JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NOS: 36, 37, 38 & 39/04

BEFORE: **THE HON. MR. JUSTICE FORTE, P.**
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE SMITH, J.A.

IN THE MATTER OF an application for Administrative Orders Pursuant to the Jamaica (Constitution) Order in Council, 1962

AND

IN THE MATTER OF a Bill entitled "AN ACT to establish the Caribbean Court of Justice"

AND

IN THE MATTER OF a Bill entitled "AN ACT to Amend the Judicature (Appellate Jurisdiction) Act."

AND

IN THE MATTER OF a Bill entitled "AN ACT to Amend the Constitution of Jamaica

BETWEEN

THE INDEPENDENT JAMAICA COUNCIL FOR HUMAN RIGHTS (1988) LIMITED

EDWARD SEAGA

THE JAMAICA BAR ASSOCIATION

JAMAICANS FOR JUSTICE

LEONIE MARSHALL **APPELLANTS**

AND **THE PRESIDENT OF THE SENATE**
HON. SYRINGA MARSHALL-BURNETT 1ST RESPONDENT

THE ATTORNEY-GENERAL OF
JAMAICA 2ND RESPONDENT

R N A Henriques, Q. C. for Edward Seaga

Dr. Lloyd Barnett, Q.C. & Miss Nancy Anderson for the Independent Jamaica Council for Human Rights

David Batts, Carol Vassell, Stacy-Ann Powell instructed by Dunn Cox for the Jamaica Bar Association

Richard Small instructed by Nunes, Scholefield DeLeon & Co for Jamaicans for Justice and Leonie Marshall

Michael Hylton, Q.C., Director of State Proceedings, Ms. Gladys Young and Miss Simone Meyhew for Respondents

7th, 8th, 9th, 10th 17th, June and July 12th 2004

FORTE, P. (Delivered orally on June 17)

The appellants filed a FIXED DATE CLAIM FORM, claiming as follows:

1. A Declaration that the Second Reading of the Bills and/or the full debate by the Senate thereon cannot be legally proceeded with.

2. A Declaration that in order to be valid and constitutionally effective the procedure adopted from the passage of the Bills must conform with section 49(2)(a), 4(a) and (5) of the Constitution as to –

   (a) introduction in the House of Representatives initially and before being sent to the Senate;
   (b) the time intervals and

(c) the special majorities therein prescribed.

3. An Order directing the First Respondent to give instructions that the Second Reading of the Bills should not be placed in the Order Paper of the Senate or should be removed from the Order Paper, if already included

4. An Order restraining the First Respondent from permitting and or authorizing the taking of any further steps from the passage of the said Bills in the Senate pursuant to their introduction in that House.

5. Alternatively, an Order restraining the First Respondent from sending a message to the House of Representatives indicating that the said Bills have been passed.

These claims are predicated on the presentation by the Honourable Attorney-General of three Bills in the Senate over which the First Respondent presides. The nature of these Bills are set out in paragraph 7 of the Claim Form.

It is sufficient to refer to them in summary form. One Bill seeks to amend the Constitution i.e. the Bill entitled an Act to amend the Constitution of Jamaica for abolition of appeals to Her Majesty in Council, to make provision for appeals to the Caribbean Court of Justice.

This amendment relates to section 110 of the Constitution which provides for appeals to the Privy Council. The Bill seeks to delete section 110 in its present form and to substitute therefor, provisions for appeals to the Caribbean Court of Justice.

Section 49 of the Constitution the section which determines the method of amendment of the various clauses of the Constitution does not provide for the

entrenchment of section 110 and consequently the amendment of that section can be made by the votes of a simple majority in both Houses. The method being pursued in Parliament is therefore on the face not in breach of section 49.

Of the other Bills, one seeks to amend the Judicature (Appellate Jurisdiction) Act to allow appeals to the Caribbean Court of Justice and the other to establish the Caribbean Court of Justice. None of these necessitate an amendment to the Constitution other than of course the amendment to Section 110 which is dealt with in the Bill earlier referred to.

The appellants rest their claim on the basis that if there is a creation of a new Court then that Court must be entrenched as are the Supreme Court and the Court of Appeal over which it will have supervisory jurisdiction.

They contend that –

> "any measure which seeks to alter or compromise the constitutional scheme by which the judicial power is exercisable only by the constitutionally created judicial institutions and by the constitutionally protected judicial officers is ultra vires and invalid, unless it conforms with the constitutional prescription for amendment."

The "constitutional prescription" for amendment of the provisions of the Jamaica Constitution exists in section 49 which prescribes that the relevant section i.e. section 110 can be amended by a simple majority. Nothing has been demonstrated in the appellants' case to lead to the conclusion that there is any legal requirement to amend section 110 by the process reserved for entrenchment clauses. If the appellants contend that the newly created Court

should be entrenched then that would have to be done by the amendment of section 49(2) requiring two-thirds (2/3rd) majority etc.

The appellants place great emphasis on what they describe as "the constitutional scheme by which judicial powers are exercisable only by constitutionally protected judicial officers" as a basis for the contention that the new Court ought to be entrenched as is the Supreme Court and the Court of Appeal. They are however faced with the fact that in the present constitutional scheme the final Appellate Court for which the Caribbean Court of Justice is to be substituted is itself not entrenched in the Constitution.

The question of the entrenchment of a new final Appellate Court rests in my view with the policy-makers. The Judiciary cannot come to that conclusion without some legal or constitutional basis. Although the entrenchment of the final Court of Appeal is, without doubt, desirable, and would create greater stability and certainty in relation to its continuation, that cannot be a reason to fault the legislature which acts in accordance and within the powers given to it by the Constitution.

The appellants also laid emphasis on the security of tenure which they contend will not be in place for the Judges of the Caribbean Court of Justice.

This is provided for in the Agreement between the participating states, which is incorporated as part of the Jamaican legislation in the Schedule to the proposed new Act, which creates the Court.

The Agreement speaks to the appointments of the President and Judges of the Court. Significantly these sections also prescribe that before a Judge or the President can be removed from office a tribunal has to be appointed "consisting of a chairman and not less than two other members from among persons who hold or have held office as a Judge of a court of unlimited jurisdiction in civil and criminal matters in some part of the Commonwealth or in a State exercising civil law jurisprudence common to Contracting Parties or a Court having jurisdiction in appeals from any such Court."

This tribunal is required to inquire into the matter and advise the Heads of Government or the Commission as the case may be whether or not the President or the Judge ought to be removed from office.

Paragraph 5(1) and (2) of the Schedule to this proposed Act speak to the removal of the President [subsection (1)], and Judges [subsection (2)] for inability or misbehaviour.

These provisions are clearly aimed at giving "security of tenure" to the Judges of the Court, which though not included in the Constitution, nevertheless give legislative protection.

In addition Art. XXVIII paragraph 3 provides that "the salaries and allowances payable to the President and the other Judges of the Court and their other terms and conditions of service shall not be altered to their disadvantage during their tenure of office."

The Agreement incorporated into the Jamaican legislation therefore provides for the security of tenure of the Judges and protects them from outside influences.

In this context it should be noted also that in so far as the Jamaica Court of Appeal is concerned similar constitutional provisions are not entrenched and that section can be amended by a simple majority of both Houses.

As presently constituted therefore the Judges of the Court will enjoy security of tenure which will be protected by the legislation.

In conclusion, nothing has been offered by the appellants to establish that the legislature is in the process of acting ultra vires its powers under the Constitution.

Intervention at Pre-Enactment Stage

The test as to whether relief can be given by the Court at the pre-enactment stage of a Bill is clearly stated by Lord Nicholls of Birkenhead in delivering the opinion of the Board in the case of ***The Bahamas District of the Methodist Church in the Caribbean and the Americas and others. v. Symonette and Others*** (2000) 5 Law Reports of the Commonwealth 196 as follows at page 210:

> "Their Lordships have already expressed the view that pre-enactment relief should be granted only when, exceptionally, this is necessary to enable the Courts to afford the protection intended to be provided by the Constitution. When that state of necessity exists, to deny the Courts powers to intervene would, ex hypothesi, be a failure to safeguard citizens' rights under the Constitution. When that state of necessity

> exists, the threatened enactment of legislation, which will be void under the Constitution but nevertheless cause irreparable damage, is a sufficient foundation (or 'cause of action') for the complainant's application to the court."

In my view, there can hardly be any more exceptional circumstances justifying intervention by a Court, than legislating for a final Court of Appeal in clear breach of Parliament's constitutional powers. A Court which is unconstitutional or based on the foundation of unconstitutional legislation or placed in the Constitution in breach of the very provisions of the Constitution can cause citizens to lodge their appeals in a Court that has no jurisdiction and consequently fail to appeal to the Court which has jurisdiction. The uncertainty and confusion which would be caused to litigants, in my view would create exceptional circumstances of the type which would cause a Court to intervene at the stage of the Bill. Had I found that the Parliament was acting in breach of its constitutional powers then I would have been minded to reverse the decision of the Full Court, and having heard sufficient arguments on the merits, grant the Declarations and Orders claimed.

