

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
COMMONWEALTH OF DOMINICA
DOM HCV 006 OF 2010

In the matter of the House of Assembly (Elections) Act Cap 2:01

And

In the Matter of a Parliamentary Election for the Constituency off La Plaine held on the 18th
day of December 2009

BETWEEN

RONALD A.K.A "RON" GREEN

Petitioner

AND

1. PETTER SAINT JEAN
2. MERINA WILLIAMS
3. MARCELLA AUGUSTINE
4. EARL BLACKMORE
5. GERALD BURTON (Chairman of The Electoral Commission)
6. ALICK LAWRENCE (Member of The Electoral Commission)
7. KONDWANI WILLIAMS (Member of The Electoral Commission)
8. DON CHRISTOPHER (Member of The Electoral Commission)
9. BERNIE DIDIER (Member of The Electoral Commission)
10. DOMINICA BROADCASTING CORPORATION
11. ATTORNEY GENERAL OF DOMINICA

Respondents

AND

DOM HCV 7 of 2010

In the Matter of House of Assembly Election for the Constituency of Vieille Case, held on the
18th day of December 2009

AND

In the Matter of the Commonwealth of Dominica Constitution Order (1978) Sections 31,
32(1)(a), 40 and 103;

AND

In the Matter of the House of Assembly (Elections) Act Chap. 2:01

Respondents

BETWEEN

MAYNARD JOSEPH

Petitioner

AND

1. ROOSEVELT SKERRIT
2. THERESA ROYER (Returning Officer for the Constituency of Vieille Case)
3. GERALD BURTON (Chairman of The Electoral Commission)
4. ALICK LAWRENCE (Member of The Electoral Commission)
5. KONDWANI WILLIAMS (Member of The Electoral Commission)
6. MCDONALD CHRISTOPHER (Member of The Electoral Commission)
7. BERNIE DIDIER (Member of The Electoral Commission)
8. DOMINICA BROADCASTING CORPORATION
9. THE ATTORNEY GENERAL OF THE COMMONWEALTH OF DOMINICA

Respondents

Appearances: Mr. Douglas Mendes S.C. and Mr. S. Young and Mr. G. Letang for the Petitioners
Mr. Anthony Astaphan S.C. and Mrs. H. Felix-Evans for the First Respondents
Mrs. Kathy Buffory-Royer and Ms. Sherma Dalrymple for the Second Respondents

2011: March 31st,
April 1st
June 7th

JUDGMENT

- [1] **THOM, J:** On the 18th day of December 2009 General Elections were held in The Commonwealth of Dominica.
- [2] The First Respondents were the successful candidates. Roosevelt Skerit was the successful candidate in the Vieille Case constituency and is now the Prime Minister. Petter Saint Jean was the successful candidate in the constituency of La Plaine and is now a Minister of Government.
- [3] Ronald Green was the unsuccessful candidate in the La Plaine constituency and Maynard Joseph was the unsuccessful candidate in the Vieille Case constituency.
- [4] Both Petitioners challenged the validity of the nomination and election of the First Respondents.
- [5] On the 25th day of August 2010 the Honourable Justice Errol Thomas ruled that the only issue which should proceed to trial is whether the Respondents were disqualified from nomination or election by virtue of the provisions of Section 32(1) (a) of the Constitution of Dominica.
- [6] On the 3rd day of January 2011 the Petitioners made application to the Court in which they sought the following orders:
- (i) That judgment be entered for the Petitioner in default of Defence;
 - (ii) Alternatively, that the First Respondent do file and serve his Defence to the Petition within 21 days;
 - (iii) That the First Respondent do provide disclosure of all documents relevant to the matter in question in this Petition which now or have been in his control, including such documents which are or were in his physical possession or which he has or has had the right to inspect or take copies of or which he has or has had a right to possession of;

- (iv) That the First Respondent do provide the disclosure sought at (3) above with a list of documents, such list being confirmed as true and accurate by affidavit to be sworn to by the First Respondent, with both the list and affidavit being filed and served within 21 days after the filing and service of the First Respondents Defence herein. That there be inspection of the documents on the list within 14 days of the filing and service of the said list and affidavit;
- (v) That the First Respondent disclose any French passports, whether current or cancelled, which are now or have been in his control, including such passports which are or were in his physical possession or which he has or has had the right to inspect or take copies of or which he had or has had a right to possession of;
- (vi) That the First Respondent do provide the disclosure sought at (5) above via the swearing of an affidavit providing the said information to be filed and served within 21 days after the filing and service of his Defence herein;
- (vii) That the Chief Elections Officer, Ms. Merina Williams, do provide the Petitioner with a copy of the Form 13 Declaration of the First Respondent, within 21 days;
- (viii) That the Chief Elections Officer, Ms. Merina Williams, the Second Respondent, do deliver to the Registrar of the High Court all of the documents referred to in Section 44(1) of the House of Assembly (Elections) Act, Chapter 2:01 of the Laws of the Commonwealth of Dominica, as well as a copy of the Form 13 Declaration of the First Respondent, within 21 days of the date of this Order and that she do provide the Petitioner with an index of all documents so delivered within 21 days;
- (ix) That the Registrar of the High Court do permit the Petitioner and/or his Attorneys at Law access to, and copies of, all documents from the Chief Elections Officer."

- [7] The Application was opposed by the Respondents.
- [8] At the hearing of the Application the Petitioners did not pursue the relief for judgment in default nor the relief sought at sub-paragraph (viii).
- [9] The Petitioners based their application for the Orders on:
- (a) CPR 2000
 - (b) The House of Assembly (Elections) Act
 - (c) The inherent jurisdiction of the Court.
- [10] The Respondents contend that CPR 2000 do not apply and the Court's jurisdiction under the constitution and the House of Assembly (Elections) does not include power to make the interlocutory orders that the Petitioners seek. The jurisdiction conferred by Parliament on the High Court is a special jurisdiction and the Court cannot use its inherent jurisdiction to grant the Orders sought.

