

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF ANTIGUA AND BARBUDA**

IN THE HIGH COURT OF JUSTICE

CLAIM NO: ANUHCV2018/0096

BETWEEN:

[1] TREVOR WALKER

Claimant/Applicant

and

[1] NATHANIEL JAMES

[2] JOHN JARVIS

[3] ANTHONYSON KING

[4] PAULA LEE

[5] SUZETTE CHARLES

[6] GENARIS ROBINSON

Defendants/Respondents

Appearances:

Mr. Charlesworth Tabor for the Applicant

Mrs. Emily Simon Ford for the Respondents

.....
2018; March 15
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DECISION

[1] **HENRY J.:** On February 27th 2018, the Claimant filed an application pursuant to Part 17.2 (1) (b) and therein he sought an order, pending the determination of the substantive claim:

- 1) restraining the Respondents whether by themselves, their servants or agents or howsoever otherwise, from conducting a poll in Antigua for the election of the Representative from the constituency of Barbuda in the ensuing general election which is scheduled for the 21st day of March 2018;

- 2) restraining the Respondents whether by themselves, their servants or agents or howsoever otherwise, from denying the Applicant his constitutional right to vote in the ensuing general election in the constituency of Barbuda where he resides.

[2] The stated grounds of the application are:

- 1) The applicant is a citizen of Antigua and Barbuda who resides at Barbuda and is registered on the list of electors for the constituency of Barbuda where he should legally exercise his franchise.
- 2) The Respondent, as chairman of the Antigua and Barbuda Electoral Commission (ABEC) has declared that in the ensuing general election in Antigua and Barbuda scheduled for the 21st of March 2018, eligible voters who are registered on the list of electors for the constituency of Barbuda will be required to exercise their franchise in Antigua.
- 3) The respondent has declared that the legal basis to allow eligible electors registered in the Constituency of Barbuda to exercise their franchise in Antigua is pursuant to Section 35 of the Representation of the People Act, No 17 of 2001, which the applicant contends is an incorrect interpretation.

[3] The applicant states that should he be required to exercise his franchise in the ensuing general election by voting in Antigua instead of in the Constituency of Barbuda where he is registered to vote, this would be tantamount to his disenfranchisement.

[4] The right to vote, he continues, is a fundamental right and this right is presently under threat if the Electoral Commission is allowed to implement their decision to make the electors of the Constituency of Barbuda vote in Antigua (instead of Barbuda) in the general election scheduled on the 21st day of March, 2018 to elect the Barbuda Representative to Parliament. He continues that in a letter to the Prime Minister of Antigua and Barbuda dated the 26th day of January, 2018 the Chairman of the Electoral Commission, Nathaniel Paddy James, indicated that:

“...the Antigua and Barbuda Electoral Commission (ABEC) at a meeting on the 24th instant has decided pursuant to Section 35 of the Representation of the People (Amendment) Act No. 17 of 2001 to cause poll to be conducted for the Constituency of Barbuda in a Constituency on Mainland Antigua that in the view of the Commission is best suited for the convenience of the Electors of Barbuda who reside prior to the next General Elections in Mainland Antigua ..”

[5] Further, at a meeting with the Chairman of the Electoral Commission and the Supervisor of Elections, Lorna Simon, on the 26th day of February, 2018 with a view to get the Commission to review their decision, the Commission indicated that its decision to have electors in the Constituency of Barbuda cast their vote in Antigua still stands. At the same meeting he pointed out to them that any alteration to the boundaries of any polling districts or polling places should be published in the constituency. Despite the proposed alteration by the Electoral Commission, to date no publication has been done in the constituency. This is a clear breach of the requirements of the Act.

