GRENADA

IN THE COURT OF APPEAL

Motion No. 1 of 1992

BETWEEN: (1) ANDY MITCHELL (2) VINCENT JOSEPH
(3) CALLISTUS BERNARD (4) COSMOS RICHARDSON
(5) LESTER REDHEAD (6) CHRISTOPHER STROUDE
(7) HUDSON AUSTIN (8) BERNARD COARD
(9) LIAM JAMES (10) LEON CORNWALL
(11) JOHN ANTHONY VENTOUR (12) DAVE BARTHOLOMEW
(13) EDWARD LAYNE (14) COLVILLE McBARNETTE
(15) SELWYN STRACHAN (16) PHYLLIS COARD
(17) CECIL PRIME

Applicants

and

(1) ATTORNEY GENERAL
(2) DIRECTOR OF PUBLIC PROSECUTIONS

Respondents

Before: The Rt. Hon. Sir Vincent Floissac - Chief Justice
The Hon. Dr. Nicholas J.O. Liverpool - Justice of Appeal
The Hon. Mr. Satrohan Singh - Justice of Appeal

Appearances: Mr. C.A.F. Hughes S.C and Mrs O.A. Augustine for the Applicants
Mr. C. Hudson-Phillips Q.C. and Dr. Francis Alexis (Attorney General) for the Respondents

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1993: July 5, 6, 7
November 8.

JUDGMENT

SIR VINCENT FLOISSAC, C.J.

This is a Motion for the hearing or rehearing and determination or redetermination by this Court of certain matters (namely Criminal Appeals numbers 4 to 20 of 1986, Civil Appeals numbers 7 and 11 of 1988 and Motion No.1 of 1991 in the said Criminal Appeals). All of these matters purport to have been heard and determined by the so-called Former Court of Appeal of the so-called Former Supreme Court which was established on the 28th and 29th March 1979 by the Revolutionary Government (the so-called People's Revolutionary Government of the New Jewel Movement) and which thereafter served as the appellate court of Grenada until it was abolished in August 1991. All of these matters relate to the homicide of the late Prime Minister Maurice Bishop of the Revolutionary Government.

The issues in this Motion are (1) whether the Former Court of Appeal was abolished on 1st August 1991 or on 16th August 1991 and (2) whether this Court has jurisdiction to hear or rehear and determine or redetermine the appeals and motions heard and determined by the Former Court of Appeal before its abolition.

(1) Date of abolition of the Former Court of Appeal

On 19th July 1991, the Governor-General of Grenada assented to the Restoration Act (the Constitutional Judicature (Restoration) Act No.19 of 1991) which was expressed to be "An Act to restore the Judicature provided for by and under the Constitution and certain Constitutional Orders in Council". The preamble and enacting part of the Restoration Act read as follows:

> "WHEREAS the Constitution was on the 28th day of March 1979 with effect from the 13th day of March 1979 revolutionarily suspended by the People's Revolutionary Government (PRG) by the Suspension of Constitution Act 1979, People's Law No.1 of 1979
>
> AND WHEREAS the suspending of the Constitution was effected without observing or even purporting to observe the requirements stipulated by the Constitution for its legal change
>
> AND WHEREAS by the ruling of the Court of Appeal of the Supreme Court created by the said PRG the said PRG never became a legitimate government de jure so that the said Supreme Court created by the said PRG had validity only on the basis of necessity
>
> AND WHEREAS as a result of the matters aforesaid the said suspension of the Constitution by the said PRG was never legitimate de jure
>
> AND WHEREAS following the historic events of October 1983 most provisions of the Constitution have been restored with full force and effect by Proclamations issued by the Governor-General paving the way for the return of Parliamentary Democracy under the Constitution as happened with the holding of parliamentary general elections in December 1984 repeated in March 1990
>
> AND WHEREAS certain provisions of the Constitution particularly those regarding the regional Supreme Court provided for by and under the Constitution and those vesting in Her Majesty in Council jurisdiction in and over Grenada have not yet been restored and it is a matter of constitutional obligation that these provisions be restored
>
> NOW THEREFORE so that all provisions of the Constitution regarding the judicature not yet restored be restored with full force, efficacy and authority
>
> Be it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Senate and House of Representatives of Grenada and by the authority of the same as follows:--"

On the same day (19th July 1991), the Governor-General also assented to the Re-enactment Act (West Indies Associated States Supreme Court (Grenada) Act (Re-enactment) Act No.20 of 1991) which

was expressed to be "An Act to re-enact the West Indies Associated States Supreme Court (Grenada) Act 1971".

Accordingly, the express objects of the Restoration Act and the Re-enactment Act were to abolish the so-called Former Supreme Court (which included the so-called Former Court of Appeal) and to restore the original Supreme Court which is now known as the Eastern Caribbean Supreme Court and which includes this Court of Appeal. In other words, the legislative intention was to replace the Revolutionary Supreme Court by the Constitutional Supreme Court of Grenada and for this purpose to terminate the suspension of the Courts Order (Imperial Order 1967 No. 223).

To this end, section 4 of the Restoration Act provides that:

> "(1) The Courts Order shall, in its entirety, be restored and shall have full force and effect in so far as it is applicable to Grenada so that the High Court and the Court of Appeal of the Supreme Court established by PART II of the said Courts Order shall again have full jurisdiction in and over Grenada as from the appointed day, and all decisions of the said Supreme Court, whether given before or after that day, shall have full force and effect in Grenada.
>
> (2) Subject to the provisions of this Act, the Acts establishing the Former High Court and the Former Court of Appeal of the Former Supreme Court, in particular the Establishment of Supreme Court of Grenada Act 1979, the Supreme Court Jurisdiction Act 1979 and the Court of Appeal Act 1979, shall no longer be of any force and effect and the Former Supreme Court is accordingly abolished as from the appointed day."

Section 2 of the Restoration Act provides that "appointed day" means "the day appointed by the Governor-General by proclamation published in the Gazette for the coming into force of this Act" and section 10 of the said Act repeats that "The Act shall come into force on such date as the Governor-General may, by proclamation published in the Gazette, appoint"

On the same day (19th July 1991), the Governor-General (acting under the said section 10) issued and published in the Gazette a proclamation (the First Proclamation) entitled "Constitutional Judicature (Restoration) Act (Appointed Day) Proclamation S.R.O. 14

of 1991". By the First Proclamation, Thursday 1st August 1991 was appointed "as the day the Constitutional Judicature (Restoration) Act 1991 shall come into force." On 30th July 1991, the Governor-General issued and published in the Gazette S.R.O. No. 21 of 1991 (the Second Proclamation) whereby His Excellency purported to revoke the First Proclamation. On 15th August 1991, the Governor-General issued and published in the Gazette S.R.O No.25 of 1991 (The Third Proclamation) whereby His Excellency appointed Friday 16th August 1991 "as the day the Constitutional Judicature (Restoration) Act 1991 shall come into force." The question therefore arises as to whether the Restoration Act came into force on 1st August 1991 (the date appointed by the First Proclamation) or on 16th August 1991 (the date appointed by the Third Proclamation) and consequently whether the former Court of Appeal was abolished on the former or latter date.

