In The Supreme Court of Bermuda

CIVIL JURISDICTION

2024 No 346

BETWEEN:

(1) K. AMANI LAWRENCE

(2) EUGENE JOHNSTON **APPLICANTS**

-AND-

(1) THE PUBLIC SERVICE COMMISSION

(2) THE MINISTER OF THE CABINET OFFICE

(3) THE HEAD OF THE PUBLIC SERVICE

(4) THE ATTORNEY GENERAL OF BERMUDA

(5) THE GOVERNOR OF BERMUDA **RESPONDENTS**

Case management hearing; application for leave to amend the Form 86A and statement of grounds in support of judicial review application; protective costs order and Corner House principles; directions for hearing.

Appearances

Mr Eugene Johnston in person

Ms K Amani Lawrence in person

Ben Adamson of Conyers Dill & Pearman Limited for the Public Service Commission

Paul Harshaw of Canterbury Law Limited for the Minister of the Cabinet Office, the Head of the Public Service, and the Attorney General of Bermuda

Richard Horseman of Wakefield Quin Limited for HE Governor of Bermuda

Before **MARTIN J** in Chambers

Date of hearing: 10 November 2026

Date of Ruling: 24 November 2026

Introduction

1. This matter came on for a case management hearing on 10 November 2026 for directions for the trial of the Originating Motion seeking judicial review of two recommendations made by the Public Service Commission ("the PSC") for the appointment of the Chief Parliamentary Counsel ("CPC") and the Solicitor General ("SG") as public officers employed in the Attorney General's Chambers. The background facts have been set out in details in the previous rulings this court has made in relation to earlier aspects of the case[1], so it is not necessary to set them out again here.

2. There were two principal points of controversy at the case management hearing. The first related to an application for leave to amend the Statement of the Grounds to add additional grounds for the setting aside of the PSC's recommendations and the second related to an application for a pre-emptive costs order or protective costs order to immunise the applicants from their potential costs' exposure in the event that their respective applications are ultimately unsuccessful.

Summary and disposition

Leave to amend

3. For the reasons explained in this Ruling, the court has decided to grant leave to amend in the form proposed by the applicants. The general rule is that a party is entitled to amend their pleaded case at any time if it is necessary or desirable to narrow the claims the court is being asked to consider or to put forward additional or alternative arguments for consideration at the trial.

4. In this case the application to amend seeks to do both. The application does not involve the introduction of any additional evidence which would require responsive evidence to be filed or additional disclosure or otherwise delay the setting down of the matter for a trial. As Mr Johnston submitted, it is preferable for these amendments to be made now rather than at the trial itself, to enable the parties to prepare fully to address all the arguments the applicants intend to advance.

5. The claims are made in the draft amended Form 86A and the draft amended Statement of Grounds[2] and are sufficiently supported by primary facts asserted in the affidavits of Ms Lawrence, upon which Mr Johnston also relies in support of his own case[3]. The amendments introduce claims for declarations as to the true meaning and interpretation of sections 82 and 89 of the Bermuda Constitution Order 1968 ("the Constitution") when read with section 56 of the

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[1] See [2025] SC (Bda) 10 civ.
[2] Paragraphs 1,2,7,8 and 12 of the draft amended Form 86A and paragraphs 8-14 and 46-63 of the draft amended Statement of Grounds
[3] See paragraphs 27 and 31 of the Court of Appeal's decision [2025] CA (Bda) 14 civ.

Supreme Court Act 1905. The new claims for declaratory relief and other amendments are not obviously bound to fail and there is no prejudice caused to the respondents which would justify the court in refusing leave to amend.

Protective costs order

6. The court is also satisfied that it is appropriate to exercise its discretion to grant a protective costs order in this case because the matter involves issues which are of general public importance and which the public interest requires the court to determine, and the applicants have broadly met the other requirements for the grant of some protection from the ordinary exposure to costs in the event that they do not prevail at the trial. These are explained in more detail below and involve some qualifications and limitations.

7. In summary, the issues of general public importance that have been raised include (a) whether the manner in which recommendations for appointment to senior positions within the public service are managed by the PSC is sufficiently independent from the influence or control of the Executive branch or is in contravention of the requirements of the Constitution and (b) whether the appointment of the CPC and the SG falls within the exercise of power of the Governor acting on the recommendation of the PSC under section 82 of the Constitution or upon the recommendation of the Chief Justice under section 89 of the Constitution.

