IN THE SUPREME COURT OF THE PITCAIRN ISLANDS

SC 2/2022
[2023] PNSC 3

BETWEEN	**MICHAEL WARREN** Applicant
AND	**THE ATTORNEY-GENERAL OF PITCAIRN** First Respondent
AND	**THE GOVERNOR OF PITCAIRN** Second Respondent

Hearing:	12 – 14 December 2022 on Pitcairn Island (via AVL) 13 – 15 December 2022 NZ
Counsel:	A Ellis for Applicant K Raftery KC for Respondents
Judgment:	17 May 2023

JUDGMENT OF HAINES J

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Introduction

[1] Charles Stuart Blackie was appointed Chief Justice of the Pitcairn Supreme Court with effect from 1 February 2000 by Notice under the hand of the (then) Governor dated 8 June 2000. He was sworn in at Auckland, New Zealand, on 30 June 2000 by the (then) Governor, who administered to him the oath of allegiance and the judicial oath. A claim by Mr Warren that Blackie CJ had not in those circumstances been lawfully sworn in was dismissed by the Court of Appeal in *Warren v R* [2015] PICA 1 at [43]–[67]. Under s 54(1) of the Pitcairn Constitution Blackie CJ held office until he attained the age of 75 years. That date was 21 January 2022.

[2] On 16 January 2022 the Governor of Pitcairn appointed Paul Heath KC, then President of the Pitcairn Court of Appeal, to be the new Chief Justice of the Pitcairn Supreme Court. The appointment was expressed to be with effect from 20 January 2022 NZ time.

[3] On 20 January 2022 NZ time (19 January 2022 Pitcairn time) a sitting of the Supreme Court was convened at Adamstown, Pitcairn, with video connections to Auckland and other places in New Zealand for the swearing in of the new Chief Justice and two new Justices of Appeal, being Asher and Dobson JJA, whose appointments had similarly been made on 16 January 2022. The outgoing Chief Justice, the incoming Chief Justice and Asher JA participated in the sitting from Auckland by video-link which had been established at the British Consulate, while Dobson JA participated from his home in Wainui, Gisborne.

[4] At the ceremony Blackie CJ, as the outgoing Chief Justice, administered the oath of allegiance and judicial oath to Heath CJ and thereafter played no further part in the sitting. Having entered upon the functions of his office Heath CJ thereupon administered the oath of allegiance and judicial oath to Asher and Dobson JJA.

[5] Mr Warren has now challenged the competence of Blackie CJ to preside at the first part of the swearing in ceremony and particularly his competence to administer the two oaths to Heath CJ. This, in turn, has placed in issue the validity of the oaths consequently administered by Heath CJ to Asher and Dobson JJA.

[6] For the removal of any doubt, on 13 June 2022 at a Court sitting on Pitcairn with a video-link to New Zealand, the oath of allegiance and judicial oath were

administered to Heath CJ by Lovell-Smith J, the most senior judge of the Supreme Court in terms of the date of her appointment. Between taking office on 20 January and the re-making of his oaths on 13 June 2022 Heath CJ did not hold any substantive hearing or make any substantive decisions in any matter affecting Mr Warren or in any other matter. He did, however, issue three procedural case management minutes in proceedings to which Mr Warren is a party.

[7] Both Asher JA and Dobson JA were on 14 October 2022 re-sworn by Heath CJ at a further court sitting on Pitcairn with video-link connections to New Zealand. Between the appointments in January 2022 and the re-swearing there were no sittings of the Court of Appeal and no Justice of Appeal exercised any judicial functions.

[8] In broad terms the present challenge by Mr Warren is whether Blackie CJ could lawfully administer the two oaths during the first part of the sitting held on 20 January 2022.

[9] The relevance of this issue to Mr Warren is that on 27 May 2019 in the Pitcairn Magistrate's Court he pleaded guilty to a charge of behaving in an indecent manner in a public place. He was convicted and fined and ordered to enter into a recognisance for a period of 12 months. Some two and a half years later, on 6 December 2021, he was found guilty on three further counts of similar offending and again fined. The earlier recognisance was not enforced. These circumstances have resulted in various appeals and applications, details of which are not necessary to recite here.

[10] The present claim has arisen because it is alleged by Mr Warren that Heath CJ, who is sitting on Mr Warren's criminal appeal, gave various case management directions without first having been lawfully sworn into office, a condition precedent to entering the functions of that office. The validity of the appointment of Heath CJ is not itself challenged. Nor is it challenged that he was subsequently lawfully re-sworn on 13 June 2022 and is accordingly fully able to preside over the proceedings involving Mr Warren.

[11] Before describing in greater detail the circumstances in which Blackie CJ participated in the 20 January 2022 ceremony several preliminary matters must be noted.

Further submissions

[12] Following the hearing the parties were by *Minute (No 6)* dated 20 February 2023 invited to file submissions on further material of potential relevance uncovered by the Court's own research. The deadline was 6 March 2023. As recorded in *Minutes 7 to 9* dated 3 March 2023, 13 April 2023 and 21 April 2023, the original filing date was extended at the request of Dr Ellis to 28 April 2023. The submissions by Mr Warren dated 27 April 2023 and the earlier submissions for the Crown dated 6 March 2023 have been taken into account in the preparation of this decision.

References to "Blackie CJ"

[13] Charles Stuart Blackie was Chief Justice of the Supreme Court of Pitcairn for 22 years from 1 February 2000 until his retirement on 19 January 2022. On 16 January 2022 he was appointed "Acting Chief Justice" of the Pitcairn Supreme Court with effect from 19 January 2022. The Constitutional provision under which that last appointment was made permits the appointment of "an **acting** judge". Whether such is the proper description of the status conferred by the 16 January 2022 instrument is an issue addressed later in this decision.

[14] For convenience and consistency Charles Stuart Blackie will in this decision be referred to throughout as "Blackie CJ", notwithstanding his formal resignation from that position on 19 January 2022. Use of such title is not intended to pre-determine his true legal status on 20 January 2022. Nor is the description intended to suggest Blackie CJ and Heath CJ held office as Chief Justice at the same time.

Place of hearing of present proceedings

[15] By *Minute (No 3)* dated 26 October 2022 a direction was made pursuant to ss 15E and 15F of the Judicature (Courts) Ordinance that the substantive hearing of the present proceedings scheduled to commence on 12 December 2022 take place in Pitcairn, with counsel, the Court Stenographer and the Judge participating from New Zealand by audio-visual link. The necessary arrangements were duly made by the Registrar. The ss 15E and 15F orders were repeated at the commencement of the December hearing.

Time – dates

[16] Unless otherwise stipulated, all dates referred to in this decision are expressed in New Zealand time.

Challenge to judicial independence withdrawn

[17] As recorded in *Minute (No 4)* dated 23 December 2022 and in *Minute (No 5)* dated 20 January 2023, the written submissions dated 25 November 2022 filed by Dr Ellis for the purpose of the substantive hearing in December 2022 at para 17 sought leave for Mr Warren to amend his Application by adding to the declarations sought a new declaration to the effect that no member of the Pitcairn judiciary is independent because Pitcairn law presently makes no provision for the making of a complaint about judges beyond removal from office. There is no disciplinary process short of removal. At para 18 Dr Ellis conceded this issue went well beyond the original pleadings and suggested it may be prudent for the Court to consider adjourning the fixture and appointing an intervener.

[18] At the substantive hearing itself the intervener point was developed little further by counsel in their respective written and oral submissions. Consequently, by *Minute (No 4)* issued subsequent to the hearing, the Court asked counsel to file memoranda addressing three specific issues relating to interveners. Such memoranda were not in fact filed because by memorandum dated 11 January 2023 Dr Ellis gave notice Mr Warren withdrew his application to add the new declaration. A more researched application was said to be possible at a later date.

[19] The withdrawal was formally recorded in *Minute (No 5)*, as was the fact that the intervener question is consequently no longer a matter falling for determination in the context of the present proceedings. The submissions made by Mr Warren regarding the claimed lack of independence of the Pitcairn judiciary will accordingly not be addressed in this decision.

The remedies sought

[20] Part 2 of the Constitution of Pitcairn lists some 23 fundamental rights and freedoms of the individual. Included in Part 2 is s 25, an enforcement mechanism whereby the Supreme Court has original jurisdiction to (inter alia) make declarations and orders for the purpose of enforcing any of the listed rights and freedoms.

