

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

THE COMMONWEALTH OF DOMINICA

DOMHCVAP2019/0006

BETWEEN:

[1] LOFTUS DURAND
[2] ATHERTON MARTIN
[3] DR. IRVING PASCAL
[4] NICHOLAS GEORGE
[5] DALE LAURENT
[6] OSWALD GEORGE
[7] ATHERLEY ROBIN

Appellants

and

[1] PRESIDENT OF THE COMMONWEALTH
OF DOMINICA, CHARLES A. SAVARIN
[2] THE ELECTORAL COMMISSION
[3] CHIEF ELECTIONS OFFICER, IAN ANTHONY
[4] CABINET OF THE COMMONWEALTH OF DOMINICA
[5] DOMINICA BROADCASTING CORPORATION
[6] THE ATTORNEY GENERAL OF THE COMMONWEALTH
DOMINICA

Respondents

Before:

The Hon. Dame Janice M. Pereira, DBE
The Hon. Mr. Mario Michel
The Hon. Mde. Gertel Thom

Chief Justice
Justice of Appeal
Justice of Appeal

Appearances:

Ms. Cara Shillingford and Ms. Zahidha James, instructed by Justin Simon, QC
for the Appellants
Mr. Lennox Lawrence and Ms. Jodie Luke for the 1st Respondent
Mrs. Heather Felix-Evans for the 2nd and 3rd Respondents
Mr. Levi Peter, Attorney General, and Ms. Tameka Hyacinth-Burton,
Solicitor General, for the 4th and 6th Respondents
Mr. Stephen Isidore for the 5th Respondent

2019: December 5;
2020: April 17.

Civil interlocutory appeal – Expedited appeal – Whether appeal can be heard summarily – Election dispute – Objection to register of electors – Procedure for nominations for an election – Application for leave to seek judicial review – Jurisdiction of the high court to hear election matters – Whether the high court has jurisdiction to hear election matters prior to elections taking place and without the filing of an election petition – Constitution of the Commonwealth of Dominica, Chapter 1:01, Laws of Dominica Revised Edition 1990 – House of Assembly (Elections Act) Cap. 2:01 Laws of the Commonwealth of Dominica – Registration of Electors Act Cap. 2:03 Laws of the Commonwealth of Dominica – Registration of Electors Regulations Cap. 2:03, Laws of the Commonwealth of Dominica – Rule 62.6 of the Civil Procedure Rules 2000

On 6th November 2019, the President of the Commonwealth of Dominica (“the President”) set dates for nominations and for general elections in the Commonwealth of Dominica (or “Dominica”). The general elections were set for 6th December 2019 and the nomination day was set for 19th November 2019. In error, the notice published by the Chief Elections Officer in the Dominica Official Gazette (“the Gazette”) stated that the nomination day was “Wednesday the 19th of November 2019”, which said day did not exist as the 19th November 2019 was in fact a Tuesday. This error was corrected in a subsequent issue of the Gazette.

On 18th November 2019, the register of electors was published by the Chief Elections Officer. One thousand three hundred (1,300) objections to the register of electors were filed. However, none of the objections were heard by the Chief Elections Officer by the scheduled nomination day or, indeed, by the date of the hearing this appeal. Instead, nomination day proceeded on Tuesday 19th November 2020.

On 26th November 2019, the appellants filed an *ex parte* notice of application for leave to apply for judicial review. The application for leave to apply for judicial review was broadly premised on five complaints, namely that: (i) the nominations for the election were received unlawfully in breach of the procedure set out in the House of Assembly (Elections) Act; (ii) the Chief Elections Officer failed to hear and determine the outstanding objections to the register of electors prior to the election; (iii) the President of Dominica acted unreasonably and in bad faith by refusing to adjourn the election pending the determination of the objections; (iv) the government of Dominica breached the appellants’ legitimate expectation that electoral reform, including a voter

verification exercise and the implementation of voter identification cards, would be conducted prior to the election; and (v) the Dominica Broadcasting Corporation (“DBC”) discriminated against the United Workers Party by not permitting them to have access during the period of time leading up to the general election.

On the basis of the application for leave to seek judicial review, the appellants also sought two interim injunctions which requested that the court: (i) halt the holding of elections and (ii) restrain the DBC from discriminating against any political party or candidate in the scheduled elections, pending the determination of the complaints raised in the application for leave and the proposed substantive application for judicial review.

The proposed application for judicial review questioned the respondents’ conduct and the validity of the scheduled election. It sought coercive orders to: (i) quash the decision of the respondents to proceed with the elections, (ii) compel the respondents to update the register of electors, (iii) compel the respondents to hear and determine all objections to the voter’s list, (iv) quash the revised register of electors published during the week of 17th November 2019 and, (v) compel the DBC to treat the United Workers Party and the Dominica Labour Party equally by providing equal and comparable access to the radio station.

The *ex parte* application for leave to apply for judicial review and for injunctive relief was refused at first instance. The trial judge upheld a preliminary objection by the respondents that the nature of the applications required them, in law, to be determined by the High Court in its exclusive jurisdiction to hear matters concerning the composition of parliament under section 40 of the Constitution of the Commonwealth of Dominica (“the Constitution”), and in accordance with the mandatory procedure for doing so as outlined in section 40 of the Constitution.

The appellants appealed and sought to have the appeal heard summarily. The appeal was heard on 5th December 2019 and the main issues arising for determination were: (i) whether the Court had jurisdiction to hear the appeal on an expedited basis and treat the appeal as a summary appeal notwithstanding the appellants’ non-compliance with CPR 62.6; and (ii) if the Court had jurisdiction to hear the appeal, whether the court below had jurisdiction to hear and consider on its merits, the application for leave to seek judicial review and to grant the interim and constitutional relief sought.

Held: Allowing the appeal to the extent that the application for leave to apply for judicial review in relation to the claim made against the Dominica Broadcasting Corporation, be remitted to the court below for the hearing of the application for leave

on its merits; but dismissing the appeal in all other respects; refusing the application for an interim injunction seeking to restrain the respondents from holding general elections in the Commonwealth of Dominica on 6th December 2019, or on any date prior to 5th February 2020; and making no order as to costs, that:

1. Whilst the requirements under CPR 62.6 for requesting a summary appeal are conjunctive in nature and the requirements under CPR 62.6 had not been met in this instance, CPR 62.6, like all procedural provisions under Part 62 of the CPR, is not itself the source of the court's jurisdiction in relation to appeals. The court has a broad jurisdiction to hear appeals and is not bound to refuse to hear an appeal because of non-compliance with a procedural provision.
2. The court in determining whether to exercise its jurisdiction to hear the appeal must exercise that power with a view to dealing with cases justly. The factors surrounding the appeal, namely: (i) the fact that the proceedings in the court below were truncated and were determined on a single preliminary point of law, (ii) there was no substantial inquiry or finding of fact, (iii) the matter was of recent vintage, (iv) there would be little to no injustice to the respondents in hearing the appeal and, (v) the matter was of extreme and exceptional urgency and of great public importance to the people of Dominica, were sufficient bases upon which the court could exercise its jurisdiction to hear and consider the appeal.
3. Section 40 of the Constitution confers exclusive and exclusionary jurisdiction on the High Court to hear election matters. Therefore, questions which fall within the election jurisdiction of the High Court cannot be determined within the ordinary jurisdiction of the High Court in civil matters but must instead follow the mandatory and specific procedures outlined in section 40 of the Constitution. These mandatory procedures include the stipulation that an election petition must be filed in order to commence proceedings under that section. The ordinary and grammatical meaning of Section 40(1)(a) of the Constitution, read in conjunction with section 65 of the House of Assembly (Elections) Act, indicates that the court's election jurisdiction encompasses questions which relate to the process of the election, or the returns in each electorate, and the existence of any element of unlawfulness therein.

