

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT VINCENT AND THE GRENADINES

CLAIM NO. 202 of 2015

BETWEEN:

LAURON BAPTISTE

PETITIONER

-AND-

VIL DAVIS

Returning Officer for the Constituency of North Windward

VERONICA JOHN

Presiding Officer for North Windward

MONTGOMERY DANIEL

SYLVIA FINDLAY-SCRUBB

Supervisor of Elections

RESPONDENTS

CONSOLIDATED WITH

CLAIM NO. 203 OF 2015

BETWEEN:

BENJAMIN EXETER

PETITIONER

-AND-

WINSTON GAYMES

Returning officer

KATHLEEN JEFFERS

Presiding Officer

SIR LOUIS STRAKER
SYLVIA FINDLAY-SCRUBB
Supervisor of Elections

THE ATTORNEY GENERAL OF SAINT VINCENT AND THE GRENADINES

RESPONDENTS

CLAIM NO. 202 OF 2015

Appearances:

Mr. Bertram Commissiong O.C. with Mr. Keith Scotland,

Mrs. Kay Bacchus-Baptiste, Mrs. Zhing Horne-Edwards, Mrs. Sharon Morris-Cummings with Ms. Shirlan 'Zita' Barnwell and Ms. Maia Eustace as instructing solicitors for the Petitioner.

Petitioner present.

Mr. Douglas Mendes, S.C. with him Mr. Michael Quamina instructed by Mr. Joseph Delves for the 1st, 2nd and 4th Respondents. 1st, 2nd and 4th Respondents present.

Ms. René Baptiste, Mr. Duane Daniel and Mr. Carlos James for the 3rd Respondent.

3rd Respondent present.

CLAIM NO. 203 OF 2015

Appearances:

Mr. Stanley John, O.C. with him Mrs. Kay Bacchus-Baptiste,

Mrs. Sharon Morris-Cummings, Mrs. Zhing Horne-Edwards with Ms. Shirlan 'Zita' Barnwell and Ms. Maia Eustace as instructing solicitors for the Petitioner.

Petitioner present.

Mr. Douglas Mendes, S.C. with him Mr. Michael Quamina instructed by Mr. Joseph Delves for the 1st, 2nd and 4th Respondents. 1st, 2nd and 4th Respondents present.

Ms. René Baptiste, Mr. Duane Daniel and Mr. Carlos James for the 3rd Respondent.

3rd Respondent present

Mr. Anthony Astaphan, S.C with him Mr. Kendrickson Kentish instructed by Mr. Richard Williams and Ms. Danielle France of the Law Firm Williams and Williams for the 5th Respondent.

5th Respondent present – represented by Mr. Kezron Walters

2019: February 11, 12, 13, 14, 15, 18, 19
March 6, 7, 21

JUDGMENT

INTRODUCTION

- [1] JOHN, J. (AG.): General elections were held in St Vincent and the Grenadines on the 9th of December 2015. The 3rd Respondents Mr. Montgomery Daniel and Sir Louis Straker were returned

as the duly elected representatives for the North Windward Constituency and the Central Leeward Constituency respectively. They were candidates for the incumbent Unity Labour Party (ULP).

[2] Lauron Baptiste and Benjamin Exeter, were candidates for the New Democratic Party (NDP) which at the material time was the main opposition party. Mr. Baptiste was his party's candidate for the North Windward Constituency and Mr. Exeter the candidate for the Central Leeward Constituency.

[3] The Petitioners have alleged serious irregularities in the conduct of the elections in their respective constituencies and have filed these petitions on the 31st December 2015. The 1st Respondents Vil Davis¹ and Winston Gaymes were the returning officers. The 2nd Respondents Veronica John and Kathleen Jeffers were the presiding officers. Sylvia Findlay-Scrubb, the 4th Respondent, was the Supervisor of Elections. The Honourable Attorney General is the 5th named Respondent (in Claim No. SVGHCV2015/0203). The two Election Petitions have been consolidated.

THE STATUTORY AND LEGISLATIVE FRAMEWORK

[4] The Constitution of Saint Vincent and the Grenadines², the Representation of the People Act³ (hereinafter referred to as the RPA) and the House of Assembly Election Rules⁴ (hereinafter referred to as the Rules) are the bedrock for the essential constitutional and statutory framework which govern the issuing of election Petitions in St Vincent and the Grenadines. I consider them a helpful precursor to the several issues which arise for determination.

[5] Section 36 of the Constitution of Saint Vincent and the Grenadines confers jurisdiction on the High Court to hear and determine disputed elections. Sub-section (1) provides:-

“(1) The High Court shall have jurisdiction to hear and determine any question whether--

a. any person has been validly elected as a Representative;

b. any person has been validly appointed as a Senator;

¹ Spelling of first name corrected during trial to spell V-i-l-l-e.

² Cap. 10 of the Laws of Saint Vincent and the Grenadines, Revised Edition 2009

³ Cap. 9 of the Laws of Saint Vincent and the Grenadines, Revised Edition 2009.

⁴ Cap. 9 of the Laws of Saint Vincent and the Grenadines, Revised Edition 2009.

- c. any person who has been elected as Speaker from among persons who were not members of the House was qualified to be so elected or has vacated the office of Speaker; or
- d. any member of the House has vacated his seat or is required, under the provisions of section 29(4) of this Constitution, to cease to perform any of his functions as a member of the **House.**”

[6] Section 34 of the Constitution provides for the appointment of a Supervisor of Elections and the functions of the office.

