

THE EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

CLAIM NO. 202 of 2015

BETWEEN

LAURON BAPTISTE

PETITIONER

and

VIL DAVIS
Returning Officer

and

VERONICA JOHN
Presiding Officer

and

MONTGOMERY DANIEL

and

SYLVIA FINDLAY-SCRUBB
Supervisor of Elections

RESPONDENTS

- AND -

CLAIM NO. 203 of 2015
BETWEEN

BENJAMIN EXETER

PETITIONER

and

WINSTON GAYMES
Returning Officer

and

KATHLEEN JEFFERS
Presiding Officer

and

SIR LOUIS STRAKER

and

SYLVIA FINDLAY-SCRUBB
Supervisor of Elections

and

THE ATTORNEY GENERAL OF SAINT VINCENT AND THE GRENADINES

RESPONDENTS

Appearances – Claim No. 202 of 2015:

Mrs. Kay Bacchus Baptiste, Mr. Keith Scotland (absent), Mrs. Zhing Horne-Edwards, instructed by Ms. Shirlan Barnwell and Ms. Maia Eustace for the petitioner.

Mr. Joseph Delves holding papers for Mr. Douglas Mendes S.C. (absent) and Mr. Michael Quamina (absent) for the 1st, 2nd and 4th respondents

Mr. Grahame Bollers and Mr. Carlos James for the 3rd respondent.

Appearances – Claim No. 203 of 2015:

Mr. Stanley John Q.C., Mrs. Zhing Horne-Edwards and Mrs. Kay Bacchus Baptiste instructed by Ms. Shirlan Barnwell and Ms. Maia Eustace for the petitioner.

Mr. Joseph Delves holding papers for Mr. Douglas Mendes S.C. (absent) and Mr. Michael Quamina (absent) for the 1st, 2nd and 4th respondents

Mr. Grahame Bollers and Mr. Carlos James for the 3rd respondent.

Mr. Richard Williams holding papers for Mr. Anthony Astaphan S.C. (absent) and Mr. Kenny Kendrickson (absent) for the 5th respondent

2018: Jul. 12

Nov. 13

DECISION

INTRODUCTION

- [1] Henry, J.: The most recent general elections in St. Vincent and the Grenadines¹ have given rise to two elections challenges to the results in two constituencies. Mr. Lauron Baptiste and Mr. Benjamin Exeter have respectively filed an elections petition alleging serious irregularities in the polls. They are respectively seeking orders, among other things to declare the elections void in the North Windward and Central Leeward constituencies where Mr. Montgomery Daniel and Sir Louis Straker were respectively returned and declared duly elected. The declared winners were fielded **by the Unity Labour Party ('ULP') while Mr. Exeter and Mr. Baptiste contested the respective seats** on behalf of the opposition National Democratic Party ('NDP').
- [2] The Returning Officers (Vil Davis and Winston Gaymes), Presiding Officers (Veronica John and Kathleen Jeffers), the Supervisor of Elections and the Honourable Attorney General² appear in these proceedings as respondents. Continuation of the trial is expected to resume on December 3rd 2018. The parties have filed their respective witness statements. The presiding officers, returning officers and the supervisor of elections subsequently filed³ evidential objections to portions of several witness statements filed by and on behalf of Lauron Baptiste and Benjamin Exeter. For convenience, **they will be referred to collectively as 'the respondents' at points in this decision.**
- [3] They contend that portions of the impugned witness statements are objectionable and should be struck out. They submit that those objectionable parts respectively were not pleaded, contain hearsay material or incorporate inadmissible opinion evidence. They have applied alternatively for an order to be permitted to adduce further evidence to address those matters, if this application is dismissed.

¹ Held on 9th December, 2015.

² In the Benjamin Exeter Petition only.

³ On 25th June 2018.

ISSUES

- [4] The issue is whether the impugned portions of the referenced witness statements should be struck out.

LAW AND ANALYSIS

Issue – Should the impugned portions of the witness statements be struck out?

Statements allegedly not pleaded

- [5] The greater number of impugned statements is attacked on the ground that they were not pleaded. In this regard, the presiding officers, returning officers and the supervisor of elections submitted that it is trite law that evidence not relevant to a pleaded case ought not to be allowed to stand. They cited in support the case of *Quinn-Leandro et al v Jonas et al*⁴. There, the Honourable Chief Justice said:

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

It was on this basis that Mr. Guthrie, QC, and Mr. Astaphan, SC, re-iterated relevant statements which these courts have consistently made in election cases. ... The pleadings must be precise and disclose a cause or causes of action.'

Mr. Guthrie and Mr. Astaphan agree that the purpose of pleadings is to identify the issues, and to avoid opposing parties and the court from being taken by surprise.⁵

- [6] The Learned Chief Justice accepted that the foregoing accurately captured some of the applicable principles. The Court also considered and applied the learning from the Indian Supreme Court in *Charan Lal Sahu v Giani Zail Singh*⁶ where that court stated:

⁴ ANUHCVP2010/18, ANUHCVP2010/19 and ANUHCVP2010/20, decisions delivered on 27th October 2010.

⁵ At paras. 31-32 and 36 of the *Quinn-Leandro* decision.

⁶ [1985] LRLC (Const.) 31.

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

- [7] The presiding officers, returning officers and the supervisor of elections submitted that similar pronouncements were made by the Court of Appeal of the Eastern Caribbean Supreme Court in *Frampton v Pinard*⁷ and *Ethlyn Smith*⁸. They submitted that the authorities reflect that evidence in elections petitions will come from the affidavits, and cross-examination or by oral evidence.
- [8] Mr. Exeter and Mr. Baptiste acknowledged that the referenced principles accurately outline the state of the law on this issue. They added that it is just as important for the court to have regard to other legal principles which are equally applicable. They submitted that those additional principles were outlined by Boodoosingh, J. in the Trinidad and Tobago case of *Kelsick v Kuruvilla, North West Regional Health Authority & AG of Trinidad & Tobago*⁹.
- [9] Boodoosingh, J. stated among other things:
- ‘The test for evidence is relevance. ... This test must be applied in the context of other rules. ... The trial judge will sometimes have to sift through the evidence to find the key or relevant evidence and apply such weight as is required. Some allowance must be given to

⁷ DOMHCV2005/0149.

⁸ *Ethlyn Smith v Delores Christopher et al*, Claim No. BVIHCV2002/0097, unreported.

⁹ TT 2012 HC 379.

the good sense of the trial judge not to be swayed by barely relevant evidence or emotive statements.’¹⁰

[10] He added:

‘Further, it is not always possible to determine the significance of a particular aspect of the evidence until the end of all the cross-examination in the matter. A judge would also, therefore, be entitled to admit evidence *de bene esse* or conditionally subject to its relevance being shown at the trial. ... at the pre-trial review a judge may not always be able to determine the exact significance to be attached to a particular, aspect of the evidence until all of the cross-examination unfolds and the witnesses are tested on their statements. It is always open to the parties to advance submissions on what weight, if any, is to be attached to a specific bit of evidence.’¹¹

[11] The learned judge adopted pronouncements made by Lord Woolf, M.R. stated in *McPhilemy v. Times Newspapers Ltd* [1999] 3 All E.R. 775 at 793 and cautioned:

‘As a general principle, also, a party is required to plead all material facts to establish the claim. But this must be a short statement. This requirement must be construed with a healthy dose of common sense. A party cannot be expected to set out in their statement of case (or defence) every fact in detail on which they rely... No more than a concise statement of those facts is required. ...’

17. Dealing with evidential objections cannot be an exercise in comparing the witness statement to the pleading and striking out every sentence from the witness statement which has not been specifically mentioned in the pleading.’¹²

[12] The petitioners submitted that the referenced principles are *in pari materia* with those applicable in the practice before the courts in this jurisdiction and should be adopted for purposes of determining the merits of the subject evidential objections.

¹⁰ At para. 4.

¹¹ At para. 13.

¹² At paras. 16 and 17.

- [13] The parties on both sides in these proceedings have accepted and are agreed on the legal principles which the court must be guided in evaluating the evidential objections. In summary, they concur. I agree that they have collectively outlined the applicable legal principles. I will evaluate the impugned statements based on those principles.

OPINION

- [14] The respondents argued that opinion evidence is inadmissible unless it comes from an expert. They contended that **an individual's opinion of events is not relevant to the court's determination of what** actually took place. They submitted further that opinion evidence of persons other than experts in a particular field is generally inadmissible on the general principle that witnesses must speak only to that which was directly observed by them.
- [15] The respondents cited the case of *Chaitlal v Attorney General of Trinidad and Tobago*¹³ in which Myers J stated that for evidence to be admissible:

‘Adequate foundation evidence must be adduced. - The deponent must otherwise be an appropriate person to give the evidence. - It must not offend against the hearsay rule, subject to any relevant exceptions to that rule, and perhaps any residual judicial discretion to admit otherwise legally inadmissible evidence and, - It must not constitute opinion evidence, subject to the exception to the rule.’

- [16] The petitioners rejoined that guidance on the reception of opinions as evidence may be garnered from the *Kelsick v Kuruvilla* case. The learned judge stated:

‘An ordinary witness (as opposed to an expert) will also in appropriate cases be able to give evidence of matters which may appear to be an expression of opinion if the matter is one in which they may be experienced in. ... Ultimately, it will be an issue of what weight can be attached to the evidence. ... Evidence will sometimes be allowed as part of the narrative if it helps explain some other aspect of the evidence which is directly relevant. Thus, what a party has done as part of a narrative may be admissible even though little

¹³ HCA No. 2472 of 2003.

weight will ultimately attach to the evidence once it makes other relevant evidence understandable. The assertions in the witness statement must attempt to follow from what comes before. A judge reading it must be able to make sense of the narrative. Innocuous evidence will sometimes be permitted, therefore, if it helps to make sense of the client's story.'

[17] The parties have highlighted principles of law which govern the receipt of opinion evidence. Other relevant principles were identified when certain objections were considered. I do not repeat them here. Those objections will be addressed alongside parallel objections on lack of pleading and hearsay.

[18] The respondents objected to paragraph 7 of **Deryck Smart's witness statement**¹⁴ and paragraph 5 of **Kendall Sandy's** witness statement. Referring to presiding officer Ms. Veronica John in their witness statements, the proposed witnesses stated respectively:

7. 'When I entered the polling station I noticed that Ms. John was pre-stamping many ballots in the book without tearing them out. I saw her stamping ballot paper after ballot paper in the book and signing each one.'

5. 'She stamped and initialed about 40 ballots before voting began. So when the first person came into vote she issued a ballot paper that was pre stamped.'

[19] The respondents submitted that those statements were not pleaded. They submitted further that the allegation in the witness statements is that the Presiding Officer was stamping a number of ballots while they were still in the ballot book, and before any voters appeared to be issued with a ballot. They contended that what is pleaded at paragraph 23 of the petition is that 'the ballot papers issued to Presiding Officers by the Supervisor of Elections had the official work pre-printed on them and in some instances the official mark was printed on the counter foil, or with the official mark pre-printed on the ballots.

[20] The petitioners submitted that such evidence supplies particulars in support of allegations already pleaded in the Petition under paragraph 3(23). They contended further that the petition telescopes that there was a procedural irregularity in pre-stamping ballots outside of the presence of the voter and contrary to law.

¹⁴ Filed on 7th June 2018.

[21] Paragraph 3(23) of Lauron Baptiste's petition reads:

'(23) Contrary to Rule 31(1)(a) of the Rules all the ballot papers issued to Presiding officers by the 4th Respondent had the official mark pre-printed on them and in some instances the official mark was printed on the counterfoil. This is also in violation of the procedure which states that 'The Presiding Officer puts the official election mark on the ballot paper and his/her initial, then marks the voter's number on the counter-foil of the ballot' as set out set out (sic) in 'Handbook for Election Workers' produced by the Electoral Office of St Vincent and the Grenadines, 2015 under the hand of the 4th Respondent, for 'the more effective conduct of the election process'. (bold added)

[22] This assertion differs substantially from the referenced statements made by Deryck Smart and Kendall Sandy. It alleges on the one hand that the ballot papers had the official mark pre-printed on them before they were delivered to the presiding officer Veronica John by the Supervisor of Elections. On the other hand, Ms. Smart and Ms. Sandy allege Ms. John was pre-stamping the ballots/ballot papers while they were in the ballot book and signing or initialing them. They are effectively asserting that the presiding officer was stamping the ballots after receiving them from the Supervisor of Elections and not before as pleaded. I find therefore that **Deryck Smart's and Kendall Sandy's** assertions on this subject, were not pleaded in the petition. For that reason, they are inadmissible and must be struck from the witness statements of Deryck Smart and Kendall Sandy.

