

**THE EASTERN CARIBBEAN SUPREME COURT  
SAINT VINCENT AND THE GRENADINES**

**IN THE HIGH COURT OF JUSTICE**

**SVGHCV2019/0110**

**IN THE MATTER OF THE APPLICATION FOR CONSTITUTIONAL REDRESS UNDER SECTION 16 OF  
THE CONSTITUTION**

**BETWEEN**

**JAVIN KEVIN VINC JOHNSON**

**CLAIMANT**

**and**

**THE ATTORNEY GENERAL OF SAINT VINCENT AND THE GRENADINES**

**DEFENDANT**

**and**

**THE INCORPORATED TRUSTEES OF THE SEVENTH-DAY ADVENTIST CHURCH IN SAINT VINCENT,  
THE INCORPORATED TRUSTEES OF THE EVANGELICAL CHURCH OF THE WEST INDIES, THE  
NEW TESTAMENT CHURCH OF GOD, THE ARCHBISHOP & PRIMATE (SPIRITUAL BATIST) OF  
SAINT VINCENT AND THE GRENADINES, THE CHURCH OF GOD (SAINT VINCENT AND THE  
GRENADINES) THE INCORPORATED TRUSTEES OF THENEW LIFE MINISTRIES, THE LIGHT OF  
TRUTH CHURCH OF GOD, KINGSTOWN BAPTIST CHURCH OF SAINT VINCENT AND THE  
GRENADINES, LIVING WATER MINISTRIES INTERNATIONAL (SAINT VINCENT AND THE  
GRENADINES) AND HOPE EVANGELISM OUTREACH MINISTRIES**

**INTERESTED PARTIES**

**and**

**VINCYCHAP INC**

**ADDED INTERESTED PARTIES**

**CONSOLIDATED WITH**

**SVGHCV2019/0111**

**BETWEEN**

**SEAN MACLEISH**

**CLAIMANT**

**and**

**THE ATTORNEY GENERAL OF SAINT VINCENT AND THE GRENADINES**

**DEFENDANT**

**and**

**THE INCORPORATED TRUSTEES OF THE SEVENTH-DAY ADVENTIST CHURCH IN SAINT VINCENT, THE INCORPORATED TRUSTEES OF THE EVANGELICAL CHURCH OF THE WEST INDIES, THE NEW TESTAMENT CHURCH OF GOD, THE ARCHBISHOP & PRIMATE (SPIRITUAL BAPTIST) OF SAINT VINCENT AND THE GRENADINES, THE CHURCH OF GOD (SAINT VINCENT AND THE GRENADINES) THE INCORPORATED TRUSTEES OF THE NEW LIFE MINISTRIES, THE LIGHT OF TRUTH CHURCH OF GOD, KINGSTOWN BAPTIST CHURCH OF SAINT VINCENT AND THE GRENADINES, LIVING WATER MINISTRIES INTERNATIONAL (SAINT VINCENT AND THE GRENADINES) AND HOPE EVANGELISM OUTREACH MINISTRIES**

**INTERESTED PARTIES**

**and**

**VINCYCHAP INC**

**ADDED INTERESTED PARTIES**

**Appearances:**

Mr. Jomo Thomasof counsel for the claimant Javin Johnson.

Ms. Shirlan Barnwell for the claimant Sean MacLeish

Ms. Karen Duncan with her Mrs. Cerepha Harper-Joseph for the defendant

Mrs. Mandella Peters with her Mrs. Cheryl Bailey and Mrs. Meisha Cruickshank for the 1<sup>st</sup> interested parties in both claims

Mr. Christopher Hamel-Smith with him Mr. Grahame Bollers for the added interested parties in both claims.

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2022:Nov. 2

2023:Feb.9  
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## DECISION

### INTRODUCTION

- [1] **Henry, J.:** These two claims involve challenges brought by Mr. Javin Johnson and Mr. Sean MacLeish to the constitutionality of sections 146 and 148 of the Criminal Code of Saint Vincent and the Grenadines<sup>1</sup> ('the Challenged Provisions') which criminalize consensual sexual intercourse between same-sex adults. Mr. Johnson and Mr. MacLeish contend that those provisions are unconstitutional as they violate the fundamental rights to privacy, personal liberty, freedom of conscience, freedom of expression and protection from discrimination. They seek declarations from the Court to such effect.
- [2] The Honourable Attorney General was named as the sole defendant. Pursuant to respective applications made<sup>2</sup> by several Churches within the State and by the Saint Vincent ('the Churches') and the Grenadines Chapter of the Caribbean HIV/AIDS Partnership (VincyChap SVG) Inc. ('VincyChap') the Court made orders adding them as interested parties and added interested parties respectively.
- [3] By case management order made on December 1<sup>st</sup> 2021, the parties were directed to file and exchange witness statements and/or witness summaries. It was further ordered that applications to strike out any part of such witness statements or witness summaries must be filed by 19<sup>th</sup> September 2022. The defendant (the Honourable Attorney General) and the Churches filed their statements and summaries. VincyChap (the added interested party) has by application filed on September 19<sup>th</sup> 2022, applied for an order striking out portions of the affidavits filed by the defendant and the Churches on the ground that they are inadmissible. Those affidavits were deposed to by Assistant Commissioner of Police Mr. Richard Browne<sup>3</sup> ('the Browne Affidavit'), the interested parties<sup>4</sup> and Pastor Adolph Davis<sup>5</sup> ('the Davis Affidavit'). Pastor Terence Haynes<sup>6</sup> filed

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<sup>1</sup>Cap. 171 of the Laws of Saint Vincent and the Grenadines, Revised Edition 2009.

<sup>2</sup>On 21<sup>st</sup> October 2019 and 25<sup>th</sup> November 2021 respectively.

<sup>3</sup>Filed on 9<sup>th</sup> October 2019.

<sup>4</sup> Filed on 21<sup>st</sup> October 2019.

two affidavits (respectively 'the Haynes No. 2 Affidavit' and 'the Haynes No. 3 Affidavit') which are also the subject of the instant application. VincyChap seeks in the alternative, an order to admit the first affidavit of Dr. Anna Kasafi Perkins that was filed on 19<sup>th</sup> September 2022 in support of this application, and costs.

- [4] The Churches have conceded that parts of their impugned affidavits are inadmissible and ought to be struck out. They and the Honourable Attorney General strenuously oppose the application in respect of the other statements. For the reasons outlined in this decision, VincyChap's application is allowed in part.

## ISSUES

- [5] The issues are: -

1. Whether the Court should strike out the impugned statements from the affidavits sworn to by Assistant Commissioner Mr. Richard Browne, the 1<sup>st</sup> interested parties, Pastor Adolph Davis and Pastor Terence Haynes (the 'strike out application'); and
2. Whether the Court should admit into evidence the first affidavit of Dr. Anna Perkins filed on 19<sup>th</sup> September 2022 ('Admission of evidence' application)

## LAW AND ANALYSIS

**Issue 1 – Strike out application Should the Court strike out the impugned statements from the affidavits sworn to by Assistant Commissioner of Police Mr. Richard Browne, the Churches, Pastor Adolph Davis and Pastor Terence Haynes?**

### Concessions by the Churches

- [6] VincyChap took exception to the contents of an affidavit sworn to by the Churches' representatives and filed on 21<sup>st</sup> October 2019 in support of their application to be added as interested parties, as well

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<sup>5</sup>Filed on 18<sup>th</sup> December 2019.

<sup>6</sup>Filed respectively on 18<sup>th</sup> December 2019 and 17<sup>th</sup> January 2020.

an affidavit No. 3 by Terence Haynes filed on 17<sup>th</sup> January 2020. The Churches signaled in their submissions that for the purposes of the trial, they would rely on neither Affidavit nor seek the Court's leave to do so. They submitted that notwithstanding such indication, certain paragraphs thereof should not be struck out. In this regard, they argued that paragraphs 17, 18, 19, 20 and 21 of the October 2019 affidavit and paragraph 4 of the Haynes No. 3 affidavit should not be excised.

[7] In the latter, Pastor Haynes avers at paragraph 4:

'I also indicated at paragraph 20 thereof, that the Interested Parties genuinely believe that if the Claimants are successful, amongst other things, there will be a marked increase in new cases of STDs and HIV/AIDS among persons who engage in the act of buggery and acts of gross indecency between persons of the same sex.'

VincyChap submitted that those assertions should be struck out under Rule 30.3, as inadmissible statements of information, belief and/or speculation that have not been substantiated, as required under CPR rule 30.3(2).

[8] The Churches countered that Pastor Haynes thereby merely repeats what is set out in paragraph 20 of their Affidavit filed on 21<sup>st</sup> October 2019, while paragraph 22 of that affidavit states the source of his beliefs. In light of the Churches' representation that they do not intend to rely on the October 21<sup>st</sup> 2019 affidavit and will make no application to do so, I consider that the issue of its inadmissibility does not arise for the Court's consideration. Accordingly, I refrain from making a determination as to its admissibility at trial as this has thereby been rendered a moot point. It follows that the Churches cannot be permitted to rely on paragraph 4 of the Haynes No. 3 Affidavit which is inextricably tied to the former. That paragraph must therefore be excised.

[9] VincyChap also objected to several paragraphs set out in the Davis Affidavit and the Haynes No. 2 Affidavit in support of the Churches' case. The Churches acknowledged<sup>7</sup> that several of those statements are inadmissible and should be struck out.

[10] With respect to the impugned paragraphs in the Davis Affidavit, the Churches accepted that: -

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<sup>7</sup> At paragraphs 28, 29, 61 and 62 of their written submissions filed on 25<sup>th</sup> October 2022.

- a) the last sentence in paragraph 9;
  - b) the second sentence in paragraph 10;
  - c) paragraphs 16, 17, 18;
  - d) the first two sentences in paragraph 19;
  - e) paragraphs 20 and 24 and the exhibits referred to in them;
  - f) the last sentence in paragraph 21;
  - g) in paragraph 23 - the last clause in the 1<sup>st</sup> sentence; the last clause in the 2<sup>nd</sup> sentence and the last sentence;
  - h) the last sentence in paragraph 26.
  - i) in paragraph 27 - the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 8<sup>th</sup> sentences and the last clause in the 7<sup>th</sup> sentence;
  - j) paragraph 29 and the exhibits referred to in it;
  - k) the 6<sup>th</sup> and 7<sup>th</sup> sentences in paragraph 31; and
  - l) the last sentence in paragraph 36.
- should be struck out as being inadmissible.

[11] Regarding VincyChap's objections to averments in the Haynes No. 2 Affidavit, the Churches conceded that paragraphs 26 (a) and (b) and 49 are inadmissible and should be excised. The Court is satisfied that those impugned averments in those affidavits offend the applicable rules of Court and should be struck out. The appropriate order will therefore be made.

#### Other impugned statements

[12] I turn now to look at VincyChap's objections to the other aspects of the Davis, Haynes No. 2 and Browne Affidavits. VincyChap argued that the impugned statements are inadmissible either because they are 'scandalous, irrelevant or otherwise oppressive' and/or outside of the deponent's 'own knowledge'. They invoked rules 26.3(1) and 30.3 of the Civil Procedure Rules 2000 ('CPR') and the Court's inherent jurisdiction to strike out evidence that is inadmissible on those grounds. The former empowers the Court to strike out any part of a statement of case which does not comply with a rule while the latter provides that facts outlined in an affidavit must not be scandalous, irrelevant or otherwise oppressive, and must be restricted to those from the deponent's own knowledge. Further, opinions are permissible only if the deponent is an expert to whom leave has been granted pursuant to CPR part 32. They submitted that an affiant is not permitted to 'provide his or her

“interpretation of . . . legal provisions and . . . opinion of whether [the law] was applied correctly.’ They cited **Fletcher St. Jean v Regulator of International Banking et al**<sup>8</sup> and **JIPFA Investments Limited v The Minister of Physical Planning et al**<sup>9</sup>.