- [6] With the passage of Hurricane Irma on 5th September, 2018 the island of Barbuda was severely affected and Barbudans were removed to Antigua. The situation with respect to Barbuda today is that things have been greatly normalized with the restoration of electricity, running water, the opening of schools and guest houses and the restoration of regular transportation between both islands.
- [7] There are roughly 500 residents on Barbuda, including 60 students who have returned to Barbuda. Moreover, over 400 adults who are registered on the list of electors for the Barbuda constituency are resident on the island. This number is about half of the electorate that voted in the last general election.
- [8] The Chairman of the Electoral Commission, in the meeting with him on the 26th day of February, 2018 has also indicated that Section 35 (6) of the Representation of the People (Amendment) Act, No. 17 of 2001, prevents the questioning of an election by reason of any non-compliance with the provisions of section 35 or any informality relative to polling districts and polling places. This application, however, is not questioning any election since the election is scheduled for the 21st day of March, 2018. The purpose of my application is to prevent the Electoral Commission from causing Barbudan electors registered in the Constituency of Barbuda from voting in Antigua until the Court can decide whether the manner of voting proposed by the Electoral Commission is lawful.
- [9] The major argument that the Chairman of the Electoral Commission has put forward to support his contention that Barbudans can vote in Antigua, is based on Section 35 (2) (c) of the Act. His interpretation of that Section is that because of special circumstances (although the Act does not define special circumstances) the Commission can designate an area wholly or partly outside the polling district as polling places. In the applicant's view the Commission is misinterpreting the Section. The applicant states that Section 35 (2) (c) is a Section that could not sensibly be applied to the Constituency of Barbuda (as it would to the other 16 Constituencies of Antigua) since in the case of Barbuda the island of Barbuda is a single polling district. In the case of Barbuda, therefore, unlike the other 16 Constituencies, it would be absurd and impossible to designate an area partly or wholly outside of the geographic boundaries of Barbuda as a polling place. While this could be done for all the other Constituencies since they are divided into several polling districts, Barbuda is a single polling district with one division (division A). The reasoning of the Electoral Commission is therefore flawed and any voting by the electors of the Barbuda Constituency in Antigua would be unlawful. Moreover, the words at the end of Section 35 (2) (c) "to indicate to electors in different parts of the polling district how they will be able to reach the polling station at the polling place" would not apply to the Constituency of Barbuda with a single polling station.
- [10] He also expresses the belief that there are no impediments at present that would prevent the Electoral Commission from conducting the ensuing general elections in Barbuda. In fact, the nomination of candidates for the general election, which is a requirement of the law, will be conducted in Barbuda next week.
- [11] Furthermore, there is no Section in the Representation of the People (Amendment) Act, No. 17 of 2001 which gives the Electoral Commission the authority to have the electors registered in one

constituency cast their vote in another constituency, as it has declared will be the case for the electors of the constituency of Barbuda.

- [12] An Affidavit in Response was filed by the first respondent on behalf of all the respondents, in which he placed the authority for the Electoral Commission's decision to hold the poll in Antigua on the provisions of section 35 (2) (c) of the Representation of the People (Amendment) Act 2001 and the conditions existing on Barbuda in the aftermath of Hurricane Irma.
- [13] The affidavit of the Chairman of the Commission sets out the reasons for the designation of the polling place wholly outside of the polling district. He points to the destruction caused by the passage of Hurricane Irma. He notes that the damage done was not only to infrastructure – electricity, water, phone/internet services – but to government buildings such as hospital, government schools along with private homes. As a result of the storm the island was ordered evacuated by emergency order of the Government. According to the advice he received from NODS, a total of 1523 resident out of a total population of 1600 persons were evacuated from the island to Antigua. According to the Chairman, the update received from the Executive Director of NODS is that the current population stands at about 300 persons. The applicant puts the figure at 500. According to the Chairman, there are 1100 electors registered in the constituency. As recent as 4th March there were still issues accessing electricity, water and wifi. Based on current conditions including the information received from NODS, the Commission concluded that proper accommodation for the conduct of the poll and for private individuals, who would be required to travel to the island in order to vote, was not available. Therefore, the decision was taken to move the polling place wholly outside the district to Antigua where most of the residents still reside.