(1) *There shall be a Supervisor of Elections whose duty it shall be to exercise general supervision over the registration of voters in elections of Representatives and over the conduct of such elections.*

(2) *The functions of the office of Supervisor of Elections shall be exercised either by the person holding or acting in such public office as may for the time being be designated in that behalf by the Public Service Commission or, if the Commission so decides, by such other person who is not a public officer as may for the time being be so designated, but before exercising its powers under this subsection the Commission shall consult with the Prime Minister.*

(3) *A person shall not enter upon the duties of the office of Supervisor of Elections until he has taken and subscribed the oath of allegiance and the oath of office.*

(4) *For the purposes of the exercise of his functions under subsection (1) of this section the Supervisor of Elections may give such directions as he considers necessary or expedient to any registering officer, presiding officer or returning officer relating to the exercise by that officer of his functions under any law regulating the registration of voters or the conduct of elections, and any officer to whom directions are given under this subsection shall comply with those directions.*

(5) *The Supervisor of Elections may, whenever he considers it necessary or expedient to do so, report to the House on the exercise of his functions under the foregoing provisions of this section; he shall submit every such report to the Minister for the time being responsible for matters relating to the election of Representatives and that Minister shall, not later than seven days after the House first meets after he has received the report, lay it before the House.*

(6) *In the exercise of his functions under the foregoing provisions of this section, the Supervisor of Elections shall not be subject to the direction or control of any other person or authority.*

(7) *The Supervisor of Elections shall exercise such other functions in relation to elections (whether to the House or to local government authorities) as may be prescribed by or under any law enacted **by Parliament.**”*

[7] The relevant provisions of the the RPA are as follows:

“Section 25 - Appointment and powers and duties of Supervisor of Elections

(1) For the purposes of an election, the Supervisor of Elections shall be the chief electoral officer and he shall--

(a) exercise general directions and supervision over the administrative conduct of the elections and enforce on the part of all election officers fairness, impartiality and compliance with the provisions made by or under this Act;

(b) issue to election officers such instructions as he considers necessary for ensuring effective implementation of the said provisions;

(c) execute and perform all other functions which are conferred or imposed upon him by or under this Act.

(2) For the purposes of an election, the Governor-General may appoint a Deputy Supervisor of Elections and he shall, subject to any general or specific directions of the Supervisor of Elections, have power to perform any of the functions which the Supervisor of Elections is by or under this Act required to perform.

Section 33 - Rules of elections

(1) The proceedings at an election shall be conducted in accordance with such rules as may be made by Cabinet:

Provided that until any rule is made modifying the same in any respect, the House of Assembly Election Rules shall be deemed to be the election rules applicable in relation to elections to the House of Assembly:

Provided further that those provisions of the Election Rules as relate to election offences shall not be subject to any amendment by Cabinet in exercise of the rule making power.

(2) It is the general duty of the Returning officer at an election to do all such acts and things as may be necessary for effectively conducting the election in the manner provided by the Election Rules.

- (3) No election shall be declared invalid because of any act or omission by the returning officer or any other person in breach of his official duty in connection with the election or otherwise of the Election Rules if it appears to the Court that the election was so conducted as to be substantially in accordance with the law as to the elections, and that the act or omission did not affect its result. (emphasis mine).

Section 40 – Offences by election officers

Any election officer who –

- (a) ...
- (b) ...
- (c) ...
- (d) wilfully prevents any person from voting at the polling station at which he knows or has reasonable cause to believe, such person is entitled to vote;
- (e) wilfully rejects or refuses to count any ballot paper which he knows, or has reasonable cause to believe, is validly cast for any candidate in accordance with the provisions of the Act; or
- (f) ...

is guilty of an offence and liable, on conviction on indictment, to imprisonment for two years.

Section 54 – Infringement of secrecy

- (1) Every officer, clerk and agent in attendance at polling station shall maintain and aid in maintaining the secrecy of the voting in such station, and shall not communicate, except for some purpose authorized by law, before the poll is closed, to any person any information as to the name or number on the list of voters and any voter who has or has not applied for a ballot paper or voted at that station, and no person shall interfere with or attempt to interfere a voter when marking his vote or otherwise attempt to obtain in the polling station any information as to the candidate for whom any voter in such station is about to vote or had voted.

- (2) Every officer, clerk and agent in attendance at the counting of the votes shall maintain and aid in maintaining the secrecy of the voting and shall not attempt to communicate any information obtained at such counting as to the candidate or candidates for whom any vote is given in any particular ballot paper.
- (3)
- (4) Any person who acts in contravention of any of the provisions of this section is guilty of an offence and liable to a fine of four hundred dollars and to imprisonment for six months.

Section 60. Non-compliance with rules, etc, when not to invalidate election

Notwithstanding anything contained in the provisions of this Act, no election shall be declared invalid by reason of non-compliance with the provisions of this Act or of the rules thereto or of the regulations made thereunder, or any mistake in the use of the forms prescribed under this Act, if it appears to the Court having cognizance of the question that the election was conducted in accordance with the principles laid down in this Act, and that such non-compliance or mistake did not affect the result of the election.(emphasis mine).

[8] House of Assembly Election Rules

15. *Ballot papers*

- (1) The ballot of every voter shall consist of a ballot paper and the names of the persons shown in the statement of persons validly nominated as candidates and no other person shall be entitled to have his name inserted in the ballot paper.
- (2) A ballot paper shall be in Form 7 in the Appendix and shall be printed in accordance with the directions therein and shall -
 - (a) contain the names alphabetically arranged according to surnames and numbered accordingly and other particulars of the candidates as shown in the statement of the persons nominated. Opposite to the name of each candidate there shall be printed

one of the symbols as are specified in Form 8 in the Appendix which shall be allotted by the Supervisor of Elections;

(b) be capable of being folded;

(c) have a space provided on the face of the ballot for the initials of the presiding officer;

(d) have attached a counterfoil and a stub, and a line or perforations between the ballot and the counterfoil and between the counterfoil and stub, the whole as in Form 7 in the Appendix.

16. Official mark

(1) Every ballot paper shall be marked with an official mark, which shall be either stamped or perforated.

(2) The official mark shall be kept secret and an interval of not less than seven years shall intervene between the use of the same official mark at elections in the same polling division.

24. Appointment of polling and counting agents

(1) Each candidate may appoint one agent to attend the preliminary and final counting of the votes by the presiding officer and the returning officer. Such appointment shall be in writing in Form 10 in the Appendix, and each agent, on being admitted to the poll or to the final counting of the votes, shall make the declaration of secrecy in Form 11 in the Appendix.

(2) Agents of candidates may, with the permission of the presiding officer, absent themselves from and return to the polling station at any time before one hour previous to the close of the poll.

(3) Where by these rules any act or thing is required or authorised to be done in the presence of the polling or counting agents, the non-attendance of any agent at the time and place appointed for the purpose, shall not by itself invalidate the act or thing done.

