

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
COMMONWEALTH OF DOMINICA

CLAIM NO. DOMHCV2010/0003

IN THE MATTER OF THE HOUSE OF ASSEMBLY (ELECTIONS) ACT, CAP 2:01

and

IN THE MATTER OF A PARLIAMENTARY ELECTION FOR THE CONSTITUENCY OF
ST. JOSEPH ON THE 18th DAY OF DECEMBER, 2009

Between:

JOHN HENRY ABRAHAM

Petitioner

and

1. KELVER DWIGHT DARROUX
2. MERINA WILLIAMS
3. ANTHONY JOSEPH
4. GERALD BURTON (Chairman of the Electoral Commission)
5. ALICK LAWRENCE (Member of Electoral Commission)
6. KONDWANI WILLIAMS (Member of Electoral Commission)
7. DON CHRISTOPHER (Member of Electoral Commission)
8. BERNIE DIDIER (Member of Electoral Commission)
9. DOMINICA BROADCASTING CORPORATION
10. ATTORNEY GENERAL OF DOMINICA

Respondents

CLAIM NO. DOMHCV2010/0004

Between:

BOBBY A.C. FREDERICK

Petitioner

and

1. AMBROSE GEORGE
2. MERINA WILLIAMS
3. ARUNDELL THOMAS
4. GERALD BURTON (Chairman of the Electoral Commission)
5. ALICK LAWRENCE (Member of Electoral Commission)
6. KONDWANI WILLIAMS (Member of Electoral Commission)
7. DON CHRISTOPHER (Member of Electoral Commission)
8. BERNIE DIDIER (Member of Electoral Commission)
9. DOMINICA BROADCASTING CORPORATION
10. ATTORNEY GENERAL OF DOMINICA

Respondents

CLAIM NO. DOMHCV2010/0005

Between:

CLAUDIUS SANFORD

Petitioner

and

1. ASHTON GRANEAU
2. MERINA WILLIAMS
3. HELIUS AUGUISTE
4. MAURINA LAVILLE
5. GERALD BURTON (Chairman of the Electoral Commission)
6. ALICK LAWRENCE (Member of Electoral Commission)
7. KONDWANI WILLIAMS (Member of Electoral Commission)
8. DON CHRISTOPHER (Member of Electoral Commission)
9. BERNIE DIDIER (Member of Electoral Commission)
10. DOMINICA BROADCASTING CORPORATION
11. ATTORNEY GENERAL OF DOMINICA

Respondents

CLAIM NO. DOMHCV2010/0006

Between:

RONALD a.k.a. "RON" GREEN

Petitioner

and

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

Respondents

CLAIM NO. DOMHCV2010/0007

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 Electoral Commission)
5. KONDWANI WILLIAMS (Member of Electoral Commission)
6. DON CHRISTOPHER (Member of Electoral Commission)
7. BERNIE DIDIER (Member of Electoral Commission)
8. DOMINICA BROADCASTING CORPORATION
9. ATTORNEY GENERAL OF DOMINICA

Respondents

Appearances:

Mr. Anthony Astaphan, SC and with him Mrs. Heather Felix for the Applicants/First Respondents.

Mrs. Francine Baron Royer, Attorney General, for all the Applicants/Respondents other than the First Respondents.

Mr. Douglas Mendes, SC and with him Stuart R. Young and Geoffrey Letang for the Petitioners.

2010: June 21, 22
August 25

JUDGEMENT

[1] **Thomas, J.:** Before the Court are a number of applications which bear on the five petitions' filed on 8th January, 2010, in relation to general elections held in the Commonwealth of Dominica on 18th December, 2009. By order of the Court dated the 17th March, 2010, the five applications were to be heard together on 17th and 18th June, 2010, but were instead heard on 21st and 22nd January, 2010.

Background

[2] The first of these petitions,¹ which is typical, is that of John Henry Abraham who seeks a number of remedies against the Respondents based on their alleged action or inactions. These include: corrupt practices – bribery and treating, illegal practices, returning voters and the Form 27 Oath, votes wrongly admitted or rejected, miscount, return or votes wrongly counted, denial of access to the radio station operated by the Dominica Broadcasting Corporation.

[3] In the case of the Petitioner, John Henry Abraham he prays for the following:

¹ The five Petitions are: DOMHCV2010/0003 John Henry Abraham v. Kelter Dwight Darroux et al, DOMHCV2010/0004 Bobby A.C Frederick v. Ambrose George et al, DOMHCV2010/0005 Claudius Sanford v. Ashton Graneau et al, DOMHCV2010/0006 Ronald a.k.a. "Ron" Green v, Petter Saint Jean et al, DOMHCV2010/0007 Maynard Joseph v. Roosevelt Skerrit et al.

1. That it may be or derived that there be a recount of the votes recounted having been cast in the election.
2. That it may be determined that the election was void and the Petitioner was duly elected and ought to have been returned.
3. For a declaration that the misuse of the state-owned radio for campaign purposes by the Dominica Labour Party in power, contravenes the constitutional right to the freedom of expression and thereby vitiated the poll and/or the entire elections;
4. That the Petitioners' constitutional right to freedom of expression and access to the state media has been infringed;
5. That the Petitioner may have such further or other reliefs as the Court thinks just.

The Applications

- [4] As a result of the filing of the Petitions a number of the applications were filed. There are applications by the First Respondents to the Petitions and further applications by the other Respondents to the said Petitions.

Applications by the First Respondents

- [5] The application filed by Kelter Dwight Darroux² is also typical in which general and specific grounds are relied on.
- [6] In terms of general grounds it is contended that no cause of action is pleaded against the Second and Third Respondents as well as Respondents four to eight. Further or alternatively that the allegations pleaded against members of the Electoral Commission are misconceived and are an abuse of process.
- [7] Further, general grounds relate to the matter of the 'direction' described in paragraph 13 of the Petition and its implications in terms of the judicial functions of the Elections Court and separation of powers; the 'Form 27 Oath' and its relevance to persons on the register who live abroad; the absence of or

² DOMHCV2010/0003, supra

objection or determination by the Chief Elections Officer prior to Election Day that any of the persons named were absent from Dominica for a period of five years.

[8] In terms of the Ninth Defendant, it is contended that no material fact or cause of action is pleaded against the board of Directors or any officer of the Corporation. Further, that has not been pleaded or alleged; no material fact or cause of action of any alleged conspiracy or conclusion between the board or any officer of the corporation and the Dominica Labour Party has been pleaded; and no cause of action alleging a constitutional infringement of the Petitioner's right by the corporation has been pleaded or disclosed.

[9] With respect to the Petition as a whole, the contention is that it is pleaded in vague and generalized terms, discloses no reasonable cause of action, relies on alleged treating and illegal practices which are unknown to the laws of the state and is and constitutes an abuse of process.

[10] As far as the specific grounds are concerned, the Applicant/First Respondent submits that the paragraphs³ identified on parts thereof ought to be struck out on the specific grounds mentioned.

[11] The Applicant is asking the Court, in the exercise of its statutory and inherent jurisdiction, for the following reliefs and orders:

- "1. The Second and Third Defendants be struck out as parties to the Petition.
2. The Fourth to Eight Defendants be struck out as parties to the Petition.
3. The Ninth Defendant be struck out as party to this Petition.
4. The paragraph of the petition or parts thereof which refer to common law be struck out.
5. The words "and the Petitioner was duly elected and ought to have been returned" in prayer be struck out.
6. Prayers 2 to 4 be struck out.
7. The Petition or the paragraphs of the Petition filed by the Petitioner on 8th day of January, 2010, be struck out and dismissed with costs to the First Respondents."

³ The paragraphs of the Petition identified are: 8,9,10,11,12,13,14,21 & 22 to 24.

Applications by the other Respondents

[12] These applications are along the lines of the application by the First Respondents, as outlined above, in terms of general and specific grounds, except that in terms of the latter, the paragraphs of the Petition identified are different in a minor respect.

[13] John Henry Abraham Petition the following reliefs and orders are sought⁴:

1. The Second and Third Defendants be struck out as parties to this Petition.
2. The Fourth to Eight Defendants be struck out as parties to this Petition.
3. The Ninth Defendant be struck out as a party to this Petition.
4. The paragraphs of the Petition in parts thereof which refer to the common law be struck out.
5. The words "and the Petitioner was duly elected and ought to have be returned" in Prayer 1 be struck out.
6. Prayers 2 to 4 be struck out.
7. The Petitioner on the paragraphs of the Petition filed by the Petitioner on the 8th day of January, 2010, be struck out and dismissed with costs to the Second to Ninth Respondents."

Affidavits

[14] By order dated 17th March, 2010, this Court gave directions in the matters to include the filing of affidavits by all sides. Accordingly, there exist affidavits in support of the application by the First Respondents⁵ and in support of the applications by the other Respondents.⁶ Additionally, there are affidavits in reply

⁴ The reliefs and order sought in the other applications by Respondents, other than the First Respondents, will be outlined at a later stage, as appropriate.

⁵ In terms of the First Respondents, affidavits were filed by Kelvin Dwight Darroux, (DOMHCV2010/0003), Ambrose George (DOMHCV2010/0004), Ashton Graneau (DOMHCV2010/0005), Petter Saint Jean, (DOMHCV2010/0006) and Roosevelt Skerrit (DOMHCV2010/0007).

⁶ In like manner, affidavits in support are deposed to by or on behalf of all of the Respondents, other than the First Respondents. For example, in DOMHCV2010/0003, other affidavits are deposed by Merina Williams (Second Respondent), Anthony Joseph (Third Respondent), Gerald Burton (Fourth Respondent), Alick Lawrence (Fifth Respondent), Kondwani Williams (Sixth Respondent), and Shermaine Green-Brown (of the Ninth Respondent). A supplemental affidavit was also filed by the said deponent.

and in response are also filed.⁷ The status of such evidence in this context will be addressed at a later stage.

[15] The issues for determination are:

1. Whether the Petitions should be struck out in whole or in part on account of the following pleaded issues:

- (a) bribery;
- (b) treating;
- (c) illegal practices;
- (d) returning voters and the Form 27 Oath;
- (e) return on votes wrongly counted;
- (f) denial of access to state-owned radio and breach of right to freedom of expression;
- (g) disqualification for nomination on election;
- (h) votes wrongly admitted or rejected; and
- (i) miscourt.

2. Whether any party incurred in any petition should be struck out.

ISSUE NO. 1

[16] Whether the Petitioners should be struck out in whole or in part on account of the following pleaded issues:

- (a) bribery;
- (b) treating;
- (c) illegal practices
- (d) returning voters and Form 27 Oath;
- (e) return on votes wrongly counted;
- (f) denial of access to state radio and breach of the right to freedom of speech;
- (g) disqualification for nomination or election;
- (h) votes wrongly admitted or rejected; and
- (i) misconduct.

Bribery

[17] In all the Petitions, except that of Maynard Joseph, it is pleaded that the Respondents by themselves on in connivance with and/or by certain named persons on their behalf arranged and paid for transportation for certain named

⁷ On 14th April, 2010, John Henry Abraham filed on an affidavit in reply.

persons and provided those persons with sums of money to induce them to vote for the named Respondent and other persons in that Respondents' party in other constituencies and that some of the persons were instructed to take photographs of their ballots to prove that they cast their votes for the Dominica Labour Party candidate.

[18] In the Applications, there is a mixture of general and specific grounds upon which the Petitions are attained in relation to allegation of bribery. The most extensive are by Mr. Ashton Graneau in DOMHCV2010/005 and Mr. Kelter Dwight Darroux in DOMHCV2010/003. These are the contentions, *mutatis mutandis*; the Petition is couched in vague and general terms; facts to disclose relevant material facts and therefore discloses no cause of action; relies on alleged treating and illegal practices which are unknown to the laws of the Commonwealth of Dominica and, in any event, are incapable of avoiding an election; there was no objection to votes at the preliminary nor final count has failed to ask for a scrutiny.

[19] On specific grounds, it is further contended that there is a lack of sufficiency of material facts with respect to the offence of bribery; the allegations are embarrassing and bad for duplicity; no material facts are pleaded as to the relationship with respect to the persons named in connection with the crime alleged; there is no specific plea or material facts of a bargain or agreement between the First Respondent and anyone acting on his behalf or on his instruction and his knowledge or consent; and the persons named under the particulars despite the seriousness of the alleged bribery, the Petitioner has failed to plead material facts of a relationship to the alleged acts of bribery committed by the First Respondent; the alleged corrupt bargains or arrangement made including the dates, place, time of the bargain or agreement, the manner and nature of the alleged inducement.

[20] The further contentions are: the words 'or in connivance' or the grounds that they are synonyms and not material facts, and are vague and disclose no cause of action. The

words and other persons in the First Respondent's party in other constituencies on the ground that they are irrelevant. The particulars under paragraph 9 or concerning the Le Plaine, St. Joseph and Wesley constituencies are irrelevant constituencies are the allegation relating to Ann Timothy Edesse Dorset, Charlie Corbelte and Sylvanie Burton disclose no cause of action.

- [21] Finally, with respect to paragraphs 10 and 9 of the two Petitioners, it is argued that they failed to disclose material facts and in any event are confusing. Further still, they contradict the earlier allegation in which it is alleged that the payment of money and bribery took place before the general election.
- [22] The First Respondent, Mr. Petter Saint Jean, in DOMHCV0006/2010 departs from the above in that counter allegations of bribery against the Petitioner and the United Workers Party⁸. In addition, the First Respondent seeks to leave to have certain paragraphs of the Petition, which concern bribery, struck out.

Applications by the other Respondents

- [23] Applications merely contain the general grounds outlined above in relation to petitions DOMH0003/2010 and DOMHCV0005/2010.
- [24] With respect to the Applications on behalf of the other Respondents, they do not contain specific grounds and are confused to the general grounds such as petitions being pleaded in vague and generalized terms⁹

Submissions

- [25] Mr. Anthony Astaphan, SC, on behalf of the First Respondents, made comprehensive submissions on the Petitioners' allegation of bribery.¹⁰ According

⁸ See paragraphs 1-4 of the Application

⁹ See DOMHCV0003/2010 – paragraph 14 of the Application. DOMHCV2010/0004 – paragraph 5 of the Application. DOMHCV2010/0005 – paragraph 10 of the Application. DOMHCV2010/0006 – paragraph 11 of the Application.

