EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

COMMONWEALTH OF DOMINICA

DOMHCVAP2012/0001

BETWEEN:

RONALD GREEN

Appellant

and

PETTER SAINT JEAN

Respondent

AND

BETWEEN:

MAYNARD JOSEPH

Appellant

and

ROOSEVELT SKERRIT

Respondent

Before:

The Hon. Mde. Janice M. Pereira	Chief Justice
The Hon. Mr. Mario Michel	Justice of Appeal
The Hon. Mr. Don Mitchell	Justice of Appeal [Ag.]

Appearances:

Mr. Douglas Mendes, SC, with him, Mr. Stuart Young and
Mr. Geoffrey Letang, for the Appellants
Mr. Anthony Astaphan, SC, with him, Ms. Heather Felix-Evans,
for the Respondents

2012: November 13
2013: March 11.

Election petition – Disqualification to be nominated and elected – Allegiance, obedience or adherence to a foreign state – Obtaining, renewing or travelling on a French passport

Respondents not filing any witness statements or defence, and declining to testify at trial – Only petitioners and their witnesses testify – Petitioners unable to produce any direct evidence of the allegations made in their petitions – Whether the petitioners could rely on inferences – Whether petitioners could compel the respondents by process of discovery to produce their passports – Whether the respondents could compel the respondents by subpoena the production of their passports – Whether the petitioners could compel the testimony of the respondents at the hearing of the petitions by subpoena

Foreign law – whether necessary to be pleaded and proved

Allegations were made during an election campaign that two candidates were citizens of France and held French passports. The allegations were never specifically denied, but the candidates claimed to be entitled to be nominated to run in their respective constituencies and to be elected. They were in due course nominated to run and were declared duly elected. The unsuccessful candidates filed election petitions alleging that the successful candidates were disqualified under the Constitution due to their holding French passports. The respondents filed no defence to the petitions and produced no witness statements. They successfully resisted attempts to compel them to produce their passports and to testify at the hearing of the petitions. They did not testify. The petitioners testified and brought witnesses, but were unable by direct evidence to prove the allegations as to the existence of the alleged French passports. The trial judge declined to draw inferences from the failures or otherwise of the respondents that would permit the petitions to succeed. She dismissed the petitions. The petitioners appealed.

The trial judge additionally dismissed the argument of the respondents that the petitioners were obliged to plead and to prove that by virtue of French law the possession by the respondents of French passports amounted to sufficient allegiance, obedience or adherence to a foreign state to disqualify the respondents. The respondents counter appealed.

Held: dismissing the appeals, allowing the respondents' counter-notice in respect of only the foreign law issue (Pereira CJ and Michel JA a majority, Mitchell JA [Ag.] dissenting), and making no order as to costs, that:

1. The only rules governing election petitions in the Commonwealth of Dominica are those found in the Elections Act. There are no statutory provisions applying the Civil Procedure Rules 2000 to the hearing of election petitions nor has the court an inherent jurisdiction to introduce the interlocutory procedures found in the Civil Procedure Rules 2000 into election petitions.

   Winston Peters v The Attorney General of Trinidad and Tobago et al & William Chaitan v The Attorney General of Trinidad and Tobago et al Civil

Appeal Nos. 21 and 22 of 2001, Republic of Trinidad and Tobago Court of Appeal (delivered 31st July 2001, unreported) distinguished; Ezechiel Joseph v Alvina Reynolds and Lenard "Spider" Montoute v Emma Hippolyte Saint Lucia High Court Civil Appeal No. 14 of 2012 (delivered 31st July 2012, unreported applied; Commonwealth of Dominica Constitution Order 1978, S.I. 1978 No. 1027 (U.K.) cited; House of Assembly (Elections) Act, Chap. 2:01 Revised Laws of the Commonwealth of Dominica 1990 cited; Evidence Ordinance, Cap. 64 Revised Laws of the Commonwealth of Dominica 1961 cited; Civil Procedure Rules 2000 cited.

2. Petitioners making specific allegations in their election petitions about the existence of a disqualification must bring the appropriate evidence to prove their allegations.

   Quinn-Leandro v Jonas, Maginley v Fernandez, Spencer v St. Clair Simon (2010) 78 WIR 216 applied.

3. The judge having found that there was no direct evidence of the allegations of disqualification made in the petitions, she was entitled to dismiss the petitions.

4. Before a court hearing an election petition can draw an adverse inference from the absence or silence of a witness there must be a *prima facie* case to answer on the issues.

5. The burden was on the appellants to have brought the necessary evidence before the court to prove that under the law of France, the respondents being in possession of French passports was an act which amounted to an acknowledgment of allegiance, obedience or adherence to the state of France. It was necessary to plead and produce evidence which would prove the principles of foreign law which would disqualify the respondents under section 32(1)(a) of the Constitution of the Commonwealth of Dominica. (Per Pereira CJ and Michel JA, Mitchell JA [Ag.] dissenting).

   Joyce v Director of Public Prosecutions [1946] AC 347 considered; Abraham Dabdoub v Daryl Vaz and Others and Daryl Vaz v Abraham Dabdoub, Civil Appeal Nos. 45 & 47 of 2008, Supreme Court of Jamaica Court of Appeal (delivered 13th March 2009, unreported) applied.

6. It is unnecessary for a person challenging the nomination or election of a person who has obtained, renewed, or travelled on a foreign passport either to plead the foreign law in question or to prove that under that foreign law such action amounts to an acknowledgment of allegiance, obedience or adherence to the foreign state sufficient to establish a disqualification under the Constitution. (Per Mitchell JA [Ag.]).

Joyce v Director of Public Prosecutions [1946] AC 347 applied; **Abraham Dabdoub v Daryl Vaz and Others and Daryl Vaz v Abraham Dabdoub**, Civil Appeal Nos. 45 & 47 of 2008, Supreme Court of Jamaica Court of Appeal (delivered 13th March 2009, unreported) applied.