- [13] VincyChap argued further that the Court’s powers under rule 30.3 give effect to the CPR’s overriding objective to deal with cases justly, including to safeguard individual litigants from unfair practices, to ensure a level playing field in litigation, and to protect the interest of the public in the proper functioning of the justice system. They submitted that the significant volume of inadmissible material in the referenced affidavits offends well-established procedural and evidential rules, undermines the Court’s ability to resolve this dispute proportionately and efficiently, and is likely to cause prejudice to the litigants.
- [14] On their behalf, learned Senior Counsel Mr Hamel-Smith contended that although this striking out power should not be exercised lightly (as held in **Joseph Horsford v Geoffrey Croft**<sup>10</sup>) the Courts routinely strike out affidavit evidence that offends procedural and evidential rules. He reasoned that it is therefore just and reasonable for the Court to strike out the offending statements pursuant to its powers under Rule 30.3. Learned Senior Counsel cited **Clive Cricket al v Judith Nyapadi et al**<sup>11</sup>.
- [15] Learned Senior Counsel argued that the affidavits filed on behalf of the Churches contain a significant amount of evidence about their subjective religious and moral beliefs which constitutes expert opinion evidence about the theological positions that they describe as reflective of their own Christian theology. He contended that neither Pastor Davis not Pastor Haynes was deemed an expert and they are therefore not qualified to provide such expert evidence. He stated that this is so in view of the fact that among other things the Pastors did not adduce evidence of their requisite expertise and do not meet the overriding duty of impartiality to the Court as required by the CPR. He said that in this vein, the deponents purport to give evidence of one strand of Christian theological belief with respect to homosexuality but fail to present an independent and balanced

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<sup>8</sup> NEVHCV2017/01117, (ECSC) [2018], at para. [63].

<sup>9</sup> BVIHCV2011/0040, (ECSC) [2020].

<sup>10</sup> ANUHCVP2014/0006, (ECSC) [2014].

<sup>11</sup> SVGHCV2011/0221, (ECSC) [2021] (unreported).

view of the range of Christian thought and belief on these issues, including schools that take a different position on homosexuality. Learned Senior Counsel contended that an independent expert in these matters would be duty bound to provide such a perspective in these circumstances.

[16] VincyChap submitted further that much of the evidence in the referenced affidavits is irrelevant, scandalous and otherwise oppressive. They submitted that striking out evidence that is irrelevant tends to ensure efficient management of the proceedings and avoids unnecessary waste of judicial resources that prejudices this and other matters before the Court.

[17] VincyChap argued that the core issue before the Court is whether the Challenged Provisions violate fundamental rights enshrined in the Constitution and should therefore be declared null, void and to no legal effect. They submitted that much of the evidence in the impugned Affidavits has no bearing on the facts in issue and instead merely incorporate statements of opinion or subjective religious and moral belief. They contended that the subjective private religious and moral beliefs of the Churches, however genuinely held, are not relevant to the adjudication of fundamental constitutional rights. They cited **Patrick Reyes v Rin** in which Lord Bingham referred approvingly to the judgment of Chaskalson P of the South African Constitutional Court in **State v Makwanyana** [1995] (3) SA 391 where he said:

‘Public opinion may have some relevance to the enquiry, but in itself, it is no substitute for the duty vested in the Courts to interpret the Constitution and uphold the provisions without fear or favour. If public opinion were to be decisive there would be no need for constitutional adjudication . . . . The very reason for establishing [the Constitution], and for vesting the power of judicial review of all legislation in the Courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. Those who are entitled to claim this protection included the social outcasts and marginalised people of our society’.<sup>12</sup>

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<sup>12</sup> *Patrick Reyes v The Queen*, Privy Council Appeal No. 64 of 2001, (Belize) [2002] 2 AC 235, [2002]; UKPC 11, at [26] (citing Chaskalson P in *State v Makwanyana* [1995] (3) SA 391 (South Africa), at [88]).

[18]VincyChap submitted that also instructive is the decision in **CalebOrozco v Attorney General**<sup>13</sup> the Supreme Court of Belize opined that evidence and arguments regarding religious and moral opposition to homosexuality were irrelevant to the question of the constitutionality of the gross indecency provisions of the Belizean Criminal Code. Chief Justice Benjamin stated as follows:

'[i]t needs to be made pellucid that this Claim stands to be decided on the provisions of the Belize Constitution and in this regard, the Court stands aloof from adjudicating on any moral issue. The source of the Court's remit is firmly grounded in the Constitution itself which reflects the separation of powers. The Claimant has approached the Court on the basis of alleged violation of stated fundamental rights provisions in . . . the Constitution.'<sup>14</sup>

[19]VincyChap's objections to the impugned statements are perhaps best categorised by reference to the primary reasons for the criticism. The first relates to averments which they contend are inadmissible statements of information, belief and/or speculation that, even if substantiated, are inadmissible because CPR Rule 30.3(2) does not apply to the referenced affidavits. From the Browne Affidavit, they identified in this regard: -

- a)The second sentence in paragraph 6: *'The members of the RSVGPF do not target gay men.'*
- b)The second sentence in paragraph 10 (and exhibits 'RB1', 'RB2' and 'RB3'): *'As a law enforcement officer I am aware that the the [sic] USA decriminalised their buggery laws at the Federal level only in 2003. I am also aware of a recent spate of violence against lesbian, gay, bisexual and transgender ("LGBT") people in jurisdictions where laws against buggery have been struck down. I refer to an article in the New York Times titled, "18 Transgender Killings This Year Raise Fears of an 'Epidemic' by Rick Rojas and Vanessa Swales, published on September 27, 2019; an article in The Guardian out of England titled, "Homophobic and transphobic hate crimes surge in*

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<sup>13</sup>Claim No. 668 of 2010 (Belize) 2016.

<sup>14</sup>At para. [53].

*England and Wales" by Sarah Marsh, Aamna Mohdin and Naimh McIntyre, published on June 14, 2019; and an article in The Local, a publication out of France titled, "From insults to violence: How homophobic attacks have jumped in France", published on May 14, 2019, as examples. Copies of the articles in the international print media are exhibited hereto and marked "RB1", "RB2" and "RB3".'*

- c) The first and second sentences in paragraph 15(f): *'There are openly gay persons who are living in Saint Vincent and the Grenadines who do not live in the constant fear spoken of by the Claimant. There are also persons who freely express themselves in their choice of clothing by wearing clothes that are traditionally worn by their opposite gender.'*
- d) The 9<sup>th</sup> and 12<sup>th</sup> sentences in paragraph 21(a): *'The members of the RSVGPF do not discriminate against LGBT people.'* and *'Officers offer protection to all persons.'*

[20] With respect to Pastor Davis, the following statements were objected to on this basis:

- a) Paragraph 34 and exhibit "AD1": *I am not aware of any laws in St. Vincent and the Grenadines which ban or prevent persons who identify themselves as part of the "LGBT" community from forming associations or advocating on behalf of members of their community. I am aware that the Second Claimant has made representations on behalf of the LGBT Community by publishing articles in newspapers in circulation in St. Vincent and the Grenadines. A true copy of one such article written by the Second Claimant and published in the Searchlight Newspaper on 1st June 2012 is exhibited hereto at page 21 - 22 of the bundle marked "A.D. .1.'*
- b) Paragraph 35 and the exhibit at page 23 of the bundle marked "A.O.1.": *'I am also aware of a non-profit organisation "VincyChap" which was registered in St. Vincent and the Grenadines in 2007 and is a support group for the LGBT community. A true copy of an article published by VincyChap in the Searchlight Newspaper on 8th November 2019 is exhibited hereto at page 23 of the bundle marked "A.O.1.'*

- c) The last sentence in paragraph 37: *'To the contrary, I know a number of persons who are assumed to be homosexual, who hold positions of significance in society and who live their lives without being subjected to insult or physical violence.'*

[21] Similarly, from the Haynes' No.. 2 affidavit, VincyChap levelled the identical complaint in respect of paragraph 34(a) where he asserts -*'I am aware of several individuals who are perceived to be or who identify as being homosexuals and who hold prominent positions in the Vincentian society. In fact, I am aware of openly gay men who live freely in St. Vincent and the Grenadines without persecution.'*

[22] In the second category are materials that VincyChap characterized as 'inadmissible opinion evidence that the deponent may not provide as he has not been admitted as an expert witness'. From the Browne affidavit, they argued that the following assertions are caught by that evidentiary rule: -

- a) The last sentence in paragraph 11: *'While I am in no position to admit or deny the content on this paragraph, I wish to comment that the conditions referred to by Mr. Macleish are unsupported by medical evidence which can in any way correlate to the sections of the criminal code he seeks to challenge.'* and

b) Paragraph 15(c): *'The State is empowered to retain laws prohibiting consensual adult incest, prostitution and drug use that occur in private.'*

[23] VincyChap submitted that the Davis affidavit offended this rule of evidence in a number of respects because, he has not been admitted as an expert in the religious, medical, genetic, legal, sociological or related fields: -

- a) in the second and third sentences in paragraph 10: *'The most comprehensive study to date has revealed that there is no gay gene and recognises, in effect, that the homosexual has no other biological influence beyond the standard nature-nurture influences. As such homosexuality is a choice.'*

b) the last clause in the last sentence in paragraph 14: *'harmful effects that the removal of sections 146 and 148 of the Criminal Code may have on Vincentian society'.*

- c) Paragraph 15: *'The removal of sections 146 and 148 of the Criminal Code is likely to promote buggery and acts of gross indecency as normal, healthy and acceptable sexual practices. The act of buggery and sexual activities between persons of the same sex are unnatural, in that it is impossible for those acts to lead to procreation and the continuation of the human race. I am aware that the State has a keen interest in the continued growth of the population in order to ensure the future development of our Nation, and that it is a legitimate objective of the State to discourage acts which are deliberately, directly and an affront to such growth.'*

[24] As to the Haynes' No. 2 affidavit, they identified the following averments in relation to the expert opinion challenge: -

- a) Paragraph 20: *'It is a genuinely held belief of the Interested Parties that if the Claimants are successful, the following will occur:*
- a. buggery and acts of gross indecency between members of the same sex would be facilitated and encouraged;*
  - b. the public promotion of buggery and acts of gross indecency between persons of the same sex as normal, healthy sexual behaviours, including the teaching of the same to children in school; and*
  - c. a marked increase in new cases of STDs and HIV/AIDS among persons who engage in the act of buggery and acts of gross indecency between persons of the same sex.'*
- b) Paragraph 22a, c and d: *'If the Claimants were to succeed, the Interested Parties genuinely believe, based on the history of decriminalisation of buggery and acts of gross indecency between persons of the same sex in other countries, that their rights, the rights of their members and the rights of future generations would be adversely affected as*