Browne v Francis-Gibson and anor (1995) 50 WIR 143 applied; **William Bruce Williams v Emmanuel Henry Giraudy and anor** (1975) 22 WIR 532 applied; **Patterson v Solomon** [1960] 2 All ER 20 applied; **Eugene Hamilton v Cedric Liburd et al** Saint Christopher and Nevis Civil Appeal Nos. 11, 11A,

12, 12A, 13 and 13A of 2005 (delivered 22nd March 2006, unreported) applied; **Russell v AG of Saint Vincent and the Grenadines** (1995) 50 WIR 127 followed; **House of Assembly (Elections) Act** Cap. 2:01 Laws of the Commonwealth of Dominica applied; **Ezechiel Joseph v Alvina Reynolds** HCVAP2012/0014 (delivered 31st July 2012, unreported) applied; **Payne v Adams** [2009] NZHC 508 applied.

4. With the exception of the DBC, the court's election jurisdiction under section 40 (1)(a) of the Constitution was engaged with respect to the appellants' application for leave to apply for judicial review and for injunctive relief. The court's jurisdiction was engaged as the object and purpose of the appellant's application, when read as a whole, was to question the process of the election and therefore to attack the validity of the scheduled elections. However, in so far as the application related to relief sought against DBC, the election jurisdiction was not engaged as the complaints against the DBC, and the relief sought, were purely constitutional and not a question of the process of the election.

Seecomar Singh and another v R.C. Butler (1973) 21 WIR 34 applied; **Russell v AG of Saint Vincent and the Grenadines** (1995) 50 WIR 127 applied; **Eugene Hamilton v Cedric Liburd et al** Saint Christopher and Nevis Civil Appeal Nos. 11, 11A, 12, 12A, 13 and 13A of 2005 (delivered 22nd March 2006, unreported) applied; **Brantley and others v Constituency Boundaries Commission and others** [2015] UKPC 21 distinguished; **Eddy David Ventose v Chief Electoral Officer** [2018] CCJ 13 (AJ) distinguished.

5. The Court has no jurisdiction under section 40 of the Constitution to allow a pre-emptive challenge to an election where the literal and strict interpretation of section 40 of the Constitution contemplates the election having taken place prior to challenging it. Furthermore, the fact that the court did not have jurisdiction to pre-emptively hear the proposed claim on the basis of section 40(1)(a) and in light of the mandatory procedure for invoking the court's jurisdiction under that section, it follows that the court would also have no basis in law upon which to grant an injunction to facilitate the hearing of the preemptive challenge.

M v Home Office [1994] 1 AC 377 considered; **Gladys Petrie v The Attorney General** (1968) 14 WIR 292 applied; **Seecomar Singh and another v R.C. Butler** (1973) 21 WIR 34 applied; **N.P. Ponnuswami v The Returning Officer Namakkal Constituency** (1952) SCR 218 applied; **R v Hutchinson; Ex parte Chapman and Cockington** [1959] SASR 189 applied; **Attorney**

General of Canada v Harper [2000] 2 SCR not followed; **Davis v Barlow** (1910) 15 WLR 49 not followed; **Puerto Rican Organization For Political Action v Kusper** 350 F.Supp. 606 (1972) not followed; **Madera v. Detzner** 325 F.Supp. 3d 1269 (2018) not followed; **Democratic Party of Georgia, Inc. v. Crittenden** 347 F.Supp.3d. 1324 (2018) not followed.

REASONS FOR DECISION

[1] **PEREIRA CJ:** On 5th December 2019, the eve of General Elections in the Commonwealth of Dominica (or “Dominica”), the Court heard, by way of video conference, an urgent interlocutory appeal from the decision of a High Court judge refusing an application by the appellants for; (i) leave to seek judicial review in relation to a number of matters concerning the respondents’ conduct leading up to the election; (ii) an interim injunction to restrain the holding of general elections in the Commonwealth of Dominica on 6th December 2019; and (iii) an interim order restraining the Dominica Broadcasting Corporation (or “the DBC”) from continuing allegedly discriminatory conduct against the appellants. The appeal was rigorously opposed by all the respondents. At the hearing of the appeal, the Court unanimously ordered as follows:

- (1) The appeal is allowed to the extent that the application for leave to apply for judicial review in relation to the claim made against the 5th respondent, the Dominica Broadcasting Corporation, is remitted to the court below for the hearing of the application for leave on its merits.
- (2) The appeal is dismissed in all other respects.
- (3) The application for an interim injunction seeking to restrain the respondents from holding general elections in the Commonwealth of Dominica on 6th December 2019, or on any date prior to 5th February 2020, is refused.
- (4) No order as to costs.

(5) The Court will provide written reasons for its decision at a later date.

[2] These are the reasons for our decision.

Background

[3] On 6th November 2019, The President of Dominica (“the President”) issued writs in accordance with section 12 of the **House of Assembly (Elections) Act**¹ setting the dates for nominations and for the holding of general elections in Dominica as 19th November 2019 and 6th December 2019 respectively. Following the publication of the writs by the President, and pursuant to section 13 of the **House of Assembly (Elections) Act**, the Chief Elections Officer published a notice in the Dominica Official Gazette informing the public of the date and place of the nomination. The notice stated that the date fixed for the nominations of candidates was “Wednesday the 19th of November 2019”. It is not disputed by the parties that the 19th of November was in fact a Tuesday, and therefore that the date as expressed in the Gazetted notice issued by the Chief Elections Officer did not exist. The Chief Elections Officer issued at least one subsequent notice in an attempt to correct the error in the date as published in the original gazetted notice.

[4] On 18th November 2019, the register of electors was published by the Chief Elections Officer. Following the publication of the register of electors, some 1,300 objections were filed to the register. The objections related to the names of persons who were included in the register but who had become ineligible by virtue of death, non-residence in Dominica or otherwise. At the date of the hearing of the appeal, none of the objections had been heard or determined.

