IN THE COURT OF APPEAL OF BELIZE AD 2012

CIVIL APPEAL NO 36 OF 2011

(1) **RICARDO EDMUNDO CASTILLO**

(2) **VAUGHAN HARRISON GILL** Applicants

v

(1) **THE PRIME MINISTER**

(2) **THE ATTORNEY-GENERAL**

(3) **THE GOVERNOR-GENERAL** Respondents

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BEFORE
The Hon Mr Justice Manuel Sosa President
The Hon Mr Justice Dennis Morrison Justice of Appeal
The Hon Mr Justice Duke Pollard Justice of Appeal

Lord Goldsmith, QC and G Smith, SC for the applicants.
D A Barrow, SC and L M Young, SC for the respondents.

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Hearing: 24 October 2011
Judgment: 25 October 2011
Reasons for Judgment: April 2012

SOSA P

I - *Introduction*

[1] At the outset of the hearing on 24 October 2011, there were before the Court two applications by, on the one hand, the Prime Minister, the Attorney-General and the Governor-General, and, on the other, Ricardo Edmundo Castillo

and Vaughan Harrison Gill, respectively. Of these two applications, both of which were filed on 24 October, the first to be filed was that of the Prime Minister, the Attorney-General and the Governor-General, which sought an order for (a) the discharge of an interim injunction granted under an order made by Mendes JA earlier on the same day ('the Order') and (b) costs. Suffice it, for now, to say of this application, which was to be made under Order II, rule 16(2) of the Court of Appeal Rules ('the Rules'), that it was withdrawn at the start of the hearing. Therefore the sole application heard and determined by the Court ('the Application') was that of Mr Castillo and Mr Gill ('the applicants'), which was for an order varying the Order, by which Mendes JA refused an application by the applicants for an interim injunction pending appeal. In their 'Urgent Notice of Application', the applicants specifically asked that this Court vary the Order 'so as to grant an injunction to last until the determination of the appeal of this matter'. On 25 October the Court refused the Application with costs, a judgment for which, for the reason to be given below, I was prepared unreservedly to move.

II - *The factual background*

(a)The Belize Constitution (Ninth Amendment) Bill 2011

[2] The Application concerned the Belize Constitution (Ninth Amendment) Bill 2011('the Bill'), which was introduced into the House of Representatives ('the House') on 22 July 2011. As gazetted on 23 July 2011, this historic document (which, as shall be seen later in this judgment, was subsequently to be amended) read as follows (all marginal notes being here omitted for ease of presentation):

> 'BELIZE
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> BILL
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> for
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> AN ACT to amend the Belize Constitution, Chapter 4 of the Laws of Belize, Revised Edition 2000-2003, to provide that the Government shall at all times have majority ownership and control of public utilities; to clarify the provisions relating to the amendment of the Constitution; and to provide for matters connected therewith or incidental thereto.
>
> (Gazetted 23rd July, 2011).

BE IT ENACTED, by and with the advice and consent of the House of Representatives and the Senate of Belize and by the authority of the same, as follows:-

1. This Act may be cited as the

BELIZE CONSTITUTION (NINTH AMENDMENT) ACT, 2011,

and shall be read and construed as one with the Belize Constitution which, as amended, is hereinafter referred to as the Constitution.

2.Section 2 of the Constitution is hereby amended by renumbering that section as subsection (1) and by adding the following as subsection (2):-

"(2)The words **"other law"** occurring in subsection (1) above do not include a law to alter any of the provisions of this Constitution which is passed by the National Assembly in conformity with section 69 of the Constitution."

3.Section 69 of the Constitution is hereby amended by the addition of the following new subsection after subsection (8):-

"(9)For the removal of doubts, it is hereby declared that the provisions of this section are all-inclusive and exhaustive and there is no other limitation, whether substantive or procedural, on the power of the National Assembly to alter this Constitution; *and a law passed by the National Assembly to alter any of the provisions of this Constitution which is passed in conformity with this section shall not be open to challenge in any court of law on any ground whatsoever*."

