IN THE SUPREME COURT OF THE PITCAIRN ISLANDS
HELD IN ADAMSTOWN, PITCAIRN ISLANDS

SC 3/2021
[2023] PNSC 2

IN THE MATTER OF	**THE ESTATE OF LEN CARLYLE BROWN**
AND	
IN THE MATTER OF	an application for relief under the Probate and Administration Ordinance 2000, section 8 of the Lands Court Ordinance, section 13 of the Land Tenure Reform Ordinance and an application for declaratory relief under the Constitution and the inherent jurisdiction of the Court
BETWEEN	**OLIVE FAYE CHRISTIAN**
	Applicant
AND	**LANDS COURT**
	First Respondent
AND	**ATTORNEY-GENERAL**
	Second Respondent/Intervenor

Hearing: 22 and 23 March 2023 (Pitcairn)
23 and 24 March 2023 (NZ)

Counsel: G M Illingworth KC for Applicant
No appearance by or on behalf of Lands Court
D E Kelly for Attorney-General

Judgment: 8 May 2023 (Pitcairn)
9 May 2023 (NZ)

JUDGMENT (NO. 2) OF HEATH CJ

CONTENTS

The issues [1]
Introduction [3]
Structure [21]
The effect of the Stage 1 judgment [22]
The precedent fact issues
(a) Context [40]
(b) Analysis [49]
(c) Conclusion [59]
The repugnancy issue [63]
The constitutional issues
(a) Background [81]
(b) The Constitutional architecture
(i) In 2000 [87]
(ii) In 2010 [89]
Were Len's art 21 rights infringed?
(a) Introductory comments [95]
(b) Proceedings for breach of Constitutional rights [96]
(c) Deprivation of property [105]
(d) The Land deprivation issue
(i) Did the 2000 reforms deprive Len of freehold land? [106]
(ii) Did the Land deprivation breach art 21? [108]
(e) The Inheritance deprivation issue [129]
Conclusions [140]
Disposition [141]

The issues

[1] A suite of reforms to the land tenure system of the Pitcairn, Henderson, Ducie and Oeno Islands (the Pitcairn Islands) was enacted in 2000 (the 2000 reforms). They affected the only inhabited island, Pitcairn. In an earlier judgment in this proceeding,[1] I held that the 2000 reforms had effected changes to the law of succession. As a result, I held that "house land" held by a Pitcairner as at the date of his death in 2019 could not pass to a named beneficiary under his will.[2]

[2] I am now asked to consider the constitutional validity of the 2000 reforms, by reference to the Colonial Laws Validity Act 1865 (UK), the Pitcairn Constitution Order 2010 (the 2010 Order) and the Pitcairn Constitution (the Constitution), which was brought into being by the 2010 Order.[3]

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1 *Christian v Lands Court* [2022] PNSC 1.
2 Ibid, at paras [95]–[96], summarised at para [25] below.
3 The nature of the constitutional issues are summarised at paras [14] and [16] below.

Introduction

[3] Mr Len Brown (Len) was born on Pitcairn Island on 30 March 1926. Having made his last will in 1991, he passed away on 1 November 2019. In making his will, Len made provision (among other things) for the disposition of certain freehold land he owned at that time. Specifically, he devised his "house and house land" to his daughter, Clarice, and a separate property known as "Brown's Hui" to another daughter, Coralie.

[4] On 9 December 2019, a third daughter, Ms Olive Christian (Olive), applied to the Supreme Court for the issue of Letters of Administration with Will Annexed. On 20 December 2019, her application was granted by Blackie CJ (the probate order), albeit with two important qualifications, each of which affected Olive's ability to deal with Len's land in terms of his will. Relevantly, the probate order provided:

> [2] … *any grant of administration will be limited to moveable property of the Deceased* being his pension and other money now held by the Island Treasury and his other possessions comprising personal effects.
>
> [3] … as the Will pre-dates the Lands Court Ordinance, any grant of Administration will include the following wording:
>
> > *"this grant of Administration excludes all reference in the Will as to land, trees and buildings as these are matters for determination by the island Lands Court"*
>
> (Emphasis added)

[5] The Chief Justice's additions to the probate order were intended to reflect changes to the land tenure system enacted by the 2000 reforms. However, the Lands Court (made up entirely of inhabitants of Pitcairn)[4] did not undertake the type of inquiry into the ownership of the "house and house land" and "Brown's Hui" that the Chief Justice had contemplated. As a result, on 15 February 2021, Olive applied to this Court for an order reviewing the way in which the Lands Court had (or had not) carried out the functions contemplated by the probate order. On examination, the application raised important and complex questions of both private and public law in relation to the 2000 reforms.

[6] The 2000 reforms consisted of three new Ordinances (the Land Tenure Reform Ordinance, the Lands Court Ordinance and the Probate and Administration Ordinance) which, read together, were intended to make fundamental changes to the land tenure system operating in Pitcairn. Each of the Ordinances came into force on 1 August 2000, and replaced the pre-

4 Lands Court Ordinance, s 3(3).

existing Lands and Administration of Estates Ordinance which, as its title suggests, was concerned with both land and the administration of deceased estates.

[7] The 2000 reforms were designed to replace all freehold title with a leasehold interest, to be called a Land Allocation Title.[5] Those parts of the Land Tenure Reform Ordinance that dealt with that transition (the operative parts) were to come into effect on a date to be fixed by the Governor.[6] As it transpired, there were substantial delays. The 2000 reforms did not come into force until late 2006, primarily for reasons associated with the Operation Unique historical sexual abuse trials and a withdrawal of British financial aid until they were completed.[7]

[8] On enactment of the 2000 reforms on 1 August 2000, the Lands and Estates Court established by the (now repealed) Lands and Administration of Estates Ordinance was abolished. A new Lands Court was created to replace it. By s 3(1) of the Lands Court Ordinance and s 2(2) of the Probate and Administration Ordinance respectively, jurisdiction over land and the administration of deceased estates was divided between the Lands Court and the Supreme Court.

[9] By the time of his death in 2019, Len's freehold interest in the house land he owned at the time he made his will in 1991 had been extinguished and had been replaced by a Land Allocation Title.[8]

[10] Although left to Coralie in the will, the property known as "Brown's Hui" was not part of Len's estate at the time that he died. One of his sons (Dave) applied for, and was granted, a Land Allocation Title for that property on 1 December 2006. That meant that Len had ceased to have any interest in Brown's Hui as at the date of his death, being the time at which his will spoke. Coralie does not seek to disturb the leasehold title in Brown's Hui that Dave acquired.

[11] Olive's application raised questions about the interpretation of the three ordinances that made up the 2000 reforms. Two categories of claim were advanced. The first asked whether

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5 Land Tenure Reform Ordinance, ss 4(1) and 5(1), set out at paras [23] and [24] below.

6 Ibid, s 4(1), set out at para [23] below.

7 The Operation Unique trials concluded in October 2004 but were followed by a hearing before the three trial judges, sitting as a Full Court, on constitutional challenges. Judgement was given on 24 May 2005: *R v Christian & Ors* [2005] LRC 745; [2005] PNSC 1 (Blackie CJ, Johnson and Lovell-Smith JJ). Appeals were determined by the Court of Appeal on 2 March 2006 (*R v Christian (No 2)* [2006] 4 LRC 746 (CA); *Christian v R* [2006] PNCA 1 (Henry P, Barker and Salmon JJA) and the Privy Council's advice of 30 October 2006: *Christian v The Queen* [2006] PNPC 1; [2006] UKPC 47 (Lord Hoffmann, Lord Woolf, Lord Steyn, Lord Hope and Lord Carswell)).

8 The nature of a leasehold interest under a Land Allocation Title is set out in the proviso to s 5(1) of the Land Tenure Reform Ordinance, set out at para [24] below.

Len's will operated to devise the house land to Clarice. I call these the private law claims. The second involves constitutional challenges to the validity of the 2000 reforms. I call these the public law claims.

[12] During the course of case management, I directed that the private and public law claims be heard separately, with private law claims (the Stage 1 hearing) being heard first. Following a hearing in June 2022, a judgment dealing with the private law claims was delivered on 18 August 2022 (Pitcairn) / 19 August 2022 (NZ) (the Stage 1 judgment).[9] At the Stage 1 hearing, the question was whether Len's will, as a matter of statutory interpretation of the three interlocking Ordinances,[10] operated to transfer his interests in the "house and house land" to Clarice.[11] I held that the 2000 reforms prevented Len's will from transferring the house land interest to her.[12] I did not need to address the position with regard to Brown's Hui.[13]

[13] The public law claims were argued in March 2023 (the Stage 2 hearing). Primarily, that hearing was concerned with the ascertainment of relevant constitutional principles, and their application in the context of the 2000 reforms.[14] In addition, two issues survived from the Stage 1 hearing, with which I need to deal. They arose out of:

a) Actions taken by the Governor in 2006, to suspend freehold title and to open applications for Land Allocation Titles[15] and

b) Correspondence (authorised by the Governor) that was sent to landowners on 7 November 2006 (the Governor's letter), which stressed the need to take further action to secure a Land Allocation Title in place of a freehold title to avoid being deemed to "cease to be the lawful owner".[16]

[14] Initially, counsel agreed that there were three distinct areas into which I must inquire at Stage 2:

a) The first concerned the question whether (what is said to be) a "precedent fact" to the 2000 reforms coming into effect had been met. The operative parts of the

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9 *Christian v Lands Court* [2022] PNSC 1.
10 See para [6] above.
11 By the definition of "land" contained in s 2 of the Lands Court Ordinance the house was included within that definition: *Christian v Lands Court* [2022] PNSC 1 at paras [97]–[99], set out at para [26] below.
12 See para [25] below.
13 See para [9] above.
14 See para [14](c) below.
15 See para [14](a) below.
16 See para [14](b) below.

2000 reforms had been brought into effect by the Governor's promulgation of 31 October 2006, which fixed 1 December 2006 (the suspension date), as the date on which "all existing freehold title to any interest in private land in the Islands [was] deemed to be suspended for the purposes of" the 2000 reforms.[17] Section 4(1) of the Land Tenure Reform Ordinance contemplated that a decision about the suspension date would be made by the Governor after the Land Commission (the Commission) had completed preparatory functions, under s 3(1).[18]

b) The second concerned the Governor's letter.[19] It is common ground that a letter in the same terms was sent to all other landowners at that time. The question is whether the Governor's letter contained a material misrepresentation as to the effect of the 2000 reforms that caused Len (and possibly others on the island) to apply for a Land Allocation Title immediately when one was available, without (for example) any opportunity to seek independent legal advice.

c) The third involves important principles of constitutional law affecting the Pitcairn Islands. In substance, the question is whether it was unconstitutional for the Governor (as legislator) to enact the 2000 reforms and (as executive) to fix the suspension date to bring the operative parts into force. Reliance is placed on constitutional principles going back as far as the *Magna Carta Liberatum* (the Magna Carta), signed at Runnymede on 15 June 1215. Olive's position is that the abolition of freehold titles and their replacement by Land Allocation Titles represented an unlawful confiscation of land without compensation.[20]

[15] During the course of argument, a more fundamental issue arose. I asked counsel to confirm that the Constitution did not operate as "supreme law", in the sense that I was not entitled to strike-down ordinances that were in breach of its provisions. Ms Kelly, for the Attorney-General,[21] advised me that, while the point had not been pleaded by

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17 See para [26] below.

18 The relevant parts of s 3 of the Land Tenure Reform Ordinance are set out at para [40] below.

19 The relevant part of the letter is set out at para [120] below.

20 This argument is derived from a combination of clause 5 of the Pitcairn Constitution Order 2010, and arts 21, 26 and 42 of the Constitution. Section 10 of the Land Tenure Reform Ordinance expressly provided that no compensation was payable in respect of the extinguishment of a freehold estate in land: s 10 is set out at para [43] below.

21 As to the Attorney's role at the Stage 2 hearing, see para [17] below.

Mr Illingworth KC, for Olive, a power to strike-down for repugnancy to certain types of British law did exist. She referred to s 2 of the Colonial Laws Validity Act 1865 (UK). After the Stage 2 hearing, I asked counsel to advise me whether any reliance was being placed on that Act. Mr Illingworth indicated that he did so rely. Without opposition from Ms Kelly, I gave both counsel permission to file further written submissions on that point. The last of those written submissions was received on 21 April 2023. Their primary focus was on the alleged "repugnancy" of the 2000 reforms to the Magna Carta.

[16] After debate at the Stage 2 hearing, Mr Illingworth acknowledged that the Governor's letter issue[22] could not be pursued as an independent ground of challenge. He conceded that it was no more than a factor that weighed to support his argument on the constitutional issues. As a result, there are three substantive issues I must determine:

a) Did the Governor make a lawful decision to bring the 2000 reforms into effect on the suspension date? If not, what are the consequences of a finding that the decision was unlawful? (the "precedent fact" issues)

b) Should the three ordinances that make up the 2000 reforms be declared (to the extent necessary) repugnant to the Magna Carta and, therefore, "absolutely void and inoperative"?[23] (the "repugnancy" issue)

c) If the change in status of Len's land from freehold to leasehold amounted to a deprivation of his freehold title to the house land without compensation, were the 2000 reforms unconstitutional? If so, what is the consequence of that? (the constitutional issues)

[17] By contrast with his role at the Stage 1 hearing, the Attorney-General appeared as an adversary (rather than an intervenor) at the Stage 2 hearing.[24] The Attorney seeks to support the constitutional validity of the 2000 reforms and their effect upon the status of Len's land, as found in my Stage 1 judgment.

