

IN THE PRIVY COUNCIL

No. 35 of 1969

O N A P P E A L

FROM THE COURT OF APPEAL OF THE SUPREME COURT OF JUDICATURE OF GUYANA

B E T W E E N :

CLIVE CASEY JAUNDOO
in her capacity as Executrix
of the Estate of WILLIAM
ARNOLD JAUNDOO deceased,
10 Probate whereof was granted
by the High Court on the
17th day of November 1965,
and number 613

INSTITUTE OF APPLICED
LEGAL STUDIES
- 7 APR 1972
25 RUSSELL SQUARE
LONDON, W.C.1.

(Applicant)
Appellant

-- and --

THE ATTORNEY GENERAL OF
GUYANA

(Respondent)
Respondent

CASE FOR THE RESPONDENT

RECORD

20 1. This is an appeal, pursuant to leave granted by the Court of Appeal of the Supreme Court of Judicature of Guyana, brought by the above-named Appellant against a judgment of that Court dated the 6th June 1968, dismissing an appeal brought by the Appellant against a judgment of the High Court of the said Supreme Court dated the 12th August 1966.

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2. The questions for determination on this appeal are

(1) Whether, in enforcing the fundamental

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rights provisions of the Constitution, the Courts of Guyana have jurisdiction to grant injunctions or other Orders of a coercive nature against the Attorney General; and

(2) Whether a person who alleges that any of the articles of the Constitution which provide for the protection of fundamental rights have been infringed, and who applies to the High Court for redress under article 19 of the Constitution,

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(i) may proceed by way of Originating Notice of Motion, or

(ii) must issue a Writ and proceed by way of an action.

3. The Appellant is the executrix of William Arnold Jaundoo deceased, whose estate includes certain land in the County of Demerara. This land, which is in the Northern part of Plantation Soesdyke and is situate on the East bank of the River Demerara, was valued for purposes of estate duty on the 30th October 1965 at the sum of \$40,000. At the time when the present proceedings were commenced the crops growing on the land included several hundred orange and banana trees, and the Appellant contended that there was a sandpit on the land. The latter contention has never been admitted by the Respondent.

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4. On the 9th February 1966, the Governor of Guyana (then the Colony of British Guiana), acting in pursuance of powers vested in him by the Roads Ordinance (Chapter 277 of the Laws of Guyana) and of all other powers enabling him in that behalf, determined that a road should be constructed from Atkinson Field to Mackenzie. The construction of this road is a work which has been approved by the Legislature as part of the 1966-1970 Development Programme. It is intended to run for 47 miles, and according to the Development Programme "will give access to the riverain lands of the Demarara" and "open up a first direct access from Georgetown into

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the interior".

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5. The land comprised in the estate of the late William Arnold Jaundoo lies at the Northern end of the proposed road, and it has been regarded by the Roads Division of the Ministry of Works and Hydraulics as "the natural point of commencement of operations and the basis on which all plans have been made for construction of the road". In June and July 1966, correspondence about the commencement of work on the land and the payment of compensation took place between the Appellant's legal adviser and the Chief Engineer of the Roads Division, and on the 19th July the Appellant discussed the matter with the Chief Engineer at his office. These exchanges of views were inconclusive and on the 20th July 1966 the Appellant's Solicitor issued an Originating Notice of Motion addressed to the Attorney General.

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6. By her Notice of Motion the Appellant sought (inter alia) orders pursuant to the provisions of articles 8 and 19 of the Constitution that

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(1) the Government of Guyana be restrained from commencing or continuing road building operations on the land unless and until adequate compensation in the sum of \$250,000, or such other sum as the Court might consider just, was paid to the Appellant in respect of the compulsory acquisition by the Government of part of the land;

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(2) a survey be undertaken on behalf of the Appellant and the Government jointly of crops growing on the land; and

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(3) payment be made by the Government to the Appellant promptly of such compensation as might be assessed by the Court in respect of the compulsory acquisition of the land.