Counsel for the Applicants impugned the Second Proclamation and the Third Proclamation on constitutional and legal grounds. The constitutional ground purports to be based on section 39 of the Constitution of Grenada. Section 39 (1) provides that:

> "Parliament may alter any of the provisions of this Constitution or of the Courts Order or section 3 of the West Indies Associated States (Appeals to Privy Council) Order 1967 in the manner specified in the following provisions of this section."

Section 39(9) of the Constitution provides that:

> "In this section -
> (a) references to this Constitution include references to any law that alters this Constitution;
> (b) references to the Courts Order are references to the West Indies Associated States Supreme Court Order 1967 in so far as it has effect as part of the law of Grenada and include references to any law that alters that Order in so far as it has such effect;
> (c) .....
> (d) references to altering this Constitution or the Courts Order or section 3 of the West Indies Associated States (Appeals to Privy Council) Order 1967, as the case may be, or to altering any provision include references -
> (i) to revoking it, with or without re-enactment thereof or the making of different provision in lieu thereof;
> (ii) to modifying it, whether by omitting or amending any of its provisions or inserting provisions in it or otherwise; and
> (iii) to suspending its operation for any period or terminating any such suspension."

Counsel for the Applicants submitted that the Second Proclamation and the Third Proclamation are unconstitutional and void because they purported to alter the Courts Order by suspending its operation or by continuing such suspension after 1st August 1991 and being alterations of the Constitution, they should have been effected in the manner prescribed by section 39 of the Constitution. This submission invites consideration of the section of the Constitution which has established the principle of constitutional invalidity of legislation in Grenada. That section is section 106 which provides that:

> "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."

Accordingly, the constitutional test of the unconstitutionality of legislation is inconsistency with the Constitution. This means that legislation is unconstitutional if it is inconsistent with an express provision of the Constitution or is inconsistent with a basic principle implicit in the Constitution. Notable examples of express inconsistency are laws enacted in violation of the procedure or formalities which the Constitution prescribes for the enactment of such laws, laws enacted in contravention of the express limitations imposed by the Constitution on the legislative powers of Parliament and laws which violate the fundamental rights and freedoms enshrined in the Constitution. Notable examples of implied inconsistency are laws inconsistent with the basic principles of separation of powers implicit in the Constitution.

In support of his submission, counsel for the Applicants cited several cases. None of these cases transcend the constitutional test of express or implied inconsistency with the Constitution. None of them was decided on the suggested impalpable test based on violation of the integrity of the Constitution.

In six of the cases cited by counsel for the Applicants, the issue was whether the impugned legislation was inconsistent with an express provision of the Constitution or other parent imperial legislation. In **Hodge v R** (1883) 9 App Cas 117 and in **Ladore v Bennett** (1939) A C 468, the Privy Council decided that certain statutes enacted by the legislature of Ontario were valid because in pith and substance they were within the powers conferred on that provincial legislature by the Imperial Act (The British North American 1867) and did not conflict with or encroach on the exclusive legislative powers expressly reserved to the Dominion Parliament by the Imperial Act. In **Gallagher v Lynn** (1937) A.C 863, The House of Lords decided that the Milk and Milk Products Act 1934 enacted by the Parliament of Northern Island was constitutionally valid because in pith and substance it was a law for the peace, order and good government of Northern Island and was not a law in respect of Trade and therefore it was within the legislative powers of that Parliament and did not offend the express limitations imposed on those powers by the Imperial Act (The Government of Ireland Act 1920). **Dwarkadas Shrinivas of Bombay v The Sholapur Spinning and Weaving Co Ltd** (1954) S C R 675 was a case where it was held that an Act which authorised the deprivation of property without compensation was unconstitutional and void because it violated the fundamental right expressly guaranteed to the individual by article 31 of the Constitution of India. In **Bribery Comr v Ranasinghe** (1965) A C 172, The Privy Council decided that a statutory amendment to the Constitution of Ceylon was constitutionally invalid because the bill for that purpose was presented for the Royal Assent without the Speaker's Certificate as expressly required by the proviso to section 29 (4) of the Constitution. In **Kariapper v Wijesinha** (1967) 3 AER 485, The Privy Council decided that the Ceylon Imposition of Civic Disabilities (Special Provisions) Act was an amendment to the Constitution of Ceylon because the terms of the Act were inconsistent with section 24 of the Constitution but that the amendment was valid because it was enacted in the manner provided by the Constitution.

In two of the cases cited, the issue was whether the impugned legislation was unconstitutional because it was inconsistent with the basic principles of separation of powers implicit in the Constitution. In **Liyanage v Reginam** (1966) 1 AE.R 650, The Privy Council decided that the Criminal Law (Special Provisions) Act No 1 of 1962 and the Criminal Law Act No 31 of 1962 were invalid because they were inconsistent with the basic principles of separation of powers implicit in the Constitution of Ceylon and were ad hominem and ex post facto enactments which interfered with the judicial power of the judicature. In **Hinds v The Queen** (1976) 1 AER 353, The Privy Council decided that The Gun Court Act 1974 of Jamaica was unconstitutional and invalid because it was inconsistent with the principles of separation of powers implicit in the Constitution of Jamaica in that it interfered with the constitutional jurisdiction of the constitutional judicature and with the independence of the judiciary and its exclusive judicial power.

It is evident that the common denominator of these cases is the concept of consistency or inconsistency with the Constitution. Accordingly, the question to be determined is whether the Second Proclamation and the Third Proclamation are inconsistent with an express provision of the Constitution or with a basic principle implicit in the Constitution. If the answer is in the affirmative, the Second Proclamation and the Third Proclamation are unconstitutional and invalid alterations of the Constitution and are consequently void.

Counsel's submission that the Second Proclamation and the Third Proclamation are invalid alterations of the Constitution or the Courts Order predicates that the combined effect of the Restoration Act and the First Proclamation is to alter the Constitution or the Courts Order by inserting therein a provision to the effect that 1st August 1991 was the constitutional date for the factual restoration of the Constitutional Judicature, the

Constitution and the Courts Order. If in fact the Restoration Act and the First Proclamation together constitute such an alteration of the Constitution or the Courts Order, that alteration is itself unconstitutional and invalid because the Restoration Act and the First Proclamation were not enacted in compliance with the special legislative procedure prescribed by section 39 of the Constitution for the amendment of the Constitution. In **Kariapper v Wijesinha** (supra), Sir Douglas Menzies (delivering the opinion of The Privy Council) said (at p 495):

> "This bill which became the Act was a bill for the amendment of s.24 of the constitution simply because its terms were inconsistent with that section. It is the operation that the bill will have on becoming law which gives it its constitutional character not any particular label which may be given to it. A bill described as one for the amendment of the constitution which contained no operative provision to amend the constitution would not require the prescribed formalities to become a valid law, whereas a bill which on its passing into law would, if valid, alter the constitution would not be valid without compliance with those formalities."

The truth is that the Restoration Act and the First Proclamation did not singly or jointly constitute an alteration of the Constitution or the Courts Order because the Restoration Act and the First Proclamation did not contradict any express provision of the Constitution or the Courts Order and did not offend any basic principle implicit in the Constitution. The Restoration Act and the First Proclamation sought to engender a factual (as distinct from a constitutional or legal) restoration of the Constitutional Judicature, the Constitution and the Courts Order none of which had ever been constitutionally or legally suspended. The Restoration Act and the First Proclamation purported to legislate with respect to a revolutionary or factual situation and not on a constitutional or legal subject. They constituted legislation for practical (and not constitutional or legal) purposes.

