EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

ANTIGUA AND BARBUDA

ANUHCVAP2012/0042

BETWEEN:

SIR GERALD WATT, KCN, QC

Appellant

and

[1] PRIME MINISTER
[2] JUNO SAMUEL

Respondents

Before:

The Hon. Mde. Janice M. Pereira	Chief Justice
The Hon. Mr. Davidson Kelvin Baptiste	Justice of Appeal
The Hon. Mr. Don Mitchell	Justice of Appeal [Ag.]

Appearances

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

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2013: February 27;
May 27.

Civil appeal – Constitutional law – Antigua and Barbuda Constitution Order 1981 – Representation of the People (Amendment) Act 2011 – Whether Prime Minister had lawful authority to give retroactive effect to Act – Representation of the People Order, 2012 – Whether Order was invalid – Electoral Commission – Judicial review – Retroactive orders

Sir Gerald Watt, KCN, QC was the Chairman of the Antigua and Barbuda Electoral Commission ("the Commission") before the Prime Minister recommended his removal to the Governor-General. Sir Gerald applied for judicial review of the Prime Minister's recommendation. Before the learned judge, Remy J, rendered her decision in the judicial review application, the **Representation of the People (Amendment) Act 2011** ("the 2011 Amendment Act") was passed in the House of Assembly with one of the purposes being the dissolution of the Commission. It was passed by the House on 16th November 2011

and by the Senate on 21st November, and was Gazetted on 22nd December. Section 1(1) provided that the Act should come into force on such day as the Prime Minister might appoint by Order.

Subsequently, Remy J handed down her decision granting Sir Gerald the reliefs sought; quashing the appointment of Mr. Juno Samuel as the Chairman of the Commission; and holding that Sir Gerald continued in the position of Chairman of the Commission. Six days later, on 31st January 2012, by virtue of the **Representation of the People Order, 2012** ("the 2012 Order"), the Prime Minister appointed the 22nd day of December 2011 as the day on which the 2011 Amendment Act would be deemed to have come into force.

For that reason, Sir Gerald filed an application in the same suit in which he sought by way of interim relief a number of declarations which included a declaration that the decision of the Prime Minister to appoint the 22nd day of December 2011 as the day on which the 2011 Amendment Act would come into force was null and void and of no legal effect and that all actions of the Prime Minister and Mr. Samuel made under that Act were null and void and of no effect, and that he remained the Chairman of the Commission and entitled to all the pecuniary and other benefits of the office of Chairman. Sir Gerald's contention was that the Prime Minister had no lawful authority to sign the 2012 Order bringing the Act into effect backdated to 22nd December 2011. The 2012 Order was (a) an abuse by the Prime Minister of the power granted to him under that Act, (b) was actuated by improper motives and not done in good faith, and (c) amounted to an encroachment by a member of the executive onto the province and preserve of the judiciary. Further, the 2012 Order was invalid because it offended against the doctrine of separation of powers.

The application came before Michel J who ruled that the proceedings had already concluded with Remy J's judgment in that said suit. He however went on to determine the application and found that the making of the 2012 Order on 31st January 2012 bringing the 2011 Amendment Act into force on 22nd December 2011 was part of the legislative process that did not result in the application of the presumption against retrospection. The Prime Minister, in making the appointed day, was not acting as a member of the executive branch of government, but as a person carrying out a legislative function delegated to him by an Act of Parliament.

Sir Gerald has appealed the decision of Michel J.

Held: allowing the appeal; setting aside the order of the learned trial judge; and ordering that the Prime Minister pay the costs of the application in the court below and in the appeal to be assessed if not agreed, that:

1. A Minister who has the responsibility of selecting a date upon which an Act is to come into force is expected to exercise his discretion within the law. If a Minister to whom Parliament has delegated a discretion to bring an Act into force acts outside of the law, then the citizen is entitled in a suitable case to expect that the court will exercise its jurisdiction to grant a party such remedies as he or she

appears entitled to so that all matters in controversy between them may be completely and finally determined, and a multiplicity of legal proceedings avoided. That principle would apply even though the trial court had just delivered a final judgment in the case. In the event that it is found that a Minister has acted illegally to interfere with a duly delivered High Court judgment, it is appropriate that interim relief be sought in the same case rather than the commencing of a new law suit.

Section 20 of the **Eastern Caribbean Supreme Court Act** Cap. 143, Revised Laws of Antigua and Barbuda 1992 applied; Rule 17.2(1)(a) of the **Civil Procedure Rules 2000** applied.

2. In exercising his discretion as to the date on which the 2011 Amendment Act came into effect, the Prime Minister was required to act fairly and to determine objectively an appropriate date for the law to come into effect. He was entrusted with a discretion and ought to have directed himself properly in law, and factor into the exercise of his discretion only those considerations which were relevant and material for that purpose. An abuse of discretion is a wrongful exercise of the discretion conferred and may be held to be ultra vires. In this case, the Prime Minister chose a date that was clearly designed to undermine or undercut the judgment of Remy J that was given in Sir Gerald's favour. It was a wrongful exercise of the discretion given to him and an encroachment on the principles of the separation of powers that Parliament, the Executive and the Courts each have their distinct and largely exclusive domain; in essence, it was an exercise of executive power. The Prime Minister not having lived up to the standard of fairness expected of him, his selection of the date he chose was ultra vires the discretion given to him.