[18] Following delivery of my Stage 1 judgment, I appointed Mr Edwin Fletcher as *amicus curiae* to ascertain whether any third parties with interests in land on Pitcairn might be

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22 See para [13](b) above.
23 Colonial Laws Validity Act 1865 (UK), s 2, set out at para [64] below.
24 This was intentional: see Minute No. (7) of 17 May 2022, at para [7].

adversely affected by any orders that may be made on Olive's application. I was concerned that any such persons should have the opportunity to be heard. Four potentially affected persons were identified: Mr Dave Brown, Mr David Brown, Mr Shawn Christian and Ms Darralyn Griffiths.

[19] Mr Fletcher made inquiries of them and reported to me on 16 December 2022. He advised that the potentially affected persons did not wish to make submissions on Stage 2 issues but reserved their right to be heard on questions of relief, if Olive's claim were successful. I accepted that position, excused Mr Fletcher from participation in the Stage 2 hearing, and determined that any questions of relief would be resolved following a short hearing after delivery of this judgment.

[20] At the commencement of the Stage 2 hearing, I made directions under sections 15E and 15F of the Judicature (Courts) Ordinance for the hearing to take place in Pitcairn, with counsel and myself participating from New Zealand by audio-visual link. The hearing was held on 22 and 23 March 2023 (Pitcairn)/23 and 24 March 2023 (NZ), in accordance with that direction.

Structure

[21] I structure this judgment as follows:

a) First, I summarise the effect of my Stage 1 judgment.

b) Second, I provide further background information relevant to the issues I am required to determine;[25]

c) Third, I deal in turn with:

i) The precedent fact issues;

ii) The repugnancy issue; and

iii) The constitutional issues.

[25] While some of what I have said under this heading replicates observations made in the Stage 1 judgment, other parts provide a more nuanced narrative based on contextual evidence that was not before me at the Stage 1 hearing.

d) Fourth, I set out my conclusions, on the basis that all questions of relief will be dealt with at a further hearing to be convened as soon as practicable after delivery of this judgment.

The effect of the Stage 1 judgment

[22] Olive's application has revealed the failure of the 2000 reforms to deal adequately with a question of succession. While there is ample evidence that the Pitcairn community regarded the continuation of rights of inheritance as important,[26] there is nothing to indicate that any thought had been given to what would happen if a person owning freehold land made a will before the 2000 reforms came into effect but did not die until after that title had been suspended and/or replaced by a Land Allocation Title. During a period of consultation with members of the Pitcairn community (both on Pitcairn and overseas) while the 2000 reforms were being prepared, the question of inheritance was raised. However, that only occurred in the context of a draft provision that was not directed specifically to this point.[27] I am satisfied that those with whom consultation was undertaken did not appreciate the flaw in the 2000 reforms that the present case has highlighted.

[23] Section 4(1) and (2) of the Land Tenure Reform Ordinance explained how suspension of freehold title was to be effected and the way in which Land Allocation Titles would then be issued by the Lands Court:

> **4.**—(1) *On a date to be appointed by the Governor by order, after the completion of the functions of the Land Commission under the provisions of section 3 of this ordinance (hereinafter referred to as "the suspension date"), all existing freehold title to any interest in private land in the Islands shall be deemed to be suspended and the [Lands] Court shall thereafter have jurisdiction to allocate title to all land, other than public land and reserves, in accordance with applications made under the following provisions of this section.*
>
> (2) Subject to the provisions of this ordinance, all permanent residents and former permanent residents of the Islands and their children and grandchildren (having reached the age of 18 years), may apply to the Court for the allocation of land in any of the classifications of house land, garden land, orchard land and forestry land, provided that the applicant is resident at the time of application and fully intends to remain as a resident:
>
> Provided that any person formerly resident in the Islands who prior to the commencement of this ordinance left the Islands to settle elsewhere indefinitely and who immediately prior to the suspension date is registered in the Register of Land Titles as the owner of the freehold interest in any land on Pitcairn, shall be deemed to be eligible

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26 See paras [29]–[39] below.

27 Land Tenure Reform Ordinance, s 11(2), set out in *Christian v Lands Court* [2022] PNSC 1 at para [93], which is reproduced at para [39] below.

to apply to the Court under this subsection and to be an existing owner for the purposes of subsection (4) of this section:

And provided that, upon the granting of a Land Allocation Title to any such non-resident applicant, he or she shall be deemed to be a landowner who has left the Islands to settle elsewhere indefinitely with effect from the date of the said grant, for the purposes of section 8 of this ordinance.

…

(Emphasis added)

[24] Section 5(1) identified the categories of land in question, the legal interest to be evidenced by a Land Allocation Title and the form in which that title would be issued:

> **5.**—([(1) *Every Land Allocation Title shall create a leasehold estate in the land affected*, to be held, without consideration of rent, from the Island Council as lessor, for the following terms
>
> | | |
> |---|---|
> | • house land — | for the lifetime of the applicant and the spouse and dependents of the applicant |
> | • garden land — | for terms of five years renewable as of right during the life of the applicant |
> | • orchard land — | for the life of the orchard |
> | • forestry land — | for the life of the forest |
> | • commercial land — | for a term of twenty years: |
>
> *Provided that every Land Allocation Title shall be in the form of a grant of the leasehold estate in the land affected and shall so far as practicable be in the terms set out in the Schedule*. The lease shall provide for such appurtenances, encumbrances and Notes as the Lands Court shall direct at the time of issue or subsequently. The lease document shall be prepared in duplicate, sealed with the seal of the Court and signed by the President and the Registrar. One copy shall be issued to the lessee owner and the other retained by the Registrar of the Court. Notes included by the Court at the time of issue or subsequently may state the substance of conditions and shall be binding upon the lessee and any third party until they are amended or terminated at the direction of the Court. Any such Note may make special provision for rights of access to and gathering produce from any tree or trees existing on the land prior to the grant of the leasehold interest to a succeeding owner.
>
> (Emphasis added)

[25] In my Stage 1 judgment, I held:[28]

a) An interest in "house land" acquired under a Land Allocation Title enures for the lifetime of the person who applied for the title, his or her spouse and any persons dependent upon the person holding the title.

b) On the death of the original applicant for a Land Allocation Title in house land, the interest passes by operation of law to the spouse or dependents. Therefore,

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[28] *Christian v Lands Court* [2022] PNSC 1 at paras [95] and [96].

an interest in "house land" is not capable, in law, of devolving upon named beneficiaries in terms of any will that the Land Allocation Title holder may have made.

c) As a result, Len's interest in the house land did not pass by will to Clarice.

[26] In relation to buildings and trees to be found on the land, I said:[29]

> [97] There is no definition of the term "land" in the Probate and Administration Ordinance. Nor does one appear in the Land Tenure Reform Ordinance; that Ordinance defines the particular leasehold interests in land created to replace freehold title. The only generic definition of "land" is contained in s 2 of the Lands Court Ordinance, which provides:
>
> > "land" includes any estate or interest in land or things growing thereon and all buildings and other improvements permanently affixed thereto;
>
> [98] The Lands Court has already decided that, save for one Miro tree to which Jay [Warren] is entitled, all trees claimed by Olive form part of Len's estate. In determining the assets and liabilities of the estate, I rely on the Lands Court's decision. In doing so, I endorse its approach to determination of entitlement to trees by reference to custom. I do not consider that the words "or things growing thereon" in the definition of "land" in s 2 of the Lands Court Ordinance is a sufficiently clear indication that Pitcairn custom as to trees has been abolished.
>
> [99] The only building in which Len had an interest at the time of his death was the house situated on the house land. In the absence of any definition of "land" in the Probate and Administration Ordinance, I consider that it is appropriate to use the Lands Court Ordinance definition as that was enacted as part of the 2000 reforms. Applying the definition of "land" from the Lands Court Ordinance, the house forms part of the house land.
>
> (Footnotes omitted)

[27] In my Stage 1 judgment, I raised a question about the scope of the term "dependent", for the purposes of a Land Allocation Title in house land.[30] Although I did not foreclose the opportunity for evidence to be given at the Stage 2 hearing on whether any "dependents" of the type in question existed, neither Olive nor the Attorney-General has adduced any additional evidence. In the absence of any identified "dependents" of the type contemplated by s 5(1) of the Land Tenure Reform Ordinance, I hold that if Olive's arguments on the public law issue are unsuccessful, the leasehold interest in Len's house land falls for reallocation by the Lands Court.[31]

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29 Ibid, at paras [97]–[99].

30 Ibid, at paras [81]–[86]. See s 5(1) of the Land Tenure Reform Ordinance, set out at para [24] above.

31 This follows from the reversion of the leasehold interest in the land to the Island Council (on behalf of the Crown) and the need for it to be reallocated in accordance with s 4(3) and (4) of the Land Tenure Reform Ordinance.

[28] I took the view that (with two exceptions) all questions of remedy or relief should be reserved, on the basis that my conclusions were "provisional", and "should be regarded as such pending completion of" the Stage 2 hearing.[32] While I was prepared to set aside the probate order and to declare that the trees identified in the Lands Court's report (save for the one to which Mr Jay Warren was entitled) formed part of Len's estate, I considered that the question whether "other property forms part of Len's estate … may be affected by public law arguments".[33] I concluded:[34]

> [102] I make an order, under s 6 of the Probate and Administration Ordinance that the Supreme Court's grant of Letters of Administration with Will Annexed to Olive on 20 December 2019 be revoked on the basis that the grant ought not to have been qualified by removing Olive's power to deal with any interest in land that had passed under Len's will. I am not prepared, until the issue involving "house land" has been finally determined, to make any further grant in favour of Olive. The Supreme Court will assume responsibility for administering Len's estate until such time as this proceeding has been completed.
>
> [103] I make a declaration under s 3 of the Probate and Administration Ordinance that the trees to which the Lands Court's report of 18 March 2022 refers (save for the Miro tree on Brown's Hui that is to be regarded as Jay's property) form part of Len's estate and may be dealt with on that basis. If any further direction is required pending a formal grant of Letters of Administration in favour of Olive, leave to apply is reserved for the Court to make such direction as may be necessary.
>
> [104] Some concern was expressed at the hearing about the Lands Court's decision not to proceed with any applications while this judgment was pending. As will be seen, there are discrete areas in which the Supreme Court and the Lands Court can exercise powers to resolve particular issues when questions arising out of the administration of estates and ownership of land converge. It is premature to make any formal orders in relation to the respective jurisdiction of the Supreme Court and Lands Court until after the public law questions have been decided. The outcome of those arguments may affect the form of land tenure in force in Pitcairn, whether any interest in "house land" can be devolved by will and the demarcation of jurisdiction between the Supreme Court and the Lands Court.
>
> [105] I expressly defer all questions of interpretation relating to the ["precedent fact"] argument in respect of s 3 of the Land Tenure Reform Ordinance to be dealt with at the same time as the public law issues. For the avoidance of doubt, that leaves open all evidential and legal issues in respect of the ["precedent fact"] issue.
>
> (Footnote omitted)

[29] My Stage 1 judgment provided some background to the 2000 reforms.[35] In preparing my summary, I drew upon a paper prepared by Kate Henderson, Jofe Jenkins and Chris

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32 Ibid, at para [100].
33 Ibid, at para [101].
34 Ibid, at paras [102]–[105].
35 *Christian v Lands Court* [2022] PNSC 1 at paras [36]–[39].

Hoogsteden (the Henderson paper) in 2007.[36] At the Stage 2 hearing, the Attorney-General filed an affidavit from Mr Leon Salt, who had served as Commissioner for the Pitcairn Islands between 1995 and 2003. Both before and during that time, Mr Salt was involved in consultation with members of the wider Pitcairn community about (what became) the 2000 reforms. Mr Salt had not given evidence at the Stage 1 hearing. He was somewhat critical of the Henderson paper. As he was not called for cross-examination, I treat Mr Salt's evidence as uncontested.

[30] Mr Salt is of Pitcairn descent. In the period between March 1984 and January 1987, he lived on Pitcairn and served in three capacities: Education Officer, Government Adviser to the Island Council and Government Auditor. From 1995 to 2003, Mr Salt was Commissioner for the Pitcairn Islands. During that period, he travelled to Pitcairn on about eight occasions and "corresponded daily with members of the Island Council, the Island community and the Government Adviser on Island". Mr Salt now lives in New Zealand.

[31] Between 1996 and 2000, Mr Salt was involved in the development of the 2000 reforms, together with members of the Island Council, the Pitcairn community, and the then Legal Adviser,[37] Mr Paul Treadwell. Mr Treadwell was the lawyer primarily involved in drafting the three ordinances that gave effect to the 2000 reforms.

[32] After Mr Salt completed his service on Pitcairn, he undertook a research paper as part of a Masters' degree in Resource and Environmental Planning. A copy of the paper was produced in evidence. No issue has been taken with the factual position outlined in either his affidavit or that paper.

[33] Mr Salt states that concerns about the old land tenure system were first raised when he resided on Pitcairn between 1984 and 1987. The primary concern was the accuracy (or otherwise) of the record of land holdings and the inability, as time passed, for boundaries to be identified by reference to particular landmarks. These issues resurfaced when Mr Salt held office as Commissioner for Pitcairn. By this time, other concerns had developed about the allocation of usable land on Pitcairn.

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36 Henderson, Jenkins and Hoogsteden, *Pitcairn Island Land Title Reform: Altering the Land Ownership and Land Use Patterns in the Furthermost "Pink Bit"* (2007), available at https://www.fig.net/resources/proceedings/fig_proceedings/fig2007/papers/ts_3a/ts03a_01_henderson_etal_1213.pdf last accessed 5 May 2023.