JUDGMENT

[1] **MITCHELL JA [AG.]**: Mr. Petter Saint Jean and Mr. Roosevelt Skerrit were successful candidates in the 18th December 2009 general elections in Dominica. Mr. Ronald Green and Mr. Maynard Joseph were not. They had all been nominated to stand for election in their two constituencies on 2nd December 2009. The latter brought election petitions challenging the validity of the nomination and election of the former.

The Petitions

[2] The facts pleaded in the petition by Mr. Joseph against Mr. Skerrit were that at the time of his nomination and at all other material times Mr. Skerrit was a person by his own act under an acknowledgment of allegiance and/or obedience and/or adherence to a foreign power or state, namely the Republic of France. Further, by his public pronouncement on 2nd December 2009 published through radio and other media, Mr. Skerrit declared that he is a citizen of France since June 1972 and that he is the holder of a passport issued by the Government of France. He had used his French passport on the basis of that citizenship in acknowledgment of allegiance and/or obedience and/or adherence to France. He falsely declared in his Statutory Declaration that he was not by virtue of his own act under any acknowledgment of allegiance, obedience, or adherence to a foreign power or State and was qualified to be nominated as a candidate for election to the House of Assembly for the constituency he was contesting. Mr. Skerrit published a letter of 17th December 2009 informing the electors that it was alleged by persons in the local media that because of his dual citizenship and his possession of a foreign passport he was not qualified to be elected and consequently any votes cast for

him in the general election would be thrown away. He assured them that he was validly nominated and their votes for him would not be thrown away. He did not specifically deny the allegation that he held a French passport. Mr. Joseph verily believed that by the contents of this letter Mr. Skerrit confirmed that in spite of his dual citizenship and possession of the passport he would stand for election.

[3] The pleaded case of Mr. Green against Mr. Saint Jean was similar. The petition stated that Mr. Saint Jean was at all material times by virtue of his own act under acknowledgment of allegiance, obedience and/or adherence to a foreign power or State, namely, the Republic of France of which he was at all material times a citizen and the holder of a passport issued to him between 2000 and 2002 and was thus incapacitated and disqualified from being nominated and elected. Prior to his nomination he had falsely declared in a Statutory Declaration that he was not by virtue of his own act under any acknowledgment of allegiance, obedience or adherence to a foreign power or State and that he was qualified to be nominated as a candidate for election to his constituency.

[4] The principal issue for trial before Gertel Thom J was whether Mr. Saint Jean and Mr. Roosevelt Skerrit were disqualified on nomination day[1] from nomination or election by virtue of section 32(1)(a) of the Commonwealth of Dominica Constitution Order 1978 ("the Constitution"). [2]

The Direct Evidence

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[1] Winston Peters v The Attorney General of Trinidad and Tobago et al & William Chaitan v The Attorney General of Trinidad and Tobago et al, Civil Appeal Nos. 21 and 22 of 2001, Republic of Trinidad and Tobago Court of Appeal (delivered 31st July 2001, unreported) per de la Bastide CJ.

[2] S.I. 1978 No. 1027 (U.K.)

S.32. Disqualifications for Representatives and Senators

(1) A person shall not be qualified to be elected or appointed as a Representative or Senator (hereinafter in this section referred to as a member) if he –

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

b) ...

[5] The evidence disclosed that both Mr. Saint Jean and Mr. Skerrit were born in Dominica and are Dominican citizens. Their mothers are French citizens, and Mr. Saint Jean and Mr. Skerrit both became French citizens by filiation. It is not in dispute that this inherited second citizenship did not disqualify them, unless they had by some voluntary act of their own acknowledged allegiance, obedience or adherence to the Republic of France.[3] The evidence accepted by the learned trial judge was that while they never specifically denied the allegation that they had acquired French passports, they both denied during the campaign that they had ever pledged allegiance to any foreign government or flag. In any event, she found, while it had been alleged that they held French passports, it had not been alleged that they had applied for, renewed or travelled on such French passports.

[6] The learned trial judge found that Mr. Green failed to lead credible evidence that Mr. Saint Jean held a French passport issued to him between the years 2000 and 2002 as he alleged. Mr. Joseph similarly failed to lead any evidence in support of his allegation that Mr. Skerrit made a public pronouncement that he was the holder of a French passport, as he alleged. There was no evidence led by either Mr. Green or Mr. Joseph of either of Mr. Saint Jean or Mr. Skerrit applying for or obtaining a French passport. Indeed it was conceded by Mr. Joseph at the trial that Mr. Skerrit had never made any declaration or admission that he held a French passport as alleged. Mr. Green and Mr. Joseph are confined to their pleaded case, and they are required to bring proof of the allegations they make.[4] The learned judge found that there was no proof as required, and she dismissed the petitions.

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[3] See Cedric Liburd v Eugene A. Hamilton et al and The Attorney General of Saint Christopher and Nevis v Cedric Liburd et al, Saint Christopher and Nevis High Court Civil Appeal Nos. 17 & 18 of 2010 (delivered 5th December 2011, unreported), per Baptiste JA. While this case determined that whether a person is by virtue of his own act under an acknowledgment of allegiance to a foreign state is to be determined in accordance with the provisions of the applicable foreign law, it involved the holding of a US Green Card, and not the holding of a foreign passport. The holding was that the significance of a Green Card fell to be determined under US law. No such requirement applies to the holding of a passport, the implications of which have long been established.

[4] Quinn-Leandro v Jonas, Maginley v Fernandez, Spencer v St. Clair Simon (2010) 78 WIR 216, per Rawlins CJ.

