

THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA
IN THE HIGH COURT OF JUSTICE
CLAIM NO: ANUHCV2023/0013

In the Matter of The Representation of The People Act Cap 379
as amended

and

In The Matter of a Parliamentary Election For The
Constituency of Saint Mary's South held on the 18th day of
January 2023

BETWEEN:

CASWORTH AARON

Petitioner

and

KELVIN SIMON

Respondent

Appearances:

Hugh Marshall with Mrs. Andrea Smithen-Henry, Marshall & Co for the Petitioner

Kendrickson Kentish with Harold Lovell, Sherrie-Ann Bradshaw, Leon Symister and
Charlesworth Tabor for the Respondent

2023: February 9th
February 14th

JUDGMENT

- [1] **FORRESTER, J. (Ag.):** Before the Court is the Notice of Application of the Petitioner filed 23rd January 2023 seeking an interim order for the Respondent, Kelvin Simon, to be restrained from taking the oath of Parliament until the determination of the case upon the Petition or further order of the Court and that provision be made for costs.
- [2] The following documents have been filed by the parties in relation to the Petitioner's Application:
- (a) Second Affidavit of Casworth Aaron filed 23rd January 2023 together with Certificate of Exhibits CA2
 - (b) First Affidavit of Kelvin Simon filed 3rd February 2023 together with Exhibits

- (c) Fourth Affidavit of Casworth Aaron filed 6th February 2023 together with Certificate of Exhibits C4
- (d) Written submissions of the Petitioner filed 8th February 2023
- (e) Written submissions of the Respondent filed 9th February 2023

[3] The matter came on for hearing on 9th February 2023.

Facts

[4] The Petitioner commenced an Election Petition by engaging the Election Court by lodging a Petition on 23rd January 2023. In summary, the Petition states:

- (a) that the Respondent *“was a Civil Servant and a Public Officer and illegible to be on the ballot and illegible to be elected to sit in the House of Representatives of Parliament by reason of Section 10 of the Civil Service Act 87 of the Laws of Antigua and Barbuda [sic] Section 39(1)(g) of the Constitutional Order of Antigua and Barbuda, Cap 23 of the Laws of Antigua and Barbuda.”*
- (b) that *“the Respondent was nominated on the 28th day of December 2022, being Nomination Day, when at the time he was known to be employed as a civil servant, attached to the Ministry of Education”.*
- (c) that *“the Respondent published or caused to be published a Resignation letter signed by him dated the 4th day of January 2023 and addressed to the Chief Establishment Officer...”*
- (d) that *“there has been no acceptance of... [the] resignation of the Respondent as at the date of Election, being the 18th day of January, 2023. The Respondent therefore remained and was a Public Officer as a Civil Servant within the meaning of Section 10(1) of the Civil Service Act and Section 39(1) (g) of the Constitutional Order of Antigua and Barbuda.”*
- (e) that *“the Election returned on the night of the 18th day of January, 2023 with the Respondent being declared the winner. In declaring the Respondent, the winner and in his participation in the Election processes, divers breaches of the Constitutional and Statutory Provisions governing or pertaining to the lawful eligibility of candidates was committed”.*
- (f) a declaration should be made that Kelvin Simon was ineligible to be elected and that his Return be declared void in its entirety
- (g) that the Respondent should *“be restrained from taking the oath of Parliament pending the determination of this Petition”.*

[5] It is useful to put forward the following extracts from the evidence on affidavits of Casworth Aaron in support of this Application to restrain the Respondent from taking the oath of the House:

- (a) *“...the Respondent knew that he was not eligible to be elected and further, that he has not taken any real steps to address his ineligibility prior to his nomination or the Election Day of 18th January 2023”.*
- (b) *“By my own general inquiries from staff at the Chief Establishment Office, I am told and do very [sic] believe and I am further satisfied that the procedure for any civil servant to submit a resignation is for that the civil servant to write to his or her Permanent Secretary. The Permanent Secretary will then advise the Chief Establishment Officer of the resignation. The Chief Establishment Officer*

will then place the resignation letter before the Public Service Board for acceptance or other action. This is a process I was made to understand and do verily believe can take upwards of two months."