(4)

[9] Rule 31(2) provides:

The voter, on receiving the ballot paper, shall forthwith proceed into one of the compartments on the polling station and there secretly mark his ballot paper by marking, with the black lead pencil provided, a cross within the space containing the name and symbol of the candidate for whom he intends to vote. He shall then fold the ballot paper so that the initials of the presiding officer and the official mark can be seen without opening 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 subject to Rule (31)(a) in full view of the voter and all others present remove the counterfoil and deposit the ballot paper in the ballot box.

37. Spoilt ballot paper

A voter who has inadvertently dealt with his ballot paper in such manner that it cannot be conveniently used as a ballot paper may, on delivering it to the presiding officer and proving to his satisfaction the fact of the inadvertence, obtain another ballot paper in the place of the ballot paper so delivered, in these Rules referred to as "a spoilt ballot paper", and the spoilt ballot paper shall be immediately cancelled.

39. Procedure after poll

Forthwith upon the close of the poll, in the presence and in full view of the poll clerk and the candidates or their agents, and if the candidates or their agents are absent, then in the presence of such as are present, and of at least two voters if none of the candidates is represented, the presiding officer shall proceed in the following order--

- (a) count the number of votes against whose names appear on the register of voters as having voted and make an entry thereof on the line immediately below the last name on the register, thus: "**the** number of voters who voted at this election in this polling station **is.....**" (stating the number), and affix his signature thereto;

- (b) count the spoilt ballot papers, if any, place them in the special envelope supplied for that purpose and indicate thereon the number of such spoilt ballot papers and seal it up;
- (c) count the unused ballot papers, place them with all the stubs of all used ballot papers in the special envelope supplied for that purpose and indicate thereon the number of such unused ballot papers;
- (d) check the number of ballot papers supplied by the returning officer against the number of spoilt ballot papers, if any, the number of unused ballot papers and the number of voters whose names appear in the register as having voted, in order to ascertain that all ballot papers are accounted for;
- (e) open the ballot box and empty its contents upon a table;
- (f) record and count the number of votes given to each candidate on the tally sheets supplied, giving full opportunity to those present to examine each ballot paper. The poll clerk and not less than two witnesses shall be supplied with tally sheets upon which they may keep their own score as each vote is called out by the presiding officer.

40. Rejected ballot papers

(1) Any ballot paper--

- (a) which does not bear the official mark;
- (b)
- (c)
- (d) which is unmarked or wholly void for uncertainty,

shall, subject to this rule, be void and not counted.

GENERAL PRINCIPLES RELATING TO ELECTION PETITIONS

[10] Before addressing the several complaints and the evidence on behalf of the Petitioners, I consider it useful to summarize some general principles which have emanated from decided cases relating to Election Petitions. As early as 1875 in *Woodward v. Sarsons*⁵ the Court of Common Pleas

⁵(1874 - 1875) LR.10 C.P 733

considered the position at common law and the principles to be applied under section 13 of the Ballot Act, 1872. Lord Coleridge CJ stated the common law rule for parliamentary elections as follows:

*“The true statement is that an election is to be declared void by the common law applicable to parliamentary elections, if it was so conducted that the tribunal which is asked to avoid it is satisfied, as a matter of fact, either that there was no real electing at all, or that the election was not really conducted under the subsisting election laws. It is not enough to say that great mistakes were made in carrying out the election under the election laws: it is necessary to be able to say that, either wilfully or erroneously, the election was not carried out under the election laws, but some **other method**”*

[11] Some one hundred years later the test laid down in *Woodward v. Sarsons* was considered in *Morgan v. Simpson*⁶ where Lord Denning M.R. stated the law in these three propositions:

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

[12] In the same case Stephenson L.J. although expressing some reservations about the decision in *Woodward v. Sarsons*, went on to say:

"..... for an election to be conducted substantially in accordance with the law there must be a real election by ballot and no such substantial departure from the procedure laid down by Parliament as to make the ordinary man condemn the election as a sham or travesty of an election by ballot. "

[13] In *Quinn-Leandro v. Jonas*⁷, a decision of the Eastern Caribbean Court of Appeal Rawlins C.J. in addressing the issue of the Court's power to invalidate an election said at page 260 paragraph 128:

⁶[1974] 3 W.L.R. 517

⁷ [2010] 78 WIR 216

*"The decided cases show that an election court would not invalidate an election on the ground that there was substantial non-compliance with electoral law, pursuant to s 32(4) of the Representation of the People Act, if the breach of elections procedure stipulated by law was trivial. There had to be such a substantial departure from elections procedure stipulated by law that would cause an ordinary person to condemn the election as a sham or travesty. A considerable departure was required. Accordingly, an election Court would usually only invalidate an election on that ground if the judge was really satisfied that the breach was serious. The rationale was that the return of a member of the legislature by the electorate should only be invalidated in a clear case where the Court had serious doubt that the election was a manifestation of the wishes of the **electorate.**"*

[14] The principles enunciated in the above cases illustrate that an election will be declared void or invalid if there was no real election at all, or if the election was not conducted in accordance with the principles laid down in the relevant election laws. But even if the election was conducted in accordance with the principles laid down in the election laws, even though there might have been irregularities or mistakes in carrying out the election under those laws/rules, the election must not be declared invalid unless such irregularities or mistakes affected the result of the election.

PRINCIPLES OF PLEADINGS

[15] Before setting out the relevant pleadings of the Petitioners, I have addressed some of the basic principles with respect to pleadings in Election Petitions distilled from decided cases. In *Quinn-Leandro v. Jonas Rawlins* CJ said at paragraphs 31 and 32:

"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.....these statements of principle, cases in which an election is challenged must be heard expeditiously. The pleadings must be precise and disclose a cause or causes of action. Unless statute otherwise provides, an election petition, and any amendments thereto, must be perfected within the time limited for filing the petition. The rationale is that it would otherwise defeat the underlying virtue of the mandatory nature of elections legislation, which is intended to ensure that the validity of the election of a member of the

*legislature is dealt with expeditiously, in the public interest. Voters need to know who their lawfully elected representatives are as soon as possible after an **election**.*“

[16] The Indian Supreme Court in Charan Lal Sahu v. Jagji Zail Singh⁸-stated as follows:

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 realised 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.