[21] The Constitution further provides in s 25(3) that the Court may decline to make a declaration if it is satisfied that adequate means of redress for the breach alleged are or have been available to the person concerned under any other law. The relevant parts of s 25 follow:

> **Enforcement of protective provisions**
>
> **25.**
>
> (1) If any person alleges that any of the provisions of this Part has been, is being or is likely to be breached in relation to him or her (or, in the case of a person who is detained, if any other persons alleges such a breach in relation to the detained person), then, without prejudice to any other action with respect to the same matter that is lawfully available, that person (or that other person) may apply to the Supreme Court for redress.
>
> (2) The Supreme Court shall have original jurisdiction—
>
> (a) to hear and determine any application made by any person in pursuance of subsection (1); and
>
> (b) to determine any question arising in the case of any person that is referred to it in pursuance of subsection (7),
>
> and may make such declarations and orders, issue such writs and give such directions as it considers appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of this Part.
>
> (3) The Supreme Court may decline to exercise its powers under subsection (2) if it is satisfied that adequate means of redress for the breach alleged are or have been available to the person concerned under any other law.

[22] As noted by the Privy Council in *Warren v R* [2018] UKPC 20 at [5], Part 2 is to be distinguished from other Parts of the Constitution, including Part 6, The Administration of Justice.

[23] The Application dated 16 June 2022 filed by Mr Warren is self-described as an application under s 25(1) of the Constitution. Declarations of unconstitutionality under s 25(1) and (2) of the Constitution are sought. Mr Warren must accordingly show that a provision in Part 2 of the Constitution "has been, is being or is likely to be breached in relation to him". The Application does not in fact identify any Part 2 right or freedom to which the remedy provisions of s 25(1) and (2) might attach.

[24] However, in written submissions by Mr Warren dated 25 November 2022 two Part 2 sections were referenced. The first was s 8 (fair hearing by an independent and impartial tribunal) and the second was s 13 (freedom of expression). The freedom of expression point is addressed later in this decision. As to the alleged lack of independence of the Pitcairn judiciary, Dr Ellis in his written submissions preferred to advance that challenge "directly" rather than relying on s 25. The possible application of s 8, however, fell away once the challenge to judicial independence was withdrawn.

[25] Recognising that most, if not nearly all of the complaints made by Mr Warren related to alleged breaches of Part 6 of the Constitution, not Part 2, Dr Ellis opened his written submissions with the statement that the action was brought "by way of constitutional challenge be it section 25, or any other section, as it is a rights challenge, and would in NZ be a NZBORA case". He submitted it did not really matter how one categorised the relief sought.

[26] At first impression this is a submission that either under the Constitution or under other legislation the Court has a freestanding jurisdiction, unfettered by the restrictions in s 25 or by a leave or standing requirement, to declare that any provision of the Constitution has been breached and to grant a remedy.

[27] The Crown makes two primary submissions. First, that no Part 2 breach has been established. Second, that the challenge should be brought by way of judicial review under ss 29(2) and 31 of the Senior Courts Act 1981 (UK). This will require Mr Warren to first obtain leave of the Court. Cited in supported is *R v Warren* [2014] PISC 1 at [452]–[466], upheld in *Warren v R* [2015] PICA 2 at [233]–[235] which in turn was upheld in *Warren v R* [2018] UKPC 20 at [21]. Such leave has not been granted.

[28] I have concluded the question whether the Court has jurisdiction to grant the remedies now sought by Mr Warren in his submissions is one best left until the end of this judgment when more is known of Mr Warren's case. In addition, determination of the issue will only be necessary should Mr Warren succeed in one or more of his causes of action.

The evidence before the Court – how received

[29] Where a challenge is made to the validity of a judicial appointment or to the validity of the judicial oath taken by a judge, the preferable approach is for the Crown to file a memorandum setting out the relevant circumstances and it is not appropriate for the applicant to arrange this. In any event Mr Warren has no personal knowledge of the matters at issue. For these reasons the direction given in *Minute (No 2)* on 29 August 2022 at [3]–[6] and [9.1] required the Attorney-General to place before the Court all evidence relevant to the matters pleaded in Mr Warren's Application dated 16 June 2022. It was expressly acknowledged this could be done by way of memorandum from one or more of the judicial or statutory officers involved. Dr Ellis accepted the evidence could also be placed before the Court by way of letter from the Attorney-

General. Although Mr Warren was at [9.2] given opportunity to thereafter file evidence, he did not do so. See *Minute (No 3)* dated 26 October 2022 at [2].

[30] It was in these circumstances the Crown by Memorandum dated 16 September 2022 filed the relevant correspondence between the Deputy Governor and Dr Ellis together with the attachments to those letters. The Attorney-General also submitted a letter from his own Office addressing additional material of potential relevance. A few days later the Attorney-General filed a Memorandum dated 19 September 2022 from Blackie CJ regarding the circumstances of the January 2022 swearing in.

[31] No affidavit having been filed and no oral evidence having been given, the evidence at the hearing comprised the memoranda filed by the Crown as earlier described and no objection was taken by Mr Warren as to the form of that evidence or as to its admissibility. See *Minute (No 3)* at [2]. In these circumstances no issues of credibility arise.

[32] It is now possible to provide a brief overview of the circumstances leading to the swearing in ceremony on 20 January 2022.

THE FACTS

The circumstances leading to the swearing in ceremony on 20 January 2022

[33] On 19 July 2021 Blackie CJ wrote to the Governor reminding her that he (Blackie CJ) would reach the statutory retirement age on 21 January 2022. He made reference to the need for a successor to be appointed.

[34] The recruitment process which followed has been outlined by the Attorney-General in his letter dated 1 September 2021 addressed to the Governor. It is also referenced by Blackie CJ in his Memorandum dated 19 September 2022 addressed to the Attorney-General. Details need not be recited here. The outcome, as announced by the Governor by Notice issued through the Administrator in Adamstown on 17 January 2022, was that Heath P, then President of the Court of Appeal, was appointed Chief Justice. Sir Ronald Young, then a Judge of the Court of Appeal, would replace Heath CJ as President of the Court of Appeal. At the same time two new justices were appointed to the Court of Appeal, being Asher and Dobson JJA.

[35] The Administrator's Notice went on to advise that the swearing in ceremony for Chief Justice Heath and Justices of Appeal Asher and Dobson would be held at 12.30 pm on Wednesday 19 January 2022 Pitcairn time (9.30 am on 20 January 2022 NZ time) at the Court in Adamstown via video-link to New Zealand.

[36] A few days earlier, by letter dated 14 January 2022, Blackie CJ wrote to the Governor advising he (Blackie CJ) had been giving consideration to the process for his retirement and the appointment and swearing in of his successor on 20 January 2022. After referencing his view there could not be two Chief Justices in office at the same time, Blackie CJ announced it was his intention to retire from the office of Chief Justice on 19 January 2022 so that his successor could be appointed. Addressing the fact he would consequently not have the status and power to swear in the new Chief Justice, Blackie CJ advised it would be appropriate for him to be appointed Acting Chief Justice until the incoming Chief Justice was sworn and had assumed the functions of office. This would allow Blackie CJ to administer the oaths of office to the new Chief Justice as his last act on the Pitcairn Supreme Court. Blackie CJ further advised the Governor such appointment would be in accordance with s 52(2) of the Constitution, a provision which empowers the Governor, acting with the advice of the Chief Justice, to appoint an acting judge of the Supreme Court. The full text of the 14 January 2022 letter follows:

> Your excellency,
>
> **RETIREMENT AS CHIEF JUSTICE**
>
> As my upcoming retirement draws closer, I have been giving consideration to the process for my retirement and the appointment and swearing in of my successor, scheduled for Thursday 20 January 2022.
>
> As a matter of protocol there cannot be two Chief Justices at the same time. I therefore propose to retire from the office of Chief Justice on this coming Wednesday, 19 January 2022, so that you may appoint my successor. To cover the short interim period, and to allow me to swear in the new Chief Justice, I advise that it would be appropriate to appoint me from that date as Acting Chief Justice, in accordance with s 52(2) of the Constitution until my successor is sworn in as Chief Justice and assumes the functions of the office. This will allow me to administer the oaths of the new Chief Justice as my last act for the Pitcairn Islands Supreme Court.
>
> Yours sincerely

