THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

SAINT CHRISTOPHER AND NEVIS

SKBHCVAP2012/0001

BETWEEN:

LINDSAY FITZ-PATRICK GRANT

Appellant

and

[1] RUPERT HERBERT
[2] LEROY BENJAMIN
[3] WENTFORD ROGERS

Respondents

Before:

The Hon. Mr. Mario Michel — Justice of Appeal
The Hon. Mr. Paul Webster — Justice of Appeal [Ag.]
The Hon. Mr. Tyrone Chong, QC — Justice of Appeal [Ag.]

Appearances:

Ms. Marguerite Foreman with her, Ms. Teshari A. J. John-Sargeant for the Appellant
Ms. Angelina Gracy Sookoo for the 1st Respondent

2016: June 8;
2017: July 14.

Election petition appeal – Quantification of costs of election petitions – Court of Appeal ordering costs to be quantified – Whether Civil Procedure Rules 2000 in particular Parts 64 and 65 apply to calculation of costs of election petitions – Whether learned judge erred in calculating election petition costs pursuant to inherent jurisdiction as opposed to Parts 64 and 65 of the Civil Procedure Rules 2000 – Whether costs awarded by learned judge unreasonable or excessive

The appellant brought an unsuccessful election petition against the respondents. In dismissing the election petition, the trial judge made no order as to costs. The respondents appealed the learned judge's order denying them their costs. The Court of Appeal allowed the appeals and ordered the appellant to pay the respondents' costs of the appeals and in the court below and that such costs be quantified (the "Consolidated Appeals"). In undertaking the quantification of costs, the learned judge ruled that the rules in the **Civil Procedure Rules 2000** as amended (the "CPR"), did not apply to election

petitions. The quantification of costs was then undertaken by the learned judge under the court's inherent jurisdiction.

> The appellant, dissatisfied with this decision, appealed. The appellant argued that the learned judge erred in failing to undertake the quantification of costs in accordance with the prescribed costs regime set out in Parts 64 and 65 of the CPR as directed by Barrow JA. The first respondent argued that the learned judge was correct in quantifying costs under the court's inherent jurisdiction as the CPR did not apply to election petitions. The appellant also argued that the quantum of costs awarded by the learned judge was unreasonable and excessive in the circumstances. Prior to the hearing of the appeal, the appellant entered into a settlement agreement with the second and third respondents and continued with the appeal against the first respondent only.
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> **Held**: dismissing the appeal; affirming the learned judge's award of costs in the lower court; and awarding the respondent costs of the appeal, such costs to be assessed, if not agreed within 21 days of the date of this order, that:
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> Per Webster JA [Ag.], Chong JA [Ag.]:
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> 1. The general rule is that the High Court's jurisdiction to deal with election petitions is a statutory jurisdiction that is separate and distinct from the Supreme Court's ordinary civil jurisdiction.
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>   **Theberge and another v Philippe Laudry** [1876] 2 AC 106 applied; **Devan Nair v Yong Kuan Teik** [1967] 2 WLR 846 applied; and **Patterson v Solomon** [1960] AC 579 considered.
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> 2. There is no legislation in St. Kitts and Nevis incorporating either the CPR generally or the costs regime in Parts 64 and 65 and therefore it does not apply to election petition cases. Section 100 of the **National Assembly Elections Act** is in very general terms and does not have the effect of incorporating the CPR into election court proceedings.
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>   **Section 100 of National Assembly Elections Act,** Cap.1.62, Revised Laws of Saint Christopher and Nevis 2009 applied.
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> 3. When the Court of Appeal in St Christopher and Nevis hears appeals from the High Court in election proceedings, it occupies a unique position in the court's hierarchy in that it is the final Court of Appeal. Section 36(1) of the Constitution vests the jurisdiction to hear and determine cases relating to the election of members of the National Assembly in the High Court and subsections (6) and (7) deal with appeals from decisions of the High Court in election cases. The effect of subsections (6) and (7) is that there is a right of appeal to the Court of Appeal from final decisions of the High Court in election cases, and importantly for the purposes of this appeal, there is no right of appeal

from decisions of the Court of Appeal to Her Majesty in Council. The Court of Appeal is the final court in election proceedings. This affects the principle of stare decisis and how this Court should deal with its previous decisions.
Section 36(1) of the Constitution of Saint Christopher and Nevis, Cap.1.01, Revised Laws of Saint Christopher and Nevis 2009 applied.

4. The decision of this Court in the Consolidated Appeals that the costs regime in the CPR applies to the costs of election petition proceedings is contrary to cases in the High Court, Court of Appeal and the Privy Council and is plainly wrong. It has not been followed by any other court and if it is overruled it will not affect the rights of persons not connected to the case.

   Leroy Benjamin et al v Lindsay Fitzpatrick Grant SKBHCVAP2006/009/0111 (delivered on 15th July 2011, unreported) and **Leroy Benjamin et al v Eugene Hamilton** SKBHCVAP2006/0012 (delivered on 15th July 2011, unreported) overruled; **Ezechiel Joseph v Alvina Reynolds and Lenard "Spider" Montoute v Emma Hippolyte** SLUHCVAP2012/0014 (delivered 31st July 2012, unreported) followed; and **Ronald Green v Maynard Joseph and Peter Saint Jean v Roosevelt Skerrit** DOMHCVAP2012/0001 (delivered 11th March 2013, unreported) followed.

5. On the very special facts of this case, this Court, as the final court, should not set aside the learned judge's decision when it has found that he applied the correct legal principles, and by doing so avoided a manifest injustice to the 1st respondent. This is not a case of "falsifying history" as suggested by Lord Lloyd in the **Kleinworth Benson** case, but of overruling an incorrect decision of this Court in and upholding the correct decision of the trial judge. The 1st respondent should have the benefit of an order from this Court allowing him to recover his costs quantified in accordance with the law as this Court has found it and not on the basis of incorrect procedures resulting in an award that is less than two per cent of what the trial judge found to be his reasonable costs.

   Kleinworth Benson Ltd. v Lincoln City Council [1998] 4 All ER 513 distinguished; and **Davis v Johnson** [1978] 1 All ER 1132 applied.

6. The learned trial judge erred in finding that the decision in the Consolidated Appeals was overruled sub silentio in **Jacqui Quinn-Leandro v Dean Jonas**.[1] The learned trial judge appears to have used the phrase 'sub silentio' to mean that the court in **Quinn-**

[1] 2010 (78) WIR 216.

Leandro, in reaching a decision that was inconsistent with the decision in the Consolidated Appeals, implicitly overruled the decision in the Consolidated Appeals. While this meaning and use of the sub silentio principle appears to be consistently employed in the United States, it has not been similarly applied in the English or Commonwealth courts. This Court is not aware of any decision in which the phrase sub silentio has been used in the context of overruling a previous decision. There is no need to extend the meaning of the sub silentio principle to apply to this situation.

Haywood v R [2016] 4 LRC 101 considered; **Baker v R** [1975] 3 All ER 55 considered; **Barrs v Bethel** [1982] 1 All ER 106 considered.

7. It was within the learned judge's discretion to accept the fee notes produced by counsel without receipts and there is no basis for interfering with the exercise of his discretion in accepting them. Further, the learned judge did not restrict his finding of reasonableness to the fee notes but rather, he made specific findings of fact relating to the complexity of the matter, the duration of the court proceedings as well as the absence of pleadings by the appellant in relation to the bills of costs. The learned judge was satisfied that this was a sufficiently important, long and complex case to justify instructing senior and junior counsel and there is no basis for this Court to interfere with his decision.

Per Michel JA, dissenting:

8. Even if the CPR does not apply to the conduct of election petition proceedings generally, and even if the costs regime under the CPR is not applicable to the determination and quantification of costs in election petition cases, and even if costs in these cases are to be determined in accordance with the inherent jurisdiction of the court, it is open to the court to choose its mechanism for determining the costs to be awarded. The court may, in its discretion, choose to ask the party entitled to costs to prepare and submit a bill of costs, which the court can use in assessing the costs to be awarded, or the court may choose to use – not by dictation but by discretion – the costs regime contained in the CPR. In this way, even if the costs regime under the CPR is not applied to election petition cases as a matter of course, it can yet be applied by way of the exercise by the court of judicial discretion in accordance with its inherent jurisdiction.

9. There is no doctrine or principle that I am aware of that would permit a judge of an inferior court to disregard not merely a decision of a superior court, but a virtual directive of that court to the inferior court, and instead to make and act upon his own independent and contrary decision.

10. A lower court cannot choose to disregard what in essence is a directive to it by a superior court and to make its own determination contrary to the directive of the superior court, and this Court should not countenance such disregard, far less legitimise it by overturning the decision of the superior court in line with the lower court's decision. This Court is free to criticise a previous decision of the Court in its determination of the costs regime to be applied in this case, but we ought not to reverse the decision so as to regularise what in effect is an ultra vires decision of the lower court. The Court's criticisms and expression of its position should provide sufficient guidance to be followed by this Court or a lower court in an appropriate case.