[17] In Frampton v. Pinard⁹ the following was stated:

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

[18] What is clear from Quinn Leandro v. Jonas and the kindred of local as well as english cases is that pleadings, especially in election petitions, have to be precise, specific and unambiguous so that a respondent knows what case he has to meet. In fact, this is true of civil matters generally as the function of pleadings is to give fair notice of the case which has to be met and to define the issues on which the court will adjudicate in order to define the matters in dispute between the parties.

⁸[1985] LRC (const) 31. Ind SC.

⁹ Claim No. DOMHCV 2005/0149

COMPLAINTS COMMON TO BOTH PETITIONS

[19] The following pleadings were common to both petitions:

- 12) On or about the 2nd December, 2015, the 4th Respondent forwarded to the Office of the New Democratic Party for purposes of the election the Register of Voters for twelve (12) of the fifteen (15) constituencies as well as the Polling Division lists for, in total, the fifteen Electoral Districts including Central Leeward and North Windward pursuant to the Act (hereinafter referred to as the November Register) and a compact disc bearing the words 'final list'. The 4th Respondent, contrary to established practice in breach of her duties and in spite of numerous requests,
 - a) refused to and or failed to provide the Polling Station lists for the respective constituencies;
 - b) refused to and or failed to provide the usual five(5) copies of the lists and instead insisted that the New Democratic Party should print its own lists off the compact disk she had provided some four (4) working days before the General Elections of 9th December,2015
- 14) The Petitioners were therefore put at a great disadvantage in that they were not afforded the opportunity to know the exact figure for the number of voters who were eligible to cast their ballot at some of the individual polling stations.
- 15) In the case of Polling Divisions CLF-1 and NW-1 the lists provided by the 4th Respondent to the New Democratic Party and which was used by the **Petitioners'** agents inside the polling stations, differed materially from the list used by the agents for the 3rd Respondents 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 Petitioners. As a result, the **Petitioners'** agents noted that several names that were not on the **Petitioners'** agents 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.

- 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.
- 20) Contrary to the provisions of Rule 41(8), 41(10) and Rule 42(1) respectively, of the Rules none of the fifteen (15) ballot boxes which were produced by the returning officers at the final count were sealed in accordance with the Rules and as a result they were exposed to the likelihood of the secrecy of the ballot being invaded and/or the ballot papers being tampered with.

UNSEALED BALLOT BOXES

[20] The ballot boxes used in the conduct of the elections were not secured in accordance with the law in that:

- i. None of the boxes carried locks and could not be locked with a key.
- ii. The boxes were plastic bins with detachable covers. There were no hinges affixing the covers to the boxes.
- iii. The seals could be easily cut off and replaced
- iv. Some of the boxes were never sealed with the plastic seal on the top flap but only 4 seals were placed at the sides of the boxes.
- v. There was no transparency regarding the number of seals issued to the presiding officers and no number of seals were recorded after alleged sealing.

DEFECTIVE BALLOT PAPER

[21] Contrary to Rule 31(a) the ballot papers issued to the presiding officers had the official mark pre-printed on them and in some cases the official mark was printed on the counterfoil.

BREACH OF SECRECY PLEADED BY PETITIONER BENJAMIN EXETER

[22] 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 contrary to Rule 31(2) and if the presiding officer folded the ballot to the line marked '**DO NOT FOLD BEYOND**

THIS **LINE**' he could have only verified that it was the same ballot by opening the ballot thereby invading the secrecy of the poll.

BREACH OF SECRECY PLEADED BY PETITIONER LAURON BAPTISTE

[23] The Presiding Officer opened the ballot paper as voters returned them to her before depositing them in the box. In particular she opened ballots for one Elford Burke, Eswal Guy and Hazan Williams.

COMPLAINTS PLEADED IN RELATION TO CENTRAL LEEWARD

[24] In the case of Polling Division CLF-1, the list provided by the 4th Respondent to the New Democratic Party and which was used by the **Petitioner's** agent inside the polling stations, differed materially from the list used by the agents for the 3rd Respondent and the list used by the elections officer 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** agent noted that several names that were not on the **Petitioner's agent's** lists were on the list of the elections officer and that of the 3rd **Respondent's** agents and those persons were allowed to vote because they were on the '**official**' list.

[25] The Presiding Officers recorded on the Form 16 '**Statement of the Poll**' after counting the ballots in three (3) Polling Stations, namely Polling Divisions CLA-1, CLE and CLF-1 that there was a 100% voter turnout in relation to the number of persons on the voters list as recorded by the respective Presiding Officer for those polling stations and 101% in the case of CLD-1.

[26] The Petitioner accompanied by his representatives/agents attended at the final count of votes cast in the polls for the Central Leeward Constituency purported to be conducted by the 1st Respondent and held on the 10th December, 2015 at the Layou Police Station. Contrary to Rule 42(2) (d) at that purported final count there was no amendment of the statement of the poll by the 1st Respondent who is required so to do '**in** the presence of such of the candidates or their agents as are present. In breach of Rule 42(6) and (7) he failed to properly consider the **Petitioner's** request for a recount and proceeded to purport to complete the final count.

[27] FORM 16 STATEMENT OF THE POLL

- i. No Form 16 was presented at the final count for polling station CLI-1. The Petitioner objected to the count proceeding but the 1st Respondent denied his objection.
- ii. In polling station CLD-1 485 votes were stated to have been counted and there were only 480 ballot papers received from the returning officer.
- iii. In polling station CLA-1, CLE, CLF-1 and CLH the information on the Form 16 showed that when the number of votes cast were compared with the number of names on the official list there appeared to be 100% voter turnout at the said polling stations.

[28] RECOUNT

- i. The Petitioner requested a recount of CLD-1, CLA-1 and CLE but the 1st Respondent denied his request even before the Petitioner was permitted to state his reasons.

INSPECTION OF COUNTERFOILS

- [29] At the final count the Petitioner and his representative/agent were denied the opportunity to inspect counterfoils for all polling stations.

COMPLAINTS PLEADED IN RELATION TO NORTH WINDWARD

- [30] The **Petitioner's** agents noted several names that were not on the **Petitioner's** agents 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.

- [31] No notice was published as mandated before the final count and the Petitioner had no notice of the final count as provided for in Rule 13(2).

