



# In The Supreme Court of Bermuda

**CIVIL JURISDICTION**

**2021: No. 162**

**IN THE MATTER OF BERMUDA CONSTITUTION ORDER 1968  
AND IN THE MATTER OF THE PROPOSED AMENDMENTS TO THE QUARANTINE  
(COVID-19) AMENDMENT ORDER 2021  
AND IN THE MATTER OF THE PROPOSED AMENDMENTS TO THE PUBLIC  
HEALTH (COVID-19 EMERGENCY POWERS) (PHASED-REOPENING)  
REGULATIONS  
BETWEEN:**

**(1) ALBERT BREWSTER  
(2) VINCENT LIGHTBOURNE  
(3) WENDY WARREN**

**Applicants**

**-and-**

**(1) THE PREMIER OF BERMUDA  
(2) THE MINISTER OF HEALTH**

**Respondents**

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**Before:** **Hon. Chief Justice Hargun**

**Representation:** **Dr. Courtney Griffiths QC and Mr. Mark Pettingill of  
Chancery Legal Ltd. for the Applicants**

**Mr. Delroy Duncan QC and Mr. Ryan Hawthorne of Trott & Duncan Limited for the Respondents**

**Dates of Hearing:**

**7-8 July 2021**

**Date of Ruling:**

**23 July 2021**

**JUDGMENT**

*Whether mandatory quarantine in a government approved hotel for unvaccinated travellers at their cost amounts to a breach of the Applicants’ fundamental right to freedom of movement under section 11(1) of the Constitution; relevant test to be applied in considering whether the measure in question is reasonably required in the interests of public health; whether the executive has a margin of judgment in relation to that decision*

**HARGUN CJ**

**Introduction**

1. In these proceedings Albert Brewster, Vincent Lightbourne and Wendy Warren (“**the Applicants**”) seek to challenge the constitutional validity of a provision of the Quarantine (COVID-19) (No. 3) Order 2020 (as amended) subjecting all non-vaccinated persons travelling to Bermuda to mandatory supervised quarantine and to bear all costs related to it at Government designated hotels or guest houses. The Applicants contend that such a requirement infringes their fundamental right to protection of freedom of movement enshrined in section 11 (1) of the Bermuda Constitution Order 1968 (“**the Constitution**”).
2. The application is made within the context of the current Covid-19 pandemic. The background to the current pandemic has been well documented. On 31 December 2019, China notified the World Health Organisation (“**the WHO**”) of a cluster of unusual pneumonia cases. They were later identified as being caused by a novel coronavirus, now referred to as the Covid-19. On 30 January 2021 the Director-General of the WHO made a

statement on the emergence of a previously unknown pathogen which had escalated into an unprecedented outbreak. He said that there were now 98 cases in countries outside China including countries in Asia, Europe and North America, and they included cases where the disease had been transmitted between humans. He reported a public health emergency of international concern over the global outbreak of novel coronavirus.<sup>1</sup> The WHO declared the novel coronavirus (Covid-19) outbreak a global pandemic on 11 March 2020.

3. The Minister of Health in the Government of Bermuda, the Honourable Kim N. Wilson, JP, MP, (“**the Minister**”) has given evidence to the Court by affidavit dated 28 June 2021. The Minister confirms that on 1 April 2020, the Governor declared a State of Emergency by proclamation under section 14 of the Constitution. The proclamation was published in the Official Gazette on 2 April 2020. The State of Emergency was extended by the House of Assembly to account for the Government’s 24 hour shelter-in-place that commenced on or 4 April 2020 to contain Covid-19 in Bermuda.
4. The Minister consulted with Dr. Ayo Oyinloye, the Chief Medical Officer (“**the CMO**”) about Covid-19 and the severity of the threat it posed to public health in Bermuda. This consultation also considered the immediacy of the risk of an outbreak and the effect that may have on the Bermuda public. The Minister considered it necessary to take extraordinary measures to prevent, control or suppress the spread of Covid-19 and therefore took the decision to declare a public health emergency pursuant to section 107A of the Public Health Act 1949.
5. The Minister also considered it necessary to declare a public health emergency so that the public would appreciate that the spread of Covid-19 was still rampant in these Islands, that the risk of and outbreak was clear and immediate and that the consequences of such an outbreak could be fatal. That declaration was made in the Public Health (COVID-19) Emergency Order 2021.

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<sup>1</sup> See paragraph 2 of the Judgment of Lewis J in *Dolan v Secretary of State* [2020] EWHC 1786 (Admin).

6. In June 2021, the Minister consulted with the CMO about whether the public health emergency that had been declared should be extended. The Minister states that it was clear that the pandemic posed a more severe threat to public health because of the introduction of variants across the world, which had found their way into Bermuda. The Minister therefore concluded that it was necessary to extend the public health emergency. The extension of the public health emergency was in the Public Health (COVID-19) Emergency Extension (No. 3) Order 2021.
7. It is out of the Emergency Orders above that the Quarantine (COVID-19) (No. 3) Order 2020 (“**the Quarantine (No. 3) Order**”) was enacted. The mandatory 14 -day quarantine at a Government approved hotel for unvaccinated travellers is provided for in Part 4 of the Quarantine (No. 3) Order. Paragraph 13 of the Quarantine (No. 3) Order provides that:

***“Mandatory quarantine for unvaccinated traveller***

*13 (1) Subject to subparagraph (3), each person who travels to Bermuda by air and who does not have proof of having obtained a COVID-19 vaccination under paragraph 6A, shall, upon being landed in Bermuda, be placed in quarantine—*

*(a) for a period not exceeding 14 days, subject to paragraph 18;*

*(b) at a government authorized place approved by the Quarantine Authority and the Minister responsible for national security, for the purpose.*

*(2) Subject to paragraph 14B(1), a person to whom this paragraph applies shall bear the cost for accommodation and board at the place of quarantine.*

*(3) Where a person to whom this paragraph applies receives a negative COVID-19 PCR test result on or after a period of 14 days, he shall be released from quarantine and be provided with a written notification of his test results.”*

## Procedural background

8. These proceedings were commenced by Expedited Originating Summons dated 1 June 2021 challenging the mandatory quarantine for unvaccinated travellers by reference to a press statement made by the Minister of National Security on 7 May 2021. Paragraph 16 of the Originating Summons states that:

*“On 7 May 2021, the Minister of National Security made the following remarks during a Government press conference which indicated that the Government intended to amend the existing regulations to require, inter alia:*

- a. All non-immunised persons travelling to Bermuda are subject to mandatory supervised quarantine and will be required to bear all costs for the hotel/guest house;*
- b. Last year, the Government spent \$1 .5 million on quarantine expenses. This was part in due to the fact that the hotels were closed. This year, the Government is simply not in a position to subsidise the cost of quarantine accommodations;*
- c. If rooms are not available for your preferred dates, you must change your flight for a date when a Government-authorized hotel is available or, you should look at another hotel;*
- d. You could face a fine if you do not provide evidence of pre-paid accommodation at a Government-authorized hotel prior to arriving in Bermuda;*
- e. ...*

*(“The Proposed Amendments”)*

9. The Expedited Originating Summons challenges mandatory quarantine for unvaccinated travellers as Proposed Amendments to the Quarantine (No. 3) Order as amended. As noted, the Originating Summons does so by reference to a press statement made by the Minister of National Security on 7 May 2021. The actual change in the legislation was made by the

Quarantine (COVID-19) (No. 3) Amendment (No. 2) Order 2021 (“**the Amendment Order**”) made on 18 June 2021 and became operative on 20 June 2021.