   Padfield and Others v Minister of Agriculture, Fisheries and Food and Others [1968] AC 997 applied; **Calder v Bull** (1798) 1 Curtis 269 applied; **Regina v Secretary of State for the Home Department, Ex parte Fire Brigades Union and Others** [1995] 2 AC 513 applied.

3. Parliament may intend an Act to have retrospective effect. What must be done is an objective examination of the language of the Act to determine whether Parliament intended the Act to have such an effect. If the retrospectivity would have an effect that is unfair, the court must look very hard to see if it can be sure that this is what Parliament really intended. Once the unfair effect is clearly what Parliament intended, then the court will not hesitate to give effect to the intention of Parliament. Once such an intent is not clear, then the court may presume that the statute was not intended to have retrospective effect. In this case, the wording of section 1(1) and (2) of the 2011 Amendment Act does not suggest any intention of Parliament to give the Prime Minister power to give retrospective effect to his 2012 Order bringing the Act into force. The section is entirely devoid of any suggestion that he was empowered to give it such an effect. Given the injustice of interfering with the rights of Sir Gerald then subject to litigation before the court,

the language of the section would have had to have been a great deal more compelling to drive this Court to the conclusion that there could have been no other intention of the legislature than to empower the Prime Minister to give retrospective effect to the Act.

L'Office Chefifien des Phosphates and Another v Yamashita-Shinnihon Steamship Co. Ltd. [1994] 1 AC 486 applied.

4. Furthermore, legislation generally does not apply to actions which are pending at the time when it comes into force unless the language of the Act compels the conclusion that Parliament intended that it should. The language of the enactment must be such that no other conclusion is possible than that that was the intention of the legislature. Sir Gerald's action for judicial review was pending when the 2011 Amendment Act was passed. In light of that, the language of the enactment had to have been such that no other conclusion was possible than that that was the intention of the legislature.

Wilson v First County Trust Ltd (No. 2) [2004] 1 AC 816 applied.

JUDGMENT

[1] **MITCHELL JA [AG.]**: The issue on this appeal is whether the appointment by the Prime Minister of Antigua and Barbuda of the date for coming into effect of the **Representation of the People (Amendment) Act 2011** (the "2011 Amendment Act")[1] was a valid exercise by him of the discretion given to him by Parliament.

[2] On 1st March 2011 Sir Gerald Watt, KCN, QC ("Sir Gerald") filed a claim for judicial review of the Prime Minister's recommendation to the Governor-General of Antigua and Barbuda seeking his dismissal as Chairman of the Antigua and Barbuda Electoral Commission (the "Commission"), and seeking various declarations and orders. Subsequent to Sir Gerald's filing of his suit, the Prime Minister introduced into the House of Assembly of Antigua and Barbuda a Bill which was passed as the 2011 Amendment Act by the House on 16th November 2011 and by the Senate on 21st November. The Governor-General assented to it

[1] No. 12 of 2011, Laws of Antigua and Barbuda.

on 13th December 2011. One of the purposes of the Act was by section 22[2] to dissolve the existing Commission of which Sir Gerald was Chairman. Section 1(1)[3] provided that it should come into force on such day as the Prime Minister might appoint by Order. Remy J had not yet delivered her judgment on the question of the removal of Sir Gerald by the Governor General. The Act was duly published in the Official Gazette on 22nd December 2011, nine days after it was assented to by the Governor-General, and, save for the delaying provision in section 1(1) just referred to above, would by virtue of section 52[4] of the **Antigua and Barbuda Constitution Order 1981**[5] ("the Constitution") normally have come into effect on that date.

[3] Three days after the Gazetting of the 2011 Amendment Act, in a judgment delivered on 25th January 2012,[6] Remy J delivered her judgment granting Sir Gerald the reliefs he sought, namely, an order declaring, among other things, that the recommendation of the Prime Minister to the Governor General that Sir Gerald be relieved of his position as Chairman was illegal, being contrary to sections 3

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[2] **22. Commissioners to cease to hold office**
On the coming into force of this Act the Chairman, Deputy Chairman and members of the Commission shall cease to hold office, but they shall be eligible for re-appointment.

[3] **1. Short Title**
(1) This Act may be cited as the Representation of the People (Amendment) Act, 2011 and shall come into force on such day or days as the Minister may appoint by Order.
(2) An Order under subsection (1) may appoint different days for different provisions or for different purposes of the same provision.

[4] **Mode of Exercising Legislative Power**
52. (1) The power of Parliament to make laws shall be exercised by bills passed by the Senate and the House (or in the cases mentioned in sections 54 and 55 of this Constitution by the House) and assented to by the Governor-General on behalf of Her Majesty.
(2) When a bill is presented to the Governor-General for assent in accordance with this Constitution, he shall signify that he assents thereto.
(3) When the Governor-General assents to a bill that has been submitted to him in accordance with the provisions of this Constitution the bill shall become law and the Clerk of the House shall thereupon cause it to be published in the Official *Gazette* as law.
(4) No law made by Parliament shall come into operation until it has been published in the Official *Gazette* but Parliament may postpone the coming into operation of any such law.