[7] Even if there was evidence that Mr. Saint Jean and Mr. Skerrit held French passports, then, Mr. Astaphan, SC submits, it was necessary for Mr. Green and Mr. Joseph to bring evidence of French law to establish that such act amounted to a disqualification under the Constitution. In the absence of such evidence, it was not open to the learned trial judge, if there had been direct evidence of the possession of the alleged passports, to assume that Mr. Saint Jean and Mr. Skerrit were disqualified. Mr. Mendes, SC responds that Mr. Green and Mr. Joseph had not pleaded foreign law, so that there was no requirement that they prove the foreign law.

The inferences

[8] Mr. Green and Mr. Joseph brought no direct evidence of the existence of the alleged French passports. They were obliged to fall back on asking the court to draw an inference that Mr. Saint Jean and Mr. Skerrit must have had such passports. There were a number of developments in the case, Mr. Mendes, SC submitted, that should have drawn the judge to make the necessary inferences adverse to Mr. Saint Jean and Mr. Skerrit.

[9] One, they had never during the election campaign, in the face of Mr. Green's and Mr. Joseph's accusations, made an express denial of the existence of the alleged French passports. So, Mr. Skerrit, in his letter of 17th December 2009 to his constituents, in which he referred to allegations that by virtue of his dual citizenship and/or his possession of a foreign passport he was not qualified to be elected, did not take the opportunity to deny that he had such a passport. Mr. Mendes, SC submitted that the trial judge ought to have found that she could properly infer from this failure an admission on his part of the existence of this passport. Mr. Astaphan, SC responded that, if Mr. Mendes, SC was correct, it would be open to any politician during an election campaign to make any allegation against his opponent, and the opponent if successful could be challenged for failure to answer to the allegation. This, he submitted, would bring

havoc to our electoral process. Such a result would not be in the public interest, nor, more importantly, is it in accordance with the present election rules.

[10] Two, Mr. Mendes, SC submitted, Mr. Saint Jean and Mr. Skerrit had not during the various interlocutory proceedings in this case denied their possession of such passports. An adverse inference that they were making an admission should have been drawn from this failure of theirs.

[11] Three, one of the grounds on which Mr. Saint Jean and Mr. Skerrit resisted the applications for discovery and subpoena brought against them was the constitutional entitlement to refuse to give evidence that would tend to incriminate themselves. Presumably this was a reference to the offence against section 48(1) of the Constitution which provides that any person who sits or votes in the House knowing or having reasonable grounds for knowing that he is not entitled to do so shall be guilty of an offence and liable to a fine not exceeding one hundred dollars for each day on which he so sits or votes in the House.[5] The learned trial judge found this constitutional entitlement to be a good enough reason to refuse the applications. However, for several reasons I have difficulty in seeing the relevance, and agree with Mr. Mendes, SC that the learned trial judge misdirected herself on this issue. First, you can only raise the entitlement if you go into the witness box, and Mr. Saint Jean and Mr. Skerrit had declined to do so. Second, the offence in question is a summary one, and the constitutional right has never been extended to minor summary offences.[6] Third, the judge could always make an order for discovery coupled with a prohibition on the documents being used in any other proceedings. Fourth, the court may order discovery but at the same

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[5] S.48 – Penalty for sitting if unqualified

(1) Any person who sits or votes in the House knowing or having reasonable grounds for knowing that he is not entitled to do so shall be guilty of an offence and liable to a fine not exceeding one hundred dollars, or such other sum as may be prescribed by Parliament, for each day on which he so sits or votes in the House.

(2) Any prosecution for an offence under this section shall be instituted in the High Court and shall not be so instituted except by the Director of Public Prosecutions.

[6] Rank Film Distributors Ltd. and Others v Video Information Centre (A Firm) and Others [1981] 2 WLR 668, per Lord Wilberforce at 674B-C.

time order that the documents be sealed. Fifth, a charge under this section cannot be brought without the consent of the Director of Public Prosecutions,[7] and a rational Director of Public Prosecutions, in the light of these circumstances, would not be interested in bringing a prosecution, because the party may reasonably but wrongly have considered himself fit to sit in Parliament. Sixth and more importantly, a candidate who has been declared validly elected, but who is liable to found to be disqualified, does not infringe section 48 until some competent court has found him to be not so qualified. He cannot, in the words of the section, have reasonable grounds to know that he is disqualified until a court has so ruled. The defence against self-incrimination simply has no application to the circumstances of this case.

[12] Four, they had not filed any defences to the petitions denying the claim of possession of foreign passports. They had left it for Mr. Green and Mr. Joseph to prove the allegations set out in their petitions at trial. Their failure to file a defence denying a specific allegation of disqualification, when this might easily have been done, raised, Mr. Mendes, SC submitted, an inference that there was no defence to the allegation.

[13] Five, Mr. Saint Jean and Mr. Skerrit had filed no witness statements in which they could have denied such possession. Failure by a defendant to lead evidence for production at a civil trial should result in an adverse inference.

[14] Six, Mr. Saint Jean and Mr. Skerrit had at an early stage applied to strike out the petitions on the ground that they disclosed no cause of action. Yet, they had failed to take the opportunity of their application to deny the allegation that they were in possession of or had used the alleged French passports.

[15] Seven, there was another reason, Mr. Mendes, SC submitted, why the judge should have inferred an admission by Mr. Saint Jean and Mr. Skerrit of their

[7] See note 5 above.

possession of French passports. Just prior to nomination day they both wrote "letters of renunciation" of their French citizenship. They addressed their letters to the French Ambassador to the OECS. In their letters, they made reference, to a "recent Jamaican case" which compelled them to renounce. This case could only be, he submitted, Dabdoub v Vaz.[8] The learned trial judge indeed found that this case was the recent Jamaican case they referred to. Prior to this case, it was not doubted in our jurisdiction that the obtaining of a second citizenship by an adult citizen disqualified that citizen (in a country with a constitutional provision similar to section 32(1)(a)) from being nominated or elected to parliament. Dabdoub's case established that the mere renewal of or travel on a foreign passport amounted to sufficient adherence to a foreign state to disqualify a citizen from being nominated as a candidate or to be elected to parliament. The reference to this case in the letters of renunciation, he urged, was sufficient for the judge to have drawn a necessary inference that they admitted that they were in possession of French passports.

