

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS**

IN THE HIGH COURT OF JUSTICE

Claim No. BVIHCV2019/0087

**IN THE MATTER OF SECTIONS 7, 67 (3) (a) OF THE BVI CONSTITUTION ORDER IN COUNCIL (2007)
AND IN THE MATTER OF THE ELECTIONS ACT**

BETWEEN:

MARK VANTERPOOL

Applicant

-AND-

**JULIAN WILLOCK
THE SPEAKER OF THE HOUSE OF ASSEMBLY
THE ATTORNEY GENERAL as Intervener**

Respondent

Appearances: Mr. Edward Fitzgerald, QC, Mr. Patrick Thompson and Ms. Reynela Rawlins, Counsel for the Applicant
Mr. Anand Ramlogan, Senior Counsel, Mr. Valston Graham and Ms. Cherice Archibald, Counsel for the Respondent
Mr. Baba Aziz, Attorney General appearing as Intervener

2019: April 13th
May 2nd

DECISION ON AMENDED FIXED DATE CLAIM

BACKGROUND

[1] **Smith J:** On 23rd January 2019, His Excellency, The Governor Augustus Jaspert dissolved the House of Assembly. In the general election that followed on 25th February 2019, the Applicant was elected as the representative for the Fourth District.

- [2] On 5th March 2019, the Applicant wrote to the Clerk of the House of Assembly to say that he did not wish to be sworn in and that she was to “accept this letter as my resignation from the House of Assembly”.
- [3] Subsequently, on 12th March 2019, the Honourable Julian Willock was elected Speaker of the House of Assembly (“the Speaker”) by the Members-Elect other than the Applicant. This date was also the first sitting of the House of Assembly.
- [4] The following day on 13th March 2019 the Clerk replied to the Applicant's letter stating that Mr. Julian Willock was the new Speaker of the House of Assembly and that he had been sworn into office on 12th March, 2019.
- [5] Referring to **Section 67 (3) (a)** of the British Virgin Islands (BVI) Constitution, which is set out below, the Clerk concluded: “... *therefore, you should direct the said letter to the Honourable Speaker*”. **Section 7** of the British Virgin Islands (BVI) Constitution Order 2007 No. 1678 states: “*for the purposes of the Constitution the resignation of the holder of any office that is required to be addressed to any person shall have effect from the time that it is received by that person, unless otherwise specified in the letter of resignation.*”
- [6] On 13th March 2019 the Clerk's note and the Applicant's letter were passed on to the Speaker, who the same day wrote to the Applicant referring to **Section 67 (3) (a)** of the British Virgin Islands Constitution and said: “*I have hereby accepted your letter of resignation with immediate effect, as per Section 67 (3) (a)*”.
- [7] The Clerk also wrote to the Speaker on the same day as she responded to the Applicant on the 13th March 2019. She indicated to the Speaker that the Applicant Mr. Vanterpool had offered his resignation and as the new Speaker she sought his directive on the matter.
- [8] Also on that day, the Speaker wrote to the Applicant Mr. Vanterpool indicating that his (the Applicant's) letter had been referred to him by the Clerk. He noted that at the time the Applicant wrote his resignation letter no Speaker had been sworn into office however he duly took office on 12th March 2019 and that he “*hereby accepted your (the Applicant's) letter of resignation with*

immediate effect, as per **Section 67 (3) (a)**. That letter was copied to the Governor, the Premier, the Attorney General and the Supervisor of Elections.