JUDGMENT

[1] **WEBSTER JA [AG.]**: The main issue in this appeal is whether the costs regime in Parts 64 and 65 of the **Civil Procedure Rules 2000** ("the CPR") applies to the quantification of costs awarded on an election petition in the Federation of St. Christopher and Nevis. The other issue is the actual quantification of the costs awarded to the respondents by the Court of Appeal.

[2] This appeal is another episode in the long-running battle between the appellant, Lindsay Fitz-Patrick Grant ("Mr. Grant"), and the respondents, following the general elections in Saint Christopher and Nevis in 2004. Mr. Grant and the 1st respondent, Mr. Rupert Herbert ("Mr. Herbert"), contested the election for the constituency of St. Christopher 4. Mr. Herbert was the successful candidate. Mr. Grant brought an election petition against Mr. Herbert as the successful candidate, the 2nd respondent as the supervisor of elections, and the 3rd respondent as the returning officer for the St. Christopher 4 constituency (together "the Respondents"). Following interlocutory applications and an interlocutory appeal, the petition was heard by Belle J on 2nd May 2006. He dismissed the petition and made no order as to costs.

[3] The Respondents appealed the learned judge's order denying them their costs of the proceedings in the High Court and Court of Appeal. This appeal is Civil Appeal No. 11/2006. The appeal was consolidated with another appeal by the

Respondents in Civil Appeal no. 12 of 2006 – **Leroy Benjamin et al v Eugene Hamilton** – involving similar issues ("the Consolidated Appeals"). The Consolidated Appeals were heard by a panel comprising the Hon. Sir Brian Alleyne, CJ [Ag.], the Hon. Dennis Barrow JA and the Hon. Errol L. Thomas JA [Ag.]. The unanimous judgment of the court was delivered by Barrow JA. The Court of Appeal allowed the appeals and ordered Mr. Grant to pay the Respondents' costs of the appeals and in the court below, such costs to be quantified.

[4] The Respondents' costs arising from Barrow JA's order in Civil Appeal No. 11 of 2006 were quantified by the said Thomas J sitting in his substantive position as a judge of the High Court. He carried out the quantification under what he described as the inherent jurisdiction of the court applying the principles relating to reasonable costs in a quantification exercise, and not under the provisions of Parts 64 and 65 of the CPR which has different methods of quantifying costs. The learned judge awarded US$283,333.33 to Mr. Herbert and EC$545,368.41 to the 2nd and 3rd respondents.

[5] Mr. Grant appealed against the learned judge's quantification of the costs. Prior to the hearing of the appeal, he settled the claim of the 2nd and 3rd respondents and on 9th October 2015 filed a consent order discontinuing the appeal against those respondents. The appeal continues against Mr. Herbert only.

[6] The main issues that arise from the grounds of appeal are:

> **Issue 1**: Does the CPR and in particular, the rules for quantifying costs, apply to election petition cases?
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> **Issue 2**: If yes, are the costs to be quantified as prescribed costs or assessed costs under Part 65 of the Rules?

Issue 3: If the CPR does not apply, or even if it applies, and the costs are to be quantified as assessed costs, did the learned judge err by finding that the amount of costs claimed by the respondent was reasonable?

I will deal with these issues in the order set out above.

Issue 1: Do the rules in the CPR for the quantification of costs apply to the costs of an election petition?

[7] Learned counsel for Mr. Grant, Ms. Marguerite A. Foreman, contended that Thomas J [Ag.] erred when he quantified the costs of the election petition proceedings under the inherent jurisdiction of the court and not under the costs provisions in the CPR as directed by Barrow JA in his judgment in the Consolidated Appeals. Ms. Angelina Gracy Sookoo who appeared for Mr. Herbert submitted that the judge was correct in proceeding under the inherent jurisdiction of the court. The difference between the two methods of calculating the costs is significant. Thomas J [Ag.] quantified the costs under the inherent jurisdiction at US$283,333.33 or EC$762,999.99. If the CPR and prescribed costs apply Mr. Herbert would be awarded EC$12,500.00. In order to decide which of these two contentions is correct, I will examine some of the cases and principles dealing with the jurisdiction of the High Court in election petition cases followed by the cases on the applicability of the CPR to election petitions, including Barrow JA's judgment in the Consolidated Appeals. Finally, I will examine my findings in the context of the jurisdiction of the Court of Appeal to review its own previous decisions.

The Election Petition Jurisdiction

[8] The general rule is that the High Court's jurisdiction to deal with election petitions is a statutory jurisdiction that is separate and distinct from the Supreme Court's ordinary civil jurisdiction. This was established as far back as 1876 when the Privy Council had to consider an election petition brought under the relevant election legislation in Quebec in the case of **Joseph Theberge and Another v Philippe**

Laudry.[2] After describing the new election jurisdiction created by the relevant Acts of Parliament Lord Cairns described the new jurisdiction as the Parliament of Quebec -

> "… vesting in that Court, that very peculiar jurisdiction which, up to that time, had existed in the Legislative Assembly of deciding election petitions, and determining the status of those who claimed to be members of the Legislative Assembly. A jurisdiction of that kind is extremely special, and one of the obvious incidents or consequences of such a jurisdiction must be that the jurisdiction, by whomsoever it is to be exercised, should be exercised in a way that should as soon as possible become conclusive, and enable the constitution of the Legislative Assembly to be distinctly and speedily known."

The Privy Council returned to the issue of the court's jurisdiction in election petition cases in 1960 in **Patterson v Solomon**[3] on appeal from the Court of Appeal of Trinidad and Tobago. The Board referred to its decision in the **Theberge v Laudry** case[4] noting that the relevant legislation 'created an entirely new jurisdiction in a particular court' with a 'very peculiar jurisdiction'.[5]

[9] The Privy Council went one step further in **Devan Nair v Yong Kuan Teik**,[6] an appeal from the Federal Supreme Court of Malaysia concerning the interpretation and application of the rules made under the **Election Offences Ordinance**.[7] Rule 15 provided that the petition must be served on the respondent within ten days of being presented. The petitioner failed to comply with this rule and one of the issues for their Lordships was whether the Board had discretion to extend the time for service as they did under the **Rules of the Supreme Court** (Malaysia). The Board found that rule 15 was mandatory and, having regard to the special nature of the election jurisdiction, they had no discretion to extend the time for service. In coming to this decision, Lord Upjohn compared the rules under the **Election Ordinance** with the Rules of the Supreme Court and noted that unlike the Rules of

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[2] [1876] 2 AC 106.
[3] [1960] AC 579.
[4] Supra, note 2.
[5] Ibid, p. 589.
[6] [1967] 2 WLR 846.
[7] No. 9 of 1954.

the Supreme Court, the Election Rules: 'vest no general power in the election judge to extend the time on the ground of irregularity. Their Lordships think this omission was a matter of deliberate design..[8]

The conclusion to be drawn from the way that their Lordships came to their decision is that the Rules of the Supreme Court do not apply to election petition cases because of the very specialised jurisdiction of the Election Court which is governed by its own rules.

The Decisions of the Court of Appeal in Henry v Halstead and the Consolidated Appeals

[10] The issue of the applicability of the Rules of Court to election petitions was first considered by the Court of Appeal of the Eastern Caribbean in 1991 in **Henry v Halstead**,[9] on appeal from the Election Court in Antigua and Barbuda. The election judge had awarded the costs of the petition in the lower court to the successful petitioner. The respondent to the petition appealed. The judgment of the Court of Appeal was delivered by the Chief Justice, Sir Vincent Floissac. In dismissing the appeal and confirming the costs order, the Chief Justice said:

> "The jurisdiction in regard to the award of costs by the High Court (sitting as an Election Court) is governed by sections 46, 61, 62 and 63 of the Representation of the People Act 1975."[10]

The Chief Justice then set out the sections of the Act that he referred to, including Section 61, which provides that –

> "All costs of and incidental to the presentation of an election petition and the proceedings consequent thereon, except such [costs] 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 of either the petitioner or the respondent, and any needless expense incurred or caused on the part of the petitioner or the respondent, may be ordered to be defrayed by the parties by whom

[8] Supra note 6 at p. 855.
[9] (1991) 41 WIR 99.
[10] ibid p. 99.

> it has been incurred or caused whether or not they are on the whole successful."[11]

Up to this point the Chief Justice's exposition of both the power to award costs in election cases and the quantification of such costs cannot be faulted. Section 61 gives the election judge the power to award and assess the costs of election proceedings without reference to any rules of court. However, the Chief Justice went on to include the Rules of Court in the process. He said:

> "By virtue of the said provisions of the Representation of the People Act 1975, the award of costs by the High Court (sitting as an Election Court) is governed by Order 62, rule 3 of Rules of the Supreme Court." [12]

Order 62 rule 3 deals with the court's general power to award costs as it sees fit including the rule that costs should follow the event except when it appears to the court that in all the circumstances another order should be made. The reference to Order 62 means that the Chief Justice was saying that the Rules of the Supreme Court, or at least the costs provisions in Order 62, apply to election petition cases.

[11] The rules of court, this time the CPR, were also applied in the Consolidated Appeals when the Court of Appeal awarded the costs of the appeals and in the court below to the Respondents. Under the heading "The general rule as to costs", Barrow JA referred firstly to the decision of Chief Justice Floissac in **Henry v Halstead**[13] for the general propositions that the election court 'exercises the same powers in respect of costs as a judge of the high court' and that 'a successful litigant should receive his costs unless there is some good ground for the exercise of court's discretion to refuse them'.[14]

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[11] Ibid page 100.
[12] Ibid.
[13] Supra note 9.
[14] See para. 8.

