

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

GRENADA

GDAHCVAP2021/0018

BETWEEN:

**[1] THE ATTORNEY GENERAL
[2] THE MINISTER OF FINANCE**

Appellants

and

THE GRENADA BAR ASSOCIATION

Respondent

Before:

The Hon. Mr. Mario Michel
The Hon. Mde. Gertel Thom
The Hon. Mr. Paul Webster

Justice of Appeal
Justice of Appeal
Justice of Appeal [Ag.]

Appearances:

Mr. Darshan Ramdhani KC, with him, Ms. Dia Forrester, Attorney General, Ms. Alleyna Cheesman, Crown Counsel and Mrs. Sabrita Khan-Ramdhani for the Appellants
Mr. Ruggles Ferguson for the Respondent

2021: September 24
2022: September 21

Interlocutory appeal – Constitutional law – Section 8(8) of the Constitution of Grenada – Right to a fair trial – Part 21 of the CPR – Application for representation order – Whether the GBA has standing to seek constitutional redress – Whether the GBA and the litigants before the Supreme Court have the same or similar interests in the constitutional proceedings – Whether the class of ‘litigants’ is sufficiently identifiable – Whether the availability of an alternative remedy is a bar to the constitutional motion – Whether the Judge erred in granting the representation order

On 11th July 2019, the Grenada Bar Association (“the GBA”) applied to the High Court by originating motion under section 16 of the Constitution, for a number of declarations stating, in effect, that the Government of Grenada has failed to properly fund and administer the

courts in Grenada, in breach of Section 8(8) of the Constitution. Section 8(8) enshrines the right to a fair trial. The GBA also sought orders mandating the Minister of Finance to provide adequate funds to the courts and to meet all outstanding sums of money due to the Eastern Caribbean Supreme Court.

On 17th July 2019, the GBA applied under rule 21.2 of the Civil Procedure Rules 2000 (“the CPR”) for an order that it be appointed to represent itself and all litigants who appear before the Supreme Court of Grenada in civil or criminal proceedings, to obtain the opinion of the court on the constitutional issues raised in the proceedings. The grounds of the application were that the GBA has a sufficient interest in the proceedings and that the GBA and the litigants before the Supreme Court have the same or similar interest in the proceedings. The appellants opposed the representation application and averred that it had no grounding as it sought to represent all litigants including those accused before the court. Such litigants are having their matters heard by the courts and therefore do not share any interest with other litigants and/or the GBA. Further, the motion does not request a declaration that any accused person’s rights have been, are being, or are likely to be infringed by the alleged state of the court system.

The Judge considered the evidence and the authorities that were cited to him and concluded that: (i) the GBA has a statutory interest in the proper and effective functioning of the courts in Grenada; (ii) litigants appearing before the courts constitute a sufficiently defined class of persons; (iii) the alleged failure to provide sufficient funds and adequate resources had the potential to affect the effective, efficient and timely disposal of cases thereby affecting the right to a fair trial secured by section 8 of the Constitution; and (iv) the GBA and litigants have a common interest and a common grievance in the funding and administration of the courts, and the relief sought would be beneficial to all.

Being dissatisfied with his decision, the appellants have appealed to this Court. The main issues that arose for determination were: (a) the GBA’s standing to apply for relief under the Constitution; (b) CPR part 21 and the interests of the GBA and the litigants; (c) the identification of the class of persons to be represented; (d) the alternative remedies available to the litigants; and (e) the exercise of discretion under CPR part 21.

Held: allowing the appeal and setting aside the Judge’s order with no order as to costs, that:

1. The GBA has a sufficient prima facie interest in the courts of Grenada to raise issues that may affect the constitutional right to a fair trial within a reasonable time for its members and litigants before the courts. The Judge correctly left the final determination of standing to be resolved at the trial. The real issue in this appeal is whether that right includes the right to represent persons who have trials in the courts.

Section 4 of the **Legal Profession Act** Cap. 167A of the Laws of Grenada applied.

2. The GBA and the litigants have a common interest, namely, the proper funding and administration of the courts in Grenada. In individual cases, litigants’ needs and expectations may be addressed because their cases are progressing through the courts satisfactorily. But that does not mean that they do not have the same interests

as other litigants whose needs and expectations are not being addressed. The interest is present in all litigants as soon as they become involved in a matter before the courts. Therefore, the threshold issue in CPR 21.1 of having the “same or similar interest” is satisfied.

