ANTIGUA AND BARBUDA

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE

CLAIM NO. ANUHCV2009/0141

In the matter of the Representation of the People Act (Cap 379) as amended

And

In the matter of a Parliamentary Election for the Constituency of St. George held on the 12th day of March 2009

BETWEEN:

DEAN JONAS

Petitioner

AND

JACQUI QUINN-LEANDRO
MARILYN SIMON
LORNA SIMON
~~THE ELECTORAL COMMISSION~~

Respondents

CLAIM NO. ANUHCV2009/0412

In the matter of the Representation of the People Act (Cap 379) as amended

And

In the matter of a Parliamentary Election for the Constituency of St. John's Rural West held on the 12th day of March 2009

BETWEEN:

ST. CLAIR SIMON

Petitioner

AND

WINSTON BALDWIN SPENCER
GEORGE BROWNE
LORNA SIMON
~~THE ELECTORAL COMMISSION~~

Respondent

CLAIM NO. ANUHHCV2009/0143

In the matter of the Representation of the People Act (Cap 379) as amended

And

In the matter of a Parliamentary Election for the Constituency of Barbuda held on the 12th day of March 2009

BETWEEN:

ARTHUR MANOAH NIBBS

Petitioner

AND

TREVOR WALKER
JOHN JARVIS
LORNA SIMON
~~THE ELECTORAL COMMISSION~~

Respondents

CLAIM NO. ANUHHCV2009/0144

In the matter of the Representation of the People Act (Cap 379) as amended

And

In the matter of a Parliamentary Election for the Constituency of St. John's Rural North held on the 12th day of March 2009

BETWEEN:

CHARLES HENRY FERNANDEZ

Petitioner

AND

JOHN MAGINLEY
LELIA MANWARREN
LORNA SIMON
~~THE ELECTORAL COMMISSION~~

Respondents

Appearances:

Mr. James Guthrie, QC, with Ms. Rika Bird and Ms. Samantha Marshall
for the Petitioners
Mr. Douglas Mendes, SC, with Mr. Kendrickson Kentish and Mr. Michael Quamina
for the First Respondents
Mr. Russell Martineau, SC, with Mrs. Emily Simon-Forde

for the Second and Third Respondents
Mr. Anthony Armstrong, DPP, with Mrs. Joanne Walsh, Crown Counsel

---

2009: November 16, 17, 18, 19, 20
23, 24, 25, 27
December 4, 5, 7, 15, 16
2010: March 31

JUDGMENT

INTRODUCTION

[1] Blenman J: General elections were held in Antigua and Barbuda on 12th March 2009. Two main parties contested the elections; the United Progressive Party (UPP) led by Prime Minister Winston Baldwin Spencer and the Antigua Labour Party (ALP) led by Mr. Lester Bird. In Barbuda, the contest was between the Barbuda Peoples Movement (BPM) and the ALP. There were seventeen seats that were available in the contest of elections. The UPP was declared the winner of the election and formed the government. The BPM won the single seat in Barbuda. The BPM joined with the UPP.

[2] The results in three of the constituencies in Antigua and in the Barbuda constituency are challenged in these election petitions. The Court has been asked to declare the elections void in the constituencies of St. George, St. John's Rural North, St. John's Rural West, and Barbuda. I should say that the original challenge was to the results in six of the constituencies. The additional two constituencies were All Saints West and St. Paul. However, applications were made to this Court to have the latter two petitions struck out. Following hearings on those applications to strike out, this Court ruled that the petitions infringed section 45(1) of the Representation of People's Act (as amended) and were invalid. Accordingly, the Court struck out those two petitions. So what is left for decision today is the validity of the elections in the four constituencies first named.

[3] For convenience, the Court would refer to the first petition as JONAS PETITION/St. George; the second petition as SIMON PETITION/St. John's Rural West; the third petition

as FERNANDEZ PETITION/St. John's Rural North; and the final petition, NIBBS PETITION/Barbuda.

[4] The petitions are of great importance to the State of Antigua and Barbuda. This is very evident in the manner in which all of the Learned counsel approached the petitions, the numerous witnesses who testified on behalf of the parties, the tremendous amount of documentary evidence that was placed before the Court and the very professional manner in which they were dealt with. This was also buttressed by an exceptionally high standard of advocacy in the extensive lucid oral and written submissions by Learned counsel. The Court is acutely aware of the national importance of these petitions. It is apposite for the Court to state that given the national significance of these petitions, the Court had to take great care in ensuring that deliberate consideration was given to them due to far reaching consequences that the decision of the Court could have.

BACKGROUND

The Election Petitions

JONAS PETITION/St. George

[5] The first petition concerns the constituency of St. George. The contest here was between Mrs. Jacqui Quinn-Leandro of the UPP and Mr. Dean Jonas of the ALP. At the close of the elections, the Returning Officer declared that Mr. Jonas had received 1,493 of the votes cast and that Ms. Quinn-Leandro had received 1,985 votes. This represented a majority in favour of Ms. Quinn-Leandro of 502. She was therefore declared the winner.

[6] Mr. Jonas challenges this result on three grounds. First, that there was a late opening of the polls in breach of the election laws. Secondly, that there was late voting at the polls in violation of the election laws. And thirdly, that the electoral officers failed to use the published Register for Elections but instead used "Photo Lists" in clear breach of the Election laws. He seeks to unseat Mrs. Quinn-Leandro who was declared the winner. As a result of those breaches he contends that the elections were not conducted in substantial compliance with the law and affected the results. He says the election should therefore be

declared invalid. It is important to note that objection is taken as to whether late polling was a ground alleged in the petition.

[7] Mr. Jonas named the following persons as Respondents in his petition. Mrs. Jacqui Quinn-Leandro, the declared winner, as First Respondent; Ms. Marilyn Simon, the Returning Officer for the constituency, as Second Respondent; and Ms. Lorna Simon, the Supervisor of Elections, Chief Registration Officer, and for the purpose of the election, Chief Elections Officer, as Third Respondent.

SIMON PETITION/St. John's Rural West

[8] The second petition concerns the constituency of St. John's Rural West. Here the election was fought between Ms. Gail Christian of the ALP and Mr. Winston Baldwin Spencer of the UPP. They were the only two candidates. At the close of the elections the Returning Officer declared that Ms. Christian had received 1753 votes, Mr. Spencer had received 2259 votes. This represented a majority of 506 votes in favour of Mr. Spencer over Ms. Christian. Mr. Spencer was therefore declared the winner.

[9] These results are challenged by Mr. St. Clair Simon, an elector entitled to vote in that constituency and who had actually voted. Mr. Simon alleges that there were breaches of the Election law occasioned by the late opening of the poll; the permitting of late voting; and the use of the 'Photo Lists' instead of the published Register for Elections. He seeks to have the election be declared null and void. Here again, the issue of whether late polling was pleaded in the petition arises and the consequent issue of whether Mr. Simon should be permitted to pursue this aspect of his petition.

[10] Mr. Simon names the following persons as Respondents. Mr. Spencer, the declared winner, as First Respondent; Mr. George Brown, the Returning Officer, as Second Respondent; and Ms. Lorna Simon, the Supervisor of Elections, Chief Registration Officer; and for the purpose of the election, Chief Elections Officer, as the Third Respondent

[11] It bears stating that during the hearing of this petition and in his written submissions Learned Queen's Counsel Mr. Guthrie indicated that Mr. Simon was no longer pursuing the alleged ground of bribery against Mr. Spencer as a basis for voiding the petition.

NIBBS PETITION/ Barbuda

[12] The third petition is in relation to Barbuda. The Petitioner, Mr. Arthur Manoah Nibbs, was the ALP candidate for Barbuda. Mr. Trevor Walker was the BPM candidate. Mr. Walker was declared the winner by the returning officer having received 438 votes in comparison to 437 votes. This represents a majority of one (1) vote.

[13] Mr. Nibbs challenges this result on several grounds. He contends that there were corrupt practices of bribery and/or undue influence which resulted in Mr. Walker securing the votes. He alleges that there was a breach of the Election law in relation to the counting of the votes. Also, that there were breaches of the Election law insofar that an elector, Ms. Irose Martin, who was entitled to vote was prevented from voting. So too was Mr. Fabian Hunt. As in the other petitions, the complaint here was that the electoral officers failed to utilize the published Register for Elections but instead used the "Photo Lists" in clear breach of the electoral laws.

[14] Accordingly, Mr. Nibbs argues that due to the above breaches, either individually or collectively, the elections should be declared invalid. He seeks to unseat Mr. Walker and names him as the First Respondent. He named Mr. John Jarvis, the Returning Officer, as the Second Respondent. Ms. Lorna Simon, the Supervisor of Elections, Chief Registration Officer and Chief Elections Officer was named as the Third Respondent.

FERNANDEZ PETITION/St. John's Rural North

[15] The fourth and final petition was brought in respect of the St. John's Rural North constituency. Here the candidates who contested the elections were Mr. Charles Henry Fernandez (ALP) and Mr. John Maginley (UPP). On the completion of the polling the returning officer declared that Mr. Maginley had been duly elected having received 1462

votes and that Mr. Fernandez had received 1356 votes. This represented a majority of 106 votes in favour of Mr. Maginley.

[16] Mr. Fernandez challenges the results on the grounds that on the day of election the polling stations did not open at 6:00 a.m. In fact, he alleges that several of the polling stations opened after 8:00 a.m. thereby reducing the voting time available to electors. He says that persons who had queued up to vote since 4:00 a.m. had to leave the various polling stations and were unable to cast their votes. This was in violation of the election laws. He also alleges that the returning officer and the Chief Elections Officers failed to use the published Register for Elections but instead used "Photo Lists" in breach of the Election laws.

[17] Mr. Fernandez contends that the breaches, either individually or cumulatively, should result in the Court declaring that Mr. Maginley was not duly elected. In other words, the elections ought to be declared void.

[18] Mr. Fernandez names the following persons as Respondents: Mr. John Maginley as the First Respondent; Ms. Lilia Manwarren, the Returning Officer, as the Second Respondent; Ms. Lorna Simon, the Supervisor of Elections, Chief Registration Officer and for the purpose of the election, Chief Elections Officer as the Third Respondent.

General Observations

[19] These then are the four petitions before the Court which were heard together. I must observe that each of the petitions was strenuously contested by the Respondents. Seventy (70) witnesses testified and were cross-examined. There were several bundles of documents filed in the petitions. Witness statements were filed on behalf of each witness who testified, in addition to witness statements in reply. The documentation in this case was voluminous. On completion of the evidence the Court was grateful to have received very extensive verbal and written submissions from all Learned Counsel. The petitions were heard over a period of two weeks.

[20] The Court must state that in order to expedite the hearing of the petitions the Court directed that witness statements be filed in exchange. The Court had further ordered that no inadmissible or hearsay statements should have been included in the witness statements. As alluded to earlier, the parties filed and exchanged witness statements. On the eve of the hearing of the substantive petitions, the Respondents filed several applications to have various paragraphs of the witness statements that were filed on behalf of the Petitioners, struck out on the basis that they were speculative, hearsay, and inadmissible.

[21] In an effort not to protract the hearing of substantive petitions and at the commencement of the hearing, the Court, having listened to all Learned Senior Counsel, ruled that the substantive hearing of the petitions would commence and that the Respondents would be permitted to cross-examine the witnesses. This was without prejudice to their right to have the matter of the inadmissibility of the evidence dealt with and addressed in their closing arguments. This resulted in the Court being faced with having to address several submissions in closing that dealt with various objections to the admissibility of myriad aspects of the witness statements. This was, in addition to the very helpful submissions that engaged the Court's attention on the substantive petitions. It is noteworthy that I received the transcript of the Court Proceedings on 16th of January 2010.

[22] It is therefore imperative that the Court places on record the fact that in its determination of these petitions it has given deliberate consideration to the objections raised to the inclusion of various materials in the evidence, and the responses to the objections. The Court does not however propose to have the rulings reflected in this written judgment.

Issues

[23] In relation to the constituencies of St. George, St. John's Rural West, and St. John's Rural North, the following issues emerge for the Court to resolve:

(a) Whether there was late opening of the polls in contravention of the election laws;

(b) Whether there was late voting at the polls contrary to the election laws;

(c) Whether the use of the 'Photo Lists' violated the election laws; and

(d) Whether the alleged breaches, if any, are sufficient to vitiate the elections under section 32 (4) of the Representation of People Act (as amended) and to have the Court declare that the declared winner was not duly elected.

[24] In relation to Nibbs Petition/Barbuda, different issues arose for the Court to resolve. These were:

(a) Whether there was undue influence, bribery;

(b) Whether there was the failure to allow Mr. Fabian Hunt to vote;

(c) Whether there was failure to issue a voter ID to Ms. Irose Martin, thereby preventing her from voting;

(d) Whether there had been an improper counting of the votes; and

(e) Whether the use the "Photo Lists" was unlawful.

[25] The Court was asked to determine whether any or all of these grounds was sufficient to vitiate the results of the election and to have the Court declare that Mr. Walker was not duly elected.

SUBMISSIONS

MR. JAMES GUTHRIE'S SUBMISSION

JONAS PETITION / St. George

[26] Learned Queen's Counsel Mr. Guthrie said that the Petitioner relied on two principle matters, on the particular facts in this petition: breaches of the law as to election with regard to polling hours; and breaches as to the law as to elections with regard to the Register for Election.

[27] Mr. Guthrie, Queen's Counsel referred the Court to Section 32 (4) of the Act. This provides as follows:

> "No election shall be declared invalid because of any act or omission by the returning officer or any other person in breach of his official duty in connection with the election or otherwise of the election rules if it appears to the Court having jurisdiction to determine the question that the election was so conducted as to be

substantially in accordance with the law as to elections, and that the act or omission did not affect its result."

[28] Learned Queen's Counsel, Mr. Guthrie, indicated to the Court that the history, meaning and effect of the section, and the relevant authorities, were comprehensively explained in Morgan v Simpson [1975] QB 151. The position of the English Court of Appeal was summarized by Lord Denning MR at p.164:

> "Collating all these cases together, I suggest that the law can be stated in these propositions:
>
> (a) If the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated, irrespective of whether the result was affected or not. That is shown by the Hackney case, 2 O'M & H 77, where two out of 19 polling stations were closed all day, and 5000 voters were unable to vote.
>
> (b) 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. That is shown by the Islington Case, 17 T.LR. 210, where 14 ballot papers were issued after 8 p.m.
>
> (c) But, even though the election was conducted substantially in accordance with the law, nevertheless if there was a breach of the rules or a mistake at the polls - and it did affect the result - then the election is vitiated. That is shown by Gunn v Sharpe [1974] QB 808, where the mistake in not stamping 102 ballot papers did affect the result."

[29] Learned Queen's Counsel said that that analysis had been consistently accepted as correct: see Halsbury's Laws, 4th edition (2007 reissue) at paragraph 670: "... if the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated, irrespective of whether the result was affected or not." See also Edgell v Glover [2003] EWHC 2566; Considine v Didrichsen [2004] EWHC 2711; Fitch v Stephenson [2008] EWHC 501. In Edgell v Glover the formulation of the test is further explained as follows (paragraph 23) as later approved in Considine v Didrichsen (also at paragraph 23):

> "(i) section 48 is an enabling section setting out circumstances in which, despite irregularity, a new election need not be held;
>
> (ii)Section 48 can be translated and understood as creating a positive duty with the consequence that an election must be declared invalid by reason of any act or

> omission of the returning officer if it appears that the election was not so conducted as to be substantially in accordance with the law as to elections or the act or omission did affect the result.
>
> (iii) The negative form of the section means that both substantial compliance with the law and no effect upon the result are required to save breaches of duty or rules from avoiding the election."

[30] The relevant question was posed and answered as follows in Considine v Didrichsen, at paragraphs 21 - 24:

> "Does it appear that the breach of the returning officer's duty did not affect the result? I phrase the question in this way because of the negative formulation of section 48 (1). That is the way in which Parliament chose to word it. It was stated by Lord Denning MR in *Morgan v Simpson* ... that the section should be transformed to read positively, so that it must be shown that the election was not conducted substantially in accordance with the law as to elections or that the act or omission did affect the result. That would change the meaning and effect of the section in a situation where the voting figures if the breach had not occurred were not known. For in that situation while it cannot be shown positively that the result was affected, it may equally be the case that it does not appear that the result was not affected."

Breach of the Law

[31] In the present petition Mr. Guthrie Q.C. said that the Petitioner's witnesses gave various times for the opening of the polls. He invited the Court to find that the polls opened at the times given in evidence by the Respondents. As to the closing times, he asked the Court to note that the evidence of the Second Respondent as to the closing time of 7.30 p.m. was confirmed by the evidence of Mr. Bethan Marajah and Ms. Kelcita Joseph who were assigned polling agents at Potters although their recollection was that voting there ceased at 8.30 p.m. Learned Queen's Counsel urged the Court to find on the basis of this evidence that there was some late voting. He said that the effect of the evidence as a whole therefore, was that in the constituency of St. George polling commenced at least about 2 ½ hours after 6.00 a.m. (New Winthropes and Piggotts) and in some cases (the various polling areas at Potters) as much as 5 ½ hours after 6.00 a.m. That much, he said, was accepted, if the evidence of the Second Respondent Ms. Marilyn Simon, and the polling agents Mr. Bethan Marajah and Ms. Kelcita Joseph, was believed, there was late voting in one area at Potters.

Substantial Compliance

[32] Mr. Guthrie, Q.C., invited the Court to find that electors were unable to cast their votes for at least a large part of the allotted time, and at the Potters polling station for almost half of the allotted time, when the polls were not open. He said that four witnesses gave evidence that they had tried to vote when the polling stations were closed but were unable to do so: Mr. Goldburn Samuel, Ms. Denise Marshall, Ms. Shensasba Henry, Mr. Alvor Brown. He invited the Court to find that they were telling the truth. A number of witnesses on both sides referred to the large number of persons who were present before 6.00 a.m., for example, Mr. Bethan Marajah, Mr. Goldburn Samuel, Ms. Patricia Phillip, Ms. Juliet Henry for the Petitioner; Mr. Edmeade Graham, Ms. Carla Thomas, for the First Respondent. They, (for e.g. Ms. Patricia Phillip) and other witnesses saw an indeterminate number of persons leave the lines. These witnesses plainly could not be expected to give precise numbers.

[33] Therefore, Learned Queen's Counsel for the Petitioner invited the Court to find that an indeterminate number of voters did not vote as a result of the late opening of the polls. This was a legitimate inference and not speculation. For example, in The Hackney case at p 83 Grove J asked, rhetorically it appears, (after considering those electors who had been prevented from voting because the polls were not open at all), "is it in accordance with the principles of the Act that a large indefinite number, which we cannot ascertain, should also have impediments presented to their voting, which may, and doubtless did, prevent a very considerable number of them from voting?" Mr. Guthrie, Q.C., opined that a reason for the negative wording of section 32 (4) of the Act was plainly to cater for those cases, such as the present, where the number of persons who would have voted had the breach not occurred, was not known.

[34] Elaborating further, Mr. Guthrie, Senior Counsel said that the late opening of the polls further meant that those who wanted to vote before they went to work could not then do so (e.g. the Petitioner's witnesses Ms. Shensasba Henry, Ms. Denise Marshall, Mr. Goldburn Samuel). The Petitioner can only be expected to call a sample of persons for obvious reasons. He therefore asked the Court to draw the inference that there must have been

others in a similar situation - as was done in e.g. The Hackney Case. It also meant that the delay before it was possible for many voters to cast their votes was much greater than the underlying delay in the opening of the polls; lines formed between 6.00 a.m. and 8.30 a.m. or 11.20 a.m. which caused further lengthy delay (e.g. to the witnesses Mr. Dean Jonas, Mr. James Hill - again there must have been many others in a similar situation), it is a safe inference that others must have been unable to wait to vote.

[35] Mr. Guthrie said that it is also wrong, to accuse the Petitioners' witnesses of fault in not returning to vote after they had at first been unable to do so, as was done in cross-examination e.g. of Mr. Goldburn Samuel, Ms. Denise Marshall. The First Respondent's position seems to be that voters must be expected to vote come what may, and make every conceivable effort and sacrifice to do so. But the purpose of the relevant provisions is to provide a 12 hour period: which, Mr. Guthrie submitted is plainly to ensure that the electors will have an opportunity at any time during that period to cast their votes. Learned Queen's Counsel Mr. Guthrie asked the Court to find that there was no obligation on electors to do more than attend the polling station at a time when it should have been open: indeed this is itself a principle underlying the provision by the Act of the allotted period from 6.a.m. to 6.00 p.m. See again The Hackney Case supra as to the introduction of the *Ballot Act* (the original predecessor to the Representation of the People Act, in Antigua, the U.K. and elsewhere), at p 83:

> "... since the Legislature has now reduced the time for polling to one day, it is more important that there should be means fairly taken to give to the electors the opportunity of voting with as little trouble as possible. When elections lasted a fortnight many matters could be remedied, and if people could not vote one day they might vote on another day; but now that it is crowded into one day, it is more important that there should be proper opportunities for the voters to record their votes without unnecessary trouble."

[36] Mr. Guthrie, QC further submitted that the cross-examination of the Petitioner's witnesses should in no case cause the Court to doubt that the persons concerned attempted to vote and that when they attempted to do so they could not because the polling station was closed. He asked the Court so to find with regard to the witnesses Mr. Goldburn Samuel,

Ms. Denise Marshall, Ms. Shensasba Henry, and Mr. Alvor Brown. That, he submitted, is all that it is necessary for the Petitioner to establish in any individual case.

Breach Affected the Result

[37] Moving along, Mr. Guthrie said that it is obviously not possible to be precise as to the numbers of persons who were disenfranchised. It was neither practicable nor possible for the Petitioner to investigate every voter or to call more than some witnesses by way of examples. It was therefore not possible to say with certainty to what extent the result was affected. However it was not possible to say that these facts did not affect the result and he urged the Court to accept that that was the correct way to pose the question. He referred the Court to Halstead v Simon*;* The Hackney Case at pp 81 - 82; Edgell v Glover [2003] EWHC 2566 at paragraphs 20 - 36; Considine v Didrichsen [2004] EWHC 2711 at paragraph 24.

[38] Mr. Guthrie said that the Petitioner's argument (that it cannot be said that these facts did not affect the result) is further supported by the figures. The difference between the returns for the candidates in the constituency of St George was 502 votes. The electorate was 4414 registered voters. According to the evidence of the Third Respondent some 3488 ballot papers were cast (including 20 rejected), leaving a balance of voters unaccounted for of 926 (21%). This number/percentage further represents a lower number of votes cast in the 2009 as opposed to the 2004 elections: 79% compared with 92.25% (the Third Respondent's evidence). Accordingly, Mr. Guthrie submitted that for those reasons the Petitioner Jonas was entitled to the Declaration sought, that the First Respondent was not duly elected.

PHOTO LISTS

Breach of the law:

[39] Mr. Guthrie posited that the evidence relied on by the Petitioner was not in dispute. The witnesses on all sides were agreed that the "Photo Lists", i.e. those printed in the early hours of Election Day, were used. He asked the Court to so to find. Copies of the Photo

Lists were before the Court. It was plainly not possible to say that these were in the same form as the earlier published Register for Elections (the Register was also before the Court). It also appeared from Ms. Lorna Simon's evidence that the intention was to use the "Photo Lists" as in the previous election in 2004, together with the published Register for Elections, for cross-checking purposes. However, she accepted that this was not done because of the problems with the late printing of the Photo Lists. The published Register for Election was not used but instead the Photo Lists were used. This was a breach of section 25 of the Act.

Substantial Compliance

[40] Mr. Guthrie said given that the Photo Lists were the lists used at the polls; that these were only printed in the morning of the Election Day and that they are not the same as the published Register for Elections, then, at the least the Photo Lists which were used could not be checked before the election.

[41] Insofar as a breach of the Act took place, as the Petitioner submits it clearly did, this prevented the election from being conducted substantially in accordance with the law as to elections, so that the election must be declared invalid for that reason.

Breach Affected Results

[42] Mr. Guthrie opined that in the circumstances it was no answer to say that it appeared the result was not affected. The election should be declared invalid.

FERNANDEZ PETITION / St. John's Rural North

[43] Mr. Guthrie indicated that Mr. Fernandez relied on similar matters as in Jonas Petition: breaches of the law as to elections, with particular regard to polling hours; and breaches of the law as to elections with regard to the Register for Elections. Mr. Guthrie said that the submissions made were essentially similar to those in the Jonas petition.

Breach of the Law

[44] The relevant facts in Fernandez' case are established by the evidence. He said that in relation to the breaches of the law as to elections with regard to polling hours. There were 2 polling areas A and B, and 3 polling stations: at York's Community Centre, Wesleyan Junior Academy and Cedar Grove Primary School. The evidence as to their opening and closing times was again not much in dispute. The Third Respondent gave evidence the effect of which is (as in Jonas' case) set out in the table which was supplied to the Petitioner under cover of the letter dated 31st August 2009, the evidence revealed as follows: At York's polling started at 8:20 a.m., Wesleyan started at 8:35 a.m. and Cedar Grove Polling started at 8:00 a.m. In support of his argument, Mr. Guthrie referred also to various witnesses' evidence. The Second Respondent (the Returning Officer, Lilia Manwarren) said that she was aware of the late start and began preparations when she arrived at the polling stations (7.35 a.m. at Cedar Grove, 8.05 a.m. at York's, 8.30 at Wesleyan). The First Respondent's witnesses in effect confirmed this position: Mr. Jason Percival (Cedar Grove) gave the start time as about 8.25 a.m.; he said he did not see people leaving. Ms. Eugenie Thomas-Andrew (York's) gave a start time of "after 8.00 a.m. but closer to 9.00 a.m."; she did observe "some people particularly some bank employees" leave, but many returned. Ms. Monica Dear (Cedar Grove) said that a few people said they had to leave, most said they would return. She also referred to persons who were in the line voting after 6.00 p.m. The Petitioner's witnesses also gave various times generally in keeping with the above. Mr. Fernandez (the Petitioner) added that there had been a deliberate ALP effort to encourage supporters to vote early, which was frustrated by the late opening.

[45] Mr. Guthrie said that the effect of the evidence as a whole therefore, which the Court was asked to find, was that voting began at least 2 hours late, and at Wesleyan as much as 2½ hours late. There was only a small amount of evidence as to late opening, which in this case the Petitioner accepted was not substantial.

Substantial Compliance

[46] Mr. Guthrie, QC said that it was a safe inference that some voters were unable to cast their votes as a result of the late opening of the poll. They were certainly unable to cast their votes for part of the allotted time, at the beginning of the day, when the polling stations were not yet open. Again the witnesses agreed that substantial numbers of persons were present at 6.00 a.m. when the polls should have opened, and not only the Petitioner's witnesses: e.g. also Ms. Monica Dear, Mr. Jason Percival, Ms. Eugenie Thomas-Andrew for the First Respondent. Various estimates were given of the numbers who left the lines and did not vote. Ms. Latoya Grant-Joseph (a polling agent at York's) observed "a good amount" of persons leave the lines without voting, who did not return. He asked the Court to accept her evidence. Samuel Simon (the Presiding Officer at Wesleyan) saw "about 40 - 50 people leaving in droves from the respective lines". Ms. Loretta Barnes also saw persons leaving. Mr. Alfredo Diedrick was unable to vote. He stated that he attended the polling station at York's at 6.30 a.m. and waited until 7.30 a.m. He was unable to vote when he went to the polling station; and that he waited a reasonable time, but was still unable to do so (the undisputed evidence is that the polling station did not open until 8.20 a.m.). Mr. Guthrie urged the Court to accept the evidence of all of the witnesses.

[47] Mr. Guthrie stated that as may be expected, the First Respondent's witnesses largely disagreed with the situation given in evidence as to persons leaving. However he submitted that it ought to be accepted that the late opening of the polls meant that some of those who wanted or needed to vote before they went to work could not do so (e.g. Mr. Alfredo Diedrick, some bank employees and others seen but not identified, as above) were however only examples. Learned Queen's Counsel, Mr. Guthrie asked the Court to draw the inference that there must have been others in a similar situation.

