IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction

ON APPEAL FROM THE COURT OF APPEAL OF BELIZE

CCJ Appeal No. CV8 of 2012
BZ Appeal Nos. 7, 9 and 10 of 2011

BETWEEN

THE ATTORNEY GENERAL OF BELIZE	**Appellant**

AND

PHILIP ZUNIGA **DEAN BOYCE** **KEITH ARNOLD** **MICHAEL ASHCROFT** **JOSE ALPUCHE** **PHILIP OSBORNE** **EDIBERTO TESUCUM**	**Respondents**

AND

BCB HOLDINGS LIMITED **THE BELIZE BANK LIMITED** **PHILIP JOHNSON** **KEN ROBINSON** **THANET FINANCIAL SERVICES LIMITED** **THE SWAN AT WESTGATE LTD** **JACDAW INVESTMENTS LIMITED** **SHAUN BREEZE** **DAVID HAMMOND** **JOHN LAMBIE** **PAUL BIFFEN**	**Interested Parties/ Respondents**

Before The Honourables	**Mr Justice Nelson** **Mr Justice Saunders** **Mr Justice Wit** **Mr Justice Hayton** **Mr Justice Anderson**

Appearances

Mr Denys Barrow SC and Ms Iliana Swift for the Appellant

Mr Edward Fitzgerald QC and Ms Priscilla Banner for the Respondents

Mr Edward Fitzgerald QC holds for Lord Goldsmith QC and Mr Godfrey Smith SC for the Interested Parties/Respondents

JUDGMENT
of
The Honourable Justices Nelson, Saunders and Hayton,
Delivered by
The Honourable Mr Justice Adrian Saunders
on the 24th day of January 2014
and
JUDGMENT
of The Honourable Justices Wit and Anderson

JUDGMENT OF THE HONOURABLE JUSTICES NELSON, SAUNDERS AND HAYTON

The nature of the proceedings

[1] This appeal and the respective cross-appeals concern the constitutionality of two Amendment Acts passed by the Parliament of Belize. Throughout this judgment we refer to this legislation as "the Acts" or sometimes "the Act" or "the legislation". The first of the two Amendment Acts was enacted in April 2010, the other in October, 2010. Each of them amended the Supreme Court of Judicature Act[1] ("the principal Act"). The first Amendment Act[2] added a new section, 106(A), to the principal Act. The Long Title of this first Act states its purpose as "An Act to amend the Supreme Court of Judicature Act … to strengthen the

[1] Cap 91, Laws of Belize, Revised Edition 2000 - 2003
[2] Supreme Court of Judicature (Amendment) Act, No. 18 of 2010

provisions relating to contempt of court; and to provide for matters connected therewith or incidental thereto". The second Amended Act[3] amended both the principal Act as well as the first Amendment Act. Its Long Title identifies it as "An Act to … clarify the law as to the ingredients of the offence of criminal contempt of court; to make provision for mitigation of penalties in the case of natural persons in certain extenuating circumstances; to specify the rules Governing Trial on Criminal Information and Complaint; and to provide for matters connected therewith…". Throughout this judgment, unless otherwise indicated, we shall treat with and examine the Acts as if they were consolidated into the principal Act.

[2] The new section 106(A) contains 16 sub-sections. In substance, these sub-sections: create the offence of knowingly disobeying or failing to comply with an injunction (in particular an anti-arbitration injunction); prescribe severe penalties for persons convicted of this offence, including mandatory minimum penalties; and provide for a range of ancillary matters.

[3] No sooner were they enacted than the Acts were challenged by the two groups of litigants who are the respondents to the main appeal in these proceedings. Purely for ease of reference, we refer to these groups respectively as the Zuniga group and the BCB Holdings group and we lump both groups together as "the challengers". At the time their challenge was mounted members of these groups feared that the legislation posed considerable, serious and immediate risks to their respective interests and accordingly, they instituted these proceedings against the Attorney General. With the passage of time and, in particular, given the judgment of this Court in a related suit,[4] these fears have substantially diminished. The legal issues raised by the appeal are still, however, of significant constitutional

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[3] Supreme Court of Judicature (Amendment) No 2 Act, No. 19 of 2010

[4] *British Caribbean Bank Ltd v The Attorney General of Belize* [2013] CCJ 4 (AJ), (2013) 82 WIR 63.

importance and the challengers retain their anxieties about the constitutional validity of the Acts.

[4] Having heard the challenge to the first Act (the second Amendment Act was not yet passed when the challenge to the first was initially mounted), Muria J found that, save for sub-sections 8, 9 and 12, the remaining sub-sections of section 106(A) were valid. The challengers appealed this finding. For his part, the Attorney General cross-appealed the finding that sub-sections 8, 9 and 12 were invalid. The Court of Appeal considered each of the 16 sub-sections and Mendes JA delivered a careful, painstaking judgment with which the other members of that court agreed. The Court of Appeal held that sub-sections 3 and 5 violated the Constitution; that the impact of this violation automatically rendered also invalid sub-sections 1, 2, 4, 6, 7, 10, 11, 12, 13 and 16 (all of which were, in their own right, otherwise found constitutionally unimpeachable) and that therefore, of the 16 sub-sections, all were ultimately to be struck down save sub-sections 8, 9 and 15. The Attorney General has appealed this judgment to this Court. Likewise, the Zuniga group and the BCB Holdings group have each cross-appealed the opinion of the court below that sub-sections 8, 9 and 15 are constitutionally valid.

The background

[5] The judgment of the Court of Appeal set out in very helpful detail the factual background giving rise to the passage of the Amendment Acts and the bringing of the proceedings. In doing so, that court also found and commented upon certain material facts. Since there is no challenge to the manner in which the Court of Appeal performed this exercise, it is unnecessary for this Court to approach the task of providing the background in as full or lengthy a manner as did Mendes JA. It is sufficient to indicate the following.

[6] The present Government of Belize has had a series of continuing disputes with members of both the Zuniga and the BCB Holdings groups. These disputes relate

back to an "Accommodation Agreement" entered into in 2005 between Belize Telemedia Limited ("Telemedia") and the former Government. It is unnecessary for the purpose of this appeal to enter into the details of this Accommodation Agreement. It suffices merely to note that under the agreement the then Government granted certain financial concessions, assurances and inducements to Telemedia.

[7] Upon assuming office in 2008, the present Prime Minister disavowed the Accommodation Agreement. He flatly stated that his Government would not be bound by its terms. His conception of, and vigorous opposition to, the Agreement is well captured in his resolve, uttered in Parliament, "That an agreement so patently illegal, so patently immoral, so patently anti-Belize, should continue to torture us, to bleed us, to subject us to death by a thousand cuts cannot for one second more be countenanced".

[8] The Accommodation Agreement contained an arbitration clause. When the Government repudiated the Agreement, Telemedia invoked this clause. The London Court of International Arbitration ultimately, on 18th March 2009, awarded damages against the Government in the sum of BZ$38.5 million for breach of the Agreement. Telemedia assigned this award to the Belize Social Development Limited (BSDL). The Prime Minister is recorded as having vowed in the House of Representatives "as God is my witness I will never pay that award". The Government obtained an injunction from a High Court Judge of Belize restraining Telemedia and BSDL from enforcing the award. Despite the existence of the injunction, BSDL commenced proceedings in the United States to enforce the award.

[9] Throughout the series of events relating to the fall-out from the Accommodation Agreement, the Prime Minister consistently cast matters in terms of a battle between his government and Lord Michael Ashcroft, a member of the Zuniga

group. There is evidence to suggest that, at one time, the Prime Minister believed that Lord Ashcroft owned the bulk of the shares in Telemedia. The Government's next move was to pass legislation acquiring 94% of the shares in Telemedia. In fact, although Mr Zuniga and other members of the Zuniga group, including Lord Ashcroft, were indeed at the time directors or officers of Telemedia or persons with *some* interest in Telemedia, 71% of the shares were owned by Dunkeld International Investment Limited ("Dunkeld"), a Turks & Caicos Island company wholly owned by Hayward Charitable Belize Trust ("the Hayward Trust").

[10] The process of acquiring the Telemedia shares has been far from smooth. The tremendous legal disputes are still on-going. In the first instance, the constitutionality of the acquisition was challenged by Dean Boyce (another member of the Zuniga group) and by British Caribbean Bank Limited ("BCBL"), a Turks and Caicos Islands registered institution and a wholly owned subsidiary of BCB Holdings Ltd. The courts of Belize declared the acquisition to be unconstitutional but the Government subsequently enacted fresh legislation for the re-acquisition of the shares. The constitutionality of the re-acquisition is still wending its way through the courts.

[11] There exists a bilateral investment treaty between the Government of the United Kingdom and the Government of Belize prohibiting the nationalisation or expropriation of investments except for specified purposes and upon payment of just and equitable compensation. Dunkeld responded to the acquisition of its shares by invoking the arbitration clause contained in this bilateral investment treaty. BCBL also notified the Government of its intention to commence arbitration proceedings.

[12] The Prime Minister made further public statements indicating that "he [the reference was to Lord Ashcroft] must realize I don't care how much money he has, I don't care how powerful he thinks he is, he cannot and will not defeat the sovereign united nation…" Taking the view that the members of the Zuniga group

were Trustees of the Hayward Trust (although in fact, they were mere advisors to the Trust); that the Belize courts were the proper forum for determining all matters in relation to the acquisition of Telemedia and compensation for expropriated shareholders; and that arbitral proceedings relating to the acquisition, commenced contemporaneously with the earlier mentioned domestic proceedings, were oppressive and unconscionable, the Government filed a suit against Dunkeld and the Zuniga group claiming a permanent injunction to prevent them from taking further steps in the arbitration processes they had instituted. The Government also applied for and obtained in December 2009 an interim injunction preventing these parties from proceeding further with arbitration. In February 2010 the Belize trial court continued this interim injunction until the hearing and determination of the suit filed by the Government.

[13] Dunkeld ignored the order restraining it from proceeding to arbitration. Mendes JA notes that Dunkeld "proceeded with its arbitration and enforcement action in another jurisdiction, even though there is no detailed evidence of exactly what Dunkeld did or when and where".[5] Dunkeld's disobedience of the injunction was, from all indications, a precipitating factor in the promotion and passage of the first Amendment Act which was assented to on 31st March 2010 and came into effect on 1st April 2010.

[14] In the wake of the passage of that Act the members of the Zuniga group resigned as advisors of the Hayward Trust with effect from 29th March 2010. They apparently feared that they could be charged under the Act and resigned in light of the injunction that had been granted against Dunkeld, their lack of control over the actions of Dunkeld and bearing in mind the stiff sanctions introduced by the first Amendment Act against even advisors to a party disobeying a court injunction. The Zuniga group launched their challenge to the constitutionality of the Amendment Act in April 2010 and, within a few weeks, the BCB Holdings

[5] See para 20 of the Judgment of the Court of Appeal.

group applied to be joined to the suit as Interested Parties. Later, in June 2010, finding that the members of the Zuniga group actually exercised no control over Dunkeld, the Court of Appeal discharged the injunction that had earlier been obtained against them.

[15] The above background merely gives the briefest context in which to consider the impugned legislation and the challenge to it. We proceed now to consider each of the 16 sub-sections of section 106(A) highlighting at times, only so much of their content as is necessary to understand better the bases of the challenge and the decisions of the courts below and of this Court. But before we do so it is just as well to say a brief word about the principal Act since the Acts should also be considered in light of that Act.

The principal Act and the provisions of the Amendment Acts

[16] The principal Act is a pre-Independence statute dating back, at least, to 1958. It is the statute that details the contours of such of the vast jurisdiction of the Supreme Court as can conceivably and coherently be captured in print. It provides, among other matters, for the manner in which that jurisdiction is to be exercised.

[17] The first of the two Amendment Acts contained three sections. Section 1 expressed the Short Title, namely, "Supreme Court of Judicature (Amendment) Act, 2010" and declared that the Act was to be read and construed as one with the Supreme Court of Judicature Act. Section 2 contained an addition to section 70 of the principal Act but this was later removed by the second Amendment Act. Section 3 added the new section 106(A) to the principal Act.

[18] Following the passage of the second Amendment Act the new section 106(A) now contains 16 sub-sections. The new section falls under Part IX of the principal Act which deals with contempt of court. Part IX has five sections ranging from sections 102 to 106 (inclusive). Leaving aside section 105 for the moment, these

sections of the principal Act (i) prescribe a punishment not exceeding imprisonment for a term of three months or a fine of two hundred and fifty dollars for criminal contempt committed in the face of the court or calculated to interfere with the administration of justice in pending proceedings; (ii) describe what acts are targeted under this offence; (iii) provide for appeals to the Court of Appeal; and (iv) indicate that all fines levied are to be paid into the Consolidated Revenue fund.