8. For the reasons explained later in this Ruling, the court has found that:

    a. the fact that the principal claims involve Ms Lawrence's private interest in being appointed as CPC and Mr Johnston's private interest in his exclusion from the pool of potential applicants by reason of the wrong advertisement of the minimum requirements for the post of SG;

    b. the fact that they may have resources with which to fund payment of the costs liability in the event they are unsuccessful in their claims; and

    c. the fact that the applicants have not given an unequivocal indication that they will discontinue the proceedings if they are denied protection

    do not (in each case) of themselves bar the grant of protective costs order relief.

9. Although the application for a protective costs order ought normally to be made at the very beginning of the proceedings so that all parties know what the position as to costs will be, I am satisfied that the grant of a protective costs order that extends retrospectively to the costs of the whole proceedings is not prejudicial to the other parties in the context of the present case. The main additional expense that has been incurred related to the appeal against the limitations imposed by the court on the scope of relief at the outset of the proceedings, which were broadly upheld by the Court of Appeal. There has been no extensive disclosure or preparation of witness evidence.

10. However, the protective costs order is to be subject to some conditions and limitations. First, the protective costs order will not relate to the application for the court's recusal. That application was held by both this court and the Court of Appeal to be unjustified and without merit and the issues raised did not relate to the determination of any of the points raised by the applicants in the main case. The costs associated with that application fall outside the court's jurisdiction to grant a protective costs order, which requires the general public importance element (and other conditions) to be satisfied. Therefore, the recusal costs will not form part of the protection provided by the protective costs order.

11. This court reserved the costs of the recusal application pending the determination of the protective costs order application. The costs order in relation to the recusal application at first instance is therefore at large and will now fall to be determined at the conclusion of the proceedings, as part of the disposition of the case as a whole. The Court of Appeal determined that the costs of the appeal on the recusal application are to follow the event.

12. Second, the protective costs order will not be a complete immunity against the potential liability for costs. For the reasons explained in the Ruling, the court has imposed a limit on the applicants' exposure to costs. The court has determined that an appropriate limitation should be BD$25,000.00 for each applicant. Therefore, in the event the applicants are not successful in establishing their claims to relief, the applicants will not be liable for the costs of the respondents above BD$25,000.00 each or BD$50,000 in total for all respondents (save for the recusal costs).

13. Third, as a matter of parity and proportionality, the court has ordered that in the event they are successful in establishing entitlement to relief, the applicants shall not be entitled to recover any costs from the respondents as a whole in excess of BD$25,000 each or BD$50,000.00 in total (including the costs awarded to them in respect of the Court of Appeal's decision in June 2025).

Other matters

14. The costs of the case management directions application were reserved. Directions were agreed for the setting down of the hearing of the case in December 2026.

The principles applied

Leave to amend

15. In reaching my decision on the question of amendment, I have applied the conventional test for granting leave to amend, tailored to the judicial review context. In short, the main question is whether the amendment has a real--as opposed to a fanciful-- prospect of success. If the amendment crosses the real prospect of success threshold, the court then goes on to consider whether the amendment will cause prejudice or injustice to the other parties that cannot be remedied, and evaluates any questions of delay that might be relevant to the exercise of the court's discretion[4].

[4] See Supreme Court Practice 1999 Vol 1 at 20/8/6 and **CNM Estates (Tolworth Tower) Ltd v Carvill Biggs** [2023] EWCA 480 [66-77].

16. The principal amendments are to seek additional declarations in the following terms:

> "A declaration that the appointment of a person as (a) the Chief Parliamentary Counsel (b) the Solicitor General or (c) the holder of any other public office the functions of which include acting as barrister and attorney for the government is lawful only if made in accordance with section 89 (1) of the Bermuda Constitution Order 1968 ("The Constitution") unless the appointment is made under section 86 of the Constitution."
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> A declaration that the appointments in this case were unlawful because "the [CPC] and the [SG] are required to possess legal qualifications to perform the necessary functions of those offices, and such appointments were not made pursuant to section 89 (1) of the Constitution and/or the executive branch of government interfered in or unlawfully influenced both appointments contrary to section 84 (7) of the Constitution."
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> "A declaration that the [Recruitment] Code and/or [Recruitment] Guidance are unlawful because they demand public officers (members of the executive) to perform functions and/or carry out responsibilities that can only be performed by the [PSC] contrary to Part VI of the Constitution."
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> "A declaration that the government's recruitment process is unlawful because the [PSC] does not act independently and free of interference or impermissible influence from the executive branch of government."
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> "A declaration that the [PSC] may lawfully recommend for appointment to public office a person who does not possess the qualifications or experience set out in a job specification made by the Head of the Public Service pursuant to Regulation 18 (1) of the [Public Service] Regulations."

