ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

HCVAP 2010/018

BETWEEN:

JACQUI QUINN-LEANDRO

Appellant

and

DEAN JONAS

Respondent

HCVAP 2010/019

BETWEEN:

JOHN MAGINLEY

Appellant

and

CHARLES HENRY FERNANDEZ

Respondent

HCVAP 2010/020

BETWEEN:

WINSTON BALDWIN SPENCER

Appellant

and

ST. CLAIR SIMON

Respondent

Before:

The Hon. Mr. Hugh A. Rawlins	Chief Justice
The Hon. Mde. Ola Mae Edwards	Justice of Appeal
The Hon. Mde. Janice George-Creque	Justice of Appeal

Appearances:

Mr. Douglas Mendes, SC, with him Mr. Kendrickson Kentish, Mr. Michael A.A. Quamina and Mr. Chaku Symister for the Appellant in Civil Appeal No. 18 of 2010
Mr. Russell Martineau, SC, him Ms. E. Patricia Simon-Forde for the Appellants in Civil Appeals Nos. 19 and 20 of 2010
Mr. James Guthrie, QC, and Mr. Anthony Astaphan, SC, with them Ms. Rika Bird and Ms. Samantha Marshall for the Respondents in Civil Appeals Nos. 18, 19 and 20 of 2010

2010: July 1 and 2;
October 27.

Election Petitions – Whether the trial judge erred in holding that late voting was properly pleaded – Whether the trial judge erred in finding, as a matter of fact, that there was no late voting by persons who joined the lines after the statutory closing time in one constituency - Whether the trial judge erred in holding that voting after the statutory closing time by persons who were in the lines at that closing time did not breach electoral law - Whether the judge erred in holding that the late opening of the polls breached electoral law - Whether the judge erred when she held that late opening of the polls did not result in substantial non-compliance with electoral law – Whether the judge erred in declaring the results of the elections in the contested constituencies invalid – Sections 24 and 32(4) of the Representation of the People (Amendment) Act, No. 17 of 2001 of the Laws of Antigua and Barbuda – Rule 1(7), 26(1), 36 and 40 of the Election Rules, No. 11 of 2002 of the Laws of Antigua and Barbuda

General Elections to elect members of Parliament for Antigua and Barbuda were held on 12th March 2009. Subsequently, election petitions were instituted by the 3 respondents in these appeals. They challenged the validity of the election of the 3 appellants in the constituencies in which they (the appellants) were returned as the elected members.

The petitioners claimed that electoral officials used 'photo lists' instead of the Register for Elections, as prescribed by law for the conduct of the elections. Difficulties which developed in the printing of these lists caused some polling stations to open late. Voting then continued to various times past the 6.00pm scheduled closing time in some polling stations in the St. George and St. John's Rural West constituencies. The petitioners claimed that the late voting breached Rule 1(7) of the **Election Rules**. This rule provides that polling in a general election shall be between the hours of 6.00am and 6.00pm on the day of the elections. The reasons for the late voting were disputed. However, the trial judge found that it occurred because persons, who were waiting in the line when the polling stations closed at 6.00pm, were permitted to vote after 6.00pm.

There were 4,414 registered voters in the St George constituency. 3,488 electors voted. There were 20 rejected ballots. 926 or about 20.9% of the registered voters in that constituency did not vote. 79.1% of the electorate voted as opposed to 92.26% in the previous General Elections held in 2004; a difference of 13.1%. The respondent/appellant, Jacqui Quinn-Leandro received 1,985 votes. The respondent, Dean Jonas received 1,483 votes. The margin of appellant Quinn-Leandro's victory was 502 votes.

There were 3,577 registered voters in the St John's Rural North constituency. 2,827 electors voted. There were 9 rejected ballots. 750 or about 20.97% of the voters registered in the constituency did not vote. 79.03% of the electorate voted as opposed to 91.10% in the previous General Election held in 2004; a difference of 12.07%. The respondent/appellant, John Maginley, received 1,462 of the votes cast. The petitioner/respondent, Charles Henry Fernandez, received 1,356 votes. The margin of appellant Maginley's victory was 106 votes. There was no late voting in this constituency.

There were 4,996 registered voters in the St John's Rural West constituency. 4021 electors or 80.48% of the electorate voted in the constituency, as opposed to 89.48% in the previous General Election held in 2004, a difference of 9% voted. There were 9 rejected ballots. 975 or about 19.52% of the electorate registered in the constituency did not vote. The respondent/appellant, Winston Baldwin Spencer, received 2,259 votes. The opposition candidate, Gail Christian, received 1,743 votes. The margin of appellant Spencer's victory was 506 votes.

The petitioners prayed for orders declaring the elections in the 3 contested constituencies invalid. They contended that the elections were conducted in breach of electoral law. They also insisted that the elections were not conducted substantially in accordance with electoral law. They further contended that the matters which they complained of affected the results of the elections in the 3 contested constituencies.

At the trial, the respondents to the petitions (the appellants in the appeal proceedings) insisted that late voting was never properly pleaded, or at all, in the petitions. They contended that this did not therefore arise as a triable issue. They also argued that the late opening of the polls and the use of the photo lists did not breach electoral laws. They contended that, in any event, their return as elected members of the legislature should not be invalidated because any breach of electoral laws that might have occurred did not

amount to substantial non-compliance with electoral law. They further contended that any breach of electoral law which may have occurred did not affect the results in the elections.

The trial judge found that the issue of late voting (voting after 6.00pm) was properly pleaded and therefore raised a triable issue. She held that Rule 1(7) of the **Election Rules** required the polls to open for voting to begin at 6.00am and to close at 6.00pm. She found, as a matter of fact, that there was no voting by any person who allegedly entered the lines in the St. John's Rural West constituency after 6.00pm. She further found, as a matter of fact, that there was late voting in the St. George and St. John's Rural West constituencies by persons who were in the lines by 6.00pm, but who were permitted to vote after 6.00pm. She held, however, that Rule 1(7) of the **Election Rules** permitted persons in line at 6.00pm to vote after 6.00pm because this was in keeping with an elector's constitutional right to vote pursuant to section 40 of the Constitution of Antigua and Barbuda. The judge accordingly held that the voting which took place after 6.00pm did not breach Rule 1(7).

The learned judge found that the use of the 'photo lists' breached section 25(1) [sic section 24] of the **Representation of the People (Amendment) Act**, No. 17 of 2001. However, she held that the use of the 'photo lists' did not result in an election which was a sham or a travesty so that it prevented substantial compliance with electoral laws. The trial judge held, additionally, that the use of the 'photo lists' did not affect the results in the contested constituencies.

Premised on her decision that Rule 1(7) of the **Election Rules** required the polls to open for voting to begin at 6.00am and close at 6.00pm, the judge held that the late opening of the polls in the 3 contested constituencies breached Rule 1(7). Notwithstanding this, she found that the late opening and the consequent late start of voting did not cause substantial non-compliance with the law as to elections, having regard to the amount of time during which the polls were open and the high percentage voter turnout in each of the contested constituencies so that the election was not a sham or a travesty. She found, however, that some persons were denied the right to vote due to the late opening of the polls in the 3 constituencies. She stated that although she was unable to say how many such persons there denied the right to vote in each case about 20% of the electors did not vote. However, the trial judge concluded that an indeterminate number of persons were disenfranchised because of the late opening of the polls. She was therefore not satisfied that the late opening did not affect the final result in each of the contested constituencies. She accordingly invalidated the election in the 3 constituencies, and ordered the parties to bear their own costs.

The respondents appealed, seeking to set aside the orders of the trial judge. The petitioners counter-appealed against the judge's finding of fact that there was no late voting in the St. John's Rural West constituency by voters who joined the line after 6.00pm. They also challenged the judge's findings that Rule 1(7) of the **Election Rules** permitted voting after 6.00pm by persons who were in the lines by 6.00pm. They also contended that the judge should have found that the effect of the breaches of electoral law, which occurred due to the late opening of the polls, late voting and the use of 'photo lists' were so

substantial that provided grounds for invalidating the elections, in any event, regardless of whether the results were affected or not. The petitioners/respondents seek orders dismissing the appeals with costs. They also seek costs of their petitions in the proceedings in the High Court.

Held: allowing the appeals, with the parties to meet their own costs in the appeal proceedings and in the High Court:-

1. The rule that a petitioner must raise an issue for trial in the pleadings is intended to permit a respondent and the court to know the issues that are to be tried and a respondent to prepare to meet those issues by counter-pleading. It is also to allow the parties to present evidence and counter-evidence on the issues to be tried. The trial judge erred in holding that late voting was properly pleaded because the issue was neither raised on the facts pleaded in the petitions nor by way of further particulars. Late voting was not therefore a live issue for the trial notwithstanding that the petitioners sought to bring it in subsequently in evidence that was presented for the trial.

   Donald Halstead v Henderson St. Clair Simon & Hubert Henry (1989) 1 O.E.C.S. L.R. 198 and dicta in **Charan Lal Sahu v Giani Zail Singh**, [1985] LRLC (Const.) 31; **Ethlyn Smith & Others v Delores Christopher and Others**, High Court Claims Nos. BVIHCV2003/0097 and 2002/0098 (23rd July 2003); **Ferdinand Frampton v Pinard and Others**, Claim No. DOMHCV2005/0149,150,151,152 and 154 (28th October 2005) and **George Prime v Elvin Nimrod and Others**, Claim No. GDVHCV2003/0551 (19th March 2004), considered.

2. Notwithstanding that the trial judge erred when she held that late voting was properly pleaded, the trial judge did not err, in any event, in finding, as a matter of fact, that there was no voting in the St. John Rural West and St. George constituencies by persons who joined the lines after 6:00pm on the day of the elections. The trial judge correctly found, as a matter of fact, that there was late voting in the St. George and St. John's Rural West constituencies by persons who were in the lines by 6:00pm. There is nothing in her judgment that suggests that these decisions were arrived at in a manner that breached the principles in **Benmax v Austin Motors Co. Ltd**. [1955] A.C. 370; [1955] 1 All E.R. 326.

   Dictum in **Golfview Development Limited v St. Kitts Development Corporation and Another**, Saint Christopher and Nevis Civil Appeal No. 17 of 2004 (20th June 2007), at paragraphs 23 and 24, applied.

3. The trial judge correctly interpreted Rule 1(7) of the **Election Rules** to require polling stations to open for voting at 6:00am and close at 6:00pm.

Based on her interpretation of Rule 1(7), the trial judge did not err when she held that the late opening of the polls in the 3 contested constituencies breached Rule 1(7) of the **Election Rules**.

New National Party of South Africa v Government of the Republic of South Africa. (1995) 5 BCLR 489,mentioned.

4. Notwithstanding that late voting was not properly pleaded, the trial judge did not err, in any event, when she held that voting after 6:00pm, in the St. George and St. John Rural West constituencies, by persons who joined the lines before 6:00pm on the day of the elections did not breach Rule 1(7) of the **Election Rules**. This is because by requiring "polling" to end at 6:00pm, Rule 1(7) does not preclude persons who are in the line at a polling station at 6:00pm from voting after 6:00pm. The trial judge was correct when she found that this interpretation of Rule 1(7) is in keeping with an elector's constitutional right to vote pursuant to section 40 of the Constitution of Antigua and Barbuda.

Gribbin v Kirker [1873] IR 30 and **The West Division of the Borough of Islington**, (1901) 5 O'M & H 120, distinguished.
Halstead v Simon, supra; **Bruno and Another v The Election Appeal Board of the Samson Cree Nation and Others**, 2006 FCA 249; **Randolph Russell v Attorney General of St Vincent and the Grenadines** (1995) 50 WIR 127 and **Sauve v Attorney General of Canada** [2002] 3 SCR 519, considered.

5. The trial judge did not err when she held that, notwithstanding that the late opening of the polls in the contested constituencies breached Rule 7(1) of the **Election Rules**, the breach did not result in substantial non-compliance with electoral law. None of the election in these constituencies was a sham or travesty, particularly given that about 80% of the registered electors voted in each contested constituency, notwithstanding the late opening of the polls.

Dicta in **Woodward v Sarsons** [1875] L.R. 10 C.P. 733; **Parliamentary Election for Fermanagh and South Tyrone** [2001] NIQB 36; **Kenneth Anthony Edgell v Ivan Glover and another** [2003] EWHC 2566; **Borough of Drogbeda** (1874) 2 O'M & H 201 and **Morgan v Simpson**; 1975] QB 151, applied.

The Borough of Hackney, Gill v Reed [1874] 2 O'M & H 77 and **Halstead v Simon**, supra, considered.

6. In all of the circumstances of the cases, the elections should not be declared invalid in any of the contested constituencies on the ground of substantial non-compliance with electoral law, whether or not breaches affected the results. The circumstances do not show that the breaches that occured in the conduct of the election were substantial in the sense that a reasonable person would think that the election in each contested constituency was a sham or travesty, particularly given the high percentage of the electorate that voted in each contested constituency.

7. The trial judge erred when she invalidated the election of Mrs. Quinn-Leandro, Mr. Maginley and Mr. Spencer on the ground that she was unable to say that the results in the St. George, St. John's Rural North and St. John's Rural West constituencies were definitely affected by the breach, and, accordingly, that she could not find that the result was not affected by the breach. Although the judge correctly applied the principle stated in **Morgan v Simpson**, which was followed in **Considine v Didrichsen** [2004] EWHC 2711 (QB) and applied in **Halstead v Simon**, the judge erred when she dismissed the statistical evidence adduced during the trial on the ground that she found them very unhelpful, without attempting to assess them. Since an election is for the purpose of determining the will of the registered electors, a court must attempt to determine that will, as far as it is possible, on an election challenge. On an assessment of the statistical evidence it is highly improbable that the late opening of the polls affected the results in the St. George and St. John's West constituencies. It was improbable that the late opening of the polls affected the result in the St. John's Rural North constituency. The trial judge should not therefore have found that the results in those constituencies were affected by the breach in electoral law and, thereupon, declaring the election of the appellants invalid.

   Dicta by Jack J and Newman J in **Considine v Didrichsen**, supra, explained; **Morgan v Simpson**, supra; **Halstead v Simon**; **Edgell v Glover**, supra; **Marshall v Gibson** Divisional Court, 14th December 1995 considered; **Fitzpatrick v Hodge** (1995) S.L.T. (Sh Ct) 118; **Miller v Dobson** (1995) S.L.T. (Sh Ct) 114, referred to.

JUDGMENT

[1] **RAWLINS, C.J.:** These appeal proceedings involve 3 consolidated appeals from a judgment delivered by Blenman J on 31st March 2010. In the judgment, the learned judge granted 3 election petitions in which Dean Jonas challenged the

election of Jacqui Quinn-Leandro to serve as the member for the St. George constituency; Charles Henry Fernandez challenged the election of John Maginley as the member for St. John's Rural West and St. Clair Simon challenged the election of Winston Baldwin Spencer as the member for St. John's Rural North. Dean Jonas and Charles Henry Fernandez were candidates in St. George and St. John's Rural West, St. Clair Simon was a voter in the St. John's Rural North constituency, which was contested by Gail Christian.

[2] In granting the 3 petitions, the learned trial judge declared that the 3 respondents to the petition were not duly returned as the elected representatives of the constituencies, which they contested. Accordingly, the judge declared their election invalid. The 3 respondents appealed and the respondent counter-appealed against some decisions as well. The appeals and counter-appeals will be considered against an essential background to the proceedings.

Background

[3] A General Election to elect members to serve in the Legislature of Antigua and Barbuda was held there on 12th March 2009. The 3 appellants were returned as members. Subsequently, election petitions were brought by the 3 respondents in these appeals, challenging the validity of the election of the appellants in the constituencies in which the appellants were returned.

[4] The challenges revolve around 3 related circumstances that arose during the elections. First, electoral officials used 'photo lists' instead of the Register for Elections, as prescribed by law. It is common ground that difficulties which developed in the printing of these lists caused some polling stations to open after the scheduled 6.00am. Voting then continued to various times past the 6.00pm scheduled closing time, in some stations in the St. George and St. John's Rural West constituencies, in breach of Rule 1(7) of the **Election Rules**.[1] Rule 1(7) of

[1] Representation of the People (Amendment) Act, No. 11 of 2002.

the **Election Rules** provides that voting in a general election shall be between the hours of 6:00am and 6:00pm on the day of the elections. However, the petitioners did not complain of late voting in the St. John's Rural North constituency.

[5] Many polling stations in the contested constituencies were affected by late opening and closing of the polls. The learned trial judge found, as a matter of fact, that voting in some of the stations continued for at least one hour after 6:00pm. The reason for the late voting was disputed. However, the judge found, again as a matter of fact, that the late voting resulted because persons who were waiting in the line when the polling stations closed at 6:00pm, were then permitted to vote.[2]

[6] There were 4,414 registered electors in the St George constituency. 3,488 electors cast ballots. The appellant, Jacqui Quinn-Leandro, received 1,985 votes and the respondent, Dean Jonas, received 1,483 votes. There were 20 rejected ballots. 79.02% of the electorate voted in the 2009 election, while 91.10% voted in the previous General Election in 2004. The margin of the appellant's victory was 502 votes. There was late voting in this constituency.

[7] There were 3,577 registered electors in the St John's Rural North constituency. The number of electors who cast ballots was 2827. These included 9 rejected ballots. 79.03% of the electorate voted as opposed to 92.26% in the previous General Election held in 2004. The appellant, John Maginley received 1462 of the votes cast and the respondent, Charles Henry Fernandez, received 1,356 votes. The margin of the appellant's victory was 106 votes. There was no late voting in this constituency.

[8] There were 4,996 registered voters in the St John's Rural West constituency. The number of electors who cast ballots was 4021. This included 9 rejected ballots. The number of registered voters who did not vote was 966 or about 19.52% of the electorate registered in the constituency. This meant that 80.48% of the electorate

[2] See paragraph 209 of the judgment.

voted as opposed to 89.48% in the previous General Election held in 2004, a difference of about 9%. The appellant, Winston Baldwin Spencer, received 2,259 votes and the opposition candidate, Gail Christian, received 1,743 votes. The margin of the appellant's victory was 506 votes. There was late voting (after 6:00pm) in this constituency. The reason for the late voting was disputed. However, the judge also found that the late voting was by persons who were waiting in line when the polling stations closed at 6:00pm, and they were permitted to vote.[3] The petitioner contended that there was also late voting by persons who joined the lines after 6:00pm in breach of Rule 1(7) of the **Election Rules**.

The petitioners' prayers

[9] The petitioners prayed for orders declaring the election in each contested constituency invalid. They contended that the elections were conducted in breach of electoral laws. They contended, additionally, that the elections were not conducted substantially in accordance with electoral laws and/or that the breaches affected the results contrary to section 32(4) of the **Representation of the People (Amendment) Act**.[4] This provision states, in effect, that no election shall be declared invalid because of a breach of election law if it appears to the Court that the election was so conducted as to be substantially in accordance with election law, and that the breach did not affect its result.