In the event, for the reasons earlier stated I would dismiss the appeals.

HARRISON, J.A:

On the 17th day of June 2004, we dismissed the appeal and I agreed with the oral judgment of Forte, P and promised to put my reasons in writing. These are my reasons.

The appellants appeal against a decision of the Full Court of the Supreme Court (Wolfe, C.J., Marsh and McIntosh, JJ) on April 21, 2004, striking out on a preliminary objection, the appellants' fixed date claims which challenged the constitutionality of the legislative process employed for the passage of three Bills seeking to abolish appeals to the Judicial Committee of the Privy Council ("the JCPC") and to substitute therefor appeals to the Caribbean Court of Justice ("CCJ").

The respondents' notice of preliminary objection dated February 23, 2004, to strike out the appellants' fixed date claims, was based on the following grounds:

(1) the statement of case discloses no reasonable grounds for bringing the claim;

(2) the claim is premature in that the Bills have not yet been enacted;

(3) any irregularity in the conduct of parliamentary business is a matter for Parliament and is not justiciable in the Courts.

The Full Court upheld the objection on the said grounds in striking out the claims.

The grounds of appeal are:

"1. The learned judges erred in law in not applying the principle that a heavy burden lies on a party who seeks to strike out a claim, particularly, where it raises constitutional questions.

2. The learned judges erred in law in failing to hold that the appellant had a good and arguable case which should be heard and decided on the merits.

3. The learned judges erred in law in striking out the appellant's claim without hearing submissions on the merits of the claim.

4. The learned judges erred in law and/or wrongfully exercised their discretion in acting contrary to or reversing the directions given at the pre-trial review for the procedure to be followed as to the hearing of submissions on the preliminary objection at the same time as submissions on the merits of the substantive issues and without giving all the parties a chance to be heard before making their ruling reversing the said directions.

5. The learned judges erred in law in holding that, they had no jurisdiction to and/or were prevented from and/or could not properly, consider the merits of the claim prior to the enactment of the Bills in question.

6. The learned trial judges erred in law in holding that they were prevented or could not properly adjudicate or had no jurisdiction to adjudicate or had no jurisdiction to adjudicate or enquire into the merits of the claim by reason of –

    (i) parliamentary sovereignty, immunity or privilege; and/or
    (ii) executive authority in respect of the treaty-making power.

7. The learned judges failed to appreciate that it is the duty of the court to uphold, apply and declare the law and in a Constitutional Democracy it was the duty of the court to consider allegations of Constitutional irregularity, illegality or unlawful conduct and/or Constitutional breach.

8. The learned judges erred in law in that they failed to appreciate that a preliminary point based on the fact that the Bills were not yet law does not go to jurisdiction and does not prevent the court considering the merits of the claim.

9. The learned judges erred in law in failing to take into account sufficiently or at all the fact that the enactment of the Bills into law would pose a serious dilemma for litigants and/or cause irreparable harm to prospective appellants if the substantive issue remained undetermined by the court.

10. The learned judges erred in law in failing to take into account sufficiently or at all the facts that the issues raised in the claim are of fundamental constitutional importance and rendered the matter exceptional in character."

Dr Barnett, for the appellants, as one of his main contentions, argued that the introduction of the said three Bills to substitute the JCPC with the CCJ, would effect an alteration of the judicial power and provisions conferred and protected by Chapter VII of the Constitution, which are entrenched provisions, and that the process being employed for their enactment is contrary to the constitutional amendment process and therefore unconstitutional.

The Constitution of Jamaica, ("the Constitution") contained in the Second Schedule to the Jamaica (Constitution) Order in Council 1962, came into force in August 1962. Structured as it was on the Westminster model, the Constitution embraces the principle of the separation of powers. The function of the legislature, the executive and the judicature are specifically defined. The three areas perform independent, distinct and separate powers, in the main.

Accordingly as a general rule, neither the legislature nor the executive would interfere with the function of the judiciary and vice versa.

The exclusive power of the legislature to enact laws is laid down in the Constitution. Section 48(1) reads:

> "48-(1) Subject to the provisions of this Constitution, Parliament may make laws for the peace, order and good government of Jamaica."

The supremacy of the Constitution is expressed in section 2. It reads:

> "2. Subject to the provisions of section 49 and 50 of this Constitution, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void."

The restraint in the wording of section 48 "Subject to the provisions of ... this Constitution ..." is a recognition that the law-making powers of Parliament, must conform with and are circumscribed by the ambit of the Constitution. The judiciary is the guardian of the operation of the Constitution, to ensure that any law enacted or sought to be enacted, conforms with the dictates of the Constitution. In that regard, if a law when enacted infringes any provision of the Constitution, it is the duty of the judiciary on application to declare it unlawful and void. It is the recognition of the principle of the separation of powers and the distinct functions of the said organs that led to the bold assertion of Justice Menzies in ***Cormack v Cope et al*** (1974) 131 CLR 432, in respect of the non-interference of the judiciary in the legislative process. At page 464, he said:

> "It is a firmly established principle that this Court may declare or treat as invalid any law of the Parliament

> made without the authority of the Constitution. The exercise of this authority assumes the completion of the parliamentary process to turn a bill into an Act. It is no part of the authority of this Court, however, to restrain Parliament from making unconstitutional laws. It is of course convenient to speak of an unconstitutional law but the phrase means merely that the purported law is not a law at all. This Court does not consider in advance whether if Parliament were to pass a particular bill it would result in a valid law." (Emphasis added)

Despite this unqualified statement, in certain circumstances however, the court will intervene before enactment. In the case of ***Rediffusion (Hong Kong) Ltd. v Attorney General of Hong Kong*** [1970] AC 1136, the plaintiffs who had been granted an exclusive television licence by the Government of Hong Kong, brought an action seeking a declaration that it would be unlawful for the legislature to pass a bill to extend, certain copyright laws. The effect of the statute would cause the plaintiffs to be in breach of the copyright laws if they sought to operate under the licence granted to them. The JCPC, agreeing with the Supreme Court of Hong Kong, held that the Court had jurisdiction to intervene at the pre-enactment stage of a bill being considered by the legislature. However, their Lordships' Board held that the plaintiffs' writ could not stand, because the legislative process itself was not unlawful, and the Court should only intervene if there was no remedy after the Act was passed. Lord Diplock, at page 1144 said:

> "... the immunity from control by the courts which is enjoyed by members of a legislative assembly while exercising their deliberative functions is founded on necessity. The question of the extent of the immunity

> which is necessary raises a conflict of public policy between the desirability of freedom of deliberation in the legislature and the observance by its members of the rule of law of which the courts are the guardians. If there will be no remedy when the legislative process will by then have achieved its object, the argument founded on necessity leads to the conclusion that there must be a remedy available in a court of justice before the result has been achieved which was intended to be prevented by the law from which a legislature which is not fully sovereign derives its powers."

Clearly, the Board maintained that the Bill when it became an Act would be void as against the plaintiffs and could then be so declared by the Court.

The Court has to maintain a balance between the freedom of the legislature to deliberate freely in the performance of its functions and the duty of the judicature not to intervene unless the boundaries of the Constitution may be exceeded.

The ***Rediffusion (Hong Kong)*** case followed an earlier case of ***Attorney General of New South Wales v Trethowan*** [1932] AC 526, in which the Judicial Committee of the Privy Council held that the High Court of Australia, upholding the decision of the Supreme Court of New South Wales, was correct to find that the respondents could prevent two Bills from being presented by the legislature, to the Governor for His Majesty's assent. Section 7A of the relevant Act had provided that Bills of that nature "be approved by a majority of the electors before being presented for assent." The Bills have been passed by both Houses but neither had been approved thereafter by the requisite referendum, before attempting to send them for the assent. The respondents

consequently had filed a suit seeking a declaration and injunction restraining the presentation of the Bills.

In the instant case it was accepted on all sides that such a power of restraint exists in the judicature. Such power will however be exercised in rare and exceptional occasions.