[5] Cap. 23, Revised Laws of Antigua and Barbuda 1992.

[6] Sir Gerald A. Watt, KCN, QC v The Prime Minister et al, Antigua and Barbuda, High Court Claim No. ANUHCV2011/0025 (delivered 25th January 2012, unreported).

and 4 of the substantive Act[7], and was therefore null, void and of no legal effect, and quashing the appointment of Mr. Juno Samuel as the new Chairman. The judge declared that Sir Gerald continued in office as the Chairman of the Commission and that any actions taken by Mr. Samuel such as the signing off of the Register of Elections and any matter involving staffing and operations of the Commission were null and void. She awarded damages to be assessed and costs based on the amount of damages assessed.

[4] On 17th February 2012, the Prime Minister and Mr. Samuel appealed this decision to the Court of Appeal, and Sir Gerald cross-appealed. The judgment of the Court of Appeal in that matter is delivered at the same time as this one is.[8] The facts and circumstances leading up to the decision of Remy J are sufficiently outlined in the High Court and Court of Appeal judgments in that case so that they do not bear repetition.

[5] Meanwhile, by the **Representation of the People Order, 2012**[9] ("the 2012 Order") dated 31st January 2012, six days after the delivery by Remy J of her judgment, and published in the Gazette on 16th February 2012, the Prime Minister appointed the 22nd day of December 2011 as the day on which the 2011 Amendment Act would be deemed to have come into force. This was the date of its publication in the Official Gazette, and it was also the day before the Prime Minister filed his appeal against Remy J's judgment.

[6] Eleven days later, on 27th February 2012, Sir Gerald filed an application in claim No. ANUHCV2011/0025 in which he sought by way of interim relief under rule 17

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[7] The Representation of the People (Amendment) Act 2001.

[8] The Prime Minister et al v Sir Gerald Watt, KCN, QC, Antigua and Barbuda, High Court Civil Appeal ANUHCVAP2012/0005 (delivered 27th May 2013, unreported).

[9] Statutory Instrument No. 2 of 2012.

of the **Civil Procedure Rules 2000** ("CPR")[10] a number of declarations and orders. These included a declaration that the decision of the Prime Minister to appoint the 22nd day of December 2011 as the day on which the 2011 Amendment Act would come into force was null and void and of no legal effect, and that all actions of the Prime Minister and Mr. Samuel made under that Act were null and void and of no effect, and that he remained the Chairman of the Commission and entitled to all the pecuniary and other benefits of the office of Chairman.

[7] The complaint of Sir Gerald was that the pith and substance of the 2011 Amendment Act was nothing more than a legislative plan designed after the filing of his claim to facilitate, if not ensure, that he would be jettisoned from the Commission and stripped of his office as Chairman. The 2012 Order appointing 22nd December 2011 as the day on which the Act came into force was (a) an abuse by the Prime Minister of the power granted to him under that Act, (b) was actuated by improper motives and not done in good faith, and (c) amounted to an encroachment by a member of the executive onto the province and preserve of the judiciary.

[8] Sir Gerald's objection to the 2012 Order was that the Prime Minister had no lawful authority on 31st January 2012 to sign the 2012 Order bringing the 2011 Amendment Act into effect backdated to 22nd December 2011. The 2012 Order was invalid because it offended against the doctrine of separation of powers. It was directed to the course of the legal proceedings, was *ad hominem,* amounted to an interference with the functions of the judiciary, and was accordingly unconstitutional. There was no law empowering the Prime Minister to make an Order that was void, and accordingly his decision to do so was null and void and of

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[10] **Orders for interim remedies**
17.1 (1) The court may grant interim remedies including –
(a) an interim declaration;
(b) an interim injunction;
[et cetera].

no effect. Further, it was a retroactive Order. It amounted to legislation targeted at him and directed to nullify any adverse decision by the court against the Prime Minister. This action by the Prime Minister was a "naked and violent interference" by the Prime Minister, as a member of the executive branch of government, with the functions of the judicial branch.

[9] The application for interim relief came up before Michel J in the High Court and was heard by him on 6th June 2012. He reserved his decision, and gave it in writing on 6th December 2012. His ruling was that, when Sir Gerald filed his application for interim relief in suit ANUHCV2011/0025 on 27th February 2012, those proceedings had already concluded with Remy J's judgment and order of 25th January 2012, other than the assessment of damages. CPR 17.2(1)(a) was not intended to provide a tool to reopen concluded proceedings, and he rejected the attempt by Sir Gerald to do so by his application. In the event he was wrong, he went on to deal with the substantive application.

[10] The learned trial judge held that the Constitution of Antigua and Barbuda, though it did not expressly state so in any of its provisions, like the Constitutions of the other Commonwealth Caribbean countries and territories, envisages three branches of government: the legislative branch, the executive branch, and the judicial branch. In Antigua and Barbuda the legislative branch is the Parliament consisting of the House of Representatives and the Senate; the executive branch is the Governor-General acting either directly or through the Prime Minister and Cabinet and the public officers of the State; and the judicial branch is the court, whether at the level of the District Court, the High Court, the Court of Appeal, or the Judicial Committee of the Privy Council. All three branches are headed by Her Majesty the Queen. It is envisaged by the doctrine of separation of powers that there would be a separation of powers between the three branches of government so that each would operate independently of the other. Parliament would make the laws, the

Executive would implement the laws, and the Court would interpret, apply, and enforce the laws in the event of any dispute.