[10] More particularly, the petitioners complained that voting in various polling stations in each contested constituency commenced late in breach of Rule 1(7) of the **Election Rules**. The petitioners further complained that the electoral officials failed to use the published Register for Elections, and used a "photo list" instead, in breach of electoral law. The petitioners alleged that there was late voting in the St. George the St. John's Rural West constituencies in breach of Rule 1(7) of the **Election Rules**. The respondents alleged, further, that a number of persons actually entered the lines at polling stations after 6:00pm and voted in the St.

[3] See paragraph 259 of the judgment.
[4] No. 17 of 2001. These Acts will hereinafter be referred to as "the Representation of the People Act".

John's Rural West constituency, in breach of rule 1(7) of the **Election Rules**.

[11] At the trial, the respondents to the petitions insisted that late voting was not a triable issue because it was never properly pleaded, or pleaded at all, in the petitions. They argued that the late opening of the polls and the use of the 'photo lists' did not breach electoral laws. They argued, additionally, that, in any event, the judge should not have invalidated their return as the elected members in the contested constituencies. This, they said, was because, notwithstanding any breach of electoral laws that might have occurred in the conduct of the elections, there was substantial compliance with the laws. They also contended that any breach that may have occurred did not affect the result of the elections.

The High Court judgment

[12] The learned trial judge held that late voting was properly pleaded and was therefore a triable issue. She further decided that on a proper construction, Rule 1(7) of the **Election Rules** required voting to begin at 6:00am and end at 6:00pm. Accordingly, she held that the late opening of the polls in the contested constituencies breached Rule 1(7). She found, as a matter of fact, that there was no voting by any person who allegedly entered the lines in the St. John's Rural West constituency after 6:00pm. In so doing, the judge rejected the evidence tendered on behalf of the St. George and St. John's Rural West petitioners that persons joined the line after 6:00pm as not credible evidence. The judge however found, as a matter of fact, that there was late voting in the St. George and St. John's Rural West constituencies, but only by persons who were in the lines by 6:00pm who were permitted to vote after 6:00pm. She held, however, that Rule 1(7) of the **Election Rules**, properly construed, permitted persons in line at 6:00pm to vote after 6.00pm. She held that under Rule 1(7), Parliament intended persons who were waiting in line before 6.00pm to be permitted to vote if they had not done so at 6:00pm. In her view, any action to the contrary would have constituted a breach of an elector's constitutional right under section 40 of the

Constitution of Antigua and Barbuda. Accordingly, she held that the voting which took place after 6:00pm did not breach Rule 1(7).

[13] The trial judge further held that the use of the 'photo lists' breached electoral law, more particularly, section 25(1) [sic section 24] of the **Representation of the People Act**. However, she held that, in all of the circumstances, the use of the 'photo lists' did not result in a sham or a travesty that prevented substantial compliance with electoral law. She further held that the use of the 'photo lists' did not affect the results in the 3 contested constituencies.

[14] Notwithstanding that the trial judge found that the late opening of the polling stations and the consequent late start of voting breached Rule 1(7) of the **Election Rules**, she held that the late opening did not cause substantial non-compliance with the law as to elections. This, she said, was because of the high percentage of the voter turnout in each of the contested constituency bordering on 80% of the registered electors. In those circumstances she found that the election was not a sham or a travesty.

[15] However, the judge found that an indeterminate number of persons were denied the right to vote due to the late opening. In those circumstances, she held that in order to avoid invalidation she had to be satisfied that the late start did not affect the results. She stated that given the large percentage of persons who did not vote (20%), she was not so satisfied that the late opening did not affect the final result in each contested constituency. In those premises she invalidated the election in the 3 constituencies.

[16] The judge ordered the parties to bear their own costs in the High Court proceedings.

The appeals

[17] The respondents to the petitions, including the Supervisor of Elections and the Returning Officer for each contested constituency, appealed. However, only the elected representatives have actively pursued the appeals.

[18] The appellants seek orders setting aside the judgment and orders of the trial judge. Their central contention is that the trial judge erred when she invalidated their returns as elected representatives because she wrongly interpreted section 32(4) of the **Representation of the People Act**. In particular, they insisted that the judge erred when she invalidated their election on the ground that she could not say that the late opening of some polling stations did not affect the results. In other words, because she could not say that the results in the contested constituencies were not affected by the late opening. They also appealed against the judge's finding that the allegations of late voting and late closing of some polling stations were properly pleaded. They contended that there was substantial compliance with electoral laws and that any breach of such laws did not affect the final results in any of the contested constituencies. However, they did not challenge the decision that the use of 'photo lists' in the elections was a breach of the law as to elections.

[19] In their counter-notices, the petitioners challenge the judges finding of fact that there was no late voting in the St. John's Rural West constituency by voters who joined the line after 6.00pm. They also challenge the judge's decision that Rule 1(7) of the **Election Rules** permitted voting after 6:00pm by persons who were in the lines by 6:00pm. In this regard, they contended that the judge erred when she failed to hold that voting after 6:00pm by persons who were in line at 6:00pm breached electoral law. They relied, in particular, on **Morgan v Simpson**;[5] **Halstead v Henderson St Clair Simon & Hubert Henry**;[6] **Edgell v Glover**[7] and

[5] [1974] 3 All E.R 722.
[6] [1989] HC No 34 of 1989; (1989) 1 O.E.C.S. L.R. 198 (Antigua and Barbuda) (Redhead J).

Considine v Didrichsen.[8] In addition, the petitioners contended that the effect of breaches of the law as to elections which occurred due to the late opening and the late closing of the polls were so substantial that they provided grounds for invalidating the elections, in any event, regardless of whether the results were affected or not.

[20] The petitioners/respondents accepted the judge's decision that the use of 'photo lists' in the elections did not cause substantial non-compliance and did not affect the results of the elections, notwithstanding that it breached election law. In the premises, these issues will not be considered in this judgment.

[21] It initially seemed that Mr. Martineau, SC, had resiled from his position that the trial judge erred when she held that the use of the 'photo lists' was a breach of election law. He later maintained that, in substance, the 'photo lists' contained the information which the law requires to be in the Register for Elections with ID card numbers and photographs of voters, additionally. He urged us to find, in effect, that the use of the Lists was to support the Register for Elections and was therefore well intentioned. In the event that I misapprehended Mr. Martineau's intention, I would only briefly state that, in my view, the trial judge was correct in her decision that the use of the 'photo lists' breached election law, for the reasons which she gave.

[22] Mr. Martineau remained concerned with other findings which the trial judge made with respect to the use of the 'photo lists'. He insisted that the judge should not have found[9] that it was inexcusable, if not a sign of incompetence, for electoral officials to try to print the 'photo lists' on the day before the elections. He submitted that this finding was inconsistent with her prior finding[10] that the late publication of the 'photo lists' was the result of difficulties experienced with the

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[7] [2003] EWHC 2566.
[8] [2004] EWHC 2711.
[9] At paragraph 214 of the judgment.
[10] At paragraph 212 of the judgment.

printing machines and was not deliberate. In my view, notwithstanding that the first mentioned conclusion by the judge may be understandable, it is a conclusion that should only have been drawn if that question was made a central issue in the petitions and was canvassed as such. It was not.

[23] Mr. Martineau further submitted that the trial judge should not have found that electoral officials quite unwisely decided to use the 'photo lists' instead of the Register for Elections on election day. Mr. Martineau insisted that the uncontroverted evidence was that it was always the intention of the electoral office to use both the 'photo list' and the Register together as was done in previous elections. It is perhaps understandable, in my view that electoral officials intended, by using these lists, to buttress the integrity of the electoral process and to provide additional security for it. Notwithstanding that this intention was admirable, it remains that the 'photo lists' were not prescribed for use by law. It may be that if they were so prescribed, their use would have benefited from a certain, rationalized and planned process, which may have obviated the judge's comment. It is my view that the comment was not central to the resolution of the critical issues that arise on this appeal.

[24] In summary, then, the central task for this court is to adjudicate upon the appellants' prayers for orders setting aside the judge's decisions declaring their election invalid, and to determine the petitioners/respondents prayers for orders dismissing the appeals with costs. It was not clear whether the petitioners/respondents also seek costs in their petitions in the proceedings in the High Court.

The issues

[25] The issues that arise for consideration on the appeals and counter-notices revolve primarily around the late opening of the polls and late voting. I shall first consider whether late voting was properly pleaded. Logical development dictates that I

then consider the other issues that arise from late voting. However, I shall then consider the issues that arise from the late opening of the polls; return to the issues that revolve around late voting, and then to the questions whether any breach or breaches mean that the elections in any of the contested constituencies was not conducted substantially in compliance with the law as to elections. I shall then consider whether any breach or breaches affected the results of the elections so as to invalidate the results.

[26] From the perspective of the foregoing suggested order, I hereby summarize the issues as follows, in the order in which they will be considered in this judgment:

(1) Did the learned trial judge err when she held that the issue of late voting (after 6:00pm) in polling stations in the St. George and the St. John Rural West constituencies was properly pleaded?
(2) Did the learned trial judge err when she held, as a matter of fact, that there was no late voting in the St. John Rural West constituency by persons who joined there after 6:00pm on election day?
(3) Did the learned trial judge err when she held that the late opening of polling stations (after 6:00am) on election day in the contested constituencies breached Rule 1(7) of **the Election Rules**.
(4) Did the judge err when she held that voting after 6:00pm by persons who were in line at 6:00pm did not breach Rule 1(7) of **the Election Rules**?
(5) Did the judge err when she held, further, that notwithstanding that the late opening of the polls breached Rule 1(7) of **the Election Rules**, the elections were conducted substantially in compliance with electoral law?
(6) In any event, were the elections in each contested constituency conducted in a manner that was not substantially in compliance with election laws in all of the circumstances, so as to render the elections invalid, whether or not the results were affected?
(7) Did the learned judge err, in any event, when she invalidated the elections on the ground that she could not say that the results in the contested constituencies were not affected by the late opening of the polling stations and the consequent late start in voting in the contested constituencies?
(8) Costs.

Was late voting properly pleaded?

[27] This issue concerns the St George and St John's Rural West constituencies, but not the St John's Rural North constituency. It will be recalled that the trial judge found that there was late voting in St George and St John's Rural West by persons who joined the lines before the scheduled 6:00pm closing of the polls. This was not challenged in these appeals. However, Mr. Guthrie, QC, also raised the issue of late voting from another perspective at the trial in relation to the St. John Rural West constituency. He asserted that some persons who joined the lines after 6.00pm were permitted to vote after 6:00pm, in breach of Rule 1(7) of the **Election Rules**. The trial judge did not find this proved on the evidence. The question whether she erred in so finding will be considered after the present pleading issue is determined.

[28] It suffices for present purposes to set out Rule 1(7). It states as follows:

> "(1) The proceedings at the election shall be conducted in accordance with the following provisions:
>
> …
>
> (7) 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."

[29] At the trial, Mr. Mendes and Mr. Martineau insisted that late voting was not a live issue for consideration because it was not properly pleaded, or at all, by the petitioners, as procedural law principles required. However, the learned trial judge stated as follows:[11]

> "Having examined the pleaded allegations, this Court is of the respectful view that the complaint of late votes can fall properly within the allegations as pleaded in the petition."

[30] At the appeal hearing, Mr. Mendes and Mr. Martineau complained that the trial judge erred when she rejected their submission that late voting was not pleaded.

[11] In paragraph 223 of the judgment.

They asserted that the error is reflected in the fact that the judge dismissed their submissions on this pleading point in a single sentence without providing any analysis or reason for her statement. They complained, further, that the judge did not identify the statements in the petition which in her view encompassed the pleading of late voting. They argued that she did not show where and how it was pleaded in the petitions. These latter assertions are correct. This court must therefore now examine the pleadings in order to determine whether the issue of late voting was properly pleaded, in the light of the applicable principles.

Principles on pleading

[31] The basic principles on pleadings in elections cases are uncontroversial. As in civil cases, generally, the purpose of pleadings is to identify the issue or issues that will arise at a trial. This is in order to avoid the opposing parties and the court being taken by surprise.

[32] It was on this basis that Mr. Guthrie, QC, and Mr. Astaphan, SC, re-iterated relevant statements which these courts have consistently made in election cases. According to these statements of principle, cases in which an election is challenged must be heard expeditiously. The pleadings must be precise and disclose a cause or causes of action. Unless statute otherwise provides, an election petition, and any amendments thereto, must be perfected within the time limited for filing the petition. The rationale is that it would otherwise defeat the underlying virtue of the mandatory nature of elections legislation, which is intended to ensure that the validity of the election of a member of the legislature is dealt with expeditiously, in the public interest. Voters need to know who their lawfully elected representatives are as soon as possible after an election. These principles were stated, for example, in **Ethlyn Smith and others v Delores Christopher and Others**,[12] in **Ferdinand Frampton v Pinard and Others**,[13] and

[12] High Court Claims Nos. BVIHCV2003/0097 and 2002/0098 (23rd July 2003), at paragraph 44 [Rawlins J).
[13] Claim No. DOMHCV2005/0149, 0150, 0152 and 0154 (28th October 2005), at paragraphs 14, 16 28, 29

in **George Prime v Elvin Nimrod and Others**.[14]

[33] In **Ferdinand Frampton**, it was noted[15] that section 45(3) of the **Representation of the People Act** of Antigua and Barbuda,[16] provides that petitions may be amended with leave. It is noteworthy that, by its express terms, section 45(3) permits amendments only to plead corrupt practices. The 2002 **Representation of the People Act** of Antigua and Barbuda provides that an election petition should be filed within 7 days of the results that are challenged. That period is 21 rather than 7 days in other jurisdictions in the Eastern Caribbean.

[34] Mr. Mendes and Mr. Martineau submitted that the rules of pleading are strictly applied in election cases with respect to the time for filing and perfecting a petition, as well as to precision in pleading. Learned counsel cited as authority the decision of the Indian Supreme Court in **Charan Lal Sahu v Giani Zail Singh**[17] when that Court stated as follows:[18]

> "In these petitions, pleadings have to be precise, specific and unambiguous so as to put the respondent on notice. The rule of pleadings that facts constituting the cause of action must be specifically pleaded is as fundamental as it is elementary…The importance of a specific pleading in these matters can be appreciated only if it is realized that the absence of a specific plea puts the respondent at a great disadvantage. He must know what case he has to meet. He cannot be kept guessing whether the petitioner means what he says… They [the petitioners] cannot be allowed to keep their options open until the trial and adduce such evidence of consent as seems convenient and comes handy. That is the importance of precision in pleadings, particularly in election petitions."

[35] Counsel also referred to **Frampton v Pinard**, in which the following was stated:[19]

> "There is now a general principle of practice in civil proceedings, which is

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and 30, [Rawlins J).

[14] Claim No. GDVHCV2003/0551 (19th March 2004) [Pemberton J].

[15] At paragraph 30 of the judgment.

[16] Cap. 379 of the Revised Laws of Antigua and Barbuda 1990.

[17] [1985] LRLC (Const.) 31. See also Mitbilesh Kumar v Venkataraman (1989) LRC (Const. 1); Hari Shanker Jain v Gandhi [2002] 3 LRC 562, paras 22-24.

[18] At p. 42d-g.

[19] By Rawlins J at paragraph 62 of the judgment.

> also applicable to election petitions, that a person who institutes an action should plead sufficient material facts to create a cause of action. A respondent must know what the case against which he or she must defend. Evidence need not be pleaded, because that will come from the affidavits, and cross-examination thereon or by oral evidence."

[36] Mr. Guthrie and Mr. Astaphan agree that the purpose of pleadings is to identify the issues, and to avoid opposing parties and the court from being taken by surprise. They also agree that the statements in **Charan Lal Sahu v Giani Zail Singh**, **Ethlyn Smith** and kindred cases underline the general principles, which they accept are of general application to election petitions.

Evidence of late voting

[37] Mr. Mendes and Mr. Martineau pointed out that although late voting was not specifically pleaded in the 2 petitions, the respondents Jonas and Simon subsequently sought to adduce evidence to the effect that it is unlawful to permit anyone to vote after 6:00pm. I note, for example, that Mr. Jonas stated,[20] in his witness statement that the returning officer arrived at Potters School at about 11:00am and that voting commenced shortly thereafter and did not cease until after 8:00pm. Mr. Jonas' witness, Bethan Marajah, stated in his witness statement[21] that he worked at Potters School until approximately 8:30pm when the voting ended. At 6:00pm, Ms Irene Lake, the presiding officer, told the police officer to stand behind the last person in the line. When the police officer reached the entrance of the polling station they closed off voting. No one else was allowed to vote. Voting ended at about 8:00pm.

[38] I note, further, that in the Simon/St John's Rural West petition, Cicely Joseph referred to late voting in her witness statement.[22] In her witness statement, Gail

[20] At paragraph 11.
[21] At paragraph 6.
[22] At paragraph 9.

Christian also referred to voting taking place after 6:00pm.[23] Ramon Gomez; Adolfo Pena; Lovelace Christopher; Ynes James; Esau Harrigan, and Bernadette Ephraim made similar statements.

[39] There were even statements by witnesses for the appellant/respondent, Quinn-Leandro, which spoke to late voting. Elaine Colbourne stated:[24]

> "The voting finished between 7:30 p.m. and 8:00 p.m. This was because every voter who was in the line at 6.00 p.m. was allowed to stay in line and vote…. I did not see anybody arrive after 6:00 p.m. and attempt to join the line to vote."

Sylvester stated as follows, in his witness statement:[25]

> "The voting finished between 7:30 p.m. and 8:00 p.m. in order to give those in the line before 6:00 p.m. the opportunity to vote. … I did not see anybody arrive after six o'clock and attempt to vote."

There were also statements to similar effect in the witness statements of Edmeade Graham and Ashley Galloway.[26]

[40] In the Simon/St John's Rural West petition, the appellant/respondent, Spencer, witness, Phyllis Proctor, stated in her witness statement,[27] that there was late voting. Witness, Janice Constant, made similar statements.[28] So did witness Itha Anthony;[29] Jason Meade,[30] and Jasmine De Silva.[31] The question, though, is where was late voting pleaded?

The Jonas/St. George petition

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[23] At paragraph 9.
[24] At paragraphs 5 and 6.
[25] At paragraph 5.
[26] At paragraphs 5, respectively.
[27] At paragraph 9.
[28] At paragraph 8 of her witness statement.
[29] At paragraph 4 of her witness statement.
[30] At his paragraph 7 of his witness statement.
[31] At paragraph 7 of her witness statement.

[41] Mr. Mendes submitted that the evidence on late voting is of no moment because it is plain that the question of persons voting after 6:00pm was not pleaded at all in the St George (Jonas) petition. In response, Mr. Guthrie insisted that the issue was raised in paragraphs 8.2, 8.3 and 8.4 of the Jonas petition. Mr. Mendes asked this court to note that paragraph 8.2 of that petition simply states the times between which the polls should be opened. Paragraph 8.2 of that petition states as follows:

> "The Election Rules scheduled to the Act provide that in the case of a general election, polling shall take place between the hours of 6am and 6pm."