[48] This Petitioner further makes the same submissions as in the Jonas Petition with regard to the suggestions that those voters who were at first unsuccessful are to be criticized for not having returned. There was no reason to suppose that Mr. Alfredo Diedrick, who gave direct evidence that he attempted to vote but was unable to do so, was not telling the truth.

[49] A further feature of this Petitioner's case is the reduction in the percentage of votes compared with the 2004 election: 79.03% as opposed to 91.1% (the Third Respondent's evidence). Mr. Guthrie said that it was again not possible to be precise as to the number of persons disenfranchised by the late opening. It was therefore not possible to say with certainty to what extent the result was affected, in the sense that the Petitioner would otherwise have won. However, it was not possible, either, to say with absolute certainty that these facts did not affect the result, which Learned Queen's Counsel again urged, was the correct way of putting the test. He relied on the same authorities as above.

[50] The Petitioner's argument (that it could not be said that those facts did not affect the result) was further supported by the figures. As noted above, the difference between the candidates was 106 votes - a comparatively small majority in the First Respondent's favour. The electorate was 3577 registered voters. Apparently some 2827 ballot papers were cast (including 9 rejected) leaving a balance of voters unaccounted for of 750.

Breach Affected the Result

[51] Mr. Guthrie made the same submission (as in the Jonas Petition) that this point was not reached. He posited that the breaches of the law as to elections with regard to polling hours meant that the election was not conducted substantially in accordance with the law and so must be declared invalid for that reason, without reference to the effect on the result.

[52] Learned Queen's Counsel, Mr. Guthrie therefore submitted that the Petitioner Mr. Fernandez was entitled to the Declaration sought, that the First Respondent was not duly elected.

PHOTO LISTS

Breach of the Law

[53] Turning next to the Photo Lists, Mr. Guthrie said that in this petition, the position was as in Jonas Petition. "Photo Lists" were used instead of the Register for Elections as required

by section 25 of the Act. Again this was not disputed and he asked the Court to find this as fact. Some of the Petitioner's witnesses referred to difficulties caused by the way in which the lists were put together, for e.g. with pages upside down. (These witnesses included Ms. Loretta Barnes, Ms. Latoya Grant-Joseph, Mr. Vere Bird). The First Respondent's witnesses did not refer to these issues. The Second Respondent referred to the use of the Photo Lists.

[54] The Third Respondent's witness, Mr. Colin James, referred to the conversation with Mr. Hugh Marshall, Sr., one of the Petitioner's witnesses. The effect of their evidence was of some significance. It demonstrated that the breaches of the law as to elections with regard to the use Photo Lists as opposed to the Register for Elections was brought to the Third Respondent's attention before the election took place, when it might have been corrected. In this regard, he asked the Court to pay particular regard to Ms. Lorna Simon's evidence in which she indicated her intention was to use the Photo Lists together with the Register for Election. This did not occur.

Substantial Compliance

[55] Mr. Guthrie, Queen's Counsel said that Mr. Fernandez had frankly accepted that he could not show that the use of the Photo Lists as opposed to the published Register for Elections made a difference to the result of the election in his case. However, Mr. Guthrie submitted, as above, that the use of the Photo Lists involved a fundamental breach of safe democratic procedures, and that this could only be seen as a substantial breach of the law as to elections. Therefore, the Petitioner was entitled to the Declaration sought.

NIBBS PETITION/ BARBUDA

Corrupt and illegal practices of bribery and undue influence

[55] Learned Queen's Counsel, Mr. Guthrie, asked the Court to pay particular regard to the evidence that was adduced on behalf of the Petitioner. He invited the Court to examine the Petitioner's case at paragraphs 8.2 - 8.7. For convenience sake, this is now set out with amendments and alterations.

The Petitioner's case as follows:

> 8.2. On about 4th February 2009 the Government (through the United Progressive Party, hereafter t(the UPP", with which the BPM is publicly affiliated) commenced, with the open participation of the First Respondent, substantial road works in Barbuda. Such works included the grading of roads, demolition and reconstruction, in particular in the area of the First Respondent's office in Codrington. The works involved, for the period from 4 February to 12 March 2009, an increase in temporary employment
>
> 8.3 .....
>
> 8.4 At a public rally held for the BPM in Codrington in Barbuda on 4th March 2009 the First Respondent said to those present or words to the following effect:
>
> " if you don't vote for me the concrete roads and drains will stop."
>
> "If you don't vote for me the ferry that PM Spencer has promised for Barbuda will not happen."
>
> "If you don't vote for me workers of the Council will not be paid."
>
> 8.5 At a further political meeting held in Codrington at which the First Respondent was present the Honourable Prime Minister Baldwin Spencer (and the Honourable Minister Wilmouth Daniel) said to those present words to the effect that if the people of Barbuda voted for the Petitioner:
>
> "the UPP Government will not support the Petitioner, and that all the works will come to an end."
>
> 8.6 The First Respondent and or persons acting on his behalf further arranged for or connived at the payment for the travel to Barbuda of a number of Barbudan students from Cuba to Antigua and thence to Barbuda, so that they could vote in the election. The Petitioner claims that the students' travel by chartered flight was paid for or contributed to by others on behalf of the First Respondent and the BPM, in breach of the Act. The Ambassador to Cuba Bruce Godwin has publicly acknowledged on the Observer Radio station on 14th March 2009 that the effect of the students' votes was to ensure the First Respondent's success in the election.
>
> 8.7 The matters set out ... amounted to the corrupt practices of bribery, ... and undue influence for the purposes of sections 29, ...(and) 29B ...of the Act."

[57] He drew the Court's attention to the relevant statutory provisions and authorities. Section 29 of the Act (as relevant) provides as follows:

> "29. (1) A person is guilty of a corrupt practice if he is found guilty by a Court of competent jurisdiction of bribery.

(a) A person is guilty of bribery if he, directly or indirectly, by himself or by any other person in his behalf

(b) gives any money or procures any office to or for any voter or to or for any other person on behalf of any voter or to or for any other person in order to induce any voter to vote or refrain from voting;

(c) ....

(d) makes any such gift or procurement as aforesaid to or for any other person in order to induce that person to procure the return of any person at an election or the vote of any voter; or

(e) ....

(3) For the purposes of subsection (2) references to giving money shall include references to giving, lending, agreeing to give or lend, offering, promising, or promising to procure or to endeavour to procure any office, place or employment".

Section 29B of the Act provides:

"29B. (1) A person shall be guilty of a corrupt practice if he is guilty of undue influence.

(2) A person shall be guilty of undue influence -

(a) if he directly or indirectly, by himself or any other person on his behalf, makes use of or threatens to inflict, by himself or by any other person, any temporal or spiritual injury, damage, harm or loss upon or against any person in order to induce or compel that person to vote or refrain from voting, or on account of that person having voted or refrained from voting; or

(b) ...

Section 65 of the Act provides:

"65.(1) If a candidate who has been elected is reported by an election Court personally guilty or guilty by his agents of any corrupt or illegal practice his election shall be void."

(2) ....

Section 68 of the Act further provides:

"68. (1) Where on an election petition it is shown that corrupt or illegal practices or illegal payments, employments or hiring committed in reference to the election for the purpose of promoting or procuring the election of any person thereat have so extensively prevailed that they may be reasonably supposed to have affected the result, his election, if he has been elected, shall be void and he shall be incapable of being elected to fill the vacancy or any of the vacancies for which the election was held.

(2) An election shall not be liable to be avoided, otherwise than under this section by reason of general corruption, bribery, treating or intimidation."

[58] Learned Queen's Counsel, Mr. Guthrie stated that it was established by the authorities that the provision of temporary employment could constitute payment to an elector and so could constitute bribery: see AG & others v Kabourou [1995] 2 LRC 757 at 774; Selwyn Walter v Lester Bird, 16th July 1999; Wigmore v Matapo & ors, C/A (Cook Islands)14/2004; Jugnauth v Ringadoo PC [2008] UKPC 50, 5th November 2008 (Mauritius). Mr. Guthrie submitted that the same cases established that the provision of road works or other services could have the same effect. See A-G & others v Kabourou [1995] 2 LRC 757 at 774.

[59] Mr. Guthrie also said that it was well established that a candidate may be liable under the doctrine of agency, and that

> … his liability to have his election avoided under the doctrine of election agency is distinct from, and wider than, his liability under the criminal or civil law of agency. Once the agency is established, a candidate is liable to have his election avoided for corrupt or illegal practices committed by his agents even though the act was not authorized by the candidate or was expressly forbidden. The reason for this stringent law is that candidates put forward agents to act for them; and if it were permitted that these agents should play foul, and the candidate should have all the benefit of their foul play without being responsible for it in the way of losing his seat, great mischief would arise.

In order to prove agency it is not necessary to show that the person was actually appointed by the candidate or that he was paid. The crucial test is whether there has been employment or authorization by the candidate to do some election work or the adoption of his work when done."

See Halsbury's Laws, *Elections and Referendums,* 4th edition (2007 reissue) Vol. 15 (3) at paragraphs 251 - 252.

[60] Mr. Guthrie said that the First Respondent's witnesses (especially Mr. Trevor Walker himself) attempted to say that the road works in Barbuda were ongoing works, but the other evidence including the documentary evidence was against them. Mr. Guthrie said that the evidence clearly established that the UPP Government "turned on the financial

tap" to start the works in January/February 2009, when e.g. the contractor Mr. Griff Walker was able to take on labour.

[61] In further support of his argument, Mr. Guthrie referred the Court to the evidence of the Petitioner, who was one the witnesses who recalled the actual words spoken. He said that statements were made at both meetings to the effect set out in his petition. Learned Queen's Counsel submitted that the evidence of the witness was truthful. The witness was upset at being called "*an enemy of Barbuda".* This was plainly not feigned. His account of the meetings ought to be accepted.

[62] Mr. Guthrie asked the Court to find the following. There was a previous contract with Ameriswiss which had come to an end, and the road works to which it applied had ceased, in 2006. A contract to complete at least some of the work had been agreed with Patrice Luke in July 2007 but it was not signed on behalf of the Government until 28th August 2008. The witnesses agreed that Patrice Luke began work in February 2009 (the election was called on 9th February 2009). A Special Warrant to pay Luke was issued. The Warrant was dated 20th February 2009. Considerable drainage works had been envisaged, but not carried out. A preliminary assessment was carried out in December 2008, but the works only began on 15th January 2009.

[63] Mr. Guthrie said that the First Respondent's witnesses Mr. Beazer and Mr. Gore (and the First Respondent himself) all gave similar evidence that the theme of the meetings was a comparison between (in simplified terms) the allegedly "bad old days" of the ALP, and improvements to Barbuda made in the more recent days of the UPP. Mr. Guthrie said that was an unrealistic (and untrue) view of the effect of the meetings held in January 2009, to launch the BPM candidate (the First Respondent) and on 6th March 2009, to muster support less than a week before election day in what was on the evidence a highly charged political atmosphere. Mr. Nibbs' description of the meetings was convincing and correct. In any case, the First Respondent's witnesses broadly accepted that reference was made to the road works being stopped. Mr. Guthrie urged that the Court find that reference to the road works stopping was an example of the sort of bribery and

malpractice referred to in the cases, such as AG & others v Kabourou [1995] 2 LRC 757 at 774.

> "Next we come on to our reasons ... in which we upheld the finding of the trial judge to the effect that the road construction in Kigoma during the campaign period was executed with the corrupt motive of influencing voters to vote for the CCM candidate and that it affected the results of the election."

[64] In summary, the Court reached that conclusion because (i) the work was carried out as a reward for voting CCM; (ii) the undertaking to carry it out was not made in the ordinary course of government but in the election campaign; and (iii) it was made by *"prominent cabinet ministers at well-attended public rallies in the constituency"* and so must have influenced the voters to vote CCM.

[65] Mr. Guthrie submitted that the position with regard to Barbuda and the 2009 campaign was very similar. The election of Mr. Walker should be declared invalid. There was clear evidence of bribery and undue influence.

Counting of the Ballots

[66] Mr. Guthrie said that the procedures to be adopted after the close of the poll, and for counting the votes, are contained in the Election Rules. There were again some discrepancies between the witnesses. On any view, however, the evidence was that an informal recount took place, which was not of all, but only of some of the votes. Mr. Jarvis, the Returning Officer said that this was of 2 but not all 3 of the boxes. He asked the Court to accept that (at least) such a limited recount took place, and that there was no recount of all of the whole ballot (no witness testified that there was). Mr. Guthrie argued that this was not in accordance with the Rules. These provided, if it was necessary, for a recount of the votes, but not a recount of only part of the votes, for e.g. one or two boxes out of three. Given that this was the slenderest of majorities, Mr. Guthrie submitted that the Court could not be satisfied that the result was not affected, so that the election of the First Respondent should be declared invalid for this reason also.

IROSE MARTIN

[67] Mr. Guthrie next addressed the allegations of the refusal to allow a registered elector, Ms Irose Martin, to vote. He said that this matter is set out in the Petition as follows:

> "9.7 … the Second Respondent wrongfully refused to allow one Irose Martin, voter registration number 687, among others, to vote on the ground that she did not have her voter ID card although her name appeared on the voters' list. The Petitioner challenged the refusal, because she had previously applied for a replacement card, which she was not given despite repeated requests made to the Registration Office in Barbuda. Irose Martin was not given a special identification card and was prevented from voting by the Second Respondent despite being entitled to do so".

[68] The Petitioner's evidence was that Ms. Irose Martin was unable to vote and he described his attempts to assist her on Election Day by referring her case to the Second Respondent, Mr. Jarvis, who in turn advised him that he had made several attempts to contact the Third Respondent (the Supervisor of Elections, Lorna Simon) about her. Mr. Jarvis said that Ms. Irose Martin had reported a missing ID card but *"from his memory she had done so outside of the deadline."*

[69] Ms. Irose Martin stated that she had reported her card missing in October 2008, and that the Second Respondent on the day of the election, confirmed that she had done so. She was still refused the opportunity to vote. In giving evidence, the Registration Officer, Mr. Mulvane George, said that Ms. Irose Martin had not reported her card missing, and that she could not have done so because the office was closed due to Hurricane Omar. The Registration Officer said that the hurricane was the reason given by Ms. Irose Martin for having lost her card in the first place.

[70] Mr. Guthrie, Queen's Counsel, said that the relevant legal provisions are as follows. Section 15 (4) of the Act provides that no person may vote without first producing the identification card issued to him under section 26 or where such identification card is lost produces a special identification card issued to him by the Supervisor of Elections in accordance with subsection (6). Section 15 (6) provides that:

> "The Supervisor of Elections shall, on application by a person whose identification card is lost, issue to such person a special identification card if the applicant produces evidence to prove his identity and that his identification card is lost."

[71] That obligation was absolute. The duty of Election Officers to comply with particular provisions of the law as to elections was normally absolute: see for e.g. Considine v Didrichsen supra at paragraph 12. There is no provision in section 15 of the Act permitting the Supervisor of Elections to refuse a Voter his or her card if the conditions are satisfied. These conditions plainly were in Ms. Irose Martin's case. Her position was accepted and the only reason why she did not get her card was because there was no flight to take it to Barbuda before 6.00 p.m. This amounted to a breach of the Election Law.

FABIAN HUNT

[72] Turning next to Mr. Fabian Hunt, Mr. Guthrie said that he was also unable to vote since his transfer of registration from Antigua to Barbuda "was not approved". The Third Respondent accepted that that was an error in the Registration process, "a system failure". Mr. Fabian Hunt was entitled to vote and should not have been prevented from doing so. It followed that the refusal to allow Mr. Hunt to vote was a breach of the Regulations. Since the winning margin was only one vote, it plainly could not be said that this did not affect the result.

[73] In this petition, Mr. Guthrie posited that it was beyond argument that these breaches of the Act could not be said not to have affected the result of the election, given that the majority was only 1 vote. The First Respondent's election must therefore be declared invalid for this reason as well as those which had already been stated.

Cuban Students

[74] Mr. Guthrie said that the Petitioner also gave evidence that 7 Barbudan students who were studying in Cuba returned home to vote. He said that this had been arranged by the First Respondent and the UPP who had organized and paid for a chartered flight, as confirmed

during the weekend after the election by Mr. Bruce Goodwin on the Observer Radio Station. Mr. Goodwin also accepted in his evidence, before the Court, that he had made the arrangement on the instructions of the Prime Minister, and nobody else. He had not referred the matter to the Supervisor of Elections (the Third Respondent) or the Electoral Commission. The exercise had cost US$60,000 which was paid through the Cuban Embassy by the Government. Mr. Guthrie said that the details of the episode were confirmed by 3 students (witnesses) Mr. Mario Mack, Ms. Kereanna Baltimore and Ms. Eulisa Weston.

[75] Mr. Guthrie was adamant that Mr. Goodwin's arrangement of the flight from Cuba was a straightforward party political exercise at Government expense aimed at ensuring, in so far as possible, that those brought back from Cuba voted for the UPP. Mr. Goodwin's attempt to describe the arrangements as being provided by the Government, and not the Government wearing its UPP hat, ought to be condemned. He asked the Court to conclude that Mr. Nibbs has proved the allegations of bribery here again.

SIMON PETITION/ST. GEORGE

[76] Mr. Guthrie stated the relevant facts in the Simon Petition. There were three polling areas: A, B and C; and 6 polling stations: at Miss Generlette Building, St Anthony's Church, Nazarene Church, Exhibition & Cultural (Multicultural) Centre, Greenbay Primary School and Five Islands School.

Polling

[77] He referred the Court to the evidence in the matter and asked that the evidence given by the Petitioner's witnesses be accepted. One of those witnesses, Mr. Ramon Gomez, saw people continuing to vote until after 10.00 p.m. Mr. Lovelace Christopher (Magistrates' Court Bailiff and ALP polling agent at Greenbay) gave the start time for voting as about 12.50 p.m. He saw people *"trying to enter on Federation Road"* at about 6.30 p.m. Mr. Francisco Matthias (Greenbay) arrived before 5.00 a.m. and waited until about 7.45 a.m. before he had to leave to go to work. He was unable to return. Ms. Gail Christian (the ALP Candidate) referred to people being unable to vote and various other difficulties. Mr. Esau

Harrigan (Presiding Officer for Polling Division C at Five Islands) confirmed that voting there began at 10.10 a.m. Ms. Bernadette Ephraim (Greenbay) saw persons voting after 8.00 p.m. Mr. Guthrie urged the Court to find that these witnesses were telling the truth as to the essential details of what took place that day.

[78] Mr. Guthrie, Queen's Counsel said that although there are the usual dispute as to detail, the general effect of this evidence, and the effect of the detailed letter from the Attorney for the Supervisor of Elections dated 13th October 2009, was that the polls did not open before 7.30 a.m. (at the Exhibition and Cultural Centre); 7.45 a.m. (Nazarene Church); 7.55 a.m. (St Anthony's Church); 8.00 a.m. (the Miss. Generlette Building); 10.10 a.m. (Five Islands School); and 12.45 p.m. (Greenbay Primary School). This was a delay of at least 1½ hours of the 12 hours allowed by the Election Rules, and at Greenbay (much the largest polling station in the constituency) of some 6½ *hours*, i.e., a delay of more than half the time allowed. He asked the Court to find these opening and closing times, as a matter of fact. They are the basis of this part of the Petitioner's case.

[79] He opined that it may be helpful to look for independent support. An example in favour of the Petitioner Simon would be the production by Mr. Winston Joseph of his passport (WJ 1), which clearly bore the exit stamp from Antigua and an equivalent entry stamp for Dominica.

Breach of Law

[80] Mr. Guthrie argued that there was a breach of the election law when the polling station opened after 6 a.m. and remained open after 6 p.m. and voting was permitted after 6 p.m. Since it is not disputed that these breaches occurred in a considerable number of cases, and that in some stations voting went on for as much as 3 ½ hours after 6.00 p.m., the relevant breaches of the law as to elections were established. It does not matter how they came to pass: see Halstead v Simon supra at pp 32 and 54.

Substantial Compliance

[81] Mr. Guthrie submitted that to a considerable extent the opening and closing times speak for themselves. Electors were unable to cast their votes for part of the allotted time, and at the largest polling station for over half of the allotted time. This cannot possibly be said to have been "substantially in accordance with the law as to elections". Persons continued to vote for as much as 3½ hours after 6.00 p.m. This also cannot be said to have been "substantially in accordance with the law as to elections". There was no voting anywhere for part of the allotted hours, and for 6 ½ hours at the largest polling station (Greenbay), i.e. over half the voting day. There was then wholesale voting after the allotted hours.

Breach Affected the Results

[82] As to the starting times, similar points were made as in Jonas' and Fernandez's petitions. The late opening of the polls meant that those who wanted to vote before they went to work would not have been able to do so (the specific example in this Petitioner's case is Mr. Francisco Matthias). The same applied to persons who had to vote early for some other reason (e.g. Winston Joseph). It also meant that the delay before it was possible for many voters to cast their votes was much greater than the underlying delay in the opening of the polls. Lines formed between 6.00 a.m. and the time the polls opened, which caused further lengthy delay. Some persons so affected may have been able to wait, but others must have been unable to do so.

[83] He said that as to the late voting after 6.00 p.m., a number of points must be made, similar to those advanced in Jonas' petition. These issues had to be considered in the context of the more extreme facts in St. John's Rural West. Several hundred voters must be presumed to have voted after 6.00 p.m. Among other things, this can only be taken to have affected the result (the First Respondent's majority was 506). Put more precisely, Mr. Guthrie submitted that the Court could not be satisfied that these breaches did not affect the result.

[84] Mr. Guthrie stated, as in Jonas' petition, electors were entitled under the law to proceed on the basis of the allotted voting period. If, for example, they were unable to vote in the morning, they are not to be expected to return after 6.00 p.m. when they would assume the polls were closed. Accordingly, he said, there was a further and substantial breach of the law as to elections. See Halstead v Henderson, supra, at pp 32 and 54.

[85] Mr. Guthrie said that the First Respondent's suggested mathematical test of applying the percentage reduction in the turnout to the number of the electorate - as put to Ms. Gail Christian - was not a safe guide. 9% of 4996 is indeed 450. But this calculation was speculative because it supposed a similar electorate as in 2004. The electorate was not the same. It numbered 4996 and not 3803; there had been boundary changes; persons had come and gone for various reasons, some had died and some had reached voting age. It also ignored the fact that the difference in percentage will be misleading if voting was allowed in some polling stations but not others, as happened in this constituency. Because of the difficulties and irregularities at both the beginning and end of the day it could not be said whether one or other side was favoured. In any case one cannot say how a person would vote (e.g. as explained in The Hackney Case It is however clear - and not a matter of speculation - that there were, as a matter of fact, 750 registered voters who did not vote. He said that the Court would not be able to say that the breaches did not affect the results. The election should therefore be voided.

[86] Mr. Guthrie further alluded to what he said was a relevant consideration. With regard to the St. John's Rural West constituency, there were a lower number of votes cast in the 2009 election as compared with the 2004 election. In 2009, there was an 80.48% turnout whereas the turnout in 2004 had been 89.5%.

[87] The Petitioner's argument (that it cannot be said that these breaches did not affect the result) is again supported by the figures. As noted above, the difference between the candidates in the constituency of St. John's Rural West was 506 votes. The electorate was 4996 registered voters. Apparently some 4021 ballot papers were cast (including 9

rejected) leaving a balance of voters unaccounted for of 975. Again, on these figures it was impossible to say that the breach of the Regulations did not affect the result.

[88] Finally, Mr. Guthrie submitted that the Petitioner, Mr. Simon, is entitled to the Declaration sought, that the First Respondent was not duly elected.

Photo Lists

[89] Mr. Guthrie said that the position was similar to that set out in Jonas' and Fernandez' petitions. The Petitioner relied on the undisputed evidence of the use of the Photo Lists and not the published Register for Elections required by section 25 of the Act.

[90] The legal consequences are the same. He is entitled to the Declaration sought for this reason also.

MR. DOUGLAS MENDES' SUBMISSIONS

JONAS PETITION/St. George, SIMON PETITION/St. John's Rural West, NIBBS PETITION/Barbuda and FERNANDEZ PETITION/St. John's Rural North

JONAS PETITION / St. George

[91] Learned Senior Counsel Mr. Mendes said that the three petitions challenging the validity of the elections in the constituencies of St. John's Rural West, St. John's Rural North and St. George raise similar issues. These are the issues related to the late opening of the polls and the alleged failure to use the Register for Elections on the day of the elections.

SIMON PETITION / St. John's Rural West

Opening of Poll

[92] Mr. Mendes said that it is not in dispute that polling did not commence at 6 a.m. Having accepted that polling did not commence at 6 a.m. Mr. Mendes went on to consider section 32(4) of the Representation of the People Act (as amended) which provides that:

> "No election shall be declared invalid because of any act or omission by the returning officer or any other person in breach of his official duty in connection with the election or otherwise of the election rules if it appears to the Court having jurisdiction to determine the question that the election was so conducted as to be substantially in accordance with the law as to elections, and that the act or omission did not affect its result."

[93] In Morgan v Simpson [1974] 3 WLR 517, this provision has been held to mean that an election will be declared invalid where it appears either that it was so conducted that there was substantial non-compliance with the law as to elections or that there was a breach of the rules or an irregularity which affected the result. Where therefore there have been breaches or irregularities an election will stand only if the tribunal is satisfied both that it was conducted substantially in accordance with the law as to elections and that any breach of the rules or mistake at the polls did not affect the result. Lord Denning summarized the law in the following passage.

> 1. If the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated, irrespective of whether the result was 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. But, even though the election was conducted substantially in accordance with the law as to elections, nevertheless if there was a breach of the rules or a mistake at the polls - and it did affect the result - then the election is vitiated.

Burden of Proof

[94] The burden of proof is initially on the Petitioner to establish the act or omission or other breach of the Rules. Once that is established, in determining whether the election was substantially in conformity with the law as to elections or the irregularity affected the result, the burden of proof is not on the respondent, but the question must be decided on the evidence as a whole. This much was decided in In Re Kensington North Parliamentary Election [1960] 1 WLR 762, where Streatfield J said (at p. 766):

> "The question of the burden of proof does not, on the strict wording of section 16, really arise.... I think that with the change of wording under section 16(3) of the Act of 1949 it is for the Court to make up its mind on the evidence as a whole whether there was a substantial compliance with the law as to elections or whether the act or omission affected the result".

[95] This was accepted as being the correct position by Newman and Clarke JJ in Edgill v Glover [2002] EWHC 2566. Newman J said (at para 29):

> The judge aptly translated the function arising from the words, "it appears", into, "the Court must make up its mind on the evidence". I agree. The words impose a requirement on the Court to make a judgment on the evidence before it.

Standard of Proof

[96] Mr. Mendes in addressing the standard of proof referred to Edgill v Glover, where it was held that "having regard to the consequences of declaring an election void, for the Court to conclude the result is affected there will need to be a preponderance of evidence supporting that conclusion".

Breach of the Law

[97] Next, Mr. Mendes turned his attention to Rule 1(7) of the Act. The first question is whether the failure to commence voting precisely at 6 am constitutes a breach of Election Rule 1(7). Mr. Mendes submitted that the Petitioner has failed to establish any such breach. Election Rule 1(7) provides that:

> "In the case of a general election or a by-election, polling shall take place between the hours of 6 a.m. and 6 p.m. on the day specified in the writ by the Governor-General."

What Rule 1(7) does not say is that polling must begin at 6 am. It says that polling must take place between 6 a.m. and 6 p.m. In this case, polling commenced in each constituency between 6 a.m. and 6 p.m. There was accordingly no breach of Rule 1(7).

Substantial Compliance

[98] Mr. Mendes then stated that on the assumption that it is determined that polling is required to begin at 6am, and that there was a breach of this requirement, the next question is whether, notwithstanding the breach, the election was carried out in substantial compliance with the law as to elections. In this regard, the test to be applied was set out in the judgment of Stephenson LJ in Morgan v Simpson. He said (at p. 529 E):

> "For an election to be conducted substantially in accordance with that law there must be a real election by ballot and no such substantial departure from the procedure laid down by Parliament as to make the ordinary man condemn the election as a sham or a travesty of an election by ballot. Instances of such a substantial departure would be allowing voters to vote for a person who was not in fact a candidate or refusing to accept a qualified candidate on some illegal ground or disfranchising a substantial proportion of qualified voters."