[16] Eight, there was yet another reason, Mr. Mendes, SC submitted, why an adverse inference should be drawn. Mr. Saint Jean's and Mr. Skerrit's failure to testify at their trial, and to contradict the inference that thereby arose, confirmed and strengthened the evidence led by Mr. Green and Mr. Joseph, and entitled the court to find it more likely than not that they did hold French passports as alleged.

[17] Failure in any way and at any time to deny possession of a French passport in circumstances where a denial was to be expected, Mr. Mendes, SC submitted, was evidence from which the Court should infer possession of such passport. The learned trial judge declined to make any such finding. She reviewed the authorities and concluded that before the court could draw an adverse inference from the absence or silence of a witness there must be a *prima facie* case to

[8] Abraham Dabdoub v Daryl Vaz and Others and Daryl Vaz v Abraham Dabdoub, Civil Appeal Nos. 45 & 47 of 2008, Supreme Court of Jamaica Court of Appeal (delivered 13th March 2009, unreported).

answer on that issue. She set out her reasons for finding that Mr. Green and Mr. Joseph had not established a *prima facie* case that Mr. Saint Jean and Mr. Skerrit had by their own act acquired, renewed or used French passports. The allegations made by Mr. Green and Mr. Joseph against Mr. Saint Jean and Mr. Skerrit in the election petitions were detailed and specific, and it was for Mr. Green and Mr. Joseph to bring the necessary proof of them. This is not a civil trial, and no default judgment can be entered to an undefended election petition. Though a suspicion may be raised by the failure to file a defence, it was not open to the trial judge under the House of Assembly (Elections) Act[9] ("the Elections Act") to substitute the drawing of inferences from the absence of a defence for direct evidence of the allegation made in the election petition. She found, with ample justification, that the testimony given by the witnesses for Mr. Green and Mr. Joseph that they had seen such passports in the possession of Mr. Saint Jean and Mr. Skerrit was either false or unreliable, and there is no appeal against those findings. There was no credible evidence before her of any admission made by either of Mr. Saint Jean and Mr. Skerrit. There was no need for them to lead any evidence in their defence, and they were entitled to leave it for Mr. Green and Mr. Joseph to prove their allegations. There was no valid adverse inference that could be drawn against them. Her conclusion seems reasonable and proper, and I am satisfied that she came to the correct decision.

The discovery issue

[18] There were two minor side-issues that arose on the appeal. Mr. Green and Mr. Joseph applied for an order compelling Mr. Saint Jean and Mr. Skerrit to produce their French passports. Mr. Saint Jean and Mr. Skerrit resisted the application. The learned trial judge declined to order discovery. The question was whether she was right to have refused discovery. Mr. Mendes, SC urged that there cannot be a fair trial if discovery cannot be ordered to ensure that the

[9] Chap. 2:01 of the Revised Laws of the Commonwealth of Dominica 1990.

provisions of the Constitution that relate to qualification of members of the House are given effect to. He urged that the court had an inherent jurisdiction to order discovery. The learned trial judge reviewed the relevant authorities,[10] and concluded that the Parliament of the Commonwealth of Dominica did not provide for there to be an interlocutory process which included discovery in election petitions. She held that an order for discovery under the Civil Procedure Rules 2000 did not apply to election petitions. There is no doubt that she was right to so find. In those jurisdictions such as Jamaica, Trinidad and Tobago, and the United Kingdom, the Civil Procedure Rules apply to election petitions by virtue of an express statutory provision. There is no such statutory provision in Dominica. There is no authority to justify the High Court exercising an inherent jurisdiction to create a new scheme or to vary the scheme established by Parliament.

The subpoena issue

[19] When it became apparent that the strategy of Mr. Saint Jean and Mr. Skerrit at trial was going to be to file no defence, to lead no evidence, and to call on Mr. Green and Mr. Joseph to prove their cases, Mr. Green and Mr. Joseph obtained from the court subpoenas against Mr. Saint Jean and Mr. Skerrit. The first subpoena directed them to produce any French passports in their possession, and the second compelled them to appear at the trial to give evidence. The learned trial judge set aside both sets of subpoenas. Her reason was that the Court had no

[10] Including Olive Casey Jaundoo v Attorney General of Guyana [1971] AC 972; Russell (Randolph) and Others v Attorney-General of Saint Vincent & the Grenadines (1995) 50 WIR 127; Ferdinand Frampton v Ian Pinard et al, Claudius Sandford v Kelly Graneau et al, Curvin Ferreira v Vince Henderson et al, Leonard Newton v Loreen Bannis Roberts et al, Julian Prevost v Rayburn Blackmore et al, Commonwealth of Dominica High Court Claim Nos. DOMHCV2005/0149-0154 (delivered 28th October 2005, unreported); Winston Peters & William Chaitan v The Attorney General of Trinidad and Tobago et al, Civil Appeal Nos. 21 and 22 of 2001, Republic of Trinidad and Tobago Court of Appeal (delivered 31st July 2001, unreported) (see note 1 above).

jurisdiction to grant a subpoena to one party to an election petition against the other party. Mr. Green and Mr. Joseph appeal this holding.

[20] Mr. Mendes, SC relies on section 67 of the Elections Act[11] and section 4 of the Evidence Ordinance[12] as authority for Mr. Green's and Mr. Joseph's subpoenaing of Mr. Saint Jean and Mr. Skerrit. Section 67 provides that a judge at the trial of an election petition has the same powers, jurisdiction and authority, and witnesses may be subpoenaed and sworn in the same manner as nearly as circumstances will admit, as at the trial of a civil action. Section 4 provides that on the trial of any matter in any Court of Justice, the parties shall be competent and compellable to give evidence according to the practice of the court on behalf of either or any of the parties to the proceeding.

