IN THE CARIBBEAN COURT OF JUSTICE
APPELLATE JURISDICTION

ON APPEAL FROM THE COURT OF APPEAL OF
THE EASTERN CARIBBEAN SUPREME COURT (DOMINICA)

CCJ Application No DM/A/CV2021/002
DM Civil Appeal No DOMHCVAP2020/0012A-J

BETWEEN

GLENROY CUFFY
DAYNE OSWALD GEORGE
ATHERLEY ROBIN **APPLICANTS**

AND

MELISSA SKERRIT
IAN ANTHONY, CHIEF ELECTIONS OFFICER
JOSEPHINE LEWIS, RETURNING OFFICER
GERALD BURTON, CHAIRMAN OF THE ELECTORAL COMMISSION
HILARY SHILLINGFORD, MEMBER OF THE ELECTORAL COMMISSION
WAYNE JAMES, MEMBER OF THE ELECTORAL COMMISSION
KONDWANI WILLIAMS, MEMBER OF THE ELECTORAL COMMISSION
ALICK LAWRENCE, MEMBER OF THE ELECTORAL COMMISSION
DOMINICA BROADCASTING CORPORATION
ROOSEVELT SKERRIT (PRIME MINISTER AND MINSTER OF FINANCE)
ATTORNEY GENERAL OF THE COMMONWEALTH OF DOMINICA
THE COMMISSIONER OF POLICE, DANIEL CARBON **RESPONDENTS**

Before The Honourable: **Mr Justice A Saunders, PCCJ**
Mr Justice J Wit, JCCJ
Mr Justice W Anderson, JCCJ
Mme Justice M Rajnauth-Lee, JCCJ
Mr Justice P Jamadar, JCCJ

Appearances

Mr A Shepherd QC, Ms Z James and Ms N Reece for the Applicants

Mr A Astaphan SC, Mr L Lawrence and Ms J Luke for the First Respondent

Ms H Felix-Evans for the Second, Third, Fourth, Seventh, and Eighth Respondents

Mr A Astaphan, SC and Mr S Isidore for the Ninth Respondent

Mr L Peter, The Hon. Attorney General, Mrs V Joseph and Ms N Lando for the Tenth, Eleventh, and Twelfth Respondents

Constitutional law – Jurisdiction – Court of Appeal – Election petitions struck out by High Court for insufficient pleadings – Applicants appealed – Court of Appeal declined jurisdiction to hear appeal – Circumstances in which Court of Appeal may accept jurisdiction – Whether Court of Appeal rightly declined jurisdiction – Whether decision of trial judge final or interlocutory in context of right of appeal granted by s 40 of Constitution – Meaning of 'final decision of High Court' – Constitution of the Commonwealth of Dominica, s 40(6) and (7).

SUMMARY

Ten election petitions were filed in the wake of the Dominica General Elections held on 6 December 2019. The Petitioners claimed that in the ten constituencies, the candidate declared to be the winner had not been validly elected. They alleged that the elections were plagued with election offences, breaches of electoral laws and other irregularities. The Respondents (among whom were the Chief Elections Officer, various Returning Officers, the Commissioner of Police, members of the Electoral Commission, the Prime Minister and the Attorney General) applied to strike out the petitions. They claimed that the petitions were insufficiently particularised and disclosed no case to answer. The High Court judge agreed that the petitions lacked sufficient particulars and accordingly struck them out.

The Petitioners filed Notices of Appeal against the judge's decision and the Respondents applied to strike out the notices on the ground that the Court of Appeal lacked jurisdiction to hear the appeal. That court's jurisdiction is found in s 40 of the Constitution. According to ss 40(6) and (7) of the Constitution, an appeal lies as of right to the Court of Appeal from any final decision of the High Court determining a question concerning the validity

of an election. The Court of Appeal found that the High Court judge did not decide the petitions on their merits and that his decision was therefore not a final decision. The Court of Appeal accordingly declined jurisdiction to hear the appeal.

The Petitioners then applied to the Caribbean Court of Justice (CCJ) for Special Leave to appeal against the decision of the Court of Appeal. Before addressing the Special Leave Application, this Court determined on written submissions that it had jurisdiction to entertain the application.

The judgment of the Court was delivered by Saunders PCCJ. The central issue in the case was whether the decisions of the trial judge were 'final' in the sense in which that word is used in s 40(6), or 'interlocutory'. The Court noted that English common law had developed two competing tests (the 'order test' and the 'application test' respectively) to assess whether a decision was final or interlocutory. The Court also noted that the Eastern Caribbean Court Civil Procedure Rules 2000 expressly states that the application test is to be employed in determining whether an order is final or interlocutory.

The Court held however, that the meaning of 'final' in the context of the right of appeal granted by s 40 of the Constitution is to be determined by construing ss 40(6) and (7). This exercise would involve, among other things, an examination of the meaning, aim and history of the constitutional provisions. One must look to the rationale for and the context in which the Constitution deprives a litigant of the right to appeal all but a final determination of the question as to whether any person has been validly elected as a Representative or Senator.

The Court noted the wealth of jurisprudence which asserted that disputed election proceedings were to be determined expeditiously so that the legitimacy of a government does not remain in question. The constitutional provisions reflect a policy to have elections petitions fully determined as quickly as possible and that policy rests on the presumed competence of professional judges who are not infallible. The Court found that the petitions before the judge were not determined on their merits. They were determined at an intermediate stage, before the taking of evidence and before the judge rendered any determination on whether any person was or was not validly elected as a Representative. Accordingly, the orders made by the High Court judge were interlocutory.

The Court disagreed with the Petitioners' argument that their appeal should be heard in light of the importance of the petitions. The Court noted however that the Constitution affords to every person in Dominica the right to a fair hearing within a reasonable time by an independent and impartial tribunal. A very high value is placed on that fundamental right and therefore if a Petitioner complains, in the hearing of an interlocutory aspect of their petition, that their right to a fair hearing was contravened, the Court of Appeal should assume jurisdiction to hear that complaint. That exercise of jurisdiction by the Court of Appeal does not conflict with the provisions of ss 40(6) and (7). Instead, it demonstrates compliance with a constitutional provision which guarantees access to the courts to safeguard a fundamental right. The Petitioners did attempt to advance the point that they were deprived of the right to a fair hearing, but this was rejected. The Court found that they were afforded a fair or reasonable opportunity to be heard.

In a concurring judgment, Jamadar JCCJ found that the limitation on the right of appeal in ss 40(6) and (7) against a final decision of the High Court had to be construed against the purpose of general elections in a liberal democracy and the right to question how elections are conducted and their outcomes. In that regard, there were two analytical perspectives, a quantitative analysis, and a qualitative analysis. In determining what is a final order therefore a pragmatic, purposive approach driven by the objectives of elections and election petitions, and the two analytical perspectives is the appropriate approach. In law, and especially constitutional law, context is vital to both analysis and application.

Jamadar JCCJ stated that the holding of free and fair elections is part of the basic deep structure of Dominican constitutionalism, and integral to that is the right to vote. The Constitution established the Electoral Commission which, among other things, has the responsibility of maintaining the integrity of the lists of electors. In this case, a complaint which appeared in nine of the ten petitions filed was that the election officials failed to use the revised annual list and the supplementary register in accordance with s 17 of the Registration of Electors Act. Also, the High Court acknowledged that based on the pleadings there was patent non-compliance with that law. Jamadar JCCJ opined that the Court of Appeal arguably may have had jurisdiction on constitutional grounds, irrespective of whether the decision was considered, in the contexts of ss40(6) or (7), final. The right

to be registered to vote is about the legitimacy of the voters' lists. It is at the heart of free and fair elections.

The Application for Special Leave was refused, and the orders of the Court of Appeal dated 21 May 2021 were upheld. The Court made no order as to costs.

Cases referred to:

Abraham v Darroux (Dominica HC, 25 August 2010); *A-G v Brandt* (Montserrat CA, 11 November 2020); *A-G v Joseph* [2006] CCJ 3 (AJ) (BB), (2006) 69 WIR 104; *A-G of Grenada v David* (2008) 72 WIR 155 (GD CA); *A-G of Guyana v Richardson* [2018] CCJ 17 (AJ) (GY), (2018) 92 WIR 416; *Andama v Andayi* (Kenya CA, 7 August 2013); *Belize International Services Ltd v A-G of Belize* [2020] CCJ 9 (AJ) BZ, [2021] 1 LRC 36; *Browne v Francis-Gibson* (1995) 50 WIR 143 (VC CA); *Consolidated Contractors International Co SAL v Masri* (2009) 74 WIR 235 (BM CA); *Exeter v Gaymes* (Saint Vincent and the Grenadines CA, 13 June 2017); *Gill v Reed (Hackney Case)* (1874) 2 O'M & H 77; *Grant v Phillip* (Saint Christopher and Nevis HC, 4 November 2010); *Green v Saint Jean* (Dominica HC, 7 June 2011); *Green v Saint Jean* (Dominica CA, 11 March 2013); *Gunn v Sharpe* [1974] QB 808; *Habet v Penner* (Belize SC, 4 May 2012); *Hamilton v Liburd* (Saint Christopher and Nevis CA, 3 April 2006); *Joseph v Reynolds* (Saint Lucia CA, 31 July 2012); *Marin v R* [2021] CCJ 6 (AJ) BZ; *McEwan v A-G of Guyana* [2018] CCJ 30 (AJ) (GY), (2019) 94 WIR 332; *Medhurst v Lough (Islington West Division Case)* (1901) 17 TLR 210; *Morgan v Simpson* [1975] QB 151; *Nervais v R* [2018] CCJ 19 (AJ) (BB), (2018) 92 WIR 178; *Parry v Brantley* (Saint Christopher and Nevis CA, 27 August 2012); *Petrie v A-G* (1968) 14 WIR 292 (GY HC); *Prevost v Blackmore* (Dominica HC, 14 September 2005); *Quinn-Leandro v Jonas* (2010) 78 WIR 216 (AG CA); *R (Daly) v Secretary of State for the Home Dept* [2001] 2 AC 532; *Returning Officers v Munroe* (Trinidad and Tobago CA, 30 November 2015); *Russell v A-G of St Vincent and the Grenadines* (1995) 50 WIR 127 (VC CA); *Salaman v Warner* [1891] 1 QB 734; *Shubrook v Tufnell* (1882) 9 QBD 621; *Singh v Perreira* (Guyana CA, 11 November 1998); *Skerrit v Defoe* [2021] CCJ 4 (AJ) DM; *Vehicles and Supplies Ltd v Financial Institutions Services Ltd* (2005) 66 WIR 260 (JM PC); *Ventose v Chief Electoral Officer* [2018] CCJ 13 (AJ) (BB), (2018) 92 WIR 118; *White v Brunton* [1984] 2 All ER 606; *Williams v Giraudy* (1975) 22 WIR 532 (GD CA).