17. There are a number of other amendments proposed, but these are for the most part deletions and/or consequential amendments that follow from the proposed changes described above. The amendments in the draft amended Form 86A are then elaborated in the draft amended statement of grounds, which I will not set out in detail, but they are to substantially the same effect.

18. Apart from a high-level assessment of the amendments, the court does not conduct a detailed merits assessment of the arguments at this stage. Mr Harshaw invited the court to go through the various amendments in an effort to persuade the court that the arguments on which the declarations sought in the amendments are bad in law. I have declined that invitation. The new question raised by the amendments is whether the Constitution requires the Governor to act after consultation with the PSC or the Chief Justice in appointing the CPC and the SG (and any other legal officer). The other amendments relate to claims for relief that have already been articulated.

19. In my view the issues in the amendments are arguable insofar as the court cannot say at this stage from a high level that they are obviously bound to fail or that the prospect of success is so low as

to be fanciful. In addition, the amended claims are not bound to fail or are not academic or "useless" simply because Ms Salick (the appointee to the CPC position) subsequently left her post.

20. The broad issue for the court's determination is whether the procedure adopted by the PSC was unlawful by reason of an alleged improper delegation by the PSC to a panel which included members of the Executive branch of government. Mr Harshaw accepted that this is still a live issue. The respondents have not sought to strike out the application as an abuse or otherwise being academic or hypothetical. The amendment is made in good time before the hearing so that all parties have a proper chance to prepare to meet it. None of the parties are prejudiced by the amendment nor would it be unjust on any other ground to grant leave to amend on conventional principles.

21. I now turn to consider the application for leave to amend in the judicial review context. First, although the amendment comes long after the grant of leave, it does not rely on a new act that is outside the 6-month time limit or require additional evidence or involve additional disclosure obligations[5]. Second, the amendment is not a "rolling" judicial review because it seeks to add an alternative argument and the new declarations sought reasonably relate to the question of the validity of the recommendations the court needs to address under the original application[6].

22. Leave is therefore granted to amend in the form set out in the draft amended Form 86A and amended statement of grounds at JHB 3-29 of the Joint Hearing Bundle.

Protective Costs Orders

23. In reaching my decision in relation to the grant of a protective costs order, I have applied the conventional **Corner House** principles. It is useful to set out briefly the development of these principles from an earlier decision to put them in their context before applying them to the facts of the present case. This also assists the court to address the debate between the parties as to what extent those principles have been modified by later judicial statements.

24. The English court's decision in **R v Lord Chancellor ex p Child Poverty Action Group**[7] ("**Child Poverty Action Group**") by Dyson J (as he then was) was the modern precursor of **Corner House** which set the framework for the development of the principles in later cases which followed.

25. The court's approach to protective costs orders was explained by Dyson J in **Child Action Poverty Group** in the following terms[8]:

> *"In my judgment, the discretion to make pre-emptive costs orders even in cases involving public interest challenges should be exercised only in the most exceptional circumstances.*

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[5] **R (Trafford) v Blackpool Borough Council** [2014] 85 Admin.
[6] **Sec of State for the Home Department v R (Spahiu)** [2018] EWCA 2604.
[7] [1999] 1 WLR 347.
[8] At pages 355 F to 356 E.

The starting point must be the basic rule encapsulated in RSC Order 62 rule 3 (3) that costs follow the event. It is true that the role of the court in all public law cases is to ensure that public bodies do not exceed or abuse their powers, but the parties to such proceedings are nevertheless adverse as is the litigation.....I accept the submission of Mr Sales that what lies behind the general rule that costs follow the event is the principle that it is an important function of rules as to costs to encourage parties in a sensible approach to increasingly expensive litigation. Where any claim is brought in court, costs have to be incurred on either side against a background of greater or lesser degrees of risk as to the ultimate result. If it transpires that the respondent has acted unlawfully, it is generally right that it should pay the claimant's costs of establishing that. If it transpires the claimant's claim is ill founded, it is generally right that it should pay the respondent's costs of having to respond. This general rule promotes discipline within the litigation system, compelling parties to assess carefully for themselves the strength of any claim.