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7. By article 8(1) of the Constitution:

"No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except by or under the authority of a written law and where provision applying to that acquisition or taking of possession is made by a written law -

- (a) requiring the prompt payment of adequate compensation; and 10
- (b) giving to any person claiming such compensation a right of access, either directly or by way of appeal, for the determination of his interest in or right over the property and the amount of compensation, to the High Court".

8. By article 19 of the Constitution :

"(1) Subject to the provisions of paragraph 6 of this article, if any person alleges that any of the provisions of articles 4 to 17 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress. 20 30

(2) The High Court shall have original jurisdiction --

- (a) to hear and determine any application made by any person in pursuance of the preceding paragraph;
- (b) to determine any question arising in the case of any person which is

referred to it in pursuance of the
next following paragraph,

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10 and may make such orders, issue such
Writs and give such directions as it may
consider appropriate for the purpose of
enforcing or securing the enforcement
of any of the provisions of articles 4
to 17 (inclusive) of this Constitution:
Provided that the High Court shall not
exercise its powers under this paragraph
if it is satisfied that adequate means
of redress are or have been available
to the person concerned under any other
law.

20 (3) If in any proceedings in any Court
subordinate to the High Court any
question arises as to the contravention
of any of the provisions of articles 4
to 17 (inclusive) of this Constitution
the person presiding in that Court shall
refer the question to the High Court
unless, in his opinion, the raising of
the question is merely frivolous or
vexatious.

30 (4) Where any question is referred to
the High Court in pursuance of paragraph
(3) of this article, the High Court
shall give its decision upon the question
and the Court in which the question arose
shall dispose of the case in accordance
with that decision or, if that decision
is the subject of an appeal under this
Constitution to the Court of Appeal or
to Her Majesty in Council, in accordance
with the decision of the Court of Appeal
or, as the case may be, of Her Majesty
in Council.

40 (5) Parliament may confer upon the
High Court such powers in addition to
those conferred by this article as may
appear to Parliament to be necessary or
desirable for the purpose of enabling

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the High Court more effectively to exercise the jurisdiction conferred upon it by this article.

(6) Parliament may make provision with respect to the practice and procedure -

(a) of the High Court in relation to the jurisdiction and powers conferred upon it by or under this article;

(b) of the High Court and Court of Appeal in relation to appeals to the Court of Appeal from decisions of the High Court in the exercise of such jurisdiction; 10

(c) of subordinate Courts in relation to references to the High Court under paragraph (3) of this article;

including provision with respect to the time within which any application, reference or appeal shall or may be made or brought; and, subject to any provision so made, provision may be made with respect to the matters aforesaid by rules of Court." 20

9. The Appellant's Motion was heard by Bollers C.J. (Ag.) on 28th July 1966, and judgment was delivered on the 12th August 1966. The learned Judge held that the proceedings in the case had been incorrectly commenced by Originating Notice of Motion. He referred to the Rules of the Supreme Court 1955, and in particular to Order 2, which provides that save and except where proceedings by way of petition or otherwise are prescribed or permitted by any Ordinance, by the common law of the colony, by the Rules, or by any rules of Court, any person who seeks to enforce any legal right against any other person or against any property shall do so by a proceeding to be called an action, and to Order 3, Rule 1 which provided that every action shall be commenced 30 40