[23] **Objection was also taken to paragraph 8 of Deryck Smart's witness statement** where she alleged:

8. 'She folded the ballot paper twice, so that the Up with the mark that sad do not fold beyond this line.'

[24] The respondents contended that it is not intelligible. They reasoned that to the extent that it states that the presiding officer folded the ballot paper twice or that something was folded beyond this line such was not pleaded. The petitioners made no counter submission thereby conceding that the objection was not without merit. I have seen no pleading from which the statement arises. It follows that the objection in relation to that statement is admitted. I therefore rule that it is inadmissible on that basis.

[25] **Kendall Sandy's witness statement was further criticized for containing material which was not** pleaded. In this regard, the respondents submitted that on this score, her assertion that Ms. John:

‘... had 3 ballot books but one of the books was not full it had a missing ballots papers.’
is inadmissible.

[26] The petitioners countered that this proposed testimony is in support of an allegation pleaded at paragraph 3(32)(a) of the Petition to the effect, that there were missing ballot papers at polling station NW1, and thereby demonstrated that the first respondent failed to ensure that the election was conducted in accordance with applicable rules.

[27] Paragraph 3(32)(a) of the petition alleged:

‘(32) The 1st Respondent failed to ensure that the election was conducted in accordance with the Elections Rules given the following particulars:

a. There were missing ballot papers at polling station NW1 in that there were 39 counterfoils more than ballots.’ (bold added)

[28] The impugned statement in the witness statement echoes the assertion (in the petition) that ballot papers were missing in the North Windward constituency. This part of the witness statement narrowed the focus to the polling station at NW1. Ms. Sandy indicates that the polling station in which she observed the missing ballots was at the NW1 polling station¹⁵. Although she did not mention counterfoils in that part of her witness statement, her complaint that ballot papers were missing is caught by the pleading at paragraph 3(32)(a) of the petition. That part of her testimony is therefore relevant and is admissible.

[29] Ms. Sandy alleged further that after voters had voted, the Presiding Officer Ms. John held the ballots in a manner which allowed her to see how the voter had voted, peeked at the ballots of persons whose party affiliation was unknown and deliberately opened the ballots of one Elford. She averred¹⁶:

‘7. When the voter returned (sic) the ballot she held it in such a way that the vote was exposed and she could see who the voter voted for and I could see also.

¹⁵ Paragraph 1 of the witness statement.

¹⁶ At paragraphs 7, 8 and 9 of her witness statement.

8. I personally saw the way about 60 persons voted. The voting community is small. The voters are well known, I observed that she will peak at the vote of persons who were not a well known ULP or NDP. It was clear to me she was checking the votes of persons she was not sure of.
9. I know **she peaked a (sic) one Elford Burke's ballot**, who (sic) visibly upset that **she looked at his vote. He is currently residing out of the state.**' (bold added)

[30] The respondents submitted that those assertions were not pleaded. They argued that what is pleaded at paragraph 25 of the Petition is that the Presiding Officer deliberately opened ballot papers, in particular the ballot papers of Elford Burke, Eswad Guy and Hazan Williams.

[31] The petitioners submitted that this evidence contains particulars relevant to allegations at paragraph 3(25) of the Petition, to the effect that the 2nd Respondent Ms. John deliberately breached the secrecy of the ballots of Elford Burke, Eswal (sic) Guy and Hazan Williams among others, thereby allowing for breach of secrecy of the ballots of more than the three named voters. They submitted further that evidence that the Presiding Officer peeked in particular at the ballots of voters with unknown party affiliation are relevant particulars in support of the pleaded allegation that the breach of secrecy was deliberate.

[32] At paragraph 3(25) of the Petition, the petitioner Lauron Baptiste alleged:

‘The 2nd Respondent deliberately breached the secrecy of the ballot by opening the ballot paper as voters returned them to her before depositing them in the ballot box. In particular she opened ballots for one Elford Burke, Eswal Guy, Hazan Williams among others **thereby intimidating voters.**’ (bold added)

[33] The foregoing allegation is broad enough to accommodate testimony that the presiding officer **peaked at Elford Burke's ballot; peaked at the vote of voters and/or held the ballot in such a way to** enable her to see how the voter had voted. I am of the considered opinion that the proposed testimony is relevant and is foreshadowed in the pleadings. I find that the impugned paragraphs are admissible and make no order that they be struck out.

[34] The respondents objected to similar statements recorded in Neleon Adams' witness statement at paragraphs 6 and 7. The statements complained of are:

'6. Mrs. Veronica John will fold the ballot paper in such a way that when the voters returned the ballot paper to her the vote was exposed.'

7. I observed that the ballots Mrs. John looked at were of voters that were not well known supporters of either party.' (bold added)

[35] **Those assertions mirror Ms. Sandy's in material respects.** They add nothing not contained in Ms. Sandy's witness statement. **The respondents object to them on the same basis. Those objections are overruled for the reasons given earlier in respect of Ms. Sandy's.**

[36] Ms. Adams accused the presiding officer of seeking to influence voters to vote for the ULP candidate. She stated in her witness statement that Ms. John used the expression 'show me your voting finger' from a ULP slogan and campaign song, to voters many times:

'11. ... thereby advising voters how to vote and seeking to influence voters to vote for the ULP candidate.'

[37] The respondents contended that this was not pleaded. The petitioners rejoined that this evidence supplies particulars of the pleaded allegation in paragraphs 3(27) and 3(28) of the petition to the effect that the 2nd Respondent was openly biased throughout the voting procedure, in breach of section 30 of the Representation of the **People's Act ('RPA')** and Form 1 of the RPA.

[38] Paragraphs 3(27) and 3(28) of the petition state respectively:

'(27) The 2nd Respondent was openly biased throughout the voting procedure and in particular was very rude to one of the Petitioner's agents Mr. (sic) Kay Bacchus-Browne when she attempted to replace an inside agent at polling division NW1. She refused to let her replace the agent even though she was shown the relevant papers.

(28) As some persons came to vote at NW1 the 2nd Respondent would say loudly "show me your voting finger". This is a well known ULP slogan for the elections.'

- [39] The combined effect of those paragraphs is to among other things level an allegation of bias against **Ms. John as articulated in Ms. Adams' witness statement. They are almost identical. The respondents' contention that this was not pleaded is unfounded.** That statement is not objectionable on that basis.
- [40] The respondents contended that the impugned statement at paragraph 7 is also objectionable and inadmissible on the ground that this is an expression of opinion as to the effect of what Mrs. John was alleged to have said. The petitioners have invoked section 30 of the RPA and Form 1 which stipulate that elections officers are required to subscribe to an oath of office by which they are to be guided in the performance of their functions. They are bound by that oath to faithfully perform such duties without partiality fear, favour or affection.
- [41] The petitioners appear to be seeking to invite the court to find that Ms. John demonstrated that she was biased in carrying out her functions. Ms. Adams has apparently concluded that she was. In deciding whether her conclusion was permissible under the circumstances, the court would need to evaluate all the relevant circumstances including what was allegedly said and done by Ms. John. It must then make an objective assessment whether the allegation of bias is permissible in light of the referenced observations.
- [42] If the court concludes that such inference could have reasonably been formed by the witness, in all the circumstances, the court may permit the evidence to be led not to prove that Ms. John was biased, but rather to evaluate it as part of the evidence and circumstances for the purpose of determining whether the claim of bias has been made out.
- [43] It is established in law that the question of whether a person is biased can be determined based on what is said and done coupled with any relevant circumstantial material. The person making such determination, an observer or adjudicating body is entitled to take all such matters into consideration. In similar fashion, a proposed witness may in appropriate circumstances express an opinion in respect of matters he or she has observed, from which a logical and reasonable conclusion may legitimately be **made as to the state of another person's frame of mind, as for** example where a staggering person is considered to be drunk, if alcohol can be detected on his/her breath.

[44] The existence or non-existence of the referenced slogan or campaign song is not within the knowledge of this court. It may or may not shed light on the merits of the objection. I am therefore unable to conclusively pronounce on whether **sufficient circumstantial basis exists for Ms. Adams'** conclusion or opinion as articulated in the impugned statement. I therefore refrain from making a ruling on it, (at this point) in respect of the opinion objection. If necessary, it will be considered during the course of the testimony.

[45] The respondents **objected to Ms. Adams' conclusion that Ms. John's alleged unwelcoming 'attitude'** severely compromised the voting and made it unfair and oppressive. She said of Ms. John:

'12. When she thought an NDP person came in she would be visibly unwelcoming. This severely comprised the voting rendering (sic) it unfair and oppressive.¹⁷

They objected only to the second sentence. However, both sentences must be taken together for context. The respondents argued that this is an expression of opinion as to the effect of what Mrs. John was alleged to have said.

[46] The petitioners countered that this evidence particularizes allegations pleaded in the Petition in paragraphs 3(27) & 3(29) as to the 2nd Respondent's bias (contrary to section 30 of RPA and Form 1 of the RPA) as displayed throughout the voting procedure. Ms. Adams is here purporting to speak about what Ms. John was thinking when certain persons came to the polling station. She is not in a position to do so unless Ms. John revealed this to her. Ms. Adams has not said that Ms. John told her what she was thinking at those moments.

[47] Moreover, in her witness statement, Ms. Adams has not pointed to any measurable description or objective data **of what 'visibly unwelcoming' entailed**, from which she purported to conclude that any part of the voting process **was compromised by Ms. John's 'thoughts'** and unwelcoming façade. **In the circumstances, the respondents'** objection to this testimony is upheld.

[48] The respondents **also objected to Ms. Adams' statement** in the last sentence of paragraph 17:
'I cannot recall if all ballots had the official seal on them and no one looked to ensure whether the ballots **had the official seal on them.**'

¹⁷ Paragraph 12 of the witness statement.

They submitted that this sentence can only support a pleading that the ballot papers did not have the official mark on them; or that the Presiding Officer did not check to verify whether there was indeed an official mark on them. They argued that there is no such pleading.

[49] The petitioners argued that this was pleaded in paragraph 3(23) of the Petition, where it is alleged that the failure to verify the presence of the official mark on the ballot paper was a departure from procedure prescribed by law. Paragraph 3(23) is outlined above. It alleged that the official mark was pre-printed on all the ballot papers. There is no assertion in that pleading that any of **the ballot papers did not have the official mark. To the extent that Ms. Adams' reference to 'seal' means 'the official mark', her assertions are contrary to the pleadings.** They contain no similar allegations elsewhere. The respondents' **objection is therefore upheld.**

[50] The respondents objected to similar assertions in **Cheryl Sutherland's witness statement** where she claimed at paragraphs 8 and 11 respectively:

'8. ... I did not notice the official mark on the ballots counted nor did I observe anyone looking to ensure that the ballots had the official mark on them.' and

'11. ... I cannot say if the official seal or presiding officer's initials were on any ballots.'

For the reasons articulated above, I agree that these statements are inadmissible on the ground that the allegations on which they are based were not pleaded.

[51] The respondents objected to Ms. **Adams' assertion in her paragraph 18 where she said:**

'I recall that at about 1:00pm an OAS observer came into the polling station. She asked Mrs. John why she was not checking the voters fingers before they voted. Then she asked how many persons voted so far. The poll clerk said 274 persons. I checked over my list and only 262 persons had vote. I told the observer I got only 262 and I double checked to see if we missed any. We did not. The observer wrote how much the poll clerk said but I do not think she noted what I said. I noted that the presiding officer and the ULP inside agent' list of voters had twelve (12) extra voters than our list.'

[52] The respondents submitted that this testimony effectively states that at some point the poll clerk had recorded 12 more persons as having voted than the NDP polling clerk had recorded. They contended that there is no such pleading. The petitioners contended that these matters were

pleaded at paragraphs 3(15), 3(16) and 3(17) of the Petition. They argued that the pleadings allege that uncertainty arose due to differences in the voting lists supplied to the various political parties and election officials.