The basic rule that costs follow the event ensures that the assets of the successful party are not depleted by reason of having to go to court to meet a claim by an unsuccessful party. This is as desirable in public law cases as it is in private law cases....It is plainly right that in the normal run of the mill public law case, the unsuccessful party should pay the other side's costs. To this Mr Drabble would respond by saying that typical judicial review proceedings involve adversarial litigation, in which the applicant is seeking to promote or protect his or her own private interest: it does not raise a public interest challenge as defined. Nonetheless, in considering whether, and in what circumstances, there should be a departure from the basic rule that costs follow the event in public interest challenge cases, in my view it is important to have in mind the rationale for that basic rule, and that it is for the applicants to show why, exceptionally, there should be a departure from it."

26. Dyson J went on to say[9]:

"I conclude, therefore, that the necessary conditions for the making of a pre-emptive costs order in public interest challenge cases are that the court is satisfied that the issues raised are truly ones of general public importance and that it has a sufficient appreciation of the merits of the claim that it can conclude that it is in the public interest to make the order. Unless the court can be so satisfied by short argument, it is unlikely to make the order in any event. Otherwise, there is a real risk that such applications would lead in effect to dress rehearsals of the substantive applications, which, in my view, would be undesirable. The necessary conditions are not, however, sufficient for the making of an order. The court must also have regard to the financial resources of the applicant and the respondent, and the amount of costs likely to be in issue. It will be more likely to make an order where the respondent has a superior capacity to bear the costs of the proceedings than the applicant, and where it is satisfied that, unless the order is made, the applicant will probably discontinue the proceedings and will be acting reasonably in so doing."

[9] At page 358 C-E.

27. Thus, a protective costs order is only to be made as an exception to the general rule that the loser pays, having regard to the circumstances of the particular case, taking into account the point of general public interest involved, the likely costs that will be incurred, the relative resources available to the parties and the likelihood that if a protective costs order is not made, the applicant will reasonably decide to abandon the claim.

28. The Court of Appeal applied this approach and developed a statement of the key principles in **R (Corner House Research) v Secretary of State for Trade and Industry**[10] ("**Corner House**"). The present framework for the grant of a protective costs order requires the court to be satisfied that

    a. The issues raised in the proceedings are of general public importance;
    b. The public interest requires those issues to be resolved;
    c. The applicant has no private interest in the outcome of the case;
    d. Having regard to the financial resources of the applicant and the respondent and the amount of costs likely to be involved, it is fair and just to make the order;
    e. If the order is not made, the applicant will probably discontinue the proceedings and will be acting reasonably in doing so.

General public importance

29. Subsequent cases have refined the application of these principles. In **R (Compton) v Wiltshire Primary Care Trust**[11] ("**Compton**") the English Court of Appeal held that there is no absolute standard by which to define what amounts to an issue of general public importance.

30. An issue can qualify as one of general public importance even if it is not an issue which applies to a large number of people, and some issues may be in the first rank of public importance, and others of lesser public importance[12]. It does not need to be an 'exceptional' case in addition to raising an issue of general public importance, but as it is an 'exception' to the general rule, it is likely to be uncommon[13]. The degree of general public importance, and the court's assessment of all the **Corner House** factors, may shape the exercise of the court's discretion in limiting or qualifying the protective costs relief that is provided. The criteria set out in **Corner House** should not be applied in an overly restrictive way[14].

31. In **Child Action Poverty Group** Dyson J disapproved of engaging in a mini-trial of the issues but stated that the court must be able to see from a high-level assessment of the matters in issue that the case genuinely involves a point of general public importance. In **Corner House** Lord Phillips

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[10] [2005] EWCA Civ 192.
[11] [2008] EWCA Civ 749.
[12] **Compton** at [24] per Waller LJ and [75] and [86] per Lady Justice Smith.
[13] **Compton** at paragraph [82] per Lady Justice Smith.
[14] **Compton** at paragraphs [86] to [88] per Lady Justice Smith.

MR said that the test should be whether the application has a '*real prospect of success*'[15]. I have therefore kept my own review of the issues at a high level and as an 'in principle' assessment.

