IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES

IN THE HIGH COURT OF JUSTICE
(CIVIL)

GRENADA

GDAHCV2010/0247

BETWEEN:

SHORN BRAVEBOY
LETTISHA LESSEY BRAVEBOY

Claimants/Applicants

and

1. **RICHARD DANIEL**
2. **GARVIN JOHNSON**
3. **EARL DUNBAR**
4. **THE ATTORNEY GENERAL**

Defendants/Respondents

and

1. **RBTT BANK (GRENADA) LIMITED**
2. **GRENADA COOPERATIVE BANK LIMITED**
3. **REPUBLIC BANK (GRENADA) LIMITED**
4. **FIRST CARIBBEAN INTERNATIONAL BANK (BARBADOS) LIMITED**
5. **THE BANK OF NOVA SCOTIA**

Garnishees

APPEARANCES:

Mrs. Melissa Modeste-Singh for the Claimants/Applicants
Ms. Dia Forrester, Solicitor General; Mr. Sasha Courtenay, Crown Counsel; and
Ms. Olabisi Clouden, Crown Counsel for the Defendants/Respondents

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2019: June 12th
July 12th

JUDGMENT

[1] **SMITH J**: This claim raises an important constitutional issue: whether section 21(4) of the **Crown Proceedings Act**[1] ("the Act") and rules 50.2 (3) and 59.7 of the **Civil Procedure Rules** 2000 ("CPR") infringe the right to a fair hearing guaranteed by section 8(8) the **Grenada Constitution** ("the Constitution").

[2] The facts giving rise to the constitutional challenge are undisputed and may be succinctly stated. In May 2016, the applicants obtained judgment in the sum of $58,250.00 with interest and costs against the Government of Grenada ("the Government"). The Government failed to promptly satisfy this judgment debt causing the applicants to apply under rule 50 of the CPR for a provisional garnishee order to freeze and attach funds belonging to the Government held in accounts at the garnishees in order to satisfy the judgment debt. Faced with the formidable obstacle that CPR 50.2(3) and CPR 59.7 of the CPR prohibit an attachment of debts order against the state and section 21(4) of the Act forbids the enforcement of money judgments against the Crown, the applicants contended that those provisions violated section 8(8) of the Constitution.

[3] The learned judge ruled that a challenge to the constitutionality of those provisions could not be made within the application for a charging order and had to be brought by way of an originating motion. On appeal against that ruling, the Court of Appeal set it aside and, by order dated 29th May 2018, gave directions for the hearing and determination of the constitutional challenge.

[4] A useful starting point is to juxtapose section 21 of the Act with section 8(8) of the Constitution. Section 21 provides that:

> "21. **Satisfaction of orders against the Crown**
> (1) Where in any civil proceedings by or against the Crown, or in connection with any arbitration to which the Crown is a party, any order (including an order for costs) is made by any court in favour of any person against the Crown or against a Ministry or Government

[1] Cap 74, Continuous Revised Edition of the Laws of Grenada, 2011.

department or against an officer of the Crown as such, the proper officer of the court shall, on an application in that behalf made by or on behalf of that person at any time after the expiration of twenty-one days from the date of the order or, in case the order provides for the payment of costs and the costs require to be taxed, at any time after the costs have been taxed, whichever is the later, issue to that person a certificate in the prescribed form containing particulars of the order: Provided that, if the court so directs, a separate certificate shall be issued with respect to the costs (if any) ordered to be paid to the applicant.

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

(3) If the order provides for the payment of any money by way of damages or otherwise, or of any costs, the certificate shall state the amount so payable, and the Permanent Secretary (Finance) shall, subject as hereinafter provided, pay to the person entitled or to his or her solicitor the amount appearing by the certificate to be due to him or her together with the interest, if any, lawfully due thereon: Provided that the court by which any such order as aforesaid is made or any court to which an appeal against the order lies may direct that, pending an appeal or otherwise, payment of the whole of any amount so payable, or any part thereof, shall be suspended, and if the certificate has not been issued may order any such directions to be inserted therein.

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

[5] In contrast, section 8(8) of the Constitution provides that:

"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."

[6] Mrs. Modeste-Singh contends that while section 21 of the Act provides a procedure for seeking satisfaction of debts, subsection 4 inhibits its effective enforcement and restricts a citizen's access to the court to such an extent that the very essence of the right is impaired. She contends that the constitutional right of access to the court for the purpose of enforcing the judgment against the state is being infringed by section 21(4) of the Act.

[7] The essence of the learned Solicitor General's contention is that, firstly, the presumption of constitutionality imposes a heavy burden on the applicants to show a clear breach of the section 8(8) right of access to the courts; and, secondly, section 21(4) of the Act satisfies what, in constitutional adjudication, is termed as the rationality and proportionality requirement, that is, section 21(4) is reasonably required in the public interest and is proportionate to its legitimate aim.

Issues

[8] The broad question for the determination of this Court is whether CPR 50.2(3) and 59.7 and section 21(4) of the Act are in breach of section 8(8) of the Constitution. The resolution of this broad issue engages the following specific issues:

(1) Whether the applicants have rebutted the presumption of constitutionality?

(2) Whether section 8(8) of the Constitution confers a right of access to the court and what, if any, are its limitations?

(3) Whether section 21(4) of the Act satisfies the requirements of rationality and proportionality?