[53] Paragraphs 3(15), 3(16) and 3(17) of the Petition state:

‘(15) As a result of the failure of the Fourth Respondent aforesaid the Petitioner was put to great expense and inconvenience in having lists printed for outside agents and also to try to contrive the polling Station Lists from the polling Division lists that were supplied on the compact disc by the Second Respondent. Accordingly, it was not known exactly how many persons were expected to vote at particular polling stations because the polling division lists provided gave the breakdown for the polling divisions and not the polling stations where applicable.

(16) The Petitioner was therefore put at a great disadvantage in that he was not afforded the opportunity to know the exact figure for the number of voters who were eligible to cast their ballot at the individual polling stations.

(17) Further, in the case of Polling Station NW1, the lists provided by the 4th **Respondent to the New Democratic Party and which used by the Petitioner’s** agents inside the polling stations, differed materially from the list used by the agents for the 3rd Respondent and the list used by the elections officers in that the lists used by the agents of the latter persons contained additional names that were not on the list of the agent for the Petitioner. As a result, the **Petitioner’s agents noted that several names that were not on the Petitioner’s agent’s lists but were on the list of the elections officers and that of the 3rd Respondent’s agents and** those persons were allowed to vote because they **were on the ‘official’ list.’**

[54] **Ms. Adams’ witness statement on this point alleged** that when the OAS observer came to the polling station, **there was a difference of 12 between Ms. Adams’ count and Ms. John’s record** of how many voters had cast their ballots at that time. The pleadings at paragraphs 3(15) (16)

and (17) of the Petition speak to a difference in the lists of voters supplied to the Petitioner and **those being used by the Respondent's agents**. They alleged that two distinctly different lists **were being used by the respective 'camps' and that the Respondent's agent had a list which** contained more names than the list supplied to the Petitioner. In this regard, the pleadings and the proposed statement by Ms. Adams differ to no great or material extent. The impugned **portions of Ms. Adams' witness statement are therefore admissible**.

[55] Ms. Adams stated further:

'I was not permitted to scrutinize the counterfoil nor the ballots to ensure if the ballots were all valid.¹⁸'

The respondents contend that this was not pleaded. The Petitioners rejoined that this was pleaded in paragraph 3(32)(b) of the Petition. They maintain that the pleadings accuse the 1st Respondent of failing to ensure that the election was conducted in accordance with applicable rules through the **failure to note objections made by the Petitioner's agents**.

[56] Paragraph 3(32)(b) of the Petition states:

'(32) The 1st Respondent failed to ensure that the election was conducted in accordance with the Elections Rules given the following particulars:

- a. ...
- b. **Failing to note objections made by the petitioners (sic) agents.'**

[57] It is necessary to consider the impugned statement in context. **Ms. Adams' proposed testimony** is as follows:

'19. At the preliminary count the poll clerk counted 405 counterfoils then placed them in a shoe box. The counterfoils were not shown to us. We then counted 364 valid votes as follows 141 for NDP, 220 for ULP, 2 for Green Party, 1 for DRP and 2 rejects a total of 366 votes. There were 39 counterfoils more than ballots cast. I was not permitted to scrutinize the counterfoils nor the ballots to ensure if the ballots were all valid. I only saw the way the ballot was marked for the particular candidate.

¹⁸ The penultimate sentence at paragraph 19 of her witness statement.

20. Kendal Sandy for NDP also objected to the discrepancy of 39 more counterfoils than ballots no objection was recorded by the presiding officer.

21. The presiding officer did not note the objection contrary to Rule 41(4) as I am advised by my lawyer. When I objected to the difference in the counterfoils and ballots, Mrs. John replied "I don't have time for that I have my paper work to **do.**" (underlining added)

[58] At her paragraph 19, Ms. Adams refers to ballots and counterfoils which she was not permitted to scrutinize. She did not aver that she or anyone else made any objections to them. This allegation is therefore not foreshadowed in the pleadings and is inadmissible.

[59] **The respondents also objected to aspects of Cheryl Sutherland's witness statement. They submitted** that part of paragraph 4 was not pleaded. Ms. Sutherland stated there:

'4. ... **There were other boxes about 7 in number that** had documents in them. They were brighter blue than the ballot boxes referred to. These boxes were not sealed. Documents like male and female count, the tally of votes and other documents were taken from them and placed in their correct envelope and then placed in the biggest **envelope and placed in the ballot boxes.'**

[60] The petitioners conceded that there is no corresponding allegation in the pleadings. I therefore find **that the respondents' objection is justified. That portion of Ms. Sutherland's witness** statement is therefore inadmissible.

[61] Ms. Sutherland also averred:

'10. No counterfoils were counted and I did not examine any of them. No one asked me to.'

The respondents submitted that this was not pleaded. The petitioners rejoined that this was pleaded at paragraphs 3(36)(a) and 3(36)(e) of the Petition where it is alleged that there was in essence no final count for North Windward.

[62] Sub-paragraphs 3(36)(a) and 3(36)(e) of the Petition read:

'(36) (a) The 4th Respondent failed to comply with R.P.A. rule 41(2) (a) no counting or recounting of the votes was done for North Windward.' and

'(e) Instead of counting each ballot individually the 1st Respondent perused the envelopes containing the ballots and accepted whatever figure was written on the envelope as the final count for that polling division. Thus a final count was not conducted.'

[63] Ms. Sutherland speaks in the impugned statement to the absence of counting of counterfoils, not ballots or votes. Sub-paragraphs 3(36)(a) and 3(36)(e) of the Petition do not deal with counting or examination of counterfoils. This was not pleaded. The objection on this point is therefore upheld and that paragraph is rendered inadmissible.

[64] **The respondents also objected to Ms. Sutherland's averment:**

'11. ... I cannot say if the official seal or presiding officer's initials were on any ballots.'

They reiterated that such an assertion can support only a pleading that the ballot papers did not have the official mark on them or that the Presiding Officer did not check to verify whether there was indeed an official mark on them. They submitted that there is no such pleading.

[65] The petitioners argued that the pleadings on this issue are supplied in paragraph 3(36)(d) of the Petition where it is alleged that the witness was not advised by the 1st Respondent what to look for at the final count and therefore could not say whether any of the ballots were official, i.e. not void.

[66] Sub-paragraph 3(36)(d) of the Petition states:

'(d) This agent asked by the 1st Respondent to witness the "recounting" was never advised what to look for and she cannot say if any of the ballots were official ballots or not.' (bold added)

[67] The petitioner has foreshadowed in the referenced sub-paragraph of the petition that there is a live issue regarding whether the ballots all contained **the presiding officer's initial** or official stamp, and if not whether such ballots were official. This allegation is foreshadowed in the petition. Ms.

Sutherland's averments to this effect, at paragraph 11 are therefore not objectionable on the ground that they were not pleaded.

[68] The respondents objected to paragraphs 12 through 18 of Barbara Creese's affidavit. Mrs. Creese's proposed testimony purports to detail her experience at polling station CLB1 as an inside agent for the NDP candidate on election day in 2015. Paragraph 12 of her witness statement states:

'12. When the Presiding Officer took the ballot from the ballot book, he stamped it with his secret mark, initialed the ballot and wrote on the ballot the voter identification number called out by the Poll Clerk. He put three sets of marks in all: namely his initials, the voter identification number and the stamp, **all above the line that said "Do not fold beyond this line" or words to that effect. He** did not put any mark below this line. I can say this because I was sitting closest to him, about two feet away and I saw him do these things. The stamp he used was the one he had gotten from the supplies box that morning. He marked his initials and placed **his stamp in the box marked "Space for PO initials" or words to that effect. I was there from the start and I observed these things.'**

[69] Paragraphs 13, 14, 15 and 16 read:

13. I never saw him put either his initials or stamp below the box, or below the **"Tear here" or below the dotted line that said "Do not fold beyond this line" or words to that effect.**
14. **I saw that he then folded the ballot up to the line that said "Do not fold beyond this line"** or words to that effect and I saw this clearly as I was next to him.
15. He explained very well to the voters to bring back the ballot in the way he had folded it and when someone came with a badly folded ballot he would take a blank ballot and demonstrate the folding to them and ask them to go back to the voting booth and fold it properly.
16. **In making the double fold he ensured that it reached just above the "Tear here" line and the "Do not fold beyond this line" dotted line, high enough that it obscured at least the bottom half of the box labeled "Space for Initials of PO".'**

[70] Paragraphs 17 and 18 state:

'17. When the voter returned with the ballot, he put a ruler on the folded part and using the edge of the ruler like a knife. He tore the top of the ballot right through his initials and

the official stamp. He tore right through the middle of the box labeled “Space for Initials of PO”, immediately under the words “Space for Initials of PO”. The voter’s number on roll remained in tact in the upper portion of the ballot paper that was severed, but the stamp and initials of the Presiding Officer were mutilated in the process. None of the ballots seen subsequently at the count had a complete mark or complete initial of the Presiding Officer. He repeated this process throughout.

18. He explained that he was using the ruler because the ballots were difficult to tear without it.’

[71] The respondents objected to these paragraphs on the ground that they were not pleaded. They contended that those paragraphs detail the procedure followed by the Presiding Officer in polling station CLB1 and specifically the:

1. stamping and placing his initials on the Ballot Paper;
2. place where he put his stamped initials;
3. method used to cut off the counterfoils (with a ruler); and
4. place where he cut off the counterfoils from the ballot paper.

[72] They argued further that Ms. Creese concluded at paragraph 17 that in cutting off the counterfoils:

1. ‘the stamped initials of the Presiding Officers were mutilated in the process’; and
2. ‘None of the ballots seen subsequently at the count had a complete mark or a complete initial of the Presiding Officer.’

The respondents submitted that this evidence seeks to support a pleading made in relation to polling stations CLF and CLF1, to the effect that the ballots were ‘mutilated’; or that the official stamp was not on the ballot; and that they therefore stood to be rejected in accordance with Rule 40(1) of the Election Rules.

[73] They reasoned that the only pleading in relation to polling station CLB1 is contained in paragraph 27(a) of the Petition which states: ‘although the Presiding Officers complied with the requirements of Rule 31 the ballots seen at the final count differed in material respects from the ballots seen at the preliminary count.’ **They submitted that the facts and matters deposed to in paragraphs 12 to**

18 are not reflected anywhere in the pleadings in relation to polling station CLB1 and ought to be struck-out.

[74] The Petitioners countered that the impugned evidence contains particulars in relation to allegations pleaded in the Petition under:

1. paragraph 3(23) where it is alleged that the referenced ballots appeared to have been willfully mutilated in such a manner that is contrary to Rule 15(2), Rule 16, Rule 31(1) and 40(1)(a) respectively, of the Rules;
2. paragraph 3(26) to the effect that the majority of ballots (over ninety percent (90%)) counted at the purported final count by the 1st Respondent, bore the official mark and the Presiding Officers initials in a manner which was contrary to Rule 31(2); as a result of which the Petitioner and his representatives objected persistently to their inclusion in the count; and
3. paragraph 27(a) which states that ‘although the Presiding Officers complied with the requirements of Rule 31, the ballots seen at the final count at CLB and CLB 1 differed in material respects from the ballots seen at the preliminary count.’

[75] Sub-paragraphs 3(23), 3(26) and 27 (a) of the Benjamin Exeter Petition state respectively:
‘(23) The said ballots appeared to have been willfully mutilated in such a manner that contrary to Rule 15(2), Rule 16, Rule 31(1) and 40 (1)(a) respectively, of the Rules, and as a result:

(a) **All of the ballots cast in the ballot box marked “CLF” appeared to have** been willfully mutilated in that they appeared different from the majority of the other ballots that were counted as valid at the final count by the 1st Respondent on that they bore neither the stamp nor initials of the Presiding Officer. Despite objections made by the Petitioner and his agents at the final count that they should not be counted, the 1st Respondent affirmed the preliminary count thereby refusing to reject any of those ballots.