37 Under clause 6(4) of the Pitcairn Constitution Order 2014, the office of "Legal Adviser" became that of "Attorney-General" as from 4 March 2010.

[34] Mr Salt explained community concerns with the old land tenure system as follows:

> 11. I can recall the concerns raised with me during that time by the Pitcairn community.
>
> (a) *Some Pitcairners claimed they do not have sufficient land for their children to build a home on Pitcairn should they wish to*.
>
> (b) *Most of Pitcairn was owned by folk who will never return to live there. Five absentee individuals owned title to 23 sections in Adamstown*.
>
> (c) Although Section 20 of Part IV of the old ordinance provided for caretakers of land, where owners had not returned for ten years, to apply to be registered as the owner, no one took advantage of this for various reasons. The most likely of these was that the absentee landowner or his family may be willing to provide goods to the caretaker or in some way be obliged to be kindly disposed towards them. If they made a claim, the opposite would be the case.
>
> (d) In one case, the land was registered as the undivided land of the occupant's grandfather. In other words, the land belonged to all of the descendants of the occupant's grandfather, a situation that offered no security.
>
> (e) *In some cases, titles had become so small that they could not fit a home on them*.
>
> (f) *Some were aware of folk who would return if they knew they had access to land upon which to live*. The community believed that there was enough room for everyone who wanted to live on Pitcairn, to be able to do so.
>
> (g) the boundaries of land outside the township were largely unknown. Trees and rocks that marked these in days gone by had rotted away or been pushed away by the bulldozer. The traditional practice of walking the land to identify boundary marks at the beginning of each year, had ceased in about 1952.
>
> (h) *The community were almost unanimous in wanting to ensure that land could not be alienated and could not be claimed by the Crown*.
>
> 12. Throughout the year there was further correspondence about land and a complaint from a Wellington Pitcairner about land he claimed he had lost access to. In mid 1996, the Governor appointed an Administrative Advisor to visit Pitcairn for six months and report with advice on how the island should be reformed administratively. The Administrative Advisor met with the Wellington and Auckland Pitcairn communities before leaving. The Wellington group in particular had strong views on land ownership. *The report of the Administrative Adviser raised the issue of the land tenure situation preventing the return of Pitcairners to live on the island. The report stated that there was no land in the*

village, for those who do not own and, to live on, should they return and that this was disadvantageous in terms of the future of the island.

(Emphasis added)

[35] I agree with Mr Salt that, as a result of the consultation, members of the Pitcairn community (including its overseas diaspora) had identified six principles that ought to underpin any new land tenure system. Mr Salt put those principles in the following terms:

a) To remove the (then existing) doubt and debate over land ownership and rights

b) To develop a system of land tenure which is viable and could be applied to meet Pitcairn's current and future needs

c) To provide land for all Pitcairners, their children and their grandchildren, should they wish to reside on Pitcairn, sufficient to meet their needs

d) To provide for Pitcairners not residing on Pitcairn who wish to retain clear title to their land

e) To ensure that children can inherit the land of their parents

f) To ensure that all land for which title is not held by private individuals is protected through being vested in the Island Council, through the Lands Court.

(Emphasis added)

[36] As might be expected, there was not universal acceptance of the final form of the 2000 reforms. However, on 1 November 1999, after consultation in 1998 and 1999 when a draft of the proposed legislation was being considered, the Island Council approved the 2000 reforms. Fundamentally, they were designed (in Mr Salt's words) "to provide all Pitcairners, their children and grandchildren (whether born on Pitcairn or not), the right to occupy house land, garden land, orchard and forestry land should they choose to live on Pitcairn, without cost". It is important, in my view, that Mr Salt's observations be read in the context of the islanders' desires to have the ability to leave their land to their children (inheritance) and to have sufficient land for their children to build a home on Pitcairn (occupation).[38] The three Ordinances were enacted on 1 August 2000.

[38] See para [35](c) and (e) above.

[37] I acknowledge that Mr Salt's evidence demonstrates a much greater degree of consultation with Pitcairners during the period leading up to the 2000 reforms than was suggested in the Henderson paper.[39] Having said that, the additional evidence from Mr Salt does not change the way in which, for the purposes of Olive's application, I view the 2000 reforms. Mr Salt has acknowledged that one of the underlying principles on which the 2000 reforms were accepted by the Pitcairn community was "to ensure that children can inherit the land of their parents". While, in the final form of the Land Tenure Reform Ordinance, the ability to leave a leasehold interest in garden land, orchard land, forestry land and commercial land was permissible, the position was different with regard to house land. That is because interests in land (other than house land) would continue for the balance of the permitted periods and could be the subject of testamentary disposals during those periods. In respect of house land, the statute provides for limited succession by operation of law only.[40] The inability of Pitcairners to devise house land to their children by will is at the heart of Olive's application.[41]

[38] That said, Mr Salt's evidence is important in two respects:

a) It confirms that (at a practical day-to-day level) the 2000 reforms were (despite having the effect of extinguishing freehold title) broadly acceptable to the Pitcairn community to address identified problems caused by perceived insufficiency of land and absentee owners;[42] and

b) It highlights the absence of any clear provision regarding inheritance that was needed to meet the aspirations of Pitcairners involved in the consultation process.[43]

[39] From reviewing minutes of community and Island Council meetings around the time that drafts of the Land Tenure Reform Ordinance were being prepared, it seems reasonably clear that members of the Pitcairn community (and, most likely, those involved in the drafting process) mistakenly believed that s 11(2) of the Land Tenure Reform Ordinance was sufficient

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39 Ibid, at para 3.1, set out at para [39] of the Stage 1 judgment.

40 *Christian v Lands Court* [2022] PNSC 1, at paras [95]–[99], summarised and set out at paras [25] and [26] above. See also s 5(1) of the Land Tenure Reform Ordinance, set out at para [24] above.

41 Section 5(1) of the Land Tenure Reform Ordinance (set out at para [24] above) does allow the leasehold interest in house land to pass to "dependents". However, as in this case, not all children are dependents. Further, it might be problematic for house land to pass to more than one dependent on the death of the Land Allocation Title holder. There does not appear to be any statutory mechanism to resolve competing claims among qualifying dependents.

42 See para 11(a) and (b) of Mr Salt's affidavit, set out at para [34] above.

43 See para [35](e) above.

to meet their desire for continued inheritance rights. I considered s 11 in my Stage 1 judgment. I said:[44]

> [93] … Section 11 provides:
>
> > **11.**—(1) It shall be unlawful to enter into an agreement for, and the Court shall have no jurisdiction to approve, the transfer *inter vivos* of any interest in land to a person who is not a permanent resident of the Islands.
> >
> > (2) Nothing in subsection (1) shall be so construed as to prevent the transmission of an interest in land, whether by will or intestate succession, to any descendant of the owner or any other person entitled under the provisions of this ordinance to own land in the Islands, whether permanently resident in the Islands or not.
>
> [94] Section 11(1) prohibits an *inter vivos* transfer of any interest in land to a person who is not a permanent resident, whereas s 11(2) makes it clear that prohibition does not apply to testamentary dispositions. *The ability to pass an "interest in land" under s 11(2) is limited to those interests that are capable of passing*.
>
> [95] *To reiterate, house land is not capable of being passed by will to a named beneficiary. Rather, it passes by operation of law to a spouse or dependents.* The term of the Land Allocation Title for house land expires at the latest of the death of the Land Allocation Title holder, his or her spouse or any dependents wholly reliant upon him or her.
>
> (Emphasis added)

The precedent fact issues

(a) Context

[40] The Commission was established by s 3 of the Land Tenure Reform Ordinance, to identify boundaries of certain categories of land before the operative parts of the 2000 reforms were brought into effect. Section 3, in the form in which it stood after the Land Tenure Reform (Amendment) Ordinance (the 2006 Amendment) was enacted on 30 October 2006, relevantly stated:

> **3.**—(1) There is hereby established a Land Commission comprising the elected members of the Island Council and such other persons appointed from among the permanent residents of the Islands by order of the Governor so that each extended family shall be represented by at least one member.
> (2) *It shall be the function and responsibility of the Land Commission to identify and establish the boundaries of all usable land on Pitcairn Island other than house land, public land and reserve land, that is to say, all garden land, orchard land and forestry land, and to cause the same to be divided into viable blocks according to the classification of the land*.
> (3) *The Land Commission shall compile and maintain a register of the said land and shall establish marks delineating the boundaries thereof in durable and permanent form*.

[44] *Christian v Lands Court* [2022] PNSC 1, at paras [93]–[95].

> (4) In the exercise of its functions under subsections (2) and (3), the Land Commission may engage the services and advice of such professional experts as may assist the accurate and speedy accomplishment of its objectives.
> …
> [(8) Upon completion of its functions under subsections (2) and (3), the Land Commission shall cause full details of its findings to be conveyed to the Registrar of the Court.
> The Registrar of the Court shall thereupon ensure that these are amalgamated with the previous register of house land in Adamstown made by the Ordnance Survey in 1985. The amalgamated registers shall thereupon have the force of law and shall be, subject to the grant of any leasehold interests under this ordinance, the only true and official record of the ownership and boundaries of private and public land on Pitcairn Island. The authority of the register so created by amalgamation shall not be called into question in any court in any proceedings whatever.]
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> (Emphasis added)

[41] On 31 October 2006 (the day after the 2006 Amendment was enacted), the Governor issued a "Notice of Appointment of Suspension Date", by which 1 December 2006 was fixed as the suspension date. I infer that, on 30 October 2006, when the 2006 Amendment was enacted, the Governor knew that the suspension date would be promulgated the next day. In terms of s 4(1) of the Land Tenure Reform Ordinance, 1 December 2006 became the date on which "all existing freehold title to any interest in private land in the Islands [was] deemed to be suspended for the purposes of that Ordinance.[45] Section 5(1) explained the nature of the leasehold interest that would follow suspension, when a Land Allocation Title was issued.[46]

[42] On any view (notwithstanding that the legal status of a suspended interest in freehold land is far from clear), once the freehold title was suspended, the owner immediately lost the ability to deal freely with his or her land. The concept of "suspension" necessarily imports a temporary prohibition on the performance of any act that could have been done beforehand. Following suspension, dealings with the land were dependent upon the issue of Land Allocation Titles by the Lands Court.[47] Section 4(3) and (4) of the Land Tenure Reform Ordinance respectively set out the criteria that the Lands Court was to apply in determining whether to grant a Land Allocation Title. Section 4(4) made it clear that the Lands Court had no power to refuse an application "made by an existing owner of a suspended interest in that land".

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45 Section 4(1) of the Land Tenure Reform Ordinance is set out at para [23] above.
46 Section 5(1) of the Land Tenure Reform Ordinance is set out at para [24] above.
47 Section 4(2) of the Land Tenure Reform Ordinance (set out at para [23] above) identifies the classes of persons entitled to apply for Land Allocation Titles.

[43] When Land Allocation Titles were issued, the former owner ceased to hold a freehold interest in the land, which reverted to the Sovereign. The Island Council (as notional lessor) now holds that land on behalf of His Majesty. On the grant of a Land Allocation Title, the freehold interest was extinguished and was replaced by a leasehold estate in the relevant land, "without consideration of rent from the Island Council".[48] Mr Illingworth submits that amounted to a statutory confiscation of the freehold interest, without compensation. Expressly, s 10 of the Land Tenure Reform Ordinance provided that:

> 10. For the avoidance of doubt, no compensation shall be payable to any person for the extinguishment of a freehold estate in land held immediately before the suspension date and its replacement by a leasehold estate.

[44] As at 31 October 2006, the Commission was chaired by Ms Meralda Warren. She had been appointed as Chair in February 2006 and held that role until the Commission was (in her words) "wound up in November 2006". In making an affidavit for the purpose of this proceeding, Ms Warren made it clear that she no longer holds any paper records of the Commission's work and has endeavoured to give evidence to the best of her recollection, having refreshed her memory from some documents provided by the Attorney-General.

[45] In the context of the delays to implementation of the 2000 reforms due to the Operation Unique trials and the temporary withdrawal of British aid,[49] Ms Warren explained the work of the Commission as follows:

> 6. In February 2006, a surveyor, Jofe Jenkins, was engaged to assist the Land Commission. He worked with the Commission to complete the work of identifying boundaries of land on Pitcairn.
>
> 7. The work the Land Commission undertook involved recording (electronically) the boundaries of land in Adamstown that had previously been surveyed (by Frank Preston). We did not change the boundaries surveyed by Mr Preston. If someone wanted to apply for unoccupied land in Adamstown to be garden land, orchard land, or forestry land, we checked the boundaries and recorded the category of land.
>
> 8. It also identified boundaries of sections of land outside of Adamstown that would be used as garden, orchard or forest land. This was difficult, as we could not decide the land use or appropriate size without knowing what the owner's intention was for the land. In July 2006 we decided to leave areas outside Adamstown to be surveyed and designated as house land or garden land etc for when a person makes an application for the land for use under a particular category.

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48 Land Tenure Reform Ordinance, s 5(1).

49 See para [7] above.

9. The process we adopted for identifying boundaries of land outside of Adamstown was as follows:

   a. Pitcairners could identify land that [they] currently used or wished to use, for one of the purposes in the Land Tenure Reform Ordinance (garden land, orchard land, etc), and ask the Land Commission to survey that land;

   b. The Land Commission, with the help of Mr Jenkins, then surveyed and identified the boundaries of that land, including by putting markers in the ground, and the category of the land;

   c. Applications for the land were then passed to the Lands Court.

