IN THE GRAND COURT OF THE CAYMAN ISLANDS
CAUSE NO. 288 OF 2009

BETWEEN	1.	GORDON SOLOMON	
AND	2.	SANDRA CATRON	
	3.	RONALD EBANKS	
	4.	JEAN EBANKS	
	5.	ROXANNE BASHAM-EBANKS	
	6.	MICHAEL MCLAUGHLIN	PLAINTIFFS
AND	1.	MARK SCOTLAND	
	2.	DWAYNE SEYMOUR	DEFENDANTS

IN OPEN COURT
THE 24TH JULY 2009
BEFORE THE HON. ANTHONY SMELLIE, CHIEF JUSTICE

APPEARANCES: Mr. Gerald Clarke instructed by Messrs. David McGrath and James Kennedy for the Plaintiffs

Lord David Pannick QC and Mr. Ramon Alberga Q.C. with Mr. Steve McField instructed by Thorp Alberga for the Defendants

JUDGMENT

1. The Plaintiffs bring this action under the Cayman Islands (Constitution) Order 1972 ("the Constitution") seeking a declaration that the Defendants were not qualified to be elected as members of the Legislative Assembly at the general elections held on 20th May 2009.

2. The Plaintiffs aver that the Defendants were disqualified from election by having failed to disclose their interests in certain public service

contracts within the one month deadline prescribed by the Constitution for the notification to the public of such interests.

3. While making no admission as to the merits of the Plaintiffs' claim, the Defendants respond by challenging the propriety of the form of action taken by the Plaintiffs; and questioning the jurisdiction of the Court to hear the Plaintiffs' case.

4. The Defendants now apply to strike out the Plaintiffs' action on the basis that it is impermissibly brought under the Constitution instead of by petition under the Elections Law and as the Elections Law specifies a twenty-one day period within which an electoral challenge may be brought, the Plaintiffs are out of time.

5. Thus, the question before the Court is whether the Plaintiffs are entitled to bring an action seeking a determination as to the disqualification of the Defendants as candidates for election under the Constitution, otherwise than by way of a petition under the Elections Law.

6. If the Defendants are correct then they are entitled to have the Plaintiffs' action struck out as being an abuse of the process of the Court. However, if the Plaintiffs are correct that the provisions of the Elections Law do not apply or do not exclusively apply, then the action would have to be heard and determined on its merits.

The Relevant Background

7. The Defendants were returned, certified and declared to be duly elected members of the Legislative Assembly for the electoral district of Bodden Town following the general elections on 20th May 2009. The Returning Officer so declared on 21st May, 2009. The return was signed by the Returning Officer, and a copy of the return was given to the Governor of the Cayman Islands on 22nd May, 2009.

8. Twenty-six days later, on 16th June 2009, the Plaintiffs filed their Originating Summons alleging that, by virtue of Section 19(1)(g) of the Constitution, the Defendants were not qualified to be elected to the Legislative Assembly and that their elections are invalid.

The Constitutional and statutory framework

9. Section 19(1)(g) of the Constitution provides:

> *"19(1) No person shall be qualified to be elected as a member of the Assembly who....*
>
> *(g) is a party to, or a partner in a firm or a director or manager of a company which is a party to, any contract with the Government of the Islands for or on account of the public service and has not, in the case of a contested election, caused to be published, at least one month before the day of the poll, a Government Notice setting out the nature of such contract and his interest,*

or the interest of any such firm or company, therein."

10. It is acknowledged that the Defendants did cause notice to be published but the Plaintiffs' claim is that they failed to meet the deadline of one month imposed by section 19(1)(g).

11. Further provisions of the Constitution arise for consideration. The Legislative Assembly is established by Section 17(1) of the Constitution.

12. Section 23 of the Constitution states in relevant part as follows:

"(1) ....

(2) Any question whether a person has been validly elected as a member of the Assembly, or whether an elected member of the Assembly has vacated his seat therein, shall be determined by the Grand Court, whose decision shall be final and not subject to any appeal.

(3) (a) An application to the Grand Court for the determination of any question whether a person has been validly elected as a member of the Assembly may be made by –

(i) a person who voted or had the right to vote at the election to which the application relates;

(ii) a person claiming to have had the right to be returned at such election;

(iii) a person alleging himself to have been a candidate at such election; or

(iv) the Attorney-General.

(b) An application to the Grand Court for the determination of any question whether an elected member of the Assembly has vacated his seat therein may be made by –

(i) an elected member of the Assembly; or

(ii) the Attorney-General.

(iii) If any application referred to in paragraph (a) or (b) of this subsection is made by a person other than the Attorney-General, the Attorney-General may intervene and may then appear to be represented in the proceedings."

Section 28 of the Constitution in relevant part provides:

"Subject to the provisions of this Constitution, a law enacted under this Constitution may provide for the election of members of the Assembly, including (without prejudice to the generality of the foregoing power) the following matters, that is to say:

...

(c) the ascertainment of the qualification of electors and of candidates for election;

...

(f) the determination of any question whether any person has been validly elected a member of the Assembly or whether the seat (of) any elected member in the Assembly has become vacant."

13. In the exercise of this legislative authority given by the Constitution, the Legislature enacted the Elections Law (2004 Revision) ("The

Elections Law"). It contains, among other things, a scheme for the regulation of elections. Part VIII of the Elections Law contains detailed provisions for the bringing of election petitions, beginning with section 83 which provides:

> *"83. A petition complaining of the undue election or undue return of a member of the Assembly (in this Law called an election petition) may be presented to the Grand Court by anyone or more of the following persons, that is to say –*
>
> *(a) a person who voted or had a right to vote at the election to which the petition relates;*
>
> *(b) a person claiming to have had a right to be returned at such election; or*
>
> *(c) a person alleging himself to have been a candidate at such election."*

16. It is immediately apparent that the Elections Law reproduces the categories of persons who may challenge the validity of an election as identified by section 23(3)(a) of the Constitution; except for the Attorney-General. As will be explained, this exclusion of the Attorney-General is a helpful guide for construing what is the true nature of the statutory scheme.

17. The time limits and requirement of security for the presentation of an election petition are matters prescribed in section 84(a), (b) and (c) of the Elections Law as follows:

"84. The following provisions shall apply with respect to the presentation of an election petition –

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

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

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

(ii) to the member whose election or return is complained of; or

(iii) to any other person named as a respondent to the petition,

shall be given on behalf of the petitioner; and

(c) the security shall be to an amount of three thousand dollars and shall be given by deposit of money in the Grand Court."

18. The time-limit of twenty-one days specified by section 84(a) is that which is in issue here, there being no allegation of corrupt practices to which the twenty-eight day limit would apply.