4.The Constitution is hereby amended by the addition of the following as new Part XIII (containing sections 143 to 145) immediately after section 142:-

"PART XIII

GOVERNMENT CONTROL OVER PUBLIC UTILITIES

143. For the purposes of this Part:-

"public utilities" means the provision of electricity services, telecommunication services and water services;

“public utility provider” means –

“(a) **Belize Electricity Limited**, a company incorporated under the Companies Act, or its successors by whatever name called;

(b) **Belize Telemedia Limited**, a company incorporated under the Companies Act, or its successors by whatever name called;

(c) **Belize Water Services Limited**, a company incorporated under the Companies Act, or its successors by whatever name called; and

(d) any other entity designated as a public utility provider for the purposes of this Part by a resolution passed by the National Assembly in that behalf.

“Government” means the Government of Belize;

“Government shareholding” shall be deemed to include any share held by the Social Security Board;

“majority ownership and control” means the holding of not less than fifty one *per centum* (51%) of the issued share capital of a public utility provider together with a majority in the Board of Directors, and the absence of any veto power or other special rights given to a minority shareholder which would inhibit the Government from administering the affairs of the public utility provider freely and without restriction.

144.(1) From the commencement of the Belize Constitution (Ninth Amendment) Act, 2011, the Government shall have and maintain at all times majority ownership and control of a public utility provider; and any alienation of the Government shareholding or other rights, whether voluntary or involuntary, which may derogate from Government’s majority ownership and control of a public utility provider shall be wholly void and of no effect notwithstanding anything contained in section 20 or any other provision of this Constitution or any other law or rule of practice:

Provided that in the event the Social Security Board (“the Board”) intends to sell the whole or part of its shareholding which would result in the Government shareholding (as defined in section

143) falling below 51% of the issued stock capital of a public utility provider, the Board shall first offer for sale to the Government, and the Government shall purchase from the Board, so much of the shareholding as would be necessary to maintain the Government's ownership and control of a public utility provider; and every such sale to the Government shall be valid and effectual for all purposes.

(2) Any alienation or transfer of the Government shareholding contrary to subsection (1) above shall vest no rights in the transferee or any other person other than the return of the purchase price, if paid.

145.(1) For the removal of doubts, it is hereby declared that the acquisition of certain property by the Government under the terms of the –

(a) Electricity Act, as amended, and the Electricity (Assumption of Control Over Belize Electricity Limited) Order, 2011(hereinafter referred to as "the Electricity Acquisition Order"); and

(b) Belize Telecommunications Act, as amended, and the Belize Telecommunications (Assumption of Control Over Belize Telemedia Limited) Order, 2011, (hereinafter referred to as "the Telemedia Acquisition Order"),

was duly carried out for a public purpose in accordance with the laws authorising the acquisition of such property, *and no court shall enquire into the constitutionality, legality or validity of the said acquisitions notwithstanding anything to the contrary contained in section 17, section 20 or any other provision of this Constitution or any other law or rule of practice*.

(2) *The bar on the jurisdiction of the court contained in subsection (1) above is absolute and no court shall assume jurisdiction on any ground whatsoever including, without limitation, any alleged ground of lack of jurisdiction in the persons making the said Acquisition Orders, or any ground alleging breach of the rules of natural justice.*

(3) The property acquired under the terms of the Electricity Acquisition Order and the Telemedia Acquisition Order referred to

in subsection (1) above shall be deemed to vest absolutely and continuously in the Government free of all incumbrances with effect from the date of commencement specified in the said Orders.

(4) Nothing in the foregoing provisions of this section shall prejudice the right of any person claiming an interest in or right over the property acquired under the said Acquisition Orders to receive reasonable compensation within a reasonable time in accordance with the law authorising the acquisition of such property."' [Italics on pages 3 and 5 mine – to identify portions later permanently to be deleted as opposed to deleted only to be restored, as in the case of clause 2.]