¹⁰ The following authorities were quoted in submissions: Mann v Singh [1980] ISCC 713; Agarwal v. Ghandi [1987] supp SCC 93; Suhaiman v Gunsalam Election Petition No. 26-8 of 2008, Malaysia at page 7; Schofield's Election Law, 2nd ed. at paras. 18:02 & 18:03; Mande v Lowley [1874] 1XCPD 163; Rogers on Elections Vol. 11, 17th Edition, at pages 200 – 201. The Powers, Duties and

to the learned Senior Counsel, the First Respondents contend that an allegation of bribery under section 55 (a) of the House of Assembly (Elections) Act requires the Petitioners to, among other things, plead and perfect material facts and particulars in their petitions of affidavits in support, filed within twenty-one days to show that: (1) the First Respondents or other persons acting on behalf of the said First Respondents and with their authority and consent committed the specific offences of bribery; (2) corrupt bargains were made by the First Respondents or their agents acting with their authority and consent and those persons named who the Petitioners alleged were bribed; (3) corrupt bargains were made by the First Respondents on their agents acting with their authority and consent with the intention to induce the named electors to vote in a manner in which they would not otherwise have voted (to vote against their consciences); (4) the dates, times, place and manner of the alleged corrupt bargain; and (5) the First Respondents acted corruptly.

[26] As regards the criminal offence of bribery, it is contended that a number of consequences flow from the seriousness of the allegation and the nature of the burden of proof. According to Mr. Astaphan the first "consequence" is that no personal charge of bribery ought to be made unless the person making the allegation is in possession of admissible evidence to properly plead and establish the charge beyond a reasonable doubt. The second consequence is that the allegation must be properly pleaded and particularized within the twenty-one days prescribed by Parliament. And further, that in this case, the Petitioners are pleaded largely in general pejorative and conclusionary terms and the affidavits filed contain no material facts or particulars of the offence of bribery.

Liabilities of an Election Agent and Returning Officer, 3rd Edition by Oscar R. Parker at pp. 669-701; R v. Rowe [1992] 1 WIR 1059; Wanarake v Dusava [2009] PG SC 11; Associated Leisure Ltd v Associated Newspapers Ltd [1970] 2Q3 at page 456; Eastern Division of Manchester Day's election cases 1892-3, Frampton et al v Pinard et al DOMHCV2010/0149 at paras. [60] to [62]; Re Rica Gold Washing Company [1879] 11 CL 36, 43; Belmont Finance Corporation v Williams Furniture Ltd [1978] WLR 712, 728 per Lord Justice Buckley; Thomas v Stoutt [1997] 55 WIR 112, 117; Armitage v Nurse [1997] 3 WLR 1046; Spencer v Attorney General [1999] # LRC; Ethlyn Smith v Christopher and Supervisor of Elections Claim No. BVIHCV2003/0097; Shemilita Joseph v Bowen and others Suit No. 40/1999, The Lancaster Division of the County of Lancaster [1896] 5 O'M&H 39, 41 & 42.

[27] In a further submission it is stated that it is settled law that general allegations of serious offence or misconduct are not permitted; and in this regard, reliance is placed on a dictum of **Jessel MR in Re Rice Gold Washing Company**¹¹ which concerns pleadings with respect to an allegation of fraud, and also a dictum of Lord Justice Buckley in **Belmont Finance Corporation v Williams Furniture Ltd.** to the effect that an allegation of dishonesty must be pleaded clearly and with particularity.

Submissions on behalf of other Respondents

[28] Both in her written and oral submissions to the Court, the learned Attorney General made no input on the issue of bribery.

Submissions of behalf of the Petitioners

[29] *Ab initio*, Mr. Douglas Mendes, SC, notes that in the Petitions, with the exception of the Maynard Joseph Petition, it is pleaded that the Respondent by himself or in co with and/or by certain named persons on his behalf arranged and paid for transaction of certain persons and provided those persons with sums of money to induce them to vote for the named Respondent and other persons in that Respondent's party in other constituencies and that some persons were instructed to take photographs of their ballots to prove that they cast their votes for the Dominica Labour Party Candidate. The submissions continue: "It is respectfully submitted that this pleads all the elements of the offence of bribery which by section 55 (a) of the House of Assembly (Elections) Act is committed where any person gives any money or reliable consideration to any elector to induce any elector to vote or refrain from voting. Once again, the Respondents are left in no doubt as to the case they must answer."

¹¹ [1879] 11 Ch. 36.

[30] Learned Senior Counsel for the Petitioners goes on to address the criticisms by the Respondents which according to him are "misconceived." He first deals with the contention that the provision of transportation is bribery per se. This is accepted, but learned Senior Counsel says that transportation is not pleaded. According to him, what is pleaded is that such transportation was provided as an inducement to vote and more than that it was coupled with instructions to take photographs to ensure that the deal was consummated. And in any event, says learned Senior Counsel, the provision of money as an inducement to vote is bribery without more.

[31] The other criticism addressed is the Respondent's contention that there is a failure to plead the time and date of the bribe and the amount of the bribe. This is the manner in which Mr. Mendes, SC sought to deal with the issued paragraph 22 of his written submissions:

"It is accepted that it would always be a counsel of perfection to include such details if available. But the absence of such details does not make the pleading defective. It only entitles the Respondent to particulars, with which they will be provided if requested and available. In any event, if the request is made and particulars cannot be provided that will not necessarily result in the pleading being struck out. A pleader is only required to provide such particulars as he has in his possession. Suppose for example, that a witness observes a parcel containing cash being handed over accompanied by a promise to vote in a particular way. In such circumstances, it would not be possible to plead the amount of cash in the bag but it would surely be sufficient to plead that cash was paid in exchange for a vote. Similarly, if the evidence of payment of a bribe is derived from an admission by the accused to that effect but without details as to date or time, it would not be possible to plead such and the inability to provide particulars would not be fatal. This must be so particularly in a case such as this where the details of any transaction would be in the first instance peculiarly within the knowledge of the Respondent."

Analysis

[32] To begin, the point must be made abundantly clear that the Court is not concerned with whether any person is 'guilty' of bribery. Rather, the concern is to determine whether a reasonable cause of action is made out with respect to bribery in order that the issue may be tried on the merits.

[33] The offence of bribery is created by a statute, namely section 55 of the House of Assembly (Elections) Act. This section prescribes seven circumstances in which a person is “deemed to be guilty of bribery within the meaning of the meaning of this Act.” However, in the Petitions paragraph (a) of the said section 55 is pleaded. It says that:

“55. The following persons shall be deemed guilty of bribery within the meaning of this Act:

a) Every person who, directly or indirectly, by himself or by any other person on his behalf, gives lands or agrees to give land, or offers promises, or promises to provide or to endeavour to procure any money or valuable consideration to or for any elector, or to or for any person on behalf of any elector, or to or for any other person in order to induce any elector to vote or refrain from voting , or corruptly does any such act as mentioned above on account of any elector having voted or refrained from voting at any election...”

[34] The context of the provision, is of course, an election and the mischief prescribed is first to give, lend or agree to give or lend or to offer, promise or promise to procure or to endeavour to procure any money or valuable consideration to or for any elector, or to or for any person on behalf of any elector by any person. Second, it is directed at any person whether directly or indirectly by himself or by any person on his behalf. And third, the action identified is to induce any elector to vote or refrain from voting at any election.

[35] In sum, the provision casts its net widely and seeks to embrace not only the briber but also his agent; and also not only the elector but persons acting on his behalf. Further, the bribery is not contained to the giving of money but also to lending or agreeing to lend or offering, promises or promise to procure money or valuable consideration to or for any elector or on his behalf.

[36] It is common ground that the Petitioners are pleaded in similar terms. And in terms of bribery the critical pleading in the Petition filed by John Henry Abraham bears repetition:

“8. The First Respondent directly and/or indirectly by himself and or in connivance with Roosevelt Skerit, Martin Charles, Barbara Daley and Hartly Henry, Paul Naymonte and Bernard Sylvester and /or by the said Roosevelt Skerit, Martin Charles, Barbara Dale, Hartly Henry , Paul Maynard Bernard Sylvester and Franklyn Lawrence on his behalf arranged and paid from the transportation of the following persons from various countries to the Commonwealth of Dominica and provided them with sums of money to induce them, all electors, to vote in the said election for the First Respondent, and other persons

in the First Respondents' party in other constituencies contrary to common law and/or section 55 (a) of the House of Assembly (Election) Act."

- [37] Under the rubric "Particulars of Persons Bribed," the names of persons are recorded in La Plaine Constituency, Wesley Constituency and St Joseph Constituency.
- [38] At paragraph 9 of the said Petition, it is pleaded that: "Some of the said persons were instructed to take photographs of their ballot after voting to prove that their vote was casted for the Dominica Labour Party."
- [39] It will also be recalled that two of the basic rules cited were that pleadings will not be struck out so long as the Respondent knows the case he has to face. The other basic rule is that given the draconian nature of the Court's power to strike, it will be used very sparingly. But there a host of other principles which must be used in the correct context.
- [40] It will also be recalled that Mr. Astaphan, SC's case is that the pleadings regarding bribery are bad in that there is a lack of sufficiency of material facts and the allegations are embarrassing. On the other hand, learned senior counsel for the Petitioners, Mr. Mendes, SC, says that the pleadings are adequate and the Respondents know the case they have to face.
- [41] The distinguishing feature of bribery is that it is a criminal offence and jurisprudence suggests that generally general allegations in this regard will not suffice.
- [42] An analogy is drawn with respect to fraud and more particularly the celebrated dictum of **Jessel MR in Re Rice Gold Washing Company**¹² in these terms:

"The petition contains vague allegations of fraud but I have always understood it to be the rule in equity that where you allege fraud you must state the facts which constitutes the fraud. You are not entitled to say to the other side 'you have defrauded me; you have obtained money by fraud you must state the facts which you say amount to fraud so that the side knows what he has to meet.' I agree that it is not necessary to state the evidence which shows the fraud but you must state facts which constitute fraud."

¹² Supra.

[43] The matter was picked up by then Chief Justice Denis Byron in **Thomas v Stoutt** when he too, on behalf of the Court, said that an allegation of fraud in general terms will not suffice. Instead, it was necessary to particulars of fraud such as definite facts on specific conduct to be pleaded. His Lordship made the further point that such requirements regarding pleadings for fraud are not new but rest on what he termed an “ancient principle” with origins in the case of **Wallingford v Mutual Society and Official Liquidation**.¹³

[44] The mantle was taken further in **Ferdinand Frampton v Ian Pinard et al** by Mr. Justice Hugh Rawlins, as he then was, when he equated fraud, bribery and treating for the purposes of a petition. This is what he said, in part:

“It is my view that the ancient that fraud must be specifically pleaded is also applicable to the pleading of allegations of bribery and treating in elections. They are allegations of dishonest conduct. A petitioner must plead some particulars, either in the petition or in the affidavit in support, to enable the court, and particularly the respondents to know what acts are complained of. The respondents would otherwise be severely prejudiced in their defence. Baptiste J adopted the same principles recently... in the decisions in **Lindsay Fitzpatrick Grant v Rupert Herbert and others** claim No.SKBHCV2004/0182 at paragraphs 24-26 and in **Eugene Hamilton v Cedric Liburd and others**, claim no SKBHCV2004/0183 at paragraphs 29-34.”

[45] As noted before in the John Henry Abraham Petition, as well as the others in which bribery is alleged, the following constitutes the essence of the pleadings in this regard:

1. The First Respondent directly and/or indirectly by himself and in connivance with named persons on his behalf arranged and paid for the transportation of the following persons from various countries to the Commonwealth of Dominica.
2. Provided them the said persons with sums of money to induce them, all electors, to vote in the said election for the First Respondent and other persons in the First Respondent's party in other constituencies, contrary to common law and or section 55 (a) of the House of Assembly (Elections) Act.
3. The particulars of persons bribed relate to La Plaine Constituency, Wesley Constituency and the St. Joseph Constituency.

[46] The nature and extent of the pleadings in this context as contended by the First Respondents has already been noted. But what is the law?

¹³ [1880] 5 App Cas 685.

[47] In a word, the law is grounded in the 'ancient principle' which, as noted above, has been fused or adopted by our Court. And despite the rule that the Court must exercise its draconian power to strike very sparingly, that must be taken and applied in context. The context here is criminal law with the implications and standard of proof.

[48] In the **Ferdinand Frampton** case the context included allegation of bribery and treating. And at paragraph 62, His Lordship Mr. Justice Hugh Rawlins, as he then was, said this:

"There is now a general principle of practice in Court proceedings, which is also applicable to election petitions, that a person who institutes an action should plead sufficient material facts to create a cause of action. A Respondent must know what case he or she must defend. Evidence need not be pleaded because that will come from the affidavits and cross-examination thereon by the oral evidence. Evidence might be given at the trial. If, therefore, a petitioner merely states statutory provisions upon which he or she intends to rely, with little or no material facts, or facts which are vague, the court is entitled to strike out such parts of the petition as disclosing no reasonable cause of action."

[49] The case of **Agarwal v Ghandi**¹⁴ though concerned with a petition involving corrupt practice also make the point regarding the nature and purpose of pleadings in the subject context. Part of the holding of the Indian Supreme Court reads thus:

"Allegations of corrupt practice are in the nature of criminal charges. It is necessary that there should be no vagueness in the allegations so that the returned candidate may know the case he has to meet. If the allegations are vague and general and the particulars of corrupt practice are not stated in the pleadings, the trial of the petition cannot proceed for want of cause of action. The emphasis of the law is to avoid a fishing expedition and a roving inquiry. It is therefore necessary for the Court to scrutinize the pleadings relating to a corrupt practice in a strict manner."