Legislation referred to:

Dominica – Constitution of the Commonwealth of Dominica 1978, Eastern Caribbean Supreme Court Civil Procedure Rules 2000, House of Assembly (Elections) Act, Chap 2:01, Registration of Electors Act, Chap 2:03, Registration of Electors Regulations, Chap 2:03, House of Assembly (Election Petition) Rules 2014, SI 2014/2; **Trinidad and Tobago** – Election Proceedings Rules 2001, Representation of the People Act, Chap 2:01.

Treaties and International Materials referred to:

Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III).

Other Sources referred to:

Parker F R, *The Powers, Duties and Liabilities of an Election Agent and Returning Officer at a Parliamentary Election in England and Wales: Including the Law and Practice of Election Petitions* (3rd edn, Charles Knight & Co 1920); Samaroo B, *Adrian Cola Rienzi* (Royards Publishing 2021).

JUDGMENT
of
The Honourable Mr Justice Saunders, President
and The Honourable Justices Wit, Anderson, Rajnauth-Lee
and Jamadar

Delivered by
The Honourable Mr Justice Saunders, President

and

CONCURRING JUDGMENT
of
The Honourable Mr Justice Jamadar

on 5 July 2022

JUDGMENT OF THE HONOURABLE MR JUSTICE SAUNDERS, PCCJ:

Introduction

[1] The critical issue in this appeal is whether the Court of Appeal rightly declined jurisdiction to review the decision of a trial judge who had dismissed ten election petitions filed by the Petitioners. The appeal is concerned not with whether the judge was in error in striking out and so, effectively, dismissing the petitions, but with whether the unsuccessful parties had a right of appeal to the Court of Appeal. It was the view of the Court of Appeal that, under the Constitution, there was no

such right. The Petitioners have asked this Court for Special Leave, that is, permission, to appeal that determination.

[2] The ten petitions had been filed in the wake of General Elections held on 6 December 2019. The candidates of the Dominica Labour Party (DLP) were successful in most of the constituencies. The Petitioners claimed that in ten constituencies, the particular candidate declared to be the winner had not been validly elected. In support of their claims, the Petitioners alleged that the elections were plagued with several election offences, breaches of the electoral laws and other irregularities.

[3] Although the petitions also referenced allegations of violations of constitutional rights, it was clear that the Petitioners were fundamentally concerned with the question of whether the particular candidate, declared to be the winner, was validly elected. The petition presented by Glenroy Cuffy, for example, indicates at para 3:

> Your Petitioners say that Melissa Skerrit was not duly elected and returned and that the election was void as a result of several electoral offences which were committed and as a result of several breaches of the electoral laws…

At the very end of that petition, after making several allegations impugning the elections and the conduct of Mrs Skerrit and other members and supporters of her political party, Mr Cuffy's petition stated:

> Whereof your Petitioner prays that it may be determined and the said Melissa Skerrit was not duly returned, and that the election was void. Alternatively, the Petitioners pray for a declaration that Glenroy Cuffy should be duly returned. The Petitioners also pray for a declaration that their constitutional rights have been infringed, for compensation in the form of damages and for costs.

[4] The Respondents to the petitions typically comprised the Chief Elections Officer, various Returning Officers, the Commissioner of Police, members of the Electoral Commission, the Prime Minister, the Attorney General, and the Dominica Broadcasting Corporation (DBC) which is responsible for the operations of DBS radio (DBS).

The High Court Proceedings

[5] The High Court judge did not determine the petitions in the sense of taking evidence, hearing witnesses, and then giving a final judgment on the merits. The judge never reached that far in the proceedings because, at the outset, the Respondents made applications to strike out various parties and, as well, the entirety of each of the petitions. Essentially, the Respondents argued that the petitions were insufficiently particularised and therefore disclosed no case to answer.

[6] The judge addressed the strike out applications as a preliminary issue. In an extensive judgment, the judge found that all the Respondents were properly joined except the DBC against whom constitutional violations were alleged. The judge ruled that the Attorney General was the proper party where breaches of constitutional rights were alleged. The judge agreed with the Respondents, however, that the petitions were insufficiently particularised and the judge accordingly struck them out.

[7] The judge's decision to strike out the petitions was largely premised on the decision in *Morgan v Simpson*[1] in which case Denning LJ proposed the following approach to the determination of election petitions, namely:

i. If the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated, irrespective of whether the result was affected or not.

ii. If the election was so conducted that it was substantially in accordance with the law as to elections, it is not vitiated by a breach of the rules or a mistake at the polls - provided that it did not affect the result of the election.

iii. But even though the election was conducted substantially in accordance with the law as to elections, nevertheless, if there was a breach of the rules or a mistake at the polls - and it did affect the result - then the election is vitiated.

[8] In other words, the judge considered that to succeed, the Petitioners had to cross two sequential hurdles. First, they had the burden of making out on the pleadings,

[1] [1975] QB 151.

and secondly, establishing at the trial (if they crossed the first hurdle), facts to demonstrate that the elections were a sham or alternatively, that there were breaches of the rules or other irregularities and that the election results would have been different had it not been for those breaches or irregularities. Evidently, the judge considered that the first hurdle had not been crossed and that there was no need to proceed to the second. It is useful to provide a flavour of some of the principal allegations made and the judge's treatment of them.

Date for Nominations

[9] The Petitioners alleged that the Chief Elections Officer initially published a notice which confused the public as to the true date for receiving nominations of candidates. The Notice had stated that nomination day was to be *Wednesday,* 19 November 2019. In fact, there is no date of Wednesday, 19 November 2019. Nomination day was really on *Tuesday,* 19 November 2019. An erratum was subsequently issued, just prior to nomination day, but the Petitioners alleged that, because of the error, specifically named persons were deprived of their constitutional right to be nominated because they had been misled and had turned up and were refused to be nominated on Wednesday 20 November after the nomination process had concluded. The court ruled that the Petitioners had not pleaded any facts to support the notion that the irregularity had such an effect on the conduct of the elections as to render the same a sham, or as to affect the results.

Objection Complaints

[10] The Petitioners pleaded that throughout the 21 constituencies, a total of 1544 objections had been lodged to various names on the preliminary and quarterly register of electors and that none of those objections was heard and determined in accordance with the Registration of Electors Regulations[2]. The court ruled that these pleadings did not indicate how the alleged failure to resolve the objections tangibly affected the results of the elections.

[2] Chap 2:03.

Section 17 and the Use of Different Registers

[11] The Petitioners alleged that the preliminary list and supplementary register of electors were used as opposed to the revised annual lists and the supplementary register. The court ruled that the Petitioners failed to plead what were the differences between the documents required by the relevant section of the Registration of Electors Act[3] (s 17) (the "Registration Act") and those used on polling day. According to the judge, the pleadings failed to specify how the registers lacked credibility, how particular registered voters were disenfranchised, and whether unqualified voters were included on the registers and allowed to vote in the elections. In essence, according to the judge, not enough was pleaded to indicate how these alleged breaches of the electoral laws affected the outcome of the elections or rendered the elections a sham.

Failure to Disclose the Names of Newly Registered Electors

[12] Similarly, in relation to complaints about the disclosure of the names of newly registered electors to the public, the judge ruled that there was no pleading that the Chief Elections Officer had refused, failed, or omitted to follow the process of informing the public of the names of registered persons.

Treating

[13] The Petitioners alleged that the DLP and the successful candidates were guilty of treating. For example, it was stated that gospel artist Donnie McClurkin had provided free entertainment to voters in Castle Bruce and that this circumstance corruptly lured persons to attend and listen and subsequently to vote for the DLP's candidates. The court considered *Abraham v Darroux*[4] where Thomas J in quoting from 'The Powers, Duties and Liabilities of an Election Agent and Returning Officer', explained that where a petition alleges bribery, treating and undue influence, the Petitioner had to particularise, in relation to the persons allegedly responsible for engaging in bribing, unduly influencing or otherwise treating, the

[3] See (n 2).
[4] (Dominica HC, 25 August 2010) at [50].

following: their names and addresses; the dates when, and the places where, each act of bribery, treating or undue influence took place; the nature, character, and description of each act of bribery, treating or undue influence; and precisely to which person each bribe or treat was given, promised or offered. Similarly, the identity of the persons who were bribed, treated and unduly influenced had to be detailed. This great level of specificity is required, it was said, because a charge of treating involves an element of criminality. Having considered the standard required for pleading treating, the court found that the pleadings were also insufficient in this regard.

Importation of Electors

[14] In relation to the complaint in the petitions about the importation of voters by the DLP, the court stated that in Dominica, there was no offence against transporting a voter to the polling station once there was no corrupt bargain so as to influence the vote of that person in a particular way and no such bargain was pleaded.

Lack of Access to DBS

[15] Citing *Parry v Brantley*[5], the Petitioners claimed that DBS, which they contended was state-owned media machinery, covered only the events of the DLP and in so doing breached the Petitioners' constitutional rights not to be treated in a discriminatory manner by reason of political opinion. The Petitioners claimed that this gave an unfair advantage to the DLP. The Respondents' response was that DBS was not state-owned, but, noting that this issue was a matter suited for trial, the court properly did not venture into an analysis of the respective positions on that score. The court ruled, however, that there was no suggestion in the pleadings that there was involvement by or knowledge or collusion by the DLP candidates or their agents in relation to the impugned conduct of DBS. Also, according to the judge, the Petitioners did not plead particularly how DBS's conduct affected the results of the elections rendering the same a sham or travesty.

[5] (Saint Christopher and Nevis CA, 27 August 2012).

Intimidation and Police Brutality

[16] The crux of the allegations under this head was that the Prime Minister and political operatives of the DLP had engaged in threats, acts of intimidation, brutality and harassment leading up to the elections. The court noted that the alleged conduct came under the election offence of undue influence which was forbidden by s 57 House of Assembly (Elections) Act[6].The court found that the pleadings were required to specify that the conduct affected how a person or persons voted or did not vote. In the court's view, the pleadings were defective in that they did not demonstrate how there was undue influence on any person to vote or to refrain from voting one way or another.