ISSUES

- [11] The issues the Court must determine are whether the Court is empowered to order the First Respondent to file a defence and order discovery, and whether the Court should order the Chief Elections Officer to lodge the Form 13 Declaration of the First Respondents with the Registrar of the High Court for inspection by the Petitioners.

SUBMISSIONS OF THE PETITIONERS

APPLICABILITY OF CPR 2000

- [12] Learned Senior Counsel for the Petitioners submitted that the provisions of CPR 2000 apply to Election Petitions. Election Petitions are civil proceedings and are included in Part 2.2(1). They are not excluded by Part 2.2(1)(e) since the Chief Justice has not made any Rules under Section 68(2) of the House of Assembly (Elections) Act.

- [13] Learned Senior Counsel agreed that Election Petition proceedings are special and peculiar, that they do not involve ordinary civil rights. He submitted however that there is no decision by any of the Courts of the Eastern Caribbean Supreme Court that decided that CPR 2000 do not apply to election petition proceedings. In the cases of Ethlyn Smith BVI HCV 2003/0097 and Frampton v Pinnard DOM HCV 2005/0149 Rawlins J. (as he then was) did not determine that CPR 2000 was not applicable to election petitions but rather only determined that CPR 2000 could not be resorted to, to make amendments or join parties to an election petition. The cases decided that those provisions of CPR 2000 that are inconsistent with the statute cannot be applied. Learned Senior Counsel referred the Court to the decision of the Court of Appeal of Trinidad and Tobago in Peters v The Attorney-General CA. No. 21/2001 where the Court found that the rules of the Supreme Court were applicable.
- [14] The legal authorities show that historically the Court always made orders for disclosure in election petition proceedings. The position was altered by Section 26 of the UK Parliamentary Election Act 1868 which provides in effect that in the absence of rules made under the Election Act, the principles, practice and rules by which Committees of the House of Commons had dealt with election petitions shall be observed by the Court in the case of election petitions. Therefore the UK cases of Wells v Wren [1880] 5CP D546 and Moore v Kennard [1883] 10QB 290 are not applicable in Dominica since there is no similar statutory provision in Dominica. The rules of the Committee of the House of Commons never applied to Dominica.

STATUTORY PROVISIONS

- [15] Learned Senior Counsel referred the Court to Section 40 of the Constitution of Dominica and Sections 65 - 68 of the House of Assembly (Elections) Act, and submitted that notwithstanding rules were not made pursuant to Section 68 there are sufficient directions given in the House of Assembly (Elections) Act itself for the Court to determine the procedure for the determination of election petitions.

- [16] Learned Senior Counsel submitted that Section 65 identifies the persons who can institute an election petition. Section 66 provides in effect that election petitions are to be tried in the same manner as proceedings instituted by Claim Form. The word "tried" in Section 66 is wide enough to include all the procedural steps that are to be taken from the time proceedings are commenced. It means that CPR 2000 is incorporated into the legislative scheme for determining election petitions. This requires a Respondent to give a defence and to make disclosure. Learned Senior Counsel referred the Court to the decision of the Court of Appeal of Trinidad and Tobago in Peters v The Attorney-General where the Court found that in the absence of the rules, the RSC applied even though they agreed that election petitions were special proceedings.
- [17] Learned Senior Counsel further submitted that Section 17 of the Supreme Court Order empowers the Chief Justice and two judges to make rules in relation to the jurisdiction of the High Court. One jurisdiction of the High Court is in relation to election petitions. They can make rules applicable to election petitions subject to any other law including the House of Assembly (Elections) Act. Since no rules have been made under this Act CPR 2000 which has been made by the Chief Justice and two judges applies to election petitions.
- [18] Learned Senior Counsel further submitted that pursuant to Section 66 all witnesses would have to file witness statements. The Petitioners would need to know what matters to respond to so rather than the Petitioners have to seek leave to file further witness statements the trial would be conducted in an expeditious manner if the Court ordered the Respondents to file a defence and to disclose all documents relevant to the election petition. The Court has the authority to make such orders under Section 66 which provides for an election petition to be tried in the same manner as proceedings commenced by claim form.

INHERENT JURISDICTION

- [19] Learned Senior Counsel submitted that where jurisdiction is vested in a Court but there are no rules or procedure established for the exercise of that jurisdiction then the Court can

exercise its inherent jurisdiction for the purpose of regulating the proceedings - see Peters v Attorney-General; Langley v North-West Water Authority [1991] 1WLR p. 697; Wilson v Church [1878] 9 Ch. D 552; Attorney-General v Caskill [1882] 20 Ch. D 519; and the texts Halsbury Law 4th ed. Volume 37 p.59; and Disclosure by Matthews and Hayek.

- [20] There cannot be a fair trial if there is no defence or discovery to ensure that the provisions of the Constitution that relate to qualification of members of the House are given effect to. The Court must have the power to give directions to file a defence and for discovery. Prior to Section 26 of the UK Parliamentary Elections Act, the Court granted discovery and interrogatories.

- [21] Learned Senior Counsel further submitted that cases such as William v Tenby [1879] C.P.D 135 and Duport v Freeman [1968] 11WIR 497 are not applicable to the present case since these cases deal with the issue of extension of time to file the petition outside of the statutory time period. They do not lay down general principles applicable to election petitions.

