

*Privy Council Appeal No. 29 of 2000*

**Jennifer Gairy (as administratrix of the estate of  
Eric Matthew Gairy, deceased)**

*Appellant*

v.

**The Attorney General of Grenada**

*Respondent*

FROM

**THE COURT OF APPEAL OF GRENADA**

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JUDGMENT OF THE LORDS OF THE JUDICIAL  
COMMITTEE OF THE PRIVY COUNCIL,

Delivered the 19th June 2001

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*Present at the hearing:-*

Lord Bingham of Cornhill  
Lord Nicholls of Birkenhead  
Lord Cooke of Thorndon  
Lord Millett  
Lord Scott of Foscote

*[Delivered by Lord Bingham of Cornhill]*

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1. Grenada has an entrenched constitution under which its people are entitled to protection of certain fundamental rights and freedoms. Among them is a right to protection from deprivation of property by the state without compensation. The late Sir Eric Gairy established a violation of that right. It is convenient to refer to Sir Eric as the appellant although his administrators have succeeded to his claim and one of them, Jennifer Gairy, has been appointed by the High Court to continue these proceedings. At issue in this appeal is the power or duty of the courts to grant an effective remedy against the state for such a violation.

The facts

2. Grenada became a West Indies Associated State in 1967 and an independent nation within the Commonwealth in 1974. Its constitution was given effect by the Grenada Constitution Order 1973 under powers granted by the West Indies Act 1967.

3. On 13 March 1979 the legitimate government, in which the appellant served as Prime Minister, was overthrown by an armed coup, the constitution was suspended and power was seized by the People's Revolutionary Government. By what was described as People's Law No. 95 of 1979 dated 19 December 1979 the People's Revolutionary Government purported to enact a law to confiscate and vest in the government certain real properties belonging to the appellant listed in a schedule to the law. This law took effect. The People's Revolutionary Government was overthrown by a military coup on 19 October 1983. Following a military intervention, the constitution was brought back into force (subject to some exceptions immaterial for present purposes), and in December 1984 elections were held and parliamentary democracy restored.

4. In May 1985 the appellant issued proceedings claiming a declaration that the law confiscating his property was void and of no effect, but a commission of inquiry had just been established to receive and consider claims by persons who had been deprived of property by the state without compensation and the appellant discontinued his proceedings in order to present his claim to the commission. He duly presented his claim, and the commission in its report recommended the return of his property unlawfully confiscated and payment of compensation. He did not however obtain the return of his property or any payment. On 14 October 1987 he accordingly issued the present proceedings, 1987 Suit No 377, in the Supreme Court of Grenada. The proceedings were entitled:

“In the Matter of the Grenada Constitution Order (hereinafter the Constitution) sections 6 and 16

and

In the Matter of People's Law No. 95 of 1979 intituled Property Confiscation (Eric Matthew Gairy) Law 1979.”

The respondent was the Attorney General of Grenada. The appellant sought a declaration that People's Law No 95 of 1979 contravened section 6 of the constitution and was null, void and of no effect, and consequential orders and directions. The grounds of the application repeated that the law contravened the provisions of section 6 of the constitution.

5. The appellant's motion came before St Paul J, before whom it was conceded on behalf of the Attorney-General that People's Law No 95 of 1979 contravened section 6 of the constitution. The court had “to consider what declaration or orders it may consider

appropriate for the purpose of enforcing or securing the relief the applicant may be entitled to". Having considered sections 6 and 16 of the constitution, the judge ordered on 18 January 1990:

- “1. All properties of the Applicant which were confiscated under the provision of People’s Law No. 95 of 1979, which by consent of the parties the Court declares to be null and void, be forthwith returned to the Applicant.
2. The Applicant be compensated for the unlawful confiscation of the said properties. Such compensation to be determined by an arbitrator to be agreed on by the Applicant and the Respondent, in default of agreement by a referee appointed by the Court.”

There was no appeal against that order. The appellant’s properties were returned to him (save for some parts lawfully acquired by the state) and give rise to no continuing issue. An arbitrator was duly appointed and made an assessment of the compensation due to the appellant. On 29 April 1994 the parties returned to court. The Attorney General was represented by the Solicitor General and it was ordered by Moore J by consent:

- “1. That the report of ... the arbitrator appointed pursuant to the order of the Court dated the 31st day of July 1993 be adopted.
2. That judgment be entered for the Plaintiff in the sum of \$3,649,414.00 being the amount awarded the Plaintiff by the arbitrator.
3. That interest on the said amount be paid at the rate of \$6.00 per centum per annum from the 1st day of November 1990 until payment ...
5. That the Minister of Finance be directed to issue a warrant under his hand forthwith for the prompt payment of the above amounts from the consolidated fund ...”

