[2018 Gib LR 127]

FRANCIS and OTHERS v. ATTORNEY-GENERAL (SERUYA intervening)

COURT OF APPEAL (Smith and Rimer, JJ.A. and Dudley, C.J.): June 16th, 2018

Landlord and Tenant—rent—rent control—landlord's right to enjoyment of property under Constitution, s.1 breached by reduction in rental income caused by Housing (Amendment) Act 2013 (i.e. fixed statutory rents for properties built between 1945–1959 if tenancies pre-date June 1st, 2008)—no apparent public benefit to justify significant interference with landlord's constitutional right

The appellants sought a declaration that the Housing (Amendment) Act 2013 violated their right to the enjoyment of property, as protected by s.1(a) of the Constitution.

The appellants were the trustees of an estate which included a property built in the early 1950s consisting of 41 residential tenancies and 5 business tenancies. Prior to the Housing (Amendment) Act 2013, which amended the Housing Act 2007, rents in the building had been determined by the Rent Assessor according to the Statutory Rent (Forty-Five Year Rule) Regulations 1992.

The Housing Act 2007, ss. 40(1)(a) and 41 had provided:

"40.(1) Subject to the provisions of this Act, this Part shall apply to dwellings but only to the following extent, namely—

(a) it shall apply to every dwelling that has been erected on or before the 1st March 1959 . . .

41. Except where otherwise provided in this Act, the statutory rent of any dwelling to which this Part applies shall be the rent appropriate to that dwelling as assessed by the Rent Assessor in accordance with the criteria set out in Part 1 of Schedule 4 and such further criteria as may be prescribed."

A legal notice in 2008 had provided, however, that s.40 should not be implemented and that dwellings erected between January 1st, 1945 and March 1st, 1959 should continue to be subject to ss. 10–11A of the 1983 Act, which originally provided:

"10.(1) Subject to the provisions of this Act, this Part shall apply to dwellinghouses but only to the following extent, namely:

(a) it shall apply to every dwellinghouse that has been erected on or before the 1st day of January of the year preceding by 45 years the 1st day of January of the current year . . .

11. Except where otherwise provided in this Act, the statutory rent of any dwellinghouse to which this Part applies shall be the rent appropriate to that dwellinghouse as calculated in accordance with Schedule 1.

11A.(1) Where a dwellinghouse not being one to which this Part applies, becomes by virtue of the operation of section 10(1)(a) a dwellinghouse to which this Part applies—

(a) the tenant may make application to the Rent Assessor to determine the statutory rent in respect of that dwellinghouse . . ."

Section 10(1)(a) of the 1983 Act had been amended by the Landlord and Tenant (Amendment) Act 2004, s.2, but s.11A had not been amended or repealed. Section 2 provided:

"The Landlord and Tenant Ordinance is amended in section 10(1)(a) by substituting the words 'the 1st day of January of the year preceding by 45 years the 1st day of January of the current year' with the words 'the first day of March 1959'."

The 2013 Act provided for fixed statutory rents for properties that had been built between 1945 and 1959, and which were rented out under tenancies entered into before June 1st, 2008. The Act provided:

"Title and commencement.

1.(1) This Act may be cited as the Housing (Amendment) Act 2013 and comes into operation on the date of publication in the Gazette.

(2) Sections 40 and 113(3) of the Housing Act 2007 shall, for the purposes of dwelling houses erected after the 1st day of January 1945 and on or before the 1st day of March 1959 come into operation on the commencement of this Act.

(3) Sections 10 and 11A of the Landlord and Tenant Act shall, for the purposes of dwelling houses erected after the 1st day of January 1945 and on or before the 1st day of March 1959, cease to apply on the commencement of this Act.

Amendment of the Housing Act 2007.

2.(1) The Housing Act 2007 is amended in accordance with this section.

(2) For paragraph (a) of section 40(1) substitute—

'(a) it shall apply to every dwelling that has been erected on or before the 1st March 1959; and'.

(3) For section 40(8) substitute—

'(8) This Part shall not apply to any dwelling house that has been erected after the 1st March 1959, or to any tenancy to which the former Act did not apply.'"

The 2013 Act substantially reduced the rent the appellants could charge for 23 of the residential tenancies in the property from Rent Assessor rents to lower fixed statutory rents. This resulted in an alleged reduction of rental income of more than 50% and was said to have prevented the appellants from properly maintaining the building.

The appellants brought proceedings in the Supreme Court seeking a declaration that the 2013 Act violated their right to the enjoyment of property as protected by s.1(a) of Annex 1 to the Gibraltar Constitution Order 2006. They accepted that, in general, rent control measures were for the benefit of the public and did not amount to a violation of their rights but submitted that the 2013 Act could not be justified. It had no discernible underlying policy that could be said to be for the public benefit; no special problem had been identified that required rectification. The Act did not benefit the public but only a limited number of people. When the Bill was moved in Parliament by the Chief Minister, the only explanation given to Members had been that the purpose of the amendments was to end the distinction between buildings erected before 1945 and those erected between 1945 and 1959 so as to put all buildings erected before March 1st, 1959 in the same regime for the calculation of rents. The Minister had not identified any public interest and, as the measure interfered with the appellants' enjoyment of their property, it could not be justified and violated their constitutional rights. Alternatively, if there were some public interest or benefit in the measure, it was disproportionate to the financial burden on the appellants and therefore violated their rights.

The Supreme Court (Ramagge Prescott, J.) dismissed the claim (that decision is reported at 2017 Gib LR 172). The judge held that the burden lay on the appellants to prove that the 2013 Act was unconstitutional. She considered inter alia that the 2013 Act was part of a general rent control scheme and that it had a clear and legitimate purpose to correct what the promoter of the Bill thought had been a mistake in 2004 when Parliament did not repeal s.11A of the Landlord and Tenant Act 1983 and the 1992 Regulations. All buildings erected before March 1st, 1959 were to be subject to rent control and to fall within the same regime. The judge considered that Parliament was entitled to consolidate and simplify the rent control legislation. She accepted that the rent of 23 apartments had been reduced from £500 per month to between £100 and £150 per month

but did not find that the low rents prevented the appellants from properly maintaining the building. The judge considered the 2013 Act to be a general regulatory measure passed for the public benefit. The judge did, however, go on to conduct a proportionality exercise, according to the four-stage test set out by the UK Supreme Court: (i) whether the objective was sufficiently important to justify the limitation of a fundamental right; (ii) whether it was rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether a fair balance had been struck between the rights of the individual and the interests of the community. The judge concluded that all four limbs of the test were satisfied and the interference with the appellants' enjoyment of property caused by the 2013 Act was justified and proportionate.

On appeal, the appellants submitted that (i) the judge erred in holding that the 2013 Act was a general regulatory measure enacted for the public benefit as the Act did not meet any perceived social need; rather it was a "tidying up" measure; (ii) as the Act was not enacted for the public benefit, it did not attract the "wide margin of appreciation" or light touch scrutiny enjoyed by general welfare legislation, and the judge erred in applying that wide margin of appreciation; (iii) the judge erred in equating the 2013 Act with earlier Acts dealing with rent control, all of which had been promoted in Parliament on the basis of a perceived social need at that time, whereas no social need had been advanced to justify the 2013 Act and the judge had erred in attributing to this measure the social policy identified on earlier occasions; (iv) the judge erred in her approach to proportionality in that she did not examine the particular effects of the 2013 Act or balance the way in which it met a social need against its detrimental effect on the landlords; (v) the judge erred in holding that, as the 2013 Act gave effect to what had been the Government's intention in 2004, the appellants' claim was answered; (vi) the judge erred in holding that the burden of proving unconstitutionality remained solely on the appellants; once the judge had accepted that the measure interfered with the appellants' right to the enjoyment of property, she should have held that the burden shifted to the respondent to show that the legislation pursued a legitimate aim, to explain what that aim was and on what basis the measure was a necessary and proportionate means of achieving the aim; (vii) the judge was wrong to consider that the appellants' claim was answered by a previous decision of the Court of Appeal (*Rent Tribunal* v. *Aidasani* (2001–02 Gib LR 21)); and (viii) the judge was wrong to hold that the 2013 Act would not result in significant difficulties for the landlords in maintaining and repairing the building.

The Attorney-General maintained that the judge was correct on all points.

Held, allowing the appeal:

(1) The court dealt with the first three grounds of appeal together. It agreed with the judge's conclusion that the 2013 Act was a general regulatory enactment. An amending Act took on the general character of

the original Act. As the 2007 Act was a general regulatory enactment so was the 2013 Act, even though it contained only one provision which affected only a relatively small number of people. However, in so far as the judge found that the 2013 Act had been enacted in the public benefit, her reasoning was open to question. Before she could properly have held that the 2013 Act had been passed for the public benefit, she should have examined the social purpose of the 2013 Act itself in more depth than she did. Rent control measures were usually for the public benefit but it did not follow that every rent control measure would be. It could not be assumed that because an original Act created some public benefit, an amendment would also do so. One would need to look for some explanation for why the amendment was thought desirable and how it served the public interest. The court agreed that Parliament was entitled to rationalize and simplify the criteria by which dwellings fell into the rent control net. When it was alleged, as in the present case, that a constitutional or fundamental right had been infringed, there had to be careful consideration of the specific provision in question to identify the public benefit that might justify the infringement. The judge had not asked herself what public benefit there was in rationalizing the criteria and there had been no evidence before her as to any perceived problem that the Government had wished to rectify. There was no evidence that simplification and rationalization were needed, and no evidence of administrative problems or waste of resources. In any event, very little simplification was brought about because the assessed rent regime continued in existence after the 2013 Act, applying to all post-2008 tenancies. There was no evidence that tenants of 1945–1959 properties were suffering hardship under the assessed rent regime. There was a complete absence of evidence as to what social policies lay behind the Act. The judge was wrong to conclude that the Act was in the public interest simply because it was part of a general scheme of rent control which had operated for years and that this was a change that Parliament was entitled to make. She should have examined the specific measure to identify the public interest that it served but she did not do so. When subjected to close scrutiny, it was hard to see what the public benefit was. It did not increase the stock of housing available to the public at affordable rents. It reduced rents only for those tenants of 1945–1959 dwellings whose tenancies had commenced before 2008. It therefore benefited only a closed group. The court was unsure whether a closed group could properly be classed as the public. Even if it could, the public benefit of the 2013 Act was unusual and very restricted. The judge did not appear to appreciate this. The modern approach to cases of this kind, rather than determining whether an Act was a general regulatory measure enacted for the public benefit, was for the court to determine whether an Act derogated from a claimant's rights and, if it did, to consider the issues of rationality and proportionality (according to Lord Sumption's four-stage test in *Bank Mellat* v. *H.M. Treasury (No. 2)*). This approach required the judge to balance the significance of the public interest benefit against the gravity of the effect on the claimant. In the

present case, even if it could be said that there was some public interest in the passage of the 2013 Act, the judge erred in holding that the Act was for the public benefit because of its historical position within a general scheme of rent control and therefore could only be impeached if it was manifestly irrational (paras. 51–61).

(2) The judge treated the Government's claimed intention to correct an error made in 2004 in the rent control scheme as one of the objectives of the Act and no more than that. She appeared to accept that the 2013 Act gave effect to the Government's intention in 2004. The only evidence of that was an assertion to that effect by the Chief Minister but that assertion was not supported by an examination of Hansard when the 2004 Act was passed, nor by the decision of the Chief Justice in the earlier decision in *Francis (Trustees)* v. *Balban*. If the judge based her conclusion on this issue it would have been on shaky ground, but she did not consider the issue to have answered the claim (para. 65).

(3) The judge was also entitled to reach the conclusion that the 2013 Act had not resulted in significant hardship for the appellants in maintaining and repairing the building. That conclusion was essentially an assessment of the factual evidence. The conclusion was relevant to the evaluation of the severity of the interference with the appellants' constitutional rights. It did not mean that there had not been any such interference. A reduction in rent of 70% in respect of over half of the apartments in the building must, on any view, amount to an interference. Whether the interference was justifiable or proportionate could not be determined without considering and balancing the importance of the objectives (para. 66).