10. In support of the application for an injunction, each of the Applicants filed affidavit evidence as set out in the earlier Judgment dated 9 June 2021. In those affidavits the Applicants state that they will indefinitely be prevented from enjoying an ordinary parental relationship with their children residing abroad on the ground that they and their children have chosen not to be vaccinated. They complain that they will be required to incur the significant financial burden of having to pay approximately \$3,500 at the designated hotels if they are to enjoy their ordinary familial relationship. They also complain of risks of serious deterioration to their mental health.
11. Ms. Wendy Warren has filed a further affidavit dated 5 July 2021 exhibiting several press releases and local news reports in relation to the mandatory 14-day hotel quarantine.

### **The relevant Constitutional provision**

12. The Applicants rely upon section 11 of the Constitution in support of their contention that the Amendment Order is unconstitutional. Section 11 of the Constitution provides that:

***“Protection of freedom of movement***

*11 (1) Except with his consent, no person shall be hindered in the enjoyment of his freedom of movement, that is to say, the right to move freely throughout Bermuda, the right to reside in any part thereof, the right to enter Bermuda and immunity from expulsion therefrom.*

*(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision—*

*(a) for the imposition of restrictions on the movement or residence in Bermuda or on the right to leave Bermuda of persons generally or any class of persons that are reasonably required—*

*(i) in the interests of defence, public safety, public order, public morality or public health; or*

*(ii) for the purpose of protecting the rights and freedoms of other persons,*

*except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society;”*

13. The framework of the Constitutional provisions relating to fundamental rights, including section 11, contemplates that in the first instance it is for the applicant to show that there has been a *prima facie* breach of a fundamental right and in this regard the applicant bears the burden of proving this breach.<sup>2</sup>

14. Once the applicant has discharged the burden of showing a *prima facie* breach of a fundamental right set out in Chapter 1 of the Constitution, the respondent must prove that the measures limiting the protected right are *reasonably required* in the interests of defence, public safety, public order, public morality or public health (section 11 (2)(a)(i) of the Constitution).<sup>3</sup>

15. The requirement of showing that a measure restricting the protected right is *reasonably required* was considered by the Privy Council in *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69, an appeal from Antigua and Barbuda, where the Privy Council accepted and adopted the threefold analysis

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<sup>2</sup> See page 439 of *Fundamentals of Caribbean Constitutional Law* by Tracy Robinson, Arif Bulcan and Adrian Saunders; and *Benevides v The Attorney General* [2014] SC (Bda) 22 Civ (28 March 2014), Hellman J at [34].

<sup>3</sup> See page 439 of *Fundamentals of Caribbean Constitutional Law*; and Hellman J at [35] in *Benevides*.

of the relevant criteria set out the judgment of Gubbay CJ in the Supreme Court of Zimbabwe in *Nyambirai v National Social Security Authority* [1996] 1 LRC 64. According to this three-part analysis the respondent must prove (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right of freedom are no more than is necessary to accomplish the objective.

16. As pointed out by Lord Reed in *Bank Mellat v Her Majesty's Treasury* [2013] UKSC 39, at [73], the *de Freitas* formulation of the concept of proportionality has been applied by the House of Lords and the Supreme Court of the United Kingdom as a test of proportionality in a number of cases under the Human Rights Act. It was however observed in *Huang v Secretary of State of for the Home Department* [2007] UKHL 11, at [19] that the formulation was derived from the judgment of Dickson CJ in *R v Oakes* [1986] 1 SCR 103 (Supreme Court of Canada), and that a further element mentioned in that judgment was the need to balance the interests of society with those of individuals and groups.
17. The fourth requirement referred to in *Huang* appears to be reflected in section 11 (2)(a)(ii) of the Constitution: “*except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.*”<sup>4</sup>
18. When the burden of establishing that the measure limiting the protected right is reasonably required has been discharged by the respondent, it is for the applicant to show that the measure is nevertheless *not reasonably justifiable in a democratic society.*<sup>5</sup>
19. In considering whether a measure which restricts a protected right is reasonably required and applying the threefold *de Freitas* test, the Court recognises that the executive and the legislature has a margin of judgment or appreciation which is highly fact and context specific. Executive decisions may be based upon an evaluation of complex facts or scientific advice (which may be disputed by others) relating to economic or social policy,

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<sup>4</sup> See page 444 of *Fundamentals of Caribbean Constitutional Law*.

<sup>5</sup> see page 439 of *Fundamentals of Caribbean Constitutional Law*; and *Benevides* at [40].

national security or public health. In circumstances where the executive is faced with making difficult judgments about medical and scientific issues and has done so after taking advice of the relevant experts, a wide margin of judgment must be afforded to the executive. This approach is justifiable on grounds both of democratic accountability and institutional competence.

20. In *Bank Mellat* the Supreme Court was concerned with a challenge to the decision by HM's Treasury to restrict access to the United Kingdom's financial markets by a major Iranian commercial bank on the account of its alleged connection with Iran's nuclear weapons and ballistic missile programmes. In considering the challenge to the decision of the executive and the legislature Lord Reed confirmed, at [71] and [93], that the executive and the legislature must be afforded a wide margin of appreciation:

*“71. An assessment of proportionality inevitably involves a value judgment at the stage at which a balance has to be struck between the importance of the objective pursued and the value of the right intruded upon. The principle does not however entitle the courts simply to substitute their own assessment for that of the decision-maker.”*

*“93. Legislation may be based on an evaluation of complex facts, or considerations (for example, of economic or social policy, or national security) which are contestable and may be controversial. In such situations, the court has to allow room for the exercise of judgment by the executive and legislative branches of government, which bear democratic responsibility for these decisions. The making of government and legislative policy cannot be turned into a judicial process.”<sup>6</sup>*

21. Similar sentiments have been expressed in earlier cases. In *Arorangi Timberland Ltd v Minister of the Cook Islands National Superannuation Fund* [2016] UKPC 32, the Privy Council was concerned with the constitutional challenge to the national superannuation

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<sup>6</sup> Lord Reed's judgment was a dissenting judgment in *Bank Mellat* but in respect of the above discussion in relation to the concept of proportionality the majority agreed with his analysis. Lord Sumption, speaking for the majority, confirmed at [20] *“there is nothing in [Lord Reed's] formulation of the concept of proportionality (see his paras 68-76) which I would disagree with.”*

pension scheme for all those employed in the Cook Islands under the Cook Islands National Superannuation Act 2000. The applicants challenged the scheme contending that it involved a disproportionate taking or deprivation of property contrary to article 40(1) of the Cook Islands Constitution, particularly in the absence of a guarantee, entrenchment or the right of early withdrawal or alternatively that section 53 of the 2000 Act involved such a taking or deprivation and/or was unjustifiably discriminatory in relation to migrant workers contrary to article 64(1) of the Constitution. In considering these issues the Privy Council held that the courts should accord the Government a generous margin of judgment (or appreciation). Lord Neuberger, giving the advice of the Board, explained at [38]:

*“As to the nature of the issue involved in this case, the 2000 Act was a measure of social policy with significant macro-economic implications, and, particularly bearing in mind the specific criticisms advanced by the appellants, with considerable budgetary implications for the Government (which are anyway engaged, not least because of the tax foregone on contributions to the Scheme). Whether to introduce such a scheme, and, if so, what its general terms should be, and in particular whether they should include a Guarantee, Entrenchment and/or early withdrawal rights are, by their very nature, decisions as to which the courts should accord the Government a generous margin of judgment (or appreciation). When it comes to policy choices of a social and macroeconomic nature, the courts should be particularly diffident about interfering, given the nature of the functions, expertise and experience of the judiciary as against the executive or (as in this case) the legislature - see eg R (Rotherham Metropolitan Borough Council) v Secretary of State for Business, Innovation and Skills [2015] UKSC 6; [2015] PTSR 322, paras 22-23 and 61-65.*