[5] Nomination day was held on 19th November 2019 in accordance with the President’s writ. Following the holding of nominations, on 26th November 2019, the appellants filed an *ex parte* notice of application for leave to apply for judicial

¹ Cap. 2:01, Laws of the Commonwealth of Dominica.

review, and also sought two interim injunctions. The application raised 5 broad complaints. These were that: (i) the nominations for the election were received unlawfully in breach of the procedure set out in the **House of Assembly (Elections) Act**; (ii) the Chief Elections Officer failed to hear and determine the outstanding objections to the register of electors prior to the election; (iii) the President acted unreasonably and in bad faith by refusing to adjourn the election pending the determination of the objections; (iv) the government of Dominica breached the appellants' legitimate expectation that electoral reform, including a voter verification exercise and the implementation of voter identification cards, would be conducted prior to the election; and (v) the DBC discriminated against the United Workers Party by not permitting them to have access during the period of time leading up to the general election. These complaints will be addressed in further detail below.

- [6] On the basis of these complaints, the appellants sought interim relief in the form of an injunction restraining the respondents, whether by themselves or through their servants, from holding general elections in Dominica on the 6th December 2019, or any date prior to the 5th February 2020, until the complaints were resolved. The appellants also sought an interim injunction restraining the Dominica Broadcasting Corporation from discriminating against any political party or candidate in the upcoming general elections. The proposed substantive judicial review claim sought a number of declarations that the respondents' conduct, calling and proceeding with the scheduled election, was unlawful, unreasonable and in bad faith. More importantly however, the appellants sought a number of coercive orders as follows:

- (i) To quash the decision of the respondents to proceed with the general elections on 6th December 2019 rendering any results from the election null and void.

- (ii) To compel the respondents to update the Register of Electors by embarking on a voter verification exercise, and to issue voter identification cards to eligible voters.
- (iii) To compel the respondents to hear and determine all objections to the voters' list.
- (iv) To quash the revised register of electors published during the week of the 17th November 2019; and
- (v) To compel the Dominica Broadcasting Corporation to treat the United Workers Party and the Dominica Labour Party equally by providing equal and comparable access to the radio station and providing access at similar times, duration and with equal frequency.

[7] After the application was filed, the respondents were given notice. The respondents thereafter raised a preliminary objection and argued that the application was suited for determination by the High Court in its exclusive jurisdiction to hear matters concerning the composition of parliament under section 40 of the **Constitution of the Commonwealth of Dominica**² (the "Constitution of Dominica" or the "Constitution"), that the procedure for invoking the court's jurisdiction under section 40 had not been complied with, and therefore that the Court did not have jurisdiction to hear the matter.³ On 3rd December 2019, the judge delivered an oral ruling by which she upheld the preliminary objection, dismissed the application for leave and concluded and ordered as follows:

"[40] I am of the view that all of the applicants may have legitimate concerns which can be entertained by the court but just not as Judicial review matters or at this time ... their rights and concerns will have to be properly addressed by way of petition as they are in fact asking this court to predict the outcome of the election which just cannot be. The applicants in their various applications are seeking to invalidate the election results

² Chapter 1:01, Laws of Dominica Revised Edition 1990.

³ The first respondent also objected on the basis that the office of the President of the Commonwealth of Dominica was not amenable to judicial review in relation to any of the matters raised by the appellants.

before the election takes place by saying the elections will not be free and fair this is calling the election into question and the basic principle of election law and the jurisdiction with which this court is clothed with can only be challenged by way of election petition pursuant to the rules and regulations of the Dominica House of Assembly Elections Act.

...

[42] The Court's conclusion therefore is that the elections having commenced with the proclamation by the President of elections in the circumstances of this case I find that this court does not have the jurisdiction to grant hear the application for the injunctions or judicial review on matters pertaining to the Elections which have been called as is being sought by the applicants. I make no order as to costs.

[43] Leave is hereby given to the applicant to appeal my decision if they so see fit."

The appeal

[8] The appellants filed a notice appeal on the evening of 4th December 2019, alleging 17 grounds upon which the judge is said to have erred. The notice of appeal was accompanied by a number of documents, including a certificate of exceptional urgency, by which the appellants certified that the hearing of the appeal was exceptionally urgent because the relief sought directly related to the general elections scheduled to take place on 6th December 2019 and asked the Court to treat with the appeal as a summary appeal.

[9] On 4th December 2019, the same day on which the notice of appeal was filed, the Court received a notice of opposition to summary appeal from the 4th, 5th and 6th respondents in response to the appellants' notice of appeal and certificate of exceptional urgency. By this notice, those respondents urged this Court to refuse to hear the appeal. The respondents took the view that the appellants did not comply with the procedure contained in rule 62.6 of the **Civil Procedure Rules 2000** ("CPR") for procuring a summary appeal, and therefore that the appeal should not be heard.

[10] By order dated 5th December 2019, the appeal was set for hearing before the Full Court via video conference on the same day, and the parties directed to file written submissions in support of the appeal. The submissions were filed. On the notice of appeal, notice of objection and written submissions, the determinative issues arising on the appeal were:

- (i) Whether this Court had jurisdiction to hear the appeal on an expedited basis or treat the appeal as a summary appeal notwithstanding the appellants' non-compliance with CPR 62.6 ("the preliminary objection"); and
- (ii) If this Court had jurisdiction to hear the appeal, whether the court below had jurisdiction to hear and consider on its merits, the application for leave to seek judicial review and other interim and constitutional relief.

These issues are dealt with in turn.

The preliminary objection

[11] At the hearing of the appeal, the 4th, 5th and 6th respondents were joined in their preliminary objection by the remaining respondents. The respondents' objection was grounded on the words of rule 62.6 of the CPR, which in their view contained the exclusive procedure which the appellants were required to follow in order to have the appeal heard on an expedited or summary basis. Rule 62.6 provides:

"(1) This rule applies to any appeal in which the appellant files with the notice of appeal –

(a) a certificate that the –

- (i) appeal is of exceptional urgency;
- (ii) appeal relates to specific issues of law and can be heard justly without the production of the full record; or
- (iii) circumstances of the appellant and/or the respondent are such that the cost of preparing the record would impede that party's ability to prosecute the appeal and that the appeal can be heard justly without production of the full record; and

(b) evidence of the parties' agreement that the appeal should proceed as a summary appeal.

(2) The court office must immediately refer the notice of appeal to the Chief Registrar.

(3) The Chief Justice shall assign the matter to a single judge of the court to determine whether the appeal should be dealt with summarily, and if the judge so determines, the judge must give such case management directions as are appropriate to enable the appeal to be dealt with summarily, including dispensing with any procedural requirements in this Part with regard to an appeal proceeding under this Rule.”

[12] The respondents argued that the appellants failed in accordance with CPR 62.6 to certify that the parties to the appeal agreed for the appeal to be heard summarily. This was because the appellants at no time sought such an agreement. The respondents in any event indicated that they were unwilling to consent to such a course. The respondents argued that the requirements of CPR 62.6 are conjunctive, and that, in so far as there was no proof that the respondents agreed to the hearing of the appeal summarily, the Court did not have jurisdiction to hear the appeal. The respondents further went on to argue that, in any event, it would be unjust to hear the appeal without the production of a full record of appeal.