[42] Mr. Mendes further noted that paragraphs 8.3 and 8.4 of the St. George (Jonas) petition only pleads material facts or allegations on the late opening of the polls. He insisted that they make no allegation of persons voting or joining the lines at the polls after 6:00pm. Paragraphs 8.3 and 8.4 state as follows:

> "8.3. On the day of the election none of the polling stations in the Petitioner's constituency of St. George opened at 6 a.m. and in some cases did not open for several hours, until 8 a.m. The polls in the three constituency polling districts only opened as follows: Polling station A (New Winthorpes) opened at 8;50am. Polling station B (Pigotts) opened at 8:30 a.m. Polling station C (Potters) was opened at 11:15am. This represented a substantial reduction in the time available to the voters to cast their votes.
> 8.4. As a result of the late opening of the polling stations, and the reduction in the time available, substantial numbers of voters (some of whom had queued since 4:30 a.m.) were prevented from casting their votes. For example, many persons in Potters (polling station C) work at the local hotels, and as domestic helpers would have been unable to meet the cost of transport to return to [P]otters to vote before 6pm. This is to be contrasted with the many government workers who did not lose any pay and so were able to remain."

[43] It is clear to me that these are allegations concerning the late opening of the polls, with the consequent reduction in the time which electors had available to them to vote. The consequence of the late opening, according to these statements, is that many persons, some of whom had queued for long periods, were unable to vote. These statements do not allege that there was late voting in breach of electoral

law. I discern no other statement in the petition that refers to late voting as a complaint or allegation in and of itself. In my view, therefore, the statements to which Mr. Guthrie refers as alleging late voting in the Jonas/St. George petition, do not allege late voting or the unlawfulness of late voting.

Pleading late voting in the Simon/St. John Rural West petition

[44] Mr. Martineau, SC, pointed out that the pleadings were similar to those contained in the Jonas petition, except that the Simon petition contains paragraph 9.5 in addition. This paragraph states as follows:

> "Further irregularities took place after 6:00 p.m. when certain persons only were permitted to vote. Many were not and in any event those who were permitted were not properly able to do so according to the provisions of the Act and the Election Rules."

[45] Mr. Martineau submitted that this pleading was not a complaint that the voters were permitted to vote after 6:00pm. Rather, he insisted, this was an allegation that some persons were not permitted to vote while others were permitted to do so after 6:00pm. Counsel further submitted that there was no plea that those who were permitted to vote after 6:00pm should not have been permitted to do so, in breach of Rule 1(7) or other electoral law.

[46] I do not think that paragraph 9.5 of the Simon petition provides the precise, specific and unambiguous notice of the allegation which the respondent should have been given to permit him to meet the issue of late voting in the trial. It does not appear on its wording, that paragraph 9.5 was a complaint that persons voted after 6:00pm in breach of elections law. Rather, as Mr. Martineau maintained, in effect, the paragraph alleges that some persons were permitted to vote after 6:00pm, while others were, perhaps, discriminatorily or unfairly not permitted to vote after that time. It is from this perspective that I agree with counsel that paragraph 9.5 presents a contrast from the pleading on the issue of late voting

contained in the petition in **Halstead v Simon et al**,[32] which stated as follows:

> "(b) 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 6 p.m. and until the hour of 9 p.m. on election day.'

The **Halstead** formulation clearly and precisely raised the issue of late voting for consideration, as the principles require. It seems to me that a clear formulation in similar terms would have put the issue of inadequate or improper pleading beyond question.

[47] It is noteworthy that solicitors for appellant Spencer requested further information/particulars of paragraph 9.5 of the St John's Rural West (Simon) petition. The request read as follows[33]:

> "Under paragraph 9.5
> Of the allegation that "after 6 pm certain persons only were permitted to vote", identify the persons who were permitted to vote after 6pm by stating their names and addresses.
> Of the allegation that many persons were not permitted to vote, identify the persons who were not permitted to vote by stating their names and addresses.
> Of the allegation that those persons who were permitted to vote" were not properly able to do so according to the provisions of the Act and the Election Rules", identify the persons referred to by stating their names and addresses, state in each case the ways in which they were not properly able to vote and identify the provisions of the Act and the Election Rules referred to."

[48] In answer, solicitors for petitioner/respondent Simon stated as follows:[34]

> a) The petitioner cannot and need not give the names and addresses of all those concerned. This is a matter of evidence.
> b) The names of some of the persons either permitted or not permitted to vote after 6.00pm are: Ynes James, Gray's Farm, St John's Antigua.

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[32] (1989) 1 O.E.C.S. L.R. 198, at page 202.
[33] Request for further information, Core Bundle Volume II, page 178.
[34] Petitioner's response to First respondent's request for further information, Core Bundle, Volume II, pages 54-56.

c) The names of the persons either permitted or not permitted to vote after 6.00pm are stated in (b) above.

d) The Representation of the People (Amendment) Act 2002, First Schedule Election Rules, Part II, Rules 8 states:
[Deals with the publication of the notice of elections by the returning officer].
The persons stated above, among others unknown but who were observed by, among others, Adolfo Pena, Ramon Gomez and Ron Martin, were not able to vote during the hours of 6.00am to 6.00pm.

e) [Makes reference to Election Rule 26(1) dealing with the notice of polling times].

f) [Makes reference to Election Rule 31(1) dealing with the provision of ballot boxes and materials to be provided to polling station].
The persons stated above were not able to vote during the hours of 8.00am and 6.00pm.

[49] The information/particulars provided on behalf of petitioner Simon identified a number of rules which persons who voted after 6:00pm allegedly did not comply with. It is noteworthy, however, that none of those rules prohibited voting after 6:00pm. Neither the petition nor the further particulars contained a specific allegation that there was voting after 6pm that violated rule 1(7) of the **Election Rules**. Notwithstanding this, Mr. Guthrie asked us to find that late voting was indeed a live trial issue, mainly because, in any event, the appellants were not taken by surprise. This is a fall back position by Mr. Guthrie. Where does it lead?

Mr. Guthrie's reserve position

[50] In apparent realization that late voting was not pleaded in the petitions, Mr. Guthrie urged us to adopt a modified approach to pleadings in these types of cases. Accordingly, learned counsel suggested that we might find some guidance as to the approach which we should adopt by looking at Rule 4(1)(d) of the English **Election Petition Rules**. Mr. Guthrie submitted that this sub-rule requires a petition to state the grounds on which relief is sought, setting out with sufficient particularity the facts relied on but not the evidence by which they are to be

proved. Counsel submitted that this provision plainly does not allow for each and every sub-allegation which might be pleaded to be included in a petition. Counsel insisted that the petitions were pleaded and pursued on these principles.

[51] Mr. Guthrie and Mr. Astaphan submitted that it was always made plain that the petitioners relied on breaches of those aspects of the law as to elections which provide for voting hours. Thus, counsel asserted that, in the Jonas petition, Rule 1(7) was pleaded in paragraph 8.2, and at paragraphs 9.1 and 9.5 of the Simon petition. He said that they pleaded to the effect that irregularities took place after 6.00pm when certain persons only were permitted to vote. It seems clear to me, however, that these paragraphs simply state the scheduled opening and closing hours of the polls. The complaint is that some persons were permitted to vote after 6:00pm while others were not, in breach of electoral law.

[52] Mr. Guthrie and Mr. Astaphan further submitted that the court should take notice of the fact that counsel for the appellants accepted, in paragraph 1 of their written submissions, that the late voting which took place resulted from late opening of the polls. Counsel submitted that it would be absurd to limit the court's examination of what took place to one end of the day and not be concerned with its result at the other end of the day. Mr. Guthrie suggested that it was sufficient that a breach of Rule 1(7) was alleged in other parts of the petition, which did not speak specifically to late voting. He submitted that this was sufficient to render voting a triable issue.

[53] Alternatively, Mr. Guthrie urged us to hold that, in any event, some allegations will be unclear until the evidence gathering process is completed. He buttressed this submission by reference to the fact that in **Frampton v Pinard**, as well as in the present case, the court directed the parties to file witness statements. Learned counsel noted that the parties in the present cases were required to file witness statements, which were filed and served almost 2 months before the scheduled commencement of the hearings. Counsel submitted that the requirement that witness statements be provided gives a further safeguard against the risk that the

opposing parties were taken by surprise by the issue of late voting.

[54] Further, Mr. Guthrie submitted that the appellants themselves dealt with the issue of late voting in their own witness statements to assert that late voting was not in breach of the law if the voters concerned were in the line by 6:00pm. Accordingly, Mr. Guthrie maintained that the appellants could not have been taken by surprise by the issue of late voting.

[55] These are interesting submissions. In my view, however, the effect of accepting any of them would be to introduce an unacceptable uncertainty and laxity into pleadings as to henceforth blur the boundaries for the parties and the court. It would mean that from henceforth, notice of an issue for trial would arise not from the pleadings but from the evidence as it unfolds and even from the submissions by counsel. Ultimately, issues for trial would unfold during the course of trial or after the trial if the trial judge orders counsel to make closing submissions or to file further written submissions.

[56] Further, in the alternative, Mr. Guthrie and Mr. Astaphan suggested that the court should relax the rules of pleading with precision in election cases which do not involve fraud or dishonesty. Accordingly, counsel urged us to draw a distinction between cases in which irregularity in the conduct of the elections as to voting hours is alleged and those in which there are allegations of electoral offences such as bribery on the part of a candidate. Learned counsel suggested that the court could insist on greater particularity and precision in pleadings in the latter cases because a respondent may then be at risk of criminal sanctions. I merely observe that on present principles, any allegation approaching dishonesty in any civil case, electoral or otherwise, must be clearly and specifically pleaded with a level of precision that is not required in pleading a mere irregularity. However, the irregularity must be clearly raised in the pleading.

[57] Mr. Guthrie further submitted that the court cannot close its eyes to the legal

consequences of undisputed facts, on the basis of a technical pleading point, especially where petitioners allege no prejudice. He commended the approach in the case **Sonia Grant v Sutherland Madeiros and Others**.[35]

[58] **Grant v Madeiros** is a case from Bermuda. It arose because the petitioner, Grant, challenged the election of the respondent, Madeiros, as Mayor of the city of Hamilton, Bermuda. Ground CJ noted[36] that the rules of pleading are strictly applied to election petitions and that changes or amendments are not allowed to petitions after the time for filing a petition has expired. The Chief Justice stated, in effect, that he could have dismissed her case on a pleadings point. However, he then decided that lest it was thought wrong to dispose of the case on the pleading point alone, he would go on to consider the merits of the case. He did so and dismissed the petition on its merits.

[59] Mr. Guthrie enjoined us to remember that election petitions are not ordinary litigation *inter partes* because they affect the electorate as a whole and not just the parties. While he accepted that the respondents were entitled to know the case against them in order to meet it, he submitted that issues should not be removed from the court's consideration by insistence on technical points of pleading. This, he said, would not promote the just resolution of the dispute. It would also be contrary to the interests of the parties and the electorate, who are entitled to an election according to law and to a true result. I merely point to my observations in paragraphs 55 and 56 of this judgment. I am confirmed in the view that an issue for trial must be clearly raised on the pleadings.

[60] Inasmuch as the issue of late voting was not clearly raised in the petitions, the trial judge erred when she so found and made it a live issue. This conclusion bears out the correctness of the approach by Redhead J, (as he then was) when a similar procedural issue arose in **Halstead**. During the course of the trial,

[35] [2007] Bda. L.R. 21.
[36] At paragraph 19 of the Judgment.

evidence emerged which disclosed that the presiding officer voted for a number of persons whom he said were nervous. It was argued on behalf of the petitioner that since nervousness was not a form of physical incapacity within the Election Rules, what the presiding officer did amounted to an irregularity which could invalidate the election. Counsel for the respondent countered that since this issue was not pleaded, the court would, in effect, be permitting the petitioner to rely on new facts which were not pleaded, although the time for amending the petition had long passed. Redhead J agreed with the latter contention. He ruled that the petitioner could not rely on the new evidence adduced at the trial.[37] His approach was correct and informs the approach which this court would take. In the premises, I would allow this ground of the appeals by Mrs. Quinn-Leandro and Mr. Spencer.

[61] Notwithstanding this conclusion, however, I shall, based upon Mr. Guthrie's suggestion, consider the merits of the issue of late voting as it arose in these cases. This is not however intended to signal a change in the principles of the law as to pleadings in election cases within the jurisdiction of this court.

Late voting

[62] The evidence at the trial clearly discloses that there was voting after 6.00pm at various polling stations in the St. George and St. John's Rural West constituencies. The question of late voting by persons who joined the lines after 6.00pm was raised in relation to the St. John's Rural West constituency. The learned trial judge found, as a matter of fact, that there was late voting in the 2 constituencies but only by persons who had entered the lines by 6:00pm. The trial judge found, as a matter of fact, that late voting by persons who joined the lines after 6:00pm was not borne out by the credible evidence. Respondents Jonas and Simon challenge this finding of fact in their counter-notices.

[37] See O.E.C.S. Law Reports, Volume 1, at page 249.

[63] It was also seen that the judge held that the late voting did not breach Rule 1(7) of **the Election Rules**. Respondents Jonas and Simon also challenge this finding in their counter-notices. I shall now consider the counter-appeal against the finding of fact referred to in the foregoing paragraph first. Later in this judgment, I shall consider the counter-appeal on the question whether the judge erred in holding that late voting did not breach Rule 1(7).

The basic principles on appeal from fact-finding

[64] In **Golfview Development Limited v St. Kitts Development Corporation and Another**,[38] this court restated the settled principles that are applicable where an appellant seeks to impeach fact-finding by the trial judge. The basic principles are that an appellate court will not impeach the finding of facts by a first instance or trial court that saw and heard witnesses give evidence, except in certain very limited circumstances. An appellate court may, however, interfere in a case in which the reasons given by a trial judge are not satisfactory, or where it is clear from the evidence that the trial judge misdirected himself. Where a trial judge misdirects himself or herself and draws erroneous inferences from the facts, an appellate court is in as good a position as the trial judge to evaluate the evidence and determine what inference should be drawn from the proved facts. Where therefore there is an appeal against the finding of facts, the burden upon the appellant is a very heavy one. An appellate court will only interfere if it finds that the court of first instance was clearly and blatantly wrong, or, as it is sometimes more elegantly stated, exceeded the generous ambit within which reasonable disagreement is possible. These statements of principle on appeals from the fact finding of a trial court are often referred to as the *Benmax principles*, from the *locus classicus*, **Benmax v Austin Motors Co. Ltd**.[39]

[38] Saint Christopher and Nevis Civil Appeal No. 17 of 2004 (20th June 2007), at paragraphs 23 and 24.
[39] [1955] A.C. 370; [1955] 1 All E.R. 326.

[65] The foregoing statements suggest that it is necessary to review the manner in which the trial judge arrived at her decision that there was no late voting by electors who entered the lines after 6pm on election day. Basically, the judge found that the evidence that persons entered the lines after 6:00pm to vote, in particular the evidence of Mr. Pena and Mr. Gomez, was not credible. She further stated that although Ms. Gail Christian was forthright with the court, much of her evidence was hearsay and inadmissible.

The judge's reasons for the finding of fact

[66] The judge reasoned this aspect of the case in her judgment in this way:[40]

> "[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

[40] At paragraphs 259-261.

> 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."

Submissions

[67] Learned counsel for respondent Simon submitted that the judge should have found that some part of the late voting in John's Rural West was done by persons who joined the line after 6:00pm. This, he said, arises from the evidence that persons so joined the lines, and given the extent to which late voting took place.

[68] Mr. Guthrie and Mr. Astaphan referred to the evidence of witnesses on behalf of the respondents, Gomez and Pena, who said that they saw "about 100 people" entering the polling station between 6:00pm and 8:00pm through "a small gate on Federation Road" and that some persons were still voting after 10:00pm. Lovelace Christopher, who was a polling agent at Greenbay, said that he saw people "trying to enter on Federation Road" at about 6:30pm. Bernadette Ephraim stated that she saw persons voting at Greenbay after 8:00pm.

[69] Mr. Guthrie and Mr. Astaphan submitted that although the judge disbelieved the witnesses Gomez and Pena, the disputes which emerged in oral evidence should make little impact on the overall position. Counsel argued that as a matter of common sense, the length of time that voting continued after 6:00pm, was unlikely to have only been the result of queues which formed before 6:00pm. Counsel insisted that, on any calculation, a very large number of persons must have voted after 6:00pm. Accordingly, counsel asserted that it was unlikely that all of these voters were in line inside the main gate at 6.00pm. Counsel insisted that it was rather more likely that a considerable number of voters entered through one or other of the 2 gates in Federation Road as witnesses Pena and Gomez testified.

[70] On the other hand, Mr. Martineau urged us to note the evidence filed on behalf of

petitioner Simon in the witness statements filed by Jurmin Smith, Ynes James and Julian Wallace. In his witness statement[41], Jurmin Smith said that he joined the line at Green Bay at 5:30pm but at 6:00pm the gate was closed and he and 100 other persons were locked out and so prevented from voting, while others in the line inside the gate were permitted to vote after 6:00pm. In her witness statement[42], Ynes James said that she arrived at Green Bay at 3:30pm, but after 6:00pm she was told that she was in the wrong line. However, by the time she got to the correct line it was already closed and she was not allowed to vote. In his witness statement[43], Julian Wallace said that he reached the polling station at 5:20pm but discovered that he should have been at another polling station. By the time he got there it was after 6.00pm and he was not allowed to vote. They all complained that they were not allowed to vote after 6:00pm, but petitioner Simon did not call these witnesses.

[71] Finally, Mr. Martineau sought to raise acquiescence in answer to the late voting claim. He submitted that there was evidence of acquiescence because of evidence that Ms. Christian took her supporters to the polls to vote while watching supporters of Mr. Spencer voting late. While I shall consider the other submissions by counsel for the parties in the following paragraphs, I would at this juncture dismiss the submissions on acquiescence, which does not arise in this case. As Mr. Astaphan pointed out, Ms. Christian is not in a position to acquiesce in anything since she is not the petitioner.

Decision on late voting

[72] The trial judge had the opportunity to see and hear the witnesses. She rejected the evidence of Pena and Gomez. In challenging the judge's findings, Mr. Guthrie submitted that the judge should have found that the more likely story was that given by Pena and Gomez that a considerable number must have entered the

[41] CTB II pages 100-102.
[42] Ibid pages 122-123.
[43] Ibid. pages 132-133.

compound after 6:00pm. Learned counsel noted that there was a cumulative total of 15 hours of late voting at different polling booths. He also noted the evidence to the effect that each voter was likely to take not much more than a minute or 2 to vote. This, said counsel, meant that several hundred persons must have voted after 6:00pm and all of them could not have been inside the main gate at 6:00pm.