- (c) *"[h]aving regard to the above I am off the honest fortified belief that no letter of resignation has been received by the Chief Establishment Officer. Had that been the case it would be properly dated and addressed to the proper person"*
- (d) *"I... do not believe that the Respondent ever did more than publish his so-called resignation letter. In other words, the Respondent failed to formally submit his resignation as required and in accordance with the process stated above. The Respondent never submitted his resignation to anyone, and I do verily believe that if he had done so, he would have addressed it to the correct person. Yet, he made such a basic yet fundamental mistake, thereby demonstrating that the proper channels were not followed."*
- (e) *"On or about 22nd December, 2022, the Writs of Election were issued and delivered to the Supervisor of Elections which provided that Nomination Day would be on 28th December, 2022.... I maintain that the Respondent was at the date of nomination a civil servant and accordingly, his tenure of employment and engagement as a civil servant was governed by the Civil Service Act and also the Civil Service Regulations which are incorporated by the Civil Service Act."*
- (f) *"it is my honest belief that the Respondent knowingly submitted his resignation in a manner and in a timeframe which he knew was insufficient to meet the qualifying requirements of acceptance of that resignation and therefore for that resignation to have taken effect."*
- (g) *"I... maintain that the Respondent, having not resigned in the manner provided for by law was, as at the date of the election or rather the date of the Return and even prior to that, the date of nomination, prohibited from being elected by the Constitution of Antigua and Barbuda and also by the Civil Service Act of Antigua and Barbuda."*

[6] In the Respondent's Affidavit in response to the Petitioner's Application to restrain him from taking the oath for the House, he avers:

- (a) *"...I was an established Civil Servant"*
- (b) *"On the 28th December, 2023 I was duly nominated as a candidate to contest the general election. On the 29th December, 2023 the Antigua and Barbuda Electoral Commission (ABEC) declared that my nomination was in accordance with the law."*
- (c) *"I was a candidate in the 18th January, 2023 general elections on the United Progressive Party (UPP) ticket for the constituency of St. Mary's South"*
- (d) *"I submitted a resignation letter to the Permanent Secretary of the Ministry of Education to take effect from the 5th [sic] day of January, 2023."*
- (e) *"I believe that I was qualified to be elected as a member of the House of Representatives since I am an Antiguan and Barbudan citizen who is over twenty-one years old, has resided in Antigua and Barbuda for over twelve months immediately before the date of the election on the 18th day of January, 2023 and is able to speak and read the English language".*

- (f) *“Based on the overwhelming support of the electorate to my candidacy since I obtained 55% of the votes casted, I believe that I should be allowed to act as the Representative of the people of the St. Mary’s South Constituency since as at the date of the election I was not subjected to any disqualifying circumstances.”*

- [7] On an interim application, the Court does not need to determine any issues of facts. Notwithstanding, it is apparent that it is not in dispute that the Respondent was nominated as a candidate on 28th December 2022 and, that at the time of his nomination, he was a Civil Servant having tendered his resignation on 4th January 2023 to the Chief Establishment officer u.f.s the Permanent Secretary with the request for the effective date of his resignation to be 4th January 2023¹. Further, it is not in dispute that the Respondent was elected and returned as the winner of a constituency on 18th January 2023 which was the election day/polling day. It is in dispute whether, on the Election Day, the Respondent continued to be a Civil Servant or held public office which, are not matters that have to be determined by this Court on this Interlocutory Application.

Submissions of the Petitioner

- [8] The Petitioner contends that as this is an application for an interim remedy upon the Petition, the High Court has jurisdiction to determine the application having regard to section 46 of the Representation of the People Act Cap 379 (“RPA”) and Section 44 (1) (a) of the Constitution which includes being able to make interim or consequential orders. Further, that the Respondent’s contention that the House should be concerned with its own affairs, does not prevent the High Court from considering the issues arising on this application, as the High Court’s jurisdiction is expressly provided for in the Constitution. The Court is not being asked to deal with the affairs of Parliament but merely a question arising on the eligibility of a person to sit.
- [9] In determining the application to restrain the Respondent, the Petitioner submits that the Court should follow the principles in **American Cyanamid Co (No.1) v Ethicon Ltd [1975] A.C. 396**, namely that the Petitioner has an arguable case, that damages would not be an adequate remedy, that the balance of convenience favours the granting of the injunction and, the maintenance of the status quo favours the Petitioner.
- [10] With the Constitution being the supreme law of the land and Section 39(1)(g) of the Constitution providing that no one holding a public office can be an elected member of the House, the Petitioner avers that the Respondent was disqualified from being a member of the house, as such, there is an arguable case to be tried. Relying on the Trinidad and Tobago Court of Appeal case of **Peters v AG and another and Chaitan v AG and another (2001) 63 WIR 244** which, was adopted in the Eastern Caribbean High Court in Dominica in **Claim No. 7 of 2010 Ronald Green v Peter Saint Jean et al and Maynard Joseph v Roosevelt Skerrit et al** in a decision of Justice Thom (as she then was), the Petitioner submits that since Respondent did not resign as an established civil servant prior to nomination day, he was disqualified from being elected as a member of the House. Section 2 of the RPA stipulates that election means that period of time beginning with the Writ of Election and ending with the return of the writ and, in the circumstances of this case, nomination day was 28th December

