

GRENADA

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 18 OF 2004

BETWEEN:

JANIN CARIBBEAN CONTRACTORS LIMITED

Appellant

and

CONSOLIDATED CONTRACTORS COMPANY (KUWAIT) WLL

Respondent

Before:

The Hon. Mr. Michael Gordon, QC

Justice of Appeal

The Hon. Mr. Hugh A. Rawlins

Justice of Appeal

The Hon. Ms. Ola Mae Edwards

Justice of Appeal [Ag.]

Appearances:

Mr. Michael Sylvester for the Appellant

Mr. Russel Martineau, SC and Ms. Rosalyn Wilkinson for the Respondent

2005: December 7;

2006: July 3.

JUDGMENT

[1] **EDWARDS, J.A. [AG.]:** This is an appeal from the Judgment of Master Brian Cottle dated 4th May 2004. In this Judgment, the Master refused the application of the Appellant/Plaintiff (Janin) to lift the stay of proceedings ordered by Brian Alleyne, J., as he then was on the 7th May 1998 pursuant to the Arbitration Act.

Background Facts

- [2] Janin's claim against the Respondent/Defendant (C.C.C.) is for Declarations, an Injunction and Damages for breach of a Sub-contract Agreement dated 1st January 1996.
- [3] A term of this Agreement provided for settlement of disputes between the parties through compulsory and binding arbitration.
- [4] On the Application of C.C.C. filed on the 27th March 1998, Justice Alleyne S.C. stayed the proceedings in the following terms:
- “All further proceedings in this matter be stayed, pursuant to section 7 of the Arbitration Act Cap. 19 (1990 Revised Laws of Grenada) the Plaintiff and the Defendant having by an Agreement made in writing dated 1st day of January 1996 agreed to refer to Arbitration the matters in respect of which this action is commenced.
- (2) That the Plaintiff pays the Defendant their costs of and occasioned by this action including the cost of this Application to be taxed.”
- [5] Janin's subsequent non-monetary Arbitration reference to the International Chamber of Commerce Court of Arbitration (I.C.C.C.A.) attracted a provisional fee of U.S \$14,000.00 with a U.S. \$2,500.00 deposit by Janin. However, C.C.C.'s response to this reference along with its counterclaim quantified at more than U.S. \$2.7 million, led the I.C.C.C.A. to refix the provisional advance on costs at U.S \$94,000.00. Each party was required to pay half of this amount prior to the transmission of their files.
- [6] Because of Janin's impecunious circumstances, it withdrew its arbitration reference, thus forfeiting its U.S \$2500.00 deposit. C.C.C. has decided not to prosecute its counterclaim unless Janin is proceeding with its Arbitration Reference.

- [7] It is against this background that the Master heard the Application of Janin in Chambers on the 22nd April 2004 and delivered his Judgment.
- [8] The Master treated Janin's Application for a stay of the order of Alleyne J. as an application to lift or remove the earlier stay granted. He found that C.C.C. knew that Janin was impoverished although there was no evidence adduced to establish its poverty. Having considered the alleged consequences for Janin if the stay was not lifted and there be no arbitration, the Master weighed the competing claims and applied the principles of law which govern the grant of stay in the first instance. The Master concluded that Janin's Application had to be refused because it was not the breach of contract by C.C.C., but rather the filing of C.C.C.'s counterclaim that Janin had alluded to as making arbitration impossible.

Preliminary Matters

- [9] The preliminary questions raised for our decision stem from the Amended Notice and Grounds of Appeal filed on the 7th October 2005. We gave leave for a preliminary matter to be argued apart from the substantive grounds. The preliminary matter concerns the jurisdiction of the Master to hear and determine the issues of law which were raised in the subject application. Though this point was never taken in the Court below, we heard the arguments. A final decision on this matter of constitutional and public importance, can only serve to engender appreciation of and respect for the Master's role in improving the functioning and efficiency of the High Court of Justice in the Eastern Caribbean Supreme Court.

The Grounds of Appeal

- [10] On behalf of Janin, learned Counsel Mr. Sylvester relied on the following grounds of appeal for the preliminary matter :
- (a) "The learned Master Cottle was and is not appointed as a Puisne Judge of the High Court of Justice in accordance with the provisions of section 5 of the West Indies Associated States Supreme Court Order. Accordingly, the

learned Master is not a member of the High Court as constituted by Section 4 of the Court Order and does not have the jurisdiction to hear and determine the issues of law which were raised in the subject application.

- (b) To the extent that certain provisions of:
Act No. 36 of 2000
S.I. No. 2 of 2001
The Eastern Caribbean Supreme Court Civil Procedure Rules 2000 (CPR 2000)
purportedly cloak a Master with the authority and jurisdiction of a Puisne Judge of the High Court of Justice, those provisions are inconsistent with the provisions of the aforesaid Courts Order and pursuant to Section 106 of the Constitution of Grenada such provisions are, to the extent of the inconsistency void.”

[11] The questions which therefore arise are:

- (1) Can the jurisdiction and powers of the Judge in Chambers be validly delegated to the Master in conformity with the Courts Order 1967 and Constitution of Grenada? If yes —
- (2) What is the extent of the Master’s jurisdiction and powers under the West Indies Associated States Supreme Court (Grenada) Act as amended by the West Indies Associated States Supreme Court Act No. 36 of 2000?
- (3) Is the S.C.A. Cap. 336 as amended inconsistent with the Courts Order 1967 and the Grenada Constitution?

Judicial Statement on Master’s Jurisdiction

[12] Mr. Sylvester first pointed out that in **Gordon St. Bernard v the Attorney General of Grenada**¹ Redhead J.A. stated:

“I make the observation that I find great difficulty in appreciating that a Master has jurisdiction to hear and determine the issues of law when there is a statement of claim and a defence notwithstanding that there was an agreement by the parties as to facts. If the Master has the authority to adjudicate on matters such as this, then, in my view there is a serious blurring of the functions between Judge and Master.”

¹ (Civil Appeal No.1 of 2004 at paragraph 3)

In **St. Bernard** the Master had tried and dismissed the Appellant's claim for declarations concerning his entitlement to pension upon his retirement from the Public Service, based on his service in Grenada as a Teacher. The Court of Appeal allowed the appeal with costs to the Appellant, and declared that the Appellant was entitled to be paid a pension in respect of 12 years service.

[13] Mr. Sylvester submitted that various enactments which purport to establish the office of Master, including the method of appointment, conditions of service of Masters and which specify the jurisdiction and authority of such Masters are incompatible with requirements of the Constitution of Grenada including the Courts Order insofar as these are concerned with the independence of the judiciary.

[14] The statutory powers of the Registrar of the High Court are inextricably linked with any consideration of the constitutionality of the Master's jurisdiction, and powers assigned to the Master, by the impugned legislation. I must therefore also focus on the office and functions of the Registrar of the High Court under the statutory provisions in the West Indies Associated States Supreme Court (Grenada) Act Cap. 336 (S.C.A Cap. 336), the Civil Procedure Act of Grenada Cap. 55 (C.P. Act), other relevant Rules of the Supreme Court, and repealed Statutory Instruments and enactments, which reflect our Courts' jurisdictional and procedural English heritage.

Constitution and Jurisdiction of the Court

[15] Section 4 of the West Indies Associated States Supreme Court Order 1967 (the Courts Order 1967) established a Supreme Court for Associated States including Grenada pursuant to section 6 of the West Indies Act 1967. Though the Courts Order 1967 came into operation on the 27th February 1967, for Grenada it became operative only when the S.C.A. Cap. 336 was promulgated on the 16th April 1971 as Act No. 17 of 1971.

[16] The Supreme Court is a superior Court of Record, consisting of a Court of Appeal and a High Court of Justice. Under the terms laid down in the Court Order 1967, the Chief Justice is appointed by Her Majesty by Letters Patent. The Puisne Judges and Justices of Appeal are appointed by the Judicial and Legal Services Commission established by the Court Order 1967.

[17] Section 9 of the Courts Order States:

- “(1) The High Court shall have, in relation to a State, such jurisdiction and powers as may be conferred on it by the Constitution or any other law of the State.
- (2) The Court of Appeal shall have, in relation to a State, of such jurisdiction to hear and determine appeals and to exercise such powers as may be conferred on it by the Constitution or any other law of the State.
- (3) The process of the Supreme Court shall run throughout the States and any judgment of the Court shall have full force and effect and may be executed and enforced in any of the States.
- (4) The provisions of subsection (3) of this section shall be without prejudice to the provisions of the constitution of each State relating to fundamental rights and freedoms.”

