THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

FEDERATION OF SAINT CHRISTOPHER AND NEVIS

SAINT CHRISTOPHER CIRCUIT

(CIVIL)

A.D. 2013

CLAIM NO. SKBHCV 2013/0090

In the Matter of Sections 52(6) of the Constitution of St. Christopher and Nevis

And in the Matter of an Application for Declaratory, Injunctive and Other Relief pursuant to Section 96 of the Constitution of St. Christopher and Nevis

BETWEEN:

[1] HON. MARK BRANTLEY (Leader of the Opposition)
[2] HON. EUGENE HAMILTON
[3] HON. SHAWN RICHARDS
[4] HON. VANCE ARMORY
[5] HON. SAM CONDOR
[6] HON. TIMOTHY HARRIS

Claimants/Respondents

And

[1] HON. CURTIS MARTIN (Speaker of the National Assembly)
[2] HON. DENZIL DOUGLAS (Prime Minister)
[3] HON. DR. ASIM MARTIN (Deputy Prime Minister)
[4] HON. PATRICE NISBETT
[5] HON. MARCELLA LIBURD
[6] HON. GLEN PHILLIP
[7] HON. RICHARD SKERRIT
[8] HON. NIGEL CARTY
[9] HON. JASON HAMILTON
[10] THE ATTORNEY GENERAL OF ST. CHRISPTOPHER AND NEVIS

Defendants/Applicants

Appearances:-

Mr. Douglas Mendes, SC leading Mr. Vincent Byron instructed by Mr. MacClure Taylor for the Claimants/Respondents

Mr. Anthony Astaphan, SC instructed by Ms. Angelina Gracy Sookoo for 1st Defendant/Applicant

Dr. Henry L. Browne, QC leading Mr. Sylvester Anthony instructed by Ms. Angelina Gracy Sookoo for the 2nd – 9th Defendants/Applicants

Lord Peter Goldsmith, QC PC leading the Solicitor General, Mrs. Simone Bullen-Thompson and Ms. Nisharma Rattan-Mack for the 10th Defendant/Applicant

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2013: December 16
2014: February 12

Constitutional Originating Motion – Parliamentary Privilege – Internal Affairs of Parliament - Whether the Court has jurisdiction to intervene in the Internal Affairs of Parliament – Whether Intervention Permissible in Cases of Breach of Provision of the Constitution.

Constitutional Rights - Implied Constitution Right – Method of Discovering Implied Rights – Text and Structure of the Constitution – Whether Context Within Which the Constitution Drafted Relevant

Motion of No Confidence in Government – Constitutional Structure of Government – Constitutional and Parliamentary Democracy – Whether Right to Govern Dependant on Electoral Mandate Given by Support of Majority of Elected Representatives – Whether Expressed Constitutional Urgency Where Vote of No Confidence in Government by Majority of Elected Representatives – Whether Substantive and Procedural Implied Right in Section 52(6) of the St. Kitts and Nevis Constitution that Motion of No Confidence be Debated with Reasonable Time as a Matter of Urgency.

Relief under Section 96 of the St. Kitts and Nevis Constitution – Extent of Such Relief – Applicable Principles – Discretion to Grant Declaration - Whether Relief May include Injunctive Relief - Whether Section 96 allows the Grant of Injunction Against the Speaker or Members of the National Assembly in matters Relating to the Conduct of Internal Affairs.

The claimants in the substantive matter are elected members of the National Assembly who are complaining that they have been unable to cause the Speaker of the Assembly to place a motion of no confidence in the government of St. Kitts and Nevis on the Order Paper so that it may be debated and voted on. Their originating motion was filed on the 3 April 2013, in which they seek constitutional relief against not only the Speaker but also the Prime Minister and other members of the Cabinet, alleging that these latter persons have been responsible for the failure.

Almost immediately following the filing of this originating motion, the 1st to the 9th defendants and the 10th defendant filed separate applications to strike out the underlying originating motion and for a number of declarations.

These applications have raised jurisdictional objections, and have made it necessary to decide as preliminary legal issues whether the court has any power or discretion to intervene in the internal affairs of the National Assembly, and whether there is to be implied in section 52(6) of the Constitution, a right given to every Member of the National Assembly to request that a motion of no confidence in the government be placed on the Order Paper of the Assembly to be debated within a reasonable time as a matter of urgency, and there if there was such a right, whether the court has power pursuant to section 96 of the Constitution to grant declarations and injunctive relief against the Speaker of the National Assembly in relation to matters of internal procedure of the Assembly. Finally, on the question going to jurisdiction, the court is tasked with considering whether the motion of no confidence itself is a conforming motion, and if it is not, whether the entire originating motion should be struck out on this basis alone.

The applications have also raised an issue as to whether the Hon. Prime Minister and Members of his Cabinet could in the circumstances of this case be properly joined as parties for any failure of the Speaker in relation to matters of internal procedure of the Assembly.

Held, removing the 2nd to the 10th defendants as parties to the originating motion and granting their costs to be assessed if not agreed, but refusing all other declarations sought on the two applications, and allowing the matter to proceed against the 1st defendant, that:

1. It is not part of the court's functions to make binding statements as to whether a motion to be laid before the National Assembly is of a particular kind or not. When a request is made in the prescribed manner for a motion to be placed on the Order Paper, the Speaker, for the purpose of determining whether and what kind of priority to accord the motion, is tasked with making a determination whether the particular motion is of the kind it proclaims itself to be. If, on its face, it is expressed to be a motion of no confidence, the Speaker ought not to engage in making pronouncements whether it has met a particular threshold or not, or whether or not he is satisfied that it is that kind of motion. He should be guided by what it proclaims itself to be, treat it as that kind of motion, and place it before the Assembly, for it (the Assembly), on the debates and the vote, to make those final determinations as to its nature.

   Considered: Conacher v Canada (Prime Minister) [2010] F.C.R. 411; Attorney General of Guyana v David Granger CM No. 94 of 2012 High Court of Guyana.

2. The finding that it is for the Assembly ultimately to discover the true nature of a motion, does not of itself, bar this court from considering the other issues which have arisen. On these applications, and the originating motion, the court should rely on what the motion on it face proclaims itself to be, for the purpose of addressing the other issues raised on these applications and the originating motion.

3. The St Kitts and Nevis Constitution, like all other written constitutions styled on the Westminster model, has displaced the common law doctrine of general competence and

unqualified supremacy of Parliament. The National Assembly's right of control over the internal management of its own affairs is a privilege which history has shown, is one which is necessary as being essential to the discharge to its lawful functions. Accordingly, in a constitutional supremacy, the Assembly is not completely immune from the scrutiny of the court, which has a limited right to intervene to ensure that the Assembly has not acted, or is not acting in a manner inconsistent with any provision of the Constitution.

Considered: Bahamas Methodist Church v Symmonette (2005) 32 WIR 1; Hughes v Roger Civil Suits Nos. 99 & 101 (Anguilla); The Speaker v De Lille Case No. 297 of 1998; Attorney General of Guyana v David Granger and Raphael Trotman CM No. 94 of 2012 High Court of Guyana; Bradlaugh v Gosset 12 QB 271; Burdett v Abbot (1810) 104 ER 554; Smith v Mutasa et al [1990] LRC 87; Rediffision (Hong Kong) Ltd. v Attorney General of Hong Kong [1970] AC 1136

Distinguished: The Prime Minister of Dominica and Others v Hector John and Others Civil Appeal No. 6 of 2013 (Dominica); Nicholls Esprit and Others v Speaker of the House and Others Civil Appeal No. 5 of 2008; Sakeasi Butadroka v The Attorney General [1993] FLR 115

4. The St. Kitts and Nevis Constitution establishes a constitutional democracy defined by an effective representative government elected by free, fair and periodic elections. In this constitutional structure, the executive authority of government is vested in Her Majesty, but is for all practical purposes exercised by the Prime Minister and his Cabinet. The Constitution expressly provides that the appointment of the Prime Minister is informed by the majority of elected Members of the Assembly, and expressly clothes him with considerable executive authority giving him inter alia, the power of appointment and dismissal of all Members of the Cabinet, and what business of the Government, if any, each Member of his Cabinet should be given. Under this system of Government, the term of Prime Minister and his Cabinet is only validated by the support of a majority of the elected Representatives of the Assembly; it is the mandate of the people, through the elected representatives that the Prime Minister and his Cabinet is given the right of government. By a number of expressed provisions, the Constitution expressly stipulate that if a majority of the elected Representatives vote in favour of a motion of no confidence in the government, a Prime Minister and his Government will cease to have the right to govern. The Constitution expressly not only provides that on such vote the Prime Minister is to either resign or else Parliament is dissolved, but it also express an urgency that should follow such a vote of no confidence. It would therefore make nonsense of these provisions if a majority of members of the elected Representatives may have lost confidence in the Government, and being ready and willing to vote on such a motion have requested that such a motion be placed on the Order Paper, but no steps are being taken to have such a motion debated and voted on within a reasonable time as a matter of priority. There is accordingly to be derived from the text, structure and context of the St. Kitts and Nevis Constitution, an implied substantive and procedural right in section 52(6) that each and every member of the National Assembly is entitled to request that a motion of no confidence be placed before the Assembly, and that such a motion must be accorded priority over other business by being scheduled, debated and voted on within a reasonable time given the programme of the Assembly.

Interpreting and Applying Provisions of Part IV and V of the Constitution of St. Kitts and Nevis, specifically sections, 25, 26, 29, 30, 31, 41(1) 47, 48, 52(2), 52(3), 52(9), 54, and 59.

Applied: Hinds v The Queen [1977] AC 195; Sharma v Attorney General of Trinidad and Tobago [2007] 1 WLR 2223; Suratt v Attorney General of Trinidad and Tobago [2008] AC 655; Dicta of Moseneke DCJ in Mazibuko v Sisulu [2013] ZACC 28; Dicta of Mason CJ in Australian Capital Television Pty Ltd v The Commonwealth (ACTV) 177 CLR 106 at page 135.

Considered: Lange v The Australian Broadcasting Commission (1997) 189 CLR 520; Australian National Airways Pty. Ltd. v The Commonwealth (1945) 71 CLR 29; Victoria v The Commonwealth (1971) 122 CLR 353;

5. Where it is shown to the court's satisfaction, that the Speaker has failed, or is failing to act in a manner consistent with the implied substantive and procedural right contained in section 52(6) of the Constitution, the court has a right, on the proper application being made by any Member of the Assembly as being a person with a relevant interest, to enquire, intervene and to declare such a breach under section 96 of the Constitution. In approaching the exercise of discretion under section 96, the court must accord respect for parliamentary privilege, and must not be concerned in any sense to express views on how the executive should conduct themselves, it is simply to ensure there is an 'affirmation of constitutional values', and that the person with the relevant interest is able to exercise rights given to him under the Constitution without any executive interference. As has been noted 'vindication involves an assertion that the right is a valuable one'. 'In most, if not all cases, a declaration on its own may achieve all that is needed to vindicate the right. In other cases, more will be called for to give a meaningful remedy. In a case involving the section 44(1) power given to Parliament to manage its own internal affairs, it can only be in the rarest of cases, and only where every other course has failed, that a court may consider the grant of an injunction to preserve the sanctity and dignity of the Constitution.

   Applied: Angela Inniss v The Attorney General of St. Kitts and Nevis [2008] UKPC 42

   Considered: Attorney General of Trinidad and Tobago v Ramanoop [2006] 1 AC 328; Merson v Cartwright and another [2005] UKPC 38; Taunoa and others v Attorney General [2007] 5 LRC 680; Attorney General of Guyana v David Granger and Another CM No. 94 of 2012; R (Walumba Lumba and another) v Secretary of State for the Home Department [2011] UKSC 12

6. It is the Speaker who has the duty to regulate the conduct of proceedings in the Assembly. There is no duty on the Prime Minister or the Cabinet, or for that matter the Attorney General. From the claimants' case itself, there has been no statement that there has been acceptance by the Prime Minister or any Member of the Cabinet that they have interfered with the process. It would be improper to use a 'practice' on how the Cabinet places matters on the Order Paper to ground an enforceable cause of action against the 2nd to 9th defendants that they have prevented the Speaker from placing this motion on the

Order Paper, or that they are the ones deciding that this motion should not be placed on the Order Paper. No amount of oral evidence could elevate this aspect of the case to produce a cause of action. This is not a case where live issues of facts have been raised which can only be determined by oral evidence. If there has been a contravention of the implied Constitutional right to be found in section 52(6), that breach has been committed by the Speaker, and not by the other defendants. It would be speculation to use the 'practice' to ground a conclusion that the Speaker was prevented from laying the motion on the Order Paper, or that he had abdicated his obligations in favour of the Cabinet. There is no grounding in the pleadings of any interference, much less wrongful interference. Therefore, there could be no cause of action that these defendants have breached their lawful duty. The pleadings does not show or raise an enforceable cause of action that the Prime Minister or his Cabinet has unlawfully or improperly interfered with the Speaker's duty to place this motion of no confidence on the Order Paper. These defendants are accordingly removed from the proceedings. On this basis, the Attorney General is also removed from the proceedings.

Applied: Tawny Assets Ltd. East Pine Management Ltd. and others Civil Appeal No. 7 of 2012 BVI; Ian Peters v Robert George Spencer Civil Appeal No. 16 of 2009 (Antigua and Barbuda)

Considered: Edifil Chenfil James and Hector John v Speaker of the House of Assembly of Dominica and Others Claims Nos. 199 & 200 of 2010; Attorney General of Guyana v David Granger and Raphael Trotman CM No. 94 of 2012 High Court of Guyana

JUDGMENT

[1] RAMDHANI J. (Ag.) These are two separate applications, one filed by the 1st to the 9th defendants, and the other filed by the 10th defendant (the 'defendants') seeking not only to strike out the claimants' (the 'claimants') originating motion for constitutional relief under section 96 of the Constitution of St. Kitts and Nevis, but also for certain specific declarations to ensure that the claimants never again attempt to invoke the court's jurisdiction to compel the Speaker of the National Assembly (the 'Assembly') to place any 'motion of no confidence' on the Order Paper for debate; this, the defendants say, is a matter entirely for the Speaker and the court has no role to play in such matter. Additionally, and in any event, they have asked that the court to remove the 2nd to the 9th defendants as there is no cause of action disclosed against them.

The Parties

[2] The claimants are all elected representatives of the National Assembly (the 'Assembly'). They are, in order as they appear on the pleadings, (1) the Hon. Mark Brantley of Montpelier Estate, Nevis, Barrister-at-Law and Solicitor, the elected Member of the Assembly for Nevis 9, and Leader of the Opposition, (2) the Hon. Sam Terrance Condor of Bird Rock, Basseterre, former Deputy Prime Minister, the elected Member for St. Christopher 3, (3) the Hon. Shawn K. Richards of Crab Hill, Sandy Point, elected Member for St. Christopher 5, (4) the Hon. Timothy Harris of Tabernacle, former Senior Minister, the elected Member for St. Christopher 7 (5) the Hon. Eugene Hamilton of Cunningham Heights, Cayon, the elected Member for St. Christopher 8, and (6) the Hon. Vance Amory of Church Ground, Nevis, the Premier of Nevis and elected Member for Nevis 10.

[3] Except for the Speaker, all of the defendants comprise the Cabinet. The defendants, in the order that they have been named on the pleadings, are (1) Hon. Curtis Martin of Stapleton Estate, St. Kitts, the Speaker of the Assembly, (2) the Rt. Hon. Dr. Denzil Douglas of St. Paul, St. Kitts, medical doctor, Prime Minister and elected Member of the Assembly for St. Christopher 6, (3) the Hon. Dr. Asim Martin of Frigate Bay, St. Kitts, medical doctor, Deputy Prime Minister and elected Member of the Assembly for St. Christopher 1, (4) the Hon. Marcella Liburd of Bird Rock, Basseterre, St. Kitts, Barrister-at-Law and Solicitor, and elected Member of the Assembly for St. Christopher 2, (5) the Hon. Glen Phillip of Stonefort, St. Kitts, Member of the Assembly for St. Christopher 4, (6) the Hon. Patrice Nisbett of Camps, Nevis, Barrister-at-Law and Solicitor, and Member of the Assembly for Nevis 11, (7) the Hon. Richard Skerrit of Frigate Bay, St. Kitts, Senator on the Government benches, (8) the Hon. Nigel Carty of Saddlers, St. Kitts, Senator on the Government benches, and (9) the Hon. Jason Hamilton of LimeKiln, Basseterre, St. Kitts, Barrister-at-Law and Solicitor, Attorney General and Senator on the Government benches, and (10) the Attorney General of St. Kitts and Nevis of Government Headquarters, Basseterre, St. Kitts.

