**GRENADA**

**IN THE COURT OF APPEAL**

**CIVIL APPEAL NO. 8 OF 1999**

BETWEEN:

**ATTORNEY GENERAL OF GRENADA**

Appellant

and

**THE GRENADA BAR ASSOCIATION**

Respondent

**Before:**

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| The Hon. Mr. Justice C. M. Dennis Byron | Chief Justice |
| The Hon. Mr. Justice Satrohan Singh | Justice of Appeal |
| The Hon. Mr. Justice Albert Redhead | Justice of Appeal |

**Appearances :**

Mr. Allan Alexander S.C.; Mr. Keith Friday and Mr. Rohan Phillip for the Appellant
Mr. James Bristol; Mr. Reynold Benjamin and Mr. Alban John for the Respondent
Mrs. Celia Edwards for Mr. Malcolm Holdip (out of courtesy to the Court)

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1999: November 23;
2000: February 21

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**JUDGMENT**

[1] **BYRON, C.J.:** This is an appeal against a judgment of Alleyne J. dated 9th February, 1999 in which he declared that:

[a] the Office of Director of Public Prosecutions is not subject to termination by effluxion of time;

[b] the contractual clause appointing Mr. Malcolm Holdip to the office of Director of Public Prosecutions for two years is null, void and of no effect, and;

[c] Mr. Holdip holds office subject to termination in accordance with the provisions of the Constitution and not otherwise.

**The Factual Background**

[2] By an instrument dated 29th November, 1996, His Excellency the Governor-General appointed Mr. Malcolm Holdip to the office of Director of Public Prosecutions for a period of two years with effect from 2nd January 1997, giving effect to a contract into which Mr. Holdip had entered. At the end of the two years the Government refused to renew his contract. These proceedings were instituted by the Grenada Bar Association. Mr. Holdip remained in the post pending the outcome of the case, with the consent of all parties. At the commencement of the appeal, Mrs. Edwards informed the court that Mr. Holdip had voluntarily demitted office after judgment had been given in the court below and had left Grenada presumably for greener pastures.

**The Appeal**

[3] The learned trial Judge had made a comprehensive review of the constitutional and legal principles applicable. Counsel for the appellant generalized the grounds on which he determined to challenge the decision under the broad questions:

[a] Whether the office of the Director of Public Prosecutions was endowed with tenure by the Constitution.

[b] Did the agreement of the Director of Public Prosecutions to a term operate as a waiver or estoppel?

[c] Did the appointment to an unconstitutional term make the entire appointment invalid, or could it be severed?

**The Constitutional Provisions**

[4] The relevant provisions of the Constitution of Grenada are to be found in section 86. They are sub-sections (1), (5), (6) and (7).

> "86(1) The Director of Public Prosecutions shall be appointed by the Governor-General acting in accordance with the advice of the Judicial and Legal Services Commission.
>
> (5) Subject to the provisions of subsection (7) of this section, the Director of Public Prosecutions shall vacate his office when he attains the prescribed age.

(6) A person holding the office of Director of Public Prosecutions 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.

(7) The Director of Public Prosecutions may be removed from office by the Governor-General if the question of his removal from office has been referred to a tribunal appointed under subsection (8) of this section and the tribunal has recommended to the Governor-General that he ought to be removed for inability as aforesaid or for misbehaviour".

[5] The question raised by this section of the Constitution is in reality one of interpretation: Does the exercise of the power of appointment under section 86(1) of the Constitution create an appointment until the prescribed age or does it allow the Governor-General to appoint for a shorter term by agreement or otherwise? The appellant contends that "appointment" does not stipulate a period of time, and "vacate office" refers simply to the time beyond which the office could not be held. The respondent contends that the combined import of the section is that the appointee holds office until he reaches the prescribed age of 55 years subject only to removal for inability and misbehaviour.