22. In *R (Rotherham Metropolitan Borough Council v Secretary of State for Business, Innovation and Skills* [2015] UKSC 6, the Supreme Court was concerned with the distribution of European Structural Funds among the regions of the United Kingdom. It concerned the complaint of a number of local authorities in Merseyside and South Yorkshire about the way in which it was proposed to distribute funds allocated to the

United Kingdom for the year 2014 to 2020. The appellants argued that they should receive more and other regions correspondingly less. Lord Neuberger explained at [61]-[62] the proper approach for the courts to take in such matters:

*“61. The courts have no more constitutionally important duty than to hold the executive to account by ensuring that it makes decisions and takes actions in accordance with the law. And that duty applies to decisions as to allocation of resources just as it applies to any other decision. However, whether in the context of a domestic judicial review, the Human Rights Act 1998, or EU law, the duty has to be exercised bearing in mind that the executive is the primary decision-maker, and that it normally has the information, the contextual appreciation, the expertise and the experience which the court lacks. The weight to be given to such factors will inevitably depend on all the circumstances...”*

*62. The importance of according proper respect to the primary decision-making function of the executive is particularly significant in relation to a high level financial decision such as that under consideration in the present case. That is because it is a decision which the executive is much better equipped to assess than the judiciary, as (i) it involves an allocation of money, a vital and relatively scarce resource, (ii) it could engage a number of different and competing political, economic and social factors, and (iii) it could result in a large number of possible outcomes, none of which would be safe from some telling criticisms or complaints.”*

23. In *R (Dolan and others) v Secretary of State for Health and Social Care* [2020] EWCA Civ 1605, the Court of Appeal was concerned with a challenge to regulations made in response to the Covid-19 pandemic which introduced what was commonly known as a “lockdown” in England. The applicants challenged the regulations on a number of grounds including that they violated a number of the Convention rights which were guaranteed in domestic law under the Human Rights Act 1998. This case is of particular relevance as it deals with the same subject matter and similar issues raised in this case. The Court of Appeal considered that a wide margin of judgment must be afforded to the Government in relation to these matters. The reasoning of the Court of Appeal in this respect appears from [89], [90] and [97]:

“89. We also bear in mind that this is an area in which the Secretary of State had to make difficult judgements about medical and scientific issues and did so after taking advice from relevant experts. Although this case does not arise under European Union law, we consider that an analogy can be drawn with what was said by Lord Bingham of Cornhill CJ in R v Secretary of State for Health, ex parte Eastside Cheese Co [1999] 3 CMLR 123, at para. 47: “on public health issues which require the evaluation of complex scientific evidence, the national court may and should be slow to interfere with a decision which a responsible decision-maker has reached after consultation with its expert advisers”.

90. We find it impossible to accept that a court could possibly intervene in this context by way of judicial review on the ground of irrationality. There were powerfully expressed conflicting views about many of the measures taken by the Government and how various balances should be struck. This was quintessentially a matter of political judgement for the Government, which is accountable to Parliament, and is not suited to determination by the courts.

...

97. In this context, as in the case of the other qualified rights, we consider that a wide margin of judgement must be afforded to the Government and to Parliament. This is on the well-established grounds both of democratic accountability and institutional competence. We bear in mind that the Secretary of State had access to expert advice which was particularly important in the context of a new virus and where scientific knowledge was inevitably developing at a fast pace. The fact that others may disagree with some of those expert views is neither here nor there. The Government was entitled to proceed on the basis of the advice which it was receiving and balance the public health advice with other matters.

24. In *Philip v Scottish Ministers* [2021] CSOH 32, Court of Session (Outer House) was concerned with the petition by the ministers and church leaders of Christian churches of various protestant denominations and a Roman Catholic priest, for judicial review of the enforced closure in January 2021 of the places of worship in Scotland, effected by the Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels)

(Scotland) Amendment (No. 11) Regulations 2021. The closure was a response by the Scottish Ministers to the risks posed by Covid-19, specifically the new variant B.1.1.7, which emerged towards the end of 2020. The issues included whether the closure was an unjustified infringement of the petitioners' human rights to manifest their religious beliefs, and to assemble with others in order to do so, in terms of articles 9 (2) and 11 of the European Convention. In considering the question whether a less intrusive measure than closing places of worship could have been used without unacceptably compromising the achievement of the objective of maintaining public health and preserving life by reducing the risk of infection from coronavirus, Lord Braid articulated the approach, at [105], which should be followed by the courts;

*“The approach at this stage has recently been summarised by the Court of Appeal in R (FACT) v Environment Secretary [2020] 1 WLR 3876, as follows:*

- (i) The decision maker has a margin of appreciation or discretion which is highly fact and context specific. The evaluation will take account of all relevant circumstances, including conditions prevailing at the time the decision was taken, and the reasons given why less restrictive measures were rejected.*
- (ii) A measure will be disproportionate if it is clear that the desired level of protection could be attained equally well by measures which were less restrictive.*
- (iii) The burden of proof lies with the decision maker.*
- (iv) The decision maker is not required to consider every possible alternative.*
- (v) The mere assertion that some other measure is equivalent and less intrusive is not sufficient; and equally the fact that some other measure can be envisaged is not enough.*
- (vi) It is relevant that the measure is "general, simple, easily understood and readily managed and supervised””*

## **Evidence submitted to the Court by the parties**

### ***Evidence on behalf of the Applicants***

25. As noted at paragraphs 10-11 above the Applicants have filed affidavits in support of the relief sought in these proceedings.

26. In addition, in support of the Applicant's claim, affidavit evidence has been filed by Dr. Henry Dowling, Dr. Amani Flood, Dr. Amne Osseryan and Mr. Aaron Evans.

27. Dr. Dowling has a Bachelor of Arts in Psychology, Medical Doctorate, and Specialty Boarding in Family Medicine. He is the former head of the Bermuda Medical Doctors Association and is currently the lead practitioner and owner of a local medical practice, Associates in Integrated Health. Dr. Dowling has no particular specialist knowledge or experience of managing public health risks in a virus outbreak such as the current Covid-19 pandemic. Nevertheless the Court will review and take into account the evidence tendered by Dr. Dowling.

28. In his first affidavit Dr. Dowling makes two substantive points:

(1) *"It is an accepted and indisputable matter of fact in the medical community that the Covid-19 vaccination does not preclude an individual from contracting or spreading the Covid-19 virus"* (paragraph 40).

(2) *"It is an accepted and indisputable matter of fact in the medical community that both vaccinated and unvaccinated individuals pose a risk of contracting and transmitting the virus"* (paragraph 41).

29. In his second affidavit Dr. Dowling states that after reviewing the affidavit evidence submitted on behalf of the Government, he does not find the information supplied by the

CMO and Dr. Carika Weldon to lend any medical and/or scientific support to the contention that the mandatory 14-day hotel quarantine is reasonably required or justifiable.

30. Dr. Amani Flood is a Doctor of Naturopathic Medicine from Southwest College of Naturopathic Medicine, Tempe, Arizona and Bachelor of Arts in Social Work from San Francisco State University, California. In her affidavit Dr. flood makes the following substantive points:

- (1) The WHO has conceded that the research is still ongoing in respect of how much and to what extent vaccines protect against the disease, infection, and transmission of Covid-19.
- (2) The WHO has conceded that it does not know the extent to which a Covid-19 vaccination will prevent a patient from being infected and passing the virus on to others.
- (3) The WHO's concession undoubtedly confirms that there is sufficient uncertainty as to the effectiveness of the Covid-19 vaccinations available at present to justify a patient's decision not to be vaccinated at this time, or at all.
- (4) It is an accepted and indisputable matter of fact in the scientific community that Covid-19 vaccination does not preclude an individual from contracting or spreading the virus.
- (5) It is an accepted and indisputable matter of fact in the scientific community that both vaccinated and unvaccinated individuals pose a risk of contracting and transmitting the virus.