[18] Section 17 of the Courts Order provides:

- “(1) Subject to the provisions of this Order and any other law in force in any of the States, the Chief Justice and any other two judges of the Supreme Court selected by him may make rules of court for regulating the practice and procedure of the Court of Appeal and the High Court in relation to their respective jurisdiction and powers in respect of any of the States.
- (2) Without prejudice to the generality of the foregoing subsection such rules may be made for any of the following purposes:
 - (a) to (c)...
 - (d) for prescribing and regulating the powers and duties of the Chief Registrar, registrars and other officers of court,
 - (e) to (h)...
 - (3) to (5)...”

[19] Section 12 of the Courts Order is the enabling provision which validates the Master's appointment. It states:

- 12(1) "There shall be, for all states, an office of Chief Registrar and such other offices of the Supreme Court as the Chief Justice may from time to time prescribe by order made with the concurrence of the...[heads of government] of all the States; and the holders of such offices shall be paid such salaries and allowances and shall have such terms and conditions of offices as may from time to time be determined by the Chief Justice with the concurrence of the ...[heads of government] of all the States."
- (2) Power to make appointments to the office of Chief Registrar and to other offices prescribed under this section and to exercise disciplinary control over persons holding or acting in such offices shall vest in the Judicial and Legal Services Commission.
- (3) ...
- (4) The power to constitute offices and make appointments thereto conferred by this section shall be in addition to any power conferred by the Constitution of any State to constitute the offices of and appoint for that State a Registrar and other offices of the High Court."

[20] The Powers of the Supreme Court are defined by ordinary law of Grenada and each of the other States or dependent territories which agreed to have the Eastern Caribbean Supreme Court as their common court.

[21] Section 6 of the S.C.A. Cap. 336 vests in the High Court:

"... all jurisdiction which was vested in the former Supreme Court by the Supreme Court Ordinance or by any law of the Legislature of Grenada or any other law for the time being in force in Grenada and such jurisdiction shall include :

- (a) the jurisdiction which was vested in, or capable of being exercised by, all or any one or more of the Judges of the former Supreme Court sitting in Court or Chambers or elsewhere when acting as judges or a judge pursuant to any Order in Council [the Courts Order 1967], Act; Ordinance or any other law for the time being in force in Grenada;
- (b) all the powers given to the former Supreme Court or to any judge or judges thereof by any Act, Ordinance or any other law for the time being in force in Grenada;

- (c) all ministerial powers, duties and authorities incidental to any and every part of that jurisdiction.”

[22] By section 7 (1) of the S.C.A. Cap. 336, it is provided that:

“The High Court may have and exercise within Grenada all such jurisdiction (save and except the jurisdiction in Admiralty) and the same powers and authorities incidental to such jurisdiction as, from the commencement of this Act, are vested in the High Court of Justice in England.”

[23] By virtue of Section 11 (1) of the Act:

“The jurisdiction vested in the High Court in civil proceedings, and in probate, divorce and matrimonial causes, shall be exercised in accordance with the provisions of this Act and any other law in operation in Grenada and Rules of Court, and where no special provision is therein contained such jurisdiction shall be exercised as nearly as may be in conformity with the law and practice for the time being in force in the High Court of Justice in England.”

The Former Supreme Court

[24] The S.C.A Cap. 336 came into operation on the 16th April 1971 and it repealed and replaced the Supreme Court Act Cap 289-(1958). Section 3 of this repealed Ordinance provided for the former Supreme Court as follows-

“There shall be vested in the Court all such jurisdiction as at the commencement of this Ordinance is vested in Her Majesty’s High Court of Justice in England, which is capable of being exercised by a Colonial Court, save and except as otherwise provided for in this Ordinance in addition to any other jurisdiction conferred by this or any other Ordinance.”

[25] Section 9 of this repealed Ordinance stated that:

“The jurisdiction vested in the Court shall be exercised (so far as regards practice and procedure) in the manner provided by this Ordinance, the Civil Procedure Ordinance, the Criminal Procedure Code, Rules of Courts, or in default of the foregoing by the Statutes, Orders and Rules governing practice and procedure of the High Court in England.”

[26] The Repealed Ordinance was enabled by the Leeward Islands and Windward Islands (Courts) Order in Council 1939.

Judicial Functions of Registrar

[27] Research will indicate that Rules of Court were made by the Chief Justice of the Supreme Court of the Windward Islands and Leeward Islands with the approval of the Governors of the Windward and Leeward Islands under Section 17 of The Leeward Islands and Windward Islands (Courts) Order in Council dated 20th December 1939.

[28] These Rules are cited as The Supreme Court of the Leeward Islands and Windward Islands (Powers of Registrars) Rules, (Statutory Rules and Orders No. 255 to be found in Laws of Grenada 1958 Vol. VI at pages 1134 to 1135). The significance of these Rules has persuaded me to burden this judgment by reproducing the relevant sections:

“2. POWERS OF REGISTRAR IN ABSENCE OF JUDGE. During the absence of a Judge from any Colony in the Windward Islands the Registrar of such Colony may, subject to appeal as hereinafter provided, transact all business and exercise all authority and jurisdiction as might be transacted and exercised by a Judge in Chambers, with particular reference to the following matters:-

Application and Orders

- (a) For substituted or other service of writs of summons and for renewal of writs;
- (b) For the amendment of any writ, petition, or any pleading;
- (c) The adjournment of any proceeding;
- (d) For the enlargement of time for doing an act;
- (e) For leave to enter up judgment by default;
- (f) For the sale of land in execution of judgment;
- (g) For the stay, or renewal, of writs of execution;
- (h) For the arrest of absconding defendants or their discharge;
- (i) For the attachment of goods before judgment, or the release thereof;
- (j) For the perpetuation of testimony, and for the taking of evidence de bene esse;
- (k) For the interim protection of property, (on such understanding by the applicant to be answerable in damages as, under the circumstances of the case, may seem just and reasonable);

- (l) All other interlocutory applications and orders relating or incidental to a suit or proceeding in every case on such terms (if any as to costs as may seem just and reasonable);
- (m) Interpleader matters:

Provided always that where it appears necessary to obtain the opinion of a Judge upon the construction of a document or upon any question of law, the Registrar may, on his own motion or on the application of any party to such suit, proceeding or matter, stay further proceedings therein, and refer the matter to a Judge for hearing; and no fresh summons shall be necessary for such deferred hearing.

3...

4. APPEAL FROM DECISION OF REGISTRAR

(1) Every order or decision of a Registrar so made under the authority of the preceding rule may be confirmed, varied or discharged by the Judge on his return to the Colony, after hearing the parties or affording them the opportunity of being heard; provided that written notice of any intention to appeal to the Judge is given (by any of the parties) at the time of the making of such order by the Registrar or within three days thereof. The Judge or Registrar shall appoint the time for the hearing of the appeal, and no fresh summons shall be necessary.

(2) An appeal to the Judge from the Registrar's decision shall be no stay of proceedings unless so ordered by a Judge or Registrar:

(3) Nothing in these Rules contained shall prejudice the right of any person affected by any order or decision of a Registrar or a Judge to appeal to the Court of Appeal."

[29] The Powers of Registrars Rules 1939 were saved by Section 29(1) of the Windward Islands and Leeward Islands (Courts) Order in Council 1959 (Statutory Instrument No. 2197 of 1959), which came into operation on the 1st January 1960. The Rules were to continue to have effect for the purposes of this Order, subject to amendment or repeal by the competent authority. They were to be construed with such adaptations and modifications as may be necessary to bring them into conformity with the provisions of the Order. I found nothing to suggest that these Rules were amended or repealed by the competent authority.