19. Sections 85 and 86 deal specifically with petitions alleging corrupt or illegal practices showing that the consequences of such practices may be different than the consequences of other petitions. Section 85 declares the election of any particular candidate shown to be guilty of such practices to be void and by section 86, any candidate on whose behalf such practices were engaged to the extent that the election must have been tainted by them, is deemed incapable of being elected to fill any seat declared vacant as the result of the tainted election.

20. Section 87 expands upon the jurisdiction of the Grand Court in these terms:

> *(1) Every election petition shall be tried in the same manner as an action in the Grand Court by a Judge sitting alone.*
>
> (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 what, other person was duly returned and elected, or whether the election was void, 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."*

The Arguments: The Plaintiffs'

21. The Plaintiffs contend that they are not bound to bring their challenge by election petition under the Elections Law nor; therefore, by its prescribed time limits or other requirements for doing so. They contend that section 23 of the Constitution gives them an alternate avenue of redress to which no time limit applies.

22. To begin, they say that the power delegated to the Legislature and by which the Elections Law was enacted is a power given by section 28 of the Constitution which itself presents the power as being *"Subject to the provisions of the Constitution"* which include section 23, the section which gives them a Constitutional right to challenge and by which they bring that challenge.

23. They also point to the fact that the Attorney-General is excluded from section 83 of the Elections Law but nonetheless retains the right given under section 23 of the Constitution to question the validity of an election. This, they say, is indicative of the wider ambit of the Constitutional provisions. The Attorney-General plainly has a right to apply to the Court other than by way of an election petition (he must have that right otherwise section 23(3)(a)(iv) of the Constitution would be rendered nugatory); and so it is difficult to see why others identified in section 23(3) cannot also so apply, absent any express

provision to the contrary effect and particularly where the grounds for challenge, as they say, are not amongst those expressly specified in Part VIII of the Elections Law.

24. Those grounds specified in the Elections Law are identified by the terms "undue election" and "undue return" in section 83, but the terms are not defined. Notably, section 23 of the Constitution uses the term "validly elected", which the Plaintiffs submit is wider in meaning than the term "undue election". The latter term, they say, is to be given a particular meaning which would not include a question of qualification to stand for election; on the basis of case authority in the Cayman Islands citing: ***Thompson-Murphy and Thompson v Pierson [1997] CILR 61***.

25. In the reported judgment from that case, at page 65 line 28 and following, Chief Justice Harre, considering a case of alleged "illegal practices" under an earlier but similarly worded version of the Elections Law, said this:

> ***"The first of a number of questions of interpretation with which I must deal is the meaning of "undue election". That expression is not defined in the Law, but the following passage from the Australian case, Re Surfers' Paradise Election Petition is pertinent ([1975]***

Qd. R. at 119): "The Act [the Election Act (Queensland) 1915] contains no definition of the expression "undue election" but the words take their meaning from the history of disputed elections.

An "undue election" is one where there has been a departure from the prescribed method of election or one in the course of which there has been misbehaviour or [mis]management of a kind which history has shown may result in the selection of a candidate otherwise than by the will of the constituency.

....The expression does not apply to an election in which the prescribed method of election has been followed, but that method is unlawful." I adopt that passage from the judgment of Dunn J. which is to be found in **4 Words and Phrases Legally Defined** **3rd Ed., at 351 (1990)** *with reference to an enactment similar to our own to the relevant extent. It is the will of the constituency which prevails."*

26. The Plaintiffs argue that this dictum strongly supports their contention that an election petition is appropriate in a case where the election is said to have been tainted by wrong procedure, misbehaviour or

mismanagement, but is not appropriate or mandated in a case which concerns, not the process of election, but a fundamental issue as to whether a candidate can be elected at all. It is not said in the present case that the will of the constituency has been subverted by, for example, corruption, or other electoral misconduct, but it is said instead that two of the candidates had no Constitutional right to stand for election. Therefore, the constituency could not lawfully express a will to elect those candidates. Thus, the role of the Judge hearing an election petition is to decide the question of due or undue election, not matters of entitlement to election. A challenge of the latter kind can only be brought by motion under section 23 of the Constitution.

27. The Plaintiffs' alternative argument is that even if a question of entitlement to or qualification for election can be the subject of an election petition, a petition is not prescribed as the exclusive route for challenge. Section 23 of the Constitution is itself a separate and independent route and the Elections Law cannot, as a matter of principle, amend, supplant or override the Constitution itself: see again the opening words of section 28 of the Constitution already cited above, that is: *"Subject to the provisions of this Constitution"*; which they say delineate the ability of the Legislature to prescribe a law that might undermine the Constitutional right of challenge. As an

Order-in-Council made under the West Indies Act 1962, the Constitution is a legislative instrument of the United Kingdom, whereas the Elections Law is a legislative act of the Legislative Assembly which itself derives its authority from the Constitution. The Constitution therefore takes precedence over the Elections Law, which cannot remove the right of a person to apply to the Court for determination of a question as to the validity of an election, or remove the Court's duty to determine the question (note the words in section 23 of the Constitution: "shall be determined").

28. The Plaintiffs seek to illustrate their argument by the hypothetical: a case where a candidate is disqualified from election but the grounds of disqualification do not become known until more than 21 days after the electoral return, and so outside the time limit for an election petition. For example, in the present kind of case, by the deliberate concealment of an interest in a Government contract or, in another example; suppose that details of a candidate's lack of qualification on the basis of citizenship, or residence, or insolvency elsewhere in the Commonwealth, only emerged after the expiration of the twenty-one day time limit.

29. In such circumstances, despite the plain breach of the Constitution, the notion that the person in question could continue to sit in the

Assembly and his or her election could not be challenged because of the time limit, would be an affront to constitutional law, say the Plaintiffs.

The Defendants' arguments

30. The Defendants contend that the only permitted legal remedy for challenging the validity of an election to the Legislative Assembly available to the Plaintiffs is that provided by the Elections Law, namely: a petition which must be brought within twenty-one days. They say the election petition is the only permitted legal remedy by reason of three matters of fundamental importance:

(i) the language of the constitutional and statutory provisions;

(ii) the history of election petitions; and

(iii) the purposes of the Elections Law.

31. As to the Constitutional language, section 23(2) of the Constitution directs that any question whether a person has been validly elected shall be determined by the Grand Court, section 23(3) listing the categories of persons who may apply for such a determination. Although neither section 23(2) nor section 23(3) purports to regulate the procedure by which a determination must be sought, the Constitution nonetheless recognises that there may need to be such a

procedure and so section 28 allows that a law may provide for the election of members to the Legislative Assembly, including, under section 28(f):

> *"the determination of <u>any question whether any person has been validly elected</u> a member of the Assembly...."*
> *(emphasis supplied)*

32. By repeating the language of section 23 – "any question whether a person has been validly elected as a member of the Assembly" – section 28(f) of the Constitution specifically envisages that a law may be enacted to establish the procedure for the determination of that question.