Presumption of Constitutionality

[9] As remarked by Constitutional scholar, Tracy Robinson, "it is 'trite' to say there is a presumption of constitutionality and yet it is still unclear what this presumption means". In an article[2] reviewing nearly fifty years of case-law on this question in the Caribbean, she concludes "that the presumption in favour of the constitutionality of a challenged law has two quite divergent implications in

[2] *The Presumption of Constitutionality* (2012) 37 WILJ 1.

Caribbean constitutional law: one as an allocation of the burden of proving elements required to establish the law is unconstitutional and the other as a canon of construction applied in the interpretation of the law that is in jeopardy of being declared unconstitutional."

[10] **Attorney General v Antigua Times**[3] and **Attorney General v Mootoo**,[4] on the one hand, are oft-cited authorities for the proposition that in determining the constitutionality of legislation, the presumption of constitutionality applied and cast a heavy burden on the applicant to prove the invalidity of the law. The proper approach to the question is to assume, until the contrary appears or is shown, that all Acts passed by parliament are reasonably required. The state naturally relies on these cases.

[11] In **Hector v Attorney General**[5] and **de Freitas v Permanent Secretary**[6], on the other hand, the Privy Council considered the application of the presumption of constitutionality as an aid to construction of statutes. If the law was open to an interpretation that was consistent with the constitution and another which was not, it should be interpreted so as to save the law. If, however, the law is not capable of two interpretations and is plainly inconsistent with guaranteed right, then no implied language can save it.

[12] The upshot of all of this is that if the applicant establishes that the law in question prima facie infringes a guaranteed right, he is deemed to have met the burden of establishing a clear transgression of constitutional principles. The burden then shifts to the state to demonstrate that the limit on the right is constitutionally justified.

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[3] (1975) 21 WIR 560.
[4] (1979) 30 WIR 411.
[5] (1990) 37 WIR 216.
[6] (1998) 53 WIR 131.

[13] From the juxtaposition of section 21(4) of the Act and section 8(8) of the Constitution at paragraphs 4 and 5 above, it think it safe to conclude that it is apparent, on the face of section 21(4) of the Act that it infringes the applicants' right to access the court for a determination of their claim for enforcement. The burden therefore shifts to the state to justify the limitation.

Right of Access and its Limitations

[14] Section 8(8) of the Constitution does not expressly confer a right of access to the court, but it is settled law in the Eastern Caribbean that that section should be read as conferring such a right.

[15] In **Capital Bank International Ltd. v Eastern Caribbean Central Bank**,[7] Byron CJ traced the provenance of section 8(8) as deriving from the section 6(1) of the **European Convention for the Protection of Human Rights,** which the European Court of Human Rights has construed as conferring a right of access to the court. Byron CJ adopted and applied the words of Lord Bingham in **Brown v Stott:**[8]

> "Article 6 contains no express right of access to a court, but in **Golder v United Kingdom** (1975) 1 EHRR 524, 536, para 35 the European Court held that it would be "inconceivable" that article 6 should describe in detail the procedural guarantees afforded to parties in a pending law suit and should not first protect that which alone makes it possible to benefit from such guarantees, namely access to a court. The court added, at p. 537, para 38:
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> > 'The court considers ... that the right of access to the courts is not absolute. As this is a right which the Convention sets forth without, in the narrower sense of the term, defining, there is room, apart from the bounds delimiting the very content of any right, for limitation permitted by implication."

This expression of view was repeated in **Ashingdane v United Kingdom** (1985) 7 EHRR 528, 546, para 57 where the court ruled:

> "Certainly, the right of access to the courts is not absolute but may be subject to limitations; these are permitted by implication since the right of

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[7] GDAHCVAP2002/0013 and 0014 (delivered 10th March 2003, unreported) at paras. 12-13.
[8] (2001) 2 WLR 817 at 826

> access, 'by its very nature calls for regulation by the state, regulation which may vary in time and place according to the needs and resources of the community and of individuals'. In laying down such regulation, the contracting states enjoy a certain margin of appreciation. Whilst the final decision as to observance of the convention's requirements rests with the court, it is no part of the court's function to substitute for the assessment of the national authorities any other assessment of what might be the best policy in this field'."

[16] At paragraph 10 of the **Capital Bank** judgment, Chief Justice Byron made the following observations about the scope and application of section 8(8):

(1) Although the section does not confer the right of access in express terms it is generally accepted that it does.

(2) Proceedings must be instituted or be likely to be instituted before the provision comes to life.

(3) Although the section is not subject to express limitations all rights are subject to the rights of others and the public interest whether expressly stated or inherent or implied.[9]

(4) It is a right for the determination of the existence or extent of any civil right or obligation. Therefore unless such a determination is invoked the provision cannot be relied on.

[17] **Capital Bank** is therefore good authority for the proposition that section 8(8) confers a right of access to the court which is subject to the public interest whether such limitation is stated or implied. Keeping Chief Justice Byron's four observations in mind, it is clear that, in the case at bar, the applicants can rely on section 8(8). That section comes to life since proceedings have been instituted to determine the extent of the applicants' civil right to enforce a judgment debt against the state.

[18] If further authority were required, the Privy Council in **Toussaint v Attorney General**[10] stated:

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[9] Except the right not to be subjected to torture. It seems to be generally accepted that no limitations are permitted.