*follows:*

- a. *our right and the right of our members to freedom of expression, freedom of thought, conscience and belief in relation to matters concerning buggery and acts of gross indecency between persons of the same sex will be adversely affected; [...]*
- c. *our right and the right of our members to equality before the law will be adversely affected;*
- d, *our right and the right of our members to enjoy a healthy environment will be adversely affected.'*
- c) Paragraph 23: *'The Interested Parties strongly believe that if successful, the Claimants' claims will be detrimental to the common good and interest of St. Vincent and the Grenadines, without conferring any benefit whatsoever on society.'*
- d) Paragraph 26 a and b:
  - a. *'sexual identity is a physical matter rather than a mental reality;*
  - b. *sexual identity is fixed by one's sex at birth;'*
- e) Second and third sentences in paragraph 45: *'I reiterate that I am not aware of any laws in St. Vincent and the Grenadines which criminalise homosexuality; sections 146 and 148 deal specifically with buggery and acts of gross indecency among persons of the same-sex. To the best of knowledge, anyone, whether or not he or she identifies as heterosexual, homosexual or otherwise, may be punished under those sections if he or she engages in the prohibited acts, without reference to his or her perceived or identified sexuality.'*
- f) Second and third sentences in paragraph 48: *'However, as it relates to the Second Claimant's reference to sexual orientation, I am aware that the causes of sexual orientation are poorly understood. From literature that I have read, sociological, environmental and biological factors are thought to play a part.'*
- g) Paragraph 49: *'The issue of the buggery law and acts of gross indecency between persons of the same sex refers specifically to behaviour and as with all behaviours which have a demonstrably negative impact on the common good, its regulation is correctly subject to*

*the purview of the State. Apart from persons considered mentally ill and mentally retarded, behaviour is always a matter of choice.'*

h) Second, third, fourth and fifth sentences in paragraph 56: *'I deny that sections 146 and 148 of the Criminal Code "primarily exist to punish" the Second Claimant and "other LGBT citizens". In addition to being discouraged on the basis of morality, there is extensive and respected authority that anal penetration poses an exceptionally high degree of risk to one's health, regardless of the sex of the participants. I deny the last sentence of paragraph 22 of the Affidavit, in that, all citizens of St. Vincent and the Grenadines are afforded the same rights, protections and freedoms under the Constitution. There is no distinction in the sections 146 and 148, as far as I am aware, as it relates to one's chosen sexual identity.'*

i) The last clause in paragraph 58: *'the Second Claimant's averments that homosexuals in St. Vincent and the Grenadines are pressured to "hide their sexuality and sexual encounters" and that because of this pressure "this leads them to engage in riskier behaviour such as unsafe sex", are not grounded in fact or supported by research.'*

j) Paragraph 59: *'In St. Vincent and the Grenadines there are organisations whose work includes HIV prevention, education programmes and offers treatment, care and support to persons infected with or affected by HIV/AIDS. Those organisations are known to cater to certain key populations affected by HIV/AIDS, including men who have sex with men. The HIV/AIDS Coordinator (formerly AIDS Secretariat) within the Ministry of Health, Wellness and the Environment is one such organisation. This clearly demonstrates the existence of Vincentian organisations which openly reach out to members of the Vincentian society who identify as homosexuals notwithstanding the presence of sections 146 and 148 of the Criminal Code.'*

k) Paragraph 61: *'There are strong and compelling moral, public health, public policy and*

*philosophical considerations for the maintenance of the present status quo in St. Vincent and the Grenadines. Sections 146 and 148 of the Criminal Code are necessary in St. Vincent and the Grenadines for their instructive role and undergirding of a coherent*

*philosophical perspective on socialisation. The Interested Parties hold that the presence of those sections represent a type of philosophy that accords with the reality of nature and serves the common good.'*

[25] Thirdly, VincyChap submitted that the Browne, Davis and Haynes No. 2 Affidavits contain statements which are inadmissible either because they constitute expert opinion or assertions of information, belief and/or speculation which even if substantiated are inadmissible since CPR rule 30(2) does not apply. As to the Browne affidavit, the impugned statements are at:

- a) the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> sentences in paragraph 13(a) (and exhibits "RB4", "RB5" and "RB6"): '*As a law enforcement officer I am aware that the ongoing violence against LGBT's internationally has been characterised as an epidemic, and this is in countries that have decriminalised buggery in their laws. I refer to an article in The Guardian titled, "Homophobic hate crime reports soar but charges fall", published on September 11, 2019; a report from The Williams Institute, University of California, USA, titled "Discrimination and Harassment by Law Enforcement Officers in the LGBT Community" by Christy Mallory, Amira Hasenbush and Brad Sears, published in March 2015; and an article in USA Today titled, "Anti-LGBT hate crimes are rising, the FBI says. But it gets worse", by Grace Hauck, published on June 28, 2019. Copies of these recent articles in the international print media and the report are exhibited hereto and marked "RB4" , "RB5" and "RB6".*'
- b) The last sentence in paragraph 13(b) (and exhibits "RB1" through "RB6"): '*I repeat that violence against LGBT people in jurisdictions where laws against buggery have been struck down persists, despite the decriminalisation. I repeat (a) above and rely on exhibits "RB1" through "RB6" herein.*'
- c) The last clause in the first sentence and the second sentence in paragraph 13(c) (and exhibits "RB1" through "RB6"): '*as the existence of the laws is not the cause of the violence. Violence continues against LGBT people in jurisdictions where laws against buggery have been struck down. I repeat (a) above and rely on exhibits "RB 1" through "RB6" herein.*'

- d) The 4<sup>th</sup> sentence in paragraph 19(a): *'As a law enforcement officer I am aware that violence against LGBT people occurs in jurisdictions where laws against buggery have been struck down, despite the decriminalization.'*
- e) The 4<sup>th</sup> and 5<sup>th</sup> sentences in paragraph 21(d) (and exhibits "RB1" through "RB6"): *'I further repeat that as a law enforcement officer I am aware that violence against LGBT people occurs in jurisdictions where laws against buggery have been struck down, despite the decriminalisation. I rely on exhibits "...1" through "...6" herein, specifically the copies of articles in The Guardian newspaper out of England titled, "Homophobic and transphobic hate crimes surge in England and Wales" by Sarah Marsh, Aamna Mohdin and Naimh McIntyre, published on June 14, 2019 and "Homophobic hate crime reports soar but charges fall", published September 11, 2019.'*

[26] In the Davis affidavit, they are:

- a) The 1<sup>st</sup> and 2<sup>nd</sup> sentences in paragraph 19: *'I truly believe that the normalisation of homosexuality will have a direct consequence of creating an affirming or enabling environment. However, in circumstances where people who are broken by the issues of dysfunctional family life, the brokenness of those people will often remain unaddressed on the basis that their activities will be encouraged and accepted as though they are normal.'*
- b) The 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 8<sup>th</sup> sentences, and the last clause of the 7<sup>th</sup> sentence in paragraph 27: *'She indicated political will, civil society and an international component which included seeking to satisfy international obligations and resource support. I noted that some are of the view that the main driver was the international component. That is, it is that component which drives the political will and civil society, and therefore has implications for sovereignty and self-determination. [...] '... it appears that this is nothing more than neo-colonialism. It is evident that these movements are not indigenous as most of the suggested reforms are coming at a time and pace that is not in accord with our Caribbean culture and traditions.'*
- c) Paragraph 29(a) (and the exhibit at page 18 of the bundle marked "A.D.1"): *'I have conducted extensive research in the matter and found a number of articles that I wish to bring to*

*the attention of the Court: (a) In an article titled 'New HIV diagnoses in London's gay men continue to soar', by Tony Kirby and Michelle Thornber-Donwell and published in The Lancet, Volume 382, Issue 9889, page 295, the authors wrote that, "HIV infections among men who have sex with men (MSM) are indeed soaring. In January (2013), 1296 new HIV infections were thought to have occurred in London's MSM in 2011; but more recent data from PHE (Public Health England), which reflect the latest information submitted by sexual health services, have updated this 2011 figure to 1420 new infections. The latest figure for 2012 is 1720 new HIV infections in London's MSM, an increase of 21% on the 2011 number. However, based on how data has been updated over time in previous years, the final 2012 figure could easily rise to 1900 or more, a rise of at least 33% compared with 2011. Whatever the final number, experts agree that London has a serious problem." A true copy of that article is exhibited hereto at page 18 of the bundle marked "A.D.1.'*

*d) Paragraph 29(b) (and the exhibit at pages 19-20 of the bundle marked "A.D.1"): 'the Lancet also reported that in France, HIV disproportionately affects certain groups and "transmission seems to be out of control in the MSM population." A true copy of the abstract by Dr Stephane Le Vu et al entitled 'Population base HIV-I Incidence 2003-08: a modelling analysis', Lancet Infectious Disease 2010 October; 10 (10), pages 682-687 is exhibited hereto at pages 19 -20 of the bundle marked "A.D.1.'*

*e) Paragraph 30: 'The number of persons noted as having been directly affected and those indirectly affected by this virus is staggering. While the demographics and narrative of HIV/AIDS is diverse, I am deeply concerned, and have expressed this concern, that the strategy implemented by PANCAP to deal with the HIV/AIDS epidemic in the Caribbean fails to adequately address lifestyle or behavioural change as one of the useful or critical methods of intervention. PANCAP has acknowledged that men who have sex with men is the highest risk group in relation to HIV/AIDS, however, PANCAP has not actively sought to discourage that high risk behaviour. Sections 146 and 148 of the Criminal Code provide restrictions which prohibit some of the harmful behaviours which have been linked to the proliferation of HIV/AIDS.'*

f) Paragraph 36: *'In St. Vincent and the Grenadines, I am aware that VincyChap, and another similar organisation, Care SVG, has done extensive work in relation to HIV prevention, education programmes and that they offer care and support to persons infected with or affected by HIV/AIDS. Those organisations are known to cater to certain key populations affected by HIV/AIDS, including men who have sex with men. This clearly demonstrates the existence of Vincentian organisations which openly reach out to members of the Vincentian society who identify as homosexuals notwithstanding the presence of sections 146 and 148 of the Criminal Code.'*

[27] In the Haynes No. 2 affidavit, the following portions were objected to for these reasons:

a) Paragraph 32(b): *'Sentence 8 is denied, in that it is not a regular or normal occurrence for violence or abuse to be meted out against persons who identify themselves as being part of the "LGBT" community in St. Vincent and the Grenadines. In fact, I am aware of many persons in this country who identify themselves as being "gay" or who are suspected of being "gay", but who to my knowledge have never claimed to have suffered physical violence against them by reason of their perceived or stated sexual preferences.'*

b) First and second sentences in paragraph 41: *'As far as I am aware and have experienced, many Christian Churches in St. Vincent and the Grenadines, including but not limited to the Interested Parties, provide a safe environment for all attendees, even those who have same-sex attractions or identify as being homosexuals. The Interested Parties do not engage in or encourage and have openly denounced acts of physical violence and abuse towards individuals who are perceived to be or who identify themselves as homosexuals.'*

c) Last sentence in paragraph 51: *"As it relates to the last sentence of paragraph 17, I am aware of persons who have identified themselves publicly as homosexuals in St. Vincent and the Grenadines who have not suffered abuse, physical violence or victimisation for doing so."*

d) Last clause in the 2<sup>nd</sup> sentence and 3<sup>rd</sup> sentence in paragraph 52: *"and accept the Second Claimant's worth and dignity as a human being without reservation. Notwithstanding*

*that position, the Interested Parties do challenge the assertion that the Second Claimant's constitutional rights have been infringed by the existence of sections 146 and 148 of the Criminal Code, and that those rights create a legitimate basis to assert that the laws which presently criminalise acts of buggery and gross indecency between persons of the same sex are not reasonably required or reasonably justifiable in the Vincentian democratic society."*