[13] The Court agreed with the respondents that the requirements under CPR 62.6 for requesting a summary appeal are conjunctive in nature. It is clear from the indications of counsel and from a reading of the notice of objection, that the requirements under CPR 62.6 have not been met. This fact, however, is not wholly determinative of whether the Court has power to hear the appeal. CPR 62.6, like all procedural provisions under Part 62 of the CPR, is not jurisdiction conferring. In other words, CPR 62.6 is not itself the source of the Court's jurisdiction in relation to appeals.⁴ Properly understood, the summary appeals procedure under CPR 62.6 is only a means by which the Court may be invited to hear an appeal on the basis that the conditions under that rule are met. This procedure exists within the context of, and without prejudice to, the Court's plenitude of inherent case management powers. This is evident even from the

⁴ See West Indies Associated States Supreme Court Order 1967; see also the Eastern Caribbean Supreme Court (Dominica) Act Cap. 4:02 Laws of the Commonwealth of Dominica

plain words of CPR 62.6 which indicates that the Court may, notwithstanding that the relevant certificate of summary appeal has been filed with the notice of appeal, determine that the matter ought not to proceed summarily. With the above said, the Court took the view that it was not bound by the non-compliance with CPR 62.6 in its determination of whether the appeal should be heard. The issue therefore was simply whether the Court should hear the matter on an expedited basis.

[14] Of course, the Court's case management powers are required to be exercised with a view to dealing with cases justly.⁵ In determining whether it was just to hear the appeal on an expedited basis, the Court took into account a number of factors. First, the Court noted that the proceedings in the court below had not yet reached very far, the appellants' application for leave to seek judicial review having been determined on a single preliminary point of jurisdiction, on the basis of written and oral submissions by counsel on both sides, without evidence from the parties' witnesses or any substantial inquiry or findings of fact in relation to the complaints made. This Court was provided with all the documents filed in the proceedings below. Accordingly, for the purposes of the appeal, the Court was in full possession of the relevant documents which would have comprised the record of appeal needed to determine the matter.

[15] Second, the matter was of not much vintage. The application for leave was filed on 26th November 2019, heard on 2nd December 2019 with judgment delivered the next day, and with the appeal coming on for hearing on 5th December 2019. The matter was relatively fresh in the minds of counsel for the parties. The period between the hearing of the application, the judge's judgment and the hearing of the appeal could not occasion much injustice, if any at all. Third, it was clear, and the Court was satisfied, that the matter was of extreme and exceptional urgency and of great public importance for the people of Dominica. In all the

⁵ See Rule 1.1 of the CPR.

circumstances, there was little injustice, if any at all, to be occasioned by the Court's hearing of the appeal on an expedited basis. Accordingly, and for all the above reasons, the respondents' objection to the hearing of the appeal was dismissed and the Court proceeded to hear the appeal.

- [16] We turn now to the second and main issue: whether the court below had jurisdiction to hear and consider the application for leave to seek judicial review. As a first step, the complaints in the application for leave to seek judicial review require more detailed examination.

The application for leave to seek judicial review

- [17] First, the appellants argued that the nominations tendered and accepted by the Chief Elections Officer were invalid because of the irregularity in the date on the publication issued by the Chief Elections Officer. As a result of the irregular publication, the appellants argued that many persons believed that the nomination day was on a Wednesday, which was in fact the 20th November 2019, and were unable to exercise their right to vote. The consequence of this was three-fold in the appellants' view: (i) the constitutional right to vote was breached by the persons who were unable to participate in the nomination day; (ii) the receipt of nominations by the Chief Elections Officer on a date which was not published in the Official Gazette was unlawful, ultra vires, null and void; and (iii) the holding of elections on the basis of invalid nominations would be an exercise in futility and therefore it was in the interest of justice and good public administration to grant an injunction.⁶
- [18] Secondly, the appellants argued that the election should not proceed until the objections to the register of electors were heard and determined. The appellants contended that the Chief Elections Officer failed to hear the over 1,300 objections

⁶ See paragraph 16 of the appellants' written submissions in the court below.

in accordance with the **Registration of Electors Act**⁷ and the **Registration of Electors Regulations**.⁸ In as much as the register contained the names which were the subject of the undetermined objections, the appellants argued that the register which was proposed to be used for the upcoming election was void, and therefore the election proposed to be conducted on the register was invalid.⁹ The appellants' position did not differentiate between the objections filed within the 7 day period following the publication of the register, as required by regulation 32 of the **Registration of Electors Regulations** and those filed outside the required time.

[19] Thirdly, the appellants contended that the citizens of Dominica had a legitimate expectation that the register of electors would be cleansed by the removal of the names of ineligible voters and that voter identification cards would have been issued before the election. The appellants pointed to a number of indications by the Government and circumstances to establish this expectation and said that both the verification should be carried out, and the voter IDs issued, before the election was allowed to proceed.

[20] Fourthly, the appellants argued that the DBC acted in breach of section 13 of the Constitution (the right to protection from discrimination) by allegedly discriminating against the opposition United Workers' Party on the basis of their political opinion. The crux of the appellants' complaint in this regard was an allegation that the DBC refused to broadcast their events and advertisements in the same way and with the same frequency that they broadcasted the Government's events and advertisements.

[21] Fifthly, the appellants argued that the President was empowered to adjourn the elections under section 19 of the **House of Assembly (Elections) Act**, and in as

⁷ Cap. 2:03, Laws of the Commonwealth of Dominica.

⁸ S.I. 38 of 1974, Cap. 2:03, Laws of the Commonwealth of Dominica.

⁹ See paragraphs 32 and 38 of the appellant's writing submissions in the court below.

much as he was aware of the appellants' complaints and refused to adjourn the election, he acted unreasonably and in bad faith in failing or refusing to do so.

- [22] As the learned judge's refusal to hear the appellants' application was solely on the basis that the High Court did not have jurisdiction to grant the relief claimed, it is necessary to discuss the jurisdiction of the court in relation to the conduct of contested elections.

Jurisdiction to hear election matters

- [23] While it is generally true that the High Court has the inherent and broad jurisdiction to determine whether the actions of a public authority are lawful or in breach constitutional rights, it has long been decided that the jurisdiction of the court to hear questions related to the composition or constitution of Parliament is not inherent or at large. The court's jurisdiction in this regard is rather one traditionally exercised by Parliament but which is now vested in the courts by way of transfer under enactment. In **Devan Nair v Yong Kuan Teik**,¹⁰ the Privy Council said:

"Constitutionally, decisions on questions of contested elections are vested in the assembly for which the contested election has been held, but in the course of the 19th century many countries, including this country and many of Her Majesty's possessions overseas, adopted the view that, as the deliberations of the assembly itself were apt to be governed rather by political considerations than the justice of the case, **it was right and proper that such questions should be entrusted to the courts. This required legislation in every case, and in many cases the right of appeal after the hearing of an election petition by an election tribunal to which those hearings was entrusted was severely limited**, clearly for the reason that it was essential that such matters should be determined as quickly as possible, so that the assembly itself and the electors of the representatives thereto should know their rights at the earliest possible moment." **(My emphasis)**

¹⁰ [1967] 2 All ER 34, per Upjohn LJ at page 36.