¹ Exhibit KS-1 to the Affidavit of Kelvin Simon filed 3rd February 2023

2022 which is a date after the Writ of Election was issued on 22nd December 2022. Moreover, the disqualification of the holders of public office in Section 39(1)(g) of the Constitution is part of the supreme law of Antigua and Barbuda contrary to the contention of the Respondent that the case **Leon Natta-Nelson v The Attorney General of Saint Christopher and Nevis [2019] ECSCJ No. 104** which found the restriction prohibiting public officers from being elected to the House to be unconstitutional is applicable, as the constitution of St. Christopher and Nevis which that case considered, does not contain a provision equivalent to Section 39(1)(g) of the Constitution. Further, Section 39(2) of the Constitution does not supersede Section 39(1)(g) and require it to be interpreted in a narrow sense as there is no provision of the Constitution with any greater prominence than any other provision.

- [11] Further, despite the Respondent having tendered his letter of resignation prior to the election day, the Petitioner submits that the Respondent's resignation was contrary to the Civil Service Act Cap 87 ("CSA") and the Civil Service Regulations of 1993 ("CSA Regulations"), as the required notice period was not given by the Respondent. As there is no evidence that the Public Service Commission received the Respondent's letter of resignation, and or that the Public Service Commission accepted the Respondent's letter of resignation, it is highly likely that the Respondent at the Election Day was still a civil servant holding public office. This again, the Petitioner contends, confirms that there is an arguable case against the Respondent that is likely to result in the Petitioner succeeding on his Petition.
- [12] The Petitioner submitted that damages are an inadequate remedy as no award of damages can compensate for the failure of the Respondent to comply with the mandatory provisions of the Constitution and CSA. As such, the Court should consider where the balance of convenience lies. In deciding on where the balance of convenience lies, this Court should have regard to Section 45 of the Constitution which makes one liable to be guilty of an offence for sitting or voting in the house knowing or having reasonable grounds for knowing that he is not entitled to sit or vote in the House. Counsel for the Petitioner contended that once the Court determines that there is an arguable case, that meets the threshold that there are reasonable grounds for the Respondent to know that he is not entitled to sit or vote in the House, and the Court should not permit the Respondent to engage in an activity that is contrary to Constitution and will undermine the express and clear provisions of the Constitution. On the face of the Petition noting the evidence before the Court, the Respondent is not eligible to sit in the House, as such, the balance of convenience favours the granting of an injunction to restrain him from taking the oath as permitting the Respondent to proceed to take the oath will create an illegality.
- [13] Further, if this Court should look to whether there is a need to preserve the status quo, the status quo is that the Respondent has not yet taken the Oath of Parliament though he was returned in a constituency as the individual who would be the member of Parliament, he should not be permitted to take the oath prior to the determination of the Petition. The Court is being asked not to restrain Parliament from administering the oath but, to restrain the Respondent from taking the oath having not yet done so.

- [14] Counsel for the Petitioner averred that there is no public interest to be served that needs to be considered as the issue here is whether the Respondent will be allowed by the Court to engage in an unlawful act or not. The business of the house is to be conducted only by people entitled to sit and vote in the context of what the framers of the Constitution contemplated. If the Respondent is restrained from taking the oath, the House will be free to carry on without the Respondent if the House so chooses to do as the Court's order does not intervene with the proceedings of the House.