33. The Legislature has enacted such a law: The Elections Law, providing for most of the matters listed in section 28 of the Constitution.

34. In particular, provision is made for the determination of any question whether any person has been validly elected in Part VIII of the Elections Law. This establishes the framework for challenging the outcome of elections, and the limits within which such challenge may be made. These include placing limits – but in keeping with section 23(3)(a) of the Constitution – on the persons who may present an election petition (section 83), establishing a time limit within which a petition must be brought (section 84(a)), ensuring that security is

given for any costs, charges and expenses for which the petitioner may become liable (section 84(b) – (c)), stating the consequences of a finding that there have been corrupt or illegal practices (sections 85-86), and specifying the proper process and the powers of the court in trying election petitions (sections 86-88).

35. To suggest that any conclusion other than that these provisions are intended to be a comprehensive scheme for challenging the outcome of elections would be absurd.

36. If challenges could be brought by some mechanism other than by election petition, the statutory scheme would be redundant. There would be no reason for any plaintiff to comply with a statutory scheme which imposes a twenty-one or twenty-eight day limit (as the case might be); the requirement of payment of security, and (by Grand Court Rules Order 93) requires publicity for the petition and a speedy hearing.

37. The Defendants further submit that the conclusion that the Elections Law provides the only means by which the validity of their election may be legally challenged is further strengthened by the history of the development of the right to challenge the outcome of elections.

38. As is explained in **Erskine May, Parliamentary Practice** 23rd Edition, page 45, fn 1:

"Before 1770, disputed elections were determined in accordance with party strengths on the floor of the House of Commons. In subsequent years, however, The Grenville Act and others made provisions for the selection of committees by lot, in an attempt to eliminate partiality. The enterprise was not wholly successful and in 1839 a further statute established a new system, on different principles, increasing the responsibility of individual members, and leaving little to the workings of chance. These principles subsisted in general until 1868 ([the Parliamentary Elections Act 1868]) when the jurisdiction of the House in controverted elections was passed by law to the Courts."

39. The jurisdiction given to the Courts has been recognised in the case law to be a sensitive and special jurisdiction, delving into the regulation of Parliament itself, and has been strictly and narrowly construed by the Courts. The provisions which carefully regulate the role of the Courts and the specified time-limits within which petitions can be brought are of crucial importance.

40. The Defendants cite, in support of this proposition, dicta from the Privy Council in **Theberge v Laudry (1876) 2 App. Cas. 102** ***and De Silva v Attorney-General for Ceylon (1949) WN 248.***

41. Furthermore, argue the Defendants, the very purpose of the Elections Law is to place limits on the manner and time in which challenges may be brought to the validity of the election of a person; and this has long been recognised as a vital element of the election petition procedure. They cite ***Williams v Tenby Corporation (1879) 5 CPD 135***, in support. In that case the petitioners failed to give the respondent notice of their election petition within the relevant time limit. Mr. Justice Grove, rejecting the petition stated at p. 137:

> ***"The meaning of the enactment is that the petition shall not be kept long hanging over the heads of a person elected in municipal corporations. The petition must be presented in twenty-one days, and during that time the petitioners should read the Act and ascertain what they have to do."***

42. He held (at p 138) that the provisions of the elections legislation were **"conditions precedent"** which must be complied with before the petition could be presented. ***Williams v Tenby Corporation*** was approved by the Judicial Committee of the Privy Council in ***Devan***

Nair v Yong Kuan Teik [1967] 2 AC 31, a case to be more fully considered below along with others which more recently have come, including in the context of Constitutional arrangements comparable to our own; to cite public policy reasons for enforcing strict compliance with the relevant rules relating to election petitions.

43. The Defendants say that it would frustrate these essential policy considerations if the Plaintiffs were able to avoid the rules set out in the Elections Law designed to protect the public interest in ensuring that any challenge be brought speedily, and to do so by adopting a procedure of their own choosing.

Analysis

44. It is immediately apparent that, in essence, what is in issue between the two arguments of the Plaintiffs and the Defendants, is the competing private interests of the Plaintiffs as citizens having the right to vote in due and lawful elections, the private interests of the candidates themselves, as well as, and more importantly; the public interests in the ascertainment of its Government in a timely manner, but all in keeping with the Constitution and the Elections Law.

45. It must now be recognised as incontrovertible, that the right to participate in government implies universal adult suffrage including

the right to vote by secret ballot and the right to stand for election. See: **Constitutional Law and Human Rights, Butterworths,** London 1997, para. 118.

46. As a necessary corollary of these rights, there must be the right to the protection of the law, by due process, for their enforcement. These are all matters recognised and addressed by the Constitutional and legal provisions under discussion.

47. However, it is equally well established that in a democratic society, civil liberties exist within the interstices of the law. As Sir John Donaldson MR (as he then was) so famously said: "The starting point of our domestic law is that every citizen has a right to do what he likes, unless restrained by the common law or by statute – ***The Attorney-General v Guardian Newspaper Ltd. (No. 2) [1988] 3 All. E.R. 545 at 596.***

48. Accordingly, it is now an established aspect of Commonwealth (and indeed international jurisprudence) that limitations, even on Constitutional rights, may be imposed such as are reasonable and demonstrably justified in a free and democratic society. See, for example, ***R v Oakes [1987] LRC (Const.) 477 Can S.C.*** (where it seems that that particular rubric was first employed) and ***The***

***Attorney-General of Hong Kong v Lee Kwong-Kat* [1993] AC 951 PC.**

49. Such limitations can, depending on the circumstances, include the imposition of time limits upon the exercise of civil rights; which is, of course, the very issue under consideration here.