[24] Floissac CJ in **Browne v Francis-Gibson and anor**¹¹ stated that, "...in St. Vincent and the Grenadines, the enactment which sets up the election tribunal is the **Constitution** itself. The election tribunal set up is the High Court." In Dominica, the position is the same. Section 40 of the Constitution is the source and foundation of the High Court's jurisdiction in these matters. Section 40 of the Constitution provides for the types of enquiries which the Court is entitled to entertain in relation to the composition of Parliament. At subsection (1) It reads:

"(1) The High Court shall have jurisdiction to hear and determine any question whether –

(a)any person has been validly elected as a Representative or Senator;

(b)any person has been validly appointed as a Senator;

(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 provision of section 35(4) of this Constitution, to cease to perform any of his functions as a member of the House." (My emphasis)

[25] This jurisdiction is exclusive and exclusionary. Davis CJ in **William Bruce Williams v Emmanuel Henry Giraudy and another**¹² remarked in relation to the equivalent provision in the Saint Lucian Constitution, that, "on a perusal of the provisions of the Constitution, this section is the only one which confers jurisdiction on the High Court in election matters". Indeed, in the absence of any statutory or constitutional provision which confers a jurisdiction to the court in relation to the composition of Parliament, the extent of its jurisdiction is contained in section 40.

[26] It has also been recognized that the court's jurisdiction under section 40 is one which cannot be encroached upon by the jurisdiction of the High Court in civil matters. In **Patterson v Solomon**¹³ the Privy Council said:

¹¹ (1995) 50 WIR 143.

¹² (1975) 22 WIR 532.

¹³ [1960] 2 All ER 20 at page 24.

“Adapting the words of Lord Cairns LC in *Theberge v Laudry* they are of opinion that, on a fair construction of the Order in Council, **it does not provide for the decision by the Supreme Court of mere ordinary civil rights, but creates an entirely new jurisdiction in a particular court** of the Colony for the purpose of taking out of the Legislative Council with its own consent and vesting in that court the very peculiar jurisdiction which had existed in the council itself of determining the status of those who claim to be members of the council.” **(My emphasis)**

Accordingly, as Alleyne CJ stated in **Eugene Hamilton v Cedric Liburd et al**,¹⁴ questions which fall within the election jurisdiction “cannot be determined by the ordinary jurisdiction of the High Court in civil matters”. Similarly, the election jurisdiction is not an ordinary constitutional jurisdiction notwithstanding that the jurisdiction itself resides within the text of the Constitution. Section 103 of the Constitution, which gives the High Court original jurisdiction in claims for relief under the Constitution, expressly excludes from that jurisdiction, questions that fall to be determined under section 40. Floissac CJ in **Russell v AG of Saint Vincent and the Grenadines**,¹⁵ made the following remarks in relation to the equivalent exclusionary provision in the Constitution of Saint Vincent and the Grenadines:

“By expressly excluding the parliamentary jurisdiction from the constitutional jurisdiction, section 96(7) of the Constitution ensures that a constitutional contravention which may theoretically have affected the validity of a parliamentary election is not used as pretext for invoking the constitutional jurisdiction for the purpose of invalidating the parliamentary election. Section 96(7) also ensures that the constitutional jurisdiction is not available as a means of circumventing the strict substantive and procedural rules which govern the parliamentary jurisdiction and applications for determinations of questions as to the validity of parliamentary elections or as a means of gaining ultimate access to Her Majesty in Council under guise of seeking to enforce a constitutional provision.”

In this connection, the election jurisdiction cannot be bypassed simply because a question on the composition of Parliament also raises, by extension, relief under the Constitution.

¹⁴ Saint Christopher and Nevis Civil Appeal Nos. 11, 11A, 12, 12A, 13 and 13A of 2005 (delivered 22nd March 2006, unreported).

¹⁵ (1995) 50 WIR 127.

[27] The jurisdiction enshrined in section 40(1)(a) is *ex facie* most relevant to the judge's finding in the court below, as there was no allegation related to the appointment of senators, the appointment of Speaker of the Assembly or vacation of seats under section 40(1)(b), (c) or (d). The Constitution, by section 40(1)(a), gives the High Court jurisdiction to hear and determine whether any person has been validly elected as a Representative to the House of Assembly.

[28] The question arises: what amounts to a question whether 'a person has been validly elected' within the terms of section 40(1)(a)? The Constitution itself does not expressly provide an answer to this question. However, some guidance can, in our view, be gleaned from an examination of the statutory rules Parliament has prescribed for invoking the court's jurisdiction under section 40(1)(a). There is no doubt that the procedure for invoking the court's jurisdiction under section 40(1)(a) primarily requires the filing of an election petition. As Davis CJ in **Williams** stated, "the means by which a question is determined whether a person is validly elected or not is by an election petition." Section 65 of the **House of (Assembly) Election Act**, which speaks to election petitions provides as follows:

"A petition complaining of an undue return or undue election of a member of the House of Assembly, in this Act called an election petition, may be presented to the High Court by any one or more of the following persons:

- (a) some person who voted or had a right to vote at the...
- (b) some person claiming to have had a right to be returned at the election;
- (c) some person alleging himself to have been a candidate at the election."

[29] Reading section 40(1)(a) of the Constitution together with section 65 of the **House of Assembly (Elections) Act**, it is apparent that a question of whether a person has been validly elected as a representative, is a question or complaint of an undue return or undue election of a member to the House of Assembly under section 65. In **Payne v Adams**¹⁶ the High Court of New Zealand explained that a

¹⁶ [2009] NZHC 508.

complaint of an undue election or unlawful return relates to “... the processes of the election or returns in each electorate and the existence of any element of unlawfulness which relates to those processes.” It also appears from the ordinary and grammatical meaning of both sections that the court’s jurisdiction in this regard equally embraces a challenge to the election of a singular candidate and the validity of an entire election return.

[30] Lastly, the procedure for invoking the court’s jurisdiction is mandatory. As Rawlins CJ in **Ezechiel Joseph v Alvina Reynolds**¹⁷ stated:

“In keeping with the strict approach, our courts have generally insisted that the provisions in elections legislation must be strictly complied with ... Our election courts have consistently stated that they have little or no discretion to waive non-compliance with the applicable statutory requirements. Accordingly, the consistent result is that failure to comply is fatal to the petition rendering it a nullity, unless the court finds that the failure goes to form. The jurisprudence in our courts states that time and other electoral proceedings statutory requirements are conditions precedent to instituting a proper electoral challenge, which are mandatory and peremptory.”¹⁸

[31] The procedure for the filing of an election petition includes that under sections 66 to 68 of the **House of Assembly (Election) Act**, which provide that a petition ought to be filed no later than 21 or 28 days after the conduct of an election or the payment monies as a form of corrupt practice, respectively. Accordingly, and in keeping with the reasoning of Rawlins CJ in **Ezechiel Joseph**, an election petition, and therefore a complaint of an undue election or election return or question as to the validity of an election, is itself only valid and properly before the court if filed within 21 or 28 days as the case may be.

¹⁷ HCVAP2012/0014 (delivered 31st July 2012, unreported) at p. 20.