(4) So far as the burden of proof was concerned, once it had been shown by a claimant that his constitutional right was affected he could not then bear the evidential burden of proving that the measure was not justified. Only the legislature could say what the objective of the measure was and explain its importance. It was then for the court to evaluate the importance of the legislature's objective and the severity of the derogation of the claimant's rights and to balance them. In so doing, the court would bear in mind, to the degree that was appropriate in the context, the deference that should be given to the knowledge and expertise of the legislature. The court had also to bear in mind that it had to exercise caution before declaring a measure to be unconstitutional and to grant the legislature a wide margin of appreciation. The expression "burden of proof" was not a helpful concept in this exercise (para. 69).

(5) The judge failed to apply the four-stage proportionality test properly or at all. In relation to the first limb of the test, *i.e.* whether the objective of the 2013 Act was sufficiently important to justify the limitation of a fundamental right, the judge took too general an approach to the identification of the objective of the Act. It was not sufficient to say that the objective was rent control. There was a need to examine the particular

purpose of the provision in question and then to consider whether that objective was sufficiently important to justify the interference with a constitutional right. Rent control measures might well be sufficiently important to justify interference with a constitutional or fundamental right but it did not follow that all rent control measures would do so. The court had to look at the individual measure, identify its objective, and consider whether that particular objective was of sufficient importance to justify interference with a constitutional right. The judge also erred in relation to the second limb of the test, *i.e.* whether the 2013 Act was rationally connected to the objective, because her conclusion on that limb was wholly dependent on her conclusion on the first limb. In respect of the third limb of the test, *i.e.* whether a less intrusive measure could have been used, it was not sufficient to say that this limb was met merely because the legislature's judgment about what lay in the public interest had a reasonable foundation. The third limb could not be approached unless and until the specific objective or objectives of the measure had been established and consideration given to any proposal as to another and less intrusive way of achieving the same end. Judges did not have to try to think of an alternative proposal themselves. It would have been sufficient in the present case if the judge had said that no one had suggested an alternative proposal which would have achieved the same end. The fourth limb of the test required the judge to consider whether, having regard to these matters and to the severity of the consequences, a fair balance had been struck between the rights of the individual and the interests of the community. The judge's consideration of this limb was inadequate. She did not identify the policy objective underlying the measure and without that she could not evaluate its importance or balance it against the effect on the appellants. The deficiencies in the judge's approach were that she did not discuss the underlying policy of the Act or note the absence of any underlying social policy or objective. She did not consider the social need (or lack of it) to simplify the arrangements for determining which properties fell within the fixed rent regime or the assessed rent regime. As the judge had not identified and evaluated the objectives underlying the measure, she was unable to carry out the essential process required by the proportionality test (paras. 72–76; paras. 84–85).

(6) The court applied the proportionality test itself. It started from the premise that the 2013 Act did interfere with the appellants' constitutional right to enjoyment of their property, namely the rents and value of the building. It appeared not to be disputed that the rents of 23 of the 41 apartments in the building were reduced from about £500 per month to between £100 and £150 per month, and that the tenants of those 23 apartments became entitled to two successions which significantly increased the likely length of those tenancies. The court accepted the judge's finding of fact that the rent reduction did not prevent the appellants from maintaining the building but there was nonetheless a substantial interference with the appellants' right to the enjoyment of their property which required the court to decide whether that interference was justified

by the importance of the public interest to be served by the 2013 Act, *i.e.* whether it was a proportionate means of achieving the desired objectives. There were three potential objectives to be examined. First, one of the objectives of the Act was said to be the rationalization or simplification of the criteria by which it was to be decided into which category of rent control any tenancy fell. That was not in itself a social policy objective but a practical one. One had to look behind the practical objective to ascertain the social policy it served. There had been no explanation of the underlying objective. There was no suggestion that the old arrangements were cumbersome, wasteful of resources or in any way caused difficulty. The measure did not reduce the two separate systems of rent calculation to one; indeed, by bringing more tenancies into the fixed rent regime its operation would tend to delay the time when the fixed rent regime was phased out. Secondly, the Chief Minister had claimed that Parliament had intended in 2004 to repeal s.11A of the Landlord and Tenant Act 1983 as amended and the 1992 Regulations. If done, that would have had the effect of putting an end to the assessed rent regime. There would no longer have been any statutory framework for the Rent Assessor to apply. The court, however, found the Chief Minister's statement puzzling. There was no hint of such an intention in Hansard for 2004 and in an earlier case it had been held that there was no evidence that the failure to repeal s.11A and the Regulations had been accidental. It seemed that all the Chief Minister could have meant was that some Members of Parliament thought that those provisions should have been repealed in 2004. However, the 2013 Act did not repeal the provisions relating to the Rent Assessor; they remained in operation although slightly modified. The court could not see what social problem was being tackled or what social benefit was being promoted by the correction of any previous error even supposing that there had been an error in the first place. Thirdly, the real objective underlying the 2013 Act seemed to be that rents would be reduced for tenants of pre-2008 tenancies in buildings erected between 1945 and 1959. That effect was not made clear in Parliament as a transparent democratic process usually required. The result of the Act seemed almost capricious, providing one group of tenants with a windfall. The court would answer the first limb of the four-stage test by saying that it could not detect any objective behind the measure related to any social policy or which sought to meet any recognized need or remedy any recognized problem. In so far as the measure had any objective that was capable of benefiting the public, it could not be said to be of sufficient importance to justify any significant interference with a constitutional right. The measure failed the proportionality test at the first stage. If the court were wrong and it was necessary to examine the second limb of the test, only the objective of reducing the rents of the pre-2008 group of tenants was rationally connected to the means adopted. It was not necessary to examine the third limb of the test. As the objectives were wholly unclear, it would be a pointless exercise to consider whether they might be achieved in some other way. The objectives behind the 2013 Act could not and did not justify the significant

interference it caused to the appellants' constitutional right of enjoyment of property. It could not be rationally justified. The court would therefore allow the appeal (paras. 86–95).

Cases cited:

(1) *Arorangi Timberland Ltd.* v. *Minister of the Cook Islands National Superannuation Fund*, [2016] UKPC 32; [2017] 1 W.L.R. 99, considered.

(2) *Bäck* v. *Finland*, [2004] ECHR 360; (2005), 40 E.H.R.R. 48; [2005] BPIR 1, considered.

(3) *Bank Mellat* v. *H.M. Treasury (No. 2)*, [2013] UKSC 39; [2014] A.C. 700; [2013] 3 W.L.R. 179; [2013] 4 All E.R. 533; [2013] H.R.L.R. 30, applied.

(4) *Bittó* v. *Slovakia*, E.Ct.H.R., Application No. 30255/09, January 28th, 2014, referred to.

(5) *Francis (Trustees)* v. *Balban*, 2007–09 Gib LR 229, referred to.

(6) *Grape Bay Ltd.* v. *Att.-Gen. (Bermuda)*, [2000] 1 W.L.R. 574; [2000] 1 L.R.C. 167; (1999), 57 W.I.R. 62, not followed.

(7) *James* v. *United Kingdom*, [1986] ECHR 8793/79; (1986), 8 E.H.R.R. 123; 75 ILR 396; [1986] R.V.R. 139, referred to.

(8) *Mellacher* v. *Austria*, [1989] ECHR 25; (1990), 12 E.H.R.R. 391, considered.

(9) *R. (Spath Holme Ltd.)* v. *Environment Secy.*, [2001] 2 A.C. 349; [2001] 2 W.L.R. 15; [2001] 1 All E.R. 195; (2001), 33 H.L.R. 31; [2001] 1 E.G.L.R. 129, distinguished.

(10) *Rent Tribunal* v. *Aidasani*, 2001–02 Gib LR 21, considered.

Legislation construed:

Housing Act 2007, s.40(1)(a):

"Subject to the provisions of this Act, this Part shall apply to dwellings but only to the following extent, namely—

(a) it shall apply to every dwelling that has been erected on or before the 1st March 1959 . . ."

s.41(1): "Except where otherwise provided in this Act, the statutory rent of any dwelling to which this Part applies shall be the rent appropriate to that dwelling as assessed by the Rent Assessor in accordance with the criteria set out in Part 1 of Schedule 4 and such further criteria as may be prescribed."

Housing (Amendment) Act 2013, ss. 1–2:

"**Title and commencement.**

1.(1) This Act may be cited as the Housing (Amendment) Act 2013 and comes into operation on the date of publication in the Gazette.

(2) Sections 40 and 113(3) of the Housing Act 2007 shall, for the purposes of dwelling houses erected after the 1st day of January 1945 and on or before the 1st day of March 1959 come into operation on the commencement of this Act.

(3) Sections 10 and 11A of the Landlord and Tenant Act shall, for the purposes of dwelling houses erected after the 1st day of January 1945 and on or before the 1st day of March 1959, cease to apply on the commencement of this Act.

Amendment of the Housing Act 2007.

2.(1) The Housing Act 2007 is amended in accordance with this section.

(2) For paragraph (a) of section 40(1) substitute—

'(a) it shall apply to every dwelling that has been erected on or before the 1st March 1959; and'.

(3) For section 40(8) substitute–

'(8) This Part shall not apply to any dwelling house that has been erected after the 1st March 1959, or to any tenancy to which the former Act did not apply.'"

Landlord and Tenant Act 1983, s.10:

"Subject to the provisions of this Act, this Part shall apply to dwellinghouses but only to the following extent, namely:

(a) it shall apply to every dwellinghouse that has been erected on or before the first day of March 1959 . . ."

s.11(1): "Except where otherwise provided in this Act, the statutory rent of any dwellinghouse to which this Part applies shall be the rent appropriate to that dwellinghouse as calculated in accordance with Schedule 1."

s.11A: "Where a dwellinghouse not being one to which this Part applies, becomes by virtue of the operation of section 10(1)(a) a dwellinghouse to which this Part applies—

(a) the tenant may make application to the Rent Assessor to determine the statutory rent in respect of that dwellinghouse . . ."

Landlord and Tenant (Amendment) Act 2004, s.2:

"The Landlord and Tenant Ordinance is amended in section 10(1)(a) by substituting the words 'the 1st day of January of the year preceding by 45 years the 1st day of January of the current year' with the words 'the first day of March 1959'."

Gibraltar Constitution Order 2006, Annex 1, s.1: The relevant terms of this section are set out at para. 3.

J. Restano, *Q.C.*, *R. Pennington-Benton* and *M. Levy* for the appellants;
J. Neish, *Q.C.* and *L.-A. Saez* for the respondent;
The intervenor appeared in person.

1 **SMITH, J.A.:**

Introduction

This is an appeal from the judgment of Ramagge Prescott, J. in the Supreme Court of Gibraltar dated July 28th, 2017. The judge refused to make a declaration that the Housing (Amendment) Act 2013 ("the 2013 Act") violates the claimants' (now the appellants') right to the enjoyment of their property as protected by s.1(a) of Annex 1 of the Gibraltar Constitution Order 2006.

2 The 2013 Act is a rent control measure and affects some of the rents chargeable on apartments within a property known as the Matilde Francis Building ("the building") of which the appellants are landlords. The building was constructed in the early 1950s and comprises 41 residential apartments and 5 commercial units on the ground floor. This litigation is concerned only with the apartments. The apartments have been subject to statutory rent control since 1997/98. There are two forms of rent control applicable to some privately rented properties in Gibraltar. For ease of reference I shall call these the fixed rent and assessed rent regimes. Both fixed and assessed rents are less than the open market rent but fixed rents are considerably lower than assessed rents. The effect of the 2013 Act was to move the tenancies in the building which came into existence before June 2008 from the assessed to the fixed rent regime. This change had a significant effect on the rental income of the landlords and on the value of the building. The landlords contended that this change served no legitimate public interest, was unjustifiable and infringed their right of enjoyment of property under the Constitution.