- [9] The next day, 14th March, 2019, the Applicant wrote to the Speaker indicating that he had been advised by the Attorney General that his earlier resignation letter was "invalid" and that he was requesting the Speaker to arrange for his swearing in *"as soon as possible as the declared elected representative of the Fourth District."* He regretted any inconvenience caused.
- [10] The Court is advised that there had been no response to that letter.
- [11] On 15th March 2019, the Speaker wrote to the Governor and indicated that *"in the instance that a seat in the House of Assembly is vacant when it convene, a by-election will need to be held in the coming weeks in accordance with **Section 24A of the Elections Act**. You are to note that the seat remains vacant."*
- [12] The Speaker followed up that letter with another letter to The Governor dated 18th March 2019 "advising" the Governor that the seat formerly held by the Applicant Mr. Vanterpool was indeed vacant and that a by-election needed to be held.
- [13] On 25th March 2019, the Speaker issued a statement on the matter, the first of two. He referred to his earlier "ruling" on 13th March 2019 to accept the Applicant's resignation, and said that this "ruling" still stood. He also said that he had advised the Governor on two occasions that there was a vacancy for representation in the Fourth District, *"as Mr. Vanterpool followed through with his express intent and did not show up on 12th March 2019 to be sworn in as an Elected Member"*. Having regard to the need of the people of the Fourth District to be represented as soon as possible, he concluded: *"... we await a by-election date, which under the constitution, can only be called by him [The Governor]"*.
- [14] On 26th March, 2019, the Governor issued a statement in response.
- [15] The Governor indicated that he had received the Speaker's correspondence and that he was aware that the *"the question of whether the Fourth District seat is vacant is being contested by the Member-Elect of that district"*. His statement concluded: *"I have received legal advice that has*

been copied to the Honourable Speaker, advising that the resignation of the Member-Elect was invalid on the basis that the Member-Elect has no constitutional right to resign prior to being sworn in. Therefore, at this point, I do not intend to issue a writ for a by-election. **The swearing in of the Member-Elect is a matter for the House to determine, having regard to the will of the electors in the Constituency**" (my emphasis).

- [16] On 28th March 2019, the Speaker issued a second statement on the issue. He confirmed that he had read the Governor's statement but his position remained the same. Recognizing the constitutional significance of the issues, however, he accepted that:

"... it would be prudent at this juncture to seek the opinion of the courts in the interest of fairness, transparency, and best practice of the Honourable Attorney General, of whom I have the highest respect, has advised myself, the Governor and Mr. Vanterpool of his position."

- [17] The Speaker confirmed that he would comply with the outcome of that process. The Speaker also wrote to the Attorney General Mr. Baba Aziz to say that the House of Assembly would be engaging independent counsel *"to adjudicate the Constitutional matter if it reaches to a court of law"*. He also indicated that he had received legal advice on the matter.

- [18] On 1st April 2019, the Applicant's legal practitioners sent a pre-action letter to the Speaker of the House. The essence of their complaint was that Mr. Vanterpool was being unlawfully prevented from taking his seat and sought a reply by 2 p.m. that day, failing which **all available remedies would be pursued** (my emphasis). The Court is not aware of a response to that letter.

- [19] On 2nd April 2019 during a sitting of the House of Assembly, the Leader of the Opposition attempted to raise the issue of the Applicant being sworn in on a Point of Information. The Speaker indicated that he would not entertain the question raised as it "did not comply with Standing Order 24 of the House of Assembly, Standing Orders (amendment) 2016 which mandated that a member give written notice of such questions at least seven (7) days in advance of the sitting".¹

- [20] Later that day, after the 2pm deadline, the Applicant filed an application for leave to make a claim for Judicial Review. The Court provided an urgent hearing on the application the same day.

¹ Supplemental Affidavit of Julian Willock, paragraph 7, page 4. Filed 15th April 2019.

- [21] Ellis J. in an oral decision, which was later reduced to writing, rejected the Applicant's application for an interim injunction to delay the First Sitting of the new session of the House of Assembly, which would be taking place the following day, but scheduled a hearing of the application for leave on either the 10th or 11th April 2019. That hearing eventually came before the Court on 12th April in two forms: 1) a Fixed Date Claim and 2) an application for Judicial Review of the Speaker's actions.
- [22] On 13th Saturday April 2019, the Applicant filed an amended Fixed Date Claim in essentially the same terms as the previous one. The Court dismissed the application for Judicial Review indicating that the application was inappropriate, and proceeded to hear the request for relief under Section 87 of the Constitution on the amended Fixed Date Claim.
- [23] This ruling deals with that hearing.