[11] He found that the passage of the 2011 Amendment Act was an act of the Parliament of Antigua and Barbuda and not that of the Prime Minister. The act of appointing the day on which the Act came into force was part of the legislative process of making the law, even though the Minister authorised by the Act to appoint the day was the same person who at the relevant time was the Prime Minister.

[12] He found that in those circumstances the submission that the appointment of the day on which the 2011 Amendment Act came into effect was an abuse of the power of the Prime Minister and was actuated by malice and not done in good faith, and amounted to an encroachment by a member of the executive onto the province and preserve of the judiciary, was not sustainable. The Prime Minister, in making the appointed day, was not acting as a member of the executive branch of government, but as a person carrying out a legislative function delegated to him by an Act of Parliament.

[13] The learned trial judge rejected Sir Gerald's submission that the 2012 Order offended "the presumption against retrospection". He found that the presumption was no more than a legal inference that Parliament does not intend to give retroactive effect to legislation unless that intention is clear from the relevant provision of the statute in question. He concluded that the making of the 2012 Order on 31st January 2012 bringing the 2011 Amendment Act into force on 22nd December 2011 was part of the legislative process that did not result in the application of the presumption against retrospection. The Constitution of Antigua and Barbuda[11] provides that a bill passed by the House and the Senate becomes law when it is assented to by the Governor-General, but that it does not come into

[11] By section 52 at note 4 above.

operation until it has been published in the Official Gazette. So, that, in the present case, the Act became law on the 13th December 2011 when it was assented to by the Governor-General, but was not yet in force. It could have come into force on the day it was published in the Official Gazette on 22nd December 2011 if Parliament had permitted this to happen. Section 52 of the Constitution permitted Parliament to postpone the coming into force of an Act by appointing another date for it to come into force. Parliament could do this either directly by a provision in the Act appointing a later date, or by vesting someone (in this case the Minister with responsibility for elections, the Prime Minister) with the authority to appoint a day for the coming into force of the Act. He found that the Prime Minister's appointment of the day of publication of the Act in the Official Gazette as the day for its coming into force did not in fact give retrospective effect to the Act. There was nothing in the Prime Minister's making of the appointed day so unfair as to render the Act or the 2012 Order invalid or unconstitutional.

[14] In any event, he held, the presumption against retrospection, even if applicable, did not necessarily render invalid legislation which may have retrospective effect. The principle operated so as to give only a prospective application to a statute unless a retrospective intent of parliament is manifest. He therefore dismissed Sir Gerald's application and ordered him to pay the costs of the respondents to be assessed if not agreed. Sir Gerald has now appealed.

The Interim Remedy Point

[15] While I have some difficulty with the novelty of Sir Gerald's application, I have to consider that this is a public law case, not a matter of private law, and different considerations apply. The proceedings concern a complaint that the actions of the Prime Minister interfered with the independence and impartiality of the Commission. He had at first attempted to remove Sir Gerald legally by recommending to the Governor-General the setting up of a tribunal to investigate Sir Gerald. When this failed to achieve the desired result, he did it illegally as I

have held in my judgment delivered in the Prime Minister's appeal[12] by recommending to the Governor-General Sir Gerald's dismissal as Chairman of the Commission. Now, in a third effort, the Prime Minister was signing an Order which would have the necessary effect, Sir Gerald claims, of cutting the bottom out of the judgment Remy J had just delivered declaring that Sir Gerald was still Chairman of the Commission by retroactively dissolving the Commission several days before the date of her judgment. I accept that this act of the Prime Minister in using the 2012 Order to back date the coming into effect of the 2011 Amendment Act was part and parcel of his attempt to remove Sir Gerald from the chairmanship of the Commission. If he did it illegally, an interim remedy is available to Sir Gerald to prevent it. CPR 17.2(1)(a)[13] expressly provides for an application for interim remedies to be made at any time including after judgment has been given. Where a person has succeeded in litigation, including a judicial review matter, and has obtained an order for the fruits of his litigation, he can in the same action take steps to secure and retain those fruits from an illegal action designed to frustrate the judgment of the court. Whether the Prime Minister's actions were legal or illegal was a matter to be determined by the learned trial judge applying the appropriate rules of public law.

[16] I have difficulty in seeing the force of the "fruits of judgment" argument made by Dr. Dorsett when carried to its fullest extent. The legislature of Antigua and Barbuda is sovereign under the Constitution and subject to the Constitution is empowered to remove the fruits of any judgment delivered by a court. Sir Gerald has no entitlement to the chairmanship of the Commission that could not be removed by an Act of Parliament. The Act in question must not offend the Constitution and, in particular, it must be enacted in the manner provided for in the Constitution. However, I understand Sir Gerald to be saying no more than that one of the reasons why he claimed to be entitled to bring the application in the

[12] See note 7 above.
[13] See note 9 above.

case in which final judgment had just been handed down was that he was seeking an interim remedy, designed only to preserve the fruits of the judgment. In the final analysis, everything will depend on whether or not the 2011 Amendment Act was brought into effect in a correct manner.