Domestic legislative background

The constitutional provisions

3 Section 1 of Annex 1 of the Gibraltar Constitution Order provides as follows:

> "**Fundamental rights and freedoms of the individual**
>
> **1.** It is hereby recognised and declared that in Gibraltar there have existed and shall continue to exist without discrimination by reason of any ground referred to in section 14(3), but subject to respect for the rights and freedoms of others and for the public interest, each and all of the following human rights and fundamental freedoms, namely—
>
> (a) the right of the individual to life, liberty, security of the person, the enjoyment of property and the protection of the law;
>
> . . .

and the provisions of this Chapter shall have effect for the purposes of affording protection to the said rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest."

4 Section 16 of Annex 1 provides for the enforcement of the protective provisions by the Supreme Court. Section 18(8) provides that a court or tribunal determining a question which has arisen in connection with a right or freedom set out in Chapter 1 must take into account any judgment, declaration or advisory opinion of the European Court of Human Rights.

The landlord and tenant provisions

5 The relevant landlord and tenant legislation is complex and, I fear, has not always been drafted with great clarity. However, as this court is not required to construe any provision and, as the parties are in agreement as to the meaning and effect of the various relevant provisions, I propose to summarize the relevant legislation with very little actual citation.

6 There has been some rent control of privately owned lettings since 1938. Throughout, the main underlying policy appears to have been to ensure or preserve a supply of affordable rented domestic accommodation.

7 The Rent Restriction Ordinance 1938 froze the rents of dwellings at their January 1936 level. It applied only to dwellings constructed before 1936.

8 The Landlord and Tenant (Miscellaneous Provisions) Ordinance 1959 repealed the 1938 Ordinance and, in respect of dwellings built before May 1st, 1940, introduced a new scheme of fixed rents, determined by reference to floor surface area. Disputes about rent were to be determined by the Rent Tribunal. There was no provision for the adjustment of rents once fixed. Under this provision there was no control over the rents of dwellings built after May 1940. Accordingly, the rents of the building, after its construction in the early 1950s, were not controlled by the 1959 Ordinance.

9 The Landlord and Tenant Act 1983 (the 1983 Act), as first enacted, had limited effect on private lettings. By s.10, the provisions of Part III (the relevant rent control Part) applied to dwellings built before January 1st, 1945. However, very few had been built between 1940 and 1945. Under s.11, the level of fixed rents was to be determined under Schedule 1 to the Act, with disputes decided by the Rent Tribunal. The level of fixed rents was raised above the previous level. The building remained free of rent control.

10 The Landlord and Tenant (Amendment) Act 1991 (the 1991 Act) amended the 1983 Act and introduced a two-tier system of rent control. Pre-1945 dwellings remained subject to fixed rents (determined under Schedule 1) but s.10 of the 1983 Act was amended so as to introduce a new system of rolling rent control, by way of assessed rents, which applied to dwellings as they became 45 years old. Thus, in 1991, dwellings built in 1946 fell into rent control and more dwellings were to fall within it every year. The building (constructed in 1952/53) fell within the new scheme of rent control in 1997/98. By s.11A of the amended 1983 Act, the tenant of a dwelling which fell within the new provisions could apply to the Rent Assessor to set the rent. He would do so by reference to the Statutory Rent (Forty-Five Year Rule) Regulations 1992 (the 1992 Regulations). Rents assessed under this regime were lower than market rents but higher than fixed rents. The regime of rent assessment was more flexible than the fixed rent regime in that the Rent Assessor had to take a wide range of criteria into account. Also, the rent could be reassessed periodically on application by a tenant. Thus, the rent could keep pace with changes in the value of money and changes in the condition of the dwelling and its facilities.

11 The Landlord and Tenant (Amendment) Act 2004 (the 2004 Act) again amended the 1983 Act and brought to an end the provision for rolling inclusion of properties in rent control after 45 years. The last properties to fall within the assessed rents pool were those built in 1959. Section 11A and the 1992 Regulations were not repealed.

12 In 2007, a dispute arose as to the meaning and effect of the 2004 Act, which had created an ambiguity. Mr. Paul Balban, a tenant of an apartment in the building, had agreed a rent of £400 per month. When he fell into arrears, the landlords sought to evict him and he applied to the Rent Tribunal to set a fixed rent. The landlords protested that the Rent Tribunal had no jurisdiction as the building was built in the early 1950s and fell within the Rent Assessor's regime. The Rent Tribunal accepted jurisdiction and fixed the rent at £45.20 per month.

13 The landlords appealed to the Supreme Court, arguing that the Rent Tribunal had no jurisdiction because s.11 and Schedule 1 of the Act did not apply. The tenant, it was said, should have applied to the Rent Assessor for an assessed rent to be set under s.11A and the 1992 Regulations. Those provisions had not been repealed and it was, the landlords argued, Parliament's intention that the two-tier system of determining rent should continue after the 2004 Act. The tenant's argument was that, as the building had been erected before 1959, the rent should be assessed under s.11 and Schedule 1. Section 11A and the 1992 Regulations were otiose and should have been repealed.

14 Judgment was handed down on June 30th, 2008. After consideration of the history of the legislation and the Hansard report of the debate on the Bill for the 2004 Act, Dudley, C.J. allowed the appeal, holding that Parliament had intended to maintain the two-tier system of rent assessment: see *Francis (Trustees)* v. *Balban* (5). The Chief Justice said that there was nothing to suggest that the failure to repeal s.11A and the 1992 Regulations had been accidental. His decision was unchallenged and its effect was to establish that the 2004 Act maintained the two-tier system of rent control, with pre-1945 properties remaining under the fixed rent regime and properties built between 1945 and 1959 subject to the rent assessment regime.

15 The Housing Act 2007 was a reforming and consolidating measure, passed after wide consultation between interested parties in Gibraltar. As enacted, it repealed the provisions of the 1983 Act (although as I will explain, at the time of implementation, some were kept in force). One of the objects of the Act was to protect the rights of existing tenants. As enacted, its provisions appeared relatively simple. By s.40(1)(a), rent control was to apply only to dwellings erected before 1945. All dwellings erected after that date were to be decontrolled save that the rights of tenants in tenancies which came into existence before January 1st, 2007 were to be preserved if they had already taken advantage of their right to have their rents assessed by the Rent Assessor. However, that provision was not brought into force when the Act was implemented on June 1st, 2008. Legal Notice No. 12 dated March 13th, 2008 provided that s.40 should not be implemented and that dwellings erected between January 1st, 1945 and March 1st, 1959 should continue to be subject to ss. 10 and 11A of the 1983 Act (as amended). That meant that dwellings erected between 1945 and 1959 (including the building) remained, as before, subject to the Rent Assessor's regime.

16 Section 41 of the 2007 Act, provided that "except where otherwise provided in this Act," all rent controlled dwellings would be subject to the Rent Assessor's regime. However, fixed rent tenancies in existence before the date on which the Act came into force were to remain on fixed rents, thus preserving the tenants' rights. So, for the purpose of preserving existing rights, June 1st, 2008 became the dividing line. Fixed rent tenancies in existence before that date remained on fixed rents. New tenancies created after that date (we are here dealing with pre-1945 properties) were to be rent-assessed. I observe that, at the time this Act was passed and implemented, Parliament seemed to be clear about the concurrent existence of the two methods of assessing controlled rents. Indeed it made minor modifications to the detailed rules to be applied by the Rent Assessor.

17 The Act also made changes to the fixed rent regime, which applied only to pre-June 2008 tenancies in pre-1945 buildings. The old fixed rents

were raised to a higher level and were made subject to retail price indexation. (This was almost certainly in response to litigation in which Mr. Aidasani, the landlord of a property the rents of which had been fixed under the 1983 Act, claimed that, by 2000, the level of rent available to him amounted to a deprivation of property and an infringement of his constitutional rights. The Court of Appeal, while dismissing Mr. Aidasani's appeal, clearly felt some sympathy for him and recommended that the level of fixed rents be reviewed and increased.) In addition, under the 2007 Act, the transmission arrangements for existing tenants of pre-1945 properties were changed. Hitherto, tenants had been allowed two transmissions to close family members (subject to conditions which are not material for present purposes). Under the 2007 Act, the first transmission was to be at the fixed rent, the second at an assessed rent.

18 The 2007 Act appeared to be designed to phase out the fixed rent regime. As originally enacted, only pre-1945 buildings would be subject to rent control. All new tenancies would have assessed rents; only existing tenancies would remain under the fixed regime; as they came to an end, fixed tenancies would gradually disappear. As the Act was brought into force, the policy of phasing out fixed rents remained although the more extreme provision of decontrolling post-1945 properties was abandoned. All tenancies save existing tenancies in pre-1945 buildings were to be governed by the Rent Assessor. As the old fixed rent tenancies came to an end, they would be replaced by assessed rent tenancies so that, in the course of time, fixed rents would be phased out. This would take some time as fixed rent tenancies had advantageous rights of succession.

19 The Housing (Amendment) Act 2013 amended and brought into force s.40(1)(a) of the 2007 Act. Section 1(3) of the Act, the amending section, provided as follows:

> "Sections 10 and 11A of the Landlord and Tenant Act shall, for the purposes of dwelling houses erected after the 1st day of January 1945 and on or before the 1st day of March 1959, cease to apply on the commencement of this Act."

The Landlord and Tenant Act referred to was that of 1983. Sections 10 and 11A were the provisions relating to the assessment of rents by the Rent Assessor for dwellings erected between 1945 and 1959 which had been kept in force by Legal Notice No. 12 of March 2008. Thus, although the wording is not entirely clear to the unfamiliar reader, the undisputed effect of this amendment was to change the status of tenancies which had come into existence before June 1st, 2008 in dwellings built between 1945 and 1959 from control by the Rent Assessor to control under the fixed rent regime. Tenancies of 1945–1959 properties which commenced after June 1st, 2008 remained under the Rent Assessor's regime. The effect for tenants of 1945–1959 buildings whose tenancies had commenced before

June 1st, 2008 was doubly beneficial. Not only did their rents fall from approximately £500 per month to about £150 per month but, in addition, they received the advantage of the succession provisions applicable under the fixed rent regime. The appellants in the present case described these advantageous changes as a "windfall." The corollary of that windfall was that the landlords concerned suffered the double blow of reduced income from rents paid by tenants and the prolonging effect of the succession provisions.

20 Thus, the effect of the 2013 Act was a significant change to the policy behind that of the 2007 Act which I explained above. Tenancies in 1945–1959 properties which had begun before June 1st, 2008 were to go into the fixed rent regime to which they had never before been subject. The effect would be to increase the number of properties subject to fixed rents and thereby prolong the life of the fixed rent regime.

The passage of the 2013 Act through Parliament

21 On July 25th, 2013, the Bill for the 2013 Act was moved by the Chief Minister, who began by explaining that he was moving the Bill because "quite coincidentally" the Minister for Housing lived "in an affected hereditament" and would therefore be abstaining from voting on the Bill. The Minister for Housing was the Paul Balban who, in 2007/8, while a tenant of the building, had unsuccessfully contended that, under the 2004 Act, dwellings built between 1945 and 1959 had been made subject to the fixed rent regime. Instead, the Chief Justice had held that it had been Parliament's intention to keep those dwellings within the assessed rent regime.

22 The Chief Minister explained the history of rent control from 1983, through the 1991 introduction of the 45-year rolling programme of inclusion in rent control effected by an amendment to s.10(1)(a) which had come into force in 1992. He explained that, at that time, the new s.11A had created a dual system of rent control; pre-1945 dwellings were subject to s.11 and Schedule 1 of the Act and dwellings caught by the 45-year rolling rule had their rents determined by the Rent Assessor under the 1992 Regulations. So far, the Chief Minster had provided Members with a useful and accurate reminder of the development of the legislation.

23 The Chief Minister then came to the 2004 Act. He noted that s.10 had been amended to bring the 45-year rolling inclusion to an end, thereby fixing the application of Part III (rent control) to dwellings erected before March 1st, 1959. He continued (Hansard, Thursday, July 25th, 2013 at 22):

> "However, Mr Speaker, section 11A of the regulations should have been repealed concurrently with the amendment of section 10(1)(a)

and the cessation of the rolling 45-year rule, since both became superfluous from that date.