In a more recent decision, namely, ***The Bahamas District of the Methodist Church et al v Symonette et al*** [2000] 5 LRC 196, Lord Nicholls, delivering the judgment of the Board, in respect of the power of the judicature to restrain the legislature in the pre-enactment stage, at page 210 said:

> "... pre-enactment relief should be granted only when, exceptionally, this is necessary to enable the courts to afford the protection intended to be provided by the Constitution. When that state of necessity exists, to deny the courts power to intervene would, ex hypothesi, be a failure to safeguard citizens' rights under the Constitution. When that state of necessity exists, the threatened enactment of legislation, which will be void under the Constitution but nevertheless cause irreparable damage, is a sufficient foundation (or cause of action) for the complainant's application to the Court." (Emphasis added)

A Bill was introduced in the Bahamas House of Assembly which Bill would create a new church, the Methodist Church of the Bahamas alongside the existing Bahamas District of the Caribbean Church. The constitutional validity of the Bill was challenged. One of the provisions of the Bill was that certain lands and chattels owned by the pre-existing church and held in trust should be vested in the new church. The effect of the Bill, it was argued, would firstly, breach the constitutional right of protection from deprivation of one's property by

compulsory acquisition. Secondly, the said Bill was being introduced not in accordance with the Rules of the House and was therefore in breach of the Constitution, and void. The Board held that the division of the church's trust property in the circumstances with the Court exercising its cy-près jurisdiction, did not contravene the constitutional protection, nor did the irregularity in the parliamentary procedure oblige the court to intervene. The role of the judicature as it relates to the proceedings in Parliament, was explained by Lord Nicholls at page 209. He said:

> ""... so far as possible, the courts of the Bahamas should avoid interfering in the legislative process. The primary and normal remedy in respect of a statutory provision whose content contravenes the Constitution is a declaration, made after the enactment has been passed, that the offending provision is void. This may be coupled with any necessary, consequential relief. However, the qualifying words 'so far as possible' are important. This is no place for absolute and rigid rules. Exceptionally, there may be a case where the protection intended to be afforded by the Constitution cannot be provided by the courts unless they intervene at an earlier stage. For instance, the consequences of the offending provision may be immediate and irreversible and give rise to substantial damage or prejudice. If such an exceptional case should arise, the need to give full effect to the Constitution might require the courts to intervene before the Bill is enacted. In such a case parliamentary privilege must yield to the courts' duty to give the Constitution the overriding primacy which is its due." (Emphasis added)

Chapter VII of the Constitution of Jamaica governs the provisions for the Judicature. Part 3 of Chapter VII, section 110, concerns appeals to the JCPC. It reads, inter alia:

> "110-(1) An appeal shall lie from decisions of the Court of Appeal to Her Majesty in Council as of right in the following cases.
>
> ...
>
> (2) An appeal shall lie from decisions of the Court of Appeal to Her Majesty in Council with the leave of the Court of Appeal in the following cases -
>
> ...
>
> (3) Nothing in this section shall affect any right of Her Majesty to grant special leave to appeal from decisions of the Court of Appeal to Her Majesty in Council in any civil or criminal matter."

Any of the provisions of the Constitution may be amended, in accordance with section 49, which reads, inter alia:

> "49-(1) Subject to the provisions of this section Parliament may by Act of Parliament passed by both Houses alter any of the provisions of this Constitution ..."

In a recent decision of the Board in ***Dave Antonio Grant v The Queen*** delivered on June 14, 2004 and which concerned the finality of an appeal before the Court of Appeal in Jamaica barring any further appeal to the JCPC in extradition matters, reference was made to the abolition of appeals to the JCPC. Their Lordships (per Lord Nicholls) at paragraph 8, said:

> "... since independence the Parliament of Jamaica has been competent to enact legislation limiting or

> abolishing appeals to the Judicial Committee of the Privy Council ...
>
> ... but if abrogation of an appeal to the Privy Council would require an alteration to the Constitution the abrogating legislation must comply with the provisions made in the Constitution regarding such an alteration."

Section 49(1) is a general provision concerned with the alteration of the Constitution. However, section 49(2) requires that any alteration of any of the sections of the Constitution listed in section 49(2) (a) and (b), must be effected by the special process prescribed therein. After reciting the sections involved, section 49(2) continues:

> "... a Bill for an Act of Parliament under this section shall not be submitted to the Governor General for his assent unless a period of three months has elapsed between the introduction of the Bill into the House of Representatives and the commencement of the first debate on the whole text of that Bill in that House and a further period of three months has elapsed between the conclusion of that debate and the passing of that Bill by that House." (Emphasis added)

The completion of that alteration process is dealt with in section 49(4), which reads:

> "(4) A Bill for an Act of Parliament under this section shall not be deemed to be passed in either House unless at the final vote thereon it is supported –
>
> (a) in the case of a Bill which alters any of the provisions specified in subsection (2) or subsection (3) of this section by the votes of not less than two-thirds of all the members of that House, or
>
> (b) in any other case by the votes of a majority of all the members of that House." (Emphasis added)

Section 110 is not listed as any of the sections in section 49(2).

The sections listed in section 49(2) are usually referred to as the entrenched provisions of the Constitution.

Section 55 provides that "A Bill other than a Money Bill may be introduced in either house ..." and a "Money Bill" is defined in section 58 as:

> "... a public Bill which, in the opinion of the Speaker, contains only provisions dealing with all or any of the following matters, namely, the imposition, repeal, remission, alteration or regulation of taxation; the imposition, for the payment of debt or other financial purposes, of charges on the Consolidated Fund or any other public funds or on monies provided by Parliament ..."

and similar related matters. On the face of it therefore, a Bill, not a "money bill," which seeks to alter the provisions of section 110 of the Constitution, by employing section 49:

> (a) may be introduced in the Senate and
>
> (b) its final vote may be "... supported ... by the votes of a majority of all the members of that House", a simple majority; and

is prima facie not contrary to the amending provisions of the Constitution.

The three relevant Bills are:

(1) A Bill entitled "An Act to Amend the Judicature (Appellate Jurisdiction) Act"

(2) A Bill entitled "An Act to Amend the Constitution of Jamaica to provide for abolition of appeals to Her Majesty in Council to make provisions for appeals to the Caribbean Court of Justice, and for connected matters."

> (3) A Bill entitled "An Act to make provisions for the implementation of the Agreement establishing the Caribbean Court of Justice, and for connected matters".

In strict procedure, it is only the "Bill to Amend the Constitution ...", namely, section 110, which would require the specific altering provisions of section 49(1), by the final vote of a simple majority, section 49(4(b), and not the special provisions of section 49(2).

The replacement of the JCPC with the CCJ is an alteration in terms of section 49(9) of the Constitution, but the employment of section 49 as the respondents have done to effect that alteration would not infringe the constitutional provisions. The recital to that Bill which reads:

> "Be it enacted by The Queen's Most Excellent Majesty, by and with the advice and consent of the Senate and House of Representatives of Jamaica, in accordance with the provisions of section 49 of the Constitution of Jamaica, and by the authority of the same as follows ..."

conforms with the requirements of section 61(3) of the Constitution requiring those words of enactment. I agree with Mr Hylton, Q.C., that the procedure employed for the passage of the said Bill is the proper one.

The appellants also argued before us that the legislative scheme employed for the introduction of the said three Bills to effect the abolition of the JCPC and the introduction of the CCJ required that the procedure under the Constitution to be employed for the alteration of section 110 was the section 49(2) (entrenched provision) procedure. This approach was largely influenced

by the interpretation of aspects of the majority opinion in ***Hinds v the Queen*** [1977] AC 195. Their Lordships of the JCPC held that the conferment of Supreme Court judges' powers on three Resident Magistrates to try certain offences in the newly created High Court Division of the Gun Court was unconstitutional. Such Resident Magistrates did not have the security of tenure which Supreme Court judges had. Lord Diplock, consequently, at page 213, declared:

> "What, however, is implicit in the very structure of a Constitution on the Westminster model is that judicial power, however it be distributed from time to time between various courts, is to continue to be vested in persons appointed to hold judicial office in the manner and on the terms laid down in the Chapter dealing with the judicature, even though this is not expressly stated in the Constitution."

It seems to me, that their Lordships were commenting in the context of the attempt by the legislature to extend to the lower judiciary powers which were explicitly reserved by the Constitution for their exercise by the Supreme Court judges. This was declared to be unconstitutional and the relevant Court so created devoid of any such powers.

The appellants seem to contend that, by necessary implication, the creation of the CCJ "... though ... not expressly stated in the Constitution," must be effected by employing the legislative procedure laid down in section 49(2) granting constitutional protection similar to the judges of the Supreme Court and the Court of Appeal in Jamaica. They maintain that failing this the procedure is unconstitutional. I am unable to agree. Their Lordships in the ***Hinds*** case

though sounding a cautionary note in respect of a Westminster type Constitution, could not be seen by the use of the phrase:

> "... judicial power ... is to continue to be vested in persons appointed to hold judicial office in the manner and on the terms laid down in the Chapter dealing with the judicature ..."

to be making reference to the JCPC nor by extension, to its replacement, the CCJ.

The Constitution of Jamaica, in 1962, preserved the existence of the Supreme Court which was "in existence immediately before the commencement" of the Jamaica (Constitution) Order in Council, 1962: (Section 13(1). Section 97 of the Constitution reads:

"97.-(1) There shall be a Supreme Court for Jamaica ..."

The Court of Appeal was a new court created by the Judicature (Appellate Jurisdiction) Act and recognized by the Constitution. Section 103 reads:

"103-(1) There shall be a Court of Appeal for Jamaica..."

Express provisions were made for the appointment and security of tenure of the judges of both Courts and the appointment of the Judicial Service Commission, among other related matters. The said provisions are entrenched: (section 49(2)).

The Constitution, by comparison, recognized the prior existence and the hierarchy of the JCPC. Section 110 reads:

> "110-(1) An appeal shall lie from decisions of the Court of Appeal to Her Majesty in Council as of right in the following cases ..."

The Constitution does not govern the existence and functions of the JCPC.