Electoral Commission's Failure to Reform the Electoral Process

[17] The Petitioners stated that the Electoral Commission had engendered a legitimate expectation in the electorate that it would embark upon a process of electoral reforms, for example, through cleansing of the electoral registers and lists, and the introduction of voter identification cards. The Petitioners alleged that this expectation had been disappointed. The court's ruling was that the Petitioners did not plead sufficient material to show how any such legitimate expectation could have arisen.

Rejection of Ballots by Electoral Officers

[18] Under this head, the Petitioners claimed that the presiding and returning officers willfully and unlawfully rejected ballots that were lawfully cast for the Petitioners, and they also willfully and unlawfully counted ballots cast for the DLP candidates which they knew were not in fact cast for those persons. Here again, the court held that there was no pleading as to the specific irregularities or breaches on the basis of which the Petitioners wished to question the conduct of the electoral officials and, by extension, the returns or the elections as a whole.

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[6] Chap 2:01.

Allegations of Bribery

[19] Specific allegations of bribery were made by the Petitioners, but the judge cited case law[7] which, the judge said, provided guidance on the pleadings required when alleging the commission of bribery. The cases stipulate that a Petitioner must plead the issue of dishonest or corrupt conduct with a high level of precision. There needed to be pleaded, according to the judge: the material facts in relation to the alleged bribery; the names of the alleged agents; the alleged acts of bribery committed; the persons who were bribed; the alleged corrupt bargain or arrangement made including dates, place, time and manner and alleged parties; the alleged inducement; and that the persons were bribed to vote one way or another.

[20] In relation to the Roseau South petition, the court found that the pleadings did not meet the required standard of pleading bribery or any electoral offence for that matter. In relation to the Castle Bruce petition, the court found that the pleadings came close to the requirements but failed nonetheless, because there were no details to demonstrate that the payments in question were in furtherance of an act of bribery.

Voting Irregularities and Objections in the La Plaine Petition

[21] Here again, the judge found that the pleadings did not indicate or foreshadow what, if any, electoral offence, irregularity, or other misstep may have occurred and the manner in which or extent to which any such irregularity, offence or misstep may have affected the result of the elections.

Objections and Voter Irregularities in the Roseau Central Petition

[22] The Petitioners claimed that objections were filed against the inclusion of approximately nine names in the supplemental register. Also, it was alleged that the agents at the polling stations objected to persons who allegedly falsely claimed the right to vote. The court reiterated the finality accorded to the register and stated that even if the objections were accepted as valid, and the nine votes were awarded to

[7] *Quinn-Leandro v Jonas* (2010) 78 WIR 216 (AG CA) at [56] and *Grant v Phillip* (Saint Christopher and Nevis HC, 4 November 2010) at [83].

Mr Cuffy, this was not capable of overturning the results of the polls which returned Mrs Skerrit by close to 200 votes.

Billboard Advertisement

[23] The Petitioners alleged that on polling day, Mrs Skerrit and her agents allowed an LCD billboard which advertised DLP political propaganda within 100 yards of the Windsor Park Stadium polling station. The Petitioners stated that this would have unduly influenced 'hundreds of electors' to vote for Mrs Skerrit giving her an unfair advantage, and ultimately rendering her return null and void. The court ruled that the Petitioners had failed to particularise whether and how the alleged infraction affected the results or rendered the conduct or the election a sham or travesty.

Disqualification of Mrs Skerrit

[24] The Petitioners alleged that Mrs Skerrit was a citizen of Canada and a holder of a Canadian passport. The petition recited dates on which Mrs Skerrit travelled with her Canadian passport. Applying *Green v Saint Jean*[8], the court found that the Petitioners were required to plead and establish at trial that under Canadian law possession of and travel on a Canadian passport rendered the traveller a person who had pledged allegiance to Canada and the Petitioners had not so pleaded.

St Joseph Petition

[25] The Petitioners alleged that Kevin King, the son of Adis King who was declared the successful candidate of the St Joseph elections, was allowed to vote although, according to the Petitioners, he was not resident in the constituency. The court stated that the Petitioners failed to plead how the conduct of the relevant electoral officials amounted to an election offence or an irregularity that affected the outcome of the elections or rendered the same a sham or travesty.

Comment

[26] It is to be stressed that it is neither desirable nor useful for this Court to assess whether the trial judge was or was not in error in reaching the above decisions. On

[8] (Dominica CA, 11 March 2013).

the one hand, a judge is perfectly entitled to disallow a petition from going to trial on pleadings that, taken at their highest, do not disclose sufficient facts such that, if the facts pleaded are established at trial, they will reveal that the elections were a travesty or alternatively, that a different result would have ensued. Further, in the face of deficient pleadings, it is useless for a Petitioner to claim that, at trial, they would produce evidence of facts that can close glaring or serious gaps in the factual matrix that could justify the grant of the relief claimed. To allow a petition to go to trial on deficient pleadings would set the Respondents up for an ambush at the trial and the rules of court do not permit this.

[27] Striking out pleadings altogether could deprive a Petitioner entirely of the right to a trial. A judge should therefore very sparingly adopt such a draconian measure. Imposing tight timelines for the production of suitable particulars, coupled perhaps with an 'unless' provision, is often a more just alternative. Further, at this interlocutory stage, the judge is not expected to conduct a mini trial on contested facts. Indeed, the judge is in no position to decide at this stage the merits of a contested case. Nor should a judge strike out pleadings if there are enough facts pleaded that, if established, would show that the elections were a sham or that a different result would have been declared and the Respondents have a reasonable appreciation of the evidence with which they would be faced at trial. In weighing whether or not to strike out pleadings a judge is often required to exercise some discretion and the law ordinarily allows no appeal against the exercise of that discretion unless the prospective appellant is complaining that they have been denied (or they apprehend a breach of) a constitutional right, such as for example, the right to a fair trial by an independent and impartial tribunal.

The Court of Appeal

[28] The Petitioners filed Notices of Appeal against the judge's orders. The Respondents applied to strike out these Notices on the ground that the Court of Appeal lacked jurisdiction to hear the appeal. The Court of Appeal's jurisdiction derives from s 40 of the Constitution. What does the section say?

[29] Three subsections are relevant. Section 40(1) states:

> The High Court shall have jurisdiction to hear and determine any question whether-
>
> (a) any person has been validly elected as a Representative or Senator;
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> (b) any person has been validly appointed as a Senator;
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> (c) any person who has been elected as Speaker from among persons who were not members of the House was qualified to be elected or has vacated the office of Speaker; or
>
> (d) any member of the House has vacated his seat or is required, under the provisions of section 35(4) of this Constitution, to cease to perform his functions as a member of the House.

[30] Subsections (6) and (7) respectively state:

> (6) An appeal shall lie as of right to the Court of Appeal from any *final* decision of the High Court determining such a question as is referred to in subsection (1) of this section;
>
> (7) No appeal shall lie from any decision of the Court of Appeal in exercise of the jurisdiction conferred by subsection (6) of this section and no appeal shall lie from any decision of the High Court in proceedings under this section other than a *final* decision determining such a question as is referred to in subsection (1) of this section (emphasis added).

[31] The question for the Court of Appeal boiled down to this. Was the decision of the High Court judge a *final* decision determining such a question as is referred to in subsection (1) of s 40? In this connection it is appropriate to ask, What is meant by the italicised word '*final*'? The High Court judge clearly made a decision. Actually, he made several. He struck out all ten petitions. If those decisions were *final* decisions determining the question whether each or any of the ten returned candidates had been validly elected as a Representative, then clearly, the Court of Appeal could not decline jurisdiction to hear an appeal. If, on the other hand, the decisions were interlocutory, that is to say, they were all decisions given at an intermediate stage of proceedings that were aimed at determining the question referred to in s 40(1), then, notwithstanding the fact that the judge struck out the petitions (and because of time bars, they cannot now be re-filed), the Court of Appeal was constitutionally bound to decline jurisdiction.

[32] The Court of Appeal naturally assumed jurisdiction to determine whether the decisions of the trial judge were final or interlocutory. In agreeing with the Respondents that the judge's decisions were not *final*, the Court of Appeal, in a lucid judgment delivered by Dame Pereira CJ, noted that in the Eastern Caribbean, two complementary approaches have traditionally been taken to determine whether a decision to strike out an election petition was final or interlocutory. One approach is exemplified by the reasoning of Alleyne CJ in *Hamilton v Liburd*[9]. That approach seeks to construe the relevant constitutional provisions (in this case ss 40(6) and (7)). In *Hamilton*, Alleyne CJ concluded that those subsections excluded the possibility of an appeal from any decision of the High Court in any proceedings other than a final decision determining the question of whether a person was validly elected.

[33] Gordon JA in *Attorney General of Grenada v David*[10] reached a similar result using a slightly different approach. In *David*, the trial judge had struck out a fixed date claim form on the premise that a challenge to the validity of an election could not be sustained by way of that originating process. On appeal, Gordon JA applied the 'application test' to determine whether the order striking out the petition was final or interlocutory. It didn't matter whether the trial judge was right or wrong to do what he did. Since, using that test, the trial judge's decision was interlocutory, not final, there was no right of appeal.

[34] In the instant case, the Court of Appeal ultimately decided that it did not have jurisdiction to entertain the appeal because the judge had not decided the petitions on their merits; that an order striking out an election petition, prior to the hearing of evidence, on the grounds that the pleadings were insufficient or failed to disclose a cause of action, is not a final decision on the issue of whether any person has been validly elected as a Representative under s 40(1)(a) of the Constitution.

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[9] (Saint Christopher and Nevis CA, 3 April 2006).
[10] (2008) 72 WIR 155 (GD CA).

The Appeal to the CCJ

[35] The Petitioners were dissatisfied with the Court of Appeal's judgment and so applied to this Court for permission to appeal against the decision of the Court of Appeal. This Court first determined, on written submissions, the question whether it possessed jurisdiction even to entertain the application for Special Leave. Upon consideration of the written submissions and the applicable law, the Court agreed that the Petitioners were entitled to seek the requested permission to review the Court of Appeal's decision to decline jurisdiction. We also decided to roll up into a single hearing the application for permission to appeal and, in the event we were minded to grant such permission, the appeal itself.

[36] As outlined at [1] above, the central issue for our determination is whether the Court of Appeal rightly declined jurisdiction to hear the appeal of the Petitioners against the judgment of the High Court judge. That central issue can be framed in this way. Were the decisions of the trial judge 'final' in the sense in which that word is used in s 40(6), or 'interlocutory'?