[73] In my view, the foregoing submissions invite us into the realm of speculation and surmise. The judge, who saw and heard the witnesses, rejected the evidence of Pena and Gomez because of discrepancies in their evidence in chief and their cross-examination, as well as between their evidence and that of other witnesses, including witnesses for petitioner/respondent Simon, Lovelace Christopher, for example. There was also the evidence of appellant Spencer's witness, Phyllis Proctor. They both testified that the side gate through which Pena and Gomez said they saw persons coming after 6:00pm to join the line was padlocked and no one could enter. Additionally, the evidence of the appellant Spencer's witnesses, Janice Constant, Itha Anthony, Jason Meade and Jasmine De Silva, was that they saw no one joining the lines in the St. John's Rural West constituency. The trial judge believed their evidence and rejected that of Pena and Gomez. The judge's reasoning has not led me to discern anything that suggests that she fell outside of the ambit of her discretion under the *Benmax principles* when she found that there was no voting by persons who joined the lines after 6.00pm to provide cause for me to interfere with her finding. In the premises, I would have dismissed the grounds of cross-appeal in the respondents' counter-notice which challenge this fact finding by the trial judge even if they had properly pleaded late voting.

[74] However, there was a preponderance of evidence on which the judge correctly found that there was late voting (after 6:00pm) by persons who entered the lines in the 3 contested constituencies before 6:00pm on elections day. Logical sequence would require that I should now consider whether the learned judge erred when she held that the late voting did not however breach Rule 1(7) of the **Election Rules**. The trial judge's interpretation of Rule 1(7) impacts this question, but her

interpretation came when she considered the late opening of the polls and the effect of this under Rule 1(7). I would therefore now consider the question whether the judge erred when she held that the late opening of the polls breached Rule 1(7) and therein review her interpretation of this Rule, and, later, consider whether the judge erred when she held that late voting by persons who were in the lines at 6:00pm did not breach Rule 1(7)..

Did the late opening of the polls breach Rule 1(7)?

[75] Section 32(1) of the **Representation of the People Act** (as amended) provides that the proceedings at an election shall be conducted in accordance with the election rules contained in the First Schedule to the said Act. The First Schedule to the original Act was repealed by the 2002 amending Act, which substituted the present Election Rules. Rule 1(7) of the **Election Rules** expressly provides as follows:

> "(1) The proceedings at the election shall be conducted in accordance with the following provisions:
>
> …
>
> (7) 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."

[76] It is common ground that the polls opened late in the contested constituencies. There was uncontroverted evidence of the late opening of the polls, particularly from the returning officers for those constituencies. The trial judge accepted their evidence. There were witnesses on behalf of each petitioner who testified that they were unable to vote because the polls opened late in those constituencies.[44]

[77] It is common ground that, in the St. George constituency, the New Winthorpes polling station opened at 8:50am; the Piggotts polling station opened at 8.30am, and the Potters polling station opened at 11;20am. In the St. John's Rural North constituency, the polling station at York's opened at 8:00am; the polling station at

[44] See paragraphs 205, 206, 207 and 208 of the judgment.

Wesleyan opened at 8:35am and the polling station at Cedar Grove opened at 8:00am. In the St. John's Rural West constituency, the polling station at Miss Generlette Building opened at 8:30am; the polling station at St Anthony's Church opened at 7:55am; the polling station at Nazarene Church opened at 7:45am; the polling station at Exhibition and Cultural (Multicultural) Centre opened at 7:30am; the polling station at Greenbay Primary School opened at 12:45pm and the polling station at Five Islands School opened at 10:10am.

[78] The judge's decision that the late opening of the polls in the St. George constituency breached Rule 1(7) of the **Election Rules** fairly reflects her reasoning on this finding in the other 2 contested constituencies. She stated:[45]

> "[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."

[79] The interpretation of Rule 1(7) of the **Election Rules** was critical to this decision.

The judge's interpretation of Rule 1(7)

[80] The judge examined the competing submissions relating to the interpretation of Rule 1(7).[46] She stated[47] that it was imperative that the court should give effect to the intention of the legislature. The judge suggested[48] that most of the authorities to which counsel referred were not helpful because they were not based on rules that were similar to Rule 1(7). She continued as follows:

> "One thing is clear, however: the rule must be given a purposive

[45] At paragraph 228 of the judgment.
[46] See from paragraph 218 of the judgment.
[47] At paragraph 219 of the judgment.
[48] At paragraph 220 of the judgment.

> 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."

[81] It is noteworthy that the judge did not accept the submissions by Mr. Mendes and Mr. Martineau that the words in Rule 1(7) that "the polling shall take place between the hours between 6:00am to 6:00pm" meant that voting could properly commence at any time after 6:00am; at 10:00am or even 4:00pm, for example.[49] According to the judge, this would be an absurdity because it would be impossible ever to find that there was a breach of Rule 1(7) for late opening as long as polling began after 6:00am but before 6:00pm. The judge expressed the view that this could never have been the intention of the legislature. She held that Rule 1(7) means that polling must commence at 6:00am because the legislature intended electors to commence voting at that time.[50] In my view, there is great logical force in that reasoning. Counsel for the appellants think otherwise.

Submissions on behalf of the appellants

[82] Mr. Mendes and Mr. Martineau insisted that the trial judge was wrong to hold that the late opening of the polls breached Rule 1(7) of the **Election Rules**, first, because the Rule does not state that polling must begin at 6.00am. Counsel contended that, in its ordinary meaning, the Rule states that polling must **take place** between 6:00am and 6:00pm. Counsel contended that this happened on elections day because voting commenced in each constituency after 6.00am but before 6:00pm.

[83] Counsel for the appellants submitted, further, that Rule 1(7) should be contrasted with section 1 of the United Kingdom **Elections (Hours of Poll) Act**, 1885.

[49] At paragraph 221 of the judgment.
[50] See paragraph 222 of the judgment.

Counsel contended that while the latter provides, in mandatory terms, 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", Rule 1(7) does not do so. Counsel buttressed his view that Rule 1(7) does not mandate the commencement of polling at 6:00am by reference to Rule 26(1) of the **Election Rules**.

[84] Rule 26(1) of the **Election Rules** requires the returning officer to give notice of polling hours to the public. It states as follows:

> The returning officer shall in the statement of persons nominated include a notice of the poll stating the day on which and **hours during which** the poll will be taken. [Emphasis provided by counsel]

[85] Mr. Mendes submitted that if Rule 1(7) mandated the commencement of polling at 6:00am, there would be no need for the returning officer to state the hours during which the poll is to be taken. He insisted that the judge was wrong when she rejected this submission on the ground that it would "be impossible to find that there ever was a breach of Rule 1(7) once the polling began between 6.00am and 6:00pm, even if it started as late as 5:30pm".[51] It is to Mr. Mendes' credit, however, that he admitted that his suggested interpretation could, strictly speaking, produce the result, which the trial judge feared it would.

[86] Mr. Mendes' response, however, was that he did not suggest an interpretation which would mean that a decision by the returning officer to direct that polling starts and ends at a particular time should unreasonably condense the period of voting. This, he said, would be unlawful as such an unreasonable curtailment of voting time would constitute an abuse of discretion and a violation of the constitutional right to vote. This could arise, in counsel's view, because the probable consequence of such curtailment would be that those who want to vote

[51] See paragraph 222 of the judgment.

would not be able to do so, even though they acted reasonably in pursuit of that right. He referred in support to a statement parallel to this in **New National Party of South Africa v Government of the Republic of South Africa**.[52] In my view, the interpretation which Mr. Mendes suggested herein would bring an unnecessary complexity and distortion to the meaning of Rule 1(7).

Submissions on behalf of the respondents

[87] Learned counsel for the respondents submitted that, for at least 2 obvious reasons, the reference to Rule 26(1) is unnecessary as an aid to finding that Rule 1(7) is not mandatory. One reason is that the notice by the returning officer under Rule 26(1) is intended for the public, who are not usually familiar with the rules. The second is that the notice under Rule 26(1) is intended to ensure that Rule 1(7) is observed. I agree.

Decision

[88] In my view, the judge's decision that Rule 1(7) must be construed strictly, was correct for the reasons which she gave. It seems obvious to me that the interpretation, which learned counsel for the appellants suggest and engender procrastination, laxity, uncertainty and confusion in the electoral process. It could lend comfort to electoral officials to open polling stations at any time during election day, regardless of any notice that is given pursuant to Rule 26(1) of the **Election Rules**. Electors may wait and leave in frustration after lengthy periods. Electors who are employed are likely to go to the polls early. In any event, section 34 of the **Representation of the People Act** allows them to be away from work for 4 consecutive hours to vote. The interpretation which learned counsel for the appellants suggest makes it quite possible that an employed elector, for example, may not be able to vote within the time specified because of the tardy opening of

[52] (1995) 5 BCLR 489, at paragraph 23 of the judgment.

the polls. The legislature could not have intended Rule 1(7) to sanction these shortcomings and inconveniences.

[89] It seems clear to me that the strict interpretation of Rule 1(7), which the trial judge provided, is the meaning that the legislature intended the Rule to have. Her interpretation makes good sense and good law and was correct. It follows that the judge was also correct in finding, by extension, that the late opening of the polls breached Rule 1(7) of the **Election Rules**. Accordingly, I would dismiss the grounds of the appeal by the appellants which challenge this decision.

[90] I would now consider whether the learned trial judge erred when she held that late voting by persons who were in the lines by 6.00pm did not breach Rule 1(7) of the **Election Rules**.

Late voting and breach of Rule 1(7)

[91] This issue arises on the counter-notice. I think that a detailed reproduction of the reasons for the judge's decision that late voting by persons who were in the lines at 6:00pm did not breach Rule 1(7) would be helpful at this juncture.

[92] The judge stated her reasons for decision as follows:

> "[224] … 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."

[93] The judge continued:[53]

> "[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] …
> [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."

Submissions on behalf of the respondents

[94] Mr. Guthrie submitted that, in the first place, even 1 hour's voting after 6:00pm may amount to a significant number of votes, which would have had some effect on the result. Counsel stated that, given the evidence that it takes an average of 1 or 2 minutes for a voter to cast his or her vote, the number voting after 6.00pm in the constituency would have added more than 100 voters. This, he said, would have had a distorting effect on the final numbers.

[95] In the second place, Mr. Guthrie pointed to the press release, which the Supervisor of Elections, Lorna Simon, caused to be issued on election day encouraging people to vote. The release stated: *"The law does not allow for voting time to be extended beyond the 6 pm deadline."* Mr. Guthrie submitted that this statement was correct as a matter of law. He argued, however, that it was

[53] At paragraph 225 and 227 of the judgment.

incorrect in law, when it continued by stating: *"However, the law allows for anyone who is in the line before 6:00 pm to cast their ballot"* and *"all persons who are in line as aforesaid will be permitted to vote no matter how long it takes"*.

[96] Mr. Guthrie contended that even beyond this, as a matter of fact, only some voters would have known about this press release and it is impossible to say how many. He argued that voters who did not see or hear of the release would have proceeded on the basis of the allotted voting period. It meant, for example, that if they were unable to vote in the morning, they could not have been expected to return at or after 6:00pm when they would have assumed that the polls were closed. They would have been guided by the hours of voting provided in Rule 1(7).

[97] Mr. Guthrie submitted, further, that in any event, time added at the end of the day cannot substitute for time lost at the beginning of it. For this to be so, said counsel, it would be necessary to show that every voter was made aware of the time change. It would have been necessary to inform them that they could have voted in the extra period. Counsel argued that it would also have been necessary to allow voters to attend at any time during the extra period, not just at the outset, with a specific closing time for the polls. Any other arrangement, said counsel, would not have been a true or fair substitute for lost time. It would also have affected and distorted the result of the election if late voting took place in some areas, but not in others, because the electorate is not uniform in political affiliations across a given constituency. Counsel contended that this means that the only fair system requires one rule for all. Additionally, he said that because the law precludes any investigation into how a person voted it is impossible to say that what occurred did not affect the result of the elections in the contested constituencies.

Counter-submissions on behalf of Quinn-Leandro

[98] Mr. Mendes submitted that on a proper interpretation of Rule 1(7), persons in line at the polling station at 6:00pm should be permitted to vote. He insisted that any interpretation which disenfranchises such persons would violate the constitutional right to vote. Alternatively, Mr. Mendes submitted that an interpretation which precludes persons in line at 6:00pm from voting after 6:00pm is unconstitutional because it would be an unlawful constraint on the person's constitutional right to vote. Counsel invited the court either to declare Rule 1(7) void, in that it infringes section 40(3) of the Constitution if the Rule does permit a person who is in the line at 6:00pm to vote thereafter. Alternatively, he invites us to modify Rule 1(7) to bring it into conformity with section 40. He referred to **Gribbin v Kirker**;[54] **The West Division of the Borough of Islington**,[55] **Halstead v Simon**, **Darrel Regan Bruno and Another v The Election Appeal Board of the Samson Cree Nation and Others**,[56] **Randolph Russell v Attorney General of St Vincent and the Grenadines**,[57] and **Sauve v Attorney General of Canada**.[58]

The cases

[99] In **Gribbin v Kirker**, section 64 of "An Act for the Regulation of Municipal Corporations in Ireland" governed the hours of voting in elections.[59] It stated, among other things, " … **voting** at every such Election shall commence at Nine o'clock in the Forenoon, and **shall finally close at Four of the Clock in the Afternoon** of the same Day, …" An unidentified number of persons were in line but had not yet voted at 4:00pm. At 4:00pm the outer door of the house where the poll was held was closed. Those within at that time were polled until about 5:00pm. Counsel for the respondent argued that those who were polled after 4:00pm were there to give their votes before 4:00pm., and, consequently, the fault not being theirs, they should not suffer. Counsel for the petitioner argued that the

[54] [1873] IR 30.
[55] (1901) 5 O'M & H 120.
[56] 2006 FCA 249.
[57] (1995) 50 WIR 127.
[58] [2002] 3 SCR 519.
[59] 1840, 3 & 4 Vic. c. 108.

language of section 64 was clear and mandatory. The court stated as follows:

> "The provisions of the statute, requiring the poll to be closed at 4 o'clock, p.m., have not been complied with. The cases quoted are not applicable, and do not go the length of deciding that the result of the poll must be shown to have been affected by keeping the poll open after 4 o'clock, p.m. Mr. Kirker was the senior Alderman. The election must be set aside. Each party to pay his own costs."

[100] Counsel for the respondents submitted that, in so far as the stipulated period is concerned, section 64 has the effect to prevent voting after 4:00pm, just as Rule 1 (7) in Antigua and Barbuda is intended to prevent voting after 6:00pm. Counsel asked us to note that in the judgment, Monahan CJ used the word poll, in place of the word 'voting'. Counsel argued that the Chief Justice did this because 'voting' and 'polling' are synonymous. Respectfully, I do not think that we could draw this conclusion because there is nothing in the judgment to suggest that the learned Chief Justice actually addressed his mind to the question whether those words are synonymous. Additionally, section 64 is clearly mandatory in its requirement that voting shall end at 4.00pm. Rule 1(7) is not in the same terms.

[101] In **Islington**, 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 hour of 8pm. However, those electors were at the polling place by 8:00pm. It was also proved that some ballots which were received before 8:00pm were cast after that time. The election court held that the ballots that were cast after 8.00pm were invalid. The relevant statute was section 1 of **the Elections (Hours of Poll) Act 1885**. It 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***." [My emphasis]. 'Poll' was defined to mean actual voting.[60] In my view, the words "and no longer" and the definition of 'poll' made it pellucid that actual voting had to cease at 8:00pm. The court was therefore quite correct when it construed the provision to mean that voters who were in the polling station at

[60] See page 121 of the Report.

8:00pm could not vote after 8:00pm.

[102] It is noteworthy, however, that the court found that a voter to whom a ballot was given before 8:00pm was entitled to vote and to deposit it into the ballot box after 8:00pm. The court observed that the rules required voters who had received a ballot 'forthwith' to take the ballot into one of the compartments and deposit it into the ballot box. The court stated that since 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, it had to be deposited. In any event, inasmuch as the winning candidate prevailed by 19 votes, and there were only 14 invalid votes, the respondent would still have won by 5 votes. The court therefore declined to invalidate the election.

[103] **Halstead v Simon** came out of an election in Antigua and Barbuda. The time provided for the polls was contained in the precursor provision to Rule 1(7), which provided as follows:

> "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."

[104] Mr. Mendes submitted that it is clear from the report that there was no contention that the rule should be interpreted as permitting persons in line at 6:00pm to cast their votes after 6:00pm. The result, he said, was that the court proceeded on the assumption that the law prohibited voting after 6.00pm. I agree that **Halstead** provides little helpful guidance on this issue inasmuch as it was not canvassed and duly considered. The court focused on the question whether there was substantial compliance with electoral law and whether the breaches of those laws affected the result of the election.

[105] It is however noteworthy that, in the present case, the trial judge relied on the reasoning in **Bruno**. In **Bruno**, the Federal Court of Appeal of Canada held that persons in line at the closing hour were entitled to stay on to vote. The statute which provided for the opening and closing of the polls stated: "All **voting**

locations shall be open at 9:00am and shall be open until 6:00pm." [My emphasis] The Court held, quite correctly, in my view, that this section "only prescribes the hours during which 'voting locations' will be open to receive voters".[61] The court held that once voters are at the voting location before it closes they were entitled to vote.

[106] Counsel for the parties are in accord, as I am, however, that none of the foregoing cases considered a provision worded as is Rule 1(7). I agree with counsel for the appellants that there is a very marked difference between the terms of the provision considered in **Islington** and Rule 1(7) of the **Election Rules**. The statute in **Islington** specifically provided for the time when the 'voting locations' or polls were to close, and, more, made voting synonymous with polling. Rule 1(7) is different.

[107] Mr. Mendes stated, correctly, that we have seen no case that considered the effect on such interpretation of a provision such as Rule 1(7) in the context of a constitutional right to vote. Mr. Mendes and Mr. Martineau accordingly invited us to determine the meaning and effect of Rule 1(7) in the context of late voting, and in light of what they contend is the right to vote declared in section 40 of the **Constitution of Antigua and Barbuda**.

The Constitution and the right to vote

[108] Sub-sections (2) and (3) of section 40 of the Constitution of Antigua and Barbuda provides as follows:

> "(2) Every Commonwealth citizen of the age of eighteen years or upwards who possesses such qualifications relating to residence or domicile in Antigua and Barbuda as Parliament may prescribe shall, unless he is disqualified by any law from registration as a voter for the purpose of electing a member of the House, be entitled to be registered as such a voter in accordance with the

[61] See paragraph 42 of the judgment.

