

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

ANTIGUA AND BARBUDA

ANUHCVP2012/0005

**IN THE MATTER of the Representation of the
People Act**

and

**IN THE MATTER of an Application by the Prime
Minister to Remove Sir Gerald Watt KCN, QC
as Chairman of the Antigua and Barbuda
Electoral Commission**

BETWEEN:

**[1] THE PRIME MINISTER
[2] JUNO SAMUEL**

Appellants/Respondents

and

SIR GERALD WATT, KCN, QC

Respondent/Appellant

Before:

The Hon. Mde. Janice M. Pereira
The Hon. Mr. Davidson K. Baptiste
The Hon. Mr. Don Mitchell

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

Appearances:

Mr. Sanjeev Datadin with him Ms. Sheri-Ann Bradshaw for the Appellants
Dr. David Dorsett with him Mr. Jared Hewlett for the Respondent

2013: February 27;
May 27.

*Civil appeal – Constitutional Law – Whether Governor-General ought to have been joined
as party to proceedings – Representation of the People (Amendment) Act 2001 – Electoral
Commission – Whether Prime Minister had authority to advise removal of Chairman –*

*Judicial review proceedings – Whether Prime Minister's action amenable to judicial review
– Damages in breach of fundamental rights – Administrative orders – Costs*

The Prime Minister, in keeping with section 3 of the **Representation of the People (Amendment) Act 2001** ("the RPA 2001"), recommended to the Governor-General that Sir Gerald Watt, KCN, QC be appointed as the Chairman of the Antigua and Barbuda Electoral Commission ("the Commission"). Subsequently, the Prime Minister, pursuant to section 4 of the RPA 2001, informed the Governor-General that the question of the removal of Sir Gerald from the office of Chairman of the Commission be investigated. A tribunal was duly constituted for this purpose. The report issued by the Tribunal advised that it could not recommend that Sir Gerald be removed. Before resuming his office however, Sir Gerald's appointment as Chairman was revoked by the Governor-General who acted on the recommendation of the Prime Minister. Mr. Juno Samuel was then replaced as Chairman of the Commission.

Sir Gerald brought an action seeking judicial review of the decision of the Prime Minister. He sought various remedies including an injunction prohibiting Mr. Samuel from acting as Chairman; a declaration that his removal was illegal and therefore null, void and of no legal effect; and an order for aggravated and vindictory damages. The learned trial judge found that the Chairman of the Commission could only lawfully be removed by the Governor-General acting upon the Report of the Tribunal. She further found that the actions of the Prime Minister were amenable to judicial review as he had acted illegally in recommending the removal of Sir Gerald and the consequential actions of the Governor-General were themselves the fruit of an illegal act. The learned judge for the most part granted the reliefs sought; however she awarded Sir Gerald damages to be assessed, but not substantial, aggravated or vindictory damages, and his prescribed costs based on the damages as assessed.

Both the Prime Minister and Sir Gerald appealed the judgment of the lower court. The Prime Minister appealed on various grounds which included (1) the Governor-General ought to have been named as a party to the action; (2) the appropriate political leader can recommend the removal of the Chairman; (3) the recommendation of the Prime Minister was not reviewable as it was a mere recommendation; (4) the learned judge was wrong to find the act of the Prime Minister illegal, irrational and procedurally unfair; and (5) the award of an order for damages to be assessed had not been based on the evidence and was wrong. Sir Gerald appealed the learned judge's decision in relation to the damages awarded to him and the prescribed costs order.

Held: dismissing the appeal; allowing the cross-appeal and varying the orders as to costs and damages, that:

1. Whenever the validity of any act of state done by the Governor-General is being called in question, the Attorney-General is the proper party to be named in the

litigation. In the instant case, the Governor-General was properly joined as a party when the Attorney-General was named in her place in accordance with the recommended constitutional procedure.

Hochoy v NUGE and Others (1964) 7 WIR 174 followed.