Were the Judge's Decisions Final or Interlocutory?

[37] English common law has devised two competing tests to assess whether a decision is final or interlocutory. These are the 'order test' and the 'application test'. The former focuses on *the order* that is made by the judge. It looks at the effect of the order. If the order disposes completely of the proceedings, subject only to the possibility of an appeal, then the order made is considered to be final, even if the application prompting the order was interlocutory in nature. An example of the employment of the order test by a Court of Appeal in an election petition may be found in *Andama v Andayi*[11] a case from Kenya. There the court stated:

> … in our view, if an appeal is against a decision of the High Court allowing an interlocutory application seeking striking out of a Petition, then this Court would have jurisdiction to hear it for an order striking out a petition is a final decision on the petition and an appeal from it is no longer an interlocutory appeal but is an appeal on final decision on the Election

[11] (Kenya CA, 7 August 2013).

> Petition. This, in our view is only where application for striking out the petition is allowed and the petition is ordered struck out.

[38] The application test yields different results. This test focuses on *the application* that resulted in the order that was made. If the application could possibly result in an order that will not finally dispose of the case, then the order made on that application will be considered interlocutory, even if it actually turns out to be dispositive of the case. In *Consolidated Contractors International Co SAL v Masri*[12], the Court of Appeal of Bermuda said much the same thing but expressed itself in a slightly different manner. It was stated there that:

> … the application test is that if an application or claim before the court is of such a nature that, irrespective of which side succeeds, the order made in the proceedings will dispose of the case, subject only to the possibility of appeal, the order will be final. The order test is to look at the actual order, and if it is dispositive of the matter, subject only to the possibility of appeal, it is final whether or not any alternative order might not have been dispositive.

[39] The Eastern Caribbean Supreme Court Civil Procedure Rules 2000 (CPR) expressly address this specific question of the test that is to be used by the court to distinguish between a final and an interlocutory order. It was important for the rules to provide that clarity because, although both final and interlocutory orders in ordinary civil proceedings are appealable, a different rules regime governs the manner and time frames applicable to each category. Part 62.1(3)(b) of the CPR states that an order or judgment is final if it would be determinative of the issues that arise on a claim, whichever way the application or claim giving rise to the order or judgment could have been decided. An order or judgment is not to be regarded as final if it were possible for the judge to make a decision that would not be determinative of the issues that arose on the claim. An application to strike out pleadings would normally yield an interlocutory (as distinct from a 'final') order because, although a successful application may dispose of the claim, on the other

[12] (2009) 74 WIR 235 (BM CA).

hand, an unsuccessful strike out application will usually still leave to be resolved the matters in dispute on the claim.

[40] The Petitioners have accepted what is stated in the Rules, namely that the appropriate test for determining whether an order is to be treated as final, as opposed to interlocutory, is the application test. The Petitioners state, however, that the trial judge here, in effect: determined the petitions on their merits; that he made definitive findings on facts and evidence, just as if he had presided over a trial of the substantive issues; that because of the manner in which he arrived at his decisions, and given the nature of his decisions, his findings were determinative on the question of the members in question being validly elected; and that, accordingly, the Court of Appeal should treat his judgment as a final order.

[41] This submission, if correct, would blur the relatively neat distinction between the two tests. As it is now, using the application test, it is not difficult to determine, in almost all cases, *at the time an application is embarked upon*, whether any resultant order would properly be categorised as final or interlocutory. A preliminary application to strike out pleadings for failure sufficiently to particularise one's allegations of fact ought ordinarily to yield an interlocutory order because, if those applications were unsuccessful, the case would continue to trial.

[42] It is of course possible that an interlocutory application could yield a final order. Suppose, for example, there is a case where all the facts are agreed and success in the litigation turns solely on a single discrete issue of law that is argued as a preliminary point. The decision on that point would be a final order because whichever party succeeded on the point would automatically be successful on the entire claim and there would be no need for any further proceedings, subject to any right of appeal that is available. It is in this context that one should assess the statement by Lord Walker in *Vehicles and Supplies Ltd v Financial Institutions Services Ltd*[13], a case cited by the Petitioners in support of their submissions. At [22] of the judgment, Lord Walker states: '…summary judgment in proceedings in which a defendant appears and offers a defence, but the defence is held to be wholly

[13] (2005) 66 WIR 260 (JM PC).

defective, is a final judgment on the merits'. The judge in these election petitions did not have before him any such situation.

[43] In any event, we agree with the approach taken by Alleyne CJ in *Hamilton v Liburd*[14]. In order to determine the meaning of '*final*' in the context of the right of appeal granted by s 40 of the Constitution, it is best to construe the actual constitutional provisions, set out above at [29] and [30]. To do so one must utilise the normal tools of construction. What do those provisions mean? What do they aim at accomplishing? What is the history of those provisions? What is the rationale for and the context in which the Constitution deprives a litigant of the right to appeal all but a *final* determination of the question as to whether any person has been validly elected as a Representative? In light of the answers to those questions how should one approach the meaning of 'final'?

[44] The judgment of Dame Pereira CJ, answers in part some of these questions. The Chief Justice stated:

> The High Court's jurisdiction in this regard was originally exercised by Parliament and was transferred to the courts by way of the Constitution. The jurisdiction has been variously described as special, exclusionary and exclusive. According to section 103 of the Constitution, this jurisdiction is a separate jurisdiction from the court's original jurisdiction to hear and remedy matters concerning infringements of the Constitution. It is also separate to the court's original jurisdiction given under section 16 of the Constitution for the enforcement of the protective or fundamental rights contained in Chapter 1. It is common ground that this special jurisdiction incorporates the court's inherent jurisdiction to protect it from abuse in its exercise of the jurisdiction so that the case law is replete with decisions striking out election petitions on a number of bases ranging from failure to disclose a cause of action, substantial non-compliance with election laws, and vagueness to abuse of process.

[45] Anderson JCCJ in *Skerrit v Defoe*[15] restated that the exclusive and exclusionary jurisdiction of the High Court to determine the validity of elections by way of election petitions was essentially a parliamentary jurisdiction which had been assigned to the judiciary by the Constitution and by legislation. It is a special

[14] (Saint Christopher and Nevis CA, 3 April 2006).
[15] [2021] CCJ 4 (AJ) DM.

jurisdiction distinct and different from the ordinary civil or even constitutional jurisdictions enjoyed by the courts. In illustration of that point, Anderson JCCJ referred to: *Petrie v Attorney General*[16]; *Williams v Giraudy*[17]; *Russell v Attorney General of St Vincent and the Grenadines*[18]; and *Hamilton v Liburd* [19].

[46] In the same case, Anderson JCCJ also drew attention to the rules governing the conduct of election petitions which were specifically designed to ensure, *inter alia*, that disputed election proceedings were brought to completion expeditiously so that the legitimacy of a government should not long remain in question. See, for example: *Prevost v Blackmore*[20]*; Joseph v Reynolds*[21]; *Browne v Francis-Gibson*[22]*; Quinn-Leandro v Jonas*[23]*; Habet v Penner*[24]*; Green v Saint Jean*[25]*; Singh v Perreira; Jagan v Perreira*[26]. What is evident from the abundance of jurisprudence is that the idea is: to discourage, if not eliminate altogether, appeals on points of practice and procedure; and to render un-appealable the trial judge's interlocutory decisions relating to failure to disclose a cause of action, substantial non-compliance with election laws, vagueness, abuse of process and the like. Such decisions are not regarded as *final* (in the sense of being susceptible to an appeal) within the context of s 40 of the Constitution. Decisions by a trial judge on those issues are as un-appealable to a higher court as the Speaker's decisions were when this unique jurisdiction used to lie not with the courts but with the parliament. The constitutional provisions reflect a particular policy to have elections petitions ***fully*** determined as quickly as possible. The policy rests on the presumed competence of professional judges who are by no means infallible and who apply their discretion in ways that may not necessarily yield identical results across different judges. Conveniently, the application test, embraced by the CPR, perfectly accommodates itself to that constitutional construct, but even if the CPR had instead specifically

[16] (1968) 14 WIR 292 (GY HC).
[17] (1975) 22 WIR 532 (GD CA).
[18] (1995) 50 WIR 127 (VC CA).
[19] (Saint Christopher and Nevis CA, 3 April 2006).
[20] (Dominica HC, 14 September 2005).
[21] (Saint Lucia CA, 31 July 2012).
[22] (1995) 50 WIR 143 at 148.
[23] (2010) 78 WIR 216 at [32].
[24] (Belize SC, 4 May 2012) at [38].
[25] (Dominica HC, 7 June 2011) at [69].
[26] (Guyana CA, 11 November 1998) at [19].

embraced the order test, the test prescribed by the CPR could not take precedence over a proper construction of the Constitution.

[47] In the present case, the petitions before the judge were not determined on their merits. They were determined by the judge at an intermediate stage in the proceedings, before evidence was taken, before the judge got down to deciding whether any person had or had not been validly elected as a Representative. The orders made by the trial judge were interlocutory, not final. Subject to what is said later, no appeal was possible, whether against the order of the judge declining to strike out several Respondent parties (save DBC), or against the orders striking out the entire petitions. If the judge had disagreed with these respective applications to strike out, the case would have gone on for trial on the merits.

Can the Public Importance of the Petitions Yield a Right of Appeal?

[48] The conclusions in the paragraph above determine this application, but the Petitioners urged further points with such passion that it is necessary to comment on at least some of them. The Petitioners argue that the petitions disclosed matters that were of considerable public importance, and it was therefore in the public interest for the Court of Appeal to hear their appeal. We agree with the Chief Justice and the Court of Appeal that the public importance attached to election petitions could not form the basis for the assumption of jurisdiction to hear an appeal from a decision to strike out an election petition. Once the trial judge's decision was interlocutory, subject to what we shall later say, the Court of Appeal was not permitted to exercise any such jurisdiction. Dame Pereira quoted the following paragraph from her own decision in *Attorney General v Brandt*[27] with which we respectfully agree:

> It is simply not open to this Court to arrogate unto itself jurisdiction to hear an appeal where no such jurisdiction has been conferred upon it by either statute or the Constitution. Indeed, this would be a step unto a slippery slope.… Where Parliament has prescribed, either in the Constitution or in statute, the circumstances in which the court is permitted to exercise jurisdiction, it is open to the court only to interpret the provisions conferring jurisdiction and not to exceed or completely ignore those provisions in

[27] (Montserrat CA, 11 November 2020) at [48].

favour of exercising jurisdiction in circumstances not contemplated by Parliament.