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- by a Writ of Summons. It was argued unsuccessfully on behalf of the Appellant that the procedure adopted by way of notice of motion came within Order 2, on the grounds that this procedure was permitted by the common law of Guyana which was the same as the common law of England. The learned Judge was unable to accept the Appellant's contention that the decision of Warrington J., in Re: Meister, Lucius and Bruning Ltd. [1914] W.L. 390 was authority in support of the way in which she had instituted the proceedings. Finally, the learned Judge declined to consider the question whether in a proceeding commenced by Writ any coercive Order by way of an injunction or otherwise could be made against the Crown. He concluded "that the application by way of notice of Originating motion is wholly misconceived and is neither prescribed nor permitted by any statute or rule of Court or by the Rules of the Supreme Court or at common law and altogether unauthorised and that the applicant is not entitled to apply to this Court by that means for the relief claimed." Accordingly, the motion was dismissed with costs.
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10. The Appellant appealed against the decision of Bollers C.J. (Ag.) and set out various grounds in her Notice of Appeal.
11. The appeal was heard by the Court of Appeal (Sir Kenneth Stoby C., Luckhoo and Cummings J.AA.) on the 22nd and 23rd January 1968. Judgments were delivered on the 6th June 1968.
12. The Court of Appeal (Sir Kenneth Stoby C., and Luckhoo J.A.; Cummings J.A.dissenting) dismissed the appeal "on the ground that there is no jurisdiction for the grant against the Attorney General of an Order of injunction or other coercive order as prayed for in the originating notice of motion", and further ordered that the decision of Bollers C.J.(Ag.) dismissing the motion be wholly set aside "as it is competent to move the Court under

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article 19(1) of the Constitution of Guyana by way of Originating Notice of Motion." Each party was ordered to bear his or her own costs in the Court of Appeal, and the Respondent was ordered to pay one half of the costs of the Appellant in the High Court.

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13. On the question of the issue of injunctions against the Attorney General the Appellant argued that, although an injunction could not issue against the Crown at common law, it could be granted under the provisions of article 19 of the Constitution for the purpose of defending the fundamental rights and freedoms guaranteed by the Constitution. This argument was rejected by Sir Kenneth Stoby C., and Luckhoo J.A., who held that the orders, writs and directions referred to in article 19 were those known to the law, and that an injunction against the Crown was not such an order. Cummings J.A., regarded injunctions as being in principle available for the purpose of defending the constitutional rights of a litigant against the Crown.

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14. On the question of procedure, Sir Kenneth Stoby C., held that, although an originating motion could be filed under article 19 "(a) where Parliament has enacted legislation which the applicant claims is ultra vires the Constitution; (b) where the applicant desires one of the prerogative writs", an action was the proper way of obtaining an injunction if such a remedy was available. Luckhoo J.A. held that the procedure adopted by the Appellant was correctly conceived because Order 2 of the Rules of the Supreme Court permitted proceedings other than by way of action where there were prescribed or permitted at common law, and at common law "the use of motions was sanctioned because it was a desirable form of procedure, which provided a convenient and expeditious way of approaching the Court where such applications were required to be made": he referred to Re: Meister, Lucius and Bruning Ltd. [1914] W.N. 390 and to Pierre v. Mbanefo (1965) 7 W.I.R. 433. Further, he regarded the

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enforcement provisions of article 19 as dependent for their efficacy upon "easy and ready access to the Courts" and "swift, adequate and imperative remedies to applicants deserving of such grants", and this would not be attained if an applicant had to proceed by action in the ordinary way. Cummings J.A. also held that the Appellant had proceeded correctly by originating Notice of Motion.

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15. On the 17th August 1968, the Court of Appeal (Crane J.A. in Chambers) granted the Appellant leave to appeal to Her Majesty in Council conditional upon her entering into good and sufficient security in the sum of \$2,400 for the due prosecution of the appeal and the payment of costs. By Order of the said Court of Appeal dated 15th January 1969 entered on the 21st January 1969 the Appellant was granted final leave to appeal to Her Majesty in Her Majesty's Privy Council.

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16. On the hearing of this appeal, the Respondent will submit that the decision of the Court of Appeal on the jurisdiction of the Courts to grant injunctions was right and ought to be affirmed, on the ground that by the common law of Guyana, which since the enactment of the Civil Law Ordinance 1917 has been the same as the common law of England, there has been no jurisdiction to grant an injunction against the Crown or the State or any government department or against any Minister or other officer of the Crown or the State in respect of any act done in his official capacity.