31. Dr. Amne Osseryan is the interim Clinical Director of Long Term Care and was responsible for managing the Covid-19 outbreaks in rest home facilities. She has degrees in Forensics (of which PCR is a cornerstone) and Biomedical Science. In her affidavit Dr. Osseryan makes the following points:

- (1) Via direct management of Covid-19 positive patients and conduction of tests, it has become obvious that the vast majority of patients manage well with Covid-19 and that they recover, often without intervention. Bermuda's own recovery rate remains 98% even prior to the introduction of the vaccine.
- (2) The vaccination does not end and will not prevent the emergence of variants; this is a common course with microorganisms.
- (3) The quarantine of only unvaccinated persons will not prevent the emergence of variants or cases; vaccinated persons have displayed symptoms, contracted Covid-19 and have transmitted same. Some of the most recent cases in Bermuda are fully vaccinated individuals, who are free to roam the country from day one of arrival to Bermuda, provided they have a negative pre-arrival and arrival test.
- (4) There is currently no way to prove that testing on Day 14 post travel is capturing persons who have contracted the virus during travel prior to the Bermuda arrival.

32. Mr. Evans has a Bachelor's degree in economics from the University of Georgia and a Master's degree in Health Economics from the City University London. Since graduating, he has worked in health economics at Janssen Pharmaceuticals London and at Amaris Consulting in Barcelona. Mr. Evans makes the following substantive points:

- (1) The current data shows that Bermuda is now well-prepared for a possible outbreak, and there is no compelling reason which warrants a mandatory hotel quarantine for unvaccinated travellers. The evidence of Dr. Weldon and Dr. Peden in relation to the need for such a mandatory quarantine cannot be considered as robust.
- (2) The evidence presented for mandatory 14-day quarantine at a person's own expense, has low scientific value as it is based on assumptions and speculation and not quantitative data.

- (3) It is safe to infer that a possible outbreak can still occur with the mandatory quarantine in place, either by hotel staff getting infected or by travellers not complying with the quarantine.
- (4) After synthesising all the evidence, it is possible to conclude that although a mandatory hotel quarantine might have some added effectiveness over the current measures, the added value for society is minimal and considering the economic burden it carries, the trade-off is simply not worthy.

### *Evidence on behalf of the Government*

33. In addition to the evidence of the Minister of Health, the respondents have filed affidavit evidence by the Premier of Bermuda, the Honourable E. David Burt, JP, MP (“**the Premier**”), Dr. Carika Weldon, Dr. Joanna Kate Peden and Dr. Ayoola Oyinloye, the Chief Medical Officer (“**the CMO**”).
34. Dr. Weldon has a Bachelor of Science in Medical Biochemistry and a PhD in Biochemistry from the University of Leicester. Dr. Weldon was invited to become a Member of the Royal Society of Biology in April 2019 (MRSB) and awarded a Fellow of the Institute of Biomedical Science in April 2020 (FIBMS). Before returning to Bermuda in April 2020 for the Bermuda Covid-19 response, Dr. Weldon was employed as a Research Scientist in the Oxford Genomics Center at the Wellcome Trust centre for Human Genetics, a department of the University of Oxford. Dr. Weldon is also a Project Manager for all Oxford Nanopore sequencing projects. Her publications are focused on mRNA processing and using nanopore sequencing as a tool.
35. In April 2020 Dr. Weldon was appointed to lead the Government’s on-Island Covid-19 testing facility, the Molecular Diagnostics Laboratory (“**the MDL**”). Dr. Weldon is also the Science Adviser to the Government of Bermuda for Covid-19. In October 2020 Dr. Weldon was awarded the Queen’s Certificate and Badge of Honour for services to the Covid-19 pandemic response.

36. Dr. Peden has a Doctorate in Public Health from the London School of Hygiene and Tropical Health and has worked in public health in the United Kingdom and overseas for the last 23 years. She is a Consultant in Health Protection and specialises in infectious disease management and has extensive experience in communicable disease control. She has previously worked for Public Health Wales specifically advising on the Covid-19 response and also has significant experience in public health outside the United Kingdom.
37. The CMO trained as a doctor at the University of Ibadan, Nigeria and received postgraduate training at the Universities of Ibadan and Liverpool in the United Kingdom. He is a Fellow of the Faculty of Public Health in the UK. He has previously served as Deputy Director of Public Health and Consultant in Public Health for Swindon Borough Council in the UK. He is an experienced epidemiologist and was responsible for managing the Covid-19 pandemic in Swindon. He is a Public Health Physician with extensive experience in infectious disease management and public health.
38. The relevant parts of the evidence presented to the Court on behalf of the Government will be reviewed in the following section of the Judgment.

## **Discussion and analysis**

39. The first issue to consider is whether the Applicants have shown that the Amendment Order *prima facie* breaches the Applicants' fundamental right to protection of freedom of movement under section 11 (1) of the Constitution.
40. In relation to this issue Mr. Duncan QC, for the Respondents, raised the preliminary issue whether the Applicants have standing to pursue this application in light of the fact that the Originating Summons merely seeks declaratory relief in respect of a statement made by the Minister of National Security. I am satisfied, as clarified by Mr. Pettingill, that now that

the Amendment Order has been made by the Minister, the substance of the Applicants' complaint is that the Amendment Order is in breach of section 11 (1) of the Constitution.

41. Mr. Duncan QC also argues that the Applicants are unable to show that they have been *hindered* in the enjoyment of their right to freedom of movement and as such they are unable to show that there has been a breach of section 11 (1). He refers to paragraphs 34 of *Benevides* where Hellman J held that to establish an infringement of section 10 of the Constitution the applicants in that case had to show that they had been "*hindered*" in the enjoyment of their freedom of peaceful association. Hellman J went on to state that he was satisfied that the *hindrance* must be more than merely trivial. Mr. Duncan QC argues that the Applicants have not produced any evidence that they intend to travel overseas prior to the end of September 2021 (when the mandatory quarantine regime expires) and so it cannot be said that they had been *hindered* in the enjoyment of their right to freedom of movement.

42. I am unable to accept this submission. In my judgment it is sufficient to establish a breach of section 11 (1) that the Applicants are unable to freely exercise their rights to freedom of movement if they choose to do so. This interpretation would be in accordance with the guidance given by Lord Wilberforce in *Minister of Affairs v Fisher* [1980] AC 318 that the Court should be "*guided by the principle of giving full recognition and effect to [the] fundamental rights and freedoms.*" I should add that the issue raised in the injunction proceedings was a different issue, namely, whether the Applicants have established irreparable harm in light of the fact that there was no evidence that they had any plans to travel prior to the hearing of the substantive application. It was for that reason that the Court refused to grant the injunction sought.

43. In relation to this issue I am satisfied that the requirement that unvaccinated travellers must quarantine for a period of 14 days in a Government designated hotel at their own costs does *prima facie* interfere with the Applicants fundamental right to freedom of movement set out in section 11 (1) of the Constitution.

44. In the circumstances it is necessary to consider whether the Respondents can discharge the burden of establishing that the Amended Order is *reasonably required* in the interests of public health.

45. The consideration of this issue requires the Court to apply the three-part *de Freitas* test, namely, whether (1) the legislative objective is sufficiently important to justify limiting a fundamental right; (2) the measures designed to meet the legislative objective are rationally connected to it; and (3) the means used to impair the right of freedom are no more than is necessary to accomplish the objective. I now turn to consider each of these requirements of the *de Freitas* test.