[50] In the context of bribery, treating and undue influence, the onus on the Petitioner is fully explained in **The Powers, Duties and Liabilities of An Election Agent and Returning Officer** is fully explained in these terms"

"Where the petition charges specific bribery, treating and undue influence, the petitioner has been ordered to deliver particulars of the names and the last known or present street address, and number (if any) on the register of the agents of the respondent who bribed, treated, or unduly influenced, and of the persons who were bribed, treated or unduly influenced, also, of the dates when, and the places where, each act of bribery, treating or undue influence took place, also the nature, character and description of each act of

¹⁴ [1987] Supp. SCC 93

bribery, treating or undue influence; and also by which agent, and to which person, each bribe or treat was given, promised or offered, and by which agent, and upon which person, each act of undue influence was exercised or attempted to be exercised.”

[51] Learned counsel for the Petitioners in the face of these authorities, while addressing the Court, pointed to the high standard of pleadings manifested. But the point which many of the authorities make is that quite apart from the requisite reasonable cause of action; the further point is that an allegation of a criminal charge is involved.

[52] In the face of these said authorities, certain questions arise: Are the Petitioners on a fishing expedition; has a reasonable cause of action been shown in relation to bribery and or treating, or both?

[53] In terms of names, there is a great abundance except for the following:

“La Plaine Constituency
14 from New Jersey; (b) 5 from New York; (c) 3 from Atlanta; (d) 6 from Connecticut; (e) 2 from Boston; (f) 11 from Florida; (g) 6 from Maryland; (h) 23 from St. Croix; (i) 9 from Tortola; (j) 3 from Houston/Texas; (k) 3 from Canada; (l) 8 from Guadeloupe; (m) 3 from Antigua; (n) 6 from St. Martin; (o) 24 from St. Thomas; (p) 1 from Venezuela; and (q) 4 from England.”¹⁵

[54] The seemingly mischievous but relevant question must be this: Having regard to the numbers rather than names, how are the Respondents to know, for example who are the 14 persons in the whole of New Jersey, on the one hand, and the single person in Venezuela who were allegedly bribed?

[55] But much beyond the purported abundance of names, there is no idea as to their addresses whether in the constituency with which they are identified or elsewhere.

[56] Payment for transportation is pleaded but nothing more. Likewise, sums of money were paid to “them all electors to vote” for the First Respondent. The questions based on the law are: how much, when and to whom?

[57] The Petitioner, John Henry Abraham, contested a seat in the constituency of St. Joseph, but the petition includes the names of the persons in the Wesley

¹⁵ See for example, DOMHCV2010/0003 at para. 8.

Constituency and the La Plaine Constituency. And the fact that at paragraph 8 refers to “and other persons in the First Respondent’s party in other constituencies does not improve the Petitioners’ case or as Mr. Astaphan puts it: They are irrelevant. The point being that a person who is bribed or treated to vote in a particular way in St. Joseph cannot affect voting in the La Plaine or Wesley Constituency based on the learned counsel for the First Respondents has also referred to the following paragraph of the Petitioner’s affidavit in support filed on 8th January, 2010.

“4. I also now confirm that I will lodge evidence in support of my Petition as soon as this can reasonably be done and in any case according to such orders and within such time as the court may order.”

[58] Learned senior counsel for the First Respondent has characterized the foregoing in this way: “This suggests that at the time of the allegations, the petitioners had no relevant or probative evidence to support the very allegations made in the petition.”

Conclusion

[59] Having regard to the stringent requirements of the pleadings in this context, the Court has come to the conclusion that arguments tendered on behalf of the Petitioners are not viable. The Court therefore agrees with the submissions and the following conclusion advances on behalf of the First Respondents at paragraph 93 of the written submissions:

“93. The Petitioners have completely and absolutely failed to properly plead or perfect the allegation/s of bribery. Instead of the material facts and particulars, which were required by law, the Petitioners pleaded general allegations, the language of the Act, and mere statements of opinion and conclusions. In view of the requirement to plead bribery specifically and fully, and the consequences of a finding of bribery, the pleas of bribery are wholly inadequate and do not disclose a reasonable cause of action.”

[60] And the Court would add that, in so far as bribery is concerned, the exercise is in the nature of a fishing expedition.

[61] Accordingly, paragraphs 8 and 9 of DOMHCV2010/003, paragraphs 8 and 9 of DOMHCV2010/004, paragraphs 9 to 11 of DOMHCV2010/005, and paragraph 12 of DOMHCV2010/006 are hereby struck out.

Treating

[62] In the Petition filed by John Henry Abraham, the matter of treating is pleaded at paragraph 10¹⁶ in these terms:

"The First Respondent corruptly by himself or in connivance with Roosevelt Skerit, Barbara Daley, Bernard Sylvester, Paul Naymont and Hartly Henry and/or by the said Roosevelt Skerit, Barbara Daley, Hartly Henry, Bernard Sylvester and Paul Naymont or on his behalf before the said election directly and/or indirectly arranged and paid for the transportation of the following persons from various countries to the Commonwealth of Dominica and provided them with sums of money to induce them, all electors, to vote in the said election for the First respondent and other persons in the First Respondent's party in other constituencies, contrary to common law or section 56(a) of the House of Assembly (Elections) Act."

[63] As with the pleading relating to bribery, the paragraph goes on to give numbers of persons in certain countries and names of persons in some of the same countries in relation to the constituencies of La Plaine, Wesley and St. Joseph who was allegedly treated.

[64] In terms of the law, section 56 (a) of the House of Assembly (Elections) Act reads thus:

"56. The following persons will be deemed guilty of treating within the meaning of the Act:
a) Every person who corruptly, by himself or by any other person, either before, during or after an election, direct or indirectly, gives, or provides or pays wholly or in part the expenses of giving or providing for, drink, entertainment, or provision for any person for the purpose of corruptly influencing that person, or any other person, to vote or to refrain from voting at the election, on account of that person or any other person having voted or refrained from voting at the election."

[65] In short, the provision is aimed at a person who corruptly by himself or by another person, whether before, during or after an election, directly or indirectly gives or provides or pays, in whole or in part, the expenses for any food, drink

¹⁶ Loc cit.

entertainment or provision to any person in order to corruptly influencing the manner in which a person votes or to refrain from voting.

- [66] Given the fact that the giving of food and drink is an everyday occurrence, the section uses the word 'corruptly' in order to single out the conduct aimed at.

Submissions

- [67] Given the import of the law, the Respondents make no direct written submission with respect to treating. However, the Petitioners note that the Respondents make similar criticisms of the allegations of and in the circumstances their response is the same.

Analysis and conclusion

- [68] It will be recalled that bribery, treating and undue influence were placed on the same footing in terms of the pleadings. Accordingly, since there is no material difference between the pleading relating to bribery and treating except for the use of the word 'corruptly' in relation to the latter, it follows also that there is a lack of material facts using the same line of reasoning. As such no reasonable cause of action emerges from the pleadings with to all of the Petitions.

- [69] Accordingly, paragraph 10 of DOMHCV2010/003; paragraph 10 of DOMHCV2010/004; paragraph 12 & 13 of DOMHCV2010/005 and paragraph 15 of DOMHCV2010/006 are hereby struck out.

Illegal Practices

- [70] Under the above rubric, the following is pleaded at paragraph 11 of the Petition filed by John Henry Abraham:

"11. The First Respondent joint or in connivance with Roosevelt Skerit, Ramona Blackman, Barbara Dailey, Franklyn Lawrence, Bernard Sylvester, Bryon Leblanc and Hartley Henry, induced and/or procured the following persons to vote in the said election knowing that some of them were prohibited by the said Act from voting at the said election by reason of their prolonged absence from Dominica contrary to the common law and/or section 62 (1) (a) of the said Act."

- [71] As in the case of the pleadings relating to bribery and treating, a number of persons and a country are pleaded and the names of certain persons from the constituencies of La Plaine, Wesley and St. Joseph are pleaded.
- [72] The use of the words 'prohibited by the said Act from voting at the said election by reason of their prolonged absence from Dominica' gives rise to a consideration of two enactments. The first is section 62 (1) (a) of the House of Assembly (Elections) Act which states that: "Every person who – (a) votes, or induces or procures any person to vote, at any election, knowing that he or such other person is prohibited by this Act or by any other law from voting at such election is guilty of an illegal practice.
- [73] The use of the word 'prohibited by this Act on any other law' can reasonably be construed as a reference to the Registration of Electors Act of which section 6 prescribes the persons who disqualified from registration as electors. They, in summary, are persons of unsound mind, persons undergoing a sentence of imprisonment in Dominica, persons under sentence of death; or is under a written law disqualified for registration as an elector.
- [74] As an important adjunct to the foregoing section, section 7 of the Registration of Electors Act reads:
- "7. A person registered pursuant to this part shall remain registered unless and until his name is deleted from the register because;
- a) He has died;
 - b) An objection to his registration has been allowed;
 - c) He has been absent from Dominica for a period exceeding five years.
 - d) He has become disqualified for registration as an elector under this Act or any other written law imposing disqualifications for registration as an elector."

[75] In the Application by Kever Dwight Darroux at paragraph 16, the contention is that the alleged illegal practice is misconceived in that neither the House of Assembly (Elections) Act prohibits any person from voting whose name appears on the Register of Electors even if a prolonged absence from Dominica is alleged.

Submissions on behalf of the First Respondents

[76] The following are the written submissions on behalf of the First Respondents appearing at paragraph 141:

"141. The allegation under paragraph 11 is entirely misconceived for the following reasons

- a) All of the persons named were electors on the register, a fact accepted by the Petitioner [see para. 8 of his Petition].
- b) Prolonged absence from Dominica is not known under the Act and in any event cannot prevent or preclude an Elector from voting. Section 27 (2) of the House of Assembly (Electors) Act provides that an Elector is not prevented from voting simply because he she is not a resident in the District on Polling Day.
- c) The Register of Electors is on Polling Day conclusive, and an elector cannot be objected to on Polling Day on the ground of any alleged prolonged absence from Dominica.
- d) The offence prescribed by section 62 (1) (a) [of the House of Assembly (Elections) Act] is not a section 61 offence and therefore even if the offence is established by the Petitioner, it cannot void the First Respondent's election."

[77] The submissions on behalf of the Petitioners at paragraphs 31 to 33 of the written submissions are as follows:

" 31. It is pleaded that the Respondents by themselves or through others induced or procured certain persons to vote in the election knowing them to be prohibited by the Act from voting by reason of their prolonged absence from Dominica. For the reasons just given, the Respondents' objections to this plea on the basis that prolonged absence does not disentitle a person from voting is to be rejected. But the Respondents claim further that this plea ought to be rejected because any finding of the commission of an illegal practice under section 62(1) (a) does not void an election. For this submission, the Respondents rely on section 61 of the Act which disqualifies a person who is convicted of bribery, treating or undue influence or personation from being registered as an elector or voting in an election or being elected as a member of the House of Assembly or if elected of retaining his seat as such member. It is pointed out that a similar disqualification does not attach to someone who is convicted of an illegal practice under section 61. It is respectfully submitted that this submission is misconceived for the following reasons.

32. Firstly, section 61 prevents someone from continuing to be a member if already elected only if convicted of bribery etc. Accordingly, if section 61 founds the Court's jurisdiction to void an election, only a conviction in a criminal court will do. A complaint on a petition of bribery is not enough. But the Respondents do not take this objection. And rightly so since it is trite law that proof of bribery on an election petition voids the election. Fraud unravels everything.

33. Secondly, the Election Court's jurisdiction is not founded in section 61 but in section 65 which provides for the presentation of a petition "complaining of an undue return or an undue election of a member of the House of Assembly", without any limitation in relation to the circumstances which might render a return or an election undue. It is respectfully submitted that it is plain that a candidate who procures persons to vote knowing that they

are not qualified to vote cannot be duly elected since the election will have marred by the presence of illegal votes.”

Analysis and conclusion

- [78] To begin with, the Court considers that the submissions on behalf of the Petitioners take the issue well beyond the narrow compass within which it falls. However the final sentence does contain the essence of the issue. The point is that the Petition is impugning the alleged practice of processing persons to vote knowing that some of them are prohibited from voting. The alleged illegality is absence from Dominica. But this fact in and of itself is not an illegality. It requires the deletion of such a person’s name from the Register of Electors pursuant to section 11 (60) of the Registration of Electors Act having regard to section 7 and 11 (4) and (5) of the said Act. It is not automatic. Indeed, section 7 is clear in its purpose in saying that: “A person registered ... shall remain registered unless and until his name is deleted from the register because ... he has been absent from Dominica for a period exceeding five years.”
- [79] The submission on behalf of the Petitioners that: “... it is plain that a candidate who procures persons to vote knowing that they are not qualified to vote cannot be duly elected since the election will have been marred by the presence of illegal votes” presumes action being taken by the Chief Registering Officer pursuant to section 11 and then in the face of such ‘deletion’ the candidate procures such persons to vote. This is clearly not pleaded by the Petitioner at paragraph 11 of the Petition or elsewhere within the prescribed twenty-one days.
- [80] The Court therefore agrees that with the First Respondents’ argument that paragraph 11 of the Petition is entirely misconceived. The Court also concludes that condition precedent for disqualification under section 61 of the House of Assembly (Elections) Act are conformed to a conviction of bribery, treating or undue influence or personation, or of avoiding, counseling or procuring the commission of the offence of presentation. It is therefore clear that

disqualification under that said section does not embrace the offence under section 62 (1) (a).

- [81] Accordingly, paragraph 11 of DOMHCV2010/003, paragraph 11 of DOMHCV2010/004; paragraph 14 of DOMHCV2010/005 and paragraph 16 of DOMHCV2010/006 are hereby struck out.

Returning voters and Form 27 Oath

- [82] At paragraphs 15 to 18 of the Claudius Stanford Petition and at paragraphs 17 to 20 of Ronald aka "Ron" Green Petition the following is pleaded:

"Returning Voters and the Form 27 Oath"

17. It was well known in the run up to the election that arrangements were being made for Dominican citizens resident abroad to return to Dominica to vote and the question arose as to whether such persons would be eligible to vote even though their names might appear on the voters list.

