

**IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS
ON APPEAL FROM THE GRAND COURT**

BEFORE

**Sir John Chadwick, President
Elliott Mottley, Justice of Appeal
Sir Anthony Campbell, Justice of Appeal**

BETWEEN

JOHN GORDON HEWITT

Petitioner/Appellant

-and-

**(1) TARA RIVERS
(2) DELANO SOLOMON
(as Returning Officer for the Electoral District of West Bay)
(3) THE ATTORNEY GENERAL FOR THE CAYMAN ISLANDS
Respondents/Respondents to the appeal**

Mr Ransford Braham QC and Mr Abraham Dabdoub instructed by Mr Steve McField of
A Steve McField Associates for the Appellant, John Gordon Hewitt
Mr Graham Hampson with Mr Paul Keeble of Hampson and Company for the first named
Respondent, Tara Rivers
Ms Reshma Sharma, Senior Crown Counsel, for the second and third Respondents, Delano
Solomon (as Returning Officer for the Electoral District of West Bay and the Attorney
General for the Cayman Islands)

Hearing & Judgment: 15 November 2013
Reasons delivered: 21 November 2013

REASONS FOR JUDGMENT

Sir John Chadwick, President:

1. At the elections for the Legislative Assembly held on 22 May 2013 the first named respondent, Ms Tara Rivers, was returned as the second elected member for the electoral district of West Bay. By petition presented on 12 June 2013 under Part VIII

of the Elections Law (2009 Revision) – now Part VIII of the Elections Law (2013 Revision) – Mr John Gordon Hewitt sought determinations (i) that Ms Rivers was not duly nominated, (ii) that she was not duly elected or returned, (iii) that her election was null and void and of no effect and (iv) that Velma Powery – Hewitt was duly elected and ought to have been returned.

2. The petition was heard before the Chief Justice, sitting as a Judge of the Grand Court, in July 2013. For the reasons set out in a written judgment dated 9 August 2013, the Chief Justice held that the petition failed; and he refused the relief sought. On 19 August 2013 he certified to the Acting Governor pursuant to section 89(2) of the Electoral Law that the petition had been dismissed and that the validity of the election of Ms Tara Rivers as the second elected member of the Legislative Assembly for the District of West Bay on 22 May 2013 was confirmed. On 22 August 2013 the Acting Governor, also pursuant to section 89(2) of the Electoral Law, confirmed the return made by the Returning Officer.
3. On 23 August 2013 the petitioner, Mr Hewitt filed a Notice and Grounds of Appeal in this Court seeking to challenge the judgment of the Grand Court. The Notice sought a number of declaratory orders; but it did not, on its face, seek an order quashing the certificate given by the Chief Justice on 19 August 2013.
4. The jurisdiction of the Court of Appeal is conferred by section 99 of the Constitution of the Cayman Islands set out in Schedule 2 to The Cayman Islands Constitution Order 2009 (SI 2009/1379):

“99(1) There shall be a Court of Appeal for the Cayman Islands which shall be a superior Court of Record and shall have jurisdiction and powers to hear and determine such appeals from the Grand Court as may be prescribed by this Constitution or any other law.

(2) . . .

(3) Subsection (1) shall not apply to appeals relating to any matter in respect of which this Constitution or any other law provides that the decision of the Grand Court is to be final.

(4) . . .”

The limitation imposed on the jurisdiction of this Court by subsection (3) of section 99 of the Constitution is reflected in section 6 of the Court of Appeal Law (2011 Revision):

“6 No appeal shall lie-

...

(c) from any decision of the Grand Court in respect of which it is provided by any law in force in the Islands that such decision is to be final.

...”

5. Those provisions must be read with section 66 of the Constitution and section 89 of the Elections Law. Section 66(1) of the Constitution is in these terms:

“66(1) Any question whether a person has been validly elected as a member of the Legislative Assembly . . . shall be determined by the Grand Court, whose decision shall be final and not subject to any appeal.”

Section 89(2) of the Elections Law provides that:

“89(2) At the conclusion of the trial the Judge shall determine whether the member of the Assembly whose return or election is complained of or any, and if so, what, other person was duly returned and elected, or whether the election was void, and shall certify such determination to the Governor, and upon his certificate being given, such determination shall be final; and the return shall be confirmed or altered, or a writ for a new election issued, as the case may require, in accordance with such determination.”