Submissions of the Respondent

- [15] The Respondent submits that the Petitioner's application seeks to have the Court interfere in the internal affairs of Parliament and the Court has no jurisdiction to interfere in the internal affairs of Parliament. Section 48 of the Constitution is the starting point, and clearly states only a member of Parliament can be administered the oath. Therefore, only a member of the House can take the oath of allegiance and with the Respondent having won the election for a constituency, he is a member of the House, and preventing him by way of an interim order from taking the oath, is an unlawful interference in the internal affairs of Parliament. The Court's jurisdiction, based on Section 44 of the Constitution, is to determine if an individual has been validly elected to Parliament but, preventing an individual from taking the oath, prior to the trial of an Election Petition, will result in the Court interfering in the internal affairs of Parliament. Essentially, the Petitioner's application seeks to restrain Parliament from causing the oath to be administered to the Respondent, so the Respondent cannot be heard in Parliament.
- [16] In support of the above contention, the Respondent relies on the cases **Willock v Vanterpool et al Claim No. BVIHCV2019/0087 April 2019** and **Bradlagh v Gossett (1884) 12 QBD 271** which confirm that the Court has no jurisdiction nor authority to intervene in the internal and intramural activities of Parliament. As such, the Court cannot grant the relief sought on the Petitioner's application, as it cannot properly entertain such an injunction seeking to interfere in the internal affairs of Parliament. It is only in exceptional circumstances that the Court may intervene, for example, if irreversible damage will be caused and that is not the case here as set out in **The Bahamas District of the Methodist Church in the Caribbean and the Americas and Others v Symonette and Others; Poitier and Others v Methodist Church of The Bahamas and Others [2000] 5 LRC 196.**
- [17] The Respondent contends that the consideration of the Petitioner's request for an injunction should be based on the **American Cyanamid** principles, **R v Secretary of State for Transport, ex p. Factortame Ltd (No. 2) [1990] 3 WLR 81,** and **The Belize Alliance of Conservation Non-Governmental Organisations v The Department of the Environment PC App 47 of 2003** with the latter two cases considering the public law element of seeking an injunction.
- [18] In considering whether there is a serious issue to be tried, the Respondent contends that Parliament has failed to pass legislation in keeping with Section 39 (2) of the Constitution to distinguish specific departments of the public service from being elected and, that the effect of Section 39(2) on Section 39(g)(1) of the Constitution is to limit the application of Section 39(g) (1) resulting in there not being a broad prohibition on public officers being elected to Parliament. The Court should properly construe Section 39(1)(g) in a purposive manner, to not penalise a civil servant who is elected when Parliament did not pass legislation to create categories for the disqualification. Additionally, Section

39(1)(g) seeks to disqualify a civil servant from being elected to the House, but not from being nominated.

[19] Further, in relation to the interplay between Section 10 of the CSA and the Constitution, Section 10 of the CSA is not compatible with the Respondent's rights to freedom of speech and freedom of assembly under the Constitution, as seen in the comparative case from St. Christopher and Nevis **Leon Natta Nelson** which found the equivalent provisions in that jurisdiction to be unconstitutional. Consequently, there is no serious issue to be tried. Moreover, **Peter v AG** and **Chaitan v AG** are not applicable, as election starts on election day and Section 39(1)(g) of the Constitution does not refer to nomination, it refers to being elected.

[20] In relation to the relevance of Section 45 of the Constitution to the Application, Counsel for the Respondent highlights that the Petition contains no pleadings in relation to Section 45, so the Court ought not to consider any of those arguments. Notwithstanding, Section 45 of the Constitution purports to create a criminal offence in the purview of the Director of Public Prosecution to advance a charge, and there is no charge against the Respondent, and that is a matter that can only properly be examined before a Judge and Jury in criminal proceedings. This Court is not determining the legality of the Respondent's actions, it is to consider whether he was disqualified to be elected.

[21] The Respondent conceded the point on the inapplicability of damages as an adequate remedy. As such, advanced that the balance of convenience is a key consideration and maintaining the status quo for the Court. Counsel for the Respondent contends that if the Respondent is restrained, the people of his constituency would not have any representation in Parliament in the interim and that cannot be in the public interest. The status quo is that by being elected, the Respondent is a member of the house, duly elected in the constituency and that position should be preserved until the Court determines whether he was disqualified from being elected.

Issues to be determined

[22] Succinctly, this Court has to determine whether it has jurisdiction to restrain the Respondent from taking the oath in the House pending determination of the Petitioner's Election Petition and, if it does have jurisdiction, whether it should grant the interim order to restrain the Respondent.

Jurisdiction

[23] As an Election Court, this Court has jurisdiction to determine the disqualification status of a member of the House. For this Court to lack jurisdiction means that it has no right to enter upon an inquiry at all. Whilst the disqualification status of the Respondent as a member of the House is the overarching issue arising on the Petitioner's Election Petition, the relief being sought in this application by the Petitioner, is centred on a narrower point; that is, restraining the Respondent from taking the oath in the House pending determination of the Petition.