[12] At paragraph 9, Barrow JA went on to find that:

> "Costs in an election petition in the Federation of Saint Christopher and Nevis fall within the ambit of section 87[15] of the **National Assembly Elections Act**. This section provides, in a far more general way than the legislation reviewed in **Henry v Halstead**, but to a similar effect, that on an election petition the Election Court shall have the same powers, jurisdiction and authority as a judge has on a trial in the civil action in the Supreme Court. The Supreme Court's jurisdiction in relation to costs is contained in Parts 64 and 65 of the **Civil Procedure Rules** (CPR 2000)."

This passage is not without ambiguity but reading the judgment as a whole makes it clear that Barrow JA was saying that Parts 64 and 65 of the Rules apply to election petition cases. For example, at paragraph 14 of the judgment he said: 'In deciding whether or not to order the unsuccessful petitioners to pay costs Belle J was, in accordance with rule 64.6, obliged to have regard to all the circumstances'.

[13] Further, at paragraph 22, in dealing with the role of a party's conduct in the assessment of costs, he referred to rule 64.6(6). The references to "rule 64.6" are to the rule in the CPR that state that the successful party is generally entitled to his or her costs. Chief Justice Floissac also referred to the equivalent rule in the Rules of the Supreme Court (rule 62.3) in the **Henry v Halstead** appeal.[16]

[14] I find that when Barrow JA ordered in paragraph 27 of his judgment in the Consolidated Appeals that Mr. Grant should pay the costs of the respondents 'to be quantified' he meant that they were to be quantified in accordance with Parts 64 and 65 of the CPR. Further, that the combined effect of the judgments of Barrow JA and of Sir Vincent Floissac in the **Henry v Halstead** appeal is that the costs regime in Parts 64 and 65 of the CPR applies to election petition cases.

[15] Thomas J [Ag.], although a member of the Court of Appeal in the Consolidated Appeals, took a different view when he quantified the costs in the court below. The learned judge referred to his own decision in **Cedric Liburd and others v**

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[15] Now s. 100.

[16] p. 100 of the judgment. The passage is set out in paragraph 11 above.

Eugene Hamilton[17] where he analysed some of the relevant authorities including this Court's decision in **Jacqui Quinn Leandro v Dean Jonas**[18] and concluded that the CPR does not apply to costs in election cases. He continued at paragraph 27 of the **Cedric Liburd** case – 'This means that the Grant case has been overruled sub silentio, by the Court of Appeal itself (in **Quinn Leandro**)'. He relied on this passage in coming to his decision in the quantification proceedings in the court below that the CPR does not apply to costs in election cases.

[16] I do not agree with the learned judge's finding that the decision of the Court of Appeal in the Consolidated Appeals was overruled by the **Quinn Leandro** case sub silentio, but for other reasons that appear below I think that the decision in the Consolidated Appeals should be overruled. I will deal with the learned judge's use of the sub silentio principle after dealing with the other reasons for overruling the decision in the Consolidated Appeals.[19]

Application of rules of court to election petitions

[17] Ms. Sookoo submitted that the starting point in determining which rules apply to election cases is rule 2.2 of the CPR which sets out the matters to which the it applies and does not apply. Rule 2.2(1) states the general rule that:

> "Subject to paragraph (3), these Rules apply to all the civil proceedings in the Eastern Caribbean Supreme Court …". The exceptions in paragraph (3) include "(e) any other proceedings in the Supreme Court instituted under any enactment, in so far as Rules made under that enactment regulate those proceedings."

Election petition proceedings in Saint Christopher and Nevis are brought under and governed by the **National Assembly Elections Act**[20] and any rules made under the Act. This brings election petition cases under paragraph 3 of rule 2.2 and prima facie, the CPR does not apply to these cases.

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[17] SKBHCV2004/0183 (delivered 2nd December 2011, unreported).
[18] Supra, note 1.
[19] The sub silentio principle is dealt with in paragraphs 40-46 below.
[20] Cap. 1.62 Revised Laws of Saint Christopher and Nevis 2009.

[18] Ms. Sookoo also relied on the cases from the Privy Council referred to above which establish that an election court is a creature of statute with a very special and unique jurisdiction.

[19] Ms. Foreman did not dispute that the CPR does not apply to election cases generally nor to the court's power to award costs. Her position is that the quantification of costs in election cases is governed by the rules in Part 64 and 65 which are merely housed in the CPR for want of a better location. The decision of the Court of Appeal in the Consolidated Appeals was therefore correct in saying that the costs should be quantified under the CPR.

[20] Considering both sets of submissions and the relevant authorities, I note that the principle that the election court is a creature of statute with its own jurisdiction was adopted by the Court of Appeal in the Eastern Caribbean in **Randolph Russell and Others v Attorney-General of St Vincent and the Grenadines**[21] and **Browne v Francis-Gibson and Another**.[22] But these cases did not deal directly with the issue of which rules apply to election cases. The first case that disapplied the Rules is the High Court decision of Rawlins J in **Ethlyn Smith v Delores Christopher**.[23] The learned judge noted that the CPR provisions relating to the joinder of parties do not apply to election petition cases. This was followed by Hariprashad-Charles in **Lindsay Fitz-Patrick Grant v Glen Fitzroy Phillip**[24] where the learned judge was very specific in saying that: 'the election court jurisdiction is so separate and distinct from the civil jurisdiction that absolutely no recourse to the civil procedure rules is permissible'.

And at paragraph 62 the judge concluded that:

> "Consequently, I find that the CPR 2000 do not apply and the correct position to adopt is that held by Baptiste, J in **Lindsay Grant v Rupert**

[21] (1995) 50 WIR 127.
[22] (1995) 50 WIR 143.
[23] BVIHCV2003/0097 (delivered on 23rd July 2005, unreported).
[24] SKBHCV2010/0026 (delivered on 4th November 2011, unreported).

> **Herbert (No. 1)** that the Court will, in the absence of express statutory rules, be guided by its inherent jurisdiction."

[21] These are very clear findings by the High Court that the CPR does not apply to election cases. But they are inconsistent with the decisions of the Court of Appeal in **Henry v Halstead** and Barrow JA's judgment in the Consolidated Appeals, at least in relation to the costs regime that applies to election cases.

[22] The applicability of the CPR to election cases was considered in detail in the consolidated appeal **Ezechiel Joseph v Alvina Reynolds and Lenard "Spider" Montoute v Emma Hippolyte**.[25] The High Court judge in this case had, with the consent of the parties, referred certain questions to the Court of Appeal including whether the CPR applies to election petition cases. In a unanimous judgment delivered in July 2012, the Court of Appeal answered that question by finding that the CPR does not apply to election cases. This finding is at paragraph 25 of the judgment of the Chief Justice, Sir Hugh Rawlins, when he said:

> "25. In **Patterson v Solomon** and **Grant v Phillip** the Privy Council and the High Court respectively found, in effect, that the special jurisdiction of the court is such that 'election proceedings' do not fall within the definition of 'civil proceedings' under rule 2.2 of CPR 2000. The conclusion on this issue, in **Grant v Phillip**, for example, was that CPR 2000 is not applicable to election proceedings unless there is express provision in the Election legislation. The true principle is not that the civil procedure rules are not applicable in these proceedings. Rather, it is that they are not applicable in the absence of express legislation that provides for their application."[26]

This is a clear finding by the Court of Appeal that the CPR does not apply to election petition cases except where they are specifically incorporated by express legislation. The learned Chief Justice did not make an exception for the quantification of costs. **Ezechiel Joseph v Alvina Reynolds** was followed on this point by the Court of Appeal in **Ronald Green v Maynard Joseph and Peter Saint Jean v Roosevelt Skerrit.**[27]

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[25] SLUHCVAP2012/0014 (delivered 31st July 2012, unreported).
[26] Ibid.
[27] DOMHCVAP2012/0001 (delivered 11th March 2013, unreported).

[23] There is no legislation in St. Kitts and Nevis incorporating either the CPR generally or the costs regime in Parts 64 and 65 and therefore it does not apply to election petition cases. Section 87 of the **National Assembly Elections Act** (now section 100) that was relied on by Barrow JA in the Consolidated Appeals is in very general terms and does not have the effect of incorporating the CPR into election court proceedings.

Conflicting decisions

[24] To summarise, the current state of the authorities from the Court of Appeal on whether the CPR, and in particular the costs regime in Parts 64 and 65, apply to election petition proceedings, is as follows:

- There are two decisions that say that the costs provisions of the CPR apply: **Henry v Halstead** per Chief Justice Sir Vincent Floissac and **Benjamin and others v Grant** (the Consolidated Appeals) per Barrow JA.
- There are two decisions, **Ezechiel Joseph v Alvina Reynolds and Lenard "Spider" Montoute v Emma Hippolyte**[28] and **Ronald Green and Maynard Joseph v Peter Saint Jean and Roosevelt Skerrit,** that decided that the CPR do not apply to election petition proceedings.