6. Somewhat surprisingly, the Attorney General appealed against this consent order, one of his grounds (supported by the Solicitor General on oath) being that paragraph 5 of the order was contrary to law because the Minister of Finance could not be directed to issue a warrant for the prompt payment of the specified sum from the consolidated fund as directed by that paragraph. In the Court of

Appeal (Sir Vincent Floissac CJ, Byron and Singh JJA) this issue was not fully argued since counsel for the present appellant conceded, for reasons which are not wholly clear, that the mandatory order against the Minister of Finance should not have been made. In a judgment delivered by Byron JA on 6 July 1994 (in which the other members of the court concurred) no ruling was given on this question. The parties agreed that suitable wording of paragraph 5 of the order would be:

“That there be prompt payment of the above amounts.”

The order was amended accordingly, and so continued to be expressed in mandatory terms.

7. Some payments were made in pursuance of the order but a large sum remained outstanding. So, on 23 January 1997, the appellant issued a further notice of motion, still in the same proceedings. It is this which gives rise, immediately, to this appeal. Reference was made in the notice to the order of 29 April 1994 as varied by the Court of Appeal on 6 July 1994 and, having obtained leave to do so, the appellant sought an order of mandamus directed to the Minister of Finance requiring him to make prompt payment of the balance of the compensation ordered by paragraphs 2, 3 and 5 of the order as varied. A series of hearings, over a period of time, took place before Alleyne J. During that period a sum of EC\$1 million was borrowed, and payment made on 5 February 1998. That left a balance of over EC\$2,400,000 owing. In an affidavit sworn in opposition to the motion on 23 April 1998 the Prime Minister and Minister of Finance deposed that the revenues of the Government of Grenada did not permit payment of a lump sum to satisfy the residue of the debt. It appears that no payment has been made since February 1998.

8. On 25 February 1999 Alleyne J gave judgment dismissing the appellant's application. He had no difficulty in finding that the balance due on the judgment debt was a charge on and payable out of the Consolidated Fund. But he concluded that a mandatory order against the minister, enforceable by contempt or other coercive proceedings, would be an order against the crown, and in reliance on *Jaundoo v Attorney-General of Guyana* [1971] AC 972 he held that the court had no jurisdiction to make such an order.

9. The appellant challenged this ruling in the Court of Appeal (Byron CJ, Redhead JA and Matthew JA (acting)). On 22 November 1999, for reasons given in the closely reasoned judgment of Byron CJ, the appeal was dismissed. Having

considered the relevant authorities, including *Jaundoo's* case and *M v Home Office* [1994] 1 AC 377, the Chief Justice concluded that an order of mandamus could be made to compel performance by a minister of a statutory duty binding on him in his official capacity. But he did not regard the appellant's claim as one covered by the Land Acquisition Act (Cap 153 of the Revised Laws of Grenada 1990) as amended by the Land Acquisition (Amendment) Act 1991, and concluded that section 21 of the Crown Proceedings Act (Cap 74 of the Revised Laws of Grenada 1990) provided an exclusive procedure for enforcing money orders against the crown. Under this procedure the appellant's remedy, enforceable by mandamus, lay against the Permanent Secretary (Finance) and not the Minister of Finance. The appeal was dismissed because the minister was not the public official obligated to make payment of the money which the court had ordered the state to pay the appellant. Dismissal of the appeal would also have been justified, it was held, on the ground of *res judicata*: the liability of the minister had already been the subject of a consent order of the Court of Appeal on 6 July 1994 and the issue could not be raised again. The appellant's constitutional claim was not considered in depth but the Chief Justice observed:

“The provisions of section[s] 16 and 101 of the Constitution of Grenada confer unlimited jurisdiction on the court to fashion remedies to secure the enforcement of the fundamental rights and freedoms provisions of the Constitution and grant protection against the contravention of the other provisions in accordance with the law ... the courts are empowered by the Constitution and the legislature to ensure compliance with judicial orders for the payment of money by the State.”