- [24] The general position is that role of the judicial branch of Government is not to intervene in matters relating to parliamentary procedure. In **Bradlaugh v. Gossett (1884) 12 Q.B.D. 271** Chief Justice Lord Coleridge at page 275 stated “*the jurisdiction of the Houses over their own members, their right to impose discipline within their walls, is absolute and exclusive.*” Justice Stephen stated “*Blackstone says (1): ‘The whole of the law and custom of Parliament has its original [sic] from this one maxim, ‘that whatever matter arises concerning either House of Parliament ought to be examined, discussed, and adjudged in that House to which it relates, and not elsewhere.’”* At pages 281 to 282, Justice Stephen considered the taking of the oath of Parliament by a declaration versus by affirmation in relation to Section 4 of the Parliamentary Oaths Act, and noted, “[a] resolution of the House permitting Mr. Bradlaugh to take his seat on making a statutory declaration would certainly never have been interfered with by this Court. If we had been moved to declare it void and to restrain Mr. Bradlaugh from taking his seat until he had taken the oath, we should undoubtedly have refused to do so... Suppose, again, that the House had taken the view of the statute ultimately arrived at by this Court, that it did not enable Mr. Bradlaugh to make the statutory promise, we should certainly not have entertained an application to declare their resolution to be void. We should have said that, for the purpose of determining on a right to be exercised within the House itself, and in particular the right of sitting and voting, the House and the House only could interpret the statute; but that, as regarded rights to be exercised out of and independently of the House, such as the right of suing for a penalty for having sat and voted, the statute must be interpreted by this Court independently of the House.”
- [25] It is evident that the learning in **Bradlaugh v. Gossett** confirms that matters relating to parliamentary procedure are outside the realm of the Court for determination. So the question is whether taking the oath of the House is part of Parliamentary proceedings? The taking of the oath of the House may only be done by elected members of which the Respondent is one, and the Standing Orders of Antigua and Barbuda which, gives the general guidelines for Parliamentary Procedure identifies the taking of the oath for the House as part of Parliament’s proceedings. These are all matters that usually take place at the first sitting of Parliament after a general election or by-election for a member of the House. The Court understands the thrust of Counsel for the Petitioner’s contention to be that the Court is not being asked to prevent the House from taking any of its procedural steps, but seeks to restrain the Respondent as an individual from taking the oath as it is specific to him. Whilst the latter may be true insofar as these proceedings are against solely the Respondent, the ultimate effect of the relief the Petitioner seeks directly affects what happens in the Parliament of Antigua and Barbuda at its first sitting after a general election where members who were elected by the public are required to take the oath of the House. The Petitioner has proffered no submission that puts the taking of the oath of the House as being one that is outside of the procedure of Parliament.
- [26] This Court views any request to restrain a member of the House from taking the oath, as seeking to have the Court intervene and interfere in the internal proceedings of the House which, the Court ordinarily has no jurisdiction to do or should refrain from so doing. The relief sought on the Election Petition relating to whether the Respondent is disqualified, does not ask the Court to intervene in Parliament’s procedure, though, the effect of the Petitioner succeeding on his Election Petition will result in the Respondent being deemed disqualified to serve as a member of the House in keeping with Section 39 of the Constitution and the requisite steps to remove him as a member will follow.

[27] Having regard to the role of the Election Court to function as a High Court which, involves it making interlocutory orders, the ordinary restraint exercised by the Court in relation to parliamentary procedure is put into question, as there is nothing that restrains an Election Court from dealing with an application for interim orders such as an injunction arising during an election petition and in the context of what may result in an unlawful act, particularly, seeking to pre-empt such an act at common law. Section 46 of the RPA does provide that the Election Court subject to the provisions of the Act has the powers, jurisdiction and authority as a judge of the High Court. Additionally, Section 63 of the RPA states that the High Court subject to the provisions of the Act shall have the same powers, jurisdiction and authority with respect to an election petition and the proceedings thereon as if the petition were an ordinary action within its jurisdiction. Section 24 of the Eastern Caribbean Supreme Court Act CAP 143 permits the High Court to grant an injunction where it is just or convenient. As such, this jurisdiction of the High Court can properly be invoked on an Election Petition by way of an interim application.