Exceptions to the Rule as to the Court of Appeal's Jurisdiction: The Decision in *Exeter*

[49] Although it is the case that the provisions conferring jurisdiction on the Court of Appeal to hear appeals in election petitions are to be found in the Constitution, and those provisions appear to admit of no exceptions to the requirement that only final decisions may be appealed, it is also the case that the Constitution prescribes that every person in Dominica is entitled to a fair hearing within a reasonable time by an independent and impartial tribunal[28]. A rather high value is to be placed on this fundamental right to a fair hearing by an independent and impartial tribunal. That right is not only fundamental, it is a condition for enjoying and securing the enjoyment of other rights. It follows then that if appellants complain that, in the hearing of an interlocutory aspect of their election petitions, their enjoyment of this fundamental right was compromised, then the Court of Appeal should assume jurisdiction to consider *that* complaint. If the complaint can conveniently be brought as an appeal from the trial judge's decision, and is made out, the Court of Appeal must afford the complainants such relief as is appropriate in the circumstances. The Court of Appeal would not then be wrongfully assuming some inherent jurisdiction at variance with s 40, it would be complying with another provision of the supreme law that is to be accorded a value that is higher than that which is provided for in ss 40(6) and (7).

[50] The Court of Appeal's decision in *Exeter v Gaymes*[29] fits squarely into this exception to the rule establishing the Court of Appeal's jurisdiction to review only final decisions as set out in ss 40(6) and (7) of the Constitution. In *Exeter*, the Appellants alleged that, at a pre-trial hearing, the High Court judge had pre-judged the chances of success before embarking upon the hearing of a strike out application in relation to an election petition. Such conduct naturally implicated the fundamental principle of the impartiality of the court. The judge ought to have

[28] See Constitution of the Commonwealth of Dominica, s 8(8).
[29] (Saint Vincent and the Grenadines CA, 13 June 2017).

recused himself from hearing the application to strike out the petitions, even though there had been no such application for recusal made by the parties. When that case reached the Court of Appeal, Baptiste JA was right to refer to the constitutional right to a fair trial by an impartial tribunal and to note that this right holds 'a prominent place in a democratic society and is pivotal for public confidence in the administration of justice.' The Court of Appeal was therefore entitled to hear and determine Mr Exeter's appeal and ultimately to reinstate the petition for hearing before another judge even though the order appealed was not a final order.

[51] Although the Chief Justice's statements in the instant case were not explicitly so framed, Dame Pereira gave other examples of instances where, in the course of hearing an election petition, and notwithstanding the interlocutory nature of the order appealed, a Court of Appeal may wish to assume jurisdiction to investigate a breach of the constitutional right to a fair hearing before an independent and impartial tribunal:

> Other examples of similar nature include a decision arrived at on an election petition in denial of the right of a party to be heard, or the right to be represented by counsel, or where there is some actual or apparent bias on the part of the judge ….

We respectfully endorse that reasoning as providing a non-exhaustive set of examples that could possibly allow a party (whether Petitioner or Respondent) to appeal an interlocutory order made in election proceedings. At [46] above, we noted that the policy choice reflected in s 40(6) rests on the presumed competence of professional judges. In this regard, it is arguable that if a judge acts in a manner that obviously and manifestly contradicts that premise, it might then be said that in such circumstances the petitioner has not received a hearing that is fair and that the Court of Appeal is entitled to intervene. Clearly, the threshold for making such an argument must be quite high. In all of these instances, a review by the Court of Appeal is really not *an exception* to the right of appeal granted by s 40. In truth, it is more accurately to be regarded as an independent means of access to the courts to complain about a breach of the constitutional right to a fair hearing by an independent and impartial tribunal.

[52] The Petitioners here have alleged that their hearing was unfair because 'the learned judge called for evidence' and 'knew or ought to have known that legislation and precedent precluded the [Petitioners] from pleading evidence in their petitions'. The Petitioners also insist that the trial judge decided the substantive issues in the claim. We disagree with these characterisations of the exercise upon which the judge embarked. What the judge decided was that the facts alleged in the petitions did not contain the degree of particularity and specificity such that, if the same had been properly pleaded and established at the trial, the court could reach findings that the elections were a travesty or that a different election result was inevitable, or that election offences were committed by identified candidates who had been returned, or that in the case of Melissa Skerrit, she bore allegiance to Canada. To succeed at trial such facts needed to have been established and the judge took the view that it was not enough for the Petitioners to plead general, or even specific, irregularities if the sum total of what was alleged and pleaded in any particular petition, taken at its highest, was insufficient to establish those necessary facts at trial. In other words, the judge's view was that there were serious gaps in the pleadings. The case of *Parry v Brantley*, upon which the Petitioners relied, is to be distinguished. In the first instance, that was a case that actually went to trial on pleadings, one must assume, the trial judge considered adequate. More importantly, that case was a terrible instance of bad faith and misfeasance on the part of an elections official in circumstances where it was clear that, but for such misbehavior, there would inevitably have been a different result.

[53] It is not enough for the Petitioners to say that, at trial, they would have presented evidence to close the gaps. It was the responsibility of the Petitioners, clearly and specifically, to foreshadow in their pleadings the facts that would allow for such evidence to be given at trial so as to afford the Respondents an opportunity to rebut such facts in the Defence and then at trial, unless of course the Respondents admitted them. The judge's view is that the Petitioners had not done this. The judge did not decide the rights of the parties, but rather focused on the sufficiency and efficacy of the Petitioners' pleadings. If the judge appeared to be extremely, perhaps overly, painstaking in his approach, that as such did not render the trial

unfair. As Anderson JCCJ noted in *Marin v R*[30], the concept of a 'fair hearing' as used in the constitutional provision is mainly concerned with whether the parties were afforded a fair or reasonable opportunity to be heard. In this case, both the Petitioners and the Respondents were permitted fairly to make their respective submissions on the issues at hand and they were afforded every opportunity to be heard.

Conclusion

[54] For the reasons above stated, the Petitioners must be denied permission to appeal the judgment of the Court of Appeal to this Court. An appeal to this Court has no reasonable prospects of success. The trial judge's judgment was interlocutory, not final, and the Court of Appeal was right to decline jurisdiction to hear an appeal against that judgment. Even if the judge made errors, and we do not in the slightest determine the question whether the judge did or did not, any such errors cannot convert what is clearly an interlocutory order into a final order. Interlocutory decisions are un-appealable, save for the narrow exception to which reference was earlier made.

[55] It would be remiss if the Court did not, however, offer the following observations. Some of the allegations raised by the Appellants are serious and, if true, would be troubling. Periodic elections that are free and fair are the lifeblood of a country's democracy. Every effort must be made by a State scrupulously to adhere to the legislative provisions governing elections and, in particular, to those that relate to the integrity of the lists of electors. We would hope that the relevant authorities would seriously reflect on the allegations made in these proceedings and consider whether there are steps that can or should be taken to improve the elections machinery so that, as far as possible, the occasion for the making of such allegations as were made here would not arise in the future.

[56] Finally, efforts by the citizenry, in good faith, to call attention to perceived deficiencies in the electoral process should not be discouraged. Such efforts

[30] [2021] CCJ 6 (AJ) BZ at [180].

conduce to a healthy democracy. Since the trial judge had determined that the defendants were properly joined as parties, in the exercise of our discretion in this case, we would order that each party should bear their own costs in this Court.

JUDGMENT OF THE HONOURABLE MR JUSTICE JAMADAR, JCCJ:

Introduction

'The will of the People shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.'[31]

[57] I have read the opinion of Saunders PCCJ and I agree with much of what is stated subject to one small nuance. The central and narrow issue before this Court is whether, in light of ss 40(6) and (7) of the Constitution of Dominica, the Court of Appeal had the jurisdiction, to entertain appeals against the decision of the High Court judge striking out several election petitions brought under s 40(1)(a)[32] of the Constitution of Dominica. The petitions were filed following General Elections held in Dominica on 6 December 2019. They were struck out pre-emptively for pleading deficiencies and no hearings on the merits ensued.

[58] It is regrettable that these petitions have taken this long to be finally decided, as the objectives of the special jurisdiction conferred on the courts by way of election petitions, include the fair, just and expeditious disposition of any such challenges. Indeed, when one considers the historical and democratic contexts in which challenges to elections are permitted, it is clear that these are policy choices that inform the limitations on appeals to challenges to elections that ss 40(6) and (7) impose.

[31] Article 21(3) of the Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III).
[32] 40(1) 'The High Court shall have jurisdiction to hear and determine any question whether – (a) any person has been validly elected as a Representative …' The petitions were struck out for not disclosing a cause of action.

[59] This case raises issues of constitutional concern that go to the heart of liberal representative constitutional democracies such as Dominica and other Commonwealth Caribbean states. I wish to offer my reflections on two aspects. First, an analysis of the meaning of 'final decision of the High Court' and constitutional exceptions to the application test and to an interlocutory/final order analysis, in the context of s 40(1)(a) and ss 40(6) and (7) of the Constitution. Second, the singular importance of legitimate and lawful electoral lists in conducting free and fair elections in a democratic state like Dominica and the implications for prosecuting election petitions.

[60] In *Marin*,[33] this Court asked and explained:

> What is the centre point of this Court's approach to Caribbean constitutional interpretation? … it is that Caribbean constitutions are sui generis. And as such, have their own interpretative principles that arise from their special character, status, and origins as constitutions. And which, because of the supremacy clauses, take paramountcy. The consequence is 'that the interpretation of Caribbean Constitutions is a legal activity in its own right.' Indeed, Wit JCCJ would insist in *A-G v Joseph*, that this approach is necessary 'so that a genuine constitutional law will be developed on the basis of the Caribbean Constitutions themselves as the embodiments of the democratic societies they endeavour to establish and guard.'

Having once accepted this centre point, it becomes the primary lens through which one must view, read, interpret, and apply constitutional provisions, values, and principles.

[61] The legal provisions centrally implicated in this appeal are contained in the Constitution of Dominica. Their interpretation and application are therefore to be informed by this Court's jurisprudence on the approaches to be taken to Caribbean constitutionalism.[34]

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[33] [2021] CCJ 6 (AJ) BZ, [30]–[31], citing *A-G v Joseph* [2006] CCJ 3 (AJ) (BB), (2006) 69 WIR 104 (BB) at [17] (Wit JCCJ).