10. Where there were trees planted outside of Adamstown, it was generally understood that these belonged to the person who planted them (or their descendants), regardless of whether an application was made for the land.

11. We also categorised some land as reserve land. This was land of public significance for Pitcairn, including for example St Paul's pool and Ship's landing point.

12. It is my view that the Land Commission finished everything it was required to do by November 2006 – there was nothing left for it to do. Throughout the process all members of the Land Commission tried to do everything the proper way.

13. All land was recorded in paper and on CD. I personally passed all the records of the Land Commission on to the Lands Court in November 2006.

[46] Mr Illingworth relies upon s 4(2) of the Land Tenure Reform Ordinance[50] as a foundation for his proposition that the Commission had not completed all of its work as at 31 October 2006. He submits that Ms Warren's evidence establishes that, by that date, the Commission had not identified and established the boundaries of all useable land on *Pitcairn* that was classified as garden land, orchard land and forestry land and divided those parcels of land into viable blocks. Mr Illingworth contended that the fact that had been done for *Adamstown* was not enough to comply with s 4(2).

[47] Ms Kelly submitted that Ms Warren's evidence has been misconstrued and that, in fact, everything that the Commission needed to do had been done by the promulgation date. In particular, she referred to Ms Warren's evidence that the Commission decided to defer both survey and classification of use of land outside of Adamstown until an application was made to identify a proposed use.[51]

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50 Set out at para [23] above.

51 See para 8 of Ms Warren's affidavit, set out at para [45] above.

[48] There are two distinct issues that I need to consider:

a) The first is whether completion of the Commission's functions a "precedent fact" to lawful promulgation of the suspension date.

b) The second (which arises only if a precedent fact exists) is whether, it has been established that the condition was not met by due date.

(b) Analysis

[49] A legislative instrument will often repose a discretion in a public official to fix a date when something with which the instrument deals is to come into effect. In some cases, that discretion can only be exercised if a particular state of affairs were to exist at the relevant time. Mr Illingworth's argument is that the Governor was not, on 31 October 2006, entitled to exercise a discretion to fix the suspension date because the Commission had not completed its work.[52] The first inquiry is as to whether completion of the Commission's work was required before the discretion to fix the suspension date could be exercised. If so, the consequential question is whether the act of fixing the date necessarily invalidates what follows.

[50] Both Mr Illingworth and Ms Kelly accept that it is for the Court to determine, as a matter of statutory interpretation, whether a "precedent fact" truly exists, and, if so, to determine whether, as a matter of fact, the function had been completed. To support his submission that s 4(2) created a precedent fact Mr Illingworth relied primarily on *Khawaja v Secretary of State for the Home Department*[53] and *R (on the application of Sainsbury's Supermarkets Ltd) v Wolverhampton City Council*.[54] To the contrary, Ms Kelly submitted that the more analogous cases are *R v Hillingdon Borough Council ex parte Pulhofer*,[55] *R v Home Secretary, ex parte Jeyeanthan*[56] and *R v Soneji.*[57]

[51] Mr Khawaja was a Pakistani national who had lived in Belgium immediately before his entry into England on a visitor's visa. He applied for judicial review of a decision made by the Secretary of State for the Home Office to refuse him to remain in the United Kingdom, having

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52 Land Tenure Reform Ordinance, s 3(2) and (3), set out at para [40] above.
53 *Khawaja v Secretary of State for the Home Department* [1983] 1 All ER 765 (HL).
54 *R (on the application of Sainsbury's Supermarkets Ltd v Wolverhampton City Council* [2010] 4 All ER 931 (SC).
55 *R v Hillingdon Borough Council (ex parte Pulhofer)* [1986] 1 AC 484 (HL).
56 *R v Home Secretary, ex parte Jeyeanthan* [2000] 1 WLR 354 (CA).
57 *R v Soneji* [2005] 4 All ER 321 (HL).

married an English resident. Mr Illingworth relies on what was said by Lord Wilberforce, in response to a submission that the Court was not entitled to inquire into whether a sufficient evidential foundation existed on which an immigration officer could exercise the discretion to reject the type of application in issue. Lord Wilberforce explained the respective functions of the executive and the courts as follows:[58]

> I would therefore restate the respective functions of the immigration authorities and of the courts as follows. (1) The immigration authorities have the power and the duty to determine and to act on the facts material for the detention as illegal entrants of persons prior to removal from the United Kingdom. (2) Any person whom the Secretary of State proposes to remove as an illegal entrant, and who is detained, may apply for a writ of habeas corpus or for judicial review. On such an application the Secretary of State or the immigration authorities if they seek to support the detention or removal (the burden being on them) should depose to the grounds on which the decision to detain or remove was made, setting out essential factual evidence taken into account and exhibiting documents sufficiently fully to enable the courts to carry out their function of review. (3) *The court's investigation of the facts is of a supervisory character and not by way of appeal (it should not be forgotten that a right of appeal as to the facts exists under s 16 of the 1971 Act even though Parliament has thought fit to impose conditions on its exercise). It should appraise the quality of the evidence and decide whether that justifies the conclusion reached, eg whether it justifies a conclusion that the applicant obtained permission to enter by fraud or deceit. An allegation that he has done so being of a serious character and involving issues of personal liberty requires a corresponding degree of satisfaction as to the evidence.* If the court is not satisfied with any part of the evidence it may remit the matter for reconsideration or itself receive further evidence. It should quash the detention order where the evidence was not such as the authorities should have relied on or where the evidence received does not justify the decision reached or, of course, for any serious procedural irregularity.
>
> (Emphasis added)

[52] While *Khawaja* explains how the Court approaches determination of the factual basis on which the decision-maker has acted, it does not deal specifically with how one establishes whether it is necessary for the decision-maker to be satisfied that the fact has been established before exercising a discretion. Section 4(1) of the Land Tenure Reform Ordinance is silent on whether the Governor could only exercise the discretion to fix the suspension date after the Commission had completed its functions. Any limits on the Governor's discretion must be distilled from the legislation itself.

[53] *Sainsbury's Supermarkets* is directed to a different point. The appeal with which the Supreme Court of the United Kingdom was concerned involved questions of interpretation arising out of legislation that empowered local authorities to acquire private property by compulsion. Lord Collins, in giving the lead judgment, stressed the "strict construction on

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[58] *Khawaja v Secretary of State for the Home Department* [1983] 1 All ER 765 (HL), at 777–778.

statutes expropriating private property" that courts had, historically, been "astute to impose".[59] While *Sainsbury's Supermarkets* is relevant to the question of how s 4(1) of the Land Tenure Reform Ordinance should be interpreted in deciding whether completion of the Commission's functions was necessary before the Governor fixed the suspension date, I consider that the analyses undertaken in *Jeyeanthan* and *Soneji* provide more direct guidance on that question.

[54] *Jeyeanthan* and *Soneji* each focus on the usefulness (or otherwise) of an approach to interpretation which would require a decision characterising whether the existence of the asserted precedent fact was mandatory or permissive.

[55] In *Jeyeanthan*, Lord Woolf MR, with whom Judge and May LJJ agreed on this point, said:[60]

> Bearing in mind Lord Hailsham LC's helpful guidance [in *London and Clydeside Estates Ltd v Aberdeen District Council* [1980] 1 WLR 182 (HL) at 188–190] I suggest that the right approach is to regard the question of whether a requirement is directory or mandatory as only at most a first step. In the majority of cases there are other questions which have to be asked which are more likely to be of greater assistance than the application of the mandatory/directory test. *The questions which are likely to arise are as follows*:
>
> 1. *Is the statutory requirement fulfilled if there has been substantial compliance with the requirement and, if so, has there been substantial compliance in the case in issue even though there has not been strict compliance?* (The substantial compliance question.)
>
> 2. *Is the non-compliance capable of being waived, and if so, has it,* or can it and should it be waived in this particular case? (The discretionary question.) I treat the grant of an extension of time for compliance as a waiver.
>
> 3. If it is not capable of being waived or is not waived then what is the consequence of non-compliance? (The consequences question.)
>
> Which questions will arise will depend upon the facts of the case and the nature of the particular requirement. *The advantage of focusing on these questions is that they should avoid the unjust and unintended consequences which can flow from an approach solely dependant on dividing requirements into mandatory ones, which oust jurisdiction, or directory, which do not*. If the result of non-compliance goes to jurisdiction to will be said jurisdiction cannot be conferred where it does not otherwise exist by consent or waiver.
>
> (Emphasis added)

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59 *R (on the application of Sainsbury's Supermarkets Ltd) v Wolverhampton City Council* [2010] 4 All ER 931 (SC) at para 9.

60 *R v Home Secretary, ex parte Jeyeanthan* [2000] 1 WLR 354 (CA) at 362.

[56] To similar effect, in giving the principal speech in the House of Lords in *Soneji*, Lord Steyn concluded:[61]

> 23. Having reviewed the issue in some detail I am in respectful agreement with the Australian High Court [in *Project Blue Sky Inc v Australian Broadcasting* Authority(1998) 153 ALR 490 (HCA) at 516-517) (McHugh, Gummow, Kirby and Hayne JJ)] that the rigid mandatory and directory distinction, and its many artificial refinements, have outlived their usefulness. Instead, as held in *Attorney General's Reference (No 3 of 1999)* [[2001] 1 All ER 577 (HL)], *the emphasis ought to be on the consequences of non-compliance, and posing the question whether Parliament can fairly be taken to have intended total invalidity.* That is how I would approach what is ultimately a question of statutory construction. In my view it follows that the approach of the Court of Appeal was incorrect.
>
> (Emphasis added)

[57] I apply the approach adopted in both *Jeyeanthan* and *Soneji* to reject the mandatory/permissive dichotomy in favour of one that considers to what extent the relevant tasks have been undertaken, whether the obligation to complete any outstanding tasks may have been waived, and the consequences of any declaration of invalidity.[62]

[58] The unique nature of Pitcairn's governance structure requires a more nuanced approach to determination of whether completion of the Commission's work was a precedent fact. Unlike the United Kingdom, Pitcairn is not a parliamentary democracy. In 2000, when the Land Tenure Reform Ordinance was enacted, the Governor was empowered to "make laws for the peace, order and good government of" the Pitcairn Islands.[63] Executive authority was vested in the Crown, subject to its exercise by the Governor or an authorised delegate. By s 4(1) of the Land Tenure Reform Ordinance,[64] the Governor (as legislator) gave the power to himself (as executive) to fix the suspension date. In the context of Pitcairn's constitutional framework, it would be wrong to draw a strict and uncompromising distinction between the respective roles of the Governor in a case such as this.[65] In my view, the legislation intended to allow a more holistic view to be taken by the Governor as to whether the Commission had completed sufficient work to justify promulgation of a suspension date.

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61 *R v Soneji* [2005] 4 All ER 321 (HL), at para 23, with whom Lord Rodger of Earlsferry (at paras 39 and 41-42), Lord Cullen of Whitekirk (at paras 53, 55, 57 and 68) and Lord Brown of Eaton-under-Heywood (at paras 78 and 79) agreed.

62 See *R v Home Secretary, ex parte Jeyeanthan* [2000] 1 WLR 354 (CA) at 362 and *R v Soneji* [2005] 4 All ER 321 (HL) at para 53, set out respectively at paras [55] and [56] above.

63 Pitcairn Order 1970, clause 5(1), set out at para [90] below.

64 Set out at para [23] above.

65 See arts 33 and 36 of the Constitution, set out at para [61] below.

(c) Conclusion

[59] It is clear from Ms Warren's affidavit that the Commission did not complete all survey work anticipated by s 3 of the Land Tenure Reform Ordinance before the Governor appointed 1 December 2006 as the "suspension date".[66] However, under the circumstances, I do not believe that anyone involved in the consultation or implementation process of the 2000 reforms, with knowledge of all relevant facts, would have contemplated that the Governor lacked power to fix the date when he did. Even if there was some more work for the Commission to do, there had, in my view, been "substantial compliance" with the statutory requirements.[67]

[60] Further, the nature of the Governor's all-embracing powers suggests that it is inconceivable that anyone involved in the legislative process would have thought non-compliance of the type described[68] would have rendered invalid the decision to promulgate the suspension date.[69] My views are reinforced by the fact that no action was taken to avoid the consequences of the 2000 reforms between the suspension date and the time the specific problem with inheritance came to light. In my judgment, the consequences of finding that the 2000 reforms were invalid because of that non-compliance would be out of all proportion to the nature of the failure.

[61] Another way of looking at the issue is to consider whether the Governor effectively waived the need for compliance by the Commission.[70] This possibility stems from the dual roles of the Governor, as both executive and legislator. Articles 33 and 36 of the Constitution provide:

> **33.—**(1) The executive authority of Pitcairn is vested in Her Majesty.
> (2) Subject to this Constitution, the executive authority of Pitcairn shall be exercised on behalf of Her Majesty by the Governor, either directly or through officers subordinate to the Governor.
> (3) Nothing in this section shall preclude persons or authorities other than the Governor from exercising such functions as are or may be conferred on them by any law.
>
> …
>
> **36.—**(1) Subject to this Constitution, the Governor, acting after consultation with the Island Council, may make laws for the peace, order and good government of Pitcairn.

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66 See paras [45] and [46] above.
67 *R v Home Secretary, ex parte Jeyeanthan* [2000] 1 WLR 354 (CA) at 362, set out at para [55] above.
68 See paras [46] and [47] above and compare with para 8 of Ms Warren's affidavit, set out at para [45] above.
69 *R v Soneji* [2005] 4 All ER 321 (HL), at para 23.
70 *R v Home Secretary, ex parte Jeyeanthan* [2000] 1 WLR 354 (CA) at 362 (points 2 and 3).