The Avoidance of Multiplicity of Actions Point

[17] Section 20 of the **Eastern Caribbean Supreme Court Act**[14] imposes a positive duty on the trial judge to determine all matters in controversy between the parties and to avoid a multiplicity of legal proceedings. Sir Gerald was not challenging the constitutionality of the 2011 Amendment Act. He was challenging an action of the Prime Minister in bringing the Act into force in a manner that he alleged was illegal. Parliament is empowered by the Constitution by properly enacted legislation to settle any controversy whether between citizens or between a citizen and an organ of the state, and this might include overturning or blocking the effectiveness of a judgment of the court. But, Parliament must do so within the limits of the Constitution. Similarly, if Parliament delegates to a Minister the selection of the date upon which an Act is to come into force, the Minister is expected to exercise his discretion within the law. If a Minister to whom Parliament has delegated a discretion to bring an Act into force acts outside of the law, then the citizen is entitled by section 20 in a suitable case to expect that the court will exercise its jurisdiction to grant a party such remedies as he or she appears entitled to so that all matters in controversy between them may be completely and finally determined, and a multiplicity of legal proceedings avoided. That principle would apply even though the trial court had just delivered a final

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[14] Cap. 143, Revised Laws of Antigua and Barbuda 1992
Determination of matters completely and finally
20. The High Court and the Court of Appeal respectively in the exercise of the jurisdiction vested in them by this Act shall in every cause or matter pending before the Court grant either absolutely or on such terms and conditions as the court thinks just, all such remedies whatsoever as any of the parties may appear to be entitled to in respect of any legal or equitable claim or matter so that, as far as possible, all matters in controversy between the parties may be completely and finally determined, and all multiplicity of legal proceedings concerning any of these matters avoided.

judgment in the case. In the event that it is found that a Minister has acted illegally to interfere with a duly delivered High Court judgment, it is appropriate that interim relief be sought in the same case rather than the commencing of a new law suit. Otherwise the proliferation of law suits could conceivably multiply indefinitely.

The Retrospectivity Point

[18] There are several authorities that throw light on the issue of retroactivity and the power of Parliament to enact retrospective legislation. In **L'Office Chefifien des Phosphates and Another v Yamashita-Shinnihon Steamship Co. Ltd.**,[15] the owners of a vessel allegedly damaged while on hire to the charterers referred their claim against the charterers to arbitration in 1985. In 1992 the charterers applied to the arbitrator to dismiss the claim for want of prosecution under an amendment to the **Arbitration Act** which had come into effect on 1st January 1992. The arbitrator found the owners guilty of inordinate delay before, but not after, 1st January 1992. He concluded that the section applied retrospectively and that the conditions prescribed for its operation were satisfied and he dismissed the claim. The High Court set aside the arbitrator's award holding that in the absence of express statutory terms the presumption against retrospectivity applied so as not to deprive the owners of their existing right to pursue the claim. The Court of Appeal upheld this finding and dismissed the appeal of the charterers. The House of Lords, however, allowed the appeal holding that the basis of the rule regarding retrospectivity was fairness; that the rule was not absolute and the question in each case was whether the consequences of reading the statute with the suggested degree of retrospectivity were so unfair that Parliament could not have intended its words to be so construed. The arbitrator had been entitled to take into account the delay that had occurred before 1st January 1992 and to dismiss the owners' claim.

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[15] [1994] 1 AC 486 at pp.523-529.

[19] Lord Mustill, with whom all the other judges agreed, gave the principal judgment of the House of Lords. He dealt with the presumption against retrospectivity in this way:

> "My Lords, it would be impossible now to doubt that the court is required to approach questions of statutory interpretation with a disposition, and in some cases a very strong disposition, to assume that a statute is not intended to have retrospective effect. Nor indeed would I wish to cast any doubt on the validity of this approach for it ensures that the courts are constantly on the alert for the kind of unfairness which is found in, for example, the characterisation as criminal of past conduct which was lawful when it took place, or in alterations to the antecedent national, civil or familial status of individuals. Nevertheless, I must own up to reservations about the reliability of generalised presumptions and maxims when engaged in the task of finding out what Parliament intended by a particular form of words, for they too readily confine the court to a perspective which treats all statutes, and all situations to which they apply, as if they were the same. This is misleading, for the basis of the rule is no more than simple fairness, which ought to be the basis of every legal rule. True it is that to change the legal character of a person's acts or omissions after the event will very often be unfair; and since it is rightly taken for granted that Parliament will rarely wish to act in a way which seems unfair, it is sensible to look very hard at a statute which appears to have this effect, to make sure that this is what Parliament really intended. This is, however, no more than common sense, the application of which may be impeded rather than helped by recourse to formulae which do not adapt themselves to individual circumstances, and which tend themselves to become the subject of minute analysis, whereas what ought to be analysed is the statute itself."[16]

What I take from this authority is the principle that Parliament may indeed intend an Act to have retrospective effect. In each case, it is a matter of finding out objectively, from the words of the Act, what was the clear intent of Parliament. If the retrospectivity would have an effect that is unfair, the Court must look very hard to see if it can be sure that this is what Parliament really intended. Once the unfair effect is clearly what Parliament intended, then the court will not hesitate to give effect to the intention of Parliament. Once such an intent is not clear, then

[16] Ibid, pp. 524-525.

the Court may presume that the statute was not intended to have retrospective effect.