Brief Background Events

[4] On the 11 December 2012, the Leader of the Opposition, the Hon. Mark Brantley, lodged with the Clerk of the National Assembly (the 'Clerk'), what has been described as 'motion of no confidence' in the government of St. Kitts and Nevis', and requested that it be placed on the Order Paper for debate in the Assembly. The 'motion of no confidence' which was lodged, is in the following terms:

Resolution

> *"Resolution of the National Assembly of Saint Christopher and Nevis for a Vote of no confidence in the Government of St. Kitts and Nevis caused by the poor Leadership of Prime Minister the Rt. Honourable Dr. Denzil L. Douglas."*
>
> *WHEREAS since the installation of the Rt. Hon. Dr. Denzil L. Douglas as Prime Minister of St. Kitts and Nevis and Leader of the Government of St. Kitts and Nevis our Federation has been governed in a manner which has undermined our Constitution, has led to disastrous economic outturns and lack of public confidence in his leadership and in his government.*
>
> *AND WHEREAS the Prime Minister has constantly and willfully disregarded the Constitution of the Country.*
>
> *AND WHEREAS the Prime Minister has undermined the Ministerial system of Government as prescribed in the Constitution.*
>
> *AND WHEREAS the Prime Minister has failed to consult the Country prior to the Land for Debt Swap Agreement with the St. Kitts-Nevis and Anguilla National Bank Ltd with the resultant sellout of our patrimony.*
>
> *AND WHEREAS the Prime Minister has refused to effect a decrease in electricity rates in St. Kitts with the result that household and commercial consumers find themselves unable to pay and some have had to return to early 20th century modes of lighting with lamps and candles.*
>
> *AND WHEREAS the Prime Minister has refused to uphold a system of good governance thereby destroying the public service.*
>
> *AND WHEREAS the Prime Minister has mismanaged the financial affairs of St. Kitts and Nevis thereby incurring a massive national debt with defaults on bond payments and the imposition of haircuts without regard to the consequences for bondholders and the Country's financial image.*

AND WHEREAS the Prime Minister has refused to have full ventilation with the Nation of the IMF conditions relative to the public debt.

AND WHEREAS the Prime Minister displays unruly parliamentary behavior and unruly extra parliamentary behavior even threatening to sell a fellow national.

AND WHEREAS the Prime Minister has attempted to further increase the number of senators in Parliament in the face of the IMF calls for a lessening of public expenditure.

AND WHEREAS the Prime Minister has instituted SIDF as an alternative to the consolidated fund to receive moneys which constitutionally are to be paid into the consolidated fund and thereby insulating the foundation from parliamentary and audit scrutiny and oversight.

AND WHEREAS the Prime Minister has as Prime Minister of Elections publicly supported the previous Supervisor of Elections in defying the directive of the Electoral Commission with the result that hundreds of registered voters in Nevis were illegally removed from the Voters List in Nevis causing tremendous harm and damage to the reputation of the electoral system in St. Kitts and Nevis.

NOW THEREFORE,

BE IT RESOLVED that this Honourable House expresses its concern and lack of confidence in the Government of St. Kitts and Nevis cause by the poor Leadership of Prime Minister, the Rt. Hon. Dr. Denzil L. Douglas.

BE IT FURTHER RESOLVED that this Honourable House calls for the immediate resignation of the Rt. Hon. Dr. Denzil L. Douglas as Prime Minister of St. Kitts and Nevis.

[5] It would appear that on receipt of the 'motion of no confidence', the Clerk in the usual way, recorded the date and time he received it, and passed the original to the Speaker and copies to the Prime Minister, the Attorney General and the Secretary to the Cabinet. The Speaker, by letter dated 10 December 2012, had earlier informed the Leader of the Opposition that a motion properly submitted would be entertained at the earliest convenient time, subject to the exigencies of the Government business. The Speaker noted that it was impossible to include the motion on the Order Paper for the next sitting as the budget had already been slated for debate during that session.[1]

[1] Letter attached as 'MB10' to the affidavit of Mr. Mark Brantley dated 3 April 2013.

[6] Up until April 2013, however, the motion has not been placed on the Order Paper for debate, despite numerous requests by the 1st claimant and others. The budget debates had been postponed but there were several sittings of the Assembly to debate other matters including the debates and vote on the Senators (Increase of Numbers) Bill 2012.

[7] The evidence[2] presented to the court indicates that the Clerk had not received any instructions from the Speaker to place the motion on the Agenda for debate in the National Assembly. It seemed that despite a number of enquiries since the letter of the 10 December 2012 from the Speaker, no formal explanation for the 'non listing' of the motion was given to the 1st claimant.

[8] The specific provisions of Standing Orders of the National Assembly[3] (the 'Standing Orders') themselves do not treat directly with motions of no confidence, but establish general rules relating to the placing of matters on the Order Paper for debate in the Assembly. This provides that when a Member wishes such a matter to be debated, he is required to submit a notice in writing of the motion to the Clerk of the Assembly. He must sign this notice and address it to the Clerk.[4] 'The notice could either be given at some previous sitting of the Assembly or to the Clerk 'not less than three days previous to the hour of the sitting of the National Assembly at which such motion is to be made.[5]

[9] When the Clerk receives the notice he is required to enter it in the Order Book, and it seems that he is to record a date in that book as to when the motion is to be set down for debate.[6] The Standing Orders however, do not provide who is to fix that date, nor do they provide who is to determine what business is included in the Order Paper before the Assembly for a particular sitting, or 'how a particular motion graduates from the Notice Paper to an Order Paper'.

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[2] Paragraph 23 of the affidavit of Mr. Jose Lloyd, the Clerk to the National Assembly sworn on the 16 April 2013.
[3] Third Schedule to the National Assembly Elections Act Cap 2.01, Laws of St. Christopher and Nevis
[4] SO 27(1) and (2)
[5] SO 26
[6] SO 11(4)

[10] With regards to motions from private Members, the Standing Orders provides that such motions 'shall be set down on the Order Paper in the order in which [they were] entered in the Order Book.'[7] Again, there is no express provision that states how and who should decide on these fixtures, but all the parties seem agreed that by Standing Order 9(5) it is the Speaker who is given this general power. This Standing Order provides:

> *"The Speaker in the National Assembly… shall have the power to regulate the conduct of business in all matters not provided for in these Standing Orders."*

[11] Of relevance is Standing Order 85, which incorporates the usage and practice of the United Kingdom's House of Commons in matters not expressly provided for by the St. Kitts and Nevis provisions, once these are not inconsistent with the local provisions. Whilst there are no precise rules to be drawn from the United Kingdom, more will be said about this later.

[12] That there are no express rules and or that there is no express mechanism to determine when and how motions of no confidence should be placed on the Order Paper for debate has contributed significantly to the underlying matter, and the events which have taken place.

The Originating Motion

[13] On the 3 April 2013, the claimants filed an originating motion pursuant to section 96 of the Constitution seeking a number of declarations as well as an injunction, namely:

1. *A Declaration that the Claimants and each of them are entitled as of right to bring a motion of no confidence in the Government of St. Christopher and Nevis before the National Assembly, pursuant to section 52(6) of the Constitution of St. Christopher and Nevis.*

2. *A Declaration that the Claimants and each of them are entitled as of right to move a motion of no confidence in the Government of St. Christopher and Nevis before the National Assembly, pursuant to section 52(6) of the Constitution of St. Christopher and Nevis.*

[7] SO 14(4)

3. *A Declaration that the National Assembly must debate and decide a motion of no confidence as a matter of urgency;*

4. *A Declaration that a motion of no confidence must be scheduled for debate in the National Assembly as a matter of urgency and within a reasonable time of the motion being handed to the clerk or sent to or left at the Clerk's office.*

5. *A Declaration that the First Defendant, as Speaker of the National Assembly, and/or the other Defendants, collectively as the Cabinet, is obliged to schedule the debate on a motion of no-confidence as a matter or urgency and within a reasonable time of the motion being handed to the Clerk or sent to or left at the Clerk's office;*

6. *A Declaration that the Claimants' right to bring and/or move a Motion of no confidence in the Government of St. Christopher and Nevis has been and is being violated by the failure of the First Defendant and/or the other Defendants to schedule the Motion of No confidence in the Government of St. Christopher and Nevis sent to and/ or left at the office of the Clerk on the 11 December for debate in the National Assembly;*

7. *An order directing the Defendants to take whatever steps are necessary to ensure that the Motion of No Confidence in the Government of St. Christopher and Nevis sent to or left at the office of the Clerk on the 11 December 2012 be scheduled for debate in the National Assembly on or before the 9 April 2013 and so soon thereafter as may be practicable and in any event before any other business, with the exception of the budget, is dealt with by the Assembly;*

8. *An interim order restraining the Defendants whether by themselves or their servants and or agents or by the Clerk of the Assembly from scheduling any business of the Assembly, other than the budget, to be dealt with by the Assembly before the debate on the said Motion of No Confidence.*

9. *Such further or other relief as may be just;*

10. *Costs.*

[14] The court office listed the *ex parte* application for the injunction to be heard on the 5 April 2013. This application was eventually made *inter partes* and after several adjournments, it was withdrawn on the 18 April 2013.

[15] 'On the 15 April, 2013 the 1st to the 9th defendants and the 10th defendant separately filed the applications which are the subject of this judgment, to strike out the originating motion,

and for certain declaratory relief.'[8] Serious jurisdictional issues have been raised by these applications. That very day, the claimants filed an application for a timetabling order so that the originating motion could be set for hearing on the 18 April 2013. This application was granted.

[16] By the 17 April 2013, the 1st to the 9th defendants and the 10th defendant filed separate submissions in support of their respective applications.

[17] 'On the 18 April 2013, at the hearing, the claimants withdrew the application for the injunction, but the hearing of these applications were adjourned to the 11, 12 and 13 of July 2013 with the court giving certain directions relating to affidavits and submissions to facilitate the smooth hearing of the matter. In particular, the claimants were directed to file affidavits in response to the applications to strike out on or before the 29 April 2013, and to file submissions by 7 June 2013.

[18] The claimants did not comply with the directions, but on the 4 July 2013, they filed and served on all the defendants, a 'Notice of Withdrawal' under CPR Part 37 'wholly discontinuing the claim'.

[19] By way of an explanation, the claimants have said that they had continued to hope that notwithstanding the court proceedings, the motion would have been placed on the Order Paper for debate. But they lost this hope they say, when they received a letter from the Speaker dated the 24 June 2013 in response to a letter written by them dated the 11 June 2013. In this last letter, the Speaker was now saying to them that he was now unable to place the motion on the Order Paper for debate as 'the matter was now *'sub judice'*, as a claim had been filed in the High Court. The Speaker pointed to Standing Order 43, which he says will not permit the matter to be debated.

[20] It was for this reason, the claimants say, that they withdrew the substantive originating motion, as they had hoped this would then open the way for the Speaker to place the

[8] Certain aspects of the chronology of events are usefully set out in the 10th defendant's supplementary submissions dated 25 November 2013.

motion on the Order Paper. They state that on the 5 July 2013, they wrote again to the Speaker indicating that they had withdrawn the matter and invited him again to table the motion.

[21] The defendants, however, considered that this withdrawal left many important matters unresolved. They state that the claimants on the 4 July 2013 also filed a new motion of no confidence. And it is this, they say, which had caused them to file the applications to strike out the notice of withdrawal, so that the serious jurisdictional matters which had been raised by their applications to strike out could be decided once and for all. The claimants, from their side contended that this was but another attempt by the defendants to prolong the matter in court so as to avoid debating the motion.

[22] The applications to strike out the notice of withdrawal came before the court on several occasions and eventually, the claimants withdrew the notice of withdrawal and discontinuance. At one stage, the defendants had sought to argue that if they succeeded on their applications to strike out the notice of withdrawal, it did not mean that the underlying claim was revived but only their applications to strike out were revived. They did not pursue this, properly so, in this Court's view. All the parties have now quite properly agreed that the status quo has reverted; the claim is revived. The parties have also agreed that these applications to strike out that claim are still pending and the court should first hear these applications before treating with the substantive matter.

The Applications to Strike out by (a) the 1st to 9th Defendants, and (b) the 10th Defendant

[23] The application to strike by the 1st to the 9th defendants is dated the 15th April 2013 and seeks the following orders:

> *(i) A declaration that the High Court has no jurisdiction to determine any of the issues raised or grant he relief claimed and in particular the mandatory or injunctive declarations and orders against the Speaker and National Assembly;*

(ii) Alternatively, a declaration that the issues raised by the claimants are non-justiciable or are not enforceable by the High Court.

(iii) An order that the claimants originating Motion and Application filed on April 3, 2013 by struck out in their entirety in that the claim and the relief claimed violates or contravenes

a) the powers, privileges and immunities of the National Assembly and the Speaker under the common law and the National Assembly (Powers and Privileges) Act Cap 2.04; and or

b) the separation of powers doctrine.

(iv) An order that the declarations and orders claimed in the claimants Originating Motion and Application, and in particular the mandatory or injunctive declarations and orders against the Speaker and National Assembly, be refused and denied;

(v) A declaration that the Second to the Ninth Defendants are improperly joined to the Claimants' Originating Motion and Application as no proper cause of action was pleaded or disclosed against them.

(vi) An order removing the names of the Second to the Ninth Defendants as parties to the Claimants' Originating Motion and Application;

(vii) A declaration that the Claimants are not entitled to any or any interim relief in respect of section 52(6) of the Constitution whether under section 96 of the Constitution or otherwise.

[24] The 10th Defendant filed a separate application on the same date seeking essentially the same relief except the one listed as (vi), that is, there is no specific relief seeking the removal of the names of the 2nd to the 9th defendants. Notwithstanding this contention is contained as ground '10' in his application.

[25] The grounds in support of the applications are essentially in similar terms. I propose to set out the grounds supporting the application by the 1st to the 9th defendants. These are:

(1) The claim for relief claimed by the claimants are in respect of

i. the resolution relied on by the claimants to ground their claim under section 52(6) of the Constitution, which purports to be in relation to a vote of no confidence, but which is not, in true character, a motion of no confidence;

ii. the powers of the Speaker of the National Assembly and his alleged failure to schedule what is being described as a motion of no confidence pursuant to section 52(6) for debate or vote by the National Assembly;

iii. the powers and privileges of the National Assembly; and

iv. The internal management, procedure, rules, standing orders and proceedings of the National Assembly inclusive of its powers and privileges.

(2) The High Court is precluded from inquiring into internal management, procedure, rules and proceedings of the National Assembly inclusive of its powers and privileges. The Parliament is master of its own management, rules, procedures and affairs.

(3) The provisions of section 23 of the National Assembly (Powers and Privileges) Act Cap 2.04 of the revised Laws of Saint Christopher and Nevis, 2002 provide and/or ensure that in keeping with the common law and/or separation of powers doctrine neither the Speaker nor any officer of the National Assembly shall be subject to the scrutiny of any Court;

(4) In view of section 23 of the National Assembly (Powers and Privileges) Act Cap 2.04 and/or the separation of powers doctrine

i. the High Court has no jurisdiction and ought not to hear or determine the claimants claim or grant the relief claimed

ii. the High Court ought not to make or grant

a) any order which intrudes into the powers and privileges and/or internal proceedings of the National Assembly; or

b) any mandatory, coercive or injunctive order against the First Defendant Speaker of the National Assembly in relation to the powers and privileges and/or internal proceedings of the National Assembly or powers of the Speaker of the National Assembly.

(5) The Claim

i. does not concern any fundamental rights or

ii. any expressed provision of the Constitution which restricts or controls its procedure or rules, and there

(a) discloses no cause of action or

(b) no justiciable or enforceable cause of action.

(6) The claims for declaratory relief, in particular relief (3), (4) and (5) not being tied to a particular motion are academic in nature and should be struck out.

(7) Votes of no confidence or matters relating to them are political questions or in the nature of political questions and/or lack legal aspects or characteristics and create no legal rights justiciable or enforceable by the High Court.

(8) The Claimants have no justiciable or enforceable rights.

(9) The issues raised by the Claimants in relation to the purported resolution or vote of no confidence are political in nature and are not legal issues, and are therefore not justiciable or enforceable by the High Court.

(10) The Second to the Ninth Defendants are improperly joined as Defendants; and in any event there is no proper cause of action pleaded or disclosed against them.

Alternatively

(11) The Declarations and orders claimed by the Claimants violate the privileges and powers of the National Assembly, section 23 and National Assembly (Powers and Privileges) Act Cap. 2.04 and/or the doctrine of separation of powers and therefore the High Court ought not to grant them;

In the Further Alternative

(12) On the assumption that the High Court has jurisdiction, the High Court ought, in view of the delay of well over 124 days, to refuse to grant any of the interim or coercive relief claimed by the Claimants.

The Issues Raised on the Applications

[26] In my view, having regard to how the defendants have presented their case, a number of issues arise for the court's determination, most of which go to the jurisdiction of the court to hear the matter.

[27] First, the court is called upon to determine as a preliminary issue, whether, the purported motion is a motion of no confidence in the government contemplated by section 52(6) of the Constitution; and in any event, if there is any question as to whether the purported motion is a motion of no confidence contemplated by section 52(6) of the Constitution or not, whether this question is a matter for the Speaker to decide and not the High Court.?

[28] Second, whether the court has jurisdiction to hear this matter concerning the exercise of the Speaker's discretion or decision relating to the motion of no confidence, which the Leader of the Opposition has requested be placed on the Order Paper for debate in the Assembly?

[29] Third, if the answer to the second issue is in the affirmative, what is the extent of the court's power under section 96 to grant relief? Specifically whether the court has the power

to issue an order to the Speaker to place the motion on the Order Paper for debate in the Assembly?

[30] Fourth, whether on the pleadings there is disclosed a cause of action against the 1st to the 9th defendants?

Issue No. 1 - Whether the Motion of No Confidence is a Conforming Motion – Whether this is a political question?

[31] There was some dispute as to whether the motion lodged with the Clerk of Parliament was attached as exhibit 'MB11' to the affidavit of Mr. Mark Brantley dated 2 April 2013 however, at the hearing, it was conceded by the applicants that the motion which was lodged with the Clerk is the one which is attached to Mr. Mark Brantley's affidavit as exhibit 'MB6'.[9]

[32] Notwithstanding the clarification the defendants have maintained most of their arguments on this point, arguing, as a preliminary point, that the motion represented as 'MB6' is not a conforming motion. They say that 'first, the form of the resolution is quite plainly not a conforming resolution of no confidence in the Government. It is clear that it is to do with the position of the Prime Minister rather than the Government as a whole. That is clear from the matters that are relied upon in support of the motion which are all to do with the personal conduct of the Prime Minister, and also obvious from the operative part of the resolution which refers to the Prime Minister again.'[10]

[33] They go on to say that this 'is no technical matter but very significant. It may be, for example, that those who, it is said will support the motion, could not support a motion which straightforwardly alleged no confidence in the Government because they themselves were members of the Government, as indeed were the 5th and 6th Claimants at the time the alleged motion was sent. And moreover do not wish to be seen by their constituents as attacking their own party and their own Government. The defendants say

[9] This has been set out at paragraph 4 above in full.
[10] Arguments of Lord Goldsmith Q.C. P.C. extracted from the submission dated 17 April 2013 on behalf of the 10th defendant.

that neither of the two 'defectors' have in fact defected from the party or crossed the floor of the House.'