***(1) The legislative objective is sufficiently important to justify limiting a fundamental right***

46. The 14 day mandatory quarantine at a Government mandated hotel for unvaccinated travellers is intended to control the potentially devastating effects of the present Covid-19 pandemic. Plainly, the legislative objective is sufficiently important to justify restricting a fundamental right. However, to the extent that any evidence is needed to satisfy this requirement, the evidence is provided in the affidavit evidence of the Minister, the Premier and the CMO.

47. In her affidavit the Minister sets out the relevant considerations for the implementation of the Amendment Order and the potential negative consequences the Amendment Order is intended to avoid. The Minister states:

*“13. The mandatory quarantine for unvaccinated individuals in the Quarantine (No. 3) Order is designed to control and prevent the spread of Covid-19. The mandatory quarantine for unvaccinated individuals has been adopted with due consideration to the specific circumstances Islands. As stated above, each measure is considered having regard to the public safety and health, as well as the Government’s resources and the extent that any outbreak would cause of the disruption to the economy, education, and businesses.*

*14. Public health and hospital resources were overrun by community spread in the outbreak that started in March and April 2021 and was caused by Alpha Variant (B.1.1.7). Bermuda only has one hospital that was overburdened by the uncontrolled outbreak. For the first time since the pandemic began, the Ministry of Health was not able directly to contact each close contact to give public health instructions. This increased the risk of further spread and resulted in the need for severe social measures that needed to be inflicted on the entire population to control and outbreak. These measures negatively impacted the economy, livelihoods, Government budgets, as well as the health of the individuals and the education and development of children.*

*15. There were deaths in the latest outbreak whose index case was, based on the contact tracing, considered most likely a traveller who breached quarantine. It was considered imperative to control the borders comprehensively to prevent future outbreaks, lockdowns and further economic damage and deaths.”*

48. The same sentiment is echoed by the Premier in his affidavit dated 28 June 2021:

*“5. The Government of Bermuda has had to manage three outbreaks of the Coronavirus in Bermuda. Following the latest outbreak that started in February it was clear that more stringent border protection was necessary to stop the seeding of new cases by travellers. The Government formulated a policy that would allow the country to reopen its domestic economy with more stringent controls at our border based upon the risk that is posed by travellers. It was determined that, until Bermuda achieved a higher vaccination, we would need to quarantine persons at the border who are at greatest risk of contracting and transmitting Covid-19: namely, unimmunised travellers. This shift in policy would reduce the risk of further outbreaks given the impact to the economy of repeated restrictions and the increasingly virulent strains.”*

49. The CMO describes the public health and safety aim of the Amendment Order as protecting approximately 40% of the population that are not fully vaccinated and those who are unable to obtain full immunity from vaccination:

*'19. Bermuda has a total of 2,510 reported cases of the Covid-19 and a total of 33 deaths (as at 25 June 2021). 21 of these deaths followed an outbreak in February 2021, which is believed based on the contact tracing to be caused by an individual breaching the quarantine requirement... As at 19 June 2021, just under 60% of the population of Bermuda is fully vaccinated, which is insufficient to achieve "herd immunity". The government therefore has the responsibility of protecting just over 40% of the population that are not fully vaccinated and those who are unable to get full immunity from the vaccination.'*

50. Seeking to reduce the opportunity for transmission of coronavirus has been recognised as a legitimate objective of legislative measures in other jurisdictions. In *R (Dolan and others) v Secretary of State for Health* [2020] EWHC 1786 (Admin) Lewis J so held at [41]:

*"The Regulations seek to achieve a legitimate aim, namely the reduction of the incidence and spread of coronavirus. They do so by seeking to reduce the opportunity for transmission between households. That is a legitimate aim and is in accordance with law as the restrictions are included in the Regulations made under powers conferred by an Act of Parliament."*

51. In the circumstances I am satisfied that the Amendment Order satisfies the first limb of the *de Freitas* test as it is clear that the legislative objective of the Amendment Order is, in my judgment, sufficiently important to justify limiting a fundamental right.

***(2) The measure designed to meet the legislative objectives is rationally connected to it***

52. In discussing the concept of “*rational connection*” Lord Reed in *Bank Mellat* referred, at [92], to the Canadian decision in *Lavigne v Interior Public Service Employees Union* [1991] 2 SCR 211, where Wilson J observed at 291:

*“The Oakes inquiry into ‘rational connection’ between objectives and means to attain them requires nothing more than showing that the legitimate and important goals of the legislature are logically furthered by the means government has chosen to adopt.”*

53. Lord Reed considered that the words “*furthered by*” point towards a causal test: a measure is rationally connected to its objective if its implementation can reasonably be expected to contribute towards the achievement of that objective. In the following paragraph at [93] Lord Reed stated that legislation may be based on an evaluation of complex facts, or considerations which are contestable and may be controversial and in such situations, the Court has to allow room for the exercise of judgment by the executive.

54. In considering whether the Amendment Order is rationally connected to the objective to be achieved, in the sense that it can reasonably be expected to contribute towards the achievement of that objective, the Court has to consider a number of issues which underlie and are connected to the Amendment Order. These issues are (i) the rate of infection for vaccinated persons compared with unvaccinated persons; (ii) rate of transmission for infected vaccinated persons compared with infected unvaccinated persons; (iii) whether the period of 14 days for quarantine is rationally based; (iv) whether hotel quarantine is more effective than home quarantine; and (v) cost to the traveller.

***(i) the rate of infection for vaccinated persons compared with unvaccinated persons***

55. It is the evidence of Dr. Weldon that studies have emerged from the United States, Israel, Scotland, Denmark, Sweden and the United Kingdom showing significant reduction in the rate of infection of those vaccinated compared to those unvaccinated. Dr. Weldon refers to

a number of studies in respect of Covid-19 more than 14 days after the final dose. These studies show:

- (a) 86% reduction using either Pfizer-BioNTech or Moderna vaccines in the general population in California (*Andrejko K. PJ, Myers JF, et al. Early evidence of Covid-19 vaccine effectiveness within the general population of California. MedRxiv. 2021*).
- (b) 97% reduction using Pfizer BioNTech vaccine in health care workers in the United States (*Swift MD, Breeher LE, Tande AJ, Tommaso CP, Hainy CM, Chu U, et al. Effectiveness of mRNA Covid-19 vaccines against SARS-Cov-2 infection in a cohort of healthcare personnel. Clin Infect Dis. 2021*).
- (c) 99% reduction using Moderna vaccine in health care workers in the United States (*Swift MD, Breeher LE, Tande AJ, Tommaso CP, Hainy CM, Chu U, et al. Effectiveness of mRNA Covid-19 vaccines against SARS-Cov-2 infection in a cohort of healthcare personnel. Clin Infect Dis. 2021*).
- (d) 90% reduction using either Pfizer-BioNTech or Moderna vaccines in health care, front-line and essential workers across the United States (*Thompson MG BJ, Naleway AL, et al. interim Estimates of The vaccine Effectiveness of BNT 162b2 and mRNA-1273 Covid-19 Vaccines in preventing SARS-Cov-2 Infection Among Health Care Personnel, First Respondents, and Other Essential and Front-line Workers-8 US Locations, December 2020-March 2021. MMWR Morb Mortal Wkly Rep. 2021; ePub: 29 March 2021*).
- (e) 77% reduction using Johnson & Johnson vaccine in Health Care system members in the United States (*Corchado-Garcia J. P-ZD, Hughes T., et al. Real-world effectiveness of Ad26.COV2.S adenoviral vector vaccine for Covid-19. medRxiv. 2021*).