"[27] The right of access to a court is basic to both ss 8(8) and 16. Fairness, publicity and promptness are (as the European Court of Justice said in **Mc Elhinney v Ireland** (2001) 34 EHRR 322 at para 33, summarising its reasoning in the previous case, **Golder v United Kingdom** (1975) 1 EHRR 524) 'meaningless in the absence of any protection for the pre-condition for the enjoyment of those guarantees, namely, access to court'. Lord Hoffman pursued the theme in **Matthews v Ministry of Defence** [2003] UKHL 4, [2003] 1 AC 1163 at para [29]:

> 'These principles require not only that you should be able to get to the courtroom door. The rule of law and separation of powers would be equally at risk if the executive Government was entitled, as a matter of arbitrary discretion, to instruct the court to dismiss your action.'"

The Requirement of Rationality and Proportionality

[19] The respondents do not dispute the applicants' right of access to the court. Their contention is that the section 21(4) limitation is in the public interest, has a legitimate aim and that the means employed is proportionate to the aim sought to be achieved. They contend, relying on the Eastern Caribbean Court of Appeal judgment in **Gairy v Attorney-General of Grenada (No. 2),**[11] that section 21(1) to (3) of the Act provides for a comprehensive, special and workable procedure to obtain prompt payment of judgments from the Government through the mandatory duty imposed on the Permanent Secretary in the Ministry of Finance (the "Permanent Secretary") to cause payment to be made on a money judgment. There is therefore no complete shut out from access to the court for a remedy; it is merely that section 21(4) limits or restricts other methods or forms of enforcement of payment by the Crown, not that there is no form or means of enforcement. (Underlining supplied)

[20] The classic formulation of the rationality and proportionality test is to be found in the advice of the Privy Council delivered by Lord Clyde in **de Freitas v Permanent Secretary of the Ministry of Agriculture, Fisheries, Lands and Housing and**

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[10] (2007) 70 WIR 167.
[11] (1999) 59 WIR 174.

Others.[12] Lord Clyde approved the analysis formulated by Gubbay CJ in **Nyambirai v National Social Security Authority**[13] and stated:

> "In determining whether a limitation is arbitrary or excessive he [Gubbay CJ] said that the court would ask itself:-
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> > 'whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.'
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> Their Lordships accept and adopt this threefold analysis of the relevant criteria."

[21] That formulation was re-stated by Lord Sumption in the United Kingdom Supreme Court decision of **Bank Mellat v HM Treasury (No. 2),**[14] at paragraph 20, as follows:

> "The requirements of rationality and proportionality, as applied to decisions engaging the human rights of applicants, inevitably overlap. The classic formulation of the test is to be found in the advice of the Privy Council, delivered by Lord Clyde, in *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 at 80. But this decision, although it was a milestone in the development of the law, is now more important for the way in which it has been adapted and applied in the subsequent case-law, notably *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 (in particular the speech of Lord Steyn), *R v Shayler* [2003] 1 AC 247 at paras 57-59 (Lord Hope of Craighead), *Huang v Secretary of State for the Home Department* [2007] 2 AC 167 at para 19 (Lord Bingham of Cornhill) and *R (Quila) v Secretary of State for the Home Department* [2012] 1 AC 621 at para 45. Their effect can be sufficiently summarised for present purposes by saying that the question depends on an exacting analysis of the factual case advanced in defence of the measure, in order to determine (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community. These four requirements are logically separate, but in practice they inevitably overlap because the same facts are likely to be relevant to more than one of them. Before us, the only issue about them concerned (iii), since it was suggested that a measure would be

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[12] (1998) 53 WIR 131at pp. 143-144
[13] [1996] 1 LRC 64.
[14] [2013] 4 All ER.

> disproportionate if any more limited measure was capable of achieving the objective. For my part, I agree with the view expressed in this case by Maurice Kay LJ that this debate is sterile in the normal case where the effectiveness of the measure and the degree of interference are not absolute values but questions of degree, inversely related to each other. The question is whether a less intrusive measure could have been used without unacceptably compromising the objective. Lord Reed, whose judgment I have had the advantage of seeing in draft, takes a different view on the application of the test, but there is nothing in his formulation of the concept of proportionality (see his paras 68-76) which I would disagree with."

[22] I will therefore apply the test as formulated in **De Freitas** as modified in **Bank Mellat** to determine whether section 21(4) satisfies the rationality and proportionality requirement. In doing so, I will evaluate each of the following factors:

(1) Whether its objective is sufficiently important to justify the limitation of a fundamental right;

(2) Whether it is rationally connected to the objective;

(3) Whether a less intrusive measure could have been used; and

(4) Whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community.

Is objective sufficiently important to justify limitation?

[23] The solicitor general's argument as to the legitimacy of section 21(4) is as follows: The primary objective of the state is to provide for the welfare of its subjects and the defence of the realm through the provision of certain social services funded through the Consolidated Revenue Fund (the "Fund"). The animating purpose of section 21(4) is not to grant immunity to the state from legal process since it provides a mechanism for enforcing money judgments against the state. All that section 21(4) does is to exclude other forms of enforcement – other than that set out in section 21 – which could have disastrous consequences on the revenue of the state and the national economy. The object of the limitation, therefore, is to prevent the disruption of the finances and function of the Government, which

would result if attachment of debts or execution were permitted, without regulation, against the state.