32. In this case, I am satisfied that the question as to whether and (if so) how far the PSC is entitled to rely upon, delegate to, follow the procedure directed by or follow guidance from the Executive branch in making its recommendations for appointment to public office under the Constitution is in principle a matter of general public importance.

33. Although it arises in a context of two specific recommendations for appointment, the process by which candidates are selected, screened, interviewed, and recommended for appointment to senior posts in the Executive branch is a matter which applies to all appointments to public office and engages processes which are governed by constitutional provisions which are designed to guarantee the integrity of the process as being fair and merit-based. A challenge to the process as lacking the appropriate degree of independence raises broader issues than the specific circumstances that apply to this case.

34. There has been no recently decided case which has examined the process, and while every case involving appointment to public office will clearly not justify treatment as a matter of general public importance, the appointments to the two most senior posts in the government's employed legal service, who are entrusted with carrying out duties and responsibilities at the highest level, carry a more significant degree of sensitivity and weight.

35. The issue of independent performance of the PSC's role has been raised squarely in the application and relates to matters about which the Court of Appeal has confirmed that the applicants have a sufficient interest to complain. There may be cases in which the court will seek to draw distinctions between issues which are genuine public issues and those that are not when granting protective costs relief but, in this case, it seems sufficiently clear to me that all of the issues raised in the case revolve broadly around the point described above.

36. In addition, the amendments described above introduce a question as to the proper interpretation of sections 82 and 89 of the Constitution, when read with section 56 of the Supreme Court Act 1905. On the interpretation advanced by the applicants, all public officers who are required to have legal qualifications for the conduct of their duties in office must be appointed by the Governor after consultation with the Chief Justice, not upon the recommendation of the PSC. If the applicants are right on their interpretation (as to which the court expresses no view at this stage) then this would mean that the appointments of the CPC and SG in this case (and potentially other public officers employed as lawyers in the government service) were not made with constitutional authority and were unlawful. This is a matter of general public importance.

[15] At [143].

The public interest requires those matters to be resolved

37. Mr Johnston submitted that once a constitutional claim is raised, the court "*should lean towards granting a protective costs order*" based on a decision of the Cayman Grand Court[16]. I am not prepared to go further than to say that a constitutional element is usually an important factor to be taken into account. Not all issues of a constitutional character will require determination in every context. There is in my view no general rule that all constitutional cases are suitable for the grant of special dispensation from the ordinary rule that parties who bring unsuccessful claims and those who resist successful claims must pay the other side's costs. It will always depend on the court's assessment of the particular circumstances in each case. That is the essence of Dyson J's explanation quoted above. Therefore, I do not accept Mr Johnston's submission that the **Corner House** principles have been modified to require protective costs order relief to be given in every case in which an arguable constitutional issue is raised.

38. That said, given the importance of the separation of constitutional functions to ensure that each organ of government in a modern constitutional democracy operates within its legitimate powers and performs only the respective separate functions that the constitution reposes in each respective organ, it seems to me that the public interest does require the principal issue(s) raised in this case to be resolved. This goes to whether the public can have confidence in the PSC's recommendation process, as well as confidence in a private citizen's ability to challenge the process in practical terms.

39. In addition, the posts concerned are the two most senior posts of employment in the government's legal service (the Attorney General not being appointed by the PSC). The proper interpretation and application of sections 82 and 89 of the Constitution in relation to public officers who are also lawyers (including the CPC and the SG) raises an issue of general public importance which the public interest requires the court to determine. It is of general public importance that all appointments to public office are made applying the correct relevant constitutional authority. This point, apparently raised for the first time, needs to be addressed in a definitive way for the present and future guidance of those responsible for making those appointments, if there is any arguable room for doubt.

40. I am therefore satisfied that, taken together, the public interest does require the issues (as described above) to be determined. As Mr Johnston rightly submitted, the court is required to interpret and uphold constitutional values and to enforce constitutional limitations[17].

No private interest disqualification

41. This element is finely balanced in this case. In **Tucker v Public Service Commission**[18] the applicant criticised the process of selection of another candidate as a result of (inter alia) (a) an alleged improper constitution of the interview panel (b) an improper delegation of the Board of

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[16] **Roulstone v Cabinet of the Cayman Islands** [2020] 1 CILR 224.
[17] Citing **AG of Trinidad & Tobago v Dumas** [2017] 1 WLR 1978 JCPC at 1985 A approving Bhagwati J in the Supreme Court of India in **State of Rajasthan v Union of India AIR** 1977 SC 1361 at [143].
[18] [2020] CA (Bda) Civ 13.