- (f) 90% reduction using Pfizer-BioNTech or AstraZeneca vaccines in health care workers in the United Kingdom (*Lumley SF RG, Constantindes B., et al. an observational cohort study on the incidence of SARS-Cov-2.S infection and the B.1.1.7 variant infection in health care workers by antibody and vaccination status medRxiv. 2021*).
- (g) 92% reduction using Pfizer-BioNTech or AstraZeneca vaccines in health care workers in Scotland (*Shah A GC, Bishop J, et al. effect of vaccination on transmission of Covid-19: and observational study in health care workers and their households. medRxiv*).
- (h) 92% reduction using Pfizer-BioNTech vaccine in health system members in Israel about 60 years of age (*Aran D. Estimating real-world Covid-19 vaccine effectiveness in Israel using aggregated counts. Github. 2021*).
- (i) 93% reduction using Pfizer-BioNTech vaccine in health system members in Israel under 16 years of age (*Aran D. Estimating real-world Covid-19 vaccine effectiveness in Israel using aggregated counts. Github. 2021*).

56. Dr. Weldon also lists further key findings of studies against SARS-CoV-2 infection more than 7 days after final dose and key findings from studies showing vaccine effectiveness on asymptomatic SARS-CoV-2 infections more than 7 days past final dose, which show similar results.

57. The CMO confirms that the rate of infection for fully vaccinated persons is substantially reduced as compared with unvaccinated persons. He refers to a recent study that Pfizer vaccine prevents asymptomatic SARS-CoV-2 infections as well as severe Covid-19 from the virus. The research letter included 5217 employees at St. Jude's Children's Research Hospital, who were routinely screened for SARS-CoV-2 infection before and after vaccination. This study shows that the risk of any infection after vaccination is significantly lower after vaccination.

58. Dr. Peden also confirms the substantial reduction in the rate of infection after vaccination and in particular in relation to the Delta variant. Dr. Peden states that data published in the UK showed vaccine effectiveness with one dose against the Delta variant as 35% and 79% with a second dose.

59. In the circumstances, having regard to the evidence of Dr. Weldon and the studies to which she refers, there is a reasonable basis for the Government to conclude that vaccination does indeed substantially reduce the risk of infection as compared with unvaccinated persons, in some cases as much as 99%. The fact that vaccination may not entirely remove the risk of infection, a position asserted by Dr. Dowling and Dr. Flood, is irrelevant and unhelpful. Public bodies charged with controlling the spread of Covid-19 virus in the middle of a pandemic are entitled to fashion policies on the basis of probabilities.

(ii) *rate of transmission for infected vaccinated persons compared with infected unvaccinated persons*

60. Dr. Weldon states that studies have shown that Covid-19 vaccination lowers the viral load in the vaccinated person; a high viral load (i.e. low Cp values) is the driving factor for transmission of the virus. In support of these propositions Dr. Weldon relies upon *Levine-Tiefenbrun M., Yelin I, Katz R, Herzl E, Golan Z, Schreiber L, et al. Initial report of decreased SARS-CoV-2 viral load after inoculation with the BNT162b2 vaccine. Nat Med. 2021;27(5): 790-2* and *Marks M, Millat-Martinez p, Ouchi D, Roberts CH, Alemany A, Corbacho-Monne M, et al. Transmission of Covid-19 in 282 clusters in Catalonia, Spain: a cohort study. Lancet Infect Dis. 2021.*

61. Dr. Weldon explains that this evidence falls in line with local Bermuda data which shows that during the 2021 outbreak (March-May) those unvaccinated or only having one dose had majority low Cp values, whilst those with a second dose or fully immunised had majority high Cp values.

62. In her second affidavit Dr. Weldon confirms that having regard to the data collected concerning travellers since June 20, 2021, an unvaccinated passenger is 19.6 times more likely to test positive on or after arrival than a fully vaccinated passenger. In relation to the rate of transmission Dr. Weldon confirmed that since May 3, 2021, not a single arriving traveller that has arrived in Bermuda that is fully vaccinated has transmitted the infection to any other person in Bermuda. She confirms that the only transmission event has been from an unvaccinated persons.
63. The CMO also refers to the study from Israel (*Marks M, Millat-Martinez p, Ouchi D, Roberts CH, Alemany A, Corbacho-Monne M, et al. Transmission of Covid-19 in 282 clusters in Catalonian, Spain: a cohort study. Lancet Infect Dis. 2021*), which he says gives some clues about what is behind the reduced transmission of the virus from vaccinated persons. He says that researchers identified nearly 5000 cases of breakthrough infection in previously vaccinated people, and determined how much virus was present in their nose swabs. Compared to unvaccinated people, the amount of virus detected was significantly lower in those who were vaccinated. The risk of transmission is related to the viral load. The authors suggest that this implies reduced risk of transmission in vaccinated individuals.
64. The Minister states that based on the advice of the CMO, coupled with her own research with PHE, PAHO, WHO, the distinction between vaccinated and unvaccinated individuals is supported by considerable body of medical and scientific evidence. She says that this has been confirmed to her by Dr. Michael Ashton MD, the Chief of Medicine, and an Infectious Diseases expert at the Bermuda Hospitals Board. From a public health and safety prospective, in the Minister's view, the Government cannot ignore the increased risk posed by unvaccinated travellers to Bermuda, particularly from countries where there is community transmission of new variants. The Minister states that unvaccinated travellers are more likely to acquire and transmit the virus to others.
65. The Court accepts that there is credible evidence that Covid-19 vaccination lowers the viral load detected and as high viral load is a driving factor in transmission of the virus, vaccinated persons who become infected are less likely to transmit the virus to others.

66. The evidence reviewed so far provides reasonable grounds to conclude that (a) a vaccinated person is substantially less likely to be infected than an unvaccinated person; and (b) in the event a vaccinated person does become infected he is less likely to transmit the virus to others. These findings, in my judgment, provide a reasonable basis for the Government to differentiate between vaccinated and unvaccinated persons when it comes to formulating policies and safeguards designed to minimise the risk of transmission of the virus.

**(iii) *whether the period of 14 days for quarantine is rationally based***

67. It is the evidence of Dr. Weldon that the quarantine period of 14 days was decided based upon the known incubation period of SARS-CoV-2. From initial studies at the onset of the pandemic, the median incubation time was determined as approximately 5 days, however the range of incubation observed was between 2 to 15 days. 95% of cases experienced an incubation period of 13 days or less, and so a 14-day quarantine period became standard.

68. Dr. Weldon also refers to the current CDC guidance which is to complete a 14-day quarantine. As stated by the CDC, *“The recommendation for a 14-day quarantine was based on estimates of the upper bounds of the Covid-19 incubation period. Quarantine’s importance grew after it was evident that the persons are able to transmit SARS-CoV-2 before symptoms developed and that a substantial portion of infected persons (likely somewhere between 20% to 40%) never develop symptomatic illness but can still transmit the virus. In this context, quarantine is a critical measure to control transmission.”* Although alternatives are given by the CDC for shorter periods (i.e. 7 or 10 days), they state clearly that, *“any option to shorten quarantine risks being less effective than the currently recommended 14 day quarantine.”*

69. Dr. Weldon also gave evidence of the Bermuda experience since the airport opened on 1 July 2020. As of 21 June 2021, MDL has identified 260 traveller cases. Of this total, 125 cases tested negative on arrival then converted to positive during the 14-day quarantine period. Those that tested positive on day 6, 7 and 8 had negative day 4 tests. Those that

tested positive on day 9, 10, 12 and 14 also had negative tests on day 8. The actual experience demonstrates that 9% (24) of cases were recorded on day 14, suggesting a need to keep the 14-day period.

70. The CMO states that his Department takes the risk of false negatives and late onset of infection very seriously and exercises extreme caution, particularly in light of the more transmissible variants now present in Bermuda as it is in other parts of the world. The CMO refers to the case of one individual who tested positive on day 12 and likely infected a number of other individuals who attended a party which resulted in 21 fatalities. He also refers to the fact that the ease with which the virus can spread in such a small jurisdiction and the limited resources are also reasons to exercise caution and points to the position in Cayman Islands, with similar population, requiring all unvaccinated visitors to quarantine in a hotel for 14 days.