### The Constitution of Grenada

10. Section 106 of the Constitution provides:

“This Constitution is the supreme law of Grenada and, subject to the provisions of this Constitution, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void.”

“Law” is defined in section 111 to include “any instrument having the force of law and any unwritten rule of law”. Existing laws are to be construed with such modifications, adaptations, qualifications

and exceptions as may be necessary to bring them into conformity with the constitution (paragraph 1 of Schedule 2 to the 1973 Order).

11. In the recitals to the constitution the people of Grenada express their respect for the rule of law and their desire that their constitution should make provision for ensuring the protection in Grenada of fundamental rights and freedoms. Chapter 1 of the constitution is entitled “Protection of Fundamental Rights and Freedoms”. Section 1 records that every person in Grenada is entitled to certain fundamental rights and freedoms, among them “protection ... from deprivation of property without compensation”. Section 6 is more specific. So far as relevant it provides:

“6.-(1) No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where provision is made by a law applicable to that taking of possession or acquisition for the prompt payment of full compensation.

(2) Every person having an interest in or right over property which is compulsorily taken possession of or whose interest in or right over any property is compulsorily acquired shall have a right of direct access to the High Court for –

- a. the determination of his interest or right, the legality of the taking of possession or acquisition of the property, interest or right and the amount of any compensation to which he is entitled and
- b. the purpose of obtaining prompt payment of that compensation:

Provided that if Parliament so provides in relation to any matter referred to in paragraph (a) of this subsection the right of access shall be by way of appeal (exercisable as of right at the instance of the person having the interest in or right over the property) from a tribunal or authority, other than the High Court, having jurisdiction under any law to determine that matter.

(3) The Chief Justice may make rules with respect to the practise [sic] and procedure of the High Court or any other

tribunal or authority in relation to the jurisdiction conferred on the High Court by subsection (2) of this section or exercisable by the other tribunal or authority for the purposes of that subsection (including rules with respect to the time within which applications or appeals to the High Court or applications to the other tribunal or authority may be brought).”

12. Section 16 of the constitution, so far as relevant, provides:-

“16.-(1) If any person alleges that any of the provisions of sections 2 to 15 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress.

(2) The High Court shall have original jurisdiction –

- a. to hear and determine any application made by any person in pursuance of subsection (1) of this section; and
- b. to determine any question arising in the case of any person which is referred to it in pursuance of subsection (3) of this section and may make such declarations or orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 2 to 15 (inclusive) of this Constitution:

Provided that the High Court may decline to exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law.

...

(5) Parliament may confer upon the High Court such powers in addition to those conferred by this section as may appear to be necessary or desirable for the purpose of enabling that court more effectively to exercise the jurisdiction conferred upon it by this section.

(6) The Chief Justice may make rules with respect to the practice and procedure of the High Court in relation to the

jurisdiction and powers conferred on it by or under this section (including rules with respect to the time within which applications may be brought and references shall be made to the High Court).”

Parliament has taken no steps under subsection (5). Rules were made governing the procedure for obtaining constitutional redress – the Supreme Court (Constitutional Redress – Grenada) Rules 1968, continued in force by paragraph 1 of Schedule 2 to the 1973 Constitution Order – but no procedural (as opposed to jurisdictional) objection has been taken to the appellant’s application.

### The Crown Proceedings Act (Cap 74)

13. The Crown Proceedings Act (Cap 74) took effect in 1959. It is closely modelled on the United Kingdom Act of 1947, although with obvious differences. Its object was the same, to remove certain historical impediments to the bringing of civil proceedings against the crown. Section 17 reproduces section 21 of the UK Act. Section 21 of the Grenada Act, relied on by the Chief Justice in the judgment under appeal, is in these terms:

“21. (1) Where in any civil proceedings by or against the Crown, or in connection with any arbitration to which the Crown is a party, any order (including an order for costs) is made by any court in favour of any person against the Crown or against a Ministry or Government department or against an officer of the Crown as such, the proper officer of the court shall, on an application in that behalf made by or on behalf of that person at any time after the expiration of twenty-one days from the date of the order or, in case the order provides for the payment of costs and the costs require to be taxed, at any time after the costs have been taxed, whichever is the later, issue to that person a certificate in the prescribed form containing particulars of the order:

Provided that, if the court so directs, a separate certificate shall be issued with respect to the costs (if any) ordered to be paid to the applicant.