Education's functions and (c) an alleged failure of the PSC to conduct an independent selection process. The claims made by the applicants in this case bear a striking similarity.

42. On an appeal in relation to costs in that case, the Court of Appeal made the observation (albeit *obiter*[19]) that the essential issues in that case related to a personal claim and would not have justified a protective costs order[20]. Similarly, this court[21] has previously refused an application for a protective costs order where the applicant was seeking relief against the Police Complaints Authority in a case which involved an alleged failure to investigate a complaint of abusive conduct on the grounds that the dominant motive for the claim was for personal redress against alleged infringements of his personal dignity.

43. Ms Lawrence's application seeks to set aside the recommendation to appoint someone other than herself to the post of CPC, on the grounds that she was qualified (or is to be treated as having been qualified) and is a Bermudian, and was entitled to preference in selection, all other things being equal. This aspect of her claim is therefore steeped in her personal interest.

44. Mr Johnston's case is that the advertisement wrongly excluded potential applications to the post of SG from persons (including himself) who met the criteria set out in the (then) approved job description. This is possibly a broader class of potential public interest because the advertising error excluded other potential applicants, but the basic interest in obtaining the relief is grounded in Mr Johnston's personal exclusion from the field of potential applicants.

45. However, against that, the court considers that an evaluation of the extent to which the performance of the functions of the PSC must be carried out independently from the Executive is inextricably linked to the process of recommendation for appointment to HE Governor. It is difficult to see how any claim that the PSC has failed to perform its constitutional role independently could ever be raised unless it involves a challenge to a recommendation for an appointment to a public office. In practical terms, this must inevitably require a disappointed applicant to dispute the independence of the recommendation.

46. Although the issues have arisen in the context of applications for employment in the public service, on balance, in my judgment, the element of private interest should not be allowed to override the elements of general public importance in the case. First, the government is the largest employer on the island, and all appointments to public office are based on the independent recommendation of the PSC. That the process is conducted in accordance with the limits of the Constitution is of both wide public interest as well as being of general public importance.

47. Second, those appointments must be made within the lawful confines of the constitutional authority of HE Governor, after following the designated consultation process, which is now in dispute. This is also a matter with potentially wide implications and is of general public

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[19] The issue the Court of Appeal was addressing was the costs of the appeal only (see [9]). The appellant had not in fact sought a protective costs order in the court below.
[20] Per Smellie JA at [47].
[21] **Amir Mizrachy v Police Complaints Authority** [2026] SC (Bda) 30 civ.

importance. The element of private interest (namely the application for potential employment) is, in my view, an indivisible part of the principal questions the court is being asked to examine and determine.

48. It is established law that the existence of a private interest is not (of itself) a bar to the grant of protective costs relief[22]. The court is required to take a flexible approach to the application of the principles in the round and make an overall assessment.

49. Taking that broad and flexible approach to the issues in this case, the court agrees that the degree of public interest in having the matter resolved displaces the element of private grievance in the overall assessment of the **Corner House** principles and concludes that the element of private interest in this case should not disqualify the applicants from seeking a protective costs order.

Financial resources

50. This point also gives rise to some finely balanced nuances. It is obvious that the financial resources of the applicants do not match those of the respondents. But it is also clear that the applicants have resources from which they could pay an adverse costs order if they are ultimately unsuccessful.

51. Mr Johnston submitted that the respondents will only be entitled to one set of costs if the applicants fail, based on the principle that the respondents are different emanations of the State and can decide between themselves how they wish to run the case, but they represent the same interest and so can only expect one award of costs between them[23].

52. While I agree that the second, third and fourth respondents may be regarded as separate emanations of the State, I do not accept Mr Johnston's submission that the PSC is an emanation of the State in this context because it is clear that the PSC is a separate organ of the constitutional framework (indeed his case depends upon it). I am therefore hesitant to accept (without hearing full argument) that the PSC represents the same legal interest as the second, third and fourth respondents. Clearly, HE Governor (and the prerogative functions that are reposed in the office of Governor as representative of the Crown) is also a separate organ of the constitutional framework, so that office also does not fall into the category of an 'emanation of State' in this context.