18. The Petitioner through the United Workers Party objected to the existing electoral list because of the presence of overseas voters who were being brought home/Dominica to vote.

19. Instead of issuing directions to Presiding Officers to require such persons to take the Form 27 oath before voting and/or warning such persons that it was a corrupt practice to accept an inducement to vote for a candidate, whether by way of receipt of a stipend or being provided with transportation to vote, and/or that persons absent from Dominica for five years were ineligible to vote, the Electoral Commission issued a press release on the eve of the elections stating that such persons were eligible to vote and that it was not an offence for registered voters residing overseas to return to Dominica to cast their votes. As a consequence, Presiding Officers did not as a matter of policy require persons who were identified as being resident abroad to take the Form 27 oath.

20. In the La Plaine constituency, of the approximately 51 people returning from overseas to vote, only 14 were asked to take the oath and 37 were not so asked. The Presiding Officer did not draw to the attention of the said remaining 37 voters the requirement under section 7 (c) of the Registration of Elections Act Chapter 2:03 that they were ineligible to vote if they had been absent from Dominica for a period of five years."

- [83] In the Ronald Green Petition, the names of several persons are particularized; while in the case of the Claudius Sanford Petition, there is a single name.

- [84] In the Application by First Respondent, Petter Saint Jean, the contentions are that: the Petitioner has not pleaded that he objected to any votes on polling day or at the preliminary or final count and has not prayed for a scrutiny; no material facts

are pleaded and the allegations disclose no cause of action in relation to paragraph 17; the allegations in paragraph 20 of the Petition disclose no cause of action and are entirely misconceived because there was no determination by the Chief Elections Officer regarding persons absent from Dominica for more than five years, prior to Election Day, there is no provision for objections to persons voting on Election day as alleged, Form 27 Oath is irrelevant; there is no pleading that the Petitioner or the poll clerk or one of his agents or an elector required any elector to take the Form 27 Oath, and there is no provision in the election law which prohibits a person from voting if his name appears on the Register of voters.

[85] In the application by the First Respondent, Ashton Graneau, the contentions are similar to the foregoing on the absence of a reasonable cause of action. However these additional contentions are also recorded:

- iv. In relation to paragraphs 15 and 16 there is no legal basis under the election law for any objection to the existing electoral list because of the presence there of overseas voters who were brought home to vote!
- v. Further, the allegation in paragraph 16 are vague and devoid of material facts.
- vi. Further the Practitioner and/or the UWP failed to invoke the procedure set out by the law for objecting to any person on the electoral list."

[86] In the Application on behalf of the Respondents, other than the First Respondents, the contentions centre on the absence of a pleading relating to an objection on polling day or at a preliminary count and a failure to pray for a scrutiny; in relation to paragraph 17 of the Petition, no material facts are pleaded and the allegations disclose no cause of action, paragraph 20 of the Petition is misconceived for the reasons given. These include the following:

- " (e) The petitioner has failed to plead that he or the poll clerk, or one of his agents or an elector required any elector to take the Form 27 Oath as required by section 37 (2) of the House of Assembly (Elections) Act.
- (f) There is no provision of the election law which prohibits anyone from voting once his or her name appeared on the Register of voters on the ground alleged by the Petitioner."

Submissions

[87] At paragraph 158¹⁷ of the written submissions on behalf of the First Respondent Graneau it is stated in part as follows:

"More specifically in relation to paragraph 18 of the Petition, the First Respondent Ashton Graneau submits that there is no basis in law of any objection to an Elector on Polling Day on the alleged ground that the Elector 'was out of state for a continuous period of five years and over ...' Additionally, even if Bernadette Durand was not allowed to vote, the result of the election in Salybie would not be affected."

[88] As far as the First Respondent, Petter Saint Jean, is concerned the submission reads in part thus:

"The First Respondent Saint Jean relies and submits further in relation to paragraph 20 of the Petition, that the allegation is misconceived. The mere fact that on Polling Day an elector resides overseas is not a basis for objection or disqualification from voting. There must be an objection or determination by the Chief Election Officer to delete names prior to Polling Day. (See section 27 (2) of the House of Assembly (Elections) Act."

Submissions on behalf of the Respondents except the First Respondents

[89] In these submissions, the learned Attorney General, Mrs. Francine Baron-Royer address the contention by the Petitioner, John Henry Abraham, that he objected to the existing voters list though the United Workers Petitioner has failed to plead the material facts regarding such objection and in this connection refers to section 13(1) of the Registration of Electors Act which prescribes the procedure for such objection. The further submission is that the Petitioner has failed to plead that he at anytime invoked the prescribed process.

[90] With respect to the Form 27 Oath, the submission is that the requirement to mandate an elector to take an oath... cannot be and the request must be related to an objection in respect to matters dealt with in the Oath." The submission on the point concludes in this way at paragraph 36:

"Further, even if the voter could properly have been required to take the oath in the existing circumstances, and it was not done, this would be insufficient to void an election. The applicable principles can be distilled from the judgments of Baptiste J in **Lindsay**

¹⁷ In relation to the Petition against Ashton Graneau DOMHCV2010/0005, it is stated at paragraph 128 of the written submissions that the First Respondent relies on the general and specific submissions made on behalf of Kelter Dwight Darroux.

Fitzpatrick Grant v Rupert Herbert et al. These references were made to Lord Denning's propositions on the Law in the case of **Morgan and others v Simpson** and another which are as follows."

"(1) If the election was conducted so badly that it was not substantially in accordance with the law as to elections, the elections is vitiated, irrespective of whether the result is affected or not.

(2) If the election was so conducted that it was substantially in accordance with the law as to elections, it is not vitiated by a breach of the rules or a mistake at the polls provided that it did not affect the result of the election.

(3) Even though the election was conducted substantially in accordance with the law as to elections, nevertheless if there was a breach of the rule or a mistake at the polls and it did affect the result, then the election is vitiated.¹⁸

Submissions on behalf of the Petitioners

[91] The basic submission is that even though section 7 (c) of the Registration of Electors Act contemplates the deletion of names of persons living abroad for more than five years yet by virtue of section 4 (1) of the said Act such persons are not entitled to vote even if they are registered. As it is put: "Thus the fact of registration is not sufficient to found an entitlement to vote. The proposed elector must also be qualified to vote."

[92] With respect to the Form 27 Oath, the requirement in this regard and the context thereof. The submission continues at paragraphs 29 and 30 in these terms:

" 29. It is respectfully submitted that it ought to have been readily apparent to the Commission that any person resident abroad returning for the purpose of voting was likely not to be domiciled in Dominica, or may have become not qualified because of absence for five years or more, or may not have been resident for the requisite period before resignation. Accordingly, there was a danger that the persons returning in droves were not eligible to vote and could therefore unlawfully influence the course of the election. In the circumstances, the Commission acted irrationally and accordingly unlawfully in failing to exercise its power under section 37 to require such persons as a matter of course to take the oath. By failing to do so the possibility existed that the result of the election was unlawfully affected and the election was an undue election.

30. For these reasons, the Respondents objections to the pleadings with regard to the failure to administer the Form 27 oath ought to be rejected."

Analysis

¹⁸ It is indicated at paragraphs 29 and 42 of the submissions of the learned Attorney General that these arguments are adopted to DOMHCV2010/0005 and DOMHCV2010/0006.

- [93] The issues raised in the pleadings centre on the returning voters, objection to such persons voting and the application or non-application of the Form 27 Oath.
- [94] Contrary to the submissions on behalf of the Petitioners, it is the further ruling of the Court that persons living abroad in excess of five years are qualified to vote, unless their names are deleted in accordance with section 7 and 11 (b) of the Registration of Electors Act. And section 4 (1) of that Act does not alter that legal section. That section merely says that a person is qualified to be an elector if on polling day he is qualified to be an elector in the register for the polling district and is on that day registered in the register of electors to be used at the election. Accordingly, the disqualification or non-entitlement would arise if his name is not included on the official register of electors.
- [95] The Chief Registering Officer is fully empowered by sections 11(6) and 15 of the Registration of Electors Act to make removals from the registers but the matter does not end there. In this context therefore, the Court agrees with the submission by learned senior counsel, Mr. Astaphan and the learned Attorney General and the contentions in the Applications that there are no material facts pleaded to support the contention that the Petitioner through the united Workers Party objected to the presence of overseas voters who were being brought home to vote. As such, no reasonable cause of action arises.
- [96] With respect to the Form 27 Oath, section 37 (2) of the House of Assembly (Elections) Act which governs it, provides the taking of such an oath may be articulated by the presiding officer, the poll clerk, one of the candidate or an agent of the candidate or an elector present. The section makes no mention of directions by Electoral Commission. And to submit, as Mr. Mendes, SC does, that "it ought to be readily apparent to the commission that any person resident abroad returning for the purpose of voting was likely not to be domicile," it would be

taking the issue a bit far given the complexity of the principles governing domicile.¹⁹

[97] Therefore on the whole in relation to the pleadings regarding voters and the Form 27 Oath, they are devoid of material facts and do not give rise to a reasonable cause of action.

[98] Accordingly, in DOMHCV2010/005 paragraphs 15 to 18 and DOMHCV2010/006 paragraphs 17 to 20 are hereby struck out.

Return on votes wrongly counted

[99] In the Petition filed by John Henry Abraham against Kelter Dwight Darroux and others, the following is pleaded under the heading: 'Return on votes wrongly counted.' Similarly in the Petition filed by Ronald 'Ron' Green against Petter Saint Jean and others, at paragraph 29 thereof the pleading in this regard is generally along the same lines as paragraph 12 of the Abraham Petition. The pleadings are as follows:

"12. In the premises, the First Respondent obtained an apparent and colourable majority over your Petitioner, whereas in truth and in fact had it not been for the corrupt practices of bribery and treating your Petitioner had a majority of lawful votes of the electors of the said St. Joseph Constituency who voted at the said elections and who were at the time thereof duly qualified by law to vote, and was duly elected as a Representative to serve in the House of Assembly for the said St. Joseph constituency and ought to have been returned as such Representative.

13. Instead of issuing directions to Presiding Officers to require such persons to take the Form 27 Oath before voting and/or warning such persons that it was a corrupt practice to accept an inducement to vote for a candidate, whether by way of receipt of a stipend or being provided with transportation to vote, and/or that persons absent from Dominica for five years were ineligible to vote, the Electoral Commission comprises numbers 5 to 9 Respondents issued a press release on the event of the elections stating that such persons were eligible to vote and that it was not an offence for registered voters residing overseas to return to Dominica to cast their votes. As a consequence, Presiding Officers did not as a matter of policy require persons who were identified as being resident abroad to take the Form 27 Oath."

The Applications

¹⁹ See for example: *Winams v. Attorney General* [1904] AC. 287; *Re Flynn (No. 1)* [1968] 1 WCR 103.

In the Application by Kelter Dwight Darroux filed on 30th March, 2010, the said paragraphs 12 and 13 of the Abraham Petition are addressed on the basis of a failure to indicate that there was no objection to any vote on polling day or at the preliminary or final count and also the absence of a prayer for scrutiny.

Submissions

[100] The submissions by Mr. Astaphan, SC, basically reflect the relevant context of the Application. To this end, he says that paragraph 12 thereof is not a proper pleading and discloses no cause of action, and further there is no pleading that any objection was raised on polling day or to any ballot at any of the counts which followed the vote on polling day.

[101] As far as paragraph 13 of the Petition is concerned, it is submitted that it is "entirely misconceived and discloses no cause of action." It is submitted further that there is no law which imposes an obligation on the commission to issue directions to, or on presiding officers requiring persons who allegedly lived abroad for whatever period of time to take the Form 27 Oath which in any event is "totally irrelevant." The further submission is that giving of any such directions would have involved the Commission exercising a judicial function which in turn would be in conflict with section 8 (1) or 8 (8) of the constitution.

[102] There are no submissions on behalf of the Second to Tenth Defendants or on behalf of the Petitioners.

Analysis and Conclusion

[103] Paragraph 12 of the Petition filed by Mr. John Henry Abraham at paragraph 29 of the Petition filed by Mr. Ronald Green suffers from a lack of material facts. It is therefore a series of loose statements which are supposed to form the basis of the impugning on election. In the circumstances, the Court agrees that no cause of action arises. And further given the nature of the statements in the said paragraph, the Court agrees further that there are no pleadings to reflect

objections to any elector on polling day or to any ballot at the time of counting of the ballots.

[104] Paragraph 13 relating to the issuing of directions by the commission is not new as it has been raised and addressed by the Court. However, the short point in regards to this pleading is as Mr. Astaphan, SC puts it “entirely misconceived.” This rests on the basic principle that a functionary can only exercise powers granted to him which is the case as far as ‘directions’ are concerned. Further, the context and purpose of section 37 (2) of the House of Assembly (Elections) Act and the Form 27 Oath have already been addressed. In any event that form has no relevance to the pleading at paragraph 13 of the Abraham Petition.

[105] The result is that paragraphs 12 and 13 of DOMHCV2010/003 and paragraphs 29 of DOMHCV2010/006 are hereby struck out.

Denial of access to state-owned radio and breach of right to freedom of expression

[106] Denial of access to state-owned radio is a common factor in all of the Petitions, and except for the references to the constituencies that concerns the Petitioner the pleadings are the same. In the Petition filed by Ronald “Ron” Green it is pleaded thus at paragraph 30 to 40.²⁰

[107] In the Petition filed by Ronald “Ron” Green, the following is a summary of the pleadings at paragraphs 30 to 40 ²¹ thereof. It is contended that the stated-owned corporation and the Government Information Service (GIS) were used exclusively by the Dominica Labour Party for political propaganda: its shareholding is owned and controlled by the Government with power to approve directions and controlled by Ministers who approve the Board of Directors. The United Workers Party was denied and/or refused access to the said state-owned radio for their programmes

²⁰ In the other petitions, the relevant paragraphs are: DOMHCV2010/0003 – paras. 14-23; DOMHCV2010/0004 – paras. 12-22; DOMHCV2010/0005 – paras. 19-29; DOMHCV2010/0007 – paras. 8-17.