(2) A copy of any certificate issued under this section may be served by the person in whose favour the order is made upon the Attorney-General.

(3) If the order provides for the payment of any money by way of damages or otherwise, or of any costs, the certificate

shall state the amount so payable, and the Permanent Secretary (Finance) shall, subject as hereinafter provided, pay to the person entitled or to his solicitor the amount appearing by the certificate to be due to him together with the interest, if any, lawfully due thereon:

Provided that the court by which any such order as aforesaid is made or any court to which an appeal against the order lies may direct that, pending an appeal or otherwise, payment of the whole of any amount so payable, or any part thereof, shall be suspended, and if the certificate has not been issued may order any such directions to be inserted therein.

(4) Save as aforesaid no execution or attachment or process in the nature thereof shall be issued out of any court for enforcing payment by the Crown of any such money or costs as aforesaid, and no person shall be individually liable under any order for the payment by the Crown, or any Ministry or Government department, or any officer of the Crown as such, of any such money or costs.”

Section 31(5), reproducing section 40(5) of the UK Act, provides:

“This Act shall not operate to limit the discretion of the Court to grant relief by way of *mandamus* in cases in which such relief might have been granted before the commencement of this Act, notwithstanding that by reason of the provisions of this Act some other and further remedy is available.”

The Act does not, like section 38(2) of the UK Act, define “civil proceedings” as not including proceedings on the crown side of the King’s Bench Division, but the Chief Justice saw no reason why the expression should be understood differently in the Grenada statute and this view has not been challenged.

#### The appellant’s submission

14. The appellant’s submission, stripped to its bare essentials, is short and simple. The constitution is the supreme law of Grenada, superseding (subject to its terms) all other laws, written or unwritten, to the extent that they are inconsistent with it (section 106). It guarantees certain fundamental rights. One of these is a right not to have property compulsorily possessed or taken by the state save under a law providing for prompt payment of full compensation (section 6). The appellant’s right under section 6 has been violated. While his property has been returned to him, the

compensation admittedly due to him for his temporary expropriation and dispossession has not been fully paid, let alone promptly. Seven years have passed since judgment was entered by consent for the sum assessed by the court-appointed arbitrator. Under section 16 of the constitution the court has ample power to ensure that effective redress is granted to any person, like the appellant, whose right has been violated. While the court may, under section 16(2), decline to exercise its powers under that subsection if other adequate means of redress are available, the courts below did not exercise their discretion to decline to grant relief on this ground. In any event, no other means of redress was available: while section 21 of the Crown Proceedings Act provided a procedure for seeking satisfaction of ordinary debts against the crown, it did not cover claims for constitutional redress and (by subsection (4)) inhibited effective enforcement. The historic immunities of the crown could not constrain the power of the court to grant effective constitutional relief. Under section 3(2) of the Finance and Audit Act 1964 it is the Minister of Finance who may authorise withdrawal of moneys from the Consolidated Fund, into which (by section 75 of the constitution) all revenues or other moneys raised or received by Grenada (unless payable into some other fund established for any specific purpose) must be paid. As the minister responsible for exercising general direction and control over the Ministry of Finance (section 67 of the constitution) he is the public officer against whom the appellant must obtain redress.

#### The Attorney General's answer

15. Counsel for the Attorney General complained that the appellant's case, as advanced to the Board, departed from that presented in the courts below. There the claim had been for the traditional common law remedy of mandamus to enforce a duty said to lie on the minister under the Land Acquisition Act. The claim for constitutional relief was a new, and different, case.

16. The Board has a measure of sympathy with this complaint. The application for an order of mandamus inevitably directed attention to the considerable body of case law concerning that traditional common law remedy, and plainly the confiscation of the appellant's property by the People's Revolutionary Government was not an exercise of power under the Land Acquisition Act. But the caption of the appellant's proceedings has, from the outset, included reference to sections 6 and 16 of the constitution; his written submissions in the Court of Appeal focused on the claim to constitutional relief (although they were not largely reflected in the judgment); and the claim has always been grounded on the

constitution. It is appropriate to consider the appellant's claim on its merits, and the Board was not invited to do otherwise.

17. On the merits it was submitted that, even if the appellant's claim were accepted as being for constitutional relief, he was not entitled to the order sought. The cornerstone of this submission was the important case of *Jaundoo*.