The Preliminary Point

- [14] At the hearing of the application, Counsel for the respondents took a preliminary objection which she states affects the jurisdiction of the court to hear the matter. She submitted that the question raised by the applicant belongs to a class of questions within the special jurisdiction of the High Court and must be presented by petition after the election is concluded. In other words, this is an election matter within the confines of Section 43 of the Representation of the People Act Cap 378 (the RPA) in that the election process has commenced and if the injunction is granted, would have the effect of vitiating the elections in Barbuda at this time. The date for the election has been set for the 21st March. She points out that Parliament was dissolved on the 26th February, 2018 and that the Governor General on 27th February issued the Writ. Notice of Elections has been issued and published, including the Writ of Elections for the Constituency of Barbuda. She therefore contends that the process of election is now in train.
- [15] She submits that Section 44 of the Constitution together with section 43 of the RPA gives the court jurisdiction over any matter arising over an election. However, once the process begins any matter concerning election must be brought by Petition after the election is concluded. Counsel refers the court to three cases: **Gladys Petrie and Others v The Attorney General and Others**¹,

¹ (1968) 14 W.I.R. 292;

Seecomar Singh v Butler² and N.P. Ponnuswami v Returning Officer Namakkal Constituency³.

- [16] In response, the applicant submits that both section 44 (1) (a) of the Constitution and section 43 (1) of the RPA deal with the issue of an election to the House after it is completed and the method of challenging the results. Counsel contends that the application before the court is not challenging an election result but instead is moving the court for an order to protect his constitutional right to vote in the Constituency in which he is registered as an elector. Further, the Order he seeks is to prevent the Electoral Commission from unlawfully having the electors registered in the Constituency of Barbuda, cast their vote in Antigua to elect the Representative for the Barbuda Constituency.
- [17] Counsel characterized the submission by the respondent that the matter raised by the applicant is an election matter as “clearly unfounded”. He refers to the meaning of “election” in Section 2 (1) which states that an election means an election of a member or members to the House of Representatives. He concludes that from this meaning, one can see that an election is a single act and not a process, that is to say, casting a vote on polling day to elect a Representative to the House. Counsel also refers the court to two other definitions in Section 2 (1) of the RPA: “At an election” and “during an election”. The section defines “at an election” as that period of time beginning with the issue of the writ of election and ending with the return of the said writ in accordance with the provisions of this Act. “During an election” is said to bear the same meaning as “at an election”. He concludes that an “election” does not carry the same meaning as “at an election”. The situation in Antigua and Barbuda, he continues, can be distinguished from the situation in Guyana where the **Petrie** case decided that the word “election” referred to the whole process of an election. He is adamant that the instant case does not come within Section 45 (1) of the RPA and is not an election matter requiring an election petition to be brought. He insists that the matter brought by the applicant “is a normal matter pursuant to Part 17.2 (1) (b) of the CPR to protect his constitutional right to vote in the Constituency in which he is a registered elector”. Counsel sees the issue as whether it is contrary to the RPA as amended and the Constitution of Antigua and Barbuda for the Electoral Commission to move the poll for the election of the Representative for the Constituency of Barbuda outside of Barbuda.
- [18] The relevant provisions on this preliminary point are Section 44 of the Constitution and Section 43 of the RPA.

Section 44 of the Constitution provides:

44. (1) The High Court shall have jurisdiction to hear and determine any question whether-

- (a) any person has been validly elected as a member of the House;
- (b) any person has been validly appointed as a Senator or as a temporary member of the Senate;

² (1973) 21 W.I.R. 34

³ (1952) 35 C.R. 218

- (c) any person who has been elected as Speaker from among persons who were not members of the House was qualified to be so 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 41 (2) of this Constitution to cease to perform any of his functions as a member of the House.
- (7) The circumstances and manner in which and the imposition of conditions upon which any application may be made to the High Court for the determination of any question under this section and the powers, practice and procedure of the High Court and the Court of Appeal in relation to any such application shall be regulated by such provision as may be made by Parliament.

Section 43 of the RPA provides:

43. (1) No election and no return to the House of Representatives shall be questioned except by a petition complaining of an undue election or undue return (hereinafter referred to as an election petition) presented in accordance with this Part.

(2) A petition complaining of no return shall be deemed to be an election petition and the High Court may make such order thereon as it considers expedient for compelling a return to be made or may allow the petition to be heard by an election court as provided with respect to ordinary election petitions.

[19] The applicant relies on section 2(1) as defining election as a single day event that is polling day. That section however does not purport to define the word “election”. Section 2 (1) indicates that when the word “election” is used in the RPA, it is referring to election of members to the House of Representatives. In other words, the provisions in the RPA apply to elections being held to select a member or members to the House. It therefore states that in this Act “election” means an election of a member or members to the House of Representative. It could not be defining the word election, by using the same word in the definition. This section therefore does not assist the court in the preliminary point.