2. The RPA 2001 makes provisions for the different political interests to be represented in the formation of the Commission. However, in light of the fact that the mischief which the RPA 2001 was designed to avoid was political interference in the functioning of the Commission after it was appointed, it could only mean that the office of Chairman or the office of an ordinary Member is not susceptible to the direction or control of any other person or authority. Dismissal from office is perhaps the ultimate form of control. Thus, the RPA 2001 must be read to reflect that once the members have received their instruments of appointment, there is to be no further political interference in the functioning of the Commission. Therefore, the learned trial judge was correct to find that none of the five members, the Chairman, Vice Chairman or the three Members may be removed from office except on the recommendation of the Tribunal.

Sections 3, 4 and 6 of the RPA 2001 applied.

3. The recommendation of the Prime Minister was not merely a preparatory step on the way to the making of a formal legally binding decision. The body authorised to take the preparatory step was the Tribunal, and the Prime Minister had usurped the authority of the Tribunal in purporting to make the recommendation to the Governor-General. Consequently, his decision was amenable to judicial review.
4. Irrationality, or unreasonableness, takes into account decisions reached in the exercise of a statutory discretion that are unlawful because it can be shown that in reaching the decision the body exercising the discretion has acted on an erroneous view of the applicable law. The Prime Minister's recommendation to dismiss Sir Gerald had been clearly irrational and misdirected in law in view of the Tribunal's Report stating the contrary.

Bromley London Borough Council v Greater London Council and Another [1983] 1 AC 768 applied; **Council of Civil Service Unions and Others v Minister for the Civil Service** [1985] AC 374 applied.

5. The **Civil Procedure Rules 2000** do provide that a court may at the trial of a claim make a direction for the assessment of the quantum of damages and may give directions for the service of witness statements relating to this issue.

Rule 16.4 of the **Civil Procedure Rules 2000** applied.

6. Despite there being no suggestion that any constitutional right had been infringed, Sir Gerald held a statutorily entrenched position of Chairman of the Commission from which he was summarily dismissed on the basis that the Prime Minister had lost confidence in his performance. The learned trial judge ought to have granted Sir Gerald substantial damages as opposed to nominal damages, for the purpose of the award of damages is to vindicate the right. Vindication involves an assertion that the right is a valuable one. In this case, the right violated was in the nature of a constitutional right. Any award of damages for its contravention is bound, to some extent at least, to act as a deterrent against further breaches.

Inniss v Attorney General of Saint Christopher and Nevis [2008] UKPC 42 applied.

7. On the hearing of an application for an administrative order, the learned judge ought to have assessed the costs rather than make an order for prescribed costs.

Rule 56.13(5) of the **Civil Procedure Rules 2000** applied.

JUDGMENT

- [1] **MITCHELL JA [AG.]:** Sir Gerald Watt KCN, QC, is an eminent barrister of Antigua and Barbuda. The Governor-General on the 1st day of October 2005 appointed him to the Antigua and Barbuda Electoral Commission (“the Commission”). He received two instruments of appointment, one as a member of the Commission, and the other as its Chairman. His appointment as Chairman was made by the Governor-General acting on the advice of the Prime Minister, as provided by section 3 of the **Representation of the People (Amendment) Act 2001** (“the RPA 2001”).¹

¹ No. 17 of 2001, Laws of Antigua and Barbuda. “Electoral Commission 3.(1)For the purposes of conducting elections under this Act, there shall be established the Electoral Commission. (2) The Commission shall consist of a Chairman, a Deputy Chairman, and three other Members who shall be persons of Integrity. (3) The Chairman and two other members of the Commission shall be appointed by the Governor-General, acting on the recommendation of the Prime Minister after consultation with the Leader of the Opposition, by instrument under the Public Seal and two other members shall be appointed by the Governor-General, acting on the recommendation of the Leader of the Opposition after consultation with the Prime Minister, by instrument under the Public Seal. (4) [et cetera].”