[24] It is not difficult to envision a scenario in which the government of a small Eastern Caribbean state is faced with a huge monetary judgment which it is unable to immediately satisfy due to severe budgetary constraints. If such a government were required to immediately satisfy a money judgment (without the opportunity for payment by instalments that was provided by Lord Bingham in **Gairy**) such an outcome could, conceivably, lead to a disruption of some essential public service to the nation, for example, the delivery of health care services.

[25] The objective of stability and the continuation of essential services in tiny nation states is surely sufficiently important to justify a limitation on an individual's right to enforce satisfaction of a monetary judgment against the government. The extent of that limitation is what requires careful consideration.

Whether Rationally Connected to the Objective

[26] The long title to the Act reads as follows:

> "An Act relating to the civil liabilities and rights of the Crown and to civil proceedings by and against the Crown; to the civil liabilities of persons other than the Crown in certain cases involving the affairs or property of the Crown, and for connected purposes."

[27] Chief Justice Byron, in examining the purpose of the Act in **Gairy**, stated at paragraph 11:

> "The **Crown Proceedings Act** was passed in England in 1947. It should be noted that the purpose of this legislation was to make it easier for the Crown to be a party to litigation. It was intended to facilitate, not restrict, the right of the citizen to gain redress against the Government. Thereafter Acts in similar terms were passed throughout the Dominions. Such an Act was enacted in Grenada on the 15th day of April 1959 as the **Crown Proceedings Act**."

[28] I agree with the learned solicitor general that sections 21(1) through (3) of the Act does provide a mechanism for the satisfaction of judgments against the state and, at section 21(4) limits other forms of enforcement. When the Act is examined as a

whole, I find that section 21(4) is rationally connected to the overall aims of the Act, which I have found to be sufficiently important to justify limitation.

Whether less intrusive means available?

[29] In **Suratt and others v Attorney General of Trinidad and Tobago**[15] the question was whether the **Equal Opportunity Act** 2000 (the "EOA") was inconsistent with the **Constitution of Trinidad and Tobago**. Baroness Hale in considering whether the right balance had been struck between the rights of the individual and the public interest stated:

> "The appeal will also be allowed on the other points where the courts below found the EOA unconstitutional. It cannot be the case that every Act of Parliament which impinges in any way upon the rights protected in ss 4 and 5 of the Constitution is for that reason alone unconstitutional. Legislation frequently affects rights such as freedom of thought and expression and the enjoyment of property. These are both qualified rights which may be limited, either by general legislation or in the particular case, provided that the limitation pursues a legitimate aim and is proportionate to it. It is for Parliament in the first instance to strike the balance between individual rights and the general interest. The courts may on occasion have to decide whether Parliament has achieved the right balance. But there can be little doubt that the balance which Parliament has struck in the EOA is justifiable and consistent with the Constitution. Section 7 does impinge upon freedom of expression but arguably goes no further in doing so than the existing law; if it does go further, by including gender as well as racial or religious hatred, it is merely bringing the law into conformity with all modern human rights instruments, which include sex or gender among the prohibited grounds of discrimination. Sections 17 and 18 do impinge upon freedom of contract but in ways which are now so common in the common law world that it can hardly be argued that they are not proportionate to the legitimate aim which they pursue. Finally, adding to the role of the Judicial and Legal Service Commission inexactly the way contemplated by s 111 is not inconsistent with the Constitution." (Underlining supplied)

[30] In **Gairy**, the question for the Eastern Caribbean Court of Appeal was whether the Court could make a mandatory order against the minister enforceable by contempt or coercive proceedings. Chief Justice Byron was of the view that section 21(3) provided a foolproof mechanism for satisfaction of money judgments against the

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[15] 71 WIR 391.

state. Although the Privy Council set aside the Court of Appeal's decision, the state, in the case at bar, still places great reliance on section 21(3) as a foolproof mechanism for a citizen to satisfy a money judgment against the state. For this reason, I feel obliged to revisit that analysis.

[31] In analysing section 21(4) of the Act, this is what Byron CJ stated:

> "**Enforcing Money Orders against the Crown**
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> [30] It has become commonplace for counsel to complain about the difficulty of collecting money judgments against the Government. In my view, these complaints are based on a misinterpretation of the statutory provisions. There is sufficient statutory protection for the constitutional principle of the separation of powers to ensure that the executive does not refuse to comply with court orders for money payments with impunity. The relevant statutory duty is not placed on any minister of government but on a senior civil servant, in the person of the Permanent Secretary (Finance). The **Crown Proceedings Act** makes such provision for the enforcement of money judgments against the Crown. These provisions impose a specific statutory duty enforceable by mandamus on a public official. I will reproduce section 21 to demonstrate the scheme of the legislation:
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> ....
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> [31] In my view the duty imposed on the Permanent Secretary (Finance) in section 21(3) is mandatory and once the procedure has been followed he must perform that duty or be at risk. There was some argument that section 21(4) operated to prevent an order enforcing the statutory duties imposed by section 21(3). I respectfully reject that. The prohibition is against other methods of execution or attachment to enforce payment by the Crown. It does not prevent coercing compliance with section 21(3). This makes sense in the context of an Act intended to facilitate proceedings against the Crown and eliminate the procedural pitfalls that had previously plagued such litigation.
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> [32] This section seems to me to be designed as a foolproof method of providing for the enforcement of court orders for the payment of money against the government. Had the appellants followed the procedure laid out in the section, the Permanent Secretary would have been under a statutory duty to perform, and the law is clear that mandamus will issue to compel the performance of a statutory duty. The Minister of Finance cannot be made accountable for the statutory duty of the Permanent Secretary (Finance)." (Underlining supplied)

[32] The respondents adopt this analysis and submit that the special procedure contained in section 21 of the Act was and is available to the applicants to obtain prompt payment of the judgment or to obtain a schedule of payment upon triggering the process set out in section 21.