[20] In **Don John Francis Douglas Liyanage and Others v The Queen**[17] from Ceylon, Acts of the Ceylon legislature modified the **Criminal Procedure Code**, among other things, to legalise *ex post facto* the detention of persons suspected of having committed an offence against the State, widening the class of offences for which trial without a jury by three judges nominated by the Minister of Justice could be ordered, allowing arrest without warrant for waging war against the Queen, and prescribing new minimum penalties for that offence. The principal Act was expressed to be retrospective to cover an abortive *coup d'état* in which the appellants took part, and was to cease to be operative after the conclusion of the relevant legal proceedings. At the hearing before the Privy Council it was agreed between the parties that the Acts were *ultra vires* and invalid, and the convictions could not stand. The appeals were allowed and the convictions quashed.

[21] In the course of giving the opinion of the Board, Lord Pearce cited with approval the words of Chase J in the Supreme Court of the United States in **Calder v Bull**:[18] "These acts were legislative judgments: and an exercise of judicial power." He also cited Blackstone in his **Commentaries** who said:

> "Therefore a particular act of the legislature to confiscate the goods of Titius, or to attaint him of high treason, does not enter into the idea of a municipal law: for the operation of this act is spent upon Titius only and has no relation to the community in general: it is rather a sentence than a law."

And, Lord Pearce continued:

> "If such Acts as these were valid the judicial power could be wholly absorbed by the legislature and taken out of the hands of the judges. It is appreciated that the legislature had no such general intention. It was beset by a grave situation and it took grave measures to deal with it,

[17] [1967] 1 AC 259.
[18] (1798) 1 Curtis 269.

> thinking, one must presume, that it had power to do so and was acting rightly. But that consideration is irrelevant, and gives no validity to acts which infringe the Constitution. What is done once, if it be allowed, may be done again and in a lesser crisis and less serious circumstances. And thus judicial power may be eroded. Such an erosion is contrary to the clear intention of the Constitution. In their Lordships' view the Acts were ultra vires and invalid."[19]

It may be worth a reminder that in the case at bar there was no constitutional challenge to the validity of the 2011 Amendment Act. What was challenged was the validity of the Prime Minister's 2012 Order bringing the Act into effect retroactively so as to deliberately cut away at the validity of a judgment of the court. If Parliament intends to give an Act retrospective effect it is free to do so, subject to section 15(4) of the Constitution,[20] by making such an intention clear. Section 15(4) is the constitutional prohibition of Parliament's enacting a law to make illegal an act which at the time it was committed was not illegal.

The Legislative Process Point

[22] There can be no doubt that if Parliament had established in the 2011 Amendment Act the date for its coming into effect, or had left section 52 of the Constitution[21] to govern the date, that date would have been validly selected, regardless of its effect on Remy J's judgment. Subject to a finding of contravention of a provision of the Constitution, no court can challenge Parliament's right to enact any legislation that it deems appropriate for the good government of the country. Parliament is free to amend any Act that it has previously made without any concern that any court will presume to intervene to judge the merits of the legislation. Indeed, it is in my view constitutionally impossible, as being contrary to the doctrine of the separation of powers, for this Court to hold that an Act or

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[19] See note 17 above at pp. 291-292.

[20] **Provision to secure protection of the law.**

(4) No person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for any criminal offence that is more severe in degree or description than the maximum penalty that might have been imposed for that offence at the time when it was committed.

[21] See note 4 above.

Parliament, not in breach of any provision of the Constitution, procedurally properly passed through the legislature, and brought into effect, was not a valid Act, whatever the purpose of the Act may be, and whatever the motives of some of the legislators might have been.

[23] In the context of the unwritten British Constitution, Lord Mustill in the 1995 House of Lords decision in **Regina v Secretary of State for the Home Department, Ex parte Fire Brigades Union and Others**,[22] expressed the following views on the occasional risk of conflict between the judicial, legislative and executive branches of government. He said:

> "It is a feature of the peculiarly British conception of the separation of powers that Parliament, the executive and the courts have each their distinct and largely exclusive domain. Parliament has a legally unchallengeable right to make whatever laws it thinks right. The executive carries on the administration of the country in accordance with the powers conferred on it by law. The courts interpret the laws, and see that they are obeyed. This requires the courts on occasion to step into the territory which belongs to the executive, to verify not only that the powers asserted accord with the substantive law created by Parliament but also that the manner in which they are exercised conforms with the standards of fairness which Parliament must have intended. Concurrently with this judicial function Parliament has its own special means of ensuring that the executive, in the exercise of delegated functions, performs in a way which Parliament finds appropriate. Ideally, it is these latter methods which should be used to check executive errors and excesses; for it is the task of Parliament and the executive in tandem, not of the courts, to govern the country. In recent years, however, the employment in practice of these specifically Parliamentary remedies has on occasion been perceived as falling short, and sometimes well short, of what was needed to bring the performance of the executive into line with the law, and with the minimum standards of fairness implicit in every Parliamentary delegation of a decision-making function. To avoid a vacuum in which the citizen would be left without protection against a misuse of executive powers the courts have had no option but to occupy the dead ground in a manner, and in areas of public life, which could not have been foreseen 30 years ago. For myself, I am quite satisfied that this unprecedented judicial role has been greatly to the public benefit. Nevertheless, it has its risks, of which the courts are well aware. As the judges themselves constantly remark, it

[22] [1995] 2 AC 513.