> (2) The Governor shall not be obliged to act in accordance with the advice of the Island Council in exercising the power conferred by subsection (1), but in any case where the Governor acts contrary to the advice of the Council any member of the Council shall have the right to submit his or her views on the matter to a Secretary of State.
> (3) The Governor may exercise the power conferred by subsection (1) without consulting the Island Council whenever he or she is instructed to do so by Her Majesty through a Secretary of State.

[62] Although it is fair to say that the Governor was, when promulgating the suspension date, acting as executive rather than legislator, in the unusual circumstances in which the Pitcairn Islands are governed, it would be artificial to suggest that he did not intend to allow himself some latitude as to what constituted completion of the statutory tasks .[71] In my view, by deciding to promulgate the suspension date, the Governor can be seen (for all practical purposes) as waiving the need for the balance of the Commission's work to be undertaken.

The repugnancy issue

[63] I deal next with Mr Illingworth's submission that the three Ordinances that make up the 2000 reforms should be declared "absolutely void and inoperative" as a result of the application of s 2 of the Colonial Laws Validity Act 1865 (UK).

[64] Sections 2 and 3 of the Colonial Laws Validity Act provide:

> 2. Any Colonial Law which is or shall be in any respect repugnant to the Provisions of any Act of Parliament or repugnant to any Order or Regulation made under Authority of such Act of Parliament, or having in the Colony the Force and Effect of such Act, shall be read subject to such Act, Order, or Regulation, and shall, to the Extent of such Repugnancy, but not otherwise, be and remain absolutely void and inoperative.
>
> 3. No Colonial Law shall be or be deemed to have been void or Law when inoperative on the Ground of Repugnancy to the Law of England nor void for Repugnancy unless the same shall be repugnant to the Provisions of some such Act of Parliament, Order, or Regulation as aforesaid.

[65] Mr Illingworth submitted that the 2000 reforms were repugnant to the Magna Carta, a quasi-constitutional instrument that (among other things) is designed to protect property rights of individuals. Both at the time of the 2000 reforms and at present, the Magna Carta remains as part of English law, and, therefore, Pitcairn law.[72] Relevantly, Chapter 29 of the Magna Carta provides:

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71 See para [58] above.
72 Constitution, art 42, set out at para [93] below.

XXIX Imprisonment, &c. contrary to Law. Administration of Justice.

> NO Freeman shall be taken or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any other wise destroyed; nor will We not pass upon him, nor condemn him, but by lawful judgment of his Peers, or by the Law of the Land. We will sell to no man, we will not deny or defer to any man either Justice or Right.

[66] Sir Kenneth Roberts-Wray, in his seminal text *Commonwealth and Colonial Laws*,[73] discusses the origins of the Colonial Laws Validity Act by reference to a number of cases of high authority in which it had been considered.[74] Sir Kenneth considered that there were difficulties in applying the 1865 Act to colonies that had adopted English law that was subject to "local circumstances". That is the position that pertains in Pitcairn.[75] Although primarily used in the context of colonies that were "ceded" rather than "settled",[76] I adopt the following passage from Sir Kenneth Roberts-Wray's book in relation to the position of Pitcairn:[77]

> A Court may therefore hold, in light of the circumstances, that an English law is to be entirely rejected or that it must be applied with modifications. All the circumstances are to be taken into account, including the local relevance or otherwise of circumstances in England which explain a particular law.

[67] This approach was taken by the Pitcairn Court of Appeal, in *Warren v R.*[78] In that case, the appellants had argued that the Justice Ordinance, which provided for trial without juries, was void by virtue of repugnancy to the Bill of Rights 1688 (UK). The Court of Appeal found that the Ordinance was not repugnant because, in Pitcairn's unique (local) circumstances, a trial by jury was impracticable. The Court said:[79]

> [101] Nor does the Pitcairn Justice Ordinance fall foul of the Colonial Laws Validity Act 1865. The Pitcairn Constitution, including s 42, is not inconsistent with ("repugnant to") the Bill of Rights because the 1887 Act has authorised the making of a constitution for the peace, order and good government of Pitcairn. The Pitcairn Constitution is validly made under this power and s 42, consistently with the common law, disapplies any English legislation of general application that is unfit for local circumstances. So, to this extent at least, the Bill of Rights is not in force in Pitcairn. Thus, there is no repugnancy for s 2 of the 1865 Act to make void.

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73 Roberts-Wray, *Commonwealth and Colonial Laws* (Stevens & Co, 1966).

74 Ibid, at 395–402.

75 See para [93] below.

76 Roberts-Wray, *Commonwealth and Colonial Laws* (Stevens & Co, 1966) at 544. In *Christian v The Queen* [2006] PNPC 1; [2006] UKPC 47, the Privy Council held that Pitcairn had been "settled", rather than "ceded". See para [86] below. In this context the Privy Council's use of the term "conquest" is equivalent to the concept of a colony being "settled".

77 Roberts-Wray, *Commonwealth and Colonial Laws* (Stevens & Co, 1966), at 545.

78 *Warren v R* [2015] PNCA 1, at para [100] (Potter, Blanchard and Hansen JJA).

79 Ibid, at para [101]. To similar effect, see observations of the Privy Council in *Warren v The State* [2018] UKPC 20, at paras 22–26 (per Lord Hughes and Lord Lloyd-Jones, for the Board) where a submission that creation of a non-representative legislature was repugnant to the Bill of Rights 1688 was rejected.

[68] A determination of "repugnancy" may have an unintended consequence of leaving a gap in the law of the particular country which might take considerable time for the local legislature to fill. To avoid that problem, particular principles have been developed to ensure that statutes passed by the local legislature will not be declared inoperative or void unless necessary to remedy any inconsistency. That principle is reflected in s 2 of the Colonial Laws Validity Act which states that the statute will be "absolutely void and inoperative" only to the extent of the relevant repugnancy.[80]

[69] The authors of *British Overseas Territories Law*[81] refer to two authorities that set out the principles of interpretation in unequivocal terms: *Suratt v Attorney-General of Trinidad and Tobago*[82] and *Campbell-Rodriques v Attorney-General of Jamaica*,[83] decided on 15 October 2007 and 3 December 2007 respectively. The proximity of the two decisions reinforces the applicability of the principles involved.

[70] In *Suratt*, Baroness Hale, for the majority of the Privy Council, said:[84]

> 45. … The constitutionality of a parliamentary enactment is presumed unless it is shown to be unconstitutional and the burden on a party seeking to prove invalidity is a heavy one: see *Grant v The Queen* [2007] 1 AC 1, para 15, citing *Mootoo v Attorney General of Trinidad and Tobago* [1979] 1 WLR 1334, 1338-1339. On the other hand, the Constitution itself must be given a broad and purposive construction: see *Minister of Home Affairs v Fisher* [1980] AC 319, 328.

[71] In *Campbell-Rodriques*, Lord Carswell, delivering the advice of the Board, qualified the nature of the broad and purposive interpretation to which Baroness Hale had referred by reference to *Minister of Home Affairs v Fisher*.[85] His Lordship said that "a 'generous and purposive interpretation' does not permit a distortion of the explicit relevant constitutional provisions".[86]

[72] Returning to the question whether the three Ordinances that made up the 2000 reforms are repugnant to the Magna Carta, it is necessary to consider whether what occurred constitutes a relevant "taking" or "deprivation" of property for the purpose of assessing whether any

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80 Colonial Laws Validity Act 1865 (UK), s 2, set out at para [64] above.

81 Hendry and Dickson, *British Overseas Territories Law* (Hart Publishing, 2nd ed 2018), at 178-179.

82 *Suratt v Attorney-General of Trinidad and Tobago* [2007] UKPC 55.

83 *Campbell-Rodriques v Attorney-General of Jamaica* [2007] UKPC 65.

84 *Suratt v Attorney-General of Trinidad and Tobago* [2007] UKPC 55 at para 45. Although Lord Bingham dissented as to the result, there is no suggestion in his separate judgment of disagreement with the principle.

85 *Minister of Home Affairs v Fisher* [1980] AC 319 (PC), 328.

86 *Campbell-Rodriques v Attorney-General of Jamaica* [2007] UKPC 65, at para 12.

repugnancy exists. I refer to two authorities touching on this: *Campbell-Rodriques v Attorney-General of Jamaica*[87] and *Waitakere City Council v Estate Homes Ltd*.[88] Each deals with a case where it was submitted that a relevant "taking" had occurred by reason of local town planning laws.

[73] *Waitakere City Council v Estate Homes Ltd* is a decision of the Supreme Court of New Zealand, delivered on 19 December 2006 about one year before *Campbell-Rodriques*. In that case, the question was whether the terms of a resource consent for the subdivision of land amounted to a taking without compensation. In the course of its judgment, the Supreme Court referred to the impact of the Magna Carta, as a matter of New Zealand law. There was no dispute that, by virtue of s 3(1) and the First Schedule to the Imperial Law Application Act 1988 (NZ), Chapter 29 of the Magna Carta[89] remained part of New Zealand law.

[74] Delivering the judgment of the Supreme Court, McGrath J said:[90]

> [45] New Zealand law provides no general statutory protection for property rights equivalent to that given by the eminent domain doctrine under the Fifth Amendment to the United States Constitution, under which taking of property without compensation is unconstitutional and prohibited. The New Zealand Bill of Rights Act 1990 does not protect interests in property from expropriation. The principal general measure of constitutional protection is under the Magna Carta, which requires that no one "shall be dispossessed of his freehold . . . but by . . . the law of the land". One of the effects of this measure is to require that the power to expropriate is conferred by statute, and the statutory practice is to confer entitlements to fair compensation where the legislature considers land is being taken for public purposes under a statutory power. Furthermore, as Professor Taggart has pointed out, [in "Expropriation, Public Purpose and the Constitution", contained in *Forsyth* (ed), *The Golden Metwand and the Crooked Cord* (1998) at 104–105], and the Courts have been astute to construe statutes expropriating private property to ensure fair compensation is paid. It was no doubt in this spirit that the majority of the Court of Appeal invoked s 322(2) of the Local Government Act, which is a provision which authorises the taking of land subject to compensation in stipulated circumstances.
>
> [46] The common law presumption of interpretation applies, however, only if there is actually a taking. It is necessary in the present appeal accordingly to inquire whether the Council's requirement, as a condition of its subdivision consent, that Estate Homes construct an arterial road over lot 71 of its subdivision and cause the land to be vested in the Council as road reserve amounts to a taking.
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> (Footnotes omitted)

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87 Ibid.
88 *Waitakere City Council v Estate Homes Ltd* [2007] 2 NZLR 149 (SC).
89 Set out at para [65] above.
90 *Waitakere City Council v Estate Homes Ltd* [2007] 2 NZLR 149 (SC), at paras [45] and [46].

[75] In the particular situation with which it was concerned, the Supreme Court took the view that the relevant provisions of the Resource Management Act 1991 (NZ) were to be interpreted without reference to the presumptive position that land should not be taken without compensation.

[76] In the present case, the "no compensation" provision in s 10 of the Land Tenure Reform Ordinance[91] is expressly referable to the extinguishment of freehold title and its replacement with a leasehold interest. The Governor, acting as legislator, reached a deliberate decision (in unequivocal language) that compensation should not be paid. That decision was reached after consultation with the Pitcairn community and general approval of the Island Council of the 2000 reforms.[92]

[77] There is a long line of authority in England and Wales that makes it clear that land may be confiscated without compensation if undertaken pursuant to a clearly expressed statute. A good example is the statement of principle articulated by Lord Denning MR in *Prest v Secretary of State for Wales*:[93] "no citizen is to be deprived of his land by any public authority against his will, unless it is expressly authorised by Parliament and the public interest decisively so demands".[94] While Lord Denning might be thought to have spoken of a legitimate deprivation as one that was "expressly authorised by Parliament" *and* in "the public interest", the latter concept is simply part of the interpretation process. This was made clear in *R (on the application of Sainsbury's Supermarkets Ltd) v Wolverhampton City Council*,[95] a decision of the Supreme Court of the United Kingdom. Lord Collins adopted the following propositions, taken from a judgment given by French CJ, in the High Court of Australia, in *R & R Fazzolari Pty Ltd v Parramatta City Council*:[96]

a) Common law protections for private property rights subjected to compulsory acquisition are not absolute but take the form of interpretative approaches when statutes are said to adversely affect such rights.

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91 Set out at para [43] above.

92 See paras [29]–[37] above and [114] below.

93 *Prest v Secretary of State for Wales* (1982) 81 LGR 193 (CA).

94 Ibid, at 198, cited with approval by Lord Collins in delivering a plurality judgment of the Supreme Court of the United Kingdom in *R (on the application of Sainsbury's Supermarkets Ltd) v Wolverhampton City Council* [2010] UKSC 20 at paras 9 and 10.

95 *R (on the application of Sainsbury's Supermarkets Ltd) v Wolverhampton City Council* [2010] UKSC 20.

96 *R & R Fazzolari Pty Ltd v Parramatta City Council* [2009] HCA 12, at paras 40, 42 and 43.

b) A "presumption", in the interpretation of statutes, against an intention to interfere with vested property rights is linked to "legislative intention". It means that "where a statute is capable of more than one construction, that construction will be chosen which interferes least with private property rights …".[97]

[78] As Ms Kelly submitted, Chapter 29 of the Magna Carta does not provide an unqualified right to property. It contains a qualification which allows the "law of the land" to prevail.[98]

[79] I consider later, in the context of the constitutional issues, whether the 2006 reforms had the effect of expropriating Len's freehold land.[99] The present question is one of pure law. It turns on whether the 2000 reforms conflict with relevant English law such that they may be considered "repugnant" to it and therefore, to the extent necessary to meet that repugnancy, should be declared "void and inoperative" under the Colonial Laws Validity Act.