- e) Second sentence, first clause of the 3<sup>rd</sup> sentence and 4<sup>th</sup> and 5<sup>th</sup> sentences in paragraph 54: *"I deny that the individuals, including the Second Claimant, who identify as homosexuals risk severe criminal sanction for expressing themselves. Additionally, it is not accurate. ... From my understanding of sections 146 and 148 of the Criminal Code, there are no sanctions against homosexuality. Furthermore, I am aware of persons who openly identify as homosexuals, who have been living in St. Vincent and the Grenadines for decades, and who are not treated degradingly by the Vincentian public."*
- f) Last clause in the 1<sup>st</sup> sentence of, and 2<sup>nd</sup> sentences in paragraph 55: *'Second Claimant's equivalence of being a "gay man" to being a "criminal" is not grounded in fact as there are no statutory provisions which criminalise homosexuality. Further, it is not unusual for someone to censor his or her thoughts and feelings which are considered to be immoral or sinful in a particular society; this is not peculiar to someone who may have attractions to members of the same sex. Persons who have desires or thoughts to engage in activities in violation of the laws of this State are required to restrain themselves; failure to uphold the laws will naturally lead to punishment.'*
- g) The last clause in the second sentence in paragraph 57: *'... as I am not aware of any group in St. Vincent and the Grenadines that has been singled out for punishment on the basis of their identity.'*
- h) Last clause of the 1<sup>st</sup> sentence and 2<sup>nd</sup> sentence in paragraph 60: *'... I am informed that in the United States of America, Canada, the United Kingdom and Europe where buggery/sodomy has been decriminalised, and where there appears to be little or no stigma attached to a homosexual lifestyle, the HIV prevalence rate has not dissipated*

*and HIV infections among men who have sex with men are soaring. This seems to me to be an indicator that it is behavioural choice that drives the spread of HIV, and not laws, policies, culture, religious or political forces.'*

[28] As regards the next category, VincyChap contended that the following impugned statements are objectionable because they are either irrelevant to the issues in the case (because they speak to the functioning of the HDT); or even if they contain information, beliefs or speculation by the affiants, they are inadmissible because rule 30(2) is inapplicable. From the Davis affidavit: -

a) As to relevance – The fifth, sixth and seventh sentences in paragraph 31: *'This was not surprising to me as mentioned in paragraph 25 above, I am fully aware of the mandate of HDT. However, it was alarming that those recommendations were made, in spite of the fact that no empirical evidence or data had been presented to demonstrate that there was a legitimate basis for recommending the repeal of sections 146 and 148. From my experience with HDT, it is evident that they are a very deliberate external force seeking to thrust the LGBT agenda upon our Nation by providing technical and financial support to implement changes to the laws of St. Vincent and the Grenadines.'*

b) As being expert testimony regarding subjective religious beliefs – The last sentence in paragraph 9: *'Based on God's intention for the created order (Genesis 1: 27-28, 2:18-25, Romans 1:18- 32), homosexuality is a deviation, and its influence is disruptive to the cohesiveness of the family unit, which is the cornerstone of life in society.'*

c) Paragraph 16: *'From reading the Affidavits of the Claimants, it is clear that their ultimate objective for challenging the legitimacy of sections 146 and 148 is to foster societal acceptance of homosexuality as an alternative lifestyle. This directly and deliberately undermines the teachings of the Church, biblical authority and God and the world view of the vast majority of Vincentians.'*

d) Paragraph 17: *'Further I have observed in my personal research that the challenge of the buggery laws across the Commonwealth is a concerted agenda by the Lesbian, Gay, Bisexual and Transgender (LGBT) lobby to promote and normalise those lifestyles, as has been demonstrated in Belize, Canada, the United States of America,*

*the United Kingdom and across Europe. The removal of those sections is usually the foundation upon which the LGBT “Trojan Horse” agenda is launched to rapidly infiltrate society, in particular our schools and the minds of our children.’*

- e) Paragraph 24 (and the exhibits at pages 13-14 and pages 15-17 respectively of the exhibit attached hereto and marked “A.D.1.”) *‘The LGBT lobbyists do not hide their desires to effect cultural and attitudinal change as it is their philosophy that sexual relationships between persons of the same sex are intrinsically good and equal to sexual relationships between persons of the opposite sex. True copies of the mission statements of two well known LGBT lobby groups in the United Kingdom namely Stonewall and the Human Dignity Trust, which I will refer to as “HDT” are attached hereto at pages 13-14 and pages 15-17 respectively of the exhibit attached hereto and marked “A.D.1.’*
- f) The last clause of the second sentence and the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> sentences in paragraph 32: *‘... left with the distinct impression that there was a deliberate attempt, not only to achieve tolerance of the homosexual and the homosexual lifestyle, but also, for the Church to accept, affirm and celebrate sexual practices between persons of the same sex. The Church embraces persons regardless of whether or not they are engaged in immoral or sinful lifestyles. However, we cannot depart from biblical principles and affirm lifestyles which we know to be sinful, immoral and unhealthy. As such while we embrace all persons we continue to encourage lifestyle changes to reflect biblical principles and values.’*
- g) Paragraph 33: The last clause of the second sentence—*‘... including the ordination of Ministers who have declared themselves to be engaged in homosexual practices. ...*

[29] From the Haynes No. 2 affidavit, the extracts following were said to contain statements of belief and information to which rule 30.3(2) does not apply and/or which express irrelevant subjective religious beliefs -

- (a) 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> sentences in paragraph 29: *‘What I can say is that from my interactions with my church members and other persons in the public sphere, I have become*

*aware that a large section of the Vincentian population who disagree with the homosexual lifestyle hold those views based on moral and religious beliefs, and not based on sections 146 and 148 of the Criminal Code. I was not even aware of the specifics of sections 146 and 148 until these proceedings surfaced. Throughout the public education campaigns of the Interested Parties, it was revealed that many of those persons were also unaware of the existence of sections 146 and 148.'*

- b) *Fourth, fifth, sixth and seventh sentences in paragraph 42: 'One male student who is now a lawyer and a self-declared homosexual was actively involved in church activities before taking up a promotion outside of St. Vincent and the Grenadines. While living in St. Vincent and the Grenadines, he represented the Church at the national and international levels, despite his obvious effeminacy. He, like all other young people in my congregation, was encouraged to maintain his sexual purity until marriage and to desist from engaging in sexual immorality and temptation. The leadership of the Church never treated him with disdain or disregard; he was given equal opportunity to participate in Church activities and was well loved by Church members.'*
- c) *Paragraph 63: 'I have had conversations with several congregants who have declared that they have had homosexual experiences and effeminacy issues. I had the opportunity to counsel those persons and did not discriminate or stigmatise them in any way. One of those persons became involved with a homosexual lifestyle through exposure to gay pornography. That individual's mother was dominant and his father was disinterested in the family unit; it was discovered that that dysfunctional family environment had a negative impact upon his emotional and social development. As an adult he received counseling which addressed his emotional and social issues and he has now come out of the homosexual lifestyle and now encourages others to refrain from engaging in any forms of sexual immorality.'*

[30] Yet another category of challenges related to statements in the Davis affidavit which are impugned on three separate bases as alternatives or cumulatively. They are described as being inadmissible because rule 30.3(2) is inapplicable to them; and/or that they contain expert opinions and/or that they are irrelevant to the issues in this case.

[31] Those averments are in –

- a) Paragraph 18: *'One of the fundamental problems with the normalisation of homosexuality that I have witnessed in other countries such as the United Kingdom and Canada, is that issues of brokenness within persons who have same sex attractions or adopt a homosexual lifestyle, are often left unaddressed. As a Minister of the Gospel and as a Counsellor I have encountered, not only here in St. Vincent and but also abroad, situations where people have engaged in homosexual activities and have adopted a homosexual lifestyle as a result of child abuse and having grown up in dysfunctional family settings. One example is an encounter that I had with a young lady who was involved in a homosexual lifestyle. It was revealed that that young lady had been molested as a child. After I gave her counselling in relation to her issues of brokenness, she left the homosexual lifestyle, and is now living happily as Christian.'*
- b) Paragraph 20 (and the exhibit at pages 1-12 of the bundle marked "A.D.1."): *'The removal of sections 146 and 148 of the Criminal Code will enable the LGBT agenda to be forced upon a community whose religious ethos is totally at odds with it. For instance, in the United Kingdom, the current flashpoint affecting that society is about the sensitive issue of sex and relationship education. An openly gay Deputy Head designed a "No Outsiders" programme which enabled primary school children to be introduced to questions of sexuality through stories about same-sex relationships and marriages. "No Outsiders" asked children to explore different identities, accept homosexuality as morally correct, and states that ".five-year-olds need to be taught that gay men, lesbian women, bisexual and trans people exist." A true copy of an online newspaper article in relation to that case and emanating out of the United Kingdom is attached hereto at pages 1-12 of the bundle marked "A.D.1."*
- c) The last clause in the second sentence, the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> sentences in paragraph 21: *'I am aware that similar comprehensive sex education initiatives have already been suggested to Caribbean Governments for implementation within the curriculum of our education system. The comprehensive sex education curriculum that PANCAP has*

*formulated includes images of same-sex couples and addresses gay marriage as equal and normal to marriage between a man and a woman. I am also aware that some of the proposed sex education curriculum seeks to educate children that masturbation and anal penetration are normal and healthy sexual practices. This is problematic because it will expose children to that which contradicts biblical principles and to unhealthy behaviours.'*

- d) Paragraph 22: *'Insofar as St. Vincent and the Grenadines is concerned, guidelines are being proposed by the Ministry of Education concerning sexual orientation and gender identity sensitivity known as "SOGI". Those guidelines include the abolition of separate bathrooms for boys and girls, in favour of gender neutral bathrooms. Those guidelines will impact, not only the Methodist Church, as we have a pre-school "the Kingstown Methodist Pre-School", but also, many other Churches, which also manage and own schools in St. Vincent and the Grenadines. Those suggested policies to accommodate SOGI, and the thrust to eliminate natural gender norms, will have an impact on our value systems and on how we run our schools. The more those guidelines are enshrined in our education system, the more we will be impacted as our schools are governed in accordance with biblical precepts.'*
- e) The last clause in the first sentence, the second and third sentences in paragraph 23: *'... is that there have been changes in legislation and policy and those changes are accelerating the normalisation of same sex sexual activities, a change that the Vincentian Society is simply not ready for as demonstrated by the overwhelming support that the March and Rally received from Vincentians from all walks of life. St. Vincent and the Grenadines is generally acknowledged as a highly conservative, Christian society, and the LGBT agenda is anti-Bible and anti-God. It is an affront and an attack on decades and centuries long, valid, tried and tested values of the Christian faith within our society.'*
- f) Fifth, sixth and seventh sentences in paragraph 26: *'As such, one of the questions that lingered for me is what would be the implications of that partnership, since they were clear as to their primary agenda item. Naturally, decriminalisation is their platform issue, but they also outlined other intentions and expectations which include anti-discrimination and*

*hate crime legislation. This is of great concern for me since the LGBT agenda advocates principles and values which are considered progressive and grounded in human rights and civil liberties with some of these principles being contradictory, unsustainable and harmful to any collective group of people and St Vincent and the Grenadines in particular.'*

- g) The last clause in the fifth sentence, the sixth and seventh sentences in paragraph 33: *'I was considered by some of the congregants to have been very bold and brave for doing so, in light of the fear on the part of other Ministers that they would be sanctioned for doing the same. I am aware that in Canada due to certain legislative provisions, a Minister has to be mindful not to offend the LGBT community when preaching the Word of God. I consider this to be an assault on constitutional rights to freedom of expression and freedom of conscience.'*

[32]VincyChaphighlighted a number of statements in the Haynes No. 2 affidavit that they claim constitute subjective religious beliefs that are irrelevant to the legal issues in the case. In this regard, they identified: -