[34] They say that this is not a conforming motion of no confidence is 'supported by considerations of context, i.e. the factual matrix. It is clear that this is not a motion which is driven solely by the view of an opposition that they can do better than the Government. It is not triggered by any scandal or by any crisis in the country. Or by popular uprising of discontent with the Government. It is only made possible by the personal ambition of one man who wishes to become Prime Minister.

[35] The defendants go further and they say that if it is necessary they will contend that the motion of no confidence is not brought in good faith because it is actuated by these particular considerations outlined above. In any event they urge the court to decline jurisdiction on all these matters; they say it is not for the court to enquire as to matter relating to what is debated in Parliament. This is a significant point being made by the defendants and the court will return to this shortly.

[36] The claimants do not dispute that in its preambular statements, the motion of no confidence places reliance almost exclusively on the 'misdeeds of the Prime Minister.[11] But they say that it is 'equally clear that those complaints relate to his performance as Prime Minister, and not to anything he may or may not have done in his personal life. It is 'those misdeeds' they say which have "led to a lack confidence 'in his Government'". They go on to say that 'it is not at all unusual that a motion of no confidence in a government would focus on the conduct of a particular Minister, to the extent that that conduct is either condoned by his Cabinet colleagues, or if not condoned, cannot be remedied other than by a motion of no confidence in the Government. To be sure, if the perceived misdeeds are that of a particular Minister, the first remedy would be to replace him or her. But if the Minister whose conduct is in question is the Prime Minister himself, the only avenue of redress is to have him removed under section 52(6), if he fails to call an election or resign."

[11] Submission of Mr. Douglas Mendes S.C. dated 9 December 2013 on behalf of the claimants.

[37] The claimants also go on to say that the 'character of a resolution of no confidence in the Government is also not changed because it would appear that some of the persons who have signaled their intention to support it are members of the Government. In a two party system, a motion of no confidence in a Government can only ever succeed if representatives on the government side break ranks and support the motion. And in an Assembly such as the St. Kitts and Nevis Assembly, where there are only 11 representatives entitled to vote on a no confidence motion, it is very likely and certainly not unusual, that the defectors might still be holding ministerial posts. Where the government representatives are made up of 6 or more Members, in other words, they are likely all to be members of the Cabinet. There is no requirement that a minister, who desires to vote in favour of a no confidence motion, or to lodge one himself, must first resign his position as a Minister or as a member of the ruling party. Indeed, it is wholly conceivable that the purpose of a no confidence motion is to force the Prime Minister to resign so that another member of his Cabinet can take over as Prime Minister. There is no other way that this can be achieved than by a no confidence motion in the government as a whole."

[38] The claimants say that for 'this reason as well, it is wholly irrelevant that one of the defecting Ministers may have ambitions to be Prime Minister'. They say that 'one of the results of a successful no confidence motion' is that either the Prime Minister resigns and allow the elected Representatives to support another candidate for post of Prime Minister, or else he call fresh elections.

Analysis and Findings

[39] The defendants have approached this issue from two angles. First they raise the issue as to whether the motion is a conforming motion, and they say that if it is not, the claimants originating motion should be dismissed. Second, they say that the court should not determine this issue as it is a political one and contend that a finding that this specific issue is a 'political question' automatically leads to a dismissal of the entire claim. The court does not agree with the defendants on either of these points.

[40] In examining whether this motion is a conforming motion of no confidence I have sought to find some guidance from an examination of the historical development of such motions. Motions of no confidence are part of our constitutional inheritance from Westminster. Under the United Kingdom's parliamentary system, there grew up a convention that since government depended on the approval of the House of Commons for the approval of financial expenditure, it was necessary that government continue to secure the support of the elected Representatives.[12] Votes of no confidence, also known as censure motions' is considered one of the most significant parliamentary device as it could determine the fate of a government. In the past when these censure motions were taken in the British Parliament, there were many occasions when it was simply being used as a tool of criticisms to one or the other department of government, and it did not effectively seek to bring down the entire government.

[41] It was for these reasons, and the recognition that in the past, that it was sometimes difficult to recognize whether a motion was a conforming motion of no confidence in the government itself that Parliament has to examine the characteristics of the motions in an effort to determine whether they were in fact motions of no confidence. Under the United Kingdom's practice these characteristics included the 'timing, the speakers and more importantly the terms of the motions'. By convention, with regards to 'timing', such motions were usually debated before any other business, and the speakers were usually first the Prime Minister and then followed by the Leader of the Opposition. What was the most significant characteristic, however, had always been the terms of the motion. The motion will usually include such terms as 'confidence' or 'censure' and may refer in critical terms to some aspect of governance, whether to policy or to some conduct by a government minister or department. The United Kingdom's experience has shown, however, that sometimes, innocuous motions could be considered motions of no confidence in the government. Perhaps it was for this reason that legislation was passed to treat with this issue. Section 2(4) of the United Kingdom's Fixed-term Parliaments Act 2011 states that an early parliamentary election is to take place if a motion passed by the House of

[12] The UK Practice on these motions were drawn from a paper issued and published on the UK's Parliament Website at http://www.parliament.uk/briefing-papers/SN02873/confidence-motions - "Confidence Motions" by Richard Kelly - updated on the 13 May 2013

Commons is in the following terms, namely: "That this House has no confidence in Her Majesty's Government."[13]

[42] There is no equivalent provision here in St. Kitts and Nevis, but to my mind this is unnecessary for the resolution of this issue in this case. By the terms the motion was prefaced in the following terms:

> *"Resolution of the National Assembly of Saint Christopher and Nevis for a Vote of no confidence in the Government of St. Kitts and Nevis caused by the poor Leadership of Prime Minister the Rt. Honourable Dr. Denzil L. Douglas"*

[43] Having regard to the above, and what I have concluded on the next aspect of this argument, I will express a non-binding view that it could hardly be any clearer. Regardless of what were the reasons for complaint, and whether they were directed solely to the conduct of any one Minister or the Prime Minister himself, it was clearly saying that a resolution of no confidence in the government was being sought. It did not matter whether any political agendas were being pursued and whether there was an attempt to remove the Prime Minister (as political agendas and the removal of a Prime Minister are the essence of such motions), once it appeared to be seeking that particular resolution that the Assembly had 'no confidence in the Government, it would be sufficient to qualify the motion as being proper for that purpose. I am of the view that the claimants' submissions are to be preferred on this point.

[44] In saying that this is political issue and not a matter for the court, the defendants have relied on the case of Conachar v Canada (Prime Minister),[14] in which the court speaking of a vote of no confidence stated that:

> *"A government losing the confidence of the House of Commons is an event which does not have a strict definition and often requires the judgment of the Prime Minister. … it is the Court's conclusion that votes of no confidence are political in nature and lack legal aspects. The determination of when a government has lost the confidence of the House should be left to the Prime Minister and not be turned into a legal issue for the courts to decide.'*

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[13] Section 2 (5) of the same Act states that this early election can be avoided if a confidence motion is passed by the House within 14 days of the no confidence motion, and is in the following terms, namely: 'That this House has confidence in Her Majesty's Government.'

[14] 2009 FC 290 [2010] F.C.R. 411

[45] As I understand it, the dicta in that case was treating with who had the power to decide whether a vote itself amounted to one of no confidence for the purposes of what is to follow after the vote was taken. As history has shown, very often a vote of no confidence or of censure, may not amount to a no-confidence vote in the entire government, but may merely go to a particular act or policy of the government.[15] The Canadian case, and the learning cited by the judge relates to who should determine what the vote in the House effectively means. I do not see that case making any point that all issues relating to no confidence motions are political and are to be left out of court. I am, however, attracted to the logic that it should not be the court who should be called on to determine whether a motion is of a particular kind or not. It would be ridiculous if the court would be expected to determine whether a motion as drafted was the kind of motion it proclaimed to be. When a request is made in the prescribed manner for a motion to be placed on the Order Paper, the Speaker, for the purpose of determining whether and what kind of priority to accord the motion, is tasked with making a determination whether the particular motion is of the kind it proclaims itself to be. If, on its face, it is expressed to be a motion of no confidence, the Speaker ought not to engage in making pronouncements whether it has met a particular threshold or not, or whether or not he is satisfied that it is that kind of motion. He should be guided by what it proclaims itself to be, treat it as that kind of motion, and place it before the Assembly, for them, on the debates and the vote, to make those final determinations as to its nature.

[46] Finally on this issue, I wish to state that the finding that it is for the Assembly ultimately to discover the true nature of a motion, does not of itself, bar this Court from considering the other issues which have arisen. On these applications, and the originating motion the court ought not to make binding statements about whether or not the motion is one of no confidence in the government, but should rely on what the motion on its face proclaims itself to be, for the purpose of addressing the other issues raised on these applications and the originating motion.

[15] See Attorney General v David Granger and Another CM No. 94 of 2012, a case relied on by the defendants. In this case the High Court of Guyana ruled that there was nothing unconstitutional about the Guyana Parliament passing a no confidence vote in a single Minister of Government.

Issue No. 2 - Whether the Court has Jurisdiction – Separation of Powers - Parliamentary Privilege – Political Questions.

[47] The defendants' main argument that the court has no jurisdiction to determine any of the issues raised in the originating motion rests primarily on the separation of powers doctrine. They say that the separation of powers doctrine is an inherent and fundamental part of the St. Kitts and Nevis Constitution. They say that 'the effect is that the powers entrusted to the three pillars: the Executive, the Legislature and the Judiciary are exclusively exercisable by them respectively.' They refer to a number of cases to make this point, including: Hinds v DPP [1977] AC 195; John v DPP (1985) 32 WIR 230; AG for Barbados v Joseph and Boyce (2006) 69 WIR 104; DPP v Mollison [2003] 2 AC 411; Bowen v The AG of Belize Civil Claim No. 445 of 2008; Benjamin v The Minister of Information and Broadcasting Suit No. 56 of 1997 High Court of Anguilla.

[48] They say that the 'consequence is a very strong rule of non-interference by the judiciary in the work and functions of Parliament.' On this specific point they also refer to a number of cases, namely: Methodist Church in the Caribbean and the Americas (Bahamas District) v Simonette (2005) 59 WIR 1 (PC); Bradlaugh v Gosset 12 QB 271; Hughes v Rogers Civil Suits Nos. 99 and 101 of 1999 High Court of Anguilla; Attorney General of Guyana v David Granger and Others 94/12 CM (HC Guyana); Bobb and Moses v Manning No. 97 of 2007 PC Trinidad and Tobago; Spencer v The AG of Antigua and Barbuda and Others Civil Appeal No. 20A of 1997; (Kennilores v The AG (1986) LRC (Const) 126; Nichols Esprit et al v Speaker of the House Civil Appeal No. 5 of 2008.

[49] Quite apart from this constitutional separation of powers doctrine, the defendants also rely on section 22 and 23 of the National Assembly (Powers and Privileges) Act Cap. 2.04, which they say, exclude any action in court in respect of acts of the Speaker and officers of the National Assembly in exercise of their power. They say these two sections read together have the effect that, anything which is done or not done by the Speaker and officers in exercise of powers in relation to the National Assembly, is not justiciable. They say that section 23 also provides immunity for Members of the Assembly not only for

things said in Parliament but also for 'any matter brought by him or her before the National Assembly by petition, bill, question, motion or otherwise. It is their submission that 'the effect of this provision must also be to make members immune for allegedly not bringing the same matters before the Assembly. It cannot be right that they have immunity for bringing a matter to the Assembly but no immunity for failing to bring it to the Assembly.

[50] The claimants on the other hand do not dispute the existence of the separation of powers doctrine. They also recognize the principle of non-interference by the court into affairs of Parliament. They contend however, that none of these principles are disturbed or infringed with regards to the declarations being sought which are numbered 1 to 6 in their originating motion, it 'is the duty of the court to interpret the Constitution and to declare the law. They say that they are 'also entitled under section 96 to apply to the High Court for declaratory relief where any non-human rights provisions of the Constitution have been or are being contravened and the High Court is empowered by section 96(1) to determine whether any non-human rights provisions have been or are being contravened and to make declarations accordingly. They say that if 'on a proper interpretation of section 52(6) it is determined that the claimants are entitled to bring a resolution of no confidence and to have that resolution scheduled, debated and voted on without undue delay, they are entitled to declarations to that effect. And if there is, as a corollary to that right, a duty in the Speaker or the members of the Cabinet, to schedule the resolution for debate, the claimants are also entitled to declarations to that effect."

[51] The claimants agree that the reliefs numbered 7 and 8 which were being sought in the originating motion have the effect of interfering with the internal affairs of Parliament, as these are orders which they seek to compel the defendants to schedule the motion for debate and to restrain them from scheduling any other business ahead of the motion. They nonetheless say that since constitutional rights are threatened, the principle of non-interference does not apply. They rely on a number of cases in this regard, namely: Bahamas Methodist Church v Symmonette (2005) 59 WIR 1; Hughes v Rogers Civil Suit Nos. 99 and 101 of 1999; Smith v Mutasa [1990] LRC 87; The Speaker v De Lille Case No. 297 of 1998; Madzibuku v Sisulu.

Analysis and Findings

The Separation of Powers Doctrine and the Principle of Non-intervention in the Affairs of Parliament

[52] The St. Kitts and Nevis Constitution, like many others in the Caribbean, is a Westminster styled constitution and is characterized by certain and several distinctive features. One of these features is the separation of the three branches of government, namely the Executive, the Legislature and the Judiciary. The significance and effect of this separation have been examined in a number of cases from this region. The defendants have properly referred this Court to some of the relevant decisions in this area as noted earlier, starting with Hinds v The Queen where Lord Diplock stated that:

> *"….it is well established as a rule of construction applicable to constitutional instruments under which this governmental structure is adopted that the absence of express words to the effect does not prevent the legislative, the executive and the judicial powers of the new state being exercisable exclusively by the legislature, by the executive, and by the judiciary respectively."*

[53] I am in agreement with the ratio and dicta of all the cases cited by the defendants on this point that this separation of powers doctrine is one of the "'immutable imperatives'[16] guiding the elaboration of a Westminster model constitution", and that the 'separation of powers is considered to be the backbone of any constitutional democracies'[17]. I note in particular the discussion of Chief Justice Conteh of the Belize Supreme Court when he made the clear points *inter alia* that the separation of powers doctrine is part of the basic structure of the constitution, a basic structure which also proclaims that the constitution is the supreme law of the land.[18]

[54] The true jurisprudential basis for the Separation of Powers doctrine is really is a system of mutual checks and balances between the various arms of government. The modern

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[16] Per Pollard J in AG for Barbados v Joseph and Boyce (2006) 69 WIR 104 at para. 58
[17] Per Wit J in Joseph and Boyce at para. 91. *Ibid*
[18] Bowen v The AG Civil Claim No. 445 of 2008 (Belize) at paragraph 119.

constitutional democracy is a state that seeks among things, to realize ideals of Justice, Liberty and Equality. In this context Professor McIntosh writes:

> *"…the separation of powers is indispensable to the realization of a just state, for it is only through the separation of powers principles that the authorities are made accountable in various ways to one another and are subject to mutual sanctioning. For example the legislature can censure the executive for failing to execute its laws properly, and the judiciary can expose the legislature to criticism by finding that the laws it makes are in contravention of certain constitutional provisions."*

[55] The cases are numerous in which the courts have played their part to ensure that the others arms of government do not transgress or exceed their lawful powers. This being so, does the doctrine effectively mean that the court cannot enquire into the internal affairs of Parliament? Further, and significantly, is this true even in those cases where there are allegations of contravention of constitutional provisions?

[56] In approaching these issues, I have considered that it would be helpful to rationalize the jurisprudential basis upon which Parliament claims the privilege of non-interference. In light of the fact that the St. Kitts and Nevis Constitution is evolutionary and has formalized those institutions that existed in England and operated in these Caribbean states prior to independence, this exercise has led me to a brief examination of the historical separation between the courts and Parliament in the United Kingdom.

[57] History shows that in the United Kingdom, 'parliamentary privilege, arose out of a desire of the Crown for Parliament and its Members to discharge their functions in an effective and unhindered manner.'[19] The learning shows that for centuries there was a recognition that for Parliament to operate effectively and carry out its functions it was necessary that its functions not be interfered with by the other arms of government, the executive and the judiciary. As was noted by the Nicholls Report speaking in context of the English Parliament:[20]

> *"Parliamentary privilege consists of the rights and immunities which the two Houses of Parliament and their members and officers possess to enable them to*

[19] Per Adrian Saunders in a presentation on Parliamentary Privilege – "Third Annual Lloyd Barnett Lecture to the Council of Legal Education' 4 September 2008.

[20] Report of the joint committee on parliamentary privilege (HL 43-I, HC 214-I, 1998-99) referred to in A.W. Bradley M.A. LLM. LLB (Hons.) and K.D. Ewing LLB. Phd., 'Constitutional and Administrative Law' 14th edn. at page 223

carry out their parliamentary functions effectively. Without this protection members would be handicapped in performing their parliamentary duties, and the authority of Parliament itself in confronting the executive and a forum for expressing the anxieties of citizens would be correspondingly diminished."