[34] See also *A-G v Joseph* [2006] CCJ 3 (AJ) (BB), (2006) 69 WIR 104 at [17], [20] (Wit JCCJ); *Nervais v R* [2018] CCJ 19 (AJ) (BB), (2018) 92 WIR 178 at [39], [59], [71]; *A-G of Guyana v Richardson* [2018] CCJ 17 (AJ) (GY), (2018) 92 WIR 416 at [146]; *McEwan v A-G of Guyana* [2018] CCJ 30 (AJ) (GY), (2019) 94 WIR 332 (Saunders PCCJ) at [41]–[45], [51]; *Belize International Services Ltd v A-G of Belize* [2020] CCJ 9 (AJ) BZ, [2021] 1 LRC 36 at [14] (Wit JCCJ) and at [319]-[321], [350] (Jamadar JCCJ); *Marin v R* [2021] CCJ 6 (AJ) (BB) at [32]–[35].

Constitutional Interpretations of 'Final Decision of the High Court'

[62] In law, context is everything.[35] The first observation is that s 40 is a constitutional provision and it is to be interpreted according to constitutional rules of interpretation.[36] The starting point is the *sui generis* nature of Caribbean written constitutions and the premium to be placed on fundamental human rights as well as basic deep structure values. This starting point arises out of the twin facts that Dominica is 'a sovereign democratic republic'[37]and that the Constitution is 'the supreme law of Dominica'.[38] It is erroneous to suggest that the jurisdiction conferred is anything other than a constitutional jurisdiction, despite its antecedents in Dominica or elsewhere.

[63] The question of jurisdiction that ss 40(6) and (7) raises for consideration must therefore be answered primarily by interpreting and applying these sections contextually as constitutional provisions. These sections arise in the context of ss 40(1) and (2) of the Constitution, which confer jurisdiction on the High Court to hear and determine questions raised by a person entitled to vote or who was a candidate in an election or by the Attorney General, as to the validity of the impugned election. Thus, when ss 40(6) and (7) impose limitations on the rights of appeal to any/a 'final decision' in an election petition brought pursuant to s 40(1), the interpretation of these words of limitation must be undertaken in the context of the purposes of both: (i) general elections in liberal representative democracies; and (ii) the right to question how they are conducted and their outcomes (validity) by way of election petition.

[64] This analysis compels one to conclude that the jurisdictions under s 40(1) as well under ss 40(6) and (7) are indeed special constitutional jurisdictions conferred on the courts to achieve the objectives stated. They are to be understood as such and liberated from their antecedental practices as a parliamentary jurisdiction. In Dominica, the Constitution is supreme, not Parliament. These jurisdictions of the

[35] *R (Daly) v Secretary of State for the Home Dept* [2001] 2 AC 532 (Lord Steyn).
[36] See n 32 above.
[37] Constitution of the Commonwealth of Dominica, s 116.
[38] ibid s 117.

High Court and Court of Appeal are now unshackled to this extent, though not entirely.

[65] In this regard there are two interlocking analytical perspectives: (i) quantitative analysis; and (ii) qualitative analysis. Quantitative analyses could, for example, raise questions as to whether and if so to what degree did irregularities or deficits in how an election was conducted affect the outcome (validity) of that election. Qualitative analyses could raise different kinds of questions, for example, whether and if so to what degree did irregularities or deficits in how an election was conducted affect the legitimacy or integrity (validity) of that election *qua* election *per se*. The focus of the former tends to be on outcome validity, whereas in the latter it is on procedural legitimacy or integrity and on the seriousness of a breach. Used in these senses, both can and often do overlap. However, qualitative analysis now has an added aspect to be reckoned, constitutional legitimacy and integrity. Thus, a breach of electoral law may be either fundamental or may materially affect the result of an election and may in either case lead to an electoral challenge and a declaration of invalidity.

[66] In determining what is meant by a 'final decision of the High Court' in ss 40(6) and (7) of the Constitution, which is, in short, a final order, a more pragmatic purposive approach driven by the objectives of elections and election petitions, as well as by the two analytical perspectives explained, is the appropriate approach. In a sense what one looks at are the aims of free and fair elections and election petitions, and the means prescribed to achieve the former and conduct the latter, and in a balancing exercise sensitive to all these considerations, determine what is meant by a 'final decision'. It is an approach not bereft of common sense. In law, and especially constitutional law, context is vital to both analysis and application.[39]

[67] The legal term of art, 'final decision', is capable of more than one meaning. A plain grammatical meaning would suggest a decision that has brought an end to the matter itself. That meaning focuses on the order made, in law referred to as the

[39] 'In law context is everything.' *R (Daly)* (n 34) at [28] (Lord Steyn).

'order test'.[40] An alternative legal test for deciding what is a final order is known as the 'application test'. This test looks at the application on which an order is made. If the application could lead to an order that may not finally dispose of a matter, it was considered an interlocutory order – and not a final order (even though it could also lead to an order that may finally dispose of the matter).

[68] In interpreting a constitution, historical context is also a relevant aid. Sections 40(6) and (7) first appear in the Constitution of Dominica in 1978.[41] These sections have remained unchanged. At this time the prevailing test for determining the meaning of 'final order' was the 'application test', which had supplanted reliance on the earlier 'order test'.[42] Further the aims and means prescribed by the Constitution for challenging elections in a democratic state, support an intention and purpose to: (i) create a right in qualified persons to challenge an election; (ii) permit a further right of appeal in relation to such election petitions; and (iii) narrow that right of appeal because an election petition must be determined expeditiously in the interests of effective democratic governance. The convergence of these vectors supports the use of the application test to determine what is a 'final decision' for the purposes of ss 40(6) and (7). Procedural matters are largely discretionary, and interlocutory decisions that decide them are not usually final orders. On the altar of effective democracy and therefore of expediency in the hearing of election petitions, certain rights of appeal have been sacrificed.

[69] In dealing with the case of *Exeter*,[43] Saunders PCCJ, at [49], makes the point with which I agree, that:

> A rather high value must naturally be placed on the fundamental right to a fair hearing by an independent and impartial tribunal as that is a condition for the enjoyment of other rights. It follows then that if appellants complain that, in the hearing of an interlocutory aspect of their election petitions, their enjoyment of this fundamental constitutional right was compromised, then

[40] The 'order test' focusses on the consequences and effects of an order.
[41] The independence Constitution was named the Commonwealth of Dominica Constitution Order. It was made on 25 July 1978, and it came into operation on 3 November 1978.
[42] The courts started using the application approach as early as 1891. It emerged in *Shubrook v Tufnell* (1882) 9 QBD 621 , and was affirmed in *Salaman v Warner* [1891] 1 QB 734. It quickly became the preferred approach. The English courts' unequivocal commitment to using the application test was expressed by Sir John Donaldson MR in 1984 in the case of *White v Brunton* [1984] 2 All ER 606, 'The court is now clearly committed to the application approach as a general rule and *Bozson's* case can no longer be regarded as any authority for applying the order approach.'
[43] See (n 29).

> the Court of Appeal should assume jurisdiction … The Court of Appeal would not then be assuming some inherent jurisdiction at variance with s 40, it would be complying with the supreme law.

[70] This is one example of a right of appeal that contextualises the meaning of 'final decision' as used in ss 40(6) and (7). It goes to a constitutionally based qualitative analysis of the process engaged in the hearing of an election petition. A court hearing that does not pass constitutional muster cannot be considered a legitimate hearing and can be reviewed. Strictly speaking, this is a jurisdiction that is independent of the 'final decision' construct that informs ss 40(6) and (7), as the challenge is really on the constitutional basis of what can be understood as a non-hearing.

[71] Section 8 of the Dominica Constitution amplifies s 1(a) which guarantees the general fundamental right to the protection of the law. To secure this right s 8 provides for the right to 'a fair hearing … by an independent and impartial court'. The right to challenge an election before the courts as provided in s 40(1) includes an entitlement and guarantee to be able to do so in the context of the fair hearing guarantee.[44] And therefore, an alleged breach of this guarantee can allow an appeal that raises such a complaint. The scope of this ground is best left uncircumscribed so as not to limit the ambit or enjoyment of the right.

[72] Indeed, an appeal may in principle arguably lie under s 40 in any circumstance which may have the effect of contravening core constitutional principles and values with the consequence of rendering both the hearing of an election petition and/or an election itself invalid. In the former instance the challenge is on the constitutional basis of what may be termed a 'non-hearing', and in latter instance it would be on the constitutional basis of what may be described as a 'non-election'.

[73] It is a matter of context and circumstance, which in relation to election petitions and because of their specific purpose – to determine the validity of an election – would include considerations of both quantitative and qualitative effect and impact

[44] See also s 4(1) of the House of Assembly (Election Petition) Rules 2014 which confers a duty and power on a Judge hearing an election petition to consider and order particulars to 'ensure a fair and effectual trial'.

on validity. The basic underlying premise would be contravention of the supreme law either in relation to the hearing of an election petition and/or the conduct of an election itself. The constitutional status of the principle breached and degree of egregiousness/seriousness of the breach may trigger election challenges and can thus, I would think, potentially confer jurisdiction in relation thereto. The reckoning of the meaning and application of 'final decision' must be evaluated in this light.

Electoral Lists in Free and Fair Elections

Fundamental Underpinning Premises

[74] Core constitutive preambular values in the Dominica Constitution include fundamental human rights, freedom (of persons and institutions), the inalienable equality and dignity of persons, participatory and representative democracy, and the creation and maintenance of lawfully constituted authority. It is these values, among others, that the Constitution expressly avows that the People of Dominica 'desire that their Constitution should make provision for …'

[75] Furthermore, the text of the Constitution itself provides for regular and periodic parliamentary elections,[45] as well as for the entitlement of duly qualified persons: (i) to be registered to vote; (ii) to vote in any such elections;[46] and (iii) to challenge them[47]. Thus, in the context of a representative participatory constitutional democracy, and the constitutive preambular values cited, and these specific constitutional provisions, the unavoidable conclusion is that the holding of regular and periodic free and fair elections are part of the basic deep structure of Dominican constitutionalism, and integral to this, is a constitutional entitlement to vote.