- [22] The expressio unius rule is not applicable to exclude disclosure simply because the Chief Elections Officer is required by statute to disclose certain documents pursuant to Section 47 of the House of Assembly (Elections) Act. Parliament never intended to inhibit the Court from doing justice between parties to an election petition by prohibiting discovery – see Colhoun v Brooks; Dean v Wilsengrad.

DISCOVERY BY CHIEF ELECTIONS OFFICER

- [23] Learned Senior Counsel referred the Court to Section 47 of the House of Assembly (Elections) Act and submitted that pursuant to Section 47 the Court is empowered to order the Chief Elections Officer to lodge with the Registrar of the High Court the Form 13 which the First Respondents would have attested to. The documents would show that the Respondents had sworn that they were qualified to be elected and that the document is relevant to these proceedings to show that on the date of nomination the First

Respondents swore falsely to a statutory declaration and therefore their nomination was itself invalid and that they were not eligible to be elected.

SUBMISSIONS OF THE RESPONDENTS

- [24] Learned Senior Counsel for the First Respondents submitted that the jurisdiction vested in the High Court by Section 40 of the Constitution is not the ordinary civil jurisdiction of the Court but a special and peculiar jurisdiction. This has been established in numerous cases without and within the Eastern Caribbean. Learned Senior Counsel referred the Court to several cases including Theberge v Laudry 1876 2 A.C. 102 pp. 106-108, Patterson v Solomon [1960] AC 579 at page 589; Duporte v Freeman [1968] 11 WIR 497; Browne v Francis-Gibson and Another [1995] 50 WIR p. 143; Russell v Attorney-General of Saint Vincent and the Grenadines [1995] 50 WIR 128, and Eugene Hamilton v Cedric Liburd and Others CA Nos. 11 and 11A of 2005.
- [25] Learned Senior Counsel further submitted that election petition proceedings are not civil proceedings within the meaning of CPR 2000. CPR 2000 do not apply to election petition proceedings - see Etnlyn Smith v Christopher and Supervisor of Elections BVI HCV 2003/0097; Frampton and Others v Pinard and Others DOM HCV 2005/0149 Wells v Wren [1880] 5CP D546; and Moore v Kennard [1883] 10QB 290]. These decisions and the texts Rogers on Elections vol 11 20th ed. pp 230 to 204; and Leigh and LeMerchant's Election Law 4th ed. at p. 219 to 222 establish that the election Court has no jurisdiction to change or amend a petition, and that discovery and inspection are limited to election documents under the particular circumstances prescribed under Section 47 of the House of Assembly (Elections) Act.
- [26] Learned Senior Counsel also relied on submissions made by Learned Senior Counsel for the Petitioners who was then Counsel for the Respondents in the election petition case in Antigua of Dean Jones and v Jacqui Quinn Leandro and Others where Learned Senior Counsel submitted as follows:

"6. In their applications for orders that the parties exchange and serve on the Court witness statements, the Petitioners rely on Sections 46(2) and 63 of the Representation of the People Act, both of which vest in the Election Court "the

same powers, jurisdiction and authority" of the High Court "as if the petition were an ordinary action within its jurisdiction." It appears that the Petitioners will contend that the effect of these Sections is to make the Eastern Caribbean Supreme Court Civil Procedure Rules 2000 applicable to election petitions, including those rules requiring the parties to proceedings to file witness statements. The First Respondent submits that this argument is flawed for the following reasons:

7. Firstly, Sections 46(2) and 63 vest the powers, jurisdiction and authority of the High Court in the Election Court in relation to petitions but stop short of making the full gamut of the Civil Procedure Rules applicable to election petitions. In effect, the Petitioners are reading Sections 46(2) and 63 as providing that "the practice and procedure of the High Court shall apply to an election petition as if the petition was an ordinary action", but these sections do not say so.

8. Furthermore, any such interpretation is contradicted by other provisions of the Act which clearly envision that rules specific to election petitions will have been made. Thus, Section 44(3) provides that the petition should be in such form as may be prescribed by the Rules of the Supreme Court; Section 45(6) provides that the jurisdiction of the Court to permit the amendment of a petition should, subject to rules of Court, be exercised by a judge sitting in Court or in chambers; Section 44(2) provides that security for costs shall be given in the prescribed manner; Section 47(5) provides that an objection to be recognizance shall be made in the prescribed manner; Section 50(1) provides that the notice of the time and place of trial shall be given in the prescribed manner. If it was the intention of the persons drafting the legislation that the Civil Procedure Rules were to apply an election petition as if it were an ordinary action, there would have been no need to make provisions for the prescribing of the various matters just referred to. Indeed, the Petitioners would have been required to file Claim Forms, there would have been the need to schedule Case Management Conferences etc., but none of this has ever been thought necessary to take place."

[27] Learned Senior Counsel submitted that it is for Parliament to amend the House of Assembly (Elections) Act and expressly incorporate CPR 2000. Unless this is done CPR 2000 do not apply. Learned Senior Counsel submitted that in these jurisdictions where the civil procedure rules apply it was done expressly by legislation. Learned Senior Counsel referred the Court to the Section 24(3) of the Election Petitions Act of Jamaica, Section 4 of the Election Proceedings Rules of Trinidad and Tobago and Section 4 of the UK Election Petition Rules 1960.

[28] Section 24(3) reads:

"(3) An election petition shall be deemed to be a proceeding in the Supreme Court and, subject to the provisions of this Act and to any directions given by the Chief

Justice, the provisions of the Judicature (Civil Procedure Code) Law and the rules of Court shall so far as practicable, apply to election petitions."