> is not they who are appointed to administer the country. Absent a written constitution much sensitivity is required of the parliamentarian, administrator and judge if the delicate balance of the unwritten rules evolved (I believer successfully) in recent years is not to be disturbed, and all the recent advances undone."[23]

[24] In the House of Lords case of **Padfield and Others v Minister of Agriculture, Fisheries and Food and Others**[24] an Act of Parliament empowered the Minister to direct a committee of investigation to consider and report on any complaint made to the Minister as to the operation of a milk marketing scheme. A complaint was eventually made, but the Minister refused to appoint a committee of investigation. The claimants applied to the court for an order of mandamus to compel him to do so. The Minister's reason for his refusal was that he took the view that the complaint should be considered by the board of the scheme rather than by the committee. He contended that while he had a duty to consider any complaint made to him, he had a complete discretion to decide whether to refer the complaint to a committee of investigation. While the Law Lords agreed that the Minister had a discretion, they confirmed that he was required to exercise it lawfully. A person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider: per Lord Greene MR in **Associated Provincial Picture Houses Ltd v Wednesbury Corporation**:[25] He must not allow himself to be influenced by something extraneous and extrajudicial which ought not to have affected his decision. Lord Upjohn in seeking to establish the relevant principles under the unwritten constitution of the United Kingdom set out the basic principles of law that applied in this case:

> "The Minister in exercising his powers and duties, conferred upon him by statute, can only be controlled by a prerogative writ which will only issue if he acts unlawfully. Unlawful behaviour by the Minister may be stated with

[23] At p. 567.
[24] [1968] AC 997.
[25] [1948] 1 KB 223, 229.

> sufficient accuracy for the purpose of the present appeal (and here I adopt the classification of Lord Parker C.J., in the Divisional Court): (a) by an outright refusal to consider the relevant matter, or (b) by misdirecting himself on a point of law, or (c) by taking into account some wholly irrelevant or extraneous consideration, or (d) by wholly omitting to take into account a relevant consideration."[26]

The Minister having failed to give a single valid reason for refusing to order an inquiry by the committee into a legitimate complaint all his disclosed reasons were invalid. The appeal was allowed and the matter remitted to the Divisional Court to order the Minister to consider the complaint according to law.

[25] While the above common law authorities are useful for placing the relevant principles within a historical legal framework, we must remember that a modified approach is required in the context of our written Constitution. The court is required to carry out a function of bringing fairness to the process of administration by devising the means to control the exercise of discretion by public bodies and officials and to provide an efficient scheme of legal remedies to rein in the abuse of power. In addition to the conventional challenges to the exercise by an official of a discretion conferred by a statute of 'illegality', 'irrationality', and 'procedural impropriety', we now add 'unconstitutionality'. A public functionary must not stray from the confines of a power conferred on him. He must factor into the exercise of his discretion only those considerations which are relevant and material for that purpose. Any seemingly wide power in a public authority must be tied down to the discharge of the authority's functions. A discretion conferred upon a public authority must be exercised reasonably and in accordance with the law. An abuse of discretion is a wrongful exercise of the discretion conferred, and may be held to have been *ultra vires*.

[26] If it is not permissible for the executive branch of government to trespass on the judicial function, so that the doctrine of the separation of powers implicit in the

[26] Fn. 23 at 1058.

Constitution is maintained sacrosanct, the courts must be similarly careful not to trespass on the legislative function. As Saunders J so eloquently expressed it in the High Court in Anguilla in 2008:

> "Our democracy rests on three fundamental pillars: The Legislative, Executive and the Judicial. All must keep within the bounds of the Constitution. The Judiciary has the task of seeing to it that legislative and executive action does not stray outside those boundaries onto forbidden territory. If that occurs and a citizen with standing complains, the court declares the trespass and grants appropriate remedies.
>
> Within their constitutional parameters the Legislature and the Executive are responsible for enacting and implementing such policy measures as in their wisdom they consider to be most appropriate for the people. The Judiciary has to be careful that it too does not stray from its function and usurp the authority and role reserved for the other two pillars.
>
> I reiterate that there is a fine line which the court must tread in these circumstances. On the one hand it must protect the citizens and guarantee them the rights and freedoms which the Constitution proclaims. On the other hand the court should not intrude into the preserve of the other branches of the State.
>
> For our democracy to operate effectively it has been said that it is necessary that a certain comity should exist between the three branches. Each should respect the role and function of the other. The court is subject to and must enforce laws passed by Parliament that are intra vires the Constitution. The Executive should respect and obey the decisions and accept the intimations of the court. If this comity does not exist, then the wheels of democracy would not turn smoothly. A jarring and dangerous note will resonate from them.[27]