The Legal Framework

- [24] **Section 7** of the BVI Constitution contains a general provision on resignation:

“Resignation

7. For the purposes of this Constitution, the resignation of the holder of any office that is required to be addressed to any person shall have effect from the time that it is received by that person, unless otherwise specified in the letter of resignation.”²

- [25] So far as relevant, **Section 67** of the BVI Constitution provides:

“Tenure of seats of members of the House of Assembly

67.-(1) Every elected member of the House of Assembly shall vacate his or her seat in the House at the next dissolution of the House after his or her election.

... (3) An elected member of the House of Assembly shall also vacate his or her seat in the House-

(a) If he or she resigns it by writing under his or her hand addressed to the Speaker
...”

² The United Kingdom House of Commons provides no such right of resignation

[26] **Section 73** entrenches in the Constitution, the requirement for newly elected members of Parliament to swear an oath or affirmation:

“Oaths and Affirmations”

73. No member of the House of Assembly shall be permitted to take part in the proceedings of the House (other than proceedings necessary for the purposes of this Section) until he or she has made and subscribed before the House an Oath or Affirmation of allegiance and an Oath or Affirmation for the due execution of office as such member in the forms set out in Schedule 1; but the election of the Speaker and Deputy Speaker may take place before the members of the House have made such Oaths or Affirmations”.

[27] This requirement to swear an Oath "for the due execution of office as such member" is reinforced in Standing Order (3) (1) of the House of Assembly's Standing Orders:-

“Except for the purpose of electing a Speaker and Deputy Speaker after a general election, no Member of the House shall take part in the proceedings thereof until he has made and subscribed the Oath of allegiance ...”.

28. **Section 87** of the BVI Constitution states at:

(1) “The High Court shall have jurisdiction to hear and determine an appeal under **Section 67 (9)** and any question whether—

(a) any person has been validly elected as a member of the House of Assembly; or

(b) any elected member of the House of Assembly has vacated his or her seat in the House or is required by virtue of **Section 67 (4)** to cease to perform his or her functions as a member.

(2) An application to the High Court for the determination of any question under subsection (1) (a) may be made by—

(a) any person entitled to vote in the electoral district and at the election to which the application relates;

(b) **any person who was a candidate in that district at that election;**
or

(c) the Attorney General.

(3) An application to the High Court for the determination of any question under subsection (1) (b) may be made by—

(a) any person entitled to vote at an election in the electoral district for which the member concerned was returned;

- (b) any elected member of the House of Assembly; or
- (c) the Attorney General.
- (4) If an application is made under subsection (2) or (3) by a person other than the Attorney General, the Attorney General may intervene and may then appear or be represented in the proceedings.
- (5) The Legislature may make provision with respect to— (a) the circumstances and manner in which, and the imposition.”

The Applicant's Case

- [28] The Applicant's contention is that he could not validly resign a seat which he had not held. He further indicated that he did not attend the First sitting of the House of Assembly on 12th March 2019, because at that stage he still did not wish to be a member of the House of Assembly.
- [29] **Section 67 (3) (a)** of the BVI Constitution 2007 provides that a Member of the House of Assembly may vacate their seat by resignation. There is no dispute to this fact.
- [30] Therefore, in order to resign under **Section 67 (3) (a)** one must be a Member who has already taken their seat. Until that time, they are only a Member-Elect, and they have no power or right to resign.
- [31] The Applicant's case is that the clear effect of **Section 67 (1)** of the BVI Constitution is that when Parliament was dissolved on 23rd January 2019, the existing Members vacated their seats.
- [32] The Applicant contended that it is also clear from the language of **Section 67 (3)** that this subsection is directed at elected members who have already taken their seats in Parliament.
- [33] The Applicant submitted that the effect of **Section 67 (3) (a)** was that such a person could vacate his seat by submitting his resignation in writing to the Speaker of the House of the Assembly.
- [34] However, the effect of **Section 73** of the BVI Constitution, which is a familiar feature in Parliaments of the Westminster model, is that a member does not take his seat unless he has been sworn or has affirmed his allegiance.