[29] Section 4 of the Trinidad and Tobago Election Proceedings Rules reads:

"(4) Subject to the provisions of the Act and these Rules, the practice and procedure of the High Court, including the rules relating to the discovery and inspection of documents and the delivery of interrogatories, shall apply to a petition or reference under these Rules as if it were an ordinary civil action within its jurisdiction."

[30] Section 4 of the UK Election Petition Rules reads:

"(4) Subject to the provisions of the Act and these Rules, the practice and procedure of the High Court, including the rules relating to the discovery and inspection of documents and the delivery of interrogatories, shall apply to a petition under these Rules as if it were an ordinary action within its jurisdiction, notwithstanding any different practice, principle or rule on which the Committees of the House of Commons used to act in dealing with election petitions."

STATUTORY PROVISIONS

[31] Learned Senior Counsel submitted that in construing the Sections 66, 67 and 68 of the Act, the Court must look at the jurisdictional genesis off the Court and the Act as a whole.

[32] The first sentence in Section 66 cannot be construed as conferring on the High Court jurisdiction to deal with interlocutory matters. If Parliament had intended to confer an interlocutory jurisdiction then words similar to those used in the Jamaica Elections Act would have been included in the House of Assembly (Elections) Act.

[33] Prior to the statutory provisions the Court did not have jurisdiction to deal with election petitions so Parliament laid down a "bench mark" as to the mode of the trial. It would be in the same manner as proceedings commenced by a claim form.

[34] "Tried" means the hearing of the election petition. It does not include the interlocutory stages such as case management and Pre-trial review that are applicable in civil actions commenced by Claim Form. The section concludes by stating what the judge should do at the conclusion of the trial.

- [35] Section 67 vests in the Election Court certain powers which a Judge would have in civil matters, such powers to be exercised as nearly as circumstances will admit, thus recognizing that the trial of an election petition will not fit squarely with a trial of a civil action.
- [36] Section 68 provides for rules to be made by the Chief Justice alone to be applicable to election petitions. Thus rules made by a different rule making authority as is the case with CPR 2000 cannot be applicable to the determination of election petitions. A different rule making body cannot make rules for the election jurisdiction of the Court. In Peters v The Attorney-General the statutory provisions which the Court considered are not similar to those in Dominica and further in Trinidad and Tobago the legislation provides for the same rule making authority to make rules for all jurisdictions of the Court.

INHERENT JURISDICTION

- [37] Learned Senior Counsel submitted that the inherent jurisdiction of the Court cannot be used to confer a power that was not expressly conferred by Parliament except in relation to strike out - see Nair v Teik [1967] 2A.C. 31. The inherent jurisdiction of the Court cannot be used to confer power on an election Court for interlocutory purposes to make orders for the filing of defence and discovery.
- [38] Prior to the UK 1960 Rules the UK Courts held that they had no jurisdiction to order disclosure - see Wells v Wren; and Moore v Kennard.

DISCOVERY PURSUANT TO SECTION 47 OF THE HOUSE OF ASSEMBLY ELECTIONS ACT

- [39] Learned Counsel for the Chief Elections Officer submitted that the Petitioners have failed to adduce any evidence as required by Section 47 and therefore the Order sought should not be granted.

LAW AND COURTS ANALYSIS

APPLICABILITY OF CPR 2000

[40] The relevant provision is Part 2.2 of CPR 2000. Part 2.2 of CPR 2000 reads:

"APPLICATION OF THESE RULES

2.2 (1) Subject to paragraph 3 these Rules apply to all civil proceedings in the Eastern Caribbean Supreme Court in any of the Member States or Territories.

(2) In these rules "civil proceedings" include Judicial Review and applications to the Court under the Constitution of any Member State or Territory under Part 56.

(3) These Rules do not apply to proceedings of the following kind:

- (a) family proceedings;
- (b) insolvency (including winding up of companies);
- (c) non-contentious probate proceedings;
- (d) proceedings when the High Court is acting as a prize court; and
- (e) any other proceedings in the Supreme Court instituted under any enactment in so far as rules made under that enactment regulate those proceedings.

(4) Notwithstanding paragraph 3(d) these Rules apply to proceedings when the High Court is acting as a prize court in Saint Vincent and the Grenadines.

[41] The question that arises is whether election petitions are civil proceedings within the meaning of Part 2.2 and whether they are excluded under Part 2.2(3). Both sides referred the Court to a number of decisions emanating from the Eastern Caribbean Supreme Court including **Duporte v Freeman**; **Browne v Francis-Gibson**; **Russell v Attorney-General of Saint Vincent and the Grenadines**; and **Eugene Hamilton v Cedric Liburd**. In all of these cases the Court has consistently stated that the jurisdiction of the High Court to determine election petition is a peculiar and special jurisdiction. It is not a jurisdiction that determines ordinary civil rights. It is a parliamentary jurisdiction.

[42] In **Browne v Francis-Gibson and Another** Chief Justice Sir Vincent Floissac said at pp 148-151:

"The Judicial Committee of the Privy Counsel has repeatedly affirmed that the jurisdiction conferred on local courts of a British Colony or former British Colony to

determine questions as to the validity of elections and appointments to the local legislature is a peculiar and special jurisdiction in at least five respects. Firstly, constitutionally the jurisdiction is a parliamentary jurisdiction conveniently assigned to the judiciary by the constitution or by legislation. It is not a jurisdiction to determine mere ordinary civil rights. Secondly, the parliamentary questions which the local courts are constitutionally or statutorily authorised to determine are expected to be determined expeditiously so that the composition of the legislature may be established as speedily as possible. Thirdly, the legislature must have envisaged that the parliamentary question would be determined either on their merits or purely on procedural grounds and without hearing evidence. Fourthly, because of the urgency of the parliamentary question, the legislature is presumed to have intended that the decision of the local original and appellate courts would be unappealable to Her Majesty in Council. Finally, the presumption against appeals to Her Majesty in Council is usually confirmed by imperial or local legislation declaring the decisions of the local courts to be final and unappealable. In any event, the presumption is rebuttable only by specific imperial or local legislation unequivocally authorizing such appeals."