Rule 21.1(2) of the **Civil Procedure Rules 2000** applied; **Millharbour Management Ltd and others v Weston Homes Ltd and another** [2011] EWHC 661 applied; **John v Rees** [1970] Ch 345 applied; **Duke of Bedford v Ellis and others** [1901] AC 1 considered.

3. The persons who comprise a represented class must be identifiable. The common interest between the GBA and the litigants existed at the time when the claim was filed in July 2019, and though the membership of the represented group fluctuates it can be ascertained from time to time by, for example, checking the courts’ lists. Membership of the class is attained once a person becomes a litigant and does not depend on the result of the proceedings. Therefore, the represented class of litigants is sufficiently defined for the purposes of CPR part 21.

Emerald Supplies Ltd v British Airways plc [2010] EWCA Civ 1284 applied; **John v Rees** [1970] Ch 345 applied; **Markt & Co. Limited v Knight Steamship Company Limited and others** [1910] 2 K.B. 1021 considered.

4. It is not disputed that an alternative remedy exists, namely, to file individual constitutional claims in the High Court alleging that a litigant’s constitutional right to a fair trial within a reasonable time protected by section 8 of the Constitution has been breached or is likely to be breached. However, the availability of an alternative remedy is not an absolute bar to bringing a constitutional motion. The wording of section 16 of the Constitution is discretionary.

Akim Monah v The Queen GDAHCRAP2021/0015 (delivered 23rd February 2022, unreported) applied; **Attorney General v Ramanooop** [2005] UKPC 15 applied.

5. A representation order would not necessarily strengthen a litigant’s rights in these proceedings nor any future claims for constitutional relief. Neither will the order create an estoppel between the State and individual litigants. Any application by a litigant for a declaration that his right to a fair trial within a reasonable time has been infringed will depend on the facts of the case that he presents to the court. He cannot use a declaration of unconstitutionality in these proceedings to claim that his rights have been infringed in other proceedings. There is no utility in continuing the representation order as the GBA can pursue the substantive claim without such an order.

Akim Monah v The Queen GDAHCRAP2021/0015 (delivered 23rd February 2022, unreported) applied.

JUDGMENT

- [1] **WEBSTER JA [AG.]:** This is an appeal against the judgment of the learned trial judge (“the Judge”) dated 4th June 2021 in a constitutional claim brought by the Grenada Bar Association (“the GBA”). The Judge granted the GBA a representation order in the constitutional claim to represent itself and litigants who appear before the Supreme Court of Grenada, whether in civil proceedings or in criminal proceedings.

Background

- [2] The GBA is a non-profit organisation continued under the provisions of the **Companies Act**¹ with a membership of approximately 125 practising lawyers. Being dissatisfied with the way that the courts in Grenada were being funded and administered, the GBA applied to the High Court by originating motion on 11th July 2019 for the following relief:

- (i) A declaration that the failure by the Government of Grenada to provide any or any adequate courts and associated accommodation is in breach of the GBA’s fundamental right to a fair trial enshrined in section 8(8) of the Constitution;
- (ii) A declaration that the Government of Grenada’s failure to provide sufficient court administrative staff to ensure the timely production of trial transcripts is a breach of the GBA’s fundamental right to a fair trial enshrined in section 8(8) of the Constitution;
- (iii) A declaration that the Government of Grenada’s failure to fund the Eastern Caribbean Supreme Court under its obligations so to do is a breach of the GBA’s fundamental right to a fair trial enshrined in section 8(8) of the Constitution;

¹ Cap. 58A of the Laws of Grenada.

- (iv) An order that the Minister of Finance do forthwith provide adequate funds to enable the provision of adequate courts and associated accommodation;
- (v) An order that the Minister of Finance do forthwith meet all outstanding sums of money due to the Eastern Caribbean Supreme Court in accordance with its obligations so to do;
- (vi) An order that the costs of and incidental to the application be paid by the appellants (the respondents in the court below).

[3] The motion does not seek declaratory or other relief for any of the members of the GBA nor any of the litigants that it seeks to represent. Apart from the mandatory orders sought in sub-paragraphs (iv) and (v) against the Minister of Finance, its aim is to get declarations from the court on certain constitutional issues regarding the courts and the court system in Grenada.