- [32] The 1st Respondent failed to ensure the election was conducted properly in that:
- a. There were missing ballot papers at polling station NW-1- there were 39 counterfoils more than ballots;
 - b. Failing to note objections by **Petitioner's** agents;

- c. Failure to seal ballot box for NWD at all; and
- d. Failure to report broken latch for the top flap of the ballot box rendering it incapable of being sealed by the plastic seal.

[33] No Form 16 Statement of the Poll was presented at the final count for the North Windward Constituency.

[34] The 2nd Respondent refused to accept the ballot of one Derrick Small¹⁰ who came in to vote about 3:30 p.m. on Election Day because she said she heard a sound like a camera flash, that the voter took a picture of his vote. She refused to put his ballot into the box even when Ms. Bacchus-Browne objected to her arbitrary decision and she refused to note her objections.

ANALYSIS OF THE EVIDENCE AND SUBMISSIONS

[35] As I embark upon an analysis of the evidence on behalf of the Petitioners I have uppermost in my mind a statement made by Tugrdhat J. in the case of *Jim Miller v Chris Bull (Returning Officer of Herefordshire Council) and others*¹¹ where he said at paragraph 43:

“.....the major interest at stake in an election petition is not the private right of a petitioner, but the rights of the public. There is a public interest that there should be free elections held under conditions which will ensure the free expression of the opinion of the people.”

[36] THE VOTERS' LIST

- i. Did the 4th Respondent fail to provide the polling station lists for the constituencies of Central Leeward and North Windward?
- ii. Did the 4th Respondent insist that the New Democratic Party print its own list off the compact disc which she had provided for these prior to the election?

¹⁰ Name corrected in Evidence in Chief to be Derrick Smart and not Derrick Small

¹¹[2009] EWHC 2640 (QB)

- iii. Were the lists provided to the Petitioners materially different from those used by the agents for the 3rd Respondents?
- iv. Were there names on the lists of the election officers and the 3rd **Respondent's** agent which were not on the lists of the agents for the Petitioners?
- v. Were there persons who were allowed to vote and whose names did not appear on the lists of the **Petitioners'** agents?

[37] The 4th Respondent, the Supervisor of Election swore two witness statements, attended at the hearing and gave evidence and was cross-examined by counsel for the Petitioners. In relation to the above complaints she said that she provided each candidate and each political party with a hard copy of the Register of Voters for all 15 constituencies and Polling Division Lists of all polling divisions in each of the 15 constituencies. She also provided the candidates and the political parties with a compact disk which contained the Register of Voters and the Polling Division Lists. She further said that she was not aware of any practice whereby 5 or 6 copies of any document is provided to candidates or political parties for the general election. Nor was she aware of any practice whereby voters lists were broken down by polling stations as opposed to polling divisions and that such lists are provided to candidates or parties for the general elections.

[38] The witness was cross-examined by Mr. Stanley John QC. She was questioned about her experience and training. This is what she said:

Prior to being appointed Supervisor of Elections, I was an educator. All Supervisors of Elections in St. Vincent and the Grenadines were retired persons. Prior to being appointed Supervisor of Elections, I worked in three previous elections, 1979, the By-election in 1983 and General Election in 1984.

[39] Under further cross-examination by Learned **Queen's** Counsel she said that she equipped herself for her task by acquainting herself with the law as it applies to elections and she did so under the guidance of personnel from the Attorney **General's** Chambers. She said she spent time with her predecessor who briefed her on her role. Two previous Supervisors of Elections offered her assistance, namely Mr. Egbert Samuel (deceased) and Mr. Selwyn Jones and she availed herself

of their expertise. She went on to say that she was an avid reader and read whatever related to elections.

[40] She was further asked by Learned **Queen's** Counsel:

Q. How did you see your role in the interest of the stakeholders and the political parties?

A. I sought to ensure fairness to all parties. I considered my role to be responsible for free and fair elections in Saint Vincent and the Grenadines and I would have had it no other way. I expected everything to be done in accordance with the law. I would not have been satisfied if anything was done contrary to the rules and the law.

[41] Learned Senior Counsel Mr. Astaphan, counsel for the 5th Respondent in his written submissions referred the Court to sections 11 – 16 of the Representation of the People Act which required the preparation and publication of the registers, quarterly lists, claims and objections, revised quarterly lists and the publication of the supplementary register in public places by the Fourth Respondent. He further submitted that there was no pleading or evidence to suggest the Fourth Respondent, or any other election official, failed to comply with these provisions of the Act.

[42] Further, he submitted that the allegations concerning the list were not made during polling day and referred to the report of the 2015 elections exhibited to the witness summary of the Petitioner Benjamin Exeter. In the report, the 4th respondent said that on election day she responded to six (6) queries from persons whose names were not on the **voters'** list. Only two (2) of those cases had merit; their names had been inadvertently omitted from the final **voter's** List. The other four (4) individuals had failed to update their registration over the last ten (10) years and their names had been removed from the **voters'** list.

[43] On this issue Mr. Astaphan SC further submitted that the Petitioner had the benefit of the lists without complaint in the expectation that they would win. And having lost, they ought not to be allowed to complain about the lists. In support of his submission he cited the statement made by Sir Morris Maurice Davis CJ in Radix v. Gairy¹² where at page 556 he said:

¹² [1978] 25 WIR 553

*"I cannot accept that the legal position is the candidate who went as a contestant on an existing list of electors, may be allowed to accept the list as valid if he wins but be allowed to argue that the list is invalid if he **loses.**"*

[44] The Court has considered the case of Radix v. Gairy and the case is clear authority for the rule that complaints against the registration process may not normally be brought in an election petition. In that case, the Electoral List had not been revised annually as required by the House of Representatives Act. The losing candidate, Kenrick Radix, complained by way of an election petition that several persons who were entitled to be registered to vote were precluded from doing so, while others whose names had appeared on an earlier list were improperly omitted, so that the election was contrary to the Constitution and null and void. The trial judge dismissed his petition. On appeal, Sir Maurice Davis CJ held that the election of a candidate can be avoided only upon proof of an election offence committed by the candidate or upon proof of some irregularity during the conduct of the election which affected the results, or that the election was conducted so badly that it was not substantially in accordance with the law on elections. The validity of the list was a separate question, and the time to raise that issue was some time before it was proclaimed by the Governor General. Once it was proclaimed it became conclusive as to the persons who were entitled to vote at the next election or by-election as the case may be, and he dismissed the appeal against the decision of the trial judge.