18. In that case ([1971] AC 972) the plaintiff sought a *quia timet* injunction to restrain the government from building a road across her land until adequate compensation had been assessed and paid. Most of the relief which she claimed was held to have been, at the time of her application, misconceived (page 984). The claim for an injunction was rejected primarily because it was sought against the Government of Guyana, which would have meant granting an injunction against the crown (page 984). That, it was held, no court in Her Majesty's Dominions had jurisdiction to grant, for the court exercised its judicial authority on behalf of the crown and it was incongruous that the crown should give orders to itself. It was however pointed out that an interim injunction could have been sought and granted against the appropriate minister or public officer (page 985). If the stage was ever reached when the plaintiff became entitled to compensation, the new road having by this stage been completed, the order for redress "ought not to be in form, as it cannot be in substance, coercive" (page 987): thus the court could make a declaration, or an order for payment with a prohibition of execution or attachment, but no more (page 987). In reliance on this authority (which he said was indistinguishable) the Attorney General contended that the relief sought by the appellant is coercive relief against the Government of Grenada; that, as in the case of Guyana, such relief is effectively sought against the crown; and that such relief may not be granted against the crown (as recently reaffirmed by the House of Lords in *M v Home Office*, above).

19. The Board cannot accept this argument:

(1) It is fallacious to suppose that the rights, powers and immunities of the crown are immutable. They have over time been attenuated and abridged, on occasion as a result of violence (as after the Civil War in the seventeenth century), sometimes of legislation (for example, the Bill of Rights 1688, the Statute of Westminster 1931, the Crown Proceedings Act 1947), sometimes of judicial decision (for example, *Conway v Rimmer* [1968] AC 910, *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374). It is in no way inconsistent for an

independent state, while continuing to bear full allegiance to the crown, to circumscribe the historic rights, powers and immunities pertaining to the crown in its governmental capacity.

(2) By Chapter 1 and section 106 of their constitution the people of Grenada established a new constitutional order. The constitution has primacy (subject to its provisions) over all other laws which, so far as inconsistent with its provisions, must yield to it. To read down its provisions so that they accord with pre-existing rules or principles is to subvert its purpose. Historic common law doctrines restricting the liability of the crown or its amenability to suit cannot stand in the way of effective protection of fundamental rights guaranteed by the constitution.

(3) The Board is not persuaded, despite the appellant's argument to the contrary, that *Jaundoo's* case can be distinguished on the basis of differences between the 1966 constitution of Guyana and the 1973 constitution of Grenada. That there are some differences is clear; but sections 2, 3(c), 8 and 19 of the Guyana constitution, corresponding to sections 106, 1c, 6 and 16 of the Grenada constitution, are striking in their similarity. It was however argued for the Attorney General in *Jaundoo* that the constitution conferred no greater rights on the subject against the executive than had previously been enjoyed (page 976). This reflected the approach of the Board to a number of constitutions which it considered at this period: it was assumed that the rights specified in the constitutions were already secured to the people and that the object of embodying them in the constitution was to restrain future enactments which might derogate from them (see *Director of Public Prosecutions v Nasralla* [1967] 2 AC 238; *Baker v The Queen* [1975] AC 774; *de Freitas v Benny* [1976] AC 239). So, giving the advice of the Board in *Jaundoo* (at page 984) Lord Diplock stated:

“At the time of the hearing in the High Court and in the Court of Appeal, Guyana was still a constitutional monarchy and part of Her Majesty's Dominions – a circumstance which imported into the public law of Guyana the common law concepts derived from the historic position of the Crown within those Dominions, except in so far as these had been modified by the written Constitution itself or by any other law of Guyana.”

This somewhat conservative approach to the substance of the law contrasted with Lord Diplock's view of the constitutional right of any person to apply to the High Court for redress, and the High

Court's power to grant redress, under a provision equivalent to section 16 of the constitution of Grenada of which he said (at page 982):

“These words in their Lordships’ view, are wide enough to cover the use by an applicant of any form of procedure by which the High Court can be approached to invoke the exercise of any of its powers. They are not confined to the procedure appropriate to an ordinary civil action, although they would include that procedure until other provision was made under article 19(6). The clear intention of the Constitution that a person who alleges that his fundamental rights are threatened should have unhindered access to the High Court is not to be defeated by any failure of Parliament or the rule-making authority to make specific provision as to how that access is to be gained.”