[4] The motion is made under section 16 of the **Constitution of Grenada**² (“the Constitution”) alleging breaches of section 8(8). Section 8(8) deals with the establishment of independent and impartial courts for determining civil rights and obligations and for persons instituting proceedings under the section to be given a fair hearing within a reasonable time. The motion was amended to include alleged breaches of section 8(1) which provides similar rights to persons charged with criminal offences. The sections read –

Section 8(8) -

“Any court or other authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other authority, the case shall be given a fair hearing within a reasonable time.”

² Grenada Constitution Act Cap. 128A, Laws of Grenada.

Section 8(1) –

“If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.”

The provision for enforcing rights under section 8 and other sections of the constitution is Section 16(1) which reads –

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

- [5] The motion is supported by the 1st affidavit of Lisa Taylor, the then president of the GBA. Her affidavit details the many challenges facing the courts and administrative staff in Grenada, the physical deterioration and lack of repairs of the buildings used as courthouses and as the registry, the backlog of cases, and the delays in the production of trial transcripts. She fears that this state of affairs will continue unless the court intervenes.
- [6] On 17th July 2019 the GBA applied under rule 21.2 of the **Civil Procedure Rules 2000** (“CPR”) for an order that it be appointed to represent itself and litigants who appear before the Supreme Court of Grenada in civil or criminal proceedings to obtain the opinion of the Court on the constitutional issues raised in the proceedings (“the representation application”). The GBA relied on the 1st affidavit of Ms. Lisa Taylor filed on 11th July 2019 in support of the application. The grounds of the application are that the GBA has a sufficient interest in the proceedings and the GBA and litigants before the Supreme Court have the same or similar interest in the proceedings.
- [7] On 8th August 2019 Ms. Xiomara Forsyth, acting Registrar of the Supreme Court, filed an affidavit opposing the motion in which she denied or explained the deficiencies of the court system detailed in Ms. Taylor’s affidavit, and outlined the

details of the Government's attempts to ameliorate the situation regarding the state of the courts and the operating systems.

- [8] On 29th January 2021 Ms. Forsyth filed her 2nd affidavit. This affidavit opposed the representation application and responded to Ms Taylor's affidavit filed on 11th July 2019. She relied on her 1st affidavit filed on 8th August 2019 and averred that the representation application has no grounding in the originating motion as it seeks to represent all litigants including those accused before the court. Such litigants are having their matters heard by the courts and therefore do not share any interest with other litigants and/or the GBA. Further, the motion does not request a declaration that any accused person's rights have been, are being, or are likely to be infringed by the alleged state of the court system.
- [9] The central issue before the Judge was whether the GBA and litigants before the Supreme Court have the same or similar interest in the issues raised by the constitutional motion, namely, whether the State's management and administration of the facilities for conducting trials amount to a breach or potential breach of the rights of persons appearing before the Supreme Court to a fair trial within a reasonable time guaranteed by section 8 of the Constitution. The Judge considered the evidence and the authorities that were cited to him and concluded that the GBA and the litigants have the same or similar interests in the constitutional proceedings and granted the representation order.
- [10] The Judge's approach to the issue of the same or similar interests cannot be faulted. He examined the evidence in the constitutional claim, as he was bound to do for the representation application, to determine the similarity of the issues between the GBA and the litigants. He found that the GBA has a statutory interest in the proper and effective functioning of the courts in Grenada; that litigants appearing before the courts constitute a sufficiently defined class of persons; that the alleged failure to provide sufficient funds and adequate resources had the potential to affect the effective, efficient and timely disposal of cases thereby

affecting the right to a fair trial secured by section 8 of the Constitution; and that the GBA and litigants have a common interest and a common grievance in the funding and administration of the courts, and the relief sought would be beneficial to all. The Judge did not make findings on the standing of the GBA to represent litigants and alternative remedies, noting that these matters are better suited to the trial of the claim. He therefore granted the relief sought in the representative application.