[45] Learned Senior Counsel Mr. Mendes in his written submissions said:

- i. No evidence was adduced of the existence of any alleged practice to support the claim of **"legitimate expectation"**.
- ii. There was no evidence to contradict the evidence of the Supervisor of Elections where she said that she is unaware of any practice.
- iii. The Supervisor of Elections said she provided Polling Division lists. As she explained a Polling Division is made up of at least two Polling Stations and the Polling Division list provided contained, in alphabetical order all the names of the voters in the Division.
- iv. There was no evidence led of any confusion caused by anyone not knowing the number of persons eligible to vote in any given polling station.

- v. There was no evidence to establish the claim that the list provided for the NDP differed materially from that used by the election officials and agents of the ULP.
- vi. Wollis Christopher, Presiding Officer for CLF-1 testified that “*there was no suggestion by anyone at anytime during the course of the day that the lists were **different***” and if there was any difference no allegation was made that as a result of the differences anyone who was not eligible to vote was allowed to vote or that anyone was disenfranchised.

[46] On the evidence relative to these complaints the court finds the following:

- i. The Supervisor of Elections carried out her duties at the elections in accordance with her mandate under the Constitution.
- ii. She provided each candidate and each political party with a hard copy of the Register of Voters for all 15 constituencies.
- iii. She provided the candidates and political parties with a compact disk which contained the Register of Voters and the Polling Division lists.
- iv. The Court accepts her evidence that she was unaware of any established practice as alleged by the Petitioner.
- v. On the authority of *Radix v. Gairy* the validity of the list was a separate issue and the time to raise that issue was prior to the election.

[47] In light of the foregoing, the Court finds no evidence to substantiate the complaints and they are dismissed.

THE BALLOT BOXES

[48] The Petitioner Benjamin Exeter and Ms. Maia Eustace both complained about the ballot boxes. Mr. Exeter at paragraphs 10 and 11 of his witness statement had this to say:

“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. Consequently, I used my smart phone to take photographs of these inadequately sealed boxes, copies of which are shown to me and marked BX-1, BX-2, BX-3, BX-4 and BX-5 respectively.

*11. I formed the view that the boxes were not properly sealed at all, because each had four orange plastic straps to close it on the four sides of the box and one on the flap which opens to gain access to the contents of the box. These orange straps could have been easily removed and **replaced**.”*

The witness under cross-examination by Mr. Mendes SC said that the ballot boxes were not tamperproof but he accepted that he did not put any evidence before the Court that the ballot boxes were in fact tampered with.

[49] Ms. Maia Eustace in her witness statement said inter alia, that on 5 of the 15 ballot boxes, what appeared to be the seal of the respective presiding officers, was placed inappropriately. In two of those boxes, the purported seals were used as labels in that they were simply applied to the cover of the ballot box without touching the flap, covering the slot through which ballots are to be deposited. In the third instance the purported seal was placed on the hinge of the center flap rather than the lip, thereby presenting no barrier to access. In a fourth instance the purported seal was mangled into a wad around a plastic zip tie. In a fifth instance, on the ballot box marked CLB, the purported seal was placed across the length of the plastic zip tie securing the center flap. It incorporated the plastic zip tie into the purported seal across the centre flap.

[50] She further said at paragraphs 16 – 18 in her witness statement:

- i. 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. 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.*
- ii. 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.*

iii. *In the circumstances I realized that none of the 15 ballot boxes was sealed according to law.*

[51] Ms. Cheryl Sutherland in her witness statement on this issue said at paragraphs 4 – 6;

“4. I observed all the ballot boxes. They were blue in color with a white plastic label on the top but the entire flap was not covered. I cannot say all labels were duly signed because of the plastic material the labels were made of the writing was somewhat difficult to see.

The labels were used instead of seals. A plastic label was placed on top the boxes partly covering the flap. The material of the label made it difficult for the officials to sign on them. The labels could also be easily removed and replaced.

5. All labels with signatures were so placed that if one were to remove it, it will peel off intact without damaging the label and could be easily tuck back.

*6. The ballot boxes had orange plastic tags. Most boxes had 4 plastic tags at the 4 sides only. These tags were cut with a scissors by the returning officer at the commencement of the recounting. Some of the ballot boxes had an additional tag on **the top.**”*

[52] The 4th Respondent, the Supervisor of Elections said in her witness statement at paragraphs 21, 22, 24 and 25;

“21. The ballot boxes provided for the election, about which complaint is made in this constituency, were identical to the ballot boxes provided for all the other constituencies, about which no complaint has been made. Furthermore, these were the same ballot boxes which were used in the referendum held in 2009 and the general election held in December 2010 and there were no complaints then about the boxes.

22. The ballot boxes are made of hard plastic, with a similarly hard plastic cover, and are constructed so that ballot papers, once inserted through the slot in the middle of the cover of the box cannot be removed without the entire cover being removed. The boxes are locked by the insertion of plastic cable ties through a hole on each of the four sides of the box which matches with a hole on the cover, and then pulling the ties tight until it grips the cover and the side of the box together ad locks them in place. The cover has a flap in the middle which covers the slot through which the ballots are inserted. This flap is also locked in place in a similar manner to the sides of the box. In all, five (5) cable ties are

used, save for when access to the slot is required to receive the ballots, in which case four (4) are used.

24. All political parties had a chance to examine these boxes before the decision was made in 2009 to switch these boxes. When I took up the position of supervisor, a sample of the plastic box was in the office already. I invited representatives of the NDP and the ULP to view the sample box. Representatives of both parties attended and they were treated to a demonstration as to how the boxes would be secured. Both sides expressed satisfaction with the boxes. Mr. Eustace attended on behalf of the NDP and Mr. Francis and Mr. Snagg attended on behalf of the ULP.