[58] This protection was first given statutory life in Article 9 of the Bill of Rights 1689, which defined the relationship between the Crown and Parliament following the end of the 'Glorious Revolution', and was '*to ensure that Members of Parliament were not subjected to any penalty, civil or criminal, for what they said and were able, contrary to the previous assertions of the Stuart monarchy, to discuss what they, as opposed to the monarch, chose to have discussed."*[21] Significantly it declared that proceedings in Parliament 'ought not to be impeached or questioned in any court or place out of Parliament'.[22]

[59] A landmark case giving full recognition to this privilege in the United Kingdom is Bradlaugh v Gosset.[23] In this case the Parliamentary Oaths Act 1866 required Bradlaugh to take the oath as an elected Member of the House. The House passed a resolution restraining him from taking this oath, and following an attempt on his part to administer the oath to himself he was ordered out of the House. He moved to the courts for an order restraining the Sergeant at Arms from preventing him from entering the House and from taking the oath. 'The court decided against Bradlaugh on the ground that the order of the House related to the internal management of its procedure over which they had no jurisdiction. Lord Coleridge CJ ruled that Bradlaugh had no right to the move the court but to appeal politically 'to the constituencies whom the House of Commons represents'.[24] The exclusive jurisdiction of the House in this instance was considered essential for the discharge of its function and based on necessity.'[25]

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[21] Per Lord Browne-Wilkinson in Pepper v Hart [1993] AC 593 at page 638

[22] Article 9 of the Bill of Rights 1689 declared that the 'freedom of speech and debates or proceedings in parliament ought not to be impeached or questioned in any court or place out of Parliament'.

[23] (1884) 12 QBD 271

[24] As Lord Coleridge CJ held, at p 275:"What is said or done within the walls of Parliament cannot be inquired into in a court of law … The jurisdiction of the Houses over their own members, their right to impose discipline within their walls, is absolute and exclusive." See also R. v Chaytor (David) [2011] 1 A.C. 684

[25] See also Pickins v British Railway Board [1974] AC 765 in which the court refused to investigate alleged defects of procedure in the passage of a certain piece of legislation; See also Pepper v Hart *ibid*. n. 21

[60] But even from as early as the late nineteenth century, there has been recognition that in certain circumstances the courts were entitled to enquire into the internal affairs of Parliament. In Burdett v Abbot[26] in was made it clear *inter alia* that the *lex parliamenti* was not different from the common law, and that neither House of Parliament could bring a matter within its exclusive jurisdiction by simply declaring it to be a matter of privilege.[27] So too it was made clear that the privilege enjoyed by Parliament did not take it outside the reach of the criminal law. For instance Parliament could not offend against the king and claim immunity.[28]

[61] To end this brief excursion in the past, it is sufficient to say that today in the United Kingdom, the general position is perhaps best described by the authors of Constitutional and Administrative Law, 14th edn., where they state at page 223:[29]

> *"Privileges is an important part of the law and custom of Parliament, but aspects of the law are still obscure. It has been developed over centuries by the response of Parliament, especially the commons, to changing circumstances and also, since privileges affects those outside Parliament, by decisions of the courts. Since neither House separately exercises legislative supremacy, neither House can by its own resolution create new privileges. When a matter of privilege is disputed, 'it is a matter for the courts to decide whether a privilege exists and for the House to decide whether such privilege has been infringed.'*

[62] Here in the Commonwealth Caribbean, parliamentary privilege is well recognized and respected. A regional case (commended to the court by both sides), which underscores, and has given due regard to Parliament's right to control it own internal matters is Privy Council's decision in Bahamas Methodist Church v Symmonette.[30] In this case Lord Nicholls of Birkenhead speaking for the Board, stated:

> *"The second general principle is that the courts recognize that Parliament has exclusive control over the conduct of its own affairs. The courts will not allow any challenge to be made to what is said or done within the walls of Parliament in performance of its legislative functions."*

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[26] (1810) 104 ER 554
[27] See also R v Chaytor and Others *ibid* n. 24
[28] R v Elliot (1629) 3 State Tr 293
[29] A.W. Bradley M.A. LLM. LLB (Hons.) and K.D. Ewing LLB. Phd., Constitutional and Administrative Law 14th edn.
[30] (2005) 59 WIR 1

[63] Another regional case which the defendants have also relied on is Hughes v Rogers[31] where 'the failure to act by the Speaker of the National Assembly was held to be a matter of internal procedure and as such immune from scrutiny by the courts'.

[64] This Court therefore agrees that as a general rule, the court should not meddle in the affairs of Parliament and leave it to regulate its own internal procedure. The court must give due respect to the Constitutional right given to the National Assembly to regulate its own procedure. The St. Kitts and Nevis Constitution actually provides by section 44(1) that:

> *"Subject to the provisions of this Constitution, the National Assembly may regulate its own procedure and may in particular make rules for the orderly conduct of its own proceedings."*

[65] Thus in the normal case, the court has no right to insert itself within the sacred walls of Parliament to dabble with the internal affairs of Parliament. The court has no business there. But this general rule has at least one exception, which even section 44(1) of the Constitution recognizes, and which is also the necessary result of the overriding 'supremacy of the Constitution'.[32] The cases themselves, including some cited by the defendant, have dealt with this limited exception.

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[31] Civil Suits Nos. 99 and 101 of 1999

[32] Section 2 of the Constitution provides: *"This Constitution is the supreme law of St. Christopher and Nevis and subject to the provisions of this Constitution, if any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency be void.";* Speaking in context of legislation passed in breach of the constitution, Lord Nichols stated in Bahamas Methodist Church *"30. Likewise, the second general principle (on non interference) must be modified to the extent, but only to the extent, necessary to give effect to the supremacy of the constitution. Subject to that important modification, the rationale underlying the second constitutional principle remains as applicable in a country having a supreme, written constitution as it is in the United Kingdom where the principle originated. "31. Their Lordship consider that this approach points irresistibly to the conclusion that, so far as possible, the courts of the Bahamas should avoid interfering in the legislative process. The primary and normal remedy in respect of a statutory provision whose content contravenes the Constitution is a declaration, made after the enactment has been passed, that the offending provision is void. This may be coupled with any necessary, consequential relief. However, the qualifying words 'so far as possible' are important. This is no place for absolute and rigid rules. Exceptionally there may be a case where the protection intended to be afforded by the constitution cannot be provided by the court unless they intervene at an earlier stage. For instance, the consequences of the offending provision may be immediate and irreversible and give rise to substantial damage or prejudice. If such an exceptional case should arise, the need to give full effect to the Constitution might require the Court to intervene before the Bill is enacted. In such a case parliamentary privilege must yield to the court's duty to give the Constitution the overriding primacy which it is due."* [emphasis supplied]

[66] In The Speaker v De Lille,[33] a South African case quoted with approval by Saunders J in Hughes v Rogers,[34] the Supreme Court of Appeal, treating with the issue as to whether the National Assembly had the power to suspend the respondent from Parliament, stated:

> *"This enquiry must rest on the Constitution of the Republic of South Africa. It is supreme – not Parliament. It is the ultimate source of all lawful authority in the country. No Parliament, however bona fide or eminent its membership, no President, however formidable be his reputation or scholarship or official, however efficient or well meaning, can make any law or perform any function which is not sanctioned by the Constitution. Section 2 of the Constitution expressly provides that law or conduct inconsistent with the constitution is invalid and the obligations imposed by it must be fulfilled. It follows that any citizen adversely affected by any decree, order or action by any official or body, which is not properly authorized by the constitution is entitled to the protection of the courts. No Parliament, no official and no institution is immune from judicial scrutiny in such circumstances. It is therefore necessary to examine the provisions of the Constitution to determine whether there is any constitutional authority which entitle the Assembly to suspend the respondent in the circumstances relied on by the Appellant."*[35]

[67] In Hughes v Rogers the court also accepted this exception to the privileges enjoyed by Members of Parliament. In a decision delivered on the 12th January 2000, Saunders J, then of the Eastern Caribbean Supreme Court stated:

> *"[38] A common thread runs through all these cases. It is this. The courts are entitled to enquire into the existence and extent of any privilege claimed by the house of Assembly. Moreover, the courts will intervene where Parliament, or the Speaker, has exceeded its powers, or has claimed for itself powers that it did not have, or has acted in a manner clearly inconsistent with constitutional provisions. ….*
>
> *[60] It is my considered opinion that what occurred in the Anguilla House of Assembly in August and September 1999 respectively formed part of the internal proceedings of the House. Since I can discern no infringement of the Anguilla Constitution by the Speaker, who was acting* ***intra vires*** *his powers, the Court ought not embark upon an enquiry into those proceedings or the propriety of the actions of the Speaker. In these circumstances, the House, and by extension the Speaker's decision to adjourn the meetings, is immune from scrutiny by the courts.*
>
> *[61] Where there is no breach of the Constitution, the High Court cannot be called upon to play the role of appeal in respect of rulings by the Speaker that fall within his jurisdiction and authority. To perform such role would open the courts to a 'blizzard of applications relating to Parliamentary procedure and invite conflict*

[33] Case No. 297 of 1998, August 26, 1999
[34] *ibid* n. 31
[35] Per Mahomed CJ at para. 14

between the legislature and the judiciary". See: Tong v Takabwebwe Kiribati High Court Civil Case No. 48/88 [emphasis supplied]

[68] In Attorney General of Guyana v David Granger and Raphael Trotman (Speaker of the National Assembly),[36] the Learned Chief Justice Ian Chang in refusing to strike out those parts of a constitutional motion seeking to challenge a decision of the Speaker to bar a Member of the Assembly from speaking in the assembly, stated:

> *"It is a well established constitutional principle firmly rooted in the soil of the doctrine of separation of powers that the court has no jurisdiction to judicially review the working or operations of the National Assembly except for the purpose of determining whether the National Assembly has acted unconstitutionally or contrary to law. Thus the National Assembly can conduct its affairs or business free from judicial intervention or interference so long as its conduct does not run counter to any provision of the constitution or the law of the land. A motion to judicially review the conduct of the National Assembly must therefore be premised on a claim of unconstitutional or illegal conduct on the part of the National Assembly. If such a claim is apparent on the motion paper then the court is moved to judicially review the conduct of the National Assembly for unconstitutionality or illegality. The jurisdiction of the court is invoked and the submission that the court has no jurisdiction to review the operations or conduct of the National Assembly cannot successfully be made."*

[69] Following the arguments in this matter, in January of this year, the Eastern Caribbean Court of Appeal in The Prime Minister of the Commonwealth of Dominica and Others v Hector John (Leader of the Opposition)[37] delivered a decision which treated with issues of jurisdiction in a case in which the respondent had challenged the parliamentary procedure that was followed in election of the President by the elected representatives in Parliament. The appeal before the court concerned whether the court could intervene in face of a certificate issued by the Speaker of the House of Assembly certifying that the President was duly elected in accordance with the provisions of the Constitution? The head-note of the Court of Appeal judgment states *inter alia* that: *"**It is no part of the court's function or responsibility to meddle in parliamentary affairs particularly when the Constitution clearly precludes it from so doing.** The office of President is one, which was meant to be held in the highest regard and subjected to the highest form of integrity. To allow the court to meddle into the affairs of the election process of the*

[36] *ibid* n. 15
[37] Civil Appeal No. 6 of 2013 (Dominica) delivered on the 13 January 2014.

President is an affront to the dignity of the high office of President. It is a course, which a court, in the face of expressed exclusion ought to be loath to permit incursion no matter how inviting the invited excursion may appear to be.' [emphasis supplied]

[70] At first blush this statement appears to be laying down a clear rule of non-intervention, but a careful examination of the decision reveals that the Court of Appeal's ruling must be understood in the factual context of the case, and it cannot be understood to mean that the courts are precluded in all cases from intervening in matters of the privilege and internal procedures of Parliament.

[71] In Hector John, the court found that the expressed ouster provisions of the Constitution precluded an inquiry into the election process by the courts. Section 22(5) of the Dominica Constitution actually provided that the Speaker's certificate is conclusive of the act of the election of the President, and it goes further to state that the certificate stating that conclusive fact shall not be enquired into by any court of law. The learned Chief Justice held that to give any other interpretation to this provision would not represent the intention of the framers. The Learned Chief Justice stated:

> *"This position is further bolstered by the fact that the Constitution makes provision for the aspects relating to the Presidency, which may be challenged. The only involvement of the court in this process is set out in section 22 of the Constitution. Section 22(1) recited above, speaks specifically to a challenge only in regard to the qualification of the holder or a nominee for such office. The jurisdiction given however is to the Court of Appeal and not the High Court, the decision from which no further appeal lies. There is no provision under Chapter 2 which allows a challenge to the President or the electoral process for the Office. I am therefore of the view that outside such circumstances, the court has no jurisdiction to interfere. It remains strictly a parliamentary matter, the windows of which have been expressly shielded from the enquiring eyes of the court."*

[72] It is instructive to note the cases which were cited by the respondent in Hector John, namely Re Gerriah Sarran,[38] Endell Thomas v The Attorney General of Trinidad and Tobago,[39] Jones and others v Solomon[40], Smith v Mutasa et al,[41] were all

[38] (1969) 14 WIR 361
[39] (1982) AC 113
[40] 41 WIR 269
[41] [1990] LRC (Const.) 87

distinguished by the Court of Appeal. The decision in **Smith**[42] is to be particularly noted. This is a decision from the Supreme Court of Zimbabwe, a Member of the House of Assembly was suspended from the House of Assembly for a period of one year for contempt and he was therefore deprived of his lawful salary and allowances. Before the High Court 'a certificate from the Speaker was produced pursuant to section 6(1) of the Privileges, Immunities and Powers of Parliament Act, in which the Speaker stated that he considered the proceedings to be matters of parliamentary privilege, although he did not mention or specify what those matters were. The judge held that the Speaker's certificate was conclusive and stayed the proceedings. The Member, while conceding that his suspension from the House was a matter of privilege, appealed to the Supreme Court on the ground that there was no legal authority for the suspension of his remuneration as there was no provision for such a punishment in the Act. He accordingly argued that the suspension of his remuneration was in breach of his constitutional right under section 16(1) not to be compulsory deprived of property except under certain conditions as set out therein.'

[73] The Supreme Court agreed with him, and, although agreeing that punishment for contempt was a matter of parliamentary privilege, it was held that there was no statutory authority to ground the deprivation of the Member's remuneration as part of any punishment; it was therefore an illegal penalty. The Supreme Court further ruled that the respondent could not seek to rely on the Speaker's certificate to oust the court's jurisdiction even in the face of any general exclusionary formula, to defend Parliament acting in a manner which amounted to a disregard of its own statutes and the Constitution in breach of fundamental rights. With regard to the principles set out in **Smith** and the other cases treating with the jurisdiction of the courts to intervene, the learned Chief Justice in **Hector John** stated:[43]

> *"Whilst I am in complete agreement with the principles set out in the cases of* ***Re Sarran, Smith****, and like cases, I agree with the appellants, for the reasons they have advanced, that they are distinguishable and are inapplicable to the case at bar. Here, the matter does not concern an Act of Parliament in respect of which the Court is always empowered to examine against the mirror of constitutionality. It is the Constitution which provides for Parliament to elect the President and it is the*

[42] *ibid* n. 41
[43] *ibid.* n. 37 at para. 30

Constitution (section 22(5)) which says that the Speaker's certificate stating that the election was in accordance with section 19 of the said Constitution 'shall be conclusive evidence of the fact so stated and shall not be questioned in any court of law'. Here the Speaker's certificate stated this fact precisely and specifically. It was neither vague or ambiguous. Section 22(5) of the Constitution is clearly intended to oust the jurisdiction of the court. It is clear that this certificate creates an irrefutable factual presumption that Parliament complied with the provisions of section 19 of the Constitution. The Speaker's certificate, once authentic or not tainted by irregularity on its face, operates as a complete shield against any judicial inquiry. It is apparent that the framers of the Constitution did not want to subject the Office or the electoral process of the President to any interference by the court and for good reason. The highest Office of the State must be insulated from controversy. Additionally, section 103(1) which is a supportive provision made subject to section 22(5), makes it clear that although judicial relief can be sought in the High Court for some challenges made under certain sections of the Constitution, a challenge made under section 22(5) is not one of them."

[74] Thus, it is clear to this Court that the ratio in Hector John does not operate to exclude the court's power to intervene in all cases, and it was clear that the ruling that there ought not to be any intervention in the matters of internal procedure relating to the appointment of the President in Dominica was founded on the very specific provisions of the Dominica Constitution which was crucial to the finding of non-intervention.

[75] Thus Hector John, the other regional and commonwealth cases, and those from South Africa have shown that the courts may in certain circumstances enquire and intervene even in matters of the internal affairs of Parliament. The courts are entitled to enquire into the extent of any privilege claimed,[44] and, in matter of internal management and procedure, whether the House or the Speaker has acted or is acting in contravention of the Constitution. An enquiry of this nature does not amount to intervention. But if infringement of the Constitution is discovered, then parliamentary privilege will not bar the intervention of the court. There could be no privilege that has the effect to infringing the Constitution, unless the very constitution bars the intervention (Hector John).

[44] This point was made clear with the decision of Stockdale v Hansard (1839) 9 A & E 1 , 147–148 Lord Denman CJ said of the argument that the House of Commons was a separate court with exclusive jurisdiction over the extent of its privileges:
"Where the subject matter falls within their jurisdiction, no doubt we cannot question their judgment; but we are now inquiring whether the subject matter does fall within the jurisdiction of the House of Commons. It is contended that they can bring it within their jurisdiction by declaring it so. To this claim, as arising from their privileges, I have already stated my answer: it is perfectly clear that none of these courts could give themselves jurisdiction by adjudging that they enjoy it."