Appeal

[11] The appellants' notice of appeal lists seven grounds of appeal which, with all due respect to the drafting of the grounds of appeal, I summarise as follows:

- (a) The Judge erred in finding that the GBA's statutory interest in the proper and effective functioning of the courts in Grenada gave it standing to seek redress under the Constitution on behalf of its members when there was no evidence that such members have cases before the courts and are likely to be affected (ground (v)).
- (b) The Judge failed to carry out a proper assessment of the pleadings and the facts and erred in finding that the alleged failure to provide sufficient funds and adequate resources for the courts had the potential effect of breaching the right to a fair trial secured by section 8 of the Constitution (ground (i), (iii)).
- (c) The Judge erred in finding that the GBA and the litigants share the same interest before the courts in the relief sought under section 16 of the Constitution (grounds (ii) and (vi)).
- (d) The Judge erred in not properly considering the availability of alternative remedies and allowed the GBA to pursue public interest litigation (ground (vii)).

[12] The issues arising from the grounds of appeal that will be addressed in this judgment are:

- (a) The GBA's standing to apply for relief under the Constitution;
- (b) CPR part 21 and the interests of the GBA and the litigants;
- (c) Identification of the class of persons to be represented;
- (d) Alternative remedies available to the litigants;
- (e) The exercise of discretion under CPR part 21;
- (f) Disposal of the appeal.

The GBA's standing

[13] The Judge found that the GBA has a statutory interest in the proper and effective functioning of the courts in Grenada which gives it standing to seek redress under the Constitution on behalf of its members and persons who have cases before the courts and are likely to be affected. The GBA's statutory interest derives from section 4 of the **Legal Profession Act**.³ The Judge summed up the functions of the GBA in paragraph [3] of his judgment as -

“Section 4 of the Legal Profession Act (LPA) recognizes the GBA as the representative body of the legal profession in Grenada. That section empowers the GBA to represent and protect the interests of the legal profession in Grenada; assist the public in all matters relating to law; promote, maintain and support the administration of justice and rule of law; and do all things incidental or conducive to the achievement of those purposes. Therefore, the GBA contends that it has the same vested interest in the due administration of justice and upholding of the fundamental right to a fair trial enshrined in section 8 of the Constitution as all civil litigants and accused persons before the Supreme Court.”

[14] The Judge continued at paragraph 27(6) of his judgment by noting that the GBA's statutory interest in the effective functioning of the courts ‘...confers a sufficient basis for the GBA to complain that insufficient funding or inadequate resourcing have led to or may likely lead to a breach of section 8(1) and 8(8) of the Constitution’.

³ Cap. 167A of the Laws of Grenada.

- [15] I adopt this finding by the Judge – the GBA has a sufficient prima facie interest in the courts of Grenada to raise issues that may affect the constitutional right to a fair trial within a reasonable time for its members and litigants before the courts. The Judge correctly left the final determination of standing to be resolved at the trial. The real issue in this appeal is whether that right includes the right to represent persons who have trials in the courts (“the litigants”).

Part 21 of the CPR

- [16] The representation application was brought under part 21 of the **CPR**. Part 21 is adapted from the old RSC Order 16 rule 9 in England which was replaced by part 19.6 of the English Civil Procedure Rules 1998. The brief background to RSC 15.16 and part 19(6) of the English CPR can be found in the seminal decision of the House of Lords in **Duke of Bedford v Ellis and others**⁴ where Lord Macnaghten summed up the basic principle behind the rule as follows –

“The old rule in the Court of Chancery was very simple and perfectly well understood. Under the old practice the Court required the presence of all parties interested in the matter in suit, in order that a final end might be made of the controversy. But when the parties were so numerous that you never could “come at justice,” to use an expression in one of the older cases, if everybody interested was made a party, the rule was not allowed to stand in the way. It was originally a rule of convenience: for the sake of convenience it was relaxed. Given a common interest and a common grievance, a representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent. To limit the rule to persons having a beneficial proprietary interest would be opposed to precedent, and not, I think, in accordance with common sense.”

- [17] CPR 21.1-21.3 , insofar as it is material, provides as follows:

“21.1 (1) This rule applies to any proceedings, other than proceedings falling within rule 21.4, in which 5 or more persons have the same or similar interest.

(2) The court may appoint –

- (a) a body having a sufficient interest in the proceedings; or
 - (b) one or more of those persons;
- to represent all or some of the persons with the same or similar interest.

(3) A representative under this rule may be either a claimant or a defendant.

⁴ [1901] AC 1.

21.2(1) An application for an order appointing a representative party may be made at any time, including a time before proceedings have been started.

- (2) An application for such an order may be made by any –
- (a) party;
 - (b) person or body who wishes to be appointed as a representative party; or
 - (c) person who is likely to be a party to proceedings.