[76] Indeed, it would be remarkable if the separation of powers and judicial independence are among the basic deep structures of Dominican constitutionalism, and free and fair elections were not. After all, the most obvious and defining hallmark of liberal democratic states is free and fair elections. It is through such

[45] Constitution of the Commonwealth of Dominica, ss 53, 54 and 55.
[46] ibid s 33(2) (a) and (b).
[47] ibid s 40(2).

elections that two of the core institutional structures of the state are established – the legislature and the executive. Without any such elections, the constitutionally warranted governance structure of the state would simply not exist – so fundamental to democracy is free and fair elections.

[77] Moreover, without such free and fair elections, the preambular value of the creation and maintenance of and respect for lawfully constituted authority would be fatally undermined. The consequences of such a denial, that a reflection on Caribbean history demonstrates include, loss of legitimacy, public unrest, and even revolt. In contemporary terms, free and fair elections are so fundamental to the democratic way of life, that without it the very legitimacy and sovereignty of the constitutional state is brought into question – constituted as is by, 'the People of Dominica'. In this regard it is worth reminding ourselves: 'The will of the People shall be the basis of the authority (legitimacy) of government.'[48]

Responsibilities and Accountability

[78] Section 38 of the Constitution of Dominica establishes an Electoral Commission with responsibility 'for the registration of voters' and 'for the conduct of elections'. The right to vote is sacrosanct in representative democracies. The journey to universal adult suffrage in Caribbean states has not been a free or easy passage, enslaved and indentured, fractured colonies that we were. Disenfranchisement was the order of business for the colonial powers that ruled these island populations, for whom divisions based on ideologies of class and race were instrumental in maintaining power and control.

[79] In Trinidad, for example, restrictive property and income qualifications existed for candidates and voters, and in a particularly discriminatory way a requirement for (English) language qualifications. Indeed, the 1941 Franchise Committee (Trinidad) papers document resistance to universal adult suffrage on the basis of class, race, and education – the committee's chair opposed granting the right to vote

[48] Article 21(3) of the Universal Declaration of Human Rights (n 30).

to ‘waifs and strays’ and to ‘people who sleep on the streets’.[49] It took the intervention of the Colonial Office and an Order in Council to remove the language qualification.[50] Throughout the Caribbean there have been similar experiences.

[80] In this context, I wholly agree with the view of Saunders PCCJ at [55][51]:

> Some of the allegations raised by the appellants are serious and, if true, would be troubling. *Periodic elections that are free and fair are the lifeblood of a country’s democracy*. Every effort must be made by a State scrupulously to adhere to the legislative provisions governing elections and, *in particular, to those that relate to the integrity of the lists of electors*.

The Electoral Lists Issue

[81] Electoral lists are central to legitimate and lawful elections. The duty to maintain the integrity of lists of electors falls to the Electoral Commission. One complaint in these matters is that: ‘The polling clerks, returning officer, and Chief Elections Officer failed to use the revised annual list and the supplementary register as the register of electors of the polls’ (‘the list complaint’). Of the ten petitions filed, nine contained the list complaint.

[82] The Roseau Central petition has been filed with this Court. The particulars provided by the Applicants in relation to the list complaint are summarised as follows:

a. The Chief Elections Officer published a notice stating that the public had until 19 November 2019 to submit objections to the preliminary list.

b. More than 1544 objections were submitted, 404 objections were made in relation to the Roseau Central Constituency and 51 names of persons who were objected to were identified in a schedule to the petition.

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[49] Trinidad and Tobago Legislative Council Paper (35 of 1944) 113; Brinsley Samaroo, *Adrian Cola Rienzi* (Royards Publishing 2021) 112-120.
[50] Colonial Office 295/630, 27 March 1945.
[51] Emphasis added.

c. The objections were not heard pursuant to section 35(1)(d) of the Registration of Electors Regulations[52].

d. On 26 November 2019, the electoral office published a press statement indicating that, 'the preliminary and supplemental registers have been issued and will constitute the final lists … for the … general elections'.

e. By failing to use the revised annual list as the register of electors, the polling clerks, returning officer and Chief Elections Officer acted unlawfully thus rendering the elections null and void.

[83] The first instance judge, Justice Glasgow, made the following remarks about the list issue at [129]:

> Section 17 of the Registration Act states that the revised annual list and the supplementary register shall constitute the register of electors for the respective polling districts and shall be used as the register for any election. If the pleadings are taken as correct then *the use of the preliminary and supplementary registers at the 6 December 2019 elections, was a patent non-compliance with section 17 of the Registration Act*.[53]

The Law Relating to Preliminary Lists, Objections, and the Publication of Revised Lists and Supplementary Registers

[84] In Dominica, a person is entitled to vote only if they are qualified to vote as an elector in the register for that polling district and is on that day registered in the register of electors to be used at the election.[54] A person may become disqualified under certain circumstances[55]. A person's name may also be deleted from the register under certain circumstances, one of which is if an objection to their registration has been allowed.[56]

[85] The Chief Registering Officer shall prepare and publish not later than 30 September of each year for each polling district a preliminary register of electors entitled to

[52] Chap 2:03.
[53] Emphasis added.
[54] Registration of Electors Regulations, Cap 2:03, s 4.
[55] ibid s 6.
[56] ibid s 7.

vote at any election.[57] At the time of publishing the preliminary register, the Officer shall also publish a notice stating that objections may be made to the inclusion of a person's name in any such preliminary register.[58]

[86] A person may object to the registration of persons whose names appear in the registers or lists of electors.[59] The Chief Registering Officer has the power to disallow and/or disregard objections where: it is made late[60]; they have asked for particulars on the objection, and these have not been supplied or they have been supplied at a late stage[61]; and the objector is not allowed to object[62].

[87] The Chief Registering Officer shall make all additions or removals in consequence of any action taken by s 7 (persons deleted from list due to objections, death, absent from Dominica, disqualification) or s 13 (claims and objections being determined) and shall publish before 20 November 2022, the corrected annual lists as the revised list of electors.[63] The Chief Registering Officer also has to publish a supplementary register in the manner prescribed by s 16.[64] Pursuant to s 17, the revised annual list and the supplementary register published for each polling district constitutes the register of electors for that polling district.[65]

[88] What Justice Glasgow concluded on the totality of the preliminary evidence placed before him on the pleadings, was that in relation to the General Elections held in Dominica on 6 December 2019, there 'was a patent non-compliance with s 17 of the Registration Act.'[66] This is a matter of the most serious concern that ought to be investigated irrespective of the outcome of this appeal and of these petitions.[67]

[89] This court agrees that for the purposes of these s 40(1)(a) election petitions that challenge the validity of an election, the sufficiency of the material facts pleaded in

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[57] ibid s 11(1).
[58] ibid s 32(1).
[59] ibid s 13.
[60] ibid s 33.
[61] ibid s 35(1)(b).
[62] ibid s 35(1)(c).
[63] ibid s 15.
[64] ibid s 16.
[65] ibid s 17.
[66] At [129].
[67] Justice Glasgow also concluded, at [131], that '… the mere pleading of a breach of electoral laws by elections officials without more is not adequate.'

these petitions was a matter for the first instance judge's discretionary assessment, with which this Court will not lightly interfere.[68] However, that does not mitigate the egregiousness of the default if true, taken in the context of free and fair elections and the democratically sacrosanct nature of the right to vote.

Parry's Case and the Sacrosanct Nature of Electoral Lists

[90] In this regard, the election petition case of *Parry* from St Kitts and Nevis is instructive.[69] It concerned the July 2011 election to the Nevis Island Assembly. The relevant facts for these purposes could be briefly stated. Persons were removed from the voters' list due to certain objections. The election officials failed to publish the objections, and the said persons were not properly notified of the objections, nor were they properly notified of the hearing of the objections. As such, they were not able to contest them. Just five working days before the elections, the revised list was published. Several voters turned up on polling day only to learn for the first time that their names had been struck from the list.

[91] The election was contested on the basis of the revised list, which showed the disenfranchisement of 203 voters. The trial judge found that the removal of the voters was the result of a reckless disregard of the importance of observing the rules of natural justice. He declared the election invalid on the ground that the principles of natural justice had not been followed in the process of upholding the objections. It is also not irrelevant that the petitioner, Mr Brantley, lost the election to a particular constituency by a small margin of 14 votes, well within the number of voters disenfranchised, and that from the 203 voters who were removed from the list, 39 testified that they would have voted for Mr Brantley if they had been given the opportunity to do so. Also, the relevant election officials were determined by the court to be biased towards the governing party.

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[68] In this regard, s 4(1) of the House of Assembly (Election Petition) Rules 2014. *Parry* is apposite, as it allows a Judge hearing an election petition to order particulars to 'ensure a fair and effectual trial'. That could, and maybe ought to, have been an approach considered and adopted by the trial Judge on this issue, given his conclusions of unlawfulness on the pleadings.

[69] Consolidated appeals: *Parry v Brantley* HCVAP 2012/003; *Benjamin v Lawrence* HCVAP 2012/004; and *Daniel v Brantley* HCVAP 2012/005 (Saint Christopher and Nevis CA, 27 August 2012). This was not an adequacy of pleadings case, as the matter was determined at the trial/hearing stage. The election laws and rules explained in the preceding section were substantively like those under consideration.

[92] On appeal, the Court of Appeal in a unanimous decision delivered by Mitchell JA[70], opined, among other things, that:

> The Act provided a procedure whereby their constitutional right to vote could be taken away. … *Given that nothing less than the exercise of a fundamental democratic right is involved and given the constitutional pedigree of the provisions of the Act, strict compliance with the procedure for the extinguishment of the right to vote is called for.*[71]

And also that:

> The *election was accordingly held on the basis of a defective list* which excluded the names of the 203 disenfranchised voters. *On this basis alone the petition ought to have succeeded,* and I would uphold Mr. Brantley's appeal on this issue.[72]

[93] The case-note summary of the court's decision states:

(a) The right of enfranchisement is of constitutional pedigree and, in applying the law and the regulations, preference must be given to recognition of the right to vote, and the legislation must be construed in a manner which promotes enfranchisement and guards against disenfranchisement.[73]

(b) The list used for the July 2011 election was not the list required to be used by section 48 of the National Assembly Elections Act. … The election was accordingly held on the basis of a defective list and on this basis alone the petition ought to have succeeded.[74]

[94] For the Court of Appeal, strict compliance with the procedure for the extinguishment of the right to vote is called for. The court ultimately held that there was a failure by the election authorities to comply with the prescribed election laws and regulations in relation to voters' lists. In *Parry's* case, the electoral authorities acted improperly and unlawfully, the election was not substantially conducted in accordance with the law, and as well, the irregularities affected the result of the election.