In the respectful view of the Board, that enlightened approach to the procedural implications of protecting fundamental rights must extend to the substance of the law also. In interpreting and applying the constitution of Grenada today, the protection of guaranteed rights is a primary objective, to which the traditional rules of the common law must so far as necessary yield. The Board cannot regard *Jaundoo* as an accurate statement of the modern constitutional law applicable in Grenada.

(4) It is noteworthy that not many years later, in *Maharaj v Attorney-General of Trinidad and Tobago (No. 2)* [1979] AC 385, the Board made an order for compensation against the state. A barrister had been committed to prison by a judge in breach of natural justice. This was held to be a contravention of his constitutional rights. His constitutional right to apply to the High Court for redress, conferred in terms very similar to those of section 16 of the Grenada Constitution, showed a “clear intention to create a new remedy whether there was already some other existing remedy or not” (page 398). An order for payment of compensation when a right protected by the constitution had been contravened was clearly a form of redress (page 399). The Board made clear that the contravention in question was by the state, and its liability was not vicarious (pages 397, 399). The barrister obtained his remedy not against a minister, or a public official, or any servant of the state, but against, in effect, the government.

(5) In *M v Home Office*, above, the House of Lords defined the circumstances in which injunctive relief may be granted against ministers of the crown and the extent to which such orders may be

enforced. The law stated was however that of the United Kingdom, a state with no entrenched constitution and at that time no legal provision for the enhanced protection of fundamental human rights. For reasons already given, the situation in Grenada is categorically different. The reasoning in *M v Home Office* cannot be relied on to deny the appellant relief to which he is entitled under the constitution of Grenada.

20. It was next contended for the Attorney General that the appellant's entitlement to be paid fell within the terms (quoted above) of section 21 of the Crown Proceedings Act (Cap 74) and so was enforceable by mandamus but only against the Permanent Secretary (Finance) and only subject to the terms of that section.

21. Again, the Board cannot accept that submission. Since the expression "civil proceedings" probably excludes what would now be called applications for judicial review, it must be highly questionable whether it includes claims for constitutional redress which the draftsmen in the UK in 1947 and Grenada in 1959 could not have contemplated and which may fairly be regarded as *sui generis*. But even if it be accepted that the appellant's claim falls within the expression "civil proceedings", that goes only to show that there was another procedural route which the appellant could have followed. Had such a means of redress been shown to exist and to be adequate, the court could have declined to exercise its powers under section 16(2) of the constitution pursuant to the proviso to the subsection. But the court would not have been bound to decline. Since nearly five years had elapsed since the consent order of Moore J when Alleyne J gave judgment on this application, he could scarcely have thought it was the lack of a certificate issued under section 21(1) which was holding up payment, particularly when account was taken of the evidence and the fact that some payments had been made. It was moreover likely that if the appellant pursued his rights under section 21 he might be denied enforcement in reliance on section 21(4), an obstacle he could overcome (if at all) only by relying on his rights under the constitution. But if the appellant was relying on the constitution he was not bound by section 21 in so far as that section inhibited his claim to constitutional relief.

22. It was next submitted for the Attorney General that there was no duty on the Minister of Finance to discharge this judgment debt, that there was no power in the court to order him to discharge it and that no coercive order could be made against him if he did not. Attention was drawn to the Minister of Finance (Incorporation) Act 1994 which incorporated the Minister of Finance as a

corporation sole, vested property in the corporation and provided (in section 8(3)(b)) for the enforcement against the corporation of any judgment or award obtained against the government and not fully satisfied before the commencement of the Act. But section 8(3)(b) had been specifically repealed by section 4(c) of the Minister of Finance (Incorporation) (Amendment and Validation) Act 1998. There only remained an obligation on the government, not enforceable by a coercive order against the minister.

23. This submission, it would seem, derived from the principle that mandamus only lies to compel a minister or public official to perform a statutory or public duty. But for reasons already given the appellant is not constrained by the principles governing applications for judicial review. Having proved a breach of a right protected by the constitution, having obtained a money judgment and having failed to obtain full payment, the appellant now seeks an effective, not merely a nominal, remedy. The court has power to grant such a remedy. And if it is necessary to fashion a new remedy to give effective relief, the court may do so within the broad limits of section 16. Whereas, in granting a person constitutional relief not related to Chapter 1, the court may under section 101(3) “grant to that person such remedy as it considers appropriate, being a remedy available generally under the law of Grenada in proceedings in the High Court”, the court’s powers under section 16(2) are not so limited. The court has, and must be ready to exercise, power to grant effective relief for a contravention of a protected constitutional right.