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17. The Respondent will further submit that the inability of the Courts to grant injunctions against the Crown is founded on practical considerations which transcend the traditional explanations that the Queen cannot be sued in her own Courts and that it would be incongruous for a peremptory order to issue in her name against herself or her officers. These considerations are relevant

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whatever the constitutional status of the country concerned. In particular, they are as applicable in a Republic within the Commonwealth as in an independent Commonwealth country of which Her Majesty is Queen. In this connection the Respondent will refer to the following passage in the judgment of Luckhoo J.A. in the Court of Appeal: "Although a Court may declare or assess damages against the Government under the law as it now stands, the element of coercive force is lacking. The State in effect is the judge in its own cause and cannot exercise constraint against itself". 10

18. The Respondent will further submit that there are reasons of policy for prohibiting the grant of injunctions against the Crown or the State, even in defence of the fundamental, and what might in ordinary circumstances be regarded as the inalienable rights of individuals. In an emergency the government may find it imperative to do unlawful acts which infringe individual rights, and it might be highly detrimental to the public interest if a party aggrieved were to be able to obtain the immediate intervention of the Courts. This does not leave him entirely without redress for (unless indemnifying legislation is passed) he will be able to bring an action for damages in due course. 20

19. The Respondent will further submit that article 19 of the Constitution did not confer on the Courts any new jurisdiction to grant injunctions against the Crown or to grant remedies unknown to the law at the date when the Constitution came into force. In providing that the Court "may make such orders, issue such Writs and give such directions as it may consider appropriate for the purpose of enforcing" the fundamental rights provisions, article 19(1) did not change the nature of judicial remedies (including the prerogative Writs) nor allow them to issue in cases where they could by no possibility have issued before. At most, article 19 ensures that technical considerations will not preclude the granting 30 40

10 of a remedy in defence of a constitutional right in a case in which the remedy is appropriate according to the substantive law. In this connection the Respondent will refer to the following passage from the judgment of Luckhoo J.A.: "There is no arbitrary right to distribute remedies according to any judicial whim or fancy, without regard to the vital question, as to whether those remedies are known to law".

20. The Respondent will further submit that the construction of article 19(1) advanced in the last paragraph is supported by article 19(5) of the Constitution, which implies that there are in the law which enables a citizen to enforce and defend his fundamental rights lacunae which those who framed the Constitution envisaged as being filled by legislation.

20 21. The Respondent will further submit that this construction of article 19 does not leave the citizen who wishes to enforce or defend his fundamental rights without redress nor does it render nugatory the provisions of the Constitution by which those rights are guaranteed. The prerogative Writs remain available to the citizen of Guyana in the same way as they have always been available at
30 might have been sought as between citizen and citizen, an action for a declaratory judgment may be brought against the Government and any declaration granted will be acknowledged and respected.

40 22. On the hearing of this appeal, the Respondent will also submit that the decision of the Court of Appeal on the question of procedure was wrong and ought to be reversed, and that the decision of Bollers C.J. (Ag.) ought to be restored, on the ground that article 19 of the Constitution lays down no special procedure for the enforcement of the fundamental rights provisions of the Constitution so that, in the absence of any

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exercise of the legislative power conferred upon Parliament by article 19(6), recourse must be had to the ordinary practice and procedure of the High Court. The procedure to be followed is governed by the Rules of the Supreme Court Order 1, Rule 2, Order 2 and Order 3, Rule 1, which respectively provide that the Rules shall apply to all proceedings within the Civil Jurisdiction of the High Court; that except where proceedings by way of petition or otherwise are prescribed or permitted by "the common law of this colony" by the Rules, or by any rules of Court, any person who seeks to enforce any legal right against any other person shall do so by a proceeding to be called an action; and that every action shall be commenced by a Writ of Summons. 10

23. The Respondent will further submit that neither "the common law of this colony" nor anything in the Rules of the Supreme Court permits proceedings for an injunction to be commenced otherwise than by Writ of Summons. "The common law of this colony" should be understood to mean Roman-Dutch law, which was the law in force in the late Colony of British Guiana when the provisions now contained in Order 2 was first introduced in 1910, and an Originating Notice of Motion is an English proceeding foreign to Roman-Dutch law and would be an inappropriate method of commencing a Roman-Dutch proceeding. 20 30

24. The Respondent will further submit, in the alternative to the submissions set out in the two preceding paragraphs, that if the provisions of the Rules referred to are regarded as not containing anything decisive of the present case, the provision applicable is Order 1, Rule 3, by which wherever the Rules of the Supreme Court are silent as to any matter of practice and procedure, the Rules of the Supreme Court for the time being in force in England shall apply. By Order 5, Rule 5 of the Rules in force in England at the material date proceedings might be begun by Motion only if 40

the Rules or any Act requires or authorises the proceedings to be so begun.