[19] In the context of this appeal section 105 of the principal Act is of some importance. That section gives the Supreme Court "the same powers as regards punishments for all contempts, whether criminal or otherwise, as are possessed by the High Court of Justice in England, and the practice and procedure shall be as nearly as possible the same as the practice and procedure in that Court in like case". In the appeal before us the issue arose during oral argument whether the reference there to English practice is ambulatory, i.e. always speaking, or whether it is frozen as at the time of the passage of the principal Act. The relevance of the issue is to be able to determine the penalty for contempt under section 105. Counsel on all sides accepted that the maximum punishment that may be imposed for contempt in the United Kingdom today is imprisonment for a term of two years and that this has been the case for many years. Accordingly, counsel agreed and we are prepared also to accept that this is the maximum term that could be awarded for criminal contempt under section 105 of the principal Act. Disobedience of a court order or injunction can, of course, be a civil contempt and section 106A(1) was thus stated to be "without prejudice to the power of the Court to punish for contempt in accordance with Part 53 of the Supreme Court (Civil Procedure) Rules 2005" that supplements section 105.

The 16 sub-sections of section 106(A)

[20] Sub-section 1 of the new section 106(A) criminalises, whether in Belize or elsewhere, knowingly (the word "knowingly" was inserted by the Second Amendment Act) disobeying or failing to comply with an injunction "issued by

the Court". The second Amendment Act makes it clear that this new offence is to be tried summarily by a judge sitting alone without a jury on a criminal information and complaint under sub-section 2.

[21] Sub-section 2 states that a criminal complaint for an offence under sub-section 1 may be laid by the Attorney General or the aggrieved party or a police officer not below the rank of inspector.

[22] Sub-section 3 prescribes the punishment for a person found guilty of an offence under sub-section 1 (or under sub-sections 4 and 5 as indicated below). In the case of a natural person the penalty is a fine which shall not be less than $50,000.00 but which may extend to $250,000.00, or imprisonment for a term which shall not be less than five years but which may extend to ten years, or both such fine and term of imprisonment. If the offence is continuing, the convicted person faces an additional fine of $100,000.00 for each day the offence continues. In the case of a legal person or other entity (whether corporate or unincorporated) the prescribed penalty is a fine which shall not be less than $100,000.00 but which may extend to $500,000.00. In the case of a legal person, if the offence is continuing the convicted entity faces an additional fine of $300,000.00 for each day the offence continues. Sub-section 3 contains a proviso (introduced by the second Amendment Act) that relieves a natural person from the previously specified penalties if the convicted person could establish extenuating circumstances. Those circumstances are listed as a clean criminal record, ignorance by the defendant of the consequences of his/her action and grave hardship if the full penalty were imposed. In that event, the penalty is reduced to a mandatory minimum fine of $5,000.00 and a maximum of $10,000.00 and, in default of payment of such fine, a term of imprisonment of not less than one year and not more than two years.

[23] Sub-section 4 is aimed at a person who, whether in Belize or elsewhere, "directly or indirectly, instigates, commands, counsels, procures, solicits, advises or in any manner whatsoever aids, facilitates, or encourages the commission" of a sub-

section 1 offence. The section also targets a person who, knowing that an injunction has been issued by the court, does any act the effect of which would be to disregard such injunction. It matters not that the injunction was issued before or after the commencement of the Act. The penalties set out in sub-section 3 are made applicable to a person convicted under sub-section 4.

[24] Sub-section 5 purports to spread the net even wider to criminalise other persons. The challengers say that this sub-section improperly reverses the burden of proof. The Court of Appeal declared the sub-section to be unconstitutional on that ground and this is the subject of detailed analysis later in this judgment. At [66] below sub-section 5 is set out in full.

[25] Sub-section 6 gives extra-territorial effect to the new offences created. It provides that notwithstanding anything to the contrary contained in any other law, the offences shall be adjudicated regardless of whether they occurred in Belize or elsewhere, or whether the offender was or was not present in Belize.

[26] Sub-section 7 makes it plain that the new section 106(A) covers injunctions issued both before and after the commencement of the Act.

[27] Sub-section 8(i) gives the court jurisdiction to issue an injunction against a party or arbitrators (or both) restraining them from commencing or continuing arbitral proceedings or, in the case of a party, from embarking upon proceedings for the enforcement of an arbitral award, whether in Belize or elsewhere, where it is shown "that such proceedings would be oppressive, vexatious, inequitable or would constitute an abuse of the legal or arbitral process". Sub-section 8(ii) gives the court jurisdiction "to void and vacate an award made by an arbitral tribunal (whether in Belize or abroad), in disregard of or contrary to any such injunction".

[28] Sub-section 9 has to do with the modes of service of notice of, or an application for, an injunction. In addition to the modes prescribed in the *Supreme Court (Civil*

Procedure) Rules 2005 ("CPR"), sub-section 9 permits service by registered post, fax, courier service or a notice in the Belize Gazette (as may be appropriate in the circumstances of each case) regardless of whether the defendant is present or resident within or outside Belize, "and for this purpose, no leave of the Court for serving the injunction, notice or order, as the case may be, outside Belize shall be required notwithstanding anything to the contrary contained in any other law or rule of practice".

[29] Sub-section 10 states that where an offence created by the section is committed outside Belize, the information and complaint for such offence is to be laid in the Central District of the Supreme Court.

[30] Sub-section 11 provides for trial *in absentia* if the court is satisfied that the defendant was given at least 21 days' notice of the charge and the date, time and place of the trial and that he had a reasonable opportunity of appearing before the Court but had failed to do so. Sub-section 12 states that the notice referred to in sub-section 11 could be served personally, or by registered post, or by a notice in the Belize Gazette, as may be appropriate in the circumstances of each case.

[31] Sub-section 13 states that a defendant could not be prosecuted under section 106(A) if he had already been punished for the same offence under Part 53 of the CPR, or *vice versa*. Part 53 deals with the power of the Civil court to commit a person to prison or to make an order seizing assets for failure to comply with an order requiring that person to perform an act or an undertaking to refrain from doing an act.

[32] Sub-section 14 indicates that the word "person" in the Act is to have the same meaning ascribed to it in section 3 of the Interpretation Act. In the latter Act "person" means a natural person or a legal person and includes any public body and anybody of persons, corporate or unincorporated. The definition applies

notwithstanding that the word "person" occurs in a provision creating or relating to an offence or for the recovery of any fine or compensation.

[33] Sub-section 15 empowers the Attorney General to make rules for giving better effect to the provisions of the section and sub-section 16, added by the second Amendment Act, establishes the rules which are to apply until the Attorney General exercises that power. These rules are set out in an Appendix and they address such matters as the content of every criminal information and complaint, issues of joinder of counts and the powers of trial judges and directions they may give.

The grounds on which the legislation is challenged

[34] The challengers question the legislation's constitutional validity on a variety of grounds. Several of these grounds attack the legislation as a whole. Some are aimed at specific aspects. In enumerating the list of grounds below, we make no distinction between the two. Some of the grounds succeeded before the Court of Appeal (whose ruling the Government seeks now to reverse), while others were rejected by the Court of Appeal and accordingly form the subject of a cross-appeal in these proceedings. The challengers claim that:

A) The legislation breaches the separation of powers principle because it was introduced specifically in order to target the members of the Zuniga group in their recourse to international arbitration and to deter them from pursuing that remedy (**the *ad hominem* point**);
B) The legislation was enacted for an improper purpose and is therefore in breach of the section 68 constitutional imperative that the National Assembly make laws "for the peace, order and good government of Belize" (**the section 68 and improper purpose point**);
C) The legislation further contravenes the separation of powers principle because it introduces a special regime for the prosecution and harsh

punishment of a breach of an anti-arbitration injunction and this regime can be initiated at the complete discretion of the Executive, in the person of the Attorney General, as an alternative to the normal jurisdiction of the courts to deal with contempt (**the discretion of the Attorney General point**).

D) The mandatory minimum sentences prescribed in sub-section 3 are draconian and for this reason they contravene both the separation of powers principle and section 7 of the Constitution which proscribes inhuman and degrading punishment. This point (**the mandatory minimum sentence point**) is addressed in a separate and discrete manner but it is fair to state that the existence of the mandatory minimum sentences is also an important plank in the submissions advanced in support of many of the other points and in particular the discretion of the Attorney General point;

E) The constitutional right to the protection of the law set out or inherent in section 6 of the Constitution is infringed by the combined effect of such matters as the reversal of the burden of proof and the procedural provisions governing service, notice and trial in absentia (**the protection of the law point**); and

F) Sub-section 8 constitutes a breach of the right to property guaranteed by sections 3(d) and 17(1) of the Constitution (**the right to property point**).

Some general observations

[35] Before embarking on a consideration of these points it is useful briefly to make a few general observations. Firstly, sections 1 and 2 of the Constitution describe Belize as "a sovereign democratic State" and the Constitution as "the supreme law". As a consequence of its supremacy no law may be made that is inconsistent with the Constitution. To assess the validity of a law, however, the Court does not simply lay the Constitution side by side with the impugned legislation to

determine whether the latter squares with the former.[6] The words written in the Constitution do not exhaust the full meaning and breadth of that instrument. Such a perfunctory approach to judicial review would do a serious dis-service to the solemn mandate assigned the court to uphold and promote constitutional supremacy. The court's judicial review responsibility must necessarily include discovering and applying fundamental norms and principles that characterise the Constitution.

[36] Secondly, as will be explored later in greater detail, the Constitution itself makes it clear that inconsistent laws are to be invalidated by the court "to the extent of the inconsistency". This means that, provided it is possible and feasible to save a law that may contain one or more inconsistent provisions, a scalpel, rather than a machete, is to be used by the court to sever that which is inconsistent. Thirdly, the two Acts in question here are essentially penal in nature. Penal statutes should be clear, certain, coherent and fair in the consequences they pose for those who risk falling foul of them. Failing this, the *rule of law*, yet another fundamental, albeit at times, implicit feature of the Constitution, is placed in jeopardy.

The *ad hominem* point

[37] Before the trial judge, the Government led evidence to suggest that the Act was not directed at any particular entity but was passed against the backdrop of "widespread and contemptuous disregard of injunctions". Not only was this latter claim unsupported but, before the Court of Appeal, the Government shifted its position and sought to justify the legislation on the basis of Dunkeld's anticipated breach of the injunction issued against that company. Indeed, the Dunkeld and BSDL situations provided the only evidence adduced of the alleged tendency in the society towards a disregard of injunctions. The challengers insist that the legislation was indeed aimed at Dunkeld and Lord Ashcroft.

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[6] See on the contrary *United States v Butler (1935) 297 U.S. 1 at 62-63*

[38] The gist of the challengers' submission is that a) the legislation was "*ad hominem*"; b) it introduced draconian, mandatory and disproportionate punishments against Lord Ashcroft, Dunkeld and its officers and this was coupled with special rules relating, it was said, to the reversal of the burden of proof, notice to accused, extraterritorial application and trial *in absentia*; c) the pre-existing law and procedure for contempt was sufficient to deal with any disregard for injunctions but there was never any resort to them; and d) the Attorney General, an official of the Executive arm of government, was given the special power to invoke the new procedure. The challengers claimed that, under the principles developed by the Privy Council in *Liyanage v R*[7], the legislation should be struck down as a contravention of the separation of powers doctrine.

[39] *Liyanage* was a case from Ceylon, as Sri Lanka was then called. The case was decided by the Privy Council in 1962. It arose against the backdrop of a foiled coup staged by army officers. While the men were in prison awaiting trial, Parliament enacted legislation to cover their peculiar situation. The legislation legalised their detention *ex post facto* and otherwise operated retrospectively to encompass the acts of which they were accused. The new laws were specifically tailored to meet the circumstances of these acts and were made to lapse after the trial of the men. The legislation included the creation of new offences, the alteration of the law of evidence so as to apply to statements made by the men and the creation of severe mandatory minimum sentences to be applied if (in all the circumstances it is almost more appropriate to say "when") the men were found guilty by the court. The Privy Council struck down the legislation and, in the process, established helpful principles to which one could have regard in determining when legislative interference amounted to an impermissible breach of the separation of powers doctrine.