(b) There were a further ninety nine (99) ballots which appeared to have been willfully mutilated identified in **the ballot box marked “CLF1”** which despite objections by the Petitioner and his representatives to their

inclusion at the purported final count were so included by the 1st Respondent who stated that since both candidates received mutilated ballots. **“what is good for the goose is good for the gander.”**

‘(26) Further and in addition to the above, the majority of ballots (over ninety percent (90%)) counted at the purported final count by the 1st Respondent bore the official mark and the Presiding Officer’s initials in a manner which is contrary to Rule 31(2) as a result the Petitioner and his representatives/agents objected persistently to their inclusion in the count because:

(a) **Rule 31(2) of the Rules (Voting procedure) provides that the ‘The voter, on receiving the ballot paper shall forthwith proceed into one of the compartments in the polling station and there secretly mark his ballot paper...’ He shall then fold the ballot paper so that the initials of the presiding officer and the official mark can be seen without unfolding it, and hand the paper to the presiding officer who shall without unfolding it ascertain by examination of the initials, the numbers and the official mark appearing thereon that it is the same paper as that delivered to the voter and if it is the same, he shall forthwith in full view of the voter and all others present remove the counterfoil and deposit the ballot paper in the box’.**

(b) If the presiding officer folded the ballot paper **to the line marked ‘Do not Fold Beyond the line’** he could have only verified that it was the same ballot as she or he is required to do by law, by examining his initial and the official mark by opening the ballot thereby invading the secrecy of the poll.

(c) The invasion of the secrecy of the vote is inimical to one of the core principles for the conduct of the election namely that of secrecy of the vote and is tantamount to a substantive departure from the law with regard to the conduct of elections and specifically, section

54(3) of the Representation of the People Act and Rule 31(2) of the Rules.’

‘(27) **Contrary to Rule 40 the 1st** Respondent refused to accede to the objections of the petitioner and his representatives/agents and count in counting various ballots as follows:

(a) The authenticity of the ballots counted in respect of Polling Division CLB and CLB1 which comprised a total of 223 and 201 votes respectively was questioned because although the Presiding Officers complied (sic) with the requirements of Rule 31 the ballots seen at the final count differed in material respects from the ballots seen at the preliminary count.’ (bold added)

[76] In relation to this testimony, I am to decide whether the pleadings, specifically subparagraphs 3(23), 3(26) and 27 (a) contain any allegation that ballots from polling station CLB1 were mutilated or did not have the official stamp on them. Subparagraph 3(23) speaks of **‘the said ballots’**. **Polling station CLB1 is not mentioned there.** The immediately preceding sub-paragraph alleged that the 1st Respondent counted as valid mutilated ballots from polling divisions CLF and CLF1. No other polling divisions are mentioned in that sub-paragraph. It follows that the reference in subparagraph 3(23) to **‘the said ballots’ does not include ballots from CLB1 polling station.**

[77] Subparagraph 3(26) of the petition complains that the ballots bore the official mark and **the presiding officer’s initials in a spot which necessitated an invasion of the secrecy of** the vote, by the presiding officer in order to verify that it was the same ballot handed to the voter. It contains no allegation that the **presiding officer’s** official mark and/or the initial were missing as averred by Mrs. Creese in the impugned passages. Accordingly, those matters were not pleaded in this sub-paragraph.

[78] Subparagraph 27 (a) charges that 201 ballots counted at the final count (from CLB1 polling station) differed in material respects from those counted at the preliminary count. This assertion is not that the ballots were mutilated or did not bear the official mark and presiding **officer’s initials but rather that the ballots at the final count were different from the ones seen at the**

preliminary count. Mrs. Creese's averments from paragraphs 12 through 18 of her witness statement are to the effect that they were mutilated and did not bear the initials and official mark. She did not say that the ballots differed from one count to the next. The Petition contains no pleadings which correspond with her allegations.

[79] A similar scenario **arises in respect of Mr. Paul Creese's testimony set out at paragraphs 15 to 17** of his witness statement. He claims that he was serving at CLB polling station on the day of the elections where he observed the Presiding Officer instructing voters on the voting procedure. The respondents raised the identical objection as that made in respect of the similar testimony from Mrs. Creese as recorded at her paragraphs 12 and 17. **The petitioner's** conceded that the pleadings did not foreshadow such matters in relation to polling station CLB where Mr. Creese was posted.

[80] At paragraph 15 of **Mr. Creese's** witness statement he states:

'15. I was sitting close to her so I was able to observe these things. My table was about **two (2) feet away from the Presiding Officer's table. She wrote the voter identification number at the top part of the ballot where there was a space for it. She placed her initials in the box marked "Space for initials of PO" or words to that effect and she placed the secret stamp above the line marked "Do not fold beyond this line" or words to that effect. I did not see her stamp below the line or place her initials below the line. From what I saw she always put her stamp above "Tear here" and above "Do not fold beyond this line" or words to that effect. I did not observe her placing either her stamp or initials under the space under "Tear here" or "Do not fold beyond this line". She folded to the line. She had a pattern and I did not see her adjust it. The fold was very close to the line. The stamp, initials and the voter identification number were all above the line.**

[81] He continued at paragraphs 16 and 17:

'16. When the voter returned the marked and folded ballot, I observed the Presiding Officer use a ruler on the edge of the fold and tear off the folded part.

17. I voted in that same Polling Station. When I received my ballot I observed that she used the same procedure.'

[82] **Mr. Creese's assertions are** similar to Mrs. **Creese's in relation to those matters.** Almost identical considerations arise. Subparagraph 27 (a) of the petition records that 223 votes were counted at the final count (from CLB polling station) which were different from those counted at the preliminary count in material respects. Nowhere is it alleged that the ballots **were mutilated or did not bear the official mark and presiding officer's initials** as alleged at subparagraph 3(23) of the petition. Rather the complaint is that the ballots at the final count differed from those at the preliminary count. The Petition contains no pleadings which support **Mr. Creese's** allegations as articulated in his paragraphs 15 through 17. They are therefore inadmissible.

[83] The respondents contended further that Mrs. **Creese's** averment in paragraph 19 of her witness statement was not pleaded. Mrs. Creese stated:

'19. There was one issue I had with the list. One voter came in to vote with a surname **beginning with "G". Polling Station CLB1** – the station I was assigned to – was for **voters whose surnames ran from "H" to "Z". That particular voter came in and gave** his ID card to the Poll Clerk. The Presiding Officer, the Poll Clerk and the ULP agent checked their list and got the name of the voter. The Presiding Officer had already given the ballot to the voter and he went in to vote. When he returned with the ballot I **said "Stop!" and stated that I did not find the name of this person on my list. It was** then that it was realized that the Presiding Officer, the Poll Clerk and the ULP agent, **each had the entire Polling Division list with all the surnames from "A" to "Z" and that I** **had the blue and white Polling Station list with names from "H" to "Z." My voter's list** is shown to me and hereto attached and **marked 'BC 3'.** That ballot was treated as a spoilt ballot.'

[84] The respondents argued that this paragraph deals with a ballot which was declared spoilt because the voter cast his vote in CLB1 when he should have voted in CLB. The Petitioners contended that subparagraph 3(16) of the petition deals with the 4th Respondent's failure and/or refusal to issue the customary polling station lists which resulted in a lack of clarity and confusion regarding the number of persons eligible to vote at the various polling stations. They submitted that the pleadings in that subparagraph adequately encapsulates **Mrs. Creese's** assertion.

[85] Sub-paragraph 3(16) of the petition states:

‘(16) The failure and or refusal of the 4th Respondent to issue the customary Polling Station lists resulted in a lack of clarity and confusion as regards the number of persons eligible to vote at the various polling Stations as evidenced by the Presiding Officers recording on the Form 16 ‘Statement of the Poll after Counting the Ballots’ in three (3) Polling Stations, namely Polling Divisions CLA1, CLE and CLF1 that there was a 100% voter turnout in relation to the number of persons on the voters list as recorded by the respective Presiding Officers for those polling stations and 101% in the case of CLD1.’(bold added)

[86] The foregoing pleading addresses the concern that there was confusion and a lack of clarity as to whether certain persons were eligible to vote at certain polling stations because of the alleged **failure by the Supervisor of elections to issue ‘customary polling station lists’**. Mrs. Creese’s witness statement highlights concerns as to identification of a certain voter based on the lists which the respective parties were using. The petitioner points to this as an example of how **the ‘different lists’** led to a spoilt ballot. I find therefore that this is caught by the pleadings.

Paul Creese

[87] Similar arguments were made by the respective parties in respect of paragraphs 9 through 12 of **Mr. Paul Creese’s witness statement. Paragraphs 9 and 10 state:**

‘9. At 7:00 am the Presiding Officer instructed Officer Lewis to inform the people that the polls were open and that they must line up to vote. He complied. However, before they came in Inspector James presented the Presiding Officer with Officer Lewis’ identification card and asked for him to vote in this Polling Station. The Poll Clerk called the officer’s name as well as his voter identification number. When that happened, I was looking for his name on the list that I had but I recalled that our Polling Station was supposed to cover surnames beginning “A” to “G”. I then thought that he must have had a transfer but that it was not yet shown to me. I thought the Inspector had the transfer but he did not produce any as it would have bene (sic) presented to the Presiding Officer.

10. I therefore informed the Presiding Officer that there needed to be a transfer for the Officer. In my presence she said she was telephoning the Returning Officer, Mr Winston Gaymes and I believe that she did. During her conversation, I heard her saying that the Police Officer needed to have a transfer and she was repeating that **'you will organize it'. After her conversation she told me that** the Returning Officer said that he will 3organize (sic) the transfer. The Officer voted and his ballot was placed in the box.'

[88] Mr. Creese added at paragraphs 11 and 12:

- '11. The Election Clerk Mr Clyde Robinson came in at about 45 minutes after the Officer voted and I again raised the issue with the Presiding Officer within his hearing, stressing the need for a transfer to have been produced. The Presiding Officer informed Mr Robinson about the matter and he said to both of us that he will get in touch with Mr Gaymes, the Returning Officer, to sort it out.
12. An hour and a half later I again raised the issue with the Presiding Officer. She said that Mr Robinson had called her and that the transfer cannot be done so they will **have his name deleted from the list in CLB1 where Officer Lewis' name would have** been, so he could not vote twice.'

[89] The respondents submitted that the foregoing paragraphs are objectionable and inadmissible because they are not supported by the pleadings. They contended that those paragraphs concern:

- '1. **an** attempt by a police officer to vote at polling station CLB;
2. the need for a transfer form for him to do so; and
3. the deletion of his name from the voting list in polling station CLB1.'

[90] The petitioners responded that those statements support allegations in the Petition that the failure and/or refusal of the 4th Respondent to issue the customary polling station lists resulted in a lack of clarity and confusion as regards the number of persons eligible to vote at the various polling stations. **The matters described by Mr. Creese's witness statement highlight what he** described as issues with determining whether the police officer was entitled to vote at polling station CLB. The petitioner relies on those statements in support of his allegation that

confusion and lack of clarity existed as to whether certain persons were eligible to vote, due to the use of different **lists by the respective candidate's agents**. Those matters are broadly foreshadowed in paragraph 3(16) of the Petition and are admissible.

[91] The respondents contended further that the last sentence in paragraph 21 and the entire paragraph 22 of Mr. **Creese's witness statement** were not pleaded. The Petitioners conceded that this is so except for the final sentence in paragraph 22. I agree with that assessment.

[92] The respondents argued that the last sentence in paragraph 22 refers to polling station CLB. It reads:

‘She showed us each ballot as she counted and it did not include any initial or stamp on it; **only the voter's mark apart from the Candidates' names and the symbols.**’

The respondents submitted that the petitioner made this allegation in the petition but not in respect of polling station CLB. They argued that the assertion in the petition related exclusively to polling stations CLF and CLF1.

[93] The petitioners countered that those allegations find expression in subparagraphs 3(23) and 3(18)(c) of the petition, where it is asserted respectively that:

1. all of the ballots issued to presiding officers appeared to have been willfully mutilated in such a manner that is contrary to Rule 15(2), Rule 16, Rule 31(1) and 40(1)(a) respectively, of the Rules, and
2. the 1st Respondent conducted the counts in a partial and or improper manner by: - allowing mutilated ballots to be included in the counts but rejecting the same type of ballots in other polling divisions.