(b) The initial public response

[3] If I may be permitted to borrow the apt expression of Conteh CJ in the court below in Vellos and Ors v The Prime Minister and Anor, Claim No 305 of 2008 (judgment delivered on 28 July 2008), at para 10, '[i]t is common knowledge of which no doubt judicial notice can properly be taken' that the advent of the Bill served forcibly to bring to the fore and exacerbate the deep-seated political polarisation of this young democracy. As the learned leading Senior Counsel for the Prime Minister, the Attorney-General and the Governor-General ('the respondents'), neither, in my opinion, purporting to testify nor evidently exaggerating, put it in his address to this Court (pp 53-54, Record):

> 'Most of Your Lordships have not been here for these 90 days but the effect of [the Bill] has been debated *ad nauseam* across the country of Belize. The amount of panels, television shows, the radio call-in talk shows in the morning and at every conceivable listening hour makes this, speaking in a general sort of way as a member of the public, the most hotly and widely and protractedly debated issue that I am aware of in recent history, if not in the entirety of my few years on this earth.'

There was both support for, and opposition to, the Bill, the Belize Council of Churches and the Evangelical Association of Churches being at an early stage amongst those who publicly opposed it. Representatives of the government and of these two bodies, in a display of commendable maturity, met and arrived at a

compromise as early as 22 August 2011. Clauses 2, 3 and 4 of the Bill were, as a result, amended and the religious bodies in question ceased their opposition. In the case of clause 2, reproduced at page 3, above, the words 'by renumbering that section as subsection (1) thereof' were substituted for the words 'by renumbering that section as subsection (1)'. In clause 3, also reproduced at page 3, above, the words 'and a law passed by the National Assembly to alter any of the provisions of this Constitution which is passed in conformity with this section shall not be open to challenge in any court of law on any ground whatsoever', italicized by me on the said page, were deleted from the new subsection (9) of section 69. Clause 4, reproduced beginning at page 3, above, and ending near the top of this page, was amended in four respects. First, para (d), italicized by me on page 4, was deleted from the definition of 'public utility provider' contained in section 143. Secondly, there were deleted from subsection (1) of section 145 the words 'and no court shall enquire into the constitutionality, legality or validity of the said acquisitions notwithstanding anything to the contrary contained in section 17, section 20 or any other provision of this Constitution or any other law or rule of practice', italicized by me on page 5. Thirdly, subsection (2) of section 145, also italicized by me on page 5, was deleted in its entirety. And, fourthly, by way of consequential amendment, subsections (3) and (4) of that section were renumbered as subsections (2) and (3), respectively.

[4] The applicants, Mr Castillo and Mr Gill, were amongst those who remained in steadfast opposition to the Bill. It is undisputed that they are not only citizens of Belize registered as electors on the approved voters' list (a designation which found its way, unaccompanied by the customary definition, into the Referendum Act in 2008, through a new section 2(b)) but also, respectively, in the words of the Attorney-General (taken from his third affidavit, at paras 3 and 4, respectively), 'the constituency chairman of the opposition Peoples (*sic*) United Party for the Pickstock Electoral Division' and 'the [People's United Party] Campaign Manager for Cayo South Electoral Division'. Three affidavits sworn by Mr Castillo, and one sworn by Mr Gill, were filed and relied upon by the applicants in the court below. It is recognised that the matters deposed to in those affidavits are for that court in due course to accept or reject, it having heard the claim and reserved its decision on 12 January 2012, as the Registrar has advised. At the same time, of course, it is perfectly open to me to assume to be true, purely for the sake of argument at this stage, any matter so deposed to. With this in mind, I shall refer in several of the paragraphs next following to a number of such matters as if they were matters of proven fact.

[5] At no time prior to July 2011 had there been any suggestion by the government that the Constitution was to be amended as proposed in the Bill. Despite this assumed absence of advance warning, opponents of the Bill were not slow to respond negatively to it. Thus, by 27 July 2011, the Bar Association of Belize ('the Bar Association') had issued a position paper on the Bill. Some two days later, the Prime Minister addressed Belizeans by an open letter dated 29 July 2012 announcing the start of a public consultation process, by the outcome of which the government would, according to him, consider itself bound. This development was followed almost a month later by a press release of the Bar Association dated 25 August 2011. In the meantime, there had been other relevant press releases by the Belize Chamber of Commerce and Belizeans for Justice and an editorial critical of the Bill in a newspaper published on 21 August 2011 in Jamaica.