Neither the Constitution nor the Courts Order says anything about revolutions, Revolutionary Governments and Courts or the revolutionary suspension of the operation of the Constitutional

Judicature, the Constitution or the Courts Order or about the termination of such suspension and the restoration of the status quo ante a revolution or about the appointment of a date for such termination or restoration. Such revolutionary and restorative acts are political acts extraneous to and beyond the purview and contemplation of a written democratic constitution. Admittedly, the revolution and the revolutionary acts themselves were unconstitutional because they were inconsistent with basic principles implicit in the Constitution. But no such inconsistency can be attributed to legislation designed factually to reverse the revolution and factually to restore the status quo ante the revolution.

In my judgment, the Restoration Act is a valid statute and the First Proclamation was a valid statutory instrument. The date (1st August 1991) appointed by the First Proclamation was a statutory date authorised by the Restoration Act. It was not a constitutional date because it was not and did not purport to be a date or an alteration of a date expressly or impliedly authorised by the Constitution. Being a statutory date, it could have been altered by statute or statutory instrument.

The Second Proclamation and the Third Proclamation purport to be such statutory instruments. For reasons applicable to the First Proclamation, the Second Proclamation and the Third Proclamation are not impeachable on the ground of inconsistency with the Constitution or on the ground that they were invalid alterations of the Constitution or the Courts Order. The Second Proclamation and the Third Proclamation merely altered or purported to alter the statutory date which was appointed by the First Proclamation and which had never become a constitutional date. The date (16th August 1991) appointed by the Third Proclamation was not a constitutional date because it was not and did not purport to be a date or an alteration of a date expressly or impliedly authorised by the Constitution. It was a statutory date in substitution for

another statutory date. If the Second Proclamation and the Third Proclamation are impeachable at all, it is on legal grounds which are not constitutional.

The legal ground advanced by counsel for the Applicants is that the Governor-General was *functus officio* after he had issued and published the First Proclamation and that he had no legal power or authority to issue the Second Proclamation and the Third Proclamation. The issue on this point is whether section 10 of the Restoration Act authorises the Governor-General to perform only one act or to issue and publish only one proclamation appointing a date on which that Act shall come into force or whether section 10 authorises the Governor-General to issue and publish successive proclamations revoking previous proclamations and altering previous appointed dates. This is a question to be determined by reference to rules governing the interpretation of statutes and statutory provisions.

It is well established that the interpretation of a statute or statutory provision is the ascertainment of the meaning or meanings which the legislature intended that that statute or statutory provision or the words or phrases therein should bear. That legislative intention is an inference drawn from the primary meanings of those words or phrases with such modifications to those meanings as may be necessary to make them concordant with the statutory context. The statutory context comprises every word or phrase used in the statute and all relevant surrounding circumstances which may properly be regarded as indications of the legislative intention.

A relevant surrounding circumstance to which reference may be made is the state of the law at the time when the Restoration Act was passed. According to Halsbury's Laws of England (Fourth Edition) Vol. 44 paragraph 899:

> "The state of things which may be considered includes the state of the law, and it ought generally to be assumed

that Parliament knew the existing state of the law"

We should therefore assume that Parliament knew of the Interpretation Act (The Interpretation and General Provisions Act No. 30 of 1989) which is expressed to be "An Act to make provision in regard to the construction, application and interpretation of written law, to make certain general provisions with regard to such law and for matters and purposes incidental thereto". Accordingly, sections 33, 3, 25 and 28 of the Interpretation Act must be included among the components of the statutory context by reference to which the legislative intention which motivated the Restoration Act may be inferred and by reference to which section 10 of the Restoration Act is required to be interpreted.

Section 33 provides as follows:

> "(1) Where any written law confers any power or imposes any duty, then, unless a contrary intention appears, the power may be exercised and the duty shall be performed from time to time as occasion arises.
> (2) Power conferred to do any act or thing, or to make any appointment, may be exercised as often as is necessary to correct any error or omission in any previous exercise of the power".

Section 3 provides as follows:

> " 'Subsidiary legislation' means any legislative provision (including a transfer or delegation of powers or duties) made in the exercise of any power in that behalf conferred by any written law, by way of proclamation, regulation, rule, order, rule of court, by-law, notice or other instrument".

Section 25 provides as follows:

> "Where an Act confers power on any authority to make subsidiary legislation, the following provisions shall, unless a contrary intention appears, have effect with reference to the making of such subsidiary legislation:-
>
> (a) when any subsidiary legislation purports to be made or issued in exercise of a particular power or powers, it shall be deemed also to be made or issued in exercise of all other powers thereunto enabling;
>
> (b) no subsidiary legislation shall be inconsistent with the provisions of any Act;
>
> (c) subsidiary legislation may at any time be amended by the authority for the time being lawfully empowered or authorised to make or issue such subsidiary legislation and in the same manner by and in which it was made....."

Section 28 provides that:

> "Where an Act is not to come into operation immediately

> on the publication thereof and confers power to make any appointment, to make any subsidiary legislation, to prescribe forms or to do any other thing for the purposes of the Act, such power may, unless a contrary intention appears, be exercised at any time after the publication of the Act, so far as may be necessary or expedient for the purpose of bringing the Act into operation on the day of the commencement thereof, but so, however, that any instrument made in exercise of such power shall not, unless a contrary intention appears in the Act or the contrary is necessary for bringing the Act into operation, come into operation until the Act comes into operation."

In **R v Minister of Town & Country Planning** (1950) 2 A E R 282, Tucker L.J (commenting on section 37 of the English Interpretation Act 1889 from which the said section 28 was derived) said (at p 285):

> "In my view, s.37 applies to the present case. It clearly gives power to take the necessary steps to set up the machinery for bringing the Act of 1947 into operation as well as for doing such an act as appointing a day for the Act to come into operation. The words in s. 37 dealing with regulations, byelaws, notices, prescribed forms, and so forth, make it, I think, clear that matters of that kind may be dealt with under the provisions of s. 37 so that the necessary machinery will function as soon as the Act comes into operation and things shall not come to a standstill by reason of the repeal of an existing Act".

In **Usher v Barlow** (1952) 1 A E R 205, Sir Raymond Evershed (commenting on R v Minister of Town & Country Planning) said (at p 207):

> "I agree, accordingly, on the authority of that case, that the phrase in s. 37 of the Interpretation Act, 1889,
>
> "so far as may be necessary or expedient for the purpose of bringing the Act into operation at the date of commencement thereof,"
>
> extends to something more than that which is requisite to enable the Act to come into operation at all. In other words, I think, particularly having regard to the words "or expedient", that the section covers such steps as would be required to enable the Act to operate effectively."

Accordingly, the First Proclamation (being subsidiary legislation within the meaning of section 3 of the Interpretation Act) could have been amended by the Governor-General (acting under sections 25 (c) and 28 of the Interpretation Act) at any time before 1st August 1991. The First Proclamation could have been so amended if it were necessary to take steps to ensure that the Restoration Act would operate effectively and if such amendment was necessary or expedient for the purpose of bringing the Restoration Act into effective operation on the date of its commencement.