[37] On 16 January 2022, citing the advice given by Blackie CJ, the Governor appointed Charles Stuart Blackie to be the "Acting Chief Justice" of the Pitcairn

Supreme Court with effect from 19 January 2022 until the (incoming) Chief Justice assumed the functions of his office:

> **NOTICE OF APPOINTMENT OF ACTING CHIEF JUSTICE**
>
> PURSUANT TO sections 52(2) and 54(2) of the Constitution, and in accordance with the advice of the Chief Justice, I hereby appoint **CHALES STUART BLACKIE**, to be Acting Chief Justice of the Pitcairn Supreme Court with effect from the 19th day of January 2022 (NZ time), until the Chief Justice assumes the functions of the office.
>
> Dated at Wellington this 16th day of January 2022
>
> [signature]
>
> Laura Clarke
> Governor of Pitcairn

[38] Relevant to one of the points raised by Mr Warren is the fact that neither the Public Notice published in Adamstown by the Administrator nor that similarly published by the Deputy Registrar in Adamstown made reference to the resignation of Blackie CJ and his subsequent appointment as Acting Chief Justice. In both notices the swearing in ceremony was described as having the purpose of the swearing in of Heath CJ and Asher and Dobson JJA. The Notice published by the Administrator did, however, state that the new appointments followed the retirement of Blackie CJ.

The swearing in ceremony held on 20 January 2022

[39] On 20 January 2022 a special Court sitting was held on Pitcairn with video-links to New Zealand. The court was open to the public and at least 10 members of the Pitcairn community attended, together with the Island Magistrate and Deputy Registrar. Relevantly, Blackie CJ, Heath CJ and Asher JA appeared via the Auckland video-link while Dobson JA appeared by video-link from his home in Wainui, Gisborne.

[40] Blackie CJ presided during the first part of the sitting, making orders under ss 15E and 15F of the Judicature (Courts) Ordinance and administering to Heath CJ the oath of allegiance as well as the judicial oath. The appointment of Blackie CJ having at that point consequently expired, no further part was played by him in the proceedings and Heath CJ, having entered upon the functions of his office, took over as the presiding judicial officer. It was Heath CJ who thereupon at the same sitting administered the prescribed oaths to Asher and Dobson JJA.

THE PRINCIPAL POINTS MADE BY MR WARREN

[41] It is convenient at this point to summarise the principal submissions made by Mr Warren in respect of the narrated events:

(a) The advice given to the Governor by Blackie CJ that he (Blackie CJ) could be appointed Acting Chief Justice under s 52(2) of the Constitution was wrong in law. The appointment itself was unlawful.

(b) Blackie CJ did not himself, following his appointment as Acting Chief Justice or as an acting judge, take the oath of allegiance and the judicial oath and could not, in turn, lawfully administer those oaths of office to Heath CJ.

(c) Section 47(2) of the Constitution required that the oaths of office taken by Heath CJ be administered by Lovell-Smith J, she being at the time the most senior judge of the Supreme Court.

(d) There was a failure to announce publicly the appointment of Blackie CJ as Acting Chief Justice. The source of the duty to publish was said to be the common law as well as the constitutional right to freedom of expression.

[42] The respondents submit nothing done by the Governor or Blackie CJ was unlawful but should the Court find to the contrary, the Court ought to apply the doctrine that acts of a de facto officer are valid. The respondents also submit that the issues are moot in that all oaths administered by Blackie CJ and Heath CJ on 20 January 2022 have subsequently been validly made before a different judicial officer (a point conceded by Mr Warren) and in none of the matters Mr Warren presently has before the Court will he be affected by the outcome of these present proceedings.

[43] It is intended to first address the appointment of Blackie CJ as "Acting Chief Justice" on 16 January 2022.

VALIDITY OF THE 16 JANUARY 2022 APPOINTMENT OF BLACKIE CJ

Discussion

[44] The Notice of Appointment signed by the Governor on 16 January 2022 appointed Charles Stuart Blackie to be "Acting Chief Justice of the Pitcairn Supreme Court" with effect from 19 January 2022 until the new Chief Justice assumed the functions of his office. The Chief Justice referred to was of course Heath CJ, who was appointed by simultaneous but separate Notice on 16 January 2022. By reason of s 52(5) of the Constitution he could not enter upon his functions of office until the requisite oaths had been made:

> **Appointment of judges and judicial officers**
>
> **52.**
>
> (5) Before entering upon the functions of the office, every holder of a judicial office referred to in this section shall make an oath or affirmation of allegiance and the judicial oath or affirmation in the forms set out in the Schedule.

[45] The office of "Acting Chief Justice" is not recognised by the Constitution or by the Pitcairn Ordinances.

[46] However, the Chief Justice is a judge of the Supreme Court. See ss 47(1) and 52(1)(a) and (b) of the Constitution:

> **Judges of Supreme Court**
>
> **47.**
>
> (1) The judges of the Supreme Court shall be a Chief Justice and such number of other judges (if any) as may be prescribed by law.
>
> **Appointment of judges and judicial officers**
>
> **52.**
>
> (1) The Governor, on instructions from His Majesty given through a Secretary of State, shall appoint—
>
> (a) the Chief Justice and any other judges of the Supreme Court; and
>
> (b) the President of the Court of Appeal and the Justices of Appeal.

[47] Section 48 of the Constitution further provides that not only the Chief Justice but also any other judge or acting judge may hold the Supreme Court. It is also provided that any judge (if not the Chief Justice) so holding the Supreme Court has, in exercise of the jurisdiction of that Court, the jurisdiction, powers, authority, privileges and immunities conferred on the Chief Justice:

Exercise of jurisdiction of Supreme Court

48.

(1) The Chief Justice or any other judge or acting judge of the Supreme Court may hold the Supreme Court.

(2) A judge holding the Supreme Court has, in exercise of the jurisdiction of that Court, all the powers and authority of the Court, and, if not the Chief Justice, has the jurisdiction, powers, authority, privileges and immunities conferred on the Chief Justice.

(3) If, at any time, there are two or more judges who may hold the Supreme Court, each of them may hold sittings of the Court simultaneously.

(4) In this section "Chief Justice" means the person holding the office of Chief Justice.

[48] The question is whether the 16 January 2022 Notice appointing Blackie CJ as "Acting Chief Justice" is to be construed as an instrument appointing him either as a judge of the Supreme Court or, in the alternative, as an **acting** judge of that Court. Each possibility will be addressed in turn.

[49] Appointment of a judge of the Supreme Court by the Governor is possible only on instructions from His Majesty given through a Secretary of State. See s 52(1). Whereas the receipt of such instructions is specifically recorded by the Governor in the Notice of Appointment of Chief Justice relating to Heath CJ, the simultaneous Notice given in respect of Blackie CJ refers only to the receipt by the Governor of advice under s 52(1) from Blackie CJ as Chief Justice, being advice given by him prior to his retirement on 19 January 2022. In the admitted absence of instructions from His Majesty, it is not possible to construe the Notice appointing Blackie CJ as "Acting Chief Justice" as an appointment as Chief Justice or as a judge of the Supreme Court.

[50] The Governor nevertheless has power under s 52(2) to appoint an **acting** judge of the Supreme Court provided he or she does so in accordance with the advice of the Chief Justice and further provided the numerical cap in s 3(1) of the Judicature (Courts) Ordinance is not exceeded (Chief Justice plus up to four other judges or acting judges). Instructions from His Majesty are not required. In the present case advice pursuant to s 52(2) was given by Blackie CJ prior to his retirement from office, albeit the words used by both him in his advice and by the Governor in her Notice were "Acting Chief Justice" instead of "acting judge". Nevertheless, the advice given was explicitly referenced by Blackie CJ and the Governor to s 52(2). I have concluded the divergence between "acting judge" and "Acting Chief Justice" is in the context of the case not material:

(a) The advice given by the Chief Justice expressly relied on s 52(2). It is a provision which confers jurisdiction to appoint an **acting** judge. It is the same provision explicitly cited by the Governor in her Notice of Appointment. No other provision has been or could have been relied on to confer jurisdiction to appoint. The reference by the Governor to s 54(2) was for the different purpose of fixing the tenure of the acting judge.