[25] Faced with these two sets of conflicting decisions of the Court of Appeal on the applicability of the CPR to election cases, this Court must decide how to deal with the conflict and which of the cases to follow. These issues were not addressed by counsel for the parties at the hearing of the appeal in June 2016. Because of the importance of the issue, on 5th December 2016 we directed counsel for the parties to file supplemental submissions on the apparent inconsistency between the two lines of cases, how we should deal with the inconsistency, and what effect, if any, our decision on the inconsistency would have on the decision of Thomas J [Ag.] on the quantification of the costs of the proceedings. Counsel for both parties filed submissions during the week commencing 30th January 2017 and I will deal with those submissions in resolving the issues.

[28] Supra, note 25.

[26] There are two ways for this Court to decide how to deal with the two lines of conflicting cases. Firstly, we can decide if, as a final Court of Appeal in election proceedings, we can depart from our previous decisions. Alternatively, as an intermediate Court of Appeal, we can decide if we are bound by the decision in the Consolidated Appeals to apply the CPR to the quantification of the respondent's costs, or if we can depart from the decision in the Consolidated Appeals under one of the exceptions to the rule in **Young v Bristol Aeroplane Co Ltd**.[29]

The Court of Appeal as the Final Court in Election Proceedings

[27] When the Court of Appeal in Saint Christopher and Nevis hears appeals from the High Court in election proceedings, it occupies a unique position in the court's hierarchy in that it is the final Court of Appeal. Section 36(1) of the **Constitution of Saint Christopher and Nevis**[30] ("the Constitution") vests the jurisdiction to hear and determine cases relating to the election of members of the National Assembly in the High Court and subsections (6) and (7) deal with appeals from decisions of the High Court in election cases. They read:

> "(6) An appeal shall lie as of right to the Court of Appeal from any final decision of the High Court determining any such question as is referred to in subsection (1).
> (7) No appeal shall lie from any decision of the Court of Appeal in the exercise of the jurisdiction conferred by subsection (6) and no appeal shall lie from any decision of the High Court in proceedings under this section other than a final decision determining any such question in subsection (1) of this section."

The effect of subsections (6) and (7) is that there is a right of appeal to the Court of Appeal from final decisions of the High Court in election cases, and importantly for the purposes of this appeal, there is no right of appeal from decisions of the Court of Appeal to Her Majesty in Council. The Court of Appeal is the final court in election proceedings. This affects the principle of stare decisis and how this Court should deal with its previous decisions.

[29] [1944] 2 All ER 293.
[30] Cap. 1.01, Revised Laws of Saint Christopher and Nevis 2009.

[28] When the Court of Appeal sits as an intermediate court it is bound to follow its previous decisions except in the limited circumstances recognised by the decision in **Young v Bristol Aeroplane Co Ltd**.[31] The reason for limiting the Court of Appeal in this way when sitting as an intermediate court is a matter of policy and is well founded. The doctrine of stare decisis promotes certainty in the development and application of the law and if the Court of Appeal, as an intermediate court, is allowed to depart from its previous decisions this could create uncertainty and confusion in the law. When the Court of Appeal makes an error, the matter can be put right by the Privy Council. On the other hand, the Privy Council, as a court of final instance, is not bound by its previous decisions and can overrule itself in appropriate cases. This approach to the doctrine of binding precedent was repeated by Lord Salmon in **Attorney General of Saint Christopher and Nevis v Reynolds**,[32] a decision of the Privy Council on appeal from this State, when he said:

> "So long as there is an appeal from a Court of Appeal to Their Lordships' Board or to the House of Lords, the Court of Appeal should follow its own decisions on a point of law and leave it to the final appellate tribunal to correct any error in law which may have crept into any previous decision of the Court of Appeal. Neither Their Lordships' Board nor the House of Lords is now bound by its own decisions, and it is for them, in the very exceptional cases in which this Board or the House of Lords has plainly erred in the past, to correct those errors just as it is for them alone to correct the errors of the Court of Appeal."[33]

This approach can also be seen in the House of Lords decision of **Davis v Johnson**[34] where Lord Diplock said:

> "In an appellate court of last resort a balance must be struck between the need on the one side for the legal certainty resulting from the binding effect of previous decisions and on the other side the avoidance of undue restriction on the proper development of the law. In the case of an intermediate appellate court, however, the second desideratum can be taken care of by appeal to a superior appellate court, if reasonable means of access to it are available; while the risk to the first desideratum, legal certainty, if the court is not bound by its own previous decisions grows

[31] Ibid.
[32] [1979] 3 All ER 129.
[33] ibid, p. 140.
[34] [1978] 1 All ER 1132.

> ever greater with increasing membership and the number of three-judge divisions in which it sits, as the arithmetic which I have earlier mentioned shows. So the balance does not lie in the same place as in the case of a court of last resort."[35]

[29] These passages illustrate the reason why the Court of Appeal sitting as an intermediate court is generally bound by its decisions and when it makes a serious error the matter can be resolved by the final court. Different considerations apply when the Court of Appeal is sitting as the final court. In this situation, the Court of Appeal is not bound by its previous decisions and has the same powers as the Privy Council to overrule itself. An illustration of the powers of the Court of Appeal sitting as a final court can be found in at least one case from the Republic of Guyana. During the period 1976 to 2006 the Court of Appeal of Guyana was the final court of that state. In **B. Munisar v Bookers Demerara Sugar Estates and others**,[36] the Court of Appeal, sitting as a final court, had to decide whether to overrule its previous decision in **Demarara Bauxite Company Limited v Hunte**[37] concerning the interpretation section 82(6) of the **Police Act** dealing with the period of notice that the Commissioner of Police had to give to a member of the force whose employment was being terminated. The Court of Appeal decided that the majority of the Court in the **Hunte** case was clearly wrong in its interpretation of section 82(6) and that as a court of final instance, it had the power to correct errors in its previous judgment. The Court's position on this issue was summed up by Crane JA at page 360 of the judgment:

> "This court as a court of final instance has been approached on a few occasions with allegations of errors in our past judgments and addressed on the necessity for correcting them. And I think it is only right that we should have this jurisdiction as a court of last resort. As Lord Denning MR said in *Davis v Johnson* ([1978] 1 All ER 841) [1978] 1 All ER 841 at 856, 'In every jurisdiction throughout the world a court of last resort has, and always has had, jurisdiction to correct errors of a previous decision.'" [38]

[35] Ibid p. 1137.
[36] (1979) 26 WIR 337.
[37] (1974) 21 WIR 109.
[38] See: p. 360.

[30] Luckhoo JA sounded a word of caution in his judgment by saying that it is not in every case of an error by the final court that it should overrule itself. There is still a balance to be struck between certainty in the law and justice for the party before the court having to abide by an incorrect decision. Luckhoo JA said:

> "One would normally think that the chief function of an appellate court is to correct wrong decisions and to ensure that no judicial precedent that has been wrongly decided should be allowed to go uncorrected. But it sometimes happens in the interests of certainty of the law that it is better that a judicial decision, which has been wrongly conceived, should remain as it is, particularly when parties have accepted it as correctly given and have, for some reasonable time, regulated their lives and business interests on the strength of it, and when the decision is not clearly wrong and has worked no manifest injustice in its application."[39]

Mindful of these words of caution Luckhoo JA went on to find that:

> "However, it seems clear that a balance must be struck between what is considered perpetuating a discovered error in our judgments by maintaining stare decisis and the overruling of it. Though the principle underlying stare decisis is not as rigid in criminal as in civil cases, insofar as this court is concerned, it has already set for itself the criteria by which it determines whether any of its precedents or decisions should be overruled or reversed by adopting the famous practice direction of the House of Lords of 26th July 1966. Before we overrule any precedent or choose not to follow one it must appear to us to be clearly wrong and manifestly unjust, and it must also contain some 'broad issue of justice, public policy or question of legal principle' which is sought to be corrected, as Lord Reid said in Jones's case ([1972] 1 All ER 145, [1972] AC 944, [1972] 2 WLR 210, 116 SolJo 57, HL). I am of the clear opinion, however, that insofar as the two months' notice is concerned, the decision in Hunte's case ((1974) 21 WIR 109) is clearly wrong and manifestly unjust and ought to be overruled for the reasons I have given."[40]

Applying the principles

[31] Ms. Sookoo submitted that the Court of Appeal, as the final court in election petition proceedings in Saint Christopher and Nevis, has the power to overrule its previous decisions but, in the interest of certainty embodied in the principle of stare decisis, it should only overrule itself if the decision in the previous case is clearly wrong and it would be manifestly unjust to continue to follow that wrong

[39] See: p. 361.
[40] See: p. 362.

decision. In applying these basic principles to the facts of this case, I have taken into consideration the following:

(a) The decision in the Consolidated Appeals that the costs regime in the CPR applies to the costs of election petition proceedings is contrary to cases in the High Court, Court of Appeal and the Privy Council case of **Devan Nair v Yong Kuan Teik**,[41] and it is plainly wrong.

(b) If we do not overrule the decision in the Consolidated Appeals Mr. Herbert's costs of successfully defending these long and difficult proceedings in both High Court and Court of Appeal will be quantified as prescribed costs under Part 65 of the CPR on the basis of a default value of the claim of $50,000.00 resulting in an award of $12,500.00.