> provisions of any law in that behalf and no other person may be registered.
> (3) Every person who is registered as a voter in pursuance of subsection (2) of this section in any constituency shall, unless he is disqualified by any law from voting in that constituency in any election of members of the House, ***be entitled so to vote in accordance with the provisions of any law in that behalf***." (Emphasis added by counsel for the appellants)

[109] Mr. Mendes highlighted **Russell**. In that case this court interpreted the effect of an identical provision (section 27) in the Constitution of St Vincent and the Grenadines. Sir Vincent Floissac, CJ, stated as follows:[62]

> "The constitutional right conferred by section 27 is two-fold. The first is the basic right to be registered as a voter in the appropriate constituency. That basic right is granted to every Commonwealth citizen of the age of eighteen years or upwards, if he possesses the prescribed qualifications relating to residence or domicile in St Vincent and is not disqualified by Parliament from registration as a voter. The second is the concomitant right to vote in the appropriate constituency. That concomitant right is granted to every citizen who is entitled to the basic right. That concomitant right is a right to vote 'in accordance with the provisions of any law in that behalf'. This means that although the manner of voting is statutory or customary, the right to vote is inherently constitutional."

[110] These provisions undoubtedly confer a constitutional right to vote. It is a right that is contained in the constitution to be exercised "in accordance with the provisions of any law in that behalf". The reference is to electoral laws. With respect, however, I do not agree with the submission by counsel for the respondents that the right to vote is merely a statutory right created by Rule 1(7). It is a constitutional right which is to be exercised in accordance with electoral law, including Rule 1(7). The critical question in the context of the present case, however, is what impact does this have on legality or otherwise of persons who were in line before 6:00pm voting after 6:00pm?

[62] See page 139 of the judgment.

The effect of the interpretation

[111] Mr. Mendes submitted that the effect of section 40 of the Constitution, as it relates to the Rule 1(7) of **the Election Rules** requirement, is that polling must take place on election day between 6:00am and 6:00pm. I agree with his further submission that a duly registered elector who presents himself or herself at a polling station between these hours on an election day is entitled to vote between those hours. It is an attractive contention that it would probably be a denial of the right to vote, and, accordingly, a *prima facie* breach of section 40(3) of the Constitution to deny an elector the opportunity to vote. It is also clear, however, that a duly registered elector could not arrive at a polling station before 6.00am or after 6.00pm and claim to be entitled to vote before or after those hours. That would breach Rule 1(7), in my view. It is not clear, however, where the entitlement or right falls when a person arrives at the polling station before the 6.00pm closing time. The constitution provides no direct pointer and, in effect, leaves the question to be determined upon the interpretation of Rule 1(7).

Statutory provisions in other countries

[112] Unfortunately, unlike some countries, the **Antigua Election Rules** have no provisions which elaborate Rule 1(7). Statute in Australia,[63] for example, provides that the poll shall open at 8 o'clock in the morning, and shall not close until all electors present in the polling booth at 6'clock in the afternoon, and desiring to vote, have voted. It further states that the doors of the polling booth shall be closed at 6 o'clock in the afternoon and no person shall be admitted after that hour to the polling booth for the purpose of voting. In New Zealand, statute[64] provides that the poll at every election shall commence at 9:00am, and, except as otherwise provided in the statute, shall finally close at 7:00pm on the same day. It further states that every elector who is present in a polling place for the purpose of voting

[63] Sub-sections 220(b) and (c) of the Commonwealth Electoral Act, 1918.
[64] Section 161 of the Electoral Act, No. 87 of 1993.

at the close of the poll is entitled to receive a ballot paper and to mark and deposit it in the same manner as is he or she had voted before the close of the poll. In Canada, statute[65] provides that an elector who is entitled to vote at a polling station and who is in the polling station or in the line at the door at the close of voting hours shall be allowed to vote.

[113] Within the Commonwealth Caribbean, in Trinidad and Tobago, statute[66] provides that the taking of the poll at each polling station shall be between six o'clock in the morning and six o'clock in the afternoon of the same day. It further states that if at the hour of the closing of the poll there are any electors within the polling station who have not cast their votes, the poll shall be kept open a sufficient time to enable them to vote. Jamaican statute[67] provides that if at the hour of closing of the poll there are any electors inside the polling station or within the immediate precincts who are qualified to vote and have not been able to do so, the poll shall be kept open a sufficient time to enable them to vote. The statute further provides that no one not actually present within the polling station or actually identified by the presiding officer as being within the immediate precincts at the hour of closing shall be allowed to vote.

Interpretation

[114] Rule 1(7) does not clearly state that a person who is at the polling station at 6.00pm can or cannot be allowed to vote after 6:00pm. Mr. Mendes submitted, however, that when the sub-rule is read with the right to vote in section 40 of the Constitution, the benefit of the entitlement to vote should enure to the voter inasmuch as Rule 1(7) does not set a cut off point by which a voter must present himself at the polling station. By way of explanation, Mr. Mendes contended as follows: each voter is free to approach his assigned polling station at any hour

[65] Section 153(2) of the Canada Elections Act, 2000, c. 9 E-2.01.
[66] Subsections 27(1) and (2) of the Representation of the People Election Rules, Ch. 2.01.
[67] Rule 35(6) of the Representation of the People Act, Cap. 342 of the Laws of Jamaica.

between 6:00am and 6:00pm. It is conceivable that voters acting independently and consulting their own individual convenience could turn up in droves an hour or 2 before the 6:00pm. It would be a strong position to take that persons who are still in line at 6:00pm are, through no fault of their own, automatically deprived of their right to vote simply because the lines were too long. This, Mr. Mendes argued, would amount to a direct deprivation of the right to vote. It would also be undemocratic and would not result in the election of persons truly representative of the constituency. He relied on **Sauve v Attorney General of Canada** and **Bruno v The Election Appeal Board**.

[115] In **Sauve**, McLachlin CJ stated:[68]

> "The right of all citizens to vote, regardless of virtue or mental ability or other distinguishing features, underpins the legitimacy of Canadian democracy and Parliament's claim to power… More broadly, denying citizens the right to vote runs counter to our commitment to the inherent worth and dignity of every individual… the vote of each and every citizen is a badge of dignity and of personhood. Quite literally, it says that everybody counts."

[116] In **Bruno**, the Canadian Federal Court of Appeal, 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, stated as follows:[69]

> "…. 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 Councillors 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."

[117] Rule 1(7) is a provision that elaborates the manner in which the right to vote under section 40 of the Constitution is to be exercised. To that extent the Rule has a

[68] At paragraphs 34-35 of the judgment.
[69] At paragraph 43 of the judgment.

constitutional pedigree. I can discern no ground, however, on which to hold that Rule 1(7) is violative of section 40 to warrant either striking down or amending the Rule to bring it into conformity with section 40. I am inclined to agree, however, that given its constitutional pedigree, an interpretation of Rule 1(7) should have some regard to the rule of construction which requires a generous interpretation of constitutional provisions or statute made further to such provisions in order to promote and give meaning to the constitutional right.

[118] With respect, however, I do not agree with the further submission by Mr. Mendes that Rules 29(1), 34(1) and 40 of the **Election Rules** should be used to aid in the interpretation of Rule 1(7). These Rules provide for the regulation of the polls and voting therein by presiding officers. Rule 29(1) provides as follows:

> "29. (1) Every presiding officer shall manage the affairs of the polling station to which he is assigned in an efficient and courteous manner. He shall act with fairness and impartiality in administering his tasks in accordance with the provisions of section 12 of the Act and consistent with rules 4 and 5 of these rules."

[119] Rule 34(1) provides as follows:

> "34(1) The presiding officer shall regulate the number of voters to be admitted to a polling station at the same time, and shall exclude all other persons except -
> (a) the candidates;
> (b) the polling agents appointed to attend at the polling station;
> (c) the clerks appointed to attend at the polling station;
> (d) the police officers on duty; and
> (e) the companions of blind voters and physically challenged voters."

[120] Rule 40 provides as follows:

> "40(1) A ballot paper shall be delivered to a voter who applies therefor, and immediately before delivery ...
> (2) The voter, on receiving the ballot paper, shall forthwith proceed into one of the compartments in the polling station and there secretly mark his paper and fold it up so as to conceal his vote, and shall then show to the presiding officer the back of the paper, so as to disclose the official mark, and after the provisions of rules 41,42,43 and rules 44 to 46, as the case may be, have been complied with, put the ballot paper so folded up into the ballot box in the presence of the presiding officer."

[121] Mr. Mendes submitted that the polling process is governed by these Rules. It begins, he said, with an application by a voter for a ballot and ends with the depositing of the ballot in the ballot box. He insisted that consistent with the right to vote under section 40 of the Constitution, Rule 40 should be interpreted as meaning that a voter applies for a ballot as soon as he or she turns up at the polling station and gets in line to vote. In that event, he suggested, the voter becomes entitled to have a ballot delivered to him or her on arrival at the polling station. It should not be held against the voter, said Mr. Mendes, if upon arrival there are other persons in line equally entitled to be provided with a ballot ahead of him or her. The voter's entitlement to be provided with the ballot should not be extinguished because 6:00pm arrives before he or she reaches the head of the line. Furthermore, argued Mr. Mendes, where there are persons in line at 6:00pm, Rules 29 and 34 should be interpreted as empowering the presiding officer to invite those already in line to enter the polling station in order that he may carry out his statutory duty to deliver the ballots to them.

[122] In my view, acceptance of the foregoing submission presents an extraordinarily strained construction on Rule 1(7) as well as of the language of Rules 29, 34 and 40 of the **Election Rules**.

[123] However, I think that the learned trial judge was correct when she held that Rule 1(7) should be afforded a generous interpretation which gives meaning to the right vote because of its constitutional pedigree. In my view, however, that is as far as **Bruno** is helpful to the interpretation of Rule 1(7) because the relevant statute that was considered in **Bruno** was different from the formulation in Rule 1(7). Whereas the **Bruno** statute required 'polling places' to be closed by the stipulated time, Rule 1(7) stipulates that 'polling', which is a process, should take place between 6:00am and 6:00pm.

[124] The use of the word 'polling' rather than 'voting' is significant, in my view. While

'voting' is the actual casting of a ballot, 'polling' is the process which facilitates the casting of ballots. It encompasses the activities which Mr. Mendes described that are set out at paragraph 121 above. It also includes the exercise which ensures that the polling stations are ready for voting to commence; the activities which go with the checking of the electoral lists in the polling station; verifying identification when electors present themselves to vote; official at the polling station giving instructions and giving the ballot to those electors; voting and placing the ballot into the ballot box and securing counterfoils thereafter in the manner stipulated by electoral laws. Voting is therefore a part of the polling process. It follows that in the absence of definition 'voting' is not synonymous with 'polling'.

[125] Electors go to the polls to vote. It seems to me that if an elector is in line at the polls to vote prior to 6.00pm on election day, he or she is engaged in the polling process, as Mr. Martineau submitted, for the purpose of Rule 1(7) of **the Election Rules**. That elector should be permitted to vote even if the actual vote is cast after 6:00pm. Accordingly, I conclude that, in the present case, those electors who were in line by 6.00pm were correctly permitted to vote after 6:00pm. The fact that the right to vote is a constitutional right merely buttresses this conclusion. It was from this perspective that the trial judge did not err when she held that voting after 6:00pm by persons who were in line at the polls by 6:00pm did not breach Rule 1(7) of the **Elections Rules**. The result is that even if late voting were properly pleaded, I would have dismissed the grounds of the cross-appeal which challenge this decision by the trial judge.

Late opening and substantial compliance

[126] This issue arises on the respondents' counter-notice. In her judgment, the trial judge found in each case that the election was so conducted as to be substantially in accordance with the law as to elections. Mr. Guthrie and Mr. Astaphan, contended that the judge was wrong to find that there was substantial compliance with electoral law. Mr. Mendes and Mr. Martineau contended that the approach

adopted by the trial judge that there was substantial compliance with electoral laws, notwithstanding the breach of Rule 1(7) which she found, was correct.

[127] The operative statutory provision is section 32(4) of **the Representation of the People Act**, and in particular, that aspect of it which states, in effect, that no election shall be declared invalid if it appears to the court that that the election was conducted substantially in accordance with the law as to elections.

The basic principles

[128] The decided cases show that an election court will not invalidate an election on the ground that there was there was substantial non-compliance with electoral law if the breach of elections procedure stipulated by law is trivial. There must be such a substantial departure from elections procedure stipulated by law that would cause an ordinary person to condemn the election as a sham or travesty. A considerable departure is required. Accordingly, an election court would usually only invalidate an election on this ground if the judge is really satisfied that the breach is serious. The rationale is that the return of a member of the legislature by the electorate should only be invalidated in a clear case where the court has serious doubt that the election was a manifestation of the wishes of the electorate. These principles are elaborated in many cases.

[129] Accordingly, the Court of Common Pleas stated as follows in **Woodward v Sarsons**:[70]

> "…we are of opinion that the true statement is that an election is to be declared void by the common law applicable to parliamentary elections, if it was so conducted that the tribunal which is asked to avoid it is satisfied, as matter of fact, either that there was no real *electing* at all, or that the election was not really conducted under the subsisting election laws. As to the first, the tribunal should be so satisfied, i. e. ***that there was no real electing by the constituency at all, if it were proved to its***

[70] [1875] L.R. 10 C.P. 733, at pages 743-744.

> ***satisfaction that the constituency had not in fact had a fair and free opportunity of electing the candidate which the majority might prefer. This would certainly be so, if a majority of the electors were proved to have been prevented from recording their votes effectively according to their own preference***, by general corruption or general intimidation, or by being prevented from voting by want of the machinery necessary for so voting, as, ***by polling stations being demolished, or not opened***, or by other of the means of voting according to law not being supplied or supplied with such errors as to render the voting by means of them void, or by fraudulent counting of votes or false declaration of numbers by a returning officer, or by other such acts or mishaps. And we think the same result should follow if, by reason of any such or similar mishaps, the tribunal, without being able to say that a majority had been prevented, should be satisfied that there was reasonable ground to believe that a majority of the electors *may have been* prevented from electing the candidate they preferred. But, if the tribunal should only be satisfied that certain of such mishaps had occurred, but should not be satisfied either that a majority had been, or that there was reasonable ground to believe that a majority might have been, prevented from electing the candidate they preferred, then we think that the existence of such mishaps would not entitle the tribunal to declare the election void by the common law of Parliament. (Emphasis provided by counsel)

[130] In **Re Parliamentary Election for Fermanagh and South Tyrone**[71] Carswell LCJ stated as follows:

> "The decided cases show that a fairly considerable departure from proper procedure has been required before the court will set aside an election on this ground: see *Parker's Law and Conduct of Elections,* paras 19.89 to 19.91. In particular, irregularities in respect of opening hours at a single polling station have not been regarded as sufficient to avoid the election: see *Drogheda* 2 O'M & H 201; *Islington,* 5 O'M & H 201*; East Clare* 4 O'M & H 162. We take into account also the remark of Willes J retailed by Martin B in *Warrington* 1 O'M & H 42 at 44, that a judge to upset an election ought to be satisfied beyond all doubt that the election was void, and that the return of a member is a serious matter and not lightly to be set aside."

He provided further enlightenment as to the test for substantial compliance when

[71] [2001] NIQB 36 (19 October 2001).

he stated as follows in **Re Parliamentary Election for Fermanagh**:

> "The final issue is that contained in section 23(3)(*a*) of the 1983 Act, whether the election was so conducted as to be substantially in accordance with the law as to elections. In our view this phrase refers to the election as a whole, not to the proceedings at the particular polling station. Statements of the law suggest that for the breach of election law to be regarded as substantial there has to be something which would make one have serious doubt whether the election was a proper manifestation of the wishes of the electorate in choosing their member."

The judgment in the High Court

[131] Having found that Rule 1(7) was breached by the late opening of the polls, the judge stated as follows, as it related to the question whether there was substantial compliance:[72]

> "[229] … 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 Simpson**, 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'."

[132] As far as the burden of proof is concerned, she stated[73] that there is no onus on the respondent to prove, in the event of a breach (which is the petitioner's burden), that the election was nevertheless conducted so as to be substantially in

[72] At paragraphs 229 and 230 of the judgment.
[73] At paragraph 231 of the judgment.

accordance with the election law. It simply fell for the court to examine the whole of the evidence in order to determine whether this was so or whether the result was affected. She cited in authority **Re Kensington North Parliamentary Election**.[74] She noted[75] that these basic principles were judicially acknowledged in **Edgell v Glover** [76] when Newman J stated:

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

The trial judge was expressly and correctly guided by these statements of principle.

[133] Applying the basic principles to the evidence in the St. George (Jonas) petition, the trial judge stated[77] that, in seeking to ascertain whether the election was conducted substantially in accordance with the election law, the court must take into consideration the period during which non-voting took place. She noted that the hours of voting lost due to the late opening of the polls are as follows: In New Winthorpes and Piggotts a period in excess of 2 hours, and in Potters a period in excess of 5½. Hours. However, she stated[78] that the hours of voting lost could not in itself determine whether the election was conducted substantially in accordance with the election law. Additionally, stated the judge, there had to be clear evidence that as a result of the non-polling a significant percentage of the electorate was prevented from voting in order to lead to the conclusion that there was not substantial compliance with the election law. She cited **Hackney** in authority.[79]

[134] The learned trial judge continued her own analysis and findings on the principles as they relate to the evidence in the St. George petition as follows:

> "[235] It follows, for example, that if there is cogent evidence before the

[74] [1960] 1 WLR 762.
[75] At paragraph 232 of the judgment.
[76] [2003] EWHC 2566, at page 24.
[77] At paragraph 233 of the judgment.
[78] At paragraph 234 of the judgment.
[79] (1874) 2 OM & H 77.

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] … the Court should seek to determine what was achieved despite 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."

[135] With respect to the St. John's Rural North constituency, having repeated that the petitioner had clearly lead incontrovertible evidence upon which she found that voters were denied their right to vote due to the late opening of the polls, the learned trial judge stated as follows:[80]

"[395] The Court however, has no evidence on which it can conclude as to

[80] At paragraphs 395 and 396.

> 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."

[136] The judge noted,[81] with respect to the St. John Rural West constituency, that polling commenced at least 1 hour and 30 minutes late at the stations at Miss G, St. Ann's Church, Multipurpose Centre, and at the Nazarene Church. Polling commenced 4 hours late at Five Islands. At Greenbay, which is the largest of the polling stations, it opened in excess of 6 hours late. The judge restated her finding that several persons left the polling station at Greenbay and at the Five Islands polling station due to the late opening of the poll, and that while some of these persons returned and were able to cast their votes others did not. Moreover, she concluded, from the evidence, that an indeterminate number of persons were unable to cast their votes due to the late opening of the polls. She stated,[82] that notwithstanding the lost voting hours, there was clear evidence that 80.48% of the registered voters voted in the constituency. She found that by any assessment this was a very significant turn out. She said that she found very persuasive the statement by Redhead J in **Halstead v Simon** that, on that evidence, the election could not be condemned as a sham or travesty in such circumstances, particularly as the percentage turnout was greater than in some of the other constituencies notwithstanding the late opening of the polls.

[81] At paragraph 272 of the judgment.
[82] At paragraph 273 of the judgment.