[99] Mr. Mendes SC said that the polling in St. John's Rural West got off to a much later start than elsewhere. Nevertheless, 80.48% of the electorate voted which is more than the turnout in St. John's City East (80.05%), St. John's City South (79.56%), St. John's Rural South (76.36%), St. John's Rural East (80.18%), St. Mary's North (77.84%), All Saints East (79.87%) and All Saints West (79.27%), these being constituencies where the polling started on time. He said that there was no basis on which it can be contended that a turnout of 80.48% is anything but a real election. If the elections in the constituencies in which the turnout was less than 80.48% are considered to be real elections, then so must the election in St. John's Rural West. He argued therefore that there was substantial compliance with the law as to elections.

[100] In Evo v Supa [1986] LRC (Const.) 18, the High Court of the Solomon Islands applied this test. In that case, due to a boundary error, 216 voters had been-illegally registered in the constituency in question, and 154 of them had voted. The Court found that, "bearing in mind that the error in boundaries affected voters whose votes did not affect the result in either of the electoral constituencies, and that in other respects the rules as to elections were complied with in "a real election by ballot", I am unable to agree that what happened amounted to a substantial breach or violation of the principles of the Act. Adopting the

language of Stephenson LJ., the departure from the requirements of the electoral law in this case, in my view, was not so substantial as "to make the ordinary man condemn the election as a sham or a travesty of an election by ballot."

[101] In the Hackney case (1874) 2 OM & H 77, a Borough which contained about 41,000 electors was divided into 19 polling places, with an average of over 2,000 electors to each. On Election Day, two of the polling places were closed throughout the day. Three other polling places were open for only part of the day. The Court found it proved that as a result nearly 5,000 people were unable to vote at the two stations that were closed, and a large number of other people were either prevented or might reasonably be supposed to have been prevented from voting at the other three stations. There were three candidates. The winning candidate received 6,968 votes, the runner-up received 6,893 votes and the candidate in third place received 6,310 votes. Thus only 75 votes separated the winner from the runner-up. Justin Grove J was of the view that the real point in the case was "whether the constituency had had an opportunity of fairly recording their votes for the different candidates". He was of the clear view that they did not. His conclusion appears in the following passage:

> "I am perfectly certain ... that an election which is conducted in such a way as (whether by accident or by design) not to afford to a very large mass of the electors an opportunity of voting, cannot be a true election of members. It appears to me that there was no real election here which was in any sense a fair representation of the views of the electors of the Borough of Hackney."

[102] In his view, one of the principles of the Act was that the electors should have a fair opportunity of recording their votes. As such, the question to be decided was:

> "... is it in accordance with the principles of the Act that a large proportion, amounting to several thousands of the electors, should be absolutely deprived of the power of voting, and that a large indefinite number, which we cannot ascertain, should also have impediments presented to their voting, which may, and doubtless did, prevent a very considerable number of them from voting at all?"

[103] Learned Senior Counsel Mr. Mendes said that this case can be contrasted with the Borough of Drogheda case (1874) 2 OM & H 201 where it was proved that due to some

unforeseen accident the seven polling stations were not opened at the statutory hour of 8 a.m. and in fact no votes were received until 8:45 a.m. It was clear that the late opening had no affect whatever upon the result of the election and that not a single voter was in consequence prevented from voting. In fact, the whole constituency was almost entirely polled out before the poll was closed. Barry J. was of the view that:

> "to hold an election void under such circumstances as the present would be to put it in the power of any careless or corrupt presiding officer in any one polling station to nullify the solemn act of the largest constituency in the Kingdom."

[104] Mr. Mendes submitted that the question therefore is whether there was a real election and not a sham election or a travesty of an election by ballot. In other words, the question is whether a substantial proportion of qualified voters were disenfranchised. Learned Senior Counsel, Mr. Mendes submitted that a relevant factor in determining whether there is substantial compliance with the law as to elections is the actual turnout of voters which was achieved. For example, it would be absurd to invalidate an election where, say, the polling booths were open for only, say, two out of the required twelve hours, if during that time an overwhelming majority of the registered voters turned out and voted despite the drastically reduced hours. In such a case the electorate would have expressed its will and there would be no basis in common sense to declare the election void. In Halstead v Simon supra where (at pp. 233-234) Redhead J said that even in a case where there was only 5 ½ hours of voting time, if "everyone on the voters list had cast their ballots, in those circumstances, without anything more, no Court despite the breach, would declare the election void. The Court must take a common sense approach to the situation."

[105] Learned Senior Counsel, Mr. Mendes posited that it is therefore appropriate that the Court should explore both the period of time that was lost as a result of the late opening as well as the turnout which was achieved in determining whether there was substantial compliance with the law as to elections. He urged the Court to find that there was substantial compliance with the law as to elections.

Breach not affected the Result

[106] Mr. Mendes next addressed the issue of whether the result was affected. Did the late opening affect the result? The answer to this question depends upon the evidence adduced as to the number of persons, if any, who were prevented from voting because of the late start. He asked the Court to find, based on the evidence, that the result was not affected.

[107] Learned Senior Counsel, Mr. Mendes said that there is no dispute in this case that some persons were permitted to cast their votes after 6 p.m.; it is not disputed either that these persons were in line at 6 p.m. The evidence tendered in support of paragraph 9.5consists of: The evidence of Ramon Gomez that at 8 p.m. 20 persons in line at Box E-G at Green Bay were not permitted to vote, while others in line at 6 p.m. were so permitted (p. 94 Part II); However, Mr. Mendes Senior Counsel submitted that the Petitioner, has not proved his case under paragraph 9.5. There is accordingly no cogent evidence in support of these allegations. Secondly, the credibility of Mr. Ramon Gomez has been irreparably tarnished in cross-examination and accordingly should be rejected. He said that there is no evidence that the persons who voted after 6 p.m. "were not properly able to do so according to the provisions of the Act and the Election Rules, no evidence has been led of any irregularity in relation to the casting of their ballots.

Late Polling

Matters not pleaded

[108] Mr. Mendes, Senior Counsel said that the Simon petition is unique in that it now appears from the evidence adduced in support of the petition that the Petitioner wishes to contend that: It was unlawful to permit persons in line at 6 p.m. to cast their votes after 6pm since voting after 6pm is prohibited by Election Rule 1(7); Some 100 persons (maybe more) joined the lines after 8 p.m. and were permitted to vote.

[109] Mr. Mendes argued that these matters were not pleaded and accordingly do not arise for consideration. In this regard, the First Respondent contends that the rules of pleading are strictly applied in Election Petitions and changes after the expiry of the period for filing a Petition are not allowed - see Grant v Madeiras [2007] Bda. L.R. 21, paras 18-20; Halsbury's Laws of England, 4th ed. Reissue, Vol. 15, para 760. He also referred the Court to Charan Lai Sahu v Giani Zail Singh [1985] LRLC (Const.) 31, the India Supreme Court said (at p. 41). He also referred the Court to Mitbilesh Kumar v Venkataraman (1989) LRC (Const. 1); Hari Shanker Jain v Gandhi [2002] 3 LRC 562, paras 22-24. In Halstead v Simon (1989) OECS L.R. 198, at 249, Redhead J held that the Petitioner could not rely on new matters which arose during the course of the hearing. Mr. Mendes said that it was clear that there was no complaint in the petition that 100 or more persons joined the line after 6 p.m. or that anyone who turned up to vote before 6 p.m. was not permitted to vote. Accordingly, these complaints should be dismissed out of hand.

[110] The Petitioner's pleading in this case should be compared with the pleadings in Halstead v Simon (1989) 1 OECS Law Reports 198 where it was pleaded that:

> "Polling was carried out during hours other than those specified or allowed by the said Table in the Election Rules to wit polling was carried out after the hour of 6pm and until the hour of 9pm on election day."

He said that in Halstead it was clearly pleaded that voting occurring after 6 p.m. was not permissible and cited the relevant rule which was breached.

FERNANDEZ PETITION / St. John's Rural North

[111] Next, in relation to St. John's Rural North, Mr. Mendes conceded that the evidence indicated that the polls did not open at 6 a.m. Learned Senior Counsel also said that out of an electorate of 3577 eligible voters, 1,558 could have voted for a period of 10 hours, 823 could have voted for a period of 9 hours 40 minutes, and 1,196 could have voted for 9 hours and 25 minutes. In other words, while the polls were not open for the full 12 hours, they were open for a substantial portion thereof, more than 75% of the time in all cases. Moreover, despite the presumed late start, 79.03% of the electorate turned out to vote.

While this was marginally below the average voter turnout of 81.02%, it was greater than the turnout in St. John's Rural South (76.36%) and St. Mary's North (77.84%), where the polls opened on time. Mr. Mendes maintained that, in the circumstances, the election in this constituency could not be said to have been a sham or a travesty and it cannot be said that a substantial proportion of voters was disenfranchised. Rather, it is clear that there was a real election by ballot in which 79.03% of the electorate voted. He also urged the Court to find that the election was conducted substantially in accordance with the election law and the result was not affected.

JONAS PETITION / St. George

Late Opening

[112] Turning his attention next to late voting, Mr. Mendes stated that in relation to the constituency of St. George, the polls were open for 1025 voters for 91/2 hours, for 1345 voters for 9 hours 10 minutes, for 1213 voters for 6 hours and 45 minutes and for the remaining 831 voters for 6 hours and 40 minutes. In other words, the polls were open for more than 75% of the available time for 54% of the electorate, and for more than 50% of the time for the remaining 46%. Furthermore, 79.01% of the electorate actually voted which is just marginally less than the average voter turnout for all of the constituencies of 81.02% and is more than the turnout in St. John's Rural South and St. Mary's North. Mr. Mendes, Senior Counsel, advocated that the election in St. George where 79.01% of the electorate cast their votes could not be considered a sham despite the late start.

Late Voting

[113] Mr. Mendes referred the Court to the evidence led on behalf of the Petitioner Jonas of individuals who were prevented from voting is as follows: Mr. Denise Marshall voted at Potters, and is a bank worker. She claimed in her witness statement that because of the late start, she was not able to vote. She said that she arrived at 7:00 a.m., and left at 8:35 a.m., because she held the keys for the bank vault, and she had to prepare staff salaries for the day. Ms Marshall said in her witness statement that she "was unable to vote since my responsibilities at my work place if not carried out would seriously affect the operations

of the Bank and the payment of staff salaries". Under cross examination a different story emerged. She admitted that the processing of salaries and sending out of wires transfers did not prevent her from voting. The witness admitted that she could have returned to vote after 2:00 p.m. but did not.

[114] Mr. Alvor Brown came to Potters to vote and left because of the delay in voting. Under cross-examination it was demonstrated, despite attempts by Mr. Brown to change his evidence, that he left Potters at 11:00 a.m. and had he not done so, he could have voted since he was not expected at work until 3:00 p.m. Mr. Goldburn Samuel also went to vote at Potters. Mr. Mendes said that Mr. Samuel was totally discredited in cross-examination. His viva voce evidence contradicted his witness statement in many respects. He said that it was quite apparent that his evidence was fabricated.

[115] Ms. Shenshaba Oozunni Henry attempted to vote at Piggots. The First Respondent accepts that she was genuinely prevented from voting because of the late start. Ms. Henry arrived at 7:30 a.m. and left at 8:00 a.m. to report for work to take care of an invalid patient. Mr. Neville Jeremy who was a polling agent at Pigotts was the only witness who could name an individual who was prevented from casting his vote, one Mr. Veary George. Mr. George while providing a witness statement, failed to appear to give evidence. Mr. Jeremy was unable to say whether any of the other voters he allegedly saw leaving the polling station as a result of the delay in voting ever returned to vote.

[116] Mr. Mendes submitted that the Court should reject the evidence of all three witnesses except Ms. Henry. In the result there is evidence that only one person was unable to vote because of the late start.

[117] Mr. Mendes, Senior Counsel said there was also evidence from various witnesses that they saw person leaving the lines. Ms Patricia Phillip at Potters attested to seeing many people leaving because of the late start. She described these people, who she did not know, as hotel workers. Ms. Juliet Henry was a Polling Agent at Potters who knew only one person who left the line because of the delay but indicated that that person returned to vote. Ms. Henry left the polling station at 1:00 p.m. and said that the line was long, 10

or 12 people. Learned Senior Counsel said that it was later demonstrated in cross-examination that she left through a backdoor and therefore it would have been impossible for her to give an assessment of the length of the lines at 1:00 p.m.

[118] Ms. Rosalind Jeremy was a polling agent at box P to Z at Piggots, she saw several people who said that if they left the line, they would not return. She said "I tried to get people to stay but some left and some stayed. I don't know if the ones who left returned later. Under cross-examination Ms. Jeremy testified that there were 4 lines at Piggots with about 500 people in each line. She was unable to explain her evidence in the face of the fact that her estimate would well exceed the electorate assigned to that station. Ms. Jeremy also testified that there was no one in line at her box at 6:00 p.m. Mr. James Hill managed to vote at Potters, but gave evidence to the fact that once voting started, it took him 3 hours to vote.

[119] Mr. Mendes stated that the witnesses for the First Respondent also saw persons leaving the line but saying that they would return or in fact returned later in the evening. Ms. Elaine Colbourne attached to the Potters school gave clear and concise evidence to the effect that prior to voting she was located at the mock station. She said persons did leave the line but the vast majority stayed. She knew and was able to name some of the persons who left the line and some of whom had returned to vote. Ms. Colbourne indicated that once voting started it ran smoothly. Voting concluded between 7:30 p.m. and 8:00 p.m. and that this was because every voter who was in the line to vote at 6:00 p.m. was allowed to vote. Mr. Edmeade Graham was attached to Piggotts. She testified that while on the compound prior to the commencement of voting, she did not see anybody leave the compound. At 6:00 p.m. there were still some voters in the line. The voting stopped at about 6:20 p.m. Ms. Carla Thomas was attached to New Winthropes School she said voting started at 8:45 a.m. and ended at 6:00 p.m. She too reported that some people left the lines to go to work and that she saw some of these people return to vote later on.

[120] Mr. Mendes, Senior Counsel said that in this petition only one witness testified that he was unable to vote because of the late start. He is Mr. Alfredo Diedrick, who went to vote at 6:30 a.m. and left at 7:20 a.m. without voting. This witness said in his witness statement that he left because he was in the middle of constructing a wine bar and did not return because of the construction work. In the witness box however, he stated that the reason why he did not return to vote was because he had no transport to return to the station to vote. His girlfriend had the car. When confronted with the contradiction with his witness statement, he said that both the lack of transport and the construction at the wine bar prevented his return to vote. Mr. Mendes, Senior Counsel, submitted that his evidence that the late start prevented him from voting should be rejected.

[121] Next, Mr. Mendes, Senior Counsel reminded the Court that other witnesses for the Petitioner gave general evidence of seeing persons leaving the line. Indeed, Mr. Charles Henry Fernandez, the Petitioner was unable to produce any first- hand evidence of any voters being prevented from casting their votes as a result of the delay or otherwise. Ms. Latoya Grant Joseph was posted at Yorks. Ms. Grant-Joseph observed several electors in line waiting to vote who came out of line after waiting a long time, and that a good amount of them did not come back to vote. Under cross examination Ms. Grant-Joseph was unable to say how many people she saw leaving but described it as several. When asked Ms. Grant-Joseph said that when she said 'several' she had no number in mind. She also admitted that she did not know the people she saw leaving. Ms. Joseph said: "I was engaged in my duties as a polling agent, I was not looking at lines." Mr. Samuel Simon was another witness who said that he saw people were leaving the lines in droves, about (40 to 50) prior to the commencement of voting, as a result of the delay, but that he did not know the persons who left. Ms Loretta Barnes who was posted at the Wesleyan Junior Academy. This witness saw about 20 people she knew leave the line. Under cross examination, she indicated that she was not counting the number of persons, and that (although she allegedly knew the persons who left) she did not know the names of the persons who left.

[122] Mr. Mendes Senior Counsel said that the First Respondent's witnesses were more helpful: Ms. Mistie Perry was attached to the Wesleyan Junior Academy as a polling agent. She testified to not seeing anybody leaving the lines and in fact found that persons were determined to cast their vote. Voting at her station concluded at 6:00 p.m. Ms. Monica Dear was a polling agent attached to the Cedar Grove Primary School. She too spoke to a few persons leaving the lines with most saying that they would return. She said voting progressed very smoothly throughout the day and the box was closed just after 6:00 p.m. Mr. Jason Percival was also attached to the Cedar Grove Primary School. Voting started at 8:25 a.m. and concluded at 6:00 p.m. Mr. Percival recollected that there was a large turnout leading up to the commencement of voting and once voting began the lines were long. Mr. Percival said that he did not see anybody leave the line and go away. Those who left the lines did so for shelter or to get umbrellas. When tested in cross-examination Mr. Percival indicated that he was able to observe what was happening outside through the window. Ms. Eugenie Thomas Andrew was a polling agent at York's Community Centre and once again she spoke of some persons leaving before voting commenced, but returning later on to vote. She said that polling ended at that station at 6:00 p.m.

SIMON PETITION / St. John's Rural West

[123] Learned Senior Counsel Mr. Mendes said that the two witnesses called by Mr. Simon gave evidence of not being able to vote because of the late start. Mr. Francisco Matthias went to vote at Greenbay School. He alleged that he had to leave the Polling station at 7:45 a.m. in order to report to work for 9:00 a.m. He initially suggested that he completed work at 5:30 p.m. and therefore could not return to vote by 6:00 p.m. Under cross-examination Mr. Matthias admitted that he had worked for 6 hours and therefore completed work at 3:00 p.m. and went home. He admitted that he was simply too tired to go to vote. He said: "If I was not tired I would have gone to vote." Mr. Mendes accepted that it cannot be disputed that Mr. Winston Joseph was unable to vote at Green Bay before he had to leave on a 10:50 a.m. flight to Dominica.

[124] Accordingly, Mr. Mendes, Senior Counsel said that it is also significant that only very few credible witnesses were produced to say that they could not vote because of the late start.

Were there 'droves' of people out there who were disenfranchised because of the late start one would have expected them to be volunteering to come to Court to lodge their justifiable complaints. The fact that only so few have turned up, he submitted, suggests that in fact that only an insignificant number of persons were prevented from voting. This point was made in The Akaroa Election Petition (1891) 10 NZLR 158 by Williams J (at p.166).

Breach did not affect the Results

[125] Mr. Mendes argued that overall, therefore, is no evidence that any significant number of persons were disenfranchised as a consequence of the presumed late start. There is therefore no evidence on which to base a finding that the late opening affected the elections. On the contrary, the large turnout in the constituencies under challenge is evidence that very few persons if any at all were disenfranchised and that accordingly the result was not affected. Elaborating further, Learned Senior Counsel, Mr. Mendes submitted that the percentage turnout at an election can be an indication as to whether a late opening has resulted in voters being prevented from voting.

[126] In St. John's Rural North, there were 3577 names on the list of electors. In St George, there were 4414 names on the list of electors. Mr. Mendes said that on the assumption that the bigger percentage decrease in St. John's Rural North and St George were due entirely to the late starts in those constituencies, these larger decreases would, in St. John's Rural North, represent 55 voters (1.51% of 3577) while in St George it would represent 119 voters (2.68% of 4414). On the assumption, therefore, that the percentage number of voters in these two constituencies decreased above the average entirely because of the late start in voting, this could mean that in St. John's Rural North 55 persons did not vote because of the late start and in St George 119 persons did not vote because of the late start. But on that assumption, the late start would not have affected the result since in St. John's Rural North the successful candidate won by 106 votes and in St George the winning candidate won by 502 votes. In other words, if it is assumed that the all of the persons who it is presumed did not vote would have voted for the Petitioners they would still have polled less that the winners.

[127] Further, since in the constituency of St. John's Rural West the percentage decrease in voters of 9% was less than the average decrease of 10.56%, there would be no basis on the results to conclude that the late start in that constituency affected the turnout of voters at all. In the result, there is ample evidence that the late opening did not affect the result and there is no basis to invalidate the elections on this ground.

Photo Lists

[128] Next, Mr. Mendes turned his attention to the use of the Photo Lists. Mr. Mendes said that it is not disputed that the Registers for Elections which were published in February and the one for St. John's Rural West which was re-published on March 2, 2009 were not used on the day of the election. However, the evidence is also clear that all of the information contained in Registers for Election (with the exception of the James Underwood in St. John's Rural North) was contained in the Photo Lists which were used on the day of the election, but that the photographs and ID numbers of the voters on the list were added on. Furthermore, the evidence is that the Petitioners' polling agents were permitted to and take the original register with them into the polling station.

JONAS PETITION / St George

[129] He referred the Court to the evidence in relation to the Photo Lists. Ms. Sherleen Edwards Royer who was stationed at Potters and testified to one voter, a Mr. Denfield Simon, being on the Photo Lists but not on the Register. Under cross-examination it was demonstrated that Mr. Simon was on both lists. Ms Patricia Phillip was also responsible for and gave evidence to the effect that by 9:30 a.m. she had distributed the Register to all polling agents in the constituency, thereby addressing the complaint that the polling agents for the Petitioner were not permitted to use the Register.

[130] Mr. Mendes advocated that there was no evidence led of duly registered persons not being allowed to vote and persons not registered being allowed to vote because of the deficiencies of the Photo Lists.

FERNANDEZ PETITION / St. John's Rural North

[131] Mr. Mendes, Senior Counsel drew the Court's attention to the fact that Mr. Fernandez spoke about to discrepancies between the Register for Election and the Photo Lists. These discrepancies amounted to the fact that the register used sequential numbers as opposed to the Photo Lists which used electoral numbers. Also, there was one deceased individual – Mr. Underwood- who appeared on the Register for Elections but not on the Photo Lists. It is evident that not one of these discrepancies would have affected the poll and the Petitioner accepted as much in cross-examination. Mr. Mendes said that Vere Bird III spoke to issues faced by him on Election Day and permitted himself to say that the production of the photo was intentional and designed so that a fair election would not be held. He had no evidence to support this contention. His evidence did not touch or concern the claims made in the petition.

SIMON PETITION / St. John's Rural West

[132] In relation to the Photo Lists, Mr. Mendes said that apart from the evidence of Ms. Lorna Simon and Ms. Gail Christian, no one gave evidence of differences between the Register for Election and the Photo Lists. Ms Simon testified that there were eleven names on the Photo Lists which were no on the Register. This was due to the updating of the Register after 25th February due to the adjustments in the boundary.

Substantial Compliance

[133] Mr. Mendes, Senior Counsel posited that there were no substantial differences between the Register for Elections published in February and March 2009 and the Photo Lists, the question is whether there was substantial compliance with the law as to elections. In this regard, Mr. Mendes, Senior Counsel submitted that given that, except for the photos and ID numbers, there was no difference between the Register and the Photo Lists used in St. George and St. John's Rural North, except for the exclusion from the Photo Lists in St. John's Rural North of the name of the deceased John Underwood, there was clearly substantial compliance with the law as to elections in that all of the information on the

Register was available on election day. With regard to St. John's Rural West, and putting to one side the question whether the Revised Register is the Register for this purpose, the only difference between the Register (as opposed to the revised Register) and the Photo List is the presence in the Photo Lists of 11 additional names of persons being included because of the change in constituency boundaries. Once again it can hardly be said that this did not constitute substantial compliance. And if the Revised Register is the Register for this purpose, there is no difference between the Register for Elections and Photo Lists at all in St. John's Rural West. It cannot be said that because of the use of the Photo Lists the election was a sham. There is no evidence that anyone was disenfranchised because the Register was not used on Election Day. The election was a real one and there was accordingly substantial compliance with the law as to elections.

Breach did not Affect Results - Photo Lists

[134] Learned Senior Counsel, Mr. Mendes said that the insignificant differences between the Photo Lists and the Register for Election and the failure to bring forward the case of anyone who was disenfranchised because of the use of the Photo Lists or who was allowed to vote though not entitled to do so because of the use of the Photo Lists, it is impossible to conclude that the result was affected. Indeed, given that the Photo Lists is identical in content to the Register for Election it would be impossible to conclude otherwise. Mr. Mendes therefore submitted that the use of the Photo Lists could not have and did not affect the result of the election.

Polling after 6:00 p.m.

[135] Mr. Mendes, Senior Counsel said that on the assumption that the Petitioner is permitted to pursue his claim that the voting which took place after 6pm was in breach of Election Rule 1(7), despite the absence of any pleading to this effect, he submitted that permitting persons in line at 6 pm to vote is not in breach of Rule 1(7). On a proper interpretation of Rule 1(7) persons in line at the polling station at 6pm are permitted to vote and any interpretation which disenfranchises such persons violates the Constitution and ought to be rejected. Alternatively, to the extent that such an interpretation is unavoidable, Rule 1(7) is unconstitutional and cannot constitute a valid constraint on persons already in line waiting to cast their votes.

Rule 1(7) provides as follows:

> "In the case of a general election or a by-election, polling shall take place between the hours of 6 a.m. and 6 p.m. on the day specified in the writ by the Governor-General."

Mr. Mendes next submitted that there is as yet no authority binding on the Court which favours an interpretation of Rule 1(7) which would disenfranchise person standing in line waiting to vote at 6 p.m.

[136] In support of his position, Mr. Mendes referred the Court to the Islington Case (1901) in which the winning candidate was elected by a majority of 19 votes. It was proved that 14 ballot papers were delivered to electors after the closing hours of 4 p.m., but that those electors were at the polling place by 8 p.m. It was also proved that some ballots which had been received before 8 p.m. were cast after 8 p.m. The election Court held that those ballots received and cast after 8 p.m. were invalid. The relevant provision was section 1 of the Elections (Hours of Poll) Act 1885 which provided that the poll "shall commence at eight o'clock in the forenoon and shall be kept open till eight o'clock in the afternoon of the same day and no longer." "Poll" meant actual voting (see p. 121). The Court was of the view that this meant that even voters in the polling place at 8 p.m. were not permitted to cast their votes after 8 p.m. but that if the voter had the ballot delivered to him before 8 p.m. he was entitled to deposit it in the ballot box after 8 p.m. The Court came to the latter conclusion because the rules required voters who had received a ballot 'forthwith' to take it into one of the compartments and put it into the ballot box. Given that there was no provision as to how such a ballot was to be dealt with, and it was clearly not a 'spoiled' or an 'unused' ballot paper, it had to be deposited.

> "The proceedings at the election shall be conducted in accordance with the following table .... In the case of a general election between the hours of 6 a.m. and 6 p.m. on the ninth day after the delivery of nomination papers."

[137] Mr. Mendes said that it is clear from the report that it was not argued that the rule should be interpreted as permitting persons in line at: 6 p.m. to cast their votes, The Court

therefore proceeded on the assumption that the law prohibited such activity. The question which engaged the Court's attention was whether there was substantial compliance and whether the breaches affected the result.

[138] Buttressing his position, Mr. Mendes said that Bruno v The Election Appeal Board of the Samson Cree Nation 2006 FCA 249, the Federal Court of Appeal held that persons in line at the closing hour were entitled to stay on to vote. The relevant provision read as follows: "All voting locations shall be open at 9:00am and shall be open until 6:00pm." The Court held that this section "only prescribes the hours during which "voting locations" will be open to receive voters" - para 42. Once voters are at the voting location before it closes they are entitled to vote. It is apparent that none of these cases considered a provision worded as Rule 1(7) is. The difference between the terms of the provision under consideration in the Islington case and Rule 1(7) of the Antigua and Barbuda Election Rules is stark. The English rule required the poll in mandatory terms to open at 8 a.m. and stay open until 8 p.m., "and no longer". Rule 1(7) on the other hand requires that 'polling7 take place between 6 a.m. and 6 p.m. It does not say that it must start at 6am or stop at 6 p.m. Moreover, whereas in the English legislation "poll" is defined as 'actual voting', 'polling' is not defined in the Antigua and Barbuda Rules.

[139] Furthermore, none of the cases considered the effect of such interpretation on a constitutionally entrenched right to vote. It is accordingly for the Court to determine the meaning and effect of Rule 1(7) in light of the right to vote declared in section 40 of the Antigua and Barbuda Constitution.