(b) Notwithstanding the inaccuracy of the word "Chief" in the title used by the Governor, the underlying legal reality was that an appointment under s 52(2) as an acting judge had been advised and that advice had been acted on by the Governor.

(c) While the title employed by the Governor could have been improved upon by deletion of the word "Chief", the nomenclature chosen by her could not invalidate an acting judge appointment which was within her jurisdiction to make. In context the description "Acting Chief Justice" is to be read as a condensed description of the office and of the role intended to be played by Blackie CJ (as **acting** judge) at the 20 January 2022 sitting. The label was not an attempt to circumvent the requirement that a Chief Justice or a judge of the Supreme Court be appointed only on the instructions of His Majesty.

(d) Section 48 of the Constitution provides that an **acting** judge may hold the Supreme Court and in doing so has, in exercise of the jurisdiction of that Court, all the powers and authority of the Court and if not the Chief Justice, the same jurisdiction, powers and authority as those conferred on the Chief Justice.

[51] It follows that subject to himself making the requisite oaths, Blackie CJ, as an **acting** judge of the Supreme Court, possessed via s 48 of the Constitution the requisite power to hold the 20 January 2022 sitting and to administer the two oaths to Heath CJ. Under s 48(2) he did not become the Chief Justice or "Acting Chief Justice" but he did, in holding the Supreme Court on 20 January 2022, have "the jurisdiction, powers, authority, privileges and immunities conferred on the Chief Justice". It would appear

this is what the description "Acting Chief Justice" employed by the Governor in the Notice of Appointment was endeavouring to capture.

Conclusion

[52] In the particular circumstances the Governor's Notice dated 16 January 2022 lawfully appointed Charles Stuart Blackie to be an **acting** judge of the Supreme Court. That, however, does not dispose of the challenge as there is still the matter of the oaths of office.

THE OATHS OF OFFICE

Discussion

[53] The Constitution makes a clear distinction between appointment to office on the one hand and entering upon the functions of that office on the other. Functions can only be entered upon after an oath or affirmation of allegiance as well as the judicial oath or affirmation in the forms set out in the Schedule to the Constitution have been made. See s 52(5):

> Before entering upon the functions of the office, every holder of a judicial office referred to in this section shall make an oath or affirmation of allegiance and the judicial oath or affirmation in the forms set out in the Schedule.

[54] It is common ground that following his appointment as Chief Justice in 2000 Blackie CJ on 30 June 2000 made both the oath of allegiance and the judicial oath. Mr Warren's challenge to those oaths was dismissed in earlier proceedings. See *Warren v R* [2015] PICA 1 at [43]–[67] and *Warren v R* [2014] PISC 1 at [185]–[226].

[55] It is further common ground that following his retirement and subsequent appointment on 16 January 2022 as **acting** judge, Blackie CJ made no further oath.

[56] The issue for determination is whether this omission meant Blackie CJ was ineligible to enter upon the functions of the new office to which he had been appointed on 16 January 2022 and in particular, to preside during the first part of the sitting held on 20 January 2022, to make the orders under ss 15E and 15F of the Judicature (Courts) Ordinance and most importantly, to administer the two Schedule oaths to Heath CJ as the incoming Chief Justice.

[57] While taking the point that the Constitution requires a judge to make both the oath of allegiance and the judicial oath, Mr Warren's submissions concentrated on the failure by Blackie CJ to make the judicial oath subsequent to the 16 January 2022 appointment. While it was acknowledged the original oath of allegiance made on 30 June 2000 arguably continued beyond retirement from office, it was submitted the judicial oath expired by virtue of that retirement.

[58] The Crown accepts it would have been preferable had Blackie CJ sworn fresh oaths but there is no evidence he had acted otherwise than in conformity with the oaths made in 2000. His new appointment in 2022 had the limited purpose of allowing him to preside over the first part of the swearing in ceremony until the incoming Chief Justice had assumed the functions of office. It was not necessary for Blackie CJ to make fresh oaths as he would not himself be sitting as an active judge hearing and determining cases.

[59] If accepted, the Crown submission would produce the result that a properly sworn presiding judge was not a necessary prerequisite to a sitting of the Supreme Court convened for the purpose of ensuring the lawful transition from one Chief Justice to another. It is a submission which undervalues the judicial oath to a significant degree and is in my view untenable.

The judicial oath

[60] As can be seen from the form of the oath prescribed by Schedule to the Constitution, the judicial oath is expressly linked to the particular office to which the person making the oath has been appointed. It follows that upon that office being vacated the obligations under the oath end as they are specific to that office. The form of the prescribed judicial oath follows:

> **3.** Judicial Oath
>
> I…….do swear that I will well and truly serve His Majesty Charles the Third, His Heirs and Successors in the office of ……..……and I will do right to all manner of people according to law, without fear or favour, affection or ill-will. So help me God.

[61] Of such an oath the following commentaries by Lord Bingham of Cornhill and Lord Devlin respectively have been conveniently collected by Sir Grant Hammond in

Judicial Recusal: Principles, Process and Problems (Hart Publishing, Oxford, 2009) at 35:

> THE JUDICIAL OATH
>
> In all common law jurisdictions, a judge takes a judicial oath on appointment. A relatively common form is an oath to 'do right to all manner of people after the laws and usages of [this country] without fear or favour, affection or ill will'.
>
> Lord Bingham of Cornhill has said of such an oath:[1]
>
> > If one were to attempt a modern paraphrase, it might perhaps be that a judge must free himself of prejudice and partiality and so conduct himself, in court and out of it, as to give no ground for doubting his ability and willingness to decide cases coming before him solely on their legal and factual merits as they appear to him in the exercise of an objective, independent, and impartial judgment.
>
> In the view of another distinguished jurist, Lord Devlin, the essential function of a judge is to remove any sense of injustice. This is something that would be more easily aroused by an apprehension of unequal treatment than by anything else. As his Lordship put it in the fourth Chorley Lecture:[2]
>
> > The social service which the judge renders to the community is the removal of a sense of injustice. To perform this service the essential quality which he needs is impartiality and next after that the appearance of impartiality. I put impartiality before the appearance of it simply because without the reality the appearance would not endure. In truth, within the context of service to the community the appearance is the more important of the two. The judge who gives the right judgment while appearing not to do so may be thrice blessed in heaven, but on earth he is no use at all.
>
> (Footnote citations omitted other than footnotes 6 and 7)

[62] The oath has been described as a "solemn commitment to independence and impartiality during judicial service" and as "a continuous strong force for judicial neutrality". See *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd* [2009] NZSC 72, [2010] 1 NZLR 35 (SC) at [105] per McGrath J:

> On taking up an appointment, a judge is required to take an oath to "do right to all manner of people after the laws and usages of New Zealand without fear or favour, affection or ill will". The importance of that solemn commitment to independence and impartiality during judicial service is substantial. Adherence to that responsibility is a fundamental aspect of judicial integrity, commitment to which is the guiding principle in every decision that a judge takes. The oath is accordingly a continuous strong force for judicial neutrality.
>
> (Footnote citation omitted)

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1 Footnote 6: TH Bingham, 'Judicial Ethics' in *The Business of Judging: Selected Essays and Speeches* (Oxford, OUP, 2000) 69, 74.

2 Footnote 7: P Devlin, 'The Judge as Lawmaker' in *The Judge* (Oxford, OUP, 1981) 3.

Whether judicial oaths required to be made

[63] The Crown's submission that a judicial oath was not required because Blackie CJ would not be called to "active judicial services" misses the point. The solemn commitment to independence and impartiality during judicial service required by the judicial oaths and underpinned by s 44 of the Constitution is a constant and does not vary or diminish according to the occasion. Judicial service is an all-embracing term. It includes presiding at a swearing in ceremony and administering the oaths of office to a new judge.

[64] This was not a case where Blackie CJ, as the departing Chief Justice, continued in office up to the point the incoming Chief Justice took the oaths of office. Instead the departing Chief Justice had in the present case elected to resign in advance of the sitting and had advised the Governor to appoint him to the different position of **acting** judge. If it was intended that he preside during the first part of the sitting so that he could administer the oaths of office to the new Chief Justice, Blackie CJ was required to first comply with the mandatory requirements of s 52(5) of the Constitution and himself make those same oaths. In short, a fresh position required a fresh oath. See also the analogous decision in *Williamson c Cour du Québec* 2004 CanLii 30899 (QC CS) at [50] in which it was held that upon reappointment, retired judges were required to retake the judicial oath.