- a) The first clause of the first sentence in paragraph 17: *'The Interested Parties acknowledge that the Preamble to the Constitution of St. Vincent and the Grenadines states that, inter alia, the nation of St. Vincent and the Grenadines is founded on the belief in the supremacy of God, and that Judeo-Christian principles are the foundation of many of the laws of the State of St. Vincent and the Grenadines an ...'*
- b) Paragraph 53: *'Furthermore, the Interested Parties teach and believe that human actions*

*which are deviant to God's mandate are what degrade and devalue one's human dignity. Man was made in the image of God and that is where man finds his true value. The more man deviates from this image of God by thwarting God's design, the more he degrades and devalues himself.'*

[33]VincyChapsubmitted further that several passages in the HaynesNo. 2 affidavit contain expert opinion and/or are irrelevant to the legal issues in this case. In this regard, they identified the following: -

a) The first clause in paragraph 18: *'The orders being sought contravene the Judeo-Christian principles upon which the laws of St. Vincent and the Grenadines were founded.'*

b) Paragraph 19: *'The Interested Parties oppose the practice of buggery and acts of gross indecency between persons of the same sex generally on biblical, medical, and social grounds and this is a part of our teaching to our members, adherents and congregant'.*

c) Paragraph 28: *'In paragraph 17 of the Affidavit, the First Claimant has stated that "[t]hroughout my childhood, I felt an overwhelming sense that being gay was wrong." The Church affirms and believes that conscience is not an externally imposed warden. Conscience has to do with the state of one's mind. The Bible speaks of clear conscience versus a guilty one. When one practises the things which God deems to be pure, one has a clear conscience. However, when persons live contrary to God's mandate their consciences are seared by their own actions. These principles are reflected in the following scriptures:*

*John 3:21 (KJV): "But he that doeth truth cometh to the light, that his deeds may be made manifest, that they are wrought in God";*

*Titus 1:15 (KJV): "Unto the pure all things are pure: but unto them that are defiled and unbelieving is nothing pure; but even their mind and conscience is defiled";*

*Proverbs 28:1 (KJV): "The wicked flee when no man pursueth: but the righteous are bold as a lion"; and*

*Rom. 2:14,15 (KTV) "14 For when the Gentiles, which have not the law, do by nature the things contained in the law, these, having not the law, are a law unto themselves: 15 Which shew the work of the law written in their hearts, their conscience also bearing witness, and their thoughts the mean while accusing or else excusing one another.'*

d) The last clause of the first sentence, the second, third, fourth, fifth and sixth sentences in paragraph 47: *'... save to say that the Second Claimant's reference to being "...overcome by self-disgust and shame" speaks to the inner workings of the Second Claimant's conscience. I reiterate that conscience has to do with the state of one's mind and is not an externally imposed warden. The Bible speaks of clear conscience versus a guilty one. When one practises the things which God deems to be pure, one would have a clear conscience. However, when one lives contrary to God's mandate one's conscience is seared by one's own actions. As stated previously, these principles are illustrated in the passages of scripture which are quoted in paragraph 27 above.'*

[34] Similarly, VincyChap complained that portions of paragraph 64 of the Haynes No. 2 affidavit are objectionable on three scores. They argued that the impugned statements are inadmissible as they express expert opinions and/or statements of information, belief or speculation to which rule 30.3(2) of the CPR does not apply, and/or that are subjective religious expressions that are irrelevant to the issue to be decided in this case.

[35] In this regard, they submitted that the second, third and fourth sentences in paragraph 64 are caught by these challenges. There, Pastor Haynes averred -*'We had in a neighbouring island an outstanding public leader in the Church. There were rumours that this leader was a homosexual as he was never married and there was often debate about the effeminate characteristics he displayed. Notwithstanding the views of some of the congregants, this person was seen and recognised by the Church to be a national civic leader and was a patron of activities within our youth ministry.'*

#### Defendant's submissions

[36] On behalf of the Honourable Attorney General, the learned Solicitor General argued that VincyChap was not entitled to make the present application because when it was added as an interested party, its participation was limited to providing submissions. VincyChap countered that the order adding it as an interested party was silent on whether it was permitted to adduce evidence and they are therefore entitled to the benefit of every item of the case management order including the right to file affidavit evidence.

[37] It is a matter of record that the Court's order of December 1<sup>st</sup>, 2021 permits VincyChap to file and serve evidence by way of witness summaries or statements. While the order adding VincyChap as an Interested Party contains no express prohibition against VincyChap making such interlocutory applications it is apparent that it was contemplated that VincyChap's involvement would extend to filing of evidence commensurate with which is the right to apply for evidence or statements of case to be struck out. Accordingly, the Court will refrain from interpreting it the referenced order in the manner contended by the learned Solicitor General. In any event, as part of its case management powers, the Court has wide discretion and an obligation to exclude evidence for inadmissibility or contravention of rules of Court, in furtherance of the pursuit of justice.

[38] The learned Solicitor General submitted further that the impugned portions of the Browne Affidavit address general unparticularized assertions outlined in the claimants' affidavits, which if struck out, would create a situation where the claimants' referenced averments would remain unanswered. She submitted that this would create an evidentiary imbalance. She argued that on the claimants' and the defendant's cases those are assertions which may need to be tested at trial, but it would not be appropriate to do so at this juncture as no challenge has been made to the claimants' assertions. She submitted that in accordance with CPR 56.10, affidavits filed in answer to administrative law claims serve the purpose of outlining the defendant's statement of case. Learned counsel correctly noted that they are treated as the defence filed pursuant to Part 10 of the CPR.

[39] Learned counsel contended further that the impugned portions of the Browne Affidavit do not contain statements of information and belief or scandalous, irrelevant or oppressive matters and further that the contents of the affidavit are from his own knowledge. She argued that to the extent that the affidavit contains opinion evidence, the affiant has the necessary qualifications and experience to express a view on them. She submitted that this is allowed by section 29 of the **Evidence Act**<sup>15</sup> and Part 56 of the **CPR**, and therefore the impugned portions are admissible. She relied on **Multiplex Construction (UK) Limited v Cleveland Bridge UK Limited**<sup>16</sup>, **ES v Chesterfield and North**

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<sup>15</sup> Cap. 220 of the Laws of Saint Vincent and the Grenadines, Revised Edition 2009.

<sup>16</sup>[2008] EWHC 2220 (TCC).

**Derbyshire Royal Hospitals NHS Trust<sup>17</sup>, Sheldon Bain v The Queen<sup>18</sup>, Clive Crick, and DN v London Borough of Greenwich<sup>19</sup>.**

The Churches' Submissions

- [40] The Churches associated themselves with the learned Solicitor General's submission with regards to preserving a level playing field. They submitted that the Davis and Haynes No. 2 Affidavits should therefore not be amended as prayed by VincyChap. They submitted that retaining the impugned portions would serve to preserve the balance between Mr. Johnson and MacLeish's cases on the one hand and the defendant's and the Churches' on the other. To strike out the impugned portions would create an evidentiary imbalance that would be prejudicial to the Churches. They rejected VincyChap's contentions that much of the evidence in the Davis and Haynes No. 2 Affidavits 'relate to statements of opinion and subjective religious and moral belief' that 'have no bearing on the facts in issue'.
- [41] The Churches accepted that among the issues to be determined in the substantive claim is whether the Challenged Provisions violate certain fundamental constitutional rights and/or freedoms, namely protection of the right to personal liberty, protection from inhuman treatment, arbitrary search and entry, freedom of conscience, freedom of expression, freedom of movement and protection from discrimination. They argued that those rights are however subject to the rights and freedoms of other persons within the State of Saint Vincent and the Grenadines. They argued that the Court must consider public interest and third-party rights and freedoms in determining whether the claimants' rights and freedoms have been, are being or are likely to be violated by retention and application of the Challenged Provisions.
- [42] Learned counsel Mrs. Peters submitted that other live issues in the case are whether the word 'sex' in sections 1 and 13 of the Constitution may be interpreted to include 'sexual orientation', 'sexual identity' 'sexual activity' and/or 'sexual expression'. She stated that the questioned portions of the

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<sup>17</sup> [2003] EWCA Civ 1284.

<sup>18</sup> GDAHCRA2016/0007.

<sup>19</sup> [2004] EWCA Civ 1659.

Davis and Haynes No. 2 Affidavits are relevant in assisting the Court to resolve those issues. She argued that the evidence must not be examined 'in isolation or [subject] to sterile interpretation' but must be read together with other parts of the Affidavits and also in conjunction with the claimants' Affidavits. For this proposition, she relied on **Mable Phillips v Corrine Clara**<sup>20</sup>.

[43] Learned counsel submitted that Pastors Davis and Haynes are put forward as witnesses of fact. She argued that Messieurs Johnson's and MacLeish's Affidavits contain anecdotal evidence as to their rights and freedoms in the State of Saint Vincent and the Grenadines. In contrast the pastors supply contrary views within their personal knowledge and observation as to what happens in the State. She submitted further that their expertise in theology does not make their evidence expert evidence of a religious nature which renders it inadmissible.

[44] Learned counsel Mrs. Peters cited **LICS Limited v Gay-Yin-Wong**<sup>21</sup> in which the Court of Appeal quoted with approval from the **Modern Law of Evidence by Keane 5<sup>th</sup> Ed, page 59** and stated:

'... a non-expert witness may give evidence on matters in relation to which it is impossible or virtually impossible to separate his inferences from the perceived facts those inferences from the perceived facts those (sic) inferences are based. In these circumstances, the witness is permitted to express his opinion as a compendious means of conveying to the Court the facts he perceived. The admissibility of non-expert evidence is largely the question of degree and the matters open to proof by such evidence defy comprehensive expectations. The learned authors then went on to describe certain situations.'<sup>21</sup>

[45] Learned counsel argued further that statements of facts or comment by persons who possess expertise in circumstances where that evidence is not expert evidence, may be admissible. She relied for this proposition on **R (on the Application of) The Good Law Project Limited v Minister for the Cabinet Office & another**<sup>22</sup>. On the issue of relevance, the Churches cited **Kelsick v Kuruvilla**,

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<sup>20</sup> Grenada Civil Appeal No. GDAHCVAP2014/0023.

<sup>21</sup> Antigua and Barbuda Civil Appeal No. ANUHCVP2018/0026 – Digest dated Friday 15<sup>th</sup> March 2019.

<sup>22</sup> [2021] EWCH 2091 (TCC).

**North West Regional Health Authority and Attorney General<sup>23</sup> and JIPFA Investments Limited v The Minister of Physical Planning et al.**

[46] The Churches contended that the decisions in **Patrick Reyes v R** and **Orozco v Attorney General** are not binding on this Court and may be distinguished from the facts in the case at bar. While they acknowledged the proposition of law in **Patrick Reyes**<sup>24</sup> that the Court is not required to give effect to public opinion when dealing with potential breaches of the constitutional fundamental rights provisions, they argued that it has been recognized that public opinion may be relevant to the Court's inquiry – as noted by Chaskalson P in **State v Makwanyana**<sup>25</sup> in the South African Constitutional Court (referred to earlier). They submitted further that the impugned evidence touches and concerns not only public opinion but also matters in relation to public morality and is therefore relevant.

[47] Learned counsel Mrs. Peters argued that unlike in sections 3, 4 and 7 of the Belizean Constitution, no similar provisions exist in the Vincentian Constitution relating to the relevance of laws which are reasonably required in the interest of public morality. She pointed out that in the **Orozco Case** the Court stopped short of concluding that 'evidence and arguments regarding religious and moral opposition to homosexuality were irrelevant to the question of the constitutionality of the gross indecency provisions of the Belizean Criminal Code', and stated simply that the claim is not to be

decided on any moral issue but on the Constitutional provisions.