- (3) An application for such an order must –
- (a) be supported by affidavit evidence; and
 - (b) identify every person to be represented, either
 - (i) individually; or
 - (ii) by description, if it is not practicable to identify a person individually.

21.3 (1) If there is a representative claimant or defendant, an order of the court binds everyone whom that party represents.”

[18] The effect of the opening words of rule 21.1 is that it is a threshold requirement that the applicant for the representation order must have “the same or similar interest” as the persons he seeks to represent. If that requirement is satisfied the court will proceed to consider the other requirements of rules 21.1 and 21.2 and whether it is just in all the circumstances to grant the representation order. As stated above the equivalent rule in England is CPR 19.6, which is substantially the same as rules 21.1 and 21.2 of the Eastern Caribbean CPR but the wording of the English rule is different. One difference is that rule 19.6 states that the represented party must have “the same interest” as the party applying for the representative order. The equivalent expression in CPR 21.1 is “the same or similar interest” which suggests that the Eastern Caribbean courts have a wider discretion than the English courts in assessing the common interest between the applicant and the person sought to be represented. That said, the parties agreed that the English cases provide helpful guidance on how Eastern Caribbean courts should deal with representation applications.

The interests of the GBA and the Litigants

[19] It is helpful to set out at the outset the dictum of Akenhead J in **Millharbour Management Ltd and others v Weston Homes Ltd and another**⁵ where the learned judge listed a very helpful summary of the general principles relating to applications for a representation order. He said:

“In my judgment the following general principles can be derived from the wording of the CPR Pts 19.6 and the authorities:

- (1) To enable a party to claim, or be claimed against, in a representative capacity for other parties, that party must have the same interest in the claim in question as those who are to be represented. That is a threshold point which must be established by reference to the facts so far as it is possible to ascertain the facts at the time when the court considers the representative capacity of any party. It is legitimate to proceed by reference to the proposed or actual pleadings to ascertain at least what the facts are assumed to be.
- (2) It must be possible at any stage during the proceedings to ascertain whether any given person qualifies for membership of the represented class of persons as having the same interest as the party which seeks to represent them.
- (3) The question of whether and the extent to which parties have the same interest can only be answered by reference to the facts of the particular case, albeit that it will be necessary to determine, amongst other things, whether the representing party and the represented parties in effect have the same cause of action or liability as the case may be, subject of course to the relevant facts ultimately being found.
- (4) As in the *Duke of Bedford* case, it will be inappropriate, before the final judgment on the issues resolved in relation to the represented parties, for the court to decide the issues or, indeed, to indicate in some obiter way what the answer may well be. That is simply because the court will not have heard full argument and will only have unchallenged written evidence before it at that stage.
- (5) Once it is clear that there is the same interest, the court has a discretion whether to allow the relevant party to act or to continue to act in a representative capacity. Indeed, the court retains a discretion even at and after the judgment to direct that a judgment is not binding or is not to be enforced. Thus, it is conceivable that, if in the judgment findings of fact or other law are such that it emerges that one or more of the

⁵ [2011] EWHC 661 at paragraph 22.

represented persons does not have the same interest, the judge could well direct that the judgment is not to be enforced against them.

- (6) The overriding objective must always play an important part in the exercise of the discretion. Thus the saving of cost and time to the parties, and indeed to the court, must be factors in appropriate cases to take into account.”

To this I would add the passage of Lord Macnaghten in **Duke of Bedford** set out in paragraph 16 above and the words of Megarry J in **John v Rees**⁶ where he referred to the procedure for a representative action as ‘not a rigid matter of principle but a flexible tool of convenience in the administration of justice’ and ‘a rule of convenience only’, and that he ‘...would therefore be slow to apply the rule in any strict or rigorous sense.’⁷

- [20] The authorities suggest that the court should adopt a flexible approach in dealing with representation applications under CPR 21.

- [21] I am guided by these principles in considering this appeal.

Same or similar interest in the proceedings

- [22] The first principle in considering a representation application is that the applicant and the party to be represented must have the same or similar interest in the proceedings. Lead counsel for the respondents, Mr. Darshan Ramdhani KC, challenged the Judge’s finding that the GBA and the litigants have a common interest in the sense contemplated by CPR 21.1(2). He submitted that the evidence must show that all members of the represented group (the litigants) have the same interest in the courts of Grenada as the GBA and that the common interest must exist at the time when the claim was filed. He said that the evidence does not show this. It shows that the court system in Grenada is working, cases are being tried, and not all litigants would have the same interest as the GBA. The Judge was

⁶ [1970] Ch 345.

