GRENADA

IN THE COURT OF APPEAL

HCVAP 2006/034

BETWEEN:

THE ATTORNEY GENERAL OF GRENADA

Appellant

and

[1] PETER CHARLES DAVID
[2] SUPERVISOR OF ELECTIONS
[3] BRENDA HOOD

Respondents

Before:

The Hon. Mr. Michael Gordon, QC	Justice of Appeal
The Hon. Mr. Denys Barrow, SC	Justice of Appeal
The Hon. Mr. Hugh A. Rawlins	Justice of Appeal

Appearances:

Mr. R. N. A. Henriques, QC and Mr. Hugh Wildman for the Appellant
Dr. Francis Alexis, Mr. Ruggles Ferguson and Mr. Anselm Clouden for the First Respondent

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2007: March 26, June 7;
2008: June 2.

JUDGMENT

[1] GORDON, J.A.: After a hearing in this matter in March 2007, the court issued a written decision in June of that year which effectively invited written submissions from counsel for the parties on the nature of the decision from Benjamin J against which it was sought to appeal and the jurisdiction of the court to entertain this appeal. At the very considerable risk of repetition I believe that substantial portions of the judgment referred to above should be repeated here to establish the context for this present decision.

"Before this court is an application by the Attorney General for an extension of time within which to appeal against the decision of Benjamin J, given on 12th September 2006, striking out the Fixed Date Claim Form that commenced the proceedings from which the application arises. The judge decided the court had no jurisdiction to entertain a challenge to the validity of the election of the first respondent (the respondent) as a member of the House of Representatives, brought by Fixed Date Claim Form procedure.

At an earlier stage the Attorney General filed a Notice of Application in this court for leave to appeal against the decision of Benjamin J. A Notice of Appeal accompanied the Notice of Application for leave to appeal. That Notice of Application was heard by teleconference by a single judge on 31st October 2006 and was dismissed on the ground that no leave could be given because if the decision from which it was sought to appeal was other than a final decision there was no jurisdiction in this court to hear the matter and if the decision was a final decision then no leave was required.

Thereafter the usual steps in the progress of an appeal were taken, including the preparation of a Record of Appeal and the filing and exchange of skeleton arguments.

On 5th December 2006 when the appeal came on for hearing counsel for the respondent objected that there was no appeal before the court because the Attorney General had filed no Notice of Appeal. Crown Counsel in the Attorney General's chambers subsequently explained that he had proceeded on the thinking that because a Notice of Appeal had been filed with the Notice of Application for leave to appeal, there was no necessity to file another Notice of Appeal. This court upheld the objection and dismissed the proceedings.

In consequence the Attorney General applied by notice filed on 20th December 2006 for an extension of time within which to appeal and it was that application that came before us.

Before deciding that application it seems to me there is a precedent issue that must be decided, which is whether an appeal lies from the decision of Benjamin J and that notwithstanding the decision of the single judge referred to at paragraph 2 above. That issue arises upon a consideration of the terms of section 37 of the Constitution of Grenada, pursuant to which the Attorney General sought a declaration that Mr. David was not validly elected because he was disqualified on account of his Canadian citizenship. Section 31 of the Constitution provides that no person shall be qualified to be elected as a member of the House of Representatives if he is, by virtue of his own act, under any acknowledgement of allegiance, obedience or adherence to a foreign power or state.

Section 37 of the Constitution provides:

> "37 (1) The High Court shall have jurisdiction to hear and determine any question whether –

(a) …
(b) any person has been validly elected as a member of the House of Representatives;
(c) …
…
(5) Parliament may make provision with respect to –

> (a) the circumstances and manner in which and the imposition of conditions upon which any application may be made to the High Court for the determination of any question under this section; and
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> (b) the powers, practice and procedure of the High Court in relation to any such application.

(6) An appeal shall lie as of right to the Court of Appeal from any final decision of the High Court determining such a question as is referred to in subsection (1) of this section.
(7) No appeal shall lie from any decision of the Court of Appeal in exercise of the jurisdiction conferred by subsection (6) of this section and no appeal shall lie from any decision of the High Court in proceedings under this section other than a final decision determining such a question as is referred to in subsection (1) of this section." (Emphasis added).
"It was expressly stated in the heading as well as the body of the Fixed Date Claim Form that the Attorney General brought the claim against the respondent, seeking a declaration that his election was a nullity, pursuant to section 37 of the Constitution. There is no dispute, therefore, that the provisions of section 37 confer and demarcate the jurisdiction of the court.

The decision of Benjamin J, as indicated, was on a strike out application and not on the hearing of the substantive claim that the Attorney General brought. The substantive claim never came on for hearing. As indicated, the judge decided that the claim form procedure was the wrong procedure, that "the court is not clothed with jurisdiction to entertain the claim in its existing form" and that the Fixed Date Claim Form stood dismissed for want of jurisdiction.