For some reason, Mr Speaker, section 11A and the regulations were not repealed. Consequently, there remained in existence two methods of calculating rents: the pre-1945 dwellings method and the dwellings built between 1945 and 1st March 1959 method."

I interpose at this stage to observe that the Chief Minister's words were inconsistent with the decision of the Chief Justice in 2008 in *Balban* (5). The Chief Minister had asserted that s.11A and the 1992 Regulations should have been repealed as they were superfluous. But the Chief Justice had ruled that Parliament had intended to keep two methods of rent calculation in existence and that the fact that s.11A and the 1992 Regulations had not been repealed was not accidental. The Chief Minister continued (*ibid.* at 22–23):

"Part III of the Landlord and Tenant Act was repealed by the Housing Act [2007].

Section 40 of the Housing Act provides the following, and I quote again, Mr Speaker:

'40.(1) Subject to the provisions of this Act, this Part shall apply to dwellings but only to the following extent, namely— (a) it shall apply to every dwelling that has been erected on or before the 1st January 1945, provided that the rights exercised and thus accrued by a tenant before the 1st January 2007 under the former Act in respect of a dwelling that has been erected on or before the 1st March 1959 shall not be prejudiced and shall persist as if it were a tenancy to which this Part applied.'

Section 40(1) of the Housing Act created one operative date only, which was 1st January 1945, section 40(8), for falling within the ambit of the Housing Act, but was stipulating that tenants who had accrued rights, because of living in buildings erected between 1945 and 1st January 1959 [*sic*: this should have been "1st March 1959"], would not be prejudiced and were to persist as tenancies to which part II of the Housing Act applied.

The Housing Act, Mr Speaker, as commenced by Legal Notice 2008, No. 12, specifically provides the following, and I quote again, Mr Speaker:

'In exercise of the powers conferred upon it by section 1 of the Housing Act 2007, the Government has appointed the 1st June 2008 as the day the Act comes into operation, except that sections 40 and 113(3) shall not be commenced for the following purposes, namely dwelling houses erected after the 1st day

> of January 1945 and before the 1st day of March 1959, for which purposes the provisions of section 10 and 11A shall continue to apply.'"

The Chief Minister repeated that provision and then explained the present amending legislation in the following terms (*ibid.* at 23):

> "The purpose of the amendments contained in this Bill is to do away with this distinction, so as to place all buildings erected before 1st March 1959 in the same regime with regard to the calculation of rents. This is achieved by the changes in commencement contained in subclauses (2) and (3), which replace the commencement provisions in Legal Notice 2008, No. 12, and the changes to section 40 of the Housing Act 2007 contained in clause 2."

With that, the Chief Minister commended the Bill to the House. The second reading was carried unanimously without any discussion of the merits or policy behind the Bill. The Committee Stages and the Third Reading were taken at the same sitting. The Bill was carried without any discussion of its effect or merits.

24 I draw attention to the fact that at no stage had the Chief Minister explained to the House the reason why the Government was promoting this change in the law. He said that it was wished to do away with the distinction between properties built before 1945 and those built between 1945 and 1959 but he did not say why. He did not refer to any underlying policy or say how or why, in the Government's view, this change was for the benefit of the public.

The claim for a declaration

25 By a claim dated July 18th, 2014 for a declaration issued under CPR Part 8, the claimants/appellants asserted that the 2013 Act violated their right to enjoyment of their property. Their arguments, in a nutshell, were these. They accepted that, in general, rent control measures are for the benefit of the public and therefore do not amount to a violation of their rights. But they submitted that this particular measure could not be justified; it had no discernible underlying policy which could be said to be for the public benefit. No social problem had been identified which required rectification. The measure was not for the public benefit as it benefited only a limited number of people, those with tenancies which had commenced before June 2008.

26 When the Bill was moved in Parliament by the Chief Minister, the only explanation given to Members was that the purpose of the amendments was to do away with the distinction between buildings erected before 1945 and those erected between 1945 and 1959 so as to place all buildings erected before March 1st, 1959 in the same regime with regard

to the calculation of rents. The Minister had not suggested any policy reason for this measure and had not identified any public interest which was to be served. Therefore, as the measure interfered with the claimants' enjoyment of their property, the measure could not be justified and violated their constitutional rights.

27 In the alternative, if there were some public interest or benefit in the measure, it was disproportionate to the financial burden it placed on the claimants and, for that reason, violated their rights. It was said that the financial burden was severe. 23 tenants of the building (whose tenancies had commenced before June 2008) had applied to the Housing Tribunal to have their rents reduced from an assessed rent to a fixed rent. The result, it was claimed, was that the rental value of the residential apartments in the building had fallen by about 50% and the value of the building itself by almost as much. The claimants did not contend that the building should be decontrolled altogether, only that it should remain as it had been since 1997/98, subject to the Rent Assessor provisions. It appears that the claimants also contended that the burden of proving that the 2013 Act was constitutional lay on the defendant.

28 The Attorney-General submitted, first, that the burden within the litigation lay on the claimants. He submitted that the Act was plainly a general regulatory Act passed in the public interest. It was not for the courts to question Parliament's perception of what was in the public interest. It was plainly the will of Parliament that this Act should be passed; the measure had been passed unanimously. The underlying policy of the measure was to tidy up the legislation. Further, the case was governed by the previous authority of *Rent Tribunal* v. *Aidasani* (10), referred to above.

29 The intervenor was given permission to make written submissions, which supported the Attorney-General's position. From his submissions, it became evident that there had been a bad relationship between the landlords and tenants of the building since about 2011, when the landlords had sought to increase the existing rents. A state of dispute had arisen and, from 2012, the rents were being paid under protest. As I have said, since the passage of the 2013 Act, the rents of 23 pre-2008 tenancies have been reduced by about 70%.

The judgment below

30 It is necessary to examine the judgment below in some detail. The judge summarized the rent control legislation and the constitutional provisions in an uncontroversial way. She then rejected the appellants' first submission, namely that the Attorney-General bore the burden of proving that the 2013 Act was constitutional. She held that the burden lay on the party asserting that the measure was unconstitutional, relying on

Arorangi Timberland Ltd. v. *Cook Islands National Superannuation Fund (Minister)* (1) where the Privy Council said ([2016] UKPC 32, at para. 31):

> "The Board would accept that, save perhaps in extreme circumstances, a statute should be presumed to be constitutional until it is shown to be otherwise, that (in so far as it is helpful to speak of a burden in such circumstances) the burden is on the party alleging that the statute is unconstitutional, and that any court should be circumspect before deciding that a statute is unconstitutional."

I will return to this point later as it forms one of the grounds of appeal.

31 The judge then considered whether or not the 2013 Act was part of a general rent control scheme. She said that it was clearly an Act to amend the 2007 Act. Without the 2007 Act, the 2013 Act "would be redundant." It had not been suggested that the 2007 Act was anything other than a part of a general rent control scheme. She cited the passages from Hansard to which I have referred at para. 23 above. The judge held that the legislative purpose of the 2013 Act was clear; it was to correct what the promoter of the Bill thought had been a mistake made in 2004 when Parliament did not repeal s.11A and the 1992 Regulations. She noted (2017 Gib LR 172, at para. 37) the Chief Minister's statement as to the purpose of the Bill, namely to—

> "do away with this distinction [as between pre-January 1st, 1945 dwellings and March 1st, 1959 dwellings], so as to place all buildings erected before 1st March 1959 in the same regime with regard to the calculation of rents."

She summarized the changes since 2004 and observed that, by 2008, there were two criteria by which rents were to be determined, the old criterion of the age of the building and a new criterion, namely the date on which the tenancy came into existence. She concluded (*ibid.*):

> "The effect of the amendment was therefore clear: all buildings erected before 1959 were either fixed rent, if tenancies had been created pre-2008, or rent-assessed, if tenancies had been created post-2008 . . . The effect of the 2013 Act and, in my view, its intent, was that all buildings erected before March 1st, 1959 should be subject to rent control, as in fact they had been since the 1991 Amending Act, and importantly, that they should all fall into the same single regime that, as the promoter says, they should have been, following the 2004 Act."

32 She then dealt with and rejected the appellants' complaint that there had been no debate in Parliament when the Bill was considered and no consideration of the effect which the provisions would have on affected landlords. She thought that the absence of detailed consideration did not

reflect a lack of understanding of the issue. She thought, on the contrary, that the lack of discussion indicated that all members were agreed on the issue and that no debate had been necessary.

33 At para. 39 of her judgment, the judge discussed what I will call the "swings and roundabouts" effects of the rent control legislation over the years. She observed that some provisions had worked to the advantage of tenants and some to landlords. This, she said, was an intrinsic part of rent control. In short, she regarded the change brought about by the 2013 Act as no more than part of the ebb and flow of rent control provisions which had advantages and disadvantages for both sides. She said that it would be hard to envisage a rental control scheme which would not give rise to some complaint from either landlord or tenant.

34 The judge also considered submissions and evidence relating to the economic impact of the Act. As these have not featured significantly in the appeal, I will not dwell upon them. Suffice it to say that the judge was not sympathetic to the landlords' claim that the low rents they would receive would effectively prevent them from properly maintaining the building. She did, however, appear to accept that the rent of 23 flats had been reduced from £500 per month to between £100 and £150 per month.

35 At para. 49, the judge held that the 2013 Act had a legitimate purpose that was part of a broad scheme of rent control and management. She had earlier (2017 Gib LR 172, at para. 40) summarized her views about the intention of Parliament, saying:

> "It is apparent to me from consideration of the 2013 Act against the background of the 2004 and 2007 Acts that the intention of the legislature was to have one date (in relation to the erection of buildings) which is determinative of the buildings' qualification for rent control, and thereafter two periods (tenancies pre- or post-2008) which are determinative of the type of rent (fixed or assessed) which would be payable. The concept of fixed rent, which the claimants complain of as unfair, was not a new introduction in 2013, but rather the groups of people caught by the new adjustment of relevant periods in 2013 changed. The amendments introduced in 2013 may have had the effect of seemingly favouring a small proportion of tenants by moving them from assessed rents to fixed rents, and conversely disadvantaging a particular class of private landlords by reducing the rent recoverable by them, but it seems to me that, notwithstanding, Parliament was perfectly entitled to consolidate and simplify the legislation."

36 The judge concluded this section of her judgment by saying that, in any event, it seemed to her that the case fell squarely within the ambit of the *Aidasani* case (10). In 2000, Mr. Aidasani, a landlord whose property was subject to the fixed rent regime, appealed to the Supreme Court from

a decision of the Rent Tribunal fixing his rent under Schedule 1 to the 1983 Act. He argued that the operation of Schedule 1 (which fixed the rents at a definite level without any provision for an increase to reflect changes in the value of money) amounted to a deprivation of his property which contravened ss. 1 and 6 of the Constitution of Gibraltar. He claimed that it was impossible for him even to maintain his property let alone make a profit. At first instance, Schofield, C.J. rejected his claim under s.6 but set aside the Rent Tribunal's decision as being contrary to s.1 of the Constitution. The Court of Appeal allowed the Rent Tribunal's appeal.

37 Some of the issues the Court of Appeal had to resolve in *Aidasani* are not in issue in this appeal but some are important as they laid the foundation of the judge's decision in the instant case. So far as is relevant to the present appeal, the Court of Appeal held, first, that, at the time it was passed, the 1983 Act (or Ordinance as it was then called) was a general regulatory enactment passed for the public benefit within the meaning of those terms as explained in the case of *Grape Bay Ltd.* v. *Att. Gen. (Bermuda)* (6). The Court of Appeal had considered the passage from the opinion of Lord Hoffmann ([2000] 1 W.L.R. at 583) in *Grape Bay*. The judge also cited this:

> "It is well settled that restrictions on the use of property imposed in the public interest by general regulatory laws do not constitute a deprivation of property for which compensation should be paid . . . The give and take of civil society frequently requires that the exercise of private rights should be restricted in the general public interest. The principles which underlie the right of the individual not to be deprived of his property without compensation are, first, that some public interest is necessary to justify the taking of private property for the benefit of the state and, secondly, that when the public interest does so require, the loss should not fall upon the individual whose property has been taken but should be borne by the public as a whole. But these principles do not require the payment of compensation to anyone whose private rights are restricted by legislation of general application which is enacted for the public benefit. This is so even if, as will inevitably be the case, the legislation in general terms affects some people more than others. For example, rent control legislation restricts only the rights of those who happen to be landlords but nevertheless falls within the general principle that compensation will not be payable."