24. The expression “coercive” is sometimes used to describe an order which requires a party to do something. Such orders, directed to ministers and public officials, are commonplace. They may be made in support of constitutional rights, as evidenced, for example, by the recent judgment of the Board in *Observer Publications Limited v Campbell “Mickey” Matthew and Others* (19 March 2001, unreported, [2001] UKPC 11). The expression is also used to describe mandatory orders to which there attaches a sanction (whether explicit or implicit), such as committal, for non-compliance. Such orders, regularly made against private individuals, are not made against ministers and public officials. There is no need. Experience shows that if such orders are made there is compliance, at any rate in the absence of most compelling reasons for non-compliance. That is so in the United Kingdom, and the Board has no doubt it is so in Grenada also. But the Board would caution against the view that a mandatory order made against a minister (or a government or a public official) may be disregarded with impunity: a court charged under the constitution

with securing effective protection of fundamental rights cannot be denied such power of enforcement as proves necessary for its task.

25. In this case the Minister of Finance is the minister upon whom there rests the obligation to ensure that the debt owed by the state to the appellant is discharged. There is no one to whom the court's order can more appropriately be addressed.

26. It was submitted for the Attorney General, finally, that the appellant's claim against the minister is barred on grounds of *res judicata*. It was also suggested that the appellant's revived claim was an abuse of process within the rule in *Henderson v Henderson* (1843) 3 Hare 100, as recently explained by the House of Lords in *Johnson v Gore Wood & Co* [2001] 2 WLR 72.

27. There is authority, which was not challenged, that a consent order may found a plea of *res judicata* even though the court has not been asked to investigate and pronounce on the point at issue (see Spencer Bower, Turner and Handley, *Res Judicata*, 3rd ed. 1996, chapter 2, paragraph 38), and it may well be abusive to raise in later proceedings an issue or claim which could and in all the circumstances should have been raised in earlier proceedings. But these are rules of justice, intended to protect a party (usually, but not necessarily, a defendant) against oppressive or vexatious litigation. Neither rule can apply where circumstances have so changed as to make it both reasonable and just for a party to raise the issue or pursue the claim in question in later proceedings. Whatever the basis of the concession made by the appellant in the Court of Appeal on 6 July 1994, the appellant could reasonably have regarded the change as one of form and cannot have doubted that payment would be made of the sum which was mandatorily ordered to be paid promptly. When the appellant issued his present application in January 1997 it was plain that a more effective remedy was required and, although substantial payments on account have been made, a large part of the debt remains outstanding. In these changed circumstances it would not be just to shut the appellant out from relief because of a formal concession made in July 1994.

28. In the opinion of the Board, the submissions of the appellant are in all essentials correct. The appellant is entitled to the relief he seeks.

29. To deny the appellant, on the present facts, the remedy which he now seeks to enforce his constitutional rights would run counter to the Board's constitutional decision-making exemplified by the

cases of *Maharaj* and *Observer Publications* mentioned above, and also by the recent case of *The Bahamas District of the Methodist Church in the Caribbean and the Americas and Others v The Hon Vernon J Symonette MP, Speaker of the House of Assembly and 7 Others* (unreported, 26 July 2000). It would also run counter to the trend of constitutional decision-making elsewhere. In *Levesque v Attorney-General of Canada et al* (1985) 25 DLR (4th) 184 a serving prisoner claimed and sought to enforce a right to vote. It was held that he had such a right, and the question arose whether an order of mandamus could issue to enforce it. Rouleau J held (at pages 191-192):

“If the *Canadian Charter of Rights and Freedoms*, which is part of the Constitution of Canada, is the supreme law of the country, it applies to everyone, including the Crown or a Minister acting in his capacity as a representative of the Crown. Accordingly, *a fortiori* the Crown or one of its representatives cannot take refuge in any kind of declinatory exception or rule of immunity derived from the common law so as to avoid giving effect to the Charter.”