[21] The trial judge held that section 4 limited the court's powers to the issuing of a subpoena to a 'witness', which term did not include parties to an election petition. I am not certain I would so limit the interpretation of the word 'witness', as it seems clear that the Elections Act contemplates that an election official such as the Supervisor of Elections or a Returning Officer who is named as a party to an election petition can be forced to testify or to produce documents if he refuses voluntarily to do so. There is nothing in principle preventing one party to a suit from subpoenaing another party to the action.[13]

[22] Mr. Mendes, SC urged that section 67 means that, at the trial of an election petition, a judge has the same powers of a judge at the trial of a civil proceeding. This includes the power on behalf of a petitioner to compel a respondent to give evidence for a petitioner. While I accept that this is a correct interpretation of the

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[11] S.67 – Powers of Judge. Summoning witnesses
At the trial of an election petition the Judge shall, subject to the provisions of this Act or of any Proclamation to be made by the President, have the same powers, jurisdiction and authority, and witnesses shall be subpoenaed and sworn in the same manner as nearly as circumstances will admit, as in a trial of a civil action in the High Court, and shall be subject to the same penalties for perjury.

[12] Cap. 64 of the Revised Laws of the Commonwealth of Dominica 1961 (S.4. – Parties to any suit in a Court of Justice competent and compellable to give evidence).

[13] See Adelaide Steamship Company v Spalvins and Others (1997) 24 ACSR 536.

law, I cannot agree that the section was intended to be used in effect to shift the burden of proof from an election petitioner onto a respondent by enabling a petitioner, who lacks sufficient evidence to prove the allegations in his petition, to compel the respondent to testify against himself. That is a bridge too far. The conclusion that the learned trial judge came to, namely that under our present election rules a subpoena is not available to an election petitioner to compel his opponent to testify, is unassailable.

The foreign law issue

[23] There was a great deal of argument both in the High Court and in the appeal as to whether the letters of renunciation written by Mr. Skerrit and Mr. Saint Jean were sufficient in French law to renounce citizenship. Mr. Mendes, SC points out with some justification that a letter written to an Ambassador can hardly be a proper way to renounce citizenship. Since the issue of their citizenship is not relevant to the question of disqualification, both being citizens by filiation and not by their own voluntary act, the point amounts to a non-issue in this case. Additionally, Mr. Green and Mr. Joseph did not plead French law. It was, therefore he submits, not necessary for them to prove French law.[14] The issue is whether the allegations in the election petitions of the holding and using of French passports have been established, by direct evidence or by inferences, and, once proved, whether that holding and using disqualifies the holder. The terms of a passport are familiar. All passports are documents issued in the name of a head of state or his official to a named individual entitled to be presented to the government of a foreign nation and to be used as that individual's protection as a subject in foreign countries. It requests and requires in the name of the head of state all those whom it may concern to allow the bearer to pass freely, without let or hindrance, and to afford him all the assistance and protection which he may need. In Dabdoub v Vaz, Mr. Vaz's mother was a US national, and he acquired his US

[14] Sir Lawrence Collins, Dicey, Morris & Collins: The Conflict of Laws (14th edn., Sweet & Maxwell 2006) Volume 1, para. 9-025.

nationality at birth through her. As an adult, he acquired a US passport, which he maintained, renewed and used for travel before and after his nomination for the general elections in Jamaica. The trial judge at first instance, and as confirmed by the Court of Appeal, held that by his positive act of renewing and travelling on the US passport, Mr. Vaz by his own act acknowledged his allegiance, obedience and adherence to the United States of America and was by virtue of the Jamaican constitutional provision not qualified to be elected as a member of the House of Representatives. The possession of a passport gives rights and imposes obligations of protection upon the State issuing the passport. The holder of a foreign passport, travelling on it, thus by his own act maintains the bond which while he was within the State bound him to it. While in the Dabdoub v Vaz case, there was expert opinion evidence before the trial judge that the acquisition of a passport by Mr. Vaz amounted to his 'by his own act' acknowledging US citizenship and his allegiance, it can in my view no longer be doubted that the mere acquiring of the passport of a foreign State amounts to a voluntary acknowledgment of allegiance to that State. No proof of the foreign law is necessary. I am satisfied from the authorities that once it is established that a citizen of the Commonwealth of Dominica by his own voluntary act as an adult acquired, renewed or travelled on a foreign passport, he was by all the authorities that bind our court or that are persuasive[15] disqualified by virtue of section 32 of the Constitution.[16] In my view, it is unnecessary for a qualified person challenging the nomination or election of a person who obtained, renewed, or travelled on a foreign passport either to plead the foreign law in question or to prove that under that foreign law such action amounts to an acknowledgment of allegiance, obedience or adherence to the foreign State sufficient to establish a disqualification under the Constitution. The Oxford Dictionary defines "passport"

[15] See, for example, Joyce v Director of Public Prosecutions [1946] AC 347, per Lord Jowitt LC at 369, from the UK; and Abraham Dabdoub v Daryl Vaz and Others and Daryl Vaz v Abraham Dabdoub, Civil Appeal Nos. 45 & 47 of 2008, Supreme Court of Jamaica Court of Appeal (delivered 13th March 2009, unreported), per Smith JA at paras. 73-76.

[16] See note 2 above.

as meaning since the year 1536, "A document issued by a competent authority, granting permission to the person specified in it to travel, and authenticating his right to protection." It is this right to protection by a government that is enjoyed by a citizen, and that is in itself the proof of citizenship. The holding and producing of a passport has for centuries been the most common way for a person to establish his citizenship. A passport is one's proof of citizenship. There is no document more eloquent or more commonly used by persons all over the world to establish citizenship than a passport. It is in my view the party who suggests the contrary view that the acquisition of a foreign passport, or the mere travelling on it, by an adult Dominican national who has the burden of proving that such act does not thereby place him under an acknowledgment of allegiance, obedience or adherence to that foreign State.