²¹ In the other Petitions, the relevant paragraphs are: DOMHCV2010/003 – paras. 18-23; DOMHCV2010/0004 – paras. 12-22; DOMHCV2010/0005 in 19-29; DOMHCV2010-0007 – paras 8-17.

and by that pleading breached the Petitioner's right to freedom of expression. It is also contended that the content of the radio programmes displayed – marked bias in favour of the Dominica Labour Party and its candidates which rendered the election on 18th December, 2009, not a genuine democratic election by universal and adult suffrage and function that a large number of people in the constituency of La Plaine listen to the state-owned radio.

[108] It is also pleaded that prior to the election, demonstrations were staged by both opposition parties in an attempt to gain access to promote their programmes and policies to the electorate.

[109] With respect to the period immediately prior to the election, it is contended that on 17th and 18th December, several advertisements were served promoting the activities of the Dominica Labour Party while in contrast two advertisements delivered to the state on behalf of the United Workers Party on 17th December were not broadcast.

[110] The matter of the purchase of "all of advertising and programming air time" from Kairi FM, a private radio station, the Dominica Labour Party and/or the Directors of the Corporation is pleaded at paragraph 38. And further still, it is contended that the facilities of GIS were put at the disposal of the Dominica Labour Party which was calculated to handicap the Petitioner and influence the results of the election.

[111] In all of the Applications on behalf of the First Respondents, the subject allegations are addressed in similar mode. In the Application by Petter Saint Jean at paragraphs 30 to 38, the matter is addressed and a summary is as follows: the allegations are misconceived, vague and generalized and disclose no cause of action, the UWP or Petitioner had no legal or constitutional right to free and access to the state-owned radio; the provisions of the Dominica Broadcasting Act are not pleaded; no material facts to give rise to cause of action are not pleaded; no material facts pleaded relating to the control of the Corporation by the relevant

Minister; no material facts pleaded which disclose a cause of action against the corporation or the Government of the Commonwealth of Dominica; the manner in which the corporation was used exclusively for the political propaganda of the Dominica Labour Party; the alleged denial of access to the UWP or the Petitioner; the alleged policy of the corporation and the attendant material facts as to formulation and execution; the alleged or any use or abuse of section 13 of the Act, any interference, directions, interference on instructions to the Board of Directors of the Corporation by the Minister, the First Respondent or any member of the Dominica Labour Party; the alleged abuse of the state media by the Dominica Labour Party in favour of its candidates; any alleged agency or conspiracy between the Board of Directors of the Corporation and the Petitioner and any member of the Dominica Labour Party.

[112] It is also contended by the First Respondents that the allegations by the Petitioner constitutes an abuse of process for the following reasons: the Dominica Labour Party had no greater access to the state-owned radio and was not allowed to use the facilities of the Corporation or broadcast any live meeting or rallies during the general election; the policy issued by the Board of the Corporation applied to all political parties including the Dominica Labour Party; the allegation concerning the two advertisement mentioned at paragraph 37 of the Petition discloses no material facts and/or is vague and embarrassing; 17th December, 2009, was a day before the general election and the Petitioner has failed to plead that the results of the general election were or may have been affected by this alleged failure to broadcast two advertisements, and the Petitioner has failed to plead that by broadcasting two advertisements for the DLP two days prior to the general election would have affected or materially affected the result of the general election.

[113] Finally the First Respondent contends that the Petitioner had deliberately sought to mislead the Court by failing to or mention the following material facts: The Petitioner and the UWP and/or their agents had full access to the Q 95 radio, a local radio station which broadcasts live on the internal, Q 95 has near island-wide

coverage via channel 95 on the Marpin Television and on SAT Television; the corporation broadcast 9 live events for the UWP between 26th May, 2009 and 6th November, 2009; the corporation broadcast no live events for the DLP in 2008 and 4 live events for the Dominica Labour Party between June and November, 2009; and that during the broadcast on 19th November, the Prime Minister announced the date of the general election, and the Corporation's news desk carried news items of and concerning the UWP almost on a daily basis from the date of the announcement of the election to the date of the election.

[114] The contentions reflected in the Application on behalf of the Second to Eleventh Respondents (in the Ronald "Ron" Green Petition), are along the same lines as those of the First Respondent Petter Saint Jean. Likewise, the Application by the other Respondents to the remaining petitions are also along the same lines as those of the First Respondent in the said Ronald "Ron" Green Petition.

[115] The relevant paragraphs of the Applications on behalf of the other Respondents are as follows: DOMHCV0003/2010 paragraph 17 (by implication, given the absence of a clear indication, these submissions made on behalf of the Ninth Respondent also relies on paragraphs 10 -13 above); DOMHCV0004/2010 paragraph 6 (these submissions are made by the Ninth Respondent, the Dominica Broadcasting Corporation); DOMHCV0005/2010 paragraph 12.4 (these submissions are made by the Second to Eleventh Respondents); DOMHCV0007/2010 paragraph 8 submissions are made in behalf of the Eight Respondent, the Dominica Broadcasting Corporation).

Submissions on behalf of the First Respondents

[116] Mr. Anthony Astaphan, SC begins with a summary of the general allegations in the Petitions²²: These are: Exclusive use of the Corporation and GIS of the principle purpose of the Dominica Freedom Party; the United Workers Party was denied

²² At paragraph 106 of the Corrected Submissions.

access to the Corporation's facilities; display of bias in the Corporation's programming in favour of the Dominica Labour Party; advertisements broadcast promoting the activities of the Dominica Labour Party two days prior to the election; and the failure to broadcast two advertisements for the United Workers Party one day before the election.

[117] Against the allegations, it is the contention of learned Senior Counsel that no material facts or particulars are pleaded or referred to in the Petitions or Affidavits in Support to substantiate "these vague and conclusionary allegations."²³

[118] With respect to the Corporation, it is submitted that it is not disclosed in the pleadings whether its board or any of its officers acted in bad faith or committed any unlawful act or were responsible for the alleged "policy" or any of the allegations made by the Petitioners. According to Mr. Astaphan, such a failure to plead a specific allegation or a cause of action against the Board or particular officer or agent of the Corporation is a serious flaw.²⁴

[119] A further failure to plead particulars is highlighted with respect to the allegation by the Petitioners that the GIS facilities were put exclusively at the disposal of the Dominica Labour Party.

[120] In terms of the right to expression, it is accepted as a constitutional right, but the contention is that the rights protected by the constitution are personal rights as distinct from 'collective' constitutional rights.²⁵

[121] It is the further submission of learned senior counsel that there is no constitutional right of unrestricted or unfettered right to use the facilities of or access to the state-

²³ Ibid at paragraph 107.

²⁴ Ibid at paragraph 108-109.

²⁵ For this proposition, section 16 of the Constitution, *Spencer v Attorney General* [1999] 3 LRCI and *Matedeen v Pointu* [1998] 3 WLR 18, 25 (f) to 26 (b) are cited.

owned media, or live broadcasts on a state-owned radio station whether during a general election or otherwise. According to Mr. Astaphan the test is equal access.

[122] The question of access to Q 95, a radio station, is also addressed by learned senior counsel together with the evidence of Mr. Lennox Lawrence.

[123] Apart from the foregoing, learned senior counsel also makes specific submissions²⁶. In this regard, it is stated that the First Respondent (being Kolver Darroux) relies on two grounds: the allegations disclose no cause of action and the allegations are an abuse of process.

[124] The contentions that the allegations disclose no cause of action rest on the following reasons: Absence of any sufficient material facts or particulars pleaded, except for the broadcast relating to two days prior to the election there is no specific pleading relating to the general elections; except for the result relating to the two advertisements; there is no pleading relating to any or failure on refusal during the election; failure to plead also formulated the exclusive use of the state radio; failure to plead bad faith or any act or decision which violated the Dominica Broadcasting Corporation Act; failure to plead the nature and content of the two advertisements that were refused; failure to plead any specific failure to broadcast except for the two advertisements, and it is indicated at paragraph 21 of the Petition that the two advertisements had nothing to do with programmes, policies or political alternatives of the Petitioner or the United Workers Party.

Submissions on behalf of the Respondents other than the First Respondents

[125] In her submissions²⁷ on behalf of the Respondents, other than the First Respondents, the learned Attorney General²⁸ casts doubt on the relevant portions

²⁶ See para. 145-147 of the corrected submissions on behalf of the First Respondents.

²⁷ The submissions are geared towards DOMHCV2010/0003 and, as noted before, it is stated at paragraph 18 of the submissions as follow: "One proposes to deal with the applications to strike in the following manner, the allegations made in DOMHCV2010/0003 will be dealt with first and

of the Petitions. It is her contention that the allegations against the Corporation must be strike out for a number of reasons, including the absence of material facts and other identified issues relating to the pleadings. The allegations against the Corporation are also characterized as an abuse of the process of the Court. It is further contended that no material facts supporting a cause of action has been pleaded against or of in respect of the Government Information Service.

Submissions on behalf of the Petitioners

[126] At paragraph 34 of the submission on behalf of the Petitioners, it is stated that the Petitioners complain that the Corporation treated them unfairly and in breach of their right to freedom of expression by giving preferential treatment to the Dominica Labour Party during the course of the run up to the elections. It is further stated that the ways in which the differential treatment arose is set out in the petitions. The authorities relied on are: **Observer Publications Ltd v. Matthew** [2001] UK PC 11; **Cable and Wireless (Dominica) Limited v Marpin** [2008] 1 WLR 1123; **De Freitas v Permanent Secretary, Ministry of Agriculture, Fisheries, Lands and Housing** [1998] 53 WIR 131; **Central Broadcasting Services Ltd v Attorney General of Trinidad and Tobago** [2006] 1 WLR 2891. Particular reliance is placed on **Suraj Rambachan v Trinidad and Tobago Television** (HCA 8789 of 1982) where similar unequal treatment was meted out to opposition parties by a state corporation during an election season.

[127] The Submissions go on to say that the Respondents challenge the pleading on a number of different grounds. These are identified as: the focus of the complaint, the fact that there is no complaint against the Dominica Labour Party, no pleading relating to the election results, no constitutional right to unrestricted right of access or an unfettered right to use the facilities of the state-owned radio, the evidence addressed shows that the Petitioners were given access and there was no

then adopted where appropriate in respect of Petitions 4, 5, 6 and 7 and matters specific to each petition will be dealt with separately.”

²⁸ See paragraphs 23 to 25 of the submissions in respect to all Respondents save the First Respondent.

unequal treatment, and there is no rational basis for the voiding of the election because of the breaches of the Petitioner's constitutional rights.

[128] As far as the focus of the focus of the complaint is concerned, Mr. Mendes, SC, argues in effect that the fact of the existence of the Corporation means that someone must act on its behalf. As such, there is no obligation to identify whether the complaint is against the Board, the Corporation or a particular officer or agent of the Board.

[129] With respect to the fact that there is no complaint against the Dominica Labour Party, the contention is that such failure to implicate the party directly in the discriminatory treatment is not a flaw in the pleading once its nature is appreciated and properly represented.

[130] Concerning the fact that the Petitioners have not pleaded that the results have been affected, the submission is that there is no such requirement. It continues: "The onus is on the Petitioners only that the election was due. It is for the Respondents to defend, if they wish, by alleging that in any event the result was not affected and so no relief should be granted."

[131] Regarding the access to state radio, the argument is that there is no claim for an unrestricted or unfettered right of access. Rather, it is equal access which was denied. Further, on the question of evidence, reference is made to the fact that evidence was addressed to show that the Petitioners were access and there was no unequal treatment. According to learned senior counsel: "The evidence is clearly in dispute and can only be resolved at a trial. It is an abuse of process for the Respondent to attempt or an application to strike out pleadings to raise evidential issues and to seek in effect a summary trial of the facts."

[132] The submissions end in these terms:

"40.The Respondents say finally that there is no rational basis for the voiding of the election because of the breaches of the Petitioners' constitutional rights. They say that it

was necessary for the Petitioners to plead that as a consequence the election was a sham or a fraud. It is respectfully submitted that there is no such requirement in law and this Honourable Court is reminded of the court's broad constitutional jurisdiction to redress breaches of constitutional rights which there is no reason to think excludes the voiding of an election. There are other complaints in the Petitions of breaches of election law and a court might be minded, after having heard all the evidence, to exercise its constitutional jurisdiction to declare an election void. Whether such relief is appropriate cannot and ought not to be determined at an interlocutory stage when all of the evidence has not yet been led."

Analysis

[133] The nature and extent of the pleadings and the submissions by all sides require a re-focus. The Petitioners raise a number of issues regarding what they consider to be denial of access to state radio and breach of their right to freedom of expression. These matters, it is claimed, render the election unfair to the Petitioners. In summary, the Petitioners allege that: there was exclusive use of the state-owned radio by the Governing Dominica Labour Party, the opposition United Workers Party was denied or refused access and opportunities to use the radio for their programmes by which policy the Dominica Broadcasting Corporation Act was breached, a large number of persons listen to the state radio during the campaign, a marked bias was displayed during the campaign in favour of the Dominica Labour Party and its candidates, the misuse of the state media by the governing Dominica Labour Party rendered the election other than a secure democratic election by universal and adult suffrage, there were protests by the opposition parties in an effort to gain access to the state radio prior to 18th December, 2009, there were activities promoting the activities of the Dominica Labour Party 16th and 17th December, an advertisement was submitted to the state radio on 17th December was paid for but it was never aired, the Dominica Labour Party and/or the Directors of the Dominica Labour Party apart from denying access to the state-owned radio to the opposition purchased all the advertising and programming airtime from Kairi FM a privately owned radio station, whose signals are also available on television and the facilities of GIS were used exclusively by the Dominica Labour Party.