[28] The learning from the Privy Council in the Hong Kong case **Rediffusion (Hong Kong) Ltd. and Attorney-General of Hong Kong and Another [1970] A.C. 1136** offers useful general perspective at common law in relation to the position that the Court does not or from time to time, does intervene in parliamentary procedure though the facts of the case do not relate to and or arise in the context of an Election Petition and are far removed from the facts in these proceedings. Notably, starting at page 1154, the majority decision delivered by Lord Diplock states:

“the broad question on the jurisdiction summons is whether a court of justice in Hong Kong has any power to interfere either by persuasion (declaration) or compulsion (injunction) with the conduct of members of the Legislative Council in carrying out a part of the legislative process, or more specifically in carrying out the deliberate part of the legislative process, even though that conduct is unlawful.

*This question cannot be answered by applying to Hong Kong the legal principles which govern the jurisdiction of English courts to interfere in the conduct of proceedings in the fully sovereign Parliament of the United Kingdom. **It is well settled that the common law of England which is introduced into a colony does not include the whole of the lex et consuetudo parliament** I.² Members of a legislative assembly in a colony do not enjoy all the privileges and the immunity from control by courts of justice which are enjoyed by members of the Parliament of the United Kingdom, but only such of those privileges and so much of that immunity as are essential to enable them to carry out their functions under the colonial constitution...” [emphasis added]*

[29] Further, Lord Diplock noted that in the context of equitable relief such as a declaration or an injunction directed to prevent future unlawful acts, from page 1154 to page 1157:

“These are remedies which the court has a discretion to grant or to withhold notwithstanding that the plaintiff has established a threatened breach of his legal rights by the defendant.

² “the lex et consuetudo parliament I” translates to law and custom of parliament

When considering an action claiming relief in the form of discretionary remedies only it is thus important to distinguish between the jurisdiction of the court to entertain the action at all, i.e., to embark upon the inquiry whether facts exist which would entitle the court to grant the relief claimed, and a settled practice of the court to exercise its discretion by withholding the relief if the facts found to exist disclose a particular kind of factual situation. The application of a discretion to refuse relief even though this may be pursuant to a settled practice is an exercise of jurisdiction, not a denial of it...

The immunity from control by the courts, which is enjoyed by members of a legislative assembly while exercising their deliberative functions is founded on necessity. The question of the extent of the immunity which is necessary raises a conflict of public policy between the desirability of freedom of deliberation in the legislature and the observance by its members of the rule of law of which the courts are the guardians. If there will be no remedy when the legislative process is complete and the unlawful conduct in the course of the legislative process will by then have achieved its object, the argument founded on necessity in their Lordships' view leads to the conclusion that there must be a remedy available in a court of justice before the result has been achieved which was intended to be prevented by the law from which a legislature which is not fully sovereign derives its powers.

In their Lordships' view the Full Court of Hong Kong were right in holding that they had jurisdiction to enter upon the inquiry whether or not it would be unlawful for the Legislative Council of Hong Kong to pass the proposed bill, and if they found that it would be unlawful, to decide in their discretion whether or not to grant the relief by way of declaration and injunction claimed." [emphasis added]

[30] It is apparent that **Rediffusion (Hong Kong) Ltd. and Attorney-General of Hong Kong and Another** has put into context that there are circumstances where the Court has jurisdiction to intervene in Parliament's procedure particularly where there is the possibility of an unlawful act. This is also the position of the Privy Council in **The Bahamas District of the Methodist Church in the Caribbean and the Americas and Others v Symonette and Others; Poitier and Others v Methodist Church of The Bahamas and Others** which considered the issue in the context of countries with Constitutional supremacy and not Parliamentary supremacy and that the principle that the Court does not interfere in the affairs of Parliament may be displaced or modified to give effect to the supremacy of the Constitution.³

[31] As the Petitioner's Application seeks to restrain the Respondent from taking the oath of the House on the basis that he is disqualified from being a member of the House having regard to the disqualification provisions of Section 39 (1) of the Constitution which, means that if he does take the oath of the House, he may be acting in contravention of the Constitution which is unlawful, this Court as an Election Court deems that it does have jurisdiction, in the circumstances of this case, to consider the application of the Petitioner to restrain the Respondent from taking the oath of the House.

³ See paragraphs 29 to 31 of the decision of Lord Nicholls of Birkenhead **The Bahamas District of the Methodist Church in the Caribbean and the Americas and Others v Symonette and Others; Poitier and Others v Methodist Church of The Bahamas and Others**

Application for Interim Relief

- [32] Both parties have relied on the principles in **American Cyanamid** as being what should guide the Court's consideration of whether to grant the Orders sought by the Petitioner on its application. In short, the Court has been asked to consider whether there is a serious issue to be tried, whether damages are an adequate remedy, where does the balance of convenience lay and whether the status quo should be preserved.