53. This engages the court's discretion to weigh the degree of public interest and the element of private interest, the constitutional context of the responsibilities that are under review, as well as evaluation of the financial considerations identified in **Corner House** and **Compton**, and the extent to which the applicants have met all the criteria for the grant of relief.

54. In weighing these factors, I have accepted that the issues raised are of general public importance, and the public interest requires them to be determined, but the issues raised do carry a strong

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[22] **Wilkinson v Kitzinger** [2006] EWHC 835 Fam at [54] and **R (Compton) v Wiltshire Primary Care Trust (supra)** ("**Compton**").
[23] **Tucker v PSC and Board of Education** [2020] CA (Bda) civ 13 at [50].

element of private interest. The applicants do have financial resources available and so it is also right that they should carry some liability to meet the respondents' costs if they are unsuccessful, in the normal way.

55. In light of the much narrower focus of the issues that the court will now be required to decide, the absence of cross-examination of witnesses and the absence of any lengthy disclosure process, the court considers that it should be possible to achieve the determination of the issues in the case within a reasonable financial limit. The hearing will substantially involve legal argument. The matter has been listed for three days but the parties acknowledge that this is likely to be an overestimate of the hearing time required.

56. The PSC and the second, third and fourth respondents opposed the grant of a protective costs order on the grounds that the declarations and issues to be determined were essentially private grievances and did not give rise to issues of general public importance that the public interest required to be determined. In the alternative, the respondents (apart from HE Governor who took no position on this point) proposed a limit on the costs payable by the applicants of BD$100,000.00 in the event they are unsuccessful. They also say that the applicants should not recover any costs in the event they are successful.

57. However, I can see that the legal arguments advanced in answer to the applicants' case by the PSC and the second, third and fourth respondents are very likely to cover much of the same territory. In my view it would not be just to impose a duplicated burden of costs on the applicants, even though the legal interests represented by the PSC, the second to fourth respondents and the fifth respondent are (in my view) different. Likewise, the court must apply the protective costs order in a just, proportionate and even-handed manner.

58. The court's jurisdiction to grant relief is flexible and is not restricted to any particular form of relief. While the costs protection must be applied fairly (as far as possible) as between the parties, this does not mean that the protection must match equally[24].

Limited protection

59. I am persuaded that the appropriate course is to grant some (but not total) relief in respect of the potential costs liabilities that will be incurred. In setting these limits I have also taken into account the unresolved costs liability in relation to the recusal application which falls outside the 'issues of general public importance' arena, which I will explain in more detail below.

60. Doing the best the court can, taking into account the issues in the case, the evidence as to the applicants' limited resources compared to the resources of the respondents, and using experience as a guide, it seems to me that it would be just, fair and proportionate to limit the applicants' exposure to an adverse costs order to BD$25,000 each (as they are separate parties) or BD$50,000 in total in respect of the combined standard taxed costs of the respondents as a whole.

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[24] **Compton** at [86] per Lady Justice Smith.

61. I do not consider that it is appropriate to reduce the applicants' costs exposure to zero in recognition of (a) the general rule that a party who engages in litigation is expected to face liability for (at least some) of the other side's costs if they lose, (b) the evidence that the applicants have some resources which can reasonably be applied to meeting at least a proportion of those potential costs (c) the dilution of the element of public interest by the private interests of the applicants and (d) the court's experience that a complete immunity from the consequences of unsuccessful litigation tends to 'dull the edge of husbandry'.

Retrospective effect

62. Although a protective costs order is normally only prospective in effect, the court can grant relief after the hearing in some cases[25]. Here, the application could and should have been made at the outset of the proceedings before any substantial costs were incurred. While an intention to apply was stated in the originating materials, no application was actually made until just before the case management hearing. Ordinarily, these facts would not justify retrospectivity.

63. I am, however, prepared to extend the protection to cover the costs incurred from the outset of the proceedings as an exception to the general rule for the reasons set out below. The actual inter-party costs that have been incurred in the case can be grouped under five headings: (i) the initial application for leave to commence judicial review proceedings (ii) the application for leave to appeal to the Court of Appeal in respect of the limitations on the grant of leave to issue the judicial review proceedings (iii) the appeal to the Court of Appeal in relation to the scope of leave (iv) the applicants' recusal application and (v) the applicants' appeal to the Court of Appeal in relation to the recusal application. While the first three categories relate to the scope of the issues to be determined in the case, the latter two do not. I will address this distinction below.