- [35] The Applicant asked the Court to therefore follow and adopt the analysis of The Governor as to the invalidity of the Applicant's resignation: *"the Member-Elect has no constitutional right to resign prior to being sworn in"*.
- [36] The Constitution only makes provision for resignation of an elected member after they have taken their seat, so that they hold a seat as an elected Member of the House of Assembly.
- [37] Secondly, it is the Applicant's case that the Speaker's purported acceptance of the resignation under **Section 67 (3) (a)** was invalid.
- [38] The Applicant submitted that this was so because **Section 67 (3) (a)** simply did not apply. The Applicant had merely made a proffer of resignation which was never validly accepted and was then withdrawn.
- [39] Thirdly, on the assumption that the Applicant did have the right to resign under **Section 67 (3) (a)** before he had taken his Oath, his letter of 5th March 2019 was invalid for that purpose. This is because it was not "addressed to the Speaker", as required by **Section 67 (3) (a)**.
- [40] The Applicant further stated that he was "informed and verily believed that **Section 67 (3) (a)** actually governed the situation where an Elected Member who holds a seat vacates that seat by a letter in writing specifically "addressed to the Speaker" which was not the position in his case. He stated by way of affidavit that "I had in fact never written a letter of resignation addressed to the Speaker"³.
- [41] Counsel for the Applicant couched his final submission in these terms "we seek relief under **Section 87.1 (b)** of the British Virgin Islands Constitution, in the form of a declaration that the Applicant has not vacated his seat in the House and is therefore entitled to be sworn in".

³ Second Affidavit of Mr. Mark Vanterpool, filed 15th April 2019

The Respondent's Case

- [42] The first issue, the Respondent raised was whether a successful candidate in a general election could resign his seat **before** (my emphasis) he is sworn in as a member of the House of Assembly.
- [43] Secondly, could a Member-Elect, resign before a Speaker has been appointed; and if so, the manner in which that was to be done.
- [44] Thirdly, could the letter of resignation submitted to the Clerk prior to the appointment of the Speaker be valid. Could the Speaker adopt, as it were, or receive that letter resignation when he is appointed if it predated his appointment?
- [45] Counsel for the Respondent indicated that **Section 64** of the BVI Constitution had some of the answers. **Section 64** states:
- "The Elected Members of the House of Assembly shall be persons qualified for election in with this Constitution and subject to this Constitution shall be elected in the manner provided by or under any law being in force for the time being."
- [46] He went on to say that subject to **Section 63 (2)** for the purposes of election, the British Virgin Islands shall, there shall be single electoral district and shall return four members of the House of Assembly.
- [47] Counsel urged the Court to look at the capacity that they are returned in, stating that *"they are returned after the election; they are returned and clothed with the constitutional status of Members of the House of Assembly"*.
- [48] Counsel indicated that point was indeed crucial and critical saying *"...now, My Lady, this is critical as the layman's perception and indeed legal perception, is that you are a member of Parliament and you take the Oath and you are sworn in. That is not correct, with respect. You become a member of the House of Assembly when one has successfully stood for election and one has been returned as the winner. This is when a person becomes an Elected Member of the House of Assembly"*.

- [49] Counsel pointed to the wording of **Section 64** of the Constitution saying: "*The elected members of the House of Assembly shall be persons qualified for election in accordance," etc., "shall be a single electoral district"*.
- [50] He also pointed out that nowhere in **Section 64** did the question of an Oath appear nor the Speaker of the House of Assembly.
- [51] Counsel for the Respondent and the Applicant both agreed in their submissions that the position in relation to resignation of elected members in the United Kingdom (UK) is very different from what is contemplated in the BVI Constitution 2007. In the UK, "Taking the Chiltern Hundreds" now refers to the legal procedure used to effect resignation from the British House of Commons. The important point being a member of the House of Commons or member elect did not have the right to resign⁴.
- [52] It was further submitted the framers of the BVI Constitution 2007, felt it was important to create a right where none existed; that right being the right to resign. The Court is of the opinion that all parties agree with this point.
- [53] The Constitution states that "an elected member of the House of Assembly shall also vacate his or her seat in the House, if (a) he or she resigns it by writing under his or her hand addressed to the Speaker."
- [54] Counsel for the Respondent indicated that the fundamental issue to be noted is that one must first be an Elected Member. Therefore only those persons who are elected members of the House by virtue of their return enjoy this right of resignation.
- [55] Counsel submitted that these were the only category of persons with the right to resign and that the right could only be exercised in the following terms: a) must be in writing b) under his or her hand and c) addressed to the Speaker.