Serious issue to be tried

- [33] The Court has to be satisfied that the Petition is not frivolous or vexatious, that is, that there is a serious issue to be tried. It is apparent that whether the Respondent was either the holder of a public office pursuant to Section 39(1) of the Constitution and or a Civil Servant pursuant to Section 10 of the RPA when elected and therefore, disqualified from being elected as a member of the House are triable issues. The evidence presented by the parties confirms that the Respondent was nominated as a candidate on 28th December 2022 whilst still being an established civil servant who thereafter in January 2023 tendered his letter of resignation to take effect on 4th January 2023 prior to the 18th January 2023 which was the polling day for the elections and he succeeded in obtaining the majority of votes for a constituency on the latter date making him a member of the House. That is neither a frivolous and or vexatious matter and the Court confirms there is obviously a serious issue to be tried. However, the factual and legal issues surrounding what is an election, the effect of the Respondent's resignation, the actual date on which the Public Service Commission deemed the resignation of the Respondent to be effective which evidence is not before the Court on this Application and, all other factual and legal issues on the Petition are not matters that this Court needs to resolve on this interlocutory application. All questions of law or fact are for determination on the trial of the Petition.

Whether damages are an adequate remedy

- [34] The Respondent conceded on the point that damages are an inadequate remedy. With that concession, the Court goes on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought.

Balance of Convenience

- [35] The Privy Council in **Belize Alliance of Conservation Non-Governmental Organisations v Department of the Environment and Another (2003) 63 WIR 42** confirmed that on an application for interim relief, the existence of a public law element is a special factor in relation to the balance of convenience. The Petitioner's Application has that public law element to it as it seeks to restrain the Respondent from taking the oath of the House though the public elected him to be a member of the House.
- [36] In examining the balance of convenience, Lord Bridge of Harwich in **Regina v. Secretary Of State For Transport, Ex parte Factortame Ltd. and others (No. 2) (Case C 213/89) [1991] 1 A.C. 603** stated at page 659 that:

“The objective which underlies the principles by which the discretion is to be guided must always be to ensure that the court shall choose the course which, in all the circumstances, appears to offer the best prospect that eventual injustice will be avoided or minimised. Questions as to the adequacy of an alternative remedy in damages to the party claiming injunctive relief and of a cross-undertaking in damages to the party against whom the relief is sought play a primary role in assisting the court to determine which course offers the best prospect that injustice may be avoided or minimised. But where, as here, no alternative remedy will be available to either party if the final decision does not accord with the interim decision, choosing the course which will minimise the risk presents exceptional difficulty”

- [37] In this case, it is useful to note that Section 45 of the Constitution presents as a remedy available within the Constitution to deal with any individual who is unqualified to sit in the House, having done so. The existence of an alternative remedy is always a relevant consideration in the exercise of a discretion whether to grant or withhold relief at an interlocutory stage of proceedings. Section 45 of the Constitution provides as follows:

“(1) Any person who sits or votes in either House of Parliament knowing or having reasonable grounds for knowing that he is not entitled to do so shall be guilty of an offence and liable to a fine not exceeding five hundred dollars, or such other sum as may be prescribed by Parliament, for each day on which he or she sits or votes in that House.

(2) Any prosecution for an offence under this section shall be instituted in the High Court and shall not be so instituted except by the Director of Public Prosecutions.”

- [38] The Court notes that the Petitioner’s contention in relation to Section 45 of the Constitution is that once the Court finds there is a serious issue to be tried, it means the Respondent has reasonable grounds for knowing that he may be sitting in the House when he is not entitled to do the same. The Court does not find favour with that contention of Counsel for the Petitioner. Finding that there is a serious issue to be tried, does not result in the Court taking a definitive stance on any issue of fact or law and none should be inferred, as that finding merely confirms that the issue raised is not vexatious or frivolous and will be determined at trial. Finding that there is a serious issue to be tried cannot equate, on this interlocutory application of the Petitioner, to placing on the Respondent knowledge that he has “*reasonable grounds for knowing he is not entitled*” to be in the House, as that infers that the Court made findings of fact on an interlocutory application which, have not been made. Even if I am wrong on this point and the inference of reasonable grounds knowing he is not entitled can be inferred, I would prefer to decide this point having regard to all the circumstances of this case that informs the balance of convenience. This Court should not restrain the Respondent from taking the oath unless the challenge to his validity to serve as a member is so firmly based as to justify such an exceptional course being taken having regard to all the circumstances of the case.