- [30] The West Indies (Dissolution and Interim Commissioner) Order in Council 1962 (Statutory Instrument No. 1084 of 1962) apparently saved the 1939 Powers of Registrars Rules also.
- [31] The Courts Order 1967 states in Section 23(1) that:
“Any Rule of Court made under or kept in force by the Order of 1959 on the Order of 1962 and having effect as part of the law of a State immediately before the prescribed date shall continue in force on and after that date notwithstanding the revocation of those Orders.”
- [32] By the West Indies Associated States Supreme Court Statutory Instruments No. 2 of 1970, the Rules of the Supreme Court (Revision) were made and came into operation on the 17th April 1971 in each of the West Indies Associated States. These Rules have subsequently been revoked by CPR 2000. Order 47 of the Rules of the Supreme Court seems to have replaced the Powers of Registrars Rules 1939, though it does not seem that they have been expressly revoked.
- [33] Order 47 Rule 1 provided that:
“When business is pending before the court or before a Judge in Chambers, and there is no judge present or available for the disposal of such business, the Registrar shall adjourn such matters in accordance with any instructions given by a judge, or if no instructions have been given, to a date of which notice shall be given to the parties”.
- [34] Order 47 Rule 2 provided that:
“(1) Subject to any instructions which a judge may give under these Rules a Registrar who is qualified as a barrister or a solicitor may in the absence of a judge dispose of any interlocutory application in Chambers relating or incident to a suit or proceeding which requires prompt attention, on such terms as to costs as may seem just.
(2) This Rule shall not apply in respect of the following matters and proceedings-
(a) matters relating to criminal proceedings;
(b) matters relating to liberty of the subject;
(c) applications by a person in respect of whom an order restricting his right to institute legal proceedings has been made, for leave to institute such proceedings;
(d) any other matter or proceeding which by any of these Rules is required to be heard only by a Judge.”

[35] Order 47 Rule 3 provided for the Registrar to refer to a judge any matter which he thinks should properly be decided by a judge, and the judge may either dispose of the matter or refer it back to the Registrar with such directions as he thinks fit.

[36] Order 47 Rule 4 provided that:

“(1) Every order or decision of a Registrar made under the authority of the preceding Rule may be confirmed, varied or discharged by a judge, provided that written notice of any intention to appeal to a judge is given by any of the parties at the time of the making of such order or within three days thereof. The judge shall appoint the time for hearing of the appeal, and no fresh summons shall be necessary.

(2) An appeal to the judge from a Registrar’s decision shall not operate as a stay of proceedings unless so ordered by a judge or the Registrar.

(3) Any party dissatisfied with the decision of a judge on appeal from the Registrar may appeal to the Court of Appeal”

[37] It is against the background of the Powers of Registrars Rules 1939 that the Registrar of the Supreme Court was required to function from 1940. Under the repealed Supreme Court Ordinance Cap. 289 which remained in force from the 20th December 1944 to the 16th April 1971, the Registrar, by virtue of section 13 was styled the Registrar of the Grenada Circuit Court. The Registrar was required to:

“...perform the duties of Provost Marshall and such duties as may be prescribed by the Rules or by the Chief Justice or by any law or usage for the time being in force and subject thereto, he shall perform such duties as are performed by a Master or a Registrar or a Chief Clerk or a Clerk of the Crown or a Sheriff in the High Court of Justice in England.”

A similar provision existed in the 1898 Supreme Court Ordinance of Grenada Cap. 220, Section 28.

[38] Also, whenever a judge was not in the colony or where the judge was sick or absent from work, the Registrar was empowered by Section 14:

“(1)...to make Interlocutory Orders; to issue such process and exercise such powers in relation to the administration of justice; as may respectively be authorized by any Rules now existing or hereunder made

(2) Every such order, process, or act done in exercise of any power respectively, so authorised as aforesaid, [was] liable to be altered or set aside by a judge within six months of such order or process having been made or such act having been done”.

The Registrar also enjoyed immunity from being sued while performing such functions in good faith, pursuant to Section 14 (3).

[39] By virtue of Section 21 of the Repealed Ordinance:

“In the absence of the Registrar from duty the Deputy Registrar...[could] exercise all or any of the functions and authorities assigned to or conferred on the Registrar save and except the powers to make Interlocutory Orders and to issue process as...[was] conferred on the Registrar...

(2) In the exercise of such functions and authorities the Deputy Registrar [had] all the privileges and liabilities of the Registrar”

[40] Under the present dispensation of the SCA Cap. 336, the Registrar by Section 63 is required to:

“...perform the duties of Provost Marshall and such duties as may be prescribed by Rules of Court or the Chief Justice or by any law or usage for the time being in force, and subject thereto he shall perform such duties as may be prescribed by rules of Court.”

By virtue of Section 71, the Registrar in the absence of the Chief Registrar is the Taxing Master for the Court, and every taxation of costs that he does shall be subject to Review by the Judge in Chambers.

[41] I note that section 63 of the S.C.A Cap 336 does not specifically state that the Registrar has powers to make Interlocutory Orders, as was spelled out in Section 14 of the Repealed Ordinance Cap. 289. I must also mention that Section 104 of S.C.A. Cap. 336 prior to being amended by Act 36 of 2000 provided:

“104(1) In the absence of a Judge, any interlocutory or other application which may be made to a Judge in Chambers may be reduced to writing and transmitted under the seal of the Court by the Registrar to the Judge to whom it shall be directed together with such affidavits and documents as the applicant shall think necessary.

(2) The Judge's order in writing thereon shall be deemed to be the order of the Court.

(3) No such application shall be made unless the Registrar shall certify that to the best of his belief all parties liable to be affected by the order sought and entitled to be heard against the same have had due notice thereof and have had an opportunity of transmitting any counter-affidavits or other documents in opposition thereto."

[42] However, Section 67(1) of the S.C.A Cap. 336 states that:
"In the absence of the Registrar from duty the Deputy Registrar may, subject to the provisions of Section 71, exercise all or any of the functions and authorities assigned to or conferred on the Registrar save and except the powers to make interlocutory orders and to issue process as are conferred on the Registrar by the Civil Procedure Act or Rules of Court...."

[43] It appears to me therefore that the Registrar did have power on the 16th April, 1971 the commencement date of the Act, to make interlocutory orders and issue process under S.C.A Cap. 336, by virtue of the 1970 Rules of the Supreme Court, Order 47, up until the 31st December 2000 when the 1970 Rules of the Supreme Court were repealed. The extent of the Registrar's powers under the CPR 2000 are yet to be clarified in my opinion.

[44] Section 92 of the Civil Procedure Act Cap. 55 by a general saving provision states that:

"Nothing in this Act shall be deemed to curtail or abridge any power or authority now vested in the High Court or in any court whose jurisdiction has been transferred to the High Court"

[45] This historical analysis and exercise should erase any doubt that immediately before the Courts Order 1967 came into operation, judicial power vested in the Supreme Court of Grenada and/or the High Court of Justice was assigned to the Registrar of the Court to a limited extent, in the absence of any statutory creation of the office of Master by the Chief Justice. Consequently the Registrar of the High Court was empowered to perform such duties as were then performed by a Master in the High Court of Justice in England.

- [46] I shall move on now to consider the Master's jurisdiction in England immediately before the Courts Order 1967 came into operation.

The Master in England

- [47] The jurisdiction of the Judge in Chambers was conferred on the Masters of the Common Law Courts by the Judges Chambers Despatch of Business Act 1867.

This Act empowered the Judges, to make Rules empowering those Masters:

“...to do any such thing and to transact any such business and to exercise any such authority and jurisdiction in respect of the same as by virtue of any custom or by the Rules and Practice of the said Courts or any of them”

which were then done, transacted or exercised by a Judge in Chambers and as should be specified in such Rules, except in respect of matters relating to the liberty of the subject: (The Supreme Court Practice 1970 (Whitebook) Vol. 1, page 463 para 32/11-13/1).

- [48] The jurisdiction of the Queen's Bench Master has since 1867 from time to time been enlarged, and since the Rules of the Supreme Court 1965 began operating on the 1st October 1966, up until the commencement of the English Civil Procedure Rules 1998. Order 25, Order 32. Rules 11 and 14, Order 36 Rule 11, Order 37 Rule 1, and Order 14 Rule 6-2 have primarily regulated the Master's jurisdiction.

- [49] Under Order 32 Rule 11 and Order 25, a Master of the Queen's Bench Division has power to make orders, and give directions with reference to substantially all the proceedings in a Queen's Bench action, except those which are expressly excepted by Rule 11.