**The Principles of Interpretation**

[6] The principles that govern the interpretation of Constitutions have been considered from time to time. As a suitable starting point I would like to adapt the elegant description of the basic principle of statutory interpretation set out by Sir Vincent Floissac C.J. in **Savarin v Williams** Dominica Civil Appeal No.3 of 1995 at p.3. The basic principle is that the interpretation of every word or phrase of a constitutional provision is derived from the intention of the framers of the Constitution in regard to the meaning that word or phrase should bear. That intention is an inference drawn from the primary meaning of the word and phrase with such modifications as may be necessary to make it concordant with the context of the Constitution. In this regard the context of the Constitution comprises every other word and phrase used in the Constitution as a whole, all the implications there from and all relevant surrounding circumstances which may properly be used as indications of the intention of the framers of the Constitution. The relevant surrounding circumstances include the antecedents from which underlying principles are drawn. In the well known case of **Minister of Home Affairs v Fisher** (1973) AER 21 Lord Wilberforce reminds that

these antecedents include the European Convention for the protection of Human Rights and Fundamental Freedoms and the United Nations Universal Declaration of Human Rights 1948 which encourage a generous interpretation avoiding 'the austerity of tabulated legalism' to ensure that the full benefit of the constitutional provisions are enjoyed. In **Dow v Attorney General** [1992] LRC (Const) 623 Aguda J.A. painted his summation at 668:

> "In my view the overriding principle must be an adherence to the general picture presented by the Constitution into which each individual provision must fit in order to maintain in essential details the picture of which the framers could have painted had they been faced with the circumstances of today."

[7] The nature of a Constitution requires that a broad, generous and purposive approach be adopted to ensure that its interpretation reflects the deeper inspiration and aspiration of the basic concepts on which the Constitution is founded. Respect must be paid to the language that is used and its context, by considering all relevant provisions bearing on the subject for interpretation as a whole, and to the traditions and usages which have given meaning to that language, in order to effect the objective of the Constitution. In order to do this the court must have a sober and objective appraisal of the general canvas upon which the details of the constitutional picture are painted.

**The Nature of the Constitution**

[8] In our jurisdiction there have been several cases which have been decided on the premise that the Constitutions of the Commonwealth Caribbean have adopted the structure of dividing the agencies of government into the three branches or arms of Executive, Legislature and Judiciary. This is based on the doctrine of the separation of powers in which the functions of these branches are entrusted solely to the appropriate branch of government. Thus the Constitutions have been held to have institutionalized a political theory intended to establish a system that provides mutual checks and balances, thereby limiting arbitrariness and abuse of power in Government and promoting the liberty of the individual. Chapter 1 of the Grenada Constitution contains provisions for the protection of fundamental rights and freedoms including the right to the protection of the law. Section 8 of the Constitution mandates that every person charged with a criminal offence "shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law". This provision intrinsically links criminal justice with the concept of an

independent and impartial judiciary. This provision makes it clear that the independence and impartiality of the judiciary is a right granted to and for the benefit of the citizen as an incident of the constitutional guarantee of his right to have a fair trial.

[9] Security of tenure is a cornerstone of the constitutional provisions for judicial independence. These provisions prescribe that the appointment of the judicial officer is an appointment until he reaches retirement age subject to a condition permitting his removal for inability or for misbehaviour. This is intended to insulate him from the temptation to cater to the wishes of the political directorate to preserve or prolong his continuation in office.

**The Context of the Constitution as a Whole**

[10] The late distinguished Sir Allen Lewis C.J., in "The Separation of Powers – its relevance for Parliamentary Government in the Caribbean" an essay published in the West Indian Law Journal October 1978 page 4, said:

> "Further provision is made for restricting the exercise of arbitrary power by institutionalizing the distinction between the office of the Attorney General, with responsibility for administration of legal affairs of the State, including the preparation of legislation consistent with legal interpretation of the Constitution, and that the Director of Public Prosecutions, a legal officer with the secured tenure and independent status of a judge, with responsibility for the conduct of criminal proceedings."