- [39] A significant part of the Petitioner’s position is that election starts from the commencement of the issuing of the Writ of Elections which took place on 22nd December 2022, so only individuals who are not holding public office for the purposes of Section 39 (1) (g) and or a Civil Servant for the purposes of Section 10 of the RPA, may be elected during the election period. The decisions of **Peters v AG**, **Chaitan v AG**, and **Ronald Green v Peter Saint Jean et al and Maynard Joseph v Roosevelt Skerit et al** are not binding on this Court. Moreover, those decisions did not deal with an

interlocutory application seeking relief of the nature sought on the Petitioner's application but were all determined at trials. That confirms that for an Election Court to undertake the determinations of fact and law made in those decisions, a full expounding on the issues has to be done by the Election Court at the trial of the Petition. At this preliminary stage, it is improper for this Court to embark on a similar exercise and conduct a mini-trial.

- [40] This Court views upholding the decision of the public to elect the Respondent as its member to the House as being of great public importance and greater than the private interest of the Petitioner. In fact, the Petitioner has presented no evidence of any prejudice that would be sustained by him if such is not done. The Petitioner's submissions have centred around whether the Court may be facilitating an illegal act by allowing the Respondent to take the oath but the Petitioner disregards the presumption of validity that is afforded to the Respondent prior to the Court's determination of the disqualification status of the Respondent on the Election Petition. In fact, there were no arguments that the Respondent was not duly qualified based on Section 38 of the Constitution, to be a member of the House. In relation to whether the Respondent is disqualified from being a member, there are additional facts not before the Court on this application such as the evidence of the decision of the Public Service Commission as to the terms and conditions on which the Respondent's resignation took effect which is within the sole discretion of the Public Service Commission to decide, amongst other matters, that have to be presented to resolve the issues arising on the Petition which will in turn inform the findings of law that would eventually be made on the Petition.
- [41] Having regard to the circumstances of this matter at this stage, this Court finds that there is no overwhelming evidence to lean the balance of convenience in favour of the Petitioner to restrain the Respondent from taking the oath of the House. At present, the Respondent is presumed to have been validly elected and the status of his disqualification will be for determination at trial and he should be permitted to carry on with the business of the people pending trial.
- [42] In this case, if the Petitioner's Petition is dismissed as the Respondent is found to not be disqualified, the will of the public that voted for him to represent the constituency would have been infringed upon together with the Respondent being prevented from participating in the affairs of the House. The impact of the same means that the constituency in question would be without a representative, that there would be no representative of that constituency to participate in the proceedings of the House when performing its functions, in particular, its legislative functions and a constituency should properly have representation in the House.
- [43] If the Petitioner succeeds on the Petition and the Respondent has already taken the oath of the House and is sitting and voting in the house, the Respondent will be removed as a member of the House likewise, the Director of Public Prosecutions may initiate proceedings against the Respondent pursuant to Section 45 of the Constitution. There were no arguments advanced on this application that asserted the Respondent participating in the House pending determination of the Petition would make matters he, for example, voted on, voidable.
- [44] As a consequence, the Court finds that the balance of convenience favours the Respondent not being restrained having regard to all the circumstances of this case. Further, with the status quo being that the Respondent is a member of the House whose next step is to take the oath of the

House to participate in the proceedings of the Parliament, that position should be maintained. Therefore, the Petitioner's application is dismissed.

[45] On the issue of costs, costs is awarded in favour of the Respondent in the sum of \$1,000.

[46] The following directions are given for the hearing of the Election Petition:

- (a) Disclosure by the parties shall be undertaken on or before 24th February 2023.
- (b) The parties are to file and exchanged an agreed Bundle of Documents on or before 3rd March 2023.
- (c) The parties are to file and exchange witness statements on or before 15th March 2023. The witness statements filed shall stand as the examination in chief of witnesses. All witnesses are required to attend the trial of the Petition.
- (d) The last date for the filing of any interlocutory application by the parties is 24th March 2023 supported by Skeleton Arguments. Any interlocutory application filed is to be treated as urgent and shall be given an urgent hearing date by the Court.
- (e) The parties are to file and exchange submissions on the Petition by 19th April 2023.
- (f) The matter is listed for pre-trial review on 24th April 2023 at 9:00am.

**Justice Dia C Forrester
High Court Judge (Ag.)**

By the Court

Registrar