64. The costs incurred in relation to the first three categories can reasonably be seen as preliminary matters which needed to be addressed before the case could come on for hearing for directions. The applicants obtained relief from the Court of Appeal and then the matter came back to the court for directions. Up to that point, very little else had been done in the case.

65. Taking matters in the round, with some hesitation, I am therefore satisfied that it is appropriate to allow the applicants to have the protection from costs exposure in relation to the costs that relate to categories (i), (ii) and (iii) from the commencement of the proceedings.

Equal and proportionate relief

66. The court considers that the relief granted to the applicants must be balanced by a similar protection in favour of the respondents as a matter of parity and fairness. If the applicants rely upon the combined limitation of costs up to BD$50,000.00 of the respondents' total standard taxed costs as a whole, then it seems to me that as a matter of equality of arms and proportionate case management, the applicants may not enforce any costs awarded to them in excess of BD$25,000.00 each (or BD$50,000.00 in total) against the respondents as a whole. This

[25] **Corner House** at [74] per Lord Phillips MR.

limitation will necessarily include the costs awarded in relation to the appeal to the Court of Appeal in relation to the scope of the leave granted by the court (category (ii)) [26].

Recusal application costs

67. The second limitation is that the protection given to the parties will not apply to the costs of the recusal application (i.e. costs falling into categories (iv) and (v)). This court reserved the costs of the recusal application pending the outcome of this application[27]. I consider that it is appropriate to determine liability for those costs at the conclusion of the proceedings. The Court of Appeal ordered that the costs of the appeal in relation to the recusal application should be the costs in the cause and will follow the event of these proceedings[28].

68. It seems to me that the recusal application costs, both in this court and on appeal, are not properly within the scope of the protective costs order. This is because those costs did not relate to the determination of issues which are of general public importance or attract the public interest element of the substantive application, and therefore they fall outside the limits of the court's protective costs order jurisdiction.

69. Therefore, the responsibility for the costs of the recusal application before me will remain at large until the end of the action, and the costs of the appeal to the Court of Appeal on the recusal appeal will follow the event in accordance with its order.

Probability of discontinuance

70. The applicants have not put in evidence to say that if they do not receive costs protection that they will have no choice but to discontinue the proceedings and will be acting reasonably in so doing. Although this is also a requirement of the **Corner House** principles, it is tolerably clear from the evidence that there must be some potential risk of this happening if no protection is given at all.

71. Having concluded that the application raises issues of general public importance which the public interest requires be determined, in my view it would be inconsistent for the court to deny the protection simply on the ground that there is no direct evidence of a probability that the applicants will discontinue the proceedings if they are denied a protective costs order. The absence of a clear statement of the applicants' intentions in this regard is, however, a factor that I have taken into account in setting the limits of protection set out above.

72. It seems to me that the costs protection afforded to the applicants is sufficiently generous to provide an adequate safeguard to ensure that the applicants will not be driven from the judgment seat on financial grounds. This should not be taken as formulating a rule of general application; it is the court's assessment of the right thing to do on the particular facts of this case.

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[26] **Lawrence and Johnston v PSC et al** [2025] CA (Bda) 14 Civ at [45] (d): costs were awarded to the appellants as costs in action 2024/364.
[27] [2026] SC (Bda) 23 civ at [59].
[28] [2026] CA (Bda) Civ 15 at [34].

Conclusion

73. Applying all the factors set out in the **Corner House** principles, the court is satisfied that costs protections to all parties set out above are fair and just and are geared to promote the fair and efficient determination of the issues at the trial in accordance with the Overriding Objective.

Other directions

74. The court also gave other directions for the conduct of the hearing and set a three-day hearing on 16, 17 and 18 December 2026 for the trial. Directions were agreed for (i) the preparation of a combined hearing bundle to be served by the applicants 21 days before the hearing (ii) the applicants are to serve skeleton arguments 14 days before the hearing (iii) the respondents are to serve skeleton arguments 7 days before the hearing and (iv) that the court reserved the costs of the case management hearing to be dealt with at the conclusion of the trial.

Order

75. The parties will prepare an Order in agreed form to reflect the terms of the Ruling set out made above.

24 November 2026

THE SEAL OF THE SUPREME COURT OF BERMUDA

THE HON. MR. JUSTICE ANDREW MARTIN

PUISNE JUDGE OF THE SUPREME COURT