[137] The trial judge continued as follows:[83]

> "[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."

[138] It is apparent that the central question upon which the learned trial judge focused was whether there was a real election, which did not amount to a sham election or a travesty of an election by ballot. In that context she considered whether a substantial proportion of qualified voters were disenfranchised.

Submissions on behalf of the appellants

[139] Mr. Mendes and Mr. Martineau agreed that a relevant factor in determining whether there was substantial compliance is the actual turnout of voters. They insisted that it would be absurd to invalidate an election where, for example, the polling booths were open for only 2 out of the required 12 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, submitted counsel, the electorate would have expressed its will and there would be no basis in common sense to declare the elections void. Counsel relied on the following statement by Redhead J in **Halstead v Simon**:[84]

> In determining whether or not there is substantial compliance with the law or rule as to opening and closing of the poll, one is not or should not be confined solely to the number of polling hours which was lost but with what was achieved, that is the number of votes which was cast during polling hours."

[140] On the foregoing basis, counsel noted the observation by Redhead J[85] that even

[83] At paragraphs 274 and 275.
[84] At pages 233-234.
[85] At page 232.

in a case where there was only 5½ 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 at the situation. Learned counsel noted that in **Halstead**, there was both a loss of regular voting time and an excess of voting time after the stipulated hour. It would be recalled that in that case the court found that voting commenced at 6:00am but stopped at about 12:30pm to 1:00pm because of a shortage of ballot papers. Voting re-commenced at about 5:30pm to 5.40pm and continued until about 9.00pm.[86]

[141] Learned counsel noted that the **Halstead** case showed that there were 2,829 registered voters in the constituency. The winner, Mr. Simon, received 874 votes, while the petitioner received 611 and a third candidate received 67 votes. The margin of victory was therefore 263 votes. There were 9 rejected ballots. The turnout was accordingly 55%.[87] Voting time was extended by 3 hours to 9pm by judicial order. Redhead J found as a fact that there were 850 persons on the Register who were not physically present in Antigua and Barbuda on elections day. Accordingly, he found that 76% of the electorate voted who were in the country. The percentage of the total registered electors who voted would have been 50% if the 850 who were not physically present were included.[88] It was in these circumstances, said counsel, that Redhead J expressed the view that the election was not conducted in a way as to make the ordinary man deem it as a sham or travesty, and, further, he had no doubt that there was a real election by ballot. He concluded that the election was conducted substantially in accordance with the law as to elections.[89] Counsel said that it is clear that where a substantial number of voters are disenfranchised, that an election can be said to be a sham or a travesty. He cited the statement to that effect by the Court of Common Pleas in

[86] See page 203.
[87] See page 201.
[88] See pages 228-229.
[89] See page 233.

Woodward v Sarsons.[90]

[142] Learned counsel urged this court to distinguish **Hackney** from the present case on the facts.

[143] In **Hackney**, 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. Only 75 votes separated the winner from the runner-up. In their submissions, counsel for the appellants noted that the court found it proved, in **Hackney**, that as nearly 5,000 people were unable to vote at the 2 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 3 stations. Grove J stated that one of the principles of the Act was that the electors should have a fair opportunity of recording their votes. Accordingly, the question to be decided was:[91]

> "… 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?"

Grove J expressed 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."[92] He concluded as follows:[93]

> "… 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 … (I)t 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."

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[90] [1874-75] L.R. 10 C.P. 733, at pages 743-744.
[91] See page 83 of the Report of the judgment.
[92] See page 80 of the Report of the judgment.
[93] At page 81 of the report of the judgment.

[144] Counsel suggested that we should instead be guided by the decision in the **Borough of Drogbeda** case.[94] In this case it was proved that due to some unforeseen accident the 7 polling stations were not opened at the statutory hour of 8am and no votes were received until 8:45am. Counsel said that it was clear that the late opening had no effect upon the result of the election and that not a single voter was in consequence prevented from voting. In fact, stated counsel, the whole constituency was almost entirely polled out before the poll was closed. Counsel asked this court to note the following statement in that case by Barry J:[95]

> "… 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."

Submissions on behalf of the respondents

[145] Mr. Guthrie and Mr. Astaphan, counsel for the respondents, stated that the trial judge correctly identified[96] the 2 issues that arise on section 32(4) of **the Representation of the People Act** as follows:

(i) was the election conducted so badly that it was not substantially in accordance with the law as to elections, so that it was invalid, whether the result was affected or not?

(ii) even if the election was conducted so as to be substantially in accordance with the law as to elections, does it appear that the breaches of the law did <u>not</u> affect the result?

[146] On the issue of substantial compliance, counsel submitted that 'substantially' as it appears in section 32(4) is a question of degree. From this perspective, counsel contended that whether there was substantial compliance may not be the same in the constituency of St John's Rural North, where there was no late voting, as in St John's Rural West, where the late opening of the polls was the most delayed, and

[94] (1874) 2 OM & H 201.
[95] At page 203 of the Report.
[96] Especially at paragraphs 201 – 202 of the judgment.

late voting extended over a long period. Counsel suggested the court's decision should take into account that the opportunity to vote is crucial to any election, and the **Election Rules** are intended to ensure that it exists. Counsel submitted, correctly, in my view, that if the relevant Rule is breached so that the opportunity to vote is substantially compromised, the election cannot properly be said to have been conducted substantially in accordance with the law as to elections.

[147] With regard to the passage in the judgment of Stephenson LJ in **Morgan v Simpson** which the trial judge mentioned[97] counsel asked us to note that the judge omitted the words "*but not such an irregularity as was committed in this case …*" that follow where her quotation ended. Counsel submitted, correctly, in my view, that those omitted words show that the passage was *obiter*, so that Stephenson LJ was not limiting the circumstances in which the facts might show that an election was not conducted substantially in accordance with the law. This, in my view, reflects that the basic principle in determining whether there was substantial compliance must be decided with reference to the facts and the circumstances in each case. It appears to me that the learned trial judge intended to capture the basic principles rather than to apply **Morgan v Simpson**.

[148] Mr. Astaphan noted that the trial judge found on the facts of the present case that there was a real election by ballot; that a substantial portion of the electorate voted, and that the election could not be described as a sham or travesty. He insisted that the same things can be said of **Hackney**, which was expressly approved by **Morgan v Simpson**.[98] It is clear that the required exercise is not to be guided by application, comparison or distinguishing of cases. While decided cases may afford some guidance, the decision whether there was substantial compliance in the conduct of an election is to be decided on the circumstances in each case.

[97] At paragraph 230 of the judgment.
[98] [1974] 3 All E.R. 722, at page 728.

[149] Counsel for the respondents contended that on this issue, the trial judge left out of consideration, with regard to the constituencies of St George and St John's Rural West, the fact of late voting, which, as the respondents have submitted, was also in breach of electoral law. In the circumstances, said counsel, on the evidence in the present cases, it cannot properly be said that the elections were conducted substantially in accordance with electoral law where the polling stations were closed for large parts of the allotted time, and where voting was permitted for considerable periods outside the allotted time. These breaches, submitted counsel, went to the heart of the democratic process. I have concluded, however, that the trial judge correctly decided that the circumstances in which late voting occurred did not occasion a breach of electoral law.

[150] Finally, learned counsel drew attention to what he said was a misleading and incorrect aspect of the appellants' submissions in relation to **Halstead**. In their submissions, counsel for the appellants contended that Redhead J stated[99] that "the election was not conducted in a way as to make the ordinary man deem it as a sham or travesty" and that "there is no doubt that there was a real election by ballot." Counsel noted that the appellants also stated that Redhead J concluded that the election was conducted substantially in accordance with electoral law,[100] but that they added a footnote stating that "As will be shown later, Redhead J then proceeded quite inexplicably to rule that the election was not conducted in substantial compliance with the law as to elections." Thereby, said Mr. Astaphan, the appellants attempted to rely on and to distinguish **Halstead**, which is an authority against them. Mr. Astaphan insisted that counsel for the appellants misunderstood Redhead J's judgment. He pointed out that Redhead J did not conclude "that the election was conducted substantially in accordance with the law as to elections". Rather, insisted Mr. Astaphan, he found that the election was not conducted in such a way as to make the ordinary man condemn it as a sham or travesty; that there was a real election by ballot; that the secrecy of the ballot was

[99] See page 229.
[100] See at page 233.

not violated in any way; and that there was not a disenfranchising of a substantial portion of the electorate. Mr. Astaphan insisted that none of these matters answered the question posed by the law, which Redhead J proceeded to ask in this way: "Was the election so conducted as to be substantially in accordance with the law as to elections?" He answered the question in the negative, said counsel, so that there is nothing "inexplicable" about this approach: it is the correct application of the law.

Decision on the judge's finding on substantial compliance

[151] I agree that the approach by Redhead J to this question was the correct approach in considering this issue. The focus is on 'substantial compliance' with the law in the conduct of the election. The concern is not only with the results but more so on actual compliance with electoral law. The quintessential question that the court must ask, in effect, is what matters went wrong with the conduct of the elections that render the conduct inconsistent with the procedures stipulated by law. The court must consider whether a petitioner has proved that things were done which electoral law proscribes. The court must then, consider all of the surrounding circumstances and determine whether the degree of non-compliance was 'substantial'. That is, that the degree of non-compliance was such that the election may be invalidated on the ground that its conduct was not in substantial compliance with elections law.

[152] In effect, the judge took into account in each case the actual time when voting commenced and the result achieved despite the late start in voting in the 3 contested constituencies. She was impressed by the fact that the voter turnout was quite high in each constituency (all around 80%).[101] She was of the 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

[101] See generally paragraphs 233-240, 273-275 and 392-396.

was achieved in spite of the hours that were lost."[102] She held 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 the poll, the Court acting sensibly would not hold that there was not substantial compliance."[103]

[153] In the present case the learned judge found, correctly, in my view, that the late opening of the polls in the 3 contested constituencies breached Rule 1(7) of the **Election Rules**. However, she found that this breach did not in and of itself mean that there was not substantial compliance with the law as to elections. In so doing, she examined the circumstances that were relevant to an assessment of this issue from the perspective of late opening of the polls as reflected in the paragraphs of her judgment which are reproduced above. She further found that there was late voting but concluded that this did not occasion a breach of electoral law. In my view, she was correct in her decision that there was substantial compliance with electoral law notwithstanding the breach of Rule 1(7) occasioned by the late opening of the polls in the 3 contested constituencies. I would therefore dismiss those grounds of the counter-appeal which challenge the judge's decision on this issue.

Was there substantial compliance in the totality of the circumstances?

[154] Mr. Guthrie and Mr. Astaphan insisted that on the evidence in the present case, it cannot properly be said that the elections were conducted substantially in accordance with electoral law where polling stations are closed for large parts of the allotted time, and where in 2 of the contested constituencies voting continued for considerable periods after the statutory closing time. The respondents each complain in their counter-notices that late voting and the late opening of polling stations, separately and cumulatively meant that the election was not conducted

[102] Paragraph 238.
[103] Paragraph 235.

substantially in accordance with election law. Counsel insisted that these were sufficient grounds on which to invalidate the elections on the ground of substantial non-compliance.[104]

[155] As I understand it, the complaint is that the judge should have determined the question of substantial compliance not only from the perspective of each separate breach but considering the conduct of the elections as a whole. Thus Mr. Guthrie and Mr. Astaphan submitted that the judge should have determined, on the totally of the circumstances, that the elections were conducted so badly that they were not substantially in accordance with the law as to elections.

[156] The trial judge found that the late opening of the polls breached Rule 1(7). She also found that the use of the 'photo lists' breached electoral law. She held, however, that this did not in and of itself mean that the conduct of the elections was not substantially in accordance with the law as to elections. She found that late voting did not breach electoral law so that the question whether the elections were conducted substantially in accordance with electoral law did not arise on this ground.

[157] I have agreed that the trial judge correctly found that the late opening of the polls breached Rule 1(7) and that the use of the photo-lists breached electoral law. There were no other findings of breach of electoral law. I also found that the judge was correct when she held that the late voting, done as she found by persons who were in the lines before the statutory closing time, did not breach electoral law. It seems to me, as learned counsel for the respondents seemed to concede, that the use of the photo-lists was not serious. Their use however occasioned the delay in the opening of the polls. Can it be said that these circumstances in the conduct of the elections occasioned substantial non-compliance with electoral law?

[104] See paragraphs 5(vi) and 5(vii) of the grounds of appeal contained in each counter-notice.

[158] Mr. Guthrie and Mr. Astaphan submitted that the improper conduct of the elections and any breach of election law, which occurred during the conduct of the elections, went to the heart of the democratic process. It is my view, however, that the breach occasioned by the use of the 'photo lists' added little over and above what resulted from the late opening of the polls. The evidence shows that the use of the 'photo lists' occasioned the late opening of the polls. I do not think that the totality of the circumstances occasioned breaches of electoral law so as to amount to substantial non-compliance in the sense that the election was a sham or travesty. This is particularly given the high percentage of the electorate that voted in each of the contested constituency. I would therefore dismiss the grounds in the counter-notice which urge us to find that there was substantial non-compliance with electoral law in all circumstances of the conduct of the elections.

Did breach affect the results?

[159] The operative statutory provision is section 32(4) of **the Representation of the People Act**, and in particular, that aspect of it which states, in effect, that no election shall be declared invalid if it appears to the court that that the election was conducted substantially in accordance with electoral law and the breach did not affect the result. Section 32(4) is as central to the resolution of this issue, as it was to the resolution of the issue of substantial compliance. The provision states as follows:

> "32(4) 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."

The breach and the result

[160] The learned trial judge declared the election of the appellants void on the ground that it was only possible to deduce from the evidence that an indeterminate number of persons were prevented from voting during the hours of voting time that were lost. The judge concluded that the effect of the breach caused by the late opening of the polls on the results in the contested constituencies was not known. Given this and the number of persons who did not vote in each of these constituencies, as well as the margins of victory, it was difficult to say definitely that the results were affected or were not affected by the late start in voting. In those circumstances the applicable test which the judge used was that which was applied in **Edgell v Glover**, and later approved in **Considine v Didrichsen**. According to the judge, that test dictates that where the court cannot say that the result was not affected by a breach, the court must void the election.

The judge's reasoning

[161] It would be helpful to set out the reasoning of the trial judge in some detail. She stated them thus in the Jonas/Quinn-Leandro case:[105]

> "[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 … Counsel. It bears noting that all … 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

[105] At paragraphs 241-245 of the judgment.

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 …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 **Considine 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 **Considine 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. Jacqui-Quinn Leandro was not duly elected."

[162] The judge reasoned as follows in the Fernandez/Maginley case:[106]

> "[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 **Considine 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."

[106] At paragraphs 397-399 of the judgment.

[163] She reasoned as follows in the Simon/Spencer case:[107]

> "[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 **Considine 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.
> [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 **Considine 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."

The appeals on this issue

[164] The appellants contend, in their notices of appeal, that the trial judge erred when she invalidated their elections on the ground that she could not say that late opening of the polls did not affect the result. They argue, in effect, that she

[107] At paragraphs 276-280 of the judgment.

thereby applied a wrong principle on her interpretation of section 32(4). They also insist that she wrongly assessed the facts which the evidence disclosed.

Interpreting section 32(4)

[165] The interpretation of section 32(4) of **the Representation of the People Act** is not free from difficulty. For one thing, the provision is formulated in the negative. Secondly, it appears to be conjunctive on its face. At first blush, this seems to invite an interpretation that a court must determine that the 2 main requirements in the sub-section are satisfied before a court declares an election invalid. The wording of the sub-section suggests that a court can only nullify an election for breach if the court determines that the election was not conducted substantially in accordance with election law **and** the breach affected the result. In the words of Mr. Mendes, once it appears to the court that the election was conducted substantially in accordance with the law as to elections and that the breach did not affect the result of the election; the Court is prohibited from declaring the election to be invalid.

[166] However, the authorities show that the sub-section has received a disjunctive interpretation on good principle. Accordingly, in **Morgan v Simpson**, the English Court of Appeal held that on a proper construction of section 37(1) of the Act of 1949 (which is in *pari materia* to section 32(4) of the Antigua Act) a breach of elections rules which affected the result was by itself enough to compel the court to declare the election void. Lord Denning stated:[108]

> "That section is expressed in the *negative.* It says when an election is *not* to be declared invalid. The question of law in this case is whether it should be transformed into the *positive* so as to show when an election *is* to be declared invalid. So that it would run:
>
> > "A local government election *shall* be declared invalid (by reason of any act or omission of the returning officer or any other person in breach of his official duty in connection with the election or otherwise of the local election rules) if it appears to the tribunal having

[108] At page 725.

> cognisance of the question that the election was *not* so conducted as to be substantially in accordance with the law as to elections *or* that the act or omission *did* affect the result."
>
> I think that the section should be transformed so as to read positively in the way I have stated. I have come to this conclusion from the history of the law as to elections and the cases under the statutes to which I now turn, underlining the important points."

Lord Denning examined the case law and further stated:[109]

> "Collating all these cases together, I suggest that the law can be stated in these propositions:
>
> (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. That is shown by the *Hackney* case, 2 O'M. & H. 77, where two out of 19 polling stations were closed all day, and 5,000 voters were unable to vote.
>
> (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. That is shown by the *Islington* case, (1901) 17 T.L.R. 210, where 14 ballot papers were issued after 8 p.m.
>
> (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. That is shown by *Gunn v. Sharpe* [1974] Q.B. 808, where the mistake in not stamping 102 ballot papers *did affect* the result."

[167] Similarly, in **Edgell v Glover**, Newman J stated:[110]

> "(i) Section 48 [which re-enacted section 37(1)] 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 that 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 the rules from voiding the election."

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[109] At page 728.

[110] At paragraph 23.

In **Edgell v Glover**, Glover was declared the winner over Edgell by one vote. In the course of the count, Edgell saw a ballot paper with a vote for Glover being counted by an assistant. Writing on the ballot suggested that the voter had not completed a Declaration of Identity as required by the rules. There would have been a tie had this vote not been counted. Notwithstanding that the election was conducted substantially in accordance with elections law, it was invalidated because the error affected the result.

[168] Mr. Mendes submitted that the case law has thrown up 4 propositions on the interpretation of section 32(4) of **the Representation of the People Act** that guide decisions on this or similar provisions. He adumbrated them as follows:

i) An election must be declared to be invalid where it appears that the election was not conducted substantially in accordance with the law as to elections, whether or not the breach affected the result;

ii) An election must be declared to be invalid where the breach affected the result, whether or not the election was conducted substantially in accordance with the law as to elections;

iii) Where an election is conducted substantially in accordance with election law, it can only be invalidated if the breach affected the result;

iv) An election must be invalidated where it does not appear that the breach did not affect the result, even though the election was conducted substantially in accordance with the law as to elections.