- [50] The Master has no jurisdiction in the following proceedings-
- (a) matters relating to criminal proceedings, other than applications to which Order 79 Rule 10(2) relates. This Rule allows the Master to hear an

Originating Summons for a direction that a witness summons in a criminal matter shall be of no effect;

- (b) matters relating to the liberty of the subject;
- (c) proceedings to which Order 57 applies (i.e. proceedings before a single judge relating to an appeal to the High Court from any Court, tribunal or person including an appeal by case stated, and the reference of a question of law by way of case stated;
- (d) proceedings for the grant of an injunction or other Order under Section 37 of the Supreme Court Act (UK) 1981- (this section empowers the High Court to grant orders for an injunction);
- (e) proceedings for the appointment of a Receiver;
- (f) appeals from district Registrars;
- (g) applications for review from a taxing officer's decision;
- (h) applications under section 42 of the Supreme Court 1981 Act for leave to institute or continue legal proceedings;
- (i) any other matter or proceedings which by any of these Rules is required to be heard only by a judge.

[51] Regarding (d) and (e): the Master and Registrar have power to grant an injunction in the terms agreed on by the parties to the proceedings in which the injunction is sought. The Master and Registrar have power to make an order for the appointment of a Receiver by way of equitable execution, and if the required injunction is ancillary to or incidental to a charging order on a beneficial interest of the judgment debtor imposed under Order 50 Rule1, or on beneficial interest imposed under Order 50 Rule 4, or on money in Court imposed under Order 50, Rule 1.

[52] Where a Statute other than the Judicature Act 1925 (UK) or a Rule of the Supreme Court confers jurisdiction on a Judge in Chambers, it seems that the Master has no jurisdiction. Matters under such Statutes must be dealt with by a Judge. They include rectifying or ordering inspection of the register of a company, leave to file a

contract after the time limited by the Companies Act 1948 has expired extending the time for registering charges under the Companies Act 1948, vacating entries in Land Registers, orders for prisoners in criminal custody to give evidence, orders for sale under section 28 of the Merchant Shipping Act, orders for detention of ship; applications for relief under the Registration of Business Names Act 1916.

[53] In Arbitration matters in England under the Arbitration Act 1950, there are 5 matters arising under the Act which must be heard by a single Judge sitting in Court. Order 73 Rule 2 of the 1965 Rules lists them as applications-

- (a) to remit an award under section 22;
- (b) to remove an arbitrator or umpire under 23(2);
- (c) to set aside an award under section 23(2);
- (d) special cases stated by an Arbitrator or umpire under section 21 for the decision of the High Court;
- (e) application for a declaration that an award of an arbitrator or umpire was made without jurisdiction and is not binding.

[54] Pursuant to Order 73 Rule 3, in all other applications under the Arbitration Act, including applications to stay proceedings, the jurisdiction of the High Court or a Judge may be exercised by a Judge in Chambers or a Master.

[55] A distinction must be made between the jurisdiction of the Masters in the Queen's Bench and Family Division and those in the Chancery Division dealing with the Court's equitable jurisdiction. Masters in the Chancery Division have no independent jurisdiction. In general, their authority is derived from the Judges. They can transact the same business and exercise the same authority and jurisdiction as a Judge in Chambers, unless the judges direct otherwise.

[56] A Registrar or Master of the Family Division may grant an injunction if it is ancillary or incidental to any relief sought in proceedings under the Married Women's Property Act 1882 Section 17 (See Order 89 Rule 3); or under the Matrimonial

Homes Act 1967 (See Order 89 Rule 3-1). Both Masters and Registrars are empowered to determine applications in such proceedings.

- [57] The Master can decide all or nearly all the preliminary questions which arise in an action prior to trial. A District Registrar has similar powers as a Master. Though the duties of the Master usually comprise judicial work in Chambers, and issuing directions on points of practice and procedure, in modern times in England, lesser judicial officers are empowered by Rules to hear and determine claims. Order 36 Rules 1 and 9 of the 1965 Rules of the Supreme Court (UK) empower the Master to try a cause or matter or any question or issue of fact arising therein where either of the parties make an application to the Court and both parties consent for the Master to try the matter. This is the general rule.
- [58] If the Court considers that having regard to the nature of the case it is desirable (whether on the grounds of expedition, economy or convenience or otherwise) in the interest of one or more of the parties, the Court may order that the cause or matter be tried by the Master.
- [59] The exceptions to the general rule are provided by Order 14 Rules 6-2 and 6-3. Pursuant to Order 14 Rule 6-2, if the Master thinks that the action will not take long to try, and that a speedy trial is necessary, he may order the action to be set down for trial, give directions regarding the trial, and with the consent of both parties try the matter on a date set by him. I must confess I have my reservations about the Master trying claims in Chambers. Trials are conducted in open Court. I am of the view that our CPR 2000 provisions conflict with this English practice that existed prior to their Civil Procedure Rules 1998 (U.K). Moreover, prior to our CPR 2000, neither the Registrar's Powers Rules 1939 nor the 1970 Supreme Court Rules could accommodate the Registrar trying any claim in my opinion.
- [60] In most cases an appeal lies against the decision of a Master to a Judge in Chambers under Order 32 Rule 11, Order 50 Rule 9, Order 51 Rule 2, Order 107

Rule 1 and Order 58 Rule 1. Appeals from the judgments, orders or decisions of Masters in all causes, matters, questions of issues tried before or referred to the Master, may be made to the Court of Appeal. Having examined this jurisdiction of the Master, I now turn to consider the submissions of Counsel regarding the questions posed at paragraph 10-A of this Judgment. But before doing so I must set out the provisions of the impugned legislation.

The Statutory Creation and Jurisdiction of the Master

[61] Upon the amendment of the S.C.A Cap 336 by the West Indies Associated States Supreme Court (Grenada) (Amendment) Act No 36 of 2000 the relevant provisions of the S.C.A. Cap 336 relating to the Master's office are as follows-

- (1) Section 2 defines "Master to mean "a Master of the Supreme Court"
- (2) Section 9A states: "(1) A Master shall exercise the authority of a Judge of the High Court sitting in Chambers and such other authority and jurisdiction as may from time to time be assigned by Rules of Court made under section 10 of the Supreme Court Order. (2) Where a Master has and exercises jurisdiction in relation to any matter, the Master shall have all the powers, rights, immunities and privileges of a Judge in relation to such matter."
- (3) Section 33(1) of the S.C.A Cap 336 provides that the Court of Appeal shall have jurisdiction to hear and determine any matter arising in civil proceedings upon a case stated or upon a question of law reserved by the High Court or by a Judge of the High Court or by a Master pursuant to any powers conferred in that behalf by any written law;
- (4) Section 33(2)(c) provides that no appeal shall lie-
 - (e) from an order of a Judge of the High Court or a Master giving unconditional leave to defend an action;
 - (f) without the leave of a Judge of the High Court or a Master making the order, or of the Court of Appeal;
 - (g) without the leave of the Judge of the High Court or a Master or of

the Court of Appeal from any interlocutory judgment or any interlocutory order given by a Judge of the High Court or a Master except-

- (i) where the liberty of the subject or the custody of infants is concerned;
- (ii) where an injunction or the appointment of a Receiver is granted or refused;
- (iii) in the case of decree nisi in a matrimonial cause or a judgment or order in an admiralty action determining liability;
- (iv) in such other cases, to be prescribed, as are in the opinion of the authority having powers to make Rules of Court of the nature of final decisions.

(5) Section 104 (1) and (2) of the S.C.A Cap 336 now provides:

- “(1) In the absence of a Judge or Master, any interlocutory or other application, which may be made to a Judge in Chambers or to a Master, may be reduced to writing and delivered, posted or sent by facsimile or other electronic means by the Registrar to the Judge or to the Master, together with such affidavits and other documents as are required by the Rules of Court
- (2) the written order of the Judge or Master shall be transmitted to the Registrar and shall be deemed to be the Order of the Court.”

[62] Statutory Instrument No. 2 of 2001 promulgated The Supreme Court (Masters) Order 2000. It was gazetted on the 29th June 2001.

It states as follow:

“The Chief Justice by virtue of the powers vested in him under section 12(1) of the West Indies Associated States Supreme Court Order 1967 (S.I. 1967 No 223) and with the concurrence of the Prime Ministers of all the States, hereby orders-

1...

2...In this Order “Courts Order” means the Eastern Caribbean Supreme Court Order; “Master” means the office established by section 3 and, where the context admits, includes the holder of the office and unless otherwise stated includes a person appointed to act in the office...

3...There is established as an office of the Supreme Court the office of Master of the Supreme Court.

4...(1) A Master shall perform the duties and exercise the functions conferred upon Masters by the Rules of Court made pursuant to subsections 17(1) and (2) of the Courts Order

(2) A Master may exercise such functions, as may be conferred upon Masters in relation to any State or Territory, by any law in force in that State Territory.