The public interest

[24] The argument in this appeal raised two conflicting public interest issues. The first is the constitutional requirement that every trial should be fair. The denial of access to evidence is generally accepted to constitute a denial of the right of access to the court.[17] Interlocutory procedures have been developed under rules of court to ensure this objective of fairness. The second issue that conflicts with the first is the repeatedly stated[18] requirement that election petitions must be dealt with promptly. It is in the public interest to know with certainty fairly soon after the conclusion of elections which candidates have been elected and which party has the necessary majority to form the government.

[25] Election petitions are of a special nature. There is a clear distinction between the election jurisdiction of the court created by parliament by a law intended to

[17] Toussaint v Attorney General of Saint Vincent & the Grenadines [2007] 1 WLR 2825. This case however did not concern an election petition but a very different jurisdiction, and is to be distinguished.

[18] See Ferdinand Frampton v Ian Pinard et al, Claudius Sandford v Kelly Graneau et al, Curvin Ferreira v Vince Henderson et al, Leonard Newton v Loreen Bannis Roberts et al, Julian Prevost v Rayburn Blackmore et al, Commonwealth of Dominica High Court Claim Nos. DOMHCV2005/0149-0154 (delivered 28th October 2005, unreported) per Rawlins J (as he then was) at para. 16.

determine election matters, and the jurisdiction of the court under section 16 of the Constitution to determine constitutional issues. Very different rules apply in the election jurisdiction than do within the constitutional or ordinary civil jurisdiction of the court.

[26] The lack of election petition rules, or a statutory provision incorporating the normal civil procedure rules in the election petition process, sometimes gives rise to uncertainty as to the correct procedure to be followed. Interminable interlocutory process might lead to a fairer and more transparent hearing, but might on the other hand cause an undesirable delay in establishing a new government after a general election. Until the necessary election petition rules are made under the Elections Act, or there is a statutory provision incorporating the Civil Procedure Rules, there can be no reliance placed on Civil Procedure Rules 2000 to supplement the rules found in the Elections Act itself and to introduce into election petition proceedings the interlocutory proceedings for civil trials found in those rules.[19]

[27] The pleadings before the trial judge were confined to narrow issues of fact. Mr. Green alleged that Mr. Saint Jean had been issued a French passport between 2000 and 2002. There was no pleading that Mr. Saint Jean had applied in person for, renewed or travelled on a French passport. The judge rejected the evidence of the witnesses who claimed that Mr. Saint Jean had shown them his alleged French passport. There was no attempt to produce evidence he had been issued a passport between 2000 and 2002 as alleged. On that basis, the petition should have been dismissed. The allegation against Mr. Skerrit was that he had admitted that he was the holder of a French passport. Mr. Joseph conceded at the trial that this pleaded admission was false. The petition should have been dismissed on that basis alone.

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[19] Ezechiel Joseph v Alvina Reynolds and Lenard "Spider" Montoute v Emma Hippolyte, Saint Lucia High Court Civil Appeal No. 14 of 2012 (delivered 31st July 2012, unreported), per Sir Hugh Rawlins CJ, in which he provides a full review of the relevant cases.

[28] I would dismiss both appeals and the counter appeal. For the reason given by the learned trial judge in her judgment, viz, the great national importance of the matter, I would not make any order as to costs of the appeal.

[29] The order is that the appeal and the counter appeal are both dismissed with no order as to costs.

Don Mitchell
Justice of Appeal [Ag.]

[30] PEREIRA CJ: I have read the judgment of my learned brother Mitchell JA [Ag.] and I agree with his findings on all areas save and except for his findings on the foreign law issue. My reasoning parts ways with that of Mitchell JA [Ag.] on his findings that if foreign law is not pleaded it is not necessary to prove it and his other finding that it is unnecessary for the challenger to either the nomination or election of a candidate to plead or prove that under foreign law, a voluntary act amounted to acknowledgement of allegiance, obedience or adherence to a foreign power or state sufficient to establish a disqualification under the Constitution. I start from the basic principle that he who asserts must prove, unless some other specific principle or circumstance causes the burden of proof to shift to a respondent.

[31] In order to rely on section 32(1)(a) of the Constitution, not only is it trite law, but it also stands to reason, that this must be pleaded and proved. In my view the very wording of the provision imports into it an element of foreign law. The only way in which it can be proved as a matter of fact is by producing the evidence of foreign law that a person, through his/her own voluntary act, is under an acknowledgement of allegiance, obedience or adherence to a foreign power or

state. Baptiste JA put it succinctly in Cedric Liburd v Eugene A. Hamilton[20] when he opined:

> "It emerges from the case of Sykes v Cleary[4] [*[1992] HCA 60; (1992) 176 CLR 77*] that the question whether a person is by virtue of his own act, under an acknowledgement of allegiance, obedience or adherence to a foreign power or state, is to be determined in accordance with the provisions of the applicable foreign law."[21]

[32] The consequences of disqualification under any grounds of the Constitution, particularly under 32(1)(a) require very specific proof of what is alleged. It is therefore very necessary for a person who is challenging the nomination or election of a candidate on the basis that the candidate has obtained or renewed or travelled on a foreign passport, to plead and prove the foreign law. It cannot be enough to assume on a presumption, the application of local law by default.

[33] Section 32(1)(a) is an important provision which determines a key aspect of a country's democratic process and not to mention a citizen's democratic right. The significance of this provision is shown by the fact that it is entrenched in the Constitution of Dominica. This, in my mind, reflects the seriousness of the provision as the consequences which flow from the breach of it can have a dire effect on the democratic process. For this reason it must be sufficiently proved and cannot be left up to determination by a presumption on default.