<u>(c) The petition for a referendum</u>

[6] A petition for a referendum on the Bill was launched by some of the Bill's critics on 12 September 2011, that is to say, no less than 51 clear days following its introduction into the House ('the introduction'). The applicants both signed it sometime during that same month. On 5 October 2011, the Prime Minister reportedly stated in an interview aired on Channel 7 that, as far as the continuing efforts to obtain a referendum by means of a petition were concerned, even if those moving the petition 'did have that required number of signatures, the whole matter of verification is such that they would not be able to trigger any such referendum before we go back to the House [of Representatives] … [Y]ou can hardly expect to have a referendum on what is a done-deal'. He reportedly went on to say later in the interview that holding a referendum after the Bill had been enacted into law 'will be pointless, futile and expensive. And I certainly will not do it, except that I am obliged to'. And there is further attributed to the Prime Minister a statement, made on 12 October 2011, that 'a referendum is to inform the legislative process and it is futile after the legislative [process] is completed'. (The Prime Minister's reported description of such an exercise as futile was, for some reason, to be made to reverberate, and otherwise accorded much importance, in the course of the submissions of learned Queen's Counsel for the applicants before this Court.) On 12 October 2011, that is to say, one month following its launch and 81 clear days after the introduction, the petition, bearing what purported to be the signatures of more than 21,000 registered electors, ie in excess of ten per centum of all 169,674 electors registered in Belize, and whose names appeared in the approved voter's list, was presented to the Governor-General by Tanya Usher, the well-known Executive Director of an organisation

calling itself Friends of Belize. On that same day, Ms Usher dispatched a letter to the Prime Minister requesting his confirmation that he would hold a referendum before the Bill's enactment into law. No such confirmation had been received by her when the applicants filed their application for an interim injunction in the court below.

(d) The litigation in the court below

[7] That application was filed on 17 October 2011 (that is to say, 86 clear days following the introduction) in Claim No 647 of 2011 in the court below, a fixed date claim by way of originating motion based on the Form for an Administrative Order (For Relief under the Constitution or a Declaration) ('the Claim'). It is worth noting before proceeding that, specified in the Claim, were eight declarations and one injunction. And whilst there is no necessity to enumerate in these reasons for judgment each and every one of these claimed reliefs, it may usefully be observed that, amongst the declarations spelled out, were the following:-

> '(1) A Declaration that the Government is obliged to hold a referendum on [the Bill];
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> (2) A Declaration that such referendum should take place before bringing [the Bill] into force;
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> (3) A Declaration that the Governor General should refer the petition requesting a referendum on the Bill to the Chief Elections Officer pursuant to Section 2(3) of the Referendum Act, Cap 10 (as amended by Act No 1 of 2008); and once the Chief Elections Officer has produced a certificate under Section 2(4) of the Referendum Act issue a Writ of Referendum pursuant to Section 3(1) of the Referendum Act …'

Also noteworthy is the fact that the sole injunction included amongst the desired reliefs was one

> 'restraining the [respondents] whether by themselves or by their servants or agents from taking any steps (including presenting the Bill to the

> Governor General for his signature, or the Governor General giving his assent to the Bill) to bring [the Bill] into force until a referendum is held.'

Sometime before the filing of the Claim, the office of the Clerk of the National Assembly issued a public notice of a sitting of the House on Friday 21 October 2011 at 10 am, that is to say, 90 clear days following the introduction. Mr Castillo, expecting that the government would 'attempt to pass' the Bill at that sitting of the House, closed the penultimate paragraph of his first affidavit filed in the court below as follows:-

> 'In light of the impending amendments to the Constitution, it is imperative that this claim be heard as soon as possible to ensure that the electorate's right to have a referendum on this issue is ensured.'