The CCJ, an extra-territorial court, created by the Agreement between Caribbean states, is not sought to be established by nor can it be governed by The Constitution. A distinction exists however, in that the CCJ is also sought to be recognized not only by the Constitution in section 110, but it is also to be incorporated into domestic law by means of the Bill entitled:

> "AN ACT to make provisions for the implementation of the Agreement establishing the Caribbean Court of Justice, and for connected matters."

The appellants are contending that the cumulative effect of the three Bills as introduced and the rationale in ***Hinds v the Queen*** (supra) demand that the alteration of section 110 to replace the JCPC with the CCJ, if sought to be effected by a legislative procedure, should conform to section 49(2), otherwise it is unconstitutional. I am unable to agree with this approach.

Viewing the three Bills together as a "legislative scheme" as the appellants contend is probably a misconception. The Bills must be considered singly. Of necessity, the Bill entitled:

> "AN ACT to make provision for the implementation of the Agreement establishing the Caribbean Court of Justice, and for connected matters."

must be presented for enactment, as the first Bill in order that the entity the CCJ, be brought into existence in our domestic law, to replace the JCPC in section 110, by means of the Bill "... to amend the Constitution of Jamaica ..."

Presented singly, none of the said three Bills is in contravention of the prescribed legislative procedure in section 49 of the Constitution. "Cumulatively" I cannot see that they do.

In that regard, because the legislative procedure being employed for the enactment of each of the three Bills is not unlawful or in contravention of any of the provisions of the Constitution, but rather conforms faithfully with the section 49(1) provisions, this appeal must fail. These proceedings cannot be regarded as exceptional.

It is of signal significance that the Agreement governing the establishment of the CCJ specifically ensures the security of tenure of its judges and the relevant Regional Judicial and Legal Services Commission.

A common feature in both the ***Trethowan*** case (supra) and ***The Bahamas District of Methodist Church*** case (supra), is that there was an irregularity in the parliamentary procedure involved in the presentation of the Bills prior to enactment. In the ***Rediffusion (Hong Kong)*** case, (supra) the Board found that the legislative process was not unlawful and consequently refused to sanction the intervention of the court prior to enactment.

In the instant case none of the three Bills sought to be presented is, simpliciter, in contravention of the parliamentary procedure.

No basis therefore exists, in that regard to halt the process (see ***Rediffusion (Hong Kong***) case (supra)). If the Bills were enacted, the jurisdiction of the CCJ could still be challenged in the JCPC, if the appellants

contend that it is unconstitutional and therefore void. A remedy does exist after enactment.

The Full Court therefore correctly found that the appellants' actions seeking the intervention of the Court prior to enactment of the Bills was premature.

The appellants also complain that the Full Court erred in reversing the pre-trial review order permitting the consideration of the merits along with the application on the preliminary point. Suffice it to say, that a court has an undoubted discretion to re-visit a pre-trial order granted as to the conduct of a hearing, albeit with the input of the parties who participated in the said pre-trial order. In the circumstances of this case, for the reasons stated above, the issues involved in the preliminary objection were primarily whether or not the respondents were in breach of the parliamentary procedure. The question of the merits was not central to the resolution of those issues. However, in any event, the appellants were allowed to, and did argue some aspects of the merits, before this Court. Accordingly, no prejudice was ultimately occasioned by the re-consideration by the Full Court of the pre-trial order.

For the above reasons I agreed that the appeal should be dismissed with no order as to costs.

SMITH, J.A.:

In February, 2004, the appellants filed Fixed Date Claim Forms in the Supreme Court challenging the constitutional validity of the legislative process embarked upon by the respondents for the passage of the following three Bills:

(i) A Bill entitled "AN ACT to make provisions for the implementation of the Agreement establishing the Caribbean Court of Justice, and for connected matters";

(ii) A Bill entitled "AN ACT to amend the Judicature (Appellate Jurisdiction) Act";

(ii) A Bill entitled "AN ACT to Amend the Constitution of Jamaica to provide for the abolition of appeals to Her Majesty in Council, to make provisions for appeals to the Caribbean Court of Justice, and for connected matters".

These Bills were introduced in the Senate by the Attorney General.

The first Bill seeks to:

(1) establish the Caribbean Court of Justice as a Superior Court of record with:

(a) original jurisdiction to hear and determine matters relating to the Revised Treaty of Chaguaramus ; and

(b) appellate jurisdiction to replace the jurisdiction of the Judicial Committee of the Privy Council in relation to appeals from Jamaica's Court of Appeal.

(2) establish the Regional Judicial and Legal Services Commission to deal with the appointment of Judges other than the President and to make recommendation for the appointment of the President.

This Bill also makes transitional provisions to exclude from its application any appeals to Her Majesty in Council or any applications for leave to appeal, made before its coming into force.

The second Bill is a companion measure to the first and third and seeks to amend the Judicature (Appellate Jurisdiction) Act with a view to repealing the provisions relating to appeals to Her Majesty in Council and replacing them with provisions for appeals to the Caribbean Court of Justice and to make transitional provisions.

The third Bill is a companion Bill to the first and second and seeks to amend the Constitution to repeal the provisions relating to appeals to Her Majesty in Council and replace them with appeals to the Caribbean Court of Justice.

The combined purpose of the Bills is to replace the existing rights of appeal to Her Majesty in Council by appeals to the Caribbean Court of Justice which will eventually become the final Court of Appeal for Jamaica.

On February 23, 2004, the Attorney General filed a Notice of Application for Court Orders to strike out the appellants' claims on the ground that the Statements of Case disclosed no reasonable grounds for bringing the claim. On 15th March, 2004, a Notice was filed on behalf of the respondents stating the specific grounds on which the application to strike out the claims was based as follows:

(1) The claim is premature in that the Bills have not yet been enacted;

(2) Any irregularity in the conduct of Parliamentary business is a matter for Parliament and is not justiciable in the Courts.

The appellants' claims were set down to be heard by the Full Court on April 19-23, 2004. A preliminary objection was raised by the respondents pursuant to Notice dated 23rd February, 2004.

On the 14th April, at a pre-trial review, directions were given detailing the procedure to be followed. On the 21st April, 2004, the Full Court (Wolfe, CJ, Marsh and Mrs. N. McIntosh JJ) upheld the preliminary objection and ordered that the Fixed Date Claim Forms be struck out. The learned judges were unanimously of the view that the Full Court ought not to exercise its jurisdiction to intervene prior to enactment of the Bills. The appellants have now appealed to this court seeking to have the order of the Full Court set aside. The appellants also seek an order that there be a new trial before a differently composed panel of the Full Court of the Supreme Court.

The Grounds of Appeal

Ten grounds of appeal were filed:

1) The learned Judges erred in law in not applying the principle that a heavy burden lies on a party who seeks to strike a claim, particularly, where it raises constitutional questions.

2) The learned Judges erred in law in failing to hold that the appellants had a good and arguable case which should be heard and decided on the merits.

(3) The learned Judges erred in law in striking out the appellants' claims without hearing submissions on the merits of the claim.

(4) The learned Judges erred in law and/or wrongfully exercised their discretion in acting contrary to or reversing the directions given at the pretrial review for the procedure to be followed as to the hearing of submissions on the preliminary objection at the same time as submissions on the merits of the substantive issues and without giving all the parties a chance to be heard before making their ruling reversing the said directions.

(5) The learned Judges erred in law in holding that, they had no jurisdiction to and/or were prevented from and/or could not properly consider the merits of the claim prior to the enactment of the Bills in question.

(6) The learned Judges erred in law in holding that they were prevented or could not properly adjudicate or had no jurisdiction to adjudicate or enquire into the merits of the claim by reason of –

(i) parliamentary sovereignty, immunity or privilege; and/or

(ii) executive authority in respect of the treaty-making power.

7. The learned Judges failed to appreciate that it is the duty of the court to uphold, apply and declare the law and in a Constitutional Democracy it was the duty of the court to consider allegations of Constitutional irregularity, illegality or unlawful conduct and/or of Constitutional breach.

8. The learned Judges erred in law in that they failed to appreciate that a preliminary point based on the fact that the Bills were not yet law does not go to jurisdiction and does not prevent the court considering the merits of the claim.
9. The learned Judges erred in law in failing to take into account sufficiently or at all the fact that the enactment of the Bills into law would pose a serious dilemma for litigants and/or cause irreparable harm to prospective appellants if the substantive issue remained undetermined by the court.
10. The learned Judges erred in law in failing to take into account sufficiently or at all the fact that the issues raised in the claim are of fundamental constitutional importance and rendered the matter exceptional in character.

The main issues raised by these grounds may be broadly stated as:

(1) Whether the procedure embarked upon for the passage of the Bills conformed with the constitutional prescription.

(2) Whether the learned judges erred in striking out the claims without hearing submissions on the merits.

(3) Whether the learned judges erred in holding that the claims were premature.