⁴ In the 17th century Members of Parliament (MPs) were often elected against their will. On 2nd March 1624, a Resolution was passed by the House of Commons making it illegal for an MP to quit or willfully give up his seat.

[56] Counsel took issue with the Applicant's interpretation of this Section of the Constitution saying "now, here Counsel says "But, what it does not mean is that if the Speaker is not there you cannot exercise your right to resign. It does not mean that."

[57] The Court was asked to reject that line of thinking.

The Attorney General's Submission

[58] The learned Attorney General prefaced his submissions by setting out his role in these proceedings. He noted that **Section 87** of the British Virgin Islands Constitution Order, 2007 confers a public interest function on the Attorney General.

[59] He also indicated that the said Attorney General may apply or intervene in proceedings for the determination of certain questions including whether any elected member of the House of Assembly has vacated his seat.

[60] Such application had been made and granted on 12th April 2019 by this Court.

[61] The learned Attorney General then invited the Court to take judicial notice of the following occurrences:-

- (1) that The Governor by proclamation, pursuant to **Section 84 (2)** of the BVI Constitution, **dissolved** (his emphasis) the House of Assembly on 24th January 2019;
- (2) that there was a general election on 25th February, 2019;
- (3) Members were duly elected in that election;
- (4) The Governor by another proclamation, pursuant to **Section 83 (1)** of the BVI Constitution, appointed the 12th day of March 2019 for the First Session of the Fourth House of Assembly following the coming into force of the British Virgin Islands Constitution Order 2007.

[62] The learned Attorney General further submitted that the life cycle of the House of Assembly which begins by a proclamation either expires at the end of a four year period from the date of its first sitting after a general election or is dissolved earlier by proclamation as per **Section 84** of the BVI Constitution.

- [63] The learned Attorney General also submitted that the new House of Assembly was therefore given birth to and came into legal existence effective from the 12th day of March 2019 with the election, the first of the Speaker and thereafter the Deputy Speaker, pursuant to **Section 69 (1) (4)** of the BVI Constitution; followed immediately by the subscribing of Oaths or Affirmations of allegiance and due execution of office by all members before the House of Assembly.
- [64] The principal proceedings which distinguish the meeting of a new Parliament from the opening of any subsequent session are the election of a Speaker and the taking and subscription of the Oaths or Affirmations by members: see page 148 of Erskine May **Parliamentary Practice** [24th edition].
- [65] As already stated above, the situation in the UK differs from that in the British Virgin Islands and this was alluded to by Counsel for the Respondent as well as the Counsel for the Applicant.
- [66] In the United Kingdom, the position is set out in **Section 702** of Halsburys Laws of England. That Section states under the rubric **Retirement from the House of Commons**: A member who has been elected to sit in the House of Commons cannot resign his seat and can only cease to represent his constituency in Parliament:
- (1) By reason of his death;
 - (2) By being expelled from the House of Commons by an order in the House;
 - (3) By the dissolution of the Parliament to which he has been elected; or
 - (4) By becoming disqualified for membership of the House.
- [67] The learned Attorney General further submitted that in this case, the notice of resignation was issued during the period when the House of Assembly was not in existence and there was no Speaker. A compelling case for the matter to have been dealt with at the very least by the House as a whole rather than by the Speaker when the House of Assembly was subsequently convened.

The Authorities

- [68] All parties referred to a number of authorities in their submissions; however I do not propose to refer to all of them in this decision as the Court is of the view that some are more relevant than others.