- [43] In **Russell v The Attorney-General of Saint Vincent and the Grenadines** Sir Vincent Floissac emphasized the distinction between the constitutional jurisdiction of the Court conferred by Section 96 and the Parliamentary jurisdiction conferred by Section 36. Sections 36(2)(2) and (7) of the Saint Vincent and the Grenadines Constitution is in the same terms as Section 40(1)(2) and (5) of the Dominica Constitution.

- [44] At page 138 Sir Vincent said:

"Accordingly, there are sufficient differences between the constitutional jurisdiction conferred by Section 96 and the parliamentary jurisdiction conferred by Section 36. Whereas the constitutional jurisdiction is available to any person with a relevant interest, the parliamentary jurisdiction is available only to the Attorney-General and candidates and voters at the impugned election. Whereas the constitutional jurisdiction is regulated by procedural rules (if any) made by the Chief Justice, the parliamentary jurisdiction is regulated by procedural rules enacted by Parliament. Whereas there is an ultimate appeal to Her Majesty in Council from decisions given in the exercise of the constitutional jurisdiction, there is no such appeal from decisions given in the exercise of the Parliamentary jurisdiction."

- [45] All of the above mentioned authorities have stated very clearly that the jurisdiction of the High Court to determine election petitions is not the same as the ordinary civil jurisdiction nor the constitutional jurisdiction. The Parliamentary jurisdiction conferred on the High Court is to deal specifically with matters pertaining to Parliament - the memberships of the

Parliament. Such proceedings are not within the ordinary civil proceedings which are regulated by CPR 2000. Indeed CPR 2000 made express provisions for CPR 2000 to apply to applications under the Constitution. Such applications are included as civil proceedings in Part 2.2(2).

- [46] Learned Senior Counsel for the Petitioners emphasized that none of the cases referred to by the First Respondents determined that CPR 2000 did not apply to election petitions. The statements by Rawlins J (as he then was) in Ethlyn Smith v Christopher and Supervisor of Elections BVI HCV 2003/0097 and Frampton and Others v Pinnard and Others DOM HCV 2005/0149 are not definitive statements that CPR 2000 do not apply to election petition cases.

- [47] In Ethlyn Smith case, after considering the provisions of Section 63 of the British Virgin Islands Election Act which is in very similar terms to Section 67 of the Dominica House of Assembly (Elections) Act, the only difference being that in Section 67 of the Dominica legislation in addition to the words "subject to the provisions of this Act" the words "or any Proclamation to be made by the President" are included. Rawlins J (as he then was) said at paragraphs 18 and 19:

"18. It may appear that this provision can be relied upon to bring into these proceedings the provisions contained in the Eastern Caribbean Supreme Court Civil Procedure Rules 2000 (the Rules). These Rules could have been particularly helpful to the case for the petitioners because joinder of parties is almost an automatic process particularly before the case management stage. In normal civil procedure either the court of its own volition on the application of a party could add new parties, substitute an existing party or remove a party even at a case management conference. Part 19 of the Rules would regulate all of the issues that relate to mis-joinder of parties raised in these cases.

19. The difficulty for the petitioners however is that on the principles enunciated in the election cases, we cannot go to the Rules."

- [48] In Frampton and Others v Pinnard and Others Rawlins J (as he then was) said at paragraph 15 under the heading "General Principles":

"15. The normal civil procedure rules in our case, the Eastern Caribbean Supreme Court Civil Procedure Rules 2000 (the Rules) are not applicable for example to join new parties after the time provided for the presentation of the petition, unless the election statutes provide for it...

And at paragraph 29:

"29. Learned Counsel for the Petitioner contended that the Rules are applicable in these cases to permit amendments on interlocutory process, the joinder of additional parties and interrogatories, for example. I do not think that the Rules are applicable in election cases in Dominica because the election statutes do not provide for it. In any event, this in my respectful view, is not the critical consideration here. The question is whether the Court could permit petitioners in election cases to circumvent the mandatory requirement to present and perfect their petitions within the time limited and embark upon a lengthy interlocutory process. The authorities are against it."

- [49] Having reviewed the above statements and the context in which they were made I agree with Learned Senior Counsel for the Petitioners that Rawlins J (as he then was) did not decide that as a general rule CPR 2000 do not apply to election petitions. However having regard to the numerous cases that have established that the election jurisdiction is a Parliamentary jurisdiction which does not deal with ordinary civil rights but rather with matters pertaining to Parliament - the membership of Parliament. As Sir Vincent Floissac said in **Russell v The Attorney-General** "whereas the constitutional jurisdiction is regulated by procedural rules made by the Chief Justice, the Parliamentary jurisdiction is regulated by procedural rules enacted by Parliament." I find that election petitions are not civil proceedings within the meaning of Part 2.2 of CPR 2000.

STATUTORY PROVISIONS

- [50] Learned Senior Counsel for the Petitioners contended that the provisions of CPR 2000 are applicable to election petitions by virtue of Sections 66, 67 and 68 of the House of Assembly (Elections) Act and Section 17 of the Supreme Court Order.