[2] After controversial general elections were held in Antigua and Barbuda in the month of March 2009, the Prime Minister represented to the Governor-General that the question of the removal of Sir Gerald from the office of Chairman should be investigated. The Prime Minister's authority for making such a recommendation is section 4 of the RPA 2001.² A Tribunal headed by retired Justice of Appeal Ian Forte of Jamaica was appointed and carried out an investigation. The Tribunal issued its report to the Governor General advising that it could not recommend the removal of Sir Gerald, and he having earlier been suspended pursuant to the RPA 2001 prepared to resume his office.

[3] Before Sir Gerald could resume office, he received a letter from the Prime Minister which advised him that he no longer enjoyed the confidence of the people of Antigua and Barbuda and he, the Prime Minister, had written to Her Excellency the Governor-General recommending that Sir Gerald be relieved of his position as Chairman of the Commission. The Governor-General subsequently wrote to Sir Gerald advising him that she had received a letter from the Prime Minister stating:

"Please be advised Your Excellency that Commissioner Sir Gerald Watt Q.C. no longer enjoys my confidence to act in the capacity of Chairman of the Commission. Consequently, I am recommending that you terminate his appointment as Chairman of the Antigua/Barbuda Electoral Commission with immediate effect."³

² Removal from office 4. (1) A member of the Commission may be removed from office only for inability to exercise the functions of his office (whether arising from infirmity of body or mind or any other cause) or for misbehaviour and shall not be so removed except in accordance with the provisions of this section. (2) A member of the Commission shall be removed from office by the Governor-General if the question of his removal has been referred to a tribunal appointed under subsection (3) and the tribunal has recommended to the Governor-General that he ought to have been removed from office for inability as aforesaid or for misbehaviour (3) If the Prime Minister or Leader of the Opposition represents to the Governor-General that the question of removing a member of the Commission under this section ought to be investigated then – (a) the Governor-General may appoint a tribunal which shall consist of a chairman and not less than two other members, selected by the Chief Justice from among persons who hold or have held office as a judge of a court having unlimited jurisdiction in civil and criminal matters in some part of the Commonwealth or a court having jurisdiction in appeals from such a court; and (b) the tribunal shall enquire into the matter and report on the facts thereof to the Governor-General and recommend to him whether the member ought to be removed under this section. (4) [et cetera].

³ See p. 40 of Core Trial Bundle 2(a).

She therefore by letter revoked his appointment as Chairman of the Commission. She advised Sir Gerald that this revocation as Chairman did not affect his position as Member of the Commission. Acting on the advice of the Prime Minister, the Governor General appointed Mr. Samuel to be the new Chairman. Sir Gerald continued to attend meetings of the Commission as a Commissioner but no longer performed the functions of Chairman.

[4] According to Sir Gerald's claim, which was not denied by the Prime Minister, "a squadron of senior members of the Royal Antigua and Barbuda Police Force"⁴ was posted outside the headquarters of the Commission in an effort to bar his entry. The Prime Minister, in the view of Sir Gerald, having failed to remove him from office legally, was not loath to proceed to remove him illegally. According to Sir Gerald, and it is not denied by the Prime Minister, the Prime Minister boasted in Parliament, "at the end of the day a fu me decision."⁵ In Dr. Dorsett's submission the actions of the Prime Minister were a sustained attack on Sir Gerald's integrity and a breach of the statutory protection afforded the members of the Commission who were expected to perform their functions impartially and independently.

[5] Sir Gerald brought an action in the High Court for judicial review of his removal as Chairman. He sought a number of reliefs including an injunction prohibiting Mr. Samuel from acting as Chairman; a declaration that his removal as Chairman was illegal and therefore null, void and of no legal effect; damages on the footing of aggravated damages and vindictory damages; costs; and interest. Remy J dealt with the issues that arose under the two general headings, how is a Chairman of the Commission to be removed, and whether the recommendation of the Prime Minister is reviewable.

⁴ As seen in the affidavit of Sir Gerald A. Watt, KCN, QC filed on 25th January 2011, para. 18.

⁵ See para. 85 of the lower court judgment.