(c) The decision in the Consolidated Appeals has not been followed by any other court and if it is overruled it will not affect the rights of persons not connected to the case.

[32] In the circumstances, I would overrule the decision of this court in the Consolidated Appeals insofar as it directed that the costs be quantified under the CPR. However, this is not the end of the matter. Overruling a case does not change the decision in the case. It simply means that the decision is no longer a precedent and should not be followed in subsequent cases. But it continues to be binding on the parties who were subject to the decision.

[33] The effect of Ms. Foreman's submissions is that the decision continues to be binding on the parties and should have been followed by Thomas J [Ag.] in the quantification proceedings. Ms. Sookoo's response is that Thomas J [Ag.] was correct based on a proper interpretation of the law and his decision should not be overturned by this court.

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[41] Supra, note 6.

[34] This creates the very unusual situation which, as far as I am aware, has never been considered by a court, namely, where a lower court does not follow an order of a higher court but in doing so applies what we have now found to be the correct principles, should this court set aside the lower court's decision because it did not follow the higher court's order. Dicta from the dissenting judgment of Lord Lloyd of Berwick in **Kleinworth Benson Ltd. v Lincoln City Council**[42] suggests that the incorrect decision of the Court of Appeal should be followed by the parties to the appeal. When dealing with the retrospective effect of judge made law, Lord Lloyd noted that -

> "An inevitable consequence of determining the law in relation to a particular case is that the same law will apply to other cases as yet undecided, in which the same point arises. This is so whether the transaction in question lies in the past or the future. So again, to that limited extent, it can be said that the decision operates retrospectively. But that, as it seems to me, is the full extent of any retrospective effect. There is no way in which the decision can be applied retrospectively to cases which have already been decided. Nor is there any logical reason why there should be. It is the function of the court to decide what the law is, not what it was. So when the House of Lords overrules a line of Court of Appeal decisions it does not, and cannot, decide those cases again. The law as applied to those cases was the law as decided at the time by the Court of Appeal. The House of Lords can say that the Court of Appeal took a wrong turning. It can say what the law should have been. But it cannot say that the law actually applied by the Court of Appeal was other than what it was. It cannot, in my learned and noble friend Lord Browne-Wilkinson's vivid expression, falsify history."

This statement by Lord Lloyd was made obiter in his dissenting judgment and is not binding on this Court. I do not think that the statement is of universal application and each case should be decided on its own facts.

[35] In this case, we are dealing with an appeal from the decision of Thomas J [Ag.] in which he applied what we have found to be the correct regime for quantifying the costs of election proceedings. Having applied the correct principles, the issue for this Court is whether we should set aside his decision because he did not follow the order of the Court of Appeal in the same proceedings. I have already set out

[42] [1998] 4 All ER 513.

the reasons why I think that the decision Consolidated Appeals should be overruled and for the same reasons, this Court, sitting as the final court in this matter, should set matters right by upholding the decision of Thomas J [Ag.] by which he quantified the costs of the proceedings under the court's general powers to quantify costs and not under the costs regime in the CPR.

[36] I find some support for this conclusion in **Davis v Johnson** where Lord Salmon, in agreeing with the judgment given by Lord Diplock, said:

> "This House decides every case that comes before it according to the law. If, as in the instant case, the Court of Appeal decides an appeal contrary to one of its previous decisions, this House, much as it may deprecate the Court of Appeal's departure from the rule, will nevertheless dismiss the appeal if it comes to the conclusion that the decision appealed against was right in law."[43]

[37] This statement of Lord Salmon is most profound. His Lordship clearly indicated that a higher court will not overturn a correct decision of a lower court notwithstanding the fact that the lower court flouted the rule of stare decisis in coming to its conclusion. In other words, the question becomes whether the lower court applied the law correctly as opposed to whether it ought to have followed the rules of precedent. This suggests that the higher court ought to address its mind to the substantive findings made by the lower court and those findings of law, to the extent that they are correct, may be upheld notwithstanding that there has been a failure to conform to the doctrine of precedent.

[38] The situation in the instant appeal is different only to the extent that we are dealing with a judge who did not follow the direction given by the Court of Appeal in the same proceedings. But on the very special facts of this case, this Court, as the final court, should not set aside the learned judge's decision when we have found that he applied the correct legal principles, and by doing so avoided a manifest injustice to Mr. Herbert. This is not a case of "falsifying history" as suggested by Lord Lloyd in the **Kleinworth Benson** case, but of overruling an incorrect decision

[43] [1978] 1 All ER 1132 at 1152.

of this Court in the Consolidated Appeals and upholding the correct decision of the trial judge. Mr. Herbert should have the benefit of an order from this Court allowing him to recover his costs quantified in accordance with the law as we have found it and not on the basis of incorrect procedures resulting in an award that is less than two per cent of what the trial judge found to be his reasonable costs.

Young v Bristol Aeroplane Co Ltd

[39] Having decided that this Court should uphold the trial judge's decision to quantify Mr. Herbert's costs under the general powers of the Court, it is not necessary to deal with the alternative position that this Court, as an intermediate court, is not bound to follow its own decision in the Consolidated Appeals under one or more of the exceptions to the rule in **Young v Bristol Aeroplane Co Ltd**. However, out of deference to the submissions made by counsel on both sides, I will comment on the alternative position very briefly.

[40] The well-known rule in **Young v Bristol Aeroplane Co Ltd. i**s that the Court of Appeal is bound by its own previous decisions and decisions of courts of co-ordinate jurisdiction with three exceptions: (i) it may choose between two conflicting decisions of its own; (ii) it must refuse to follow a decision of its own which, though not expressly overruled, is inconsistent with a decision of the House of Lords or the Privy Council; or (iii) it is not bound to follow a decision of its own given per incuriam.

[41] In paragraph 22, above I found that the decisions of this Court in **Henry v Halsted** and the Consolidated Appeals are inconsistent with the decision in **Joseph v Reynolds** and **Green and Joseph v Saint Jean and Skerrit**. Having so found this Court must, under the first exception to the rule in **Young v Bristol Aeroplane Ltd.**, decide which of the two conflicting lines of decisions to follow. I would, without hesitation, choose to follow the decisions of this Court in **Joseph v Reynolds** and **Green** and **Joseph v Saint Jean and Skerrit** to the effect that the

CPR (including the costs regime in parts 64 and 65) does not apply to election petition cases. My reasons for doing so are:

(i) The election jurisdiction is a specialised statutory jurisdiction with its own rules and the CPR has not been incorporated into the election petition regime.

(ii) The non-application of the Rules of Court to election cases is consistent with the observation of Lord Upjohn in **Devan Nair v Yong Kuan Teik** that excluding the Rules of Court was a matter of deliberate design.[44]

(iii) There is a consistent line of cases in the High Court and Court of Appeal that have decided that the CPR does not apply to election cases.[45]

[42] This is sufficient to dispose of the issue of how this Court would have dealt with the conflicting lines of cases if we were sitting as an intermediate court.

Sub Silentio

[43] In paragraph 16 above, I disagreed with the learned judge's conclusion that the Court of Appeal in **Quinn Leandro** overruled the decision in the Consolidated Appeals sub silentio. I will now outline my reasons for doing so. In doing so it is necessary to explore exactly what is meant by the phrase sub silentio. The phrase is defined in three ways in **Black's Law Dictionary**[46] as "under silence; without notice being taken; without being expressly mentioned." These definitions speak for themselves. What I have extracted from the cases is that where the ratio decidendi of a case consists of two points, say A and B, but point B was not argued or considered by the court, the decision is not authority on point B. Point B is said to have been decided sub silentio. The only reference that I have found to the expression in any case decided by a court in the Commonwealth is **Haywood v R**,[47] a decision of the Court of Appeal of Barbados. In clarifying a previous

[44] Supra, note 6.
[45] See: Lindsay Grant v Glen Phillip ANUHCV2009/0147 and ANUHCV2009/0148 (delivered 4th November 2011, unreported), per Hariprashad-Charles J; Ethlyn Smith v Delores Christopher BVIHCV2003/0097, per Rawlins J; Lindsay Grant v Rupert Herbert No. 1 SKBHCV2004/0182, per Baptiste J.; Cedric Liburd v Eugene Hamilton SKBHCV2004/0183, per Thomas J.
[46] 10th Edition, 2014.
[47] [2016] 4 LRC 101 at 112.

judgment by the court concerning the power to impose sentences for related criminal convictions, the Court of Appeal relied on the case of **R v Warner** in coming to the conclusion that 'precedents sub silentio and without argument are of no moment'. Burgess and Mason JJA further indicated that the modern application of this "elementary principle of law" can be found in the cases of **Baker v R**,[48] and **Barrs v Bethel**.[49]

[44] In **Baker and another v R**, the Privy Council had to consider the situation where the Jamaican Court of Appeal did not follow the decision of the Board in **Maloney Gordon v R**[50] to the effect that the relevant date under section 29(1) of the **Juveniles Law** of Jamaica for the purpose of for determining whether a young person was under the age of 18 years when he committed murder was the date that the murder was committed. The Court of Appeal of Jamaica in **Baker and Another v R** did not follow the decision in **Maloney Gordon v R** on this point and decided that the relevant date was the date when the young person was being sentenced. When the case went on appeal to the Privy Council, the Board decided that the Court of Appeal was correct not to follow the decision in **Maloney Gordon v R** since it was clear that although the part of the decision dealing with the age of the appellant formed a part of the ratio in **Maloney Gordon v R** it did not bear the authority of the decision reached by the Board but was merely a proposition assumed to be correct for the purpose of disposing of that appeal. The majority judgment of the Board was delivered by Lord Diplock who, after referring to the Board decision on the point in **Maloney Gordon**, stated that:

> "[It is] not that the Board had acted per incuriam [in **Maloney Gordon**] but that it had merely accepted as correct for the purpose of disposing of the particular case a proposition which counsel in the case either had agreed or under the practice of the Judicial Committee were not in a position to dispute. Their Lordships have had the advantage, denied to the Court of Appeal for Jamaica in R v Wright, of perusing the cases lodged by the parties in the appeal to this Board in Maloney Gordon v The Queen. In their Lordships' view these provide clear confirmation that such was the case.