[11] Counsel for the respondent prepared a table, to demonstrate that the theory referred to by Sir Allen, found expression in the Constitution of Grenada. Section 71(6) prescribes that in the exercise of the functions vested in him by the Constitution, the Director of Public Prosecutions "shall not be subject to the direction or control of any other person or authority". Section 84(3) specifically exempts the Director of Public Prosecutions from the application of section 84, which confers responsibility on the Public Service Commission for the appointment, and disciplinary control of public officers. Instead provision is made for the removal of the Director of Public Prosecutions from office only on the ground of inability and misbehaviour and only by the special procedure set out in section 86(6)-(9). It is significant that the provisions for the removal of a Judge set out in the Courts Order section 8(4)-(9) prescribe an identical formula, and limit the power of removal to the

identical grounds of inability and misbehaviour. With regard to the provisions protecting pension, section 93(3) of the Constitution makes equal provision for the Judge and the Director of Public Prosecutions, and with regard to salary, the Judge's protection prescribed by the Court's Order section 11(1)(b) and 11(2) is similar to that of the Director of Public Prosecutions prescribed by section 80(3) and 80(4) of the Constitution respectively.

[12] I am satisfied that the context of the Constitution does demonstrate that the office of Director of Public Prosecutions is required to be endowed with the same qualities of independence as the judiciary to ensure that the criminal justice system is independent of political and other improper influences and operates on the lofty principles of equality before the law. Thus, the general picture of the Constitution of Grenada depicts the judiciary as being independent and impartial, in a state based on the separation of powers. Under the umbrella of the judiciary stands the Director of Public Prosecutions as one of the guardians, being independently responsible for the institution and conduct of criminal proceedings, according to the same high standards of equality before the law, fairness and freedom from political or other improper influences. Against this background section 86 must be interpreted to maintain the essential characteristics of that picture. It would seem to my eye, that any diminution in the security of the tenure of the Director of Public Prosecutions will result in a diminution of the independence of the office of Director of Public Prosecutions, and would be out of harmony with the general picture. The details of each section of the Constitution must fit into the overall scheme in the same manner that the framers of the Constitution would have conceived. In my view it seems clear that they would have unhesitatingly ensured that the Director of Public Prosecutions was insulated from political and other improper influences to the same extent as the judiciary.

**The Language**

[13] Counsel for the appellant gave an enlightening and learned discourse on the term tenure which has its origins in landholding in feudal times and signifies a right by which land or an office is held and the mode of the relevant holding or occupation. He argued that the Commonwealth Constitutions conferred the right to hold office by using the enacting

clause "shall hold office", and that the absence of such a clause in section 86 imports the view that no right or mandate to hold the office was created for any particular period.

[14] He submitted that in the absence of such mandate it was for the executive to do fix the duration by way of contract. He relied on **Thomas v Attorney General** (1981) 32 W.I.R. 375 at 386 where Lord Diplock said:

> "The functions of the Police Service Commission fall into two classes: (1) to appoint officers to the Police Service, including their transfer and promotion and confirmation in appointments; and (2) to remove and exercise disciplinary control over them. It has no power to lay down terms of service for police officers; this is for the legislature and, in respect of any matters not dealt with by legislation (whether primary or subordinate) it is for the executive to deal with in its contract of employment with the individual police officer. Terms of service include such matters as (a) the duration of the contract of employment, eg for a fixed period, for a period ending on attaining retiring age, or for a probationary period as is envisaged by the reference to "confirmation of appointments" in section 99(1); (b) remuneration and pensions; and (c) what their Lordships have called the "code of conduct" that the police officer is under a duty to observe."