Procedure for Constitutional Amendment

Dr. Barnett for the appellants submitted that the process which had been embarked on for the enactment of the three Bills, aimed at abolishing appeals to the Privy Council and replacing them with appeals to the Caribbean Court of Justice(the "CCJ"), was unconstitutional. "The

grant of judicial powers to any institution must satisfy the requirements of Chapter VII of the Constitution," he argued. He contended that in so far as the Bills were calculated to effect an alteration or modification of the judicial function provided for in Chapter VII, they must conform with the special amendment procedure laid down in section 49 (2) (a), (4) (a) and (5) of the Constitution. He submitted that the very introduction of the Bills in the Senate and the absence of the constitutional declaration that the amending process prescribed by section 49 of the Constitution was being implemented, demonstrated, without any possibility of doubt that the Bills were not being introduced by way of the section 49 constitutional amendment process. By virtue of section 49 (2) of Chapter VII of the Constitution the provisions for the establishment of the Supreme Court and the Court of Appeal; the appointments of Judges; their security of tenure; and the establishment of the Judicial Services Commission are all entrenched, he pointed out. Any new institution invested with the powers and functions of the Supreme Court and Court of Appeal and with powers to alter the decisions of those Courts must, itself, be a Chapter VII Court with the same constitutional arrangements for its establishment and the appointment and tenure of its judges. He relied heavily on passages in the Privy Council's decision in ***Hinds v The Queen*** [1977] A.C. 195 at 212 D-E and p. 214 C-G.

It is Dr. Barnett's contention that from their very inception the Bills are unconstitutional and should not be introduced into Parliament. Among the many other cases cited by Dr. Barnett were - ***McCawley v The King*** [1920] A.C. 691, ***Waterside Workers Federation of Australia v J. W. Alexander Ltd.*** [1918] 25 C.L.R 434, ***Akonnay v Attorney General*** [1994] 2 LRC 399, ***Bribery Commr. v Ranasingh*** [1964] 2 WLR 1301 and ***Attorney General of New South Wales v Trethowan*** [1932] A.C. 526.

The Solicitor General, Mr. Hylton, QC, on the other hand submitted that the Constitution did not require the entrenchment of the new CCJ. Neither in the reasoning in ***Hinds'*** case nor on logic is there a basis to imply in the Constitution a requirement that a new final court must be entrenched. It would be a usurpation of Parliament's role for the Court to say that the CCJ should be entrenched. The entrenchment of the CCJ is a matter of policy - a political issue. The Solicitor General referred to various provisions in the Constitution and submitted that on the face of the Bills the procedure being followed was correct and there was nothing unconstitutional.

It is necessary to examine briefly the relevant constitutional provisions. Section 2 of the Constitution entrenches the principle of constitutional supremacy. It provides:

> "Subject to the provisions of sections 49 and 50 of this Constitution, if any other law is inconsistent with this Constitution, this Constitution shall prevail

> and the other law shall, to the extent of the inconsistency, be void."

Section 27 provides for the appointment of a Governor General who shall be Her Majesty's representative. Section 34 provides that there shall be a Parliament of Jamaica consisting of Her Majesty, a Senate and a House of Representatives. Section 48(1) invests Parliament with the power to make laws for the peace order and good government of Jamaica. It is of significance to note that the Senate and the House of Representatives alone do not constitute the Legislature. They are the deliberative parts of Parliament. Let me mention section 60 here. Subsection (1) of section 60 provides that a Bill shall not become law until the Governor General has assented thereto in the name of and on behalf of Her Majesty and has signed it. Subsection 2 provides that subject to sections 37, 49, 50, 56 and 57 a Bill shall not be presented to the Governor General for his assent unless it has been approved with or without amendments by both Houses. Subsection 3 gives the Governor General the discretion to give or withhold his assent. Thus, although the passing of a bill in both Houses is an essential part of the legislative process no Bill passed by the Houses has any effect as part of the law of Jamaica unless and until it is assented to by the Governor General.

Section 49(1) provides that Parliament may alter any of the provisions of the Constitution. However, subsection 2 lists certain sections and subsections which are referred to as entrenched. By virtue of

subsection 4(a) those sections and subsections can only be altered by an Act which is supported by the votes of not less than two-thirds of all the members of each House. Further, subsection 2 requires a three-month period between the introduction of the Bill in the Lower House and the commencement of the first debate in that House and a further three-month delay between the conclusion of the first debate and the passing of the Bill in the Lower House. Subsection 3 lists sections usually described as "deeply entrenched" which not only require the two thirds majority [subsection 4 (a)] and the delays applicable to the entrenched provisions, but are also subject to a referendum.

By virtue of subsection (4) (b) of section 49, sections of the Constitution not listed in subsections (2) and (3) may be altered by the votes of a simple majority of the members of both Houses. These sections are not entrenched. Section 61(3) provides the words of enactment of a Bill presented to the Governor General for assent under section 49.

Section 110 makes provisions for appeals to Her Majesty in Council from the decisions of the Court of Appeal as of right or with the leave of the Court of Appeal. Section 110 is not mentioned in section 49(2) or (3). It is therefore not entrenched and may be altered by a simple majority. This is not in dispute and, indeed, could not be. However, the appellants contend that in as much as the legislative objective of the Bills is to grant to the CCJ the same powers of the Supreme Court and the Court

of Appeal and the jurisdiction to hear appeals from the Court of Appeal in place of the Judicial Committee of the Privy Council, the CCJ must be entrenched. This would require enactment by the procedure appropriate for amending entrenched provisions. I understand the appellants to be saying that the new CCJ must be a Chapter VII Court with the same constitutional arrangements for its establishment and the appointment and tenure of its Judges as obtain in respect of the Supreme Court and the Court of Appeal.

In my view it is important to examine the Bills. For reasons which will become obvious, I will examine the first Bill last. The third Bill seeks to amend Part 3 of Chapter VII of the Constitution which comprises section 110. We have seen that section 110 may be amended by ordinary legislation - Section 49(4) (b). This Bill contains the recital required by section 61(3) in respect of Bills presented under section 49 of the Constitution. It was introduced in the Senate. This procedure is not unconstitutional. See section 55(2) of the Constitution which provides that "a Bill other than a Money Bill may be introduced in either House, but a Money Bill shall not be introduced in the Senate". Section 58 defines a Money Bill. This Bill does not fall within the definition and, indeed, the appellants are not saying that it does. I agree, therefore, with the Solicitor General that on its face the legislative procedure embarked on

in respect of this Bill is not inconsistent with any provision of the Constitution.

The second Bill seeks to amend section 2 of the Judicature (Appellate Jurisdiction) Act. It is enough to say that, in my view, it is beyond debate that this Bill does not involve an amendment of any provision of the Constitution and is, therefore, not amenable to the section 49 procedure.

The first Bill seeks to establish the CCJ. This Bill is the sequence of an Agreement signed by the Government of Jamaica and other Regional Governments, ("the Contracting Parties"), for the establishment of the CCJ to replace the Judicial Committee of the Privy Council as their final appellate Court. The passage of the second and the third Bills will depend on the prior enactment of the first Bill. By this Bill (section 3) the provisions of the Agreement shall have the force of law in Jamaica.

Before turning to the relevant provisions of this Bill and the appellants' challenge thereto, I will attempt to make some general observations about the constitutional requirements for establishing a superior Court of record. I think it should be noted that in the preamble to the Agreement which is the Schedule to the Bill, the Contracting Parties express the desirability of entrenching the Court in their national Constitutions. Now for my observations. The authorities indicate that:

1. In respect of the Judicature, a Constitution based on the Westminster model, such as the Jamaican Constitution, invariably contains provisions dealing with the qualification, the method of appointment and the security of tenure of the judges. These are designed to assure to them a degree of independence from the other two branches of government, the Legislature and the Executive. See ***Hinds v The Queen*** [1977] A.C. 195 at 213.
2. The Legislature, in the exercise of its powers to make laws for the "peace order and good government" of the state, may provide for the establishment of new courts and for the transfer to them of the whole or part of the jurisdiction previously exercisable by an existing court.
3. Implicit in the very structure of a Constitution based on the Westminster model, is the principle that judicial power, however it may be distributed from time to time between various courts, must continue to be vested in persons appointed to hold judicial office in the manner and on the terms laid down in the Chapter of the Constitution dealing with the Judicature. Thus, the Legislature may not vest in a new court composed of members of the lower Judiciary a jurisdiction that forms part of the existing jurisdiction of the Supreme Court even though this is not expressly stated in the

Constitution – ***Hinds v The Queen*** (supra) ***Liyanage v The Queen*** [1967] 1 A.C. 259, 287-288.

4. The purpose served by the machinery for entrenchment is to ensure that those provisions which are regarded as important safeguards by the political parties should not be altered without mature consideration by the Parliament and the consent of a larger proportion of its members than the bare majority required for ordinary laws.

5. In deciding whether any provision of a law passed by the Legislature as an ordinary law is inconsistent with the Constitution the courts are concerned solely with whether that provision is of such a character that it conflicts with the entrenched provision of the Constitution and so can be validly passed only after the Constitution has been amended by the method laid down by it for altering that entrenched provision.