Under section 33 of the Interpretation Act, the power conferred on the Governor-General by section 10 of the Restoration Act could have been exercised "from time to time as occasion arises" and as often as was necessary to correct any error or omission in any previous exercise of that power.

By way of explanation of the purpose of section 10 of the Restoration Act and of the reasons for the Second Proclamation and the Third Proclamation, the Respondents produced two letters from the Chairman and Director-General respectively of the O.E.C.S (The Organisation of Eastern Caribbean States) which speaks for the Governments of the islands which the Constitutional Court serves. The Chairman's letter (which is dated 22nd March 1988 and is addressed to the Prime Minister of Grenada) reads:

"The Authority of the Organisation of East Caribbean States (O.E.C.S.) note with great interest the expressed desire of the Government of Grenada that Grenada should again participate in the Eastern Caribbean Supreme Court.

While the Authority welcome such a decision on the part of Grenada, they consider the time for the re-admission of Grenada inappropriate until the appeals regarding the murder of Prime Minister Bishop and his colleagues have been disposed of by the Appeals Court of Grenada....."

The Director-General's letter (which is dated 7th August 1991 and is addressed to the Attorney General of Grenada) reads:

"Further to our conversations of 29th July last and of yesterday 6th August and my letter of yesterday, I am to remind you of the letter of 22nd March 1988 written by the OECS Chairman, The Right Honourable John Compton to the then Prime Minister of Grenada The Right Honourable Herbert Blaize.

That letter stated that the OECS Authority considered the time for the readmission of Grenada to the Eastern Caribbean Supreme Court inappropriate until the Maurice Bishop murder appeals were disposed of by the Appeals Court of Grenada.

It seems to follow that Grenada cannot be readmitted to the Eastern Caribbean Supreme Court unless and until the Motion filed in the Court of Appeal of Grenada on 29th July last is disposed of by the Court of Appeal of Grenada; for the applicants in that Motion are asking the Court of Appeal of Grenada to rehear their appeals against their convictions and sentences in the Maurice Bishop murder appeals."

The question therefore arises as to whether these extraneous letters are admissible in evidence as indications of the legislative intention which inspired the Restoration Act and by reference to which section 10 of that Act should be interpreted.

For guidance on this point, I refer to the recent decision of the House of Lords in Pepper v Hart (1993) 1 A E R 42. There, Lord Griffiths said (at p 50):

"The object of the court in interpreting legislation is to give effect so far as the language permits to the intention of the legislature. If the language proves to be ambiguous I can see no sound reason not to consult Hansard to see if there is a clear statement of the meaning that the words were intended to carry. The days have long passed when the courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears on the background against which the legislation was enacted. Why then cut ourselves off from the one source in which may be found an authoritative statement of the intention with which the legislation is placed before Parliament".

Lord Browne-Wilkinson said (at p 64):

"Statute law consists of the words that Parliament has enacted. It is for the courts to construe those words and it is the court's duty in so doing to give effect to the intention of Parliament in using those words. It is an inescapable fact that, despite all the care taken in passing legislation, some statutory provisions when applied to the circumstances under consideration in any specific case are found to be ambiguous. One of the reasons for such ambiguity is that the members of the legislature in enacting the statutory provision may have been told what result those words are intended to achieve. Faced with a given set of words which are capable of conveying that meaning it is not surprising if the words are accepted as having that meaning. Parliament never intends to enact an ambiguity. Contrast with that the position of the courts. The courts are faced simply with a set of words which are in fact capable of bearing two meanings. The courts are ignorant of the underlying parliamentary purpose. Unless something in other parts of the legislation discloses such purpose, the courts are forced to adopt one of the two possible meanings using highly technical rules of construction. In many, I suspect most, cases references to parliamentary materials will not throw any light on the matter. But in a few cases it may emerge that the very question was considered by Parliament in passing the legislation. Why in such a case should the courts blind themselves to a clear indication of what Parliament intended in using those words? The court cannot attach a meaning to words which they cannot bear, but if the words are capable of bearing more than one meaning why should not Parliament's true intention be enforced rather than thwarted?"

These dicta confirm that the true purpose of a statute is a cogent surrounding circumstance of the statute and a dominant component of the statutory context from which the legislative intention may be inferred and by reference to which the statute is required to be interpreted. These dicta also confirm that relevant extrinsic evidence is admissible to prove that purpose. Accordingly, the letters from the Chairman and the Director-General of the O.E.C.S are admissible in evidence as aids to the interpretation of the Restoration Act in general and section 10

thereof in particular because the letters amplify and elucidate the true purpose of that Act and that Section and explain the background against which that Act and that section were enacted.

The letters explain that the restoration expressed to be the purpose of the Restoration Act was a factual and practical (and not a mere legal or theoretical) restoration. This means that the restoration expressed and intended was a full restoration of the Constitutional Judicature as a regional Court available to function effectively and to sit in Grenada as it did before the revolution. The letters indicate that the Government of Grenada acknowledged that the factual restoration of the Constitutional Judicature was not a unilateral act of the Parliament or Government of Grenada, but was a multilateral act of the Governments of the islands which the Constitutional Judicature serves and that a precondition of the availability of the Constitutional Judicature was the determination by the Former Court of Appeal of the appeals and other matters to which this Motion relates.

In those circumstances, when the Parliament of Grenada elected to enact section 10 of the Restoration Act empowering the Governor-General to appoint a date for the coming into force of that Act, Parliament must have intended that the power conferred should possess the amplitude accorded to such a power by sections 25, 28 and 33 of the Interpretation Act. To achieve its purpose, the power necessarily had to be ambulatory and to be exercisable repetitively. Parliament must have realised that if the power to alter the appointed date was the only means of counteracting attempts to defeat the purpose of the Restoration Act, that power would be more effective in the agile hands of the Governor-General than in the comparatively slothful hands of Parliament itself.

The evidence is that at the time of the publication of the First Proclamation on 19th July 1991, no notice of this Motion had been filed in this Court. Accordingly, when the Governor-

General published the First Proclamation and thereby appointed 1st August 1991 as the date for the coming into force of the Restoration Act, His Excellency evidently assumed that all the matters to which this Motion relates had already been determined and that the precondition for the full and factual restoration of the Constitutional Judicature had been fulfilled and would not thereafter be thwarted. When therefore the notice of this Motion was subsequently filed in this Court on the 29th July 1991, the precondition was frustrated and the Governor-General was thereupon required or obligated to exercise his powers under section 10 of the Restoration Act (supplemented by the Interpretation Act) to correct any error in his belief or assumption that the precondition would survive the appointed date (1st August 1991). His Excellency made this correction by his publication of the Second Proclamation and the Third Proclamation.

I therefore conclude (1) that the Second Proclamation and the Third Proclamation are constitutionally and legally valid (2) that the First Proclamation was validly revoked by the Second Proclamation (3) that by virtue of the Third Proclamation, the Restoration Act came into force on 16th August 1991 and (4) that the Former Supreme Court (including the Former Court of Appeal) was abolished and the Constitutional Judicature (including this Court of Appeal) was restored on 16th August 1991 and not on 1st August 1991.