In addition, the applicants filed a notice dated 17 October 2011 of an application for 'an interim injunction until trial or further order that [the respondents] whether by themselves or by their servants or agents be restrained from taking any steps to bring [the Bill] into force (including, but not limited to, presenting the Bill to the Governor General for his signature, or the Governor General giving his assent to the Bill) until the Petition … has been verified by the Chief Elections Officer and, if certified as duly signed by the requisite number of electors, a referendum held.'

[8] The court below did not delay in hearing and determining this urgent application. The hearing took place before the learned Chief Justice on the afternoon of 19 October 2011 and judgment was delivered by him by 21 October, an accomplishment for which due tribute is paid to him.

[9] In his judgment, the learned Chief Justice was careful to distinguish between issues raised in the Claim, which were not before him for determination at that time, and those raised in the discrete application for an interim injunction, which were. In setting the stage for the resolution of the latter issues, he stated, at para [27] of his judgment:

> 'The Court is guided by the principles governing the grant of interim injunctions as set out in the case of American Cyanamid Co v Ethicon 1975 AC 396. The principles have been adopted by the Privy Council in National Commercial Bank Jamaica Ltd v Olint Corporation Ltd [2009] 1 WLR 1405 which case has been embraced by the Court of Appeal in Belize Telemedia Ltd v Speednet Communications Limited – Civil Appeal No 27 of 2009.'

And he went on to cite key passages from the speech of Lord Diplock in American Cyanamid and the judgment delivered by Lord Hoffmann in National Commercial Bank Jamaica in which he obviously considered that the governing principles were given expression (para [28] of his judgment). The learned Chief Justice proceeded in due course successively to reach the following five salient conclusions:

i) '… there is a live issue [in the Claim] as to the holding of a referendum pursuant to the duties created under the [Referendum] Act.' (para [34]);

ii) '… the Court cannot step out of the clear legal position presented upon a construction of the Referendum Act (as amended) vis-à-vis the provisions of section 69 of the Constitution.' (para [34]);

iii) '… the very attitude of the Courts is to be loathe (*sic*) to interfere in the legislative process.' (para [35]);

iv) 'It is true that the legislative process may well lose the opportunity to be advised by the outcome of the referendum but … that eventuality does not offend the law.' (para [36]);

v) 'It has been … said on behalf of [the applicants] that [they] as electors would suffer irremediable damage and therefore the balance of convenience is in their favour … I do not agree.' (para [36]).

In those circumstances, the learned Chief Justice refused the applicants' application for an interim injunction and directed that the Claim itself be heard on

14 November 2011. (As already noted a para **[4]**, above, the Registrar advises that the Claim was heard at a later date and that judgment is now pending.)

[10] On the same day that the learned Chief Justice delivered his judgment, the Bill had its final reading in the House, where it was supported by the votes of not less than three quarters of all members. All that now remained, as a practical matter, was for it to be passed, by a simple majority, in the Senate and submitted, along with a certificate under the hand of the Speaker of the House to the effect that section 69(3) of the Constitution had been complied with, to the Governor-General for his assent.

(e) The application to the single judge of the Court

[11] It was against this backdrop that the applicants approached the Registrar of the Court of Appeal on Friday 21 October 2011 with an application under Order II, rule 16(1) of the Rules, which provides:

> '16.-(1) In any cause or matter pending before the Court a single judge of the Court may upon application make orders for-
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> (a) giving security for costs to be occasioned by any appeals;
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> (b) leave to appeal in *forma pauperis*;
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> (c) a stay of execution on any judgment appealed from pending the determination of such appeal;
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> (d) an injunction restraining the defendant in the action from disposing or parting with the possession of the subject matter of the appeal pending the determination thereof;
>
> (e) extension of time;

and may hear, determine and make orders on any other interlocutory application.'

The Court, then about to complete the second week of its arduous three-week October sitting and faced, on the one hand, with a full schedule for its final week

and, on the other, with the manifest urgency of the application, was left with no option but the unenviable one of setting down that application for hearing on Saturday 22 October. (For reasons which it is obviously not for me to enter into in this judgment, the hearing did not take place until shortly after the crack of dawn on Monday 24 October 2011.) Sitting as a single judge of the Court, Mendes JA heard and refused the applicants' application, denying them the particular interim injunction prayed for; but he granted them an interim injunction (to remain in force until 4 pm on the next day, ie 25 October).