50. Perhaps the most remarkable example of this is the kind of time limits imposed by law (including rules of court) upon the right to appeal (as an aspect of the right to a fair trial) in capital cases. A full discussion of those rules and their implications is to be found in ***Pratt and Morgan v the Attorney-General for Jamaica et al* [1994] 2 A.C. 1** (in particular at page 18.H) And, as an example of the strict application of such time limits against the Crown; see: ***Regina v Weir* [2001] WLR 421.**

51. Another pertinent example of a limitation, is that which might restrict access to the Courts for seeking some other remedy apart from that provided by a statutory provision enacted specifically to deal with the situation. In the present case, the Defendants say – by reliance on the Privy Council decision in ***Kemrajh Harrikissoon v Attorney-General of Trinidad and Tobago* [1980-] AC 265** ("***Harrikissoon***") – that it is implicit in our Constitutional scheme that a remedy is provided by the statutory framework in the Elections Law enacted pursuant to the

Constitution and so it is an abuse of process to seek another remedy under the Constitution. The same principle may well apply where the normal and more appropriate remedy is one available at common law: ***Jaroo v Attorney General of Trinidad and Tobago [2002] 1 A.C. 871.***

52. These are important considerations in any approach to the construction of a Constitutional right of access to the Courts and are well established in Cayman Islands jurisprudence: see ***Kirk Freeport v Immigration Board 1997 CILR 502 (C.A.).***

53. Lord Diplock's forceful reminder on behalf of the Privy Council of the limitations, in the ***Harrikissoon*** case, is directly pertinent:

> ***"The notion that whenever there is a failure by an organ of government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by Chapter 2 of the Constitution is fallacious. The right to apply to the High Court under section 6 of the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value***

will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action....the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the Court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the Court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy...."

54. With that statement of principle firmly in mind, it indeed becomes my task now to determine whether the election petition is the prescribed normative way for seeking the appropriate judicial remedy in this matter.

55. While the task at hand must remain essentially one involving the proper construction of our Constitution and Elections Law, a further consideration of the peculiar nature of the right to challenge an election in a case such as this, seen through the eyes of other Commonwealth courts will, as always, be helpful.

56. The ***County of Tipperary Case*** *(1875) 3 O'M & H 19* was among the earliest of the cases decided by the common law Courts on the subject of election petitions. In it the question was whether the Court had jurisdiction to hear two petitions presented after the death of the member whose election was challenged, both on grounds of his disqualification as a candidate when he was alive and on grounds of the resultant irregularity in the conduct of the returning officer in having accepted his nomination.

57. The following words from the judgment of Justice Lawson (at page 23 of the Report) are instructive:

> ***"The entire fallacy of the arguments used (in aid of the challenge as to jurisdiction) rests upon considering this proceeding as an ordinary*** *lis,* ***or action between individuals. It is said that you cannot bring an action against a dead man (which is quite true), and therefore that you cannot present a petition against a dead man. This is not a proceeding of a personal nature against a dead man; it is the assertion of a right*** *in rem,* ***a right to set aside an undue return, and in no sense falls within the meaning of the maxim,*** *actio personalis moritur cum persona.* ***It is remarkable how carefully the Act and the***

rules recognise this distinction between an election petition and an ordinary suit or action."

58. And, in the judgment of Justice Morris (at page 25):

"It was strongly urged that a petition is a mere cause in the Court, and that as an ordinary cause could not be instituted against a dead person, by analogy a petition could not be lodged seeking to set aside the return of a deceased person. I consider this is a fallacious analogy, because a petition is not a suit between two persons, but is a proceeding in which the constituency itself is the principal party interested. Section 2 [(of the Parliamentary Elections Act, 1868)] says that a petition is to be dealt with as an ordinary cause, not that it becomes one."

59. In ***Theberge v Laudry*** (above) the issue before the House of Lords was whether a candidate whose election had been declared null and void under the Quebec Controverted Elections Act, 1875 (and its predecessor Act of 1872) and himself declared to be guilty of corrupt practices, had a residual right of appeal by invoking the prerogative of the Crown, notwithstanding that the Act precluded a right of appeal.

60. In reflecting on the nature of the Courts' jurisdiction as it related to the rights of the applicant Lord Cairns, in delivering the unanimous judgment had this to say (at p106):

> ***"These two Acts of Parliament, the Acts of 1872 and 1875, are Acts peculiar in their characters.***
>
> ***They are not Acts constituting or providing for the decision of mere ordinary civil rights; they are Acts creating an entirely new, and up to that time unknown jurisdiction in a particular Court of the colony for the purpose of taking out, with its own consent, of the Legislative Assembly, and vesting in that Court, that very peculiar jurisdiction which, up to that time, had existed in the Legislative Assembly of deciding election petitions, and determining the status of those who claimed to be members of the Legislative Assembly. A jurisdiction of that kind is extremely special, and one of the obvious incidents or consequences of such a jurisdiction must be that the jurisdiction, by whosoever it is to be exercised, should be exercised in a way that should as soon as possible become conclusive, and***

enable the constitution of the Legislative Assembly to be distinctly and speedily known."

61. So there, clearly explained in the case law, is the fact that the right of challenge invoked by the Plaintiffs here is not primarily a personal right, it is one to be exercised primarily in the public interest in the due conduct and process of elections. Accordingly, the jurisdiction of the Court is not one which is vested primarily for the vindication of private rights, but primarily to secure the same public interest objectives; objectives which imply that time is of the essence and a jurisdiction which is therefore to be circumscribed by the legislative imposition of time-limits.

62. This view of the legislative objective is even more clearly obtained from a closer examination of the historical background.

63. An early and off-cited judicial appreciation of the history comes from Justice Keogh's judgment in the ***County of Tipperary Case*** (above) at p27:

"Every constitutional lawyer is aware, that from a very early period of our Parliamentary history, the House of Commons asserted with the most jealous care the exclusive jurisdiction over election petitions, and carefully guarded its rights in the matter of writs,

the issuing of writs, the returns, and every matter connected with the right of questioning the election of members. Without the Speaker's warrant no writ could issue, and when, even in the reign of Elizabeth, and whilst Parliament was not sitting, writs for the return of members were issued out of Chancery, the members returned were expelled, and new writs were issued under the authority of the Speaker's warrant. By means of this exclusive jurisdiction, every interference with the freedom of election, and all the rights of the electors and the elected, were brought under the cognizance of the House of Commons; and returning officers of every denomination, mayors, sheriffs, bailiffs, and portreeves were kept under strictest supervision, so as to prevent either delay or falsification in return of the writs, and to insure the speedy and complete redress of any wrong or the rectification of any error which might be committed by those in whose hands rested the taking of the poll and the making of the returns. For this purpose it will be found that from a very early period Sessional Orders

were provided to insure the immediate decision of all controverted questions between electors and elected, candidates and members. A strict time was limited, within which alone petitions could be presented questioning the propriety of the election; but during that time, and up to the last moment of that time, petitions could be presented."

64. It was against that historical background described by Justice Keogh that the Parliamentary Elections Act 1868 was enacted; that Act under which the ***County of Tipperary Case*** itself was amongst the earliest decided. It was that Act which for the first time, transferred to the common law courts, the jurisdiction to try petitions complaining of undue election or undue return of a member of Parliament and so entrusting to the courts – as its long title explained – for *"...providing more effectually for the Prevention of corrupt Practices at Parliamentary Elections*"; the regulation of that crucially important aspect of Parliamentary affairs.