The crown was held to be subject to the provisions of the charter in the same way as any other individual (page 191). The decision has been tentatively understood to qualify, where constitutional rights are at stake, the rule hitherto prevailing in Canada that orders of mandamus cannot be made against the crown (see Mullan, *Administrative Law*, 3rd ed., 1996, at paragraph 545), and it has been suggested that *Levesque* could well be followed in New Zealand (see Joseph, *Constitutional and Administrative Law in New Zealand*, 1993, at pages 797-8). In Australia mandamus has issued to compel payment of money from the consolidated fund where there was an unperformed statutory duty in that regard (*Health Insurance Commission v Peverill* (1994) 179 CLR 226 at 242; *Commissioner of State Revenue (Vic) v Royal Insurance Aust. Ltd.* (1994) 182 CLR 51 at 81, 88; and see Aronson and Dyer, *Judicial Review of Administrative Action*, 1996, at pages 775-778). In *N Nagendra Rao and Co v State of A.P.* AIR 1994 SC 2663 R M Sahai J (in paragraph 24 of his judgment) said:

“No legal or political system today can place the State above law as it is unjust and unfair for a citizen to be deprived of his property illegally by negligent act of officers of the State without any remedy ... The modern social thinking of progressive societies and the judicial approach is to do away with archaic State protection and place the State or the Government at par with any other juristic legal entity.”

In Ireland it has been clearly held that the state, under its independent constitution, does not enjoy the historic immunity of the crown. In *Byrne v Ireland and The Attorney General* [1972] IR 241 at 281 Walsh J in the Supreme Court said:

“Where the People by the Constitution create rights against the State or impose duties upon the State, a remedy to enforce these must be deemed to be also available. It is as much the duty of the State to render justice against itself in favour of citizens as it is to administer the same between private individuals ... There is nothing in the Constitution envisaging the writing into it of a theory of immunity from suit of the State (a state set up by the People to be governed in accordance with the provisions of the Constitution) stemming from or based upon the immunity of a personal sovereign who was the keystone of a feudal edifice. English common-law practices, doctrines, or immunities cannot qualify or dilute the provisions of the Constitution ...”

Having indicated that the plaintiff’s claim, if it succeeded, would lead to judgment against the state, he added (at page 289):

“It is unnecessary at this juncture to consider how such a decree would be executed or enforced but it is sufficient to say that an order for mandamus to compel compliance with the judgment would be an appropriate step and not without precedent.”

Budd J said (at page 299):

“From what is to be deduced in the main from an analysis of the foregoing provisions of the Constitution, in so far as they affect the immunity of the State from suit, it would seem correct to say that the Constitution is not imbued with feudal conceptions of privilege and exemptions but rather with modern conceptions of the duty of the State and the recognition by it of the human rights and needs of those who are the citizens of the State so that, instead of hedging the State with privileges and immunities, the general trend is to place obligations on the State.”

He further ruled (at pages 306-307):

“If the plaintiff is successful, in the ordinary way the damages would be assessed during the course of the trial; there would seem to be no reason to believe that the necessary moneys to meet the decree would not be voted. That would only be what would be normally expected in a

State governed according to the rule of law, and there would seem to be no reason to believe that the State would not honour its legal obligations ... it is unnecessary to come to a final decision on the ways and means of enforcing such a decree beyond remarking that *prima facie* the ordinary procedure of execution by way of levy or enforcement by mandamus would both seem to be appropriate.”

In *The State (King) v Minister for Justice* [1984] IR 169 these judgments were cited and applied.

The order

30. On 1 May 2001 the Board were informed that the sum due to the appellant on that date was EC\$2,792,540.10. This was understood to be an agreed figure, inclusive of accrued interest.

31. The Board will humbly advise Her Majesty that the appeal should be allowed. The Minister of Finance shall take all steps necessary to procure that payment be made to the appellant forthwith of EC\$2,792,540.10 plus interest at the rate of 6 per centum per annum on the principal sum outstanding (forming part of that total) from 1 May 2001 until payment of the full sum outstanding. Both parties will have leave to apply to a judge of the High Court. If any issue arises on the calculation of interest, it shall be determined by the judge. If the exigencies of public finance prohibit the immediate payment to the appellant of the full sum outstanding, the Attorney General, representing the Minister of Finance, may apply to the judge for approval of a schedule of payment by instalments. The Board would however stress that the payment is already overdue and no deferment should be approved save on the basis of full, clear and compelling evidence. The Attorney General must pay the appellant's costs in the courts of Grenada (both the High Court and the Court of Appeal) relating to the appellant's notice of motion issued on 23 January 1997 and the costs of the appellant before the Board.