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[7] [1967] 1 AC 259

[40] A word or two about this doctrine is appropriate here. It may be said that in the post-independence Anglophone Caribbean the doctrine of the separation of powers derives its force from the fact that the fundamental law upon which the legal order rests, i.e. the Constitution, disperses the power of the sovereign State among various branches, insulates the judicial branch from interference by the political branches and enshrines the paramount principle of constitutional supremacy.[8] The Constitution having conferred particular functions on the judicial branch, constitutional supremacy requires that, among other things, in the exercise of these functions, the judiciary is not undermined by action taken by another branch of the State. Specifically, in the context of the point being discussed here, the judiciary must possess the ability, independence and freedom to interpret and apply substantive legal principles so as to guarantee to litigants in a particular case a just outcome that itself is protected from executive or legislative interference. Application of the separation of powers doctrine upholds the Constitution, advances the rule of law and promotes the description of Belize as "a sovereign democratic State".[9]

[41] *Liyanage* is a particularly notorious example of a breach of the separation of powers doctrine. The instant case is at an entirely different point in the spectrum. Legislation prompted by the acts of a particular individual or group, accompanied by the introduction of steep mandatory penalties and providing for rules to be made by the Attorney General, might raise a red flag, especially where the Government has or may have an interest at stake. But even if present, these *indicia* by themselves alone do not necessarily establish that the separation of powers doctrine is compromised. To offend the doctrine it must be shown that the legislature is undermining the decisional authority or independence of the judicial branch by compromising judicial discretion. The court's ability to address legal principles in a pending case, i.e. *its adjudicative process*, must be negatively

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[8] See *Boyce & Joseph v The A.G of Barbados (2006) 69 WIR 104; [2006] CCJ 3 (AJ)*, per Wit J at [19]
[9] For a helpful discussion on the Separation of Powers See Gerangelos, THE SEPARATION OF POWERS AND LEGISLATIVE INTERFERENCE IN THE JUDICIAL PROCESS, Hart Publishing, 2009

impacted so that it can truly be said that the legislature, in order to guarantee a particular outcome, is prescribing or directing or constraining the court in its application or interpretation of those principles. The litigant must be protected from a situation where he/she has to contend in court with both the opposing side and the interference of the legislature seeking, in the midst of proceedings, to direct the judge as to the outcome of the contest. When a claim is made, in a case of this kind, that the doctrine is engaged, the task of the court is to examine and assess the various indications pointing towards or away from impermissible interference and to consider the impugned legislation as a whole to discover its true purpose. Ultimately, the court makes a judgment as to whether the Act in question is an exercise of legislative power or an interference with judicial power under the guise of exercising legislative power.

[42] In his written submissions to the court, Mr Fitzgerald QC, on behalf of the Zuniga group, focused heavily on the alleged *ad hominem* character of the legislation, the mandatory penalties imposed and the "power invested in the Attorney General to apply the new regime selectively to special targets". This last factor is the subject of separate treatment at [51] – [56] below but it is sufficient to state that its linkage here to the *ad hominem* point does little to alter the court's assessment of the challenge based on the point under discussion. Counsel claimed that in all the circumstances the legislature is effectively instructing or directing the courts on how to deal with any case brought before them under the special regime. In any event, submits counsel, the *Liyanage* principle goes beyond dictating to the judiciary the decision it must reach in a specific case.

[43] There is absolutely no doubt that the legislation here is not *ad hominem* in relation to any precise proceedings. It does not direct the court on how it should deal with the challengers (or any member(s) of the two groups) in any particular proceeding. As Mendes JA pointed out, although it might be correct to characterize the Act as having been passed with the appellants and the interested parties in mind, it "is not expressed to apply to specific individuals, or to specific

arbitrations, or to be applicable to any pending criminal or other proceedings. It is expressed in terms of general application".[10] Mendes JA also observed, quite properly, that apart from mandating the sentence to be imposed on anyone found guilty of a sub-section 1 offence (a matter which shall separately be considered), there is no direction to the judiciary as to how it should exercise the discretion bestowed upon it.[11]

[44] Subject to the Constitution, Parliament is at liberty to exercise its legislative power so as to abrogate or alter rights and liabilities which would otherwise be subject to judicial determination. On the other hand, it seems to us that the true principle to be extracted from *Liyanage* is that Parliament may not interfere with the judicial process itself in the sense of compromising judicial discretion by prescribing or directing the outcome in specific and pending proceedings. This is evident also from the manner in which the *Liyanage* principle is applied in later Australian cases.[12] In our view the principle was properly applied by Mendes JA who concluded[13] that the challenged Act:

> "…constitutes an ordinary exercise of legislative power. It is the business of the legislature to identify conduct to which penal sanctions are to attach and to determine the severity of such punishment. It is also the business of the legislature to vest new powers in the judiciary and to create new rights and obligations. As Mason CJ, Dawson J and McHugh J said in their joint judgment in *Leeth v. Commonwealth (1972) 174 CLR 455*, para 30, 'a law of general application which seeks in some respect to govern the exercise of a jurisdiction which it confers does not trespass upon the judicial function'…"

[45] Mr Fitzgerald suggested that caution should be exercised in relying on Australian cases as a different constitutional regime exists there where the respective powers

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[10] See Judgment of the Court of Appeal at [64]
[11] See Judgment of the Court of Appeal at [66]
[12] See *R v Humby; Ex p Rooney (1973) 129 CLR 231*; *Australia Building Construction Employees' & Builders Labourers' Federation v Commonwealth (1986) 161 CLR 88; Building Construction Employees' & Builders Labourers' Federation of New South Wales v Minister for Industrial Relations (1986) 7 NSWLR 372; Nicholas v R (1998) 193 CLR 173*
[13] at [67] of the judgment of the Court of Appeal

of the legislature and the judiciary are differently defined, and where Parliament remains sovereign. We do not consider this difference material in relation to this point. Given the structure of Australia's Constitution, the Australian High Court has regarded as constitutionally entrenched the separation of judicial power from executive and legislative power[14] and there is no reason why this Court ought not to have regard to the judgments of Australia's highest court that extract and apply the *Liyanage* principles. In all the circumstances the cross-appeal on this point fails. The Court of Appeal was right to reject the challenge to the legislation on this ground.

The section 68 and improper purpose point

[46] There are two limbs to the challengers' position on this point. One limb focused on sub-section 8 of the new section 106(A). As is outlined at [8] and [27] above, sub-section 8 specifically targets anti-arbitration injunctions. The challengers submitted that the Act (and this sub-section specifically) was introduced to thwart their undoubted right to seek and pursue both international arbitration claims and proceedings to enforce arbitral awards that may be granted in their favour; and the enactment was passed at a time when it was common knowledge that they were actively pursuing arbitration claims against the State. It was said that in this respect the Act violated the rule of law and the due process principle recognised by the Privy Council in *Thomas v Baptiste.*[15]

[47] It is unnecessary to spend a great amount of time on this limb of the submission. Much of the wind was taken out of its sails by the intimations contained in the judgment of this Court in *British Caribbean Bank Ltd v The Attorney General of Belize.*[16] These proceedings were pending at the time we delivered that judgment and we were aware then that an interpretation of sub-section 8 was an issue in this

[14] See *R v. Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 275-6 and 297
[15] [2000] 2 AC 1; (1998) 54 WIR 387
[16] [2013] CCJ 1 (AJ)

appeal. We were nevertheless prepared then[17] to accept the Court of Appeal's view that, to the extent that sub-section 8 empowered the court to restrain a party from proceeding with foreign arbitration proceedings on the ground that such proceedings would be oppressive, vexatious, inequitable, or would constitute an abuse of the legal or arbitral process, the sub-section merely codified pre-existing law which had never been regarded as being in conflict with the Constitution. This Court ruled that it was only in exceptional cases that an anti-arbitration injunction would be granted.[18] The ruling effectively allayed much of the anxiety of the challengers that the Act could operate to undermine or frustrate their on-going and/or anticipated international arbitration proceedings. We have heard nothing in these proceedings to lead us to differ from the Court of Appeal's view of sub-section 8. As to the remainder of sub-section 8, while we see nothing *unconstitutional* in it, it is immediately difficult to envisage a circumstance in which a court in Belize would be justified in issuing an injunction against *arbitrators* to restrain them from commencing or continuing arbitral proceedings in light of the well-known principle of *Kompetenz-Kompetenz*.[19]

[48] The more significant limb of the improper purpose point relates to the submissions made in relation to section 68 of the Constitution which section grants the National Assembly the power to pass laws for the "peace, order and good government" of Belize. The challengers submit that, in light of the principle of constitutional supremacy, this power to legislate is subject to review by the Court on ordinary public law principles. Mr Fitzgerald referred to *Bowen v The Attorney General*[20] where Chief Justice Conteh stated that the grant of law-making power to the legislature is not unlimited and is subject to "a continuing audit [by the court] to ensure conformity in its exercise with the Constitution".

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[17] See [2013] CCJ 1 (AJ) op-cit at [32]
[18] 2013] CCJ 1 (AJ) [30] – [41]
[19] See *West Tankers Inc v Allianz SpA (formerly RAS Riunione Adriatica di Sicurtà SpA) and another* [2009] AC 1138 and also *Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP* [2013] UKSC 35
[20] Belize High Court Claim No. 445 of 2008, decided 13th February 2009

[49] It is trite law that the court is entitled to determine whether laws enacted by Parliament are in conformity with the Constitution and to strike them down to the extent of their inconsistency. If the Chief Justice's words are interpreted to mean that, absent some breach of the Constitution (outside of a perceived breach of section 68 itself) the Court is at liberty to declare a law void merely because, in its wisdom, the court does not consider the law to fall within the compass of what conduces to the "peace, order and good government" of Belize, then respectfully, we must disagree. We prefer the approach taken by Mendes JA who noted that "it is not possible to eke out an implied principle that the judiciary may second guess the elected representatives on the question of what purpose it is appropriate for legislation to serve. Such a power would put the judiciary in competition with the legislature for the determination of what policies ought to be pursued in the best interests of Belize".[21]

[50] In the realm of policy, the National Assembly is not only best equipped, but it also has a specific remit to assess and legislate what it considers suitable for Belizean society. The expression "peace, order and good government" is not to be, and has never been seen as, words of limitation on parliament's law making power.[22] On the contrary, the words are to be regarded as a compendious expression denoting the full power of Parliament freely to engage in law-making subject only to the Constitution. Without more, it is not for the court to question the wisdom or appropriateness of an Act of Parliament to determine whether the Act is inimical to the peace, order and good government of Belize. This Court would not go so far, however, as to endorse the blanket suggestion that a court may never be concerned with the propriety or expediency of an impugned law. It may be appropriate and even necessary to be so concerned where, for example, the purpose of the law is a relevant issue in determining a breach of the separation of powers doctrine (as we have seen above at [37]) – [45]), or a violation of a

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[21] See [49] of the judgment of the Court of Appeal
[22] See *Ibralebbe v R [1964] AC 900* at 923; *Regina (Bancoult) v Sect of State for Foreign & Commonwealth Affairs (No 2) [2009]* 1 AC 453 at 485-511

fundamental right. Outside of such contexts, it is not for this Court to say that section 68 has been breached because, for example, the Acts in question were not passed to meet a legitimate and real concern about adherence and obedience to court injunctions. If the National Assembly considers it fit to enact new legislation along the lines of section 106(A) criminalising and stiffening the penalties for breaches of injunctions, then, subject to the Constitution, it is so entitled.

The discretion of the Attorney General point

[51] The challengers submit that the power invested in the Attorney General, in sub-section 2 of 106(A), to lay a complaint under the new provisions introduced by the Act is unconstitutional. The submission rests on three premises. It is said that, firstly, section 105 of the principal Act and section 269 of the Criminal Code each criminalises contempt of court and or the breach of court orders; secondly, while the maximum penalty for transgressing section 269 is three months, and under section 105, two years[23], the mandatory minimum penalty for a breach of sub-section 1 (which latter breach Mendes JA categorised as being less serious than a breach of section 269) is the harsh punishment as set out at [22] above; and thirdly, where it appears that there has been a contempt of court, in lieu of permitting either section 105 or section 269 to run its course, the Attorney General can now choose whether to proceed under section 106(A) so as to ensure that the accused faces a steep mandatory minimum punishment if convicted. It is therefore contended that the Attorney General, an official of the Executive, is empowered by Parliament, in effect, to select the sentence of the offender. If the transgressor is Joe Blow, the Executive may, on a whim, lay a complaint that renders Joe triable for an offence contrary to sub-section 1, thereby requiring him to face a stiff penalty. But if the transgressor is Jenny Bloggs, the Attorney General may allow her to be charged with a section 269 or section 105 offence

[23] See [19] above

where the maximum penalty is considerably less. Guided by the authority of *Ali v R*,[24] the Court of Appeal held that to invest this power in the Attorney General was a violation of the separation of powers.

[52] There is undoubtedly some overlap between the offence described in section 105 and the offence described in section 106(A). We do not consider, however, that section 269 of the Criminal Code should similarly be regarded as overlapping with section 106(A). Section 269 relates to "*any order … made or issued by any court or magistrate*". The section must be read with section 3(2) of the Summary Jurisdiction (Procedure) Act, Cap. 99 which provides:

> *"Every offence created by any Act or other law with respect to which it is directed that the offender shall be liable on conviction summarily or on summary conviction ... to any punishment or penalty, shall be a summary conviction offence within the meaning of this section."*

[53] In section 2 of the Summary Jurisdiction (Procedure) Act, "court" means "a summary jurisdiction court established under the Inferior Courts Act." On the other hand, "court" in the principal Act, and consequently in the two Amendment Acts, is defined in section 2 as "the Supreme Court" Disobedience to a court in section 106A can therefore only refer to disobedience to an order of a judge of the Supreme Court. Disobedience to an order of a magistrate can only be dealt with under section 269 of the Criminal Code. Accordingly, there is no overlap between section 269 and section 106A of the Amendment Acts.