65. By section 5 of the 1868 Act, the categories of persons who could petition were identified (the same three categories as those in section 83 of the local Elections Law). The 1868 Act also similarly provided for procedural matters and, most to the point here, by section 6(2) that

the *"Petition shall be presented within twenty-one days after the Return has been made...."*

66. Time-limits have consistently remained a requirement of the Elections Act in Britain up to the current Representation of the People Act 1983. See **Halsbury's Laws of England** 4th Ed. 2007 reissue Vol. 15(4) paragraph 766. They have been in place in the Cayman Islands elections law since at least that of 1959 which was enacted pursuant to sections 30(2) and 35 of the Islands' first formal Constitution – the Constitutional Order-in-Council of 1959.

67. Similar twenty-one day limits are now common place throughout the Commonwealth, as was amply demonstrated by the review of comparative statutes and case law provided by Counsel in this case.

68. The same imperatives explain the provisions in section 23(2) of the Constitution which mandate that the decisions of the Grand Court on any question whether a person has been validly elected shall be final and not subject to any appeal. Its rationale is authoritatively explained by Lord Upjohn in the following passage from his judgment on behalf of the House of Lords in ***Devan Nair v Yung Kuan Teik*** (above) at p38:

> ***"Constitutionally decisions on questions of contested elections are vested in the Assembly for which the***

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

69. A similar explanation for the limitation on the right of appeal is given in ***Patterson v Solomon*** *[1960] 2 All. E.R. 20,24* (per Viscount Simonds on behalf of the Privy Council) in a case from Trinidad and Tobago involving allegations of disqualification of a member for

having failed to disclose an interest in a Government contract as required by the Constitutional Order-in-Council of 1950 then in force.

70. As we have seen, the twenty-one day time limit for the filing of a petition was declared to be mandatory in ***Williams v The Mayor of Tenby and others*** (above); Justice Grove in that case (at p341) describing it as being a "condition precedent" to the bringing of a petition and that like the other mandatory requirements, it is ***"preemptory and could not be dispensed with by a judge or the Court".***

71. This dictum was expressly and, for present purposes, conclusively approved by the Privy Council in ***Devan Nair v Yong Kuan Teik*** (above) an appeal from Malaysia per Lord Upjohn, in determining whether the time limit for giving notice of the presentation of an election petition, under the Malaysian Election Offences Ordinance, had been met. At p44 E to 45 F Lord Upjohn declared:

> ***"So the whole question is whether the provisions of rule 15 are "mandatory" in the sense in which that word is used in the law, i.e., that a failure to comply strictly with the times laid down renders the proceedings a nullity; or "directory", i.e., that literal compliance with the time schedule may be waived or excused or the time may be***

enlarged by a judge.... This question is a difficult one, as is shown by the conflict of opinion in the court below.

The circumstances which weigh heavily with their Lordships in favour of a mandatory construction are:

(1) The need in an election petition for a speedy determination of the controversy, a matter already emphasised by their Lordships. The interest of the public in election petitions was rightly stressed in the Federal Court, but it is very much in the interest of the public that the matter should be speedily determined.

....

The case of Williams v Tenby Corp; which has stood the test of nearly 90 years and seems to their Lordships plainly rightly decided, strongly supports the view that the provisions of rule 15 are mandatory.

On the whole matter their Lordships have reached the conclusion that the provisions of rule 15 are mandatory and the petitioner's failure to

observe the time of service thereby prescribed

rendered the proceedings a nullity."

72. Notwithstanding the common historical background against which the Constitution has entrusted to the Cayman Courts the regulation of the election of the membership of the Legislature and the public imperatives recognised by the mandatory nature of the rules prescribed for those purposes; it is at least implicit in the Plaintiffs' arguments that, by affording them an alternative avenue of complaint under section 23 of the Constitution, instead of by petition under the Elections Law, they are to be kept and Parliament must have intended that they are to be kept; to no time limits whatsoever.

73. This would be so because no such limits are prescribed by section 23 of the Constitution itself.

74. A further peculiarity of the Plaintiffs' argument in this regard is the implication, that the legislative intent in question here, would be that of the Westminster Parliament from which our Constitutional Order-in-Council derives its authority by virtue of the powers conferred upon Her Majesty the Queen in Council by the West Indies Act 1962.

75. The patent absurdity that would result was not sought to be addressed in the Plaintiffs' arguments. And it is not apparent how it could be. The same concerns which Westminster – as the Imperial Parliament –

would have for the ascertainment of its membership and for the regularity of its affairs, would equally appertain here and, so too, would the protection of the public interests in the Cayman Islands in the speedy determination of the composition of its elected government.

76. When matters of real public importance are legislated, it is, moreover, by no means unusual that the Courts regard Parliament as having intended that non-compliance by a litigant with statutory time-limits in relation to the jurisdiction of the Court, should result in the Court *lacking jurisdiction* to hear the matter.

77. See, for example ***Petch v Gurney*** ***[1994] 3 All. E.R. 731 C.A.*** approved in ***R v Weir*** (above, at page 426 para 14, per Lord Bingham).

78. In ***Petch v Gurney*** Millet LJ (for the Court of Appeal) stated at p. 738 e-f (in ruling that the 30 day time limit under section 56(4) of the Taxes Management Act 1970 for transmitting a case stated by a Special Commissioner of Tax to the High Court was absolute):

> ***"If the only time limit which is prescribed is not obligatory, there is no time limit at all. Doing an act late is not the equivalent to doing it in time…. Unless the court is given a power to extend the time, or some***

other and final mandatory time limit can be spelled out of the statute, a time limit cannot be relaxed without being dispensed with altogether…."

79. Moreover, as Lord Pannick very comprehensively argued here, Commonwealth courts have frequently cited the public policy reasons for enforcing strict compliance with the relevant rules relating to election petitions. The following pertinent examples of cases were cited:

(1) The decision of the Supreme Court of the Federation of the West Indies (on Appeal from the Supreme Court of Jamaica) in ***Allen v Wright No. 2 (1960) 2 WIR 102*** applying ***Williams v Tenby Corporation*** (above) and upholding the lower Court's decision to strike out a petition which was served late.

Chief Justice Hallinan stated at p103A that:

"Some of [the Election Petition Law's] objects were to prescribe a rigid time-table and the steps which a petitioner must take to bring his action to trial; and the grounds of public policy would not be far to seek, namely, that it is desirable that if a member of the legislature had been wrongly elected, he should

cease to sit and vote in the legislature as soon as possible."