[169] I agree that the foregoing statements from **Morgan v Simpson** and from **Edgell v Glover** are eminent authority for the first 2 propositions. A number of other cases have followed and applied these propositions. These include **Fitzpatrick v Hodge**[111] and **Miller v Dobson**.[112]

[170] There is support for the third proposition in **Morgan v Simpson**. Lord Denning

[111] (1995) S.L.T. (Sh Ct) 118.
[112] (1995) S.L.T. (Sh Ct) 114.

stated as follows:[113]

> "Soon after that Act was passed, *Leigh* and *Le Marchant* published a valuable commentary on it. They transformed the negative into the positive in the way I have suggested [*Leigh & Le Marchant's Election Law],* at p. 97:
>
> > "A non-compliance with the provisions of the Ballot Act 1872, and Schedules 1 and 2, or a mistake at the poll, *will vitiate* the election, *if it should appear that the result of the election was affected thereby,* but not otherwise, provided the election was conducted in accordance with the principles laid down in the body of the Act."

Additionally, Stephenson LJ stated in **Morgan v Simpson**:[114]

> "Failures to comply with the rules or to use the right forms do not avoid an election unless they have affected its result."

In **Marshall v Gibson**, Colman J stated as follows: [115]

> "The effect of section 48(1) of the 1983 Act is that an election will not be declared invalid merely because there has been a breach of official duty in connection with the election or of the Rules by the returning officer or any other person. There cannot be a declaration of invalidity unless it appears either that the election was so conducted that there was substantial non-compliance with the law as to elections or that there was a breach of official duty or of the Rules which affected the result**.** It is clear now that the 'result' means the question which person or persons are elected as distinct from the number of votes cast for each persons."

[171] In ***Edgell v Glover*** Newman J further stated:[116]

> "Having regard to the terms of section 48(1), there should be no declaration that the election is void or invalid unless it appears to the court that the result was affected."

[172] It seems to me that more often than not, proposition (iii) would be of helpful application in those cases in which mathematical or statistical assessment would easily yield a determinative answer.

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[113] At page 726.
[114] At page 729.
[115] Divisional Court, 14th December 1995, (referred to in Fitch v Stephenson [2008] EWHC 501, at paragraph 40.
[116] [2003] EWHC 2566, at paragraph 25.

Proposition (iv)

[173] The legal status and meaning of proposition (iv) is not always clear. Mr. Mendes submitted that there seems to be a contradiction between propositions (iii) and (iv). He opined that under proposition (iii) the breach must affect the result of the election for it to be invalidated. He submitted that under proposition (iv), however, it appears that the election is to be invalidated, even if it does not appear that the result was affected, as long as it does not appear that the result was not affected. He noted that the trial judge accepted proposition (iv) as an accurate statement of the law relying on **Considine**. He appeared to have doubted the soundness of proposition (iv). He accordingly questioned the judge's reliance on it.

[174] I do not discern any contradiction between propositions (iii) and (iv) as Mr. Mendes stated them. It is apparent that Mr. Mendes was of the same view when he stated that there does not appear to be much difference, if any at all, between a finding by a judge that he or she is not satisfied that a breach did not affect the result and a finding that the result was in fact affected. He correctly surmised that there are only two possibilities: either the result is affected or it is not. If a court is not satisfied that the result is not affected, then it seems that the court would be saying that the result is affected.

[175] What, however, is the true principle in **Considine**, and its rationale? Why is it necessary and how is it to be applied?

[176] In my view, the principle is a necessary proposition under section 32(4) to cover circumstances such as those which arose in **Considine** and kindred cases.

[177] In **Considine**, it was declared that candidate John Cornforth received 945 votes in elections and that he was duly elected and returned. The petitioner, John Considine received 938 votes. Cornforth therefore had a majority of 7 votes.

Considine prayed that the election of Cornforth should be voided on the ground that a number of voters in the Ward did not receive ballot papers. Election rules required the returning officer to issue ballot packs to voters as soon as practicable after 5:00pm on 17 May and not later than 1 June 2004. Among other things, the ballot packs should have contained ballot papers for each election. Because of an error that the printers made in assembling the packs, a number of packs that were sent to voters in the Derringham Ward had ballot papers for the Marfleet Ward instead. This appeared to have affected at least Moorhouse Road and Wold Road, in which some 779 electors were registered, but the extent of the problem was not clear. There appeared to be no pattern whereby it could be established which electors received the wrong papers, nor how many were affected. The petitioner's evidence indicated that 17 electors in Derringham Ward received *only* papers for the Marfleet Ward. The error was compounded by the fact that the returning officer issued a press release which suggested that new ballot papers would be sent out without the need for action on the part of a voter. In fact, only 68 ballot packs with the correct Derringham ballot paper were issued to affected voters. The consequence of these errors was that an unknown number of electors in the Derringham Ward did not receive ballot papers for the Derringham Ward election, to which they were entitled. They received instead ballot papers for the Marfleet Ward election, to which they were not entitled.

[178] It was on the foregoing facts and circumstances that Jack J posed the following question: "Does it appear that the breach of the returning officer's duty did not affect the result?" He explained why he framed the question this way in the following passage:[117]

> "22. 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 at page 161 of his judgment 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

[117] At paragraph 22 of the judgment.

> 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 that it does not appear that the result was not affected**. The examples considered by Lord Denning to illustrate his point were all cases where the votes which would have been cast if the breach had not occurred were known." [My emphasis]

The true principle

[179] In my view, the highlighted words reflect the principle that is applicable for cases in which the evidence, particularly of numbers, the inferences therefrom and circumstances, do not permit the court to make a definitive decision on proposition (iii) as to whether the breach affected the result. Neither do they permit the court to determine that the result was not affected by the breach. This was obviously what the trial judge intended to say and meant when she stated[118] that she was unable to say that the result was definitely affected by the breach and that, equally, based on the preponderance of the evidence, she could not find that the result was not affected by the breach. Proposition (iv) is not applicable to **Morgan** and kindred cases in which the available statistical information permit a mathematical solution to the question whether the breach affected the result.

[180] However, I think that, for good reason, the authorities seem to show that where there is evidence that includes statistical data and other relevant information from which a court may determine, even inferentially, that the breach did not affect the result, proposition (iv) is not to be applied without first attempting to determine whether the result was affected. This is because an election in a democratic society is for the purpose of determining the will of the voters. The court must seek to determine this as far is it is possible when an election is challenged. In my view, this is borne out in the highlighted words in the above quoted statement of Jack J in **Considine**. It is also borne out in the approach of Newman J in

[118] In paragraph 245 of the judgment.

Considine when he stated as follows:[119]

> "Does it appear that the breach did not affect the result? The most relevant facts are the following. The majority was only seven. The number of Derringham Ward voters who received Marfleet ballot papers is not known. Seventeen persons have made statements saying that they did not receive ballot papers for the Derringham Ward. Another 68 voters did not initially receive ballot papers for the ward but then applied for them and received them. 779 voters were registered in Moorhouse Road and Wold Road, which were the roads most affected. An unknown number of voters did not apply for replacement papers because they understood that they did not need to do so. **I can only conclude that the breach may well have affected the result and, therefore, that it does not appear that it did not affect it.** Section 48(1)(b) is not satisfied. So the election must be declared void. I appreciate that this conclusion is one which is not to be reached lightly, because, apart from other aspects, an election is an expensive matter." [Emphasis provided]

[181] Newman J assessed available statistics and determined from that exercise that the breach may well have affected the result before he concluded that it appeared that it did not appear that the breach did not affect the result. It is from this perspective that proposition (iv) is more accurately reflected by the following statement:

> "(iv) An election must be invalidated where it appears that the breach may well have or probably would have affected the result and, therefore, it does not appear that the breach did not affect the result, even though the election was conducted substantially in accordance with the law as to elections."

[182] This is a convenient juncture at which to recall the proof that a petitioner is required to meet in order to succeed on a plea that breach of electoral law affected the result. A good statement of this provided in **Edgell v Glover**, as follows:[120]

> "… 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."

Submissions

[119] At paragraph 24 of the judgment.
[120] [2003] EWHC 2566 (QB), at paragraph 29 of the judgment.

[183] Mr. Mendes sought to impeach the judge's finding on the facts as they relate to the issue whether the results were affected. There is great force in his submission that the percentage turnout in an election can be an indication as to whether a late opening has resulted in voters being prevented from voting. He sought to draw parallels between the percentage turnout in each contested constituency and other constituencies where there were apparently no allegations that polling stations opened late. Accordingly, he pointed out that in St John's Rural West the voter turnout of 80.48% was greater than that 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%). There were no complaints of late opening of the polls in these constituencies. Mr. Mendes also pointed out that in St George and St John's Rural North, the voter turnout of 79.02% and 79.03% respectively was greater than that in St. John's Rural South (76.36%) and St. Mary's North (77.84%), where the polls opened on time. Such evidence, he contended, strongly suggests that the late start had no effect at all on voter turnout.

[184] While I agree that the large voter turnout must be factored into a determination as to whether a breach of election law affected the result, I could not arrive at a conclusion from these numbers only. That would be speculative. Mr. Mendes appreciated, as his further submissions show that there are other important determinative factors which must be taken into account. They include the percentages of registered voters who did not vote and the margins of declared victory, among others. Thus Mr. Mendes asked us to note, for example, that the average percentage reduction in voter turnout in the general election was 10.56%. He stated that although there may be a plethora of reasons to explain the fall in voter turnout in each constituency, we might assume that if the reduction in the contested constituencies was more than the average reduction in all constituencies taken together, the difference might be attributable to the late opening. He noted that in the St John's Rural North and St George constituencies

the percentage decreases were greater than the national average. In St John's Rural North the decrease was 12.07% while in St George it was 13.24%, which is 1.51% and 2.68%, respectively, above the average.

[185] Mr. Mendes and Mr. Martineau submitted that the trial judge should have dismissed the petitions because the petitioners provided little evidence to prove that the results in the contested constituencies were affected by breach of electoral law. They insisted that the petitioners provided only a few persons who gave evidence that they personally did not vote because of the late start. Counsel contended that apart from Latoya Joesph, there was no evidence of other persons leaving the lines and not returning to vote. The evidence given of persons saying that they were leaving and would not be returning is hearsay and accordingly not a sufficient basis to determine if and, if so, how many persons did not vote because of the late start. Counsel pointed out that in **Halstead**, Redhead J. found similar evidence to be unreliable. He found that the Petitioner's evidence that there were large crowds of people at the polling stations and that the voters were enquiring about ballots, and that some of them were saying that they would not come back "is not evidence of the truth that they did not go back to vote."[121]

[186] Counsel for the appellants contended that it was also significant that only very few credible witnesses were produced to say that they personally could not vote because of the late start. Learned counsel insisted that if 'droves' of people were disenfranchised because of the late start one would have expected them to be volunteering to come to court to complain. The fact that so few came, said counsel, suggests that an insignificant number of persons were prevented from voting because of the late start. Counsel noted that this point was made by Williams J in **The Akaroa Election Petition**.[122]

[187] Learned counsel for the appellants submitted that since in Antigua the number of

[121] At page 215 of the judgment in Halstead.
[122] (1891) 10 NZLR 158, at page 166.

registered voters in each constituency small, and in small communities people know each other, since the petitioners were only able to produce a small, finite number of persons who say they did not vote due to the late start, it should be assumed that there are not many other persons who were disenfranchised because of the late start. Learned counsel urged us to conclude that the trial judge did not have sufficient evidence on which to set aside the return of any of the appellants because the petitioners provided nothing approaching a preponderance of evidence to prove that the results in the contested constituencies were affected by breaches of election law. Mr. Martineau insisted that the court could not have found, on a proper construction of the evidence, that fewer than 502, 106 and 506 persons were prevented from voting in the St. George, St. John's rural North and St. John's Rural West constituencies, respectively, because of breaches of election law.

[188] In my view, while these are attractive submissions, petitioners cannot be expected to produce scores or hundreds of witnesses to give evidence in these cases. It is noteworthy that Mr. Guthrie pointed out that in **Hackney**, Grove J described the persons who were affected by the breach as a large number of persons who were either prevented from voting or whom it might reasonably be supposed were prevented from voting. Mr. Guthrie said that it is notable that it was not necessary for any of them to be called to give evidence.

Approach

[189] In my view, the trial judge made various findings of fact which fell within the generous ambit of her discretion. These are contained in paragraphs 241-245 of her judgment, in the **Jonas/Quinn** case; in paragraphs 397 and 398 in the **Fernandez/Maginley** case and in paragraphs 276 and 278 in the **Simon/Spencer** case. She correctly concluded, for example, that the evidence does not indicate that only the persons who testified were unable to vote. I make the observation that the witnesses for the respondents cannot speak for all of the registered voters

in each contested constituency who for one reason or another did not vote. The casting of votes at an election depends upon a variety of factors and it is not possible for anyone to determine how many or what proportion of votes will go to one or the other of the candidates.

[190] The trial judge was correct in finding that the number of persons who did not vote in each contested constituency was indeterminable. This was the critical factor in her resolution of the issue whether the late opening affected the results in the contested constituencies.

[191] I think, however, that the learned trial judge erred, when, apparently, mainly because the number of persons who did not vote was indeterminable, she dismissed the available statistical information on the ground that she had "… viewed the mathematical tests that were relied upon and found them very unhelpful". She did so without attempting to assess the available statistical information disclosed by the evidence.[123] An assessment of that information was a necessary exercise, in my view, to a determination whether the breach may well have affected the result in each contested constituency, before voiding a return because the number of persons who did not vote was indeterminable.

[192] The available statistical data reveals the pattern of polling at the various polling stations. Such data can often reasonably provide a relatively clear picture as to whether or not each winning candidate obtained a fortuitous lead which was capable of being reduced had the polls opened early. The general pattern of the poll in each contested constituency is that all registered voters do not usually vote. Even if we were to add to the votes polled for each candidate a number representing the votes of the registered persons who did not vote, it is obvious that all of the persons registered to vote in each constituency would not have voted. This immediately reduces the number of the registered electors who did not vote,

[123] At paragraph 241 of the judgment.

proportionately, in keeping with the overall percentage of registered electors who voted. It would also reduce the margin from which the winning and losing candidate could claim additional votes. The judge should also have considered the demonstrated distribution of the votes or the pattern of voting.

Assessing the available information

[193] Counsel for all of the parties made extensive submissions on the available statistical data. I have found the simplified breakdown provided by Mr. Mendes during the course of the appeal hearing helpful in the manner in which it provides a basis for a statistical assessment relating to the present issue for each contested constituency.

St George – Jonas/Quinn-Leandro petition

[194] There were 4,414 registered voters in this constituency. The number of electors who cast ballots was 3,488. These included 20 rejected ballots. 926 or about 20.97% of the electorate registered in the constituency did not vote. This meant that 79.02% of the electorate voted. 92.26% voted in the 2004 general elections; a difference of 13.24%. The turnout in 2004 was the highest ever in this constituency. The percentage turnout in 2009 in every constituency in Antigua was lower than the percentage turnout in 2004. The percentage turnout in this constituency in 2009 was greater than the percentage turnout in the St. John's Rural South (76.36%) and St. Mary's North (77.84%). There was no complaint that the polls opened late in these 2 latter constituencies. The national average percentage turnout in 2009 was 81.02%. The percentage turnout in this constituency was accordingly 2% lower than the average. 926 registered voters did not vote. Mrs. Quinn-Leandro received 1,985 votes. Mr. Jonas received 1,483. The margin of victory was 502.

[195] If the turnout in this constituency would have been 100% but for the late start, 926 registered voters would have been disenfranchised. For this to have made a

difference to the result, Mr. Jonas would have had to receive 502 more votes than Mrs. Quinn-Leandro in order to equal the her assumed votes. He would have had to receive 714 of the 926 votes, to 212 for Mrs. Quinn-Leandro. In other words, he would have had to receive 77% of the 926 votes to Mrs. Quinn-Leandro's 23% in order to say that the election was affected because of the late start.

[196] Mr. Mendes compared the statistics for the 2009 elections with those for the 2004 elections. He submitted that if the turnout in this constituency was destined to be the same as in 2004 and this turnout was not achieved because of the late start, 585 registered voters would have been disenfranchised. He stated that for this to have affected the result Mr. Jonas would have had to receive 502 more votes than Mrs. Quinn-Leandro, in order to equal or overhaul the margin of victory. In other words he would have had to have polled 546 of the 585 votes to Mrs. Quinn-Leandro's 39. This means that he would have had to receive the votes of 93.3% of those assumed disenfranchised electors. He noted, however, that only 4 persons gave evidence that they turned up to vote but the polls were not yet open and they left and did not return to vote. He accepted that one of them, Shenshaba Henry, did not vote because of the late start. He noted that the other 3 witnesses gave conflicting reasons for not returning to vote. He suggested that the evidence in the case established that there was sufficient time for these other 3 persons to have returned later in the day.

[197] Mr. Mendes noted that a number of other persons left the lines before the polls opened late, but the witnesses did not quantify the number of persons who left the lines. He pointed out that there was no evidence that the number of persons who left the lines equalled or exceeded the margin of victory of 502. He noted that the evidence shows that some of those who left the line returned later to vote, but there is no evidence that any of the persons who left the line did not return later to vote. He also noted that the trial judge found that there was evidence that some of the persons who left the line did not return later to vote. He insisted that there is no evidence that the number of persons who did not vote because of the late start

either equalled or exceeded the margin of victory 502.

[198] There is some force in Mr. Mendes' submission that it is unrealistic to approach the issue of invalidity on the basis that breach affected the result on the assumption that all registered electors would have voted but for the late opening of the polls. I understand his rationale that it is unrealistic given that the highest voter turnout in Antigua was recorded in 2004 and no constituency has ever recorded a turnout of 100%. An assessment based on the highest ever voter turnout in each constituency commends itself. It provides a reliable and realistic empirical basis for an assessment. However, out of deference for the submission by Mr. Guthrie and Mr. Astaphan that an assessment based on a comparison between the 2009 and 2004 figures contains too many imponderables, I shall first make an assessment assuming that 100% of the registered electors would have voted in the 2009 elections but for the late opening of the polls.

Assessment assuming 100% voter turnout

[199] In 2009 there were 3 polling locations in the St. George constituency. Votes were cast as follows in the polling stations in these locations:[124]

Polling Location	Polling Station	Quinn-Leandro	Jonas	Rejected Votes	Total Voted	Total Listed
New Winthorpes Primary School						
	A – GO	208	131	2	341	
	GE – E	221	121	3	345	
	MI – Z	236	134	1	371	
Piggotts Primary						
	A – G	142	135	0	277	
	H – O	155	130	1	286	

[124] Reproduced from Core Bundle Volume II of the Record of Appeal, page 251.