71. This is clearly an area where there can be disagreement amongst the experts. However, the evidence of Dr. Weldon, the CMO and the recommendation of the CDC, in my judgment, provide a reasonable basis for the Government to continue to conclude that a 14-day quarantine is required in the present circumstances.

*(iv) whether hotel quarantine is more effective than home quarantine*

72. In his affidavit evidence the Premier states that when considering the imposition of mandatory quarantine for unvaccinated travellers, there was consideration of alternative proposals, for example at home quarantine with Regiment checks or monitoring electronic bracelets. He consulted Cabinet colleagues, together with the Minister of Health, the Chief Medical Officer, the Governor, and the Minister of National Security.

73. The Premier and the Cabinet were advised on specific examples of breaches of at home quarantine from the Minister, as well as scientific information about how much more effective hotel quarantine is compared to at home quarantine.

74. The Premier states that after wide-ranging consultation, the Government considered the alternatives to hotel quarantine mentioned above to be both impractical and ineffective, for the following reasons:

- (a) It is for the Government to determine how best to allocate its resources. The Government does not have the resources to deploy the Regiment for this purpose and in any event does not consider it an appropriate use of the Regiment.
- (b) The scientific evidence demonstrates that hotel quarantine is more effective than at home quarantine.
- (c) The examples provided for breaches of quarantine by the Minister of Health and the potential (and in one instance, actual) fatal consequences demonstrate that the Government must take additional steps to ensure public health and safety.
- (d) The issue of visitors to a residence makes it considerably more difficult for the Government to contact trace because persons in quarantine who may have invited visitors to their residences and those persons attending the residences of those in quarantine are less likely to admit the same as this is an offence punishable by fine.
- (e) The above is essentially what caused the outbreak in February and needed to be avoided until Bermuda reached the herd immunity threshold.
- (f) It was also noted that all the examples of breaches of the quarantine provided by the Minister that resulted in infection outbreaks, and in one case a large number of deaths, all occurred in circumstances where the government had in place the less restrictive means, such as quarantine at home, that had been suggested by the Applicants in this case.
- (g) There are no similar examples when the Government had mandated quarantine in a hotel last year for travellers to Bermuda.

75. The Premier concludes that the Government did consider less restrictive methods but considers the requirement for unvaccinated travellers to quarantine in a hotel, where the risk of visitors is nearly eliminated, is the most effective method to achieve the Government's goal of reducing the risk of coronavirus variants while continuing to immunise the population to acquire a level of herd immunity which means that it is unlikely the Health Care system can be overwhelmed.
76. The Minister in her evidence states that the Government considers hotel quarantine to be the safest way to open the border while significantly reducing the risk to public health and safety. The scientific advice received from relevant experts by the Minister was that the hotel quarantine is considerably more effective than home quarantine. This was considered when deciding on the most appropriate and safest approach to unvaccinated travellers.
77. In relation to the suggestion by the Applicants that they should be allowed to quarantine at home, the Minister states that this is simply not realistic for all of those arriving in Bermuda based on what the Government has experienced to date. The Minister says that there are numerous examples that have occurred in Bermuda that justify the need for the quarantine to occur in a hotel. She provided the following examples to the Court:

Example 1: A traveller returning to Bermuda was supposed to quarantine for 14 days by the rules of the "First 14 Day Continuum". The traveller breached the quarantine requirement and attended a large party on day 12 of the quarantine. There was an outbreak at the party. The traveller reported becoming symptomatic on the evening of day 12 after attending the party and subsequently tested positive for Covid-19 on day 14. The outbreak of the party is believed to have led to the most recent and worst outbreak these Islands had experienced, resulting in 21 deaths. Further, this was the first time the B117 strain (UK variant) was identified.

Example 2: An individual was in contact with someone who was supposed to be in isolation as a Covid-19 positive case. The individual then contracted Covid-19. The individual then interacted with a close group of individuals and 60% of the group

became infected. The contact tracing indicates that the most likely source of infection was from the person that was supposed to be in isolation.

Example 3: An individual breached quarantine on a number of occasions, attending their cousin's house, their friend's house, and "sitting out" on at a local party. The individual's cousin then tested positive.

Example 4: An individual that tested positive for Covid-19 and was required to isolate. However, the individual breached the isolation and attended work. The individual was the owner of a business with limited staff and no one trained to do his job.

Example 5: An individual that was employed at the school where there had been an outbreak was required to quarantine. The individual breached the quarantine and attended a grocery store.

Example 6: A minor individual was required to quarantine after a school outbreak. The mother of the individual took the child for dental care in breach of the quarantine requirement.

78. Dr. Peden accepts that the evidence around isolating in quarantine hotels versus home isolation is limited but having reviewed the available evidence on quarantine hotels and self-isolation at home, concludes that the evidence shows that quarantining unvaccinated people in the quarantine hotel ensures stricter adherence. Dr. Peden states that evidence around behaviours shows that compliance with home isolation is low. Dr. Peden cautions that it is especially important with the rapidly developing risk of new variants emerging that a precautionary approach is taken to ensure that the vaccination program is not undermined. Dr. Peden's conclusion is supported by the studies that she cites and in particular *Dickens BL, Koo JR, Wilder-Smith, Cook AR. Institutional, not home-based, isolation could contain the COVID-19 outbreak, The Lancet 2020 of May 16, 395(10236): 1541-2*; and *L Smith, H Potts, R Amlot, N Fear, S Michie and J Rubin, "Adherence to the test, trace and isolate system: results from a time series of and 21 nationally representative*

*surveys in the UK (the COVID-19 Rapid Survey of Adherence to Interventions and Responses (CORSAIR) study” medRxiv, 2020.*

79. The Premier also gave evidence that Government mandated quarantining is not unique to Bermuda. Other jurisdictions impose mandatory quarantine in government approved hotels, for example the United Kingdom, Australia, New Zealand, Israel, China, Singapore, Qatar, South Korea, Island, Norway and Canada.
80. Having regard to the evidence of the Premier, the actual experience of home quarantining as set out in the evidence of the Minister and the expert evidence of Dr. Peden, the Court concludes that there are reasonable grounds for the Government to conclude that (a) home quarantining is less effective than quarantining in a Government mandated hotel; and (b) that a breach of the quarantine regime by a traveller can seriously augment the spread of the virus and has the potential of causing serious illness and death to others.

(v) ***Cost to the traveller***

81. I accept the general submission that the policy decision for unvaccinated travellers to bear the costs of the hotel quarantine is one that the executive is much better equipped to assess than the Court as in the present case it involves the allocation of money and different competing political, economic and social factors.
82. The policy decision for unvaccinated travellers to bear the cost of that quarantine is explained by the Premier on the basis that the public policy adopted by the Government is that those who elect to travel and need to stay at a hotel to reduce the public health risk should fund the services that they exclusively are using. The other policy alternatives of increased borrowing, increased taxes, or cuts to other vital programmes are not preferred by the Cabinet. In the Court’s view the executive is entitled to take this view.
83. It is also to be noted, as pointed out by the Premier, that other jurisdictions impose a cost on the traveller for mandatory quarantine in government-approved hotels, for example the

United Kingdom, Australia, New Zealand, Israel, China, Singapore, Qatar, South Korea, Island, Norway and Canada. Further, it appears that the costs incurred by the traveller for government mandated hotel quarantining in the United Kingdom, Singapore and Australia is higher than the cost incurred in Bermuda.