[48] [1975] 3 All ER 55.
[49] [1982] 1 All ER 106.
[50] (1979) 15 WIR 359.

> For these reasons the Court of Appeal for Jamaica were not bound to follow the decision of this Board in Maloney Gordon v The Queen as to the effect of s 20(7) of the Constitution on s 29(1) of the Juveniles Law. Their decisions in R v Wright and in the instant case were correct."[51]

[45] Their Lordships did not use the expression sub silentio in **Baker and Another v R** but it is apparent that they applied the principle by deciding that that part of the ratio decidendi of **Maloney Gordon v R** that stated that the age of the appellant for the purposes of section 29(1) of the **Juveniles Law** was the date of the commission of the murder was decided "under silence" or sub silentio and therefore was not binding on the Court of Appeal of Jamaica.

[46] Having analysed the way in which the principle of sub silentio has been applied by the Privy Council and other courts, it appears that Thomas J [Ag.] erred in finding that the decision in the Consolidated Appeals was overruled in the **Quinn-Leandro** case. Thomas J [Ag.] appears to have used the phrase sub silentio to mean that the court in **Quinn-Leandro**, in reaching a decision that was inconsistent with the decision in the Consolidated Appeals, implicitly overruled the decision in the Consolidated Appeals. While this meaning and use of the sub silentio principle appears to be consistently employed in the United States, it has not been similarly applied in the English or Commonwealth courts.

[47] In any event, there can be two conflicting decisions of the Court of Appeal. This is precisely what **Young v Bristol Aeroplane Co Ltd** sought to resolve by allowing the Court of Appeal to choose which of the two conflicting decisions to follow. On this reasoning, it appears that Thomas J [Ag.] applied the sub silentio principle to two conflicting decisions of the Court of Appeal which, respectfully, merely created an inconsistency and not an occasion for the Court to overrule itself.

[48] This Court is not aware of any decision in which the phrase sub silentio has been used in the context of overruling a previous decision. If the expression is to be

[51] Supra, note 47 at p. 65.

used in this context it would only apply to a situation where a superior court makes a decision that is obviously inconsistent with a decision of a lower court but does not expressly overrule the decision of the lower court. The decision of the higher court could then be said to overrule decision of the lower court sub silentio. However, this is a situation that is well known to the common law and is recognised as the second exception to the rule in **Young v Bristol Aeroplane Ltd**.[52] It is usually described as implied overruling. I do not think there is any need to extend the meaning of the sub silentio principle to apply to this situation.

Answer to Issue 1

[49] In conclusion, I would answer Issue 1 by finding that the learned judge's decision to quantify the costs ordered by the Court of Appeal in the Consolidated Appeals under the court's general power to quantify costs was correct and I would dismiss the appeal on this issue.

Issue 2: If yes, are the costs to be quantified as prescribed costs or assessed costs.

[50] The answer to Issue 1 makes it unnecessary to deal with Issue 2. The CPR and the provisions on the quantification of costs do not apply to election petition proceedings.

Issue 3: The amount of costs awarded by the judge

[51] Ms. Foreman submitted that even if the learned judge was correct to quantify the costs under the court's inherent jurisdiction, the amount awarded was unreasonable and excessive. Apart from submitting that the amount awarded should be in accordance with prescribed costs ($23,333.33), which I have found does not apply in this case, counsel did not propose an alternative figure for what she considers to be reasonable costs for the 1st respondent.

[52] The second exception is set out in para. 40 above.

[52] The 1st respondent applied for quantification of his costs supported by the affidavit of Mr. Denzil Hinds. Mr. Hinds' affidavit exhibited fee notes for the High Court and Court of Appeal proceedings of US$132,500.00 and US$37,500.00 respectively by senior counsel, Mr. Anthony Astaphan, SC, and US$88,333.33 and US$25,000.00 respectively for junior counsel, Mr. Sylvester Anthony, all totaling US$283,333.33 or EC$762,999.99. The learned judge carried out the quantification and awarded the respondent the full amount of his claims.

[53] The appellant's grounds of appeal on the quantification of the costs can be grouped as follows:

(a) Ground (i) – The learned judge erred in finding that the fee notes without invoices and receipts were sufficient to prove that the amounts claimed were reasonable.

(b) Grounds (v) and (vi) – The costs awarded to the 1st respondent penalised the appellant and was a deterrence to private citizens wanting to challenge election results.

(c) Grounds (iv), (vii) and (viii) – The learned judge erred in finding that the appellant's only real challenge in his evidence was an assertion that the fees claimed were exorbitant and intimidatory.

Grounds (i), (iv), (v) and (vii) - Reasonableness of the awards

[54] Grounds (i), (iv) and (v) challenge the reasonableness of the amounts awarded in different ways. Ground (i) is to the effect that the learned judge erred in finding that the amounts claimed were reasonable having regard to the fact that the fee notes were submitted without bills and receipts. I reject this ground for two reasons. Firstly, the claims were based on fee notes from counsel which are themselves bills and are not usually accompanied by receipts unless there are disbursements. The 1st respondent did not claim disbursements. It was within the learned judge's discretion to accept the fee notes produced by counsel without receipts and there is no basis for interfering with the exercise of his discretion in accepting them. More importantly, the learned judge did not restrict his finding of

reasonableness to the fee notes. He made specific findings of fact in paragraph 31 of his judgment that the proceedings involved senior and junior counsel and the costs claimed –

> "… are reasonable for High Court and Court of Appeal proceedings having regard to the complexity of the matter, the duration of the Court proceedings being 58 days and the absence of any pleadings by the Respondent with respect to the Bills of Costs."

This passage shows that the judge did not rely exclusively on the fee notes from counsel in coming to his decision that the amounts awarded were reasonable. He took into account the matters set out in paragraph 31 of the judgment that are set out above. This ground of appeal fails.

[55] Grounds (iv) and (v) also fail. They challenge the learned judge's decision on the ground that election petition proceedings are of a public nature and the court is sometimes minded to not award costs against an unsuccessful party. In fact Belle J refused the Respondents' costs on this ground in the election court, but the Court of Appeal reversed his decision. That is sufficient to dispose of the issue of not taking into account the public interest element in relation to costs in this matter. It was considered by election court judge and correctly rejected by the Court of Appeal because the public interest element should not be used to limit the quantum of a successful party's costs once he or she has the benefit of a costs order.

[56] Ground (vii) is a further challenge to the reasonableness of the amount of the awards. The first part of the ground refers to paragraph 16 of the judgment where the learned judge agreed with the 2nd and 3rd respondents' submission that the appellant merely stated that the costs (of those respondents) are 'exorbitant and intimidatory' without providing details. This part of ground (vii) does not apply to Mr. Herbert because the judge was not dealing with his claim in paragraph 16. He was dealing with the claims by the 2nd and 3rd respondents.

[57] In so far as ground (vii) applies to Mr. Herbert, the appellant had filed an affidavit in which he provided details of his reasons for saying that the amount of costs awarded to Mr. Herbert was excessive. The stated reasons are:

(a) neither senior or junior counsel submitted bills and receipts;

(b) fees fit for two counsel was not ordered;

(c) the costs awarded are exorbitant and should be based on the prescribed costs rule in the CPR.

[58] I have already dealt with reasons (a) and (c) – the absence of receipts in paragraph 54 and the non-applicability of the prescribed costs in Part 65 of the CPR in paragraphs 17 - 23 above.

[59] With regard to reason (b) Ms. Foreman submitted that the learned judge erred in allowing costs for two counsel when the Court of Appeal did not certify costs fit for two counsel. Ms. Sookoo countered by submitting that the learned judge had discretion when quantifying costs to award costs to two counsel. Neither counsel cited authority in support of their respective positions. I am satisfied as a matter of principle and on authority that the judge did have discretion in the matter. In dealing with the two-counsel rule at paragraph 62/A2/9 of the **Supreme Court Practice 1997** the learned editors state at page 1114 –

> "With regard to the question of whether or not a junior should be instructed in addition to leading counsel, it must be answered by reference to the test of reasonableness. The test must be applied by the taxing officer in the particular circumstances of each case."