(2) The jurisdictional issue

All of the matters to which this Motion relates were heard and determined by the Former Court of Appeal before its abolition on the 16th August 1991. The Court heard Civil Appeal No. 11 of 1988 and in an oral judgment delivered on 9th July 1991 dismissed that civil appeal. The Court heard Criminal Appeals Nos. 4 to 20 of 1986 and in an oral judgment delivered on 12th July 1991 dismissed those criminal appeals and affirmed the convictions and sentences of the Applicants. The Court heard Civil No. 7 of 1988 and

Motion No. 1 of 1991 and in oral judgments delivered on 8th August 1991 dismissed that civil appeal and that Motion.

The crucial question in this Motion is whether this Court of Appeal has jurisdiction to hear, rehear, determine or redetermine matters which were heard and determined by the Former Court of Appeal before its abolition. In order to answer that question or to ascertain the extent of the jurisdiction of this Court of Appeal, it is necessary to refer to the source of that jurisdiction. That source is section 9 (2) of the West Indies Associated States Supreme Court Order 1967 (Imperial Order 1967 No.223) which provides that:

> "The Court of Appeal shall have, in relation to a State, such jurisdiction to hear and determine appeals and to exercise such powers as may be conferred upon it by the Constitution or any other law of the State."

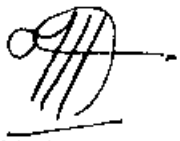
According to section 9 (2), this Court of Appeal does not have the jurisdiction in issue unless that jurisdiction has been conferred upon this Court of Appeal by the Constitution or some other law (evidently some statutory law) of Grenada. The Constitution predictably confers no such jurisdiction. Nor does any pre-revolutionary law enacted by the Constitutional Parliament of Grenada or any revolutionary law passed during the revolutionary period which began on 13th March 1979 and ended on 25th October 1983. If any such jurisdiction exists, it could only have been conferred by a post-revolutionary Act of the Constitutional Parliament of Grenada. No post-revolutionary Act confers any such jurisdiction. On the contrary, section 7 (3) of the Restoration Act (which is a post-revolutionary Act) impliedly denies any such jurisdiction. Section 7 (3) of the Restoration Act provides that:

> "All matters and proceedings pending in and not determined by the Former Court of Appeal shall be determined and concluded as if pending in the Court of Appeal."

Section 7 (3) of the Restoration Act expressly confers jurisdiction on this Court of Appeal to determine and conclude only those matters and proceedings which were pending or were not

determined by the Former Court of Appeal before its abolition on the appointed day (16th August 1991). The clear implication of section 7 (3) is that this Court of Appeal should have no jurisdiction to determine any matter which was determined by the Former Court of Appeal before 16th August 1991.

Since all of the appeals and other matters to which this Motion relates were heard and determined by the Former Court of Appeal before 16th August 1991, this Court of Appeal has no jurisdiction to determine or redetermine those appeals and matters. I would accordingly dismiss this Motion with costs to the Respondents.



.....
SIR VINCENT FLOISSAC
Chief Justice

LIVERPOOL, J.A.

The applicants were indicted for causing death by unlawful harm contrary to s. 234 of the Criminal Code (Chapter 76 of the Laws) of Grenada. On 4th December, 1986 the first, second and fourth applicants were convicted of manslaughter and the other applicants were convicted of murder. They all appealed against their convictions and on 12th July, 1991 their appeals were dismissed. On 2 June, 1986 the applicants had filed an Originating Notice of Motion (No. 191 of 1986) in which they claimed declarations that their trial was not being conducted by an independent and impartial Court and that the jury had not been empanelled according to law. The Motion was heard by Patterson J. who dismissed it on 11 July, 1988. On 19 July, 1988 the applicants' appeal (Civil Appeal No. 11 of 1988) against Patterson J's decision was dismissed by the Former Court of Appeal. In July, 1987 the applicants had filed another Originating Notice of Motion in which they claimed certain declarations and orders. (Suit No. 284 of 1986). Graham, C.J. heard the application in January, 1988 and delivered his judgment on 19th April of that year. He noted that the case constituted "another of a series of cases dealing with events and legislation wherein matters relating to the Grenada Constitution Order 1973 (the

Associated States Supreme Court Order 1967 (the Courts Order), and certain Acts of the Parliament now existing in Grenada are canvassed". He held that the case was vexatious and an abuse of the process of the Court, and refused the declarations and orders sought. On 26 April, 1988 the applicants lodged an appeal against Graham C.J.'s decision. (Civil Appeal No. 7 of 1988). It is common ground that this appeal had not been disposed of by 1st August, 1991. As will be seen later this was and continues to be a very important date as far as the arguments of the applicants are concerned.

By a Notice of Motion (Motion No. 1 of 1991) dated the 27th July, 1991, filed on the 29th day of July, 1991 and addressed to the then Court of Appeal of Grenada the applicants (who also referred to themselves as appellants) had moved that Court of Appeal for the following relief:-

> "(a) An Order that Criminal Appeals Nos. 4 - 20 be re-heard by the Court of Appeal and that the execution of the orders of that Court made on the 12th day of July 1991 in the abovementioned appeals be stayed pending the re-hearing of the said appeals.
>
> (b) An Order that the Court of Appeal do hear and determine the appeal pending before the Court of Appeal from the judgment of Mr. Justice Graham, Chief Justice dated the 19th day of April, 1988, in Suit No. 284 of 1986 (Civil Appeal No. 7 of 1988).
>
> (c) An Order granting a stay of execution of the orders of this Honourable Court made on the 12th day of July, 1991, in which the Court of Appeal affirmed the various convictions of the Applicants (Appellants) until the final hearing and determination of a **PETITION FOR PROVISIONAL AND PERMANENT RELIEF AGAINST DEATH PENALTIES AND SENTENCES OF IMPRISONMENTS**, now pending before the Inter-American Commission on Human Rights, in Washington D.C., U.S.A. Grenada being subject to the jurisdiction of the said Commission and having ratified the American Convention on Human Rights."

The hearing of the Motion was fixed for 7th August, 1991. The applicants filed a Notice of Preliminary Objection dated the 3rd day of August in which they objected to the hearing of the Motion by that Court on the ground that the jurisdiction of that Court had been abolished as from the 1st day of August 1991, by virtue of the provisions of the Constitutional Judicature (Restoration) Act, 1991 (Act No. 19 of 1991). The preliminary objection was

overruled on 7th August, 1991. The next day the Former Court of Appeal heard the substantive Motion and dismissed it. The Court also heard and dismissed Civil Appeal No. 7 of 1988 on 8th August, 1991. The applicants now seek to move this Court either to hear and determine Criminal Appeals Nos. 4 - 20, and Civil Appeals Nos. 7 and 11 of 1988, or alternatively to rehear these matters; and to hear Motion No. 1 of 1991.

The charge of causing death by unlawful harm and several other cases to which the applicants have been parties since 1984 were all heard and determined by a Supreme Court (High Court and Court of Appeal) which was established by the People's Revolutionary Government of Grenada which had taken over the Government of that country by force of arms on 13 March 1979 and which continued to run the affairs of the country until 19 October, 1983, when the then Prime Minister, Maurice Bishop and several other persons were killed. The applicants were charged and convicted of having caused those deaths. The circumstances surrounding the establishment in Grenada of the Court system which dealt with the multiplicity of cases lodged by the applicants is well documented and fully explained in the judgment of the High Court by Hedd C.J., and the Court of Appeal in Mitchell and Others v Director of Public Prosecutions and Another [1985] LRC (Const.) 127-58, and [1985] LRC (Const.) 35-121 respectively. It is however, still necessary to trace briefly the recent history of the court system in Grenada in order to gain a full appreciation of the arguments submitted on behalf of the applicants.