[15] I do no think that the quotation supports his contention because Lord Diplock clearly states that the power of appointment does not carry with it the power to lay down terms of service, including the duration of the appointment. The point is emphasized in **Abeywickrema v Pathirana & Ors.** (1987) LRC (Const) 999 a case emanating from Sri Lanka. At page 1012 Sharvananda C.J. explained that the relationship that results from employment by the State, or Government, is usually governed by status. The attachment of rights and duties is governed by public law and not by contract as these rights and duties are subject to variation by legislative prescription without the consent of the employee. In Salmond Jurisprudence (12th ed) p.240 "Status signifies a man's personal condition, so far as it is imposed upon him by the law without his own consent, as opposed to the condition which he has acquired for himself by agreement". This rationale supports the conclusion that the duration of the appointment of the Director of Public Prosecutions is less likely to be determined by any contractual arrangement than by the constitutional status of the Office, as evidenced by the rules prescribed by the Constitution itself.

[16] It is first necessary, therefore, to examine the legislative instrument, that is the constitution, to see whether section 86 provides the answer to the issue of the duration of employment.

**The Meaning of Appoint**

[17] The language of Section 86(1) is clear, concise and imperative. It simply states that the Director of Public Prosecutions "shall be appointed by the Governor-General". The subsection does not specify a period of time during which the appointment is to have effect. It does not stipulate that any terms and conditions of service be specified as part of the appointing process. In the context of the section the term appoint could mean no more than nominate or declare the occupant of the office of Director of Public Prosecutions. That is the only function of the Governor-General in relation to this matter. When the Governor-General has done that, the office is filled by the person so appointed.

[18] Section 86(5) uses the phraseology " the Director of Public Prosecutions shall vacate his office when he attains the prescribed age". It is the interpretation of this subsection that is crucial. The appellant contends that it does no more than specify the maximum age beyond which a person cannot hold the office. I would say, however, that the phrase could only have that meaning if the Director could be removed from office prior to his attainment of the prescribed age. Quite clearly, he should be in office at that date if he could not be removed earlier. The appellant relied on the first instance decision of Matthew J. (as he then was) in **Emma Hippolyte v Attorney General,** St. Lucia No.512 of 1993. Somewhat ironically learned Senior Counsel for the appellant in these proceedings is relying on this judgment which rejected the arguments he had made as counsel for the plaintiff in the Hippolyte case. In that case the Director of Audit claimed that she was unlawfully removed from her post. In 1991 she had entered into an agreement to continue in the post for a two-year period, and on its expiration the government refused to renew. The wording of the relevant provision, section 90(1), (5) and (6) of the St. Lucia Constitution, is identical with the wording of section

86(1)(5) and (6) of the Grenada Constitution. At p.27 Matthew J. said:

> " Section 90(5) of the constitution is a prescription as to the maximum age for remaining in office, nothing more"

Nonetheless, he went on to find that the Governor-General did not appoint the plaintiff for any specific period, and that it was the Public Service Commission, who without the power to appoint, fixed the duration of her employment. He concluded that was a usurpation of the Governor-General's function and was therefore ultra vires. This decision was premised on his conclusion that the power of appointment, which the Constitution vested in the Governor-General, included the power to fix the duration of service.

[19] The learned trial Judge in this case referred to this opinion as *obiter*, and indicated that he disagreed with and refused to follow it. The rules of *stare decisis* do not require that any first instance decision is binding, and we are at liberty to consider the question afresh and rule on its correctness.

[20] I can point out immediately, that in coming to his conclusion Matthew J in breach of the principle of construction requiring him to consider the context of the words to be interpreted, did not consider the import of the provisions of section 90(6) which is the equivalent of section 89(6) of the Grenada Constitution. Perhaps it was for that reason that he did not find the Australian case **The Waterside Workers' Federation of Australia v J. M. Alexander Ltd.** (1918) 25 C.L.R. 434 relevant. In that case the appellants brought proceedings alleging that the respondents had been in default of an award of the Commonwealth Court of Conciliation and Arbitration. The respondents challenged the legality of the court in as much as under the relevant legislation the President was appointed for seven years only. The court had to consider whether section 72 of the Constitution of Australia which prescribes that:

> "Justices of the High Court and of the other Courts created by the Parliament shall be appointed by the Governor-General in Council, and shall not be removed except by the same authority on address from both Houses of Parliament praying for such removal on specified grounds"

prevented the conferment of a term of years on the President of the Court.