¹⁸ See also the recent decision of *Christopher Ram v The Attorney General and others* [2019] CCJ 10 (AJ) at para 40 wherein Saunders PCCJ, adopting the reasoning of Bollers CJ in *Gladys Petrie v The Attorney General* (1968) 14 WIR 292, stated that the procedure for filing an election petition must be strictly followed.

Discussion and Analysis

- [32] The appellants advanced a number of arguments to the effect that: contrary to the judge's finding, the court's exclusionary election jurisdiction under section 40(1)(a) had not been engaged by the appellants' application because the election had not yet happened; that the court had a duty to entertain the application because the allegations contained therein engaged the constitutionally protected right to vote and the obligation on the state to ensure free and fair elections; and that an injunction could have been granted to stop the election from taking place. The appellants' arguments boiled down to two substantive questions: (i) was the election jurisdiction under section 40(1)(a) engaged by the application; and, (ii) if the election jurisdiction under section 40(1)(a) was engaged, could the court pre-emptively (i.e. before the election took place) look into the matters raised and injunct the election to facilitate the enquiry prompted by the application?

Was the election jurisdiction engaged by the application?

- [33] On the first question, the Court observes that the High Court's jurisdiction under section 40(1)(a) is not irrelevant, as the appellants suggested, merely because the section is phrased in terms which require an election to have first taken place, or that the election results are not available to be challenged. To accept this view is to accept that the High Court's exclusive jurisdiction and the procedure for invoking that jurisdiction can be leapfrogged or jettisoned depending on the time that a claim or application raising questions as to the validity of an election is made; or, that a claim or application raising such questions may be properly made at any time before election results are received. This result could not have been intended by the Constitution or the **House of Assembly (Elections) Act**, particularly given the longstanding pronouncements of this Court on the exclusive nature of the election jurisdiction and the insistence on the strict construction of and compliance with the procedures set out under the **House of Assembly (Election) Act** for such challenges to be made.

- [34] In the Court's view, the proper approach to be taken to the interpretation of the appellants' application in the court below and proposed judicial review claim was not merely to construe the individual complaints and prayers for relief made, but also to read the application as a whole, in light of its object and purpose, with a view to determining whether section 40(1)(a) was engaged any at all. This approach was taken by Bollers CJ in **Seecomar Singh and another v R.C. Butler**¹⁹ and is necessitated by the dicta of Floissac CJ in **Russell v AG of Saint Vincent and the Grenadines** and Alleyne CJ in **Eugene Hamilton v Cedric Liburd et al** quoted above, in order to ensure that an application or claim does not surreptitiously encroach upon or exceed the court's defined jurisdiction under section 40.
- [35] Examining closely the application for leave and the relief proposed to be sought on the substantive claim, a number of things become apparent. First, the relief against the DBC was of a different nature than the remainder of the application. The relief against the DBC, though presented within the application for leave, was not by way of judicial review and was purely constitutional in nature. The appellants' clear intention in relation to the DBC was to secure adequate and equal airtime on the media channels operated by the DBC. The appellants sought vindication of their rights under the Constitution which they alleged were breached by the DBC. At no point was a nexus pleaded or argued as existing between the alleged discriminatory treatment by the DBC and the ability of the election to proceed or the lawfulness or validity of the election and the imminent return of candidates. It is apparent from the outset therefore that the relief against the DBC does not fall within the exclusive jurisdiction of the High Court in relation to the composition of Parliament or more specifically a question as to the validity of the election. In this connection, the Court formed the view that the judge erred in concluding that the application, so far as it pertained to the DBC, invoked the court's election jurisdiction under section 40 of the Constitution. The judge

¹⁹ (1973) 21 WIR 34.

accordingly erred, though understandably, given the rolled-up nature of the application, in concluding that the High Court had no jurisdiction to hear the complaints against the DBC on that basis. Instead, and in so far as that aspect of the application sought solely to assert that the DBC's conduct was discriminatory and in breach of fundamental rights, the court clearly had jurisdiction under section 103 of the Constitution to hear and determine that claim although not falling within the ambit of claims for which leave for judicial review would have been required.

[36] Second, the request for an injunction stopping the election, though sought on an interim basis, was neither ancillary nor subordinate to the leave sought by the appellants to seek judicial review or the coercive and declaratory relief intended to be sought on the substantive claim. It was clear from the tenor of the arguments, both written and oral, that the injunction was as much the primary relief sought as the declarations and coercive orders which the appellants proposed to seek in the substantive judicial review claim.

[37] Third, it was clear, as it appeared to the judge in the court below, that the applications for leave to seek judicial review were pegged to the grant of the injunction and to their assertion that the elections, if conducted, were invalid. The appellants, in the several documents filed in the court below, claimed that if their complaints were not resolved before the election, the state would have been forced to incur the unnecessary fiscal burden of conducting an election which would later be voided by the court. Further, learned counsel for the appellants, Ms. Shillingford, on several occasions impressed upon this Court that the matters complained of in the application for leave and the proposed judicial review claim ought to be resolved before the conduct of elections and that the election ought not to proceed until the matters complained of were ventilated and adjudicated upon. Indeed, the prayer for the injunction was inextricably linked to the substantive proposed judicial review claim.

[38] It was clear to the Court, upon consideration of both the oral and written submissions, that the application for leave asserted that the imminent elections were invalid and could not proceed if the complaints made were not ventilated, or alternatively, that if the election were allowed to proceed, it would be invalid. In other words, the proposed claim for judicial review, and the injunction to which it was pegged, were proposed to be instituted and sought on the basis of the appellants' view that the election was invalid and the appellants clearly intended to interrogate matters which went to the validity of the impending election, and to cause the court to estop the election as a means of avoiding the invalidity. Considered wholly, and in light of the submissions made by learned counsel for the appellants, Ms. Shillingford, the proposed judicial review claim was a frontal attack on the merits and validity of the election, and accordingly the application invoked the court's jurisdiction under section 40(1)(a).

[39] Noteworthy is that the complaints made by the appellants in this case are not in the nature of the claims presented in either **Brantley and others v Constituency Boundaries Commission and others**²⁰ or **Eddy David Ventose v Chief Electoral Officer**,²¹ which were relied upon by the appellants, wherein the Privy Council and CCJ acceded to hear claims issued immediately before imminent elections. **Brantley** concerned the legality of steps taken by the government to change the constituency boundaries in Saint Christopher and Nevis immediately prior to a general election, and the intentional deprivation by government of the rights of members of the opposition to access the court to challenge the alteration. The sub-effect of the claim was to determine which register of electors ought to be used in light of the constituency boundaries. **Ventose** concerned a challenge to the refusal by the Chief Electoral Officer to include, in the register of electors, the name of a Saint Lucian national who was then long-resident in Barbados and thereby entitled to vote. The claim centered on the right of the resident to participate in the general elections. There was no pleading or suggestion in either

²⁰ [2015] UKPC 21.

²¹ [2018] CCJ 13 (AJ).

Brantley or **Ventose** that the validity or invalidity of the election was hinged on the relief sought by the claimants in either case. Neither **Brantley** nor **Ventose** were concerned with the substantive validity of the election or the validity of the outcome of the election; the claims in those cases simply could not have been construed as challenges to the validity of the impending elections, and the election jurisdiction of the court was simply not engaged, at all. These cases are, therefore, entirely dissimilar from the instant application and proposed claim in the court below.