- [51] The starting point is Section 40 of the Constitution. Section 40 reads as follows:

"(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)

(c)

(d)

(2) An application to the High Court for the determination of any question under subsection (1) of this section may be made by any person entitled to vote in the election to which the application relates or by any person who was a candidate at that election or by the Attorney-General and, if it is made by a person other than the Attorney-General, the Attorney-General may intervene and may then appear or be represented in the proceedings.

(3)

(4)

(5) The circumstances and matter 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 in relation to any such application shall be regulated by such provision as may be made by Parliament.

(6)

(7)

(8)

[52] Section 40 confers jurisdiction on the High Court to hear and determine any question whether in subsection (1)(a) a person has been validly elected as a Representative of the House. Subsection (2) outlines who may make an application under subsection (1)(a), those persons include any person who has been a candidate at the election. In this case both of the Petitioners were candidates in the election held on December 18, 2009. While subsection 5 provides that the powers, practice and procedures of the High Court when hearing such applications shall be in accordance with provisions as are made by Parliament.

[53] The House of Assembly (Elections) Act is a pre-existing Act which deals with the election of members to the House. The relevant sections are Sections 66 - 68. They read as follows:

"66. Every election petition shall be tried before the High Court in the same manner as a suit commenced by a claim form. At the conclusion of the trial, the Judge shall determine whether the member of the House of Assembly whose return or election is complained of or any and what other person was duly returned or elected, or whether the election was void, and shall certify the determination to the President and, upon the certificate being given, the determination shall be

final; and the return shall be confirmed or altered, or a writ for a new election shall be issued, as the case may require, in accordance with the determination.

67. At the trial of an election petition the Judge shall, subject to the provisions of this Act or of any Proclamation to be made by the President, have the same powers, jurisdiction and authority, and witnesses shall be subpoenaed and sworn in the same manner as nearly as circumstances will admit, as in a trial of a civil action in the High Court, and shall be subject to the same penalties for perjury.

68. (1) The following provisions shall apply with respect to the presentation of an election petition:

(a) The petition shall be presented within twenty-one days after the return made by the returning officer of the member to whose election the petition relates, unless it concerns an allegation of corrupt practices upon the making of the return of election and specifically alleges a payment of money or other reward to have been made by any member, or on his account, or with his privity, since the time of the return, in pursuance or in furtherance of the corrupt practices, in which case the petition may be presented at any time within twenty-eight days after the date of payment;

(b) At the time of the presentation of the petition or within three days afterwards, security for the payment of all costs, charges and expenses that may become payable by the petitioner -

(i) To any person summoned as a witness on his behalf; or

(ii) To the member whose election return is complained of, or to any other person named as a respondent in the petition,

shall be given on behalf of the petitioner.

(c) The security shall be an amount not exceeding twelve hundred dollars and shall be given by recognizance to be entered into by any number of sureties not exceeding four approved by the Registrar of the High Court, or by way of deposit of money in the High Court, or partly in one way, and partly in the other.

(2) Rules not inconsistent with the provisions of this Act or any law, as to the deposit of security and the practice and procedure for the service and hearing of election petitions and matters incidental thereto, may be made by the Chief Justice."

- [54] It is agreed by all that the Chief Justice has not made rules pursuant to Section 68(2).
- [55] The question that arises is in the absence of rules made by the Chief Justice pursuant to Section 68(2) does CPR 2000 apply to the determination of election petitions.
- [56] As stated earlier Section 40(5) of the Constitution of Dominica specifically provides that the powers, practice and procedure of the High Court when determining an election petition shall be regulated by such provisions as may be made by Parliament. Sections 66, 67 and 68 of the House of Assembly (Elections) Act set out the powers and procedure of the High Court in determining election petitions.
- [57] The legislative scheme established by these provisions is as follows, Section 66 provides in effect that election petitions shall be tried before the High Court in the same manner a suit commenced by Claim Form. I agree with the submission of Learned Senior Counsel for the First Respondents that Section 66 relates to the mode of trial of election petitions, that they are to be tried in the same manner as proceedings commenced by Claim Form. The amendment made by the Interpretation and General Clauses (Amendment) Act 2000 does not in any way change the effect of Section 66. Section 66 must be read in its entirety. The section must be read in context. When read as a whole "tried" means the actual hearing of the election petition. It does not include the interlocutory process outlined in CPR 2000 that is applicable to the ordinary civil proceedings. At the conclusion of that hearing the Judge is required to certify the determination to the Parliament.
- [58] Section 67 provides for the Judge at the trial to have powers, jurisdiction and authority to summon witnesses and have them sworn in the same manner as nearly as circumstances will admit as in the trial of a civil action. The same penalties for perjury apply.
- [59] Section 68 provides for the time within which the election petition must be presented, security for costs and the manner in which it should be given, and that Rules not inconsistent with the above are to be made by the Chief Justice.

- [60] As stated earlier the Chief Justice has not made rules pursuant to Section 68(2). Learned Senior Counsel for the Petitioners contended that in the absence of rules made under Section 68 CPR 2000 applies by virtue of the provision of Section 17(1) of the Supreme Court Order which reads as follows:

"17(1). Subject to the provisions of this Order and any other law in force in any of the States, the Chief Justice and any other two Judges of the Supreme Court selected by him may make rules of Court for regulating the practice and procedure of the Court of Appeal and the High Court in relation to their respective jurisdiction and powers in respect of any of the States."

- [61] Section 40(5) of the Constitution specifically provides for the practice and procedure for determination of election petitions to be by rules as may be made by Parliament. Section 68(2) specifically provides that the rules are to be made by the Chief Justice. CPR 2000 was made by the Chief Justice and two Judges as is provided in the Supreme Court Order. Parliament in Section 68(2) having specifically made provision for the rules applicable to election petitions to be made by the Chief Justice, rules made by another rule making authority as is the case with CPR 2000 cannot be applied to election petitions.