- [69] The authority which seemed to find favour with all parties was the case of **Bradlaugh vs Gossett**⁵. In that case, Mr. Charles Bradlaugh was excluded over a similar issue from the House of Commons by a Resolution of the House of Commons dated 22nd June 1880. There was another Resolution dated 9th July 1883 by which it was resolved that *“Mr. Bradlaugh, who had been duly elected member for Northampton, should not be permitted to take the Oath prescribed by law for members duly elected, and that he should be excluded, if necessary, by actual force from the House unless he would engage not to do so”*.
- [70] In that case, because Members had to take the Oath before being allowed to take their seats; Mr. Bradlaugh effectively forfeited his seat in Parliament. His seat fell vacant and a by-election was declared. Mr. Bradlaugh was re-elected by Northampton four times in succession as the dispute continued. In 1880, after three unsuccessful earlier attempts, Mr. Bradlaugh was elected to Parliament for Northampton.
- [71] When he asked to affirm (he was an atheist) instead of taking an Oath before taking his seat, a parliamentary select committee declared that the right freethinkers had to affirm in law courts didn't extend to Parliament. He then asked to take the Oath, but another select committee found his known atheism prevented this but he should be allowed to affirm under pain of statute (penalties for voting without taking the prescribed oath). The battle over his being sworn in began the day he took his seat and voted, and resulted in convoluted legal arguments continuing for six (6) years.
- [72] Eventually, in 1886 after the 1885 general election he was allowed by the Speaker to take the Oath at the beginning of the session, before objections could be made. While all this had been going on, his seat was vacated but he was re-elected at three by-elections (1881, 1883 and 1884).
- [73] This case illustrated the point that the Courts in the United Kingdom (at that time) could not interfere or force Parliament to swear in Mr. Bradlaugh and so as in the case at bar denied Mr. Bradlaugh and his constituents of legal rights of great value. It also illustrates the point that the matter should have been dealt with within the procedures of the House.⁶ However, we must note that the BVI Constitution gives the Courts in this jurisdiction such power to order such redress.

⁵ (1884) 12 Q.B.D 271

⁶ Bradlaugh sought the protection of the Parliamentary Oaths Act which did not entitle him to the relief sought.

- [74] The Respondent referred to a number of Authorities to support his arguments.
- [75] In relation to the Applicant's pursuit of a remedy under **Section 87 of the BVI Constitution**, the Respondent cited the well-known case **Jaroo vs. Attorney General of Trinidad and Tobago**⁷ **2002 UKPC**. At page 883 Lord Diplock stated:
- “The right to apply to the High Court under section 6 of the BVI Constitution for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action. In an originating application to the High Court under section 6 (1), the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom.”*
- [76] The Respondent also invited the Court to consider the case of **Malcolm Johnatty vs. The Attorney General of Trinidad and Tobago and Malcolm Johnatty vs. The Permanent Secretary of the Ministry of Education**⁸ where at paragraph 21 the Court said, *“The fact that these alternative remedies were available is fatal to the appellant's argument that he ought to have been allowed to seek a constitutional remedy.*
- [77] *In Harrikissoon v Attorney General of Trinidad and Tobago*⁹ Lord Diplock warned against the misuse of the right to apply for constitutional redress when other procedures were available. He said that its value would be seriously diminished if it was allowed to be used as a general substitute for the normal procedures for invoking judicial control of administrative action. This warning has been repeated many times.
- [78] *In Hinds v Attorney General of Barbados*¹⁰ Lord Bingham of Cornhill said that it remained pertinent. In **Jaroo v Attorney General of Trinidad and Tobago**¹¹ Lord Hope of Craighead said, *“that before he resorts to this procedure the applicant must consider the true nature of the right that*

⁷ 2002 UKPC

⁸ Privy Council Appeals No 51 and 56 of 2007 para. 21

⁹ [1980] AC 265, 268

¹⁰ [2001] UKPC 56; [2002] 1 AC 854

¹¹ [2002] UKPC 5; [2002] 1 AC 871, para 39

was allegedly contravened and whether, having regard to all the circumstances of the case, some other procedure might not more conveniently be invoked”.

[79] In ***Attorney General of Trinidad and Tobago v Ramanoop***¹² Lord Nicholls of Birkenhead said, “that where there is a parallel remedy constitutional relief should not be sought unless the circumstances of which complaint is made include some feature which makes it appropriate to take such a course. The appellant was unable to point to any such circumstances in this case.”