- [6] The learned trial judge after considering the submissions of counsel determined on the first issue that the Prime Minister had no authority under the RPA 2001 to advise the Governor-General to remove Sir Gerald as Chairman. The Chairman as with the other members of the Commission could only be lawfully removed by the Governor-General acting upon the Report of the Tribunal provided for by the RPA 2001. On the second issue, she found that the recommendation of the Prime Minister was amenable to judicial review. She found that the Prime Minister had usurped the authority of the Tribunal in purporting to make the recommendation to the Governor-General after the Tribunal had submitted its report making its recommendation not to remove the Chairman from office. He had acted illegally and the consequential actions of the Governor-General were themselves the fruit of an illegal act. The Governor-General had acted in excess of her jurisdiction as she had strayed outside the terms and authorisation of the governing statute, and her action was therefore illegal. Similarly, the appointment of Mr. Samuel as the replacement Chairman was illegal, of no effect and therefore a nullity. She further found the removal of Sir Gerald to be irrational in the face of the report of the Tribunal, and procedurally unfair in Sir Gerald not having been given an opportunity to make any representations prior to implementing an adverse decision against him. She granted the orders sought by Sir Gerald and awarded him damages to be assessed, but not substantial, aggravated or vindictory damages, and his prescribed costs based on the damages as assessed.
- [7] The Prime Minister and Mr. Samuel appeal the findings of the judgment adverse to them, as does Sir Gerald. On costs, Sir Gerald appeals the prescribed costs order on the basis that rule 56.13(5) of the **Civil Procedure Rules 2000** ("CPR") provides that on applications for administrative orders if the judge makes any order as to costs the judge must assess them.
- [8] At the hearing of the appeal, Mr. Datadin for the Prime Minister and Mr. Samuel commenced by submitting that the Governor-General ought to have been named

as a party to the action as it was her actions in the removal of Sir Gerald and the subsequent appointment of Mr. Samuel that were complained of. Nor could an order be made against her without first giving her an opportunity of being heard. This was the basis of Grounds 4 and 9 of the Notice of Appeal. Mr. Datadin called in support the case of **Hochoy v Nuge and Others**;⁶ the case of **Richard Frederick et al v Comptroller of Customs et al**;⁷ and **V. G. Ramachandran's Law of Writs**.⁸

- [9] Since the judgment of Sir Hugh Wooding CJ in the **Hochoy** case the actions of the Governor-General of Antigua and Barbuda are amenable to judicial review in a suitable case. It is a different matter to assert that the Governor-General should be named as a party and the proceedings personally served on her. As Sir Hugh Wooding CJ said in his judgment:

“ ... I would suggest that in future the practice be followed of naming the Attorney-General as defendant whenever the validity of any act of state done by the Governor-General is being called in question... In my personal view, the ordinary civilities dictate that the same course should be followed in this country as was followed in New Zealand when Cock and others challenged the validity of an appointment made there by the Governor in Council under its Commissions of Inquiry Act, 1908: they sued the Attorney-General—see 28 *NZLR* 405. I think that the same procedure might commendably be adopted here. I recommend accordingly.”⁹

And, Hyatali JA in his judgment in the same case was of the same view. He said,

“As a footnote merely, to this judgement, I would add that the constitutional status of the State is now such that it would be more in keeping with its dignity, if matters of this kind were litigated against the Attorney-General. No prejudice is likely to result from adopting this procedure and I join with the learned Chief Justice in commending it for acceptance.”¹⁰

⁶ (1964) 7 WIR 174.

⁷ Saint Lucia High Court Civil Appeal SLUHCVP2008/0037 (delivered 6th July 2009, unreported).

⁸ Volume II, 6th edn. Eastern Book Company at p.1553.

⁹ P. 181.

¹⁰ P. 185.

I therefore consider that there is no merit in the suggestion that the Governor-General ought properly to have been named as a party and brought before the court. Nor is there any merit in the suggestion that her absence means that no lawful order can be made which binds her. She was properly joined as a party when the Attorney-General was named in her place in accordance with the recommended constitutional procedure.