- [134] Given the foregoing, it is the Respondents' contention that no material facts or particulars are pleaded in the Petitions and the Affidavits in Support. It is contended further that there is no right to unfettered or unrestricted right of access to state radio whether during an election or otherwise. Rather, the test is equal access.
- [135] On the other hand, the Petitioners are saying that their Petitions are in order and that the issues raised by the Respondents such as a failure to identify who acted on behalf of the Corporation; the failure to implicate the Dominica Labour Party in the discriminatory treatment and failure to plead results and not flaws in the pleadings. It is also contended that there is no claim for unfettered or unrestricted right of access but equal access which was denied. Finally it is argued that given "the Court's broad constitutional jurisdiction to redress breaches of constitutional rights there is no reason to think [this] excludes the voiding of an election."
- [136] It is necessary to return to a fundamental statutory rule which is that a Petition in these circumstances must be "presented within twenty-one days after the return made by the returning officer." This is the mandate of section 68 (1) (a) of the House of Assembly (Elections) Act. It is final and there is no discretion in the Court modify²⁹. At the same time, and consequentially, the petition must be completed together with affidavits in support within the said prescribed time. Such a Petition must disclose a cause of action. Justice Rawlins finds it in the negative: "If therefore, a petitioner merely states the statutory provisions upon which he or she intends to rely, with little or no material facts, or with facts that are vague, the court is entitled to strike out such parts of the petition as disclosing no reasonable cause of action."³⁰ And the learning also shows that the rule that the court with its draconian power to strike out should slow the drive a person from the seat of Justice cannot serve as a house of refuge.

²⁹ See also *Ferdinand Frampton v Ian Pinard et al DOMHCV2005/0149* at para. 31 per Justice Hugh Rawlins, as he then was.

³⁰ *Ferdinand Frampton v Ian Pinard*, *supra* at para. 62.

- [137] The Court accepts that given the nature of a corporation being akin to a company must necessarily act through a person and as such it is not necessary to identify, in these circumstances, who carried out certain actions. The Court also agrees that the failure to implicate the Dominica Labour Party directly in the discriminatory treatment is not a flaw in the pleading so long as its nature is appreciated and properly represented.
- [138] The point must be made *ab initio* that the Petitioners' pleadings on the matter of access to state radio alleges denial or refusal of access to same. Therefore, the question of unequal treatment does not arise in this context.
- [139] According to the Petitioners' pleadings, the matter of denial or refusal of access arises because of exclusive use of the station by the governing Democratic Labour Party, bias in the programmes as far as the elections are concerned, the control of the Corporation's Board by the relevant Minister and the refusal to air advertisement submitted on 17th December, 2009.
- [140] These pleadings go back to first principles in that there is an insufficiency of material facts pleaded to give rise to a cause of action. In other words, at the expiration of the twenty-one days the pleadings were not perfected in order to give rise to a cause of action.
- [141] As far as the Court can determine, the only part of the pleading which addresses the question of refusal relate to the advertisement submitted on 17th December, 2009. In this regard, a few questions arise: 1. what is the rule, practice or direction regarding such advertisements; 2. what is the context of the advertisement; 3. at what time on 17th December, 2009 was submitted or airing on the same day or the next, was this advertisement critical to the election of the petitioner?
- [142] These are material facts which should have been pleaded as directed by the law. As Mr. Justice Hugh Rawlins noted, merely referring to the legislation and giving

basic facts will not suffice. And as noted above, the requirements in this regard are not in doubt.

[143] By various orders and directions of the Court, the Petitioners were given liberty to respond to any affidavits filed by the Respondents on or before 9th April, 2009, which was later extended to 14th April, 2009. On that date, John Henry Abraham of St. Joseph in the parish of St. Joseph filed an affidavit in reply in which, *inter alia*, he sought to answer paragraphs 8 to 12 of the affidavit of Shermaine Green-Brown. This is what he deposed:

"5. In answer to paragraphs 8 to 12 of the Affidavit of Shermaine Green-Brown in support of the Applications by the Respondents herein, I say that even though I admit that prior to the announcement of the date of the election there live broadcasts of events of the UWP and the Freedom Party (paid for by those parties) and that during the election period there were news items carried on the DBC radio concerning the UWP and the Freedom Party, it is blatantly false to state that the Dominica Labour Party (D.L.P.) had no greater access to the Dominica Broadcasting Co-operation (D.B.C.) and that the said D.L.P. was not allowed to use nor did it use the facilities of the D.B.C. during the General Election."

[144] John Henry Abraham is therefore now clear as to what his complaint is. But this is on 15th April, 2010, long after the twenty-one days prescribed to perfect his Petition had expired. And his complaint is not denial or refusal of access to the state radio but unequal access.

[145] It is also of some import to note that Ms. Shermaine Green-Brown, Acting General Manager of the station corroborates the Petitioner Abraham's evidence in so far as access is concerned. In fact, she deposes that: "The Corporation broadcast live events for the UWP between 26th May, 2009 ad November 6, 2009. See Annex A exhibited hereto."

[146] One of the central matters pleaded at paragraph 37 of the Abraham Petition is that of advertisements submitted to the studios of the state radio to be aired prior to the election on the following day. Some questions in this regard have already been posed in terms of the pleadings; but Lennox Lawrence of Gominier, Deputy Chairman of the Dominica Broadcasting Corporation provides one answer with

respect to the said advertisements. This is what he deposed at paragraph 13 of his Affidavit in Response:

"I received the advertisements mentioned in paragraph 9 of the affidavit around 1 pm or thereabouts on the very day before the General Election to review. I reviewed the advertisements and approved them. If I recall correctly, these advertisement related to a musical event to be held a night before the General Election in the constituency of Salybia, and not to any political message or policy."

[147] The evidence goes to the time factor and the content of the advertisements. But at the same time, however, the Petitioner should have pleaded material facts to build a cause of action.

Denial of access to Kairi FM and Q 95

[148] These matters are pleaded in the context of denial or refusal of access to state radio. But it is common ground that both of these entities are privately owned and operated. There is nothing in the Petition or otherwise to suggest state ownership. Moreover, the allegation is against the Dominica Labour Party which is not the state of the Commonwealth of Dominica.

[149] It is therefore the conclusion of the Court that the pleadings relating to the radio stations Kairi FM and Q 95 are irrelevant as, *inter alia*, they are not agents of the state so as to trigger the state action criterion.

Breach of the right to freedom of expression

[150] It is common ground that section 10 of the Constitution of the Commonwealth of Dominica guarantees freedom of expression.

[151] The Petitioners' contention is that of the Dominica Broadcasting Corporation involving denial and/or refusal the United Workers Party of which the Petitioners are "candidates" breached the Dominica Broadcasting Corporation Act as well as the Petitioner's right to freedom of expression.

- [152] This is doubted by Mr. Astaphan, SC, who contends that there is no such creature known as an unfettered right of access to the state media must fall as an ancillary right or a right incidental to freedom of expression. Another, constitutional principle that flies in the face of the right claimed is that no right under the Bill of Rights is absolute given the numerous exceptions prescribed plus the power of Parliament to derogate from such rights, sometimes by the ordinary law making process.³¹
- [153] The other point is the allegation of denial or refusal of access (as distinct from unequal access) which has now surfaced, is that as concluded before, it lacks material facts to raise a reasonable cause of action. It has not changed by what Mr. Lennox Lawrence has deposed. Further, it must be considered also that there are not proceedings under the enforcement provision of the Bill of Rights where mere allegation can trigger the review count. This allegation is contained in a Petition and the rules are clear on the matter of material facts to support an allegation.
- [154] Learned senior counsel has placed reliance on a number of cases noted above. However, the point about these cases is that they are distinguishable and the facts were initiated under the enforcement provision of the Bill of Rights.
- [155] The **Observer Publication Limited** case was concerned with the refusal to grant a broadcast license; the **De Freitas** case concerned a challenge to legislation imposing a fetter on the freedom of speech of a police officer; and the **Cable and Wireless** case concerned a statutory monopoly in the face of a right to freedom of expression.
- [156] This leaves the **Rambachan** case which offers a ray of hope which then fades. It fades because in that case there was an absolute denial of access to broadcast or broadcast on television by certain persons or groups of persons. This was held to

³¹ See for example section 10 (2) of the Constitution of the Commonwealth of Dominica.

be unconstitutional with the result that the Court ordered that a policy be drawn up to address the situation. The order was in these terms: "T.T.T by its Board of Directors and General Manager prepare a statement of policy regarding political broadcasting which to all recognized political parties broadcasting time reasonable both as to number of broadcasts and director of each broadcast."

[157] In the Petitioners' case, it is clear from their own affidavits that they were given access to the state radio over time. As it turned out, their concern was unequal access. Therefore, the allegation of denial or refusal of access does not give rise to a cause of action as what is pleaded amounts to a bare statement without supporting material facts.

[158] In the result in DOMHCV2010/0003 – paragraphs 14 to 21; DOMHCV 2010/0004 – paragraphs 12 to 20; DOMHCV20100005 – paragraphs 19 to 29; DOMHCV2010/0006 – paragraphs 30 to 40 and DOMHCV2010/0007 – paragraphs 8 to 17 are hereby struck out.

Disqualification

[159] The question of disqualification for election is confined to two Petitions being those of Ronald Green and Maynard Joseph.

The Ronald Green Petition

[160] In the Ronald Green Petition at paragraphs 9 and 10 the following is pleaded:

"9. The First Respondent is and was at all material times by virtue of his own act, under acknowledgement of allegiance, obedience and/or adherence to a foreign power or state, namely the Republic of France, of which he was at all material times a citizen and the holder of a passport issued to him between 2000 and 2002 or thereabouts and was then incapable and disqualified from being nominated and elected as a representative in the said election.

10. Prior to his nomination, the First Respondent pursuant to section 15 of the House of Assembly (Elections) Act Chap. 2:01 falsely declared in a statutory declaration, that he was not by virtue of his own act under any acknowledgement of allegiance, obedience or

adherence to a foreign power or state and that he was qualified to be nominated as a candidate for election to the House of Assembly for the constituency of La Plaine."

The Maynard Joseph Petition

[161] The pleadings by the Petitioner regarding the First Respondent's Roosevelt Skerrit's disqualification for nomination and election are set out at paragraphs 7 (1) to (9) of the said Petition. However, for present purposes paragraphs 7 (1) and (2) shall suffice. They are in these terms:

"(1) The said Roosevelt Skerrit at the time of his nomination and at all material times, was a person by his own act under an acknowledgement of allegiance and/or obedience and/or adherence to a foreign power or state, namely the Republic of France, and this was not qualified and was disqualified from being nominated, and from being elected and/or returned as a member of the House of Assembly for the said constituency of Vieille case in the said election.

(2) The said Roosevelt Skerrit, by his public pronouncement made... on 2nd day of December, 2009, published through radio and other media declared that he is a citizen of France, a foreign power on state since January, 1972 and further declared that he is the holder of a passport issued by the government of France."

[162] In the Application by the First Respondent under the specific grounds, the contentions that: paragraph 7 (1) of the Maynard Joseph Petition merely recites the language of the Constitution without any material facts pleaded; subparagraph 7 (3) is completely false and misleading; the law and the Constitution of the Commonwealth of Dominica does not preclude any person from being nominated on Nomination Day simply on the basis of an allegation of disqualification by politicians or otherwise; subparagraphs 7 (5) to 7 (7) are matters of opinion and devoid of material facts; and the purported notice of disqualification was published in the SUN on 14th December, 2009, and not the 10th, and well after Nomination Day. Therefore, the allegation that the notice was published prior to Nomination Day is patently false.

[163] With respect to Ronald Green Petition under specific grounds, the contentions are: the Petitioners has failed to plead any material facts, the relevant provisions of French law as material facts; and the specific acts of the Applicant/First

Respondent under French law which show, even remotely, that under French law the Applicant/First Respondent was by virtue of his own act under any acknowledgement of allegiance, obedience or adherence to the Republic of France.

Submissions

[164] Mr. Anthony Astaphan, SC, makes the following submissions on behalf of First Respondents, Petter Saint Jean and Roosevelt Skerrit at paragraphs 94 and 95 of his written submissions:

"94. It is settled law that:

- a. The question whether a person owes or is under an oath or acknowledgment of allegiance to a foreign state or power is a question to be determined in accordance with the provisions of the applicable foreign law. [See **Sykes v Cleary and Others** [1992] 176 CLR 77 and **Spencer v Yearwood and Others** No. ANUHCV2003/0139].
- b. The relevant provisions of the foreign law, and the alleged acts which the Petitioners alleged caused or gave rise to the alleged oath or acknowledgment of allegiance to a foreign power or state must be specifically pleaded as material facts. [See **Germany Trust Company of New York v Hannay & Co** [1918] 2 KB 623 and **Lazard Brothers and Company v Midland Bank Limited** [1933] AC 289.

95. The Petitioners Maynard Joseph and Ronald Green have not in the Petitions against Roosevelt Skerrit and Petter Saint Jean pleaded the relevant provisions of the foreign law or alleged specific acts committed by Roosevelt Skerrit and Petter Saint Jean under the foreign law which allegedly cause or gave rise to the alleged oath or acknowledgment. These are fatal failures. [See **Hari ShankerJain v Gandhi** [2002] 3 LRC 562].]"

[165] On the other hand, Mr. Douglas Mendes, SC, advances the following on behalf of Petitioners, Ronald Green and Maynard Joseph at paragraphs 14 to 16 of his written submissions:

"Foreign Allegiance

14. The Respondents Roosevelt Skerrit and Petter Saint Jean complain that the Petitioners have not pleaded the specific acts committed by the Respondents or the relevant provisions of the foreign law which give rise to the alleged acknowledgment of foreign alliance. For these reasons they say the pleading is fatally flawed. The Petitioners respectfully disagree.