6. With those provisions in mind it appeared to the Court that, before proceeding to hear an appeal from the decision of the Grand Court dismissing the electoral petition, it was necessary to determine, as a threshold question, whether or not the Court had jurisdiction to do so. Accordingly, at a case management conference on 5 November 2013, the Court directed that the matter be listed for a hearing on 15 November 2013 at which the petitioner show cause why his Notice and Grounds of Appeal should not be struck out on the ground that the Court had no jurisdiction to entertain the proposed appeal.
7. At the conclusion of the hearing on 15 November 2013 the Court indicated that, after hearing argument on the threshold question, it was satisfied that it did not have jurisdiction to entertain the proposed appeal; and that the Notice and Grounds of Appeal should be struck out. The Court stated that it would deliver a judgment setting out its reasons before the end of the current session.
8. Adopting the language of section 99(3) of the Constitution, the threshold question for determination is “whether the proposed appeal [relates] to any matter in respect of which [the] Constitution or any other law provides that the decision of the Grand Court is to be final”. More particularly, does the proposed appeal relate to any

question (i) which is within section 66(1) of the Constitution and (ii) which has been determined by the Grand Court. It is beyond argument that the proposed appeal does relate to a question which is within section 66(1): it plainly does relate to the question whether Ms Rivers has been validly elected as a member of the Legislative Assembly. The only issue capable of argument, as it seems to us, is whether that question has been “determined by the Grand Court”, within the meaning that is to be given to that phrase.

9. We accept that the phrase “determined by the Grand Court” must be given a meaning which excludes arbitrary determination. To illustrate the point by an extreme example, it cannot have been the intention of those who framed the Constitution that a determination by the judicial toss of a coin would be a determination within the meaning of section 66(1). In our view it is necessary, in order to give effect to the intention which underlies section 66(1) to read the phrase in the context of the Constitution as a whole (and, in particular, Part V “The Legislature”) and the Laws which it is contemplated, in Part V of the Constitution, that the Legislature will enact in order to give effect to its provisions. In that context, we have in mind section 66(5):

“66(5) A law enacted by the Legislature may make provision with respect to –

- (a) the time within which, the circumstances and manner in which and the imposition of conditions under which, any application may be made to the Grand Court for the determination of any question under this section;
- (b) the powers, practice and procedure of the Grand Court in relation to any such application.”

and section 93(e):

93 Subject to this Constitution, a law enacted by the Legislature may provide for the election of members of the Legislative Assembly, including (without prejudice to the generality of the foregoing power) the following matters –

...

(e) the determination of any question whether any person has been validly elected as a member of the Assembly . . . ;

...”

10. The Elections Law does contain provisions which prescribe the manner in which “any question whether a person has been validly elected as a member of the Legislative Assembly . . . shall be determined by the Grand Court”. Those provisions are found in Part VIII of the Law. Section 85 (reflecting section 66(2) of the Constitution) prescribes who may present an election petition. Section 86(a) prescribes the time

within which the petition must be presented. And Section 89(1) provides that every election petition shall be tried in the same manner as an action in the Grand Court by a Judge sitting alone. In our view, the meaning to be given to the phrase “determined by the Grand Court” is “determined in the manner for which the law provides”.

11. Section 19 of the Grand Court Law (2008 Revision) constitutes a Rules Committee; and empowers that Committee to make Rules of Court regulating pleading, practice and procedure in respect of the conduct of civil business before the Court in relation to all matters within the jurisdiction of the Grand Court: section 19(3)(a). Order 93 of the Grand Court Rules, made under that Law, contains rules relating to the content and hearing of election petitions. In particular, Order 93, rule 2(1)(c) requires that an election petition shall state the grounds on which relief is sought, setting out with sufficient particularity the facts relied on. In the present case it can be seen from the petition presented on 12 June 2013 that the grounds relied upon were (i) that Ms Rivers was not (on the nomination day, 27 March 2013) “qualified to be nominated or to be elected as a member of the Legislative Assembly as she is, by virtue of her own act, under an acknowledgement of allegiance, obedience or adherence to a foreign power or state (paragraph 6) and (ii) that Ms Rivers was not “qualified for elected membership to the Legislative Assembly by reason of the fact that she was not residing in the Cayman Islands for a period of seven years preceding the date of her nomination for election on 27 March 2013”.

12. The first of those grounds is founded on section 62(1)(a) of the Constitution:

“62(1) No person shall be qualified to be elected as a member of the Legislative Assembly who –

(a) is, by virtue of his or her own act, under any acknowledgement of allegiance, obedience or adherence to a foreign power or state;

...”

The second ground in the context of the facts alleged in the petition, is founded upon section 61(1)(d), read with section 61(e), section 61(2)(b) and section 61(3).

61(1) Subject to section 62, a person . . . shall not be qualified to be elected as a member of the Legislative Assembly if, and shall not be qualified to be so elected unless –

...

(d) he or she is a qualified citizen ; and either

- (e) he or she was born in the Cayman Islands, or was born outside the Cayman Islands in the circumstances mentioned in subsection (2)(b), has resided in the Cayman Islands for a period of not less than seven years immediately preceding the date of his or her nomination for election and, subject to subsection (3) the number of days on which he or she was absent from the Cayman Islands in that period does not exceed 400.