From 1956 to 1962 the Windward and Leeward Islands, Barbados, Jamaica, Guyana and Trinidad and Tobago were under the jurisdiction of the Federal Supreme Court. This Court was established as a direct result of a decision by the States mentioned to enter into a political federation. In 1962 when Jamaica and Trinidad and Tobago opted to become independent sovereign States, a new Court (the British Caribbean Court of Appeal) was established to serve

the remaining States. By 1966 Barbados and Guyana had decided to follow Jamaica and Trinidad and Tobago into independence, and it became necessary to establish a new political status and a new Court system for the Windward and Leeward Islands. The concept of "Associate Statehood" was conceived and Orders-in-Council were made in 1967 to provide six of the larger States of the Windward and Leeward Islands with new Constitutions which conferred that status. In the case of Grenada it was U.K. S.I. No. 227 of 1967. Simultaneously a new Court system (the West Indies Associated States Supreme Court) was established to adjudicate on matters arising in those States and also of the other islands which belonged to the grouping but which still remained colonies of the United Kingdom. (See U.K. S.I. No. 223 of 1967, "the Courts Order"). Provision was made for appeals from that Court to the Privy Council by U.K. S.I. No. 224 of 1967.

The Courts Order which had given the force of law to the agreement between the States to enter into an arrangement establishing a common Supreme Court, had also envisaged that the States themselves, with the authority of Her Majesty's Government in the United Kingdom, could enter into a separate agreement to give effect to that arrangement. On 24th February, 1967 the Associated States of Antigua, Dominica, Grenada, Saint Christopher, Nevis and Anguilla, Saint Lucia and Saint Vincent entered into an Agreement (the 1967 Agreement) to give effect to the provisions of the Courts Order. The colonies of Anguilla, British Virgin Islands and Montserrat later acceded to that Agreement. Most of the matters dealt with in the 1967 Agreement permitted the Court to function on a day to day basis. For example it provided that the headquarters of the Court should be in Grenada, and that the Government of that country was to take steps to provide and maintain suitable accommodation for the Court and its officers. The cost of financing the Court was set out in some detail; and arrangements were put in place for the audit of accounts and the certification of sums payable, and the need to promote uniformity

in certain laws of the States. It also specifically provided (Clause 3) that the arrangements for which provision had been made by the Courts Order was to have the force of law in each State, only so long as the 1967 Agreement continued in force as respects that State. The 1967 Agreement was signed by the Chief Ministers of the six Associated States on behalf of their Governments. In 1968 those States formed themselves into an Association named the West Indies Associated States (WISA) of which the highest authority was the Council of Ministers comprising their Chief Ministers. In 1974 Grenada became an independent Sovereign State, but the arrangements to participate in the unified court system with the other States which were signatories to the 1967 Agreement continued uninterrupted.

In June, 1981 the States which were parties to the 1967 Agreement and Montserrat decided to replace WISA, and entered into a Treaty which established the Organisation of Eastern Caribbean States (the Organisation), the highest Institution of which was "The Authority" which comprised the Heads of Government of its Member States. In 1982 the Authority entered into a new Agreement to replace the 1967 Agreement. This became necessary in view of the new Court system which was operative in Grenada and on 16 January, 1982 the Eastern Caribbean Supreme Court Agreement 1982 (the 1982 Agreement) came into force. The 1982 Agreement was signed by Antigua and Barbuda, Dominica, Montserrat, Saint Christopher-Nevis, Saint Lucia and Saint Vincent and the Grenadines. This Agreement was to a very large extent similar in content to the 1967 Agreement. The headquarters of the Court was moved to St. Lucia, where it had in fact been located since March, 1979; and the cost of financing the expenses of the Court was obviously no longer shared by Grenada. Article 3 of the Agreement which repeats a similar provision in the 1967 Agreement provides -

> "3. The arrangements in respect of a Supreme Court for which provision has been made by the West Indies Associated States Supreme Court Order 1967 and Independence Orders in Council shall have the force of law in each State for so long as this Agreement continues in force as respects that State."

The Court of Appeal of Grenada had held in Mitchell and Others v Director of Public Prosecutions and Another [1986] LRC (Const.) 35 that the court system established by the People's Revolutionary Government was validated by the law of necessity,but that its legality was only a temporary one. Haynes P. then went on to make the following statement:

> "But there is still this final point as the legality is temporary only. Until when? I give this answer, until either effective steps shall have been taken to resume the State's participation in the pre-revolutionary supreme court or constitutional legislation shall have been passed in compliance with s. 39 of the Constitution to establish another supreme court in its place. Of course, it is assumed that the government will act with reasonable despatch."

On 14 July, 1986 the Cabinet of Grenada authorized the Minister for Legal Affairs to make formal application for Grenada's entry with effect from 1st January, 1987 into the Court System which was foreshadowed by its Constitution but which was now subject to the 1982 Agreement. A letter to that effect was addressed to the Director-General of the Organisation of Eastern Caribbean States on 17 July, 1986. This formal application was necessary because, despite the fact that the Courts Order still applied in law to Grenada, the arrangements in respect of the Court could not have the force of law in Grenada since it was not party to the 1982 Agreement. Almost two years later, on 22 March, 1988, the Chairman of the Organisation replied noting the interest of the Authority of the Organisation (of which Grenada was a member) of the desire of the Government of Grenada that it should again participate in the Eastern Caribbean Supreme Court and welcomed that decision, but that the Authority considered ".....the time for the re-admission of Grenada inappropriate until the appeals regarding the murder of Prime Minister Bishop and his colleagues have been disposed of by the Appeals Court of Grenada". Consequently the court system which had been established by the People's Revolutionary Government continued to adjudicate on matters in Grenada.

Discussions for the re-admission of Grenada to the Eastern

Caribbean Supreme Court by way of accession to the 1982 Agreement were resumed after the Court of Appeal had dismissed the appeals by the applicants against their conviction in respect of Criminal Appeals 4 -20 of 1988, on 12th July, 1991. The way was then clear, or so it seemed at the time to the Government of Grenada, to renew the application to the Organisation and to pass local legislation to give effect to the impending change. It seemed to have been overlooked that Civil Appeal No. 7 of 1988 had not yet been disposed of by the Court of Appeal. Thereafter, the Government of Grenada passed certain Acts which compendiously provided that the jurisdiction of the Eastern Caribbean Supreme Court would be restored in Grenada. These Acts were the Constitutional Judicature (Restoration) Act, 1991 (No. 19 of 1991); the West Indies Associated States Supreme Court (Grenada) Act (Re-enactment) Act, 1991 (No. 20 of 1991); and the Magistrates Judgments (Appeals) Act, 1991 (No. 21 of 1991). Each of the Acts made provision for its commencement on such date "as the Governor-General may, by proclamation published in the Gazette, appoint". In summary Act No. 19 of 1991 sought to achieve the following objectives:

> (1) to restore the effect of certain sections of the Constitution which had been suspended by the People's Revolutionary Government, namely sections 16, 37, 39 and 101-105;
>
> (2) to restore the jurisdiction of the Supreme Court established by the Courts Order; and
>
> (3) to restore the jurisdiction of the Judicial Committee of the Privy Council over Grenada. (An attempt had been made by the People's Revolutionary Government, to abolish this jurisdiction, and it was held in Mitchell and Others v Director of Public Prosecutions and Another [1985] LRC (Const.) 122 that Act No. 1 of 1985 which had been passed unopposed by both the House and the Senate of Grenada had effectively abolished appeals from the Court of Appeal of Grenada to the Privy Council.)