[21] That Section 72 (supra) combines the provisions of section 86(1and 86(6) of the Grenada Constitution. The power of appointment is simply "shall be appointed", with no stipulation as to time as in 86(1). The power of removal is similar to that in section 86(6) and (7). It should be noted that the section did not enact that the judges "shall hold office", yet the

tenure of the judge was held to be prescribed. The court consisted of seven members and they each gave reasoned decisions. A majority of five held that section 72 of the Constitution requires that every judge be appointed for life. If the Australian constitution had provided that the office be vacated at a prescribed age, then the office would have been held to that age instead of for life. Griffiths C.J. said:

> " These words, which apply to all Federal Judges alike, have always been assumed, and I think rightly, to mean that the tenure of all Federal Judges shall be for life, subject to the power of removal".

Barton J said:

> " Words could not more clearly indicate that unless such an address be adopted he is entitled to hold office as long as he lives. It was indeed argued that a tenure for any defined period, however brief, was compatible with the provision. That view is, I think, completely untenable. There are no words indicating power to limit the tenure in that manner, and having regard to the whole scheme of Chapter III, and to the fact that an appointment during good behaviour without more has always been construed as being for life, subject to that condition, unless it is coupled with an express limitation of tenure in point of time, I do not think that the argument necessitates extended discussion."

It was pointed out by Isaacs and Rich JJ in a joint opinion that the power to fix a term gave the power to fix any term.

[22] In my view there is little difference in the concept of fixing a term that is determinable on the occurrence of an event and one that is determinable on the arrival of a date, for example, on the expiration of two years. Carrying that proposition to its extreme, if the Governor-General may fix any term he chooses, he may choose one which is determinable by the occurrence of an event such as, until a member of Parliament shall present an address in the House, expressing want of confidence in the Justice, irrespective of misbehaviour. This, quite obviously, would nullify the provisions in 86(6). If the provisions in 86(6) are to have effect, they must operate to prevent the exercise of any power to have the Director of Public Prosecutions removed from office except for the reasons and in the manner it expresses and permits. It would seem therefore that the power of appointment does not include the concept that it is at or during the pleasure of the Governor-General, as it is clear that such pleasure may be in conflict with section

86(6). It would seem that the effect of the subsection is to provide that the appointment will last until the prescribed age on the condition that the officer is able to perform and is of good behaviour.

[23] The law is well settled that an appointment during good behaviour is an appointment for life, or until retirement age and can be terminated only for misbehaviour. This principle has ancient origins and the current text books still refer to the 17th century case **Harcourt v Fox** (1693) Show Parl Cas 158 in support of the proposition. In more modern times the principle finds expression in **Halsburys Laws of England** (4th ed.) Vol. 8(2) para 903:

> "The grant of an office during good behaviour creates an office for life or until retirement age determinable upon breach of the condition."

[24] I accept, and apply the rationale in the majority of the Waterside case. Unfortunately, I do not agree with the conclusion of Matthew J. in the Hippolyte case that the constitutional provisions on which he ruled enabled the appointment for a term of years, and rule it *per incuriam*. In my view, the language of the section taken as a whole leads to the conclusion that the Constitution prescribes that the Governor-General appoints during good behaviour and ability to perform; he does not appoint during pleasure. Consequently, the holder of the office of Director of Public Prosecutions cannot be removed on any ground other than inability or misbehaviour before he attains the prescribed age. This leads inevitably to the ruling that he cannot be removed on the basis of the effluxion of time.