(2) The decision of the High Court of Australia to dismiss an election petition because of late service in ***Rudolphy v Lightfoot (1999) 197 CLR 500***. The Court stated at paragraph 12 that the time limit for serving petitions –

"...plainly is designed to produce criteria which are objective and certain and reflect the public interest in resolving expeditiously and with finality questions respecting disputed elections and returns."

(3) The decision of the Court of Appeal of England and Wales in ***Ahmed v Kennedy [2003] 1 WLR 1820,*** in which election petitions were struck out for failing to comply with the statutory rules. Lord Justice Simon Brown stated at paragraph 40 that the legislation imposed requirements -

"...to ensure that any petition is made ready for listing and disposal as speedily as possible. Flexibility and discretion are all very well but there is merit too in certainty, not least in the field of electoral challenge. It is undesirable to have someone serving in a public office with

doubts surrounding the legitimacy of his election."

80. Courts throughout the Commonwealth have thus recognised the powerful public policy reasons which underlie the need for election petitions to comply strictly with the mandatory rules, especially those as to the time-limits within which challenges are to be brought.

81. There is nothing, in my view, in the opening words of section 28 of the Constitution which would preclude the operation of the Elections Law, including its mandatory procedural rules, as an exclusive code for the bringing of electoral challenges by the categories of persons entitled to do so, other than the Attorney-General. I have so concluded contrary to the following further argument of the Plaintiffs.

82. The opening words *"Subject to the provisions of this Constitution"* must, of course, be taken as requiring that any law enacted by the Legislature pursuant to section 28, must comply with the other provisions of the Constitution, as well as with section 28 itself.

83. The question is whether the Elections Law, construed as a mandatory and exclusive code for the bringing of electoral challenges by all but the Attorney-General, would operate as an ouster of the Court's jurisdiction given under section 23 of the Constitution to hear

questions as to the validity of elections, which may otherwise be brought by any of the persons entitled under that section to do so.

84. In my view the Plaintiffs' argument in this regard confuses the concept of ouster with that of regulation.

85. Far from in any way ousting the jurisdiction conferred by section 23, the Elections Law operates in furtherance of it by providing , pursuant to the authority of section 28 of the Constitution, for the regulation of the election of members of the Assembly, including (without prejudice to the generality of [that power] for

> *"(c) the ascertainment of the qualification of electors and candidates for elections (and)*
>
> ....
>
> *(f) the determination of any question whether any person has been validly elected a member of the Assembly...."*

86. A requirement – for the powerful policy and historical reasons already identified – that a person seeking to challenge an election shall exercise his right given by section 23 of the Constitution by having to comply with the requirements of the Elections Law, is by no means to oust the jurisdiction of the Court. Rather, it is one which simply regulates the exercise of the right of challenge and does so in the public interest for reasons which the Constitution itself implicitly

recognises by providing for a regulatory law as it does by section 28. Note in this respect, the very important words in section 28 of the Constitution *"...the determination of any question..."* which must surely include any question as to the qualification to be elected as a member. And, by those express words quoted above from paragraphs (c) and (f) of section 28; it is plain as plain can be that questions as to the ascertainment of the qualifications of candidates for elections and whether any person has been validly elected, have been given over by the Constitution to the Legislature to be regulated by the Elections Law.

87. Nor is the exemption of the Attorney-General from the regulation of the Elections Law any indication to the contrary of the foregoing construction.

88. The Attorney-General is the public official regarded by Constitutional convention and by the Courts as the guardian of the public interests under law; see ***Gouriet v U.P.W*** [1978] A.C. 430. It is obvious that he is made exempt from the regulation of the Election Law by virtue of his office.

89. As the Defendants submit, the Constitution and the Elections Law assume that challenges to be brought by the Attorney-General will be

brought not for any private or partisan purposes, but rather in the public interests only in the assurance of due and lawful elections.

90. This assumption must be taken to include that the Attorney-General will act in a timely manner, on due notice to all concerned; not frivolously or vexatiously; and so as to avoid any abuse of the process of the Court.

91. These assumptions as to the official manner of conduct of the Attorney-General in the bringing of a Constitutional challenge, are also manifest, in my view, in the provisions of section 23(3)(b) and (c) of the Constitution, which respectively provide; under paragraph (b), that apart from an elected member of the Assembly only the Attorney-General can seek a determination of a question whether an elected member has vacated his seat and, under paragraph (c), that the Attorney-General may intervene in any electoral challenge brought before the Court by any of the other three categories of persons identified by section 23 (3)(a) of the Constitution. It is plain that the special status accorded the Attorney-General by section 23(3)(b) and (c) can only be on account of his role as guardian of the public interest. The result therefore, is that the Attorney-General can bring a motion under the Constitution for the determination of any question whether a person has been validly elected as a member of the

Assembly at any time, if it is in the public interest to do so and irrespective of the time or other limitation imposed by Part VIII of the Elections Law.

92. In my view, the further argument raised by the Plaintiffs – that the Elections Law does not seek to regulate the determination by the Court of a question whether a member has *vacated* his seat, suggesting therefore that the Elections Law is not meant to be an exclusive code for resolution of election disputes, is also readily addressed.

93. The answer is that the Legislature may well have taken the view that there is no need to legislate for such potential disputes given the narrower scope for them and the likely involvement, in any event, of the Attorney-General to ensure due and timely process in the public interest.

94. The foregoing analysis also meets the further hypothetical point raised by the Plaintiffs – that the disqualification of a member might come to light or to full realisation only after the expiry of the twenty-one day period prescribed in the Elections Law. In such an event, and on the basis of the foregoing construction, it would be always open to the Attorney-General to seek, in the public interest, the determination of

such an issue by the Court by motion directly under section 23 of the Constitution.

95. While those are not said to be the circumstances presented here – (judicial notice being taken of the fact that the issue of whether candidates had met the one-month requirement for declaration of interests having been raised in the public domain even before the date of the general election) – the Attorney-General's standing would remain.

96. This issue of the Attorney General's standing to bring a Constitutional motion of challenge to a candidate's qualification for election was the subject of express consideration by the courts of this jurisdiction in 1972. In that year, in the matter of the ***Attorney General v James M. Bodden*** Justice Moody of the Grand Court (the predecessor to this Court) considered the question whether the Attorney General was allowed to bring the motion under what was then section 24(2) of the Constitutional Order of 1965 to challenge Mr. Bodden's qualification to be a member of the Assembly, on account of Mr. Bodden not having renounced his United States citizenship and so his allegiance to a foreign sovereign power.

97. Section 24(2) of the 1965 Constitution provided:

> *"(2) Any question whether a person has been validly elected as a member of the Assembly, or whether an elected member of the Assembly has vacated his seat therein, shall be determined by the Grand Court, whose decision shall be final and not subject to any appeal."*

98. The arguments raised by attorney Mr. Paget-Brown for Mr. Bodden – (as the report of the ruling appeared in the Weekly Caymanian newspaper on 20 July 1972, no official transcript now being available) – was that the Attorney-General, like every other potential challenger, was bound to bring his challenge by way of petition under the Elections Law.