[33] On appeal to the Privy Council, Lord Bingham took a different view of the efficacy of section 21. In delivering the advice of the Board, he stated:

> "[19]... By Chapter 1 and section 106 of their constitution the people of Grenada established a new constitutional order. The constitution has primacy (subject to its provisions) over all other laws which, so far as inconsistent with its provisions, must yield to it. To read down its provisions so that they accord with pre-existing rules or principles is to subvert its purpose. Historic common law doctrines restricting the liability of the crown or its amenability to suit cannot stand in the way of effective protection of fundamental rights guaranteed by the constitution.
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> [illegible]... Since the expression "civil proceedings" probably excludes what would now be called applications for judicial review, it must be highly questionable whether it includes claims for constitutional redress which the draftsmen in the UK in 1947 and Grenada in 1959 could not have contemplated and which may fairly be regarded as *sui generis*. But even if it be accepted that the appellant's claim falls within the expression "civil proceedings", that goes only to show that there was another procedural route which the appellant could have followed. Had such a means of redress been shown to exist and to be adequate, the court could have declined to exercise its powers under section 16(2) of the constitution pursuant to the proviso to the subsection. But the court would not have been bound to decline. Since nearly five years had elapsed since the consent order of Moore J when Alleyne J gave judgment on this application, he could scarcely have thought it was the lack of a certificate issued under section 21(1) which was holding up payment, particularly when account was taken of the evidence and the fact that some payments had been made. It was moreover likely that if the appellant pursued his rights under section 21 he might be denied enforcement in reliance on section 21(4), an obstacle he could overcome (if at all) only by relying on his rights under the constitution. But if the appellant was relying on the constitution he was not bound by section 21 in so far as that section inhibited his claim to constitutional relief.

[[[[[... Having proved a breach of a right protected by the constitution, having obtained a money judgment and having failed to obtain full payment, the appellant now seeks an effective, not merely a nominal, remedy. The court has power to grant such a remedy. And if it is necessary to fashion a new remedy to give effective relief, the court may do so within the broad limits of section 16. Whereas, in granting a person constitutional relief not related to Chapter 1, the court may under section 101(3) "grant to that person such remedy as it considers appropriate, being a remedy available generally under the law of Grenada in proceedings in the High Court", the court's powers under section 16(2) are not so limited. The court has, and must be ready to exercise, power to grant effective relief for a contravention of a protected constitutional right.

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

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

[34] Two observations should be made in relation to the **Gairy** judgment. Firstly, it was not concerned with the constitutionality of section 21(4), as is the instant case. Secondly, it was a judgment on a constitutional motion for enforcement as opposed to the case at bar which are civil proceedings for a charging order against

the state. I nevertheless think that the statements by Lord Bingham, particularly at paragraph 21, exploded the view of section 21(3) as a foolproof method of enforcement of money judgments against the state. Firstly, he stated that "if the appellant pursued his rights under section 21 he might be denied enforcement in reliance on section 21(4), an obstacle he could not overcome (if at all) only by relying on his rights under the Constitution." The point is that if sections 21(1) to (3) were an avenue for the appellant to satisfy the money judgment, Lord Bingham would not have described section 21(4) as an "obstacle" practically impossible to overcome.

[35] Secondly, in response to the Attorney General's submission that the appellant's entitlement to be paid fell within the terms of section 21 of the Act, Lord Bingham stated that "had such a means of redress been shown to exist and to be adequate, the court could have declined to exercise its powers" pursuant to the proviso to section 16(2) of the Constitution. (Underlining supplied) This statement from Lord Bingham comes after the Court of Appeal had pronounced section 21(3) a foolproof method of enforcement and, in my view, exposes the inefficacy of section 21(3).

[36] Thirdly, Lord Bingham stated that the appellant, "having obtained a money judgment and having failed to obtain full payment, the appellant now seeks an effective, not merely a nominal, remedy." (Underlining supplied) Again, to have described the section 21 remedy as "merely nominal" is tantamount to saying it is not effective and, consequently, not a foolproof method of satisfying a money judgment. If the only recourse left to a claimant to enforce a money judgment against the state is to file a constitutional motion for the court to fashion a remedy as was done in **Gairy**, this would appear to suggest that section 21(4) is indeed too intrusive.

[37] The issue of the constitutionality of section 3 of the **State Liability Act** of South Africa – the equivalent of section 21(4) of the Act – arose in **Nyathi v Members of**

the Executive Council for the Department of Health, Gauteng and Others. I find the reasoning of the majority of the Constitutional Court of South Africa to be highly persuasive and therefore I set out the relevant portion of the analysis, though lengthy, below:

"[18] The Act is a relic of a legal regime which was pre-constitutional and placed the state above the law: a state that operated from the premise that "the king can do no wrong". That state of affairs ensured that the state and, by parity of reasoning, its officials could not be held accountable for their actions.

(i) Whether section 3 of the Act limits any of the rights in the Constitution

[36] Section 3 of the Act precludes attachment of the assets of the state and has been challenged by the applicant because it prevents the enforceability of court orders and therefore limits the applicant's right to life, dignity, equality and access to courts.