[27] While this Court of Appeal disagreed with Saunders J, the Privy Council restored his judgment.[28] The principle of the separation of powers remains paramount in the constitutional documents of the State of Antigua and Barbuda as it is in Anguilla. This Court would be loath to assume unto itself the power to hold that the Parliament of Antigua and Barbuda was in any way hobbled in its legislative

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[27] John Benjamin et al v The Honourable Minister of Information and Broadcasting et al, Anguilla, High Court Civil AXAHCV1997/0056 (delivered 7th January 1998, unreported).
[28] Benjamin and Others v Minister of Information and Broadcasting and Another (2001) 58 WIR 171.

power to pass an Act, the specific purpose of which, as expressed in section 22,[29] was to bring an end to the holding of office of the existing officers and members of the Commission, including Sir Gerald. If this action of the legislative branch of Government resonates with a "jarring and dangerous note", it is not for the Court to enter into a contest which will only produce an increased concatenation of jarring and dangerous notes. However, the issue is not the power of Parliament or the legality of the Act but the exercise by the Prime Minister of a discretion given to him by Parliament.

[28] The general rule is that legislation does not apply to actions which are pending at the time when it comes into force unless the language of the Act compels the conclusion that Parliament intended that it should. In the words of Lord Rodger in **Wilson v First County Trust Ltd (No. 2)**,[30] for pending actions to be affected by retrospective legislation, the language of the enactment must be such that no other conclusion is possible than that that was the intention of the legislature.

[29] When the 2011 Amendment Act passed through Parliament and was published, Sir Gerald's action for judicial review was still pending. Parliament could immediately have brought the Act into effect. In bringing the Act into force, Parliament was not required to act fairly towards Sir Gerald. Parliament could have enacted instant dissolution of the Commission. Parliament did not do so, but postponed its coming into operation and delegated to the Prime Minister the power to do so. By section 1(1) of the Act, Parliament gave the Prime Minister a discretion to decide when to bring it into effect. A perusal of the wording of section 1(1) and (2) of the Act[31] does not suggest any intention of Parliament to give the Prime Minister power to give retrospective effect to his 2012 Order bringing the Act into force. The section is entirely devoid of any suggestion that he was empowered to give it such an effect. Given the injustice of interfering with the

[29] See note 2 above.
[30] [2004] 1 AC 816 at para. 198.
[31] See note 3 above.

rights of Sir Gerald then subject to litigation before the court, the language of the section would have had to have been a great deal more compelling to drive me to the conclusion that there could have been no other intention of the legislature than to empower the Prime Minister to give retrospective effect to the Act.

[30] In exercising his discretion as to the date on which the 2011 Amendment Act came into effect, the Prime Minister was required to act fairly and to determine objectively an appropriate date for the law to come into effect. What is significant about the circumstance of this case is that the Prime Minister selected a date for the coming into force of the Act that was prior to the date of the delivery of the judgment in favour of Sir Gerald. He waited to select the date until the judgment against him had been delivered. Choosing a date that was clearly designed to undermine or undercut the judgment given in Sir Gerald's favour for the Prime Minister's previous wrongful act in having the Governor-General remove Sir Gerald from the Chairmanship of the Commission was a wrongful exercise of the discretion given to him. This was not a proper exercise by the Prime Minister of the discretion given to him by Parliament. In the words of Justice Chase,[32] this was more of a sentence designed to overrule Remy J than a law intended to be of general application. The fact that Parliament had the power to reverse Remy J's judgment does not provide justification for the Prime Minister's action. A minimum standard of fairness required that the Prime Minister bring the Act into force on a date subsequent to the delivery of the judgment. This could easily have been the date of the issuance of the order. The Prime Minister not having lived up to the standard of fairness expected of him, I find that his selection of the date he chose was *ultra vires* the discretion given to him.

[31] In conclusion, I would set aside the order of the learned trial judge dismissing the application and awarding costs against Sir Gerald to be assessed if not agreed. I would grant Sir Gerald the relief that he seeks and I would order that the Prime

[32] See note 18 above.

Minister pay Sir Gerald the costs in the High Court proceedings and his costs in the appeal to be assessed unless agreed within 30 days.

[32] I would order as follows:

1. It is declared that the decision of the Prime Minister to appoint the 22nd day of December 2011 as the day on which the Representation of the People (Amendment) Act 2011 is deemed to have come into force is null and void and of no legal effect.

2. It is declared that the Representation of the People Order 2012 is ultra vires and invalid and accordingly quashed.

3. It is declared that all actions of the Prime Minister and Mr. Samuel made or purported to be made pursuant to powers vested in them by the 2011 Amendment Act are null and void and of no legal effect.

4. It is declared that whilst Sir Gerald remains the Chairman of the Antigua and Barbuda Electoral Commission he is entitled to all the pecuniary and other benefits of the office of Chairman.

5. The Prime Minister is to pay the costs of the application in the court below to be assessed if not agreed within 30 days.

Don Mitchell
Justice of Appeal [Ag.]

I concur.

Dame Janice M. Pereira

Chief Justice

I concur.

Davidson Kelvin Baptiste
Justice of Appeal.