38 At para. 53 of her judgment, the judge cited a passage from the judgment of Neill, P. in *Aidasani* (10), who, giving the judgment of the court, said (2001–02 Gib LR 21, at paras. 107–109):

> "107 In our judgment this Ordinance [the 1983 Act], as its title suggests, is intended to regulate the relationships between landlords

> and tenants and is a classic example of a piece of legislation of general application . . .
>
> 108 We are therefore entirely satisfied that the 1983 Ordinance when first enacted came within the *Grape Bay* principle. It was of general application and was clearly for the public benefit . . .
>
> 109 It is, of course, true that the 1983 Ordinance did not contain any provision for the periodic review of statutory rents or any formula whereby adjustments to meet inflation or increases in the cost of living could be made. But we find it impossible to say that the absence of such provisions invalidated Schedule 1 or rendered it unconstitutional."

39 After that citation, the judge said (2017 Gib LR 172, at para. 53):

> "The Court of Appeal [in *Aidasani*] ruled that the 1983 Act was of general application and for the public benefit; by a process of logical extension, the 1991 Amending Act, the 2004 Act, and the 2007 Act must also be part of the same framework of legislation designed to regulate the relationship between landlord and tenant. The characteristics intrinsic in those Acts extend to the 2013 Act and I am of the view that the 2013 Act is an integral part of the rent control legislation and I am in no doubt that the 2013 Act is an Act of general application for the public benefit."

40 It is apparent from that holding that the judge had concluded that, to use her words, the issue she had to decide fell squarely within the principle upon which *Aidasani* (10) was decided. She had earlier rejected the appellants' submissions that the present case should be distinguished from *Aidasani*. It had been submitted that the 2013 Act was not legislation of a general regulatory character controlling the use of property but merely stripped some landlords of the benefit of assessed rents and provided no benefit to the housing situation in Gibraltar. She rejected this submission, saying that the attempt to distinguish was forced and not material. She said (*ibid.*, at para. 52):

> "Needless to say, every Parliamentary Act relating to housing legislation will have different provisions with different consequences attaching; the issue is not to split straws upon the specifics of the legislative provisions, but to consider the nature and characteristics of the legislation. The characteristics of the 1983 Act and the 2013 Act are similar, in that both concern the relationship between landlord and tenant, and both restrict the amount of rent that a landlord can demand."

41 Before leaving *Aidasani*, however, it is convenient to mention another aspect of the decision. After concluding that the 1983 Act was a general regulatory measure enacted for public benefit and holding that it

had retained its original character notwithstanding the passage of time, the court turned to discuss what we would now call the issue of proportionality, the balancing of public and private interests by which a court will decide whether a particular interference with a fundamental human right or a constitutional right can be justified by the public interest served. Under the heading "The competing public interests and the role of the court," Neill, P. first observed (2001–02 Gib LR 21, at para. 117):

> "The imposition of any system of rent control involves the consideration of issues of social policy of great difficulty, and as Lord Bingham pointed out in *Ex p. Spath Holme Ltd.* . . . ([2001] 1 All E.R. at 215), in the context of the Rent Acts (Maximum Fair Rent) Ordinance 1999 in the United Kingdom, 'it was for ministers to judge where the balance between the competing interests of landlords and tenants should be struck.'"

42 However, importantly in the context of the present case, Neill, P. then recognized that, where legislation affects a fundamental human right or a right protected by a constitution, the court is entitled to scrutinize the legislation and to form a judgment as to whether, balancing the importance of the public benefit secured against the gravity of the interference with an individual's human or constitutional right, the legislation is proportionate and the interference can therefore be justified. The court reminded itself that it should approach such a task with great caution. It decided that, in the instant case, it was not in a position to make that evaluation. The court had come to realize that the situation was more complicated than it had appeared to the Chief Justice below. They were unable to undertake this balancing exercise without a "full enquiry" which would require them to look at the needs of vulnerable people who have to look to the private housing market for affordable homes. He said that the court would have to balance their needs with the needs of the landlords who were seriously disadvantaged by the operation of Schedule 1. They felt ill-equipped to undertake this exercise. Presumably they would have had to base that evaluation on conditions prevailing in 1983. They contented themselves with urging Parliament to reconsider the effect of Schedule 1 as a matter of urgency.

43 The judge did not deal explicitly with the issue of proportionality. After stating her conclusion (at para. 53) that the 2013 Act was an Act of general application passed for the public benefit, she embarked upon a discussion of the effects of the legislation on the appellants. She noted the appellants' submission that the effect of the Act was to reduce the rents to so low a level that they could not properly maintain the property. She referred to a passage in the judgment in *Aidasani* (10) where Neill, P. said (*ibid.*, at para. 103):

> "It is first necessary to consider the nature of the legislation. Does it satisfy the two relevant tests (a) of being of general application and (b) of having been enacted for the public benefit? It is then necessary to consider the facts and the effect of the legislation on the property concerned. If the legislation passes the two tests and the legislation does not effect any transfer of property from the owner, it seems to us that the principle applies and that no compensation is payable even though the effect on the value of the property remaining in the hands of the owner is reduced to vanishing point."

44 She cited a further passage from Neill, P.'s judgment (*ibid.*, at para. 105):

> "General legislation may 'deprive' an owner of property of some of the profit that he could otherwise obtain from it, and to that extent he is deprived of the sum representing that loss of profit, but, providing the legislation is for the public benefit, the *Grape Bay* principle applies and the owner is not entitled to compensation."

She noted that the court in *Aidasani* had been "far from clear as to the precise extent of the hardship in Mr. Aidasani's case." She said that she shared a similar uncertainty with regard to any hardship suffered by the landlords in the instant case. In particular, she did not accept that the rent was so low as to make it impossible for them to maintain the property. She then continued (2017 Gib LR 172, at para. 55) to cite the passage from the speech of Lord Bingham from *R. (Spath Holme Ltd.)* v. *Environment Secy.* (9) which I cited above, which concludes that "it was for ministers to judge where the balance between competing interests was to be struck." She reminded herself that the courts will in certain circumstances have a role in intervening, but "the court must approach its task with great caution." She continued (2017 Gib LR 172, at para. 56 and para. 58):

> "56 The principle in this case is similar to that in *Aidasani*: whether a provision which discriminates against a group of people by depriving them of their right to receive a reasonable rental income from their properties offends the Constitution. Both Mr. Aidasani and the present claimants complained that the rent they received by virtue of an enactment governing rent control was too low and unrealistic and (to a greater or lesser extent) prevented them from properly maintaining their buildings. Both complained their rights under the Constitution were contravened. This case, like *Aidasani*, impacts directly upon a specific class of people defined by the applicable provisions. More importantly, the principles applied in *Aidasani* to the resolution of the issue are, to my mind, directly relevant and applicable in this case.
>
> . . .

> 58 I am of the view that the claimants have failed to establish that the 2013 Act itself offends the Constitution. In the context of the 2007 Act, I am of the view that the 2013 Act constituted a valid revision of rent control legislation which had been developing for years—in fact, the building had been subject to rent control for 25 years."

It may not matter a great deal, but that last statement was not quite accurate; the building had been subject to rent control for only 15 years (since about 1997/98). And it is perhaps relevant to be reminded that it had never been subject to fixed rents, only assessed rents.

45 That, apart from tying up some loose ends which are not relevant to this appeal, was the primary basis on which the judge reached her decision. However, on the basis that she might have been wrong to hold that the case was "caught by *Aidasani*," she turned "to consider the constitutional argument in light of the jurisprudence of the European Court of Human Rights." She summarized the Attorney-General's argument as being that, even if the 2013 Act possibly contravened the landlord's right of enjoyment to property, it was nevertheless justified.

46 The judge set out what was agreed to be the appropriate test as enunciated by Lord Sumption, JSC in *Bank Mellat* v. *H.M. Treasury (No. 2)* (3). The case concerned a direction made by the Treasury under subordinate legislation the effect of which was to prevent all persons from dealing with Bank Mellat, a major Iranian bank, on the ground that the Treasury reasonably believed that the development of nuclear weapons in Iran posed a significant risk to the security of the United Kingdom and that dealing with Bank Mellat might facilitate such development. It was accepted that the Treasury had the power to make the direction but the direction had the effect of interfering with the bank's rights. The issue was whether the interruption of the bank's commercial dealings bore a rational and proportionate relationship to the statutory purpose of hindering Iran's pursuit of its weapons programme. Lord Sumption said ([2013] UKSC 39, at para. 20):

> "The requirements of rationality and proportionality, as applied to decisions engaging the human rights of applicants, inevitably overlap . . . the question depends on an exacting analysis of the factual case advanced in defence of the measure, in order to determine (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community. These

four requirements are logically separate, but in practice they inevitably overlap because the same facts are likely to be relevant to more than one of them."

47 The judge's consideration of Lord Sumption's test is quite long and is challenged by the appellants in what I consider to be the most important ground of appeal. For that reason, I will defer consideration of it until I reach that stage. For present purposes, suffice it to say that the judge held that all four limbs of the test were satisfied and the interference with the appellants' enjoyment of property occasioned by the 2013 Act was justified and proportionate. The claim was dismissed.

The appeal

48 The grounds of appeal are contained in eight paragraphs, some with sub-paragraphs, and descend at times into argument. I summarize them as follows.

(i) The judge erred in holding that the 2013 Act was a general regulatory measure enacted for the public benefit. The Act did not meet any perceived social need—rather it was "a tidying up" measure.

(ii) As the Act was not enacted for the public benefit, it did not attract the "wide margin of appreciation" or light touch scrutiny enjoyed by general welfare legislation. The judge erred in applying that wide margin of appreciation.

(iii) The judge erred in equating the 2013 Act with earlier Acts dealing with rent control, all of which had been promoted in Parliament on the basis of a perceived social need at that time. No such social need had been advanced to justify the 2013 Act and the judge had erred in attributing to this measure the social policy identified on earlier occasions.

(iv) The judge erred in her approach to proportionality in that she did not examine the particular effects of the 2013 Act or balance the way in which it met a social need against its detrimental effect on the landlords.

(v) The judge erred in holding that, as the 2013 Act gave effect to what had been the Government's intention in 2004, the appellants' claim was answered.

(vi) The judge erred in holding that the burden of proving unconstitutionality remained solely on the appellants. Once the judge had accepted that the measure interfered with the appellants' right to the enjoyment of property, she should have held that the burden shifted to the respondent to show that the legislation pursued a legitimate aim, to explain what that aim was and on what basis the measure was a necessary and proportionate means of achieving the aim.

(vii) The judge was wrong to consider that the appellants' claim was answered by the decision of the Court of Appeal in *Aidasani* (10).

(viii) The judge was wrong to hold that the 2013 Act will not result in significant difficulties for the landlords in maintaining and repairing the building.

The respondents rely on the judgment, maintaining that the judge was correct on all points.

The first three grounds

49 I shall deal with the first three grounds together as they appear to me to be closely related. The judge held that the 2013 Act was a general regulatory measure enacted in the public interest. This was an important issue because, although the judge did not expressly say so (and at times seems almost to have doubted it) it was common ground that the effect of the Act was an interference with the appellant's enjoyment of his property. The respondent sought to rely on the *Grape Bay* principle, under which an interference with the enjoyment of property would readily be justified if the Act were a regulatory measure enacted in the public interest. Such a measure would be subject to only "light touch" scrutiny. The judge held that the Act was a general regulatory measure enacted in the public interest because she regarded it as being part of a general scheme of rent control operating in Gibraltar since before the Second World War. All the Acts had a common thread and common purpose; they regulated the relationship between landlords and tenants, in particular in relation to the level of rents payable. In *Aidasani* (10), the Court of Appeal had held that the 1983 Act was a general regulatory Act enacted in the public interest. Although the judge did not say so, it was common ground that the 2007 Act also was. The 2013 Act was an amendment of the 2007 Act, dealing with rent control. Therefore, she said, it had been enacted for the public benefit and attracted the protection of the *Grape Bay* principle.