It was not raised in argument before us or in the written submissions whether or not the decision of Benjamin J was a final order. Whether an order is a final or a procedural (or interlocutory) order, as Rawlins J.A. recently restated in JnMarie & Sons v Jamie St. Louis, is determined by employing the application test. On that test an order is final if it is made on the hearing of an application that, whichever way the application is decided, will finally determine a substantive issue between the parties.

> If the decision of Benjamin J is a final order the court must proceed to decide whether to extend time for appealing. If the decision of Benjamin J is not a final order section 37 (7) of the Constitution explicitly prohibits an appeal from the decision he gave. In my view the court must now decide on the nature of the order of Benjamin J, before proceeding with the application as this is fundamental to the jurisdiction of this court. At the risk of repetition, the decision of the single judge could not confer jurisdiction on this court in the face of the clear language of the Constitution. While it is a straightforward decision, because counsel were not given the opportunity to submit on the issue, I think it appropriate that they should now be given the opportunity to make written submissions, which will be considered without a further hearing. I would, therefore, adjourn this matter for the Registrar to issue the appropriate case management order."[1]

[2] Counsel for the parties duly submitted their arguments in support of their respective positions in a timely manner and the delay in rendering this judgment lies with the author and not with learned counsel.

[3] Learned counsel for the appellant, who signed the submissions made on behalf of the appellant, made the telling point that regardless of the underlying thinking of a judge in arriving at his conclusion, only the written order of the court is relevant. In that context he points out that the single judge (myself) "ruled that Justice Benjamin [sic] decision was a final order therefore no leave was required." Learned counsel is absolutely correct in the point that he makes, that is, once an order is settled and issued by the court, the judge or panel of judges become functus officio. Any other opinion would result in litigation never being final or certain – an untenable position.

[4] Unfortunately, learned counsel did not address himself to section 35 (3) of the Eastern Caribbean Supreme Court Act Cap 336 which reads as follows:

> "(3) The powers of the Court of Appeal in respect of an appeal shall not be restricted by reason of any interlocutory order from which there has been no appeal."

[5] It seems to me that the effect of subsection 3 is to permit the Court of Appeal to re-examine any interlocutory order given earlier in the appeal before the court whether the

[1] Attorney General of Grenada v Peter Charles David et al Grenada Civil Appeal No 34 of 2006 (delivered 4 June 2007), paragraphs 1 - 11

same has been appealed against or not and, in the particular circumstance, permits this court to re-examine the order of the single judge.

[6] Relying on the jurisdiction granted by section 35 (3) it falls for the court to re-examine the nature of the order made by Benjamin J. There are a number of decisions of this court, starting with Sylvester v Singh[2] and continuing through to Pirate Cove Resorts Limited et al v Euphemia Stephens et al[3] and JnMarie and Sons v Jamie St. Louis[4] to name but a few in which this court has taken a position of preference for the application (as opposed to the order) test in determining whether an order of the court is interlocutory or final.

[7] As stated above the application before Benjamin J was on a strike out application and not on the hearing of the substantive matter. Had the applicant to the strike out application not succeeded then clearly the court would have had to continue to the hearing of the substantive matter. As Rawlins JA (as he then was) said in JnMarie and Sons at paragraph 21:

> "I venture to state, further, that even if the order of 3rd May 2006 came after a substantive hearing on the application for summary judgment, it would not have been a final order under the application test. This is because had the appellants prevailed on that application, instead of the respondent, and the application was dismissed, the case would not have been determined since the court would not have entered judgment for the appellants. The case would have continued to trial. It follows that the order of 3rd May 2006 would not have been a final order, whether it was made because of non-compliance with case management orders or because summary judgment was entered after a hearing on the merits of the application."

[8] It is clear that no other conclusion than that the decision of Benjamin J was other than a final decision as referred to in section 37 (7) of the Grenada Constitution is consonant with the many decisions of this court.

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[2] Saint Vincent and the Grenadines Civil Appeal No. 10 of 1992 (18 September 1995)
[3] Saint Vincent and the Grenadines Civil Appeal No 11 of 2002 (5 March 2003)
[4] Saint Lucia Civil Appeal No 14 of 2006 (20 February 2007)

[9] In the premises this court is denied of jurisdiction by the clear language of the Grenada Constitution and in those circumstances must dismiss the application for an extension of time by the appellant/applicant. The first respondent Peter David Charles is awarded his costs to be taxed if not agreed.

Michael Gordon, QC
Justice of Appeal

Denys Barrow, SC
I concur. Justice of Appeal

Hugh A. Rawlins
I concur. Justice of Appeal