I turn now to examine the first Bill. Article IV of the Agreement deals with the Constitution of the Court. Para. 1 of this Article provides that the Judges of the Court shall be the President and not more than nine other Judges of whom at least three shall possess expertise in international law including international trade law.

Appointment and Removal of the Judges

Paragraph 6 of Article IV provides for the appointment and removal of the President by the qualified majority vote of three quarters of the Contracting Parties on the recommendation of the Commission. By paragraph 7 the Judges of the Court, other than the President, shall be appointed or removed by a majority vote of all the members of the Commission. Paragraph 10 provides that a person shall not be qualified to be appointed to hold or to act in the office of a Judge of the Court unless that person satisfies the criteria mentioned in paragraph 11 and-

> "(a) is or has been for a period or periods amounting in the aggregate to not less than five years, a Judge of a court of unlimited jurisdiction in civil and criminal matters in the territory of a Contracting Party or in some part of the Commonwealth, or in a State exercising civil law jurisprudence common to Contracting Parties, or a court having jurisdiction in appeals from any such court and who, in the opinion of the Commission, has distinguished himself or herself in that office; or
>
> (b) is or has been engaged in the practice or teaching of law for a period or periods amounting in the aggregate to not less than fifteen years in a Member State of the Caribbean Community or in a Contracting Party or in some part of the Commonwealth, or in a State exercising civil law jurisprudence common to Contracting Parties, and has distinguished himself or herself in the legal profession.

Paragraph 11 reads:

> "11. In making appointments to the office of Judge, regard shall be had to the following

> criteria: high moral character, intellectual and analytical ability, sound judgment, integrity, and understanding of people and society."

Paragraph 12 reads:

> "12. The Commission may, prior to appointing a Judge of the court, consult with associations representative of the legal profession and with other bodies and individuals that it considers appropriate in selecting a Judge of the Court."

Article V, VI and VII establish an independent Regional Judicial and Legal Services Commission. Article VIII provides for acting appointments. Article IX deals with the tenure of office. It is of great relevance to this appeal and is reproduced in its entirety below:

> "**Article IX – TENURE OF OFFICE OF JUDGES**
>
> 1. The office of Judge of the Court shall not be abolished while there is a substantive holder thereof.
>
> 2. Subject to the provisions of this Article, the President shall hold office for a non-renewable term of seven years or until he attains the age of seventy-two years, whichever is earlier, except that the President shall continue in office, if necessary, for a further period not exceeding three months to enable him to deliver judgment or to do any other thing in relation to any proceedings part-heard by him.
>
> 3. Subject to the provisions of this Article, a Judge of the Court shall hold office until he attains the age of seventy-two years, except that he shall continue in office, if necessary, for a further period not exceeding three months to enable him to deliver judgment or to do any other thing in relation to any proceedings part-heard by him.

4. A Judge may be removed from office only for inability to perform the functions of his office, whether arising from illness or any other cause or for misbehaviour, and shall not be so removed except in accordance with the provisions of this Article.

5. (1) Subject to Article IV, paragraph 5, the President shall be removed from office by the Heads of Government on the recommendation of the Commission, if the question of the removal of the President has been referred by the Heads of Government to a tribunal and the tribunal has advised the Commission that the President ought to be removed from office for inability or misbehaviour referred to in paragraph 4.

(2) Subject to Article IV, paragraph 6, a Judge other than the President shall be removed from office by the Commission if the question of the removal of the Judge has been referred by the Commission to a tribunal; and the tribunal has advised the Commission that the Judge ought to be removed from office for inability or misbehaviour referred to in paragraph 4.

6. If at least three Heads of Government in the case of the President jointly represent to the other Heads of Government, or if the Commission decides in the case of any other Judges, that the question of removing the President or the Judge from office ought to be investigated, then –

(a) the Heads of Government or the Commission shall appoint a tribunal which shall consist of a chairman and not less than two other members, selected by the Heads of Government or the Commission, as the case may be, after such consultations as may be considered expedient, from among persons who hold or have held office as a

Judge of a court of unlimited jurisdiction in civil and criminal matters in some part of the Commonwealth, or in a State exercising civil law jurisprudence common to Contracting parties, or a court having jurisdiction in appeals from any such court; and

(b) the tribunal shall enquire into the matter and advise the Heads of Government or the Commission, as the case may be, whether or not the President or the Judge ought to be removed from office.

7. The provisions of any law relating to the holding of commissions of inquiry in the Member State of the Caribbean Community where the inquiry is held shall apply as nearly as may be in relation to tribunals appointed under paragraph 6 of this Article or, as the context may require, to the members thereof as they apply in relation to Commissions or Commissioners appointed under that law.

8. If the question of removing the President or any other Judge of the Court from office has been referred to a tribunal under paragraph 6 of this Article, the Heads of Government in the case of the President, or the Commission, in the case of any other Judge of the Court may suspend such Judge from performing the functions of his office, and any such suspension may at any time be revoked by the Heads of Government or the Commission, as the case may be, and shall in any case cease to have effect if the tribunal advises the Heads of Government or the Commission that the Judge ought not to be removed from office.

9. (1) The President may at any time resign the office of the President by writing under the

> hand of the President addressed to the Chairman for the time being of the Conference.
>
> (2) Any other Judge of the Court may at any time resign the office of Judge of the Court by writing under the hand of the Judge addressed to the Chairman of the Commission."

It is convenient to repeat here the gravamen of the appellants' challenge. They complain that the Bills and the Agreement establishing the CCJ do not provide that the Judges of the proposed Court should be appointed to their judicial offices in the same manner on the same terms and with the same protection as are laid down in Chapter VII of the Constitution. They argued that for the Bills to be enacted and the CCJ, established, the section 49 constitutional amendment process must be followed. What does Chapter VII provide in this regard? Chapter VII makes provision in respect of the Judicature. It is comprised of four parts.

Part 1 deals with the Supreme Court. This part provides for the establishment of the Supreme Court, the appointment and qualification of the Chief Justice, Judges and acting Judges, their tenure of office, removal and remuneration (sections 97 –102). By virtue of section 49(2)(a), all the provisions of this Part I are entrenched except subsections (1) and (2) of section 100 which deal with the age of retirement and section 102 which concerns the oaths to be taken by Judges.

Part 2 of Chapter VII deals with the Court of Appeal. It comprises sections 103 to109. These sections make provisions for the establishment

of the Court of Appeal, the appointments of the President, Judges and acting Judges, their tenure of office, removal and remuneration. Sections 103-105 and subsections (3) to (9) of section 106 are entrenched. However, section 107 dealing with the remuneration of the Judges of Appeal is not entrenched.

Part 3 deals with appeals to Her Majesty in Council and comprises one section – section 110. I have already stated that this section provides that an appeal shall lie to Her Majesty in Council as of right in certain cases and with leave in others. Section 110 is not entrenched and may be altered by ordinary legislation.

Part 4 establishes a Judicial Service Commission. It comprises sections 111-113 which make provisions for the composition of the Commission, the appointment and removal of its "appointed members" and their salaries. The Commission is vested with power to appoint judicial officers. These provisions are all entrenched .

It cannot be denied that the first Bill which incorporates the Agreement makes adequate provision to ensure that only persons qualified to hold judicial office under Chapter VII of the Constitution are eligible to be appointed as Judges of the CCJ - see Article IV paragraphs 10 and 11. The Bill adequately provides for the security of tenure and the method of appointment and removal so as to "assure to the Judge a degree of independence" – see Article IX (supra). The Bill has provisions

which will ensure that these important safeguards may not be altered without mature consideration and without the consent of the majority of the Heads of Government of the Contracting Parties. This procedure is similar to the machinery for entrenchment in Chapter VII (section 49) of the Constitution. The Bill vests the power of appointing Judges of the CCJ in a Regional Judicial and Legal Services Commission whose members have security of tenure and a reasonable measure of protection from interference.

In my view the submission of the appellants that they have an arguable case that the Bills do not conform with the required constitutional prescription is without merit. In determining whether, on its face, the first Bill, which seeks to confer jurisdiction upon a new court (the CCJ), conflicts with the provisions of the Constitution dealing with the exercise of judicial power, regard must be given to the substance of the Bill. Lord Diplock in ***Hinds*** indicated two questions to which the court should address its mind. In substance these may be stated thus:

(i) What is the nature of the jurisdiction to be exercised by the Judges who are to constitute this new court?

(ii) Does the method of their appointment and security of their tenure conform to the requirement of the Constitution applicable to Judges who at the time the Constitution came into force exercise jurisdiction of that nature?

In so far as is relevant to this appeal the nature of the jurisdiction of the CCJ is to hear appeals from the Court of Appeal. In the exercise of its appellate jurisdiction the CCJ is a superior Court of record whose decision is final. It has such jurisdiction and powers as are conferred upon it by the Agreement or by the Constitution or any other law of a Contracting Party: (Part III Article XXV). As I have already mentioned only persons qualified to hold judicial office may be appointed to the Court.