[80] The learned Attorney General submitted by way of comparison, drew the Court’s attention to a number of Constitutions which require resignation of members to be addressed to the Speaker whereby these constitutions have provided for such resignations to be effected in circumstances where either the office of Speaker is vacant or the Speaker is absent or is unable to perform his functions: See the following:

- (i) section 122 of St. Lucia as of 31st December 2006;
- (ii) section 103 of the Constitution of St. Vincent and The Grenadines 1979;
- (iii) section 35 (2) of the Constitution of Mauritius 1968;
- (iv) section 37 of the Commonwealth of Australia Constitution Act; and
- (v) sections 25 – 29 of the Parliament of Canada Act 1985

Discussion

[81] An Elected Member who has not taken the Oath is prohibited from taking part in the proceedings of the House after the election of the Speaker and Deputy Speaker. The Court is guided by **Section 75 of the BVI Constitution** and so finds that:

- (a) Mr. Mark Vanterpool could not constitutionally resign as there is no constitutionally recognized right conferred on him to resign during the interval between the general election and the date on which the House of Assembly convened on 12th March 2019;
- (b) The letter dated 5th March 2019 written by Mr. Mark Vanterpool and addressed to the Clerk of the House of Assembly is not the constitutionally recognized and proper manner of resignation prescribed by **Section 67 (3) (a)** of the British Virgin Islands Constitution Order 2007;

¹² [2005] UKPC 15; [2006] 1 AC 328, paragraph 25

- (c) The proper way to effect a resignation in the Court's view was to have then issued a new notice of resignation addressed to the Speaker. As we now know, this was never done.
- (d) The purported acceptance of that letter by the Speaker by letter dated 13th March 2019 does not in the Court's view create a vacant seat for the Fourth Electoral District, especially so in the light of the letter from the Clerk of the House of Assembly dated 13th March 2019 and that of Mr. Vanterpool's dated 14th March 2019 respectively.

Court's Findings

- [82] The Court is of the view that the Applicant is entitled to seek redress under **Section 87 of the BVI Constitution**.
- [83] The Applicant has indicated on more than one occasion and in more than one forum that he is ready, willing and able to take the Oath in accordance with the Constitution thus allowing him to do so having regard to the will of the people of the Fourth Electoral District.
- [84] In the second affidavit of the Applicant filed on 11th April 2019 at paragraph 4, the Applicant stated that on 12th March 2019, he received many calls from his constituents and that they expressed great concern and asked him to reconsider his decision to proffer his resignation. This is indeed a significant point and one which has weighed on the Court's mind.
- [85] The 2019 Election was held on 25th February 2019 and since that day the people of the Fourth Electoral District have been without representation. The Applicant has not been able to represent his constituents nor contribute to the Budget Debate.

Conclusion

- [86] Finally, this Court is of the view that this case was as compelling as any case for the matter to have been dealt with by the House of Assembly as a whole rather than by the Speaker when the House of Assembly was subsequently convened. However, whereas in this case, the strict requirements of **Section 67 (3) (a)** of the Constitution had not been complied with and **Section 7** having no legal effect, it is doubtful whether the Speaker could unilaterally by acceptance or a declaration

determine that a vacancy exists and proceed to exclude a member of the House of Assembly without a formal proceeding of the House of Assembly.

[87] This Court found the comment “go back to the people, what are you afraid of?” was inappropriate and somewhat insensitive. The Territory had just come out of a General Election, to great expense to the people. There can be no doubt that elections and by-elections come at a considerable cost to the tax payers of this Territory.

[88] The Court is grateful to all parties for their fulsome submissions and affidavits which assisted the Court in its determination.

[89] The Court hereby declares that the Applicant Mr. Mark Vanterpool be granted the redress sought and be sworn in as the Representative of the Fourth Electoral District.

[90] The Issue of costs will be dealt with at the convenience of Counsel.

**Ann-Marie Smith
High Court Judge**

By the Court

Registrar