[20] In the **Ponnuswami** case, the applicant was one of the persons who had filed nomination papers for election to the Madras Legislative Assembly. The Returning Officer for that constituency rejected the applicant’s nomination papers. The applicant thereafter moved the High Court for a writ of certiorari to quash the order of the Returning Officer and directing the Returning Officer to include his name in the list of valid nominations to be published. The High Court dismissed the applicant’s application on the ground that it had no jurisdiction to interfere with the order of the Returning Officer by reason of the provisions of Article 329 (b) of the Constitution. Section 329 (b) of the Constitution in question provided:

“(b) no election to either House of Parliament or to the House or either House of the Legislature of a State shall be called in question except by an election petition . . .”

[21] The main controversy in the appeal to the Supreme Court of India centered round the meaning of the words “no election shall be called in question except by an election petition”. In their judgment

the court expressed the view that the word “election” bears a wide meaning whenever it refers to elections in a democratic country. One of the questions to be considered is when elections begin. The court referred to the passage from Halsbury’s Laws of England under the heading “Commencement of Elections” where it states:

“Although the first formal step in every election is the issue of the writ, the election is considered for some purposes to begin at an earlier date. It is a question of fact in each case when an election begins in such a way as to make the parties concerned responsible for breaches of election law, the test being whether the contest is “reasonably imminent”. . . The election will usually begin at least earlier than the issue of the writ. The question when the election begins must be carefully distinguished from that as to when “the conduct and management of” an election may be said to begin. . . . The discussion in this passage makes it clear that the word “election” can be and has been appropriately used with reference to the entire process which consists of several stages and embraces many steps, some of which may have an important bearing on the result of the process.”

- [22] As to the issue of what is meant by the words “no election shall be called in question” the court concluded that if any irregularities are committed while the election is in progress and they belong to the category or class which, under the law by which elections are governed, would have the effect of vitiating the election and enable the person affected to call it in question, they should be brought up before a special tribunal by means of an election petition and not be made the subject of a dispute before any court while the election is in progress. The court expressed that under election law, the only significance which the rejection of a nomination paper has consists in the fact that it can be used as a ground to call the election in question. The appeal before the court therefore failed.
- [23] In the **Seecomar Singh** case, the claimants who described themselves as qualified electors for election of members to the National Assembly of Guyana filed a Writ of Summons against the Chief Election Officer for various declarations, including a declaration that certain election laws are unconstitutional, illegal, ultravires, void and of no effect. They further sought an injunction restraining the defendant from inviting, accepting, or recording or taking into account postal votes by electors resident in Guyana in the conduct of the said general elections, other than in accordance with the provision of the Elections Regulations 1964. On June 5, there had been a proclamation in the Official Gazette in which it was stated that Parliament shall be dissolved on June 7, 1973 and that the President had appointed July 16 1973 as the day on which an election of members of the National Assembly would be held. At the hearing of the summons, the applicants stated their true position as directed to the mode in which overseas voters not resident in Guyana cast their votes and that they were alleging that postal voting by residents in Guyana and non-residents outside of Guyana was not permitted by the Constitution and was therefore illegal, ultravires and of no effect.
- [24] At the hearing of the summons, the Solicitor General, in his preliminary objection raised the following points:

- 1) The question raised by the action and by the summons are exclusively assigned to the special jurisdiction conferred on the High Court by art 71 of the Constitution.
- 2) The grant of the interlocutory injunction prayed for will result in substantial disobedience to the constitutional command given by art 67 for a national election to be held on July 16, 1973, being the date duly appointed for the purpose by the President's Proclamation.
- 3) An injunction cannot issue to restrain the defendant from discharging the functions vested by law in him in his capacity as Chief Election Officer.

[25] In support of the first point, the Solicitor General submitted that art. 71 of the Constitution created a special tribunal having a special exclusive restrictive jurisdiction in the determination of questions in regard to elections.