5...

6...

7....No office of Master shall, without the consent of the holder of the office, be abolished while there is a substantive holder of that office.

8...The appointment of Masters is provided for in subsection 12(2) of the Courts Order.

9....The discipline of Masters is provided for in subsection 12(2) of the Courts Order”

10...

11... (1) Subject to subsection (2), persons holding the office of Master, other than acting Masters, hold office until attaining the age of sixty-five years.

(2) The Judicial and Legal Services Commission may remove a Master from office for cause at any time.

(3) In subsection (2) “cause” means –(a) inability to discharge the functions of the office, whether arising from (i) infirmity of body or mind, (ii) failure in the due execution of the office, (iii) having been placed, by his or her conduct or otherwise; in a position incompatible with the due execution of the office, or (iv) any other cause, (b) misconduct. [12 to 27]...”

[63] The provisions in the CPR 2000 which are relevant to this appeal are Part 2.4 which defines “Judge” as not to include a Master except where required by the context; and “Master” means a Master of the Eastern Caribbean Supreme Court. Also, Part 2.5(1) which states that “Except where any enactment, rule or practice direction provides otherwise the functions of the High Court may be exercised by:

- (a) a master; (b) a registrar; (c) a single judge of the Court whether or not assigned to the Member State or Territory in which the proceedings are taking place; (d) the Chief Justice; or (e) the Chief Registrar; in accordance with these Rules and any practice direction made by the Chief Justice.”

[64] Part 2.5 (6) states that:

“The Chief Justice may by direction allocate the work of the court between Judges, Masters, the Chief Registrar and Registrars. Part 2.5(7) provides that the Chief Registrar may exercise any of the functions of a Master.”

[65] Section 82 of The Civil Procedure Act Cap 55 (Grenada) specifies what business may be transacted in Chambers or in private. It states:

“Motions and petitions shall be heard in Court, and summonses and other applications shall be heard in Chambers: Provided that any business except the trial of an action may be transacted in Chambers if the Court shall so direct; and the Court shall in each case decide whether the application is a proper one to be made by motion in Court, or by summons in Chambers, and may, at or before the hearing if it shall think fit, remove the same into Court or into Chambers as the case may be. The Court may order any proceedings except the trial of an action to be heard in private”.

[66] This Civil Procedure Act Cap 55 has been in force since the 27th November 1882. Section 3 of the Act states: “(1) The provisions of this Act may be amended, or the effect of any provisions may be modified, by Rules. (2) In all cases not expressly provided for, the practice and forms shall as nearly as possible be in conformity with the practice for the time being in force in the High Court of Justice in England; and the Orders and Rules of the High Court of Justice in England shall, so far as they may be applicable and convenient, be in force in the High Court.”

[67] I note in passing that section 82 of the C.P Act Cap 55 has been modified by the CPR. 2000, since pursuant to Part 11. 6(1), the Form 6 Notice of Application has replaced the summons, for making applications for interlocutory orders or directions in proceedings to which the CPR. 2000 are applicable.

Submissions of Counsel

[68] Learned Counsel, Mr. Sylvester contends that the cumulative result of all the preceding enactments is that a Master of the High Court is purportedly clothed with, almost without exception, the jurisdiction, power and authority of a High Court Judge sitting in Chambers. And the jurisdiction of a High Court Judge sitting in Chambers is, again almost without exception, the jurisdiction and authority of a High Court Judge sitting in open Court. That by virtue of Act No 36 of 2000, the Parliament of Grenada purported to set up a new Court or a new division of the

Supreme Court to deal with civil matters and which assumed almost all the jurisdiction of the High Court.

[69] This, he argues, is in conflict with the Grenada Constitution which is supreme, and the well settled constitutional principles governing the separation of power and the independence of the judiciary from the Executive and Legislative branches of the State. Mr. Sylvester referred to the Courts Order which was incorporated as part of the Grenada Constitution by Section 105 of the Constitution. It states that “In this chapter reference to this Constitution shall be construed as including reference to the Courts Order, which, subject to any provision made by Parliament under Section 39 of this Constitution; shall continue to have effect as part of the law of Grenada and for that purpose:

(a) “the Supreme Court established by the Courts Order shall be styled the Supreme Court of Grenada and the West Indies Associated States;”

[70] The Supreme Court of the West Indies Associated States is now styled the Eastern Caribbean Supreme Court. This has been recognised by section 4 (1) of the Constitutional Judicature (Restoration) Act No. 19 of 1991 which states that “from and after the appointed day the West Indies Associated States Supreme Court may be known and referred to in Grenada as the Eastern Caribbean Supreme Court.” This Act came into force on the 16th August 1991.

[71] Section 39 (5) of the Constitution has heavily entrenched sections 4 to 6 and sections 8,11,18 and 19 of the Courts Order. Any alteration of these sections in the Courts Order requires a 2/3 majority support votes of the members in each house of Parliament among other requirements and a Referendum approval by 2/3 or more of all of the votes validly cast on that Referendum.

[72] Mr. Sylvester submitted further, that “the judiciary” within the context of the Courts Order means the Chief Justice, the Judges of Appeal and Puisne judges, whose appointment is governed by section 5, and whose tenure, conditions of service

and removal are governed by section 6,7 and 8 of the Courts Order. “The Court” constitutes these persons, he argued, and the Constitution encourages the independence of these persons by entrenched provisions.

[73] Section 5 of the Courts order deals with the qualifications and appointment of the Judges of the Supreme Court while section 6 deals with Acting Judges. Section 8 provides for the tenure of office of judges, Section 11 deals with their remuneration, section 13 with their pension rights and section 18 with the establishment of the Judicial and Legal Services Commission. These provisions afford Judges protection against the abolition of their office, reduction in salary, loss of tenure, and discipline or removal from office only after specified due process.

[74] Mr. Sylvester contrasted the entrenched provisions concerning the judges, with section 12 of the Courts Order, which he said is not entrenched under section 39(5) of the Constitution. Section 12 provides for the appointment, tenure and conditions of service for a second category of persons to function in what is termed “offices of the Court”. Section 12 of the Constitution² is ordinarily entrenched since it cannot be altered by a majority of the votes of the members present and voting. A 2/3 majority of the votes of all the members of each house is required to amend the provisions in the Courts Order that are not heavily entrenched.

[75] Mr. Sylvester urged the Court to accept that these officers of the Court have a different and subsidiary jurisdiction and authority from that of the Judges, and because of the manner of their appointment, their conditions of service and discipline and other aspects of their terms of employment, they do not have the entrenched security and the independence of the judiciary.

² See paragraph 18 above.

- [76] The Registrar of the High Court, the Chief Registrar, and the Master fall in this second category of persons that Mr. Sylvester referred to. I shall focus only on the Master and the Registrar.
- [77] Section 12(4) of the Courts Order and section 88 of the Constitution covers the Registrar of the High Court's office. Section 88 states –
- “(1) This section applies to the offices of...registrar of the High Court.....for appointment to which persons are required to be qualified practice as a barrister or a solicitor in Grenada.
 - (2) The power to appoint persons to hold or act in offices to which this section applies (including the power to confirm appointments) and, ...the power to exercise disciplinary control over persons holding or acting in such offices and the power to remove such persons from office shall vest in the Governor-General, acting in accordance with the advice of the Judicial and Legal Services Commission.”
- [78] ³Section 7 of the Supreme Court (Masters) Order 2000 provides for the abolition of the office of a Master only with that Master's consent. Pursuant to Section 8 of the Order, the Master is appointed by the Judicial and Legal Services Commission like the High Court Judge. Pursuant to paragraph 9 of the Order the exercise of disciplinary control over the Master is vested in the Judicial and Legal Services Commission. Pursuant to Section 11 of the Order, the Master's security of tenure is less than the Judge's. Though a Judge and a Master can both be removed from office for similar reasons, the process in section 8 of the Courts Order for removing the judge is a difficult and complex one, while the process for the Master is not defined in the Court's Order.
- [79] Section 12 of the Order deals with the age of retirement for the Master which is 65 years. Section 13 states that a Master is entitled to pension in accordance with section 13 of the Courts Order which is ordinarily entrenched. Section 17 of the Order deals with the Master's remuneration, while section 19 and 20 address the allowances that the Master is entitled to.

³ See paragraph 51 above.