[76] In this case, there are no express Constitutional ouster clauses, and no issue of any Speaker's certificate that bars inquiry. Further, at the hearing all the parties seemed to have agreed at least in principle on a limited right to intervene (the defendants of course say that this limited right is not engaged in this case). This must be also the position notwithstanding section 44(1) as that provision itself says that Parliament's right to regulate its own procedure is subject to the very Constitution – the power given to the Speaker under section 44(1) cannot be read as a power to regulate internal procedure in a manner which breaches the Constitution.

[77] The defendants have commended to this Court, the decision of the Fiji High Court in Sakeasi Butadroka v The Attorney General[45] where the equivalent provision to section 44(1) in the Fijian Constitution came under the judicial microscope. The Fiji High Court following their Court of Appeal,[46] held that this provision must be construed in the narrow sense to the effect that the phrase 'subject to this Constitution' meant that unless constitutional provisions relating to matters of internal procedure were being infringed by the procedure adopted by the House, the courts had no power to intervene; it did not matter that other substantive constitutional provisions were being contravened by the procedure adopted by the House. It is significant to note that the Fiji court actually opined that even if the fundamental human rights provisions were being breached, there was no right to intervene in the affairs of the House.[47]

[78] This is seemingly contrary to the South African decision in Smith[48] which was approved by the Eastern Caribbean Court of Appeal in Hector John as being correctly decided on its facts. It is also seemingly contrary to views expressed by the Chief Justice of Guyana where he appeared to have opined that the court would be able to enforce fundamental rights provisions if these were being breached by the internal procedures of Parliament.[49] Even the Supreme Court in Trinidad in 1987 was making the point that a Member of

[45] [1993] FLR 115
[46] James Madhavan and Another v John Neil Falvey 19 FLR 140
[47] Sakeasi Butadroka v The Attorney General [1993] FLR 115 at page 132
[48] *ibid*. n. 41
[49] David Granger *ibid* n. 15, at page 8

Parliament could not take shelter behind the walls of privilege where fundamental rights provisions were at stake. As Hamel-Smith J stated:[50]

> *"A democracy which claims not only to have respect for the fundamental rights of its citizens, but which makes express provisions in its Constitution to entrench and preserve those rights, should never appear to entertain the suggestion that members of Parliament are free to do what they like provided it is done within its walls. The oath taken by its members demands of them respect for the Constitution…"*

[79] I too am not prepared to hold that the courts would be precluded from intervening even if the Assembly, in conduct of its internal procedure, was acting in breach fundamental rights provisions, and even other substantive provisions of the Constitution with regards to which the court is given specific powers of enforcement.[51] This is, of course, unnecessary for me to do in the context and findings in this case.

[80] That Parliament should conduct its internal affairs in a manner consistent with the provisions of the Constitution recognizes that unlike the United Kingdom, St. Kitts and Nevis is Constitutional supremacy. The written Constitution of St Kitts and Nevis, like all other written constitutions styled on the Westminster model, has displaced the common law doctrine of general competence and unqualified supremacy of Parliament.[52] Parliament's right of control over the internal management of its own affairs is a privilege which history has shown is one which is necessary as being essential to the discharge to its lawful functions. That such a limitation does exists in context of the written Constitutions was recognized even when this question was being raised against the background of the Colonial Constitutions. As Lord Diplock stated in Rediffusion (Hong Kong) Ltd. v A.G. of Hong Kong:[53]

> *"It is well settled that the common law of England which is introduced in the colony does not include the whole of the lex et consuetude parliamenti. Members of the legislative assembly do not enjoy all the privileges and the immunity from control*

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[50] Boodram v The Attorney General, Trinidad and Tobago High Court Action No. 6874 of 1987 cited with approval by Adrian Saunders - "Third Annual Lloyd Barnett Lecture to the Council of Legal Education' *ibid* n. 19

[51] See also Toussaint v Attorney General of St. Vincent and the Grenadines [2007] 1 WLR 2825 where the Privy Council read statutory provisions relating to parliamentary privilege to give effect to the Constitution.

[52] Adopting views expressed by the High Court in the Australian Context in Lange v Australian Broadcasting Corporation (1997) 189 CLR 520

[53] [1970] 1136 at 1154 - Quoted with approval by Chief Justice Ian Chang in Attorney General of Guyana v David Granger and Raphael Trotman *ibid.* n. 15

by court of justice which are enjoyed by members of the Parliament of the United Kingdom, but only such of those privileges and so much of that immunity as are essential to enable them to carry out their functions under the colonial Constitution. (Keilly v Carson (1842) 4 Moo P.C. (63). Doyle v Falconer (1866) LR. 1 PC 328)

[81] The colonial Constitution has been replaced with the Independence Constitution that declares that it is the supreme law of the State, and that any laws which is inconsistent with it, is considered void to the extent of the inconsistency.[54] The Supreme law clause of the Constitution declares that the provisions of the Constitution shall prevail, thus in the modern constitutional supremacy, there can be no necessity that allows Parliament to act in contravention of the constitution, whether in matters of internal procedure and management, or in substantive lawmaking. Therefore while 'Parliament is the policeman of its own procedure,'[55] the courts have a constitutional duty to ensure that this 'policeman' does his policing without breach of the Constitution.

[82] The defendants however, contend that there is no constitutional provision that is in issue here. They say that there is no constitutional right that mandates that a motion of no confidence must be debated within a reasonable time. The claimants on the other hand contends that one is implied within section 52(6) having regard to the very structure of the Constitution. That leads logically to the next issue: "Is there an implied right given by the St. Kitts and Nevis Constitution to any Member of the National Assembly to bring a motion of no confidence and to have that motion debated within a reasonable time and as a matter of priority?"

Whether there is an Implied Right to have a Motion of No Confidence Debated within a Reasonable Time.

[83] In pointing the court to the express provisions of section 52(6) of the Constitution the claimants say that 'there is to be implied from the terms of section 52(6) a right in every representative in the National Assembly to move a resolution of no confidence in the

[54] Section 2 of the Constitution of St. Kitts and Nevis

[55] Nicolls Esprit and Others v Speaker of the House and Others Civil Appeal No. 5 of 2008 per Justice of Appeal the Hon. Michael Gordon Q.C. at paragraph 1.

Government of St. Kitts and Nevis and to have that resolution scheduled, debated and voted on within a reasonable time and accorded priority over other motions and business.' They submit that 'without such a right section 52(6) would be rendered illusory', and they ask, 'what would be the point of providing that the Governor General was obliged to remove the Prime Minister within three days after a resolution of no confidence in his Government is passed, if he either fails to resign or to advise the Governor General to dissolve Parliament, if there was no concomitant right to bring a resolution of no confidence and have it debated?'

[84] The cases have shown that while the courts in the democratic constitutional world have been prepared to discover implied rights, an implied right is not to be lightly derived. There must be a solid basis upon which any court is prepared to derive a right that has not been expressed in the Constitution. How then have the courts approached this task?

The Commonwealth Experience and Implied Constitutional Rights

[85] There is significant case law coming out of Australia that reveals that the courts have not shied away from finding implied Constitutional rights. In Australian National Airways Pty. Ltd. v. The Commonwealth, Dixon J. speaking of the Australia Constitution said:[56]

> *"We should avoid pedantic and narrow constructions in dealing with an instrument of government and I do not see why we should be fearful about making implications."*

[86] In Victoria v. The Commonwealth, Windeyer J. noting this observation, clarified that:[57]

> *"The only emendation that I would venture is that I would prefer not to say 'making implications', because our avowed task is simply the revealing or uncovering of implications that are already there."*[58]

[87] There are two well known categories of implied constitutional freedoms and rights in Australia, the first which relates to freedoms and rights that are associated with those provisions of the Constitution that relate to Parliament and the government and the second

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[56] (1945) 71 CLR 29, at p 85

[57] (The Payroll Tax Case [1971] HCA 16; (1971) 122 CLR 353, at pp 401-402)

[58] These two references quoted with approval in Nationwide News Pty Ltd v Wills [1992] HCA 46; (1992) 177 CLR 1 (30 September 1992)

group which relates to those provisions of the Constitution that establish an independent judiciary.[59]

[88] Beginning in 1992 there have been a number of cases in Australia, relating to the first category of rights in which the High Court of Australia declared that there was inherent within the provisions of specific sections of the Australian Constitution an implied qualified and limited freedom of political communication. The early cases progressively extended the scope to this implied right using it not only striking down provisions in certain laws[60] but also allowed for the creation of certain defences to the common law action of defamation.

[89] The approach of the courts in finding an implied freedom or right in the Constitution became firmly entrenched in 1996 with the case of Lange v The Australian Broadcasting Commission, which was decided by the High Court of Australia comprising the Chief Justice and six other judges.[61] This was a case relating to the first category, namely right associated with Parliament and government, and one in which the court returned to the Constitution to give *inter alia,* clarity to the interaction between the derived implied freedom and the law relating to defamation.

[90] In Lange, the claimant was a former New Zealand prime minister who sued the defendant, the Australian Broadcasting Commission for defamation for political funding allegations made on a certain television programme. The defendants, in an appeal to the High Court claimed that the Constitution contained an implied freedom of speech with regard to political commentary and in the circumstances of this case, their defence to the defamation action was good in law. The court agreed that there was an implied freedom of communication but disagreed that in the circumstances of the case their defence was a good one.

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[59] Professor Cheryl Saunders 'The Australian Constitution and Our Rights', Future Justice 2010.
[60] In Australian Capital Television Pty v Commonwealth [1992] the Australian High Court found that certain provisions of the Political Broadcasts and Political Disclosures Act which sought to impose sweeping restrictions on political advertising on the electronic media during Federal, State, Territory and Local Elections was in contravention of an implied freedom of communication in relation to elections, guaranteed by the Australia Constitution.
[61] *ibid*. n. 52

[91] Following generally the same initial analysis undertaken by the earlier cases, the High Court examined a number of provisions of the Australia constitution. Among the sections identified and examined were sections 7 and 24 which essentially provided that Members of the Senate and the House of Representatives are to be chosen at periodic elections by the electors of the States and the Commonwealth respectively. The Court also examined a number of other provisions including sections 1, 8 13, 25, 28 and 30 as well as those section creating the relationship between the Executive and Parliament, and held that their cumulative effect was to guarantee a system of representative and responsible government selected by free and periodic elections. The High Court reasoned such a system of representative government necessitated that there be freedom of communication on matters of government. The fact that the Members of the House and the Senate had to be chosen by the people meant that the people had to have opportunity to be aware of the matters that affected and informed their choices.[62]

[92] Significantly, while the court did imply a freedom of political commentary - not limited to election periods, the court was careful to declare that it was not an absolute protection but was one which was limited to what was 'necessary for the effective operation of that system of representative and responsible government provided for by the Constitution.[63]

[93] The exercise undertaken by the High Court in Lange to examine the text and structure of the Constitution also led the court to limit the scope of the implied freedom as it had been

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[62] The Court stated: *"Communications concerning political or government matters between the electors and the elected representatives, between the electors and the candidates for election and between the electors themselves were central to the system of representative government, as it was understood at federation. While the system of representative government for which the Constitution provides does not expressly mention freedom of communication, it can hardly be doubted, given the history of representative government and the holding of elections under that system in Australia prior to federation, that the elections for which the Constitution provides were intended to be free elections in the sense explained by Birch. Furthermore, because the choice given by ss 7 and 24 must be a true choice with "an opportunity to gain an appreciation of the available alternatives", as Dawson J pointed out in Australian Capital Television Pty Ltd v The Commonwealth, legislative power cannot support an absolute denial of access by the people to relevant information about the functioning of government in Australia and about the policies of political parties and candidates for election. "That being so, ss 7 and 24 and the related sections of the Constitution necessarily protect that freedom of communication between the people concerning political or government matters which enables the people to exercise a free and informed choice as electors.*

[63] See also Kruger v Commonwealth ("Stolen Generations case") [1997] HCA 27; (1997) 190 CLR 1; (1997) 146 ALR 126; (1997) 71 ALJR 991 (31 July 1997)

expressed by a few earlier cases.[64] The Judges in Lange made the point that to the extent that the implied freedom of communication is an implication drawn from certain specific sections of the Constitution 'the implication can only validly extend so far as is necessary to give effect to these sections'. The court made it clear that an implied freedom of communication could only be found in the Constitutional system of representative government from the text and structure of the Constitution itself.[65] The Full Court in Lange stated:

> *"…to say that the Constitution gives effect to representative government is a shorthand way of saying that the Constitution provides for that form of representative government which is to be found in the relevant sections. Under the Constitution, the relevant question is not, "what is required by representative and responsible government?" It is, "What do the terms and structure of the Constitution, prohibit, authorize or require?"*

[94] The courts in Australia have also made it clear that implied constitutional freedoms and rights cannot be 'found' simply by way of political necessity or to prevent an abuse of power.[66] Implied constitutional rights in Australia therefore, arise from a judicial method of interpretation known as 'implication from text and structure'[67], which allows the Constitution to shine its own light, that is, to speak for itself.

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[64] See Theophanous v Herald & Weekly Times Ltd (1994) 182 CLR 104 and Stephens v West Australian Newspapers Ltd (1994) 182 CLR 211 in which the court had created a new defence to defamation actions involving political figures and extended the protection offered by the implied freedom to the State laws and State political matters.

[65] The Court in Lange approved of the approach taken by McGinty (1996) 186 CLR 140 where it was stated:*"11. Implications are not devised by the judiciary; they exist in the text and structure of the Constitution and are revealed or uncovered by judicial exegesis. No implication can be drawn from the Constitution which is not based on the actual terms of the Constitution, or on its structure. However, as an implication will be applied in a particular case to a specific factual situation, it may be expressed in terms relevant to that situation. Although the Court was divided in Australian Capital Television Pty Ltd v The Commonwealth ("ACTV"), there was nothing in any judgment to cast doubt on the approach then taken by Mason CJ:"" It may not be right to say that no implication will be made unless it is necessary. In cases where the implication is sought to be derived from the actual terms of the Constitution it may be sufficient that the relevant intention is manifested according to the accepted principles of interpretation. However, where the implication is structural rather than textual it is no doubt correct to say that the term sought to be implied must be logically or practically necessary for the preservation of the integrity of that structure."*

[66] In Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd, [1920] HCA 54; 28 CLR 129 the court stated: *"If it be conceivable that the representatives of the people of Australia as a whole would ever proceed to use their national powers to injure the people of Australia considered sectionally, it is certainly within the power of the people themselves to resent and reverse what may be done. No protection of this Court in such a case is necessary or proper. Therefore, the doctrine of political necessity, as means of interpretation, is indefensible on any ground. The one clear line of judicial inquiry as to the meaning of the Constitution must be to read it naturally in the light of the circumstances in which it was made, with knowledge of the combined fabric of the common law, and the statute law which preceded it, and then lucet ipsa per se."*

[67] Stone, Adrienne, "Australia's Constitutional Rights and the Problem of Interpretive Disagreement" [2005] UMelbLRS 3

[95] Closer to home, a vivid and popular example of the court's readiness to find fundamental implications in the Constitutions on the Westminster model is the case of Hinds v The Queen.[68] The Westminster styled Constitutions do not expressly provide for the formal separation of powers between the three arms of government, namely the executive, the legislature and the judiciary, but Lord Diplock in Hinds was prepared to find, and did in fact so declare that there was implied in these Constitutions a separation of powers in the various institutions of government, having regard to the evolutionary nature and basic structure of these Constitutions. In an ever-relevant and often quoted passage, he said:

> *"…it is well established as a rule of construction applicable to constitutional instruments under which this governmental structure is adopted that the absence of express words to that effect does not prevent the legislative, the executive and the judicial powers of the new state being exercisable exclusively by the legislature, by the executive and by the judicature respectively."*[69]

[96] The Privy Council decision in Sharma v Attorney General of Trinidad and Tobago[70] is also instructive on the issue of implied rights. In this case, in the 2001 elections in Trinidad and Tobago, each of the two main political parties, the PMN and the UNC won 18 seats in Parliament. The President appointed the leader of the PMN as Prime Minister who then appointed his other 17 Members as Ministers of Government, all of whom became entitled to ministerial salaries. All attempts to elect a Speaker in the House failed and some nine months later Parliament was dissolved without any of the 'UNC 18' ever being allowed to take the MP oath in Parliament. The House authorities took the view that the 'UNC 18' were not entitled to their parliamentary salaries as they had been unable to take the oath of allegiance. Both the High Court and the Court Appeal agreed. The Board however took a different view holding that there was an implied constitutional right to receive salary from the day of election if the Member elected was present and willing to take the oath. The Board recognized that salaries were paid in the United Kingdom since 1911 and stated that it was *'difficult to imagine a modern, democratic state in which members of the lower House at least are not paid."*

[68] [1977] AC 195
[69] [1977] AC 195 at page 212
[70] [2007] 1 WLR 2223

[97] The Board considered sections 140 and 141 of the Trinidad and Tobago Constitution as being central to the appeal.[71] Regard was also had to rule 91 of the 1961 Standing Orders of the House which provided that in matters which are not provided for by the very Standing Orders, resort should be had to the usage and practice of the Commons House of Parliament of Great Britain and Northern Ireland. This allowed to Board to call in aid the United Kingdom's practice,[72] to conclude while sections 140 and 141 did not give an express right to the payment of salary, they assumed that the Salary Review Commission would have salaries to review. The Board stated: "Thus the clear premise of sections 140-141 is that salaries, varied from time to time, will be paid." [emphasis supplied] They noted that the failure of the House to elect a Speaker of the House was a unique situation and that there was no 'British precedent for a situation in which members, present in person and willing to take the oath, are denied the opportunity to do so by the lack of a Speaker, thereby losing their entitlement to payment as members.'