[140] Learned Senior Counsel, Mr. Mendes said that the right to vote is to be exercised in accordance with the law as to elections. Under Rule 1(7) of the Election Rules, polling is to take place between 6am and 6pm. Accordingly, a duly registered elector could not claim to be entitled to turn up before 6 am or after 6 pm and be entitled to vote. On the other hand, a duly registered voter, turning up at the appropriate polling station between the hours of 6am and 6pm is entitled to vote and it would be a prima facie breach of

section 40(3) of the Constitution to deny him or her that right. Rule 1(7) does not set a cut off point by which a voter must present himself at a polling station to exercise his franchise.

[141] An interpretation of Rule 1(7) which prevents a person who is in line at 6pm from casting his or her vote would violate the right to vote guaranteed by section 40(3) of the Constitution. In Bruno v The Election Appeal Board of the Samson Cree Nation 2006 FCA 249, the Canadian Federal Court of Appeal, in commenting upon the Appeal Board's argument that the law should be interpreted to mean that persons in line at closing time were not entitled to vote said (at para 43):

> ".... The Board's interpretation is in direct conflict with the obvious purpose of the Election Law, which is to allow eligible Board members to exercise their democratic right to vote for the Councilors of their choice. The Board's interpretation taken to its ultimate logic, means that eligible voters who may have been standing in line for hours would be unable to vote because the line had not progressed fast enough and hence having been unable to vote by 6 pm, would be prevented from voting. This would, in my view, constitute an absurd result."

[142] Mr. Mendes, Senior Counsel advocated that the crucial question is whether the election was a sham or a travesty, because people in line at 6 p.m. were allowed to vote. Given that there is no evidence that they were unable to vote before then due to any fault of their own, it could not be said that the election was not a real one.

Breach did not Affect the Result

[143] There is very little clear evidence of the number of persons who voted after 6 p.m. There is the evidence of Ms. Lorna Simon who has given the times of closing. In the premises, Mr. Mendes submitted that the late polling made no difference to the result. Accordingly, Court should not invalidate to election.

NIBBS PETITION/Barbuda

[144] Mr. Mendes Senior Counsel said that from the Petition and the evidence adduced, it appears that this Petitioner raises seven discreet issues, namely: (a) That the Commission failed to effect the transfer of Mr. Fabian Hunt to the constituency of Barbuda; (b) That the Commission did not issue a special ID card to Ms. Irose Martin; (c) That the

count was incorrect; (d) That the Register for Elections was not used; (e) That the road works constituted bribery; (f) That the Petitioner and his agents exerted undue influence in their election speeches; and (i) That the Petitioner and persons acting on his behalf bribed students studying in Cuba by bringing them home to vote,

Mr. Fabian Hunt

[145] As to the first, Mr. Mendes did not plead that the Commission failed to affect the transfer of Mr. Hunt and accordingly this issue forms no part of the case. In fact, in their particulars of para 9.12 of the petition, the Petitioner gave Mr. Hunt's name as person who was prevented from voting because of the use of the Photo Lists not because he was not transferred Mr. Mendes maintained that in any event, Mr. Hunt ought to have challenged his exclusion from the Barbuda Register for Election through the normal channels prior to the election. Mr. Mendes further maintained that Mr. Hunt failed to do so and it is not permissible to raise this as an issue after the election has been completed.

Irose Martin

[146] Mr. Mendes said that with regard to Ms. Irose Martin, she conceded in cross-examination that she did not fill out an application form for the special ID card as is required by the Rules and accordingly, she cannot complain of the non-issue of the card. In any event, the Court should prefer the evidence of Mr. Mulvane George who said that Ms. Martin first reported the loss of her card after the close of business on March 11th, 2009, after the cut off date for making such reports.

Counting of Ballots

[147] There does not now appear to be any dispute on the evidence that there was initially a disagreement between the counting agents for the candidates and the Commission's counting agents as to the count in relation to box No. 1. The candidates' counting agents initially counted 148 for Walker and 148 for Nibbs, while the Commission counting agent counted 148 for Walker and 147 for Nibbs. It also appears not to be disputed that the 2nd and 3rd boxes, i.e, were then counted and the Returning Officer returned to box No. 1 and the ballots were counted again. This time all counting agents agreed that Walker received 148 votes and Nibbs received 147 votes. The Returning Officer then declared Walker the

winner by one vote. Initially, Mr. Everitt Thomas, the witness for the Petitioner, seemed to suggest in his witness statement that while the second and third boxes were being counted, the first box was left unattended creating the possibility that one of the ballots in favour of Mr. Nibbs was removed from the box, which explained that at the recount 147, and not 148, votes were counted for Nibbs. However, in cross-examination, Mr. Thomas expressly disavowed any such suggestion and stated that he was satisfied with the recount of box No. 1.

Photo Lists

[148] With respect to the use of the Photo Lists, Mr. Mendes said that Mr. Walker relied on the submissions already made in relation to the other Petitions.

Bribery

[149] Mr. Mendes reminded the Court that the Petitioner contends that the First Respondent is guilty of bribery arising out of the road works conducted in Barbuda between January to March 2009 and the chartering of a flight to bring the Cuban students home to vote. Mr. Mendes specifically said that the allegations are that:

i) "the Government ... commenced with the open participation of the First Respondent, substantial road works in Barbuda ... The works involved an increase in temporary employment/'. In answer to the First Respondent's request for particulars of "the facts and matters relied upon in support of the allegation that the First Respondent openly participated in the substantial road works in Barbuda", the Petitioner responded that the "nature of the allegation is that the First Respondent associated himself and the BPM with the works, not that he himself participated in carrying them out."

ii) "The First Respondent and/or persons acting on his behalf further arranged for or connived at the payment for the travel to Barbuda of a number of Barbuda students from Cuba to Antigua and then to Barbuda so they could vote in the election. The Petitioner claims that the students' travel by chartered flight was paid for or contributed to by others on behalf of the First Respondent and the BPM." In its particulars, the Petitioner identified Ambassador Bruce Goodwin as the person acting on behalf of the First Respondent.

[150] Learned Senior Counsel, Mr. Mendes said that although Mr. Nibbs did not identify in his submission which part of section 29 he says the First Respondent violated, it appears from the written submissions that only section 29(2)(a) & (c) are pursued. These subsections provide as follows:

> "(2) A person is guilty of bribery if he, directly or indirectly, by himself or by any other person on his behalf (a) gives any money or procures any office to or for any voter or to or for any other person on behalf of any voter or to or for any other person in order to induce any voter to vote or refrain from voting: ....
> (c) makes any such gift or procurement as aforesaid to or for any other person in order to induce that person to procure the return of any person at an election or the vote of any voter."

The Burden of Proof

[151] Mr. Mendes said that the Petitioner must prove his case of corrupt practices on the criminal standard, namely beyond a reasonable doubt. That was established in R v Rowe [1992] 1 WLR 1059. It has also been accepted by the Supreme Court of Papua New Guinea in Wanaraka v Dusava [2009] PGSC 11; SC980 (8 July 2009) that the Petitioner bears the burden of proving each element of the corrupt practice beyond a reasonable doubt. In that case, Wanaraka gave a Mr Paringu a relatively small sum of money saying "You take this money and think of me." The trial judge was of the view on the basis of this statement that the money had been tendered as an inducement to Paringu to vote for Wanaraka. The Supreme Court held that this was insufficient to discharge the criminal standard of proof.

The Road Works

[152] Mr. Mendes, Senior Counsel stated that Mr. Nibbs alleges the corrupt practice of bribery in relation to the road works was committed by the giving of employment. Accordingly, he must discharge the burden of proving beyond a reasonable doubt that the First Respondent, directly or indirectly, by himself or by some other person on his behalf gave employment to or for a voter or to or for any other person on behalf of a voter or to or for any person in order to induce any voter to vote or refrain from voting. It is important to note that Mr. Nibbs has neither alleged nor proved that Mr. Walker himself gave any employment to anyone, whether a voter or not. Indeed, the Petitioner pleaded that it was

the Government which commenced the road works which involved "an increase in temporary employment" and that Mr. Walker openly participated in such road works. Mr. Mendes suggested that, not only had the Petitioner not adduced any evidence of such participation but in his particulars expressly disavowed any allegation that the First Respondent "himself participated" in carrying out the road works and instead alleged that he "associated himself and the BPM with the works."

[153] Further, Mr. Mendes argued that there are two difficulties with this allegation. The first is that this was not pleaded and accordingly the Petitioner should not be allowed to pursue it. The second is that no evidence was adduced that the First Respondent associated himself with the works. The most that was said was that Prime Minister Baldwin Spencer attributed the road works to the First Respondent. But that is not proof beyond a reasonable doubt that the First Respondent associated himself with the road works. Mr. Mendes maintained that given that it was not pleaded nor proved that the First Respondent himself gave employment to anyone, the only other way the offence could be committed would be by someone else acting on his behalf. The Petitioner did plead (and it has been established in the evidence), that it was the Government which commenced the road works which involved an increase in employment but he did not plead that the Government was acting on the First Respondent's behalf. The case therefore fails on the pleading.

[154] In any event, it is quite clear that the road works which were carried out from January 2009 were the continuation of a project which had begun in 2005. They were not conceived for the purposes of the election. The resumption of these works was being planned and executed since in 2007 but the lack of funds and the need to import a concrete batching plant delayed the start of the works. Steps were then taken, quite prudently, to obtain technical reports on the work needed before the work actually commenced. The works were temporarily halted in the week of the election and resumed not long thereafter and have continued until today. They were temporarily halted to facilitate the rallies and motorcades which were taking place around election time.

[155] Importantly, the Petitioner admitted under cross examination that he was not in a position to deny that road works began prior to 2009 therefore putting a lie to his claim that the road works commenced around the time of the election. Mr. Mendes pointed the Court to the fact that the Petitioner also gave evidence to the effect that in his January speech Prime Minister Baldwin Spencer spoke of road works which were occurring in Barbuda which would also give a lie to the Petitioner's contention in his witness statement that the works began suddenly in February 2009. Mr. Elvis Burton also spoke to the road works and was similarly unclear as to which road works formed the basis of his complaint.

[156] Learned Senior Counsel, Mr. Mendes said that it is clear that the delivery of services to the community must continue despite the onset of an election period. It would be unreasonable to expect a Government to not commence works which are already planned lest it be said that it is attempting to bribe voters. This point was made by the Supreme Court of India in Ghasi Ram v Dal Singh [1968] 3 SCR 102. The same point was made by the same Court in Iqhal Singh v S. Gurdas Singh (1976) SCR (1) 884.

[157] Mr. Mendes reiterated that the Government was continuing a project which had been interrupted by a contract dispute. The reason for the resumption in January 2009 has been elaborately explained. The Government was duty bound to provide roads to Barbudans. It was not bribery to fulfill that duty. Mr. Mendes reminded the Court of the evidence of Mr. Charlesworth Davis, the Director of Works at the material time who gave evidence to the effect that the works were as a result of the efforts of his department, the Ministry and the Barbuda Council. Further, he indicated that the works were part of a major exercise which had been in place for years before the elections.

[158] In the petition at the bar, there was no interchange between the Government and the electorate asking if votes would be cast for the First Respondent if the roads works were carried out. Similarly, the roads works were not commenced out of the blue. They were the continuation of works the government had started years previously as part of its roads works programme in Barbuda. There was no pressure from the electorate which the

government was seeking to obtain release from. Neither was the commencement of the works unexplained. It was the continuation of a project which was in train since in 2007. He also referred the Court to the facts in Jugnauth v Ringadoo [2008] UKPC 50

Undue Influence/Bribery – Words Spoken

[159] Turning next to undue influence and bribery, Mr. Mendes said that the Petitioner appears to rely on the speeches made in Barbuda in January and March 2009 to bolster his case of bribery and to mount a case of undue influence. His evidence and that of his witness Mr. Elvis Burton were to the effect that Prime Minister Spencer, Minister Daniel and the First Respondent each said that if the people of Barbuda voted for the Petitioner, a UPP Government would not support Nibbs and would stop the road works and the promised ferry would not be provided. The First Respondent and his witnesses, on the other hand, testified that the thrust of the speeches was a comparison between the performance of the ALP government in relation to Barbuda prior to 2004 and the performance of the UPP government while in office and warned the electorate that should they vote in the ALP government they would be neglected once again. The Petitioner himself in part confirms this, where he recounts the Prime Minister's account of the achievements of the UPP government.

[160] Mr. Mendes, Senior Counsel submitted the Court should reject the account given by Mr. Nibbs for the following reasons: In his statement and in his oral evidence, the Petitioner contradicted the statements made in his Petition which he had confirmed on oath; The Petitioner said that he did not hear all of what was said in the speeches; Mr. Elvis Burton said that he did not recall any of the speakers either extolling the performance of the UPP government or criticizing the stewardship of the ALP government. Given that it would be expected that this is what would be said on a political platform, the witness' denial that any such took place makes his testimony totally unreliable; It is implausible that any politician would threaten persons whose votes they seek, particularly in a constituency where the margin of victory is traditionally narrow, that if they voted for the opposing candidate they would be punished by the withdrawal of services to which they are entitled. Such a campaign platform would reveal the candidate to be vindictive and a person in whom the

public trust should not be reposed. As the First Respondent said, that would be political suicide.

[161] Learned Senior Counsel, Mr. Mendes, urged the Court to accept that the witnesses for the First Respondent on the other hand were clear and forthright in their testimony and their evidence should be preferred. In short, the Court should find that the First Respondent and his political allies did what they were entitled to do, namely to extol their virtues, to excoriate their opponents and to promise the delivery of services in the future. This could not possibly amount to a corrupt practice under the election laws.

Cuban Students

[162] Addressing next the issue of the Cuban students, Mr. Mendes referred the Court to section 29(2) (a) of the Act:

> "A person is guilty of bribery if he, directly or indirectly, by himself or by any other person on his behalf
>
> a) gives any money or procures any office to or for any voter or to or for any other person, on behalf of any voter or to or for any other person in order to induce any voter to vote or refrain from voting."

[163] Mr. Mendes said that both the First Respondent and his witness Ambassador Bruce Goodwin have made clear that the First Respondent had nothing to do with the arrangements to bring the students home. The arrangements were made by Mr. Goodwin himself, on the instructions of the Prime Minister and Minister of Foreign Affairs, without any reference to the First Respondent and the charter was paid for out of state funds, utilizing the budget allocated to the embassy in Cuba. There is no evidence that the First Respondent paid for or contributed to the cost of the charter out of his own funds or that of his party or of the UPP, his political ally.

[164] Moreover, there is no evidence that students were offered a seat on the charter on condition that they vote for the UPP, far less for the First Respondent. In Cooper v Siade .6 EL & BL 447, the Court of Exchequer held that:

> "... a promise to a voter of his travelling expenses, conditionally on his coming and voting for the promisor, is within the first cited part of the enactment; but that a promise of travelling expenses not so conditioned is not. What the statute meant to prohibit was an act directly calculated to influence the vote; and it is impossible

> to say that a voter finding himself under the necessity of voting for a particular person or losing his travelling expenses, which he has been promised if he does vote, is not an inducement to vote. .... On the other hand, an unconditional promise of travelling expenses to a voter to go to the place of polling, with leave to him to vote or not, as and how he likes seems to us certainly not a promise of money to induce the voter to vote, being neither a promise with that view nor directly calculated to cause it."

[165] Mr. Mendes argued that there is no merit in Mr. Nibbs' petition.

[166] Finally, Mr. Mendes therefore advocated that in view of the evidence and based on the submissions, the Court should dismiss all four of the petitions and award costs to the Respondents.

MR. RUSSELL MARTINEAU'S SUBMISSIONS

[167] Insofar as most of Mr. Martineau, Learned Senior Counsel's submissions mirrored those of Mr. Mendes', with no disrespect intended, the Court will not restate those. However, the Court has given very serious consideration to the entirety of the submissions that were advocated by Learned Senior Counsel, Mr. Martineau and which were very succinct.

Statutory Background

[168] Learned Senior Counsel, Mr. Martineau quite helpfully provided the Court with the statutory background. He said that: "General Elections in Antigua and Barbuda are governed by the Representation of the People Act (as amended) and the Rules and Regulations made there under. The principal Act is the Representation of the People Act, (Cap. 379). That Act was Amended by the Representation of the People (Amendment) Act 2001 which by Section 3 repealed sections 3 to 42 of the principal Act and substituted new provisions therefor. It also repealed and replaced Section 83 of the principal Act. The Representation of the People (Amendment) Act 2002 repealed and replaced Subsection 3 (3) of the principal Act as amended and repealed and replaced the First and Second Schedules to the principal Act. This latter repeal and replacement introduced two new schedules which contain the Rules and Regulations made under the

Act as amended. The Regulations were later amended in 2003 by the Registration (Amendment) Regulations, 2003.

General Submissions

[169] Mr. Martineau Learned Senior Counsel said that in seeking a determination that the First Respondents were not elected or returned as the successful candidates, of their respective constituencies the Petitioners are in effect asking the Court to declare the elections in the four respective constituencies invalid. The law governing the declaration of elections as invalid is stated in section 32 (4) of the Act.

[170] Learned Senior Counsel, Mr. Martineau stated that in these petitions for the Petitioners to succeed it must be found either that the election was so badly conducted as not to be substantially in accordance with the law as to elections or that the acts or omissions of the election officials in breach of their duty affected the result of the elections.

[171] Mr. Martineau Learned Senior Counsel stated that there are two principles relevant in Section 32 (4) of the Act namely: First, it is for the Court to make up its mind on the evidence as a whole whether there was a substantial compliance with the law as to elections or whether the act or omission affected the result. It is not a case where the burden is on the respondent, see Re Kensington North Parliamentary Election supra. Secondly, the "result" of which the subsection speaks is not a reference to the number of votes but a reference to the success of candidates. Halsbury's Laws of England 4th edition Vol. 15 Paragraph 658 footnote 4 page 356.

Grounds in Support of the Petitions

[172] Learned Senior Counsel, Mr. Martineau said that he had distilled the events relied on by the Petitioners in their respective petitions and witness statements in support of their claims. There are six (6). Of the six (6) one is common to all four (4) petition, that is to say the use of the photo register. Two are common to three petitions (Jonas, Fernandez and St. Clair Simon) that is to say the late opening of the polling stations and the late voting.

The remaining three (3) concerns the Nibbs petition alone. These three (3) are the Ms. Irose Martin ID Card, the counting of the votes and the Mr. Fabian Hunt transfer of registration. Mr. Martineau Learned Senior Counsel dealt first with the three (3) grounds that are peculiar to the Nibbs petition.

NIBBS PETITION/BARBUDA

Ms. Irose Martin

[173] In addressing the issue of whether there was a failure to allow Ms. Martin to vote, Mr. Martineau Senior Counsel stated that on this, there is a dispute as to when Ms. Martin first reported the loss of her ID card to the Registration Officer, Mr. Mulvane George. Was it on or about October 15, 2008 or after the Registration Office in Barbuda had closed on March 11, 2009? Mr. Martineau, Learned Senior Counsel said that the Court having seen and heard the witnesses (Ms. Martin, Mr. Nibbs, Mr. George and Mr. Jarvis) should on a balance of probabilities prefer the evidence for the Respondent. Mr. Nibbs' evidence was largely hearsay and of little or no weight. The Court will recall also the evidence of Mr. George when he said October 15, 2008 was the day of Hurricane Omar. In any event, Section 15 (6) of the Act requires Ms. Martin to apply for a Special Identification Card. Ms. Martin in her cross-examination said that she did not apply in writing for the special identification card. The old Regulation 27 (3) provides that a person may apply for the special identification card in the prescribed form (Form J). "Form J" is a written form which has to be signed by the applicant. That Regulation was amended in 2003 replacing "Form J" by "Form 8" which also has to be signed by the Applicant. In other words Ms. Martin had to apply in writing signed by her for the special identification card and she did not apply in writing on her own evidence. For these reasons she cannot support a case that she was entitled to a special identification card before the General Elections. As she did not have a card she was not entitled to vote. Mr. Martineau, Senior Counsel submitted that since she reported the lost card to Mr. George on March 11, 2009 then that was not sufficient time for the Commission to issue a special identification card to her with convenient speed. Learned Senior Counsel, Mr. Martineau, referred the Court to section 44 (7) of the Interpretation Act, in support of his argument.

Counting of the Ballots

[174] Mr. Martineau, Learned Senior Counsel stated that the Court had the benefit of hearing and seeing the witnesses (Mr. Thomas and Mr. Nibbs for the Petitioner, Mr. Beazer for the first respondent and Mr. Jarvis for the Second and Third Respondent). Mr. Martineau urged the Court to find that the evidence for the respondents should be preferred. He said that the Court would recall that Mr. Nibbs was not present at the recount, so that his evidence on this matter is of little or no weight. Mr. Thomas in his cross-examination said that all the counting agents were satisfied, after the recount of the first box, that Mr. Nibbs got 147 not 148 votes. In cross-examination and in conflict with his evidence at paragraph 4 of his witness statement he said that all counting agents agreed to there being a recount of the first box. At the end of the day of all the witness who were present at the count and recount, and gave evidence in that regard, stated with confidence that the majority of votes was in the first respondent's favour. The evidence therefore clearly shows that the first respondent had the majority of votes. See Lewis v Harris (1976) 23 W1R 170 at 173 D. Further, there is the unchallenged evidence of Mr. Jarvis in his second witness statement that he was congratulated by Mr. Thomas and his team for what they considered a job well done.

[175] In any event during cross-examination, Mr. Thomas admitted that he was satisfied with the re-counting. Mr. Martineau, Learned Senior Counsel advocated that there was no live issue in relation to the counting of the ballots.

[176] Mr. Martineau said that there was a dispute in the evidence as to whether there was a recount of two or of all three boxes. Whatever the correct view, it is undisputed that the original discrepancy in the vote counting related to the first box alone. Accordingly, it is an argument in extravagance to say that the second and third boxes should have been recounted as the Petitioner argues. Moreover, given the evidence of the Petitioner's counting agent, Mr. Thomas, that he was satisfied with the recount and his congratulating the returning officer on "a job well done" in the counting, Mr. Martineau submitted that it is

mere sophistry and engagement in a sterile debate to question the count at this stage, especially on the basis that all three boxes should have been recounted. There is no Rule, as the Petitioner attempts to infer, that all boxes should be recounted. In any event when the two key questions are answered by the Court we submit that there is no ground on which the election can be vitiated. There was substantially election in accordance with the law as to elections and to recount the three boxes did no affect the result.

Mr. Fabian Hunt

[177] Mr. Martineau Learned Senior Counsel next addressed the matters that relate to Mr. Hunt. Mr. Martineau said that of the failure to transfer was not pleaded and first arose in the witness statement of Mr. Hunt filed on September 22, 2009. Accordingly, it should be disregarded and it ought not be treated as a ground on which the Petitioner can rely. In any event as Mr. Hunt says he made an application for a transfer around October 2006, almost two and a half (2 ½) years before the General Elections, he cannot wait until after the elections to have the complaint raised in a petition. The question of corrections or rectification to the electoral lists or register is something to be dealt with before (See Radix v Gairy (1978) 25 W1R 553 at 556; Drew v Hall (1983) 33 W1R 97 at 107). The evidence of Mr. Hunt in cross-examination is that he never at any time checked the list to see if his name was on it. It was persons at Digicel who were issuing free phones who told him that everything was alright. There is no evidence to support the allegation that he was wrongfully denied the right vote. Accordingly, the Court should give very little regard to the evidence on this aspect of the petition. This cannot be a basis on which the Court can void an election.

[178] Learned Senior Counsel, Mr. Martineau was adamant that to nullify the elections for the constituency on the basis of Mr. Fabian Hunt's name not being on the list would result in serious general public inconvenience in the form of a fresh election (compare Russell v AG 50 WIR 127 at 135 e). The nullification will not promote the constitutional object of section 40 (2) of the Constitution and section 15 of The Representation of the People Act. Nullification would defeat the constitutional object of the sections by sanctioning its

utilization as a political weapon to be used after a condoned general election by persons dissatisfied with the results of the election. The object of the sections is to allow qualified persons to vote for their representative. Nullification in these circumstances is to render useless the votes of all those qualified persons who voted when those who seek to nullify the elections could have taken steps before the elections to deal with the list. If it is that Mr. Hunt is aggrieved that he has been deprived of his constitutional right to vote then he may be entitled to a declaration and damages as in Russell v AG but the election cannot be nullified for infringement of Mr. Hunt's franchise.

Photo Lists

[179] In relation to all of the petitions, Mr. Martineau examined the use of the Photo Lists. He invited the Court's attention to sections 21 (1), 23 (1), 23 (3), and 24 (1), (2) of the Act.

Section 21 (1) states:

> "Subject to subsection 18 (1), the Commission shall publish not later than the 30th of June and 31st of December in each year, the register of electors for each constituency."

Section 23 (1) states:

> "The Chief Registration Officer shall make all additions to the register published under section 21 and shall make removals there from in consequence of any action taken under section 19 or 20."

Section 23 (3) provides:

> "The revised register shall be published as soon as practicable after it is completed."

Section 24 (1) and (2) provide:

> " (1) The Commission shall, not later than 7 days after the issuing of the Writ for an election for a constituency, publish in respect of that constituency, a register of electors to be known as a register for elections.

(2) The register for elections must contain the names of all persons included in the Register of Electors published pursuant to section 21 and revised register published pursuant to section 23."

[180] The conjoint effect of sections 21 (1), 23 (1), 23 (3) and 24 (2) is that the Electoral Commission shall publish by June 30 and December 31 respectively of each year a register of electors for each constituency. The register may be amended, that is to say it may be revised. The revised register shall be published as soon as practicable after it has been completed (A preliminary revised list being published not later than April 30 and October 31, in each year - Section 21 (4) (a)). Not later than 7 days after the issuing of the Writ for an election for a constituency. The Commission shall publish a register of electors known as a Register for Elections. However, that register of electors known as the register for elections must contain the names of all persons included in the register of electors (the June 30 and December 31 registers) and all names in the revised register. Mr. Martineau urged the Court to note that the names of all persons in the revised register must be included in the Register for Elections.

[181] Further, Learned Senior Counsel, Mr. Martineau said that Section 27 (4) of the Act provides for extensions of time for the validation of acts done in connection with the preparation or publication of Registers of Electors. He argued that this shows that time breaches, if any, were not fatal.

[182] Section 35 (1) of the Act provides for constituencies to be divided into polling districts. Section 35 (5) permits Regulations to be made for adapting registers to any alteration of polling districts. Regulation 31 provides that where the Commission makes alteration of polling districts it may direct that the register in force be adapted to the alteration. The above provisions govern the contents of registers of electors and the one that is the Register for Elections.

[182] The evidence of Ms. Lorna Simon is that the Register for Elections was published on February 27, 2009. This was within the 7 days prescribed by law. After publication there were, in some cases, queries to the register. There were also alterations to polling districts pursuant to an Order altering the boundaries in several constituencies including St. John's Rural West and St. George. (Paragraph 10) - As a result the Register for St. John's Rural West was republished - to be precise Districts A and B were republished not District C. She says that the agents of candidates were provided with the corrected Registers. It is clear that there were registers for elections for the respective constituencies with the names on the revised lists.

[183] By Section 15 (1) of the Act a person is entitled to vote as an elector if he is qualified to be an elector and is on election day registered in the register of electors to be used at that election. By Section 15 (2) a person is not entitled to vote as an elector at an election unless he is registered in the register of electors to be used in that election. The question as to who can or cannot vote is therefore determined in the register to be used not on whether the register is used. In other words once the name is found on the register for elections the person is entitled to vote. If the name is not found on the Register for Elections the person is not entitled to vote. The evidence is that except for the deceased Mr. Underwood, the names on the Photo Lists were the same as the names on the Register for Elections. Ms. Simon's evidence on this is undisputed and a check of the respective registers confirms it. In other words the use of the Photo Lists was at the very least substantially, if not fully, in accordance with the law as to elections, and did not affect the result. It could not possibly affect the result, except in the case of Mr. Underwood and even this exception could not affect the result of the election because Mr. Underwood did not vote as he was dead. Mr. Martineau said that on the use of the Photo Lists, that (1) the name on the register is what is important; not the form of the register, substance and not form is important on this issue; and (2) the use of the Photo Lists did not affect the result of the election.