[65] Consideration has been given to s 22 of the Judicature (Courts) Ordinance which identifies those persons who have power to administer oaths. The list includes "any judge":

> The following persons shall have power to administer oaths and take affidavits, declarations and affirmations:
>
> (a) any Judge or Magistrate;
> (b) any Registrar or Deputy Registrar;
> (c) any officer of the court designated in that behalf by a Judge or Magistrate;
> (d) the Governor, Deputy Governor, or Administrator;
> (e) any other officer of the Pitcairn Public Service designated in that behalf by the Governor.

[66] The Constitution, s 61, and the Interpretation and General Clauses Ordinance, s 2(1), define "judge" as follows:

> "judge" means the Chief Justice or another judge of the Supreme Court, the President of the Court of Appeal, a Justice of Appeal, or an acting judge of the Supreme Court.

[67] These provisions are silent on the question whether a judge proposing to administer an oath must him or herself have not only been appointed as a judge (or acting judge) but to have also taken the oaths mandated by s 52(5) of the Constitution.

[68] In my view there can be but one answer to this question. The administration of an oath is a function of office for all judges as defined in the provisions referred to. The conditions precedent to the performance of that function are that the judge administering the oath has not only been appointed to the office of judge but also that the judge has entered upon the functions of his or her office. This latter condition can only be satisfied by making the oaths mandated by s 52(5) of the Constitution. Section 22 of the Judicature (Courts) Ordinance could not on its own authorise an unsworn Blackie CJ to administer the oaths of office to Heath CJ on 20 January 2022.

Conclusion

[69] Subject to application of the de facto officer doctrine (an issue addressed later in this decision), it is concluded that while Blackie CJ was validly appointed an **acting** judge of the Supreme Court, his omission to make in respect of that office the oaths required by s 52(5) of the Constitution meant he could not enter upon the functions of that office. In particular he could not hold any part of the sitting of the Supreme Court on 20 January 2022 and could not administer the oaths of office to Heath CJ.

SECTIONS 47(2) AND 48 OF THE CONSTITUTION

[70] Mr Warren further submits it was inappropriate, unconstitutional and self-serving for Blackie CJ to advise the Governor that it would be appropriate to appoint him (Blackie CJ) to swear in his successor. Rather it was a requirement of s 47(2)(a) of the Constitution that the judicial oaths be administered by Lovell-Smith J as the most senior judge of the Supreme Court. The letter of advice dated 14 January 2022 from Blackie CJ failed to draw the attention of the Governor to s 47, which Mr Warren submits was the principal relevant section applicable in the circumstances. The requested appointment was no more than "a whim or impulse" and an abuse of office, breaching the separation of powers. Blackie CJ could have simply stayed in office, not

retired and resigned when the new Chief Justice took office. Blackie CJ either misread the Constitution or did not read it in full.

[71] Lovell-Smith J did not attend the sitting of the Supreme Court on 20 January 2022. Presumably this was because she had other judicial duties to attend to in her capacity as a judge of the District Court of New Zealand. However, there is nothing to suggest she could not have attended the Supreme Court had appropriate arrangements been made.

Discussion – section 47 of the Constitution

[72] Mr Warren is not correct in submitting that the main provision applicable is s 47(2) of the Constitution.

[73] Section 47 is in Part 6 of the Constitution which addresses the Administration of Justice. The sections in this Part must be read together in harmony as they have the unified purpose of constituting courts, appointing judges and administering the Supreme Court and Court of Appeal. Section 47(1) declares that the judges of the Supreme Court are the Chief Justice and such number of other judges as may be prescribed by law. As earlier mentioned, the cap set by s 3 of the Judicature (Courts) Ordinance is the Chief Justice and up to four other judges or acting judges. Subsections (4) and (5) stipulate the qualifications required to be held by any appointee. Those subsections are not in issue in these proceedings.

[74] Subsections (2) and (3) do, however, require examination because they do not have the relevance asserted by Mr Warren. The purpose of both provisions is to specify who is to perform the functions of the office of the Chief Justice when the Chief Justice is unable to perform those functions (the term "functions of office" or "functions" or variations thereof appear no fewer than six times in the two subsections). The provisions anticipate such inability may arise because the office of Chief Justice is vacant, or the Chief Justice has not assumed or is for any reason unable to perform the functions of that office. It is unmistakeable that the purpose of these provisions is to ensure continuity of the performance of the functions of office of the Chief Justice.

[75] The functions of office may be performed by (to summarise) the next most senior judge of the Supreme Court or by an acting judge authorised by the Governor to perform those functions. The section in full provides:

Judges of Supreme Court

47.

(1) The judges of the Supreme Court shall be a Chief Justice and such number of other judges (if any) as may be prescribed by law.

(2) If the office of Chief Justice is vacant, or the Chief Justice has not assumed, or is for any reason unable to perform the functions of, that office, those functions may be performed by—

(a) the next most senior judge of the Supreme Court in terms of the date of his or her appointment; or

(b) if there is no such judge, or if for any reason no such judge is able to perform the functions of the office of Chief Justice, then, unless this Constitution otherwise provides, those functions may be performed by an acting judge of the Supreme Court authorised to perform those functions by the Governor.

(3) If—

(a) in the circumstances described in subsection (2), there is no judge who can perform the functions of the office of Chief Justice; or

(b) the state of the business of the Supreme Court makes it desirable that an additional person should be appointed by whom the Supreme Court may be held,

the Governor may decide that an acting judge should be appointed to hold the Supreme Court.

(4) A person shall not be qualified for appointment as the Chief Justice or any other judge or acting judge of the Supreme Court unless—

(a) he or she is, or has been, a judge of a court having unlimited jurisdiction in civil and criminal matters in some part of the Commonwealth or in Ireland, or a court having jurisdiction in appeals from any such court; or

(b) he or she is entitled to practise as an advocate in such a court and has been entitled for not less than seven years to practise as an advocate or solicitor in such a court.

(5) For the purposes of subsection (4), a person shall be regarded as an advocate or a solicitor if he or she has been called, enrolled or otherwise admitted as such (and has not subsequently been disbarred or removed from the roll of advocates or solicitors) notwithstanding that—

(a) he or she holds or acts in any office the holder of which is, by reason of his or her office, precluded from practising in a court; or

(b) he or she does not hold a practising certificate or has not satisfied any other like condition of being permitted to practise.

[76] The phrase "functions of the office" is of course found also in s 52(5) which requires that before entering upon the functions of his or her office a judge must make the oath of allegiance and the judicial oath.

[77] Examples of the functions of the office of Chief Justice referred to in the Constitution included making Rules of Court (s 25(12)), giving advice to the Governor on various matters (ss 43(4) and 52(2)), approving the seal of the Court (s 45(4)), holding the Supreme Court (s 48) and being a member of the Court of Appeal ex officio (s 49(2)). Examples under the Judicature (Courts) Ordinance include giving advice to the Governor regarding rules of court (s 20) and consulting with the Governor regarding the appointment of Registrars and other officers (s 21(1)). Applications under the Legal Practitioners Ordinance require approval by the Chief Justice.

[78] The facts of the case do not engage s 47(2) and (3). There was no cause for anyone to perform the functions of the office of Chief Justice during the first part of the ceremonial sitting held on 20 January 2022. There is no requirement in the Constitution that the oaths of office of the incoming Chief Justice be administered by the outgoing Chief Justice. As will be shown, s 48(1) and (2) permit any judge or acting judge (of which Blackie CJ was one) of the Supreme Court to perform that function.

Discussion – section 48 of the Constitution

[79] While s 47(2) and (3) address who may perform the functions of the office of the Chief Justice in what might loosely be described as his or her absence, they do not address the functioning of the Supreme Court (and its judges and acting judges) when the office of Chief Justice is vacant or the Chief Justice has not assumed or is for any reason unable to perform the functions of office. This gap is filled by s 48 of the Constitution which provides:

> **Exercise of jurisdiction of Supreme Court**
>
> **48.**
>
> (1) The Chief Justice or any other judge or acting judge of the Supreme Court may hold the Supreme Court.
>
> (2) A judge holding the Supreme Court has, in exercise of the jurisdiction of that Court, all the powers and authority of the Court, and, if not the Chief Justice, has the jurisdiction, powers, authority, privileges and immunities conferred on the Chief Justice.
>
> (3) If, at any time, there are two or more judges who may hold the Supreme Court, each of them may hold sittings of the Court simultaneously.
>
> (4) In this section "Chief Justice" means the person holding the office of Chief Justice.