[60] The learned editors also referred to the case of **British Metal Corporation, Limited v Ludlow Brothers (1913), Limited**.[53] The successful party in proceedings before the Court of Appeal was awarded the costs of the appeal. The report of the decision does not make reference to the costs being for two counsel. When the costs were being assessed by the taxing master he refused an application for the costs of two counsel. The receiving party filed an objection to

[53] [1938] Ch. 787, p. 789.

the taxing master's decision and Farewell J, sitting in the Chancery Division, set aside the taxing master's decision and awarded costs for two counsel. There was no suggestion in the report of the case that the taxing master did not have the power to order costs for two counsel, only that he exercised his discretion wrongly.

[61] In this case Thomas J [Ag.] was satisfied that this was a sufficiently important, long and complex case to justify instructing senior and junior counsel[54] and there is no basis for this court to interfere with his decision. This objection also fails.

Other objections

[62] The appellant disputed the judge's finding of fact that 'the duration of the proceedings being 58 days'[55] but the appellant did not produce any evidence disputing the judge's finding.

[63] Ms. Foreman also submitted that the judge reversed the burden of proof and required the appellant to prove that the amount awarded was unreasonable. Ms. Sookoo responded by confirming that the burden of proof was on the respondent and submitted that he discharged the burden by producing the fee notes which the judge, in his discretion, accepted as sufficient proof in all the circumstances of the quantification. The burden on appeal then shifted to the appellant to show that the judge exercised his discretion improperly. She cited the case of **Village Cay Marina v John Acland and Others**.[56] I accept these submissions and find that the judge did not err in his handling of the burden of proof.

Comparables

[64] Ms. Sookoo provided the Court with helpful comparables on the quantum of costs in the following election cases from cases decided in the Federation:

- SKBHCV2003/0183 – **Cedric Liburd and others v Eugene Hamilton**[57] where the total awarded was EC$770.368.41.

[54] See: para. 28 of the judgment.
[55] Ibid, para. 31.
[56] BVIHCVAP1994/0005 (delivered 19th September 1994, unreported).
[57] Supra, note 17.

- NEVHCV2011/0130 – **Mark Brantley v Hensley Daniel** where the total awarded was approximately EC$800,000.00

Based on these awards, the amount awarded to the Mr. Herbert in this matter which involved multiple proceedings in the High Court and Court of Appeal does not appear to be unreasonable nor out of line with comparable cases.

[65] Finally, I come to the issue whether there is any basis for interfering with the learned judge's exercise of his discretion in quantifying the costs payable to the respondent. In doing so I am guided by the well-known principles regarding how the Court of Appeal should approach the judge's decision on a quantification of costs. Ms. Sookoo cited a passage from **Halsbury's Laws of England**[58] which I adopt –

> "The Court of Appeal will not interfere with his order as to costs if the judge had exercised his discretion on material which he was entitled to take into consideration. However, if the judge acted arbitrarily, or exercised his discretion against a successful party on irrelevant grounds, or without any material at all, the Court of Appeal may interfere."

This principle was echoed by Barrow JA in the Consolidated Appeals when he said at paragraph 8:

> "Furthermore, he said (referring to Chief Justice Sir Vincent Floissac in Henry v Halstead), an appeal court should not interfere with the judge's exercise of his discretion in such cases unless there is some error of commission or omission. This last principle applies not only to costs but generally and it is well established that the court will interfere with the exercise of discretion when a judge has failed to consider relevant factors."

Based on my findings above, I am satisfied that the judge did not commit any error of commission or omission, nor failed to consider relevant factors. Therefore, I would not interfere with his quantification of the costs payable by the appellant.

[58] 4th Edition, Vol. 37, p. 560.

Order

[66] In all the circumstances, I would dismiss the appeal and affirm the learned judge's award of costs in the lower court. The respondent is awarded his costs of the appeal, such costs to be assessed if not agreed within 21 days of the date of this order.

[67] **CHONG JA [AG.]**: The decision in this appeal has taxed the minds of the Court simply because of the uniqueness of the issues raised and the far-reaching consequences that a decision either way may result in, hence the reason for the delay.

[68] The issues raised by this appeal in my mind are twofold, i.e.:

(i) resolution of the conflicting decisions of this Court which are fully detailed and explained in the judgment of my learned brother Webster JA [Ag.]; and

(ii) the judicial insubordination referred to in the dissenting judgment of my learned brother Michel JA, where he states, "There is no doctrine or principle that I am aware of that would permit a judge of an inferior court to disregard not merely a decision of a superior court, but a virtual directive of that court to the inferior court, and instead to make and act upon its own independent and contrary decision."

[69] The resolution of the issues and the far-reaching consequence have, in my view, put the Court in the proverbial "rock and a hard place" since both judgments of my learned brothers are supported by learned judicial precedent, wisdom and practice.

[70] At present, there are two bodies of cases from this Court that conflict with each other as to the applicability of the CPR to election petition cases: on the one hand, we have **Henry v Halstead**[59] and the Consolidated Appeals and on the other hand

[59] Supra, note 6.

we have **Ezekiel Joseph v Alvina Reynolds** and **Lenard "Spider" Montoute v Emma Hippolyte**.[60]

[71] Both judgments recognised and dealt with the conflict that presently exists and it is time, in the interests of certainty and consistency, that this Court puts an end to this conflict and not leave the matter "hanging". This appeal presents such an opportunity and we should seize that opportunity to set the matter right once and for all and, in my opinion, this is what my brother Webster JA [Ag.] has done in his judgment.

[72] To support my learned brother Michel JA's approach would leave in my mind two unresolved issues:

(i) The issue of the conflicting decisions alluded to above; and

(ii) The justice of the case – does the justice of this case warrant following the order/direction of Barrow JA in the clear and accepted position of this Court that his order/direction was not in keeping with the law? I think not. We must break with conventional wisdom if the justice of the case merits it.

[73] An option open to the Court would be to allow the appeal and order that costs be assessed not under Parts 64 and 65 of CPR but applying the principle of reasonable costs. But this, to my mind, would serve no useful purpose as the result would be the same. Webster JA [Ag.] in his judgment dealt extensively with the process undertaken by Thomas J [Ag.] and found the costs awarded 'not … unreasonable nor out of line with comparable cases'.[61]

[74] It is for these reasons that I support the judgment of my learned brother Webster JA [Ag.]; his judgment resolves the conflict in the existing case law and brings certainty and consistency in the law as it relates to the applicability of the CPR to

[60] Supra, note 25.
[61] Para. 64 of the judgment of Webster JA [Ag.].

election petitions and does justice by not penalizing the successful party to his full costs entitlement. In arriving at this conclusion, I take comfort in the words of Lord Diplock in **Davis v Johnson**[62] that 'In an appellate court of last resort a balance must be struck between the need on the one side for the legal certainty resulting from the binding effect of previous decisions and on the other side the avoidance of undue restriction in the proper development of the law'.

To repeat, I am of the opinion that the judgment of Webster JA [Ag.] achieves both certainty and the proper development of the law.

[75] In concluding, I would therefore, like my brother, dismiss the appeal and affirm the learned judge's award of costs in the lower court.

Tyrone Chong, QC
Justice of Appeal [Ag.]

[76] **MICHEL JA:** I have read in draft the judgment written by my learned brother, Webster JA [Ag.], and, for the most part, I agree with his reasoning and analysis throughout most of the judgment, but – for the reasons which will be apparent in this dissenting judgment – I disagree with some of his conclusions and with his order dismissing the appeal.

[77] The appeal arises out of an election petition brought by the appellant against the respondents following the 2004 General Elections in the Federation of Saint Christopher and Nevis. The petition was heard by Belle J who dismissed it on 2nd May 2006 and made no order as to costs. The respondents appealed against the denial of costs to them and in a judgment delivered by Barrow JA on 15th July

[62] [1978] 1 All ER 1132, p. 1137.

2008, this Court allowed the respondents' appeal and ordered the appellant to pay the respondents' costs in the appeal and in the court below.

[78] As to the quantification of the costs, although Barrow JA did not explicitly state the mode and method by which the costs were to be quantified, the tenor of the judgment made it clear that the costs were to be quantified by a judge of the High Court in accordance with Parts 64 and 65 of the CPR. This is expressly acknowledged in the judgment of Webster JA [Ag.] when he says at paragraph 11, that 'the judgment as a whole makes it clear that Barrow JA was saying that Parts 64 and 65 of the Rules apply to election petition cases' and at paragraph 12, that 'when Barrow JA ordered that Mr. Grant should pay the costs of the respondents "to be quantified" he meant that they were to be quantified in accordance with Parts 64 and 65 of the CPR'.

[79] In arriving at the position that the determination of costs on the election petition should be in accordance with the costs regime under the CPR, the Court of Appeal was following its previous decision in the case of **Henry v Halstead**.[63] This was a case decided by this Court on an appeal from the High Court of Antigua and Barbuda on an election petition brought under the **Representation of the People Act** of Antigua and Barbuda.[64] The Court of Appeal affirmed the decision of the High Court to award costs to the successful party in an election petition and, in so doing, the Court very clearly determined that the costs regime under the Rules of the Supreme Court (which was the predecessor to the CPR) applies to the award of costs on an election petition, notwithstanding the fact that the petition was brought under the elections statute of Antigua and Barbuda. Chief Justice Sir Vincent Floissac, who delivered the judgment of the Court, expressly stated that 'the award of costs by the High Court (sitting as an Election Court) is governed by Order 62, rule 3, of the Rules of the Supreme Court'. As Webster JA [Ag.] put it in his judgment, in paragraph 10 above:

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[63] Supra, note 6.
[64] Cap. 379, Laws of Antigua and Barbuda, Revised Edition, 1992.