- [10] There is a fundamental difference between Mr. Datadin and Dr. Dorsett on the interpretation of membership of the Commission. From this difference flow the different views on the power of the Governor-General to remove Sir Gerald as Chairman on the recommendation of the Prime Minister. This was the statutory interpretation issue that formed the basis of grounds 1, 2 and 3 of the notice of appeal. Mr. Datadin submitted to the Court of Appeal, as he did in the court below, that section 3 of the RPA 2001 created a Commission of 5 members two of whom were officers, the Chairman and the Vice-Chairman. The five members once appointed may not be removed by the Governor-General save in the manner prescribed by section 3.¹¹ The member who is the Chairman is to be appointed as such by the Governor-General based on the advice of the Prime Minister, and the Vice Chairman is appointed on the advice of the Leader of the Opposition. He who appoints can disappoint or remove from office. Mr. Datadin reads the RPA 2001 as providing that the Chairman and Vice Chairman may be removed from those offices on the recommendation of the appropriate political leader, but they are otherwise secure in their offices as members. The chairmanship was a mere additional function performed by a member of the Commission, which function is not itself entrenched. Dr. Dorsett on the other hand is of the view that there are five offices, the office of Chairman, the office of Vice Chairman, and three offices

¹¹ See note 1 above.

of Member with a capital “M”. None of these five offices may be removed by the Governor-General save in the manner prescribed by section 4.¹²

[11] The learned trial judge accepted the interpretation offered by Dr. Dorsett. I have no difficulty in finding that she was right to do so. Sections 3 and 4 of the RPA 2001 set out above make a clear distinction between a member with a capital “M” and a member with a common “m”. So, section 3(2) provides that the Commission shall consist of a Chairman, a Deputy Chairman, and three other Members (with a capital “M”).¹³ Those three members hold the office of Member. Section 4(2) by contrast provides that a member (with a common “m”) of the Commission shall be removed only if recommended by the tribunal.¹⁴ It seems clear to me that the learned trial judge was correct to find that none of the five members, the Chairman, Vice Chairman, or the three Members, may be removed from office except on the recommendation of the Tribunal. The fact that Sir Gerald received two instruments of appointment, one as Chairman and one as a member, is neither here nor there. It was an oversight to have sent him an appointment as member, since it was not required as he was not appointed a Member of the Commission (with a capital “M”). One instrument of appointment, that as Chairman, was all that was required.

[12] In coming to her decision, the learned trial judge found it helpful to read section 3(2) of the RPA 2001 as follows:

“The Commission shall consist of a Chairman, a Deputy Chairman and three other **PERSONS KNOWN AS** Members and who shall be persons of integrity.”¹⁵

She was of the view that inserting the words in bold to the section would remove any seeming confusion about a “member” as opposed to a “Member”. In my view,

¹² See note 2 above.

¹³ See note 1 above.

¹⁴ See note 2 above.

¹⁵ See para. 34 of lower court judgment.

the insertion of the added words is not strictly necessary. The ellipsis is obvious when the capitalisation is used as a guide, and the requisite ordinary meaning is given to the words used in the section.

[13] The mischief which the RPA 2001 was designed to avoid was political interference in the functioning of the Commission after it was appointed. The wording of section 6(4) of the RPA 2001 makes that clear.¹⁶ The Commission is to act impartially and independently of any political or governmental influence. They shall not be subject to the direction or control of any other person or authority. Dismissal from office is perhaps the ultimate form of control. But, the section requires that while the politicians have their role to play in ensuring that the different political interests are represented in the formation of the Commission, once the members have received their instruments of appointment, there is to be no further political interference in the functioning of the Commission. The principle would be equally applicable whether it is the office of Chairman or the office of an ordinary Member.