⁷ Ibid at page 370.

therefore wrong to find that the members of the represented class, the litigants, have a common interest with the GBA. He also submitted that the class to be represented was not sufficiently identified.

[23] It is important to determine the interest that the litigants have that is said to be in common with the interests of the GBA. There is no evidence as to the identities of the litigants other than that they are litigants before the courts of Grenada. Mr. Ramdhani KC submitted that each person in Grenada, at least in theory, has an interest in the proper funding and running of the courts in Grenada. What the evidence does not show is whether persons who are appearing before the courts have the same grievance as that alleged by the GBA. For example, a person who has a case, whether civil or criminal, that is progressing through the courts in a manner that is satisfactory to him or her, may not have an interest that is in common with the interest of the GBA.

[24] Learned counsel for the GBA, Mr. Ruggles Ferguson's response is that all litigants have an interest in the proper funding and administration of the courts. In individual cases their needs and expectations may be addressed because their cases are progressing through the courts satisfactorily. But that does not mean that they do not have the same interests as other litigants whose needs and expectations are not being addressed. The interest is present in all litigants as soon as they become involved in a matter before the courts, and it would have been present for those litigants who were before the courts when the claim was filed in July 2019 and continues to be present so long as they are before the courts.

[25] I prefer Mr Ferguson's submission and I find that the GBA and the litigants have a common interest, namely, the proper funding and administration of the courts in Grenada. This is the threshold issue in CPR 21.1. Having found that it has been satisfied I will deal with the other issues in the case.

Identifying the class

[26] It is trite that the persons who comprise a represented class must be identifiable. Mr. Ferguson submitted that the class of persons to be represented was sufficiently identified and that they have the same or similar interest in the proceedings as the GBA. He referred to CPR 21.2 (3) which provides that every person to be represented must be identified either individually or 'by description, if it is not practicable to identify a person individually.'⁸ In this case, the represented class is identified by description as persons who have cases before the courts of Grenada. That class of persons will fluctuate as persons move in and out of the court system. He said that the fluctuation is not fatal.

[27] Mr. Ferguson relied on **Duke of Bedford v Ellis and others**⁹ where several plaintiffs sued on behalf of themselves and all other growers of fruit, flowers, vegetables, roots and herbs in the Covent Garden Market, to enforce preferential rights to stands in the market that they claimed to have been given to the class of growers by the Covent Garden Market Act, 1828. The defendant was the lord of Covent Garden Market. He applied to stay the action on the ground that the plaintiffs acting personally (asserting their own rights) and representing a class of persons (the other growers) would embarrass and delay the trial. In dismissing the appeal against the decision of the Court of Appeal to dismiss the defendants' application and allow the action to proceed, Lord Macnaghten, writing for the majority of the House, opined –

“If the persons named as plaintiffs are members of a class having a common interest, and if the alleged rights of the class are being denied or ignored, it does not matter in the least that the nominal plaintiffs may have been wronged or inconvenienced in their individual capacity...In considering whether a representative action is maintainable, you have to consider what is common to the class, not what differentiates the cases of individual members.”

⁸ CPR part 21 is set out in full in paragraph 17 above.

⁹ Supra note 4.

[28] In commenting on the decision in **Duke of Bedford v Ellis**, Mummery LJ said in **Emerald Supplies Ltd v British Airways plc**¹⁰ -

“They [the plaintiffs in Duke of Bedford] had a common interest with those they claimed to represent. Anyone who was a “grower” under section 6 of the Act could take advantage of the representative judgment given in favour of the plaintiffs, whether they were growers when the action started, or only later. They were a large, indefinite and fluctuating class consisting of persons having the same rights and relying on one and the same Act as their charter. The House of Lords rejected the nature of that class as an objection, holding that, although it might be difficult or impossible to compile a catalogue of growers, there was not much difficulty in determining whether a particular person claiming a preferential right was a grower or not. Thus the representative class with same interest can fluctuate: under the rule what matters when the action starts is that there is a class of more than one person.”