[80] I am satisfied that the 2000 reforms (particularly, ss 4(1), 5(1) and 10 of the Land Tenure Reform Ordinance)[100] are not repugnant to the Magna Carta, or any other relevant English law. My reasons for drawing that conclusion are:

a) As a matter of English law, Chapter 29 of the Magna Carta does not prevent expropriation of freehold interests in land without compensation, so long as clear words are used to achieve that purpose. That is because Chapter 29 expressly states that "NO Freeman shall be disseised of his Freehold … but by … the Law of the Land. …".[101]

b) The words used in ss 4(1), 5(1) and 10 of the Land Tenure Reform Ordinance are sufficiently clear to achieve the legislative purpose of expropriating freehold interests in land without compensation.

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97 Ibid, at para 43.
98 See Chapter 29 of Magna Carta is set out at para [65] above.
99 See paras [106]–[128] below.
100 Set out at paras [23], [24] and [43] above.
101 Chapter 29 of Magna Carta is set out in full at para [65] above.

The constitutional issues

(a) Background

[81] In *Christian v The Queen*,[102] on a second appeal by some of those convicted on charges following trials stemming from Operation Unique, the Privy Council was asked to consider whether the Pitcairn Islands had ever become a "British settlement", within the meaning of that term in the British Settlements Act 1887 (UK).[103] I am bound by the Privy Council's analysis of the constitutional position. I adopt what Their Lordships said and summarise the constitutional position as at the date of the Privy Council's advice, 30 October 2006; coincidentally, one day before the date on which the Governor promulgated the "suspension date".

[82] The Pitcairn Islands are classified as a British Overseas Territory. Pitcairn was first occupied in 1790 by mutineers from HMAV Bounty, together with some Polynesian men and women who arrived with them. Apart from a period when there was a general migration to Norfolk Island, a small settlement on Pitcairn has remained.[104] At present, subject to typical fluctuations, its population is about 50 people, who live on a habitable area of around 4.5km².

[83] Pitcairn is one of the most remote territories in the world. It is isolated not only by the tyranny of distance but also by general inaccessibility. There is no access by air. There is no airport or airstrip on Pitcairn. Nor is there any safe harbour in which vessels can anchor. Access by sea is completed by the collection of passengers or goods by long-boats operated by the islanders who ensure safe passage to Bounty Bay.

[84] Although, in 1883, Her Majesty Queen Victoria, made an Order in Council (the Pacific Order), by which power to establish "all such laws and institutions" as might appear to Her Majesty to be "necessary for the peace, order and good government" in any British settlement, the Pacific Order did not extend to Pitcairn. It was not until 1898, that the Pacific Order was extended to include the area in which the Pitcairn islands are located.[105] At that time, English law was expressly adopted in Pitcairn.

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102 *Christian v The Queen* [2006] PNPC 1; [2006] UKPC 47.

103 Ibid, at para 9 (Lord Hoffmann, for Lord Steyn, Lord Carswell and himself), with whom Lord Woolf and Lord Hope agreed on this point.

104 Ibid, at para 2 (Lord Hoffmann).

105 Ibid, at paras 4 (Lord Hoffmann) and 60 (Lord Hope).

[85] Application of the Pacific Order to Pitcairn was revoked by the Pitcairn Order in Council of 1952 (the 1952 Order). It provided for the Governor of Fiji to be Governor of Pitcairn and some neighbouring uninhabited islands. When Fiji attained independent status in 1970, new arrangements were needed for Pitcairn. The 1970 Order was promulgated in substitution for the 1952 Order. Shortly afterwards, the Governor made the Judicature Ordinance of 1970. Section 14 of that Ordinance provided that, subject to "local circumstances", "the common law, the rules of equity and the statutes of general application as in force in and for England at the commencement of this Ordinance shall be in force in [Pitcairn]".[106]

[86] The term "British settlement" was defined as "any British possession which has not been acquired by cession or conquest" and did not have its own legislature.[107] An argument that Pitcairn had been "ceded" was advanced by counsel for the appellants before the Privy Council, in *Christian v The Queen*. Lord Hoffmann was dismissive of that suggestion: "cession by whom?", His Lordship asked rhetorically.[108] The Privy Council unanimously held that Pitcairn's "legal status … as a British possession [was] concluded by successive statements of the executive, starting with the direction of the Secretary of State in 1898 [that extended the Pacific Order] and ending with the making of the 1970" Order.[109]

(b) The Constitutional architecture

(i) In 2000

[87] The 1970 Order was in force when the 2000 reforms were enacted. Clause 5(1) of the 1970 Order stated:

> The Governor may make laws for the peace, order and good government of the Islands.

[88] It is clear that the three Ordinances that, together, brought about the 2000 reforms[110] were lawfully made under clause 5(1) of the 1970 Order. Subject to his late argument based

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106 Section 14 of the Judicature Ordinance is reproduced in *Christian v The Queen* [2006] PNPC 1; [2006] UKPC 47 at para 7.

107 *Christian v The Queen* [2006] PNPC 1; [2006] UKPC 47, at paras 3 (Lord Hoffmann) and 60 (Lord Hope).

108 Ibid, at para 11 (with whom all other members of the Board agreed on this topic).

109 Ibid, at paras 9–11.

110 See para [6] above.

on the Colonial Laws Validity Act 1865 (UK),[111] Mr Illingworth accepted that any challenge made to the validity of the 2000 reforms after 1 December 2006 but before 4 March 2010 was bound to have failed. The Constitution did not take effect until 4 March 2010.

(ii) In 2010

[89] On 10 February 2010, Her Majesty in Council issued the 2010 Order. That created the Constitution. Schedule 2 to the 2010 Order contains the Constitution and appointed 4 March 2010 as the date on which both the 2010 Order and the Constitution would come into effect. Schedule 1 to the 2010 Order revoked the 1970 Order, various amendments made to it and Instructions issued on 30 September 1970 under the Royal Sign Manual and Signet.

[90] Clause 5 of the 2010 Order deals with application of the Constitution to laws passed prior to the Constitution coming into effect (existing laws). Clause 5 provides:

> **Existing laws**
>
> **5.**-(1) The existing laws shall have effect on and after the appointed day as if they had been made in pursuance of the Constitution and, *so far as possible,* shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution.
>
> (2) In subsection (1), "existing laws" means laws and instruments (other than Acts of Parliament of the United Kingdom and instruments made under them) having effect as part of the law of Pitcairn immediately before the appointed day.
>
> (Emphasis added)

[91] Article 21 of the Constitution provides every "natural or legal person" has a constitutional right to the "peaceful enjoyment of his or her possessions". In conferring that right, art 21 draws a sharp distinction between ownership of "possessions" (art 21(1)) and "control of the use of property by the Government of Pitcairn" (art 21(2)). In full, art 21 provides:

> **21.—**(1) Every natural or legal person is entitled to the peaceful enjoyment of his or her possessions. No one shall be deprived of his or her possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
> (2) Subsection (1) shall not, however, in any way impair the right of the Government of Pitcairn to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

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111 Which I have rejected: see paras [63]–[80] above.

[92] Article 26 of the Constitution deals with the topic of how existing laws should be interpreted. Article 26 is contained within Part 2 of the Constitution, which is also the home of s 21. Article 26 provides:

> **26.** *So far as it is possible to do so*, legislation of Pitcairn must be read and given effect in a way which is compatible with the rights and freedoms set forth in this Part.
>
> (Emphasis added)

[93] Article 42 of the Constitution (the predecessor of which was s 14 of the Judicature Ordinance enacted in 1970[112]) reaffirmed the application of English law in Pitcairn, and its limits as ascertained from "local circumstances". Article 42 of the Constitution states:

> **42.—**(1) Subject to subsection (2), the common law, the rules of equity and the statutes of general application as in force in and for England for the time being shall be in force in Pitcairn.
> (2) All the laws of England extended to Pitcairn by subsection (1) shall be in force in Pitcairn so far only as the local circumstances and the limits of local jurisdiction permit and subject to any existing or future Ordinance, and for the purpose of facilitating the application of the said laws it shall be lawful to construe them with such formal alterations not affecting the substance as to names, localities, courts, offices, persons, moneys, penalties and otherwise as may be necessary to render those laws applicable to the circumstances.

[94] A similar provision to art 42 of the Constitution was considered by the English Court of Appeal in *Nyali Ltd v Attorney-General,*[113] in relation to the protectorate of Kenya. Article 15 of the East Africa Order in Council 1902 provided (among other things) that a provision that the "common law, doctrines of equity and statutes of general application" in force in England became part of the law of the protectorate subject to "such qualifications as local circumstances render necessary".[114] Delivering the principal judgment of the Court of Appeal, Denning LJ described this provision as "wise" and held that it was one which should be construed "liberally". In a *dictum* approved by the Privy Council in *Christian v The Queen*,[115] Denning LJ said that it was for the judges of the lands in which such qualifications were made to determine the extent of them.[116]

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112 See para [85] above.
113 *Nyali Ltd v Attorney-General* [1955] 1 All ER 646 (CA).
114 Ibid, at 652–653.
115 *Christian v The Queen* [2006] UKPC 47, [2006] PNPC 1, at para 13.
116 *Nyali Ltd v Attorney-General* [1955] 1 All ER 646 (CA), at 653.

Were Len's art 21 rights infringed?

(a) Introductory comments

[95] It emerged from the oral argument of Mr Illingworth and Ms Kelly that the core difference between them on the constitutional issues is that:

a) Mr Illingworth submits that the effect of arts 21 and 26 of the Constitution is to make the Constitution retrospective so that the 2000 reforms must be interpreted by reference to whether they can be regarded as legitimate under the 2010 Constitution.

b) Ms Kelly contends that the provisions of the Constitution must be read in light of the 2010 Order, which was designed to maintain continuity in the laws applying in Pitcairn at the time the Constitution came into effect. She submits that it was not intended that the Constitution would be invoked in a retrospective manner to reverse the effects of existing laws, including the ordinances that created the 2000 reforms.

(b) Proceedings for breach of Constitutional rights

[96] Article 25 of the Constitution provides a mechanism by which a person who alleges that a right conferred by Part 2 "is being or is likely to be breached in relation to him or her" can apply to the Supreme Court for redress.[117] Articles 21, 25 and 26 are all contained in Part 2. The Supreme Court has original jurisdiction to hear and determine any such application, and "may make such declarations and orders, issue such writs and give such directions as it considers appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of" Part 2.[118] The Supreme Court may decline to exercise such powers if it were "satisfied that adequate means of redress for the breach alleged are or have been available to the person concerned under any other law".[119]

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117 Constitution, art 25(1).

118 Ibid, art 25(2).

119 Ibid, art 25(3). An example is where a constitutional point has arisen in a criminal case and an effective remedy for breach can be found in the general law: see *Warren v The State* [2018] UKPC 20 at para 13.

[97] The Constitution was promulgated at a time when the United Kingdom was part of the European Union. As a result, art 25 contains a list of European instruments that, if the Supreme Court considers are "relevant to the proceedings in which [the] question has arisen", shall be taken into account in dealing with any questions of interpretation or application of Part 2 of the Constitution.[120] In particular, reference is made to judgments or advisory opinions of the European Court of Human Rights, and those of superior courts of the United Kingdom on the interpretation or application of the European Convention on Human Rights (the Convention).[121]

[98] In *Warren v The State*,[122] Mr Warren relied on "international instruments", including the Convention. The Privy Council described that reliance as "misplaced". Their Lordships said that "None of the provisions relied on by the appellant has been implemented into domestic law in Pitcairn". While that is correct, the Constitution makes it clear that decisions given on equivalent Convention provisions are relevant to interpretation of the Constitution.[123]

[99] Article 1 of Protocol No 1 of the Convention states:

> **Protocol 1, Article 1: Protection of property**
>
> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of the State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure payment of taxes or other contributions or penalties.

[100] Article 1 of Protocol No 1 of the Convention uses the same language as art 21 of the Constitution. In my view, decisions of the European Court of Human Rights on Article 1 of Protocol No 1 are directly on point and should be considered in determining the constitutional challenges. They constitute persuasive rather than binding precedents.

[101] Article 21 of the Constitution and Article 1 of Protocol No 1 of the Convention each identify three criteria, all of which must be satisfied if a person were to be lawfully deprived of possessions, in this case land. Any deprivation of a person's possessions must be:

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120 Ibid, s 25(13)(a). Section 25(14) provides more guidance as to the form of articles of the European Convention on Human Rights: s 25(15).

121 Ibid, s 25(13)(a) and (e).

122 *Warren v The State* [2018] UKPC 20 at para 27.

123 Constitution, art 25(13)-(15).

a) In the public interest;

b) Subject to conditions provided for by law; and

c) Justified by the general principles of international law.

[102] Ms Kelly referred me to the European Court of Human Rights' Guide on Article 1 of Protocol No 1 of 2019 (the Guide). The Court's approach was articulated by reference to three questions:

a) Is the interference lawful?

b) Is the interference in the public or general interest?

c) Is the interference proportionate, in the sense that it strikes a fair balance between the general interests of the community and the requirement to protect an individual's fundamental rights?