25. At each stage of the process a differently coloured plastic cable tie is used and only the specific number of cable ties required for each step were[sic] supplied with the ballot boxes. The ties are allocated in the following manner: five(5) white cable ties were applied before the box leaves my office, that is to say, the boxes are supplied to the returning officers the day before the election with the necessary election materials inside, secured shut with five white cable ties; five (5) green ties were provided so that the boxes can be secured after the boxes are inspected the day before the election by the returning and presiding officers for the various constituencies; four (4) black ties were provided which could be affixed after the box is opened and inspected in the polling station on election day, and in preparation for receiving ballot papers from voters. One less tie is provided in this instance because the flap is to be left open for the insertion of ballots; five (5) orange cable ties were provided so that the boxes could be secured after the preliminary count at the polling station; and five (5) blue ties were provided to secure the boxes after the final count. All of these plastic cable ties are included with the election materials which are provided in the ballot **boxes.**”

[53] The Supervisor of Elections was cross-examined extensively about the ballot boxes. In answer to a question from Learned **Queen’s** Counsel Mr. John she said that when the House of Assembly Rules spoke to ‘**sealing**’ and locking the ballot box it was a reference to the wooden boxes and it was not possible to seal the plastic boxes in a similar manner. She further answered that the plastic ties were introduced to replace the key used in the wooden boxes. She accepted that there

exists no provision in the Rules for stickers and plastic ties but she said, as Supervisor of Elections, she had to make a decision how to secure the plastic boxes.

[54] Under cross-examination by Mr. Scotland the witness admitted that the lids were detachable, that is to say, they could be removed from the body of the box and there were no hinges affixing covers to the boxes. She further admitted that the boxes were secured with ties which could be removed by cutting with a scissors and replaced with one of a similar colour. She further said that in her report on the elections she said that she did not receive any reports about the ballot boxes.

[55] Both Mr. Stanley John QC and Mr. Keith Scotland in their written submissions have invited the Court to find that the ballot boxes seen at the final count were not sealed in accordance with the Rules and that neither of the presiding officers transmitted envelopes with keys for the ballot boxes.

[56] Mr. Astaphan SC in his submissions reminded the court that the plastic ballot boxes secured with zip ties were used in the 2009 National Referendum and the 2010 General Elections. Additionally, he said that the Fourth Respondent took the extraordinary step before their use in 2015 for the boxes to be inspected by the leaders of the political parties. The leaders and/or agents approved them including the then leader of the **Petitioner's** political party. He further submitted that during polling day the Fourth Respondent received eight complaints from Equity Chambers on behalf of the NDP, the **Petitioner's** political party and none concerned the ballot boxes.

[57] It is not in dispute that the plastic ballot boxes replaced the wooden ballot boxes. It is also not in dispute that the plastic ballot boxes had no keys. The evidence of the Supervisor of Elections that the boxes were used in 2009 and 2010 has not been challenged. On the evidence, all the political parties had an opportunity to examine the plastic boxes before the decision was made in 2009 to replace the wooden boxes. The unchallenged evidence of the Supervisor of Elections is that she invited representatives of the NDP and the ULP to view the sample box and representatives of both parties attended and expressed satisfaction with the boxes. The Court accepts her evidence and therefore thinks that it is too late in the day to complain about the use of plastic boxes and the manner in which they were secured. As I understand the concern of the Petitioner Benjamin

Exeter, the boxes were not tamper proof and thereby susceptible to undetected intrusion. That is not evidence that any of the boxes were tampered with.

- [58] The Court has noted the submissions of Mr. Scotland that:
- i. Plastic seals were used on the boxes not paper seals, which could be peeled off and reapplied without leaving any sign that the box was opened.
 - ii. The boxes were fastened with plastic ties which could be cut and replaced.

There is however no evidence before the Court that anyone peeled off the plastic seals or cut the plastic ties and an election court cannot speculate on matters that could have happened.

..... the role of the Court is not to attempt to reach any conclusion as to the hypothetical result, absent the relevant acts and omissions having taken place.....per Jay J in Baxter v. Fear¹³

As a consequence, the Court finds no merit in the complaint.

DEFECTIVE BALLOTS

[59] The evidence of Petitioner Benjamin Exeter is that at polling division CLF all the ballots cast were mutilated as they displayed neither the initials of the presiding officer nor the official mark and they were cut in such a manner that a portion of the ballot was torn off. He further said that in polling division CLF-1 ninety-nine (99) ballots were mutilated in a manner similar to CLF.

[60] Ms. Maia Eustace said that she observed that the design of the ballot used in the election was flawed in that the space reserved for the official stamp and initials of the presiding officer was located on the counterfoil rather than on the ballot paper. As a result she concluded that the ballots were irregular.

[61] Both witnesses were cross-examined by Learned Senior Counsel Mr. Mendes. Ms. Eustace was shown exhibit **'BX11'** and said that it was a mutilated ballot in several respects:

¹³ Neutral Citation Number: [2015] EWHC 3136 (QB)

She was then directed to 'MEE2' and 'MEE4' photographs of ballots she exhibited to her witness statement. She described 'MEE2' as a mutilated document as the design was disfigured. She however accepted that if the official mark and number are written above the "TEAR HERE" line it is not void 'per se'. When shown 'MEE4' she admitted to not having objected on the ground that it did not have the stamp or number. This ballot too she said was not void. Copies of these ballot papers are included in the Appendix.

[62] Mr. John QC has submitted that with regard to the 222 ballots in CLF and 99 in CLF-1 the Court ought to declare them invalid and they ought not to have been counted. The respondents have not disputed the allegations made in relation to polling divisions CLF and CLF-1.

[63] In his written submissions, Mr. Astaphan SC submitted that the allegations made in respect of those two polling divisions have raised mathematical issues of fact. He submitted that the Petitioner Exeter won 247 of the vote cast in CLF and CLF-1. The Third Respondent won 263 and if therefore the 246 and 267 were deducted from the total votes cast for the Petitioner and the Third Respondent, the results of the election will not have been affected. While the Court accepts that submission, it does not detract from the allegation made that the absence of the official mark and the initials of the presiding officer amount to a serious breach of the Rules.

[64] Learned Senior Counsel Mr. Mendes in his submissions accepted that the ballots in CLF and CLF-1 did not bear the official mark but were nevertheless accepted as valid by the presiding officer. He compared that **with the Petitioner's** pleading where he said at paragraph 24:

"There were also similar looking ballots in ballot boxes from various polling stations which were ruled invalid by the 1st Respondent even after he accepted similar looking ballots in CLF and CLF-1."