[80] While the purpose of s 47(2) and (3) is to ensure continuity of the performance of the functions of office of the Chief Justice, the purpose of s 48 is to ensure the continued and uninterrupted functioning of the Supreme Court itself notwithstanding the absence of a Chief Justice due to that office being vacant or, as here, because the incoming Chief Justice has not yet assumed the functions of office.

[81] In such circumstances s 48 provides that any other judge or acting judge of the Supreme Court may hold the Supreme Court. A judge so holding the Court has, in the exercise of that jurisdiction, all the powers and authority of that Court and importantly in the present case, if not the Chief Justice, also has the "jurisdiction, powers, authority, privileges and immunities conferred on the Chief Justice".

[82] To underline that the legislative intent is to ensure the continued functioning of the Supreme Court notwithstanding the absence of a Chief Justice (for any reason), s 48(3) allows two or more judges to hold sittings simultaneously. It is to be remembered also that s 48(1) makes it clear that "judge" includes **acting** judge.

[83] The separate functions of s 47(2) and (3) on the one hand and s 48 on the other must not be conflated. Their distinct purposes must be seen as part of a coherent and logical legislative scheme which allows for the continued administration of justice and functioning of the Pitcairn Supreme Court in the absence of a Chief Justice.

Conclusion

[84] The primary provision governing the determination of "who could do what" at the 20 January 2022 sitting was s 48 of the Constitution, not s 47(2). Had he himself taken the oaths of office in respect of his newly appointed position of **acting** judge, Blackie CJ would have had the power to hold the Supreme Court sitting on 20 January 2022 and to administer the oaths of office. However, as no fresh oaths had in fact been made by him prior to the sitting, he had not entered upon the functions of his new (acting) office and therefore had no jurisdiction or power to hold the Supreme Court on that date.

The criticisms made of Blackie CJ

[85] It is necessary at this point to address the at times harsh criticisms of Blackie CJ made by Dr Ellis. The written submissions (repeated in oral argument) included

assertions that by his letter dated 14 January 2022 addressed to the Governor, Blackie CJ had not only wrongly invited the Governor to appoint himself to a position which did not exist, the invitation was unconstitutional, an abuse of office breaching the separation of powers and involved the Chief Justice acting in his own cause. The "requested" appointment was no more than "a whim or impulse" which Dr Ellis defined as "a sudden wish to do or have something, especially when it is something unusual or unnecessary". The advice given to the Governor was characterised as "strange".

[86] It was said Blackie CJ could have remained in office and resigned when the new Chief Justice took office and that the logical inference was that Blackie CJ had not read Part 6 of the Constitution in full. He had made no mention of s 47(2) when tendering advice to the Governor and she, in turn, had not recognised it would be inappropriate to rely on advice which would see Blackie CJ himself being appointed. The advice was also unreasonable given the separation of powers doctrine. The constitutional power was created to fill a genuine vacancy, not to allow a Chief Justice to lobby for his own appointment, usurping other lawful rights on a whim. In particular Blackie CJ and the Governor jointly usurped the position of Lovell-Smith J as senior judge of the Supreme Court to carry out the functions of Chief Justice, including the swearing in.

[87] It was submitted the Notice of Appointment of Acting Chief Justice had been effectively kept secret and it was "surprising" Blackie CJ had not commented on this in his memorandum dated 19 September 2022. A further reference to "unannounced secret appointments" was accompanied by the phrase "arbitrary decisions to lobby for your own short-term appointment". Reference was also made to a judge who "thought he was getting a sinecure" and his failure "to take in hand" training for the Pitcairn judiciary.

Discussion

[88] The language in which these criticisms have been framed is not justified.

[89] Read fairly and in context the letter and advice of 14 January 2022 plainly shows that after 22 years in office, Blackie CJ understandably wished to ensure a smooth and seamless transition to his successor. It would most certainly have been much simpler had Blackie CJ not resigned as Chief Justice until Heath CJ had taken the oaths of office and consequently entered upon the functions of that office. But the fact that Blackie CJ chose a different path does not justify the use of harsh, if not severe

language. He honestly turned his mind to the process and acted in good faith, coming to a solution regarding the problems he perceived would ensue should two Chief Justices hold office at the same time. In turn, the Governor acted honestly and in good faith in acting on the advice given to her.

[90] One of Mr Warren's key arguments is that the main provision which had application at the 20 January 2022 sitting was s 47(2) of the Constitution. It is submitted that under this provision it was Lovell-Smith J who was competent to administer the oaths of office to Heath CJ, not Blackie CJ. For the reasons given in this judgment, this interpretation of the Constitution is wrong and is rejected. It has also been held that on the facts nothing of significance turns on employment of the phrase "acting Chief Justice" instead of "acting judge". These findings dispose of a number of the "constitutional" objections which are the context within which the unfortunate choice of language appears. But the matter of the criticisms will be returned to when the issue of mootness is considered.

THE DE FACTO OFFICER DOCTRINE

[91] The next issue is the Crown's submission that any want of authority by Blackie CJ at the sitting held on 20 January 2022 is overcome by the de facto officer doctrine. Mr Warren submits the doctrine does not apply in this case.

Discussion

[92] The de facto officer doctrine is a longstanding doctrine of the common law. It has been summarised by Wade & Forsyth *Administrative Law* (12th ed, Oxford, 2023) at 220-222 in the following terms:

> In one class of cases there is a long-standing doctrine that collateral challenge is not to be allowed: where there is some unknown flaw in the appointment or authority of some officer or judge. The acts of the officer or judge may be held to be valid in law even though their own appointment is invalid and in truth they have no legal power at all. The logic of annulling all their acts has to yield to the desirability of upholding them where they have acted in the office under a general supposition of their competence to do so. In such a case they are called an officer or judge de facto, as opposed to an officer or judge de jure. The doctrine is firmly based in the public policy of protecting the public's confidence in the administration of justice. It is a well-established exception to the ultra vires rule.
>
> (Footnote citations omitted)

[93] The second and third sentences from this quote were explicitly approved in *Fawdry and Co v Murfitt* [2002] EWCA Civ 643, [2003] QB 104 at [18] per Hale LJ, with whom Sedley and Ward LJJ agreed. The doctrine was applied again in *Coppard v Customs and Excise Commissioners* [2003] EWCA Civ 511, [2003] QB 1428 at [15] per Sedley LJ delivering the decision of the Court. In *Warren v R* [2015] PICA 1 at [61]–[67] the Pitcairn Court of Appeal considered and applied the doctrine in the context of Mr Warren's earlier unsuccessful challenge to the validity of the original appointment of Blackie CJ as Chief Justice in 2000. Both *Fawdry* and *Coppard* were referred to.

[94] As explained in *Fawdry*, *Coppard* and *Warren*, the doctrine requires that the de facto holder of the office have some basis for his or her assumption of office (variously expressed as "colourable title" or "colourable authority") but must not be a mere "usurper" who is known to have no such colourable authority. The doctrine depends upon the judge de facto having been generally thought to be competent to act and treated as such by those coming before him or her. See *Fawdry* at [21] and [22]:

> 21. … the authorities show that the *de facto* officer must have some basis for his assumption of office, variously expressed as 'colourable title' or 'colourable authority'. Quite what suffices for that purpose has been debated …
>
> 22. But the judge must not be a mere usurper who is known to have no such colourable authority. The doctrine depends upon his having been generally thought to be competent to act and treated as such by those coming before him. …

[95] The doctrine applies even when the office to which the judge has been purportedly appointed does not exist. See *In re Aldridge* (1897) 15 NZLR 361 (NZCA) at 366, cited with approval in *Fawdry* at [23].

[96] It was said by Hale LJ in *Fawdry* at [30] that the dividing line between what is and is not sufficient "colour" in borderline cases may not be as clear as one would like but the point did not arise for decision in that case.