[14] Mr. Datadin submitted that the learned trial judge's restriction of the cross-examination of Sir Gerald to exclude matters which related to his performance and conduct while he was the Chairman of the Commission was an error. This formed ground 5 of the notice of appeal. The Prime Minister's case was that the failings of Sir Gerald were so monumental that there was a disaster when the nation went to the 2009 general elections. The nation went to the polls without a lawful electoral register and with many of the polling stations late in being set up for polling on election day. The learned trial judge thereby prevented the Prime Minister from establishing the bona fides of his recommendation to the Governor-General. However, I cannot see the relevance of this line of cross-examination. Sir Gerald

¹⁶ 6(4) The Commission shall, in the exercise of its functions act impartially and independently of any political or governmental influence and shall not be subject to the direction or control of any other person or authority. The Commission shall conduct its affairs in a transparent manner, consistent with good election management practice.

had already been through an examination by the Forte Tribunal, which had found his conduct blameless. There was no point in rehashing the evidence before the Tribunal and retrying the question, which, in any event, was not relevant to the issues in the trial before her, namely, the legality of the procedure followed in the removal of the Chairman. There is no merit in this ground of appeal.

[15] Grounds 6, 7 and 8 relate to the argument that the recommendation of the Prime Minister was not reviewable, as it was a recommendation, nothing more. Mr. Datadin submitted that the recommendation of the Prime Minister was part of a two-step process which was overtaken by the actions of the Governor-General. The word “recommendation” ordinarily means the offering of advice and should not be taken to be a binding decision. The Governor-General carried out the act of disappointment. She could have refused to follow the recommendation, especially if it was illegal. The learned trial judge had concluded that the recommendation of the Prime Minister was amenable to review as it was not merely a preparatory step on the way to the making of a formal legally binding decision. The body authorised to take the preparatory step was the Tribunal, and the Prime Minister had usurped the authority of the Tribunal in purporting to make the recommendation to the Governor-General. This conclusion of the learned trial judge appears sound and well justified to me, and I find no merit in this ground of appeal.

[16] The finding of the learned trial judge that the act of the Prime Minister had been illegal, irrational and procedurally unfair formed the basis of ground 10. She found that the Prime Minister’s making of the recommendation was illegal and therefore subject to the supervisory jurisdiction of the court. She found that consequential decisions or actions emanating from that illegal recommendation were themselves the fruit of an illegal act. The action of the Governor-General in terminating Sir Gerald and appointing Mr. Samuel in his place had been similarly illegal as she had strayed outside the terms or authorised purposes of the governing statute.

She found that the Prime Minister's recommendation to dismiss Sir Gerald, coming shortly after the Tribunal had issued its Report clearing him from any blame and commending his performance, had been misdirected in law and met Lord Diplock's classification¹⁷ of "irrationality". Irrationality, or unreasonableness, takes into account decisions reached in the exercise of a statutory discretion that are unlawful because it can be shown that in reaching the decision the body exercising the discretion has acted on an erroneous view of the applicable law.¹⁸ This conclusion is based on sound reason, and I see no merit in this ground of appeal.

[17] Finally, in ground 11, Mr. Datadin submitted that the award of an order for damages to be assessed had not been based on the evidence and was wrong. Sir Gerald was obliged to lead evidence at the trial of all his loss and damage suffered and he is not now entitled to introduce this new evidence. However, CPR 16.4 provides that a court may at the trial of a claim make a direction for the assessment of the quantum of damages and may give directions for the service of witness statements relating to this issue. I find that there is no merit in this ground. Since the judge did not give directions for the hearing of the assessment I would return the question of assessment to a court below for the necessary directions to be given and for the hearing to take place.

[18] Sir Gerald's counter appeal raised two issues, first that of his entitlement to substantial, aggravated and vindictory damages and the learned trial judge had been wrong to conclude that he was not entitled to either of them, and second to the correct order for costs that should have been made.

[19] The learned trial judge came to the view that while Sir Gerald was entitled to damages he had not made out a case for the "substantial damages" which he claimed, nor for the grant of aggravated and/or vindictory damages. Mr. Datadin

¹⁷ See *Council of Civil Service Unions and Others v Minister for the Civil Service* [1985] AC 374 at 410.