> "The reference to Order 62 means that the Chief Justice was saying that the Rules of the Supreme Court, or at least the costs provisions in Order 62, apply to election petition cases."

[80] On the other side of the issue of the applicability of the CPR to election petition cases are the decisions of this Court in **Ezechiel Joseph v Alvina Reynolds** (consolidated with **Lenard "Spider" Montoute v Emma Hippolyte**)[65] and **Ronald Green v Peter Saint Jean** (consolidated with **Maynard Joseph v Roosevelt Skerritt**).[66]. In both of these consolidated appeals, the Court took the unanimous view that the CPR does not apply to election petition cases. In delivering the judgment of the Court in the **Joseph v Reynolds** and **Montoute v Hippolyte** consolidated appeals, Chief Justice Sir Hugh Rawlins stated:

> "The true principle is not that the Civil Procedure Rules are not applicable in these proceedings. Rather, it is that they are not applicable in the absence of express legislation that provides for their application."

[81] In paragraph 22 of his judgment, Webster JA [Ag.] characterised the current state of affairs on the applicability of the CPR to election petition cases as one of conflicting decisions of the Court, with **Henry v Halstead** and **Benjamin v Grant** (consolidated with **Benjamin v Hamilton**) applying the costs regime under the CPR and its predecessor to election petition cases and **Joseph v Reynolds** (consolidated with **Montoute v Hippolyte**) and **Green v Saint Jean** (consolidated with **Joseph v Skerritt**) disapplying the CPR to election petition cases.

[82] It is worthy of note that the issue in **Joseph v Reynolds** consolidated and in **Green v Saint Jean** consolidated was the applicability of the CPR to the overall conduct of election petition cases, whilst **Henry v Halstead** and **Benjamin v Grant** (consolidated with **Benjamin v Hamilton**) were decided on the narrower issue of whether the costs regime under the CPR or its predecessor was applicable to the award and/or quantification of costs in election petition cases. When the issues are so framed, one may take the view that there is no significant

[65] Supra, note 25.
[66] Supra, note 27.

conflict. Given that election petitions are instituted under election statutes, which in the case of St. Kitts is the **National Assembly Elections Act**,[67] it is possible to disapply the CPR by virtue of the first part of CPR 2.2(3)(e), which reads as follows:

> "These Rules do not apply to proceedings of the following kinds – … proceedings in the Supreme Court instituted under any enactment".

But, because there are no rules made under the **National Assembly Elections Act** to regulate the award of costs in election petitions, it is possible to apply the costs regime under the CPR to election petition cases by virtue of the remaining portion of the words quoted from CPR 2.2(3)(e), to wit –

> "in so far as Rules made under that enactment regulate those proceedings".

In fact, at the time of the hearing of the election petition and the costs appeal in this case there were no rules made under the Act at all, and even when the **National Assembly (Election Petition) Rules**[68] were made in 2014, they did not deal with the making or quantification of costs awards.

[83] Notwithstanding the possible narrowing of the conflict of decisions by this Court on the issues for determination in this appeal, I want to specifically express my agreement with the reasoning, analysis and conclusion of Webster JA [Ag.] that there is a conflict of decisions on the applicability of the CPR to election petition cases; that this Court being the final appellate court on election petition cases is entitled to overrule itself on an issue in such a case; and that the preferred position is the one taken by the Court in the Consolidated Appeals of **Joseph v Reynolds** and **Montoute v Hippolyte** and followed in the Consolidated Appeals of **Green v Saint Jean** and **Joseph v Skerritt**, that the CPR does not apply to the conduct of election petition cases. This does not, however, decide the appeal.

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[67] Cap. 162 of the Revised Laws of Saint Christopher and Nevis 2009.
[68] Stautory Rules and Orders No. 4 of 2014.

[84] The real issue in this appeal is not whether election petitions in the member states and territories of the Eastern Caribbean Supreme Court, and in Saint Christopher and Nevis in particular, are to be conducted in accordance with the CPR or in accordance with the election statutes and the rules made under the statutes. The issue in this appeal is twofold. The first part is whether the costs regime contained in Parts 64 and 65 of the CPR can be applied to the quantification of costs in an election petition case, and the second part is whether it was open to a High Court judge, in a case in which a matter had been remitted to the High Court by an appellate court to perform a particular function, to disregard the remit of the appellate court as to the manner in which the function was to be performed and to perform it instead in accordance with his own contrary viewpoint.

[85] In answer to the first question, I take the view that, even if the CPR does not apply to the conduct of election petition proceedings generally, and even if the costs regime under the CPR is not applicable to the determination and quantification of costs in election petition cases, and even if costs in these cases are to be determined in accordance with the inherent jurisdiction of the court, it is open to the court to choose its mechanism for determining the costs to be awarded. The court may, in its discretion, choose to ask the party entitled to costs to prepare and submit a bill of costs, which the court can use in assessing the costs to be awarded, or the court may choose to use – not by dictation but by discretion – the costs regime contained in the CPR. In this way, even if the costs regime under the CPR is not applied to election petition cases as a matter of course, it can yet be applied by way of the exercise by the court of judicial discretion in accordance with its inherent jurisdiction.

[86] On the facts and circumstances of this case, it may be possible to treat the intimation by Barrow JA that the costs on the election petition should be quantified in accordance with Part 65 of the CPR as the Court choosing the mechanism of the costs regime under the CPR to determine the costs to be awarded. Although it is to be conceded that Barrow JA appeared to have gone much further than

merely using the mechanism of the costs regime of the CPR to determine the quantum of the costs to be awarded; he in fact expressed the position of the Court that, not only was the costs regime under the CPR applicable, but that the CPR as a whole was applicable in the conduct of election petition cases.

[87] I part company with Barrow JA on his position as to the applicability of the CPR to election petition cases generally, and I am willing, though not committed, to part company with him on the applicability of the costs regime under the CPR to election petition cases when there are no rules under the elections statute regulating the award of costs. I will, however, keep company with Barrow JA in so far as his judgment can be taken to be an exercise by the court of its discretion to determine the mechanism which it uses to quantify the costs to be awarded in an election petition case.

[88] Even if the view is taken that it was not open to the court to apply the costs regime under the CPR to the determination of costs in this case, whether as a matter of dictate or discretion, the question still arises as to whether a High Court judge to whom had been given the task of quantifying the costs to be awarded to the successful party in an election petition case in accordance with a judgment of the Court of Appeal – which Webster JA [Ag.] agreed meant that the costs were to be quantified in accordance with Parts 64 and 65 of the CPR – could depart from the intimation or direction of the Court of Appeal and quantify the costs using a totally different method contrary to the intimation or direction of the Court of Appeal.

[89] The answer to the second question does not in my view engage the doctrine of stare decisis, by virtue of which a court of appeal is bound to follow its own decisions, unless (as in the present case) it is sitting as the final appellate court on the matter, in which event it can – like the House of Lords, the Privy Council or the Caribbean Court of Justice – overrule its previous decision. What is engaged on the facts and circumstances of this case is more akin to judicial insubordination than it is to judicial precedence.

[90] There is no doctrine or principle that I am aware of that would permit a judge of an inferior court to disregard not merely a decision of a superior court, but a virtual directive of that court to the inferior court, and instead to make and act upon his own independent and contrary decision. Although Thomas J [Ag.] did not acknowledge or even make reference to the intimation or direction given by the Court of Appeal, he could not but have been alive to it, having been a member of the Court when Barrow JA delivered the judgment of the Court. The question before this Court, therefore, is not – as set out by Webster JA [Ag.] – whether this Court could or should depart from a previous decision of the Court; it is whether it could or should endorse or legitimise the disregard by an inferior court of the directive of a superior court. The decision of the House of Lords in **Davis v Johnson**[69] referred to by Webster JA [Ag.] cannot be applied on the facts of this case.

[91] This Court's response ought in my view to be clear. A lower court cannot choose to disregard what in essence is a directive to it by a superior court and to make its own determination contrary to the directive of the superior court, and this Court should not countenance such disregard, far less legitimise it by overturning the decision of the superior court in line with the lower court's decision. This Court is free to criticise a previous decision of the Court in its determination of the costs regime to be applied in this case, but we ought not to reverse the decision so as to regularise what in effect is an ultra vires decision of the lower court. The Court's criticisms and expression of its position should provide sufficient guidance to be followed by this Court or a lower court in an appropriate case.

[92] I accordingly disagree with the conclusion of Webster JA [Ag] that the decision appealed in this case should be affirmed and the appeal against it dismissed.

[69] Supra, note 42.

Instead, I would allow the appeal and set aside the judgment and order of the court below dated 21st and 22nd December 2011.

Mario Michel
Justice of Appeal

By the Court

Chief Registrar