[97] However, it did arise in *Coppard*. The conclusion reached at [18] was that the principle does not validate the acts of someone who knows, although the litigants do not, that he or she has no authority to adjudicate. A person who knows he or she lacks authority includes a person who has shut his or her eyes to the fact when it is obvious. But it does not include a person who has simply neglected to find it out:

> … We would hold that the de facto doctrine cannot validate the acts, nor therefore ratify the authority, of a person who, though believed by the world to be a judge of the court in which he sits, knows that he is not. We accept, on well known principles, that a person who knows he lacks authority includes a person who has shut his eyes to that fact when it is obvious, but not a person who has simply neglected to find it out. We will call such a person a usurper.

[98] In the present case the issue is whether Blackie CJ, having omitted to take the oaths of office prescribed for an acting judge of the Supreme Court, shut his eyes to his lack of authority to hold the sitting on 20 January 2022 and to administer the oaths of office to Heath CJ, or whether he genuinely believed he possessed the necessary judicial authority. If the latter, he is to be regarded in law as possessing such authority. See *Coppard* at [32].

[99] Of most relevance to these issues are the two letters and one Memorandum from Blackie CJ which have been received in evidence. They are dated 19 July 2021, 14 January 2022 and 19 September 2022 respectively.

[100] They show that after Blackie CJ wrote to the Governor on 19 July 2021 reminding her he would reach the mandatory retirement age on 21 January 2022 a process was put in place to appoint a successor, as well as new appointees to the Court of Appeal. On or about 8 January 2022 Blackie CJ received confirmation from the Office of the Attorney-General that instructions had been received from Her Majesty via the Secretary of State to make the appointments recommended by Blackie CJ and the Attorney-General. This, in turn, led to the letter dated 14 January 2022 sent by Blackie CJ to the Governor in advance of the Court sitting which had already been scheduled for 20 January 2022. To avoid two Chief Justices holding office at the same time he (Blackie CJ) told the Governor he intended resigning shortly in advance of the sitting and advised the Governor it would be appropriate were he (Blackie CJ) to be appointed under s 52(2) of the Constitution as Acting Chief Justice to bridge the gap. This would allow Blackie CJ as his last act for the Supreme Court, to administer the oaths of office to the new Chief Justice.

[101] It is plain from this evidence that throughout the transition process Blackie CJ was concerned to ensure his impending retirement did not disrupt the work of the Supreme Court, a concern he applied generally to all of the courts of Pitcairn as evidenced by the joint recommendations made in respect of appointments to the Court of Appeal and in which he participated. He also correctly advised the Governor that

any appointment as an acting judge had to be made under s 52(2) of the Constitution. The only substantive error made was his failure to make again the judicial oath and the oath of allegiance in respect of his new office of acting judge. This error was plainly an inadvertent oversight. It is understandable that it could be mistakenly assumed both of the earlier oaths made on appointment in 2000 would have continuing effect, especially given one of those oaths (the oath of allegiance) arguably continued to have legal effect notwithstanding the act of resignation.

Conclusion

[102] My conclusion is that Blackie CJ was not a person who knew he lacked authority or who had shut his eyes to the fact when it was obvious. He neither knew nor ought to have known (in the sense that he was ignoring the obvious or failing to make obvious inquiries) that he was not authorised to exercise judicial functions at the sitting held on 20 January 2022. The failure to identify that the Constitution required fresh oaths of office was an inadvertent oversight by a conscientious Chief Justice whose 22 year term in office was about to end. He genuinely acted in the office under a general supposition of his competence to do so.

[103] As stated by Hale LJ in *Fawdry* at [22], the doctrine also depends upon the judge in fact (de facto) having been generally thought to be competent to act and treated as such by those coming before him or her. In the present case there can be no doubt that all those in attendance at the sitting, including the incoming Chief Justice, believed Blackie CJ to be competent to act in his judicial office.

[104] This is not a case of usurpation, nor one of lack of the requisite competence or qualification. On established principles of law, Blackie CJ was a judge-in-fact of the Supreme Court and his actions during the first part of the sitting on 20 January 2022 are to be regarded as valid in law.

[105] In reaching this conclusion sight has not been lost of Mr Warren's reliance on *Kutlu v Director of Professional Services Review* [2011] FCAFC 94. That decision is distinguishable. On the facts it was held at [47]–[48] and [119] that the de facto officer doctrine had been overridden by the particular statute there under consideration. Mr Warren relies on the fact that in his separate but concurring decision Flick J at [119] was less than enthusiastic about the doctrine, stating that "caution" was required. Doubt was expressed whether earlier decisions in which the doctrine had been applied

would be decided in the same manner today. The decision in *In re Aldridge* was explicitly cited as one such case:

> Although the doctrine may thus be regarded as part of the common law, caution must nevertheless be exercised when applying the doctrine. The decision in *In Re Aldridge* is an early instance where the doctrine was successfully invoked with the consequence that even the liberty of the subject was not sufficient to displace the doctrine's operation. Perhaps persons acting as *de facto* judges may still be able to bring themselves within the *de facto officers* doctrine. But times have unquestionably changed. Although the doctrine survives, it may be doubted whether some of the earlier decisions would be decided in the same manner today. Even though the doctrine may still survive, its ambit of operations – like other common law doctrines – must necessarily yield to either an express legislative provision precluding its operation or by a sufficiently clear legislative intention that may be discerned by a proper construction of the statutory provisions as a whole.

[106] The decisive point about *Kutlu* and its relevance to the present case is that by virtue of s 42 of the Pitcairn Constitution this Court must necessarily apply English, not Australian law. *Fawdry*, *Coppard* and *Warren* are binding on this Court. Further, neither of the judgments in *Kutlu* makes reference to *Fawdry* and *Coppard* notwithstanding those decisions were decided only nine and eight years respectively prior to the 2011 judgment in *Kutlu* and notwithstanding both English decisions cite *In re Aldridge* with approval. See *Fawdry* at [22]–[29] and *Coppard* at [16] and [21]. Flick J makes no reference to these circumstances and neither does the majority judgment.

[107] For these reasons the obiter comments made by Flick J in *Kutlu* are of no assistance.

NO PUBLIC ANNOUNCEMENT OF APPOINTMENT

The submission based on the common law

[108] A further submission made by Mr Warren was that no announcement was made of the appointment of the "purported Acting Chief Justice, or the Chief Justice's new status". It was said that under the common law secret appointments are contrary to the rule of law. Not promulgating the appointment was a breach of the rule of law and a breach of access to justice. Reliance was placed on *R (Anufrijeva) v Secretary of State for the Home Department* [2003] UKHL 36, [2004] 1 AC 604, in which the majority

held that notification of a decision which was consequent on the rejection of an asylum claim was necessary before it took effect.

[109] The Crown accepts the principle but disputes application because the circumstances in Mr Warren's case are very different. In addition the Crown submits there is no general obligation to publish information. The Constitution (s 39(1)) requires only the publication of all laws made by the Governor.

The common law – discussion

[110] The Crown submission is correct. The decision on Miss Anufrijeva's asylum claim was about her personally and had a direct impact on her rights. Her income support was withdrawn by an internal note on a departmental file with legal effect from a date prior to communication of the decision. The majority judgment at [24] records that the practice of not notifying asylum seekers of the fact of withdrawal of income support had been consistently and deliberately adopted. There was no rational explanation for such a policy. It was in this context that Lord Steyn, delivering the majority of the decision, stated at [26]:

> … Notice of a decision is required before it can have the character of a determination with legal effect because the individual concerned must be in a position to challenge the decision in the courts if he or she wishes to do so. This is not a technical rule. It is simply an application of the right of access to justice. That is a fundamental and constitutional principle of our legal system.

[111] The judgment at [31] makes clear that the "notice" principle is not one which applies generally, across the board, to decisions of every character. Rather, it applies to decisions which affect the individual personally:

> … The decision in question involves a fundamental right. It is in effect one involving a binding determination as to status. It is of importance to the individual to be informed of it so that he or she can decide what to do.

[112] In the present case the decision by the Governor under s 52(2) of the Constitution to appoint Blackie CJ a judge of the Supreme Court did not trigger an obligation to publish that fact either to Mr Warren personally or to the world at large. The decision did not affect Mr Warren personally. Nor did it affect any of his rights. No relevant authority has been cited for the proposition advanced by Mr Warren.