15. By Section 32 of the Constitution of the Commonwealth of Dominica a person is disqualified from being elected as a Representative if he "is by virtue of his own act, under any acknowledgment of allegiance, obedience or adherence to a foreign power or state." In both petitions it is pleaded that the Respondents are citizens of France and the holders of French passports. In the Maynard Joseph petition, it is specifically pleaded that Mr. Skerrit is a French Citizen by French law and that he has used his French passport "on the basis of that citizenship in acknowledgement of allegiance and/or obedience and/or adherence to a foreign power or state: (Para 7(3)). Similarly, in the

Ron Green petition it is pleaded that Mr. Saint Jean "is and was at all material times by virtue of his own act, under acknowledgement of allegiance, obedience and/or adherence to a foreign power or state, namely the Republic of France, of which he was at all material times a citizen and the holder of a passport issued to him between 2000 and 2002 or thereabouts and was thus incapacitated and disqualified from being nominated and elected as a Representative in the said election." In both cases, therefore, it is clear that all the elements of the disqualification have been pleaded. The acts of the Respondents on which reliance is placed are pleaded viz. citizenship and the obtaining or use of a passport and that as a consequence the Respondents are under acknowledgement of allegiance, obedience and/or adherence to a foreign power or state. The Respondents are accordingly fully informed of the case they have to answer.

16. To the extent that it may be necessary to prove French law in order to establish such acknowledgement, that is a matter of evidence to prove the material averment, namely the state of being under such acknowledgement by virtue of one's own act. The pleading is complete. All that is left is proof by evidence. It is respectfully submitted that it would be the height of pedantry to require that chapter and verse of French law to be pleaded in order to found the cause of action. All that need be pleaded, it is respectfully submitted, is the effect of French law which in this case is that because of citizenship and/or the obtaining and/or use of a passport, the Respondent is under the required acknowledgement."

Standing

- [166] In the Application of the First Respondent, Petter Saint Jean issue is taken with the standing of the Petitioner to file such proceedings and then with the content of the said Petition.
- [167] Insofar as standing is concerned, the First Respondent's contention, in essence, is that the Petitioner is a citizen of the United States of America, holds a United States passport and has never publicly declared that he received a certificate of renunciation approved or issued by the Secretary of State as required by the law of the United States of America.³²
- [168] Under section 65 (a) of the House of Assembly (Elections) Act on election may be presented "some person who voted or had a right to vote at the election to which the petition relates..." And in the subject Petition at paragraph 1, it is stated that "The Petitioner Ron Green is a person who voted and was a candidate..."

³² See: Notice of Application on behalf of the First Respondent at paragraphs.

[169] There is nothing in the First Respondent's Application or in the Application on behalf of the other Respondents to suggest that Ronald Green did vote or had a right to vote at the election to which the Petition relates.

[170] It is therefore the ruling of the Court that Ronald Green had standing to present the subject Petition.

Analysis

[171] It is clear that as far as Mr. Astaphan, SC, is concerned, both Petitions must fail because of the absence of material facts and the relevant portion of French law. Specifically in the case of Maynard Joseph the notice of disqualification is of no effect as it was published after nomination day.

[172] On the other hand Mr. Mendes, SC, for the Petitioners is saying that having regard to the content of section 32 of the Constitution of the Commonwealth of Dominica, the elements of disqualification have been pleaded by dint of reliance of citizenship and obtaining and use of a passport and the consequences that flows therefrom. And learned senior counsel submits further that fact-finding is and the purpose of these proceedings and hence his conclusion that the pleadings in both cases is complete. Further consideration must now be given to material facts pleaded – citizenship and passport and pleading from French law.

Citizenship and Passport

[173] In the case of Mr. Roosevelt in DOMHCV0007/2010, the fact of citizenship is not denied having been acquired in his infancy. However, the matter of the passport is rejected in the Application filed on 30th March, 2010. However in ANNEXE C to the said Application, being a letter to "Electors" dated 17th December, 2009, the matter of "my possession of a foreign passport" is raised. But nothing more is said except that: "Despite what you have heard I am validly nominated and your votes for me will not be thrown away."

[174] In the case of Petter Saint Jean, in the face of the allegations in the Petition that he is a French citizen and holds a French passport issued somewhere between 2000 and 2002, he dwells on the Petitioner's citizenship of the United States of America. He did not address the pleadings directly in this regard.

Pleading French law

[175] It is the First Respondents' pleading that failure to plead French law in this context is fatal and reliance for this proposition is placed on the case of **Hari Shanker Jain v Ghandi**³³ which carries a very strong ration in this connection.

[176] The case involved an Italian national, the Respondent, who married an Indian returned and thereby obtained citizenship of India by registration. Subsequently, the Respondent contested elections to the Lor Sabha and was elected. This was challenged on the ground that the acquisition of citizenship of India was incorrect since under Italian law the Respondent could not renounce her citizenship. The Citizenship Act 1955 was also challenged.

[177] The Respondent contended that the election petitions did not raise any issue in the High Court. The Court agreed and held that the applications did not raise any triable issue and the certificate granted to the Respondent was find and binding and could not be questioned on an election petition.

[178] The appellants appealed to the Supreme Court and disputed the certificate of citizenship issued to the Respondent and argued that being Italian the Respondent did not satisfy the prerequisites for entitlement to registration as a citizen of India and was not an Indian citizen.

[179] On the question of Italian law, this is what the India Supreme Court held:

³³ [2002] 3 LRC 562.

"(3) Italian law was foreign law as far as the Indian courts were concerned. Sections 45 to 84 of the Evidence Act permitted proof being tendered and the opinion of experts being adduced in evidence as proof of a point of foreign law. Under Ord VI, r 2 of the Code of Civil Procedure 1908 pleadings had to contain a concise statement of the material facts relied upon, but not the evidence nor law which might be applicable. The rule against pleading law was restricted to only that law of which the court was bound to take judicial notice. As the court did not take judicial notice of foreign law, that had to be pleaded as fact, requiring proof as a question of fact. A plea based on a point of foreign law had to satisfy the requirements of pleading a material fact in an election petition filed before the High Court. In the instant case, the two election petitions did not satisfy such requirement. The averments made therein did not go beyond making bald assertions. The election pleadings did not give any indication of the Italian law on which the averments made were based, whether statutory enactment or any other provision or principle having the force of law in Italy (see paras [27] - [28], post). *Guaranty Trust Company of New York v Hannay & Co* [1918] 2 KB 623 and *Lazard Brothers & Co v Midland Bank Ltd* [1933] AC 28 applied."

[180] With all the foregoing said, the point about the case is that it is not in *pari materia* with the laws of the Commonwealth of Dominica. In particular, the Code of Civil Procedure 1908 prescribes the content of pleadings and since the election pleadings did not give any indication of the Italian law or which the averments were based, the requirements were not satisfied.

[181] In this conflict of laws situation some of the learning from **Dicey, Morris and Collins on the Conflict of Laws** is as follows at paragraph 9 – 025:

"Burden of proof.

The burden of proving foreign law lies on the party who bases his claim or defence on it. If that party adduces no evidence, or insufficient evidence, of the foreign law, the court applies English law. This principle is sometimes expressed in the form that foreign law is presumed to be the same as English law until the contrary is proved. But this mode of expression has given rise to uneasiness in certain cases. Thus in one case the court refused to apply the presumption of similarity where the foreign law was not based on the common law, and in others it has been doubted whether the court was entitled to presume that the foreign law was the same as the statute law of the forum."

[182] In the face of the state of the law in this regard, the learned authors suggests the following:

"In view of these difficulties it is better to abandon the terminology of presumption, and simply to say that where foreign law is not proved, the court applies English law. More recently, the issue was examined in very great detail by the High Court of Australia, in the context of a case in which there was disagreement upon whether the precise content of foreign law had been proved, whether (if not) it was open to an Australian court to interpret a foreign rule of statute law according to the same canons of construction as would be brought to bear on a local statute cast in the same terms, and (if so) whether the adoption of this technique depended on a presumption that foreign law (as to statutory construction) was or was presumed to be the same as local law. Though the

ultimate conclusions of the judges diverged, it was apparent that the mechanical application of a principle or presumption of similarity was not favoured. There is one established exception to this rule. In a trial for bigamy, the validity of the first marriage may depend on a rule of foreign law. In such a case, the prosecution must prove that the marriage is valid according to that law. If no evidence of foreign law is given, the court will not apply English law but will direct an acquittal. However, it may be that the true principle is considerably broader than this, and that in cases where it would be wholly artificial to apply rules of English law to a claim governed by foreign law, a court may simply regard a party who has pleaded but failed to prove foreign law as having failed to establish his case without regard to the corresponding principle of English domestic law."

Conclusion

[183] Outside of the context of the Indian jurisprudence on the point, it is clear that the issue of proof of foreign law has brought about flexible conflict of law principles. Accordingly, in the absence of any pleading of foreign law and the flexible approach embodied in the conflict of law principles, the question becomes whether the First Respondents are aware of the case they have to face. With no intent to show disrespect to learned senior counsel, the Court finds it necessary to revert to the learning quoted below in light of the question posed above.

[184] In **Bullen & Leake & Jacob's, PRECEDENTS OF PLEADINGS** at para 1 - 11 in discussing the historical evolution and purpose of pleadings quoted the following dictum of Jessel MR:

"The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules... was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to definitive issues, thereby to diminish the expense and delay, especially as regards the amount of testimony required on either side at the hearing."

[185] The more succinct dictum of Lord Hoffman is also quoted which is to the effect that the purpose of pleadings is to define the issues and give the other party fair notice of the case which he has to meet. Does a cause of action arise on the pleadings?

- [186] The context of the issue must be clear. It is disqualification under section 32 of the Constitution of the Commonwealth of Dominica. The further aspect of the context is a then pending general election³⁴.
- [187] Citizenship of any country is not a minor matter. Rather, it is one of fundamental importance. And, so too is a passport derived from or conferred as a result of such status. And the Court can take judicial notice of the fact that citizenship brings with it certain rights and obligations. Indeed, the Court was referred to a decision of the Court of Appeal of Jamaica³⁵ involving the question of dual citizenship and more particularly the question of acceptance allegiance. And after referring to the reliance on the case of **Sykes v. Cleary**³⁶ Panton P noted that: "To that extent, the case supports the submission that the acquisition and use of a passport are strong indication of acceptance."³⁷
- [188] What those rights and obligations are in the case of French law is not before the Court; and given the law cited, the Court agrees with Mr. Mendes, SC, that this is a matter of evidence to be adduced at a trial.
- [189] In his Petition, Maynard Joseph pleaded the same section 32 of the Constitution at paragraph 7 (4) by saying: "The said Roosevelt Skerrit, being aware of the provisions of the Commonwealth of Dominica Constitution before his nomination, by the said public pronouncement declared on the 2nd day of December, 2009, that no law, no constitution, no lawyer could prevent him from being nominated as [a] candidate in the said election."

³⁴ Barclays Bank v Boulter [1999] 1 WIL 1919, 1923. Also quoted are Farrell v SOS for Defence [1980] 1 WIL 172, 180 per Lord Edmund Dames.

³⁵ Supreme Court Civil Appeals No. 2008/45 & 47; Abraham Dabdous v Daryl Vaz et al and Darrel Vaz v Abraham Debdous.

³⁶ [1992] 176 C.L.R 77. The dictum in issue (in Cleary) was that of Deane J at page 127 to the effect "that being under...acknowledgement of allegiance, obedience or adherence to a foreign power involves an element of acceptance or at least acquiescence on the part of the relevant person."

³⁷ At para. 33 of Panton P's judgement.

- [190] On the other hand, while Ronald Green did not plead the provision of the Constitution, he did speak of “incapacitated and disqualified from being nominated or elected as a representative in the said election.”³⁸ And even further at paragraph 11, the pleading addresses on “oral notice” of disqualification being given at two public meetings on 8th and 17th December, 2009, by the leader of the United Workers Party to the First Respondent.
- [191] All of the foregoing stems from the matter of French citizenship, and possession of French passports as alleged in the pleadings.
- [192] In all the circumstances, the Court agrees with Mr. Mendes, SC, that the elements of disqualification have been pleaded. And it is the further conclusion of the Court that the First Respondents have been made aware of case they have to face, namely disqualification; and further still a cause of action has been made out. Finally, the matter of foreign law is a matter of evidence to be dealt with at the trial.
- [193] Accordingly, the applications to strike out paragraphs 9 to 11 of the Ronald Green Petition and paragraph 7 of the Maynard Joseph Petition are hereby refused. Therefore, Petitions DOMHCV2010/006 and DOMHCV2010/007 will proceed to trial on the sole issue of disqualification for nomination and election.

Votes wrongly admitted or rejected

- [194] At paragraphs 21 to 27 of the Ronald Green Petition, matters are pleaded which relate to votes wrongly admitted or rejected. The essential of the pleadings is that the Petitioner was and credited with votes which should have been given to him and instead were rejected.’

³⁸ At para. 9.

[195] At paragraphs 23, 24 and 25, the following is pleaded:

"23. At least three of the said rejected ballots were good and valid votes for the petitioner and should have been counted in that they clearly and unambiguously expressed an intention to vie for the Petitioner.

24. The Third Respondent counted two votes for the First Respondent were improperly marked and were otherwise wholly void for uncertainty.

25. The Petitioner cannot without inspection say whether any ballot papers other than those referred to in paragraphs 23 and hereof were wrong admitted or rejected."

[196] Further pleadings relate to refusal of the Presiding Officer to administer Form 27 Oath to Blackmore and her refusal to take the said oath. Even further, it is pleaded that the Returning Officer abdicated her power in favour of a person who described herself as the "tallying Officer."

[197] In the Application by the First Respondent, the pleadings are attacked on several grounds: The absence of a Prayer for a scrutiny, the absence of any sufficient material for a security, the mere pleading of a belief or opinion at paragraphs 23 and 24 of the Petition, the absence of any material facts to substantiate why the three alleged votes were in fact good, the absence of material fact why the two votes counted for the First Respondent were in fact bad.

[198] With respect to paragraph 25 of the Petition, the contention is that it is an abuse of process and the contention by saying: The Petitioner and his agents present at the preliminary and final counts and therefore were in a position to know and/or object to any ballot paper which were, allegedly, admitted on reflected wrong feeling."

Applications by the Other Respondents

[199] In the Application by the other Respondents, the pleadings are assailed on the question of a lack of material facts and the pleading of the Petitioner's opinions. Also highlighted, is the right of the Petitioner and his agent to be present at all counting of votes and the exception as to the pleadings in such circumstances.