[12] Mendes JA prefaced his single oral reason for decision with a clear acknowledgment that, on the one hand, refusal of the injunctive relief sought would render the appeal from the order of the learned Chief Justice nugatory and, on the other, the grant of it would interfere with the legislative process, thus bringing into play the constitutional doctrine of separation of powers. His reason for refusing the only application actually made by the applicants was, however, that he considered the appeal from the order of the learned Chief Justice to have no real prospect of success, primarily because he could see no basis for the applicants' argument of legitimate expectation. Insofar as that argument was sought to be based on the provisions of the Referendum Act, to accept it would amount to holding that that Act had created a legal fetter on the legislative process, contrary to the decision of the Privy Council in The Prime Minister of Belize and Anor v Vellos and Ors [2010] UKPC 7. Insofar as the argument was sought to be based on the statement of the Prime Minister regarding the result of the government's consultative process, he was of the view that the requirement of clarity of representation had, on the evidence, plainly not been met. Since, however, the applicants intended to exercise their right to apply to the Court of Appeal (comprised of three judges) for the discharge or variation of the Order, he considered it proper to grant an interim injunction to the effect that the Prime Minister and the Attorney-General, as well as their servants and agents, be restrained from presenting the Bill to the Governor-General for his assent until 4 pm on 25 October or further order. He was clear, however, that he was not restraining the placing of the Bill before the Senate.

III - *An important aside*

[13] In his dissenting opinion in the United States Supreme Court in the notable appeal case of New York Times Co v United States, 403 US 713 (1971),

popularly known as The Pentagon Papers Case, Mr Justice Harlan said, at pp 753-754:

> 'These cases forcefully call to mind the wise admonition of Mr Justice Holmes, dissenting in Northern Securities Co v United States, 193 US 197, 400-401 (1904):
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> "Great cases, like hard cases, make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend."'

I regard these famous words of Mr Justice Holmes, among the most eminent of Mr Justice Harlan's predecessors on the US Supreme Court, as a most felicitous prologue to my reason for taking the view that the application had of necessity to be refused.

[14] This is so because I consider that there might well have been other reasons for refusing the Application had it not been for the circumstances of urgency and concomitant rush in which it, as well as the antecedent application to Mendes JA, came to be heard and determined. I shall, so far as possible, be appropriately brief in dealing with this point. Essentially, my concern is that the latter application came to the single judge under the provisions of Order II, rule 16(1) of the Rules (reproduced at para **[11]**, above), provisions which have been the subject of more than one single-judge ruling, one of which, as recently as 2007, received the blessings of a majority of the Court (comprised of three judges). I speak here of rulings which address the scope of the power conferred on a single judge by rule 16(1) and which date as far back in Belize's post-independence period as 1989, when Cotran CJ, sitting as a single judge of the Court of Appeal, handed down his oft-cited decision in Valladarez v Williams, Civil Appeal No 4 of 1989 (judgment delivered on 17 August 1989), in which he held that para (e) of rule 16(1) required narrowly to be construed. To similar

effect, but without restriction to para (e), have been the subsequent rulings made by me, sitting as a single judge of the Court, in In the Matter of Tommy Crutchfield, Civil Appeal No 7 of 1998 (judgment delivered on 28 July 1998), and Mask v Belize Hotels Limited, Civil Appeal 20 of 1998 (judgment delivered on 14 December 2000), the former of which rulings was cited with approval by both Carey JA and Morrison JA, and the latter by Morrison JA, in AG and Ors v Prosser and Ors, Civil Appeal No 7 of 2006 (judgment delivered on 8 March 2007). (As the third member of the panel in AG and Ors v Prosser and Ors, I did not see the need to deal in my own judgment with the rulings in question since I was of the respectful view that the application of the Attorney General and his co-applicants fatally fell at an even earlier stage of the game than that at which my learned brothers considered that it did.) I do not know whether these rulings and, more importantly, the approval of them expressed in AG and Ors v Prosser and Ors, were canvassed, ie thoroughly discussed, before Mendes JA prior to his determination that he had jurisdiction under rule 16(1) to hear and determine the applicants' application. (It is recorded in the transcript of the hearing that he referred to In the Matter of Tommy Crutchfield and AG and Ors v Prosser and Ors in giving reasons for his relevant ruling.) As the question of his jurisdiction was not raised before the Court (comprised of three judges) on the subsequent hearing of the Application, I am obviously in no position to express a concluded view on it. But, as President of the Court, I decided to air this concern in the way I now have lest, in time to come, it should be said that, by my silence, I tacitly approved of, or otherwise encouraged, a belief that any of the single-judge rulings or the judgment of the Court in question have ceased to be authoritative and that what was, for so long, a well-settled area of the law no longer is.