50 The appellant's contention was that this approach was wrong. The 2013 Act had only one effective provision, to alter the status of pre-2008 tenancies within buildings erected between 1945 and 1959. It was of that provision only of which the appellants complained. It was no answer to their complaint that the Act was not passed for the public benefit to say that its parent Act and other previous Acts had been. The underlying purpose of the specific Act should have been scrutinized and a public benefit identified. It was not enough to say that rent control generally is for the public benefit. It usually is but this measure was special and had no discernible public benefit. The Act gave a targeted benefit to a defined and limited number of tenants.

51 I agree with the judge's conclusion that the 2013 Act was a general regulatory enactment. It seems to me that an amending Act must take on

the general character of the original Act. The 2007 Act was a general regulatory enactment. In my view, so was the 2013 Act, even though it contained only one provision which affected only a relatively small number of people.

52 In so far, however, as the judge found that the 2013 Act had been enacted in the public benefit, I think her reasoning is open to question. Before she could properly hold that the 2013 Act had been passed for the public benefit, the judge should, in my view, have examined the social purpose of the 2013 Act itself in more depth than she did. In making her finding, she relied on the fact that previous rent control measures had been for the public benefit. They usually are but, in my view, it does not follow that every rent control measure will be. Of course, the judge was entitled to examine the 2013 Act in context. In a measure which contains several provisions, there may be "swings and roundabouts" of benefit and disadvantage. The interrelationship between the provisions will be relevant when deciding whether the measure in question was passed in the public interest. This Act contained a single provision. There were no swings and roundabouts within the Act itself. I can see that it would also be relevant and permissible, when looking at an amending Act, to consider the original Act and the amending Act together, in order to determine what the public interest in the amendment was. But one cannot assume that because the original Act created some public benefit, the amendment also did. One would need to look for some explanation of why the amendment was thought desirable and how it served the public interest.

53 The judge discussed the two objectives which had been mentioned by the Chief Minister when promoting the Bill in Parliament. She said that Parliament was entitled to rationalize and simplify the criteria by which dwellings fell into the rent control net. I agree; Parliament can do anything, even if there is no resulting public benefit, but that freedom is subject to the kind of scrutiny which takes place when it is alleged, as here, that a constitutional or fundamental human right has been infringed. When that situation arises, there has to be careful consideration of the specific provision in question to identify the public benefit which may justify the infringement. The judge did not ask herself what public benefit there was in "rationalizing" the criteria in this way.

54 I understand her difficulty as there was no evidence before her as to any perceived problem which the Government wished to rectify. There was no evidence that simplification and rationalization were needed; there was no evidence of administrative problems or waste of resources. In any event, very little simplification was brought about because the assessed rent regime continued in existence after the 2013 Act. It still applies to all post-2008 tenancies.

55 The judge also referred to the claim in the Chief Minister's speech that, in 2004, Parliament had intended to repeal ss. 10 and 11A of the 1983 Act as amended, a change which would have made 1945–1959 dwellings subject to the fixed rent regime. However, no evidence was put before the judge to support this claim, which ran contrary to the Chief Justice's holding in *Balban* (5). The judge saw (as we did also) the extracts from Hansard at the passage of the 2004 Act and there is no hint of an intention to move 1945–1959 dwellings into the fixed rent regime. The most that can be said of this supposed objective is that some Members of Parliament (including Mr. Balban, the Minister for Housing) thought that this change should have been made in 2004 and that the time had now come to do it. But the judge did not have any material by which to consider what the thinking had been behind that change and what public benefit it had brought about. Its sole effect was significantly to reduce the rents of tenancies in 1945–1959 dwellings which had come into existence before June 2008. What was the social problem or need which this change was intended to rectify? There was no evidence that tenants of 1945–1959 properties were suffering hardship because their rents were set under the assessed rent regime. Indeed, as the 2013 Act only applied to tenancies which had commenced before 2008 (and had therefore been in existence for at least five years and in some cases longer) the natural assumption in the absence of evidence to the contrary would be that those tenants had been paying their assessed rents without difficulty. The judge did not ask herself where the public benefit lay in this objective.

56 There was a complete absence of evidence of what social policies lay behind this Act. One might have expected to find evidence of those social policies in the parliamentary discussion at the time the Act was passed. The judge held that it mattered not that there had been no debate or discussion of the measure in Parliament. The Act had been passed unanimously and she considered that Members must have known what they were doing. Maybe they did but that is not the point. If there had been some debate or at least an explanation of the reasons why the measure was being introduced, there might have been a more secure basis for holding that the Act was passed for the benefit of the public. We were shown extracts from Hansard for every rent control measure since 1991. In each case, Parliament (and the public) had been given an explanation of the social purpose to be achieved. There was sometimes reference to the consultation and the balancing exercise which the Government of the day had carried out before introducing the proposed changes. That was certainly so with the 2007 Act. Subject to the Constitution, Parliament is supreme and can do as it wishes but a good democratic process requires open explanation for what is being done and such open explanations will serve Government well, if and when its legislation comes under the scrutiny of the courts.

57 In my view, the judge was wrong to conclude that the Act was in the public interest simply because it was part of a general scheme of rent control which operated for years and that this was a change which Parliament was entitled to make. She should have examined the specific measure to identify the public interest it served. She did not do so. Moreover, she accorded the Act a "general" or "standard" level of public benefit and did not evaluate its strength or importance.

58 When subjected to close scrutiny, it is hard to see what the public benefit is. First, the Act did not increase the stock of housing available to the public at affordable rents. It reduced rents only for those tenants of 1945–1959 dwellings whose tenancies had commenced before June 2008. If there had been a rent reduction for all 1945–1959 dwellings, there would have been an increase in the number of dwellings available at a low rent and a clear public benefit. But this measure benefited only a closed group. The evidence as to how many tenancies were caught by the new provisions was unclear but the class of tenants who would benefit was already closed; the tenancy had to have begun before June 2008. So no member of the public could join the group of those who would benefit. I am unsure whether a closed group can properly be classed as "the public."

59 It was a feature of the 2007 Act that the legislature wished to preserve tenants' accrued rights in the context of changes which would adversely affect the position of tenants of pre-1945 buildings, who in future would be subject to the rent assessed regime. It seems to me that that part of the Act was a "swings and roundabouts" measure which could properly be described as being for the public benefit, even though the class of tenants whose rights were to be preserved was closed. But the 2013 Act did not preserve tenants' rights; it greatly enhanced those of a specific group, not only by reducing their rents by about 70% but also by granting them rights of succession which they had not previously enjoyed. Even if I am wrong to doubt whether a benefit which applies only to a closed group can properly be described as public benefit, it seems to me that, for the purposes of justification and proportionality, the public benefit of the 2013 Act is an unusual and very restricted one. The judge did not appear to appreciate this but attributed to the Act a "general level" of public benefit which derived from the fact that it was a rent control measure.

60 The difficulty with all this is that the holding that the measure was passed for the "public benefit" assumed an importance that I do not think it should have borne. Under the *Grape Bay* principle, it seemed that once it was said that the Act was a general regulatory measure passed for the public benefit, the respondent was virtually "home and dry." He had crossed a threshold beyond which it was virtually impossible for the court to say that the measure was not justifiable or not proportionate. So far as I can see, the judge was encouraged by both sides to regard the *Grape Bay* principle as of fundamental importance. But, since the hearing of this

appeal, I have come to think that *Grape Bay* (6) may no longer be the best guide for judges faced with this kind of decision. The jurisprudence of the English courts on art. 1 of Protocol 1 of the European Convention of Human Rights (and therefore also on cases involving rights under the Constitution of Gibraltar) has developed a great deal since *Grape Bay*, which was decided before the Human Rights Act 1998 (coming into force in October 2000) had made known its real effect. It seems to me that the modern approach to cases of this kind is to be found in *Bank Mellat* (3). Instead of deciding whether the Act was a general regulatory measure enacted for the public benefit, the court looks at whether the measure derogates from one of the claimant's rights and, if it does, it then proceeds to consider the issues of rationality and proportionality according to Lord Sumption's four-stage test. Such an approach avoids the danger, which arose here, that because the judge held that the Act passed the *Grape Bay* threshold, it was virtually untouchable. The *Bank Mellat* approach requires the judge to evaluate the significance of the public interest benefit identified and to balance it against the gravity of the effect on the claimant, whereas, here, the mere fact that the judge identified some unevaluated public benefit brought the case within "light touch scrutiny" and made her reluctant to embark on a balancing exercise.

61 Even if it can be said that there was some public interest in the passage of the 2013 Act, in my judgment, the judge erred when she held that the Act was for the public benefit because of its historical position within a general scheme of rent control and therefore could only be impeached if it was manifestly irrational.

The seventh ground

62 I shall take the seventh ground next as it appears to be logical to do so. It is said that the judge was wrong to conclude that the case was "caught by" *Aidasani* (10).

63 *Aidasani* was obviously an important case and helpful for the judge to consider; there were important similarities between it and the present case. But there were also real differences. The legislation under scrutiny was the 1983 Act. The only rent regime then in existence was that of fixed rents. The 1983 Act increased (marginally) the pool of dwellings to be brought within rent control. The earlier (1959) Act applied only to pre-1940 dwellings; the 1983 Act extended the pool to pre-1945 dwellings. The 1983 Act increased the level of fixed rents from the earlier level but they were still low. Thus, although it could be said that both the 1983 and the 2013 Acts were rent control measures, they were very different in their effect. Although the landlords did not concede the point and the court had to decide it, the 1983 Act plainly was a general regulatory measure passed for the public benefit. There was a need for an increased pool of easily affordable housing which the Act purported to satisfy. Yet the

position of landlords was improved by the increased level of rent. The court observed that rent control measures are a classic example of a general regulatory measure passed for the public benefit. But that, in my judgment, did not permit the judge to follow *Aidasani* into an assumption that all rent control measures are passed for the same (general) degree of public benefit without examining the public benefit of the specific features of the 2013 Act.

64 It seems to me that the judge also mistakenly assumed that, because, as she held, the Act was a general regulatory measure passed for the public interest, there was no need for her to carry out the proportionality exercise. She accepted the argument that only light touch scrutiny was required but then gave it no scrutiny at all, largely as it seems to me, because the *Grape Bay* decision (6) gives the impression that general regulatory measures passed in the public interest are virtually immune from challenge on proportionality grounds. They are not, as the Court of Appeal in *Aidasani* (10) recognized. The court recognized that, even though the 1983 Act was passed for the public benefit, there was a further issue to be dealt with, namely whether the effect on the landlords' property right was justifiable. The court declined to deal with that issue because it felt ill-equipped to do so. One can understand why; they had come to realize that the question was complex and they needed a full inquiry. That inquiry would have had to cover circumstances prevailing over 17 years earlier. They contented themselves with urging Parliament to review the level of fixed rents. It seems to me that the judge failed to realize that, even following *Aidasani*, she should still embark on the detailed evaluation and balancing processes as explained in *Bank Mellat* (3). Although I consider that the judge's approach was not correct, this, in itself, is not sufficient to allow me to say that the appeal should be allowed because she did herself realize that she might have been wrong to hold that *Aidasani* provided the complete answer to the case. She did then consider Lord Sumption's test to which I will come in due course.