- [80] It is therefore very obvious from a comparison of the relevant provisions relating to the Judges and the Masters, that the Master's security of tenure and other aspects of his terms of employment are less favourable than Judges'.
- [81] Mr. Sylvester fortified his arguments by reference to the Privy Council decisions in **Hinds and others v R** [1995] 24 WIR 326 and **Independent Jamaica Council for Human Rights (1998) Ltd vs Hon. Syringia Marshall-Burnett and the Attorney General of Jamaica** P.C. Appeal No 41 of 2004.
- [82] In the **Hinds** case, it was held among other things that the provisions of the Gun Court Act 1974 which provided for the establishment of a Full Court Division consisting of three Resident Magistrates was in conflict with the Constitution of Jamaica and therefore void, since their practical consequence was to give a court composed of members of the lower judiciary jurisdiction to try and to punish by penalties extending in the case of some offences to imprisonment for life, all criminal offences, however grave, apart from murder or treason, committed by any person who had also committed an offence under section 20 of the Firearms Act 1967.
- [83] Their Lordships rejected the Attorney General's contention that the words: "There shall be a Supreme Court for Jamaica which shall have such jurisdiction and powers as may be conferred upon it by the Constitution or any other law..." as provided by section 97 (1) of the Constitution, along with the words: "The Supreme Court shall be a Superior Court of Record and save as otherwise provided by Parliament shall have powers of such Court", as provided by section 97(4) of the Constitution, would entitle Parliament by an ordinary law, to vest in a new Court composed of members of a lower judiciary, a jurisdiction that forms a significant part of the unlimited criminal jurisdiction that is characteristic of a Supreme Court, and was exercised by the Supreme Court at the time when the Constitution came into force. Their Lordships found that such vesting accompanied by certain ancillary provisions in the Gun Court Act would have the

consequence of causing all cases falling within the jurisdiction of the new Court, in practice, to be heard and determined by it, instead of a Court composed of Judges of the Supreme Court.

[84] Mr. Sylvester focused on the Boards adoption of “the familiar words used by Vicount Simmons in **Attorney General for Australia v R and the Boilermakers Society** that it would make a mockery of the Constitution if Parliament could transfer the jurisdiction previously exercised by holders of the judicial offices named in Chapter VII of the Constitution [Judicature] to holders of new judicial offices to which some different name was attached and to provide that persons holding the new judicial offices should not be appointed in the same manner and upon the terms prescribe in Chapter VII for the appointment of members of the Judicature. If this were the case there would be nothing to prevent Parliament from transferring the whole of the judicial power of Jamaica...to bodies composed of persons who, not being members of the Judicature would not be entitled to the protection of Chapter VII at all” : (Per Lord Diplock at page 336 to 337 para A).

[85] In the second case cited, the Privy Council declared that certain Acts of the Jamaica Parliament, purporting to give jurisdiction to the Caribbean Court of Justice (in its appellate jurisdiction) in matters which were previously within the purview of Her Majesty’s Privy Council were not enacted in accordance with the procedure required by the Constitution and were accordingly void. The Board reiterated its findings in **Hinds**, that any judicial appointment that was not protected by the entrenched provisions of the Constitution and could thus lead to interference by the legislative or executive branches of government was a deprivation of the absolute right against such interference as was provided in the Constitution.

[86] Mr. Sylvester concluded that the effect of these two decisions as applied to the Master’s appointment, jurisdiction and authority, is conclusive as to the unconstitutionality of Sections 3 and 12 of the Amending S.C.A. Cap. 336.

[87] Learned Counsel Mr. Martineau, SC capsulised his arguments by making the following points:

- (a) There is no authority which says that no part of the jurisdiction of the Judge in the High Court can be transferred to an officer who is not a Judge.
- (b) The jurisdiction given to the Master to be exercised concurrently with the Judge is a very limited jurisdiction; it is the jurisdiction of a Judge in Chambers.
- (c) One has to look at the nature of the jurisdiction and it is not a matter of principle, but a matter of the degree of functions that the Master may exercise.

[88] Mr. Martineau, SC relied on the judicial statement of Lord Diplock in **Hinds** where at page 336 the following was stated :

“Their Lordships accept that there is nothing in the Constitution to prohibit Parliament from establishing by an ordinary law a court under a new name such as the “Revenue Court”, to exercise part of the jurisdiction that was being exercised by members of the higher judiciary or by members of the lower judiciary at the time when the Constitution came into force. To do so is merely to change the label to be attached to the capacity in which the persons appointed to be members of the new court exercise a jurisdiction previously exercised by the holders of one or other of the judicial offices named in Chapter VII of the Constitution. In their Lordships view however, it is the manifest intention of the Constitution that any person appointed to be a member of such a Court should be appointed in the same manner and entitled to the same security of tenure as the holder the judicial office named in Chapter VII of the Constitution which entitled him to exercise the corresponding jurisdiction at the time when the Constitution came into force.”

[89] In **Hinds**, Lord Diplock also stated that “A written constitution...falls to be construed in the light of its subject matter and of the surrounding circumstances with reference to which it was made...” He also said in effect that in seeking to apply to the interpretation of the Constitution of Grenada “what has been said in

particular cases about other constitutions, care must be taken to distinguish between judicial reasoning which depended on the express words used in the particular constitution under consideration and reasoning which depended on what, though not expressed, is nonetheless a necessary implication from the subject matter and structure of the constitution and the circumstances in which it had been made:" (At page 330 paragraph I, 331 paragraph B).

Distinguishing Hinds

- [90] Though the submissions of learned Counsel for Janin are not radical, having been built on the web of existing law, the facts and circumstances which gave rise to those judicial statements he has relied on, are different from the present case. The circumstances in the instant case are not analogous to the **Hinds** case since Act 36 of 2000 has not expressly or impliedly created a new court in my view.
- [91] The Constitutional structure of the Eastern Caribbean Supreme Court with 6 states and 3 dependent territories sharing a common Supreme Court by agreement, gives this Court a unique character. It appears that there is no section in the Constitution of Jamaica that is comparable to Section 12 of the Courts Order. There is also no Courts Order incorporated in the Jamaica Constitution.
- [92] The only jurisdiction and power that the Constitution of Grenada has given the High Court is the original jurisdiction in the enforcement of the protection of fundamental rights and freedoms and for constitutional questions. The Constitutions of the other Member States have done the same. Although like Jamaica, the Constitution is silent as to the other jurisdiction and powers of the Court, it is implicit that the High Court retained the jurisdiction and powers set out in the S.C.A. Cap. 336, the Supreme Court Rules 1970 and any other Rules relating to the ministerial powers, duties and authorities incidental to any and every part of the jurisdiction vested in the High Court, on the coming into force of the Constitution.

- [93] By the earlier paragraphs in this Judgment it has been established that prior to the coming into force of the Courts Order in 1967 the Registrar of Grenada had a limited jurisdiction to deal with interlocutory proceedings in the High Court and the Registrar's powers in these matters were co-terminus with the High Court Judge's and that of a Master in England.
- [94] It must be presumed therefore that the framers of the Courts Order 1967 knew that Masters, Registrars and Chief Clerks in the High Court of Justice in England exercised limited jurisdiction of a Judge in Chambers.
- [95] It must be presumed that the framers of the Courts Order 1967 adopted the pre-1967 Supreme Court practice which empowered Registrars in the absence of an office of Master, to function like a Master in the English High Court of Justice.
- [96] Since the framers of the Grenada Constitution must also be presumed to have adopted a Supreme Court of the West Indies Associated States of Grenada in which the Registrar was empowered to dispose of interlocutory applications in Chambers pursuant to Order 47 of the 1970 Court Rules, then the only Constitutional consideration as to the Registrar's exercise of such powers in my view must necessarily involve, Section 1-(1) in the schedule to the Constitution Order.
- [97] Section 1-(1) is a Transitional Provision. It states that:
- "The existing laws shall, as from the commencement of the Constitution be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution and the Courts Order."
- [98] Had the Chief Justice created the office of Master prior to the coming into force of the Grenada Constitution in a similar manner, as was done by the impugned legislation, it appears to me that it would be a valid exercise of the power of the Chief Justice pursuant to Section 12 of the Courts Order. It seems to me that it

would have been within the competence of the Legislature and the Chief Justice prior to the 7th February 1974 to substitute the Master instead of the Registrar, or add the Master as a judicial officer who should dispose of the interlocutory Applications in Chambers along with the Registrar.