[38] Section 9(1) of the Constitution provides that everyone is equal before the law and has the right to equal protection and benefit of the law.

[39] It was submitted that section 3 makes an unjustifiable differentiation between a judgment creditor who obtains judgment against the state and a judgment creditor who obtains a judgment against a private litigant. This submission is sound.

[44] Section 3 effectively places the state above the law. The section, as it stands, does not positively oblige the state to comply with court orders as it should. This is not compatible with the plain language of sections 8, 34, 165(4) and (5) of the Constitution.

[47] Section 3 does not, therefore, treat judgment creditors as equal before the law. It also violates the dignity provisions of section 10. For all these reasons, I conclude that section 3 limits the right to equality before the law and the right to equal protection and benefit of the law guaranteed by section 9(1) and the right of access to courts guaranteed by section 34 of the Constitution. It now remains to consider whether such limitations are reasonable and justifiable under section 36(1) of the Constitution.

(ii) Whether such Limitation is Reasonable and Justifiable

[48] One of the issues to be investigated by this Court, therefore, is whether the attachment provision in section 3 of the Act is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. The nature and purpose of the rights of access to courts, equality, freedom; the democratic principles of state

accountability; and the rule of law are important aspects of the Constitution which are implicated in this matter.

[49] It was argued on behalf of the respondents that if this Court held that the impugned section infringed any of the rights allegedly trumped by it and in particular sections 9 and 34 of the Constitution, then such infringement is justifiable in terms of section 36(1) of the Constitution. The respondents argued that it is trite that the applicant's rights in the Bill of Rights, important as they may be to our constitutional democracy, may nonetheless be constitutionally limited where that limitation serves a legitimate and acceptable purpose and there is sufficient proportionality between the harm done by the legislation and the good sought to be achieved.

[50] It is my view that the limitation imposed by section 3, with regard to attachment of state assets, is neither reasonable nor justifiable in these circumstances. Furthermore, the respondents' argument that the limitation is reasonable and justifiable because it serves to protect essential state assets from being attached is not convincing.

[51] Section 3 serves to protect the state interests by disallowing attachment as it has the potential to disrupt service delivery and interfere with the state's accounting procedures. I agree that the attachment of certain state assets, for example ambulances and dialysis machines, would severely disrupt service delivery and would also unjustifiably limit the rights of many other individuals. There are few countries which allow such attachment and even if it is allowed, there is very specific legislation which prescribes the assets which can be attached, such assets being deemed to be non-essential to the proper functioning of the state. The respondents have therefore made very valid submissions in this regard. The respondents have, however, not made lack of resources an issue in this case.

[52] The Act does purport to make the state liable for judgment debts that accrue against it. However, the processes involved in gaining satisfaction of such debts are not in place. The doors are closed before compliance has been achieved. An in-depth analysis of case law in regard to state liability has revealed that at the core of the issue is a problem which can be located in the legislation as well as within state departments. The legislative provision prevents the attachment of state assets but it does not inhibit a state's ability to pay a judgment debt. This matter has also revealed the flaws within the office of the State Attorney. There is a desperate need for change within these departments, and such change will be monitored by this Court.

(iv) Appropriate Remedy

[79] The practical effect of section 3 is that the state cannot be forced to

> honour court orders, as there is no manner in which compliance can be enforced. In the result, the ordinary citizen has no effective remedy available in a situation where the state and its officials fail to comply with a court order. In terms of contempt proceedings the High Court found that section 3 of the Act does not mean that a Minister cannot be arrested for contempt of court. It was held that Ministers of State and other public officials can in fact be held in contempt in the exercise of the courts' inherent power to protect and regulate their process, especially in light of section 173 of the Constitution. However, contempt of court proceedings do not put money in the pocket or food on the table." (Underlining supplied)

[38] The solicitor general submitted that **Nyathi** was distinguishable from the case at bar in that, in **Nyathi**, the court observed that the state's failure to satisfy money judgments was a chronic problem and there was no evidence before this Court that there was a similar problem in Grenada. As the solicitor general put it: "On the facts disclosed ... we do not have contumelious state action that is perennial, ubiquitous or endemic; nothing approaching such scandalous state behavior." Secondly, at the time **Nyathi** was decided, South Africa did not have the equivalent of section 21(3) which allows for coercive remedies against the permanent secretary.

[39] In relation to the first point, I do not think that, sitting as a constitutional court, I am concerned with the prevalence or otherwise of the state's failure to satisfy money judgments. Once this Court's constitutional jurisdiction has been invoked to test the validity of legislation, I am obliged to carry out an audit for constitutionality by reference to the relevant constitutional principles, not the prevalence or otherwise of the problem. It therefore matters not that in South Africa there were over 200 cases against the state outstanding for payment of judgment debts and in Grenada there might be only a few.

[40] In relation to the second point, at paragraph 79 of the **Nyathi** judgment, the Constitutional Court stated that a minister of government in fact could be arrested

for contempt of court for failure to honor a money judgment against the state, but such a remedy was not effective because it did not "put money in the pocket".