84. The question posed for the Court under this head of the *de Freitas* test is whether the measure designed to meet the legislative objective is rationally connected to it. It was noted from the judgment of Lord Reed in *Bank Mellat* that a measure is rationally connected to its objective if its implementation can reasonably be expected to contribute towards the achievement of that objective. The objective of hotel quarantining for the unvaccinated traveller, as noted above, is designed to control and prevent the spread of Covid-19.
85. Under this head the Court has reviewed the evidence tendered by the parties and on the basis of that evidence has expressed the view that (i) Covid-19 vaccination substantially reduces the risk of infection as compared with unvaccinated persons, in some cases as much as 99%; (ii) in the unlikely event a vaccinated persons does become infected he is less likely to infect other persons because the amount of viral load in unvaccinated persons is substantially lower than in unvaccinated persons; (iii) the above two findings provide reasonable and sufficient grounds for the executive to differentiate between vaccinated and unvaccinated persons when it comes to formulating policies and safeguards designed to minimise the risk of transmission of the virus; (iv) having regard to the actual experience of quarantining at home, as set out in the evidence of the Minister, and the expert evidence of Dr. Peden, there are reasonable grounds for the Government to conclude that (a) home quarantining is less effective than quarantining in a Government mandated hotel and is more likely to result in a breach of the quarantining regime; and (b) a breach of the quarantining regime by a traveller can seriously augment the spread of the virus.
86. Having regard to the above findings the Court concludes that the Amendment Order is rationally connected to the legislative objective.

**(3) *The means must be no more than is necessary to accomplish the objective***

87. This is the third limb of the *de Freitas* test. In *Scottish Ministers case*, Lord Braid, at [105], stated that a measure will be disproportionate *if it is clear* that the desired level of protection could be attained equally well by measures which were less restrictive. Lord Braid also said that the *mere assertion* that some other measure is equivalent and less intrusive is not sufficient; and equally the fact that some other measure can be envisaged is not enough. What is required is evidence of such measures by the Applicants.

88. At one stage of the hearing Mr. Pettingill, appearing for the Applicants, was prepared to accept that the scientific evidence showed that vaccinated persons were less likely to be infected than unvaccinated persons; if a vaccinated person became infected with the virus he was less likely to transmit that virus to other persons; the health authorities could reasonably differentiate between vaccinated and unvaccinated travellers; and quarantining travellers in the circumstances was not objectionable as a concept. However, Mr. Pettingill contended that the health authorities could obtain the same objective by home quarantining as opposed to government mandated hotel quarantining. Counsel also suggested that home quarantining could be made more effective by substantially increased fines and prison sentences for those who breached the quarantining regime; regular visits by the Police and the Bermuda Regiment and monitoring electronic bracelets.

89. The difficulty with this submission by Mr. Pettingill is that the Government has actual experience with home quarantining and has found that it is not effective. The Minister has given examples chosen specifically to identify a range of types of breaches resulting from home quarantining. The breach, identified as Example 1, is believed to have led to the most recent and worst outbreak these Islands had experienced, resulting in 21 deaths.

90. Furthermore, as the evidence of the Premier shows, when considering the imposition of the mandatory hotel quarantine on unvaccinated travellers, there was consideration of alternative proposals, for example at home quarantine with Regiment checks or monitoring electronic bracelets. The Cabinet considered the specific examples of breach of at home

quarantine from the Minister of Health and concluded that the alternatives to hotel quarantine mentioned were both impractical and ineffective and reasons for taken that view are set out at paragraph 74 above.

91. In particular the Premier highlighted the issue of visitors to a residence makes it considerably more difficult for the Government to contact trace because persons in quarantine who may have invited visitors to their residence and those persons attending the residences of those in quarantine are less likely to admit the same as this is an offence punishable by law.

92. In the circumstances it is not clear to me that the desired level of protection could be attained equally well by measures which are less restrictive (home quarantining). Indeed, the history of home quarantining strongly suggests that to be not the case. Furthermore, this is a decision made by the executive, according to the evidence of the Premier, after consultation with Cabinet colleagues, together with the Minister of Health, the CMO, the Governor, and the Minister of National Security. In the circumstances the decision of the executive in relation to this matter must be accorded a margin of judgment. As emphasised by Chief Justice Crampton in *Spencer v Canada (Minister of Health) and the Attorney General of Canada* [2021] FC 621 (18 June 2021), the executive's opinion that there were no reasonable alternatives is entitled to some deference from the Court. At paragraph 250 of the judgment Chief Justice Crampton stated:

*“[250] Given all of the foregoing, I conclude that the Orders containing the Impugned Measures are not ultra vires the AIC. The record as a whole reveals that the AIC did in fact reach the opinion that no reasonable alternatives to prevent the introduction or spread of COVID-19 in Canada were available. That opinion is entitled to some deference, particularly given that paragraph 58(1)(d) enables the AIC to exercise the emergency powers provided for in subsection 58(1) when it is of the opinion that the conditions described in paragraphs (a) – (d) are met. So long as there is a reasonable basis in the record to support that opinion, it does not matter that others, such as the RNN Applicants, may believe or even demonstrate*

*that there was in fact a reasonable alternative available. As it turns out, the alternatives identified by the RNN Applicants were also considered, either explicitly or implicitly. They were not considered to be adequate to prevent the introduction or spread of COVID-19 in Canada.*

93. Finally, it needs to be emphasised that under the Amendment Order the mandatory quarantine regime is a temporary measure and is stated to expire at the end of September 2021, a period of 10 weeks. On the basis of the reasons set out above the Court is satisfied that the third limb of the *de Freitas* test is satisfied in the particular circumstances of this case.

**The measure is “not reasonably justifiable in a democratic society” issue**

94. As noted at paragraphs 17-18 above, once the Respondents have established that the measure is reasonably required in the interests of public health it is still open to the Applicants to show that nevertheless the provision in question is not reasonably justifiable in a democratic society. The burden of proof of establishing this is upon the Applicants.

95. In *Robinson v Sealey* [1974] 1 CCCBR 94 (HC TT), Georges J commented, obiter, that it is “*difficult to conceive of a case in which a law would be held to be reasonably required... but not reasonably justifiable.*”<sup>7</sup>

96. Counsel for the Applicants concentrated their submissions by reference to section 11(2)(a)(i) and the argument that the imposition of the restriction was not “*reasonably required*” in the interests of public health. Counsel for the Applicants made no specific submissions by reference to section 11(2)(a)(ii) and the argument that even if the restriction

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<sup>7</sup> In *Fundamentals of Caribbean Constitutional Law* the learned authors suggest that “*the overriding test of a reasonably justifiable in a democratic society would survey the broader implications of that society of limiting the protected rights. It would give more consideration to balancing the protected rights against the interests of society, asking “is the infringement too high a price to pay for the benefit of the law”... Simply put, the overriding test of a reasonably justifiable in a democratic society requires further scrutiny to achieve an appropriate balance between the interests of the society and those of the individuals and groups affected, the element that is missing in the three-part de Freitas test.*”

was “*reasonably required*” it was nevertheless not “*reasonably justifiable*” in a democratic society either in their written submissions or in their oral presentation to the Court.

97. As presently advised and in the absence of any specific submission to the contrary, the Court, for the reasons set out in paragraphs 46-93 above, concludes that the Amendment Order is reasonably justifiable in a democratic society.

### **Conclusion**

98. Having regard to the findings made by the Court in this Judgment, the Applicants’ application for a declaration that the mandatory quarantine for unvaccinated travellers implemented pursuant to the Quarantine (COVID-19) (No.3) Amendment (No. 2) Order 2021 violates the Applicants’ fundamental right to freedom of movement pursuant to section 11 of the Bermuda Constitution Order 1968 is hereby dismissed.

99. The Court will hear any application in relation to costs, if required.

Dated this 23<sup>rd</sup> day of July 2021

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**NARINDER K HARGUN  
CHIEF JUSTICE**