[184] Learned Senior Counsel, Mr. Martineau argued that the use of the Photo Register with the ID Card numbers and Photographs of electors, if anything, enhanced the security and integrity of the process for the elections. It cannot form the basis for voiding the elections.

Opening of Poll

[185] Mr. Martineau, Learned Senior Counsel next addressed the late opening of the polling stations in three of the constituencies St. George, St. John's Rural North and St. John's Rural West. He referred the Court to Rule 1 (7) which provides that "polling shall take place between the hours of 6.00am and 6.00pm on the day of elections." Mr. Martineau acknowledged that the length of the delay varied from constituency to constituency. There was, he conceded, no dispute that there was late polling. The Registers were not all printed on time, due to the breakdown of a printer. For Learned Senior Counsel, the question was whether, notwithstanding the late opening, the Court could find that the elections were so conducted as to be substantially in accordance with the law as to the elections and that the late opening did not affect the results. See section 32 (4) of the Act is relevant in determining this matter. He referred the Court to Morgan v Simpson supra.

Substantial Compliance

[186] Learned Senior Counsel, Mr. Martineau, submitted that on the evidence as a whole there was substantial compliance with the law as to elections and that the late opening did not affect the result of the elections. In law, context is everything (R. (Daly) V Home Secretary 2001 2WLR 1622 at 1636C); Morgan v Simpson supra.

Late Voting

[187] Finally on the issue of late voting, Mr. Martineau said that Rule 1 (7) which governs the hours of polling, speaks of the time when polling shall take place not of the times when polling booths shall be open or voting shall take place. The evidence shows that some polling booths opened beyond 6 p.m. The evidence also shows that at 6 p.m. the doors were closed or lines stopped so that no one could join a line for polling after 6 p.m. The question is whether persons in the line at 6 p.m. who did not yet vote can be allowed to

vote. He advocated that section 40 of the Constitution and section 15 of the Act give a right to persons so qualified and properly registered to vote. One of the main purposes of the Act is to enable persons to exercise their franchise. Accordingly, the Rules made under the Act must be construed to facilitate rather than to discourage the exercise of the franchise. It is for this reason that persons who are in the voting lines at 6 p.m. should be allowed to vote. If it were not so, a person who is in the voting line long before 6 p.m. (hours before, perhaps) may be unable to vote through no fault of his own, if he does not get to the poll clerk before 6 p.m. Given the purpose of the legislation - to encourage the exercise of the franchise - a construction of Rule 1 (7) which lends itself to that possibility should be rejected.

[188] Elaborating further, Mr. Martineau said that the conduct of an election which involves a poll is a practical matter. One cannot know how long it will take each elector to vote. Some may take longer than others. The mathematically precise application of moments of time to the process of voting is impossible. The Rule does not contemplate any such precise allocation of time. It follows that in such circumstances the Commission, which under Section 6 of the Constitution has responsibility for the conduct of the elections, must adopt a practical working rule to give effect to the purpose of the legislation and the Rules. The working rule must, of course, be consistent with Rule 1(7). In applying the working rule it is for the Commission to determine what ought to be done as 6p.m approaches. It has a right to say whether all or some of the voters in line as 6p.m approaches should be allowed to vote. To do so is not inconsistent with Rule 1. That is within the Commission's margin of discretion. He said that the Court had heard that it took hours for a mere 9 persons to vote in one polling station. The Commission exercised it practical working rule making power when, as it did, it pointed out that persons in line at 6p.m would be entitled to vote. Those persons were in line participating in the poll. Lining up to cast their vote was part of the polling process.

[189] Mr. Martineau also maintained that voters have a constitutional right to vote. In support of his argument, he relied on section 40(2) of the Constitution of Antigua and Barbuda and Russell v AG supra.

[190] In concluding, Mr. Martineau relied on the following to show that the elections were conducted substantially in accordance with the law as to elections and that the late opening did not affect the results. Mr. Martineau drew the Court's attention to the following: The high percentage of voters who voted in the 2009 Elections - 79% in St. George (Part I page 243), 79.03 in /St. John's Rural North (Part I page 453), 80.48 in St. John's Rural West (Part II pg. 305). He said that except for the General Elections in 2004 none of the four (4) General Elections showed a higher percentage of voters. In fact the percentages in 1994 and 1999 were between 58 and 69 percent. In addition, the percentage vote in the three constituencies for 2009 compare favourably with the percentage vote in the other Constituencies which opened on time. He noted that while there is evidence of persons leaving the lines before voting commenced, there is evidence of some of those persons indicating that they would return to vote and that some did return to vote. Some of the Petitioner's witnesses who gave evidence that they did not vote, when cross-examined gave reasons other than late opening for their voting. In the three constituencies where voting began late the margin of victory was relatively substantial - 502 votes (St. George) out of a total electorate of 4414, 106 votes (St. John's Rural North) out of a total electorate of 3577, 506 votes (St. John's Rural West) our of a total electoral of 4996. In addition, there were relatively few persons whom the Petitioners could produce to support their case that late opening prevented them from voting. Finally, he said that there is never 100 percent turn out to vote.

JONAS PETITION/ST GEORGE

[191] Turning specifically to the Jonas Petition, Mr. Martineau SC said that the Petitioner asks the Court to find that an indeterminate number of voters did not vote as a result of the late opening of the polls. If the Court makes that finding the Halstead case and the Consodine case (esp. para. 18) show that given the large part of the electorate that voted there was substantial compliance with the law as to elections.

[192] Learned Senior Counsel, Mr. Martineau stated that the difference between the returns for candidates in the constituency was 502 votes and the number of unaccounted voters

was 926. Mr. Martineau submitted that if 92.25% of the electorate (the highest percentage vote in the last four elections) had voted the total number of votes cast would have been 4072 which is 584 more than the number that voted. In those circumstances, where the majority is 502 votes, the Court should find that it is too large for the result to have been affected. For that to have happened, almost all the votes not cast would have had to go to the loosing candidate. In any event it is well known that the high 92.25% voter turnout in the 2004 elections was exceptional when compared with the other years and that was because a long entrenched government was being voted out of office. The Halstead case itself shows that the Court is entitled not to vitiate the elections on the ground of late opening alone where there is evidence of a substantial voter turnout.

[193] The Petitioner in his submissions said that the 79 percent vote in 2009 compared with 92.25 percent in 2009 has an obvious contributing factor in the reduction in time available to vote as a result of late opening. Mr. Martineau said that there is no such obvious contributing factor. First in the constituencies where the polls opened on time there was also a fall in the percentage vote compared with 2004. Secondly, the change in government factor accounts in part for the high turnout in 2004.

Photo Lists

[194] Mr. Martineau SC, said that the Petitioner's submissions focus on the form of the Photo Lists; the intention to use it for cross checking; the inability to check the list before use; and the alleged resultant confusion. Learned Senior Counsel stated that these were administrative matters which, even if proved and accepted, do not answer the fundamental questions of whether there was substantially an election conducted according to the laws as to elections and whether the alleged administrative breaches affected the results of the elections. Learned Counsel insisted that there was substantially an election. The percentage voter turnout spoke overwhelmingly to that. There was nothing to suggest otherwise. It was also clear that the results of the election was not and could not have been affected by the use of the Photo Lists where the names on it were the same as on the Register for Elections. It was well to remember that election petitions are not for the

purpose of punishing administrative default, if any, but for determining the validity of elections. Inability to check the Photo Lists cannot vitiate an election result where the Photo List had the same names as the Register for Elections. So too, argued Mr. Martineau, a difference in form of the List; so too the failure to give effect to the intention of checking the List before the elections; and so too the alleged resulting confusion. In fact, he said, the Court had before it the Photo Lists and was able to judge for itself the level of confusion, if any. The exaggeration and excesses of the Petitioner's witnesses were clear. Mr. Martineau said that the evidence of confusion was exaggerated; too much was being made of the fact that some pages of the List in a constituency may have been upside-down.

[195] As long as the names on the Photo Lists are the names on the Register for Elections all the essential safeguards resulting from registration remain intact. The election was conducted substantially in accordance with the law as to elections since the persons qualified or not qualified to vote remain the same whether the Photo Lists were used or the Register for elections was used.

[196] Mr. Martineau, Learned Senior Counsel, submitted that when the correct questions are asked the answers are that there was substantially an election and the use of the Photo Lists did not affect the election results. That being so the election cannot be avoided.

FERNANDEZ PETITION / St. John's Rural North

[197] Learned Senior Counsel, Mr. Martineau, said that Mr. Fernandez relied on the issues of polling hours and use of the photo register. The Second and Third Respondent's submissions are substantially the same as those in relation to the Jonas petition. In particular, he argued, on the pleading, late voting was not an issue. Just as the Petitioner specifically pleaded late opening in his petition so it was incumbent on him to have pleaded late voting in his petition - but he did not. In any event the evidence is not clear that there was late voting at all. If there was, then it was not substantial on the evidence.

[198] Mr. Martineau said that as to late opening the Petitioner rightly accepts that this was not substantial. Given this concession and his submissions above in relation to late opening, Mr. Martineau said it is clear that the election could not be vitiated on the ground that it was not substantially in compliance with the law as to elections. Mr. Martineau, Senior Counsel said that the Petitioner had asked the Court to find that the late opening of the polls meant that some of those who wanted or needed to vote before they went to work could not do so. Learned Senior Counsel submitted that it would be wrong for the Court to so find.

[199] Further, Mr. Martineau Senior Counsel stated that Mr. Fernandez also relied on the fact that the percentage vote was 79.03% as compared with 91.1% in the 2004 elections. The conclusion which the Petitioner invites the Court to draw would ignore the fact that 2004 was an exceptional year in which a long standing government was voted out of office and that the reduction to 79.03% is consistent with the trend of a reduced percentage votes in 2009 as against 2004 even in constituencies where the polls opened on time. Mr. Martineau reiterated that in any event the late opening did not affect the result of this election. He therefore urged the Court to dismiss the petition with costs.

SIMON PETITION / St. John's Rural West

[200] Learned Senior Counsel, Mr. Martineau said that this Petitioner relied on the two issues: polling hours; and use of the Photo Lists. The arguments are similar to those raised in the Jonas and Fernandez petitions. On those issues his response was the same. Mr. Martineau maintained that despite the late opening the election was conducted substantially in accordance with the law as to elections and the result was not affected. Further late voting was not pleaded in the petition as a ground for invalidating the election and, this like late opening should have been pleaded to be relied on. What in fact was pleaded in this case (unlike Jonas and Fernandez) was discrimination in that some persons were allowed to vote late and others not. Mr. Martineau submitted that for the reasons given in his earlier submissions the evidence did not support a ground of discrimination. Quite apart from the pleading point, Mr. Martineau relied on the

constitutionality of the right to vote in order to support his submission that persons in the line at 6.00 p.m. were entitled to vote. The suggestion in the Petitioner's submissions that late voting was used as substitute for late opening is not so. Late voting was allowed as a right under the law once the elector was in line to cast his/her vote at 6.00 p.m. Mr. Martineau argued that the Court should dismiss the petition with costs.

COURT'S ANLAYSIS AND FINDINGS

The Legal Principles to be Applied

[201] In seeking to resolve the main issues, the Court proposes to apply the relevant legal principles to the facts in order to determine whether or not the Petitioner has made out his claim for voiding the election. This brings into sharp focus section 32(4) of the Representation of People Act (as amended).

[202] The Court places emphasis on the fact that in England, section 37 of the Representation of People Act 1949, which is now re-enacted by section 48(1) of the English Representation of People Act 1983, is very similar to section 32(4) of the Antigua and Barbuda Act. This provision was considered in Morgan v Simpson supra, where Lord Denning distilled the relevant principles. It will be recalled that these principles were stated as follows:

> "(a) If the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated, irrespective of whether the result was affected or not. That is shown by the Hackney case, 2 O'M & H 77, where two out of 19 polling stations were closed all day, and 5000 voters were unable to vote.
>
> (b) 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. That is shown by the Islington Case, 17 T.LR. 210, where 14 ballot papers were issued after 8 p.m.
>
> (c) But, even though the election was conducted substantially in accordance with the law, nevertheless if there was a breach of the rules or a mistake at the polls - and it did affect the result - then the election is vitiated. That is shown by Gunn v Sharpe [1974] QB 808, where the mistake in not stamping 102 ballot papers did affect the result."

The Court respectfully accepts this statement as a correct interpretation of the law. It notes, however, that in Morgan v Simpson, the number of persons who could have voted, had the breach not occurred, was known. It was therefore quite understandable that the Court in that case was able to find that, the breach notwithstanding, the result was not affected. It therefore upheld the election. This is quite different from the situation where the number of persons who could have voted, had the breach not occurred, is not known. The latter situation is governed by the test as reformulated in the later cases of Edgell v Glover supra, and Consodine v Didrichsen supra. According to this test, "it may be a situation that while it cannot be shown positively that the result was affected, it may equally be the case that it does not appear that the result was not affected." If, from the preponderance of evidence the Court is unable to say that the result was not affected, the Morgan v Simpson test is not applicable. In these circumstances, the Court must be satisfied that the result was not affected by the breach. If the Court is not so satisfied, then it must void the election.

JONAS PETITION/St. George

[203] The Court has scrupulously reviewed all of the evidence adduced both on behalf of the Petitioners and on behalf of the Respondents. In addition, the Court has given very careful consideration to the all of the documentary evidence admissible in this case and the very lucid and able arguments of all Senior Counsel. The Court makes the following findings.

[204] There is no dispute that there were three polling stations in the constituency of St. George. These are: New Winthropes, Piggotts and Potters. There seems to be very little contention in regard to the opening times of the polls. The polling stations at New Winthropes opened at 8:50 a.m., Piggotts at 8:30 a.m. and Potters at 11:20 a.m. Accordingly, it is only at the Potters polling station that the voting commenced in excess of five hours after 6:00 a.m.

[205] The Court now examines whether, as a matter of fact, any person was disenfranchised by the late opening of the poll. It bears stating that the Court was provided the invaluable opportunity to hear and observe the witnesses who testified in support of Mr. Jonas' petition. I have no doubt that they were credible witnesses and that I could rely on their evidence. It

was very strong and compelling. The Court has also given due consideration to the evidence of the witnesses who testified on behalf of the First Respondent. Their evidence corroborated the evidence by the Petitioner's witnesses. It is useful to state that the following persons are among the witnesses who testified on behalf of the Petitioner: Ms. Denise Marshall, Mr. Goldburn Samuel, Ms. Shensasba Henry, Mr. Neville Jeremy, Mr. Alvor Brown, Mr. Bethan Marajah, Ms. Patricia Phillip, Ms. Juliet Henry, Mr. James Hill, Mr. Clifton Henry, Ms. Kelcita Henry and Ms. Jessica Henry. Mr. Edmeade Graham, Ms. Carla Thomas, Ms. Elaine Colbourne and Mr. Sylvester Brown testified on behalf of Ms. Quinn-Leandro. Ms. Marilyn Simon also testified on her own behalf. Ms. Lorna Simon testified on her own behalf.

[206] I am satisfied that Ms. Denise Marshall, Mr. Goldburn Samuel, Ms. Shensasba Henry and Mr. Alvor Brown joined the lines in order to vote and that they were unable to do so due to the fact that polling did not commence at 6:00 a.m. Despite the skillful cross-examination of Learned Senior Counsel, Mendes, and Learned Senior Counsel, Martineau, I have no doubt that Mr. Colbourne Samuel, Ms. Denise Marshall, Ms. Shensasba Henry and Mr. Alvor Brown left the lines due to late opening of the polling. It is clear that when they joined the line and attempted to vote they were unable to vote because the polling station was closed. The Court has examined the line of cross-examination and the submissions advocated by Learned Senior Counsel for the First Respondent which sought to establish that they were at fault for not returning later in the day to vote. The facts of this petition are to be contrasted with the observation of William J in Akaroa Election Petition at p166.

[207] Let me say that it is no part of the Court's function to seek to determine whether some of the witnesses who testified in support of the Petition were at fault for failing to return to exercise their franchise. This issue of fault simply does not arise for the Court's consideration. The Court is of the respectful view that there is no obligation on an elector who attended the polling station at 6:00 a.m., when it was not yet open, to return later on in order to be able to cast his or her vote. If an elector chooses to do so, that's all well and good. This is distinct from whether there was a legal obligation on him to do so. This will be addressed in detail shortly.

[208] Next, the Court seeks to determine how many such persons left the lines and were unable to vote. One thing is clear, and that is that even some of the witnesses who testified on behalf of the First Respondent admitted to seeing some persons leave the line when the polls did not open at 6 am. The Court accepts that what persons may have said on leaving the line is not evidence of the truth as to whether they returned or not. I am, however, not of the view as urged by Mr. Mendes on the Court, that it is not open to the Court, based on the uncontroverted evidence presented, to find that an indeterminate number of persons who attempted to vote were unable to do so and left the line because the polling booth was not open. This is not to negate the fact that it is not open to the Court to speculate about the number of persons who left the line and did not return to vote in the absence of clear and credible evidence in this regard. See Hackney's case supra; and Halstead v Simon, supra. It bears repeating that the Petitioner has led credible evidence to support his contention that several persons, in addition to the witnesses who testified, attempted to vote and were unable to do so due to the fact that the polling stations were not open. The Court accepts the reliable evidence adduced by the Petitioners that other persons, who were in line to vote, left due to late opening of the poll. Some returned; others did not.

Close of poll

[209] This brings the Court to examine the issue of the close of the poll. The Court accepts that polling in some of the stations continued for at least one hour in excess of the 6:00 p.m. hour. This was, however, only in relation to persons who were in line at 6:00 p.m. to vote. Also, it is accepted that the Supervisor of Elections, Ms. Lorna Simon, caused a press release to be issued on the afternoon of the polling in which she indicated words to the effect "that persons who were in line before 6:00 p.m. would be permitted to vote."

[210] Further, the Court accepts that the electorate consisted of 4,414 registered voters and that 3,488 ballot papers were cast including 20 rejected, leaving a balance of 926 voters unaccounted for. This amounted to about 21% of the electorate in the constituency. Ms. Quinn Leandro secured 1,985 votes and Mr. Jonas 1,483, a margin of victory of 502 votes. Further, it is accepted that in the 2009 elections 79.1% of the electorate, voted. This is in comparison to the 92.2% in 2004.

Photo Lists

[211] Ms Lorna Simon is the Supervisor of Elections as provided for by section 67 of the Constitution of Antigua and Barbuda. The Court digresses to state that Ms. Lorna Simon is tasked with the responsibility by law, under the direction of the Election Commission, to perform the duties conferred on her in an impartial, fair and efficient manner. See section 9(1) of the Registration of People Act (as amended). By section 9(2) of the Act, she was required "on the written instructions of the Electoral Commission to issue Election Officers, instructions for ensuring effective execution of the provisions of the Act."

[212] The Court now addresses the matter of the Photo Lists. The Court finds the following. The published Register of Elections contained all the information stipulated by section 25 of Representation of People Act (as amended). Quite unwisely, it was decided to use the "Photo Lists" instead of the published Register for Elections. I am satisfied that the "Photo Lists" for this constituency were not available until the morning of the date of election. This late distribution of the Photo Lists was responsible for the significant delay in the opening of the polls. It is clear that the late publication was due to difficulties experienced with the printing machines and was not deliberate. There was no bad or ulterior motive in using the Photo Lists. There is no doubt in the Court's mind that responsibility for the delay in the distribution of the list falls squarely at the feet of the Electoral Officials, that mainly being the Supervisor of Elections.

[213] The Law requires that the Register for Elections must contain the number, surname, the name, the sex, the occupation and address of the voter. The "Photo Lists" contain the same information with the addition of the elector's ID number and photograph.

[214] In passing, it is worth stating that the Court accepts that in the 2004 general elections the Photo Lists were used together with the published Register for Elections. This, however, is no excuse, for the law mandates that the Register for Elections should be used. It is also inexcusable, if not a sign of incompetence, for the electoral officers to seek to print the Registers to be used in the election the day before the scheduled elections. Such a

decision leaves them with no room to correct any mishap or error in a timely manner. The fact that this may well have been their practice in previous elections is simply no answer to the legal requirement that the electoral duties should be discharged in "an impartial, fair and efficient manner". The law establishes the parameters to assist with the efficient discharge of the electoral duties. These parameters include a timetable for the publication of the Register for Elections. The electorate simply should not and cannot properly be placed in a situation where the exercise of their franchise is precariously perched on the administrative or secretarial dexterity of election officials, however well intentioned those officials may have been. The facts in this case illustrate graphically the dangers of attempting to improvise at the last moment. Several thousands of ballots had to be printed. There were problems with the collation. It is far from satisfactory that the "Photo Lists" were used in the first place and that the late printing of the list caused the poll stations to be opened late. To emphasize, section 25 of the Representation of People Act clearly states that: "the Register for Elections published under section 24(1) shall be used for any election held in a constituency to which that register relates."

[215] The Petitioner asks the Court to find that the late supply of the Photo Lists led to confusion on the day of elections. The Court is acutely aware of the fact that the publication of the Register for Elections serves several important functions including ensuring that only persons who are entitled to vote, do so, and that no person who is not so entitled, does, in fact, vote. However, a review of the evidence led by the witnesses for the Petitioner leaves the Court to conclude that if there was any confusion in this constituency, occasioned by the use of the Photo Lists, it was very minimal. Further, the Court is not satisfied that the use of the Photo Lists resulted in persons who were entitled to vote, not being able to vote; or persons who ought not to have voted being allowed to vote. This is in no way to detracts from the Court's views that the use of the Photo Lists instead of the published Register for Elections is to be strongly deprecated. Electoral officials in the future ought not to violate the election law.

Opening of Polls

[216] It is the law that elections in Antigua and Barbuda must be conducted in accordance with the provisions of Representation of People Act (as amended). This brings the Court now to examine whether there was a breach of the relevant law.

Breach of Law

[217] The Court proposes to address whether there was a breach of the law, insofar as the opening of the poll is concerned.

[218] As alluded to earlier, Rule 1(7) of the Election Rules stipulates as follows:

> "In the case of a general election or a by-election, pollings shall take place between the hours of 6 a.m. and 6 p.m. on the day specified in the writ by the Governor General."

It seems to me that one of the issues which, perforce, the Court must address concerns the meaning and effect of Rule 1(7) of the Election Rules.

[219] That having been said, the Court must now seek to examine with great care the competing positions urged on the Court in relation to this issue. Above all else, in this exercise, it is imperative that the Court gives effect to the intention of the legislature. In undertaking this task, the Court has paid regard to the various cases that have been relied upon and has reviewed the submissions of all Learned Queen's Counsel and Senior Counsel.

[220] By way of emphasis, the Court has no doubt that the correct legal interpretation must accord with the intention of the legislature. In examining the authorities relied upon by counsel, regretfully, the Court concludes that the majority of the cases to which the Court was referred seemed not to have been based on similar rules to that of Rule 1(7). To that extent those cases were not very helpful. One thing is clear, however: the rule must be given a purposive construction interpretation. The duty of the Court is to seek to ascertain the intention of the legislature while at the same time ensuring that the meaning does not

lead to any absurdity or repugnance. The Bruno's case is very persuasive and, in my view, aptly describes the legal position.

[221] In relation to the opening hours of polling, the arguments advanced by Learned Queen's Counsel, Mr. Guthrie seem to be more persuasive and attractive. The Court accepts them. The Court does not hold the view that "the polling shall take place between the hours between 6 a.m. to 6 p.m." has the meaning contended for by the First and Second and Third Respondents, namely, that voting can be properly commenced , for example, at 10 a.m. without violating the relevant section.

[222] To give the section any other interpretation would mean, based on the position contended for by the First Respondent, and the Second and Third Respondents, that it would be lawful to commence polling at 4 p.m. Such a position needs only to be stated to be seen to be absurd. With respect, the Court reiterates that the position advocated by Learned Senior Counsel, Mr. Mendes and Learned Senior Counsel Mr. Martineau if taken to its logical conclusion would yield quite illogical results. Based on the meaning that Mr. Mendes argued for it, would therefore be impossible to find that there ever was a breach of Rule 1(7) once the polling began between 6 a.m. and 6 p.m., even if it started as late as 5:30 p.m. This could never have been the intention of the legislature. The Court rules that the section means that polling must commence at 6 a.m. The intention of the legislature is that electors must be able to commence voting at 6 a.m.

Close of Poll

[223] The Court must now go on to address the related matter of the close of poll. There appears to be an issue as to whether or not the Petitioner had complained, in the petition, about the alleged late polling. Both Learned Senior Counsel, Mr. Mendes, and Learned Senior Counsel Mr. Martineau urged the Court to hold that the Petitioner did not allege in the petition that there was late voting, i.e., any voting after 6 p.m. contrary to the election laws. They both drew the Court's attention to the pleadings that were filed on behalf of the Petitioner. For his part, Learned Queen's Counsel, Mr. Guthrie, said that the allegations as pleaded clearly included late voting. Having examined the pleaded

allegation, this Court is of the respectful view that the complaint of late polling can fall properly within the allegations as pleaded in the petition. See Frampton v Pinard DOM HCV 2005/0149 per Rawlins J.

[224] Accordingly, the Court now proceeds to ascertain whether voting by the persons who were in line at 6 p.m. is permissible under the law (Rule 1(7). Here again, the Court is obliged to ascertain the intention of the Legislature. Here again, the Court holds the view that the section must be given a purposive interpretation. I am ineluctably driven to conclude that the Legislature's intention was that electors who had entered the line before 6 p.m. should, indeed I would say, must be permitted to cast their ballot, even if they reached the voting clerk after 6 p.m. Having given careful consideration to the competing arguments, the Court cannot sensibly accept that the Legislature's intention was to disenfranchise persons who were in the lines at 6 p.m. waiting to vote. Furthermore, the Court is persuaded that to turn away an elector who had joined the line before 6 p.m. simply because he reached the polling booth after 6 p.m. would infringe the constitutional right to vote as provided for by section 40 of the Constitution of Antigua and Barbuda. To give the section any other meaning would lead to absurd and unfair results. Indeed, any such construction could lead to a stampede as the hour approached 6 p.m. Again, the Court should be slow to attribute such an intention to the Legislature.

[225] To emphasize, should the Court accept the position urged by Learned Queen's Counsel, Mr. Guthrie, it would mean electors who are in line for several hours well before 6 p.m., but who for reasons over which they had no control are unable to vote by 6 p.m., would be debarred from voting on the striking of the hour 6 p.m. This would be unjust and could never have been the legislative intention.

[226] By way of further emphasis, to give the section any other meaning would improperly serve to disenfranchise persons who were in line for several hours waiting to vote well before 6 a.m., and who were unable to do so by 6 p.m. This could hardly have been the intention of the Legislature.

[227 While the rule mandates that polling concludes at 6 p.m., it must be read in a purposeful manner to mean that persons who are lawfully in line at 6 p.m. must be permitted to exercise their franchise. See Bruno v The Election Appeal Board of the Samson supra. Accordingly, on this aspect of the petition, the Court accepts the arguments advocated by Learned Senior Counsel Mr. Mendes and Learned Senior Counsel, Mr. Martineau in preference to those advanced by Learned Queen's Counsel, Mr. Guthrie. The Court therefore holds that it is not a breach of Rule 1(7) to permit persons who are in line at 6 p.m. to exercise their franchise.

Opening of Polling
Breach of the Law

[228] The Court now considers the first issue, namely, whether there was a breach of the election law. In seeking to make this determination, the Court takes into consideration the findings of fact and applies the principles of law thereto. The Court has no doubt, based on its finding, that there was a clear breach of the election law when the polling station did not open at 6 a.m. for polling. Parliament intended that polling should start at 6 a.m. This did not occur, in relation to each of the polling stations in St. George. Prima facie, once the polling does not commence at 6 a.m., there is a breach of the law. For the reasons stated above, the Court is not persuaded that there was any breach of the law in relation to the allegation of late voting.