[48] Learned Counsel also noted that in the **Orozco Case** while it was before the High Court, in an application to strike out affidavit evidence proffered by certain church leaders, Justice Arana reasoned:

*'... While it is true that the question of the constitutionality of Section 53 of the Criminal Code*

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<sup>23</sup>Trinidad and Tobago High Court Civil Claim No. CV 2262 of 2008.

<sup>24</sup> At para. 26 of the judgment.

<sup>25</sup> [1995] (3) SA 391.

*is a legal and not a moral or religious issue, I believe that since the Constitution of Belize itself in the Preamble begins with the affirmation that the Nation of Belize shall be founded upon principles which acknowledge the supremacy of God, the nature of this particular legal and constitutional issue is such that it must be determined against the backdrop of and in the context of the teachings of the Churches of Belize. To do otherwise would be to ignore the fact that all laws are base don a moral foundation and to deny that this particular legal claim affects public morality and public order in Belize.'*<sup>26</sup>

Learned Counsel submitted that the ruling by Arana J is highly persuasive especially having regard to the fact the preamble to the Saint Vincent and the Grenadines Constitution begins with the affirmation that the Nation is founded on the belief in the supremacy of God and in light of the Churches' teachings.

## DISCUSSION

[49] The legal principles which guide the Court in determining whether any particular bit of evidence is inadmissible are well-established. They have largely been ventilated by the parties within the context of this case. I propose to summarize those which are relevant to the present application and to apply them to the present circumstances. In determining this application, I will deliberately refrain from regurgitating the very extensive legal submissions made by the respective parties but wish to assure all parties that their legal arguments have been given due consideration.

[50] The Court retains its inherent jurisdiction to strike out pleadings or evidence in a number of situations.

As to pleadings, CPR 26.3(1), empowers the Court to:

*'... strike out a statement of case or part of a statement of case if it appears to the Court that –*

*(a) there has been a failure to comply with a rule, practice direction, order or direction given by the Court in the proceedings;*

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<sup>26</sup> Reported as Belize High Court Claim No. 668 of 2010 (delivered on 27<sup>th</sup> April 2012)

[51] As regards the striking out of evidence, it is trite law that only such material that is relevant to the issues in dispute and probative is admissible as evidence.<sup>27</sup> In deciding what is relevant, the Court is required to examine the impugned statements contextually within the document and in relation to the opposing parties' assertions'.<sup>28</sup> Courts may, but are slow to excise impugned statements unless satisfied that they are patently inadmissible.

[52] At times, the relevance of a particular piece of evidence becomes evident only at the end of cross-examination of that witness. In cases of uncertainty the just approach is for the Court to admit the evidence provisionally to enable a party to establish relevance at trial or for the other party to expose the irrelevance. Boodoosingh J. explained the process quite eloquently as follows:

‘... it is not always possible to determine the significance of a particular aspect of the evidence until the end of all the cross-examination in the matter. A judge would also, therefore, be entitled to admit evidence *de bene esse* or conditionally subject to its relevance being shown at the trial. ... at the pre-trial review a judge may not always be able to determine the exact significance to be attached to a particular, aspect of the evidence until all of the cross-examination unfolds and the witnesses are tested on their statements. It is always open to the parties to advance submissions on what weight, if any, is to be attached to a specific bit of evidence.’<sup>29</sup>

[53] The **Evidence Act** (**‘the Act’**) and the **CPR** have codified other guidelines which demarcate the boundaries of admissible evidence. Sections 3 and 55 of **the Act** provide respectively that questions regarding admissibility are to be determined in accordance with its provisions or applicable rules of Court, and, where those laws are silent, in accordance with the law and practice in England.

[54] CPR rule 30.3(1) outlines the general rule that an affiant is permitted to give in evidence, facts which are within his personal knowledge. He may attest to matters of his information and belief if

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<sup>27</sup> See para. 23 of *Kelsick v Kuruvilla*, North West Regional Health Authority & AG of Trinidad & Tobago, TT 2012 HC 379, per Boodoosingh J.

<sup>28</sup> See *Mable Phillips v Corine Clara*.

<sup>29</sup> At para. 13 of the *Kelsick v Kuruvilla* case.

the CPR permits this, or if the affidavit is to be used in an application for summary judgment. The present application does not involve summary judgment considerations. Therefore CPR rule 30.3(2) does not apply.

[55] The rules further empower the Court to excise any averment that is scandalous, irrelevant or oppressive. In this regard, sub-rules (2) and (3) state:

*'2. An affidavit may contain statements of information and belief –*

*(a) if any of these Rules so allows; and*

*(b) if the affidavit is for use in an application for summary judgment under Part 15 or any procedural or interlocutory application, provided that the affidavit indicates –*

*(i) which of the statements in it are made from the deponent's own knowledge and which are matters of information or belief; and*

*(ii) the source of any matters of information and belief.*

*3. The Court may order that any scandalous, irrelevant or otherwise oppressive matter be struck out of any affidavit.'* (Emphasis added)

[56] In relation to expert testimony, CPR Part 32 outlines the procedure to be adopted for its introduction. This is generally by application, supported by affidavit evidence to which is exhibited details of the proposed expert's qualifications and breadth of experience in the relevant field of expertise. CPR 32.6(1) provides:

*'32.6 (1) A party may not call an expert or put in the report of an expert witness without the Court's permission.*

[57] The Courts have long recognized that lay persons may be permitted to express non-expert opinions in relation to matters of their own observation, in limited scenarios including with respect to matters such as the weather, a person's conduct and the like or in respect of matter in which he is experienced. As stated by Boodoosingh J. in **Kelsick v Kuruvilla**:

‘An ordinary witness (as opposed to an expert) will also in appropriate cases be able to give evidence of matters which may appear to be an expression of opinion if the matter is one which they may be experienced in. ... Ultimately, it will be an issue of what weight can be attached to the evidence.’<sup>30</sup>

[58] This dictum accords with section 29 (2) & (3) of **the Act**. It states: -

*‘(2) Where a person is called as a witness in any civil proceedings, a statement of opinion by him on any relevant matter on which he is not qualified to give expert evidence, if made as a way of conveying relevant facts personally perceived by him, is admissible as evidence of what he perceived.*

*(3) In this section, “**relevant matter**” includes an issue in the proceedings in question.’*

[59] In the instant case, among the substantive issues to be determined are whether the Challenged Provisions of the **Criminal Code** violate the claimants’ or other persons’ constitutional rights and fundamental freedoms including protection from discrimination, protection of liberty to the person, freedom of expression and the right to privacy. To the extent that the impugned provisions or any of them consist of material which is irrelevant or not probative to the determination of those issues, they are inadmissible and must be struck out. I turn next to examine the questioned averments in light of the foregoing legal principles.

#### Consideration of the impugned statements

[60] At paragraph 6(2<sup>nd</sup> sentence) of the Browne Affidavit, the affiant specifically averred that he was responding to assertions outlined in paragraph 3 of Mr. MacLeish’s affidavit filed on 26<sup>th</sup> July 2017 in support of his claim (‘the MacLeish Affidavit’). Among other things, Mr. MacLeish averred that returning to the State while the Challenged Provisions subsist would be for him, submission to a ‘life of intolerance and a constant risk of arrest, persecution and abuse.’ At paragraph 10 of the Browne affidavit, the affiant indicated that he was addressing paragraphs 9 and 10 of the MacLeish affidavit where he claimed that he can walk the streets in the USA without fear of verbal abuse, physical attacks or arrest. In his response, Mr. Browne refers to ‘a recent spate of violence against

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<sup>30</sup>At para. [7].

lesbian, gay, bisexual and transgender ('LGBT') people in jurisdictions where buggery laws have been struck down'.

[61] In view of the claims outlined in Mr. MacLeish's affidavit which the foregoing portions of the Browne Affidavit are said to rebut, I agree that the impugned statements are admissible at this stage, if only, to strike a balance in light of Mr. MacLeish's claims. To strike out those portions of the Browne Affidavit would leave Mr. MacLeish's assertions unchecked and would be unfair to the defendant (Hon. Attorney General). I am of the considered opinion that in respect of those impugned statements, a decision about excising them is best left until after cross-examination of Mr. Browne at trial, when the Court would have heard from the claimants and be in a better position to assess admissibility in light of the factual and legal context. I therefore make no order striking out the second sentences in paragraph 6 and paragraph 10 of the Browne Affidavit at this juncture.

[62] At paragraph 15(f) of the Browne affidavit the deponent continues his testimony by responding to Mr. MacLeish's affidavit evidence. In the first sentence, Mr. Browne purports to describe the state of mind of individuals he describes as openly gay persons living in Saint Vincent. He has not outlined the basis for this assessment. While VincyChap did not articulate this as a reason for attacking the statement, the Court cannot ignore this clear breach of the rules of evidence and will strike out the first sentence for that reason. In relation to the second sentence, the Court notes that paragraphs 27 through 50 of the MacLeish Affidavit contain numerous allegations to which Mr. Browne directs his attention in paragraph 15 of his affidavit. This includes the second sentence in paragraph 15 (f). For the reasons already outlined above (in paragraph [61]) I make no order striking out that sentence.

[63] Paragraph 21 (a) of the Browne Affidavit sets out portions of paragraph 23 of the affidavit of Mr. Javin Johnson filed on 26<sup>th</sup> July 2019 ('the Johnson Affidavit'). Immediately thereafter (including in the 9<sup>th</sup> and 12<sup>th</sup> sentences), Mr Browne purports to respond to the claims made therein by Mr. Johnson. For the reasons given above (in paragraph [61]) I am satisfied that there is no justifiable basis for striking out those statements. I refrain from doing so.

[64] At paragraphs 34, 35, the last sentence in paragraph 37 of the Davis Affidavit and paragraph 34(a) of the Haynes No. 2 Affidavit, both pastors purported to respond in general terms to several allegations made by the claimants Johnson and MacLeish in their affidavits, to the effect that the

ability of LGBT persons to engage in social activity in the State is stymied by the existence of the Challenged Provisions. I have considered the submissions on those aspects of the impugned affidavits and have concluded that the objections are baseless for the reasons outlined above in paragraph [61]. No order is made striking out those impugned paragraphs, namely: paragraph 34 and Exhibit labelled 'AD1', paragraph 35 and exhibit labelled 'A.O.1', and the last sentence in paragraph 37 of the Davis Affidavit; and paragraph 34(a) of the Haynes No. 2 Affidavit.

[65] At paragraph 11 (last sentence) of the Browne Affidavit, the deponent sets out what he refers to as a comment on, among other things a medical diagnosis referenced by Mr. MacLeish. I understand the comment to communicate that 'the diagnosis' and conditions described are not accompanied by any medical expert evidence. I do not get the impression that Mr. Browne was thereby seeking to offer medical expert evidence. The comment does not offend the rules against a lay person adducing expert testimony and is therefore not inadmissible on that score. At paragraph 15 (c) the affiant makes the observation that contrary to the claimant's assertion, the existence of the Challenged Provisions does not cause violence against LGBT people, since violence persists even in jurisdictions which have de-criminalized buggery. For the reasons expressed at paragraph [61] no order is made excising paragraph 15 (c).