[94] The Petitioners also submitted that they supplied the respondents with further particulars of the number of objections allegedly made; the nature of the objections made; the precise ballots allegedly objected to by the Petitioner's agents and the precise number of alleged mutilated ballots and the nature of this alleged mutilation, in response to their request for same. With respect to the **'definition of mutilated ballots'** they indicated that they meant ballots which:

1. bore neither the official mark nor initials of the Presiding Officer; or
2. bore **the presiding officer's initials below the line which should have separated the names of** the candidates from the remainder of the top portion of the ballot paper;

3 were deliberately cut in an irregular manner whereby the top portion of the ballot containing **the space for the endorsement of the Presiding Officer's initials and the official mark was** severed and absent.

[95] I have already found that subparagraph 3(23) of the petition does not speak to what transpired in respect of polling station CLB. Accordingly, the last sentence in paragraph 21 and the first three sentences in paragraph 22 are therefore inadmissible on that basis.

[96] Sub-paragraph 3(18) of the petition states:

'(18) The Petitioner contends that the 1st Respondent conducted the counts in a partial and improper manner by:

(a) ...;

(b) ...;

(c) allowing mutilated ballots to be included in the counts but rejecting the same type of ballots in other polling divisions.'

[97] It does not appear that this subparagraph restricts its applicability to any specific polling station. To the extent that it charges that mutilated ballots were included in the counts at polling stations without distinguishing which stations, it appears to cover all polling stations in the Central Leeward Constituency. The petitioner's description of mutilated ballots seems to include ballots which did not include **the presiding officer's** initial or stamp. The pleading outlined in subparagraph 3(18) of **the petition covers Mr. Creese's last sentence in paragraph 22 of his witness statement.** It is admissible.

Hollis Fitzroy Priam

[98] The respondents **have objected to portions of Hollis Fitzroy Priam's witness statement.** The Petitioners have not resisted those objections. The relevant paragraphs are:

1. all of paragraphs 3 to 6, 19, 22 and 24; and

2. the third sentence in paragraph 23; and

I find that they are not pleaded. They are therefore inadmissible.

Shanice Francis

[99] Ms. Shannice Francis provided a witness statement on behalf of the petitioner Benjamin Exeter. The respondents object to her statements in paragraphs 15 and 16. They argued that the petitioner has not pleaded in the petition that the Presiding Officer invaded the voter's privacy by examining how the voter voted.

[100] The petitioners countered that they were pleaded in subparagraph 3(26) of the petition. They submitted that the allegation is that when the presiding officer examined the ballot paper to verify the mark and initials, he or she would have unavoidably seen for whom the elector voted, because of the placement of the official mark on 90% of the counted ballots.

[101] The impugned paragraph 15 records as follows:

'15. Ms Jeffers and Mr Ceasar seemed to have a system for dealing with the voters because from voter to voter I saw little to no change in their approach. This is what I saw: the voter enters; is asked for their ID card; the voter presents their ID card; Either Ms Jeffers or Mr Ceasar – **I don't remember which at any given time** – would **announce the voter's name, pause during which the ULP Agent and I would search our respective voter's lists for the name, and then later either Ms Jeffers or Mr Ceasar would announce the voter's number; Ms Jeffers would then write something on the ballot paper and stamp it; she did this always at the upper end of the ballot paper; she would explain to the voter how to vote; I saw her pointing at the ballot paper as she explained; she would ask them to fold the ballot by either showing them how she wished to have it folded or by folding it herself; the ballot was never folded in half, it was folded part way up such that there was a portion of the ballot still exposed; the voter was then asked to vote in the booth and to return to Ms Jeffers with the ballot still folded.'**

[102] She stated at paragraph 16:

'16. When the voter returned with the ballot already folded, Ms Jeffers looking down in the direction of the ballot, lifted the folded portion at its right hand side, pulling back the ballot at the fold. When she lifted it up she appeared to look behind it. I observed that as she held the fold, the left side was not raised as high as the right hand side. The

right hand side was lifted a few inches off the page. I concluded that she was looking **for the voter's mark.'**

- [103] The petitioner has alleged at subparagraph 3(26) of the petition **that the presiding officer's action in** checking the ballot papers could have invaded the secrecy of the vote. **I find that Ms. Francis'** paragraphs 15 and 16 are pleaded.

Shirlan Zita Barnwell

- [104] The respondents objected to the **last sentence in paragraph 8 of Shirlan Zita Barnwell's witness** statement. They contended that it was not pleaded and constitutes objectionable opinion testimony. The petitioners did not deny this. I agree that it is inadmissible on both counts. That sentence must therefore be struck out.

- [105] **Similarly paragraph 10 of Ms. Barnwell's witness statement was objected to by the respondents on** the ground that it was not pleaded. Ms. Barnwell states there:

'10. Throughout the count I observed that each ballot bore at least one crease less than half way up the ballot. The portion of the ballot below the crease did not lie flat. I noticed that when placed flat on the table at which we sat, the portion of the ballot above the crease lay flat while the portion below the crease was slightly elevated. I concluded that the resulting crease was a true reflection of how the ballots were folded during voting. The crease therefore would indicate conclusively whether they were folded in such a way as to obscure the initials and official mark of the presiding officers who handled them. ***Attached is a bundle of said ballots and marked "SZB 1".***'
(bold added)

- [106] The respondents argued that **the apparent purport of this paragraph is the complaint that "The** crease would indicate conclusively whether they were folded in such a way as to obscure the **initials and official mark of the presiding officer who handled them."** They submitted that the petition contains no complaint that the Presiding Officer folded the ballot in such a way as to obscure the initials and official mark. **They argued further that among the bundle which comprises "SZB 1" is a**

photograph of a ballot which contains the voter's number at the top and the way the voter cast his or her vote. They submitted that this is a breach of the secrecy of the ballot and that for this very reason the exhibit ought to be struck out.

[107] The petitioners contended that the impugned paragraph does not allege that the Presiding Officers folded the ballots in such a way that the official mark and initials were obscured, but rather shows a methodology for demonstrating conclusively whether they were so folded. They submitted further that this evidence provides particulars supporting in part the allegations already pleaded in subparagraph 3(26) of the Petition where they alleged that the presiding officer would have unavoidably seen for whom the vote was cast, when she examined the official mark and her signature.

[108] Subparagraph 3(26) has **already been set out above and summarized.** Ms. Barnwell's paragraph 10 sets out her observation that the ballots were invariably folded in such a way which resulted in part of the ballot lying flat when placed on a table while the other part was raised. She indicated that based on this observation, she concluded that the crease reflected how the ballots were folded during voting and this would illustrate conclusively whether they were folded in a manner which **would obscure the presiding officer's initials and official mark.**

[109] **The petitioner did not plead that the presiding officer's initial and mark were concealed when the ballot was folded.** This does not appear in subparagraph 3(26) of the petition or elsewhere. However, it is implied. Ms. Barnwell's assertions at paragraph 10 of her witness statement are therefore admissible, except the second sentence which was not pleaded.

Esla Sam

[110] **Esla Sam sets out in her witness statement that she was Mr. Exeter's agent** at the CLA1 polling station in the Central Leeward Election of December 9th, 2015. The respondents submitted, without opposition from **the petitioners, that the last sentence in paragraph 5 of Ms. Sam's witness statement, all of her paragraph 7 and paragraph 42 were not pleaded.** No corresponding pleading appears in the petition. Those statements are therefore inadmissible.

[111] The respondents also contended that aspects of paragraph 9 of the witness statement were not pleaded. They argued that the 9th, the penultimate and the last sentences were not pleaded. The penultimate sentence is similar to an assertion Ms. Adams made at paragraphs 13 and 14 of the witness statement. Ms. Sam stated there:

‘9. When he returned with his folded ballot, he handed it to the Presiding Officer and she placed it on the table, stamped it and wrote something on it, She dropped the counterfoils to her right behind the ballot box. I could not see what if anything she dropped the counterfoils into.

13. When the voter returned, Ms Jeffers would then stamp the ballot paper and write something on it.

14. I was not sitting close enough to Ms Jeffers to see exactly what she wrote on the ballot paper. I could however see that she was writing on it.’ (bold added)

[112] The petitioner contended that subparagraphs 3(23) and 3(28)(c) of the petition contain pleadings on which those assertions are based. He submitted that they respectively aver that the:

1. presiding officer must put the official mark on the ballot paper; and
2. 2nd Respondent treated separately with the counterfoils and the manner in which this was done.

[113] The petitioner contended also that the respondents, by making the objection, have accepted that subparagraph 3(26) of the petition alleges that when the voter was handed the ballot the presiding officers stamped and marked the ballot papers with the official stamp and their signatures respectively, as the rules require. The respondents have made no such admission. Rather, they contended that the pleadings contain no complaint that the Presiding Officer stamped and initialed the ballot after the voter voted, as opposed to when the voter was handed the ballot, as the rules require.

[114] I understand the respondents to be saying merely that the referenced pleading did not allege that the stamping and initialing of the ballot took place after the voter voted; and not before such voting.

Moreover, subparagraph 3(26) does not allege that the presiding officer stamped and marked the ballot with the official stamp and their signatures when it was handed to the voter.

[115] Subparagraph 3(23) of the petition alleged that the ballot papers did not bear the presiding officer's initial or stamp. Ms. Sam's proposed testimony (as highlighted in bold) states that a stamp and writing was made by the presiding officer. Those allegations do not coincide. There is no pleading from which the impugned assertions can be launched.

[116] Two subparagraphs in the petition were identified as 3(28(c)). For the sake of completeness, I will set them out. They state respectively:

'(28) The 1st Respondent failed to ensure that the election was conducted in accordance with the Elections Rules given the following particulars:

(a) ...

(b) ...

(c) For about two hours immediately before the procedure for the preliminary counting could begin at polling station CLA situated at the Barrouallie Resource Center, downstairs, the 2nd Respondent as Presiding Officer had two transparent plastic containers one on the left and one the right of the table. The one on her left had more counterfoils in it, about three times as many as the one on the right, which also contained counterfoils. The presiding officer would now and then take one from the right and put it in the one on the left. She was saying she may have missed it during the rush. The container on the right appeared to be all blank counterfoils with no ID numbers.

(c) Thereafter the Presiding Officer, in the presence of the Election Clerk of the 1st Respondent purported to count the ballots and engaged in recounting same and returned a preliminary result after 11pm, some six (6) hours after the close of polls at 5 pm, of 186 votes for the Petitioner and 173 for the 3rd Respondent.' (bold added)

- [117] Both subparagraphs address happenings which allegedly took place at polling station CLA, and not CLA1. Ms. Sam was posted allegedly at the former. Her averments in the impugned statements cannot be based on those subparagraphs in the petition. There are no other such allegations elsewhere in respect of polling station CLA1. The impugned statements are therefore inadmissible.
- [118] At paragraph 10 of her witness statement, Ms. Sam purported to describe her experience when she went to vote. She said:
- ‘10. ... I observed the Presiding Officer -- upon my returning my marked and folded ballot to her – lift the fold of the ballot at the right hand side and stamp it and sign it. I do not recall whether she signed and stamped on the counterfoil or on the ballot. ... She pulled the flap up at least an inch high toward herself. It appeared to be opened wide enough that she could see for whom I had voted. I told myself that seeing that as I was an agent of the NDP she ought to have known how I would have voted and as such her action was strange.’ (bold added)
- [119] The respondents objected to the foregoing assertions on the basis that they were not pleaded. In relation to the statements in bold, the respondents submitted that there is no complaint in the pleading that the Presiding Officer stamped and initialed the ballot after the voter voted, as opposed to when the voter was handed the ballot and as require by the rules. The petitioner rejoined that this evidence supports the allegations outlined in subparagraph 3(26) of the petition where, among other things, the procedure under Rule 31(2) is pleaded, including how the official **mark and the Presiding Officer’s signature should be ascertained** after the elector had voted.
- [120] The impugned assertions allege that the presiding officer lifted the flap on the ballot and initialed and stamped it when Ms. Adams delivered it to her after voting. Such allegations were not made in subparagraph 3(26) or elsewhere in the petition. They are therefore inadmissible.
- [121] As to the last three of the impugned statements, the respondents argued that the petition contained no complaint that the Presiding Officer deliberately checked to see how the voters voted. The petitioner submitted that **Ms. Sam’s reference to the ‘strangeness’** of the 2nd Respondent opening her ballot, is a dismissal of speculation that the 2nd Respondent “**deliberately**”

checked to see how the witness actually voted, since it was possible to discern this by other means.