¹⁸ See *Bromley London Borough Council v Greater London Council and Another* [1983] 1 AC 768.

submits that there was no evidence of damages of any sort, and no award should have been made.

- [20] The principles on which the question of damages is to be considered in cases of breach of fundamental rights have been usefully analysed in the Privy Council case of **Inniss v Attorney General of Saint Christopher and Nevis**.¹⁹ In that case, the Registrar of the High Court and Additional Magistrate had her two-year contract summarily terminated after a period of one year and nine months without any recommendation by the Judicial and Legal Services Commission. She claimed a declaration that her dismissal was null and void as a contravention of section 83(3) of the Constitution and damages for breach of her constitutional rights including exemplary damages. Lord Hope of Craighead, in delivering the advice of the Board, after considering the authorities, said:

“The purpose of the award, whether it is made to redress the contravention or as relief, is to vindicate the right. It is not to punish the Executive. But vindication involves an assertion that the right is a valuable one, as to whose enforcement the complainant herself has an interest. Any award of damages for its contravention is bound, to some extent at least, to act as a deterrent against further breaches. The fact that it may be expected to do so is something to which it is proper to have regard.”²⁰

And, applying those principles to the case, the Board was satisfied that a relatively substantial award was justified. They awarded Ms. Inniss her contractual damages of \$51,025.40 and an amount of vindictory damages of \$50,000.00 for the contravention of her rights under section 83(3) of the Constitution.

- [21] There is no suggestion that any constitutional right of Sir Gerald has been infringed. However, this was no ordinary breach of contract. This was a case where a senior barrister, who can be assumed to have met the criterion in the RPA 2001 for his appointment, of his being a person of integrity, and who held a

¹⁹ [2008] UKPC 42.

²⁰ Ibid, para. 27.

statutorily entrenched position of Chairman of the Commission was summarily dismissed on the basis that the Prime Minister had lost confidence in his performance. I have no doubt that the sustained effort of the Prime Minister to have Sir Gerald removed from office undermined and cast doubt on his integrity and good name and was an improper attack on the independence and impartiality of the Commission. In my view the learned trial judge should not have been hesitant to find the claim for substantial, as compared to nominal damages, to have been made out by these circumstances. The principles established in **Inniss'** case are equally applicable in a public law case of this kind, which by its nature is a protest at an illegal interference by the political directorate of an electoral process which is required by the statute to be free from political interference. The process is one of the bastions of democracy, and any unjustified and illegal attack on it is deserving of vindictory damages. The right violated here was in the nature of a constitutional right, despite the fact that it was not entrenched in the Constitution. An additional award of damages, not necessarily of greatly substantial size, is needed to reflect the sense of public outrage and emphasise the importance of the principle in preserving the democratic process. I would grant Sir Gerald's appeal on this ground, and leave the assessment of vindictory damages to the court below.

[22] Similarly, on the question of the correct costs order that should have been made by the learned trial judge, the terms of CPR 56.13(5) are clear, "If the judge makes any order as to costs the judge must assess them." The judge ought to have assessed the costs rather than make an order for prescribed costs. I have not had any basis on which to assess the costs presented to me, and I would not do so in a vacuum. I am constrained to leave the proper amount of costs to be assessed by the court below at the time when damages come to be assessed.

[23] For the reasons set out above, I would dismiss the appeal of the Prime Minister and Mr. Samuel and uphold the judge's declarations, save as follows. I would

allow the cross-appeal of Sir Gerald and I would vary the orders as to damages and costs made by the learned trial judge to read:

1. The 1st and 2nd Defendants to pay to the Claimant general damages and vindictory damages to be assessed.
2. Costs to the Claimant to be assessed.

Don Mitchell
Justice of Appeal [Ag.]

I concur.

Dame Janice M. Pereira
Chief Justice

I concur.

Davidson Kelvin Baptiste
Justice of Appeal