- [40] In so far as the cumulative upshot of the appellants' proposed claim was to interrogate questions which go to the heart of the validity of the impending general election, except as pertains to the relief sought against the DBC, the ineluctable conclusion to which the Court was drawn is that the application sought to entreat the court's election jurisdiction under section 40(1)(a) which, for the reasons earlier explained, is impermissible via this route.

The power to injunct the election and pre-emptively review its validity

- [41] Having determined that the court's jurisdiction under section 40(1)(a) was invoked except in relation to the relief sought against the DBC, the remaining question was whether the court could have pre-emptively (i.e. before the election took place) looked into the matters raised and injuncted the election to facilitate such an enquiry.
- [42] The appellants relied on the court's general powers to grant injunctions in public law, and argued that there is nothing in law to prevent the court from exercising its discretion to injunct the impending election. The jurisdiction to grant injunctions in public law proceedings is not doubted. Authorities like **M v Home Office**,²² on which the appellants rely, very clearly reinforce that the courts have authority at common law to injunct public authorities in their official capacities. However, as indicated earlier, the court's jurisdiction in relation to elections is not at large and is

²² [1994] 1 AC 377.

delimited by the words of the Constitution. Accordingly, the general principles on the grant of injunctions in public law afford little assistance to a suggestion that the court may injunct the conduct of an election. The specific question to which this Court must address its mind, is whether the peculiar and acquired election jurisdiction of the court under section 40 embraces pre-emptive review and relief in the form of an injunction in relation to the holding of a contested election.

[43] In my view, the answer to this question is found primarily in the words of section 40(1)(a) and the procedure for mounting a challenge thereunder. As the appellants pointed out, section 40(1)(a) is framed in terms which require an election having already happened. The jurisprudence is clear that questions as to the validity of an election are to be presented to the court in accordance with the strict statutory procedures for raising such questions. There is simply no accommodation made in the procedure for launching such a challenge prior to the election taking place. In light of the jurisprudence on the strict nature of these procedures, the fact that such an accommodation has not been made in the legislation is an indicium that pre-emptive challenges to the validity of an election were not intended to be possible. Furthermore, as stated before, because of its peculiar origin as a jurisdiction vested to the courts by Parliament, the election jurisdiction of the court is not an ordinary constitutional jurisdiction²³ or indeed an ordinary civil jurisdiction.²⁴ Accordingly, there is no scope to argue that the court can pre-emptively step in to injunct an election on account of questions as to the election's validity in the same way that it has been accepted in **Bahamas Methodist Church v Symonette**²⁵ that the court, can anticipatorily intervene to prevent or review imminent irremediable consequences to be occasioned by Parliament or any other public authority.

²³ Russell v AG of Saint Vincent and the Grenadines (1995) 50 WIR 127, referred to paragraph 26 above.

²⁴ Per Alleyne CJ in Eugene Hamilton.

²⁵ (2000) 59 WIR.

[44] By dint of the fact that the court did not have jurisdiction to pre-emptively hear the proposed claim on the basis of section 40(1)(a) and the procedure for invoking the court's jurisdiction under that section, it would follow that the court would also have no basis in law upon which to grant an injunction to facilitate the hearing of the claim. Notwithstanding our conclusion on this point, the specific question as to whether the court has jurisdiction to injunct an election on the basis of questions as to the validity of the election was dealt with by the High Court of Guyana in **Gladys Petrie v The Attorney General**²⁶ and **Seecomar Singh and another v R.C. Butler**²⁷ as well as the Supreme Court of India in **N.P. Ponnuswami v The Returning Officer, Namakkal Constituency**²⁸ all of which were relied upon by the respondents. In **Gladys Petrie**, the applicant prayed the court to injunct an impending general election in Guyana on the basis that Acts of Parliament and the regulations made thereunder, by virtue of which the elections to the National Assembly were to be held, were unconstitutional and that the register of electors compiled under the Acts, and the proposed election on the basis of that register were null and void. Bollers CJ considered article 71 of the Constitution of Guyana, which provides for the exclusive jurisdiction in election matters. Article 71 of the Constitution of Guyana states, inter alia, that:

“(1) Subject to the provisions of this article, the High Court shall have exclusive jurisdiction to determine any question—

(a) regarding the qualification of any person to be elected as a member of the National Assembly,

(b) whether-

(i) either generally or in any particular place, an election has been lawfully conducted or the result thereof has been, or may have been, affected by any unlawful act or omission...”.

[45] Bollers CJ refused to grant the injunction. His Lordship's primary reasoning was that the court was not seized of jurisdiction to make such an order. At paragraph 302, the Chief Justice stated:

²⁶ (1968) 14 WIR 292.

²⁷ (1973) 21 WIR 34.

²⁸ (1952) SCR 218.

“The question remains whether an interlocutory injunction can be obtained in these proceedings or, indeed, in any proceedings, and I accept the submission by the Attorney-General, that on a fair construction of art 71(1)(b), the language used does not permit of an interlocutory injunction being granted to prevent the election being held on the appointed day. I accept his analysis of the relevant paragraph that the question which is entrusted to the court is, whether an election has been lawfully conducted. It is to be noted that the past tense is used and not the future tense, and it seems to me that if the framers of the Constitution intended that relief could be sought by way of an interlocutory injunction the paragraph would have read ‘whether an election has been lawfully conducted or will be lawfully conducted.’”

[46] In **Seecomar Singh**, Bolders CJ adopted his reasoning in **Petrie** and further stated that:

“... I can only repeat what was said in *Petrie's* case (*Gladys Petrie v Attorney General* (1968), 14 WIR 292), and that is, that under art 67 of the Constitution there is a distinct unequivocal command by the Constitution itself, that an election be held, and on a particular date which by proclamation of the President has been duly appointed, and if an injunction were granted, it would be in negation of this article of the Constitution, the function of the President exercised under this article not having been challenged.”

The same can be said here as the President has duly exercised his authority to appoint the day of elections under section 55(1) of the Constitution. We agree with counsel for the respondents that to do as the appellants asked would be tantamount to the Court negating the authority given to the President under the Constitution.

[47] In **Ponnuswami**, the appellant sought to quash the decision of the returning officer to reject his nomination paper and to direct the returning officer to place his name on the list of nominations to be published for the purposes of an imminent election. The question before the court was whether it could grant such relief, given that the election had not yet occurred. Critical to the court’s reasoning was a consideration of article 329(b) of the Indian Constitution, which reads:

“No parliamentary election and no return to Parliament shall be questioned except by a petition complaining of an undue election or undue

return (hereinafter referred to as a parliamentary election petition) presented in accordance with this Part of this Act.”