	P – Y	154	111	1	266	
Potters Primary						
	A – CO	161	135	3	299	
	CR – HA	170	135	2	309	
	HE – LE	186	152	0	338	
	LI – RIQ	191	141	4	336	
	RO – Z	161	156	3	320	
	TOTAL	**1985**	**1483**	**20**	**3488**	**4414**

[200] These numbers are uncontroversial. One critical consideration was that there was voting in every polling station and the vast majority of registered electors voted. It is therefore easy to discern visible trends. The numbers confirm that Mrs. Quinn-Leandro received 1,985 or 56.91% of the votes, while Mr. Jonas received 1,483 or 42.52%. The 9 rejected ballots accounted for .57% of the votes cast. Mr. Jonas would have had to receive the votes of 714 of the 926 persons who did not vote, to 212 for Mrs. Quinn-Leandro.

[201] A survey of the foregoing statistical information shows that Mrs. Quinn-Leandro received the majority of the votes cast at every polling station in the constituency. Given the distribution of the votes and the size of her majority, the inescapable conclusion to which I am drawn is that it is highly improbable that Mr. Jonas would have overtaken her majority if all of the registered electors voted. The result in this constituency was therefore not affected, in the sense of which person was elected by the voters, as distinct from the number of votes received,[125] by the late opening of the polls.

Assessment on 92.26% base

[202] The highest voter turnout in this constituency occurred in the 2004 elections when

[125] As Coleman J stated it in Marshall v Gibson, supra, at note 115.

92.26% of the registered electors voted. From this base, the assumed number of voters who were disenfranchised by the late opening of the polls was 585. The margin of victory was 502 votes. Assuming that the highest poll in the history of elections in the constituency was destined to be repeated in 2009, Mr. Jonas would have had to receive 502 more of the 585 votes than Mrs. Quinn-Leandro in order to equal her assumed votes. He would have required 543 or about 93% of the assumed disenfranchised votes to 42 or 7% for Mrs. Quinn-Leandro. It is clear that this was very highly improbable given the distribution of the votes and the fact that Mr. Quinn-Leandro prevailed in every polling station in the constituency.

[203] In the foregoing premises, a court could not be satisfied that the late opening of the polls in St George affected the result or not satisfied that the result would not have been affected by the late opening of the polls. The learned judge therefore erred when she invalidated the election of Mrs. Quinn-Leandro on this ground. I would therefore allow Mrs. Quinn-Leandro's appeal and set aside the orders which the judge made in her judgment of 31st March 2010, on Mr. Jonas' petition.

St John's Rural North – Fernandez/Maginley petition

[204] The statistical information shows that there were 3,577 registered voters in this constituency. The number of electors who cast ballots was 2827. These included 9 rejected ballots. The number of registered voters who did not vote was 750 or about 20.97% of the electorate registered in the constituency. This meant that 79.03% of the electorate voted as opposed to 91.10% in the previous General Election held in 2004; a difference of 12.07%. The turnout in 2004 was the highest ever in this constituency. The percentage turnout in 2009 in every constituency was lower than the percentage turnout in 2004. The percentage turnout in this constituency in 2009 was greater than the percentage turnout in St. John's Rural South (76.36%) and St. Mary's North (77.84%), where there was no complaint that the polls opened late. The average percentage turnout in 2009 was 81.02%. The percentage turnout in this constituency was accordingly 1.99% lower

than the average. Mr. Maginley received 1,462 of the votes cast. Mr. Fernandez, received 1,356 votes. The margin of Mr. Maginley's victory was 106 votes. There was no late voting in this constituency.

[205] Assuming that voter turnout would have been 100% but for the late opening of the polls, 750 registered electors would have been disenfranchised. For the late opening to have affected the result, Mr. Fernandez would have had to receive 106 more votes than Mr. Maginley to equal the margin of victory. In other words, he would have had to receive 428 or 57% of the 750 votes as against 322 or 43% for Mr. Maginley.

[206] Mr. Mendes asked the court to note that one person gave evidence that he turned up to vote in this constituency but the polls were not yet open. He left and did not return to vote. Mr. Mendes said that this witness however gave conflicting reasons for not returning to vote. In any event, said Mr. Mendes, the evidence established that there was sufficient time for him to return later in the day to vote. Mr. Mendes noted that a number of other persons left the lines before the polls opened. He pointed out that the witness, Simon, stated that between 40 and 50 persons left the lines. Mr. Mendes noted that no evidence was given that the number of persons who left the lines equalled or exceeded the 106 margin of victory. The trial judge found that there was evidence that some of the persons who left the line did not return later to vote. However, said Mr. Mendes, there was no evidence that the number of persons who did not vote because of the late start either equalled or exceeded the 106 margin of victory. He therefore insisted that the petitioner, Mr. Fernandez did not prove his case so as to satisfy the trial judge that the result was affected by breach of electoral law.

[207] For my part, I note that in 2009 there were 3 polling locations in the St. John's Rural North constituency. Votes were cast as follows in the polling stations in

these divisions:[126]

Polling Location	Polling Station	Maginley	Fernandez	Rejected Votes	Total Voted	Total Listed
York's Centre						
	A – C	162	158	0	320	
	D – HA	146	155	1	302	
Wesleyan J. A.						
	HE – L	174	123	2	299	
	M – RI	172	126	0	298	
	RO – Z	177	147	2	326	
Cedar Grove P.S.						
	A – DO	158	168	0	326	
	DR– J0	170	199	1	370	
	JU– RH	164	158	1	323	
	RI – Y	139	122	2	263	
	TOTAL	**1462**	**1356**	**9**	**2827**	**3577**

Assessment on 100% base

[208] These numbers are uncontroversial. There was voting in every polling station and the vast majority of registered electors voted. Visible trends may be discerned. The numbers confirm that Mr. Maginley received 1,462 or about 51.72% of the votes. Mr. Fernandez received 1,356 or 47.97%. The majority is 106. I recall that the majority in **Considine** was 7, while it was 164 in **Halstead** in which it was held that the result might have been affected by the breach. There were 9 rejected ballots in the election in the St. John's Rural North constituency, which accounted for .31% of the votes cast. Given a majority of 106, Mr. Fernandez would have had to receive 428 or 57% of the 750 votes of the persons who did not vote as against 322 or 43% for Mr. Maginley.

[126] Reproduced from Core Bundle Volume II of the Record of Appeal, page 461.

[209] A survey of the foregoing statistical information shows that Mr. Maginley obtained majorities in 5 polling stations and Mr. Fernandez in 4. In York Centre polling location, Mr. Maginley received an aggregate of 308 while Mr. Fernandez received 313, a majority of 5 votes. In the Cedar Grove polling location, Mr. Maginley received 631 votes while Mr. Fernandez received 647, a majority of 16 votes. In the Wesleyan polling location, Mr. Maginley received 523 votes while Mr. Fernandez received 396, a majority of 127 votes for Mr. Maginley. This voting distribution shows that it is unlikely or improbable that Mr. Fernandez would have received the 428 or 57% of the 750 assumed additional votes if all of the registered electors voted in the 2009 elections, in order to equal Mr. Maginley's assumed votes. That would have been about 9% higher than the 47.97% of the votes which Mr. Fernandez received and higher than his majorities in the York Centre and Cedar Grove polling locations. The court could not therefore have been satisfied that breach may have affected the result or that it did not appear that the breach did not affect the result.

Assessment on 91.10% base

[210] The highest voter turnout in this constituency occurred in the 2004 elections when 91.10% of the registered electors voted. From this base, the assumed number of voters who were disenfranchised by the late opening of the polls would have been 432. This figure is 91.10% of the 3,577 actual number of electors registered to vote in 2009, which is 3,259, from which the actual votes cast in the constituency in 2009 (2,827) is subtracted.

[211] Given that the margin of victory was 106 votes, Mr. Fernandez would have had to receive 106 more of the 432 votes than Mr. Maginley in order to equate his majority. He would have needed 269 or about 62.3% of the assumed disenfranchised votes to 163 or 38.7% for Mr. Maginley. This is unlikely, given that Mr. Fernandez only received 47.97% of the lawful votes actually cast in the

election in the constituency.

[212] It follows that Mr. Fernandez would not have proved his case that the result of the election in the St. John's Rural North constituency was or was likely to have been affected by the breach to have satisfied the judge that it did not appear that the breach did not affect the result. In the premises, I would allow Mr. Maginley's appeal and affirm the orders which the judge made on Mr. Fernandez' petition in her judgment of 31st March 2010.

St Johns Rural West – Simon/Spencer petition

[213] The statistics show that there were 4,996 registered voters in this constituency. The number of persons who voted was 4021. There were 9 rejected ballots. The number of registered voters who did not vote was 975 or about 19.52%. This meant that 80.48% of the electorate voted as opposed to 89.48% in the previous General Election held in 2004; a difference of 9%. The turnout in 2004 was the highest ever in this constituency. The national average percentage turnout in 2009 was 81.02%. The percentage turnout in this constituency was .54% lower than average. The appellant, Mr. Spencer, received 2,259 votes and the opposition candidate, Ms. Gail Christian, received 1,753 votes. The margin of the appellant's victory was 506 votes.

Assessment on 100% base

[214] Assuming that there would have been 100% voter turnout, but for the late opening of the polls, 975 registered voters would have been disenfranchised. For the late opening to have affected the result, Ms. Christian would have had to receive 506 more votes than Spencer from among the 975 who did not vote in order to equal the margin of declared victory. She would have had to receive 739 or 76% of those votes as against 233 for Mr. Spencer.

[215] Mr. Mendes informed us that 2 persons gave evidence that they turned up to vote and left because the polls opened late. They did not return to vote. Mr. Mendes accepted that one of them, Winston Joseph, did not vote because of the late start. He said that the other witness, Francisco Matthias, gave conflicting reasons for not returning to vote, although there was sufficient time for him to return later in the afternoon to vote. He accepted that a number of other persons left the lines before the polls opened late, but stated that the witnesses did not quantify the number of persons who left the lines. He insisted that there is no evidence that the number of persons who left the lines equalled or exceeded the margin of victory of 506. Some of those who left the line returned later to vote. He further insisted that there is no evidence that any of the persons who left the line did not return later to vote and pointed out that the trial judge found that there was evidence that some of the persons who left the line did not return later to vote. He submitted that there is no evidence that the number of persons who left the lines and did not return later to vote equalled or exceeded the margin of victory of 506. In short, Mr. Mendes contended that Mr. Simon did not prove his case.

[216] For my part, I note that in 2009 there were 3 polling locations in the St. John's Rural North constituency. Votes were cast as follows in the polling stations in these divisions:[127]

Polling Location	Polling Station	Spencer	Christian	Rejected Votes	Total Voted	Total Listed
Armstrong Rd						
	A – CH	132	121	0	253	323
St. Anthony's						
	CL – GL	129	131	0	260	319
Nazarene						
	GO – JER	130	95	1	225	283
North Road						

[127] Reproduced from Core Bundle Volume III of the Record of Appeal, page 136.

	JN – M	133	115	0	248	306
	N – SC	120	121	0	241	295
	SE – Z	123	94	1	218	288
Greenbay						
	A - B	162	139	1	302	375
	C – D	157	134	1	292	354
	E – G	169	120	0	289	348
	H – JOP	145	100	3	248	327
	JOS-MAS	172	117	0	289	373
	MAT-PI	176	114	0	290	365
	PO-SM	142	136	2	280	353
	SO-Y	171	120	0	291	352
Five Island		198	96	0	294	334
TOTAL		**2259**	**1753**	**9**	**4021**	**4996**

[217] These numbers are uncontroversial. Again, there was voting in every polling station and the vast majority of registered electors voted. It is easy to discern any visible trends. The numbers confirm that Mr. Spencer received 2,259 or 56.189% of the votes, while Ms. Christian received 1,753 or 43.60%. There were 9 rejected ballots, which accounted for .22% of the votes cast. Since Mr. Spencer's majority was 506 votes, Ms. Christian would have had to receive the votes of 739 or 76% of the 975 registered electors who did not vote, to 236 or 24% for Mr. Spencer.

[218] A survey of the foregoing statistics shows that Mr. Spencer received the majority of the votes cast in 13 of the 15 polling stations in the constituency. Ms. Christian received a majority of 2 votes (131-129) at the St. Anthony's polling station and a majority of one (121-120) at the North Road polling station. Given the distribution of the votes, the inescapable conclusion, in my view, is that it was highly improbable that Ms. Christian would have overtaken Mr. Spencer's majority if all of the registered electors voted. The result in this constituency was therefore not affected, in the sense of which person was elected by the voters, by the late

opening of the polls.

Assessment on 89.48% base

[219] The highest voter turnout in this constituency occurred in the 2004 elections when 89.48% of the registered electors voted. From this base, the assumed number of voters who were disenfranchised by the late opening of the polls was 450. The margin of victory was 506 votes. It is clear that even if all of the assumed disenfranchised voters voted for Ms. Christian, she would not have obtained the 506 votes to overtake Mr. Spencer. This was very highly improbable. Mr. Simon therefore did not prove his case to satisfy the trial judge that the result of the election in the St. John's Rural West constituency was affected by the breach so that it did not appear that the breach did not affect the result. In the premises, the learned judge erred when she invalidated the election of Mr. Spencer. I would therefore allow Mr. Spencer's appeal and set aside the orders which the judge made in her judgment of 31st March 2010 on Mr. Simon's petition.

Costs

[220] The trial judge ordered each party in the High Court proceedings to bear their own costs. The appellants, Mrs. Quinn-Leandro, Mr. Maginley and Mr. Spencer do not specifically appeal the judge's ruling on costs. Their appeals do not challenge the costs order. Rather, their appeals each pray for costs in the appeals. They state, under "Order sought": "That the decision of Madam Justice Blenman be set aside and that the Respondent's petition be dismissed with costs." The respondents do not appear to have specifically challenged the judge's costs order in the High Court proceedings either. The order for which each respondent prays states: "(i) That the appeal be dismissed with costs; and (ii) That the decision of the Hon Madam Justice Blenman be confirmed, for the reasons which she gave, and for the additional reason that the election in the constituency was not conducted in substantial accordance with election law". Accordingly, I do not propose to disturb

the trial judge's costs order.

[221] In any event, I think that her order was a proper exercise of her discretion exercised in accordance with principle on the basis of the relevant statute. I can do no better than to reproduce her reasoning. She stated as follows:[128]

> "[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

[128] At paragraphs 413-425 of the judgment.

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."

[222] In my view similar reasoning is applicable in these appeal proceedings. While I state no opinion as to fault because that issue was not squarely before this court or canvassed before us, it seems clear that the circumstances, which gave rise to these cases, were not in the creation of any of the parties who prosecuted these appeals and counter-appeals. In my view, neither the High Court proceedings nor the pursuit of appeals or counter-appeals came out of vexatious conduct, unfounded allegations or unfounded objections on the part any of the parties.

There is nothing to suggest that they occasioned needless expenses to be incurred. It seems clear to me that a just outcome on the issue of costs is that each party should bear his or her own costs in these proceedings.

Summary

[223] The learned trial judge erred when she held that the issue of late voting by persons who voted after 6:00pm in polling stations in the St. George and the St. John Rural West constituencies was properly pleaded. I would therefore allow the grounds of the appeal by Mrs. Quinn-Leandro and Mr. Spencer, which challenge that decision. Notwithstanding this, the trial judge did not err when she held, as a matter of fact, that there was no late voting in the St. John Rural West constituency by persons who joined there after 6:00pm on election day. Accordingly, I would have dismissed the grounds in the respondents counter-notices which seek to challenge this decision, had late voting been properly pleaded. I would also have dismissed the grounds of the counter-notices which seek to challenge the decision by the trial judge that late voting (after 6:00pm) on election day in the contested constituencies did not breach Rule 1(7) of **the Election Rules**, had late voting been properly pleaded.

[224] The trial judge did not err when she held that voting after 6:00pm by persons who were in line at 6:00pm did not breach Rule 1(7) of the **Election Rules**. Accordingly, I would dismiss the grounds in the respondents' counter-notices which sought to challenge that decision.

[225] The learned trial judge did not err when she held that the late opening of polling stations (after 6:00am) on election day in the contested constituencies breached Rule 1(7) of **the Election Rules**. I would therefore dismiss the grounds of the appellants' appeals, which challenged that decision of the trial judge.

[226] The trial judge did not err when she held that notwithstanding that the late opening

of the polls breached Rule 1(7) of the **Election Rules**, the elections were conducted substantially in compliance with electoral law. Accordingly, I would dismiss the grounds of appeal in the respondents' counter-notices which sought to challenge this decision. In any event, the election in each contested constituency was not conducted in a manner that was not substantially in compliance with election law so as to render the election invalid, regardless of whether the results were affected or not. Accordingly, I would dismiss the grounds in the respondents' counter-notices which sought to challenge this decision.

[227] The learned judge erred when she invalidated the election of the appellants, Mrs. Quinn-Leandro, Mr. Maginley and Mr. Spencer on the ground that she could not say that the results in the contested constituencies were not affected by the late opening of the polling stations and the consequent late start in voting in the St. George, the St. John's Rural North and St. John's Rural West constituencies. Accordingly, I would allow the grounds of the appellants' appeal which challenge the trial judge's decision on this issue.

[228] The judge's order that the parties shall bear their own costs in the High Court is hereby affirmed. The parties shall also bear their own costs in the appeal proceedings.

Order

[229] In the foregoing premises, the order that I would make on this appeal is as follows:

(1) The appeal by the appellant, Mrs. Quinn-Leandro, against the judge's decision, contained in her judgment dated 31st March 2010, which declared that Ms. Quinn-Leandro was not validly returned as the elected Member of the Legislature of Antigua and Barbuda for the St. George constituency, after elections which were conducted on 12th March 2009, is allowed; and that

decision and consequential order are set aside. It is accordingly declared that Mrs. Quinn-Leandro was validly elected and that determination is certified to the Speaker of the House.

(2) The appeal by the appellant, Mr. Maginley, against the judge's decision, contained in her judgment dated 31st March 2010, which declared that Mr. Maginley was not validly returned as the elected Member of the Legislature of Antigua and Barbuda for the St. John's Rural West constituency, after elections which were conducted on 12th March 2009, is allowed; and that decision and consequential order are set aside. It is accordingly declared that Mr. Maginley was validly elected and that determination is certified to the Speaker of the House.

(3) The appeal by the appellant, Mr. Spencer, against the judge's decision, contained in her judgment dated 31st March 2010, which declared that Mr. Spencer was not validly returned as the elected Member of Parliament for the St. John's Rural West constituency, after elections which were conducted on 12th March 2009, is allowed; and that decision and consequential order are set aside. It is accordingly declared that Mr. Spencer was validly elected and that determination is certified to the Speaker of the House.

(4) The counter-notices of appeal filed herein by the respondents are hereby dismissed.

(5) The parties shall bear their own costs in the High Court as well as in these appeal proceedings.

[230] It would be remiss of me to sign off on this judgment without commending, with appreciation, the work that the trial judge, Blenman J, did in these difficult cases. I

also thank learned counsel for all of the parties for the considerable assistance which their knowledge, research and industry afforded to this court in this very demanding litigation.

Hugh A. Rawlins
Chief Justice

I concur.

Ola Mae Edwards
Justice of Appeal

I concur.

Janice George-Creque
Justice of Appeal