- [62] I note further that in the jurisdictions where CPR applies it is as a result of express statutory provisions. In Jamaica Section 24(3) of the Election Petitions Act read:

"(3). An election petition shall be deemed to be a proceeding in the Supreme Court and, subject to the provisions of this Act and to any directions given by the Chief Justice, the provisions of the Judicature (Civil Procedure Code) law and the rules of Court shall, so far as practicable apply to election petition."

- [63] Section 4 of the Trinidad and Tobago Election Proceedings Rules provides as follows:

"4. Subject to the provisions of the Act and these Rules, the practice and procedure of the High Court, including the rules relating to discovery and inspection of documents and the delivery of interrogatories, shall apply to a petition or reference under the Rules as if it were an ordinary civil action within its jurisdiction."

- [64] Section 4 of the UK Election Petition Rules reads:

"4. Subject to the provisions of the Act and these Rules, the practice and procedure of the High Court, including the rules relating to the discovery and inspection of documents and the delivery of interrogatories shall apply to a petition under these rules as if it were an ordinary action within its jurisdiction,

notwithstanding any different practice, principle or rule, on which the Committee of the House of Commons used to act in dealing with election petition."

- [65] Learned Senior Counsel for the Petitioners contended that while legislation has been passed in Trinidad and Tobago, Jamaica and the United Kingdom which made express provisions for the rules to govern election petitions, in Dominica, Parliament has already provided for the incorporation of CPR 2000 (its predecessor) through Section 66. I respectfully disagree. If it was the intention of the Parliament of Dominica to incorporate CPR 2000 through Section 66, then Parliament would not have expressly made provision in Section 68(2) for the Chief Justice to make rules. Bearing in mind CPR 2000 and its predecessor were made by a different rule making authority. As stated earlier the amendment by the Interpretation (Amendment) Act 2000 did not in any way change the effect of Section 66.

INHERENT JURISDICTION

- [66] The Learned Authors of Halsbury Laws 4th ed. vol 37 at paragraph 14 outlined the nature of the inherent jurisdiction of the Court as follows:

"Unlike all other branches of law, except perhaps criminal procedure, there is a source of law which is peculiar and special to civil procedure law and is commonly called "the inherent jurisdiction of the court." In the ordinary way the Supreme Court; as a Superior Court of record, exercises the full plenitude of judicial power in all matters concerning the general administration of justice within its territorial limits, and enjoys unrestricted and unlimited powers in all matters of substantive law, both civil and criminal, except in so far as that has been taken away in unequivocal terms by statutory enactment. The term inherent jurisdiction" is not used in contradistinction to the jurisdiction of the court exercisable at common law or conferred on it by statute or rules of court, for the court may exercise its inherent jurisdiction even in respect of matters which are regulated by statute or rule of court. The jurisdiction of the court which is comprised within the term "inherent" is that which enables it to fulfil itself, properly and effectively, as a court of law. The overriding feature of the inherent jurisdiction of the court is that it is a part of procedural law, both civil and criminal, and not a part of substantive law; it is exercisable by summary process, without a plenary trial; it may be invoked not only in relation to parties in pending proceedings, but in relation to any one, whether a party or not, and in relation to matters not raised in the litigation between the parties; it must be distinguished from the exercise of judicial discretion, and it may be exercised even in circumstances governed by rules of court. The inherent jurisdiction of the court enables it to exercise (1) control over process by regulating its proceedings, by preventing the abuse of process and by compelling the observance of process; (2) control over persons, as for example

over minors and mental patients, and officers of the court, and (3) control over the powers of inferior courts and tribunals.

In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine, and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them."

- [67] It is settled law that where jurisdiction has been conferred by statute but matters of procedure for the exercise of that jurisdiction have not been prescribed then the Court has an inherent jurisdiction to direct the procedure to be adopted - see Jaundao v The Attorney-General of Guyana [1971] A.C. 972; Port Construction and Others v Seamen and Waterfront Workers Trade Union [1972] 21 WIR p. 505.

- [68] In Langley v North West Water Authority [1991] 1WLR 697, Lord Donaldson said at p. 702:

"Although there is no statutory authority for making local practice directions, none is needed because every court has inherent jurisdiction to regulate its own procedures, save in so far as any such direction is inconsistent with statute law or statutory rules of court."

- [69] The authorities mentioned earlier such as Russell v The Attorney-General, and Frampton v Pinnard all emphasize that the main purpose of the special jurisdiction given to the High Court in election petition matters is to ensure that the membership of Parliament is determined expeditiously.

- [70] In Frampton v Pinnard Rawlins J (as he then was) said at paragraph 16:

"16... Election challenges should be mounted before a new legislature sits and begins its work, or as soon as possible thereafter in order that the legislature might be definitively lawfully constituted. It goes to the issue of legitimacy. Electoral laws and their interpretation by the courts are intended to facilitate this."

- [71] The Parliament of Dominica did not provide for there to be an interlocutory process which included discovery. Section 40 of the Constitution and the House of Assembly (Elections) Act show that the legislative scheme established for the determination of election petitions does not include an interlocutory process. The non-inclusion of the Rules of Court with its interlocutory process was a deliberate design by Parliament. The High Court therefore

cannot exercise its inherent jurisdiction to create a new scheme or vary the scheme established by Parliament.

[72] There has been much discussion by both sides of the case Peters v The Attorney-General of Trinidad and Tobago. However having reviewed the case, I find that it is not applicable to the present case. Peters was decided on the specific legislative provisions in Trinidad and Tobago which are quite different from the legislative provisions in Dominica. Peters confirmed the principle enunciated in Jaundoo v The Attorney General of Guyana that where the jurisdiction has been given to the Court that fact that rules have not been made would not prevent exercise of the jurisdiction.