[29] Mr. Ferguson also relied on **John v Rees**¹¹ where Megarry J granted a representation order to individual members of an unincorporated association suing on behalf of all but three of its members. The learned judge noted at page 370 that the members of the Association were bound to each other by contract and linked by a common membership and had a common interest in the assets of the Association. They had a common interest and there was no reason to strike out the representation portion of the action because the plaintiffs did not represent all of the members.

[30] The dicta of Mummery LJ and Megarry J are directly relevant to this appeal. The number of litigants before the courts in Grenada is probably quite large and the membership fluctuates. But at any given time, including when the claim was filed, they can be ascertained by, for example, checking the courts’ lists.

[31] While the dictum of Mummery LJ in **Emerald Supplies Ltd** is helpful to the GBA’s case, the result of the case is not. The facts are that the claimants used the services of British Airways (“BA”) to import cut flowers into England. They brought proceedings against BA claiming damages arising out of an allegation of price-

¹⁰ [2010] EWCA Civ 1284 at paragraph 45.

¹¹ Supra note 6.

fixing of the freight charges. The particulars of claim stated that the claimants represented all the other direct and indirect purchasers of freight services from BA and asserted that they were pursuing the claim on their own behalf and on behalf of the other purchasers of freight services. BA applied to strike out the representative element of the claim on the ground that the other purchasers who the claimant sought to represent did not have the same interest in the claim to bring them within CPR 19.6(1). The trial judge granted the application and struck out the representative part of the claim finding that it was not possible to say whether a person was a member of the class of persons that the claimant sought to represent until judgment on liability was established. An appeal against his decision was dismissed by the Court of Appeal.

- [32] Similarly, in **Markt & Co. Limited v Knight Steamship Company Limited and others**¹², a decision of the Court of Appeal, the claimant, along with 44 other persons, shipped cargo on the defendant's vessel "Knight Commander". The vessel sank and all the cargo was lost. The claimant brought proceedings on behalf of itself and the other owners of lost cargo. The claimant's application for a representative order was refused on the ground that the persons listed as the other cargo owners did not have the same interest as the claimant. At page 1035 Fletcher Moulton LJ commented on the issue of common interest -

"It is impossible for the Court to give any judgment as to the rights of parties by virtue of their being members of a class without its [sic] being defined what constitutes membership of the class. A mere list tells the Court nothing, more especially when that list does not appear on the record. If such an action as this could possibly go to trial the case of each firm whose name appears in the list would have to be gone into in order to ascertain the facts relating to it, so that the Court might be able to pronounce whether and why its name should be included in such list. In other words it would not be a representative action at all. If the judgment were given upon such a writ as this, no estoppel could arise either for or against the defendants without each case being individually examined into."

¹² [1910] 2 K.B. 1021.

All the cargo owners may have suffered losses when the Knight Commander sank, but that did not give them the same interest in the proceedings as the claimant. Each would have a separate claim for damages with potentially different results on liability and quantum.

- [33] The issue for this Court, having found that there is a common interest between the GBA and the litigants, is whether the Court should find that the represented class of litigants is sufficiently identified that the Court should go on to confirm the representation order made by the Judge. Returning to the decision in **Emerald Supplies Ltd**, Mummery LJ gave the following guidance –

“62 In my judgment, Emerald’s case for a representative action, whether as originally pleaded or as proposed to be amended, is fatally flawed. The fundamental requirement for a representative action is that those represented in the action have “the same interest” in it. At all stages of the proceedings, and not just at the date of judgment at the end, it must be possible to say of any particular person whether or not they qualify for membership of the represented class of persons by virtue of having “the same interest” as Emerald.

63 This does not mean that the membership of the group must remain constant and closed throughout. It may indeed fluctuate. It does not have to be possible to compile a complete list when the litigation begins as to who is in the class or group represented. The problem in this case is not with changing membership. It is a prior question how to determine whether or not a person is a member of the represented class at all. Judgment in the action for a declaration would have to be obtained before it could be said of any person that they would qualify as someone entitled to damages against BA.”

- [34] Following this guidance, the common interest between the GBA and the litigants existed at the time when the claim was filed in July 2019, and though the membership of the represented group fluctuates it can be ascertained from time to time by, for example, checking the courts’ lists. Unlike the represented groups in **Emerald Supplies Ltd** and **Markt & Co** the membership of the class of represented litigants does not depend on the result of the proceedings. Membership of the class is attained once a person becomes a litigant. The constitutional proceedings will determine whether the rights of litigants before the

courts of Grenada have been breached or are likely to be breached, but that is not the issue in this application. That issue will be resolved in the main proceedings.