[54] All court orders, whether emanating from a Magistrate's Court or the Supreme Court, are serious commands that must be obeyed. But it is reasonable to assume that in enacting section 106(A) Parliament considered itself justified in increasing the penalties beyond those which could be imposed by pre-existing legislation,

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[24] [1992] 2 AC 93

whether s 105 of the principal Act or s 269 of the Criminal Code. In particular, in relation to the latter, it is common knowledge that for the same or similar offence, trial by a judge usually carries a greater maximum penalty than the sentence that can be imposed by a magistrate. Secondly, given the higher status of the Supreme Court, it would not be unreasonable also for Parliament to have considered that disobedience to the orders of the Supreme Court justifies penalties that attract more serious punishment than those imposed for disobeying the orders of a magistrate.

[55] In any event, it must be borne in mind that section 106(A) extends the power to lay a criminal information not only to the Attorney-General, but also to an aggrieved party and the police. It is quite a leap to suggest that the exercise of this power amounts to the selection of a penalty. As Appendix I to the second Amendment Act makes clear, a person who lays or files a criminal information and complaint in the High Court bypasses the preliminary inquiry process and begins a proceeding between the Crown and the named defendant. The Director of Public Prosecutions is required by his office to conduct the case for the Crown. The Director is obliged to make an independent decision as to whether and how to proceed. In our view, it is difficult to see how the right to lay a criminal information, with which the DPP may or may not proceed, amounts to the selection of a choice of penalty by the Attorney-General, the citizen or police officer laying the information. In all the circumstances we respectfully disagree with the Court of Appeal's treatment of this point.

The mandatory minimum sentence point

[56] As previously noted, the severity of the sentences found in sub-section 3, and, in particular, the mandatory minimum penalties, were factors that were used to strengthen the core of the challengers' objections to the Acts on grounds additional to those that fall under this point. In the course of discussing those other grounds above this court has, quite deliberately, characterised the sentences

(which are set out at [22] above) as "steep", "stiff", "harsh". We have done so bearing in mind that the mandatory minimum sentences can be meted out to *anyone* found guilty of knowingly breaching an injunction.

[57] One of the unusual circumstances of the inquiry under this point is that this is not a case where the party challenging the validity of the penalty has already been tried and is now arguing the unconstitutionality of a particular sentence that has been handed down. The court is not here dealing with the application of particular punishment to a specific offender. In a case like that a court is well positioned to consider all the relevant factors that contribute to an assessment of proportionality. The court could, for example, weigh the sentence imposed against the facts of the specific case, taking account of the gravity of the offence, the manner in which it was committed, the degree of participation and motivation of the accused and all the personal characteristics and antecedents of the particular offender before the court.

[58] Here, there is no accused person. This is a case of a pre-emptive challenge to the mandatory minimum penalty prescribed by a new law even before there has been a conviction under this law. It follows that to determine this challenge the court must look at the penalty regime in the round and make a generalised value judgment as to its validity. The court must assess whether the mandatory minimum punishment set out in the law would be grossly disproportionate in its application to likely offenders. As the assessment is hypothetical, Mr Barrow suggests that the court should not now invalidate the penalty regime but wait for an actual case to arise before we could realistically consider whether these penalties are indeed grossly disproportionate. We disagree. The Constitution fully entitles a litigant with appropriate standing not to await the full brunt upon him of a measure whose unconstitutionality is looming on the horizon. At least, in so far as the unconstitutionality relates to a breach of the citizen's fundamental rights.

Instead, the litigant is authorised to challenge the measure even before its impact is actually felt.[25] Further, we do not consider that it would be appropriate to leave on the statute books penal provisions that challenge the Constitution and which leave the citizen and the State in a state of uncertainty as to their future application. As pointed out by Chief Justice McLachlin, such an approach "deprives Parliament of certainty as to the constitutionality of the law in question and thus of the opportunity to remedy it."[26] We are persuaded that, on the face of the penalty regime set out in sub-section 3, the argument that the mandatory minimum penalties should be invalidated is made out.

[59] The nature and subject matter of injunctions issued by a judge of the Supreme Court vary widely. So, too, do the consequences resulting from their breach. Moreover, there are numerous ways in which a person can be said to have knowingly violated such an injunction. The breach may represent a contumelious defiance of the court in order, perhaps, to perpetrate some other even more dangerous crime or perhaps in order to reap handsome financial reward. In such a case moreover, the offender might be someone quite notorious for flouting the law. On the other hand, one can easily envisage many reasonable hypothetical cases which would commonly arise in which the mandatory minimum penalties would obviously be grossly disproportionate. The injunction may arise out of civil proceedings, perhaps involving a minor domestic squabble between spouses or between neighbours who have a boundary dispute, and the particular offender, though unable to come within the statutorily defined extenuating circumstances, is clearly deserving of punishment that in no way rises to the level of the minimum penalty that the court is compelled by sub-section 3 to impose.

[60] The court rejects the notion that a favourable comparison can be made between the penalty regime laid out in sub-section 3 and the factual situation in *R v Glotz*[27]

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[25] See s 20 of the Belize Constitution
[26] See McClachlin J in Ferguson v R [2008] SCC 6, [2008] 1 SCR 96 at [73]
[27] [1991] 3 SCR 485

where a mandatory seven day term of imprisonment, imposed on a defendant who was driving while prohibited, was held by a majority of the Supreme Court of Canada not to be contrary to the guarantee against cruel and unusual punishment in section 12 of the *Canadian Charter of Rights and Freedoms*. Since sub-section 3 carries a mandatory minimum fine of $50,000.00 or alternatively a five-year mandatory minimum term of imprisonment, a better comparison in Canadian jurisprudence might be *R v Smith (Edward Dewey).*[28] In that case the Supreme Court held to be incompatible with section 12 of the Charter the provision in a statute imposing a minimum sentence of seven years' imprisonment on conviction of importing narcotics into Canada. The provision was severed from the statute.

[61] It is a vital precept of just penal laws that the punishment should fit the crime.[29] The courts, which have their own responsibility to protect human rights and uphold the rule of law will always examine mandatory or mandatory minimum penalties with a wary eye. If by objective standards the mandatory penalty is grossly disproportionate in reasonable hypothetical circumstances, it opens itself to being held inhumane and degrading because it compels the imposition of a harsh sentence even as it deprives the court of an opportunity to exercise the quintessentially judicial function of tailoring the punishment to fit the crime. As stated by Holmes JA in *State v Gibson,*[30] a mandatory penalty "unduly puts all the emphasis on the punitive and deterrent factors of sentence, and precludes the traditional consideration of subjective factors relating to the convicted person." This is precisely one of the circumstances that justifies a court to regard a severe mandatory penalty as being grossly disproportionate and hence inhumane. A variety of expressions has been utilised to define "grossly disproportionate" in this context. It is said to refer to a sentence that is beyond being merely excessive. In *Smith v R,*[31] where the seven year mandatory minimum sentence was

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[28] [1987] 1 SCR 1045
[29] Per Saunders JA (Ag.) in the combined cases of *Hughes v R and Spence v R* (2001) 60 WIR 156 at [216]
[30] 1974 (4) SA 478 (A) at 482A
[31] See *Smith*, supra

invalidated, Wilson J characterised such a sentence as one where "no one, not the offender and not the public, could possibly have thought that that particular accused's offence would attract such a penalty. It was unexpected and unanticipated in its severity …"

[62] Ultimately, it is for judges, with their experience in sentencing, to assess whether a severe mandatory sentence is so disproportionate that it should be characterised as inhumane or degrading punishment. In this case the mandatory minimum fines of $50,000 plus a daily rate of $100,000 are well beyond the ability of the average Belizean to pay and so are grossly disproportionate. Equally, the imposition of a mandatory minimum fine of $50,000.00 or a sentence of imprisonment for at least a stretch of five years on anyone convicted of any of the offences in question (save those whose sentences fall within mitigating criteria fashioned not by the court but by Parliament) is grossly disproportionate. It bears no reasonable relation to the scale of penalties imposed by the Belize Criminal Code for far more serious offences and for that reason it is also arbitrary. In our view, the mandatory minimum sentences here should indeed be characterised as being grossly disproportionate, inhumane and therefore unconstitutional for contravening section 7 of the Constitution. Later in this judgment we shall consider the consequences of this finding.

The protection of the law point

[63] Section 6 of the Constitution guarantees to everyone the right to equal protection of the law. The constitutional protection afforded by this right goes well beyond the detailed provisions found in the section itself. In *The A.G. of Barbados v Joseph & Boyce*[32] de la Bastide P and Saunders J observed that, "the right to the protection of the law is so broad and pervasive that it would be well-nigh impossible to encapsulate in a section of a constitution all the ways in which it

[32] See *Boyce*, supra at [60]

may be invoked or can be infringed." In the same case, Wit J went further and drew attention to the inextricable link between the protection of the law and the rule of law, with the latter embracing concepts such as the principles of natural justice and "adequate safeguards against irrationality, unreasonableness, fundamental unfairness or arbitrary exercise of power." [33] Notwithstanding the principle that an ambiguity in a criminal statute must be resolved in favour of the accused, at [36] above we have noted, and we reiterate here, that penal statutes should be clear, certain, coherent and fair in the consequences they pose for those who risk falling foul of them.

[64] The submission of the challengers under this point is that several features of the Act impinge on their right to the protection of the law. The most egregious of these features concerns the allegation of a reverse burden of proof in sub-section 5 and it is to this that we now turn.

The reverse burden of proof

[65] Section 6(3)(a) of the Constitution establishes the presumption of innocence. Every person charged with a criminal offence is presumed to be innocent until he is proved or has pleaded guilty. It is, however, permissible for a law to impose on an accused person the burden of proving particular facts.[34] The Court of Appeal upheld the challengers' submission that sub-section 5 contravenes section 6(3)(a). The Attorney General disputes this finding and submits on appeal that the sub-section merely requires the accused to establish particular facts and it is accordingly not invalid.

[66] To consider this submission it is appropriate to set out sub-section 5 in full. It reads:

> "Where an offence under this section is committed by a body of persons, whether corporate or unincorporated, every person who, at the time of the

[33] See [20] of the judgment of Wit J
[34] See section 6(10)(a) of the Constitution

> commission of the offence, acted in an official capacity for or on behalf of such body of persons, whether as shareholder, partner, director, manager, advisor, secretary or other similar officer, or was purporting to act in any such capacity, shall be guilty of that offence and punished accordingly, unless he adduces evidence to show that the offence was committed without his knowledge, consent or connivance"

[67] Reading the text one's attention is immediately drawn to a number of matters. Firstly, the extensive degree to which the web of guilt is spread. Shareholders, advisors, secretaries; all are ensnared if they "acted in an official capacity" (more on that phrase later) at the time the offence was committed. Secondly, there is the alleged reverse burden itself. After the prosecution has proved the commission of an offence by a body of persons (say, XYZ Company Ltd), the accused is presumed to be guilty of the same crime as the company unless he adduces evidence to show that the offence was committed by the company without his knowledge, consent or connivance. If the accused is tried *after* the conviction of XYZ Company Ltd, then at his trial the entire case for the prosecution might take only a few minutes. A presumption of guilt against the accused is established if the prosecution merely adduce in evidence a) a certificate of the conviction recorded against XYZ Company Ltd for committing a sub-section 1 offence; b) a true copy of the relevant register or employment record of the company establishing that the accused is a shareholder or secretary etc. and c) evidence that the accused "acted in an official capacity" ("or was purporting" so to act) at the time the company committed the offence.