As regards the second question, the answer, clearly to my mind, must be in the affirmative. To argue as the appellants have (para. 17 of Submissions) that the Judges of the CCJ will not be appointed in the same manner as laid down in Chapter VII of the Constitution because the body which is responsible for appointing them is not the Judicial Service Commission established by Chapter VII of the Constitution is, in my respectful view, unhelpful. Such a submission ignores completely the fact that we are dealing with the establishment of a Regional Court, not a local one. To say that the Regional Judicial and Legal Services Commission is not given any security of tenure is not correct. To argue that the Bill is unconstitutional because the jurisdiction of the Court may be abolished or altered by ordinary law is devoid of merit. Indeed, appeals to the Judicial Committee of the Privy Council, as already mentioned, may be abolished by ordinary legislation. To argue that the Bill is not constitutionally valid because the Agreement establishing the

Court and determining its characteristics can be amended by political decisions taken at any time is to miss the point that the provisions of Chapter VII may also be amended pursuant to S. 49. The submission that the Bill is unconstitutional because the Executive may at any time agree to an amendment of the Agreement to change the terms of the appointment of the Judges or the Commissioners is misconceived. Indeed, if and when such an amendment of the Agreement is sought the court must then determine the constitutionality of that amendment.

The Bill seeks to transfer to the CCJ the jurisdiction exercised by the Judicial Committee of the Privy Council by virtue of Part 3 of Chapter VII. None of the provisions in Part 3 is entrenched. The Bill, in my judgment, seeks to have Judges appointed to the Court on substantially the same terms as those laid down in Chapter VII of the Constitution. Accordingly, it was not necessary for the respondents to seek to amend or alter any of the entrenched or deeply entrenched provisions of Chapter VII. As the Solicitor General correctly submitted, it is incorrect to say that the amendments of Chapter VII sought by the Bills require the procedure applicable to the entrenched sections. I hold, therefore, that the respondents have embarked upon the correct constitutional procedure in introducing the Bills.

Submissions on the merits

The appellants complained that the learned Judges erred in striking out their claims without hearing submissions on the merits. Firstly, they contend that the Judges erred in reversing the Order made at the pre-trial review.

At the pre-trial review, it was ordered inter alia that:

Oral Submissions will be made as follows:

(a) The respondents will make oral submissions on the applications to Strike Out;

(b) The Claimants... will make oral submissions on the Applications to Strike Out and on the substantive issues in the claim.

(c) The respondents will make oral submissions in response to the authorities relied on by the Claimants in relation to the Applications to strike out and on the substantive issues in the claims.

(d) The Claimants will reply to the new authorities relied on by the respondents.

The appellants submitted that the above Order indicated that full arguments would be heard before decision was made in the application for court orders to strike out. The learned Judges, they argued, "erred in law or wrongfully exercised their discretion in reversing the pre-trial Order in the absence of any request to do so by any of the parties." They relied on **Re: A Debtor No. 20 S.D.20 1999** [2000] L.T. 2, 8th February, ***Ch. D.***

(***Pells v Deutsch***). In that case the parties wrote to the Court setting out the agreed directions in relation to the matter, subject to the Court's consent. Neither party attended the "directions hearing". The District Judge struck out the claim. The High Court, while recognising that the Civil Procedure Rules allowed the Court to make an order in the absence of either party without giving them notice or an opportunity to make representations, held that it was not appropriate for the Court to make an order that did not reflect what the parties agreed, without first warning them and giving them an opportunity to make representations.

I agree with the Solicitor General that the instant case can be distinguished in that there is no evidence of any agreement among the parties and the parties were present at the hearing and had an opportunity to make representations. The Solicitor General also submitted, correctly in my view, that while the pre-trial Order (supra) set out the sequence in which submissions would be heard, it did not, and could not, state the point at which the Order on the application to strike out would be made. The Full Court therefore, did not, reverse the pre-trial order. However, even if the learned Judges did vary the pre-trial order, it certainly was within their competence to do so, as the respondents submitted.

Secondly, the appellants submitted that a claim should only be struck out where it raises an unwinnable case, where continuance of the

proceedings is without any possible benefit to the claimant and would waste the resources on both sides. Reliance was placed on ***Harris v Bolt Burdon*** [2000] L.T.L (February 2, 2000). They further argued that it was not appropriate to strike out a claim in an area of developing jurisprudence. This principle, they contended, is particularly applicable to constitutional cases. In this regard they cited ***Forah v British Airways plc.*** The Times January 26, 2001.

The respondents in reply submitted that the appellants' submissions were based on a misconception of the basis of the respondents' application and the Full Court's ruling. The respondents argued that the application to strike out was not based on the lack of substantive merit in the claims but on the submission that the appellants had no cause of action at that point and that the claims were, therefore, pre-mature. As I understand the submissions made before this Court, the appellants are not denying the jurisdiction of the Full Court to strike out a claim on the ground that it discloses no cause of action. Their contention is that before a proper determination could be made as to whether the application to strike out should be granted, the Full Court ought to have heard full arguments on the merits of the claim.

The Full Court was being asked to determine whether or not the claim was premature. There were no disputed facts. It was purely a matter of law. The learned Judges of the Full Court were obviously of the

view that it was not necessary to consider the constitutional validity or otherwise of the Bills in determining the preliminary point before them. I can see nothing wrong with this approach. A finding that the claim was premature would in no way prevent the Claimants from challenging the constitutionality of Bills on their enactment. It seems to me that much of the submissions of the appellants on this issue are more relevant to the summary procedure for striking out proceedings than they are to the instant application. In any event this Court has had the benefit of full submissions on the merits of the claim, that is to say on the constitutionality of the Bills. I have already dealt with this aspect of the case and must now proceed to consider whether or not the Full Court was correct in its ruling on the application to strike out.

Prematurity of Claims

The Claimants are seeking declarations that the Bills are unconstitutional in that they seek to establish the CCJ otherwise than in accordance with Chapter VII of the Constitution; a declaration that the Bills constitute a usurpation and infringement by the legislature of judicial power; a declaration that the procedure adopted for the passage of the Bills is in violation of the provisions of the Constitution and an Order that instructions be given prohibiting the Second Reading of the Bills.

The second respondent applied to have the claims struck out on the ground that the statement of case in each claim disclosed no

reasonable grounds for bringing the claim. At the **in limine** hearing of the respondent's application to strike out Wolfe, CJ. said:

> "... I hold that this Court ought not to exercise its jurisdiction to intervene prior to enactment of the Bills"

Marsh J in the same vein delivered himself thus:

> "This Court ought not at this 'early stage' to intervene prior to the Bills becoming law and I so hold."

N. E. McIntosh, J concurred in this way:

> "In the final analysis no case was made for treating these proceedings as exceptional and therefore no basis for the Court's intervention before the three Bills have been passed".

The three learned Judges founded their conclusion on the decision of the Privy Council in the ***Bahamas District of the Methodist Church in the Caribbean and the Americas and Others v. The Hon. Vernon Symmonette MP and Others*** [2000] 5 L.R.C. 196. In that case pre-enactment reliefs were sought on the ground that a Bill introduced in the Bahamas Houses of Assembly, if enacted would have contravened certain fundamental constitutional rights and freedoms of certain members of the Methodist Church in the Bahamas. The learned Judges below in the instant case were clearly of the view that the Courts have jurisdiction to entertain a claim for declaratory relief on the ground that the provisions in a Bill, if enacted, would contravene the Constitution. However, they held that for the Court to exercise this jurisdiction the claimants must show that if the

Bills were enacted there would probably be immediate and irreversible consequences giving rise to substantial prejudice.

Before us Dr. Barnett complained that the Full Court erred in holding inter alia that:

(i) there is an inflexible and exclusive test for the Court's intervention at the Bill stage;

(ii) exceptional cases are limited to situations in which the consequences of the offending provision may be immediate and irreversible giving rise to substantial damage or prejudice;

(iii) there was nothing exceptional in the Claims.

In the ***Bahamas District of the Methodist Church*** case Lord Nicholls of Birkenhead said that the pre-maturity argument raises questions concerning the relationship between the Courts and Parliament. His Lordship stated (p.207 h):

> "Two separate, but related principles of common law are relevant. They are basic general principles of high constitutional importance."

The first general principle is that Parliament of the United Kingdom is sovereign. This means, their Lordships observed, that in respect of the statute law of the United Kingdom, whose constitution is unwritten, the role of the Courts is confined to interpreting and applying what Parliament has enacted.

The second principle is "that the Courts recognised that Parliament has exclusive control over the conduct of its affairs. The Courts will not allow any challenge to be made to what is said or done within the walls of Parliament in performance of its legislative functions: see ***Prebble v Television new Zealand Ltd.*** [1994] 1 L.R.R. 122 at 133." Their Lordships said that this "principle was essential to the smooth working of a democratic society which espouses the separation of powers between a legislative Parliament, an executive government and an independent judiciary. The courts must be ever sensitive to the need to refrain from trespassing, or even appearing to trespass, upon the province of the legislators". That is, of course, the position in the United Kingdom where Parliament is supreme. What is the position in countries where the Constitution is supreme? Their lordships said that in other common law countries (such as the Bahamas, and, indeed, Jamaica) where their written Constitutions, not Parliament, are supreme "the first general principle mentioned above is displaced to the extent necessary to give effect to the supremacy of the Constitution." Their lordships continue (p. 208 h):

> "The courts have the right and duty to interpret and apply the Constitution as the Supreme law... In discharging that function the Courts will if necessary, declare that an Act of Parliament inconsistent with a constitutional provision is, to the extent of the inconsistency void. That function apart the duty of the courts is to

> administer Acts of Parliament, not to question them."