**Waiver and Estoppel**

[25] It was argued that the Director of Public Prosecutions had waived his right to remain in office until retirement age or was estopped from insisting on it by his own agreement to a lesser term. As I said earlier, the provision providing a safeguard is for the benefit of the citizen, as an incident to his right to a fair trial before an independent and impartial judiciary, and it is not the right of the appointee to give away. Further, an agreement which could lawfully avoid an institutional safeguard for the independence of the office the confer such a term would be a device for securing an amendment to the Constitution. This of course would offend the rule that no amendment of an entrenched provision of the

Constitution, such as section 86, could have any effect unless the procedure set out in section 39 of the Constitution is followed.

[26] Wade on Administrative Law (6th ed) at p.262 makes the point that in public law the most obvious limitation on the doctrine of estoppel is that it cannot be invoked so as to give an authority powers which it does not in law possess. In other words, no estoppel can legitimate action, which is ultra vires, and at p.264 it adds that the primary rule is that no waiver of rights and no consent or private bargain can give a public authority more power than it legitimately possesses. Once again, the principle of ultra vires must prevail when it comes into conflict with the ordinary rules of law. The institutional safeguards of the independence of the judiciary do not belong to the judicial officer for him to surrender as he pleases, they are rights which are embedded in the citizen to protect his constitutionally guaranteed rights to the rule of law, equality before the law and fair trial. I do not think that the courts could allow the consent of an office holder to any erosion of the constitutional safeguards to his independence should be allowed to have greater effect than the interest of the public in the preservation of their rights to a free and independent judicial system. In the case of **Tellis & Ors v Bombay Municipal Corp & Ors** [1987] LRC (Const) 351 Chandrachud C.J. goes even further because he concluded that even where the rights were for the benefit of the individual he could not waive them. He said at 366:

> "the high purpose which the Constitution seeks to achieve by the conferment of fundamental rights is not only to benefit individuals but to secure the larger interests of the community. No individual can barter away the freedoms conferred upon him by the Constitution." This would refer to any right as the constitution makes no distinction between fundamental rights enacted for the benefit of an individual and those enacted in the public interest or on the grounds of public policy. The argument on estoppel and waiver must be rejected."

**Severance**

[27] In disposing of the final issue as to whether the appointment of the Director of Public Prosecutions was valid notwithstanding the unconstitutionality of the term of 2 years being agreed to I can do no better than to cite with approval the words of the learned trial judge:

> "I am of the opinion that that part of the instrument of appointment which reflects a lawful exercise of a constitutional power, that is the appointment by the Governor-General on the advice of the Judicial and Legal Services Commission, can and

should be severed from that part of the instrument which reflects the *ultra vires* exercise of a presumed power, that is, the limitation of the term of appointment for a duration which falls short of the prescribed retirement age. I find support for this proposition in the judgment of Lord Goff of Chieveley in the case of **Commissioner of Police v Davis**, Privy Council Appeal No.52 of 1992 (Bahamas) where, while admittedly addressing the question of severability of legislative provisions, His Lordship made the following statement, which I think equally applicable to the question before me. The Learned Law Lord, in applying the test of substantial severability, said "this test requires that when the Court must modify the text in order to achieve severance this can only be done `when the Court is satisfied that it is effecting no change in the substantial purpose and effect of the impugned provision'." The substantial purpose of the Governor-General, on the advice of the Judicial and Legal Services Commission, was, in my view, clearly to appoint a Director of Public Prosecutions for Grenada in accordance with the provisions of the Constitution. The limitation of the term was merely incidental."

**Order**

[28] I would therefore dismiss the appeal and confirm the declarations of the learned trial Judge except for the order that Mr. Holdip holds office, which by the consent of the parties we accept is no longer accurate as he has since the hearing at first instance voluntarily relinquished office and moved on to other possibly greener pastures. Costs to the respondent fit for two counsel.

**DENNIS BYRON**
Chief Justice

I concur

**SATROHAN SINGH**
Justice of Appeal

I concur

**ALBERT REDHEAD**
Justice of Appeal