advancement of the rule of law at the national and international levels is essential for sustained and inclusive economic growth, sustainable development …'; paragraph 12, 'We reaffirm the principle of good governance and commit to … the rule of law …'. And see, Thom Ringer, Development, Reform, and the Rule of Law: Some Prescriptions for a Common Understanding of the "Rule of Law" and its Place in Development Theory and Practice, 10 Yale Hum. Rts. & Dev. L. J. (2007), 'Thus, at a minimum, a conception of the rule of law compatible with the capability approach to development … must accord intrinsic respect to at least the most basic "instrumental freedoms": … and "(3) transparency guarantees, "the freedom to deal with one another under guarantees of disclosure and lucidity." (citing Amartya Sen, Development as Freedom, 38 (2001).)' See also, Sir Shridath Ramphal, 'Development and the Rule of Law', (1981) 7 Commonwealth LB 1085, at 1094, 1096, the rule of law is essential to sustainable development.

Remedies

[373] In these circumstances, I am in full agreement with all the relief granted by Burgess JCCJ.[282] -In particular, I agree that damages are due and payable to BISL.

[374] In the context of this opinion there are no good reasons why damages should not in principle be awarded, once: (i) a sufficiently serious breach of the rule of law is established (as it has been), (ii) there is a clear causal link between the breach and any damages suffered (as appears on the face of it to be the case), and (iii) those damages are sufficiently proximate to the breach and proven.

[375] However, and in any event, the salient import of this opinion in the circumstances of this case, is that the State's defence cannot stand. It cannot stand because: (i) the conduct of the State has not met the rule of law standards of good governance, (ii) these failures constitute a serious threat to, and undermining of, fundamental and core, basic 'deep' structure constitutional values and principles, and as well because (iii) the particular illegality defence it has raised is of no avail given a Caribbean range of factors approach to State contracts, in which constitutional propriety can be a significant consideration. In relation to this third aspect, Burgess JCCJ has demonstrated that there was no substantive constitutional impropriety on the part of BISL, whereas and contrariwise (as I have sought to show), there has been significant constitutional impropriety committed by the State. The result is that under the public policy evaluation step, as explained by Burgess JCCJ,[283] and arguably even under the proportionality step,[284] the integrity of the legal system will be compromised by allowing the government to enjoy exemption from its failure to comply with its rule of law obligations in this case. Thus, this analysis also clears the way for the appellant's suit to succeed. Damages are therefore appropriately due, to be assessed by the courts below.

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[282] See Burgess JCCJ at [298]

[283] Burgess JCCJ, [211], [254], [268] – [269].

[284] Burgess JCCJ, [280], the four considerations that assist in making the proportionality assessment are, "the seriousness of the conduct, its centrality to the contract, whether it was intentional, and whether there was marked disparity in the parties' respective culpability." (citing Lord Toulson in *Patel v Mirza*.) See also, Burgess JCCJ, [281] to [285].

[376] Maybe, and in quite a curious and metaphorical way, the policy doctrine '*ex turpi causa non oritur actio*'[285] does apply in this case after all! Indeed, and again more philosophically, the requirements of the rule of law would not easily have it otherwise in these circumstances.

Disposal

[377] The Court orders that:

a. The appeal is allowed;

b. Damages are awarded to the Appellant for the Respondent's breach of the 1993 Agreement as extended by the 2005 Extension;

c. The matter is remitted to the Supreme Court of Belize for assessment of damages;

d. Costs awarded to the Appellant, to be taxed in default of agreement and certified fit for two Attorneys-at-Law.

/s/ J Wit

The Hon Mr Justice J Wit

/s/ W Anderson

The Hon Mr Justice W Anderson

/s/M Rajnauth-Lee

The Hon Mme Justice M Rajnauth-Lee

/s/A Burgess

The Hon Mr Justice A Burgess

/s/P Jamadar

The Hon Mr Justice P Jamadar

[285] Latin, *'from a dishonourable or disreputable cause an action does not arise'*.