[41] The solicitor general contended that even the Constitution, at section 76, envisaged that the kind of enforcement prohibited by section 21(4) should not be available against the state. Sections 75 and 76 of the Constitution provide that:

> **"75.** All revenues or other moneys raised or received by Grenada (not being revenues or other moneys that are payable, by or under any law for the time being in force in Grenada, into some other fund established for any specific purpose) shall be paid into and form a Consolidated Fund.
>
> **76.** (1) No moneys shall be withdrawn from the Consolidated Fund except-
>
> a. to meet expenditure that is charged upon the Fund by this Constitution or by any law enacted by Parliament; or
>
> b. where the issue of those moneys has been authorised by an Appropriation law or by a law made in pursuance of section 78 of this Constitution.
>
> (2) Where any moneys are charged by this Constitution or any law enacted by Parliament upon the Consolidated Fund or any other public fund, they shall be paid out of that fund by the Government of Grenada to the person or authority to whom payment is due.
>
> (3) No moneys shall be withdrawn from any public fund other than the Consolidated Fund unless the issue of those moneys has been authorised by or under any law.
>
> (4) Parliament may prescribe the manner in which withdrawals may be made from the Consolidated Fund or any other public fund."

[42] It is clear from those provisions that the Government cannot withdraw money from the Consolidated Fund or any public fund to satisfy a money judgment against it unless such withdrawal has been authorized under an appropriation law or a law enacted by Parliament. The effect of this seems to be that even if there is an outstanding money judgment against the state and contempt proceedings are on

foot for its enforcement, that payment cannot be made until properly authorized under Appropriation Bill, supplementary Appropriation Bill or other law.

[43] This was the view taken by the High Court of Malawi in **Tratsel Supplied Limited v Attorney General**[16] in which Mwaungulu J stated:

> "In relation to money in the Consolidated Fund there is no room for a choice. The Constitution proscribes withdrawals from the Consolidated Fund, even when money is in the bank, except by appropriation according to the Constitution. Although Government should respect court judgments, the Constitution prescribes that money required for judgments against Government should, following proper procedure, be charged to the Consolidated Fund. These constitutional provisions, in my most considered view, put moneys in the Consolidated Fund out of reach of a sheriff or his officers executing a writ of fieri facias or creditors wanting to garnishee a debtor Government or a debtor who Government owes money and complement and augment what has always been the practice of this Court since 1875 until **Tayamba General Dealers v Attorney General and Apex Car Sales v Attorney General** that Orders 45 to 52 do not apply to judgments against Government."

[44] A similar conclusion was reached by the High Court of Kenya in **Nahashon Omwoha Osiaka & Others v Attorney General**[17] in which the court stated:

> "26. The argument that the process of realizing a decree against the Government is complex, cumbersome and burdensome and therefore unconstitutional is not new and has been tested before in this jurisdiction. In the case of ***Kisya Investments Ltd v Attorney General & Another*** **(Supra)**, the High Court was faced with a similar application that sought a declaration that **section 21 (4)** of the ***GPA*** and the provisions of the Civil Procedure Rules restraining execution against the Government were unconstitutional under the provisions of **sections 84 (1)** and **2(a), 70 (a), 60(1)** and **72(1) (b), (c), (2)** and **(3)** of the former Constitution. In that case the court considered the rationale of these provisions and held that they did not violate the former Constitution. Visram and Ibrahim JJ.. (as they were) explained as follows:
>
> > History and rationale of Government's immunity from execution arises from the following: - Firstly, there has been a policy in respect of Parliamentary control over revenue and this is threefold and is exercised in respect of (i). The raising of revenue - (by taxation or borrowing); (ii). Its expenditure; and (iii). The audit of public accounts. The satisfaction of decrees or judgments is

[16] [2003] MWHC 91

[17] (unreported) Petition No. 29 of 2010.

> deemed to be an expenditure by Parliament and as a result of this must be justified in law and provided for in the Government's expenditure. It is for this reason that section 32 of the Government Proceedings Act provides that any expenditure incurred by or on behalf of the Government by reason of this Act shall be defrayed out of the moneys provided by Parliament. Parliamentary control over expenditure is based upon the principle that all expenditure must rest upon legislative authority and no payment out of public funds is legal unless it is authorised by statute, and any unauthorised payment may be recovered."

[45] Two observations may be made in relation to section 76 of the Constitution. Firstly, it illustrates that the section 21 remedy of contempt proceedings against the permanent secretary or the minister is indeed ineffective since it cannot ensure payment unless the issuance of those monies had been authorized by appropriation according to the Constitution. The court cannot coerce parliament into enacting an appropriation bill or any other law for the purpose of satisfying a money judgment. Secondly, while section 76 effectively prevents enforcement against money in the Fund, it does not prevent enforcement against other government assets.

[46] Could a less intrusive means have been found to limit a citizen's right of access to the Court for the enforcement of a money judgment while at the same time preventing any kind of deleterious interruption in the provision of essential state services? It seems to me that the Act could have provided that there would be no enforcement against the state until after a court is satisfied that the state has been given the opportunity to make payment by instalments and has failed to do so. Even then, such enforcement would be only against those assets not deemed as necessary for the provision of essential services to the public. Such an approach would have been less intrusive, strike the right balance between the right of the individual and the public interest and avoided emasculating the citizen's right to access the court for effective enforcement of a money judgment.