[68] Thirdly, it is unclear what exactly is meant by the phrase *acted (or purporting to act) in an official capacity for or on behalf of [XYZ Company Ltd] at the time of the commission of the offence*. Is it that the shareholder, partner, director etc must have acted in some official capacity *in the company's commission of the offence*? In other words, is the requirement satisfied if, by sheer coincidence, the accused happened at the time to have been holding or acting in an official capacity but took no step, in that capacity, in relation to the company's commission of the offence? Or must the capacity in which the person acted actually be linked to the

commission of the offence? The section is not very clear on this but if it were the latter interpretation (the more sensible and logical one) and the accused acted in her official capacity, whether directly or indirectly, to aid or abet disobedience to the injunction, then the accused would already be caught by sub-section 4 (See [23] above) and sub- section 5 would then be entirely redundant. If, on the contrary, sub-section 5 is to add some new factor to sub-section 4 then *acting in an official capacity at the time of the commission of the offence* must presumably mean that the person who so acted, albeit having knowledge of the intention by the company to disobey the injunction, may be caught although she falls outside the wide net cast by sub-section 4. Suppose, for example, a shareholder is on vacation. She was aware of the injunction before she left on holiday. While on vacation she learns that the company intends to disobey the injunction. She does nothing and carries on with her holiday. If the Court of Appeal was right to construe "knowledge, consent or connivance" in a conjunctive manner, then according to sub-section 5 the secretary's guilt is clear because her prior knowledge that the company intended to disobey an injunction would be enough to preclude her from taking advantage of the exculpatory aspect of the sub-section. Mendes JA put it this way:

> 148 "…an accused may adduce evidence to show, and may satisfy the court on a balance of probabilities, that he did not consent to or connive at the commission of the offence, but may yet be incapable of rebutting the presumption of guilt because he knew that the offence was being committed. Indeed, it would appear that the accused would be unable to discharge the burden even if he made efforts to prevent the commission of the offence, but was unable to persuade other officials to desist.
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> 149 In the result, the possibility is created that a person whose only "offence" was holding an official position on behalf of a company at the time it knowingly disobeyed an injunction, is in jeopardy of being held criminally responsible for the company's criminal conduct."

[69] Counsel for the Attorney General argued that in analyzing what the accused was required by the sub-section to show, the Court of Appeal i) failed to distinguish

between a legal and evidential burden; ii) misconstrued the sub-section as imposing a legal burden whereas, in fact, it did no more than cast an evidential burden on the accused; iii) erroneously equated the words "unless he adduces evidence to show" with "unless he proves" and iv) misinterpreted the phrase "knowledge, consent or connivance" to read those words conjunctively so that, according to the Court of Appeal, knowledge without consent or connivance was sufficient to satisfy guilt if the other elements of the offence were established. In support of these arguments, counsel cited *Vasquez v R, O'Neil v R,*[35] *Jayasena v R,*[36] *Sheldrake v DPP,*[37] *Westminster City Council v Croyalgrange Ltd*[38] and *Huckerby v Elliot.*[39]

[70] If indeed the Court of Appeal was right to read the expression "knowledge, consent or connivance" conjunctively, with the result that, in the example given above, either way the secretary is caught by sub-section 5, then not even counsel for the Attorney General is prepared to defend the sub-section. The idea that mere knowledge, in a case like this, could be sufficient to found guilt is preposterous. But if counsel is right, as we believe to be the case, that the sub-section should be read to mean that a shareholder has to show that the offence was committed without her knowledge *and* consent or alternatively, without her knowledge *and* connivance, then, to the extent that some sense can be made of the sub-section, it is difficult to conceive of a circumstance where she would escape being swept up in the provisions of sub-section 4(a) or 4(b). On one view, therefore, the sub-section obviously offends the rule of law and on another, quite apart from anything else, it is otiose.

[71] We agree with the conclusion reached by the court below that the sub-section contravenes the principle of the presumption of innocence. The analysis must

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[35] [1994] 1 WLR 1304; 45 WIR 103
[36] [1970] 1 All ER 219 at 221
[37] [2005] 1 AC 264 at 289
[38] [1986]2 All ER 353
[39] [1970] 1 All ER 189

begin with the fundamental duty of the prosecution in a criminal case. The basic principle is that the prosecution must prove every essential ingredient of a criminal offence.[40] It is this principle that is reflected in section 6(3)(a) of the Constitution; a provision that must be construed generously in favour of the individual.[41] The burden on the prosecution does not extend to every conceivable fact in issue. Section 6(3)(a) is not infringed by a law requiring a defendant to establish a particular matter of fact or law. Section 6(10)(a) of the Constitution actually permits the State to impose on an accused "the burden of proving particular facts". But the imposition must be reasonable and proportionate. A balance must be struck between the importance of what is at stake and the rights of the defence.[42] Since section 6(10)(a) is a derogation from a right that is to be generously construed, the derogation must be construed strictly.[43]

[72] Counsel spent some time seeking to distinguish between a legal (or persuasive) burden and an evidential burden. In order to determine whether the accused here has been saddled with one or the other, it is unproductive to engage in the semantic differences between the expressions "adducing evidence *to show*" and "having *to prove*" (on a balance of probabilities) a particular element of the offence. The substance and effect, and not necessarily the form, of the words used are paramount. If an accused is required to establish on a balance of probabilities the absence of an important element of the offence in order to avoid conviction the presumption of innocence is unjustifiably violated because a conviction is possible in spite of a reasonable doubt as to guilt.[44] As Lord Bingham noted in *Sheldrake v DPP*[45] it is "repugnant to ordinary notions of fairness for a prosecutor to accuse a defendant of crime and for the defendant to be then required to

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[40] See *Vasquez , supra* at 1313D to 1314H
[41] See *Minister of Home Affairs v Fisher* per Lord Wilberforce [1980] AC 319 and also *A-G of the Gambia v Momodou Jobe* [1984] AC 689 at 700
[42] See *Sheldrake, supra* per Lord Bingham at [23] - [27]
[43] See *Vasquez , supra* at 1313D
[44] See Dickson CJ in *R v Whyte (1988) 51 DLR (4th) 481 at* 493; Lord Nicholls in *R v Johnstone* [2003] 1 WLR 1736 at [50]See *Sheldrake, supra* per Lord Bingham at [23] - [27]
[45] See *Sheldrake, supra* [2005] 1 AC 264, 292 at [9]

disprove the accusation on pain of conviction and punishment if he fails to do so. The closer a legislative provision approaches to that situation, the more objectionable it is likely to be."

[73] In resolving the tension between section 6(3)(a) and 6(10)(a) the overriding concern is to promote the rule of law by ensuring a trial that is fair.[46] Ordinarily, in cases of contempt of court the prosecution has the burden of proving conscious, deliberate disobedience of a court order. But here, the sub-section is framed in a manner so as to relieve the prosecution of the onus of proving *mens rea* which is the vital element of the offence targeted by sub-section 5. Usually, section 6(10)(a) comes into play with reference to "offences arising under enactments which prohibit the doing of an act save in specified circumstances or by persons of specified classes or with specified qualifications or with the licence or permission of specified authorities".[47] Here, the accused does not have to show some positive exculpatory act on his part but rather is put in the unenviable position of having to establish a negative, namely that he did not consent to or connive at the disobedience to the injunction. If the sub-section is to be construed in a manner that widens the blanket of guilt beyond those captured by sub-section 4, it comes perilously close to legislating guilt by association. We agree with the Court of Appeal that the sub-section contravenes section 6(3)(a) of the Constitution and is therefore invalid.

Trial in absentia

[74] Section 6(3) of the Constitution permits trial *in absentia* if the relevant law permitting it provides for "adequate notice of the charge and the date, time and place of the trial and to a reasonable opportunity of appearing before the court." As we have seen above at [30], sub-section 11 of section 106(A) does provide for trial *in absentia*. The sub-section stipulates a 21 day notice period and it requires

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[46] See s.6(2) of the Constitution and also *Sheldrake*, *supra* at 297 [20]
[47] *Vasquez*, *supra* at 1313D where Lord Jauncey quotes Lawton LJ in *R v Edwards* [1974] 2 All ER 1085 at 1095, [1975] QB 27 at 39–40

the court, before embarking upon any such trial, first to satisfy itself that the accused had a reasonable opportunity of appearing before the Court but had failed to do so.

[75] The challengers interpret the Constitution as requiring the satisfaction of each of "two related but distinct" criteria, namely, a reasonable notice period *and* the court's satisfaction as to the reasonableness of the opportunity provided the accused to appear. The challengers claim that the Court of Appeal wrongly conflated both requirements; that sub-section 11 failed the first requirement in providing only for 21 days' notice; and that as a result, the sub-section should be struck down.

[76] The Court of Appeal rightly rejected this attempt to construe the Constitution in this tabulated manner. Mendes JA, at [164], in effect stated that the controlling provision in both the Constitution and the sub-section is the discretion vested in the court to assess whether the accused did have a reasonable opportunity to appear. Even if 21 days' notice has been given, trial *in absentia* cannot proceed unless the court is satisfied that the accused has had a reasonable opportunity of appearing. The 21 days' notice is a minimum period which the court is empowered to extend if, in all the circumstances, it proves to be unreasonably short. The first rule set out in Appendix 1 also makes this clear. It speaks about criminal complaints being filed "*at least 21 days* before the date of trial of the accused person".

Service of Proceedings

[77] Sub-sections 9 and 12 of the Act deal with service of proceedings. The sub-sections are commented upon earlier at [28] and [30] respectively. The trial judge had agreed with the challengers that both sub-sections contravened section 6 of the Constitution especially as they relate to trials *in absentia*. The Court of Appeal's judgment at [157] neatly summarized what was contended before and found by the trial judge:

> 157. The trial judge found that the requirements for service under section 106A(9) were wholly inadequate in that no time is specified within which service is to be effected, there is no requirement of personal service on a person located within Belize, no procedure to effect service out of [the] jurisdiction and no grounds have been given for effecting service on a person abroad by fax, courier service or notice in the Belize Gazette. In the circumstances, he held that subsection 9 contravenes the right to a fair hearing and the right of access to [the] court under section 6 of the Constitution. He held further that section 106A(12) infringed section 6 because it allowed a trial of an offence under section 106A(1) to proceed in the absence of the accused upon a notice of the trial published in the Gazette. He considered this to be inadequate notice particularly in relation to persons who may live abroad or in rural Belize. Accordingly, he struck down both subsections 9 and 12

[78] The Court of Appeal reversed the trial judge's finding. As Mendes JA noted,[48] the methods of service by registered post and fax merely mirror corresponding methods of service already provided for in the CPR, about which there is no complaint. With regard to service by notice in the Gazette, this method of service, as with the others, is qualified by the phrase "as may be appropriate in the circumstances of each case", a phrase to which the trial judge gave no or insufficient consideration. Sub-section 9 does permit service outside the jurisdiction without the need to obtain the leave of the court so to do. But this is balanced off by the fact that the court retains its discretion to satisfy itself that proof of adequate service has been established before one may embark upon an application for an injunction or any proceedings to enforce an injunction already granted. We agree with Mendes JA who stated:

> 161. … there is no provision deeming service to have been properly effected by the particular method of service which the claimant selects. Indeed, by providing for a choice of four methods [i.e. by registered post, fax, courier service or a notice in the Belize Gazette], "as may be appropriate in the circumstances of the case", subsection 9 anticipates the exercise by the presiding judge of his

[48] See [157] – [167] of the Court of Appeal judgment

> powers of superintendence over the method of service used to ensure that the defendant is indeed informed of the court proceedings or orders which might affect his interests.

[79] For the reasons given by the Court of Appeal we hold that there is no merit in the submission that sub-sections 9 and 12 contravene section 6(3) of the Constitution.

The right to property point

[80] Sub-section 8(i), it will be recalled, confers on the court jurisdiction to issue an anti-arbitration injunction. Sub-section 8(ii) confers jurisdiction to void and vacate arbitral awards made in disregard of such injunctions. The challengers had asserted before the court below that both sub-sections are unconstitutional because they interfere with the right to property guaranteed by sections 3(d) and 17(1) of the Constitution. They claimed that the powers given to the courts went beyond pre-existing judicial power and that, whether because of that fact or because the respects in which they exceed that power actually contravene the Constitution, they were invalid. The challengers appear to accept that the pre-existing position is not inconsistent with the Constitution.

[81] The submissions made on this point cover to some degree the arguments made on the first limb of the section 68 and improper purpose point discussed above at [47]. Here too, our agreement with the Court of Appeal's construction of the jurisdiction conferred on the court by sub-section 8[49] as not going beyond the existing law, substantially, if not completely, undercuts the premise upon which the argument on this point was made. As the Government concedes, in practice it would now be exceptional for a court to issue an anti-arbitration injunction. The BCB Holdings group still claims, however, that there are two respects in which sub-section 8 went beyond the existing law and in each respect, it is said, the added power conferred upon the court renders the sub-section unconstitutional.

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[49] See [47] above

[82] The first respect concerns the jurisdiction, conferred on the court by sub-section 8(i), to restrain arbitrations that constitute "an abuse of the legal or arbitral process". The Court of Appeal agreed that this was a novel power[50] and this view was endorsed by this Court in *British Caribbean Bank Limited v The Attorney General.*[51] The BCB Holdings Group submits that the contractual right to arbitrate constitutes property that is capable of and requires constitutional protection. Whatever criteria exist to allow injunctions to restrain arbitrations, they should not be extended to situations which involve an abuse of the arbitral process itself. It should be for the arbitral tribunal itself to control the arbitral process.