The fifth ground

65 It is said that the judge erred in holding that, as the 2013 Act gave effect to what had been the Government's intention in 2004, that answered the appellant's claim. I can deal with this very briefly by saying that I do not think that the judge did so hold. She certainly seemed to accept that the 2013 Act gave effect to the Government's intention in 2004 and I have already observed that the only evidence of that was an assertion to that effect by the Chief Minister. As I have said, that assertion is not supported by an examination of Hansard when the 2004 Act was passed. Nor is it supported by the decision of the Chief Justice in *Balban* (5). It follows that, if the judge had based her conclusion on that holding, it would have been on shaky ground. But I do not understand her to have thought that

this point answered the claim. The judge treated the Government's claimed intention to correct an error made in 2004 as one of the objectives of the Act and no more than that. I shall return to the judge's evaluation of the objectives of the Act when I consider the fourth ground of appeal.

The eighth ground

66 It is said that the judge was wrong to hold that the 2013 Act had not resulted in significant hardship for the landlords in maintaining and repairing the building. In my judgment, the judge was entitled to reach that conclusion which was essentially an assessment of the factual evidence. That conclusion was relevant to the evaluation of the severity of the interference with the landlords' constitutional rights. It did not mean that there had not been any such interference. A reduction in rent of 70% in respect of over half the apartments in the building must on any view amount to an interference. Whether that interference was justifiable or proportionate cannot be determined without considering and balancing the importance of the objectives.

The sixth ground

67 This relates to the burden of proof which the judge held lay on the appellants throughout the case. The appellants say that this was wrong and that the burden should have shifted to the respondent once it had been shown that the measure interfered with the enjoyment of property and required justification.

68 The judge relied on a passage from *Arorangi Timberland* (1) which I referred to at para. 30 above. This was to the effect that, save in extreme circumstances, a statute should be presumed to be constitutional until it is shown otherwise and (so far as it is helpful to speak of a burden in such circumstances) that the burden should lie on the party alleging that the statute is unconstitutional. The court added that any court should be circumspect before deciding that a statute is unconstitutional. One can immediately see why the judge held as she did. Yet, in my view, the position is not quite as simple as it appeared. In *Bank Mellat* (3) ([2013] UKSC 39, at para. 20), even in the passage which the judge cited, where she summarized Lord Sumption's four-stage test, Lord Sumption speaks of the need for "an exacting analysis of the factual case *advanced in defence of the measure*" [Emphasis supplied]. Further, in the judgment of Lord Neuberger of Abbotsbury, PSC ([2013] UKSC 39, at paras. 170–176), there are several references to the Treasury's *justification of its measure* (my emphasis). The burden of proof was not a specific issue in *Bank Mellat* and there are no directly relevant *dicta*. There are, of course, frequent references to the need for caution, for the recognition that the legislature has expertise which the judiciary does not have and the imperative of giving the legislature a wide margin of appreciation.

69 So far as burden of proof is concerned, it seems to me that, as a matter of pure practicality, once it has been shown (by the claimant) that his constitutional right is affected, he cannot then bear the evidential burden of proving that the measure is not justified. Only the legislator can say what the objective of the measure is and explain its importance. It is then for the court to evaluate the importance of the legislator's objective and the severity of the derogation of the claimant's rights and to balance them. In so doing, the court will bear in mind, to the degree that is appropriate in the context, what deference should be given to the knowledge and expertise of the legislator. It is also for the court to bear in mind that it must exercise caution before declaring a measure to be unconstitutional and to grant the legislature a wide margin of appreciation. It does not seem to me that the expression "burden of proof" is a helpful concept in this exercise. I note that, in the passage from *Arorangi Timberland* (1) which the judge cited, the Board, in parenthesis, appeared to doubt whether it was helpful to speak of a burden of proof in the context of an issue of constitutionality. In my judgment, the judge dealt with this issue a little too rapidly, without appreciating the evidential practicalities. That said, I do not think this treatment significantly affects the outcome of this appeal.

The fourth ground

70 It is said that the judge failed to carry out the exacting analysis required for the proportionality exercise by evaluating the objectives of the 2013 Act and balancing them against the severity of interference with the appellants' rights. It seems to me that this is the most important ground of all. If the judge erred, as I have held that she did, in her approach to *Grape Bay* (6) and *Aidasani* (10), it would matter not, as she gave herself the opportunity to correct those errors by an examination of the ECHR jurisprudence and in particular by applying Lord Sumption's four-stage test from *Bank Mellat* (3). The appellants say that, although the judge purported to apply those tests, in fact she did not carry out the exacting analysis which they call for.

71 Immediately after her citation of the four-stage test (2017 Gib LR 172, at para. 63) the judge dealt with the first two limbs of the test as follows (*ibid.*, at para. 64):

> "Given that I have discussed the matter at some length and found that the 2013 Act had a legitimate purpose, the first point of Lord Sumption's test is, in my view, met. For the avoidance of doubt, it is not in dispute that domestic and European case law has established that rent control is a legitimate objective of legislators, even if it has some impact upon the limitation of rights. The important requirement is that the measure taken should be in the general interest and proportionate. Given that I have found that the legitimate purpose of

> the 2013 Act was rent control, I am of the view that the second point of Lord Sumption's test is met as a natural extension to the first. If the objective of the measure is rent control, the level of rent (regardless of whether it is low or high) must, as a matter of logic, be rationally connected to the objective."

72 In my judgment, this analysis does not satisfy the first and second limbs of Lord Sumption's test. The judge has fallen into the same error as before, namely to take too general an approach to the identification of the objective of the Act. It is not sufficient to say that the objective is rent control. There is a need to examine the particular purpose of the provision in question and then to consider whether that objective is sufficiently important to justify the interference with a constitutional right. It is true that rent control measures may well be sufficiently important to justify interference with a constitutional or fundamental human right but it does not follow that all rent control measures will do so. One must look at the individual measure, identify its objective and consider whether that particular objective (or objectives if there were more than one) was of sufficient importance to justify interference with a constitutional right. In my judgment, the judge erred at this stage of her application of Lord Sumption's test.

73 She also erred in respect of the second limb because her conclusion on the second limb was wholly dependent on her conclusion on the first. The same problem affected her approach to the second limb as the first. She took too general a view of the process. Before approaching the second limb, it is necessary to have identified the underlying objective(s) of the particular measure and then to ask whether the solution (*i.e.* the measure itself) is rationally connected to the objective so that there can be a reasonable expectation that the measure will work to achieve the objective. It is not enough merely to say: "the objective is rent control; the measure controls rent; therefore there is a rational connection between the two." This is not the exacting analysis that the application of the test calls for.

74 For those reasons alone, I do not think that the judge's application of the proportionality test can stand.

75 In respect of the third part of the test (the least restrictive means test), the judge cited several passages from authority before declaring herself satisfied that the third part was also satisfied. I shall not set out these citations but they amounted to a warning to herself against too readily substituting a judicial opinion for a legislative one as to the place at which to draw the precise line. The legislature should be allowed a wide margin of appreciation. She observed that it was possible that, if she were Parliament, she might have settled upon a different way of achieving the purpose in hand but the substitution of a judicial opinion for a legislative

one could only be justified if the legislature's action was "manifestly without reason." She referred to *Bittó* v. *Slovakia* (4) (Application 30255/09, at para. 96) where it was observed that: "The court has declared that it will respect the legislature's judgment as to what is in the public or general interest unless that judgment is manifestly without reasonable foundation." In a belt and braces self-direction, the judge then cited a passage from the judgment of Lord Neuberger of Abbotsbury, PSC in *Bank Mellat* (3) to the effect that the court must give the legislature a wide margin of appreciation. Then, without more, the judge declared that the 2013 Act was based upon a reasonable foundation and was therefore not open to substitution of an alternative albeit less intrusive measure. Part (iii) of the test was met.

76 In my judgment, it is not sufficient to say that the third test is met merely because the legislature's judgment about what lay in the public interest had a reasonable foundation. In my view, this third limb of the test cannot be approached unless and until the specific objective(s) of the measure have been established and consideration has been given to any proposal as to another and less intrusive way of achieving the same end. Judges do not have to try to think of an alternative proposal for themselves. If an idea occurred to the judge, he or she would have to discuss it in argument. It would have been sufficient, in this case, if the judge had said that no one had suggested an alternative proposal which would have achieved the same end.

77 At para. 68 of her judgment, the judge commenced consideration of the fourth limb of the test which entails the balancing of the rights of the individual against the rights or interests of the community. Although I have held that the judge had erred in several respects, it would have been possible for her put those errors right if, at this late stage of her judgment, she had carried out the exacting analysis required and had properly balanced the rights of the individual and the interests of the community.

78 The judge began by saying that this balance must, in the first instance, be for the legislature to strike. She cited a passage from the judgment of the ECHR in *James* v. *United Kingdom* (7) (Application No. 8793/79, at para. 46):

> "Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is 'in the public interest'. Under the system of protection established by the Convention, it is thus for the national authorities to make the initial assessment both of the existence of a problem of public concern warranting measures of deprivation of property and of the remedial action to be taken . . . Here, as in other fields to which the safeguards of the Convention

extend, the national authorities accordingly enjoy a certain margin of appreciation.

Furthermore the notion of 'public interest' is necessarily extensive. In particular, as the Commission noted, the decision to enact laws expropriating property will commonly involve consideration of political, economic and social issues on which opinions within a democratic society may reasonably differ widely. The Court, finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, will respect the legislature's judgment as to what is 'in the public interest' unless that judgment be manifestly without reasonable foundation."

79 At para. 69 the judge referred to *Mellacher* v. *Austria* (8) This was a rent control case in which the landlords complained of the extent to which their rents were restricted. The judge cited from paras. 44–45 of its judgment, as follows:

"The measures taken did not amount to either formal or to a *de facto* expropriation . . . The contested measures which, admittedly, deprived them of part of their income from the property amounted in the circumstances merely to a control of the use of the property . . .

Such laws are especially called for and usual in the field of housing which in our modern societies is a central concern of social and economic policies. In order to implement such policies the legislature must have a wide margin of appreciation both with regard to the existence of a problem of public concern warranting measures of control and as to the choice of the detailed rules for the implementation of such measures."

The judge considered that the balance struck in *Mellacher* (8) was comparable with that of the present case and the justification for the deprivation of the landlord's rights was of equal application. She rejected the appellants' submission that the present case should be distinguished from *Mellacher* because, in that case, the domestic legislation had pursued the legitimate aim of improving the condition of rented property, a feature which was absent from the present case. She said that the aim of the 2013 Act was no less legitimate. The Act, like the legislation in *Mellacher*, formed part of a comprehensive scheme of rent control, the aim of which was, in this case, to remove unnecessary distinctions in the scheme and to provide for a single method of calculation of rent. She thought that that aim was no less legitimate than "a plethora of others." She thought that the creation of a uniform method of calculation could quite properly be in the general interest.

80 I interpose there to point out that the 2013 Act did not create a single method for the calculation of rent as the judge said. The two methods of calculating rent continue to operate. The Rent Assessor continues to assess rents of all post-June 2008 tenancies and the rents of pre-June 2008 tenancies which have gone through the second succession. However, the judge has here identified what she seems to have regarded as the specific objective of the 2013 Act, rather than the general objective of rent control. I note that she did not rely on the correction of the supposedly erroneous failure to repeal the Rent Assessor provisions in the 2004 Act.

81 Finally, in this section of her judgment, the judge dealt with and rejected the submission that the Act benefited only a small section of the community. She cited from *Bäck* v. *Finland* (2) (a case about debt reduction or cancellation) where the court said (Application No. 37598/97, at para. 60):

> "The Court agrees with the applicant that a transfer of property effected for no reason other than to confer a benefit on a private party cannot be 'in the public interest'. Nonetheless, it is settled case-law that the compulsory transfer of property from one individual to another may, depending upon the circumstances, constitute a legitimate means of promoting the public interest. Thus, a transfer of property effected in pursuance of legitimate social, economic or other policies may be 'in the public interest' even if the community at large has no direct use or enjoyment of the property transferred. The debt adjustment legislation clearly serves legitimate social and economic policies and is not *ipso facto* an infringement of Article 1 of Protocol No. 1."