[113] It should also be mentioned for completeness that the fact that Blackie CJ was retiring was referred to in the opening paragraph of the Notice dated 17 January 2022

published on Pitcairn by the Administrator explaining the background to the impending Court sitting and providing details of the new appointments. Reasonable steps were taken to explain the forthcoming changes to the Pitcairn judiciary and the reasons for those changes.

[114] Mr Warren also submitted the duty to publish was premised on the right to freedom of expression. That submission is addressed next.

The submission based on freedom of expression

[115] The submission was that the source of the duty to publish details of the resignation of Blackie CJ and of his subsequent appointment as an acting judge was the right to freedom of expression guaranteed in Part 2 of the Constitution, s 13. That provision was, in turn, linked to the independence and impartiality of the judiciary. It was said the alleged "corralling" of information was either a breach of equality of arms, or "the better argument" was that it was a breach of the Constitutional right to freedom of expression in s 13(1):

> **Freedom of expression**
>
> **13.**
>
> (1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.
>
> (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.
>
> (3) This section shall not prevent the Government of Pitcairn from requiring the licensing of broadcasting, television or cinema enterprises.
>
> (4) Freedom of information in Pitcairn shall be provided by Ordinance, which shall reflect the freedom of information legislation of the United Kingdom adapted to the circumstances of Pitcairn.

[116] The submission was that:[3]

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[3] Submissions in support of declarations of unconstitutionality in respect of actions of the Chief Justice and Governor, [77].

> The public including Mr Warren had a right to receive information on the important appointment of an Acting Chief Justice, withholding the information was interference by a public authority contrary to the Constitution.

Freedom of expression – discussion

[117] No authority, domestic, international or treaty-based, was cited in support of such a sweeping claim. Nor was any principled analysis offered as to how a right of such breadth would operate in practice and whether any limitations might apply. Contrast the Freedom of Information Ordinance 2012 which makes detailed provision for access to information held by public authorities. Significantly in the present context, it does not impose on such authorities an obligation to proactively disclose information held by them in the absence of a request under s 5.

[118] Mr Warren's submissions based on s 13 cannot be accepted:

(a) The right to freedom of expression in s 13(1) of the Constitution relevantly includes freedom to "receive" state-held information. Nowhere in the Constitution is this freedom to **receive** translated into an obligation on government to unilaterally **provide** to all residents of Pitcairn all items of information held by public authorities even if not requested.

(b) Rather, the boundaries of the freedom to receive are established by the Freedom of Information Ordinance which, as the Long Title states, gives to members of the public rights of access to information held by public authorities (which includes the Governor). The right is, however, contingent on the making of a written request (see ss 5 and 6) and there are categories of information which are exempt from disclosure. In addition information can be withheld for "good reason" (see s 11). Provision is also made for a request to be refused on certain other grounds.

(c) It must be doubted that it was intended that a separate freedom of information regime of wider application operate under s 13(1) of the Constitution in parallel to that in the Freedom of Information Ordinance. Not only would a regime based on the generalised, proactive, gratuitous and continuous disclosure of official information make the Freedom of

Information Ordinance largely redundant, it would put s 13 in conflict with itself in that subs (4) expressly stipulates that freedom of information in Pitcairn is to be provided by way of Ordinance. There is no room for an interpretation of s 13 which would circumvent this stipulation and result in the side-by-side operation of two disclosure regimes:

> (4) Freedom of information in Pitcairn shall be provided by Ordinance, which shall reflect the freedom of information legislation of the United Kingdom adapted to the circumstances of Pitcairn.

(d) No authority has been cited which would allow the conclusion that a constitutional right held by Pitcairn residents to "receive" information imposes on the Governor and other public authorities a positive obligation to make continuing disclosure of presumably all information held by them to a cohort of unidentified individuals in the absence of any written request under the Ordinance and in the absence of a framework regulating the circumstances in which disclosure could be justifiably refused.

[119] It is concluded that neither the constitutional "right to receive" nor the Freedom of Information Ordinance imposed an obligation on the Governor, in the absence of a request, to publish to everyone living in Pitcairn and presumably to the world at large the fact that the Governor had received from Blackie CJ advice under s 52(2) of the Constitution and that by Notice of Appointment dated 16 February 2022 the Governor had acted on that advice. Nor for the reasons given can such obligation be found in the common law.

[120] Finally, it is to be noted that in any event the evidence in the present case shows that all relevant information was in fact promptly disclosed by the Governor to Dr Ellis in response to the written requests made by Dr Ellis on 3 February 2022 and 25 March 2022. Some correspondence or parts of correspondence so disclosed were withheld where necessary to protect the privacy of natural persons (Freedom of Information Ordinance, s 11(2)(a)) or to maintain the effective conduct of Pitcairn affairs through free and frank expressions (s 11(2)(g)(i)). It has not been suggested that in responding to the two requests made by Dr Ellis the Governor failed to comply with the Ordinance.

WHETHER ISSUES MOOT

[121] Reference has earlier been made to the Crown submission that the issues in this case are moot in that all oaths administered by Blackie CJ and Heath CJ on 20 January 2022 have subsequently been validly taken before a different judicial officer (a point conceded by Mr Warren) and in none of the matters Mr Warren presently has before the Court will he be affected by the outcome of these present proceedings. In addition Blackie CJ retired on 20 January 2022.

[122] It has always been a fundamental feature of the common law judicial system that the courts decide disputes between the parties before them; they do not pronounce on abstract questions of law when there is no dispute to be resolved. A limited discretion applies in the area of public law. However, that discretion is exercised with caution. Issues which are academic between the parties should not be heard unless there is good reason in the public interest for doing so. See *R v Secretary of State for the Home Department, ex parte Salem* [1999] AC 450 (HL) at 456-457, [1999] 2 All ER 42 at 47, applied in *R (on the application of Dolan) v Secretary of State for Health and Social Care* [2020] EWCA Civ 1605, [2021] 1 All ER 780 at [40].

[123] The extensive case law (both for and against) is noted in Michael Fordham *Judicial Review Handbook* (6th ed, Hart Publishing, Oxford, 2012) at [4.6.1] to [4.6.7]. The following summary is at [4.6]:

> 4.6 **Hypothetical/academic issues: utility.** Courts do not like holding moots. One of the great values of public law is in clarifying and guiding, prospectively. But even that function is recognised as a function which arises out of deciding a specific dispute requiring resolution. In general, judges need persuading that it is right to entertain a judicial review challenge where the sole issues are, or have become, academic or hypothetical. Sometimes it will be in the public interest to grasp the nettle, rather than leave the uncertainties for yet further litigation in the future. The position on appeal may be different too, since there will be a binding judgment which may be erroneous and need considering, even though it may have become academic to the parties.

[124] It is submitted by Mr Warren the public law issues raised by him are not moot and that it is only fair that the judges who will hear his appeal behave in accordance with the rule of law. It is a matter of significant constitutional importance that the judiciary are independent and that they behave independently in all aspects and do not go around lobbying to appoint themselves. The public need to have confidence that their judicial officers behave lawfully. A record needs to be made.

[125] The Crown has a strong case for submitting that on the facts the issues are moot. In none of the matters Mr Warren presently has before the Court will he be affected by the outcome of these present proceedings.

[126] The only question is whether there is good reason in the public interest that an exception to the general principle be made.

Conclusion

[127] As to this I have decided, with some disquiet, to determine the claims made by Mr Warren. As already mentioned in this decision, the submissions advanced on his behalf, often in language best described as unhelpful to the dispassionate determination of the issues, were severely critical of Blackie CJ and by inference, the administration of justice in Pitcairn. It is in the public interest those criticisms be ventilated and subjected to objective judicial assessment.

OVERALL CONCLUSION

[128] While Blackie CJ omitted to make the prescribed oaths upon his appointment as an acting judge the de facto judge doctrine remedied that omission. In the result Mr Warren's case fails in its entirety.

[129] As none of the challenges mounted by Mr Warren have succeeded, they are dismissed.

[130] It follows it is not necessary to determine whether there would have been jurisdiction to grant the remedies sought by him had the issues been determined in his favour.

COSTS

[131] As the question of costs has not been addressed by counsel, costs are reserved.

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Justice Haines
Supreme Court