IV - *Reason*

[15] With the path to it thus hewn, I take the few remaining steps to my reason for decision. Rule 16(2) confers on the Court (comprised of three judges) the power to discharge or vary any order made by a single judge in pursuance of rule 16(1). Its provisions are strikingly similar to those of section 69(2) of the Supreme Court of Judicature (Consolidation) Act 1925 (UK). As already noted at para **[1]**, above, the Court was expressly asked by the applicants to vary the Order by granting the interim injunction which he denied them, one which was to remain in force until the determination of the appeal from the order of Benjamin CJ.

[16] The submissions of counsel for the applicants ranged relatively far and wide. There may well be strong extenuating circumstances. The legal principles governing applications for interim injunctions were trotted out again (albeit more in the written than in the spoken word), as they had been before the learned Chief Justice a few days earlier. But the march of relevant events had continued after the hearing in the court below and, even more to the point, after the historic, early-morning hearing before the single judge. That was inevitable. The members of the Senate were not respondents in either of the two applications that had already been determined. Nor had the Order sought to restrain anyone from placing the Bill before the Senate.

[17] At 10.19 am on 24 October, the Court (comprised of three judges) sat to hear the Application. Prompted by the remarks of a member of the Court, Mr Barrow SC withdrew the respondents' application for the discharge of the interim injunction, noting, whilst so doing, that the Senate had sat at 10 o'clock that morning. Counsel for the applicants, rather than embarking on his application, applied for an adjournment to allow members of the Court time to read some of the material filed by them and counsel for the other side. That application being unopposed, at 12 noon the Court adjourned until 3 pm that same day, making it clear that the interim injunction granted by Mendes JA would remain in force. Mr Barrow applied unsuccessfully for its immediate variation. Lord Goldsmith refrained from following suit. The Court resumed the hearing at 3 pm. Lord Goldsmith addressed the Court. In the course of his reply during the afternoon hearing, Mr Barrow informed the Court that he had been made to understand that the Senate had already passed the Bill. On next addressing the Court, Lord Goldsmith referred to the passing of the Bill in the Senate with what seemed a note of resignation. But while Mr Barrow sought to highlight the impact of that late development, pointing to what to him was the resulting impossibility of a referendum capable of informing the legislative process, Lord Goldsmith valiantly undertook the uphill struggle of downplaying its significance. The result at that point was, however, an entirely foregone conclusion. There can be no scope for the operation of the principles enunciated in American Cyanamid and National Commercial Bank Jamaica in circumstances where the grant of an injunction would be useless. In Atkins' Court Forms in Civil Proceedings, 2nd ed, Vol 22(1980 Issue), title INJUNCTIONS, para 8, the learned contributors, viz the Hon Sir Raymond Walton, then a Justice of Her Majesty's High Court of Justice, and Mr Alastair Walton, provide what I respectfully consider an excellent example of a situation in which the grant of an injunction would be useless, writing:

> '… if the act complained of is the felling of trees the grant of an injunction will be refused if all relevant trees have been felled before the court is seised of the matter'.

A judicial approach along those lines commends itself to me as flawless. And I am unable to distinguish the facts of the Application from those in the above example. The applicants came to this Court seeking an injunction which would have enabled the holding of a referendum whose purpose was to be the informing of the legislative process. But, once the Senate passed the Bill, all chances of informing the legislative process by means of a future referendum (however early) were, as I see it, irrecoverably lost. As Mr Barrow rhetorically asked in his address to the Court:

> 'What would be the point for this Court to do so [ie grant an injunction]?'