[122] The petitioner reasoned that the words **“She pulled the flap” cannot be construed as indicating that ‘the PO’s act was deliberate’**. He submitted that the impugned statements are part of the evidence which supports that specific allegation under paragraph 3(26) of the Petition - where it is pleaded that the Presiding officer would have unavoidably seen for whom the vote was cast when she examined the official mark and her signature.

[123] Subparagraph 3(26) of the petition outlined the manner in which a voter is required by law to fold the ballot paper after casting his vote and before delivering the ballot to the presiding officer. The relevant legislative provision as referenced there, also stipulates how the presiding officer is to examine the ballot to ensure that it is the same ballot he earlier delivered to the voter, and before depositing it in the box.

[124] The subparagraph also alleged that the secrecy of the ballot could have been invaded if it was folded in an incorrect manner, which would subsequently result in an invasion of the secrecy of the ballot, when it was being examined by the presiding officer. **Ms. Adam’s observation that the presiding officer lifted her flap on the ballot wide enough so that she could probably see for whom she voted is not supported by the petition at subparagraph 3(26) or otherwise. It is therefore inadmissible.**

[125] Ms. Sam made a similar assertion in paragraph 11 of her witness statement where she alleged:

‘11. I reflected that I had seen her lift the flap in this way several times prior to my voting that afternoon. It was not something I had checked for. It being a fairly busy day I had **focused mostly upon the voters’ list and had not been keen to check how the Presiding Officer treated with each ballot after it was returned to her by the voter.**’

[126] The respondents took exception to it on the ground that it was not pleaded. They argued to similar effect as with the previous assertions, namely that the Presiding Officer deliberately invaded the privacy of the ballot. The petitioner countered as before that subparagraph 3(26) contains pleadings which support those assertions. For the reasons given in respect of the earlier objection,

I find that the pleadings contain no foundation to which **Ms. Adams' allegations** at paragraph 11 are properly anchored.

[127] Ms. Sam noted in her witness statement:

'15. I judge that I sat about fourteen (14) feet away from Ms Jeffers.'

The Respondents argued that there is no complaint about how far away from the Presiding Officer the election agent was put to sit. This is not a sustainable objection because a party may omit from its pleadings, matters or descriptions as to distances and other circumstantial factual indices, unless they are critical to enable the other party to appreciate the case being made against them. This is not one such index. The impugned assertion is admissible.

[128] The respondents contended that paragraphs 18 to 39 **of Esla Sam's witness statement** detail the procedure followed by the Presiding Officer prior to the commencement of the count. They submitted that none of this is pleaded, and further that all that is pleaded is that the count took long.

[129] The Petitioner responded that those paragraphs do not impugn or complain about the distance between the witness and the 2nd Respondent. This submission appears to relate to matters not captured in paragraph 18 through 39. It appears not relevant to those matters and is therefore ignored.

[130] **The petitioner submitted further that those sections of Ms. Sam's proposed testimony** comprise particulars in support of allegations already pleaded in:

1. paragraphs 3(28)(a) of the Petition that the 2nd Respondent committed a breach of Rule 39, by not commencing the preliminary count after the close of the polls. The petitioner stated that the related **evidence is outlined in paragraphs 18 and 19 of Ms. Sam's witness statement**;
2. paragraphs 3(28)(b) that the 2nd Respondent had two sets of counterfoils; proceeded to **go through the list and marked counterfoils with the voter's number; and of the more than 2 hour duration of the exercise.** (in relation to paragraphs 20-25 and 27-29 of Ms. **Sam's witness statement**);
- 3.

3. paragraphs 3(28)(c) (the first sub-paragraph labeled “c”) that the 2nd Respondent adopted a particular procedure for dealing with the counterfoils, and that some of the counterfoils appeared to be blank. (As regards paragraph 27 of Ms. Sam’s witness statement); and
4. paragraphs 3(28)(c) (the second sub-paragraph labeled “c”) that the 2nd Respondent purported to count the ballots. (In relation to paragraphs 32-37 of Esla Sam’s witness statement).

[131] Paragraphs 18 to 19 of Ms. Sam’s witness statement state:

‘18. By about 4:45 p.m., we had seen the last of the voters at that station. At 5:00 p.m., Ms Jeffers closed the door to the station. Shortly after, she announced that she was going to go over the counterfoils. I asked her why and she said that because of the rush it would be better for all of us if she went over the counterfoils first.

19. I asked her why not count the ballots first. She answered that the counterfoils are as important as the ballots.’

[132] Paragraphs 18 and 19 allege that the presiding officer commenced the counting of ballots shortly after 5.00 p.m. and not after the close of the polls. This corresponds with the assertion in subparagraph 3(28)(a) of the petition, which alleged:

‘(28) The 1st Respondent failed to ensure that the election was conducted in accordance with the Elections Rules given the following particulars:

(a) The Presiding Officer for Polling Station CLA1 the 2nd Respondent herein did not commence the Preliminary Count of the votes after the close of polls in breach of Rule 39.’

It follows that paragraphs 18 and 19 are pleaded and admissible.

[133] Ms. Sam stated at paragraphs 20 – 25 of her witness statement:

‘20. I was joined by Mr Ethron Creese who is better known to me as Charmer, a former presiding officer and retired teacher. I remember that when he entered the polling station, he walked slowly across the room, approached Ms Jeffers at her table, said something to her and then walked toward my table, where he sat in an empty chair. I told him that the ballot box had not yet been opened.

21. By the time Mr Creese arrived, Ms Jeffers had not too long begun to go over the counterfoils.
22. In going over the counterfoils, mostly Ms Jeffers and sometimes Mr Ceasar would call **out a voter's name and a number. They each had sheets of white paper from which they** read. He appeared to be reading the information in the order in which the names and numbers were listed on his papers. It coincided with the order in which the names were **listed on my copy of the voters' list. I concluded that he was reading from a copy of the voters' list, albeit on white paper, unlike the blue and white copy I had.**
23. When a name and number were announced, the ULP agent, Ms Homer, the ULP relief agent Mr Javey Hillocks, and I, would each search our copy of the voters' list to confirm whether the particular voter's name had been marked as having voted. We would reply "yes" or "no". I responded according to the indication I had made in my copy of the voters' list.
24. I noticed that most of the time when the agents and I would confirm that someone had voted, the Presiding Officer would produce a counterfoil, then write something on it.
25. When Mr Caesar called the name of a voter who had not voted, the ULP agents and I would state that the person had not voted.'

[134] Subparagraph 3(28)(b) and (c) of the petition reads:

'(28) The 1st Respondent failed to ensure that the election was conducted in accordance with the Elections Rules given the following particulars:

(a) ...

(b) After the close of polls, the Presiding Officer had two sets of counterfoils, and **she proceeded to go through the list and marked counterfoils with the voter's** registration numbers. This exercise took in excess of two (2) hours.'

[135] At paragraphs 27-29 of Ms. Sam's witness statement, she said:

'27. As she wrote on and stamped each counterfoil, Ms Jeffers placed the counterfoil on the right of the pile of counterfoils. At the end of the exercise, there were some counterfoils left in the first pile, which had not been written upon.

28. The process seemed to take forever – more than three (3) hours – mostly because Ms Jeffers took a while in writing on and moving the counterfoils.
29. When the Poll Clerk had called most of the names on the list – he did not call the last page of names – they finished going over the counterfoils.’

[136] Subparagraph 3(28)(b) of the petition accuses the 2nd respondent Ms. Jeffers of having two sets of counterfoils. Paragraphs 20 to 25 and 27 to 29 of the witness statement describe the **circumstances which allegedly surround the witness's recollection and observations** on this matter. Both accounts are consistent on the central issue. The other surrounding assertions add contextual details. They are therefore admissible.

[137] The petitioners offered no defence to the objection that paragraphs 26 and 30 to 31 of the witness statement were not pleaded. The Petition contains no allegations on which those statements can be anchored. They are therefore inadmissible.

[138] Ms. Sam averred at paragraphs 32 to 37 of the witness statement:

- ‘32. After the counterfoils, Ms Jeffers approached a table further away from me (hereinafter **“the counting table”**) than the table where she and Mr Caesar had worked all day (hereinafter **“the working table”**). She unfolded an off-white tablecloth and spread it on the counting table; she explained that this was where the ballots would be counted.
33. Then Ms Jeffers returned to her seat at the working table. She sat for about a minute and then got up. As she rose she said aloud that she was going to deal with the ballots now. I assumed she was returning to the working table to get the ballot box. The lid of the ballot box was still fastened to the ballot box at that point by the same three blue plastic zip ties as were on it when we began voting.
34. Ms Jeffers rose from her seat and walked around the working table to the side closest me and Mr Caesar got up and joined her there. For about the next three (3) minutes, Ms Jeffers and Mr Caesar spoke to each other outside of my hearing, with their backs turned to me. They stood side by side right in front of the working table on which the ballot box

was placed. I could not see the ballot box because Ms Jeffers and Mr Ceasar were blocking me.

35. This lasted some three (3) minutes before I got up and proceeded to the working table to get a view. As I approached I noticed that the ballot box no longer was fastened to its lid by plastic zip ties and that in fact the lid had been removed.

36. Ms Jeffers, lifted the ballot box, and brought it to the counting table when I arrived there.

37. I conclude that they were removed when Ms Jeffers and Mr Ceasar were standing in front of the ballot box with their backs turned to me.'

[139] Paragraphs 38 and 39 state:

'38. Ms Jeffers then lifted the lid off and emptied all ballots inside it, on the counting table.

39. I recall that Ms Homer was at the counting table with us. So were two police officers who I believe worked outside the polling station since the afternoon.'

[140] Mr. Exeter pleaded at the second subparagraph 3(28)(c) of the petition:

'(28) The 1st Respondent failed to ensure that the election was conducted in accordance with the Elections Rules given the following particulars: ...

(c) Thereafter the Presiding Officer, in the presence of the Election Clerk of the 1st Respondent purported to count the ballots and engaged in recounting same and returned a preliminary result after 11pm, some six (6) hours after the close of polls at 5 pm, of 186 votes for the Petitioner and 173 for the 3rd Respondent.'

[141] **He relies on Ms. Sam's proposed testimony at her paragraphs 32 to 37 to describe how the presiding officer purported to count the ballots. That account purportedly describes the circumstances attendant on such counting and can be viewed as adding context. To such extent, it is captured by the pleading under the said subparagraph 3(28)(c). Those paragraphs are therefore admissible. For the same reason paragraphs 38 and 39 are also admissible.**

[142] Ms. Sam recounted in paragraph 40 of her witness statement:

'40. I do not recall whether there was a stamp or initial of the Presiding Officer on any of the ballots we counted.'

The respondents submitted that this was not pleaded, there being no complaint in the Petition that the Ballot Papers in CLA1 did not have the official stamp or initial on them. They contended that such a complaint is made only in relation to CLF and CLF1.

[143] The petitioners rejoined that the impugned assertions are advanced in support of the pleading that the 2nd respondent purportedly conducted the preliminary count. They argued that the witness does not allege that the ballot papers in the CLA1 polling station lacked the official stamp or initial of the Presiding Officer.

[144] The witness clearly averred in this paragraph she has no recollection as to whether the ballots counted contained the presiding officer's official stamp or initial. This is not pleaded and is therefore objectionable on that basis.

Maia Eustace

[145] Ms. Maia Eustace also provided a witness statement. In it, she asserted that she served as an agent/representative on Mr. Exeter's behalf at Layou during the final count of ballots, in the Central Leeward poll on 10th December 2015. At paragraphs 16 and 17 of her witness statement, she described what she allegedly observed when the returning officer removed the seal from the ballot boxes. She averred:

'16. ... I observed that every time he removed the Presiding Officer's purported seal, it left absolutely no adhesive or paper residue; it never once tore. It could be reapplied.

17. I observed and concluded therefore that the purported seals were tear-resistant, unbreakable, and therefore were not seals at all because they could not evidence a violation of the security of the ballot box.'

[146] The respondents submitted that this was not pleaded as there is no 'complaint about the ability 'to remove and reapply the "seal". The petitioner countered that the substance was pleaded in subparagraph 3(21) of the petition where it is alleged that the application of a plastic as opposed to customary paper white seal rendered the ballot boxes susceptible to intrusion, without such intrusion being apparent, in light of the use of a plastic adhesive type seal.