[66] VincyChap listed the 3<sup>rd</sup> sentence in paragraph 10; the last clause in the last sentence in paragraph 14; and paragraph 15 of the Davis Affidavit; paragraph 20, 22a, c and d, 23, 26 a. and b., 2<sup>nd</sup> and 3<sup>rd</sup> sentences in paragraph 45, 2<sup>nd</sup> and 3<sup>rd</sup> sentences in paragraph 48, paragraph 49; 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> sentences in paragraph 56, the last clause in the second sentence in paragraph 58, and paragraphs 59 and 61 of the Haynes No. 2 Affidavit; as expressions of expert evidence. In relation to the 3<sup>rd</sup> sentence in paragraph 10, the Court notes that it is a conclusion which is predicated on the preceding sentence. In light of the Churches' concession that the preceding sentence is inadmissible, this erodes the foundation for the conclusion in the 3<sup>rd</sup> sentence. It cannot therefore survive the challenge. It must be struck out.

[67] In the other paragraphs referenced in the preceding paragraph, Pastors Davis and Haynes posit

opposing views to those articulated by the claimants in their statements of case and affidavits relating to, among other things, some of the likely societal effects of removal of the Challenged Provisions in the

Criminal Code. The Pastors highlight in some instances how they perceive that the practice of the various religious faiths might be impacted. With three exceptions, having regard to their stated professions and expertise, those are matters which they are competent to comment on without necessitating an application for appointment as experts in religion, medicine, geneticism, sociology or related fields. Their reference to the Challenged Provisions is not viewed as being interpretive but commentary. I am satisfied that such commentary does not offend the rules regarding admission of expert evidence. Therefore, no order is made striking out those sections.

[68] The three exceptions mentioned in the preceding paragraph, are in the Haynes No. 2 Affidavit at sub-paragraphs 26 a. and b., the 3<sup>rd</sup> sentence in paragraph 48 and paragraph 49. Those portions of the affidavit contain what on the face might be described as subjective opinions on matters for which no adequate foundation is set out in the Affidavit. They are therefore struck out.

[69] The next set of impugned provisions are contained in the Browne Affidavit in the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> sentences in paragraph 13(a) (and exhibits "RB4", "RB5" and "RB6"); the last sentence in sub-paragraph 13(b) (and exhibits "RB1" through "RB6"), the last clause in the first sentence and the second sentence in paragraph 13(c) (and exhibits "RB1" through "RB6"); the 4<sup>th</sup> sentence in paragraph 19(a); and the 4<sup>th</sup> and 5<sup>th</sup> sentences in paragraph 21(d) (and exhibits "RB1" through "RB6"); in the Davis Affidavit, the 1<sup>st</sup> and 2<sup>nd</sup> sentences in paragraph 19; paragraph 30 and the first and second sentences in paragraph 36; and in the Haynes No. 2 Affidavit, paragraph 32(b); the first and second sentences in paragraph 41; the last sentence in paragraph 51; the last clause in the 2<sup>nd</sup> sentence and 3<sup>rd</sup> sentence in paragraph 52; the second sentence, the first clause of the 3<sup>rd</sup> sentence and the 4<sup>th</sup> and 5<sup>th</sup> sentences in paragraph 54; the last clause in the 1<sup>st</sup> sentence of, and 2<sup>nd</sup> sentences in paragraph 55; the last clause in the second sentence in paragraph 57; the last clause of the 1<sup>st</sup> sentence and the 2<sup>nd</sup> sentence in paragraph 60.

[70] Of those portions, it is clear that the assertions in the 1<sup>st</sup> and 2<sup>nd</sup> sentences in paragraph 19 of the Davis Affidavit and the 3<sup>rd</sup> sentence in paragraph 52 of the Haynes No. 2 Affidavit are inadmissible. As regards Pastor Davis' assertions, he purports there to engage in speculation about the underlying causes of certain types of conduct in which certain persons engage, without laying a scientific or other discernible basis for doing so. In the case of Pastor Haynes, his averment expresses an opinion regarding the constitutionality of the Challenged Provisions which he has not

undergirded with a satisfactory foundation, in circumstances where he does not claim to have the requisite legal training. Those statements must therefore be struck out.

[71] In the other impugned provisions in this category, the affiants have outlined opposing perspectives on assertions outlined by Messieurs Johnson and MacLeish in their statements of cases and affidavit accounts. In some instances, Mr. Browne and Pastors Davis and Haynes respond either directly or indirectly to the claimants' allegations and opinions, and in others, present material from their own observations and background to counter them. As demonstrated by the cited legal authorities, they are permitted to provide non-expert opinions of that kind. Moreover, these are further instances where it is just to permit these matters to proceed to trial for the reasons articulated in paragraph [52] above. I therefore make no striking out order in relation to them.

[72] Objections relating to relevance featured in respect of portions of the Davis Affidavit. So too did the objection that CPR 30.3(2) does not apply to them. In this section, the impugned parts of the Davis Affidavit are the last sentence in paragraph 9, the fifth sentence in paragraph 31; paragraphs 16, 17, 24 (and the exhibits at pages 13-14 and pages 15-17 respectively of the exhibit attached to it and marked "A.D.1."); the last clause of the second sentence and the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> sentences in paragraph 32; and the second clause of the second sentence in paragraph 33.

[73] In the last sentence in paragraph 9, Pastor Davis introduces an opinion on what he describes as God's created order, without linking it to the Churches' teachings as he did in other parts of his Affidavit. It stands out as a personal opinion which is not expressed to be grounded in either the Churches' common theology or the society's. In paragraphs 16, 17, 24 and 31, the statements contained there are not accompanied by any specifics of the referenced research, are speculative in respects and are therefore not probative of the legal issues. They are therefore struck out.

[74] At paragraph 33, Pastor Davis recounts an experience he had while undertaking ministry in Canada. He details his observations at the time, which are all allegedly from his own personal knowledge. They are clearly relevant to the morality and other issues to be determined. In this regard, the Churches have highlighted the right to freedom of religion and freedom of expression which is conferred by the Constitution. They have also posited that the Judeo-Christian foundation of the body of laws in the State are highly relevant. I agree that those are matters which are

expected to be engaged at the substantive hearing. Accordingly, no order is made striking out any of the impugned part of paragraph 33.

[75] From the Haynes No. 2 Affidavit, a number of statements were attacked on the grounds that CPR 30.3(2) does not apply to them and that they contain irrelevant subjective religious beliefs. Those offending portions are – the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> sentences in paragraph 29; the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> sentences in paragraph 42; and paragraph 63. From an examination of those statements, I am satisfied that the opinions expressed in those statements are ones which may be held by someone of Pastor Haynes' avowed training and experience, without offending the provisions of CPR Part 32 or other evidentiary rules including CPR 30.3(2). Moreover, the reasons outlined in paragraph [61] are also applicable to these statements. No order is made striking them out.

[76] From the Davis Affidavit, paragraphs 18, 20 and related exhibits, the last clause in the second sentence of and the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> sentences in paragraph 21; paragraph 22; the last clause in the first sentence of and the second and third sentences in paragraph 23; the fifth, sixth and seventh sentences in paragraph 26; and the last clause in the fifth sentence and the sixth and seventh sentences in paragraph 33 are said by VincyChap to be irrelevant and/or constitute expert opinion and/or are inadmissible because CPR 30.3(2) does not apply to them.

[77] Having regard to the concessions made by the Churches and the Court's decision to strike them out, the only remaining contentions in this category relate to the last clause in the second sentence of and the 3<sup>rd</sup>, and 4<sup>th</sup> sentences in paragraph 21; paragraph 22; the last clause in the first sentence of and the second sentences in paragraph 23; the fifth and sixth sentences in paragraph 26; and the last clause in the fifth sentence and the sixth and seventh sentences in paragraph 33. As to relevance, it is clear that the matters raised in those paragraphs touch and concern a number of the pertinent issues, such as enjoyment by third party rights of their constitutionally guaranteed rights and freedoms (in this case school aged children, the education system and religious Christian institutions among others) alongside the claimants' parallel enjoyment of theirs. The objections on this ground are at this stage without merit.

[78] As regards CPR 30.3(2), suffice it to note that the Pastor has highlighted in the impugned paragraphs, issues which are foreshadowed in the pleadings and reasonably would flow from a full

ventilation of the opposing interests and concerns of all of the parties. Moreover, for the reasons set out at paragraph [61] it cannot be justifiably maintained that the impugned assertions are inadmissible on this basis. To the extent that they express opinions by a non-expert, I am satisfied that the affiant's experience and training equip him to make those observations. I therefore make no order excising those parts of his affidavit.

[79] In respect of the Haynes No. 2 Affidavit, VincyChap flagged as inadmissible, the first clause of the first sentence in paragraph 17 and paragraph 53 on the ground that they are irrelevant and contain subjective religious beliefs. This raises once more an argument which has been addressed earlier. For the reasons expressed in the preceding paragraphs on this subject, and on the issue of relevance in the context of this case, I make no finding that the impugned paragraphs are irrelevant or inadmissible. No order is made striking them out.

[80] In similar vein, VincyChap contended that the first clause in paragraph 18 of the Haynes No. 2 Affidavit, paragraphs 19, 28, and paragraph 47- the last clause of the first sentence, the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> 5<sup>th</sup> and 6<sup>th</sup> sentences are inadmissible for the same reasons. In relation to those parts, VincyChap submitted that they contain expert opinion and are irrelevant. The sentiments expressed in those parts of the affidavit purportedly espouse Christian values and beliefs which are live issues in this case. They are therefore relevant. Moreover, Pastor Haynes' stated experience and training reflect that he is not qualified to express the opinions contained in those statements. I therefore make no order excising them.

[81] The final item of objection relates to paragraph 64 of the Haynes No. 2 Affidavit. VincyChap objects

to the second, third and fourth sentences on the grounds that they contain expert opinions and irrelevant subjective religious statements, to which CPR 30.3(2) does not apply. It is immediately apparent that the account in the referenced statements is not probative of the issues in this case. It cannot therefore be relevant and must be excised.

[82] In summary, the Court's evaluation of the claimants' objections to the impugned statements involved taking into account all of the legal submissions and applicable legal principles. In the round, this Court is satisfied that some of the impugned statements in the Browne Affidavit, the Davis Affidavit

and the Haynes No. 2 Affidavit correspond to and seek to rebut assertions made by Mr. Javin Johnson and Mr. Sean MacLeish in their statements of case and affidavit accounts. I agree that if those specific impugned statements are struck out, the claimants' averments will lie unanswered, with the inevitable consequence that they would have to be accepted without question to the unfair detriment of the opposing parties.

- [83] I hasten to add that the Court has not lost sight that the Honourable Attorney General and the Churches are entitled to apply for any part of the claimants' claims or evidence to be struck out. More fundamentally however, the Court remain cognizant that its function to act justly in furtherance of the over-riding objective of the CPR includes an obligation to maintain a level playing field as far as possible in accommodating parties in putting forward their cases. To my mind, this cannot be achieved by on the one hand, striking out statements made by the Defendant and the Churches that are made in direct response to similar unchallenged assertions made by the Claimants', even if at first blush they appear objectionable and inadmissible by reason of the objections raised to them. In all the circumstances, justice requires that those matters be considered at the trial when all of the evidence is before the Court. In other instances, the Claimants' have demonstrated to the Court's satisfaction that the questioned averments are inadmissible for the reasons given. The remaining objections did not so satisfy the Court.