Substantial Compliance

[229] In relation to the breach found, the Court must now go on to consider the next question, namely, whether, notwithstanding the breach, the election was so conducted that it was substantially in accordance with the election law. However, taking the totality of the circumstances into account including the fact that a significant percentage of the electorate voted, the Court must examine whether there was a real ballot. Utilizing the well-known examples referred to in Morgan v Simpson, the Court is not of the view that the election

was a sham or a travesty, there is no evidence that persons who voted were not lawfully entitled to do so.

[230] Further, it is worth indicating that the election was conducted in substantial accordance with the election law. The Court is guided by the reasoning provided by Stephenson LJ in Morgan v Simpon, namely:

> "For an election to be conducted substantially in accordance with the law there must be a real election by ballot and no such departure from the procedure laid down by parliament as to make the ordinary man condemn the election as a sham or travesty of an election. Instances of such a substantial departure would be allowing voters to vote for a person who was not in fact a candidate or refusing to accept a qualified candidate on some legal ground or disenfranchise a substantial portion of qualified voters."

Burden of Proof

[231] It is the law that there is no onus cast on the Respondent to prove, in the event of a breach, that the election was nevertheless conducted so as to be substantially in accordance with the election law. In contradistinction, the Court must examine the whole of the evidence in order to determine whether this was so or whether the result was affected. See Re Kensington North Parliamentary Election supra.

[232] The above position was judicially acknowledged in Edgill v Glover [2002] EW HC 2506 at p24 when Newman J said:

> "The judge aptly translated the words, "it appears" into "the Court must make up its mind on the evidence."

I agree. The words in the statute impose a requirement on the Court to make a judgment on the evidence before it. The Court is guided accordingly.

[233] In the present petition, in seeking to ascertain whether the election was conducted substantially in accordance with the election law, the Court must also take into consideration the period during which non-voting took place. The Court reiterates that the hours lost due to the late opening of the polls are as follows: In New Winthropes, the

period was in excess of 2 hours. Piggots, the period of non-voting was in excess of 2 hours. Finally, in relation to the polling station at Potters, the period of non-voting was in excess of 5 ½.

[234] The Court is of the considered view that the hours lost in the polling by themselves, cannot determine whether the election was conducted substantially in accordance with the election law. If however, there was non-polling for several hours coupled with clear evidence that as a result of the non-polling a significant percentage of the electorate was prevented from voting, the Court may well find that there was not substantial compliance with the election law. (See Hackney's case supra.)

[235] It follows, for example, that if there is cogent evidence before the Court on which it can be determined that in spite of the late opening of the polling stations the entire constituency polled out before the close of poll, the Court acting sensibly would not hold that there was not substantial compliance. See Borough of Drogbeda supra, in which it was clear that only a small number was affected by the breach and it could be positively shown that this did not affect the result.

[236] It is the Court's considered view, that the petition at bar, is to be compared with the decision in the Hackney case in which 2 out of 19 polling stations did not open, (disenfranchising some 4,900 out of 41,000 voters) and 3 other polling stations (with a possible total of about 3,900) were only open for part of the day. A large number of voters were affected or it might reasonably be supposed that they were prevented from voting. Grove J found that the election was not conducted substantially in accordance with the law as to election. The election was therefore declared invalid.

[237] It is therefore imperative for the Court to examine in totality, the circumstances in which the polling occurred in order to determine whether the election was conducted substantially in accordance with the election law. Each petition will turn on its own facts and the Court is required to take an objective and just approach in its determination of this aspect of the matter. With that principle in mind, the Court is of the view that given that only a few hours

of voting were lost, coupled with the fact that a very significant percentage of electorate in the constituency of St . George voted, there is no reason for the Court not to conclude that there was substantial compliance.

[238] To put it another way, the Court is of the considered view that in seeking to ascertain whether there was substantial compliance with the law or the rule relating to the opening hours, the Court should seek to determine what was achieved desspite the hours that were lost. The Court is required to adopt a commonsense approach in its determination of whether in view of the totality of the circumstances it could be said that there was substantial compliance with the law. See Redhead J in Halstead v Simon supra

[239] The Court has also given much consideration to Halstead v Simon supra on which all of the parties have relied on in support of their respective positions. Taking into account the totality of the circumstances, the Court is not of the view that there was substantial non-compliance with the election law.

[240] That, however, is not the end of the matter. Having found that there were breaches of the election law, which cannot be dismissed on the de minimis principle, the Court is duty bound to consider whether the breach could have affected the results. This is so, even though there was substantial compliance with the election laws, the breaches notwithstanding. Accordingly, the Court now proceeds to consider whether it appears that the breach did not affect the result.

Breach Affected the Results

[241] The Court has once again given due consideration to all of the relevant and admissible evidence that was led in this matter, together with the very comprehensive submissions of all Learned Senior Counsel and Queen's Counsel. it bears noting that all Learned Senior Counsel referred to the statistics provided and made several assumptions in urging the Court to find one way or the other that the results were not affected, or could have been affected. With respect, the Court has viewed the mathematical tests that were relied upon

and found them very unhelpful. The Court is not persuaded that a proper approach is to assume that persons did not come out to vote in the numbers in 2009 as they did in 2004, due to the length of time that the previous Government was in office, as voiced by Learned Senior Counsel for the Respondents, as being responsible for the difference in the margin of victory. Equally, the Court is not persuaded that it can be determined precisely how many persons were unable to vote as a result of the late opening of the polls. The Court will not speculate. However, where the Court has found concrete facts, it is entitled to draw inferences from those facts. The preponderance of evidence does not indicate that only the persons who testified were unable to vote. It clearly indicates that others too were unable to vote due to the breach of the election laws occasioned by the late opening.

[242] Having given careful scrutiny to all the cogent evidence adduced in this petition, the Court is sure that an indeterminate number of persons were prevented from voting during the hours that were lost. It bears repeating that 926 of the electorate did not vote. The margin of victory between the winning Respondent and the Petitioner was 502 votes. The Court has already found as a fact that several persons who attempted to vote and were in the line at 6:00 a.m. left the queue when the polls did not open on time. Included in these persons were Ms. Denise Marshal, Ms. Shensaba Henry and Mr. Alvor Brown, Mr. Goldburn Samuel. In addition, several unnamed persons were similarly affected. The Court accepts that 79% of the electorate of St. George voted in 2009 as compared to 92.25% in 2004 General Elections. Myriad factors could have accounted for this fall in the turnout. This Court is however is not about to speculate as to the reason for this. It bears stating that a Court of law can hardly feel comfortable in making the sort of assumptions that it was invited to make by the First Respondent. In the absence of any evidence to substantiate the various contentions that different percentages of the electorate voted at various times during the election, it is unclear how the Court can accept the bold assertion one way or the other based on mere percentages. This is to be contrasted with the clear and definitive evidence in the Islington case.

[243] On the cogent evidence presented, the Court is sure that an indeterminate number of persons were unable to vote due to the late opening of the poll. This has a significant

bearing on the Court's resolution of this aspect of the petition. In seeking to determine whether the breach of the law affected the result the test as stated in Morgan v Simpson arises for consideration. It is clear that this test is applicable where the effect of the breach is known. However, when the effect of the breach is not known, the applicable test is that in Edgell v Glover, which was later approved in Consodine v Didrichsen supra, whether it does not appear that the result was not affected. .

[244] I can do no more than adopt those helpful principles. This was also the approach taken by Redhead J in Halstead when he stated at page 60 as follows:

> "I find it difficult to say definitely that the result was affected or would not have been affected by the irregularity."

The Learned Judge therefore declared that the election was invalid. This is to be contrasted with Evo v Supra [1986] LRC 18, in which the Petitioner had complained that 154 persons voted who were not lawfully entitled to vote. The Petitioner argued that the election was void because their votes were illegal. It was held that there was substantial compliance with the law and that even if the 154 votes were given to the Petitioners, the result would not have been affected.

[245] The Court is cognizant of the margin of victory between the Petitioner and the First Respondent and the indeterminate number of persons who were unable to vote, coupled with the number of hours of polling lost. Taking into consideration the totality of the circumstances, the Court is unable to say that the result was definitely affected by the breach. Equally, based on the preponderance of the evidence, the Court cannot find that that the result was not affected by the breach. In short, therefore, everything turns on the test to be adopted. In my respectful opinion, in circumstances where there is no clear evidence one way or the other relating to the effect of the breach on the result, the correct approach is that stated in Morgan v Simpson; followed in Consodine v Didrichsen supra; and applied in Halstead v Simon supra. Can the Court say that the results were not affected by the breach? I cannot so say. Accordingly, the Court accedes to the

Petitioner's request to void the elections and declares that Ms. Jacqu-Quinn Leandro was not duly elected.

The Photo Lists

[246] For the sake of completeness, the Court now addresses the use of the Photo Lists. Here again, the Court is required to ascertain firstly whether there was a breach of the election rules either by the act or omission of an electoral officer or some person in connection with the election. If the Court concludes that there was no breach, the enquiry ends there. As to this ground, the petition would thereafter stand dismissed. It is only if the Court were to conclude that there was such a breach then the Court is required to proceed to address the other limbs of the principles, namely, that of substantially in accordance with the election law and whether the results of the election were affected.

[247] The Court proposes now to address the first matter as to whether use of the Photo Lists constituted a breach of the election law. This question the Court answers very shortly by saying, yes, there was a breach of the law. There is overwhelming evidence that the Photo Lists that were used instead of the legally sanctioned Register for Elections. There was no dispute in relation to this. For the reasons given earlier, the Court finds that the use of the Photo Lists was in clear breach of section 25 (1) of the Representation of People Act.

[248] As stated earlier, the breaches of election laws, without more, do not render an election void. The Court must therefore go on to ascertain whether, nevertheless the election was conducted substantially in accordance with the law as it relates to elections. If it was so conducted, the Court must nonetheless go further to consider whether or not the breach affected the result.

Substantial Compliance

[249] The Court, having carefully reviewed the totality of the evidence, in relation to the use of the Photo Lists, does not conclude that the election was a sham or travesty. Notwithstanding the use of the Photo Lists, in the Court's view, there was a real election by ballot. The error of not using the published Register for Elections as mandated by Parliament is not such as to make the ordinary man condemn the election as a sham or travesty. The Court would have been minded to hold that the election was a sham or travesty, where for example, because of confusion over the newly minted Photo Lists, the majority or a really significant number of the electors were prevented from recording their votes. This clearly is not the case. In fact, 79% of the electorate voted. Another example of the election not being conducted substantially in accordance with the election law would have existed if there was evidence that, for example, several persons who were included on the Photo Lists were not registered as electors in the published Register for Elections. See Morgan v Simpson per Stephen LJ. Again, the Court was not presented with evidence to this effect.

[250] The Court does not propose to elaborate on this point but merely states that in looking at the evidence in this round, the Court does not hold the view that any person was disenfranchised because of the use of the Photo Lists. Neither is there a scintilla of evidence that any person voted in the St. George constituency, as a result of the use of the Photo Lists, who ought not to have voted.

[251] This however does not bring the matter to an end because the Court must go on to consider whether the election result was affected by the use of the Photo Lists or by the breach of the election law.

Breach Affected the Results

[252] The Court has reviewed the totality of the evidence and has no doubt that the election was not affected by the use of the Photo Lists. The short answer is that there is not a scintilla

of evidence before the Court on which it can be properly concluded that the use of the Photo Lists had any impact on the results of the election. Indeed, there is no evidence, for example, of anyone being disenfranchised because of the use of the Photo Lists; neither is there any evidence of persons who were not entitled to vote being allowed to vote.

[253] This petition must be distinguished from Dio v Smith [1987] LRC (Cost) 250 – This was a case in which the Petitioner was seeking to have the election declared void because of the non-availability of claim forms at the polling station for some six hours, Mfalia J said that:

> "the witness complained that as persons eligible to vote by virtue of this section, they were presented from doing so by the non-availability of the prescribed for, that is, Form VI and that had they been able to vote, they would have voted for the Petitioner."

In that case, the Court held that the election was void.

[254] In view of the foregoing, in relation to the petition, the Court is unable to hold that the election ought to be declared void as a consequence of the use of the Photo Lists, regrettably and as ill-advised as that may have been..

SIMON PETITION/ST. JOHN'S RURAL WEST

[255] In this petition, among the persons who testified on behalf of the Petitioner were Ms. Gail Christian, Ms. Cicely Joseph, Ms. Kitjuana Robin, Mr. Winston Joseph, Mr. Ramon Gomez, Mr. Lawrence Smith, Mr. Adolph Pena, Mr. Lovelace Christopher, Mr. Francisco Matthias, Mr. St. Clair Simon, Mr. Esau Harrigan, Mr. Sean Mussington, Mr. Conrad Williams. Ms. Phyllis Proctor, Ms. Bernice Lee, Ms. Itha Anthony and Mr. Jason Meade, among others, testified on behalf of the First Respondent. Mr. George Browne testified on his own behalf and so too did Ms. Lorna Simon, the Third Respondent.

[256] The Court has once again very carefully reviewed the evidence adduced on behalf of the Petitioner and that presented on behalf of the First Respondent. In addition, the Court has

paid particular regard to the evidence presented on behalf of the Second Respondent. Here again, the Court gave deliberate consideration to Ms. Lorna Simon's evidence.

FINDING OF FACTS

Polling

[257] The Court finds the following facts: There were three (3) polling areas with six (6) polling stations: at Miss. Generlette Building (Ms. G), St. Anthony's Church, Nazarene Church, Exhibition & Cultural (Multicultural) Centre, Greenbay Primary School and Five Islands School. There is very little dispute in relation to the times the polls opened in the case of each of the six (6) locations. Where there is any dispute in the evidence, the Court places reliance on the documentary evidence which is consistent with the oral evidence. Having reviewed the evidence, much of which was uncontroverted, the Court has no difficulty in concluding that polling at Ms. G poll opened at 8:30 a.m. and closed at 6:00 p.m.; at St. A's Church, polling opened at 7:55 a.m. and closed at 7:00 p.m.; Nazarene Church polls opened at 7:45 a.m. and closed at 6:00 p.m.; Exhibition & Cultural Centre poll opened at 7:30 a.m. and closed at 6:00 p.m.; at Greenbay, the poll opened at 12:45 a.m. However, the various polling booths closed at various times. A - B at 6:10 p.m.; C - D at 7:15 p.m.; E - G at 7:30 p.m.; H - JON at 6:20 p.m.; JOS - MAS at 8:45 p.m.; MAT - PI at 9:00 p.m.; PO - SM at 9:30 p.m.; SO - Y at 9:00 p.m. The Five Islands Polling Station opened at 10:10 a.m. and closed at 7:30 p.m.

[258] The Court is fortified in its view and relies on the evidence of Mr. George Brown, who was the Returning Officer. He was a very forthright witness. The Court accepts his evidence that, for the better part of Election Day, he was involved in obtaining the "Photo Lists" and delivering them to the polling stations. He delivered the "Photo Lists" to Greenbay School at 12:45 p.m. on Election Day, which is six (6) hours after the scheduled time of 6:00 a.m.

Late Polling

[259] In relation to the closing of the poll and in view of the totality of the credible evidence, the Court has no difficulty in concluding that the polls were closed at some stations after 6:00

p.m. This was to facilitate persons who were in the line at 6:00 p.m. to vote. In this regard, the Court has paid particular regard here again to the press release that was issued by Ms. Lorna Simon, the Supervisor of Elections. It bears noting, however, that the Court is unable to accept the evidence of Mr. Pena and Mr. Gomez when they said that persons entered the lines after 6:00 p.m. The main reason for the Court so concluding is that both of these witnesses who testified on behalf of the Petitioner, in relation to this aspect of the case, were less than credible.

[260] The Court pauses here to say that Mr. Ramon Gomez (Greenbay), who testified on behalf of the Petitioner, was not as forthright as he could have been during cross-examination. Indeed, he was not as generous with the truth as he ought to have been. He was forced to resile from some aspects of his evidence during intense cross-examination by both Learned Senior Counsel Mr. Martineau and Learned Senior Counsel, Mr. Mendes. While the Court accepts that persons voted after 6:00 p.m., he was obviously pushing the numbers further up the continuum. To that extent, therefore, the Court is of the view that he is not a very credible witness; neither is his evidence reliable. The Court has no choice than to attach very little weight, if any, to this aspect of his evidence, insofar as the late voting is concerned.

[261] Similarly, Mr. Pena, who testified on behalf of the Petitioner, was not very credible or reliable. Accordingly, the Court attaches very little weight to his evidence. In contradistinction, the other witnesses who testified on behalf of the Petitioner were candid, particularly, Mr. Lovelace Christopher (Greenbay); Mr. Francisco Matthias (Greenbay); Ms. Harrigan (Five Islands) and Mr. Winston Joseph. It bears noting that even though Ms. Christian was forthright with the Court, much of her evidence was hearsay and inadmissible. The Court is therefore able to attach very little weight, if any, to her evidence.

Late Opening

[262] It is equally clear, and the Court so finds, that several persons who were in line to vote at 6:00 a.m. left the line due to the late opening of the poll. One such person was Mr. Winston Joseph who arrived at the poll at 4:00 a.m. and had to leave at 9:00 a.m. before the poll was opened. The Court pays regard to the evidence of Ms. Proctor who testified also on behalf of the First Respondent, who said that she saw some persons left the line. For the sake of completeness, Mr. Francisco Matthias also had to leave due to the late opening of the polls.

[263] In a word, the Court is satisfied, based on the cogent evidence that was presented, that several persons who were in line to vote at 6:00 a.m. were unable to do so due to the fact that the polls opened several hours after 6:00 a.m. The Court is equally satisfied that some of those persons who left the line returned, while others did not return, to cast their votes. However, the Court is unable to state how many of such persons there were who left the line due to the fact that the polling started very late. As in the Jonas petition, the Court reiterates its position that there is no obligation on a voter who presents himself at the polling station to cast his vote at 6:00 a.m. only to find that the station did not open for several hours, to return later in the day. There is no doubt that an indeterminate number of persons were disenfranchised by the late opening of the poll.

[264] The Court finds as a fact that the Returning Officer declared that Ms. Christian received 1,753 of the votes cast and Mr. Spencer received 2,259. 80.48% of the electorate voted. This was very significant. However approximately 20% of the electorate did not vote and substantial hours of opening the polls were lost due to the late opening.

Photo Lists

[265] Of necessity, the Court now addresses the issue of the "Photo Lists." As with the Jonas Petition, there is the uncontroverted evidence that the "Photo Lists" were used instead of the published Register for Elections. The "Photo Lists" were delayed in printing due to the

breakdown of one of the printers the day before elections on the 12th of March 2009. This constituency was the worst affected by the late opening. Indeed, the most egregious delay was at the Greenbay Polling Station – the late printing of the Photo Lists caused the late delivery of the "Photo Lists" (nearly some six (6) hours after the scheduled opening of poll). The Court finds as a fact that the Photo Lists were printed on the morning of the day of the election.

[266] The "Photo Lists," like the one in Jonas Petition, contained all of the information that is stipulated by the Representation of People Act to be included in the Register for Elections. The additional information included in the "Photo Lists" was the ID number and the photograph. There is not a scintilla of evidence on which the Court could conclude that anyone was disenfranchised as a consequence of the use of the "Photo Lists". Equally, the Court is unable to conclude that any person voted in the St. John's West Constituency as a result of the use of the "Photo Lists" who should not have been permitted to vote. The Court has accepted the irrefutable evidence that the "Photo Lists" were used in the previous election. In addition, the Court makes it clear that there is not a thread of evidence on which it can be surmised that the delay in polling on Election Day was deliberate or intentional. The fact that the competence of the electoral officials in waiting so late in the day, i.e. the day before the scheduled date of polling to print a "Photo Lists", which the law does not prescribe, definitely arises once again for adverse comments by the Court.

[267] While there appears to have been a slight inconvenience to persons by the use of the Photo Lists, the egregious breach was the great delay that was occasioned by the late printing of the "Photo Lists". The Court once again underscores its acceptance of the evidence that this was occasioned by the breakdown of one of the printers on the day before the polling. Irrespective of the reason for the level of inefficiency displayed, it is simply inexcusable and should not be repeated. All of the electoral officials must take responsibility for this inexcusable situation. Foremost is the Supervisor of Elections who is tasked with the responsibility for ensuring the Register for Elections is published and utilized.

Breach of the Law

[268] The Petitioner alleges that there were breaches of the election law in relation to the opening of the polls and the closing of the polls. Here again the use of the Photo Lists arises for the Court's consideration. In the interest of the efficiency of time, and as in the Jonas petition, the Court will refer to the issues raised and apply the relevant principles. In addition, the reasoning process utilized in relation to those issues will be undertaken even though they will not be repeated in detail.

[269] In determining this issue, without repeating, the Court adopts the principles and analyses that were made in relation to the Jonas petition, the Court adopts the same approach. In the Jonas petition, the Court has already determined that there was a breach of the election law insofar as the poll did not open at 6 am. In this petition, the Court holds similarly. The Court reiterates that it is not automatic to void an election on the basis that there has been a breach in the law where such breach did not prevent the election from being in substantial compliance with the election laws.

Substantial Compliance

[270] When a breach of the election law has been established in determining whether the Court should vitiate an election regard must be paid the principles that were enunciated by Lord Denning in Morgan v Simpson and referred to in the previous petition. Also the principles in Re Kensington supra are equally applicable here.

[271] It is prudent to repeat that should the Court conclude that "the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated, irrespective of whether the result was affected or not". See Hackney case supra; Halstead v Simon per Redhead J. However, should the Court conclude that the election was conducted substantially in accordance with the law as to elections, it is not vitiated because of the breach of the rules or a mistake at the polls provided that it did not affect the result. See Islington case supra.

[272] By way of emphasis, as previously stated, the Court found that Miss G, St. Ann's Church, Multipurpose Centre, and at the Nazarene Church, polling commenced at least one hour 30 minutes late; at Five Islands, polling commenced 4 hours late; and at Greenbay, polling commenced more than 6 hours late. It also bears repeating that Greenbay, which is the largest of the polling stations, opened in excess of 6 hours late. This is not the only fact that the Court must into consideration in determining whether there nevertheless was substantial compliance with the election law. The Court reiterates that it found as a fact that several persons left the polling station at Greenbay and at the Five Islands polling station due to the late opening of the poll. While some of these persons returned and were able to cast their votes others did not. Moreover, the overwhelming evidence leads the Court to conclude that an indeterminate number of persons were unable to cast their votes due to the late opening of the polls. The Court accepts this evidence as truthful and finds this as a fact.

[273] In this petition, the Court is obliged to examine the number of person that voted in spite of the lost hours. There is clear evidence that 80.48% of the registered voters exercised their franchise in St. John's Rural West. This by any assessment is a very significant turn out. The Court finds very persuasive the approach adopted by Redhead J in Halstead v Simon in which he said that the election could not be condemned as a sham or travesty in such circumstances. The percentage turnout in St. John's Rural West was greater than in some of the other constituencies despite the serious breaches of the election law which had occurred.

[274] On the other hand, the Court is not of the view that it should merely compare the turnout in the previous election, that is, 2004 and 2009 election in order to determine whether there was substantial compliance.

[275] However, having reviewed the evidence and taking into consideration the totality of circumstances, there is no doubt that in spite of the breach of the election law, the election was nevertheless conducted substantially in accordance with the law as to the election.

Breach Affected the Result

[276] The Court must now go on to examine whether the breach of the election law affected the result. In ascertaining the position in regard to this issue, the Court pays cognizance to the uncontroverted evidence that several persons who attempted to vote at 6 am were unable to do so. Included in this category of persons are Mr. Winston Joseph and Mr. Francias Matthias. Also the Court has reviewed the entire evidence and concludes that an indeterminate number of persons were unable to vote. Also, the Court is fortified in this view, having examined the evidence that was provided by the witnesses who testified on behalf of the First Respondent. They corroborated the Petitioner's witnesses evidence on this issue.

[277] It may well be that the Court is unable to say that the breach affected the result. The Court is of the view that the Morgan v Simpson principles as applied in Consodine v Didrichsen supra have direct relevance to this petition. This percentage of persons who did not vote is a matter for the Court to take into account in determining whether the breach affected the result. The Court is not about to speculate as to the reasons why nearly 20% of the electorate did not vote.

[278] The Court reiterates that what is important to determine is whether the Court can say that the breach of the election did not affect the result. See also Edgell v Glover supra in which this principle that was enunciated in Consodine v Didrichsen supra was applied. See also Redhead J in Halstead v Simon supra.

[279] In the present petition where there is a margin of victory of 502 coupled with the fact that approximately 20% did not vote that represents a significant number in excess of the margin of victory between the two parties, and the fact that an indeterminate number of the electorate was unable to vote in the election, due to late opening of the poll, the Court cannot say that the breach of the election law did not affect the result. The Court is unable to conclude, in view of the preponderance of the evidence, that the breach of the election law did not affect the result.

[280] As a consequence, utilizing the principles propounded in Morgan v Simpson as applied in Consodine v Didrichsen and Edgell v Glover, the Court has no alternative other than to declare the election void. Accordingly, the Court declares that Mr. Baldwin Spencer was not duly elected.

Photo Lists

[281] For the sake of completeness, the Court now seeks to determine the position in relation to the use of the Photo Lists. With respect to the findings in relation to the use of the Photo Lists, the Court adopts the same approach as in the JONAS Petition and applies the similar principles utilized in relation thereto. It may nevertheless be prudent to briefly address the issues raised in relation to the use of the Photo Lists.

Breach of the Law

[282] As with the Jonas Petition, the Court has reviewed the evidence and there is no dispute between the parties in relation to the use of the Photo Lists. Accordingly, there is no doubt that there was a breach of the election law insofar as the Photo Lists were used. This was contrary to section 25 of the Representation of People Act which mandates the use of the Register for Elections. The Court is fortified in this view and adopts its previous analysis. Also see Morgan v Simpson supra, and Halstead v Simpson supra.

Substantial Compliance

[283] Similarly, as with the Jonas Petition, the Court must next ascertain whether the election was nevertheless conducted substantially in accordance with the election law.

It is the law, as already been stated, that the breach of an election law does not automatically result in a Court voiding the election.

[284] The Court reiterates that in seeking to ascertain whether nevertheless there was substantial compliance with an election law, it must examine the totality of circumstances in order to determine what was accomplished in spite of the use of the Photo Lists.

[385] Insofar as to what amounts to substantial compliance, the principles Lord Denning propounded in Morgan v Simpson are applicable, the Court accepts and applies them.

[286] On the basis of the similar reasons as stated in the Jonas petition, the Court holds that there was substantial compliance with the election law, despite the urgings to the contrary by Mr. Guthrie. There is no evidence, for example, that persons who voted in the election ought not to have voted. Neither is there any evidence of, for example, persons having voted for other persons. In a word, there was a real election by ballot and not a sham.

Breach Affected the Result

[287] As with the Jonas petition, the Court addresses the issue of whether the result was affected by the breach. In applying the principles as stated in Morgan v Simpson, the Court concludes that there is no evidence on which it can be said that the result was affected as a consequence of the use of the Photo Lists.

[288] Further, in seeking to determine whether the election was not affected, the Court finds the enunciations in Edgell v Glover [2004] EWHC 2711 and Consodine v Didrichsen very instructive and applies them to this petition. Equally, the Court is satisfied that the use of the Photo Lists did not affect the results. Accordingly, the Court declines to void the election on the basis of the use of the Photo Lists.

NIBBS PETITION/BARBUDA

[289] Some of the persons who testified on behalf of the Petitioner were Ms. Eulisa Martin, Mr. Mario Mack, Ms. Kereana Baltimore, Mr. Everett Thomas, Mr. Elvis Burton, Mr. Fabian Hunt, and Ms. Irose Martin. Mr. Arthur Nibbs also testified on his own behalf. Mr. Leroy Gore, Mr. Bruce Goodwin, Mr. Atkinson Beazer, Mr. Charlesworth Davis, and Mr. Griff

Walker testified for the First Respondent. Mr. Trevor Walker himself testified on his own behalf. Mr. John Jarvis and Mr. Mulvaine George testified on behalf of the Second Respondents. Here again Ms. Lorna Simon testified on her own behalf.