- [99] The fact that the Master's office was created pursuant to Section 12 of the Courts Order after the commencement of the Constitution means that the constitutionality of the impugned law must be assessed in terms of Section 106 of the Constitution which states:

“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.”

- [100] In my opinion, the transfer of limited authority from the Judge in Chambers to the Master, in the exercise of the High Court's jurisdiction is not inconsistent with any of the provisions in the Courts Order or the Constitution. It is not the original jurisdiction conferred on the High Court by the Constitution that has been delegated to the Master. Neither has the most important jurisdiction to conduct trials in open Court been delegated.

- [101] It is manifest that the Courts Order contemplated that there would be judicial officers who are not members of the Judiciary exercising limited jurisdiction of the Judges in Chambers. This procedure and practice was transmitted to the High Court of the West Indies Associated States from the High Court of Justice in England. This same practice and procedure has been enacted in Jamaica, Trinidad and the Bahamas without any challenge as to its constitutionality. Nurtured in the tradition of the Supreme Court in England, the present practice in the Eastern Caribbean Supreme Court and Supreme Courts in other Caribbean States, reflects the concept of a Master, exercising the jurisdiction of a Judge in Chambers, similar to the Master in England.

[102] In such circumstances therefore it would not be feasible to apply the most rigorous and elaborate conditions of judicial independence for the judicial officers sharing the Jurisdiction of the Judge in Chambers. The conditions essential for judicial independence in these circumstances must bear some reasonable relationship to the legislative and constitutional provisions governing matters which affect the judicial independence of Judges and other officers exercising jurisdiction in the High Court.

[103] The provisions in Sections 4 to 6, 8, 11 and 13 of the Courts Order represent the highest degree of Constitutional guarantee of security of tenure and security of salary and pension. Had ordinary legislation given Masters, Registrars and the Chief Registrar these same guarantees, arguably, this could in effect constitute an unconstitutional amendment of the Courts Order in my view.

[104] It is evident to me therefore that there can be no uniformed standard of judicial independence when dealing with the adjudication of interlocutory matters in the High Court because the legislature and Constitutional provisions authorise the sharing of that jurisdiction by Judges, Registrars, Masters and the Chief Registrar. It is the Courts Order itself that has created this anomaly. Hence, any legislation or other enactments which have created the office of Master, and authorized appointment of the Master to exercise jurisdiction with the authority and power of a Judge in Chambers, cannot be seen as inconsistent with the Courts Order, and Constitution of Grenada, provided such legislation or enactments have conformed with the provisions of the Courts Order and the Constitution.

[105] I must therefore answer the questions posed at paragraph 11 above in the following manner:

- (1) In my judgment the jurisdiction and powers of the Judge in Chambers has been validly delegated to the Master in conformity with the Courts Order 1967 and the Constitution of Grenada.

- (2) In my opinion the extent of the Master's jurisdiction, powers, and authority must necessarily be limited to doing such things and transacting such business authorized by the Rules and Practice of the Supreme Court, and which are done or transacted by a Judge in Chambers, provided such matters do not relate to the liberty of the subject; and provided the jurisdiction of the Judge in Chambers has not been conferred on the Judge by a Statute other than the West Indies Associated States Supreme Court (Grenada) Act Cap. 336 or a rule of Court. In my opinion the Master has no jurisdiction to try a claim, even where the parties consent. I therefore endorse the observation of Redhead J.A. (Ag.) in **Gordon St. Bernard and the Attorney General of Grenada**.
- (3) I have formed the view that the West Indies Associated States Supreme Court (Grenada) Act Cap. 336 as amended by Act No. 36 of 2000 is not inconsistent with the Courts Order 1967 or the Constitution of Grenada.

The Jurisdiction of the Master

- [106] Both Learned Counsel, Mr. Sylvester and Mr. Martineau S.C. have directly or indirectly challenged the jurisdiction of the Master to hear the application. They have done so in different ways. Mr. Sylvester contended that the Master had no power to set aside the order of Alleyne J. because the Master exercising the jurisdiction of a Judge in Chambers who is a co-ordinate Judge, has no power to correct the order of another High Court Judge. On the other hand, Mr. Martineau argued that Janin's application was misconceived since the court cannot grant a stay of a stay. He contended that the application should be seeking an order to remove or lift the stay, and that this should be done by way of appeal. Since there was no appeal to lift the stay, for this reason alone the application should be dismissed.
- [107] Mr. Sylvester relied on the Privy Council decision in **Leymen Strachan v The Gleaner Co. Ltd and Dudley Stokes** (Appeal No. 22 of 2004) delivered on the

25th July 2005 as his authority. For the purposes of this issue, the following relevant principles may be distilled from this decision:

- (i) A High Court Judge has jurisdiction to set aside a default judgment even after damages has been assessed and a final judgment has been entered.
- (ii) Reference to “the Court or a Judge” in an enactment which enables the Court to set aside a judgment makes it clear that the jurisdiction is one which may be exercised by a Judge in Chambers,
- (iii) The application to set aside a default judgment is not the invocation of an appellate jurisdiction but of a specific rule enabling the Court to set aside its own orders in certain circumstances where the action has never been heard on the merits.
- (iv) Where an order has been made by a Superior Court, which has jurisdiction in a certain given state of facts to make the order, and there has been a mistake made, it is a mistake as to the facts of the particular case and not the assumption of a jurisdiction which the Court did not have.

[108] Mr. Sylvester referred specifically to paragraph 32 of Lord Millet’s judgment where he declared:

“The Supreme Court of Jamaica, like the High Court in England is a Superior Court or Court of unlimited jurisdiction,...it has jurisdiction to determine the limits of its own jurisdiction. From time to time a judge of the Supreme Court will make an error as to the extent of his jurisdiction. Occasionally (as in the present case) his jurisdiction will have been challenged and he will have decided after argument that he has jurisdiction; more often...he will have exceeded his jurisdiction inadvertently, its absence having been passed unnoticed. But wherever a judge makes an order he must be taken implicitly to have decided that he has jurisdiction to make it. If he is wrong, he makes an error whether of law or fact which can be corrected by the Court of Appeal. But he does not exceed his jurisdiction by making the error; nor does a judge of co-ordinate jurisdiction have power to correct it”

- [109] In my opinion the application that was before the learned Master was not an “invocation of appellate jurisdiction” wrongly assumed by the Master while exercising the jurisdiction of a Judge in Chambers. The lack or excess of jurisdiction in Alleyne J, or an error in his judgment, was never an issue in the application.
- [110] It was a summons that was before the Master pursuant to Order 66 Rule 11 of the 1970 Rules of the Supreme Court. This Rule states “...a party against whom...a[n]...Order [has been] made may apply to the Court for a stay of execution of the...Order or other Relief on the ground of matters which have occurred since the day of the...Order and the Court may by Order grant such relief and on such terms as it thinks just”
- [111] This summons was filed on the 19th December 2000. Under the CPR 2000, Part 43 is the relevant rule. Part 43 deals with the enforcement of Orders which are not money judgments. In my opinion Part 43.5 contemplates that a previous Order can be set aside or the Court can direct that the Order remains in force.
- [112] By virtue of Section 82 of the Civil Procedure Act Cap 55, an application by summons may be heard in Chambers. Order 59 Rule 2 RSC prescribes what applications under the Arbitration Ordinance or Act of the respective member state or territory must be heard in Court. The instant application is not in that category. Similar to the English Supreme Court Rules 1965, Order 59 Rule 3 states that “the jurisdiction of the High Court or a Judge thereof under the Arbitration Act, Ordinance or the Code may be exercised by a judge in Chambers.” In the absence of any Rule governing this in the CPR 2000, by usage, the previous practice is to be applied in my view.
- [113] In Halsbury’s Laws of England (4th ed. volume 37 paragraph 437) it is stated that “The Courts power to stay proceedings may be exercised under particular Statutory Provisions, or under the Rules of the Supreme Court or under the

Court's inherent jurisdiction, or under all of these powers since they are cumulative, not exclusive, in their operation."

[114] At paragraph 438 appears the following statement on the law relating to the effect of the Stay of Proceedings on the basis of an arbitration agreement:

"A stay of proceedings is not the equivalent of a judgment or a discontinuance, and may be removed if proper grounds are shown even if the stay is imposed by a Consent Order...

A stay may be removed if good cause or proper grounds are shown or the continuance of the Stay could cause or produce injustice or prejudice or where there has been a change of law."