[26] The plaintiffs in response submitted that they were not seeking for the elections not to be held nor were they asking the court to restrain the defendant from holding or conducting the General Elections on the appointed day. The plaintiffs were merely asking the court to prevent a mode of voting by persons qualified to vote which had been specified by regulations which were made without jurisdiction, and which were ultra vires the Constitution. The plaintiffs made it clear that they were not proceeding under art. 71 of the Constitution. They were asking for an interpretation of the Constitution and they conceived that it was the court's duty to interpret the Constitution and not to permit laws to be carried out so as to create a fraud upon the Constitution.

[27] The court examined the provisions of art. 71 of the Guyana Constitution, which is substantially the same as section 44 of the Antigua and Barbuda Constitution.

[28] The court referred to the judgment in the **Petrie** case and to the analysis that Parliament is here conferring an exclusive jurisdiction on the High Court to determine certain questions set out in art. 71. The court endorsed the meaning of election as used in its wider sense to include the whole process of an election. The court concluded the judgment by reference to the **Ponnuswami** case and endorsed the views expressed that all controversial matters and all disputes arising out of elections should be postponed until after the elections are over. The court expressly stated that where a right is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of. The court held that the plaintiffs had their remedy in an election petition and declined jurisdiction.

Conclusion of the Preliminary Point

[29] Section 44 of the Constitution confers on the High Court a special jurisdiction to hear and determine questions as to the validity of elections of a Member of the House, referred to as the Election Court. That section gives to Parliament wide discretion to prescribe the circumstances and manner in which and the imposition of conditions upon which any application may be made. The powers, practice and procedure in relation to such applications are also to be regulated by provisions made by Parliament. Parliament has provided for such in the Representation of the People Act. In the court's view, the word election in the RPA, carries the same meaning as set out in section 2 (1) "during an election". It recognizes and codifies the broader meaning of the word as stated in the cases to encompass the entire process between the issuance of the writ of election

and the return of the said writ in accordance with the law. Election disputes can involve allegations relating to the interpretation of election laws. They too can fall within section 43 of the RPA.

- [30] The applicant herein seeks an injunction restraining the Electoral Commission from conducting the poll in Antigua for the election of the Representative from the Constituency of Barbuda. The election is already in progress. The Writ of Election under seal of the Governor General on 27th February 2018 has been published. It states that Parliament was dissolved on 26th February 2018, and it sets the 21st March as the date appointed when the general election shall be held. The 22nd March has been appointed as the day upon which, if any, the poll shall be returned to him. The Notice of Election for the Constituency of Barbuda has been published. If the application were granted it would have the effect of vitiating the elections set for Barbuda at this time. The court is of the view that any alleged irregularities in the polling locations is a matter falling under section 43 of the RPA and can only be questioned by petition after the returns.
- [31] Even if this application does not fall under Section 43 of the RPA, and the application is, as the applicant contends, a “normal” application under the CPR, the application must nonetheless fail.
- [32] As noted by the authors of the Caribbean Civil Practice, unless it is otherwise provided by statute, a court may not grant an interim remedy without the existence of an underlying cause of action. Accordingly, once the Application for the Interim Injunction was filed, the court ordered that the Claim Form and Statement of Case be filed on or before noon on 5th March 2018. In response, the applicant filed a document headed “Fixed Date Claim”. In it the applicant states:

“The Claimant, Trevor Walker, hereby applies to the court pursuant to Part 17.2 (1) (b) of the CPR 2000. The Claimant’s claim is for an Order:

1. Restraining the respondents whether by themselves their servants or agents, or howsoever otherwise, from conducting a poll in Antigua for the election of the Representative from the Constituency of Barbuda in the ensuing general election which is scheduled for the 21st day of March, 2018; and
2. Restraining the respondents whether by themselves their servants, agents or howsoever otherwise, from denying the applicant his constitutional right to vote in the ensuing general election in the Constituency of Barbuda where he reside.

A statement of case accompanies this claim.”

- [33] No cause of action is disclosed in the Fixed Date Claim. No description of the nature of the claim was included in the Claim Form as required by Part 8.6. Instead the entire Claim Form contains only the remedies sought pursuant to Part 17. While Part 17 provides that a court may grant certain interim remedies, including an interim injunction, it cannot form the basis of a substantive claim. A court may grant an interim injunction before a claim has been made only if (1) the matter is urgent or (2) it is necessary to do so in the interest of justice⁴. Neither situation applies to the instant case, where the Claim is filed but the Claim fails to disclose a cause of action.