[147] Subparagraph 3(21) of the Petition states:

‘(21) The Petitioner will contend that the 4th Respondent was duty bound to ensure that there were in place such arrangements and or mechanisms to ensure a reasonably **secure ballot box and that without prejudice to the Petitioner’s contention that the** ballot boxes must be of such a configuration so as to facilitate compliance by the Presiding Officer with rule 41(10), the Petitioner will also contend that the failure to record the serial numbers of the zip ties provided to the Presiding Officers together with the application of a plastic, as opposed to customary paper white seal rendered the ballot boxes susceptible to intrusion without such intrusion being apparent given the design of the ballot boxes, the non recording of the serial numbers of the seals and the use of a plastic adhesive type seal.’ (bold added)

[148] Ms. Eustace outlined in her witness statement that:

‘16. I note at this juncture that during the final count when the Returning Officer Mr Winston Gaymes, having recounted the ballots in a ballot box, placed a purported seal on the said ballot box, he would first remove the paper seal ostensibly placed there by the Presiding Officer at the conclusion of the Preliminary Count. ...’

[149] **Taken in context, Ms. Eustace’s impugned statement provides** evidence which could be referable to subparagraph 3(21) of the petition. I find that paragraphs 16 and 17 are pleaded and are admissible.

[150] The respondents took objection to paragraphs 30, 37 and 38, the first sentence in paragraph 39 and paragraph **58 of Ms. Eustace’s** witness statement on the same ground - that the contents were not pleaded. This was not contradicted by the petitioner. I have identified no pleading from which those impugned assertions flow. They are therefore objectionable and ruled inadmissible.

[151] The respondents argued that the second sentence and the rest of paragraph 39 of that witness statement were not pleaded. They are:

‘39. ... We were not permitted to count them because by that time, Sir Louis Straker was represented by two (2) men who were never identified to us even after we asked Mr Gaymes. We pointed out that he had questioned us as to our identity but had not done so in relation to the men. The men instructed Mr Gaymes that we were not to

see the counterfoils, and Mr Gaymes removed the envelope from us. Mr Gaymes had also begun to complain that we were taking too long and that he had to meet with the Supervisor of Elections by 2:00 p.m.’

[152] The petitioner argued that they were. He contended that subparagraphs 3(18)(a)(f) and (h), and (33) and (34) supply the pleadings from which such evidence flows. In this regard, he submitted that those pleadings charge that:

1. The 1st respondent – the returning officer, Mr. Gaymes conducted the Final Count in an impartial or improper manner by:
 - (a) repeating the objections of the 3rd **Respondent’s agents and adopting those objections** as his own; (subparagraph 3(18)(a))
 - (b) failing to afford the Petitioner the opportunity to scrutinize the counterfoils generally; (subparagraph 3(18)(f))
 - (c) repeatedly indicating that he was under pressure from the 4th Respondent – the supervisor of elections; (subparagraph 3(18)(h))
2. Save for being shown the counterfoils at CLA, the Petitioners were denied the opportunity to inspect the counterfoils for the polling stations after the 3rd **Respondent’s** agents/representatives questioned the 1st **Respondent’s production of CLA counterfoils to the Petitioner’s agents/representatives**; (subparagraph 3(33)) and
3. repeated requests by and on behalf of the Petitioner to examine *inter alia* the counterfoils in all 15 polling stations, were denied by the 1st Respondent. (subparagraph 3(34))

[153] The impugned statement provides testimony which runs parallel to the assertions in subparagraphs 3(18)(f) & (h) of the petition. It is therefore admissible.

[154] Ms. Eustace averred at paragraphs 50, 51 and 52 of her witness statement:

‘50. Mr Gaymes in that instance however upheld our objections to the ballot being rejected.

The voter’s intention was clear and therefore it out to be counted for the ULP candidate, we argued. In Mr Nash’s silence, Mr Gaymes agreed.

51. That decision by Mr Gaymes was at diametrical odds with his earlier declaration that all **ballots not marked with an “x” were to be rejected. In that instance, Ms Morris Cummings and I objected, citing RPA Rule 40, whereupon Mr Gaymes read from**

what appeared to be the Handbook for Election Workers, stating: “The Presiding Officer may reject a ballot if...it is marked with any symbol other than what appears to be “x”.”

52. When it was pointed out that the RPA supersedes his handbook, Mr Gaymes was defiant and held to his misreading of what is also a misreading of the RPA.’

[155] The respondents submitted that the matters stated in paragraphs 51 and 52 were not pleaded. The argued that there is no complaint in **the pleadings that ballots not marked with an ‘x’ were rejected.** The petitioner contended that this evidence is being adduced as a complaint about the 1st Respondent’s bias and partiality, and not as a complaint about rejected ballots. They submitted that subparagraph 3(18)(a) of the petition contains the related pleadings.

[156] Paragraphs 51 and 52 highlights the 1st **respondent’s alleged difference in treatment** of objections lodged by representatives of the NDP and ULP candidates, during the count. It also cites as an **example the different treatment in respect of ballots marked with an ‘x’.** While the pleadings contain no averment of such ballots being rejected, the proposed evidence is admissible in relation to the complaint of bias, which is pleaded at subparagraph 3 (18)(a) of the petition.

[157] Ms. Eustace stated in paragraphs 56 and 57 of her witness statement:

‘56. In the course of touching and counting the ballots cast in the Central Leeward election at the Final Count I observed the following:

- 1.1. The ballots are constructed of thick paper comparable with card stock
- 1.2. The ballots all bore creases in the lower half of the ballots
- 1.3. When the ballots were placed flat on the table the portion below the crease projected off the table at an angle. A photograph of two ballots, one of which lies flat on the table at the Final Count to the left in the background of the photograph **is attached herewith marked “MEE 3”.** I requested the Petitioner to photograph same with his smart phone.

57. I concluded that these creases were made when the ballots were folded during the voting process the previous day and that:

- a. The papers being thick, the creases are likely to endure

- b. The creases are a true reflection of the manner and extent to which each ballot was folded
- c. The creases are a true reflection of whether the ballots were folded in such a way as to obscure the initials and official mark of the respective presiding officer.

A bundle of photographs of several of the ballots at the final count, all of which I observed the petitioner photograph with his smart phone, is attached herewith **marked “MEE 4”.**

- [158] The respondents submitted that those matters were not pleaded. They argued that there is no pleaded complaint about the material out of which the ballot papers were made or of the fact that they projected off the table when they lay flat. The petitioners rejoined that this proposed evidence is being advanced in support of the allegation at subparagraph 3(26(b) and (c) of the petition.
- [159] They submitted that the relevant pleading alleged that, if the Presiding Officer folded the ballot to **the line marked “do not fold beyond this line”**, he could have only verified the ballot by examining his initial and official mark by invading the secrecy of the poll, and that this offends a core constitutional principle governing the conduct of elections. They contended that in such **case, the presiding officer’s alleged conduct** would represent a substantive departure from the law, (i.e. section 54(3) and Rule 31(2) of the RPA).
- [160] Subparagraph 3(26)(b) and (c) of the petition complain that the ballots bore the official **mark and the presiding officer’s initials in a** way which would have required an invasion of the secrecy of the vote, by the presiding officer in order to verify whether it was the same ballot handed to the voter. They do not address the material from which the ballots were made or how they looked when laid on the table.
- [161] They do not speak expressly to the creases or marks which might have been left on them by being folded, however the reference to invasion of privacy and folding in subparagraphs **(a) and (b) of paragraph 3 are broad enough to accommodate Ms. Eustace’s description of** those folds in her paragraph 57 (c). For that reason, her paragraph 56 excluding the final two sentences in subparagraph 1.3; paragraph 57 excluding subparagraph (c) are

admissible. The other impugned assertions by Ms. Eustace are inadmissible as they were not pleaded.

[162] The Respondents submitted that **Ms. Eustace's exhibits contain a ballot #1437. They** object to it being admitted. They argued that it violates the secrecy of the ballot and ought to be struck out because it records the vote of a voter whose voter number is also identified. The petitioner submitted that the referenced photograph shows a spoilt ballot, as opposed to a cast ballot. He contended that it therefore does not violate the secrecy of the poll.

[163] The witness statement did not indicate whether the ballot was cast or spoilt. In the absence of such details, a determination of whether it is admissible is deferred pending receipt of testimony at trial.

Benjamin Exeter

[164] Mr. Benjamin Exeter filed a witness statement. At paragraph 10 he averred:

‘10. Before the final count began, I noticed on several of the ballot boxes what appeared to be a white seal was not placed over the cover of the ballot box flap and we showed this to the First Respondent Mr Gaymes. The box could have been opened without breaking the white seal. I also noticed that the white seal was not made of paper but what appeared to be an adhesive plastic composite material that the First Respondent Mr Gaymes easily peeled off from the plastic ballot boxes. I saw him do this several times. ...’

[165] The respondents submitted that the pleadings contain no complaint about the composition of the ‘white seal’ or of the ease with which it could be removed. They object to this being admitted into evidence. The petitioner argued that the relevant pleadings are outlined at subparagraph 3(21) of the petition where he alleged that the use of plastic seal rendered the ballot boxes susceptible to intrusion without such intrusion being apparent.

[166] **Mr. Exeter's** observations in the impugned statement are capable of having an evidentiary connection or relation to the referenced subparagraph in the petition. It is therefore admissible.

[167] Mr. Exeter said at paragraph 51 of his witness statement:

'51. It is my view and that of my legal representatives the omission by Presiding Officers to affix the official stamp on the ballots cast and the Presiding **Officer's willful cutting of same below or through the official mark rendered** them invalid thereby affecting the outcome of the election in that in excess of three hundred and twenty-six (326) electors who were entitled to vote in the election and did vote were disenfranchised. This included all of those Electors who voted at Polling Stations CLB and CB 1, ..." (bold added)

[168] The respondents objected to the statement in bold. They contended that there is no pleaded complaint:

1. that the presiding officer omitted to affix the official stamp on the ballots cast, in relation to Polling Station CLB and CLB 1; or
2. of the willful cutting of ballots below or through the official mark.

[169] They submitted that all that is pleaded in relation to CLB and CLB 1 is at paragraph 27(a) of the Petition, where it is alleged that "although the Presiding Officers complied with the requirements of Rule 31, the ballots seen at the final count differed in material respects from the ballots seen at the preliminary count." The respondents argued that Rule 31(1)(a) requires the ballots to be marked with the official mark and initialed by the Presiding officer. They noted that paragraph 27(a) pleaded that the Presiding Officer complied with this requirement. They contended that paragraph 51 of the witness statement contradicts this pleading.

[170] The petitioner submitted that subparagraphs 3(23), (26) and 27(a) supply the material pleadings. They argued that those pleadings allege respectively that:

1. the said ballots appeared to have been willfully mutilated in such a manner that IS contrary to Rule 15(2), Rule 16, Rule 31(1) and 40(1)(a); [at subparagraphs 3(23)]
2. over ninety percent of ballots counted at the purported final count by the 1st Respondent bore the official mark and the Presiding Officers initials in a manner which was contrary to Rule 31(2) as a result of which the Petitioner and his representatives objected persistently to their inclusion in the count; [subparagraph 3(26)]; and

3. "although the Presiding Officers complied with the requirements of Rule 31 the ballots seen at the final count at CLB and CLB 1 differed in material respects from the ballots seen at the preliminary count." [subparagraph 27(a)]

[171] A similar objection was made and upheld in respect of almost identical proposed testimony from Mrs. Creese. For the same reasons, the clause **'This included all of those Electors who voted at Polling Stations CLB and CB 1' is inadmissible.**

[172] The respondents also submitted that the petitioner did not plead any allegations which support Mr. **Exeter's statements in paragraphs 52, 66 and 67 of his witness statement. The petitioner did not** deny this contention and implicitly conceded on this point. The petition contains no such pleading. Accordingly, paragraphs 53, 66 and 67 of **Mr. Exeter's** witness statement are inadmissible.

Hearsay

[173] The respondents objected to several parts of the witness statements on the ground that those portions contain inadmissible hearsay. They submitted that hearsay evidence is inadmissible at common law due to its inherent unreliability. They argued that the evidence of the person whose words are being reported is not under oath and not subject to the glaring light of probing cross-examination. They contended that moreover, the hearsay evidence which is sought to be adduced is not actually the words of the person who uttered them, but the recollection of those words by the person seeking to put them into evidence. The respondents submitted that hearsay evidence is therefore uniquely susceptible to inaccurate reproduction brought about by the inevitable failing memory of the person adducing it.