82 Starting at para. 75, the judge explained her thinking thus (2017 Gib LR 172, at paras. 75–79):

> "75 To my mind the issue is not that the measure disadvantages an individual or small group over others, but rather the justification of the connection between the measure and the particular person, class of persons, entity or group of entities to which it relates. In the present case, the justification for the connection between the measure and the landlords was legitimate. Cut-off points were set which categorized rents payable by reference to dates of creation of tenancies and age of buildings; similar exercises had been conducted on various occasions in previous years, for example, by virtue of the provisions of the 1991 Amending Act. The measure was in keeping with protected housing policy; it did not derogate rights already granted to tenants; it is true it disadvantaged some landlords but rent control measures often do; and, on one view, that is a necessary consequence of rent control.

76 Ultimately, much turns on the interpretation by the court of the context against which the particular measure was introduced. The fact that in *Bank Mellat* . . . Lord Neuberger reached a different conclusion from Lord Sumption on the reasonableness of the measure illustrates just how difficult the assessment of such a measure is. Lord Neuberger said ([2014] A.C. 700, at paras. 168–169):

> '168 The explanation for the fact that Lord Sumption and Lord Reed JJSC have reached opposing conclusions on Bank Mellat's substantive challenge to the Direction largely lies in the difference between their respective analyses of the facts. Essentially, Lord Sumption JSC concludes that the Treasury's decision to make the Direction was flawed for two main reasons, which he summarises in para 22 . . .
>
> 169 I have concluded that, while those two points each have some force in a qualified form, neither of them amounts to a sufficiently justified criticism of the Direction to justify quashing the order.'

77 Each case must be decided on its own particular facts, and the importance of placing those particular facts into their historical and social context cannot be underestimated. The important consideration must be whether the measure is so unreasonable and unfounded as to justify an intervention by the court. In this case, in my view it is not.

78 Placed in context, the 2013 Act did not arbitrarily introduce a new concept of fixed rents by way of a random act; the principal Act (the 2007 Act), which the 2013 Act amends, already had the concept of fixed rents for pre-2008 tenancies in buildings built on or before 1945. All that the 2013 Act did in respect of fixed rents was to change the qualifying period when buildings were erected from before 1945 to between 1945–1959. As a result, there was a change in the particular group of people who qualified for the new categories, *i.e.* some landlords who had been receiving assessed rents moved into fixed rents and some tenants who had been paying assessed rents were now caught by the more favourable fixed rents. This was not an unexplained or unforeseeable introduction of a measure which aimlessly targeted a specific group, or which had no sense or purpose. This was the development of a rental management scheme which had begun years before; it simply corrected the failure to repeal s.11A, and placed all buildings erected before March 1st, 1959 in the same regime with regard to the calculation of rent. It is difficult to see how this step could be described as manifestly without reasonable foundation.

> 79 It may indeed be that subjecting a landlord to receipt of fixed rent when he was previously in receipt of assessed rent causes him some disadvantage, but that does not of itself make that measure unconstitutional. I find the 2013 Act to have a legitimate purpose, to be of general application, and to be part of a rent control scheme."

83 That was effectively the end of the judgment, although the judge concluded with a reference to the possibility that Parliament might find that landlords were having difficulty in maintaining their properties, in which case it might wish to revise the level of rents. But there was no further reference to the issue of justification or proportionality.

84 In my view, the judge's consideration of the fourth limb of Lord Sumption's test was inadequate. I find paras. 75 to 79 of her judgment difficult to follow, save that she recognized that the process was fact dependent and might well be difficult. In one sense, the exercise was doomed from the start because the judge had not adequately considered the first two limbs of the test. She had not identified the policy objective underlying the measure. Without that, she could not evaluate its importance or balance it against the effect on the appellants. The general tenor of her discussion was that this was a perfectly acceptable measure which fitted in with previous measures. It simply changed the qualifying period of fixed rents. It did not derogate from tenants' rights and the fact that it affected the landlords' interests was just one of the incidents of rent control. She also said that the Act corrected the failure to repeal s.11A of the Landlord and Tenant Act 1983 as amended. It could not be described as manifestly without reasonable foundation.

85 The deficiencies in the judge's approach are that she did not discuss the underlying policy of the Act or note the absence of any underlying social policy or objective. She did not evaluate (or even discuss) the social policy underlying the decision to put pre-2008 tenants of 1945–1959 buildings into the fixed rent regime, thereby reducing their rents by about 70%. She did not consider the social need (or lack of it) to simplify the arrangements for determining which properties fell within the fixed rent regime or the assessed rent regime. She did not discuss the policy reasons (or lack of them) behind Parliament's apparent wish in 2013 to correct a supposed error made in 2004. As the judge had not identified and evaluated the objectives underlying the measure, she was unable to carry out the essential process required by the proportionality test. Nor did she really attempt to do it; her conclusion was not that the importance of the social objectives underlying the Act justified the interference with the appellants' constitutional rights; it was only that the measure could not be described as being manifestly without reasonable foundation.

86 In short, the judge failed to apply Lord Sumption's test properly or at all and for that reason, in my view, her judgment cannot stand. It appears

to me that the best course for this court to adopt is to apply Lord Sumption's test ourselves. As all the evidence before the judge was written and as there were no live witnesses to be cross-examined, we are in as good as position as the judge was to carry out this exercise.

87 I start from the premise that the 2013 Act did indeed interfere with the appellants' constitutional right to the enjoyment of their property, namely the rents and value of the building. There seems to have been no dispute that the rents of 23 of the 41 apartments in the building were reduced from about £500 per month to between £100 and £150 per month. In addition, the tenants of those 23 apartments became entitled to two successions which significantly increased the likely length of those tenancies, with a consequential disadvantage to the appellants. I accept the judge's finding of fact that the rent reduction did not prevent the landlords from maintaining the building but it seems to me that there was nonetheless a substantial interference with the appellants' right to the enjoyment of their property which brought into play the need for the court to decide whether that interference was justified by the importance of the public interest to be served by the 2013 Act or, put another way, whether it was a proportionate means of achieving the desired objectives.

88 There are three potential objectives which it is necessary to examine. First, one of the objectives of the Act was said to be the rationalization or simplification of the criteria by which it was to be decided into which category of rent control any tenancy fell. That is not in itself a social policy objective but a practical one. One has to look behind the practical objective to ascertain what social policy it served, what social need it was designed to meet or what problem it was designed to alleviate. Neither the Chief Minister in Parliament nor the respondent by the service of evidence explained what this underlying objective was let alone why it was important. There was, as I earlier observed, no suggestion that the old arrangements were cumbersome, wasteful of resources or in any way causing difficulty. One might have understood why a Government which was paying for the operation of two separate systems of rent calculation might wish to reduce them to one; it might save resources. But this measure left both systems in operation. Indeed, by bringing more tenancies into the fixed rent regime, its operation will tend to delay the time when the fixed rent regime is phased out. If there is any public interest or benefit in changing the criterion from the date of erection of the building to the date of commencement of the tenancy, it has not been explained and I cannot detect it. It must, therefore, be very slight.

89 Secondly, the Chief Minister claimed that Parliament had intended in 2004 to repeal s.11A of the 1983 Act as amended and the 1992 Regulations. If done, this would have had the effect of putting an end to the assessed rent regime. There would no longer have been any statutory framework for the Rent Assessor to apply. I find the Chief Minister's

statement puzzling. First, as I mentioned earlier, there was no hint of any such intention in Hansard for 2004. Secondly, the Chief Justice in *Balban* (5) held that there was no evidence that the failure to repeal s.11A and the regulations had been accidental. It seems that all the Chief Minister could have meant was that some Members of Parliament thought that those provisions should have been repealed in 2004. If Parliament agreed, that could have been done in 2013, although one would still have expected to understand why that was thought desirable. However, the 2013 Act did not repeal the provisions relating to the Rent Assessor; they remain in operation although slightly modified. It follows that the Chief Minister's implication in his speech to Parliament that the 2013 Act would "put matters right" was not accurate. In addition, the Chief Minister did not explain what social policy underlay the desire in 2013 to "put matters right." The respondent to this appeal does not rely on the correcting of any error; he does not seek to justify the interference with the appellants' right by reference to any policy relating to the correcting of the 2004 "error." I cannot see what social problem was being tackled or what social benefit was being promoted by the correction of any previous error even supposing that there had been an error in the first place. There is no evidence on this from the respondent and I myself cannot detect any benefit save that there is to be rent reduction for a group of people who no one has suggested were vulnerable or particularly in need of assistance.

90 Thirdly, I come to what seems to me to be the real objective underlying the 2013 Act. Those drafting the Act must have known that the *only* effect of the Act was to reduce the rents of tenants of pre-2008 tenancies in 1945–1959 buildings and enhance the security of tenure of their families. This effect was not spelled out in Parliament as in my view a transparent democratic process would usually require. The only matters mentioned were "correcting the error" and simplifying or rationalizing the categories of tenancies. One hopes that all Members understood what the practical effect of this measure would be. Because he did not mention the actual effect of the Act, the Chief Minister obviously did not explain what social policy lay behind the desire to reduce the rents paid by that defined and closed group of tenants. The result of the Act seems almost capricious. Why should pre-2008 tenants pay 70% less than post-2008 tenants for a similar hereditament in the same building? It was not to preserve the accrued rights of the pre-2008 tenancies. The Act did not preserve the status quo. It seems to me that the appellants were justified in saying that the Act provided a group of tenants with a "windfall." The respondent to this appeal has not claimed that there was any social policy which rendered it desirable that these rents should be reduced. Rather the change is presented as a coincidental effect of the decision to simplify and rationalize the criterion. I cannot detect any social policy which this measure was designed to promote or any social problem which it was designed to alleviate. It is worrying that one of the limited class of people

who could potentially benefit from this windfall was the Minister for Housing. It is also worrying that the Act was passed against the background of a dispute between the appellants and some of the tenants in the building about the level of rents the landlords were asking for.

91 I would answer the first limb of Lord Sumption's test by saying that I cannot detect any objective behind this measure which is related to any social policy or which seeks to meet any recognized need or remedy any recognized problem. The measure adjusts the rent control provisions in Gibraltar but to no discernible purpose, other than to effect a rent reduction for a limited number of tenants who it was not suggested had any particular reason to need or expect it. In so far as this measure had *any* objective which was capable of benefiting the public, it does not appear to me that it could be said to be of sufficient importance to justify any significant interference with a constitutional right. In my view, the measure fails the proportionality test at the first stage.

92 If I were wrong about that, it would be necessary to examine the second limb of the test. If the objective was to reduce the rents of a closed and defined group of people, then the measure was rationally connected to the objective. But if it was to simplify or rationalize the categorization of tenancies, I cannot see that this provision could reasonably be expected to achieve simplification or rationalization. To all intents and purposes, the system remains as simple or as complex as before; fixed and assessed rents still have to be set. It is just that the criterion is now the date of commencement of the tenancy rather than the date on which the building was erected. The effect of the 2013 Act is that more people pay fixed rents than before. If the objective was to correct an "error" made in 2004, the measure could not be expected to achieve that and has not done so. The supposed error was the failure to repeal the rent assessor provisions but they remain in force; they just apply to fewer people than before. Only the objective of reducing the rents of the pre-2008 group of tenants is rationally connected to the means adopted.

93 I do not think it necessary to examine the third limb of the test. No one has suggested that the Act's objectives could have been achieved in any less intrusive way. As the objectives are wholly unclear to me (except achieving a rent reduction for a group of tenants), it seems a pointless exercise to consider whether that might be achieved in any other way.

94 From what I have already said, it seems to me that the objectives behind this Act could not and did not justify the significant interference it caused to the appellants' constitutional right of enjoyment of property. In simple terms, the Act provided a windfall reduction in rent and enhanced succession rights to a limited class of tenants. No policy justification has ever been suggested for this change. The measure, with its consequential

interference with the appellants' constitutional right, cannot in my view be rationally justified.

Conclusion

95 I would allow the appeal and, if the other members of the court agree with my conclusion, I would invite the parties to agree the form of an order or, if that proves impossible, to make written submissions as to the form the order should take.

96 **DUDLEY, C.J.:** I agree.

97 **RIMER, J.A.:** I also agree.

Appeal allowed.