## **Issue 2 – Admission of Evidence**

- [84] VincyChap submitted that to the extent that the Court does not strike out any or all of the evidence filed by the Churches concerning religious and moral beliefs on the ground that they constitute inadmissible opinion evidence non-experts, then in the interest of fairness and balance, the Court should exercise its power to admit the first affidavit of Dr. Anna Kasafi Perkins, Ph.D., MPhil, B.A. (Theology). They invoked CPR Parts 29 and 30.
- [85] VincyChap argued that admission of Dr. Perkins' affidavit would bring a balanced understanding of the Christian religious and moral belief on homosexuality and same sex sexual activity before the Court. Learned Senior Counsel Mr. Hamel-Smith submitted that Dr. Perkins is an independent academic theologian whose affidavit describes the plurality of views that exist within Christianity on the morality and criminalisation of homosexuality and same sex sexual activity. Learned Senior

Counsel accepted that no application was made for extension of time to file Dr. Perkins' affidavit as part of the evidence in the case, and likewise no application for relief from sanctions was filed.

[86] The record reveals that by order made on December 1<sup>st</sup> 2021, VincyChap was directed by paragraph 2 to file and serve its witness statement or summaries on or before 28<sup>th</sup> April 2022. It filed no witness statements or summaries and no affidavits. By paragraph 17, the sanction of wasted costs was stipulated for non-compliance with any term of the order. By its failure to apply for relief from sanctions or extension of time to file Dr. Perkins' affidavit, VincyChap has not moved the Court in accordance with the requirements of CPR 26.8 and related rules of court. VincyChap has placed no evidence before the Court to enable it to assess the application in accordance with those rules and pertinent legal principles. For example, no explanation has been given regarding the reason for the delay in seeking to present this evidence or to satisfy the Court that the delay was not intentional and deliberate. The application to permit VincyChap to adduce Dr. Perkins' affidavit into evidence for trial purposes must fail in those circumstances. It is refused.

## **COSTS**

[87] Costs generally follow the event. In the instant proceedings, each party had a measure of success, save that the Honourable Attorney General largely prevailed in relation to the challenges to the Browne Affidavit. In view of the fact that this is a public law matter, the Court is guided by the provisions of CPR 56.13. In all the circumstances and having regard to how the application was prosecuted and addressed by all parties, I consider the outcome has advanced the overriding objective in a number of respects including crystallizing some of the issues. It just in the circumstances to make no order as to costs. Among the factors taken into account is that the application has resulted in changes to all of the impugned affidavits. I therefore make no order as to costs.

## **ORDER**

[88] It is accordingly ordered:

1. No order is made striking out the Churches' affidavit filed on 21<sup>st</sup> October 2019 or any part of the paragraphs in it.

2. Pastor Adolph Davis' affidavit filed on 18<sup>th</sup> December 2019 is amended by excising: -
  - a) the last sentence in paragraph 9;
  - b) the second and third<sup>31</sup> sentences in paragraph 10;
  - c) paragraphs 16, 17, 18;
  - d) the first two sentences in paragraph 19;
  - e) paragraphs 20 and 24 and the exhibits referred to in them;
  - f) the last sentence in paragraph 21;
  - g) in paragraph 23 - the last clause in the 1<sup>st</sup> sentence (i.e. the words '*... is that there have been changes in legislation and policy and those changes are accelerating the normalization of same sex sexual activities, a change that the Vincentian Society is simply not ready for as demonstrated by the overwhelming support that the March and Rally received from Vincentians from all walks of life.*'); the last clause in the 2<sup>nd</sup> sentence (i.e. the words '*...and the LGBT agenda is anti-Bible and anti God.*') and the last sentence;
  - h) the last sentence in paragraph 26.
  - i) in paragraph 27 - the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 8<sup>th</sup> sentences and the last clause in the 7<sup>th</sup> sentence (i.e. the words '*...it appears that this is nothing more than neo-colonialism*');;
  - j) paragraph 29 and the exhibits referred to in it;
  - k) the 5<sup>th</sup><sup>32</sup>, 6<sup>th</sup> and 7<sup>th</sup> sentences in paragraph 31; and
  - l) the last sentence in paragraph 36.
3. Pastor Terence Haynes' affidavit No. 2 filed on 18<sup>th</sup> December 2019 is amended by excising: -
  - a) Sub-paragraphs 26 (a) and (b);
  - b) The last clause in the first sentence in paragraph 47 (i.e. the words '*... save to say that the Second Claimant's reference to being "...overcome by self-disgust and shame" speaks to the inner workings of the Second Claimant's conscience.*')
  - c) The 3<sup>rd</sup> sentence in paragraph 48;

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<sup>31</sup>Corrected pursuant to CPR 42.10 by inserting 'third' and an 's' at the end of 'sentence' to correctly reflect the holding at paragraph [66] above.

<sup>32</sup>Corrected pursuant to CPR 42.10 by inserting '5<sup>th</sup>' which was inadvertently omitted from this paragraph, although included in paragraph [73] above.

- d) paragraph 49; and
  - e) The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> sentences in paragraph 64.
4. Pastor Terence Haynes' affidavit No. 3 filed on 17<sup>th</sup> January 2020 is amended by excising the second sentence in paragraph 4;
  5. Assistant Commissioner Richard Browne's affidavit filed on 9<sup>th</sup> October 2019 is amended by excising the first sentence in sub-paragraph 15(f).
  6. No order is made excising from -
    - a) Pastor Adolph Davis' affidavit filed on 18<sup>th</sup> December 2019: -
      - (i) The last clause in paragraph 14 (i.e. the words '... harmful effects that the removal of sections 146 and 148 of the Criminal Code may have on Vincentian Society.')
      - (ii) Paragraph 15;
      - (iii) The last clause in the second sentence in paragraph 21 (i.e. the words '... I am aware that similar comprehensive sex education initiatives have already been suggested to Caribbean Governments for implementation within the curriculum of our education system.');
      - (iv) paragraph 22;
      - (v) The first clause in the second sentence, (i.e. the words '... St. Vincent and the Grenadines is generally acknowledged as a highly conservative, Christian society, ...')
      - (vi) The 5<sup>th</sup> and 6<sup>th</sup> sentences in paragraph 26.
      - (vii) The last clause in the 1<sup>st</sup> sentence in paragraph 28.
      - (viii) Paragraph 30;
      - (ix) Paragraph 32, the last clause in the second sentence (i.e. the words '... left with the

distinct impression that there was a deliberate attempt, not only to achieve tolerance of the homosexual and the homosexual lifestyle, but also, for the church to accept, affirm and celebrate sexual practices between persons of the same sex.');

and the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> sentences.

(x) In paragraph 33 –the 2<sup>nd</sup> clause in the second sentence (i.e. the words ‘... including the ordination of Ministers who have declared themselves to be engaged in homosexual practices.');

the last clause in the 5<sup>th</sup> sentence (i.e. the words ‘...I was considered by some of the congregants to have been very bold and brave for doing so, in light of the fear on the part of other Ministers that they would be sanctioned for doing the same.’) and the 6<sup>th</sup> and 7<sup>th</sup> sentences.

(xi) Paragraphs 34 and 35;

(xii) The 1<sup>st</sup> and 2<sup>nd</sup> sentences in paragraph 36; and

(xiii) The last sentence in paragraph 37.

b) Pastor Terence Haynes’ affidavit filed on 18<sup>th</sup> December 2019: -

(i) The first clause of the first sentence in paragraph 17 (i.e. the words ‘The Interested Parties acknowledge that the Preamble to the Constitution of St. Vincent and the Grenadines states that, inter alia, the nation of St. Vincent and the Grenadines is founded on the belief in the supremacy of God, and that Judeo-Christian principles are the foundation of many of the laws of the State of St Vincent and the Grenadines and ...’);

(ii) The 1<sup>st</sup> clause in the first sentence in paragraph 18 (i.e. the words ‘The orders being sought contravene the Judeo-Christian principles upon which the laws of St. Vincent and the Grenadines were founded ...’);

(iii) Paragraphs 19, 20, sub-paragraph 22 a. c. and d, and paragraphs 23 and 28.;

(iv) The 4<sup>th</sup> and 5<sup>th</sup> sentences in paragraph 29;

(v) Sub-paragraphs 32 b and 34 a.

- (vi) The 1<sup>st</sup> and 2<sup>nd</sup> sentences in paragraph 41;
- (vii) The 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> sentences in paragraph 42;
- (viii) The 2<sup>nd</sup> and 3<sup>rd</sup> sentences in paragraph 45;
- (ix) The 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> sentences in paragraph 47;
- (x) The 2<sup>nd</sup> sentence in paragraph 48.
- (xi) The last sentence in paragraph 51.
- (xii) The last clause in the second sentence in paragraph 52 (i.e. the words ‘...and accept the Second Claimant’s worth and dignity as a human being without reservation.’); and the 3<sup>rd</sup> sentence.
- (xiii) Paragraph 53;
- (xiv) The 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> sentences in paragraph 54; and the 1<sup>st</sup> clause of the 3<sup>rd</sup> sentence (i.e. the words ‘Additionally, it is not accurate ...’);
- (xv) The last clause of the first sentence in paragraph 55 (i.e. the words ‘Second Claimant’s equivalence of being a “gay man” to being “criminal” is not grounded in fact as there are no statutory provisions which criminalise homosexuality.’) and the second sentence.
- (xvi) The 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> sentences in paragraph 56;
- (xvii) The last clause of the second sentence in paragraph 57 (i.e. the words ‘... as I am not aware of any group in St. Vincent and the Grenadines that has been singled out “for punishment on the basis of their identity”.’)
- (xviii) The last clause in the second sentence of paragraph 58 (i.e. the words ‘... the Second Claimant’s averments that homosexuals in St. Vincent and the Grenadines are presumed to “hide their sexuality and sexual encounters and that because of this pressure “this leads them to engage in riskier behaviour such as unsafe sex, are not grounded in fact or supported by research.’);
- (xix) Paragraph 59;

(xx) The last clause of the first sentence in paragraph 60 (i.e. the words 'I am informed that in the United States of America, Canada, the United Kingdom and Europe where buggery/sodomy has been decriminalised, and where there appears to be little or no stigma attached to a homosexual lifestyle, the HIV prevalence rate has not dissipated and HIV infections among men who have sex with men are soaring.') and the 2<sup>nd</sup> sentence in the paragraph.

(xxi) Paragraphs 61 and 63.

c) Assistant Commissioner Richard Browne's affidavit filed on 9<sup>th</sup> October 2019: -

(i) The 2<sup>nd</sup> sentence in paragraph 6;

(ii) 2<sup>nd</sup> sentence in paragraph 10;

(iii) The last sentence in paragraph 11;

(iv) The 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup><sup>33</sup> sentences in sub-paragraph 13 (a);

(v) The last sentence in sub-paragraph 13 (b);

(vi) The last clause of the first sentence in sub-paragraph 13 (c) (i.e. the words '... as the existence of the laws is not the cause of violence.');

and the 2<sup>nd</sup> and 3<sup>rd</sup> sentences in that sub-paragraph.

(vii) Sub-paragraph 15 (c).

(viii) The 2<sup>nd</sup> sentence in sub-paragraph 15 (f).

(ix) The 4<sup>th</sup> sentence in sub-paragraph 19(a).

(x) The 9<sup>th</sup> and 12<sup>th</sup> sentences in sub-paragraph 21 (a); and

(xi) The 4<sup>th</sup> and 5<sup>th</sup> sentences in sub-paragraph 21 (d).

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<sup>33</sup>Corrected pursuant to CPR 42.10 to correct the typographical error where '2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup>' were written instead of '3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup>' as reflected in paragraphs [69] and [71].

7. VincyChap's application to admit into evidence, the affidavit of Dr. Anna Perkins' filed on 19<sup>th</sup> September 2022 is denied.
8. Each party shall bears his or its own costs.

[89] I am grateful to counsel for their quite comprehensive oral and written submissions.

**Esco L. Henry**  
**HIGH COURT JUDGE**

By the Court

Registrar