[98] It was in these circumstances that the Board considered it 'necessary to infer what the framers of the Constitution would have intended had they foreseen this extraordinary and obviously unintended contingency.' Accordingly it was held that it must be inferred that the framers of the Constitution intended the Parliamentary system to operate in a way which, subject to the constraints of democratic choice and adversarial politics, is fair and even handed as between competing partisan interests.'

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[71] *"140 (1) There shall be a Salaries Review Commission which shall consists of a chairman and four other members all of whom shall be appointed by the President after consultation with the Prime Minister and the Leader of the Opposition. (2) The members of the Salaries Review Commission shall hold office in accordance with section 126. - "141(1) The Salaries Review Commission shall from time to time with the approval of the President review the salaries and other conditions of service of the President, the holders of offices referred to in section 136(12 to (15), members of parliament, including ministers of government and parliamentary secretaries and the holders of such other offices as may be prescribed. (2) The report of the Salaries Review Commission concerning any review of salaries or other conditions of service, or both, shall be submitted to the President who shall forward a copy thereof to the Prime Minister for presentation to the Cabinet and for laying, as soon as possible thereafter, on the table of each House."*

[72] Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament 23rd ed (2004) at pages 27-28 where it is stated: *"The salary of a member becomes payable when he takes the oath or makes the affirmation required by law, and begins from the day following that on which the poll is held… A member who had not taken the oath within six months of the return of his writ to the Clerk of the Crown is not entitled to claim any salary prior to the date he takes the oath… A member who is a member at the time of the dissolution of Parliament continues to receive his salary until the end of the day of the poll in the consequent general elections."*

[99] All of these cases have approached the question of finding implied rights first from an examination of what the provisions of Constitutions themselves say. This task can only be done by an examination of the literal text and the structure of the Constitution within the context of its evolutionary background. It is this journey that may lead the court to find what is implicit, as well as how far the court should go in protecting the implied right.[73]

The Text and Structure of the St Kitts and Nevis Constitution in Context of its Background.

[100] In considering whether section 52(6) contains this implied right which is being contended for by the claimants, it is therefore necessary to examine the text and structure of the Constitution in relation to the structure of government which is established in St. Kitts and Nevis.

The Constitutional Structure Government in St. Kitts and Nevis

[101] St. Kitts and Nevis is a constitutional and parliamentary democracy, confirming to the Westminster model with the Constitution expressly providing for effective and representative government elected by free and fair periodic elections. The provisions of Chapter IV establish the Parliament of St. Kitts and Nevis and declare that it shall consist of Her Majesty and the National Assembly,[74] which in turn shall consist of the elected representatives and the appointed Senators.[75] The life of Parliament may not extend beyond a period of five years (except in cases of war) but may be dissolved at any time in certain specified circumstances, when a new mandate must be sought at fresh elections.[76]

[102] One of the main effects of the provisions of Chapter IV is that the voting population of each of the eight constituencies in St. Kitts and the three in Nevis are empowered to elect one

[73] Suratt v Attorney General of Trinidad and Tobago[2008] 1 AC – see the discussion of Baroness Hale of Richmond at paragraphs 39 to 42.
[74] Section 25
[75] Section 26
[76] Sections 47 and 48

representative to the National Assembly.[77] It is these eleven elected Representatives who go on, through the Governor-General, to inform who effectively controls executive power in St. Kitts and Nevis.[78] They also indirectly inform the appointment of the Senators.

[103] Chapter V of the Constitution governs the structure of executive power in St. Kitts and Nevis. Section 52 creates the office of Prime Minister conferring the power of such appointment on the Governor General. By section 52(2) the Governor-General is required to appoint as Prime Minister that Representative who appears to him likely to command the support of the majority of the Representatives. The general and usual effect of this provision is that that political party with the most elected Representatives will be able to have the Representative of their choice appointed Prime Minister. Where there is no political party with a clear majority, the Governor General is to be guided by the majority of Representatives if the elected representatives from more than one political party have decided to support one candidate for the office of Prime Minister.

[104] This majority concept is therefore fundamental to the structure of government. It is majority of elected representatives who informs the choice of Prime Minister – this majority must agree as to the choice of Prime Minister.[79] The Prime Minister in turn informs the choice of the two thirds of Senators,[80] unless one of these Senators is appointed Attorney General in which case the number of Senators on the government side is increased by one.[81] (This is the case at present.) The Prime Minister also dictates who becomes Ministers and form the Cabinet of St. Kitts and Nevis.[82]

[105] Another fundamental feature of Government in St. Kitts and Nevis, as in most of the Commonwealth Caribbean, is the immense power given by the Constitution to the Prime Minister. Under section 52(9) he has the power to direct the Governor General to remove

[77] Section 29
[78] Section 52(2)
[79] Section 52(2)
[80] Section 30
[81] Thus the Prime Minister and the Government may in certain circumstances still have a legislative majority even where there is no support from the majority of elected Representatives.
[82] This is the combined effect of section 52(2) and (3), and Section 53.

any Minister;[83] there is no express requirement that when the Prime Minister exercises this power he should be required to give any reason. It is also the Prime Minister who has the sole power to decide what business of government he should take responsibility for, and what he should assign to the Ministers for their management.[84] Under these provisions, he has the power to 'reshuffle' his Cabinet from time to time, and reallocate portfolios as he sees fit. He also has the effective power to decide on the appointment and removal of Parliamentary Secretaries, and what business of government should be given to each of them.[85]

[106] This immense executive power wielded by the Prime Minister is clearly given to him by the majority of the elected Representative. The Constitution contemplates and accepts that the people's mandate given to each of these Representatives includes the power to have a say as to who shall become the Prime Minister, and if a majority so chooses a particular person, then this is deemed to be the will of the people by virtue of the democratic process; this is what is ***'democratic'*** about the existing system of government. It is therefore a fundamental characteristic of the St. Kitts and Nevis constitutional and parliamentary system of government that the primary executive power wielded by the Prime Minister must be grounded in the support of the majority of elected representatives. As one writer puts it:

> *"…in parliamentary systems the only democratically legitimate institution is parliament with the government deriving its authority from the confidence of parliament, either from parliamentary majorities or parliamentary tolerance of minority governments, **and only for the time the legislature is willing to support it between elections,** and as long Parliament is not able to produce an alternative government."*[86][emphasis supplied]

[107] The St. Kitts and Nevis Constitution contains express provisions which effectively means that the majority of elected representatives are not only instrumental in the choice of Prime

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[83] Section 52(9)(a)
[84] Section 54
[85] Section 59
[86] Professor Juan A. Linz, 'Presidential or Parliamentary Democracy: Does it Make a Difference?' in *The Failure of Presidential Democracy.* Chapter 1 (Juan J. Linz and Arturo Valenzuela eds. 1994) quoted by Professor Simeon C.R. McIntosh, 'Constitutional Reform and Caribbean Political Identity – Rethinking the West Indian Polity' 2002 at page 179.

Minister, but they, on behalf of the people, are also constitutionally empowered to decide whether he and 'his government' should continue to be in office for the life of that Parliament.

[108] The first of these provisions, is section 52(6), which the applicants have relied on to ground their implied right. This states:

> *"The Governor-General shall remove the Prime Minister from office if a resolution in no confidence in the Government is passed by the National Assembly and the Prime Minister does not within three days either resign from his office or advise the Governor- General to dissolve Parliament."*

[109] The second is section 41(1) which provides that no Senator is entitled to vote on any vote of no confidence; only elected representatives may vote, and the vote will only be carried by a majority of all the representatives voting.

[110] Sections 52(9)(b) and 59(2)(b) are also crucial. They mandate that where the Prime Minister resigns on the vote of no confidence, that the office of each minister and parliamentary secretary respectively, will become vacant. No doubt these provisions are to allow the new incoming Prime Minister to exercise his constitutional right to select who are to become ministers and parliamentary secretaries under his leadership.[87]

[111] These provisions do not simply operate to remove the Government (The Prime Minister, all Ministers and the parliamentary secretaries) on the vote, but they also mandate that the Prime Minister must either resign within three days, or advise the Governor-General to dissolve Parliament. To make sense of the latter option contained in section 52(6), he must also be required to so advise the Governor-General to dissolve Parliament within the three days. In other words, he has an option to either resign permitting the government to continue and allowing the elected Representatives to support another elected Representative, or to direct that Parliament be dissolved.

[87] See also section 31 which speaks to the tenure of elected and appointed members of the Assembly – their seats are vacated whenever parliament is dissolved.

[112] It is therefore to be derived that it is the elected representatives who are really the true result of the democratic process. The mandate given to them by the voters includes a right expressly given to them by section 52(6) of the Constitution to determine whether a government will continue under the leadership of a particular Prime Minister for that term. In fulfilling the mandate of the people, if these Representatives act as a collective majority, they may be also be able to persuade a sitting Prime Minister to allow the government to continue for that term, but under the leadership of another Prime Minister. The vote of no confidence also ensures that there is a democratic means to remove 'deadlocks or the government – both the executive and the legislative.'[88]

[113] The St. Kitts and Nevis Constitution therefore provides for that form of democratic representative government installed by free and periodic elections, which constitutional writers have characterized as a system of mutual '*dependence in which the chief executive power must be supported by a majority in the legislature and can fall if it receives a vote of no confidence; and the executive power (normally in conjunction with the head of state) has the capacity to dissolve the legislature and call for elections'*.[89]

[114] This Court is of the view that this is by far, the most fundamental rein on executive power that the Constitution has provided. This is the mechanism by which the Constitution ensures that the executive government is accountable to the democratically elected membership of Parliament. I agree with the Constitutional Court in South Africa in Mazibuko v Sisulu[90] that the motion of no confidence is a 'vital tool to advance the democratic hygiene' of the country and 'plays an important role in giving effect to the checks and balances element of our separation of powers doctrine'[91]. As Moseneke DCJ delivering the majority judgment of the South African Constitutional Court stated:

> *"…the Assembly 'elected to represent the people and to ensure government by the people under the Constitution.' A motion of no confidence in the President is a vital tool to advance our democratic hygiene. It affords the Assembly a vital tool and*

[88] Professor Simeon C.R. McIntosh, *ibid* n. 86, at page 183.
[89] Alfred Stephan and Cindy Skach, "Presidentialism and Parliamentarism in Comparative Perspective,' in the Failure of Presidential Democracy 128 (Juan J. Linz and Arturo Valenzuela eds. 1994) quoted with approval by Professor Simeon C.R. McIntosh, *ibid,* n. 86 at page 175.
[90] [2013] ZACC 28
[91] Per Moseneke DCJ at Paragraph 21 of the judgment.

duty to scrutinize and oversee executive action. The Constitution does not set or preconditions for when the Assembly may vote on a motion of no confidence in the President. The ever present possibility of a motion of no confidence against the President and the Cabinet is meant to keep the President accountable to the Assembly which elects him or her. If a motion of no confidence in the President were to succeed, he or she and incumbent Cabinet must resign. In effect, the people through their elected representatives in the Assembly would end the mandate they bestowed on an incumbent President."

[115] This decision was given in the context of a South Africa Constitution that creates a constitutional democracy providing for a separation of powers between the various institutions of government, [92] and one that is founded on the rule of law and contains a bill of rights protecting fundamental human rights.[93] By this Constitution, the system of democratic government in South Africa is one in which the majority of the elected representatives are constitutionally empowered to select a President, who then has the executive authority to appoint and dismiss Cabinet Ministers with the effective result that he wields immense power.[94] Having regard to these relevant similarities, this Court considers the Mazibuko case as having persuasive force.

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[92] As Prof. Francois Venter, North-West University, Potchefstroom campus, South Africa has noted "….it may be said that South Africa is, in terms of its Constitution and the authoritative interpretation thereof by the Constitutional Court over more than a decade, a constitutional state in which the Constitution prevails over all law and all actions of the state; where fundamental rights are acknowledged and protected through the independent authority of the judiciary to enforce the Bill of Rights and the Constitution; a separation of powers is maintained; all government action is required to be legally justified; the state has a duty to protect fundamental rights; legal certainty is promoted; democracy and the rule of law are maintained; a specific set of legal principles apply; and an objective normative system of values guides the executive, the legislature, and the judiciary. http://web.up.ac.za/sitefiles/file/47/15338/South%20Africa.pdf

[93] S v Makwanyane 1995 (3) SA 391 (CC) para [130].

[94] The President as head of state and head of government (section 83 of the Constitution) dominates the executive, in that the Cabinet Ministers are appointed and dismissed by and in the discretion of the President (section 91(2)). The initiative to launch legislation largely vests in Cabinet (section 73(2)), and unavoidably the President's party controls the majority in Parliament. The President is elected by the majority in the National Assembly (section 86). This places the President in a very powerful position regarding both the executive and legislative branches of government. The nature and extent of the executive authority are set out succinctly in section 85(2) of the Constitution, providing for the executive authority to be in the hands of the President, who exercises it 'together with' the rest of the Cabinet. The combination of this authority and the President's power to appoint and dismiss Cabinet Ministers effectively means that all executive authority is exercised under the direction of the President. The executive authority essentially entails the preparation, initiation, and implementation of legislation, the development and implementation of national policies, and the coordination of the functions of state departments. Some provision is also made in the Constitution for parliamentary control over the executive. Thus, in terms of section 89, the National Assembly may remove the President from office by a two-thirds majority vote, members of the Cabinet (which includes the President) are collectively and individually responsible to Parliament and must report regularly to Parliament concerning matters under their control (section 92), and a motion of no confidence passed by a majority of the members of the National Assembly enforces the resignation of the whole of the Cabinet (including the President) or the dismissal and replacement by the President of the Ministers (section 102). Furthermore, the National Council of Provinces may require a Cabinet member, a Deputy Minister, or an official in the national executive or a provincial executive to attend a meeting of the Council or a committee of the Council (section 66(2)).

[116] This Court therefore considers that it is an implied and fundamental feature of the Constitution that any executive authority of St. Kitts and Nevis must be subject to the checks and balances that the text and structure of the Constitution obviously caters for. I can hardly say it better than the South Africa Constitution Court where it was said that such a motion is 'central to the multiparty democracy envisioned by the Constitution. It implicates the values of democracy, transparency, accountability and openness. A motion of this kind is perhaps the most important mechanism that may be employed by Parliament to hold the executive to account, and to interrogate executive performance.'[95] This is equally applicable here. In the view of this Court, the St. Kitts and Nevis Constitution has also itself expressed an urgency in what should follow, after the majority of elected representatives have decided to declare their lack of confidence in the Government, that is, within three days the Prime Minister should either resign (thereby vacating the offices of all his Ministers) or effectively cause Parliament to be dissolved. It would make nonsense of this provision that there could effectively be that required lack of confidence, and a request to have such a motion debated and voted on, but that a Speaker could refuse or fail to place such a motion on the Order Paper for debate. To my mind not only does the text and structure of the Constitution recognize an implied substantive right in each Representative of the Assembly, to conceive and request that a motion of no confidence be placed for debate by the Assembly, but also as being logically and practically necessary for the integrity of this structure[96], an implied procedural right,[97] once that motion has been submitted to the Assembly in the prescribed manner for it to 'be accorded priority over other business by being scheduled, debated and voted on within a reasonable time given the programme of the Assembly.'[98]

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[95] Mazibuko *ibid,* n. 90 Per Moseneke DCJ at paragraph 44.

[96] *Dicta of Mason CJ in Australian Capital Television Pty Ltd v The Commonwealth (ACTV) 177 CLR 106 at page 135.*

[97] Thus within the narrow scope of intervention as suggested by Butadroka v Attorney General of Fiji *ibid* n. 45

[98] This is the formulation which the South African Constitution Court was prepared to suggest, but stopped short of finding that this also was also a matter of parliamentary procedure being implied into the Constitution, and instead pointed to a lacuna in the Rules, and suspended the High Court's declaration that the motion should be debated as a matter of urgency to allow the Assembly to create the necessary Rule to facilitate tabling, debating and voting on the motion.

[117] In finding that the structure of the Constitution so provides for this implied substantive and procedural right and protection, this Court has paid critical attention to the actual text and structure of the constitutional provisions discussed above. The Court's view is further fortified not only by the persuasive force of Mazibuko, but also, the parliamentary convention existing in the United Kingdom and other commonwealth countries regarding motions of no confidence. I note in this regard that the various institutions of government as constructed by the Constitution are essentially evolved from the structure of government and replaced similar institutions which predated independence and which were founded on the United Kingdom's model of government.[99]

[118] From all the above, I am of the view that the Separation of Powers doctrine and the general rule of non-intervention into the affairs of Parliament does not help the defendants in this case, as what is at stake is an implied provision of the Constitution of St. Kitts and Nevis.

[119] As a separate issue, and if only for completeness, the Court, in this exercise, and from the findings of law made, has effectively answered the legal questions that have been raised by the declarations sought at relief (3), (4) and (5) of the originating motion. This has not been an academic exercise however, as these findings were integral preliminary questions to the grant of the substantive relief sought by the claimants. These reliefs will not be struck from the originating motion.