The Governor-General issued a Proclamation, (the first Proclamation) [under his hand and the Public Seal of Grenada] on 19 July, 1991 appointing 1 August, 1991 as the date on which Act No. 19 of 1991 should come into force (S.R.O. No. 14 of 1991). The way was now clear, or so it was thought, for full Constitutional and judicial normalcy to return to Grenada. As we have seen the

applicants filed Motion No. 1 of 1991 on 29th July, 1991 and this Motion and Civil Appeal No. 7 of 1988 were subsequently heard and dismissed on 7th, and 8th August, 1991 by the previous Court of Appeal.

As a consequence of the filing of Motion No. 1 of 1991, the Governor-General by Proclamation (the second Proclamation) dated 30 July, 1991 (S.R.O. No. 21 of 1991) revoked S.R.O. No. 14 of 1991. Reaction from the Organisation of Eastern Caribbean States to the filing of the Motion was also swift and immediate. By letter dated 7th August, 1991 the Director-General of the Organisation reminded the Government of Grenada of the terms of the letter written by the Chairman of the Authority on 22 March, 1988 and concluded "It seems to follow that Grenada cannot be readmitted to the Eastern Caribbean States Supreme Court unless and until the Motion filed in the Court of Appeal of Grenada on 29th July last is disposed of by the Court of Appeal of Grenada; for the applicants in that Motion are asking the Court of Appeal of Grenada to rehear their appeals against their convictions and sentences in the Maurice Bishop murder appeals". The Motion and appeals having been disposed of, the Governments of the territories who were signatories to the 1982 Agreement and the Government of Grenada signed an Instrument of Assession by Grenada to the 1982 Agreement, and the Government of Grenada signed an undertaking to be bound by the 1982 Agreement. The Eastern Caribbean Supreme Court (Application to Grenada) Agreement, 1991 (as it is referred to) came into force on 16 August, 1991; and by Proclamation (the third Proclamation) dated 15th August, 1991, (S.R.O. No. 25 of 1991), Act No. 19 of 1991 was brought into force on 16th August, 1991.

Undaunted, the applicants launched a frontal attack on the procedure adopted by the Government of Grenada after the passing of S.R.O. No. 14 of 1991 which had been intended to bring Act No. 19 of 1991 into force on 1 August, 1991. By this Motion (No. 1 of 1992) they seek the following relief:

(a) An Order that Criminal Appeals No. 4 - 20 of 1986 filed in the Former Court of Appeal on the 12th day of December 1986 be heard and determined by the Court of Appeal.

(b) An Order that Civil Appeal No. 11 of 1988 filed in the Former Court of Appeal on the 19th day of August 1988 be heard and determined by the Court of Appeal

(c An Order that Civil Appeal No. 7 of 1988 filed in the Former Court of Appeal on the 26th day of April, 1988 be heard and determined by the Court of Appeal

(d) An Order that Motion No. 1 of 1991 filed in Criminal Appeals Nos. 4 - 20 before the Former Court of Appeal on the 29th day of July 1991 be heard and determined by the Court of Appeal

(e) Alternatively that the Court of Appeal re-hear the said Criminal Appeals Nos. 4 - 20 of 1986, Civil Appeal No. 11 of 1988 and Civil Appeal No. 7 of 1988

(f) Such further or other order as the Court of Appeal may seem just.

Their argument was deceptively attractive. Put simply and concisely they claimed that -

1. When Parliament passed Act 19 of 1991 it evinced an intention to bring to an end the period of necessity brought about by the 1979 revolution by virtue of which Grenada had established its own court system.

2. Parliament entrusted to the Governor-General (its delegate) the power to specify the date on which the Act was to be brought into force, at which time the period of necessity would cease.

3. When the Governor-General made the first Proclamation the date mentioned therein, namely, 1st August, 1991 became part of the Act and was in fact embedded in it. This was an act in furtherance of the objectives of the Grenada Constitution.

4. The second Proclamation having revoked the first Proclamation, it became necessary to look at the purpose for making the second Proclamation, and its effect.

5. The purpose and effect of the second Proclamation was to extend the period of necessity, by virtue of which the courts in Grenada then operated for an indefinite period. That act was not in furtherance of the objectives of the Constitution. It was in effect a "suspension" of the relevant sections of the Constitution.

6. A "Constitutional" Parliament such as the one which existed in Grenada in 1991 could not suspend any part of the Constitution unless it followed the procedure laid down in the provisions of section 39 of the Constitution.

7. The second Proclamation was therefore a fraud on the Constitution and should be struck down.

8. The consequence would be that Act No. 19 of 1991 came into force on 1 August, 1991, and therefore the former Court of Appeal had no jurisdiction to hear, as it did, Motion No. 1 of 1991 and Civil Appeal No. 7 of 1988.

> 9. Motion No. 1 of 1991 and Civil Appeal No. 7 of 1988 are therefore proceedings which at 1 August, 1991 were pending in and not determined by the former Court of Appeal within the meaning and intent of section 7(3) of Act, No. 19 of 1991, and ought now to be determined and concluded by the Eastern Caribbean Court of Appeal.

Learned Counsel submitted that the power given to the Governor-General by Parliament to name a date on which Act No. 19 of 1991 was to come into force was exercisable once only. The date of 1 August, 1991 having been named by the first Proclamation, this date became part of the Act and not even Parliament itself could have changed it. Consequently, the submission continued, the Governor-General had no power to make the second Proclamation. This submission has only to be stated to be rejected in so far as Parliament is concerned. In its application to the making of the second Proclamation by the Governor-General it seems to me that the provisions of section 33 of the Interpretation and General Clauses Act (No. 30 of 1989) are applicable. Section 33 states -

> "33.- (1) Where any written law confers any power or imposes any duty, then, unless a contrary intention appears, the power may be exercised and the duty shall be performed from time to time as occasion arises.
>
> (2) Power conferred to do any act or thing, or to make any appointment, may be exercised as often as is necessary to correct any error or omission in any previous exercise of the power."

In my view it would have been quite clear to everyone concerned (including the appellants) that if the first Proclamation was permitted to stand after Motion No. 1 of 1991 had been filed, the intent and purpose of Act No. 19 of 1991 could not have been achieved since Grenada would not have been permitted to accede to the 1982 Agreement by the signatories thereto. In any event it seems to have been overlooked that Appeal No. 7 of 1988 was still outstanding and had not been heard by the Grenada Court of Appeal, so that the deck had not been cleared for Grenada to re-enter the Court established by the Courts Order. When this was pointed out to learned Counsel for the appellants he readily conceded that a judicial vacuum would have been created in Grenada, and he suggested that the problem if it had occurred, could have been solved by the recognition that a new period of necessity had

arisen. The ingenuity of Counsel is always to be appreciated, and if the interpretation of the applicable law could lead only to that conclusion, one would have to give effect to this tortuous result. But I do not think that it is necessary to engage in this form of legal gymnastics. Section 33 of the Interpretation Act clearly applied to the situation which existed on 29th July, 1991 when Motion No. 1 of 1991 was filed. Civil Appeal No. 7 of 1988 had apparently by inadvertence not yet been heard. Grenada would not have been re-admitted to the Court established by the Courts Order. The first Proclamation had been made in error, and the Governor-General had the power to correct the error and to provide for Act No. 19 of 1991 to come into force on such a date as would enable the purpose of the Act to be achieved.