[103] I start with an analysis of whether art 21 of the Constitution has been breached. I do so because the possibility of using clause 5 of the 2010 Order and art 26 of the Constitution to achieve retrospective effect[124] does not come into play unless the art 21 right (read alone in terms of general constitutional interpretation principles) has been breached. I consider that the three questions posed by the Guide reflect the criteria set out in art 21 itself. The right conferred by art 21 is in identical terms to Article 1 of Protocol No 1 of the Convention. I analyse whether there has been any breach by reference to those questions.

[104] In undertaking this analysis, I adopt the principles of interpretation articulated in *Suratt v Attorney-General of Trinidad and Tobago*[125] and *Campbell-Rodriques v Attorney-General of Jamaica*,[126] to which I have already referred in the context of the Colonial Laws Validity Act 1865 (UK).[127] In short:

a) There is a presumption of constitutionality in respect of a legislative provision;

b) There is a "heavy" burden on a party seeking to prove invalidity on the ground that the statute is unconstitutional;

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124 Clause 5 of the 2010 Order, and art 26 of the Constitution are set out at paras [90] and [92] above.
125 *Suratt v Attorney-General of Trinidad and Tobago* [2007] UKPC 55.
126 *Campbell-Rodriques v Attorney-General of Jamaica* [2007] UKPC 65.
127 See paras [70] and [71] above.

c) The Constitution itself must be given a broad and purposive construction, albeit not one that would permit a distortion of the relevant constitutional provisions.

(c) Deprivation of property

[105] Reflecting on the arguments advanced by Mr Illingworth and Ms Kelly, I have come to the conclusion (from the authorities cited at the Stage 2 hearing) that there were, in fact, two discrete deprivations:

a) The first involved the extinguishment of Len's freehold interest in the house land, on the grant of a Land Allocation Title.[128] Although ss 4(1) and 5(1) do not use the term "extinguishment" that is their combined effect. Section 10 of the Land Tenure Reform Ordinance speaks of "the extinguishment of a freehold estate in land immediately before the suspension date and its replacement by a leasehold estate".[129] (the Land deprivation)

b) The second involves the removal of Len's right to devolve any interest in land by will. An interference with that testamentary right has been held, by the European Court of Human Rights, to constitute a breach of Article 1 of Protocol No 1 of the Convention.[130] (the Inheritance deprivation)

(d) The Land deprivation issue

(i) Did the 2000 reforms deprive Len of freehold land?

[106] It is clear that, on 1 December 2006, Len was deprived of his freehold interest in the house land once the freehold title was suspended and replaced by a leasehold interest evidenced by a Land Allocation Title. Further, that deprivation occurred without compensation. That was the cumulative effect of ss 4(1), 5(1) and 10 of the Land Tenure Reform Ordinance.

[107] While Ms Kelly submitted that, apart from the issue of testamentary disposition in respect of house land, there were no substantive differences between a freehold interest and one obtained under a Land Allocation Title, I do not accept that proposition. For example, s 6(a)(iii) and (v) of the Land Tenure Reform Ordinance placed Len under the usual obligation

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128 Land Tenure Reform Ordinance, ss 4(1) and 5(1), set out at paras [23] and [24] above.
129 Ibid, s 10, set out at para [43] above.
130 See *Marckx v Belgium* [1979] ECHR 2, at para 63, set out at para [130] below.

of a tenant to keep the land and buildings in good repair and to permit inspections by authorised agents of the Island Council. No obligations of that type are owed by a freehold owner to anyone else. Further, the Council, as notional landlord, was required to permit Len's "quiet enjoyment" of the leasehold estate only as long as he performed all relevant covenants.[131]

(ii) Did the Land deprivation breach art 21?

[108] In the context of the Land deprivation, it is necessary to consider the three questions posed by the Guide, to which I have referred.[132] I deal with each in turn.

[109] The first question is whether the deprivation was lawful under Pitcairn law. As I have already concluded, in the context of the argument based on the Colonial Laws Validity Act, it was open to the Governor to enact legislation that deprived Len of his freehold land, so long as the confiscation was clearly intended to be effected without compensation.[133] I am satisfied that, read together, ss 4(1), 5(1) and 10 of the Land Tenure Reform Ordinance evidence a clear intention of that type. As a matter of Pitcairn law, what was done was lawful.

[110] The second question requires consideration of whether the deprivation was in the public interest. This question requires the property rights of individuals to be balanced against the need for compulsory acquisition in the interests of the community as a whole.

[111] In *A v Secretary of State for the Home Department,*[134] the House of Lords considered whether a statutory provision enabling detention of non-nationals suspected of terrorism constituted a lawful derogation from the Convention right to liberty, enacted as a schedule to the Human Rights Act 1998 (UK). In particular, in considering public interest factors, Their Lordships discussed the need to balance freedoms conferred by fundamental statements of right against the interests of the population as a whole. In particular, the House reviewed the circumstances in which a "margin of appreciation" should be allowed to those making political judgments in the area of national security.

[112] Lord Bingham of Cornhill expressed the view that "great weight should be given to the judgment of the Home Secretary, his colleagues and Parliament on [the question before the House] because they were called on to exercise a pre-eminently political judgment", of which

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131 Land Tenure Reform Ordinance, s 6(b).
132 See para [102] above.
133 See paras [77]–[80] above.
134 *A v Secretary of State of the Home Department* [2005] 3 All ER 169 (HL).

predictive assessments were part.[135] Lord Nicholls of Birkenhead reiterated Lord Bingham's observations and emphasised the need for a degree of latitude to politicians to take account of the nature of the human right in issue and the extent of the encroachment on that right.[136] The extent of the "margin of appreciation" is relevant to the "public interest" balancing exercise. The principles articulated by Lord Bingham and Lord Nicholls in *A v Secretary of State for the Home Department,*[137] are mirrored in the European jurisprudence.[138]

[113] The approach to "margin of appreciation" in the context of the issue before the House of Lords cannot, with respect, be gainsaid. In the context of a Parliamentary democracy in which decisions about national security are being made by Cabinet Ministers, it is clear that "great weight" should be given to the decision-maker.

[114] However, the position is different in Pitcairn where the only "democratic" institution, is the Island Council. Article 34 of the Constitution provides for establishment of the Island Council. Article 34(2) states that the members of the Council "shall be elected to office in free and fair elections held at regular intervals". Nevertheless, the Council's powers are limited to ones of recommendation which, at his or her discretion, the Governor may override.[139] That means that the Governor exercises plenary powers to enact ordinances which operate as the laws of Pitcairn.[140]

[115] On the basis of Mr Salt's evidence, it is clear that the Pitcairn community (both on island and overseas) were content with the principles underlying the 2000 reforms.[141] By that, I mean the change from freehold to leasehold interest to resolve the problems to which Mr Salt has referred; in particular, sufficiency of land and absentee ownership.[142] The question is one of clarity of legislation.[143] Given the extent of the consultation to which Mr Salt has now deposed, I find that the 2000 reforms, generally, were in the public interest.

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135 Ibid, at para 29.
136 Ibid, at para 80.
137 *A v Secretary of State of the Home Department* [2005] 3 All ER 169 (HL). See also para [111] above.
138 For example, *Broniowski v Poland* [2004] ECHR 274, *Pressos Compania Naviera SA v Belgium* [1995] ECHR 47 and *James v United Kingdom* [1986] ECHR 2.
139 Constitution, art 36. See also ss 6 and 7 of the Local Government Ordinance, for the powers of the Island Council.
140 Ibid, arts 37(2)–(7).
141 See paras [34]–[36] above.
142 See paras [34] and [35] above.
143 See para [37] above.

[116] The third question is one of proportionality. Was the wholesale extinguishment of private freehold interests in land a proportionate response to the need to devise a system of land tenure which would be viable and could meet the current and future needs of all Pitcairners?[144] In judging proportionality, there is a need to balance the views of the Pitcairn community (both on Island and overseas) that reform was required to meet Pitcairn's current and future needs[145] against the technique used to achieve that end – the extinguishment of all freehold titles without compensation and their replacement by leasehold interests evidenced by Land Allocation Titles. In my view, the technique used resulted in overreach, in the sense that the ability of persons who had previously owned freehold interests in house land to leave that property under a will was removed.[146] A range of less intrusive approaches were available; for example (without being exhaustive) compensation could have been given to affected persons for deprivation of that right or provision could have been made to ensure that any testamentary disposition of house land was limited to beneficiaries who would use the land for residential purposes. In my view, the complete extinguishment of freehold title to house land was not a proportionate response to the problems that gave rise to the reforms.

[117] The final aspect of the balancing exercise is whether the deprivation is justified by general principles of international law.[147] I am satisfied that an affirmative answer must be given to this. Nothing has been put before me to the contrary.

[118] In *James v United Kingdom*,[148] the European Court of Human Rights considered the relevance and/or weight to be attributed to any general principles of international law, to which art 21(1) expressly refers.[149] The Court took the view that the relevant principles in question were not applicable to the taking by a State of the property of its own nationals. In doing so, it supported consistent decisions that had been made by the European Commission.[150] The rationale was expressed by reference to the *travaux préparatoires* of the Convention. The Court said:[151]

> 64. Confronted with a text whose interpretation has given rise to such disagreement, the Court considers it proper to have recourse to the travaux préparatoires as a

144 See the principles set out at para [35] above.
145 Ibid.
146 See para [107] above.
147 See para [101](c) above.
148 *James v United Kingdom* [1986] ECHR 2.
149 Article 21 is set out at para [91] above.
150 *James v United Kingdom* [1986] ECHR 2, at para 59.
151 Ibid, at para 64.

> supplementary means of interpretation (see Article 32 of the Vienna Convention on the Law of Treaties).
>
> Examination of the travaux préparatoires reveals that the express reference to a right to compensation contained in earlier drafts of Article 1 (P1-1) was excluded, notably in the face of opposition on the part of the United Kingdom and other States. The mention of the general principles of international law was subsequently included and was the subject of several statements to the effect that they protected only foreigners. Thus, when the German Government stated that they could accept the text provided that it was explicitly recognised that those principles involved the obligation to pay compensation in the event of expropriation, the Swedish delegation pointed out that those principles only applied to relations between a State and non-nationals. And it was then agreed, at the request of the German and Belgian delegations, that "the general principles of international law, in their present connotation, entailed the obligation to pay compensation to non-nationals in cases of expropriation" (emphasis added).
>
> Above all, in their Resolution (52) 1 of 19 March 1952 approving the text of the Protocol and opening it for signature, the Committee of Ministers expressly stated that, "as regards Article 1 (P1-1), the general principles of international law in their present connotation entail the obligation to pay compensation to non-nationals in cases of expropriation" (emphasis added). Having regard to the negotiating history as a whole, the Court considers that this Resolution must be taken as a clear indication that the reference to the general principles of international law was not intended to extend to nationals.
>
> The travaux préparatoires accordingly do not support the interpretation for which the applicants contended.

[119] For those reasons, I do not consider that there are any relevant principles of international law that would affect my conclusion as to the applicability of art 21 in the context of the Land deprivation issue.

[120] There remains outstanding the Crown conduct issue: the alleged effect of the Governor's letter of 7 November 2006.[152] Mr Illingworth has acknowledged that his argument on that issue cannot, of itself, be sustained to invalidate the 2000 reforms.[153] I was asked to consider the point in the context of public interest or proportionality. While I do not consider that it fits readily into either of those categories, I address the merits of the point briefly.

[121] On 7 November 2006, Ms Heather Christie, from the Governor's Office, wrote to Len, in his capacity as a registered freehold owner or trustee of land in Adamstown. Relevantly, the letter stated:

> …
>
> As from 1 December 2006 all existing freehold land titles on Pitcairn will be suspended, and Land Allocation Titles may be issued instead. In addition, an annual land tax for

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152 See paras [14](c) and [16] above.
153 See para [16] above.

> unutilised land will be introduced, at a rate for the first 12 months of $NZ 0.50c per square metre for non-resident owners.
>
> If you wish to have a Land Allocation Title issued for your section/s in Adamstown and have not already applied, you will need to notify the Lands Court in writing, identifying the section/s concerned. If the owner is not resident on Pitcairn Island, the land concerned will be assessed at the end of 2007 for Land Tax for the period December 2006 to December 2007.
>
> If you do not advise us that you wish to take this opportunity, a Land Allocation Title will not be issued to you, the land will not be subject to tax and you will cease to be the lawful owner. Should a third party apply for a title to that section in the future, you will be contacted again, and given a final opportunity to apply for a Land Allocation Title issued in your name. If you choose not to take up the opportunity at that stage the Land Allocation Title may be issued to the third party.
>
> …

[122] Mr Illingworth submits that the following statement, contained in the Governor's letter, was misleading:

> If you do not advise us that you wish to take this opportunity, a Land Allocation Title will not be issued to you, the land will not be subject to tax *and you will cease to be the lawful owner*.
>
> (Mr Illingworth's emphasis)

[123] In my view, the Governor's letter does not contain any material misstatement. It would be unduly formalistic to require a letter sent to lay people on an island with no ready access to legal services to explain the nuances of the proposed reforms at a time when the Ordinances that had enacted the 2000 reforms had been made over six years beforehand. As at 7 November 2006, the suspension date had already been notified. The law would (irrespective of the Governor's letter) have taken its natural course. To say that "you will cease to be the lawful owner" is, in context, not a material mis-statement of the true position which, strictly, would have been: "you will cease to hold a freehold interest in the land". I do not consider that the Crown conduct issue has any impact on the constitutional points that Mr Illingworth has advanced. I disregard it.