⁴ National Commercial Bank of Jamaica v Olint Corporation Ltd [2009] UKPC 16

- [34] The document which accompanies the Claim Form, although headed “Statement of Claim”, is not in the nature of pleadings. The only inkling as to the nature of the claim is in paragraph 3 where it states:

“I am bringing this claim as an elector of the constituency of Barbuda to protect my right to vote in that constituency in the general elections on the 21st day of March, 2018. The right to vote in a democratic state is a fundamental right and this right is presently under threat if ABEC is allowed to implement their decision to make the electors of the constituency of Barbuda vote in Antigua (instead of Barbuda) in the general election to elect the Barbuda Representative to Parliament.”

The Statement of Claim ends with a prayer for the same two remedies set out in the Fixed Date Claim.

- [35] Section 119 of the Constitution gives original jurisdiction to the High Court in constitutional questions. It provides:

“119 (1) Subject to the provisions of section 25(2), 47 (8) (b), 56 (4), 65 (5), 123 (7) (b) and 124 of the Constitution, any person who alleges that any provision of this Constitution (other than a provision of Chapter II) has been contravened may, if he has a relevant interest, apply to the High Court for a declaration and for relief under this section.

(2) The High Court shall have jurisdiction on an application made under this section to determine whether any provision of this Constitution (other than a provision of Chapter II) has been or is being contravened and to make a declaration accordingly.

(3) Where the High Court makes a declaration under this section that a provision of this Constitution has been or is being contravened and the person on whose application the declaration is made has also applied for relief, the High Court may grant to that person such remedy as it considers appropriate, being a remedy available generally under the law in proceedings in the High Court.”

- [36] There is however, no claim for a declaration before the court. Under Section 119 (3) it is only if the court makes a declaration that a provision of the Constitution has been or is being contravened, that the court may grant to that person such remedy as it considers appropriate, being a remedy available generally under any law in proceedings in the High Court.

- [37] There is also no claim before the court for any of the Prerogative Writs of Certiorari, Prohibition or Mandamus.

- [38] The result is that there is no claim by the applicant that is properly before the court which can form the basis for the grant of an injunction. It is well established that an application for an interim injunction cannot exist in a vacuum. It must be attached to a substantive claim. No such claim is before the court. Therefore the application for the interim injunction must fail.

- [39] The court is reminded that the applicable principles to be applied when considering whether or not to grant an interim or interlocutory injunction are still to be found in the case of **American**

Cyanamid Co. v. Ethicon Ltd.⁵ The matters to which the Court is to have regard in determining whether to grant the interim injunction sought and which must be satisfied are:

- (a) the applicant has established a serious issue to be tried;
- (b) damages are not an adequate remedy;
- (c) the balance of convenience lies in favour of granting such relief (that is, the grant of an injunction will do more good than harm); and
- (d) the applicant is able to compensate the respondent for any loss which such injunction may cause him in the event that it is later adjudged that the injunction ought not to have been granted.

[40] Furthermore, where the circumstances of the case are such that the grant or refusal of an interlocutory injunction will effectively end the action, the court will look beyond the mere balance of convenience and form a view of the likelihood of success of the parties at trial⁶.

[41] The first pre-requisite for obtaining an injunction, is for the applicant to establish that there is a serious question to be tried. This means that the claim must exist in substance and reality and not be merely frivolous or vexatious⁷. Having filed a Fixed Date Claim that discloses no cause of action, it is near impossible for the applicant to establish that a claim exists or for the court to form a view of the likelihood of success necessary to meet the above standard.

[42] Given the above ruling, it is not necessary to address the other issues raised.

[43] The application for an interim injunction is denied in all respect. No order for costs.

Clare Henry
High Court Judge

By the Court

Registrar

⁵ [1975] 1 ALL E.R.504.

⁶ Cambridge Nutrition Ltd v BBC [1990] 3 All ER 523

⁷ Mothercare Ltd v Robson Broods Ltd [1979] FSR 466