62(2) For the purposes of subsection (1)(d), a qualified citizen is a British overseas territory citizen by virtue of a connection with the Cayman Islands, who either –

(a) . . . ; or

- (b) was born outside the Cayman Islands, has or had at least one parent or grandparent who was born in the Cayman Islands and is a Caymanian (or if deceased would if alive have been a Caymanian at the date of nomination for election) and who at the date of his or her nomination for election possesses no other citizenship save for any right he or she may have to some other citizenship by virtue of his or her birth outside the Cayman Islands;

and in this subsection the words ‘other citizenship’ do not include British citizenship acquired by virtue of the British Overseas Territories Act 2002.

(3) In ascertaining whether a person has been absent from the Cayman Islands for the purposes of subsection (1)(e) . . . any period of absence by reason of the following shall be disregarded -

. . .

- (b) attendance as a student at any educational establishment;

. . .”

It was asserted in the petition, and was not in dispute, that Ms River was born outside the Cayman Islands (in the United States of America) and was the holder of a passport issued by the United States of America. It was not said that she was not born of Caymanian parents who were themselves born in the Cayman Islands. The challenge under the second ground was limited to the “residence” qualification in section 61(1)(e) ; and, in particular, to the question whether the period (or part of the period) during which Ms Rivers was absent from the Cayman Islands in the seven years immediately preceding the date of her nomination fell to be disregarded under section 61(3)(b).

13. The primary question for determination by the Grand Court – and in relation to which the decision of the Grand Court was to be “final and not subject to any appeal”- was whether Ms Rivers had been validly elected as a member of the Legislative Assembly. In the context of the election petition, that required determination of the secondary

questions (i) whether she was disqualified from election by reason of section 62(1)(a) (“the allegiance question”) and (ii) whether she not qualified by reason of inability to meet the residence requirement in 61(1)(e), read with section 61(3) (“the residence question”). In order to determine the primary question, it was necessary for the Grand Court to determine the secondary questions; and in order to determine those secondary questions it was necessary for the Court (a) to determine the facts (in so far as the facts were in dispute and (b) to determine whether, on the facts as found, Ms Rivers was, at the date of her nomination, “by virtue of her own act, under any acknowledgement of allegiance, obedience or adherence to a foreign power or state” and whether during the period (or part of the period) that she was absent from the Cayman Islands (during the seven years immediately preceding her nomination) she was in “attendance as a student at any educational establishment”. Put shortly, the task for the Grand Court was the familiar one – when faced with the application of a legislative provision to a factual situation – of determining the facts and determining those facts did or did not fall within the provision. There is no doubt, on any reading of his judgment, that that was the task on which the Grand Court was engaged.

14. The question for this Court is whether – in determining the facts and determining whether those facts did or did not fall within the relevant legislative provisions – the Grand Court was determining “any question whether a person has been validly elected as a member of the Legislative Assembly”. In our view, the answer to that question is plainly “Yes”. Determination of the primary question requires determination of the secondary questions which need to be determined in order to determine the primary question; and requires determination of the facts and determination of the legislative intention (by the interpretation of the relevant legislative provisions) which need to be determined in order to determine the secondary questions. All are within the task of determining whether a person has been validly elected as a member of the Legislative Assembly; and the determination of the Grand Court on all those questions and issues is final and not subject to any appeal. There is no basis for distinguishing questions of fact from questions of law or from questions of mixed law and fact. The intention of those who framed the Constitution – for reasons which are too well known to require rehearsing – was that the determination of the Grand Court should be final, and not subject to any appeal, so that certainty as to those who were (and those who were not)

elected should be achieved with the minimum of delay. That is what the public interest requires.

15. It is for those reasons that this Court was satisfied, after hearing argument on the threshold question on 15 November 2013, that it did not have jurisdiction to entertain the proposed appeal.

16. We should, perhaps add this. It may be that the Notice and Grounds of Appeal does not seek an order quashing the Certificate given by the Chief Justice on 19 August 2013, but seek declaratory orders as to “the true spirit, meaning and intent of the provisions set out in section 61(2)(a) and (b) – or as set out in section 62(1)(a), as the case may be – of the Constitution because it was hoped that this Court might be persuaded that, notwithstanding section 66(1), it could exercise an original rather than appellate jurisdiction. If that was the reason why the Notice and Grounds of Appeal takes the curious form that it does, the hope was ill-founded. We are not persuaded that we have an original jurisdiction to make declarations as to the “true spirit, meaning and intent” of the Constitution; and not persuaded that it would be sensible or appropriate to make declarations in such general terms even if we did have such jurisdiction. If the Attorney General seeks guidance on a question arising under the Constitution he has power, under the Attorney General’s Reference of Questions Law 2012, to refer that question to this Court for an advisory opinion. This is not a case in which such a reference has been made.

Chadwick, P

Mottley, JA

Campbell, JA