[34] Although there are occasions where the court will apply the presumption by default it must be recognised that this is not a hard and fast rule. Fentiman notes:

> "It is unclear therefore that it is ever appropriate to speak of a presumption of similarity between English and foreign law. And even if we do so it is apparent that it has never been treated by the courts as a universal rule. This is not to say that the existence of such a presumption, although dubious in principle, is always harmful. It may cause little practical difficulty where it merely explains why English law applies where foreign

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[20] Cedric Liburd v Eugene A. Hamilton et al and The Attorney General of Saint Christopher and Nevis v Cedric Liburd et al, Saint Christopher and Nevis High Court Civil Appeal Nos. 17 & 18 of 2010 (delivered 5th December 2011, unreported) at para. 11.

[21] See note 3.

> law is not introduced at all, or where it has been pleaded and proved but the evidence is inadequate. But this cannot be said where foreign law is relied upon but not proved. One danger in applying the presumption in such a case is that the mandatory introduction of foreign law might thus be subverted. A party who is required to introduce foreign law by a mandatory choice of law may attempt to employ the presumption to defeat the rule's obligatory character. Another risk is that a plaintiff who relies upon foreign law even when no such duty exists might oppress a defendant by requiring the latter to disprove the presumption. Certainly, there is something potentially unfair not to say irrational, about requiring one party to disprove what the other has not sought to prove."[22]

[35] We are faced with a similar challenge here. The appellants, upon whom the onus was to prove that under foreign law, a voluntary act amounted to acknowledgement of allegiance, obedience or adherence to a foreign power or state, failed to plead and prove such and instead asked the court to draw inferences from the respondents actions as well as rely on the fall back presumption. Fentiman goes on to say:

> "… one who relies upon a proposition of foreign law must prove the allegation or see it fail. The true role of the presumption of similarity is to sanction those who rely upon foreign law but decline to prove it, not to reward them."[23]
>
> "It is intuitively unacceptable for a party to seek the application of foreign law and at the same time, with luminous inconsistency, to invite the court to apply English law by declining to offer evidence of any other. It is also potentially unfair that one party should (in effect) be made to prove (or disprove) a matter which another has introduced."[24]

Therefore, the appellants cannot seek to benefit from the presumption without having pleaded or proved the necessary elements of the foreign law but instead by relying on the evidence which they hoped would have been forthcoming from the respondents under cross-examination. The appellants have cited no authority to show that one can rely on a presumption to prove a constitutional provision which the authorities make clear, requires proof of foreign law. In my view, given the

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[22] Richard Fentiman: Foreign Law in English Courts (Oxford University Press 1998), at pp. 147-148.
[23] Ibid at p.150.
[24] Ibid at p. 152

nature of section 32(1)(a) the appellant is put to specific proof and there can be no getting around it.

[36] Consequently, I do not agree with my learned brother's finding in paragraph 23 that it was not necessary for the appellants to plead and/or prove the elements required under foreign law in section 32(1)(a) sufficient to establish a disqualification under the Constitution.

[37] Dicey and Morris in considering the mode of proof which is required for proving foreign law states:

> "It is now well settled that foreign law must, in general, be proved by expert evidence. Foreign law cannot be proved merely by putting the text of a foreign enactment before the court, nor merely by citing foreign decisions or books of authority.[51] [*Nelson v Bridport (1845) 8 Beav. 527, 542; Buerger v New York Life Assurance Co (1927) 96 L.J.K.B. 930, 940, 942 (CA); Bumper Development Corp v Commissioner of Police of the Metropolis [1991] 1 W.L.R. 1362, 1371 (CA); cf. Callwood v Callwood [1960] A.C. 659 (PC).*] Such materials can only be brought before the court as part of the evidence of an expert witness,[52] [*Bumper Development Corp v Commissioner of Police of the Metropolis, ibid., Glencore International AG v Metro Trading International Inc [2001] 1 Lloyd's Rep. 284; Dymocks Franchise Systems (NSW) Pty Ltd v Todd [2002] UKPC 50, [2004] 1 N.Z.L.R. 289, [2002] 2 All E.R. (Comm.) 849 (PC).*] since without his assistance the court cannot evaluate or interpret them."[25]

[38] In support of this statement are the authorities in this region which show not only the necessity of proving foreign law but also the manner in which foreign law must be proved. In Dabdoub v Vaz the parties pleaded and presented expert evidence to the court to establish what "by virtue of his own act" and "any acknowledgement of allegiance, obedience or adherence to a foreign power or state" encompassed. The Jamaica Court of Appeal relied on the evidence which was before it to make the determination as to whether Mr. Vaz was disqualified under the similar section 40(2)(a) of the Constitution of Jamaica.

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[25] Sir Lawrence Collins, Dicey, Morris and Collins: The Conflict of Laws (14th edn., Sweet & Maxwell 2006) Volume 1 at para. 9-013.

[39] Similarly, the petitioners in Cedric Liburd produced expert evidence of what under US law would amount to an acknowledgement of, allegiance or obedience to a foreign power. Whether the act complained of was possession or use of a permanent residence card (commonly called a green card) as distinct from possession or use of a passport issued by a foreign state is of no moment by way of a distinguishing feature. The focus must still be on the voluntary act which is said to amount to an acknowledgment of allegiance, obedience or adherence to that foreign state under the law of that foreign state. As is commom ground in this case, the singular fact of dual citizenship is not sufficient.

[40] In Joyce v Director of Public Prosecutions[26] the court held that the onus was not on the appellant to show that any duty of allegiance owed had been terminated. Other than that specific point, I am of the view that Joyce does not assist us much. Joyce was a US citizen who obtained British citizenship and whose allegiance was challenged in the British courts. Therefore that case involved an English court commenting on their own law with regard to a foreign subject. This is not the case here.