[124] Notwithstanding the significant legal differences between freehold and leasehold interests under English law, I find that the community on Pitcairn was content with the new system because the main reasons for its introduction had been met. That state of affairs is hardly surprising in a community of about 50 people. There is no market for land in Pitcairn. Whatever the legal constraints may have been, in the context of the Island Council's position

as notional landlord[154] and the required composition of the Lands Court,[155] the reality in a community such as Pitcairn is that most problems will be resolved at a social (as opposed to a strictly legal) level. Leaving to one side the Inheritance deprivation issue, I find that the 2000 reforms represented a proportionate response to the problem that was troubling Pitcairners, both on island and overseas.

[125] While those conclusions mean that it is strictly unnecessary for me to consider whether art 21 of the Constitution has retrospective effect, for completeness, I deal briefly with that issue.

[126] I have considered whether the 2000 reforms could be interpreted in a manner that required their validity to be tested against art 21 of the Constitution. That would involve using clause 5 of the 2010 Order or s 26 of the Constitution to achieve that end. I have concluded they cannot, and I express my reasons for reaching that view briefly.

[127] While clause 5(1) of the 2010 Order contemplates existing laws being construed in a manner that brings them into conformity with the Constitution, there is an express qualification to that proposition: "so far as possible".[156] The same qualification appears in s 26 of the Constitution.[157] If I were to apply art 21 of the Constitution in the manner suggested by Mr Illingworth, it would be necessary (in relation to the 2000 reforms) for the legislation to be rewritten substantially. No longer would I be conducting an exercise in interpretation. Rather, I would be drafting alternative legislation.

[128] For those reasons, leaving to one side the Inheritance deprivation issue, I am satisfied that the 2000 reforms did not infringe what became the art 21 rights.

(e) The Inheritance deprivation issue

[129] My Stage 1 judgment establishes that the 2000 reforms took away Len's right to leave the house land (whether in freehold or leasehold form) to whom he pleased. Rather, house land was to pass by operation of law in terms of the statutory formula.[158] The best way of illustrating the effect of that holding is to reverse the order in which Len and his late wife Thelma died.

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154 See paras [43] and [114] above.

155 Land Court Ordinance, s 3(3). The Lands Court consists entirely of Pitcairn residents. The proviso to s 3(3) deals with the inevitable conflicts of interest that arise in a population of about 50.

156 See para [90] above.

157 See para [92] above.

158 See para [25] above.

Had Len left the house land to Clarice in a will that spoke before Thelma died, Clarice could not have inherited the house land because s 5(1) of the Land Tenure Reform Ordinance required it to pass, by operation of law, to Thelma, as surviving spouse.

[130] Although, in *Marckx v Belgium,*[159] Ms Marckx's application was based primarily on Articles 8 and 14 of the Convention (Right to Family Life and Freedom from Discrimination respectively), the European Court of Human Rights also considered whether the unfavourable consequences of the proposed law were contrary to Article 1, Protocol No 1 of the Convention. After referring to that provision, the Court continued:

> 63. …
>
> > … By recognising that everyone has the right to peaceful enjoyment of his possessions, Article 1 [of Protocol No. 1] is in substance guaranteeing the right of property. This is the clear impression left by the words "possessions" and "use of property" (in French: "biens", "propriété" "usage des biens"); the "travaux préparatoires", for their part, confirm this unequivocally: the drafters continually spoke of "right of property" or "right to property" to describe the subject-matter of the successive drafts which were the forerunners of the present Article 1 [Protocol No. 1]. *Indeed, the right to dispose of one's property constitutes a traditional and fundamental aspect of the right of property* …
>
> (Emphasis added)

[131] There is a question whether the Inheritance deprivation occurred at the time that the 2000 reforms were enacted, at the suspension date, the date on which Len's will took effect (on Len's death) or when my Stage 1 judgment (August 2022) held that Len's will did not achieve his purpose of leaving the house land to Clarice.

[132] The temporal issue is important. If this aspect of deprivation took effect after 2010, either by reference to the date on which the will spoke or the date of my Stage 1 judgment in August 2022, no question of retrospectivity would arise. Article 21 of the Constitution would directly apply. The temporal issue was helpfully addressed in the judgment of the European Court of Human Rights in *Blečić v Croatia.*[160]

[133] The Court, in *Blečić*, considered whether a deprivation of property that had occurred before the Convention became part of the law of Croatia could be subject to a claim under Article 1 of Protocol No 1 of the Convention. The Court said:

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159 *Marckx v Belgium* [1979] ECHR 2.
160 *Blečić v Croatia* [2006] ECHR 207.

> 70. The Court reiterates that, in accordance with the general rules of international law …, the provisions of the Convention do not bind a Contracting Party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the Convention with respect to that Party (see, for example, *Kadiķis v. Latvia* (dec.), no. 47634/99, 29 June 2000).
>
> …
>
> 72. Accordingly, the Court is not competent to examine applications against Croatia in so far as the alleged violations are based on facts having occurred before the critical date. However, the question of whether an alleged violation is based on a fact occurring prior or subsequent to a particular date gives rise to difficulties when, as in the present case, the facts relied on fall partly within and partly outside the period of the Court's competence.

[134] The alleged violation in *Blečić* involved termination of a tenancy under Croatian law. A termination of the type in issue could only be achieved through an order made by a court of competent jurisdiction. After a series of hearings and appeals, the Supreme Court reversed the decision of a lower court and terminated the tenancy. The Supreme Court's judgment was given on 15 February 1996, before Croatia acceded to the Convention. Later, the Constitutional Court upheld the Supreme Court's judgment. That decision was made after accession to the Convention.

[135] A majority of the Grand Chamber of the European Court of Human Rights took the view that the date of the Supreme Court's judgment prevailed for the purposes of determining whether a relevant Convention right had been breached during a period that Croatia was bound by the Convention. The majority of the Grand Chamber (consisting of 11 members of the Court) explained:

> 84. The Court observes that for a tenancy to be terminated under Croatian law there had to be a court judgment upholding the claim of the provider of the flat to that end. The tenancy was terminated from the date on which such a judgment became *res judicata* …. In the present case, that judgment was given on 18 January 1994 by the Zadar Municipal Court. However, since it was subsequently reversed by the Zadar County Court's judgment of 19 October 1994, it became *res judicata* on 15 February 1996 when the Supreme Court, by its own judgment, reversed the County Court's judgment. Therefore, it was at that moment – neither before nor afterwards – that the applicant lost her tenancy.
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> 85. *It follows that the alleged interference with the applicant's rights lies in the Supreme Court's judgment of 15 February 1996. The subsequent Constitutional Court decision only resulted in allowing the interference allegedly caused by that judgment – a definitive act which was by itself capable of violating the applicant's rights – to subsist. That decision, as it stood, did not constitute the interference. Having regard to the date of the Supreme Court's judgment, the interference falls outside the Court's temporal jurisdiction*.
>
> 86. As to the applicant's argument that the termination of her tenancy resulted in a continuing situation …, the Court reiterates that the deprivation of an individual's home

> or property is in principle an instantaneous act and does not produce a continuing situation of "deprivation" in respect of the rights concerned (see, *inter alia*, *Malhous v. the Czech Republic* (dec.) [GC], no. 33071/96, ECHR 2000-XII, and, *mutatis mutandis*, *Ostojić v. Croatia* (dec.), no. 16837/02, ECHR 2002-IX). Therefore, the termination of the applicant's tenancy did not create a continuing situation.
>
> 87. The only remaining issue to be examined is whether the Constitutional Court's decision, in particular its refusal to quash the Supreme Court's judgment, was in itself inconsistent with the Convention.
>
> 88. In the light of the conclusion that the interference occurred prior to the critical date (see paragraphs 84-85 above), the applicant's constitutional complaint should be regarded as the exercise of an available domestic remedy. It cannot be argued that the Constitutional Court's refusal to provide redress, that is, to quash the Supreme Court's judgment, amounted to a new or independent interference since such obligation cannot be derived from the Convention …
>
> (Emphasis added)

[136] The six dissenting Judges all took issue with the view that the decision of the Supreme Court should be regarded as having triggered the Convention right, as opposed to that of the Constitutional Court. In their view, final determination was not reached until the Constitutional Court had given its decision. It is an immutable principle of European Community law that domestic remedies must be exhausted before Convention claims can be made.

[137] All Judges in the Grand Chamber agreed that termination of the applicant's tenancy occurred not with the actions of the landlord but with the subsequent confirmation of a court. Applying that principle to the facts of the present case, Olive can point to a violation of art 21 of the Constitution that occurred after 4 March 2010, when the Constitution came into force.

[138] Recourse to the courts in this case has been required because inheritance, one of the intended pillars for the 2000 reforms, was not adequately addressed. In my view, there was no actual deprivation until such time as Len's expressed wish that the house land be inherited by Clarice was not given effect. When probate was originally granted, this Court did not resolve whether Clarice could or could not take the property; rather, that question was left for the Lands Court.[161] It was not until my Stage 1 judgment that an affirmative finding was made that the gift of the house land under the will was inoperative.

[139] It is arguable that the Inheritance deprivation occurred at the time of Len's death. The rationale for that view is that, in the absence of any living spouse or dependents, Len's interest

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[161] See para [3] of the probate order, set out at para [4] above.

in the house land ceased and it was for the Lands Court to reallocate the land.[162] That meant that there was no interest in the house land that Clarice could inherit.[163] Although, I consider that the stronger argument is that the deprivation occurred when my Stage 1 judgment was given, there is no need to resolve the point because both Len's death occurred and my judgment was given after the Constitution came into force. For that reason, there is no need to reconcile the majority and dissenting opinions in *Blečić*.[164] On either view, the breach occurred after the Constitution came into force. It is therefore actionable on an application to this Court under art 25(1) of the Constitution.

Conclusions

[140] For those reasons, I have concluded:

a) The Governor's decision on 31 October 2006 to promulgate a suspension date of 1 December 2006 was not vitiated by any failure on behalf of the Commission to complete work required by s 3 of the Land Tenure Reform Ordinance.[165] As a result, the 2000 reforms were not rendered invalid by reason of the Governor's decision to promulgate the suspension date on 31 October 2006.[166]

b) Enactment of the 2000 reforms was not repugnant to English law. No declaration should be made under s 2 of the Colonial Laws Validity Act 1865 (UK) that the three Ordinances making up the 2000 reforms are "void and inoperative".[167]

c) Because the Constitution does not operate retrospectively, enactment of the 2000 reforms and promulgation of a suspension date of 1 December 2006 did not operate as an unconstitutional deprivation of Len's freehold interest in the house land at the time the Land Allocation Title was issued on 1 December 2006.[168]

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162 See para [27] and fn 31 above.
163 See para [27] above.
164 See paras [133]–[139] above.
165 See paras [40]–[62] above.
166 See paras [49]–[62] above.
167 See paras [63]–[80] above.
168 See paras [106]–[128] above.

d) Implementation of the 2000 reforms did operate as a deprivation of Len's right to leave his house land to whom he pleased by will. This deprivation took effect either on Len's death or on 18 August 2022 (Pitcairn) when my Stage 1 judgment was delivered.[169]

Disposition

[141] The proceeding is adjourned to a date to be fixed by the Registrar to deal with all questions of relief. These will include:

a) Final disposition of Olive's application for Letters of Administration with Will Annexed, Blackie CJ's order of 20 December 2019 having been revoked by my Stage 1 judgment.[170] This includes any orders required to reappoint Olive as Len's personal representative and the collection of any information relating to the extent of estate assets.

b) Relief sought in consequence of my finding that the constraint imposed on the right of a landowner to leave house land by will amounted to a breach of s 21 of the Constitution. The relief sought will be limited to that required to meet the nature of the breach.

c) Any other questions of relief (whether costs or otherwise) that counsel wish to raise, including any orders that might be required in relation to the Lands Court.[171]

[142] The Registrar is directed to forward a copy of this judgment to Mr Fletcher, as *amicus curiae*. The Registrar shall ask Mr Fletcher to speak to the four potentially affected persons (and any others whom he considers might be affected by this judgment) to ascertain whether any of them wish to be heard on questions of relief. If so, a memorandum shall be filed and served in accordance with the directions below.[172]

[143] The Registrar is directed to allocate a relief hearing of one half day on a date convenient to all counsel and myself but before 28 July 2023. If any difficulties in fixing a date were to

169 See para [139] above.
170 *Christian v Lands Court* [2022] PNSC 1, at paras [102] and [103] set out at para [28] above.
171 Ibid, at para [104], set out at para [28] above.
172 See para [144] below.

arise, the Registrar shall convene a Zoom conference to address those matters promptly. I make it clear that, unless there are extremely good reasons for extending the time further, I expect the final relief hearing to take place no later than the end of July 2023.

[144] To facilitate a prompt hearing on questions of relief, I direct:

a) Mr Fletcher shall file and serve a memorandum indicating the points (if any) on which he wishes to be heard as *amicus curiae* on behalf of the four potentially affected persons. That memorandum shall be filed and served no later than 2 June 2023.

b) Mr Illingworth shall file and serve submissions indicating the relief sought no less than 15 working days prior to the allocated hearing.

c) The Attorney-General shall file and serve submissions within 10 working days of the relief hearing.

d) Mr Fletcher shall file and serve submissions within five working days of the hearing.

e) The Attorney-General shall prepare, file and serve a bundle of relevant documents for the relief hearing. That shall be filed and served by midday on the working day prior to the hearing date.

[145] All questions of costs are reserved.

[146] I thank both counsel for their assistance at the hearing. Again, without in any way denigrating the assistance given by Mr Illingworth, I wish to pay tribute to the quality of Ms Kelly's submissions and her frank acceptance, on behalf of the Attorney-General, of the need to consider the Colonial Laws Validity Act, even though it had not been pleaded.

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Paul Heath
Chief Justice