[290] As in the petitions previously considered, the Court has, in this petition, carefully reviewed all of the evidence including the documentary evidence. Also, the Court has given deliberate consideration to the arguments advanced by all Learned Senior Counsel.

[291] It bears noting that much of the information that was provided by the witnesses who testified on behalf of the Petitioner was inadmissible. The Court has therefore taken into consideration the objections and the response to the objections to have the inadmissible evidence struck out. The Court has so ruled to strike out the inadmissible evidence in coming to its finding but in the interest of not making the judgment too cumbersome, the Court refrains from expressly stating its ruling in this judgment.

[292] Looking at some of the Petitioner's evidence, it is clear that while Mr. Nibbs appeared well intentioned, he did not appear to have most of the relevant details in order to substantiate most of the allegations he made. Most of the evidence that he presented to the Court was not based on his own knowledge but rather on what others allegedly told him. The Court has no doubt that his evidence is hearsay and inadmissible. Very little weight is therefore attached to his evidence. Mr. Nibbs struck me as someone who was emotionally involved and was not as objective as he could have been. I do not think that he intended to mislead the Court. Nevertheless I am of the view that most of his evidence was not reliable. He came across as being very upset with the UPP Government for a very long time and as harbouring very strong feelings against the administration. He did not seem to be very fond of the BPM either. Mr. Nibbs was a very respectful witness but there is no doubt that he has his own interest to serve and this impacted significantly on the reliability of his evidence.

[293] Also, the reliability of the evidence of witnesses: Ms. Kereana Baltimore and Mr. Mario Mack, both of whom testified in support of the Petitioner, left much to be desired. Mr.

Everett Thomas, Mr. Fabian Hunt and Ms. Irose Martin were not very credible or reliable witnesses. The latter two witnesses were very unconvincing. The Court will address this aspect in more detail very shortly.

[294] In contradistinction, the Court found Mr. Trevor Walker to be a very credible and forthright witness. His evidence was reliable and unshakable even in the face of very skillful and intense cross-examination. Mr. Charlesworth Davis was a witness who appeared to have no interest to serve but who had some knowledge in relation to the matters that were raised in relation to the road works in Barbuda. Mr. Leroy Gore was forthright with the Court.

[295] Mr. John Jarvis also struck the Court as a very credible and reliable witness. He gave the distinct impression that he had no interest to serve other than to speak the truth. In the Court's view, he was a very honest witness and a professional gentleman.

[296] Mr. Bruce Goodwin was a very unshakeable, convincing, formidable and confident witness. Even under intense cross-examination by Learned Queen's Counsel, Mr. Guthrie, he never resiled from the evidence he had earlier given. His evidence was reliable.

[297] Having reviewed the evidence and taken particular care to exclude the hearsay inadmissible evidence, which is too numerous to detail, the following represents the Court's findings of facts.

Road works

[298] Sometime in 2005, there was a contract with the company, Ameriswiss, to do road works in Barbuda. For reasons which are not relevant to these proceedings, that contract was not completed. The Government of Antigua and Barbuda was desirous of having the road works that were started in Barbuda completed. They set about seeking to negotiate with contractors toward this end. However, they experienced various set backs in their efforts.

In July 2007, there were ongoing negotiations between the Government of Antigua and Barbuda and Patrice Luke to complete the unfinished road works. A new agreement was reached between the Government of Antigua and Barbuda and Patrice Luke and it was signed on 28th August 2008. Preliminary assessment of the work was carried out. Thereafter, steps were taken by the Government of Antigua and Barbuda to access the funds and the material required in order to complete the road works. The Government encountered difficulties. They were eventually able to access the funds and the road works were continued in January, February and early March 2009. It stopped for a few days around Elections Day and continued thereafter.

[299] The Court has no doubt that the road works that were carried out were the continuation of the previous project. The Court does not accept that it was orchestrated by the UPP administration, which "turned on the financial tap" for ulterior purposes. The continuation of the road works was simply a part of the Government's completion of the work it had started.

[300] Given the importance of the point, and the efforts Learned Queen's Counsel devoted to it, the Court proposes to further examine the circumstances under which the road works were continued. The Petitioner's complaint is that the Government commenced with the open participation of Mr. Walker and that there was substantial road works in Barbuda. The works involved an increase in temporary employment. Mr. Nibbs testified in relation thereto and so too did his witness, Mr. Elvis Burton. Mr. Walker testified on his own behalf and so too did Mr. Charlesworth Davis, the Director of Works.

[301] Despite Mr. Nibbs' evidence to the contrary given in chief during cross-examination, Mr. Nibbs was unable to present any reliable evidence in support of his allegations. So too was his witnesses. In fact, the Court, having carefully reviewed the evidence, is satisfied that the Petitioner has failed to lead any credible evidence to substantiate his allegation that Mr. Walker associated himself with the road works that were carried out by the Government of Antigua and Barbuda. There is no reliable evidence before the Court that Mr. Walker gave any employment to anyone. In any event, this was not alleged. Further,

the evidence adduced on behalf of the Petitioner failed to meet the threshold required to prove that Mr. Walker participated in the road works at all or as alleged. The Court states further that there is not a scintilla of evidence that anyone acted as agent for Mr. Walker in the continuation of the road works. The uncontroverted evidence is that the Government of Antigua and Barbuda continued the road works.

[302] The Court pauses to state that it has to ensure that when allegations of corrupt and illegal practices are made they must be properly pleaded and strictly proven. It is only right that the Petitioner be prevented from advocating a claim that is totally different from that pleaded. In this regard, the Court relies on the case of Frampton v Pinard Supra, per Rawlins J.

[303] In any event, the Petitioner did not plead that it was anyone acting on behalf of the Respondent who provided employment to anyone. For what it is worth, the Court notes, in passing, that there was no evidence that Mr. Walker approved or ratified any conduct of any one with regard to the resumption of the road works. By way of emphasis, there is no doubt that the road works that were carried out by the Government between January to March 2009 were the continuation of road works that had commenced in previous years by the Government. They were not resumed for the purpose of obtaining votes for Mr. Walker, as the Petitioner would have the Court believe. The Court is not satisfied that there is any reliable evidence that the road works were executed by the Government on behalf of Mr. Walker.

[304] The Court is further unable to accept, based on the preponderance of the evidence produced, that the road works that were continued in Barbuda by the UPP Government, at the time of its continuance, had anything to do with Mr. Walker. Also, the Court is far from satisfied that any increase in employment, as there may have been, had anything at all to do with the elections. The evidence points to the contrary position. The Government cannot be expected to stop its discharge of the obligations to development simply because an election is called. For the allegation of bribery or corrupt practice to stick there must be

something more. The evidence adduced to the Court failed to establish that there was anything more that would substantiate these very serious allegations.

Ms. Irose Martin

[305] The Court now turns its attention to the circumstances surrounding the non-voting of Ms. Irose Martin. In this regard, Ms. Irose Martin testified on behalf of the Petitioner. Mr. Mulvaine George and Mr. Jarvis testified in support of the second named Respondent. The Court was afforded the opportunity to hear and observe Ms. Irose Martin and has carefully reviewed the evidence that she provided. It must be said that she did not strike the Court as a very credible or reliable witness. On several occasions during her testimony she was hesitant and unsure as to the answers to give. Mr. George was extremely consistent and forthcoming in his testimony, even during vigorous cross-examination by Learned Queen's Counsel, Mr. Guthrie.

[306] The Court underscores that it totally doubts the reliability and credibility of Ms. Martin's evidence

[307] Before leaving this aspect of the petition, the Court notes that on several material aspects of the report, Ms. Martin was unable to provide the relevant information. This was in stark contrast to the very consistent, forthright and unwavering manner in which Mr. George testified. He was a most impressive witness insofar as he was able to recall very minute details. Where therefore there is any conflict between the evidence, the Court readily accepts Mr. George's evidence in preference to Ms. Martin's.

[308] The Court therefore finds that Ms. Martin reported the loss of her ID card on the 11th March 2009. Inquiries were made about getting her a special ID card but it was difficult to get one to her before the evening of the 12th March 2009, the date of polling. She was therefore unable to vote. She did not even as much as fill out the requisite application form in order to be able to obtain the replacement ID card. She should have acted in a timely manner in reporting the loss of her ID card and not wait until the day before the

election to do so. This can hardly be the type of evidence on which the Court would void an election.

Cuban Students

[309] The Court now addresses the allegation in relation to the Cuban students. In paragraph 8.6 of the petition, the Petitioner alleges that: "The first Respondent and/or persons acting on his behalf further arranged for or connived at the payment for the travel to Barbuda of students from Cuba to Antigua and then to Barbuda so they could vote in the election. The Petitioner claims that the students' travel by chartered flight was paid for or contributed to by others on behalf of the first Respondent and the BPM. "

[310] On this aspect of the case, Mr. Bruce Goodwin, the Antigua and Barbuda Ambassador to Cuba was the main witness who testified. As stated earlier, he was a supremely confident witness. He was very formidable and unshakable in the face of the most grueling cross-examination. There is no doubt of his political affiliations to the UPP. However, he struck the Court as a credible and reliable witness.

[311] Mr. Goodwin obviously attributes a lot of importance to himself. His demeanor and the no nonsense manner in which he answered the questions asked and his responses to the questions made it very clear that he is a person who is not to be trifled with. He was honest and the Court attached significant weight to his evidence. The Court has no doubt whatsoever, that he takes instructions directly from the Prime Minister, who is also the Minister of Foreign Affairs, and from no one else.

[312] Here again, the Court approached Mr. Nibbs' evidence with care. Mr. Nibbs' distaste for the wrong that he perceived had transpired in the bringing home of the students from Cuba was patent. This detracted from his ability to be objective. He did not have "first hand knowledge" of most of the evidence he gave on this aspect of the matter. A great part of his evidence was therefore inadmissible.

[313] The Court has paid particular regard to the evidence of the students who testified. Mr. Mario Mack, Ms. Kenyanna Baltimore and Ms. Eulisa Weston. During cross-examination, Mr. Mack and Ms. Weston struck me as fairly honest and forthright. However, Ms. Kenyanna Baltimore was not found to be similarly circumstanced, particularly during the cross-examination. The evidence that was given by Mr. Walker was carefully reviewed.

[314] Based on the evidence, the Court is clear that in 2006 Mr. Walker visited Cuba and spoke to students from Antigua and Barbuda. There is the further finding that in excess of a year later, several students from Antigua and Barbuda who were studying in Cuba approached Ambassador Mr. Goodwin and requested that he intervene in order to bring them home to exercise their franchise.

[315] As stated earlier, the Court is satisfied that Mr. Goodwin reports only to the Prime Minister, who was then the Minister of Foreign Affairs. Having received the requests from the students, Mr. Goodwin sought the assistance and approval of the Prime Minister to bring the Antiguan and Barbudian students home.

[316] There is no credible evidence before this Court on which it can be found that Mr. Walker knew, consented or was a part to the arrangement to have the students brought back to vote in the election. The exercise was executed by Ambassador Goodwin with the approval of the Prime Minister. Students from Antigua and Barbuda returned home to vote. The funds that financed this were from the Government of Antigua's account in Cuba.

[317] The Court is unable to say, as Learned Queen's Counsel Mr. Guthrie has asked, that the exercise was a party exercise to ensure that persons were brought home to vote for the UPP. The Court is fortified in this view when it takes cognizance of the fact that Mr. Goodwin took no part in the selection of the students. Neither was there any evidence that the students who were selected to return home were so selected based on his instructions or based on party affiliations. Also, there is no evidence before the Court either that the

students, other than Ms. Baltimore, arguably, were affiliated to any of the political parties or to the politicians.

[318] In the face of the evidence, it would be quite wrong and baseless for this Court to infer or impute that Mr. Baldwin Spencer authorized the bringing home of the students from Cuba in order for them to vote for the BPM. Neither is there any credible evidence on which it can be inferred that Mr. Goodwin brought the students to Antigua from Cuba in order for them to vote for Mr. Walker.

[319] The position contended for by Mr. Nibbs is a very serious one: that there was the corrupt or illegal practice of undue influence or bribery. The Court must take care in assessing the evidence and only in the face of clear, credible and reliable evidence should the Court be satisfied that Ms. Nibbs has proven that the allegations have been made out against Mr. Walker. Nothing less will suffice. The standard of proof is stringent in a matter such as this. See Wanaraka v Dusava supra and R. v Rowe supra.

[320] In view of the totality of circumstances, the Court is not persuaded that Mr. Goodwin's arrangement to bring back the students from Cuba was to ensure that the students who were brought back voted for Mr. Walker or the BPM in Barbuda. Further, the Court is not convinced that Mr. Spencer or Mr. Walker was either party to or part of any such alleged plan. To the contrary, the overwhelming evidence is that the six students who were brought back, several of them remained in Antigua. Those who are from Barbuda had to make their own arrangements to get to Barbuda, once they got to Antigua.

[321] The Court has no doubt, whatsoever, that Mr. Walker had nothing at all to do with the arrangements by the Prime Minister and Mr. Bruce Goodwin to bring the students from Cuba home to vote. The Court underscores that the charter was paid for out of state funds, utilizing the budget allocated to the embassy.

[322] Before moving on from this aspect of the case, it is important that the Court pauses so as to examine the evidence of Ms. Kerianna Baltimore. She said that in January 2008, Mr.

Walker visited the students who were studying in Cuba. She is known to be the stepdaughter of his political opponent. Mr. Walker told her in January 2008: "I hope that if I send for you that you do not go back home and vote for your father." The Court is hesitant to accept that such a conversation took place. It would be a very serious misstep, even if stated in jest, for Mr. Walker to say such a thing to his opponent's daughter. Even if the Court is wrong and even if Mr. Walker said those words, nearly 14 months before the election of March 2009, this Court would be hard-pressed to accept, in the totality of circumstances, that he intended to bribe the students to vote for him. The uncontroverted evidence is that he did nothing to bring the students home. It was not until February 2009, when they contacted Mr. Goodwin in that regard that Mr. Goodwin made arrangements with the Prime Minister to bring them to Antigua.

[323] Finally, the Court indicates that no evidence was led from which it could be inferred that the students were selected based on party affiliation (and, to repeat, the selection was made by the student representative).

Words spoken

[324] Mr. Nibbs and Mr. Burton told the Court about the things that they heard being said by the Prime Minister, Minister Daniel, and Mr. Walker to the effect that if people of Barbuda voted for the Petitioner that the UPP would not support Nibbs and would stop the road works and the promised ferry would not be provided. Mr. Walker and Mr. Gore, his witness, said that the thrust of the speeches was that should the ALP government get back in office, Barbuda will again be neglected. The Petitioner's allegations are serious and the Court has to be satisfied that the allegations that the Petitioner makes in relation to undue influence, bribery are proven beyond a reasonable doubt. Nothing less will suffice. The Court is not satisfied that the words attributed to the Prime Minister were the exact words that he uttered. While the Court has no doubt that similar words complained of were spoken by the Prime Minister in January 2009, and that other members of the UPP said similar words to that stated by Mr. Walker in evidence, the Court holds the view that those words were mere politicking and amounted to a comparison between the ALP and the

UPP. The Court accepts the submissions urged by Learned Senior Counsel, Mr. Mendes. The politicians were there trying to paint the other side or their opponent in a bad light and I find that this was just another such situation of cultural politicking in which they were saying that they would do better than the ALP. Politicians in the hustle and bustle of politicking cannot be expected to use the same sanitized language for which this Court is sometimes known.

[325] It must be emphasized that the Court accepts the evidence of Mr. Walker as to the words he used. Mr. Beazer and Mr. Gore corroborated Mr. Walker's evidence. The Court is unable to accept that the use of the words has the effect of elevating them to the evidential basis on which to sustain the allegations of bribery or undue influence.

[326] While the Court does not doubt that Mr. Nibbs was referred to as "an enemy of Barbuda", this again is mere politicking. Even though Mr. Nibbs is clearly upset at being so referred, no reasonable person would conclude that it meant that he was an enemy in the literal sense. The entire context and culture is relevant. The Court has to take a commonsense approach to this matter. Accordingly, the Court finds that the words spoken do not support the charge brought by the Petitioner.

MR. FABIAN HUNT

[327] Mr. Nibbs alleged that Mr. Hunt was registered to vote but was prevented from doing so. Mr. Nibbs did not plead that the Commission failed to effect the transfer of Mr. Hunt. Mr. Hunt ought to have raised the issue that he now seeks to raise namely, that his name was not transferred. Mr. Hunt ought to have challenged this before the elections. The Court is of the view that it is impermissible for him to seek to void an election of this basis. This is quite apart from the Court having concluded that Mr. Hunt was entirely at fault in not ensuring that he was on the published Register for Elections. See Radix v Gary supra

[328] The Court now turns its attention to the evidence in relation to the petition. Mr. Mulvaine George, Mr. John Jarvis the returning officer and Ms. Lorna Simon testified on behalf of

the Respondents. Mr. Hunt testified in support of the Petitioner. Mr. Fabian Hunt did not paint a good picture. In fact, for the majority of his testimony he was a most unconvincing witness. Had the allegations not been as serious the Court could easily have concluded that Mr. Hunt did not take the situation with the seriousness it deserved. In the petition, the allegation was that he was not allowed to vote. However, as the evidence unfolded, the complaint was clearly one of non transference. This Court is of the view that the quality of evidence he presented left much to be desired. He seemed to know very little if anything about what he was saying and was very inconsistent particularly during vigorous cross-examination that tested his credibility and reliability. It is passing strange that Mr. Hunt seemed never to have checked the list that was published but rather relied on what Digicel personnel may have" told him, namely: that his name was on the published Barbuda list of electors. The Court was far from persuaded that Mr. Hunt took any proper steps so as to ensure that his transfer was completed. He sat back and did not seek to ensure that his name was on the published list of Register for Elections.

[329] While the Court has no doubt that Mr. Hunt was not transferred even though he had made the application, nearly two years before the election, equally the Court holds the view that he had an obligation to ensure that his name was on the Register for Elections. This is not the sort of complaint that can properly form the basis of an election petition to unseat a successful candidate.

Counting of votes

[330] The Court has reviewed the pleadings in relation to this aspect of the case. The evidence on this aspect of the petition was presented by Mr. Everett Thomas, Mr. Nibbs, Mr. Beazer and Mr. Jarvis. The complaint originally was that there was an improper counting of the votes, particularly the votes in ballot box number 1. Mr. Thomas gave one impression in his witness statement. He resiled from much of what he had said during the cross-examination. He did not have a very clear picture of what had transpired during the counting. Mr. Thomas' evidence in cross-examination, which, in the Court's view, is the correct position, is consistent with the evidence of the Returning Officer, Mr. Jarvis.

[331] Perhaps, it bears stating that much of the evidence that Mr. Nibbs provided to the Court is hearsay, inadmissible and of little weight, if any. In fact, the witnesses who testified on behalf of Nibbs did not paint a very good picture. They were not as helpful to the Court as they should have been. In addition, the evidence they provided the Court varied significantly from the allegations in the petition. This is in contradistinction to Mr. Jarvis, the Returning Officer who struck me as a very honest, straightforward and credible witness. Insofar as there is any conflict between his evidence and that of Mr. Thomas, the Court has no hesitation in accepting his evidence in preference to that of Mr. Jarvis. The original difficulty, if any, was in relation to the box number one.

[332] The Court is not at all persuaded that there was any improper conduct in the counting of the votes. The Court believes Mr. Jarvis when he told the Court that after the counting of the votes Mr. Thomas congratulated him for "a job well done". There simply was nothing amiss in the counting. In any event, during cross-examination by Learned Senior Counsel Mr. Martineau, Mr. Thomas resiled from his position and now said that he accepted the results. See Radix v Gairy supra.

Bribery and Undue Influence

[333] The Court now proposes to address the issues of bribery and undue influence as alleged by Mr. Nibbs. It is the law that if there is proof of either bribery or under influence the Court must vitiate the elections, without more.

[334] Mr. Nibbs's petition alleges that Mr. Walker is guilty of bribery and undue influence as a result of his participation in the construction of the road works that were conducted in Barbuda and by the chartering of the flight to take home students who were studying in Cuba to vote. He also alleges that undue influence was exerted on the electorate in order to secure their votes.

The Road Works

[335] Now, the Court proposes to examine the allegations vis-á-vis the road works. The Petitioner alleges that Mr. Walker on about 4th February 2009, the Government, (through the UPP, with which the BPM is publicly affiliated) commenced with the open participation of the First Respondent's substantial road works in Barbuda. The works involved the period from 4th February through to 12th March 2009, and resulted in an increase in temporary employment.

[336] It is the law that provision of temporary employment can constitute bribery. (see AG and others v Kabourou [1995 2LRC 757 at p774, Wigmore v Matapo supra, Jugnauth v Ringadoo PC [2008] UKPC 50.

[337] Allegations of bribery or undue influence are serious and proof of that can have serious effects. It is for this reason that the law in its wisdom requires that the Petitioner meets the standard of proof beyond a reasonable doubt; nothing less will suffice.

[338] Indeed, it is the law that in order to sustain an allegation of corrupt practices, the onus is on the Petitioner to prove his case beyond a reasonable doubt. The Court pauses to state that this is a high standard as set by the criminal law. If there is a reasonable doubt as to whether the Petitioner has succeeded in proving the allegations, the benefit of the doubt must be given to the First Respondent. See the case of Wenaraka v Dusava supra.

[339] In view of the Court's findings, it is not proposed to examine the allegations of bribery and under influence insofar as they are said to concern the road works. The Court is of the respectful opinion that Mr. Nibbs has failed to meet the essential evidential threshold required to sustain the allegations. His petition fails on this ground.

Undue Influence

[340] The allegation is that Mr. Walker said that if you don't vote for me the concrete roads and drains will stop.

> "If you don't vote for me the ferry that PM Spencer has promised for Barbuda will not happen."

[341] The Court has already ruled that the Petitioner has failed to satisfy the Court that Mr. Walker uttered those words attributed to him.

[342] It is also alleged that at a further political meeting held in Codrington, at which the Respondent was present, Honourable Prime Minister Baldwin Spencer said to those present words to the effect that if the people of Barbuda voted for the Petitioner:

> "the UPP Government will not support the Petitioner, and that all the works will come to an end."

[343] By way of emphasis, the Court has not found, as a fact, that Mr. Spencer said those exact words. In fact, the Court accepts that Mr. Spencer said the version of the words that was given in evidence by Mr. Walker.

[344] As a consequence, the Court is of the respectful view that the Petitioner has failed to provide the evidential basis in order to sustain the allegation in relation to bribery or undue influence as to the road works. As the Court has already found, the road works in Codrington were the continuation of a project that started in 2005. There is not a thread of cogent evidence before the Court upon which the Court can properly conclude that the First Respondent participated in the road works in Barbuda, or utilized undue influence in that regard.

[345] The Court accepts that the provision of road works can constitute bribery. See AG and others v Kabourou supra. However, Mr. Nibbs has not provided the Court with any credible evidence that Mr. Walker employed or authorized any persons to do the road works or that he accepted the road works when they were completed.

[346] Further, the Petitioner has failed to lead any credible or reliable evidence on which this Court could properly conclude that the Government of Antigua or its ministers were the

agents of Mr. Walker. There was never any employment or authorization by Mr. Walker, neither did he ratify or adopt the work that was done by the Government of Antigua. With respect, Mr. Nibbs has failed to attain the threshold required to sustain the allegations.

Bribery and Undue Influence – Cuban Students

[347] In the petition, Mr. Nibbs alleges that:

Mr. Walker and or persons acting on his behalf further arranged for or connived at the payment for travel to Barbuda of a number of Barbudan students from Cuba to Antigua and hence, to Barbuda, so that they could vote in the election. The Petitioner claims that the students' travel was paid for or contributed to by others on behalf of the First Respondent and the BPM in breach of the Act.

[348] Based on the fact that the Court has already found that the flight that was chartered from Cuba had nothing at all to do with Mr. Walker, it does not seem necessary for the Court to consider this aspect of the case in depth. There simply is no evidence to implicate Mr. Walker in the bringing home of the Cuban students.

[349] The Court reiterates its findings that the chartered flight from Cuba was arranged neither on Mr. Walker's behalf nor at his instigation. It is passing strange that in the face of Mr. Goodwin's clear evidence the Petitioner still persists in the allegation. Further, there is no evidence that Mr. Walker was even aware of the flight arrangements or adopted the arrangements that were made by Ambassador Goodwin and Mr. Spencer. On the evidence, neither Mr. Goodwin nor Mr. Baldwin Spencer could be held to have acted as Mr. Walker's agent. In order to prove undue influence or bribery there is a very stringent evidential standard, the threshold of which the Petitioner has failed to attain. Indeed, the evidence is non-existent on this aspect of the petition.

[350] The fact is that Mr. Goodwin may have made a speech on the radio after the election. Even in view of that, the Court simply does not have sufficient grounds to find that there was a relationship of agency between Mr. Walker and himself, or for that matter, between

Mr. Walker and the Prime Minister Baldwin Spencer in relation to the matter at hand. It is pellucid that Mr. Nibbs has failed to discharge the onus placed on him, to prove beyond a reasonable doubt that Mr. Walker is either guilty of the offence of bribery or that of undue influence. Accordingly, the Court needs go no further.

Counting of Votes

[351] The Court now addresses the law in relation to the counting of the votes.

Rule 57 provides as follows:

> (1) "A candidate, if present when the counting or any result of the votes is completed may require the returning officer to have the votes re-counted.
> (2) No step shall e taken on the completion of any re-cont of the votes with the candidates at the completion thereof having been given a reasonable opportunity to exercise the right conferred by this rule."

Rule 60 (1) stipulates:

> (1) Where, after the counting of the votes, including any result is completed, an equality of votes is found to exist between any candidates and the addition of a votes would entitle any of these candidates to be declared elected, then the returning officer shall forthwith make a declaration under Rule 64 that an equality of votes has been ascertained and that no candidate has been elected.."

[352] Mr. Nibbs initial complaint appeared to be that the entire ballot ought to have been recounted in circumstances where he says that there was a tie. He contends that this was in breach of the Election Rules.

[353] Originally, the Petitioner sought to have the Court declare the election of Mr. Walker invalid on the basis of the failure of the returning officer to count all of the boxes. Mr. Nibbs contended that only box 1 was recounted. It is not apparent to the Court which Rule the Petitioner was alleging was breached. Even more so, as the Petitioner's witnesses testified, it was clear that Mr. Thomas, the eyewitness, stated that he accepted that Mr. Walker had won by one vote. Further, Mr. Nibbs was not present at the counting of the s and most of what he had to say on the counting of the votes was hearsay and inadmissible.

[354] In the Court's view, the Petitioner could not with any sincerity pursue this allegation since it was at total variance with the evidence in support.

[355] In the Court's respectful view, it is therefore not necessary to rule on this aspect of the petition. However, out of an abundance of caution, the Court has no doubt that there is no merit in this aspect of Mr. Nibbs' complaint. In view of the totality of circumstances, the Court is far from persuaded that there was any breach of the rules, so far as the counting of the votes is concerned.

[356] To put the matter beyond any doubt, it bears stating that the cogent evidence is that the discrepancy occurred in relation to the first ballot box. This much is undisputed. The Court is therefore unable to see what useful purpose would have been served by recounting the second and third boxes; after there was satisfaction on the recount in relation to the last ballot box.

[357] Accordingly, there is no evidence before the Court from which it can be gleaned that there was an infringement of any Election Law. Mr. Nibbs fails in his challenge to unseat Mr. Walker on this basis. The Court refuses to accede to the request to void the election on this basis.

MR. FABIAN HUNT

New matters not pleaded

[358] The law is clear and does not require much restatement. All allegations in a petition must be specifically pleaded and proven. Therefore, where it is clear that any party seeks to raise new issues that were not dealt with in the petition the Court will not countenance that allegation. Election petitions must be strictly pleaded and proven. If any authority is required for this well-known position, the Court finds support in the judgments of Frampton v Pinard supra per Rawlins J; Halsted v Simon per Redhead J; See also Radix v Gary supra.