[174] They cited the Indian case of Kalyan Kumar Gogoi v. Ashutosh Agnihotri & anr.¹⁹, in which Panchal J explained why hearsay evidence is treated as inadmissible. He said:

'Hearsay evidence is excluded on the ground that it is always desirable, in the interest of justice, to get the person, whose statement is relied upon, into court for his examination in

¹⁹ [2011] INSC 60 (18 January 2011) A.M..

the regular way, in order that many possible sources of inaccuracy and untrustworthiness can be brought to light and exposed, if they exist, by the test of cross-examination. ...

... The reasons why hearsay evidence is not received as relevant evidence are: (a) the person giving such evidence does not feel any responsibility. ... (b) truth is diluted and diminished with each repetition and (c) if permitted, gives ample scope for playing fraud by saying "someone told me that.....". It would be attaching importance to false rumour flying from one foul lip to another. Thus statement of witnesses based on information received from others is inadmissible.²⁰

[175] The respondents submitted further that there is no cogent reason justifying the abandonment of the hearsay rule in election petitions. They argued that truth is of no less importance in a case seeking to upset the otherwise valid election of a candidate than it is in any other case concerning the rights of the parties thereto. They submitted further that for these reasons, and others, it was held by the Supreme Court of India in *Kaylan Kumar Gogoi*, by the Sri Lankan Court of Appeal in *Gunasingh Banda v Navinna*²¹, and by the National Court of Justice of Papua New Guinea in *Hoap v Iurei*²² that hearsay evidence is not admissible in election proceedings.

[176] The petitioners argued that although hearsay evidence is generally inadmissible at a trial, it may be admitted in certain cases, subject to considerations of what weight the court will place on it. They adopted this posture from the utterances of Boodoosingh, J. in the Trinidad and Tobago case of *Kelsick v Kuruvilla*, North West Regional Health Authority & AG of Trinidad & Tobago.

[177] They quoted further from that judgment and submitted that this court should apply the following statement of law:

²⁰ At paras 21-22 of the *Kelsick v Kuruvilla* case.

²¹ (2000) 3 Sri L.R. 207.

²² [2008] PGNC 118.

‘Further, where matters of clear hearsay are being relied on to prove facts which are directly relevant to the central issues in the case, a party would be hard-pressed to convince the court to admit such evidence when the parties have not agreed to admit the evidence. In this case, ... This is ultimately a rule of fairness since a party is entitled to test a witness in cross-examination to assist the court to decide what significance to place on the evidence. Cross- examination may undermine the evidence or reduce its impact. Absence of the witness prejudices the party against whom the evidence impacts. These are rules central to the fair determination of a case.’²³

[178] He added:

‘Ultimately, any hearsay evidence which is admitted must be evaluated for the weight to be attached to it. If the judge apportions too much weight to the hearsay evidence, this may later be a basis to challenge the decision depending on the importance of it to the decision made.’

[179] The Petitioners submitted further that the Evidence Act²⁴ provides for the admission of hearsay evidence, whether made orally or in a document:-

- (1) ‘In any civil proceedings a statement made, whether orally or in a document or otherwise, by any person whether called as a witness in those proceedings or not, shall subject to this section and to the rules of Court, be admissible as evidence of any fact stated therein of which direct oral evidence by him would be admissible.
- (4) Where in any civil proceedings a statement which was made otherwise than in a document is admissible by virtue of this section; no evidence other than direct oral evidence by the person who made the statement or any person who heard or otherwise perceived it being made shall be admissible for the purpose of proving it ... ’

[180] They argued that the Court may confirm the admissibility or otherwise of the impugned statements by comparing them with the contents of the Petition. Those submissions summarize portions of the applicable law. The evidentiary law in Saint Vincent and the Grenadines is founded on the common

²³ At para. 15 of the of the Kelsick v Kuruvilla case.

²⁴ Cap. 220 of the Laws of Saint Vincent and the Grenadines, 2009 Revised Edition, at section 47 (1) & (4)

law. Many aspects have been codified in the Evidence Act and rules of court. The Evidence Act also contains provisions governing the treatment of hearsay.

[181] The leading authority on what constitutes hearsay at common law is Subramanian²⁵. That case makes a distinction between hearsay which a party seeks to adduce to prove its truthfulness, and hearsay which is being repeatedly merely to establish that such statement was made. In this jurisdiction, the law on hearsay has essentially been codified by the Evidence Act and rules of court. Hearsay is admissible into evidence in certain circumstances as outline din those legislative provisions.

[182] Section 47 (1) reads:

'In any civil proceedings a statement made, whether orally or in a document or otherwise, by any person whether called as witness in those proceedings or not, shall, subject to this section and to rules court, be admissible as evidence of any fact stated therein of which direct oral evidence by him would be admissible.'

It is expressed to be subject to rules of court. I shall address those matters below.

[183] **'Civil proceedings** is described in section 2 as follows:

'(1) "civil proceedings" includes, in addition to civil proceedings in any of the ordinary courts of law-

(a) civil proceedings before any tribunal being proceedings to which the strict rules of evidence apply;'

[184] Although strictly speaking election court proceedings are not civil proceedings governed by the **Civil Procedure rules 2000, ('CPR')** they appear to be captured under the Evidence Act as such. No rules have been made under the Saint Vincent and the Grenadines Act under section 55. So, the jurisdiction of Saint Vincent and the Grenadines must apply those rules which are made under the UK Civil Evidence Act 1968. The applicable Rules of Court²⁶

²⁵ [1956] 1W.L.R. 956

²⁶ Which are deemed to have been made pursuant to section 55 of the Evidence Act, in accordance with subsection (12).

- [185] Rules of the Supreme Court Order 38 Rules 20 to 32 made under the UK Civil Evidence of 1968 provide that if a person wishes to adduce hearsay statements he must serve notice on all other parties of his desire to do so, within twenty-one (21) days after the date that the matter is set down for trial. If it is not documentary hearsay, the adducer must give particulars of the maker of the statement and the substance of the statement or words used and the time when it was made.
- [186] Where the adducer claims that the maker cannot or should not because of his unavailability be called, he must give reasons. The petitioners have not supplied such notice or any such reason in respect of the statements which are objected to on the grounds that they are inadmissible hearsay.
- [187] These include that the person is question:
1. is dead;
 2. beyond the seas;
 3. physically or mentally unfit to attend as a witness;
 4. cannot with reasonable diligence be identified or found; or
 5. cannot reasonably be expected to have any recollection of matters relevant to the accuracy of the statement.
- [188] Where a notice is served and the opposing party requires the maker of the hearsay statement to be called, he must serve a counter-notice within seven (7) days after receipt of the notice that the adducer proposes to adduce hearsay evidence.
- [189] The rules give the court a residual discretion to allow a hearsay statement which is admissible under the 1968 Act, to be given in evidence despite non-compliance with the rules or where refusal might otherwise compel one side to call an opposing party²⁷.
- [190] Section 3 of the Evidence Act is also relevant and is self-explanatory. It provides:

'Whenever any question shall arise in any ... civil proceedings whatsoever in or before any court ..., touching the admissibility or sufficiency of any evidence ..., the admissibility or sufficiency of any document, writing, matter or thing tendered in evidence, such question

²⁷ Please see the UK Law Commission Consultation Paper No.117

shall, except as provided for in this Act, be decided according to the law and practice administered for the time being in England with such modifications as may be applicable **and necessary in Saint Vincent and the Grenadines.**'

[191] I now proceed to evaluate whether the impugned witness statements are admissible. I will apply the foregoing legal provisions, including the rules and the referenced principles. The respondents argued that the first and third sentences of paragraph 23 of **Neleon Adams'** witness statement constitute hearsay and are therefore inadmissible. That paragraph reads:

'23. After I went outside various person complained to me that the presiding officer opened their ballots. I can recall Elford Burke did as well as those mentioned above which I witnessed myself. There were other such complaints by persons whose names I cannot recall.' (bold added)

[192] The petitioners argued that the foregoing statement is admissible under section 47 of the Evidence Act. They submitted that they are to be adduced for the fact that the statements were made not for the truth of the statements.

[193] The prejudicial value of this proposed testimony is significant. In the absence of names and other identifying information about the persons who alleged made the reported statements the respondents would be unable to investigate and respond to such matters. No reason has been provided why they are not themselves witnesses. The respondents in those circumstances would have no way of challenging them or mounting an effective counter. Its probative value is limited. In the circumstances, I find that this is inadmissible hearsay.

Should the respondents be allowed to provide rebuttal evidence?

[194] The **respondents' prayer that they be granted** leave to file rebuttal evidence arises for consideration. The justice of the case demands that each party be given an opportunity to lead evidence in support of their respective cases. Within the context of a matter which has been protracted over a period of three years, it is desirable that steps be taken to expedite continuation of the trial in line with the previously agreed timetable and in keeping with conventions on the time-honoured desirability of concluding elections petitions matters as soon as possible.

[195] Approximately four months have elapsed since the objections were filed. Relatively few have been overruled. Conceivably, the respondents would have made inquiries during that time and should be in a position to submit any rebuttal evidence within a short period. It is contemplated that the December 3rd 2018 timeline for resumption of the trial can be achieved. The Court will entertain submissions from the parties regarding the timeline for filing and service of rebuttal testimony on those points.

COSTS

[196] **The parties'** respective successes were almost evenly matched. I therefore make no order as to costs.

ORDER

[197] It is accordingly ordered and declared:

1. **Deryck Smart's** witness statement is amended by excising paragraphs 7 and 8;
2. **Kendall Sandy's** witness statement is amended by excising paragraph 5.
3. **Neleon Adams'** witness statement is amended by excising:
 - (a) the second sentence in paragraph 12;
 - (b) the last sentence in paragraph 17;
 - (c) the penultimate sentence in paragraph 19; and
 - (d) the first and third sentences in paragraph 23.
4. **Cheryl Sutherland's** witness statement is amended by excising:
 - (a) the fifth through eighth sentences in paragraph 4;
 - (b) the last sentence in paragraph 8;
 - (c) paragraph 10; and
 - (d) the last sentence in paragraph 11.
5. **Barbara Creese's** witness statement is amended by excising paragraphs 12 through 18.
6. Paul **Creese's** witness statement is amended by excising:-

- (a) paragraphs 15 through 17;
 - (b) the last sentence in paragraph 21; and
 - (c) the first three sentences in paragraph 22.
7. **Hollis Fitzroy Priam's** witness statement is amended by excising:-
- (a) paragraphs 3 through 6;
 - (b) paragraphs 19, 22 and 24; and
 - (c) the third sentence in paragraph 23.
8. **Shirlan Zita Barnwell's** witness statement is amended by excising:-
- (a) the last sentence in paragraph 8; and
 - (b) the second sentence in paragraph 10.
9. **Esla Sam's** witness statement is amended by excising:-
- (a) the last sentence in paragraph 5;
 - (b) paragraphs 7 and 42;
 - (c) 9th, penultimate and last sentences in paragraph 9;
 - (d) the second and third sentences in paragraph 10;
 - (e) paragraph 11;
 - (f) paragraphs 26, 30 and 31; and
 - (g) second sentence of paragraph 40.
10. Maia Eustace's witness statement is amended by excising:-
- (a) paragraphs 30, 37 and 38;
 - (b) paragraph 56 excluding the final two sentences in subparagraph 1.3;
 - (c) paragraph 57 excluding subparagraph (c); and
 - (d) paragraph 58.
11. Benjamin Exeter's witness statement is amended by excising:-
- (a) in paragraph 51 the following clause - '**This included all of those Electors who voted at Polling Stations CLB and CB 1**' ; and
 - (b) paragraphs 53, 66 and 67.

12. The 1st, 2nd, 3rd and 4th respondents are each permitted to call supplementary evidence in respect of any statement which was not struck out, provided that they serve such witness statements within the timelines ordered by the Court.

13. No order as to costs.

[198] I wish to express sincere gratitude to all counsel for their extremely helpful submissions, electronic copies of which they graciously provided.

Esco L. Henry
HIGH COURT JUDGE

By the Court

Registrar