[47] This was the approach taken by the National Assembly of the Republic of South Africa after its Constitutional Court in **Nyathi** declared section 3 of their **State**

Liability Act unconstitutional. I consider the approach taken by the Republic of South Africa to be a laudable, model and modern approach to dealing with the vexed issue of satisfying money judgments against the state within to the new constitutional landscape. I reproduce some of the relevant sections, though lengthy, below:

> "**3 Satisfaction of final court orders sounding in money**
>
> (1) Subject to subsections (4) to (8), no execution, attachment or like process for the satisfaction of a final court order sounding in money may be issued against the defendant or respondent in any action or legal proceedings against the State or against any property of the State, but the amount, if any, which may be required to satisfy any final court order given or made against the nominal defendant or respondent in any such action or proceedings must be paid as contemplated in this section.
>
> (2) The State Attorney or attorney of record appearing on behalf of the department concerned, as the case may be, must, within seven days after a court order sounding in money against a department becomes final, in writing, inform the executive authority and accounting officer of that department and the relevant treasury of the final court order.
>
> (3) *(a)* A final court order against a department for the payment of money must be satisfied-
>
> 1. (i) within 30 days of the date of the order becoming final; or
> 2. (ii) within the time period agreed upon by the judgment creditor and the accounting officer of the department concerned.
>
> *(b)* (i) The accounting officer of the department concerned must make payment in terms of such order within the time period specified in paragraph *(a)* (i) or (ii). (ii) Such payment must be charged against the appropriated budget of the department concerned.
>
> (4) If a final court order against a department for the payment of money is not satisfied within 30 days of the date of the order becoming final as provided for in subsection (3) *(a)* (i) or the time period agreed upon as provided for in subsection (3) *(a)* (ii), the judgment creditor may serve the court order in terms of the applicable Rules of Court on the executive authority and accounting officer of the department concerned, the State Attorney or attorney of record appearing on behalf of the department concerned and the relevant treasury.
>
> (5) The relevant treasury must, within 14 days of service of the final court order as provided for in subsection (4), ensure that-
>
> 1. *(a)* the judgment debt is satisfied; or

2. *(b)* acceptable arrangements have been made with the judgment creditor for the satisfaction of the judgment debt, should there be inadequate funds available in the vote of the department concerned.

(6) If the relevant treasury fails to ensure that-

1. *(a)* the judgment debt is satisfied; or
2. *(b)* acceptable arrangements have been made with the judgment creditor for the satisfaction of the judgment debt, should there be inadequate funds available in the vote of the department concerned, within the time period specified in subsection (5), the registrar or clerk of the court concerned, as the case may be, must, upon the written request of the judgment creditor or his or her legal representative, issue a writ of execution or a warrant of execution in terms of the applicable Rules of Court against movable property owned by the State and used by the department concerned.

(7) *(a)* Subject to paragraph *(b)*, the sheriff of the court concerned must, pursuant to the writ of execution or the warrant of execution, as the case may be, attach, but not remove, movable property owned by the State and used by the department concerned.

(b) The sheriff and the accounting officer of the department concerned, or an official of his or her department designated in writing by him or her, may, in writing, agree on the movable property owned by the State and used by the department concerned that may not be attached, removed and sold in execution of the judgment debt because it will severely disrupt service delivery, threaten life or put the security of the public at risk.

(c) If no agreement referred to in paragraph *(b)* is reached, the sheriff may attach any movable property owned by the State and used by the department concerned, the proceeds of the sale of which, in his or her opinion, will be sufficient to satisfy the judgment debt against the department concerned.

(8) In the absence of any application contemplated in subsection (10), the sheriff of the court concerned may, after the expiration of 30 days from the date of attachment, remove and sell the attached movable property in execution of the judgment debt.

(10) *(a)* A party having a direct and material interest may, before the attached movable property is sold in execution of the judgment debt, apply to the court which granted the order, for a stay on grounds that the execution of the attached movable property-

1. (i) would severely disrupt service delivery, threaten life or put the security of the public at risk; or

2. (ii) is not in the interests of justice."

[48] I appreciate that there are vast and crucial differences between the jurisdiction of South Africa and that of Grenada. However, what the above extract from South Africa's legislation demonstrates is that a less intrusive means can be fashioned to strike the right balance between the individual and the public interest.

Fair balance?

[49] Has the Parliament of Grenada struck a fair balance between the individual and the public interest? I am inclined to the view that it has not. The practical effect of section 21(4) is that the state cannot be forced to honour court orders as there is no effective means of enforcement. The availability of contempt proceedings against the Permanent Secretary or the Minister of Finance, while clearly a form of coercive remedy, does not guarantee that payment will be made. As was observed in **Nyathi**, "contempt of court proceedings do not put money in the pocket or food on the table." As has been demonstrated by South Africa's amended **State Liability Act**, legislative measures can quite easily be drafted to arrive at fair balance that safeguards essential state assets from execution and prevents disruption of essential public services while providing the individual with an effective remedy for the enforcement of money judgments against the state.

Disposition

[50] Based on the foregoing, I am of the view that the applicants have discharged their burden of rebutting the presumption of constitutionality that applies to the provisions under challenge in these proceedings. I therefore make the following orders:

(1) A declaration is granted that section 21(4) of the **Crown Proceedings Act** is in breach of section 8(8) of the **Grenada Constitution** and therefore unconstitutional.

(2) A declaration is granted that rules 50.2 (3) and 59.7 of the E.C. CPR are in breach of section 8(8) the **Grenada Constitution** and therefore unconstitutional.

(3) No order as to costs.

Justice Godfrey Smith SC
High Court Judge

By the Court

Registrar

REGISTRAR Ag.
SUPREME COURT
GRENADA
WEST INDIES