99. In rejecting this argument, it appears from the newspaper report that Justice Moody accepted, among other reasons, that the Elections Law then in place (the 1959 Law) did not include a challenge to qualification as ***"(the Attorney-General) was not complaining of undue election or undue return (nor seeking) to see any election documents and the respondent's comments as to procedure and production of election documents were of little value in this case."***

100. Despite the absence of an official transcript of the ruling, I have decided to consider the case because of its obvious Constitutional and legal importance and despite the fact that the Court then obviously did not benefit from the fullness of the kind of arguments presented

before me. Having seen a commentary on the case (by no less distinguished commentator than our current Madam Speaker of the House, who was in 1972 a candidate opposing Mr. Bodden) I brought it to the attention of Counsel who later obtained the newspaper report and submitted it with their written submissions on the case.

101. The following are the conclusions which I think I can safely arrive at by reference to the case:

(i) It decided, correctly in my view and in keeping with the conclusions I have expressed above, that the Attorney General's standing to apply (even in the absence then under the 1965 Constitutional Order of the enumeration of categories of persons who could apply) was unfettered by the regulatory scheme of the Elections Law 1959.

In this regard it is to be noted that while the Elections Law 1959 enumerated the same three categories of persons who may challenge which now appear in the Elections Law (the same as the first three in section 23(3)(a) of the Constitution); the Elections Law 1959, alike the current Elections Law, made no mention of the Attorney-General.

(ii) The proposition whether any person coming within the first three categories (that is: those given standing other than the

Attorney-General) could move the Court to pronounce upon a member's or candidate's disqualification other than by an election petition, was not an issue before the Court and so Justice Moody was not required to address that question in his ruling.

The case is therefore not to be considered as settled precedent – one way or the other – as to that proposition.

(iii) To the extent that Justice Moody appears to have decided that a question as to disqualification, was not subsumed within the rubric of "undue election" or "undue return" but separately came within any question of whether a person had been "validly elected" referenced by section 24(2) of the 1965 Constitutional Order; it does not appear that he was invited to consider the meaning of the same expression "validly elected" as it appeared in section 35(f) of the 1959 Order and section 29(f) of the 1965 Order, the provisions by which the Assembly had been given the Constitutional authority to legislate for the determination of the validity of elections by the Courts (and had so legislated in the 1959 Elections Law). Nor does it appear that his attention was brought to the extensive case law on the subject.

Yet, the juxtaposition of the expressions "validly elected" and "undue election" is at the heart of the issue which this Court must resolve now in deciding whether or not an "undue election" is meant to include one in which a candidate was disqualified and so not validly elected.

For those reasons, and although with due hesitation and deference, I do not regard myself as bound to follow Justice Moody's reasoning that an election petition is not meant to be the procedure for challenging a person's qualification to be elected as a member of the Assembly.

102. This then brings me more fully and finally to the consideration of the Plaintiffs' argument in this case – that the Elections Law which allows for petitions complaining of "undue elections or undue return" does not include a challenge as to the qualifications of a person to be elected.

103. As it was described, it does indeed appear that the "high water mark" of the argument of the Plaintiffs by Mr. Clarke in this regard, is its reliance on the earlier judgment of this Court in ***Thompson-Murphy v Pierson*** (above).

104. I must therefore now turn to consider in more detail that case and the Australian case of ***Re Surfers Paradise Election Petition*** (above) on which it relies.

105. At the outset, it is essential to note that ***Thompson-Murphy v Pierson*** was a case in which the question before the Court was whether or not allegations of illegal practices (allegations of the publication of false statements or facts about the character or conduct of opposing candidates) if proved; could be the basis for an election petition complaining of undue election.

106. The case was not one concerned with whether or not a candidate was disqualified from election.

107. Thus, when Harre CJ decided to adopt the meaning of "undue election" given by Justice Dunn in ***Re Surfers Paradise Election Petition***; his concern was to decide only whether the particular illegal practice alleged could found an election petition. In deciding that it could, he was not required to consider, and his attention was certainly not drawn to any of the cases which consider, the question whether cases of disqualification can found a petition alleging undue election.

108. As we have seen, a consistent line of case authorities, going back more than 130 years to the ***County of Tipperary Case*** (above) and culminating perhaps most recently in the case of ***Dabdoub v Vaz***

C.A.45 OF 2008 (in the Court of Appeal of Jamaica judgment delivered on 13th March 2009) establishes that they can. (This latter being a case in which Mr. Vaz was found not to be qualified to be elected to the House of Representatives of Jamaica on account of his United States citizenship which he had not then renounced but had actively affirmed).

109. It is apparent, moreover, from a reading of the case on which Harre CJ relied – ***Re Surfers Paradise Election Petition*** (above) – that it too was a case not concerned in any way with the lack of qualification of a candidate being the basis for an election petition alleging undue election. The case there arose from a rather more peculiar set of circumstances. As Dunn J described it (at p.117 letter E):

> ***"The so-called petition was not a petition with respect to one election of one candidate, but one which called in question the validity of all (of) the last Queensland State elections, which were held on December 7 1974."***

110. Indeed, the petition was even more remarkable for its generality as it hinged upon the central contention that the Queensland Elections Act 1915 – 1975 itself was invalid so that – as Dunn J. quoted the petitioner – ***"every supposedly held election from 1915-1975 not one of them returned one legally and lawfully nominated Candidate".***

111. So, it was with regard to that remarkably general attack upon the legal validity of all the elections themselves, that Justice Dunn had to decide whether an election petition alleging "undue election or undue return of a member" could be founded.

112. While it is hardly surprising that his answer was in the negative and so striking out the petition for being an abuse of process; it would be inappropriate to apply the meaning which he gave to the term "undue election" in the circumstances of that case, so as categorically to exclude allegations of disqualification on the part of a candidate. As he elaborated (at p.129 A-B); Justice Dunn's central concern was to explain as to the meaning of undue election that ***"...the expression does not apply to an election in which the prescribed method of election has been followed, but that method is unlawful. Mr. Soegemeier by his petition purports to complain of an "undue election" but, properly understood, that is not the complaint which he makes. His complaint is that the state of the law is such that if it is obeyed there can be no valid election."***

113. The inadequacies of Justice Dunn's meaning if taken as a categoric definition of the term "undue or unlawful election" was recognised very recently by the New Zealand High Court (sitting as a Full Court) in ***In the Matter of an Election Petition relating to the Selwyn***

Electoral District: Payne v Adams (written judgment delivered at Christ Church Registry on 7th May 2009 in Cause: Civ 2008-409-3089).