- [35] I find that the represented class of litigants is sufficiently defined for the purposes of CPR part 21.

Alternative remedy

- [36] The respondents argued forcefully that there is an alternative remedy available to the litigants, namely, to file individual constitutional claims in the High Court alleging that their constitutional right to a fair trial within a reasonable time protected by section 8 of the Constitution has been breached or is likely to be breached, and to seek relief under section 16 of the Constitution. It is not disputed that this alternative right exists as is confirmed by the recent decision of this Court in **Akim Monah v The Queen**.¹³ However, the availability of an alternative remedy is not an absolute bar to bringing a constitutional motion. The wording of section 16 of the Constitution is discretionary. It provides that the remedy for breaches of sections 2 to 15 is ‘...without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress.’¹⁴ The Constitution of Trinidad and Tobago has a similar provision in section 6 and the Privy Council acknowledged that the section is discretionary in **Attorney General v Ramanoop**,¹⁵ on appeal from the Court of Appeal of Trinidad and Tobago.

- [37] The judge alluded to this issue of alternative remedies and decided that the issue is better suited for the trial of the originating motion by the High Court. This decision was entirely within the Judge’s discretion and consistent with the reasoning in **Ramanoop**¹⁶ and the fourth principle in paragraph 22 of Akenhead J’s judgment in **Millharbour Management Ltd** which is set out in paragraph 19 above. In any

¹³ GDAHCRA2021/0015 (delivered 23rd February 2022, unreported).

¹⁴ Section 16 is set out in paragraph 4 above.

¹⁵ [2005] UKPC 15 at paragraph 24.

¹⁶ Ibid note 15.

event, the respondents did not apply, as they could have done, to strike out the notice of motion on the ground that there is an alternative remedy. Instead, they used the issue of alternative remedies as a reason for the court not to grant the representation application.

Exercise of discretion

- [38] This takes me to the important issue of whether this Court should affirm the Judge's order and allow the GBA to represent the litigants in the proceedings.
- [39] The representation application in this case is unusual. During the hearing before this Court Mr. Ferguson was asked by the Court why is it necessary for the GBA to get a representation order. Alternatively, can the GBA pursue the claim without a representation order. He responded that the representation order is important because a declaration by the court that the litigants have a constitutional right to have their cases tried expeditiously by an effective court system is important for the administration of justice, and the order would enhance (future) claims for constitutional relief. This, in my opinion, is not a good reason for the court to grant a representation order and the Court was not directed to any cases where a representation order was made in similar circumstances. The order would not necessarily strengthen a litigant's rights in these proceedings nor any future claims for constitutional relief. Neither will the order create an estoppel between the State and individual litigants. Any application by a litigant for a declaration that his right to a fair trial within a reasonable time has been infringed will depend on the facts of the case that he presents to the court (as in **Akim Monah v The Queen**).¹⁷
- [40] The claim is for declaratory relief and orders that the Government provides proper funding for the courts. The claim will stand or fall on the pleadings and evidence filed in the proceedings. There is nothing to be gained by the GBA or the litigants by a representation order. A litigant cannot use a declaration of unconstitutionality

¹⁷ Supra note 13 paragraph 36.

in these proceedings to claim that his rights have been infringed in other proceedings.

Conclusion

[41] The GBA and the litigants have a common interest and grievance in the funding and administration of the courts in Grenada and the class of represented persons is sufficiently identified for the purposes of CPR part 21. However, there is no utility in continuing the representation order as the GBA can pursue the substantive claim without a representation order. The judge did not consider the utility of the representation order, and applying the well-known principles in **Dufour and Others v Helenair Corporation Ltd and Others**¹⁸ this is reason enough to set aside his decision granting the order. For the reasons and findings in this judgment in paragraphs 39 and 40 I would allow the appeal and set aside the judge's order with no order as to costs.

[42] I apologise for the delay in the delivery of this judgment which is due mainly to the competing demands of the office.

I concur.
Mario Michel
Justice of Appeal

I concur.
Gertel Thom
Justice of Appeal

By the Court

Chief Registrar

¹⁸ (1996) 52 WIR 188.