[115] The footnote 4 to this paragraph states that so long as proceedings are only stayed, either party can return to the Court (**Empson v Smith [1966]**⁴ 1 QB. 426 at 432). Footnote 6 states that such an application is made in the Queen's Bench Division by summons to the Master, or in the Chancery Division by Motion or Summons.

[116] It seems to me therefore from these statements on the applicable law, and the existing facts, that there is no merit in the contention of both Counsel.

[117] The application to remove or lift the Order Staying the Proceedings is the invocation of a specific Rule enabling the Court to revisit its own order and remove the Stay because of matters which have occurred subsequent to the making of the Order granting Stay.

[118] The Rules empower a Judge in Chambers to hear the application to remove or lift the Stay. It is obvious therefore that Master Cottle had the requisite constitutional and statutory authority and jurisdiction to hear the application in question in my judgment.

⁴ 1 Q.B. 426 at 432.

The exercise of his jurisdiction

[119] The Master treated the application before him as an application to remove or lift the Stay of proceedings. Learned Counsel, Mr. Sylvester challenged the decision of Master Cottle on the ground that it is contrary to the principles enunciated in the Overriding Objectives as set out in Part 1 of the Civil Procedure Rules 2000.

[120] The Ground of Appeal in support of this challenge is as follows:

(c) The learned Master, having heard the evidence as to the relative financial position of the parties, and having stated that the defendant was acting deliberately by filing the counterclaim and thus increasing the advance cost of the arbitration, and having implied in his written judgment that such action was unethical, failed to apply the Overriding Objective of the Civil Procedure Rules 2000, and in particular, that of enabling the Court to deal with cases justly by-

(i) ensuring that the parties are on equal footing, and

(ii) dealing with the cases in a way which is proportionate to the financial position of each party;

by not exercising his discretion to allow the Claimant's application.

[121] Mr. Martineau S.C. has reminded this Court that we are dealing with the exercise of the Master's discretion which should not be overturned unless it is fundamentally flawed. I must remember also, that we are considering the exercise of discretion by the learned Master under Section 7 of the Arbitration Act Cap. 19, the relevant rules, and the Court's inherent jurisdiction cumulatively (See paragraph 102 of this Judgment).

[122] The Master's approach to the application before him, was a narrow one. This is reflected in paragraphs 5 and 6 of his judgment where he stated:

"(5) The claimant says that the Court in determining whether to lift the stay, should guide itself by the principles which govern the grant of stay in the first instance. Counsel for the Claimant cites with approval the case **Connelly v Ritz Corporation plc** [1997] House of Lords UKHL. This case he argues places the imprimatur of the House of Lords upon the principle

expressed in **Fakes v Taylor Woodrow Construction Ltd** [1973] QB 436, that is, where the wrongful act of the Defendant impoverishes a Claimant to such an extent as to prevent him having recourse to arbitration according to the terms of the agreement between the parties, the court should refuse to grant a stay of proceedings to permit reference to arbitration.

(6) The defendant says that this is a concern for argument at the stage of application for a stay. The stay having already been granted, different considerations apply to determine whether the stay should be lifted”

[123] It appears that the learned Master merely reapplied the **Fakes** principle to the evidence before him. Neither his notes of evidence, nor the Judgment disclose that he considered the overriding objectives and applied them to the facts before him. The Judgment does not reflect what “the different considerations” were that should apply to determine whether the stay should be lifted.

[124] It may have been that the judicial statements in **Janos Paczy v Haendler**⁵ and the learning in **Halsbury’s** on the subject matter were not brought to the Masters attention by learned Counsel for Janin, as has been done before this Court.

[125] This was a case where the Plaintiff requested the Court to remove the stay of proceedings on the ground that the agreement to arbitrate was incapable of being performed. The statutory provision governing the staying of the action was Section 1(1) of the English Arbitration Act 1975. There was a mandatory duty imposed on the Court in these terms:

“...the court, unless satisfied that the arbitration agreement is null and void, inoperative or capable of being performed, or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings.”

[126] The Judge had lifted the stay on the basis of the Plaintiff’s alleged impecuniosity which was not disclosed at the hearing of the Application to grant the stay. The plaintiff, in support of his Application to remove the stay, had disclosed in his affidavit, evidence of the I.C.C.C.’s request and policy for an estimated £1,140

⁵ (1980) Lloyds Rep. 302.

deposit; and that he was unable to provide his half of this deposit. It was held on appeal that the incapacity of one party to the arbitration agreement to implement his obligations under the agreement does not render the agreement one which is incapable of performance.

- [127] Buckley L.J., observed that the evidence put forward to establish the Respondent's impecuniosity did not satisfy the Court in an absolute sense that the Respondent was incapable of finding the deposit. He opined that:

"If it could be shown that owing to events which occurred since the stay was imposed, the arbitration agreement had been incapable of performance, I think the Court would very probably be right in lifting the stay...This is not a matter in respect of which the Court has a discretion, for the legislature has imposed an obligation upon the Court to stay proceedings at law unless the case falls within the words of the exception." (at pages 308 to 309)

- [128] Brightman L.J. also opined that subsection (1) of Section (1):

"is mandatory and not discretionary. If it had been discretionary it is possible—no more than possible—that the Court might have been in a position to assist the claimant." (at page 369).

- [129] The Master also found that the reason for Janin's impecuniosity was C.C.C.'s filing of the counterclaim. In my opinion there was ample evidence before him to support this finding. There has been much argument by Counsel for the parties as to whether this impecuniosity could ground an Application for removal of stay in light of the decisions in **Fakes, Goodman v Winchester**⁶ and the several other cases which have followed **Fakes**.

- [130] Mr. Martineau submitted that this impecuniosity is not enough to remove stay. He contended that though it may be a factor it is not determinative and that there was no evidence before the Court that the counterclaim of C.C.C. was a sham.

⁶ [1983] 1 W.L.R. 11.

[131] Mr. Sylvester has complained about the crux of the Master's Judgment in paragraph 11 where he stated:

"I feel this way [constrained to refuse the application] because the act which the claimant alludes to as making it impossible for him to go to arbitration is not the breach of contract of the defendant. Rather it is the filing of the counterclaim."

He has submitted that at the time Janin applied for arbitration, Janin was impoverished by C.C.C.'s action, but not to the extent that it could not proceed on the basis of the original fee. Impoverishment must be a relative concept he argued, and it must be viewed relative to the financial burden likely to be faced.

[132] In my opinion, there is no mandatory duty imposed on the Court under Section 7 of the Arbitration Act Cap. 19, to disregard any subsequent event after a stay of proceedings, which causes impecuniosity, when determining an application to remove the stay. Such impecuniosity or any new circumstance can be relied on, provided that Janin is able to prove on a balance of probability that if the stay is not removed it will cause or produce injustice or prejudice for Janin. The impecuniosity, therefore, need not even be shown to have resulted from any conduct on the part of C.C.C. The Court can exercise its discretion and remove the stay once it is satisfied that there is good cause or proper grounds shown.

[133] The cases that were decided under the 1950 English Arbitration Act were decided prior to the CPR 2000 when there was no Rule relating to the overriding objectives. Section 4 of this English Statute is identical to Section 7 of the Grenada Arbitration Act. The CPR 2000, by PART 1.2 states that the Court must seek to give effect to the overriding objective when it exercises any discretion given to it by the rules.

[134] This was obviously, not done by the learned Master. It is obvious to me on Master Cottle's findings of fact, that there has been a change of circumstances which justifies a lifting of the order of Alleyne J. so as to deal with Janin's claim justly and put the parties on equal footing. There is evidence that Janin is an impoverished

Company while C.C.C. is an International Company with financial resources far out weighing Janin's. On the pleadings and the documentary and other evidence on the record I am of the view that Janin's claim is not frivolous or vexatious and there are serious questions to be tried. To allow the stay to remain will prejudice Janin and shut it out of the seat of justice.

Conclusion

[135] In my opinion therefore the appeal should be allowed on this ground. I would set aside the order of the Master, order that the stay be removed, and that the matter be set down for directions before the Master or a Judge of the High Court within 20 days of the date of this Judgment so that the claim can proceed. I would also order the costs of the Appellant Janin on this appeal, to be costs in the cause.

Ola Mae Edwards
Justice of Appeal [Ag.]

I concur.

Michael Gordon, QC
Justice of Appeal

I concur.

Hugh A. Rawlins
Justice of Appeal