[83] The second respect concerns sub-section 8(ii). The challengers say that similarly, the jurisdiction conferred there (to void and vacate arbitral awards made in disregard of such injunctions) goes further than the pre-existing law. Arbitral awards should be set aside only by a competent authority of the country in which, or, under the law of which, the award was made.[52] The challengers submit that in seeking to give the courts of Belize the power to vacate not only Belizean awards, but awards of tribunals seated in other countries, sub-section 8(ii) creates an unjustifiable interference with the right to property

[84] These submissions did not find favour with the Court of Appeal. Nor do they find favour with this Court. They would be better made and assessed in the context of a concrete instance of the exercise of the powers conferred since it is difficult to envisage a circumstance in which a court will be so insensitive to the nature and scope of the jurisdiction of an arbitral tribunal and the comity that must characterise the relationship between the courts and such tribunals that the power

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[50] See [121] of the judgment of the Court of Appeal
[51] [2013] CCJ 4 (AJ) at [32]
[52] See Article V.1(e) of the New York Convention on the Recognition and Enforcement of foreign Arbitral Awards 1958 to which Belize is not a party

conferred might be exercised in a manner that renders its exercise unconstitutional. Empowering the court to exercise a power does not oblige the court to wield that power or to wield it in an indiscriminate fashion. There is nothing inherently unconstitutional in the court being given a power to restrain an abuse of the legal or arbitral process or to vacate awards. We agree entirely with Mendes JA who stated that:

> 126. It seems fairly plain to me that prohibiting the pursuit of arbitration proceedings which bear the descriptions set out in section 106A (8) as they have been understood at common law pursues the legitimate aim of promoting fairness between parties to an agreement to arbitrate. The right of access to justice, so important to the maintenance of the rule of law, cannot be exercised in such a way as to abuse the process of the court. This is a principle which is fundamental to our system of justice. Likewise, the right to arbitrate cannot be fairly pursued if the arbitration process is itself abused. Arbitration proceedings which cause oppression, vexation or inequity, as these terms have been understood at common law, are similarly not in the public interest. Further, I can think of no fairer way to deal with arbitration proceedings which fit these descriptions then by vesting in the Supreme Court the power, in its discretion, to grant injunctive relief.

[85] As to the power to void and vacate awards, the challengers concede that the exercise of this power is entirely unobjectionable so far as concerns *Belizean* awards. We fully expect that the court would be astute to take into account, before resorting to the impugned powers conferred, all the matters raised above that point towards the need for judicial restraint in favour of permitting the arbitral tribunal itself to control the arbitral process.

The consequence of the findings of this Court

[86] Like the Court of Appeal, this Court has found that the mandatory minimum penalties prescribed in sub-section 3 and all of sub-section 5 (the reverse burden sub-section) are invalid. The question now is what consequence ensues from this finding. In relation to the mandatory penalty regime, the Court of Appeal

considered the cases of *Aubeeluck v The State*,[53] *R v Ferguson*,[54] and *State v Vries*[55] and was impressed with the reasoning of the Supreme Court of Canada in *Ferguson*. The court devoted much attention to arguments on whether to leave sub-section 3 on the statute books for an actual case to arise before making an assessment of the unconstitutionality of a specific complainant's sentence or whether it might be possible to disapply the mandatory penalties on a case by case basis or to formulate an implied term which would capture those situations where the mandatory penalty might be appropriate. The court stated that since sub-section 3 was a post-independence (as distinct from "an existing") law, the judiciary had no power of modification and no power to read in or read out words in order to save the sub-section from invalidity. The court acknowledged that it should be ready to read in an implied term so as to avoid conflict with the Constitution but it felt that there was danger in reading in an implied exception since that could produce a provision that Parliament never intended.[56] The court strove but found itself "unable to formulate any implied term which would capture those situations where the mandatory penalty imposed by section 106A(3) would pass constitutional muster". In light of this, the court felt itself bound to declare, not merely the offensive mandatory penalties, but ***all*** of sub-section 3 were invalid. The court then found that sub-section 3 was so integral to the scheme of the Act that given its invalidity, automatically sub-sections 1 - 7, 10 - 13 and 16 must also be declared invalid. With great respect, on this issue we differ from the Court of Appeal.

[87] The cases of *Vries*, *Aubeeluck* and *Ferguson* all concern an offender who was challenging a mandatory sentence imposed upon him. The issue of whether to grant a constitutional exemption or to disapply the law given the particular circumstance of the offender had in those cases a resonance that is not shared in

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[53] [2011] 1 LRC 627; [2010] UKPC 13
[54] [2008] 1 SCR. 96
[55] [1997] 4 LRC 1
[56] See *de Freitas v Minisry of Agriculture* [1999] AC 69, 79

these proceedings where one is faced with the situation which we described above at [58]. Yet, the discussion in the judgment of the Court of Appeal proceeded along the same footing as in *Vries*, *Aubeeluck* and *Ferguson* i.e. the utility of granting a constitutional exemption from the impact of a provision that was unconstitutional. In relation to sub-section 3, the court below proceeded from a consideration of the inappropriateness of the principle of constitutional exemptions to the striking down of practically the entire Act. It is our view that in doing so, the court gave insufficient consideration to the question whether the offensive mandatory minimum penalties could conveniently have been expunged from sub-section 3 and, if they could, whether what would remain after severance (save and except of course the unconstitutional sub-section 5 which also had to be severed) would still leave a coherent and constitutionally valid statute that fulfilled the objectives of Parliament. It is this issue that we must now consider.

Severance

[88] In mandating that a law inconsistent with the Constitution is void *to the extent of its inconsistency*, the Constitution sanctions the principle of severance and encourages its exercise where possible. When faced with a statute that contains material that is repugnant to the Constitution the court strives to remove the repugnancy in order, if possible, to preserve that which is not. As long as the constitutional defect can be remedied without striking down the entire law, the court is obliged to engage in severance. In some cases it is not difficult to do this. But in other cases it is necessary to invalidate an entire Act so that, if it wishes, Parliament can have another go at the legislation. The court will do this because, broadly speaking, what remains after judicial surgery is incoherent or so impairs the legislative object that the constitutionally valid part cannot be said to reflect what Parliament originally intended.

[89] The doctrine of severance is not free from controversy, but it is an important judicial tool regularly employed by courts as part of their responsibility simultaneously to uphold constitutional supremacy and maintain the separation of

powers. The classic statement on severability is regarded to be that given by Viscount Simon in *Attorney-General for Alberta v. Attorney-General for Canada*[57] when he stated that:

> "The real question is whether what remains is so inextricably bound up with the part declared invalid that what remains cannot independently survive or, as it has sometimes been put, whether on a fair review of the whole matter it can be assumed that the legislature would have enacted what survives without enacting the part that is *ultra vires* at all."

[90] In performing the exercise of severance the court has no remit to usurp the functions of Parliament. Assuming severance is appropriate, the aim of the court is to sever in such a manner that, without re-drafting the legislation, what is left represents a sensible, practical and comprehensive scheme for meeting the fundamental purpose of the Act which it can be assumed that Parliament would have intended.[58] The court is entitled to assess whether the legislature would have preferred what is left after severance takes place to having no statute at all.[59] If it can safely be assessed that what is left would not have been legislated, then severance would not be appropriate. As Demerieux notes, severance involves speculation about parliamentary intent.[60] The court seeks to give effect, if possible, to the legitimate will of the legislature, by interfering as little as possible with the laws adopted by Parliament.[61] Striking down an Act frustrates the intent of the elected representatives and therefore, a court should refrain from invalidating more of the statute than is necessary.[62]

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[57] [1947] A.C. 503, 518
[58] See Lord Diplock in *Hinds v R* [1977] AC 195 at 229
[59] See O'Connor J in *Ayotte v Planned Parenthood of Northern New England (2006) 546 US 320* at 321
[60] Margaret Demerieux, FUNDAMENTAL RIGHTS IN COMMONWEALTH CARIBBEAN CONSTITUTIONS, 1992 at 491
[61] See *Schachter v Canada* [1992] 2 SCR 679 at [27]
[62] *Regan v Time, Inc (*1984) 468 U.S. 641 at 652

[91] In *Schachter v Canada,*[63] the Supreme Court of Canada indicated that severance will be warranted where a) the legislative objective is obvious and severance or the reading in of words would further that objective or constitute a lesser interference with that objective than would striking down; b) the choice of means used by the legislature to further that objective is not so unequivocal that severance/reading in would constitute an unacceptable intrusion into the legislative domain; and c) severance or reading in would not involve an intrusion into legislative budgetary decisions so substantial as to change the nature of the legislative scheme in question.[64]

[92] The argument for the total invalidation of a law that is only partially unconstitutional is invariably premised on the notion that the court cannot be sure that Parliament would have passed the constitutionally valid remainder in any event and that the court should not re-word a statute.[65] The consummate ease with which this argument can always be made should warn judges of the need closely to scrutinise it. Unsurprisingly, the challengers have said exactly this to us; that severance is inappropriate here because we do not know what Parliament would have done. The challengers also claim that the mandatory minimum penalties are not severable because they are "*the raison d'être*" for the introduction of the Acts and are inextricably bound up with its purpose.

[93] It is axiomatic that after a court has severed the unconstitutional portion of an impugned law, that which remains will never be precisely what Parliament had intended originally to enact. Further, a court can never *know* the intent of each legislator who voted to enact a statute. No court can ever be perfectly sure about parliamentary intent. If courts took it upon themselves to sever only after they possessed such certitude, then severance will never actually take place.

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[63] *Schachter, supra* at [29]
[64] *Schachter, supra* at [26]-]31], [87]
[65]See for example counsel's submissions in *Hinds, supra* at page 208-209

[94] To determine whether it would be appropriate to sever the mandatory minimum penalties from sub-section 3 an objective assessment must be made of the history and purpose of the Act. The challengers have contended that the Act was aimed at them but in fact, despite the rhetoric and acrimony of the Prime Minister, nothing in the Act actually suggests this. We agree entirely with Mendes JA that on its face, the Act constitutes an ordinary exercise of legislative power of general application and "was not expressed to apply to specific individuals, or to specific arbitrations, or to be applicable to any pending criminal or other proceedings."[66] Indeed, it is interesting to note that while the challengers claim that the Act is unconstitutional because it specifically targets them, on the other hand, they assert simultaneously that the Act is unconstitutional because the average Belizean who falls within its reach will be unable to pay the mandatory fines imposed. The reality is that the legislation was aimed at *any person* (whether the challengers or anyone else) who engaged in the conduct that was criminalised by it and, although the actions of Dunkeld and BSDL may have prompted the legislation, it would be an injustice to these bodies and also to Lord Ashcroft for anyone to presume that they possessed some special propensity to breach injunctions.

[95] Although not decisive, the Long Title of an Act is a tool for discovering and determining the purpose of the legislation. The Long Titles here have already been referred to and set out in the first paragraph of this judgment. The purpose of the first Act, as revealed in its Long Title, is to strengthen the provisions relating to contempt of court and to provide for all ancillary and incidental matters. The Long Title of the second Act[67] states that its purpose is to clarify the law as to the ingredients of the offence of criminal contempt of court; to make provision for mitigation of penalties in the case of natural persons in certain extenuating circumstances; to specify the rules Governing Trial on Criminal Information and Complaint, and to provide for matters connected therewith.

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[66] *Ibid* at para. 64
[67] Supreme Court of Judicature (Amendment) Act, No. 18 of 2010

[96] An appraisal of the various sub-sections of the Acts confirms that the respective Long Titles faithfully describe and accurately summarise the content of the constitutionally valid parts of the legislation. The strengthening of the provisions relating to contempt was accomplished by a variety of devices. Quite apart from the unconstitutional reverse burden sub-section and the introduction of the mandatory minimum penalties, Parliament also prescribed maximum penalties which considerably exceeded those that previously existed. In an appropriate case, it will now be open to a court, in its discretion, to punish an offender even more sternly than was envisaged by the mandatory minimum penalties. The strengthening of the provisions relating to contempt was also accomplished by mandating that trials be held summarily in the Supreme Court by a judge sitting alone without a jury; by widening the net, and establishing a detailed description, of those who could be charged for aiding and abetting the failure to comply with an injunction; by providing for the extraterritoriality of the Act's reach and by establishing the possibility of trial *in absentia*. In light of all these matters, we do not share the view that the mandatory minimum penalties should be isolated and regarded as "*the raison d'être*" for the introduction of the Acts.