Learned Counsel then submitted that even if it could be said that the Governor-General had the power to make the second Proclamation, its effect was to amend the Constitution without recourse to the provisions of section 39 of the Constitution, and further that it was a fraud on the Constitution to amend it in that manner. I accept the proposition that if the Parliament of Grenada wishes to alter an entrenched provision of the Constitution and any relevant provisions of the Courts Order mentioned therein, then the proper course to follow is to use the procedure laid down in section 39. But the action of the Governor-General in making the second Proclamation could, by no stretch of the imagination be regarded as an act to amend the Constitution. I think that this is one of many instances in which the appellants have displayed a distinct lack of realism and practicality in their approach to the several matters which they have filed.

The appellants cited in support of the submission that the making of the second Proclamation was a fraud on the Constitution, the cases of **Gallagher v Lynn** (1937) A.C. 863; **Ladmore v Bennett** (1939) A.C. 468; **Dwarkodas Shrinivas of Bombay v The Sholapur Spinning and Weaving Co. Ltd.** and others (1954) S.C.R. 674; and

M.R. Balaji v The State of Mysore (1963) A.I.R. 649. These cases establish the general principle that in construing the powers of Parliament the Court will look at the true nature and character of the legislation in order to ensure that the legislature does not achieve indirectly what it could not do directly. This is a principle which is well understood and indeed should guide this Court in construing the effect of the second Proclamation. In **Gallagher** Lord Atkin stated that the Court should look at the pith and substance of the legislation; and in **Ladmore v Dennett** his words were ".....the Courts will be careful to detect and invalidate any actual violation of constitutional restrictions under pretence of keeping within the statutory field. A colourable device will not avail". Mahajan J. speaking for the Supreme Court of India in **Dwarkadas** had this to say: ".....it is necessary to examine with some strictness the substance of the legislation for the purpose of determining what it is that the legislature has really done; the court, when such questions arise, is not overpersuaded by the mere appearance of the legislation. In relation to prohibitions binding a legislature it is clear that the legislature cannot disobey the prohibitions merely by employing an indirect method of achieving exactly the same result. Therefore, in all such cases the Court has to look behind the names, forms and appearances to discern the true character and nature of the legislation."

In **Balaji's** case the Government of the State of Mysore had made an Order reserving 68% of the places in technical institutions for "backward classes" and for "scheduled castes and tribes". This Order was challenged on the ground that it violated the provisions of Article 15(4) of the Constitution which authorized the making of special provision for the advancement of socially and educationally backward classes and citizens or for the scheduled castes and the scheduled tribes. The petitioners had contended that the impugned Order was invalid because the places were reserved to those persons otherwise than by open competition. It

was also claimed that this amounted to an unreasonable restraint on the fundamental rights of other citizens guaranteed by Articles 15(1) and 29(2) of the Constitution and was therefore invalid, and a fraud on the Constitution. The Court concluded that while making the adequate reservation authorized by the Constitution, care should be taken not to provide for unreasonable, excessive or extravagant reservation; and held that the reservation of 68% made by the impugned Order was plainly inconsistent with the concept of special provision authorized by Article 15(4), and set aside the Order. *Gajendragadkar J.* who delivered the judgment of the Supreme court stated -

> "The petitioners contended that having regard to the infirmities in the impugned order, action of the State in issuing the said order amounts to a fraud on the Constitutional power conferred on the State by Art. 15(4). This argument is well-founded, and must be upheld. When it is said about an executive action that it is a fraud on the Constitution, it does not necessarily mean that the action is actuated by mala fides. An executive action, which is patently and plainly outside the limits of the constitutional authority conferred on the State in that behalf is struck down as being ultra vires the State's authority. If, on the other hand the executive action does not patently or overtly transgress the authority conferred on it by the Constitution, but the transgression is covert or latent, the said action is struck down as being a fraud on the relevant constitutional power. It is in this connection that courts often consider the substance of the matter and not its form and in ascertaining the substance of the matter, the appearance or the cloak, or the veil of the executive action is carefully scrutinized and if it appears that notwithstanding the appearance, the cloak or the veil of the executive action, in substance and in the truth the constitutional power has been transgressed, the impugned action is struck down as a fraud on the Constitution."

This is a principle with which one would readily agree, and I would extend the principle to apply also to legislative action which is outside of the power conferred by the Constitution. In the course of argument learned Counsel for the applicants also referred to other authorities which supported this principle. However, in the present proceedings what is in dispute is not the validity of the principle but whether or not it applies to this case. I would hold that it is not applicable in the instant case as the Government of Grenada was doing everything in its power to return the country to constitutional and judicial normalcy. The making of the second Proclamation far from being a suspension of,

or a fraud on, the Constitution was an act done in furthering the objectives of restoring the jurisdiction of the Court system established by the Courts Order to Grenada as soon as was reasonably practicable. That this is so can be gleaned from the speed which attended subsequent events. Motion No. 1 of 1991 and Civil Appeal No. 7 of 1988 were disposed of on 8th August, 1991. On 15th August, 1991 a third Proclamation (No. 25 of 1991) was made bringing Act No. 19 of 1991 into force on 16th August, 1991; and the 1982 Agreement was made to extend to Grenada on the same day.

The Motion by which this Court was moved also requested that Criminal Appeals Nos. 4 - 20, and Civil Appeals No. 7 and 11 of 1988 be re-heard by this Court. No arguments were advanced in support of these grounds. I would however agree with the point made in the skeleton arguments for the respondent that any such jurisdiction has to be found in the West Indies Associated States Supreme Court (Grenada) Act 1971 and the West Indies Associated States Supreme Court (Grenada) Act (Re-enactment) Act, 1991 (hereinafter referred to as "the Re-enactment Act"). According to the skeleton arguments:

> "The effect of the Constitutional Judicature (Restoration) Act, 1991 is to enlarge the jurisdiction of the Eastern Caribbean Supreme Court to permit the present High Court and the Court of Appeal to hear and determine matters started in the former court provided they have not been determined by the former Court of Appeal. Without the provisions contained in the Constitutional Judicature (Restoration) Act, 1991 s 7, the Eastern Caribbean Supreme Court would have no jurisdiction to entertain any matter coming from the former court established by People's Laws 4 and 14."

For the reasons stated above, I would refuse the orders sought and dismiss this Motion with costs to the respondents to be taxed.

NICHOLAS J.O. LIVERPOOL
Justice of Appeal

SINGH J. A.

I have had the advantage of reading beforehand the Judgments just delivered. I agree with the Judgment of the learned Chief Justice and there is nothing I can usefully add. For the reasons mentioned by the learned Chief Justice I, too, would dismiss this Motion with costs to the respondents.

SATROHAN SINGH
Justice of Appeal

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