- [48] Following a review of the relevant constitutional and legislative provisions, within the context of English legislation from which the Indian Constitution is presumed to have borrowed (the English Representation of the People Act, 1949), the Supreme Court opined as follows:

“The question now arises whether the law of elections in this country contemplates that there should be two attacks on matters connected with election proceedings, one while they are going on by invoking the extraordinary jurisdiction of the High Court under article 226 of the Constitution (the ordinary jurisdiction of the courts having been expressly excluded), and another after they have been completed by means of an election petition. **In my opinion, to affirm such a position would be contrary to the scheme of Part XV of the Constitution and the Representation of the People Act, which, as I shall point out later, seems to be that any matter which has the effect of vitiating an election should be brought up only at the appropriate stage in an appropriate manner before a special tribunal and should not be brought up at an intermediate stage before any court. Article 329(b) was apparently enacted to prescribe the manner in which and the stage at which this ground, and other grounds which may be raised under the law to call the election in question could be urged. I think it follows by necessary implication from the language of this provision that those grounds cannot be urged in any other manner, at any other stage and before any other court.” (My emphasis)**

The Supreme Court went on further to say:

“(1) Having regard to the important functions which the legislatures have to perform in democratic countries, it has always been recognized to be a matter of first importance that elections should be concluded as early as possible according to time schedule and all controversial matters **and all disputes arising out of elections should be postponed till after the elections are over, so that the election proceedings may not be unduly retarded or protracted.** (2) In conformity with this principle, the scheme the election law in this country as well as in England is that no significance should be attached to anything which does not affect the "election"; **and if any irregularities are committed while it 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.” (My emphasis)

[49] **Gladys Petrie, Seecomar Singh and Ponnuswami** very clearly support the view that there is no power vested in the court to either pre-emptively enquire into the validity of an election or grant an injunction to facilitate that enquiry, in circumstances where there is vested an exclusive jurisdiction in a particular tribunal to determine such matters after an election has been conducted. The appellants have sought to dissuade this Court from construing its jurisdictional competence under the Constitution of Dominica in the same way that the courts have in the above cases. The appellants argued firstly, that the Constitutions of Guyana and India are differently worded than the Constitution of Dominica, in so far as they expressly refer to the High Court having an exclusive jurisdiction in relation to questions concerning whether an election has been lawfully conducted. While it is clear that the Guyanese and Indian Constitutions are expressed in different terms than section 40 of the Constitution of Dominica, the effect of the provisions is the same and there is no difference in effect between the words used by them. The **Russell, Browne, Ezechiel Joseph and Eugene Hamilton** cases from this Court underscore that the jurisdiction is exclusive under constitutional provisions which are framed along the same lines as section 40 and which do not use the term “exclusive jurisdiction”. The appellants’ argument that the reasoning in **Gladys Petrie, Seecomar Singh and Ponnuswami** is inapplicable on the basis that the Constitutions of Guyana and India are expressed in different terms, is therefore clearly devoid of merit. Indeed, this Court entirely agrees with the views expressed by Bollers CJ in relation to the Constitution of Guyana and the Supreme Court of India in relation to the Constitution of India, and finds that they apply with the same force in the Commonwealth of Dominica.

[50] In this Court’s view, it is very evident that section 40 is not expressed in terms that would contemplate judicial intervention upon the anticipation that an election would be invalid. Rather, section 40 is couched in terms that require an election to first have taken place. If it were intended that the court’s jurisdiction was to operate in

such a way, it would easily have been a matter for the framers of the **Constitution** to construct section 40 in terms which clearly confer a pre-emptive jurisdiction or to otherwise make provision for this in some other legislation.

- [51] Even if the application raises some question as to the lawfulness of the actions or inaction of a public authority, once a party seeks to have that matter examined within the broader context of an attempt to impugn or question the validity of an election, such a claim cannot be heard pre-emptively and is a matter for the exclusive jurisdiction of the High Court under section 40 in accordance with the procedure set out in the **House of Assembly (Elections) Act**. This was the case in **R v Hutchinson; Ex parte Chapman and Cockington**,²⁹ where the High Court of Australia refused to grant relief in the form of a mandamus on the basis that the order would have been tantamount to the determination of the validity of an election prior to the election being conducted, and concluded:

“To grant a mandamus in the case would, it seems to me, result in this Court determining in advance a question which it is peculiarly the province of Parliament to determine, viz, who is and who is not to sit and vote therein. Parliament may, by s 46, have committed to this Court or in a proper case the Local Court, jurisdiction to hear and determine a claim for penalties for sitting or voting contrary to the Act but it has not committed to this Court jurisdiction to pronounce in advance upon the qualifications of a nominated person to sit.”

- [52] Secondly, the appellants argued that there are cases in which courts have acceded to injunction applications in respect of an election; these are the cases of **Attorney General of Canada v Harper**,³⁰ **Davis v Barlow**,³¹ **Puerto Rican Organization For Political Action v Kusper**,³² **Madera v Detzner**,³³ and **Democratic Party of Georgia, Inc. v Crittenden**.³⁴ It does not however appear that any of these authorities are binding or even persuasive on this Court. It also

²⁹ [1959] SASR 189.

³⁰ [2000] 2 SCR.

³¹ (1910) 15 WLR 49.

³² 350 F.Supp. 606 (1972).

³³ 325 F.Supp. 3d 1269 (2018).

³⁴ 347 F.Supp.3d. 1324 (2018).

does not appear that any of these authorities speak directly or indirectly to the jurisdiction of the court to injunct an election on the basis of the election's alleged invalidity. In any event, in as much as any of these cases may be deemed authority in their respective jurisdictions for a court's power to grant an injunction over an election, they are at odds with this Court's consistent construction of its election jurisdiction, and the understanding offered by similarly situated courts enjoined under comparable post-colonial Westminster model constitutions. In my view, none of these cases afford the support alleged by the appellants.

[53] Finally, and importantly also, in this case, where there were inherent linkages between the relief sought, it was not the duty of this Court to artificially truncate the appellants' claim so as to make parts of it amenable to the court's jurisdiction or to make the application something that it was never intended to be. But, even if one were to separate the application for an injunction from the applications for judicial review, and further take the view that the applications for leave could stand alone as applications in public law, to what end would these applications operate? As I have stated, it is very apparent from the tenor of the appellants' submissions below and on appeal to this Court, that any declaratory or coercive relief were clearly intended to highlight defects in the integrity and propriety of the election. On any view, it appears that the court did not have jurisdiction to entertain the application, except in so far as it pertained to the constitutional relief sought against the DBC. In the Commonwealth of Dominica, a challenge to the validity of an election can only be made under section 40(1)(a) of the Constitution, in accordance with the statutory rules made by Parliament for such challenges. The application as a whole, therefore, in so far as it sought to put into question the validity of the election, could not have been entertained by the court pre-emptively upon the application for judicial review. This was simply not contemplated by the Constitution or by Parliament.

Conclusion

- [54] For all the foregoing reasons, the Court made the order at paragraph [1] herein. The Court is obliged to record its gratitude to counsel appearing in this appeal and those assisting them, for their vigour and industry in preparing for and arguing the appeal at such short notice and doing so in a manner that was refreshingly comprehensive and mentally stimulating.

I concur.

Mario Michel

Justice of Appeal

I concur.

Gertel Thom

Justice of Appeal

By the Court

Chief Registrar