Likewise, their Lordships held that the second principle must be modified to the extent, but only to the extent necessary, to give effect to the supremacy of the Constitution. Subject to that important modification, their Lordships were of the view that the rationale underlying the second constitutional principle remains as applicable in a country having a supreme written Constitution as it is in the United Kingdom.

Their Lordships observed that this approach points irresistibly to the conclusion that, "so far as possible, the Courts of the Bahamas should avoid interfering in the legislative process". As to when the courts may normally intervene their Lordships said "The primary and normal remedy in respect of a statutory provision whose content contravenes the Constitution is a declaration, made after the enactment has been passed, that the offending provision is void" (p.209 b). Does this mean that the Courts should not in any circumstance intervene at the pre-enactment stage of a Bill which, if enacted, would contravene a constitutional provision? Their Lordships answer this question in this way:

> "However, the qualifying words 'so far as possible' are important. This is no place for absolute and rigid rules. Exceptionally, there may be a case where the protection intended to be afforded by the Constitution cannot be provided by the Courts unless they intervene at an earlier stage."

Their Lordships gave as an example of an exception to the general rule a situation where the consequences of an offending provision may be immediate and irreversible and give rise to substantial damage or prejudice. If such an exceptional case should arise the need to give full effect to the Constitution might require the Courts to intervene before the Bill is enacted: (p.209 c).

After laying down the principle applicable when the claim concerns the contents of the Bill, their Lordships went on to consider one of the constitutional complaints made in relation to an alleged irregularity in the law making process. That was the failure to comply with the requirements of the Rules of the House of Assembly regarding the introduction of private Bills. In their Lordships view the principles discussed above were equally applicable to such a complaint.

The approach adopted by the Board in ***The Bahamas Methodist Church*** case is consistent with the Board's earlier decision in ***Rediffusion Hong Kong Ltd. v Attorney General of Hong Kong.*** In the latter case Lord Diplock said (p.1157 E):

> "The immunity from control by the Courts, which is enjoyed by members of a Legislative assembly while exercising their deliberative functions is founded on necessity. The question of the extent of the immunity which is necessary raises a conflict of public policy between the desirability of freedom of deliberation in the legislature and the observance by its members of the rule of law of which the Courts are the guardians. If there will be no remedy when the legislative process is

> complete and the unlawful conduct in the course of the legislative process will by then have achieved its object, the argument founded on necessity in their Lordships' view leads to the conclusion that there must be a remedy available in a court of justice before the result has been achieved which was intended to be prevented by law from which a legislature which is not fully sovereign derives its powers."

This approach is also consistent with the majority view expressed by the High Court of Australia in ***Cormack v Cope*** [1974] 131 CLR 432. That case concerned an alleged constitutional irregularity in the law making process.

As I understand it, Dr. Barnett's further submission is that where the challenge to proposed legislation is as to the vires of Parliament and is not confined to a mere complaint of procedural irregularity, the principles of constitutional law support the right to ask the Court to pronounce on the validity of the legislative process. He cited ***Whaley v Lord Watson*** [2000] 5 L.R.C. 627 and **Re 19th Amendment to the Constitution** [2003] 4 L.R.C. 290. In ***Whaley*** the Scottish Court of Session held that it had the power to intervene in the Parliamentary process because the Scottish Parliament derived its power from statute and must work within its vires. I agree with the Solicitor General that this decision establishes no new principle and does not really assist the Court in determining the pre-maturity issue. In **Re 19th Amendment** a challenge to a Bill succeeded before it had been enacted and declarations were granted. The Supreme Court of Sri Lanka

did not have the benefit of the decision of their Lordships' Board in ***The Bahamas Methodist Church*** case. In my view this case is not of much assistance to this Court. Dr. Barnett also cited ***The Attorney General for NSW v Trethowan*** [1932] A.C. 526. In that case the Constitution of New South Wales provided that no Bill for abolishing the Legislative Council should be presented to the Government for the royal consent until it had been approved by a majority of the electors. The Privy Council held that Bills which had not been approved in the specified manner could not be lawfully presented and affirmed the decision of the High Court of Australia which had granted both a declaration and an injunction. This case was referred to by Lord Diplock in the ***Rediffusion*** case. I have already observed that Lord Diplock's approach in the ***Rediffusion*** case is not different from the approach adopted in the ***Bahamas Methodist Church*** case. I do not think it is necessary for me to say more by way of comment on the ***Trethowan*** case.

Other cases were cited to this Court but, in my opinion, it will not be profitable to examine them in view of the decision in the ***Bahamas Methodist Church*** case which this court is obliged to follow in so far as the relevant general principles of law are concerned.

Before proceeding to apply the principles enunciated in that case to the instant case, I should mention one other matter. The question arises on what basis is a party who alleges that a Bill is unconstitutional, entitled

to apply to the Court for reliefs before the Bill is enacted? This question is of importance since it has been held that generally, repugnancy falls to be determined at the date of enactment and not before: see ***Rediffusion (Hong Kong)*** p.1162F. This question was addressed by their Lordships' Board in the ***Bahamas Methodist Church*** case. At p. 210 (d-e) Lord Nicholls said:

> "Their Lordships have already expressed the view that pre-enactment relief should be granted only when, exceptionally, this is necessary to enable the courts to afford the protection to be provided by the Constitution. When that state of necessity exists, to deny the courts power to intervene would, ex hypothesi, be a failure to safeguard citizens' rights under the Constitution. When that state of necessity exists, the threatened enactment of legislation which will be void under the Constitution but nevertheless cause irreparable damage is a sufficient foundation (or cause of action) for the complainants' application to the Court".

Applying the principles set out above, I am clearly of the view that the Full Court was correct in holding that the appellants in the instant case had failed to make out a case for treating their claims as exceptional. The general rule as adumbrated by Lord Diplock in ***Rediffusion (Hong Kong)*** is that intervention should take place before the enactment, only if "there will be no remedy when the Legislative process is complete". In the ***Bahamas Methodist Church*** Lord Nicholls stated the rule in this way "<u>as far as possible</u> the Courts should avoid interfering in the legislative process". It is not an absolute or rigid rule as His Lordship also said:

> "Exceptionally, there may be a case where the protection intended to be afforded by the Constitution cannot be provided by the Courts unless they intervene at an early stage."

This is a clear statement of the test. This test would certainly be satisfied if the consequences of the offending provision may be immediate and irreversible and give rise to substantial damage or prejudice.

The appellants contend that their case can be treated as exceptional because it involves the establishment not only of a superior court but of one whose decision will be final and will bind all other courts in its jurisdiction. I am unable to accept this contention. It certainly does not satisfy the "test" as stated above. If, after enactment, the three new Acts were held to be unconstitutional, the Court would declare them void. The jurisdiction of the Judicial Committee would not have been abolished and at all times would have remained in operation. Any judgments pronounced by the CCJ would be null and void. The consequences of the offending provision would not be immediate and irreversible. Indeed, in the ***Bahamas Methodist Church*** case, immediately upon the passing of the Act, property to which the plaintiffs were beneficially entitled would be vested in a new entity. The new entity could dispose of the property. The Act would, arguably, have the effect of dissolving one of the plaintiffs (the Trust Corporation created by an earlier statute). The Privy Council held that these factors were not sufficient to make it an exceptional case.

The appellants also argued that if their challenge to the Bills is not disposed of before the Bills are enacted, prospective appellants will be placed in a dilemma in that they would not know the Court to which an appeal should be directed. The appellants also raise the spectre of parties in the same appeal, appealing to different Courts and obtaining conflicting decisions. I agree with the Solicitor General that this contention is misconceived. As the learned Solicitor General argued, the first prospective appellant who doubts the validity of the CCJ legislation may petition Her Majesty for special leave on the basis that the Judicial Committee remains our final Court of Appeal. The respondent may take a preliminary objection as to jurisdiction (and ,if he does not, the Attorney General may intervene and take that objection). As it has done recently in ***Dave Antonio Grant v The Queen*** Privy Council Appeal No. 27/2004 (delivered the 14th June, 2004) the Judicial Committee will rule first on the preliminary objection. The matter will then be fully resolved before any substantive appeal is heard.

In my view there can be no doubt that there will be adequate remedy when the legislative process is complete. The appellants have failed to show that the pre-enactment reliefs sought are necessary to enable the Courts to afford the protection prescribed by the Constitution.

Conclusion

It was for these reasons that on the 17th of June, 2004 I agreed that this appeal should be dismissed and that the order of the Full court should be affirmed.