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[70] The appellate panel comprised: Justices Pereira, Baptiste, and Mitchell.
[71] *Parry* (n 4) at [75] (emphasis added).
[72] ibid at [76] (emphasis added).
[73] *Parry* at 5, para 3.
[74] ibid at 6, para 8.

[95] What is significant for the purposes of this discussion, is that in *Parry's* case a qualitative constitutional and procedural analysis was considered a sufficient basis, standing on its own, to vitiate and render an election invalid. The salient factual matrix was the sacrosanct nature of the electoral list and of the right to vote, the undermining of which could render an election invalid.

[96] This begs the questions: what if in Dominica on a *Parry's* case scenario, petitions were struck out on what was assessed to be an interlocutory application that could not yield a 'final decision' on the basis of the application test? Is it that there would be no jurisdiction to appeal and test the correctness or erroneousness of a trial judge's decision because the application that resulted in the dismissal could not yield a 'final decision' based on the application test? What if the single or cumulative egregiousness of a judge's errors, patent on the face of the record, were such as to result in a striking out of what is objectively and reasonably an arguable election petition?

[97] Whether categorised as a contravention of the right to a fair hearing or otherwise, questions arise. In relation to the former and in the context of the core value of free and fair elections, does the guarantee include an entitlement to a professional and substantive competency threshold which if not reasonably met affords a ground of appeal (review) in the specific context of election petitions? Clearly incidents of bias, the denial of representation, or deprivation of a meaningful opportunity to be heard can all qualify. But what of gross substantive incompetence, or clear miscarriages of justice?

The Entitlement to Vote: The CCJ's Insistence on Constitutional and Legal Compliance

[98] Professor Eddy Ventose approached the CCJ on Friday, 11 May 2018, after office hours, seeking to appeal a decision given on 6 May 2018 by the Court of Appeal of Barbados. Professor Ventose wanted to be entered on the Register of Voters ahead of the 24 May general election date. Given the urgency and importance of the matter, that is, the right to vote, the Court heard and determined the application via video conference on Sunday, 14 May 2018. The CCJ allowed the appeal, setting

aside the orders of the Court of Appeal. It ordered the Chief Electoral Officer to register or cause to be registered Professor Ventose as an elector by noon on Monday, 14 May 2018 or be held in contempt of Court and imprisoned or fined.

[99] In a unanimous decision delivered by Byron PCCJ, the Court commented as follows, in relation to a concession made by the Chief Electoral Officer with respect to the right to be entered on the Register of Voters:

> This was an important and wise concession because there is a wider and more important principle at stake here beyond the right of resident Commonwealth citizens to vote at general elections in Barbados. That principle is one that was long fought over in England and which was finally settled as long ago as the Glorious Revolution of 1688-1689. It is that the Crown or the Executive Authority is subordinate to Parliament; that Acts of Parliament must be obeyed by the Executive Authority. This is a fundamental aspect of the rule of law which is at the core of Barbados' constitutionalism. *Neither the Executive Authority nor the Electoral Officer is entitled with impunity to establish or implement a policy that is at variance with the Constitution and laws of Barbados. To the extent that this is what is precisely being advanced here, the court must resolutely set its face against it. … Unless the law is altered any such policy is illegal and void and the courts must say so…*[75]

[100] What is noteworthy is the insistence on compliance with constitutional provisions (and values) and electoral laws that deal with the entitlement to vote. The right to be registered to vote, is about the legitimacy of the voters' lists, and is at the heart of free and fair elections. In principle, the integrity of the electoral lists is also what is really at stake. The view of this Court is that non-compliance of electoral laws in this regard is an eventuality that 'the court must resolutely set its face against'.[76]

Conclusion

Morgan v Simpson, Adapted to Suit the Needs of Caribbean Constitutionalism

[101] In what is considered a *locus classicus* in election law, Lord Denning established

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[75] *Ventose v Chief Electoral Officer* [2018] CCJ 13 (AJ), (2018) 92 WIR 118 at [28] (emphasis added).
[76] See [99].

and explained the following three principles in *Morgan v Simpson*[77] for determining whether an election could be declared invalid:

(a) If the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated, irrespective of whether the result was affected or not. That is shown by the *Gill v Reed* (*Hackney Case*)[78] where 2 out of 19 polling stations were closed all day, and 5,000 voters were unable to vote.

(b) If the election was so conducted that it was substantially in accordance with the law as to elections, it is not vitiated by a breach of the rules or a mistake at the polls - provided that it did not affect the result of the election. That is shown by the *Medhurst v Lough (Islington West Division Case*)[79], where 14 ballot papers were issued after 8 pm.

(c) But even though the election was conducted substantially in accordance with the law as to elections, nevertheless if there was a breach of the rules or a mistake at the polls - and it *did affect* the result - then the election is vitiated. That is shown by *Gunn v Sharpe*[80] where the mistake in not stamping 102 ballot papers *did affect* the result.

[101] While it is clear that not every or any procedural irregularity could result in an election being declared invalid, it is also clear that there may be some irregularities that could have that consequence. Such a breach would invalidate the election without also having to show that it affected the result. Lord Denning's first category, an election that 'was not substantially in accordance with the law as to elections' admits to this possibility. Indeed, in a constitutional democracy an election that may not have met minimum constitutional thresholds could fail to meet the 'substantial compliance' test, understood, and re-imagined as including both quantitative as well as qualitative standards.

[102] Interference with the basic deep structure principle and value of free and fair elections, the core entitlement to vote, and the democratic sanctity of voting lists,

[77] [1975] QB 151.
[78] (1874) 2 O'M & H 77.
[79] (1901) 17 TLR 210.
[80] [1974] QB 808.

are arguably areas where quantitative impact on the outcome or result may not be necessary prerequisites for declaring an election invalid.

Trinidad and Tobago Insights on Process, Fairness, and Legitimacy

[103] In Trinidad and Tobago leave of the court is required to proceed with an election petition.[81] In 2015, a series of election petitions were filed challenging the results of elections in several constituencies as a result of the 2015 general elections. The trial judge granted leave, and by a majority decision the Court of Appeal upheld that decision on an appeal by the Returning Officers for the six impugned constituencies.[82]

[104] One highly contested issue was whether under s 35(3) of the Representation of the People Act, substantial non-compliance with the electoral law could be a basis for invalidating an election, as distinct and apart from whether the result of the election was materially affected. In answering this question Mendonca JA opined:

> I am of the view that the analysis under section 35 (3) includes both a quantitative and a qualitative analysis. So that in relation to these appeals the character of the alleged breaches of the law and how they impacted both qualitatively and quantitatively on the result of the election must be considered.[83]
>
> An election that is not in substantial compliance with the law is one where there is such a departure from the law as to the conduct of the elections that the election may be condemned as a sham or a travesty.[84]

[105] In agreement with Mendonca JA, I anchored my analysis in Caribbean constitutionalism:

> [T]he purpose and function of parliamentary elections include both process and outcome imperatives in the context of the constitutional democracy that is Trinidad and Tobago. Thus while I readily agree that the objective of unequivocally determining the will of the people in their choice of a candidate for a constituency (the outcome), is a fundamental purpose of

[81] Election Proceedings Rules, r 6 (TT).
[82] *Returning Officers v Munroe* (Trinidad and Tobago CA, 30 November 2015).
[83] ibid at 6 (Mendonca JA).
[84] ibid.

> parliamentary elections, I do not accept that it is either the only or primary purpose and function of elections.[85]
>
> [E]qually if not even more important than pure outcome, is the process by which elections are conducted, and in particular, that that process be seen and known by the citizenry to be free and fair and in conformity with the core constitutional values of equality, freedom and fair participation, values that underpin the constitutional vision of democracy in Trinidad and Tobago.[86]
>
> True representative democracies are built on at least one fundamental premise, the consent of the governed. [T]he legitimacy of this consent is at least as dependent on the process of conducting elections as it is on the outcome.[87]
>
> Thus the constitutional premise on which to judge the purpose and function of parliamentary elections and as a consequence the purpose and function of representation petitions, as well as the requirements for leave to present such petitions, is both outcome and process based.[88]

[106] The Chief Justice, though dissenting, was clear that the fairness of how an election was conducted is a material consideration. He shared the view that both quantitative and qualitative assessments were relevant:

> Of course, one of the issues that is relevant to that determination is the fairness of the conduct of the poll but to the extent that there is any breach of the prescribed procedure, any 'unfairness' that might result is a matter of degree. The impact on the validity of the elections still falls to be assessed. Not all effects are capable of reasonably accurate quantitative assessment and it will often be necessary to make an informed qualitative assessment of both the validity of the process of taking of the poll as well as the reliability of the outcome.[89]

[107] For the Chief Justice, fairness of process required compliance with the electoral law and rules:

> I accept that confidence in the outcome depends in part on the process … The constitution itself defines what is fair and expected; it is an election conducted in accordance with the RPA and the Rules.[90]

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[85] *Returning Officers* at [137] (Jamadar JA).
[86] ibid at [138] (Jamadar JA).
[87] ibid at [140] (Jamadar JA).
[88] ibid at [141] (Jamadar JA).
[89] *Returning Officers* at 3 (Archie CJ).
[90] ibid at 9 (Archie CJ).

Final Thoughts

[108] In conclusion, these appeals have been dismissed on the basis of want of jurisdiction, because there was no final decision or order made by the judge for the purposes of ss 40 (6) and (7) of the Dominica Constitution. However, there remain areas of grave concern about how the process of these elections was conducted. Future elections in Dominica ought not to proceed with these or similar taints.

[109] For my part, in relation to the electoral lists issue and the related preliminary conclusions of the trial judge on the pleadings as to unlawfulness, the Court of Appeal arguably may have had jurisdiction on constitutional grounds, irrespective of whether the decision was considered, in the contexts of ss 40(6) or (7), final or not. There can be no doubt that this particular decision conclusively pre-empted any further inquiry into arguably unlawful conduct by the election authorities that potentially went to the root of free and fair elections.

Disposal

[110] The application for special leave is dismissed and the orders of the Court of Appeal dated 21 May 2021 are upheld.

[111] No order is made in this Court as to costs.

/s/ A Saunders

The Hon Mr Justice A Saunders (President)

/s/ J Wit

The Hon Mr Justice J Wit

/s/ W Anderson

The Hon Mr Justice W Anderson

/s/ M Rajnauth-Lee

The Hon Mme Justice M Rajnauth-Lee

/s/ P Jamadar

The Hon Mr Justice P Jamadar