[359] It is clear that in his petition, Mr. Nibbs did not plead that there was a failure to transfer Mr. Hunt. The allegation was that he was prevented from voting. The Court is of the view that Mr. Nibbs ought not to be permitted to pursue the new allegation which arose from the first witness statement. Accordingly, the Court does not permit this Petitioner to prosecute this aspect of his petition. See Frampton v Pinard supra per Rawlins and Halstead v Simon per Redhead J.

[360] If I am wrong in so holding, I will now proceed to determine the issue on its merits. For what it is worth, the Court is of the view that any complaints in relation to the transfer of names ought not to form the basis of an election petition. See Radix v Gary supra; Drew v Hall supra. Indeed, it is the law that issues related to the Register must be raised before it s proclaimed.

[361] It is passing strange that Mr. Hunt says that he made the application for the transfer, in excess of two years before the General Elections were held. He took no step to check the published Register for Elections and after the elections were held he seeks to have the election voided on this, with the greatest of respect, tenuous basis.

[362] The Court is not of the view that Mr. Hunt can take refuge in the fact that, in any event, the published Register was not used on the day of the polling. There is the uncontroverted evidence that even though the Photo Lists were used in Barbuda, they were substantially in accordance with the legally required list. Had Mr. Hunt checked the published Register for Elections and not rely on what Digicel personnel are alleged to have told him he would have realized that his name was not on the published Register for Elections. This would have afforded him sufficient time to seek to have any amendments made.

[363] In Radix v Gary supra, the list of voters was published, the Petitioner did not challenge the accuracy of the list. An election was held and he lost. He then challenged the validity of the list. Morris, CJ said at page 556:

> "I cannot accept that the legal position is the candidate who went as a contestant on an existing list of elections may be allowed to accept the list as valid if he wins but would be allowed to argue that the list is invalid if he loses."
> (See also Drew v Hall supra)

[364] The Court is guided by those very helpful pronouncements. The Court is of the view that the allegations that are made by Mr. Nibbs which concern Mr. Hunt's non transference cannot properly form the basis of an election petition which seeks to have the election invalidated.

[365] The Court reiterates that it simply cannot be right for Mr. Hunt to sit back idly and not check to see whether his name was on the published Register for Elections and await until the election is held and then complain about his name not being on the register.

[366] Further, I am of the respectful view that the Court cannot accede to Mr. Nibbs' request insofar as he has failed to substantiate this claim on the basis of his allegation, in the petition.

MS. IROSE MARTIN

[367] The Court now proposes to examine the allegations in relation to Ms. Irose Martin. In paragraph 9.7 of the Petition, the complaint is as follows:

> The Second Respondent wrongfully refused to allow one Irose Martin voter registration number 687, among others, to vote on the ground that she did not have her voter ID card although her name appeared on the voters' list. The Petitioner challenged the refusal because she had previously applied for a replacement card, which she was not given despite repeated requests made to the Registration Office in Barbuda. Irose martin was not given a special identification card and was prevented from voting by the Second Respondent despite being entitled to do so.

[368] The relevant rule required Ms. Irose Martin to have applied on a specific Form 9 in order to obtain a replacement card. In addition, this Court has found as a fact that Ms. Martin only complained about the loss of her identification card on 11th March 2009.

[369] It can hardly be the case that a Court would utilize that sort of evidence to unseat a winning candidate and to declare that Mr. Walker was not duly elected. Accordingly, this court declines to accede to Mr. Nibb's request.

Photo Lists

[370] Here again, the Petitioner, as with the other Petitioners, seeks to have the Court determine that the First Respondent was not duly elected because of the use of the Photo Lists.

[371] The Court does not intend to repeat the analysis that was made in relation to the earlier two petitions save to say that the same legal principles and analysis are adopted here.

[372] Based on the totality of circumstances and the preponderance of the evidence in the Nibbs' petition and utilizing the same reasoning as in the previous petitions of Jonas and Simon, the Court concludes that:

(a) First, there was a beach of the election law insofar as the Photo Lists were used.

(b) Secondly, the Court holds that there was nevertheless substantial compliance with the election rule .

(c) The Court is clear that the use of the Photo Lists did not affect the result.

[373] In the premises, there is no basis on which this Court could void the election of Mr. Walker. To the contrary, the Court has no choice but to declare that Mr. Walker was duly elected.

FERNANDEZ PETITION/ST. JOHN'S RURAL NORTH

[374] The following persons are some of the witnesses who testified on behalf of the Petitioner: Mr. Fernandez (himself); Mr. Vere Bird III; Ms. Latoya Grant-Joseph; Ms. Kelsita Simon; Mr. Alfredo Diedrick; Mr. Hugh Marshall Snr and Ms. Loretta Barnes. Ms. Mistie Perry; Ms. Monica Dear; Mr. Jason Percival; Ms. Eugenie Thomas-Andrew testified for the First Respondent. Also giving evidence in this petition were Ms. Lilia Manwarren; Mr. Colin James; Ms. Gwendolyn Willock, Ms. Cecily King and Ms. Lorna Simon.

[375] Here again, the Court has given deliberate consideration to the evidence adduced in this petition and has paid particular regard to the documentary evidence. There was very little, if any, dispute between the evidence provided by the witnesses on behalf of the Petitioner and those who testified on behalf of the Respondents in relation to the hours at which the polling stations opened and closed. The Court had no difficulty in finding the following facts: There were two (2) polling areas; A and B, and three (3) polling stations: York's Community Centre; Wesleyan Junior Academy and Cedar Grove Primary School.

[376] The Court is satisfied that the polling at York Polling Station opened at 8:00 a.m. and closed at 6:00 p.m.; the Wesleyan Polling Station opened at 8:35 a.m. and closed at 6:00 p.m.; the Polling Station at Cedar Grove opened at 8:00 a.m. and closed at 6:00 p.m. Accordingly, the Court has no difficulty in concluding that in each of the polling stations voting began at least two hours after 6:00 a.m. The Court is equally satisfied that there were three thousand five hundred and fifty seven (3557) registered voters. It seems as though two thousand eight hundred and twenty seven (2827) ballot papers were cast (including nine (9) which were rejected). Seven hundred and fifty (750) voters were therefore unaccounted for.

[377] Turning its attention specifically to some of the evidence that was led, the Court examined the evidence of Mr. Alfredo Diedrick, Mr. Charles Henry Fernandez, Ms. Latoya Grant-Joseph (York's), Mr. Samuel Simon and Ms. Loretta Barnes, all of whom testified on behalf of the Petitioner.

[378] Let me say straight away that Ms. Loretta Barnes did not paint a very good picture under cross-examination. Her credibility was challenged and she appeared not to be a very convincing witness on some issues. The Court is satisfied that Mr. Diedrick went to vote at 6:30 a.m. and left a t 7:20 a.m. Despite the intense cross-examination of Learned Senior Counsel, Mr. Mendes, it is clear that he was unable to vote when he attempted to do so because the polling station was not open. The Court is satisfied that he left the polling station due to the fact that it was not open. The Court refuses to accede to the Petitioner's request to find that Mr. Diedrick was under an obligation to return to cast his vote. The thrust of Mr. Mendes, Learned Senior Counsel's cross-examination was to show that Mr. Diedrick could have returned later to vote. With the greatest of respect, that is beside the point. The crucial question is whether he was able to exercise his franchise when he went to do so. If he was unable to do so because the poll did not open on time, and was significantly late in opening, it is clear to me that is the end of any 'obligation' he has to present himself at the poll.

[379] The Court has paid similar regard to the evidence that was adduced on behalf of the Respondent. Ms. Mistie Perry gave the impression that she was testifying in order to support the party who called her. I did not find her to be as forthcoming as she could have been. She saw no one leave the line. The Court approaches her evidence with caution in view of the fact that its reliability is in question. Similarly, Mr. Percival, who testified to seeing long lines, told the Court that he did not see anyone leave the lines. Under intense cross-examination he admitted to seeing persons leave the lines only to get umbrellas or to shelter. The reliability of his evidence has to be dealt with carefully.

[380] Of note is the fact that Mr. Percival said that he saw all of this while he was sitting in the polling station and looking through the window. Here again the Court is unable to conclude that when he said that he saw no person leave the line, this can be relied on as proof that no person did in fact leave. In any event, given the circumstances under which the observations were made, the Court has no choice but to attach very little weight to this bit of evidence. It is acceptable that he was able to see that there were long lines; this is a

separate matter from saying that he was able to see who left the lines and returned or did not return as the case may be.

[381] The Court also considered the evidence of Ms. Eugene Thomas-Andrew of York's Community Centre. She said persons left the lines before voting commenced but they returned later on. Further, the witnesses who testified on behalf of the Petitioner and those who testified on behalf of the First Respondent such as Ms. Monica Dear; Mr. Jason Percival and Ms. Eugene Thomas-Andrew, all agreed that at the beginning of the day, persons who went to the polling stations to cast their votes were unable to do so. In addition, Ms. Latoya Grant-Joseph, a York's polling agent observed a fair amount of persons leave the lines without voting. Mr. Samuel Simon (the Presiding Officer at Wesleyan) saw about 40 - 50 people leaving in droves from the respective lines. Ms. Loretta Barnes also saw persons leaving. In relation to this aspect of the case, the Court believes her.

[382] The Court is satisfied based on the preponderance of evidence that a substantial number of persons who attempted to vote in the St. John's Rural North Constituency were unable to do so due to the late opening of the polling station. While there is evidence that some of the persons who were so affected returned to cast their vote, there is equally credible evidence that others did not or were not able to return in order to exercise their franchise. The Court, however, has no way of knowing how many such persons there were.

[383] Based on the totality of the evidence, the Court has no doubt that due to the late opening of the polls, some persons left the polling stations. There is equally no doubt that some of the persons who left the polling stations returned to vote. There is no clear indication as to how many such persons there were. Indeed, Mr. Alfredo Diedrick testified that he attended the York's Polling Station at 6:30 a.m. in order to vote and that he waited until 7:30 but was unable to do so because the polling station was not open. He had to leave and could not return. The Court notes the quality of evidence in relation to persons leaving the polling station. There is evidence, that is corroborated, that some persons were in the line voting

after 6:00 p.m. The Court accepts that this is so in relation to those persons who were waiting in the lines before 6:00 p.m.

[384] It is noteworthy that Mr. Fernandez painted a good picture and gave the impression of being forthright. He gave uncontroverted evidence that his party encouraged its supporters to vote early. Mr. Fernandez has asked the Court to pay regard to the evidence that there was a reduction in the percentage of votes cast in 2004. Compared with the 2004 election 79.03% votes were cast in 2009 as opposed to 91.1% in 2004. The Court accepts these statistics as correct.

Photo Lists

[385] Mr. Fernandez and his witnesses including Mr. Vere Bird III, testified in relation to the "Photo Lists" that were used. The Court, in its review of the evidence, turns its attention to the Petitioner's evidence. The Court reiterates that Mr. Fernandez gave his evidence in a clear and objective manner. He was very straightforward in saying that the main discrepancy in the "Photo Lists" and the "published register" was that the "Photo Lists" used electoral numbers whereas the "register" used sequential numbers. In addition, there were five (5) persons who he knew to have been deceased but all of whom appeared on both lists. Of lesser significance, there was one deceased person, Mr. Underwood, who appeared on the Register but not on the "Photo Lists." The Court notes the forthright manner in which Mr. Fernandez testified when he told the Court that he could not say that the use of the "Photo Lists," as opposed to the published Register for Elections made a difference to the result of the election in this case. The Court, however, is satisfied that some of the witnesses for the Petitioner exaggerated in their evidence about the difficulties they experienced by, for example, some of the pages of the "Photo Lists" being placed upside down.

[386] Notably, Mr. Vere Bird III, who testified on behalf of the Petitioner, did not paint a very good picture. In fact, his behaviour in Court left much to be desired. He was blatantly biased in favour of the person on whose behalf he testified. He spoke about difficulties he

experienced in relation to the "Photo Lists." While the Court accepts that a few of the pages of the "Photo Lists" were stapled upside down, the Court accepts that Mr. Bird exaggerated his evidence. This Court cannot place too much reliance on his evidence and is therefore unable to attach much weight to it. The Court, once again, holds that it was the late printing of the Photo Lists and their delivery that delayed the opening of the polls.

[387] In the interest of efficiency, similar comments made previously in relation to the use of the "Photo Lists" are here repeated. Also, the findings in relation to the "Photo Lists" are those made in the first two petitions dealt with in this judgment, namely, that they were improperly used on the day of the election, instead of the published Register for Elections. Be that as it may, the witnesses who testified on behalf of the Petitioner were unable to provide the Court with any difficulty of significance that was caused by the use of the "Photo Lists."

[388] The Court therefore accepts the submissions by Learned Senior Counsel, Mr. Mendes, and Learned Senior Counsel Mr. Martineau that there is no credible evidence led of any duly registered person not being allowed to vote and persons not registered being allowed to vote because of the use of the "Photo Lists." Similarly, as with the other petitions, and for the reasons stated there, the Court strongly deprecates the use of the "Photo Lists."

[389] In the interest of seeking to be efficient, the Court notes that the issues that arise in this petition are similar to those that were dealt with in the JONAS PETITION/ST. GEORGE and the SIMON PETITION/ST. JOHN'S RURAL WEST. The applicable principles are also the same. The reasoning of the Court will of necessity be the same insofar as the essential facts are not dissimilar. The Court does not propose to repeat or restate the principles and analyses except insofar as it becomes necessary to do so. In this regard, the Court restates that Elections in Antigua are required to be conduced in accordance with the Election Law. (See 37(1) of the Act). The facts as found by the Court were that the polling stations of York's, Wesleyan and Cedar Grove all commenced polling in excess of two hours after the time stipulated by the legislature. Indeed, the times of the

commencement of the polling varied between 8 am and 8:30 am. This resulted in a loss between 2 to 2 ½ hours at each polling station.

[390] Also, the Court found, as a fact, based on the evidence adduced by the Petitioner which was corroborated by the evidence of the First Respondent's witnesses (particularly during cross-examination) that some persons who went to vote left. One such person was Mr. Deidrick. Equally, the Court found as a fact that the electorate consisted of 3577 registered voters. Some 2827 ballots were cast (leaving a balance of 750 unaccounted for. The Court accepts that the difference in votes between the Petitioner and the First Respondent was 106 votes. The Court also accepts that an indeterminate number of persons who attempted to vote were unable to do so due to the late opening of the polls.

Breach of Election Law

[391] The Court proposes to address, in a similar vein, the same issues that were raised in the JONAS PETITION/ST GEORGE. (See Morgan v Simpson supra). Here again section 32(4) of the Election Law is brought into sharp focus. The Court asks: Was there a breach in the Election Law? The Court has no hesitation in answering this question in the affirmative. In so concluding, the Court here again applies the principles enunciated in Morgan v Sampson supra and Halstead v Simon supra. The same reasoning utilized by the Court in the JONAS Petition is applicable here. The poll ought to have commenced at 6 am. This did not occur at any of the three polling stations. This is prima facie a breach of the Representation of People Act namely, Rule 1(7). The fact that there was a breach of the Election Law does not automatically render the election void.

Substantial Compliance

[392] Based on Morgan v Sampson, this Court is required to determine whether, in spite of the breach, there was substantial compliance with the Election Law. The Court adopts the same principles that were applied in the Jonas Petition, in which it was clearly stated that it

is not axiomatic that the Court must declare an election to be valid on the basis of the breach of an election law.

[393] The Court maintains that it is for the Court to examine the totality of circumstances and based on the preponderance of evidence, including the hours that were lost in order to determine whether there was nevertheless substantial compliance with the Election Law. (See Kensington's case supra, Morgan v Sampson and Halstead v Simpson supra. The Court must ascertain what was accomplished despite the hours that were lost.

[394] While there is no burden of proof on the Petitioner, he has clearly lead incontrovertible evidence upon which the Court has already found that voters were denied their right to vote due to the late opening of the polls.

[395] The Court however, has no evidence on which it can conclude as to the exact number of persons who were disenfranchised by the late opening of the poll, or the number of persons who could have voted in the constituency of St. John's Rural North but did not do so because of the late opening. The evidence does, however, support the conclusion that there was a substantial percentage of the electorate that exercised its franchise.

[396] Indeed the Court accepts that despite the late opening, some 80.4% of the electorate voted. This is indeed a very high percentage. Relatedly, the Court has no doubt that this election could not be considered to be a sham or a travesty. Indeed, it was a real election by ballot and there was substantial compliance with the law in relation to Election. In a word, once again the Court is of the view that there was nevertheless substantial compliance with the Election Law.

Breach Affected the Result

[397] The Court must now go on to consider the final issue, namely: did the breach affect the result? In determining this issue, the Court pays regard to the fact that some persons were unable to vote as a consequence of the late polling. While there is no doubt that some of

the persons who went to exercise their franchise at 6 a.m. were unable to do so as result of the late opening of the poll, there is equally clear evidence that an indeterminate number of persons who attempted to vote at 6 am were unable to do so.

[398] The Court reiterates that it finds very instructive the principles enunciated in Morgan v Simpson. Insofar however, as the Court is unable to say how many persons were indeed unable to vote as a consequence of the breach of the election law and taking into consideration that the margin of victory is 106 votes, the Court is of the respectful view that the principle of law stated in Morgan v Simpson as applied in Edgell v Glover supra is applicable. These principles were subsequently approved an applied in Consodine v Didrichsen supra. The Court can do no more than apply those principles. The sum total of all of this is that the Court is unable to say that the breach did not affect the result. Accordingly, the Court has to declare the election void. Also, in this regard, see the judgment of Redhead J in Halstead v Simon supra.

[399] Accordingly, based on the preponderance of evidence, the Court holds that insofar as it is unable to conclude that the breach of the Election Law did not affect the result, the election of Mr. Maginley is invalid. The Court has no alternative but to grant the declaration sought.

Photo Lists

[400] For the sake of completeness, the Court would address the use of the Photo Lists which occurred in similar circumstances as the Jonas petition. As stated earlier, section 24 of the Act stipulates that:

> "The register for elections published under section 24(1) shall be used for any election held in a constituency to which that register relates."

Breach of law

[401] It has not been disputed and the Court has already found as a fact that the published Register for Elections was not used and was substituted by the Photo Lists. The first question to be determined is: Was there a breach of the election law by the use of the

Photo Lists? The Court unhesitatingly answers this question in the affirmative and states that the electoral officials by using the Photo Lists clearly breached the election law.

Substantial Compliance

[402] The Court considered whether the use of the Photo Lists, although in breach of the law, nevertheless represented substantial compliance with the election laws. The Court having found that the information contained in the Photo Lists included that stipulated by the legislature to be included in the published list of Register, is unable to say that there was not substantial compliance with the Act.

[403] This in no way negates the fact that this Court strongly deprecates the unlawful use of the Photo Lists, for the reasons fully stated above. Nevertheless, the Court is not of the respectful view that the election was a sham or travesty by the electoral officials not using the published Register for Elections.

[404] There are serious issues of legality and professionalism that arise in relation to the publication and use of the Photo Lists. However, the Court has no doubt, looking at the evidence in the round that it cannot accept that this resulted in the level of confusion as urged by the Petitioner. There was no credible evidence that the Photo Lists led to any confusion in polling even though it caused some inconvenience to the polling agents. Accordingly, there is no reliable evidence before the Court on which it can be properly concluded that the breach was so fundamental that it resulted in substantial non-compliance with the Election Law.

[405] The Court therefore holds that nevertheless, there was substantial compliance with the Election Law.

Breach Affected the Result

[406] Consideration must now be given to the final question. Did the breach affect the result? The Court answers this question very shortly by saying that based on the preponderance of evidence, there is no basis for the Court to conclude that the use of the Photo List affected the results. Equally, the Court has no doubt that the use of the Photo Lists did not affect the result. The case of Edgell v Glover supra and Consodine v Didrichsen supra are distinguished.

The Court therefore declines to accede the Petitioner's request to void the election on this basis. However, for the reasons stated earlier, the Court declares that Mr. Maginley was not duly elected.

COSTS

JONAS PETITION/St. George, SIMON PETITION/St. John's Rural West, NIBBS PETITION/Barbuda and FERNANDEZ PETITION/St. John's Rural North

[407] The Court proposes to address the issue of costs.

In the three above mentioned petitions, the issue of whether the Court should award costs to the Petitioners, all of whom have been successful, arises for consideration. Mr. Guthrie, Queen's Counsel insisted that they ought to be awarded their costs since they were put to the trouble and expense of having to bring these petitions which were resisted by all of the Respondents. Mr. Guthrie urged the Court to award costs against all three of the Respondents

[408] For his part, Learned Senior Counsel, Mr. Mendes implored the Court not to award costs against the First Respondents. He said that they were not responsible for the late start of the polling; neither did they have anything to do with the use of the Photo Lists instead of the Register for Elections. In addition, Mr. Mendes posited that insofar as Mr. Simon withdrew the allegations of bribery and undue influence that he made against Mr. Spencer and should be made to pay costs. This argument is opposed by Mr. Guthrie who

maintained that the circumstances did not give rise to the need for any special cost order to be made.

[409] Learned Senior Counsel, Mr. Martineau pursued the issue of costs on the basis that the Petitioners had failed to prove the allegations in their petition. He said that the Court should dismiss the petitions and award costs to all of the Respondents.

NIBBS/PETITION/Barbuda

[410] Mr. Nibbs' petition is different from the others insofar as the Respondent's have all prevailed in defending the challenge from the Petitioner. Here the issue arises as to whether the successful Respondents should each be awarded costs.

[411] Learned Senior Counsel, Mr. Mendes and Mr. Martineau Learned Senior Counsel argued that the successful Respondents ought to be awarded costs since they were required to defend the challenge to the conduct of the election in Barbuda and the declaration of Mr. Walker as the duly elected candidate. Learned Queen's Counsel Mr. Guthrie urged the Court not to award costs against the Petitioner.

[412] It is noteworthy that each of the litigants urged the Court not to make an order for costs against that litigant in the event that they were unsuccessful.

[413] Section 61 of the Representation of People Act (as amended) enables the Court to award costs of and incidental to the presentation of an election petition. Section 61 of the Act stipulates:

> "All costs of and incidental to the presentation of an election petition and the proceedings consequent thereon, except such as are by this Act otherwise provided for, shall be defrayed by the parties to the petition in such manner and in such proportions as the election court may determine; and in particular any costs which in the opinion of the election court have been caused by vexatious conduct, unfounded allegations or unfounded objections on the part either of the Petitioner or of the respondent, and any needless expense incurred or caused on the part of the Petitioner or respondent, may be ordered to be defrayed by the parties by

whom it has been incurred or caused whether or not they are on the whole successful."

[414] It is against that background that the determination must be made as to what is the appropriate order to do justice between the parties.

[415] The Court is cognizant of the fact that as a general rule costs follow the event, unless there are very good reasons for the Court not to adopt that course. The Court was provided with very helpful authorities that indicate that the successful party, in the election petition is usually awarded the costs. See Henry v Halstead [1991] 41 WIR at p 98.

[416] It is the law that the Court has discretion whether or not to award costs. This discretion must be exercised judicially. Should the Court be minded to exercise its discretion and not award the winning party its costs, there must be some valid ground on which to buttress that exercise of discretion.

[417] Equally, there are also cases in which our Courts have, in appropriate cases, refrained from awarding costs to the successful litigant in election petitions. See Ferdinand v Pinard supra, Odell Adams v Nellie Arthurton Civil Appeal No 2 0f 1987, Montserrat, Lewis v Harris supra. In addition, this Court in its ruling on previous applications by the Respondents to strike out several allegations of the petition did not award costs to the parties who had prevailed.

[418] There is no gainsaying that all of the four petitions have significant public interest element. They also serve to provide guidance to the Supervisor of Election and the Electoral Officials in relation to the conduct of elections. The petitions all raised several matters of national significance and indeed of public interest.

[419] Of great significance is the fact that the presentation of these petitions and their defence have resulted in the Court, it is hoped, giving much needed guidance as to whether it is legally permissible to use the "Photo Lists". The Court digresses to indicate that it had been used in the previous General Elections with apparent no objection. It therefore

behoves the Court to make it clear that the use of the Photo Lists is not in accordance with the Representation of People Act.

[420] Further, I am not of the view that any of the losing parties acting unreasonably in either defending or presenting the petition, as the case may be. Neither has there been any egregiously unfounded allegations on the part of either the Petitioners and the Respondents.

[421] The Court hopes that the Supervisor of Elections and the other election officials and the general public would be guided by this decision insofar that it holds that the legislatively sanctioned Register for Elections should be used in future elections. Whether a photo of the elector is to be included in such a list is a matter for others to decide.

[422] The petitions have also served to enable this Court to provide guidelines to the electoral officers in relation to the conduct of elections.

[423] Given the number of witnesses who testified in these petitions, the Court is of the view that Learned Counsel did extremely well and efficiently prosecuted and defended the petitions, in the allotted period of two weeks. The written submissions, very extensive as they were, proved extremely helpful to the Court.

[424] Relatedly, the Court hopes that all electoral officers, will take the necessary steps in the future to ensure that the people of this State are allowed to exercise their franchise in an electoral process befitting this great democracy.

[425] Against this background, I am of the considered view that the Court should order in these petitions, that each party bears its own costs. This seems - based on the totality of the circumstances – what the justice of the case warrants. Accordingly, the Court so orders.

CONCLUSION

JONAS PETITON/ST. GEORGE

[426] Based on the foregoing, the Court finds that the Petitioner, Mr. Dean Jonas, has succeeded on his petition insofar as the Court is unable to say that the breach of the election law did not affect the result. Accordingly, the Court declares the Parliamentary Election held on the 12th March 2009 in the constituency of St. Georges was invalid. The Court also declares that Mr. Jacqui Quinn Leandro was not duly elected.

SIMON PETITION/ST. JOHN'S RURAL WEST

[427] The Court is unable to say that the breach of the election law did not affect the result. Based on the above premises, Mr. St. Clair Simon has succeeded on his petition. Based on the preponderance of the evidence, the Court is unable to say that the breach of the election law, did not affect the result. The Court declares that the parliamentary election held on the 12th March 2009 in the constituency of St. John's Rural West were invalid. The Court further declares that Mr. Winston Baldwin Spencer was not duly elected.

NIBBS PETITION/BARBUDA

[428] In view of the premises, the Court holds that Mr. Arthur Nibbs has failed to prove the allegations made in his petition. Accordingly, the petition is devoid of merit. The Court therefore dismisses his petition. In addition, the Court declares that the Parliamentary Election that was held in the constituency of Barbuda on the 12th March 2009 was valid. Mr. Trevor Walker was duly elected, the Court so holds.

FERNANDEZ PETITION/ST. JOHN'S RUAL NORTH

[429] Based on the preponderance of the evidence, the Court holds that Mr. Fernandez has proven the allegations and has succeeded on his petition. Therefore, the Court holds that the Parliamentary Election that was held in the constituency of St. John's Rural North was invalid. Also, Mr. John Maginley was not duly elected.

COSTS

[430] Each party is to bear his own costs.

ORDERS

IT IS HEREBY ORDERED AND DECLARED AS FOLLOWS:

1. The Parliamentary Election dated 12th March 2009 for the constituency of St. George was invalid. Mrs. Jacqui Quinn Leandro, the First Respondent, was not validly elected or returned for that constituency.
2. The Parliamentary Election dated 12th March 2009 for the constituency of St. John's Rural West was invalid. Mr. Winston Baldwin Spencer, the First Respondent, was not validly elected or returned as a Member of Parliament for the said constituency.
3. The Parliamentary Election dated 12th March 2009 for Barbuda was valid. Mr. Trevor Walker; the First Respondent, was validly elected or returned as a Member of Parliament for the said constituency.
4. The Parliamentary Election dated 12th March, 2009 for the constituency of St. John's Rural North, was invalid. The First Respondent, Mr. John Maginley, was not validly elected or returned as a Member of Parliament for the said constituency.
5. Each party to bear its own costs.

The magnitude and importance of these elections petitions cannot be overstated. Therefore, it would be remiss of the Court if I did not place on record sincere gratitude to all Learned Counsel for their extensive research, comprehensive submissions and scholarly arguments, all of which were of tremendous assistance to the Court.

Louise Esther Blenman
High Court Judge