Separation of Powers Doctrine and the Issue of 'Political Questions'

[120] The finding that the general rule against non-intervention in the affairs of Assembly does not operate to preclude the court's exercise of jurisdiction where constitutional provisions relating to matters of internal procedure have been infringed, is also a sufficient answer to the defendants' arguments that the issues raised are all questions which are purely

[99] As Lord Diplock stated in Hinds v R *ibid* n. 68 '*The new constitutions, particularly in the case of unitary states, were evolutionary and not revolutionary. They provided for continuity of government through successor institutions, legislative, executive and judicial of which the members were to be selected in different ways, but each institution was to exercise powers which, although enlarged, remained of a similar character to those that had been exercised by the corresponding institution that it had replaced.'*

political in nature and should not be enquired into by a court of law. Notwithstanding, in due deference to the arguments raised, I will examine this issue having regard to the specific arguments raised in this context, if simply to demonstrate that this argument also fails.

Analysis and Findings

[121] The separation of powers doctrine serves to inform the court of the scope and extent of the court's jurisdiction and to ensure that the court remain within the bounds of its jurisdiction. I have no doubt that where questions are truly of a political nature, the courts' judicial oversight has no place. The determination of real political questions must be left to the policy makers and the politicians. It is no part of the court's business to thread on such territory; due respect and deference must be given to each arm of government and there should be no unlawful interference. The question then is whether the issues that are being raised are truly political questions in the sense that the court has no jurisdiction to hear the matter. This of course, should not be confused with cases which are of a political nature as even where the matter is one of serious political controversy, the courts may be seized with the jurisdiction and must have the courage to deal with them in a judicious manner.

[122] The defendants have relied on the United States of America's formulation of this principle as has been expressed by Justice Brennan of the US Supreme Court in the 1962 decision of Baker v Carr.[100] This was a case, however, in which the majority of the judges of the Supreme Court retreated somewhat from the political questions doctrine. Nonetheless, it now represents a landmark decision in the United States of America on the approach which the court should consider in assessing what are 'political questions' in this vexed question of jurisdiction. Faced with the issue of justiciability in the context of 'political questions', a court should ask *inter alia*, whether the matter that was being questioned has been committed by the Constitution to another arm of government, or whether for instance the court was being called upon to resolve a purely policy matter, or whether there was a

[100] 369 U.S. 186 (1962), approved by the Trinidad and Tobago Court of Appeal in Florence Bobb and Girlie Moses v Patrick Manning Civil Appeal No. 97 of 2002

lack of judicially discoverable and manageable standards for resolving it, or even whether it was impossible to determine the matter without expressing lack of respect due coordinate branches of government'. Another way to approach the issue is to consider what is the subject matter of the challenge as against the source of the power.

[123] The authorities have shown if there is a sufficient legal component to the case[101] at hand the matter should not be 'dismissed on the ground of a political question's presence. The doctrine… is one of 'political questions' not one of political cases.'[102]

[124] The defendants have sought to rely on dicta in the Canadian decision of Duff Conacher v The Prime Minister of Canada[103] to make this point. That case however, does not suggest that all issues relating to a vote of no confidence are 'political questions'. That court was simply expressing a view that if the nature of the vote was unclear and ambiguous, it was for the Prime Minister of Canada to decide whether it was in fact such a vote. If this were applicable to the St. Kitts and Nevis context, it would mean that in cases of ambiguity as to whether a motion amounted to motion of no confidence, a determination would have to first be made the Assembly, and then the Governor General for him to act on it.

[125] The claimants in this case are not asking this Court to determine whether what they submitted to the Clerk of the Assembly was a motion of no confidence. What they have

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[101] Note also Teja's Animal Refuge c. Quebec (Attorney General), 2009 QCCA 2310 (CanLII), where the Quebec Court of Appeal held that the 'appropriate level' of animal protection to be set under the Animal Health Protection Act was a matter for the Minister as it involved political choices to be made by a Minister of Government. The Court made reference to the text, *Boundaries of Judicial Review: The Law of Justiciability in Canada*, in which its author, Professor Lorne Sossin commented on the Supreme Court's view in *Finlay v. Canada (Minister of Finance)* 1986 CanLII 6 (SCC) of the appropriateness of an issue for judicial consideration as follows: "[…] [T]he fact that another branch of government might do a better job of reviewing a decision, or has greater insight into the basis of a decision, are not proper grounds for declining jurisdiction, but the fact that another branch of government has been provided jurisdiction over the matter (*Auditor General*), or the fact that a matter does not have a sufficient legal component (*CAP Reference*), or that the moral and political considerations of the case make it inappropriate for a court to decide (*Operation Dismantle*), all will be proper grounds for a declining to decide matters on justiciability grounds." Whilst the court dismissed the matter as raising only a political question, it did go on to state: "It bears mentioning as a final note that Teja alleges that the Minister and Anima-Québec failed to act with proper dispatch and proper resources to protect animal health, but does not allege that they acted in a manner that would constitute an abdication of duty or an abuse of authority. There are of course instances in which abuse of authority would justify intervention of a court, but this is not one of them."

[102] Baker v Carr *ibid* n. 100

[103] [2010] 3 FRC 411

asked this Court to determine is whether the Speaker has acted in contravention of the Constitution. They have asked this court to find that there is an implied right in the Constitution that each Member is entitled to bring such a motion and to have it debated within a reasonable time. They ask that if it is found that the Speaker has acted in contravention of the Constitution, an order should be made against him, compelling him to place the motion on the Order Paper for debate. The constitution has not relegated the question of whether implied rights are found to any department of government, nor has it given the power to any policy maker or department to determine whether there has been any breach of such right; this is not a question of a policy.[104] In fact even questions that are usually 'political questions', may have an element in an appropriate case, which is amenable to the court's jurisdiction. This is seen vividly in those cases dealing with the exercise of the Royal Prerogative.[105]

[126] In the present case, whilst there may be some aspects of the vote of no confidence which may not be amenable to the court's jurisdiction, the issues raised in this case do not fall in that category. The sufficient legal component in this case are those legal issues, namely, whether there is an implied right to be found in the Constitution, and whether the Speaker has acted in breach of this right. Only the courts are possessed with the power and the

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[104] R v Secretary of State for the Home Department, Ex Parte Bentley [1994] 1 Q.B. 349, which held inter alia that 'decisions taken under the Royal Prerogative were susceptible to judicial review if their nature and subject matter were amenable to the judicial process and in so far as the challenge did not require the court to review questions of policy; and that, although the formulation of criteria for the exercise of the Royal Prerogative of mercy by the grant of a free pardon was probably not justiciable, a failure by the Home Secretary to recognise that the prerogative of mercy could be exercised otherwise than by way of a free pardon was subject to judicial review.'

[105] As Watkins LJ stated in Ex Parte Bentley *ibid* at page 363: *"The C.C.S.U. case [1985] A.C. 374 made it clear that the powers of the court cannot be ousted merely by invoking the word "prerogative." The question is simply whether the nature and subject matter of the decision is amenable to the judicial process. Are the courts qualified to deal with the matter or does the decision involve such questions of policy that they should not intrude because they are ill-equipped to do so? Looked at in this way there must be cases in which the exercise of the Royal Prerogative is reviewable, in our judgment. If, for example, it was clear that the Home Secretary had refused to pardon someone solely on the grounds of their sex, race or religion, the courts would be expected to interfere and, in our judgment, would be entitled to do so. "We conclude therefore that some aspects of the exercise of the Royal Prerogative are amenable to the judicial process. We do not think that it is necessary for us to say more than this in the instant case. It will be for other courts to decide on a case by case basis whether the matter in question is reviewable or not."* See also Epuru Sudhakar & Anr vs Govt. Of A.P. & Ors 11 October, 2006 Kapadia J stated: *"…The controlling factor in determining whether the exercise of prerogative power is subject to judicial review is not its source but its subject matter. It can no longer be said that prerogative power is ipso facto immune from judicial review. An undue exercise of this power is to be deplored. Considerations of religion, caste or political loyalty are irrelevant and fraught with discrimination. These are prohibited grounds. Rule of Law is the basis for evaluation of all decisions. The supreme quality of the Rule of Law is fairness and legal certainty. The principle of legality occupies a central plan in the Rule of Law. Every prerogative has to be the subject to the Rule of Law.*

judicially discoverable standards to resolve these issues. This is not a non-judicial discretion or power that must be exercised. The issues raised involve principles of constitutional interpretation, and the court is quite capable of resolving this matter with the usual judicial decorum without leading to any embarrassment that could arise from multiple departments ruling on the issues raised; there is simply no other legal entity which could pronounce on the legal questions being raised here. On the converse, the Speaker having the sole right to regulate the conduct of affairs in Assembly does not mean that he can do so in breach of the Constitution.

[127] Having regard to the findings of the court on the separation of powers doctrine, the principles of non-intervention, and the subject matter of the issues that are being raised in the originating motion, it is clear to this Court that these are purely questions for judicial determination.[106] This is a political case, but these are not political questions.

[128] I wish to note here that in view of the findings of this Court, I have considered that it is unnecessary for me to treat with those arguments relating to the scope and effect of section 23 of the National Assembly (Powers and Privileges) Act Cap. 2.04. No ordinary Act of Parliament could operate to give immunity to the Assembly for breaches of the Constitution.

Issue No. 3 - What Remedies may be granted under Section 96 of the Constitution

[129] The defendants have argued that the court is not empowered to grant any remedy under section 96 of the Constitution. Alternatively, even if the court could grant the declarations being sought, they contend vigourously that the court has no power to grant an injunction in the terms being sought on the originating motion to compel the Speaker of the National Assembly relating to matters of procedure.

[106] A vivid example of a case involving a political question is Committee For Monetary v. Canada, 2013 FC 855 (CanLII) in which the court in striking out the matter, held: The Claim focuses on matters such as the Minister's decision being "financially and economically fallacious" (para. 21); that Provinces are getting more interest-free loans than others (para. 21 (d); decisions are based on "the reasoning that such loans would increase annual deficits" (para. 24); "it is long recognized that investment and expenditure in human capital is the most productive investment and expenditure a government can make etc. These few examples from the Claim, of which there are many more, resonate with policy making implications not legal considerations.

Analysis and Findings

[130] The relevant parts of Section 96 of the Constitution provides as follows:

> *"(1) Subject to sections 23(3), 37(10)(b), 50(7) and 116(2), any person who alleges that any provision of this Constitution (other than a provision of Chapter II) has been or is being contravened may, if he has a relevant interest, apply to the High Court for a declaration and for relief under this section.*
>
> *(2) The High Court shall have jurisdiction on an application made under this section to determine whether any provision of this Constitution (other than a provision of Chapter II) has been or is being contravened and make a declaration accordingly.*
>
> *(3) Where the High Court makes a declaration under this section that a provision of this Constitution has been or is being contravened and the person on whose application the declaration has also applied for relief, the High Court may grant to that person such remedy as it considers appropriate, being a remedy available generally under any law in proceedings in the High Court."*

[131] The section expressly gives the court jurisdiction, on an application made by a person with a relevant interest, to grant relief when a provision of the Constitution has been or is being breached.

[132] There was some contention about whether the use of the word 'provision' in section 96 could ever include an 'implied' right. Learned Queen's Counsel Dr. Browne, has argued that an implied right or protection is not the same as an express 'provision' of the Constitution. On this basis he submitted, that the claimants had no right to move the court under section 96 as that section only granted relief when there was a breach of a constitutional '***provision'***. This Court respectfully does not agree. There can be no difference between an ***implied*** right, protection or power and ***express*** right protection and power. The word 'provision' simply means 'a clause in a legal document'[107], or in this context a clause in the Constitution. A 'clause' can be either implied or expressed.

[107] Jowitt's Dictionary of English Law Volume 2 page 1454.

[133] In considering what is the extent of the 'relief' which a court may grant, I have found the Privy Council's decision in Angela Inniss v The Attorney General of St. Kitts and Nevis[108] to be useful. In this case section 96 was engaged in the context of the dismissal of a High Court Registrar to determine whether exemplary damages were permissible. Arguments before the Privy Council that it was inappropriate to consider the principles applicable to the grant of 'redress' for the breach of fundamental rights were rejected. Whilst noting the difference in the terminology, their Lordships considered that the case law arising out of the enforcement provision relating to a breach of fundamental rights was still relevant to the kind of 'relief' that may be granted under section 96. The Board stated:

> *"27. This case is not, as Mr. Charkham pointed out, one where a fundamental right or freedom protected by the Constitution has been breached, and the word "redress" does not appear in section 96 of the Constitution. The word that section 96(1) uses is "relief". Ramanoop was a case of unlawful arrest and detention. In Merson the appellant had been verbally and physically abused after arrest by police officers. In Taunoa the appellants had been subjected to segregation, isolation and frequent strip searches during their detention. But the fact that the guidance that was offered in those cases was given in that context does not deprive it of its value in case such as this, where the provision that has been breached is to be found elsewhere in the Constitution. Allowance must of course be made for the importance of the right and the gravity of the breach in the assessment of any award. The fundamental points are of general application, however. The purpose of the award, whether it is made to redress the contravention or as relief, is to vindicate the right. It is not to punish the Executive. But vindication involves an assertion that the right is a valuable one, as to whose enforcement the complainant herself has an interest. Any award of damages for its contravention is bound, to some extent at least, to act as a deterrent against further breaches. The fact that it may be expected to do so is something to which it is proper to have regard."*

[134] Those cases have shown that, when exercising this constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right that has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words.[109]

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[108] [2008] UKPC 42

[109] Attorney General of Trinidad and Tobago v Ramanoop [2006] 1 AC 328; Merson v Cartwright and another [2005] UKPC 38; Taunoa and others v Attorney General [2007] 5 LRC 680

[135] Whilst not conceding that section 96 is triggered in the present case, the defendants have accepted that in an appropriate case a court may grant a declaration but they have contended as vigourously, that it can never lead to the grant of injunctive relief in cases involving the duty of the Speaker to regulate the conduct of the internal proceedings of the Assembly. In so doing they have relied on a number of cases, some of which have been discussed above.

[136] One of the cases they have relied on is Attorney General of Guyana v David Granger and Others discussed briefly above.[110] This case involved a vote of no confidence against the Home Affairs Minster of Guyana, Mr. Clement Rohee, which was brought and passed by the Opposition parties in the House, who held a combined majority in Parliament. By this resolution, the Opposition resolved that that they had no confidence in him and thereafter sought to prevent him from speaking as long as he remained the Home Affairs Minister. The Attorney General moved to the High Court seeking a number of orders including declarations that the Opposition had no right to bring and have debated, a motion of no confidence in a single Member of the Parliament, and that their attempt to muzzle the Minister from speaking was in breach if his constitutional right to represent the people. The Chief Justice refused to allow the motion to proceed on a number of grounds holding *inter alia*, that there was no constitutional prohibition against a no confidence vote against a single Member of the Parliament.

[137] The defendants in this case have sought to rely on the following passage in David Granger where the Guyana Chief Justice stated:

> *"Assuming that the court, on the evidence, were to make the finding in the substantive motion that the Speaker did act in contravention of the constitutional right of Mr. Rohee as an elected member of the National Assembly and that of his electors, it behoves the Speaker and indeed the National Assembly as a whole to respect not only the finding of the court for reason of its finality but also the constitutional right of Mr. Rohee to represent his electors and their constitutional right to be represented by him in the National Assembly. But neither the constitutional right of Mr. Rohee to represent nor that of his electors to be represented in the National Assembly is an enforceable constitutional right under Article 138 to 151 of the Constitution. Thus even though the issue as to whether*

[110] *ibid* n. 15. Discussed in part at para. 68.

> *Mr. Rohee as an elected member of the National Assembly has a constitutional right to speak in the National Assembly (irrespective of the expression of no confidence in him as Minister of Home Affairs) is justiciable, the right itself (assuming it exists) appears to be of such a nature as to be enforceable by the Court."*

[138] First it is to be noted that, the Guyana Chief Justice found that the relevant constitutional right, if one existed, was not an enforceable right. In so doing he made reference to Articles 138 to 151 of the Guyana Constitution, namely the fundamental rights provisions of the Constitution. It was in this context that the Learned Chief Justice made the statement, 'it is no part of the court's function to give directions to the Speaker or the National Assembly as to the future conduct of the Assembly's affairs.' Further it is to be noted that he proceeded to strike out the relief which was being sought at paragraph 5 of the Motion, which was one which was seeking *inter alia* to compel the Speaker to allow the Home Affairs Minister to perform his functions not as elected Member of the Assembly but also as appointed Minister of the Government of Guyana pursuant to the Constitution. It is this light that his reference to Lord Coleridge CJ statement in Bradlaugh v Gosset[111] that if 'an injustice had been done by the House to an individual Member his remedy did not lie in an action in the courts of law but by an appeal to the constituencies whom the House' represented, has to be understood.

[139] In fact the Guyana Chief Justice did rule that the motion should be allowed to proceed in relation to two of the relief being sought on the motion, he ruled that the court had the jurisdiction to consider whether to grant (i) a declaration that the Speaker in prohibiting the Minister from speaking and in failing to recognize him for the purpose of presenting business before the House had acted contrary to the Constitution, and (ii) an order rescinding the decision of the Speaker to prevent the Home Affairs Minister from speaking in Parliament and refusing to recognize him for the purpose of presenting bills, motions or other presentations in Parliament, on the grounds *inter alia,* that this too was unconstitutional.

[111] *Ibid* n. 23

[140] It is unclear whether the Guyana Chief Justice was saying that the only relief that could be granted for a breach of a constitutional right other than a fundamental right was only by way of a declaration in relation to the issues that he considered that the court had jurisdiction to deal with. It is unnecessary, however, to determine whether he did go that far, as he was not treating with any provision of the Guyana Constitution that is equivalent to section 96 of the Constitution of St. Kitts and Nevis. Accordingly this aspect of his judgment is simply not applicable to this case.