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10 25. The Respondent will further submit that the cases of Re: Meister, Lucius and Bruning Ltd. and Pierre v Mbanefo, on which reliance was placed in the Court of Appeal, contain nothing decisive of the point at issue in the present case. The former merely contains a statement by Warrington J., to the effect
20 that in 1914 the High Court in England or the Chancery Division of the High Court "can be, and frequently is, approached by originating motion". The latter is concerned with the circumstances in which Originating Summons procedure is appropriate under the Rules of Court in force in Trinidad and Tobago, and cannot be regarded as of any assistance whatever on the point whether Originating Notice of Motion or Writ is the
more appropriate in Guyana.

26. The Respondent will finally submit that to require that proceedings for an injunction be commenced by the issue of a Writ will not delay or impede a citizen who wishes to defend his constitutional rights. A Writ may be issued and an interlocutory application made within a matter of hours.

30 27. The Respondent accordingly submits that the decision of the Court of Appeal on the jurisdiction to grant injunctions ought to be affirmed for the following (among other)

R E A S O N S

- (1) BECAUSE there is no jurisdiction to grant injunctions against the Crown or the State at common law.
- (2) BECAUSE there is no means by which an injunction granted against the Crown or the State could be enforced
- 40 (3) BECAUSE the possibility that an injunction might be granted against the

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executive would impede the freedom of action which it is essential for the executive to have in an emergency.

- (4) BECAUSE on its true construction article 19 of the Constitution does not confer on the Courts any jurisdiction to grant remedies unknown to the law at the date when the Constitution came into force.
- (5) BECAUSE this construction of article 19 is supported by article 19(5), which recognises that there are lacunae in the procedure for enforcing the fundamental rights provisions. 10
- (6) BECAUSE, apart from the remedy of injunction, there are other, adequate remedies available to the citizen who wishes to defend his constitutional rights.
- (7) BECAUSE the decision of the Court of Appeal on the question of the availability of injunctions against the Crown or the State was right for the reasons given in the judgments of Sir Kenneth Stoby C. and Luckhoo J.A. 20

28. The Respondent further submits that the decision of the Court of Appeal on the question of procedure was wrong and ought to be reversed for the following (among other)

R E A S O N S

- (1) BECAUSE the procedure to be followed in cases of this kind is governed by the Rules of the Supreme Court, which require (with exceptions) every proceeding to be an action commenced by Writ. 30
- (2) BECAUSE nothing in the common law of Guyana (which should be understood in this context to mean Roman-Dutch law) permits proceedings for an injunction to be commenced by Originating Notice of Motion.

- (3) BECAUSE, if the position is to be determined by the English practice at the material date, this did not permit proceedings to be commenced by motion in the absence of express authority. RECORD
- (4) BECAUSE the Court of Appeal should not have relied upon the cases of Re Meister, Lucius and Bruning Ltd. and Pierre v. Mbanefo.
- 10 (5) BECAUSE to require that proceedings for an injunction be commenced by the issue of a Writ will not impede a citizen who wishes to defend his constitutional rights.
- (6) BECAUSE the decision of the Court of Appeal on the question of procedure was wrong, and the decision of Bollers C.J. (Ag.) on that question was right for the reasons given in his judgment.

MARTIN NURSE

No.35 of 1969

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O N A P P E A L

FROM THE COURT OF APPEAL OF THE
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CHARLES RUSSELL & CO.,
Hale Court,
21 Old Buildings,
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