114. The New Zealand Court considered (at pp110-112), the passages from Justice Dunn's judgment in ***Re Surfers Paradise Election Petition*** (above) as well as the further examples given at **Halsbury's Laws of England 4th Ed. Vol. 15(4)** at para. 759 of the grounds upon which a complaint of undue election or undue return may be made. (The latter citing ***Galway County Case (1872) 2 O'Mt H 46*** and ***Tipperary County Case*** (above) as early examples of election petitions alleging disqualification).

115. The New Zealand Court then concluded at p114 para. 73 as follows:

> ***"Having considered the statutory history, structure and purposes of the Electoral Act 1993, we conclude that a complaint about the process by which a political party has selected a candidate for electoral purposes [(the complaint then before the Court)] may not be the subject of a petition complaining of "an unlawful election or unlawful return" [(terms the Court held earlier (at p110 para. 60) to have been synonymous with "undue election or undue return")] under s.229(1) of***

the Electoral Act. Election petitions under Part 8 are concerned with the validity of elections. They relate to the processes of the election or returns in each electorate and the existence of any element of unlawfulness which relates to those processes.

On any such petition, the Court is concerned with corrupt or illegal practices as defined by the Act, issues directly affecting the outcome of the election such as the <u>eligibility of candidates</u> and electors, the counting of votes, or the conduct of Returning Officers" (emphasis supplied).

116. This more compendious meaning, carefully arrived at by the New Zealand Court as applicable to a similar legislative intent and against the background of a shared legal history with that of our Elections Law, is one which I respectfully adopt. Its rationale is plain and sensible: it recognises that the questions that are likely to arise as to the validity of elections are the very kind of questions likely to arise as to whether there has been an undue election or undue return. And, as history has shown, the question of the qualification of candidates for election is amongst those most likely to arise.

117. The same rationale must apply for the present purposes of construing the Constitutional meaning of the term "validly elected" in sections 23(2) and 28(f) of the Constitution. There appears to be no logical or linguistical reason why a question whether a person has been invalidly or unduly elected might not include a question whether he has been qualified to be elected.

118. Here too, I must however, express the hesitancy with which I depart from the earlier decision of this Court in ***Thompson-Murphy v Pierson***. But, on such an important subject as this, where it is apparent that the Court was then itself dealing with an election petition brought under the Elections Law not involving any issue of whether a petition alleging disqualification would be competent, it would be wrong to allow the narrower meaning which it then ascribed to the Elections Law to operate in a manner the Court could not have intended; contrary to established case law throughout the Commonwealth and so to preclude that obvious kind of petition.

119. There is further assistance to be obtained from ***Payne v Adams*** (above). This is in respect of Mr. Clarke's further and alternative submission that the Plaintiffs' motion under the Constitution by which they seek a declaration that the Defendants were not qualified to be elected, can be heard by exercise of the Court's inherent common law

jurisdiction and powers, even if the Defendants have failed to comply with the Elections Law. The argument is that nothing in the Constitution or the Elections Law expressly precludes the operation of the Court's inherent power to grant declaratory relief as a Superior Court of Record – a power which has been expressly confirmed by section 11(2) of the Grand Court Law (2006 Revision).

120. I am unable to accede to this submission. The reason is readily understood and I think properly explained in the following passages from ***Payne v Adams***; which I also adopt: (from p111 para. 62 – p112 para. 64):

> ***"While election law in New Zealand is largely statutory, the power of the courts at common law to declare a Parliamentary election to be void on an election petition may still exist except to the extent that it has been clearly excluded or modified by statute.***
>
> [(The Court then cited the earlier New Zealand case of ***Akaroa Election Petition (1891) 10 NZLR 158*** in support then continued at para. 63 and 64)]:
>
> ***In the Akaroa election case the court relied upon the early English authority of Woodward v Sarsons (1875 L.R. 10 CP 733 where the Court of Common Pleas***

held that an election could be declared void at common law if it were so conducted that there was "no real election at all, or that the election was not really conducted under the subsisting election laws" (at p743). We would not rule out the possibility of common law jurisdiction of the kind referred to in these authorities but, in practice, attention is most likely to be focused on a breach of one or more of the statutory obligations under the Electoral Act..."

121. Here attention has been focused on an alleged breach of the Constitutional requirements for qualification for election. As I have concluded and sought to explain in this judgment; such an allegation is *par excellence* a matter to be inquired into pursuant to the process of an election petition under the Elections Law by virtue of the authority vested in the Legislature by the Constitution. The common law inherent power of the Court to enquire into such a matter has clearly thus been circumscribed by statute. While the inherent power may remain to grant declaratory relief (as explained in ***Payne v Adams***), it would therefore be wholly inappropriate for the Court to invoke these powers in the present circumstances.

Summary of Conclusions

(i) Section 28 of the Constitution (as did predecessor Constitutions) confers on the Legislative Assembly the power to enact a law regulating the procedure for challenging the validity of elections; including as to whether a person has been validly elected on account of being disqualified.

(ii) The Legislative Assembly has enacted such a law in the form of the Elections Law (and predecessor law). It provides in Part VIII, a comprehensive and exclusive statutory scheme for challenging the validity of elections.

(iii) Given the historical background to the vesting of jurisdiction by such laws in the Courts and the imperative public interest in the certainty of Parliamentary elections and the regularity of Parliamentary affairs; the time-limit imposed by the Elections Law for the bringing of challenges as well as the other procedural requirements, must be met and are regarded by the Courts as mandatory.

(iv) It is well-established (see ***Harrikissoon*** (above) that where a specific remedy is provided by statute enacted pursuant to the Constitution; it will be an abuse of process to seek to by-pass that recourse by seeking another remedy under the Constitution.

(v) The Plaintiffs, not being the Attorney-General, are required to bring a challenge to the validity of an election, including as to the qualification of a candidate, by election petition under the Elections Law. By seeking to move the Court instead by reliance on section 23 of the Constitution, they seek impermissibly (whether intentionally or not) to bypass the prescribed and mandatory statutory scheme.

(vi) If the time-limits imposed by the Elections Law can be by-passed, then there would be no time limits at all. That cannot be a proper interpretation of the Constitutional intent

(vii) For all the foregoing reasons, the Plaintiffs' Originating Motion is an abuse of the process of the Court and must be struck out. It is so ordered.

(viii) This conclusion does not affect the standing of the Attorney-General to bring a motion, if it is appropriate to do so, in the public interest.

GRAND COURT CAYMAN ISLANDS

Hon. Anthony Smellie
Chief Justice

August 3 2009