[41] In this case, the burden was therefore on the appellants, after pleading the provision above which, on the authorities accepted by this court, brings into play foreign law, to have brought the necessary evidence before the court to prove that under the law of France that the voluntary act done by the respondents (here the alleged possession of French passports particularly where it was accepted that mere possession of a French passport may not have been on the basis of the voluntary act of the possessor) was an act which amounted to an acknowledgement of allegiance, obedience or adherence to the state of France. This was not done. The appellants were aware of the many authorities which support this finding but chose not to plead and produce evidence which would prove the principles of foreign law which would disqualify the respondents under

[26] [1946] AC 347.

section 32(1)(a). Further, they were alive to this issue during other interlocutory hearings in the case.[27] Having failed to specifically plead and prove the disqualifying factors they are unable to now rely on the fall back presumption which in my view simply cannot suffice in the face of a constitutional provision to which high regard must be given in view of the impact it may have on the democratic process in an election.

[42] For the same reasons, quite apart from the fact that the respondents proffered no pleadings or evidence and therefore ought not to have been allowed to raise the issue of the efficacy of their renunciations of French citizenship only by way of their skeleton arguments, the respondents will have similarly failed on this issue given the absence of evidence of French law to prove the assertion of renunciation sought to be relied on by the respondents.

[43] Accordingly, I would dismiss the appeals on this ground alone. I do however agree that the appeals ought to be dismissed for the other reasons proffered by Mitchell JA [Ag.]. I would allow the respondents' counter-notice only in respect of the foreign law point. I would also make no order as to costs on this appeal.

Janice M. Pereira
Chief Justice

[44] MICHEL JA: I have read the judgments prepared by Pereira CJ and Mitchell JA [Ag.] and I agree with them that the appellants' appeals ought to be dismissed. Like the learned Chief Justice, I disagree with the findings of Mitchell JA [Ag.] on the foreign law issue and for the reasons proffered by the Chief Justice I too would allow the respondents' counter appeal, only in respect of the foreign law point.

[27] See judgment of Thomas J dated 25th August 2012 at para. 188.

[45] I want though to specifically address the submission of learned Senior Counsel for the appellants, Mr. Douglas Mendes, SC, to the effect that section 67 of the House of Assembly (Elections) Act[28] ("the Elections Act") of the Commonwealth of Dominica, when read together with section 4 of the Evidence Ordinance,[29] means that at the trial of an election petition the judge hearing the petition has the same powers as a judge at the trial of a civil action, which include the power on behalf of a petitioner to compel a respondent to give evidence for the petitioner.

[46] Section 67 of the Elections Act vests in a judge hearing an election petition the same powers, jurisdiction and authority as a judge in the trial of a civil action and provides for a witness to be subpoenaed and sworn "in the same manner as nearly as circumstances will admit" as in a trial of a civil action. Section 4 of the Evidence Ordinance in turn provides for the parties to a civil action, the person on whose behalf the action may be brought or defended, as also their husbands or wives, to be competent and compellable to give evidence, according to the practice of the court, on behalf of either or any of the parties to the action.

[47] It is not and has never been the practice of the court to enable one party to any trial before the court to compel the other party by subpoena to give evidence against his will at the instance of his adversary in the trial and it could not therefore have been the intendment of section 67 of the Elections Act to introduce this practice in the trial of election petitions. The combined effect of section 67 of the Elections Act and section 4 of the Evidence Ordinance must be to provide for the competence of the parties to an election petition to give evidence on behalf of either or any party to the petition and the compellability of other persons, including the husbands and wives of the parties and, conceivably, the persons on whose behalf the petition was brought or defended, to give such evidence.

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[28] Chap. 2:01 of the Revised Laws of the Commonwealth of Dominica 1990. (S. 67 is set out in note 11 above).

[29] Cap. 64 of the Revised Laws of the Commonwealth of Dominica 1961. (S. 4 is set out at para. 20 above).

[48] Like the Chief Justice and my brother judge, I would accordingly dismiss the appellants' appeals and, like the Chief Justice, I would allow the respondents' counter appeal on the foreign law issue. I too would, in the circumstances of this case, make no order as to costs.

[49] I only wish to add (by way of comment) that election petitions appear to be becoming a regular feature of general elections in the Commonwealth Caribbean, with unsuccessful election candidates now bringing election petitions with increasing frequency.

[50] While the filing of an election petition is the right of every election candidate, those seeking elective office should be careful not to transport their electoral contests from the political platforms to the law courts unless there is a good basis for challenging the outcome of an election. To file election petitions as a matter of course or whenever there is a close result or there is some inconsequential or unprovable allegation of impropriety is inimical to our democratic process which is based on first past the post and not first into court.

[51] I hasten to add that this comment is not intended to cast aspersions on the appellants in this case (who were the petitioners in the court below) or on the petitioner in any particular election petition currently before our courts, but it is intended as a general admonition to election candidates to avoid using the courts to prolong their election contests by the filing of unmeritorious election petitions.

[52] The present case appeared to be one in which the petitioners did not have the evidence to prove their cases and hoped that the respondents would do so for them by producing documents and giving testimony upon being compelled to do so by orders made under the Civil Procedure Rules 2000 of the Eastern Caribbean and the Evidence Ordinance of Dominica. The learned trial judge dashed the petitioners' hopes when she ruled that the Civil Procedure Rules 2000 do not apply to election petitions and that there were no election rules

empowering her to compel the respondents to produce documents, and that the Evidence Ordinance did not empower her to compel the respondents to give evidence obviously against their wishes and probably against their interests. Mitchell JA [Ag.] and the learned Chief Justice have concluded that the trial judge was correct in her ruling and I agree with them.

[53] By way of a postscript, I want to add further that maybe the increased prevalence of election petitions and the uncertainties which they generate in the outcome of general elections in the Commonwealth Caribbean may be stemmed by extending the rule-making powers of the appropriate officers of the Supreme Courts in relation to election petitions, so that election rules may be made which clearly set out the basis for instituting election petitions and the procedure to institute and prosecute them and penalise petitioners by cost awards for instituting and pursuing unmeritorious election petitions.

Mario Michel
Justice of Appeal