[97] It is also necessary to consider the relationship between the invalid and the valid parts of the legislation. Are the two so inextricably bound up that they cannot conveniently be separated one from the other? In our view that is certainly not the case. It is possible and convenient to read down or to remove from the remainder of sub-section 3, the unconstitutional mandatory minimum penalties. That remainder prescribes enhanced maximum penalties and is in keeping with Parliament's comprehensive scheme for prosecuting and punishing the breach of an injunction in a manner not presently captured by the pre-existing law. Neither the scheme nor the purpose of the legislation will be affected here by the absence of the mandatory minimum penalties. The constitutionally valid sub-sections of the Act are in no way inextricably bound up with, or reliant for their efficacy upon the reverse burden section and/or the mandatory minimum sentences. When faced

with an invalid mandatory sentence, in lieu of invalidating the entire sentencing regime and then the whole underlying law, courts everywhere would read down the mandatory sentence or simply remove it in order to leave standing any maximum penalty prescribed by the legislature. So, for example, in many Caribbean states, the courts have read down the mandatory death penalty so as to render the same a discretionary sentence.[68] In *Aubeeluck*,[69] Lord Clarke referred to the Mauritius cases of *Philibert v State*,[70] where a mandatory minimum sentence of 45 years' penal servitude was held unconstitutional and read down so as to provide for a maximum sentence of 45 years, and *Joosub v State*[71] where a similar approach was taken to the mandatory sentence of 30 years' penal servitude imposed upon a person convicted of unlawful possession of heroin as a trafficker.

[98] It seems to us that in light of all of this, the real question to be answered is this – Which course of action would represent a lesser intrusion on the role of Parliament? The extinguishment of the entire fruit of the parliamentary exercise (most of which reflected a valid exercise of parliamentary power) or excision of the invalid mandatory penalties and sub-section 5? For us, the answer to the question is self-evident and in this respect we must respectfully differ from the Court of Appeal, which would have left in place a mangled Act, and our colleagues who have opted to strike down the entire legislation. The court below came to the view that the mandatory penalty regime was "*the raison d'être*" of the Acts by surmising that if Parliament merely wanted heavier punishment Parliament would have simply increased the penalties of the existing section 105 which also criminalised the breach of an injunction. It is true that Parliament could have done this, but it is also true that, as we have seen, the various sub-sections of section 106(A) did much more than merely impose mandatory minimum punishment. That punishment properly reflects only one aspect of the

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[68] See for example *Spence v R* and *Hughes v R*, St Criminal Appeals Nos. 20 of 1998 and 14 of 1997 respectively, 2nd April 2001; affirmed in *Reyes v R* (2002) 60 WIR 42
[69] *Aubeeluck, supra* at [28]-[29]
[70] 2007 SCJ 274
[71] 2008 SCJ 318

statute. It is comparatively easy for bodies outside of Parliament to second guess the legislature; to assert that they would have gone about, in a different way, a measure that Parliament sought to accomplish. The point, though, is that Parliament was not disentitled from enacting section 106(A) in the way it did, save that of course Parliament was not entitled to violate the Constitution.

[99] A better example of a provision which, although not in itself constitutionally invalid, must be invalidated because it is so inextricably bound up with an invalid part that it cannot independently survive is provided by the Act itself. Clearly, the proviso to sub-section 3 and also sub-section 3(a)[72] are directly hinged on the existence of the mandatory minimum penalties. It can safely be assumed that Parliament would ***not*** have enacted these provisions without enacting the unconstitutional mandatory penalties. Accordingly, these provisions must also be invalidated.

[100] In our view therefore, the legislation is constitutionally valid save for i) the mandatory minimum penalty regime contained in sub-section 3; ii) the proviso to section 3 and also sub-section 3(a), and iii) sub-section 5 in its entirety. It follows that the Court should sever these provisions from section 106(A). We accordingly dismiss the appeal of the Attorney General and the cross appeals of both the Zuniga and BCB Holdings groups. For the avoidance of doubt, sub-section 3 shall be read in the following manner with the original words of the statute, which by this judgment have been invalidated, struck through and the words read in placed in bold lettering:

(3) A person guilty of an offence under subsection (1) above shall be punished on conviction –

(i) in the case of a natural person, with a fine which ~~shall not be less than fifty thousand dollars but which~~ may extend to two hundred and fifty thousand dollars, or with imprisonment for a term which

[72] Both the Proviso and sub-section 3(a) are set out below at [102] with the words struck through

~~*shall not be less than five years but which*~~ *may extend to ten years, or with both such fine and term of imprisonment, and, in the case of a continuing offence, with an additional fine* ***which may extend to*** ~~*of*~~ *one hundred thousand dollars for each day the offence continues;*

(ii) in the case of a legal person or other entity (whether corporate or unincorporated), with a fine which ~~*shall not be less than one hundred thousand dollars but which*~~ *may extend to five hundred thousand dollars, and in the case of a continuing offence, with an additional fine* ***which may extend to*** ~~*of*~~ *three hundred thousand dollars for each day the offence continues.*

~~*Provided that where a natural person who is convicted of an offence under this section shows that the extenuating circumstances (as described in subsection 3a below) exist in his case, a court may, in lieu of imposing the penalties specified above, impose a fine of not less than five thousand dollars and not more than ten thousand dollars, and in default of payment of such fine, a term of imprisonment of not less than one year and not more than two years.*~~

~~*(3a) For the purpose of the Proviso to paragraph (i) of subsection (3) above, the expression "extenuating circumstances: means where*~~

~~*(a) the convicted person has previously been a law abiding person and has no criminal record; and*~~

~~*(b) the offence was committed through sheer ignorance of the consequences of his conduct; and*~~

~~*(c) the imposition of full penalties prescribed in subsection (3) above would cause grave hardship to him and his family."*~~

Costs

[101] We were not specifically addressed on the issue of costs but we take into account that no one challenged the costs order made by the Court of Appeal. That order awarded the Zuniga group and the BCB Holdings group respectively 75% of their costs both in the Court of Appeal and in the trial court, certified fit for three counsel (including a Queen's Counsel and a Senior Counsel). The order further awarded the Attorney General 75% of his costs of the cross-appeal, certified as fit for three counsel (including two Senior Counsel) with all costs to be taxed, if not sooner agreed. That order was made to stand unless an application was made for a contrary order within 7 days of the delivery of the judgment. It does not appear

that there was any application made for a contrary order. That order, about which this Court expressly makes no comment, must therefore stand.

[102] In respect of the costs before this Court we order the Attorney General to pay 75% of the costs of the challengers on the main appeal certified fit for Counsel. We order further that the Zuniga group and the BCB Holding group each pay to the Attorney General 100% of the costs incurred in defending their respective cross-appeals certified fit for Counsel. All costs are to be taxed, if not sooner agreed.

JUDGMENT OF THE HONOURABLE JUSTICES WIT AND ANDERSON

[103] Section 106A (3) of the Supreme Court of Judicature (Amendment) Act 2010 (the "Amendment Act")[73] provides for mandatory minimum penalties for the offence created by Section 106A (1) of knowingly disobeying or failing to comply with an injunction or an order in the nature of an injunction issued by the courts of Belize. The court below found that these mandatory minimum penalties were grossly disproportionate. Section 106A (3) was therefore held to have violated section 7 of the Belize Constitution which prohibits inhuman or degrading punishment or other treatment. As Section 106A (3) was found to be an "important" part of the legislative scheme enacted by Section 106A the court held that Section 106A (1) and all other provisions "connected with it" were invalid as well. The court therefore declared that Section 106A (1) – (7), (10)-(13) and (16) were null and void and of no effect. Section 106A (5) which provides for the reversal of the burden of proof, was also found to be unconstitutional in itself in that it infringed the right to be presumed innocent enshrined in Section 6(3)(a) of the Constitution.

[73] The Amendment Act was itself amended by the Supreme Court of Judicature (Amendment) (No 2) Act 2010; in this opinion the term "Amendment Act" includes both amendments.

[104] This Court agrees that Subsections (3) and (5) are inconsistent with the Constitution for the reasons given by the Court of Appeal. The majority, however, are of the further view that the offending provisions can be severed because what remains is a sensible, practical and comprehensive scheme for meeting the fundamental purpose of the Amendment Act. We do not agree that severance is appropriate in the circumstances of this case and would declare the entire Amendment Act null and void for reasons which can be stated in relatively short compass.

[105] Part IX of the Supreme Court of Judicature Act punishes contempt of Court. Section 105 gives the Supreme Court of Belize "the same powers as regards punishments for all contempts, whether criminal or otherwise, as are possessed by the High Court of Justice in England" and further provides that "the practice and procedure shall be as nearly as possible the same as the practice and procedure in that Court in like case". Section 106A (1) of the Amendment Act creates the offence of knowing disobedience of a court order but this offence necessarily overlaps with the offences contemplated by Section 105. While not every contempt of court involves knowing disobedience to a court order, it is necessarily always the case that knowing disobedience to a court order is a contempt of court and punishable as such. In other words, even without the introduction of Section 106A (1), knowingly disobeying or failing to comply with an injunction or an order in the nature of an injunction issued by a court in Belize would be punishable under Section 105. Section 106A (13) and (14) of the Amendment Act ensures that a person punished for contempt under Part 53 of the Supreme Court (Civil Procedure) Rules 2005 by way of committal and seizure of assets is not subject to double jeopardy by way of prosecution under Section 106A(1).

[106] What was new and novel about Section 106A was therefore not the offence of knowing disobedience to a court order or the provisions ancillary to the creation of that offence but rather the penalty regime including most spectacularly the

mandatory minimum penalties. That the provisions of the Amendment Act, of which the draconic penalty regime was undoubtedly the legislative centrepiece, all formed part of a single scheme whose sole *raison d'être* was to erect on top of the existing legislation (Section 105) a formidable line of defence against what was apparently perceived as an impending and ruthless attack on Belize's financial integrity and sovereignty, is evident from the background to the litigation and more specifically the attendant speeches in Parliament summarized in the judgment of this Court and more amply set out in the judgment of the Court of Appeal. Parliamentary pronouncements form part of the legislative history of the statute and may be used in the determination of the parliamentary intention in enacting the legislation (*Pepper (Inspector of Taxes) v Hart*[74]) in a similar way to which the long title is a useful indicator of parliamentary intent.

[107] Section 106A (3) does indeed impose grossly disproportionate penalties for disobedience of a court order. In the case of a natural person the mandatory minimum fine is fifty thousand dollars which may extend to two hundred and fifty thousand dollars or imprisonment for not less than five years or both such fine and imprisonment. A continuing offence attracts an additional fine of one hundred thousand dollars for each day the offence continues. Where a natural person shows specified extenuating circumstances the court may impose a fine of not less than five thousand dollars and not more than ten thousand dollars and in default of payment a term of imprisonment of not less than one year and not more than two years. In the case of a legal person the monetary penalty shall not be less than one hundred thousand dollars but may extend to five hundred thousand dollars and in the case of a continuing offence an additional fine of three hundred thousand dollars for each day the offence continues. It is note-worthy that by way of contrast with the penalties provided by the Amendment Act, the most egregious

[74] [1992] UKHL 3

and wilful disobedience of court orders in England routinely attract a custodial sentence of 12 months at most: *R v Phelps*[75]; *R v Adewunmi;*[76] *R v Montgomery*[77].

[108] The mandatory penalties imposed by the Amendment Act being wholly disproportionate are consequentially inconsistent with the Belize Constitution. It is now widely accepted that the prohibition in Section 7 of the Constitution against subjection to "torture or to inhuman or degrading punishment or other such treatment" is to be read as outlawing wholly disproportionate penalties. A penalty that is wholly disproportionate to the seriousness of the offence is necessarily one which imposes inhuman or degrading punishment: *Aubeeluck v State*[78]. In delivering the judgment of the Privy Council in the case of *Reyes v R*[79] Lord Bingham of Cornhill made clear that Section 7 of the Belize Constitution prohibited the State from imposing a punishment that is grossly disproportionate to what would have been appropriate.

[109] The majority are of the view that the penalty regime stipulated by Section 106A (3) can be salvaged by severing the mandatory minimum penalties on the ground that what remains will still leave intact Parliament's comprehensive scheme laid out in Section 106(A) for prosecuting and punishing the breach of an injunction. We consider that there are several problems with this approach. Firstly, the judicial surgery to be performed on Section 106A (3) would appear to go beyond what is permissible and to intrude upon the legislative function. The severance proposed by the majority involves the re-fashioning of a discrete legislative provision by both deletion and addition. Thus the proposed severance results in the deletion of most of the penalty provision; in strict mathematical terms close to two-thirds of the wording is surgically removed. But not only is a significant majority of the provision excised, new words are added. Where Parliament

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[75] [2010] 2 Cr. App. R. (S) 1
[76] [2008] Cr. App. R (S) 52
[77] (1995) 16 Cr. App. R (S) 274
[78] [2010] UKPC 3, [2011] 1 LRC 627
[79] [2002] UKPC 11, [2002] All ER (D) 149

stipulated that the court must impose a certain financial penalty, the majority would change the wording by adding additional words to make the provision mean a fine "which may extend to" the mandated financial penalty. This clearly runs counter to the parliamentary intention and is therefore fundamentally different from the approach undertaken in *Hinds v The Queen*[80] of relocating the sentencing power from the executive to the judiciary.