The only steps then left to be taken would be those of the Speaker and the Governor-General already referred to above. At that stage, in short, the enactment of the Bill into law was in every sense a *fait accompli*. And, as was said, not without a touch of understatement, in the judgment of this Court in Prime Minister and Anor v Vellos and Ors, Civil Appeal No 17 of 2008 (judgment delivered on 27 March 2009), per Carey JA, at para 43:

> 'It is not clear what benefit could be gained by having a referendum when the amendment is a *fait accompli*. It is akin to closing the barn door after the horse has long gone.'

The point is, to my mind, as uncontroversial and unremarkable as the proposition that Belmopan is the capital of Belize, by whomsoever that proposition may be advanced. It remains axiomatic even, as matter of fact, if unarticulated by anyone. Hence my expression of mild surprise, at para **[6]**, above, over the way in which the Prime Minister's use of the word 'futile' in this context was made by learned Queen's Counsel to reverberate in the course of his submissions. (At one point, counsel actually stated that it was not for the government to say that a referendum in the circumstances under contemplation at the time would be

futile.) It was, after all, not as if the Prime Minister had said something original or defiant of logic. Indeed, the loudest cry of the claimants themselves was that giving them and their fellow petitioners a referendum after the event would be tantamount to giving them naught. But that is the only type of referendum that could be held once the Senate had passed the Bill; and there was no dispute, or disputing, by the end of oral argument before us, that the Senate had, indeed, already done so. (The question that lingers is: would time inevitably have caught up in this manner with the claimants had the petition been launched, say, 21, rather than 51, days after the introduction?)

[18] That, then, was the wholly uncomplicated reason why I, for my part, was not able to see my way to countenance the variation of the Order by the grant of the interim injunction prayed for and why I moved, without hesitancy, for refusal of the Application, with costs.

[19] I am authorised by Pollard JA to say that he has read, and concurs in, this reason for judgment.

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SOSA P

MORRISON JA

[20] I have had the great advantage of reading in draft the judgment prepared by the learned President in this matter. Subject only to the single, small caveat which I enter at para [22] below, I agree with and have nothing of substance to add to that judgment.

[21] As Sosa P has explained (in para [1] of his judgment), what remained at the end of the day was an application by the applicants to vary an order made by Mendes JA on 24 October 2011. By that order, after having determined, over the respondents' objection, that he had jurisdiction to make the order sought before him, the learned judge refused the applicants' application for an interim injunction pending the hearing of the

appeal in this matter, on the ground that he did not consider that appeal to have any real prospects of success. However, he granted an interim injunction to last until 4:00 p.m. the next day, that is, 25 October 2011, for the explicit purpose of allowing an application to the full court. The variation sought before this court was to extend Mendes JA's interim order to the hearing of the substantive appeal.

[22] In para [14] of his judgment, the learned President observes that "there might well have been other reasons" for refusing the application for an interim injunction, "had it not been for the circumstances of urgency and concomitant rush in which it…came to be heard". I can readily appreciate the reason given by the President (in the final sentence of para [14]) for choosing to mention specifically some of the previous single-judge rulings and, in particular, the judgment of the court itself (of which I was a member) in **AG and Ors v Prosser and Ors** (Civil Appeal No 7 of 2006, judgment delivered on 8 March 2007), on the scope of the powers conferred on a single judge of the court by Order 11, Rule 16(1) of the Court of Appeal Rules. However, as Sosa P also acknowledges, the question of the single judge's jurisdiction to make the order which was sought of Mendes JA in this matter was not before this court, no point having been taken about it by either of the parties. In these circumstances, and particularly because I have not seen Mendes JA's detailed reasons for considering as he did that he had the jurisdiction to determine the application for an interim injunction, I would prefer to confine myself in refusing the application that was in fact before us to the reason given by Sosa P (at para. [17]).

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MORRISON JA