[141] In asking this Court not to follow the South African case of Mazibuko,[112] the defendants have nonetheless pointed out that even in the circumstances of that case, the Constitutional Court had made a declaration regarding the Constitutional right to sponsor a motion of no confidence, without going as far as compelling the Speaker to place such a motion within a certain time before the Assembly. In that case the court even suspended the declaration made and was content to leave it to the Assembly to correct the defect in the Rules.

[142] In approaching this question of the extent of the relief which may be given under section 96, I have noted that whilst the Standing Orders of the National Assembly do not contain express provisions which indicate that a motion of no confidence should be debated as a matter of priority, it does have a working mechanism to facilitate the placing of motions on the Order Paper. That there is to be implied the right in section 52(6), it is to be expected that the Standing Order would be construed and applied in a manner consistent with the provisions of the Constitution.

[143] Further support that the Standing Order themselves contain a mechanism for there to be some urgency in placing such motions on the Order Paper is Standing Order 85 which operates to receive the present practice of the House of Commons of the United

[112] *ibid,* n. 90

Kingdom.[113] The practice in the UK relating to motions of no confidence has been usefully set out as follows:[114]

> *"A debate on a confidence motion will generally take precedence over the normal business for that day. Griffith and Ryle state that "By convention… if the official opposition tables a motion of censure on the government, the government provides time for it to be debated".[115]*
>
> *As such they may be contrasted with critical motions debated, for example, on Oppositions days or, formerly, on private Members' days. Parliament may even be recalled from a recess for such a debate to take place."*

[144] It is, however, noted that none of the above Standing Orders, mandate that there should be specific timelines that the Speaker must comply with, regarding motions of no confidence. That the rules should contain a degree of flexibility is sensible, as there could be good reason why allowances should be made for other urgent matters that could have serious consequences for the necessary functioning of government. Such matters may well include the budget debates for national spending. In this case, on the applications, the 1st defendant have offered various reasons why the motion could not be placed on the Order Paper ending finally with the view that he considered that the matter was *sub judice*, and that until the court had fully heard the matter, he would not place the matter on the Order Paper.

[145] The lack of specific rules however, could in practice lead to attempts to frustrate the process. This problem was highlighted in the South African case,[116] where the ordinary rules of Parliament were construed and applied in such a manner that effectively operated to prevent the motion from being debated. In the St. Kitts and Nevis context, if it were shown that the Speaker, who is elected by the majority of the Assembly, was acting in a

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[113] *"(1) In any matter not herein provided for, resort shall be had to the usage and practice of the Commons House of Parliament of Great Britain and Northern Ireland, which shall be followed as far as the same may be applicable to the National Assembly, and not inconsistent with these Standing Orders nor with the practice of the National Assembly.*
(2) In cases of doubt, the Standing Orders of the National Assembly shall be interpreted in the light of the relevant usage and practice of the House of Commons, but no restrictions which the House of Commons has introduced by Standing Order shall be deemed to extend to the National Assembly or its members until the National Assembly has provided by Standing Order for such restriction."

[114] Confidence Motions" by Richard Kelly– Paper Issued by the United Kingdom House of Commons, updated on the 13 May 2013

[115] Blackburn, R and Kennon, A (2003) *Griffith & Ryle on Parliament* p484

[116] Mazibuko *ibid* n. 90

contumacious manner, and is deliberately refusing to place the motion on the Order Paper without any valid reason, [117] it would be expected that clear declarations under section 96 would be a sufficient remedy, and cause the Speaker to take the appropriate steps required. But if following those declarations such contumacious conduct continues a court may at that stage be entitled to consider whether more than a declaration is necessary to ensure compliance with the Constitution. This is the effect of Inniss and the learning from the 'fundamental rights cases' in this context. In approaching the exercise of discretion under section 96, the court, giving due regard to parliamentary privilege, must not be concerned in any sense to teach the executive how to conduct themselves, it is simply to ensure there is an 'affirmation of constitutional values',[118] and that the person with the relevant interest is able to exercise rights given to him under the Constitution without any executive interference.[119] As has been noted 'vindication involves an assertion that the right is a valuable one'[120]. 'In some cases a declaration on its own may achieve all that is needed to vindicate the right. This is likely to be so where the contravention has not yet had any significant effect on the party who seeks relief.'[121] [emphasis supplied] In other cases more will be called for to give a meaningful remedy. In a case such as the present involving the section 44(1) power given to Parliament to manage its own internal affairs, it can only be in the rarest of cases, and only where every other course has failed, that a court should consider the grant of an injunction to preserve the sanctity and dignity of the Constitution.

[146] Before leaving this issue, I have noted that the Speaker has stated that he considers that the last reason why the matter was not listed is because he considers that it is *sub judice.* In this context he has also referred to SO 43(1) which provides: *"Reference shall not be made to any matter which is sub judice, in such a way as might in the opinion of the Chair prejudice the interests of the parties thereto.'* The court proceedings have arisen because the claimants wish to have this motion of no confidence heard. This is why the matter is in

[117] This Court does not find any relevance in a practice where previous motions of no confidence were never debated in the Assembly, and were simply left off the Order Paper.
[118] Per McLachlin CJ *in Vancouver (City of) v Ward* [2010] 2 SCR 28 quoted with approval by Lord Collins in R (Walumba Lumba and another) v Secretary of State for the Home Department [2011] UKSC 12 at para. 231.
[119] See this point being made by Lord Scott in *Merson v Cartright and Attorney General* [2005] UKPC 38
[120] Angela Inniss *ibid,* n. 108 para. 27 - judgment *Delivered by Lord Hope of Craighead*
[121] Angela Inniss *ibid,* n. 108

court. If the matter is now placed on the Order Paper and debated, the court proceedings may become moot and merely academic.[122] Regardless however, there could hardly ever be any prejudice caused to the interests of the parties in the court proceedings if the Assembly were to debate and vote on the motion while it was still pending in court.

[147] I now go on to consider the other aspect of the applications, which is the issue as to whether the 2nd to the 9th defendants should be removed as parties on the basis that they are not properly joined in this matter.

Issue No. 4 – Whether there is a Cause of Action against the 2nd to the 9th Defendants?

[148] The defendants have asked that this Court remove the 2nd to the 9th defendants as parties in this matter as they are improperly joined as defendants and in any event there is no cause of action and no allegation pleaded or disclosed against them. They say that from the originating motion it is clear that the claimants have sued these defendants in their capacities as Members of the Cabinet who really play no role in the matters that are in issue. They say that it is a 'matter for the Speaker only to decide whether to schedule a debate, or decide whether the purported motion or resolution is in order or is in substance a resolution for a vote of no confidence in the Government for the purposes of section 52(6) of the Constitution as opposed to a pejorative attack against the Prime Minister'.

[149] They go on to contend that 'no material facts have been pleaded, or evidence led, to show that these defendants are authorized, or any unlawful act or conduct on the part of these defendants in relation to any matter which they were required or authorized by law, rules or Standing Orders to schedule for the National Assembly'[123].

[150] The claimants, on the other hand argues that whilst it appears that it is Speaker who is authorized by the Standing Orders to decide when a motion is to be listed on the Order

[122] Borowski –v- Canada (Attorney General) [1981] 1 S.C.R. 342
[123] Written submissions of the 1st to the 9th defendants dated 17 April 2013

Paper, in practice it has been the Cabinet which decides what is to be put on the Order Paper. They contend that it is the Attorney General who would then communicate Cabinet's decision to the Parliamentary Counsel who would then instruct the Clerk, who then makes up the Order Paper. They urge this Court to note that the Speaker owes his position to the Government's majority in the Assembly to make the point that Cabinet therefore plays a pivotal role is deciding what goes on the Order Paper. They urge this court to find that the 2nd to 9th defendants are therefore properly joined.

Analysis and Findings

[151] The court's power to remove a party from proceedings before the court or to strike out the statement of case as disclosing no cause of action against a party is founded on both the statutory and inherent jurisdiction on the court. CPR 19.2(4) prescribes that the 'court may order any person to cease to be a party if it considers that it is not desirable for that person to be a party to the proceedings.' CPR 19.3(2) permits an existing party to make an application for an order that a party be removed from the proceedings.

[152] In considering whether it is 'desirable' to remove a party on the court's motion, the court should consider whether there is a judicial basis which compels that that party should be removed. The court should not remove a party where that party has a 'true interest to oppose the orders' that are being sought or whether he has some other good reason to remain a party.[124] When the court is proceeding on an application to remove a party, it is usually on the basis that the party is not a proper party in the sense that, as it is being asserted in this case, there is no reasonable cause of action pleaded against that party in the matter.

[153] The removal of a party from a matter or the striking out of the statement of case has the same effect of bringing the proceedings to an end as against that party so removed. This is a drastic step and the court should only use this power in clear and obvious cases such as

[124] Zamir & Wolf, The Declaratory Judgment (1993) 2 nd Ed. Quoted with approval by the High Court of Jamaica in Dorothy Lightbourne CD Q.C. v Christopher M. Coke and Others Claim No 1860 of 2010

where, as is being alleged as in this case, on the face of the pleadings, the claim is obviously unsustainable against the 2nd to the 9th defendants.[125]

[154] An application to strike out a party on the basis that there is no cause of action pleaded against him requires first, an identification of the cause of action against that party, and second, a determination as to whether the pleadings provides the grounding for the maintenance of that cause of action. In this process, the court is to assume the truth of the claimants' case and is not to embark on an assessment of the strength of the case.[126]

[155] Having regard to the manner in which the claimants have presented their case, it would appear that their cause of action against the 2nd to the 9th defendants is that either these defendants, with the duty to do so, are failing to give effect to the claimants' right to have the motion of no confidence placed on the Order Paper, or these defendants are unlawfully interfering with the process thereby stifling their right.

[156] The claimants in support of their claim against these defendants rely on the affidavit sworn to on the 2 April 2013, by Mr. Brantley where he states, beginning at paragraph 42:

> *"42. Since the 11 December 2012, the Motion of No Confidence has not been put on the Order Paper and no meeting of the Assembly has been scheduled for the debate of the Motion.*
>
> *43. At the beginning of February 2013, the Board of the St. Kitts and Nevis Chamber of Commerce released to the public a letter they had written to the Prime Minister calling upon him to 'do all within your power to ensure that the motion of no confidence in your government is brought before the National Assembly without further delay.'…*
>
> *44. Similarly, at around this time, the St. Kitts Christian Council and the St. Kitts Evangelical Association made public a letter written to the Prime Minister in which they called upon him 'to bring to Parliament and to have debated the Motion of No Confidence without further delay and before any other business is brought to the Parliament.'…*

[125] Baldwin Spencer v The Attorney-General of Antigua and Barbuda et al quoted with approval in Tawny Assets Ltd. v East Pine Management Ltd, and Others Civil Appeal No. 7 of 2012 BVI
[126] Tawny Assets Ltd. *ibid* n. 125 see in particular paragraph 32

45. In a public broadcast on or about 5 February 2013, the Prime Minister stated publicly that the scheduling of the Motion of No Confidence lay in the hands of the Speaker.

46. I am informed by Mr. Condor, that despite the Prime Minister's statement, the practice while he was a member of the Cabinet was that Cabinet discusses and decides what goes on the Order Paper. The Attorney General is then instructed and he in turn instructs the Parliamentary Counsel who then communicates with the Clerk of the House who then prepares and sends out the Notices and the Order Paper.

47. By letter dated 11 February 2013, the St. Kitts and Nevis Bar Association wrote to the Speaker calling on him to bring the Motion before the Assembly without further delay and pointing out that such delay would undermine the democratic principles on which our Federation is founded. …

48. By letter dated 14 February 2013, the Speaker replied that the matter is under consideration and will be dealt with in accordance with the provisions of the Constitution and the National Assembly Standing Orders….

[157] They also rely on the affidavit of Eugene Hamilton which is sworn to on the 5 April 2013 in which he deposes:

"4. On the evening of Thursday the 4th day of April, 2013, a public meeting of the St. Kitts-Nevis Labour Party was held at St. Paul's that was recorded live on local radio station Freedom FM. The Prime Minister spoke at the meeting. The meeting was taped and I have since listened to the said words that were spoken by the Prime Minister:

> *"I don't care how much summons and writ dey issue 'pon me. Not one ah dem can force me to put no motion ah no confidence on de order paper because me nuh put it there. … they could file and file and file and file again. Not one ah dem can mek me put nuttin 'pon de order paper cause me no own no order paper."*

[158] As it has been shown earlier, it is the Speaker who has the duty to regulate the conduct of proceedings in the Assembly. There is no duty on the Prime Minister or the Cabinet. Therefore there could be no cause of action that these defendants have breached their lawful duty. This Court is satisfied that the pleadings does not show or raise an enforceable cause of action that the Prime Minister or his Cabinet has unlawfully or improperly interfered with the Speaker's duty to place this motion of no confidence on the Order Paper. From the claimants' case itself, there has been no statement that there has been an acceptance by the Prime Minister or any Member of the Cabinet that they have

interfered with the process. It would be improper to use a 'practice' on how the Cabinet places matters on the Order Paper to ground an enforceable cause of action against the 2nd to 9th defendants that they have prevented the Speaker from placing this motion on the Order Paper, or that they are the ones deciding that this motion should not be placed on the Order Paper. On one view this practice shows how government's business gets on the Order Paper, it does not speak to business brought to the Assembly by private Members. No amount of oral evidence could elevate this aspect of the case to produce a cause of action.[127] This is not a case where live issues of facts have been raised which can only be determined by oral evidence.[128]

[159] If there has been a contravention of the implied Constitutional right to be found in section 52(6), that breach has been committed by the Speaker, and not by the other defendants. It would be speculation to use a 'practice' to ground a conclusion that the Speaker was prevented from laying the motion on the Order Paper, or that he had relinquished his obligations in favour of the Cabinet. There is no grounding in the pleadings of any interference, much less wrongful interference.

[160] On the other view, even if the practice could be taken as one where the Executive in Cabinet '*decides what goes on the Order Paper*', both in terms of government and private business, this too, by itself, does not amount to an allegation that they have unlawfully or improperly usurped the mandate of the Speaker to regulate the conduct of the Assembly's affairs. To indicate a cause of action against the Cabinet, it is not sufficient for the pleadings to state that the Cabinet has a practice of deciding what goes on the Order Paper – it is to be expected that they will decide what business they want the Speaker to place on the Order Paper - it should at least plead a case that the Cabinet either has a practice of unlawfully interfering with the Speaker's power to finally direct what goes on the Order Paper, or has directed that this motion of no confidence should not be placed on the Order Paper. The court notes that the pleadings do not allege any mala fides on the part of

[127] Tawny Assets Ltd. v East Pine Management Ltd, and Others *ibid* n. 125

[128] Ian Peters v Robert George Spencer Antigua and Barbuda High Court Civil Appeal No. 16 of 2009 (delivered 22 December 2009, unreported) following Citco Global Custody NV v Y2K Finance Inc Territory of the Virgin Islands High Court Civil Appeal No. 22 of 2008 (delivered 19 October 2009, unreported) quoted with approval in Tawny Assets Ltd. v East Pine Management Ltd, and Others *ibid* n. 125

the Cabinet; there has been this underlying speculation running through this matter, but there is nothing in the pleadings supporting such a claim. Approaching this issue from another angle, it is tantamount to an allegation that a decision-maker (the Speaker) has abdicated his decision-making power in favour of the third party (the Cabinet); any possible claim in these circumstances, in the absence of unlawful interference, is against the decision-maker for failing to exercise his powers, not against the third party for informing the decision and even effectively directing the decision-maker what decision to make. There is no pleading to support a cause of action of unlawful interference by the Prime Minister and the Cabinet. In removing the 2nd to the 9th defendants, the claimants will not have been deprived of the right to trial on issues essential to all of the relief that they are seeking.[129]

[161] It is in these circumstances that this Court finds that there is no reasonable cause of action disclosed on the pleadings against the 2nd to the 9th defendants. On the basis of this finding, I also consider that there is no need for the 10th defendant, the Attorney General to remain as a party to the originating motion, as the issues are between the claimants and the Speaker, the 1st defendant, and there is nothing improper that he remains alone to defend the substantive matter as he is a proper party capable of being sued.[130]

Conclusion

[162] The originating motion will be allowed to continue against the 1st defendant in relation to all of the reliefs sought.

[163] The 2nd to the 10th defendants are hereby removed as parties to the originating motion on the basis that it discloses no cause of action against them.

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[129] Blackstone Civil Practice 2009 edn. At page 431 quoted with approval in Ian Peters v Robert George Spencer Civil Appeal No. 16 of 2009 (Antigua & Barbuda)

[130] See Edifil Chenfil James and Hector John v Speaker of the House of Assembly of Dominica and Others Claims Nos. 199 & 200 of 2010; see also Attorney General v David Granger *ibid* n. 15

[164] No costs will be granted to the claimants as against the 1st defendant, having regard to the fact that the 1st defendant essentially succeeded on his application to set aside the notice of discontinuance.

[165] The claimants to pay costs to the 2nd to the 10th defendants to be assessed if not agreed.

[166] This Court was not called on these applications to grant the substantive orders being sought on the originating motion, but has found it proper to make findings in this matter as they all relate to matters of law. Like the Learned Chief Justice of Guyana, this Court also considers that it may be that these rulings will have effect of 'rendering it unnecessary for the parties to proceed to a full hearing of the substantive matter.'[131]

[167] Finally, the Court expresses its gratitude to Counsel on both sides for their assistance in this matter.

……
Darshan Ramdhani
Resident Judge (Ag.)

[131] Cases in which the Courts have decided legal issues at preliminary matters include David Granger *ibid* n. 15 citing with approval Trinidad Home Developers Ltd. v M.H. Investment Ltd. (1990) 39 WIR 355 and dicta in Perreira v Manning (1988) 42 WIR 209