[110] The rewriting of the provision by deleting as well as by adding new wording that runs counter to the parliamentary intention does not appear to be in line with the traditional doctrine of severance which by definition is confined to excising impugned provisions. A carte blanche power to rewrite legislation is more akin to the competence given to the court under Section 134 (1) of the Constitution to modify, adapt, qualify and make exceptions to existing law. That limited and special power is widely recognized as having given the courts a quasi-legislative function. The problem is, however, that Section 106A (3) is not an existing law to which Section 134 (1) is applicable. If courts can freely modify statutory provisions by recourse to the doctrine of severance in the manner proposed by the majority then the line between the judicial and legislative function may well become blurred and the separation of powers may be strained if not threatened. It is true, of course, that a law passed after the commencement of the Belize Constitution that is determined to be inconsistent with the provisions of the Constitution must be declared to be null and void and of no effect *to the extent of the inconsistency*, which means that the Constitution itself provides for *pro tanto* voidness[81] and even requires severance. In our view, however, severance should never be used as a repair tool for saving an unconstitutional law that has problematic aspects and which, being now largely divorced from the reasons for which it was apparently made, is in a sense largely academic and theoretical. In any event, the 'inconsistency' referenced in the Constitution extends not only to

[80] [1976] 1 All ER 353
[81] Margaret DeMerieux, op, cit. at p. 492

discrete provisions containing the impugned provisions but also to other provisions in the law which while not in themselves inconsistent are inextricably interwoven with those found to be inconsistent.

[111] We are not convinced that cases cited by the majority in which mandatory minimum sentences were converted into maximum sentences are apposite. Those cases may be explained on the basis that had the sentencing regime been struck down *simpliciter*, no penalty would have been available to punish the offence; a situation that would have undoubtedly been anathema to Parliament's intent. The reading down of the death penalty for murder so as to render the penalty a discretionary one (*Reyes v R*[82]) was obviously to have been preferred to leaving the offence of murder without a penalty. The reading down of the mandatory minimum custodial sentences as the maximum sentences in *Philibert v State*[83] and *Joosub v State*[84] may be explained on the basis of similar principles. The present case may also be distinguished from those involving merely appeals against sentence as opposed to constitutional challenges to the nature of the penalty regime: (See e.g., *R v Ferguson*[85]).

[112] Another difficulty with the severance proposed is that what remains of the penalty regime is not only the mere statement of maximum penalties marooned from the legislative intent and context of the enactment of the Amendment Act. The maximum penalties are themselves of astounding severity. Were those maximum penalties ever to be imposed we consider it likely that they would be struck down for being grossly disproportionate. From a constitutional perspective, Parliament may not legislate nor may the courts impose a sentence that does not bear a proper penological relationship with the offence committed. To take an illustrative example, it would not appear to be constitutionally possible for disobedience to a

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[82] [2002] UKPC 11, [2002] All ER (D) 149
[83] (2007) SCJ 274)
[84] (2008) SCJ 318)
[85] [2008] 1 S.C.R. 96

court injunction to be visited by imposition of the death penalty. It is accepted practice that a person in contempt may be imprisoned until he purges that contempt, normally in the form of an apology to the court. Theoretically this could mean, for example, imprisonment for even more than 10 years. But in such cases the prisoner himself holds the key to his release and such a case must therefore be distinguished from the power to impose a sentence of imprisonment for ten years. We see no point in leaving on the statute books a sentence the imposition of which in all likelihood will never pass constitutional muster.

[113] But the most fundamental problem with the approach adopted by the majority concerns principles intrinsic to the notion of severance. The classical statement of the test for severance is derived from *Attorney-General for Alberta v. Attorney-General for Canada*: "The real question is whether what remains is so inextricably bound up with the part declared invalid that what remains cannot independently survive or, as it has sometimes been put, whether on a fair review of the whole matter it can be assumed that the legislature would have enacted what survives without enacting the part that is ultra vires at all."[86] This has been confirmed in a series of cases of the highest authority. Thus, a similar test was adopted in *Maher v Attorney General:* "But if what remains is so inextricably bound up with the part held invalid that the remainder cannot survive independently, or if the remainder would not represent the legislative intent, the remaining part will not be severed and given constitutional validity."[87]

[114] The formulation of the test for severance in this way masks a fundamental ambiguity. It equates the coherence of the interconnectedness of the provisions in the statue with the question of the parliamentary intention when these may not be synonymous. It is possible that what remains after severance can grammatically and conceptually stand on its own but at the same time not be what Parliament

[86] [1947] A.C. 503, at p. 518
[87] [1973] IR 140, at 147

intended or would have enacted. To apply the tool of severance could then result in a law being left on the statute books that Parliament would not have enacted.

[115] In our view the correct test for severance is not merely or even primarily whether what remains comprises a clear coherent and comprehensive legislative regime but rather is a matter of parliamentary intent. The question is whether it can be reasonably assumed that Parliament would, at the time of the passage of the statute, have enacted what remains, had it known that, and why, the inconsistent provisions would have been struck down. It may be assumed that Parliament would only pass coherent enactments but a coherent law need not satisfy the parliamentary intention on how to regulate a particular problem. In the absence of clear indications of parliamentary intent, the question reduces itself into whether what remains after the impugned provisions are struck represents a fundamentally different type of legislation than that passed by Parliament: *Hinds v The Queen*[88]; *Trinidad Island-Wide Cane Farmers' Association Inc. & Attorney General v Prakash Seereeram.*[89] If the legislative provisions which remain are of a fundamentally different kind then it cannot be said with any confidence that Parliament would have enacted it on its own, and it should, accordingly, be struck in its entirety because to leave what remains on the statute books in these circumstances would be to intrude upon the legislative function. It is only if the judicial conscience is clear that Parliament would have enacted the remainder of the legislation independently of that declared unconstitutional that severance is permissible.

[116] This approach accords with the dictum of the Supreme Court of Canada in *R v Ferguson*[90] asserting that:

> "If it is not clear that Parliament would have passed the scheme with the modifications being considered by the court — or if it is probable that

[88] [1976] 1 All ER 353 at 373-374
[89] (1975) 27 WIR 329 at 343, 372-373
[90] Ibid.

> Parliament would *not* have passed the scheme with these modifications — then for the court to make these modifications would represent an inappropriate intrusion into the legislative sphere. In such cases, the least intrusive remedy is to strike down the constitutionally defective legislation."

[117] An apt illustration of the guiding principles is provided by *Independent Jamaica Council for Human Rights (1998) Ltd v Marshall-Burnett*[91] where the Jamaican Parliament had legislated by three separate statutes to abolish the right of appeal to the Privy Council and replace it with a right of appeal to the Caribbean Court of Justice. Having arrived at the interesting conclusion that the specific statute providing for appeals to the CCJ was unconstitutional, the Privy Council found it necessary to strike down the three statutes because they were "connected" and formed an "interdependent scheme". Severance was not appropriate because it was not the intention of Parliament to revoke the right of appeal to Privy Council without putting anything in its place. There was no investigation of whether what remained constituted a coherent legislative scheme. Nor did the court engage in any speculation of whether, presented with the impugned statute, Parliament may have been content to keep the legislation providing solely for the abolition of appeals to the Privy Council with a view to subsequently legislating for appeals to the CCJ. The relevant parliamentary intention was that which existed at the time of passage of the package of legislation.

[118] The present appeal provides an opportunity for application of the test for severance in circumstances where severance of constitutionally inconsistent provisions involves speculation as to parliamentary intention. This Court must ask itself whether on a fair review of the whole matter it can be safely assumed that at the time the Amendment Act was passed, the legislature would have enacted what survives without enacting the part that is *ultra vires*. All relevant indicia of

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[91] [2005] 2 AC 356, [2005] 2 lrc 840

parliamentary intention must be taken into account including the legislative history, the long title (and any perambulatory provisions) of the statute. Having consulted these sources, if the Court is reasonably certain that Parliament would have enacted the section that remains independently of what was struck down for inconsistency then severance is appropriate. But if the parliamentary intention is unclear or it is reasonably clear that Parliament would not have enacted the remainder of the statute by itself then the court is obliged to strike down the whole Act.

[119] In this case we consider that it is less intrusive to strike down the Amendment Act than to leave its neutered remains on the statute books. Even if the exercise of severance had been restricted to expunging the impugned mandatory minimum penalties, the mere fact that what remains of Section 106A (3) after the excision, or that what remains of Section 106A after the excision of sections 106A (3) and (5), comprise a coherent legislative scheme cannot be decisive and to initiate an enquiry primarily along these lines is to ask the wrong question. Whether the provisions in a statute constitute a coherent legislative scheme is primarily a matter for Parliament. It is for Parliament to decide the nature and content of the laws of the State. The courts are mainly concerned with the interpretation and application of those laws.

[120] On any reasonable view of the legislative history of the Amendment Act, the mandatory minimum penalties prescribed in Section 106A (3) was the centrepiece of that legislation. Those minimum penalties marked the radical departure from the existing law in Section 105 of the Supreme Court of Judicature Act and they cannot be excised from Section 106A (3) without grossly distorting the penalty regime contemplated by Parliament and thereby fundamentally altering the nature of the legislation. In the present case this has been compounded by the necessity for inserting wording that is patently different from what Parliament enacted and intended. Far from being unclear, the result of the "severance" proposed is a clear repudiation of the parliamentary intention and involves the modification, adaptation and qualification of the statute as passed by Parliament. Section 106A

(3) cannot be excised without denuding the Amendment Act of its apparent reason for existence.

[121] There is no doubt that the acrimony between the government and the Lord Ashcroft-led groups was the critical driving force for the deliberation and passage of the Amendment Act. We agree that the generalized wording employed by the legislation means that the legislation can in no way be characterized as an *ad hominen* attack by the government against its adversaries under the principles developed by the Privy Council in *Liyanage v R*[92]. Had the provisions of the Amendment Act otherwise passed constitutional muster, the motif for the passage of the legislation would have remained entirely inconsequential. But in circumstances where critically important provisions are by universal judicial consent deemed unconstitutional, the issue of parliamentary intention becomes relevant to the question of severance, and it becomes permissible to revisit and to take into account the rationale for the passage of the legislation. We consider that the background to the passage of the Amendment Act makes it less likely that Parliament would have passed the legislation without the impugned provisions.

[122] We do not agree with the Court of Appeal's approach of striking down the bulk of the law and leaving intact sub-sections (8) – (9) and (14) – (15). Subsection (8) legislates the power of the court to issue anti-arbitration injunctions the breach of which exposes the offender to the impugned penalty regime, but the Court of Appeal found and this Court confirmed in *British Caribbean Bank Limited v Attorney General of Belize*[93] that this provision largely repeats the common law. It must be doubtful that Parliament would have enacted this provision by itself without application of the penalty regime. Subsection (9) provides the modes for service of an injunction issued by the court and obviously cannot stand on its own. Subsection (14) is entirely ancillary to the impugned subsection (13); and

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[92] [1967] 1 AC 259
[93] [2013] CCJ 4 (AJ) at para. 31, (2013) 82 WIR 63.

subsection (15) merely empowers the Attorney General to make rules for giving better effect to the provisions of Section 106A. We do not think that, given the choice, Parliament would have wanted to enact such a hobbled, almost meaningless piece of legislation as represented by subsections (8) – (9) and (14) – (15).

[123] In the premises we agree with the judgment of the Court save that we would dispose of the case by striking the entire Amendment Act and leaving a clear slate upon which Parliament would be free in its sovereign right to enact constitutionally consistent legislation governing disobedience to orders issued by the courts.

THE ORDERS OF THE COURT

The Court accordingly orders that:

1. Both the appeal of the Attorney General and the cross-appeals of the Zuniga and BCB Holdings groups respectively be dismissed;
2. Section 106(A)(3) of the Supreme Court of Judicature Act as contained in the Supreme Court of Judicature (Amendment) Act, 2010 as amended by the Supreme Court of Judicature (Amendment) (No. 2) Act, 2010 is inconsistent with the Constitution of Belize to the extent that it provides for mandatory minimum sentences;
3. By majority decision, the said mandatory minimum sentences be severed from section 106(A)(3);
4. By majority decision, the proviso to section 106(A)(3) and sub-section (3a) be severed from section 106(A)(3);
5. Section 106(A)(5) of the Supreme Court of Judicature Act as contained in the Supreme Court of Judicature (Amendment) Act, 2010 is inconsistent with the Constitution of Belize and the same be invalidated in its entirety;

6. The Attorney General shall pay to the Zuniga group and the BCB Holdings group 75% of the costs of the State's unsuccessful appeal and the Zuniga group and the BCB Holdings group shall each pay to the Attorney General 100% of the State's costs incurred in responding to their respective unsuccessful cross-appeals.

The Hon Mr Justice R Nelson

The Hon Mr Justice A Saunders

The Hon Mr Justice Wit

The Hon Mr Justice D Hayton

The Hon Mr Justice W Anderson