[73] In Peters the Court did not exercise its inherent jurisdiction. Chief Justice De la Bastide (as he then was) stated this very clearly at page 30:

"...This the Rules Committee has not to date done. It is nevertheless, quite feasible in my view for the parties to election proceedings (and the Court) to travel that route with the assistance of (a) the RSC, 1975 (in so far as they are by their terms and content applicable to election proceedings), (b) the policy and intent of Parliament which can be gleaned from the provisions of Part VI and must govern the way in which those provisions are implemented, and (c) the rules of natural justice. Despite the existence at present of some grey areas left by the failure of the Rules Committee to draw up a procedural code specifically for election proceedings, I think that the High Court is quite capable of receiving and determining representation petitions. It may be seen as doing so by drawing on its inherent jurisdiction but in my view it is simply exercising the jurisdiction given it by Section 52 of the Constitution and Section 106 of the RPA with assistance from the three sources I have identified above."

[74] Having reviewed the cases of Wilson v Church and Attorney-General v Caskill referred to by Learned Senior Counsel for the Petitioners, I do not find that these cases advance the Petitioners' case. The decision to order interrogatories was not based on the exercise of the inherent jurisdiction of the Court but rather on the UK Rules of Court Order XXXI. In Wilson v Church the Court explained that historically discovery was only granted in the Courts of Equity. Discovery was first granted by the Common Law Courts by legislation. In Disclosure by Matthews and Malek 2nd ed. 2001 p.8 paragraph 1.10 the Learned Authors in outlining the history of discovery stated:

"The Evidence Act 1851 and the Common Law Procedure Act 1854 for the first time conferred powers on the common law courts to order general discovery and interrogatories, and although these were based on the practice in Chancery, they were exercised somewhat more narrowly than under that practice."

- [75] In all of the cases where discovery has been ordered it has been pursuant to statute. I have not been referred to any case where discovery or the general interlocutory process has been incorporated into the election petition process by way of the inherent jurisdiction of the Court.
- [76] CPR 2000 does not make it mandatory for a defendant or a Respondent to file a defence. Rather it recognises that a defendant has a right to file a defence and regulates the time within which he must file the defence, the manner in which he must do so and the consequences if he fails to file the defence within the time specified.
- [77] Parliament not having included discovery and indeed the interlocutory process in the determination of election petitions it would be wrong for the Court by way of its inherent jurisdiction to include it. The election petitions could be determined in a fair and just manner without the application of the interlocutory process.
- [78] I agree that the Court can use its inherent jurisdiction to determine the manner which the evidence of the witnesses would be presented so that the matter could be dealt with expeditiously in keeping with the legislative scheme and intention of parliament.

DISCOVERY PURSUANT TO SECTION 47 OF THE HOUSE OF ASSEMBLY (ELECTIONS) ACT

- [79] The relevant provisions are section 44(1) and Section 47(1) and (2) of the House of Assembly (Elections) Act. The Parties do not dispute that Form 13 is an election document referred to in Section 44(1). Section 47(1) reads as follows:

"47(1) The Chief Elections Officer shall keep the election documents referred to in Section 44(1) in safe custody and shall allow no person to have access to them; but if an election petition has been presented questioning the validity of any election or return, the Chief Elections Officer shall, on the order of a Judge of the High Court deliver to the Registrar of the High Court the documents relating to the election that is in dispute. However, after the expiration of twelve months from the

day of any election it shall be lawful for the Chief Elections Officers to cause the said documents used at the election to be burnt.

(2) No such election documents in the custody of the Chief Elections Officers shall be inspected or produced except under the order of a Judge of the High Court, and an order under this subsection may be made by any such Judge on his being satisfied by evidence on oath that the inspection or production of the election documents is required for the purpose of instituting or maintaining a prosecution for an offence in relation to an election, or for the purpose of a petition which has been filed questioning an election or return.

- [80] The effect of Section 47(2) is that before a Judge makes an order requiring the Chief Elections Officer to produce a document pursuant to subsection 47(1) the Judge must be satisfied by evidence on oath that the inspection or production, in the present case, is for the purposes of a petition which has been filed questioning an election or return.
- [81] Having examined the affidavits of the Petitioners, when the affidavits are read in their entirety, I am satisfied that the production of the Form 13 is for the purposes of the petition which has been filed by the Petitioners questioning the validity of the election of the First Respondents having regard to the provisions of Section 32(1) of the Constitution of Dominica.
- [82] In conclusion I find that CPR 2000 do not apply to the determination of the election petitions in Dominica. CPR 2000 is not incorporated into the legislative scheme for determining election petitions as set out in Section 40 of the Constitution of Dominica and the House of Assembly Act. I also find that the Court cannot use its inherent jurisdiction to grant the reliefs sought by the Petitioners against the First Defendants. I am satisfied that the Chief Elections Officer should produce the Form 13 attested to by the First Respondents to the Registrar of the High Court for inspection by the Petitioners.

[83] It is ordered:

- (1) The application in relation to the First Respondents is dismissed.
- (2) The Chief Elections Officer shall deliver to the Registrar of the High Court the Form 13 Declaration of the First Respondents within seven days of the date of this Order.
- (3) The Registrar of the High Court shall permit the Petitioners and or their Attorneys at Law access to and copies of the Form 13 Declaration delivered by the Chief Elections Officer pursuant to paragraph (2) of this Order within seven days of receipt of the said documents.
- (4) Each party shall bear their own costs.


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Gertel Thom
HIGH COURT JUDGE