Submissions

- [200] The matter of the allegations in paragraphs 23 and 24 of the Petition is being vague and generalized are re-stated by learned Senior Counsel. He submits further that no particulars were given, the three rejected ballots were good and in favour of the Petitioner or why the votes counted for the First Respondent were void for uncertainty.
- [201] Paragraph 25 of the Petition involving Romana Blackmore and the matter of the Form 27 Oath is characterized as an attempt at a "fishing expedition." And the absence of material facts given the right of the Petitioner and his agents to be perused at all counting of ballots.
- [202] This, according to Mr. Astaphan, SC, disentitles the Petitioner to an inspection, recount on scrutiny."³⁹
- [203] In her submissions on behalf of the Other Respondents, the learned Attorney General submits that the pleadings are vague and generalized and failed to decide material facts, respectively in respect of paragraphs 23 and 24 of the Petition in regarding the claim that at least three rejected ballots were good and valid votes from the Petitioner and that two votes for the Respondent were improperly marked and void for uncertainty. It is also contended that the Petitioner or his agent had the opportunity to be present at the preliminary and final counts and to scrutinize the votes and therefore would have been in a position to know the number of votes objected to and the reason of the objection.⁴⁰
- [204] With respect to paragraphs 26 and 27 of the Petition, the contention is that no cause of action arises. And with regard to Romona Blackmore, it is said that no reason is given as to why she was acquired to take the Form 27 Oath. Nor has

³⁹ Op cit.

⁴⁰ In this connection, the cases of *Arthurton v Fergus* [1988] LRC (Const.) 115, 121 and *Ethlyn Smith v Christopher at the Supervisor of Elections Claim No. BVIHCV2003/0097* are cited.

any legal justification been cited for requesting the Returning Officer to reject Romona Blackmore's vote.

- [205] Still on the matter of paragraph 27, the contention is that it is vague and embarrassing and further that the question of the failure to exercise a discretion also unclear.

Analysis and conclusion

- [206] The pleadings and the submissions point to a narrow issue of presence at the preliminary and final counts and material facts emanating therefrom if the complaining candidate or his agent was present.

- [207] Parts III and IV of the House of Assembly (Elections) Act prescribe in detail the procedure to be followed at elections and subsequent to polling day of immaterial relevance to this context as the right given to each candidate or his agent to be present in each polling station and the right of the said persons to be present at the detailed procedure to be followed after the poll.⁴¹ And section 40 of the Act is clear in terms as follows: Each candidate may appoint one agent to attend the preliminary and final count of the count of the votes by the presiding officer and the returning officer.

- [208] In plain terms, the purpose of an agent is to act for his principal and it is no different in the context of an election and more particularly at the counting of votes.

- [209] The Constitution and Elections Ordinance of Montserrat is in *pari materia* with the Act in issue. And the following extract from the holding or ration in the case **Arthurton v Fergus** is instructive:

"A petitioner was only entitled to claim a scrutiny of the ballot to determine which candidate received the majority of votes from his personal knowledge, or that of his representation, of what he had observed at the counting of votes, and that he, or the returning officer, had objected at the actual count to particular votes. The Ordinance

⁴¹ See section 37 and 38 of the House of Assembly (Elections) Act.

provided for the returning officer to allow candidates or their representatives to see the votes at a final count or those rejected by the officer himself before determining whether they should be rejected or had been validly cast. In the instant case, apart from the 55 rejected votes, all the parties had impliedly agreed the votes were validly cast since no objection was made by them at the count. It was not the purpose of the Ordinance, because objections could easily be made after the election to irregularities with regard to ballot papers, to allow a scrutiny in those circumstances. Accordingly, the court would not allow a scrutiny of the 1370 votes validly cast. (See pp. 121-122, post.) *Williams v Giraudy* (1978) 25 WIR 529 applied."

- [210] In all of the foregoing, the critical point as the implied acceptance that votes were validly cast since there were no objections at the time of the count. The other point is that a candidate could at a subsequent time make objections *de novo*.
- [211] This is the focal being made by learned counsel for the First Respondent and for the other Respondent. It is that if the candidate or his agent was present at the counting where are the objections or the pleadings and where are the material facts? Instead, as both counsel correctly assert, it comes down to the Petitioner's opinion.
- [212] The foregoing is equally applicable to the matter of Romona Blackmore and the question posed is why was she required to take the oath? This is not addressed in the pleadings or in the affidavit in support.
- [213] Accordingly, in DOMHCV2010/0006 paragraphs 21 to 27 of the Petition are struck out.

Miscount

- [214] At paragraph 30 and 28, of the Ronald Green and Claudius Sanford Petitions respectively:

"The votes cast at the said election were not correctly counted, in that the aggregate of the votes declared by the Returning Officer to have been cast for the 1st Respondent/Defendant namely Ashton Graneau [Petter Saint Jean] contained rejected ballots."

[215] With respect to the Claudius Sanford Petition in both Applications by the First Respondents and the other Respondents,⁴² the contention is that thus the allegations are vague and general and devoid of material facts; further, that the Petitioner have not prayed for a scrutiny and in any event disclosed no cause of action or basis for a scrutiny. On the other hand, in the Ronald Greene Petition, in both the Applications on behalf of the First Respondents and the other Respondents, the contention is the allegations are misconceived, no material facts are pleaded and no cause of action is disclosed.

Submissions

[216] The submission by Mr. Astaphan, SC and the learned Attorney General are going the same direction to say that the Petitioners and his agents had a right to be present at the preliminary final counts and to see every ballot counted by the presiding officer or returning officer. In such a circumstance, the Petitioners ought to be in a position to plead material facts and particulars with respect to the rejected ballots.⁴³ Accordingly, the allegations are not capable of disclosing a cause of action.

Conclusion

[217] The submissions represent a correct statement of the law. The essential point being, as noted before, that a candidate has a insight to be present at the preliminary and final courts. As such, there is no room for an absence of pleaded

⁴² It is to be noted that in the Ron Green Petition, "Miscount" occupies a single paragraph, but in both Applications and in the submissions on behalf of the Respondents, the paragraphs referred to are 26-29, instead of 28 as in the Petition. In the circumstance, the Court must apply a benevolent construction. See: Corrected Submissions (on Behalf of the First Respondents) at para. 170.

⁴³ See: Corrected submissions on behalf of the First Respondents at para. 170. Among the authorities cited by the learned Attorney General at paragraphs 39 to 41 of her submissions are: *Arthurton v Fergus* [1988] LRC 115 and *Williams v Girandy* [1978] 25 WIR 529. With respect to the former case, the following dictum is quoted: "It seems to me that a petitioner can only make such a claim that the successful candidate had and received a majority of lawful votes from what he has observed at the counting of the votes from his own personal knowledge or that of his agent."

material facts. There is also no room to ignore the right and then embark on a fishing expedition. The law is both clear and fair to all sides.

[218] Accordingly, paragraph 30 of the Claudius Sanford Petition at paragraphs 28 of the Ronald Green petition are hereby struck out.

ISSUE NO. 2

Whether any party named in the Petitions should be struck out.

[219] The matter of the striking out of parties arises from the various Applications and except for the variations on account of the number of Respondents, the contentions are similar.

Second⁴⁴ and Third Respondents

[220] One of the main contentions here on behalf of the First Respondents is that no cause of action is pleaded against these Respondents. See for example, the Application on behalf of Kelter Dwight Darroux in DOMHCV2010/003 at paragraphs 1 to 13. Also the application on behalf of the other Respondents, with respect to the same Petition at paragraphs 1 to 13.

Fourth to Eighth Respondents

[221] In DOMHCV2010/0006 corresponding parties are the Fifth to Eighth Respondents; while in DOMHCV2010/0007 the corresponding parties are the Third to Seventh Respondents.

⁴⁴ In all proceedings, except DOMHCV2010/0003, Marina Williams, Chief Elections Officer is named Second Respondent; while in DOMHCV2010/0007 Theresa Royer, Returning Officer is named as Second Respondent; various persons are named as the Third Respondents, being the Returning Officers: Anthony Joseph (DOMHCV2010/0003); Arundell Thomas (DOMHCV2010/0004); Helina Auguiste (DOMHCV2010/0005); Marcella Augustine (DOMHCV2010/0006).

[222] In this regard, also the contentions include the issue of the absence of a cause of action against the members of the Electoral Commission giving rise to an abuse of process.

Ninth Respondent

[223] The Dominica Broadcasting Corporation is named as a party⁴⁵ in DOMHCV 2010/003 and 2010/004. The Corporation is named as the Ninth Defendant; Tenth Defendant in DOM HCV 2010/005 and 2010/006 and as the Eighth Defendant in DOM HCV 2010/007 in all of the Petitions and the following is pleaded in Applications by the Fourth Respondents. No material facts on cause of action is pleaded against the Board of Directors; bad faith has not been pleaded on alleged; no material fail on cause of action of an alleged conspiracy or collusion between the Board of Directors or any officer of the Corporation and the Dominica Labour Party has been pleaded, and no cause of action alleging in constitutional infringement of the Petitioner's right by the Corporation has been pleaded or disclosed.

[224] The variation in the foregoing is the First Respondent, Mr. Roosevelt Skerrit, in DOMHCV2010/0007 who says that no cause of action is pleaded against the Eighth Defendant and/on the allegations against the Eighth Defendant constitute an abuse of process of the Court.

Submissions on behalf of the Respondents other than the First Respondents

[225] In her submissions⁴⁶ with respect to the Respondents, Mrs. Francine Baron-Royer contends that as far as the Second Respondent, Marina Williams and the Third

⁴⁵ In DOMHCV2010/0003 and 2010/0004, the Corporation is named as the Ninth Defendant; Tenth Defendant in DOMHCV2010/0005 and 2010/0006 and as the Eighth Defendant in DOMHCV2010/0007.

⁴⁶ At paragraph 18 of the said submissions, the following is stated: "One proposes to clear with the applications to strike the following manner, the allegations made in DOMHCV2010/0003 will

Respondent, Anthony Joseph are concerned, no allegations have been made and no cause of action pleaded against them.

[226] However, in relation to the Fourth to the Eighth Respondents, being members of the Electoral Committee, the submissions are more complex and fall under the general contention that there has been a complete failure to disclose relevant material facts and the pleadings are vague and embarrassing and disclose no reasonable cause of action. Without including any disrespect to learned counsel on all sides, the manner in which the issues were adjudicated upon has resulted in implied rulings in respect of all the parties.

[227] Based on the determinations by the Court with respect to the various issues, the sole matter for trial is that of the disqualification for nomination and election and having regard to the two surviving Petitioners, the Applications are the submissions the Dominica Broadcasting Corporation alone will be struck out as a party.

Costs

[228] The ruling emanating from the Eastern Caribbean Supreme court establish that given the fact that elections are a fundamental constitutional of our democracy, no costs are awarded except in exception in exceptional circumstances. These Petitions do not fall into that category and as such there will be no award of costs.⁴⁷

ORDER

IT IS HEREBY ORDERED AND DECLARED as follows:

be dealt with first and then adopted where appropriate in respect of petitions 4, 5, 6 and 7 and matters specific to each petition will be dealt with separately.”

⁴⁷ See: Ferdinand Frampton v Ian Pinard et al DOMHCV2005/0149 at para. 84 per Rawlins J, as he then was.

1. Upon the Application of Kelter Dwight Darroux in respect of a Petition filed by John Henry Abraham DOMHCV2010/003, the issues bribery, treating, illegal practices, return of votes wrongly counted, pleaded at paragraphs 8 and 9, 10, 11, 12, 13 and 14 to 21 respectively of the said Petition are struck out and in the result, the Petition is struck out.
2. Upon the Application of Ambrose George in respect of a Petition filed by Bobby A.C. Frederick DOMHCV2010/0004 the issues of bribery, treating, illegal practices and denial of access to state radio and breach of the right to freedom of expression pleaded at paragraphs 8 and 9, 10, 11, and 12 to 20, respectively, of the said Petition are struck out and in the result the said Petition is struck out.
3. Upon the Application of Ashton Graneau in respect of a Petition filed by Claudius Sanford DOMHCV2010/005, the issue of bribery, treating, illegal practices, returning voters and Form 27 Oath, denial of access to state radio and breach of the right to freedom of expression and miscount pleaded at paragraphs 9 to 11, 12 to 13, 14, 15 to 18, 19 to 28 and 30, respectively of the said Petition are struck out and in the result the said Petition is struck out.
4. With respect to Petition DOMHCV2010/0006 Ronald a.k.a. "Ron" Green being a person entitled to vote in the general elections in the Commonwealth of Dominica and having voted in the present general elections held on 18th December, 2009, satisfies section 65 (a) of the House of Assembly (Elections) Act and had standing to present the Petition, DOMHCV2010/0006.
5. Upon the Application of Petter Saint Jean in respect of a Petition filed by Ronald a.k.a. "Ron" Green DOMHCV2010/0006, the issues of bribery, treating, illegal practices, returning voters and Form 27 Oath, votes

wrongly admitted or rejected, return on votes wrongly counted, denial of access to state radio and breach of the right to freedom of expression and miscount pleaded at paragraphs 12, 15, 16, 17 to 20, 21 to 27, 30 to 40 and 28, respectively of the said Petition are struck out; and in the result, the Petition will proceed to trial on the sole issue of disqualification for nomination and election.

6. Upon the Application of Roosevelt Skerrit in respect of a Petition filed by Maynard Joseph DOMHCV2010/0007, the issue of denial of access to state radio and breach of the right to freedom of expression pleaded at paragraphs 8 to 19 of the said Petition are struck out and in the result the Petition will proceed to trial the issue of disqualification from nomination and election.
7. In Petitions DOMHCV2010/006 and DOMHCV2010/0007, the Tenth Respondent and Eighth Respondent, respectively, being the Dominica Broadcasting Corporation, is struck out as a party named in the said Petitions.
8. There is no order as to costs.

Appreciation

The Court must record its appreciation to Counsel on all sides for the nature of the research undertaken in these matters and from their assistance for the Court.

Errol L. Thomas
Judge