[65] What ballots have the Petitioner succeeded in establishing did not bear the official mark and initials of the presiding officer? The Court finds the following facts in relation to this complaint:

- i. Five ballots at unidentified polling stations which did not have the initials of the Presiding Officer or the official mark were rejected by the returning officer.
- ii. None of the ballots in CLF bore the official mark or the initials of the presiding officer.

- iii. Susan Thomas, the presiding officer at CLF placed the official mark and her initials on the space provided for her initials on the counterfoil as a result when she tore the ballot paper along the '**TEAR HERE**' line, the official mark and her initials remained on the counterfoil.
- iv. That of the 99 ballots in CLF-1 which did not bear the official mark or the presiding **officer's** initials, 54 ballots were in favour of the Third Respondent and 45 in favour of the Petitioner.
- v. Mr. Wollis Christopher placed the official mark and his initials on the box located on the counterfoil and later he put the mark and his initial below the line '**TEAR HERE**'. Like Susan Thomas, when he separated the ballot from the counterfoil his initials and the official mark remained on the counterfoil.
- vi. Tammie Walter presiding officer for CLB affixed the official mark and her initials on the space below the '**TEAR HERE**'.
- vii. Paul Creese the inside agent for polling station CLB said at paragraph 22 of his witness summary, "**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.**" Under cross-examination he admitted that during the Preliminary Count his focus was on the way the voters had voted and that he was not paying attention to the presence or absence of the official mark and initial. He further said to Learned Senior Counsel Mr. Mendes that he did not think the issue of the stamp was a critical one. The witness admitted that he took notes but when confronted with his notebook, he conceded that he did not make a note that the initials and stamp were not on the ballot. In the light of his answers, there is a level of uncertainty as to whether the witness was truthful or otherwise. The Court therefore attaches no weight to his evidence.

[66] In his written submissions Mr. Mendes SC posed this question; is a vote which appears on a ballot paper which contains the stamp of the presiding officer on the counterfoil and not the ballot invalid or void? He referred to Rule 15 which defines ballot papers. It was his submission that Rule 15 provides a direct and simple definition of '**ballot paper**'. He submitted further that the ballot paper is

the whole of the document in **'Form 7'**. The **'Form 7'** is hereto appended exactly as it appears in the Appendix.

[67] Having seen the **'Form 7'**, the Court is satisfied and holds that the entire document that is to say, **'ballot and counterfoil'** comprise the **'Ballot Paper'**. The Court is further satisfied that whereas **'Form 7'** provides a space for the **'initials of the presiding officer'** there is no space provided for the insertion of the official mark and accordingly the official mark on the counterfoil does not invalidate the vote.

[68] I am fortified in my view as under Rule 16 it is mandatory that every ballot paper be marked with an official mark, which shall either be stamped or perforated but there is no stipulation as to the precise location on the ballot paper where the official mark is to be stamped or perforated. Rule 31(1) which makes it mandatory for the presiding officer to mark the ballot paper with the official mark, is silent on the location for the mark.

[69] What then is the position where the presiding **officer's** initials appear on the counterfoil and not on the ballot as set out in the **'Form 7'**? Mr. Mendes SC framed his submissions in this manner:

"In this case, however, the space for the initial of the presiding officer was located on the ballot paper above the line separating the counterfoil from the ballot when, in accordance with Rule 15(2) and Form 7, that space ought to have been located below it. As such, the issue is not so much the failure of the presiding officer to follow the instructions on the ballot paper to place his or her initials in the space provided therefore, but the failure of the design of the ballot to conform with the requirements of Rule 15(2) and Form 7. In other words, the presiding officers complied with the instructions on the ballot paper, but the ballot paper was not in compliance with Rule 15(2) and Form 7."

[70] He further submitted that whereas Rule 40(1) (a) invalidates a ballot paper which does not bear the official mark, there is no similar provision invalidating a ballot paper which does not bear the presiding **officer's** initials. Indeed, where a ballot does not bear his or her initials, the presiding officer is permitted to insert his or her initials on the ballot paper during the count in the circumstances set out in Rule 41(2), that is to say:-

If, in the course of counting the votes, the presiding officer discovers that he has omitted to affix his initials to any ballot paper, as provided by Rule 31(1) (a) and as indicated in Form 7 in the Appendix, he shall, in the presence of the poll clerk and the agents, if any present, of the candidates, affix his initials to such ballot paper and shall count such ballot paper as if it had been initialed by him in the first place provided that he is satisfied that the ballot paper is one that has been supplied by him and that such an omission has really been made and also that every ballot paper supplied to him by the returning officer has been accounted for as provided by Rule 39.

[71] It must be borne in mind that this case is not concerned with the absence of the presiding **officer's** initials. The evidence is that all ballot papers under challenge were initialled. This case is concerned with the effect of putting the initials in the wrong place.

[72] Mr. Mendes SC referred to *Jenkins v. Frederick de St. Croix Bracker*¹⁴ where a similar situation arose. In that case the relevant statute required the presiding officer to place his initial at the back of the ballot. Instead, he put his initials on the counterfoil. By a majority, the Supreme Court of Canada held that the requirement that the initial be placed on the back of the ballot was directory only, and the affixing of the initials on the counterfoil did not invalidate the votes.

[73] The Court is satisfied upon a clear interpretation of the Rules and the authority cited, that the presiding **officer's** initials on the part of the ballot referred to as the counterfoil does not invalidate the votes and they were properly counted.

BALLOT PAPERS PRE-PRINTED WITH THE OFFICIAL MARK

[74] Both Petitioners complained that contrary to Rule 31(1)(a), all of the ballot papers issued to the 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. In an affidavit sworn on the 21st December 2015, the Supervisor of Elections deposed at paragraph 11;

¹⁴ (1883) 7 SCR 247

*“There is also the allegation that some ballots did not have the official mark, this is inaccurate. All ballot papers issued to Presiding Officers had the official mark as required by law. What however I noticed was that in a few instances the official mark was printed on the counterfoil. The counterfoil is part of the ballot **paper.**”*

[75] By letter dated 6th January, 2016 and addressed to Williams and Williams Barristers and Solicitors the Supervisor of Elections advised Mr. Richard Williams that there may have been a misunderstanding in relation to paragraph 11 of her affidavit and she sought to correct that when she said:-

*“The ballots were not printed with the official mark. There was no official mark printed on the ballots delivered to the Presiding Officers by me for the conduct of the General **Election.**”*

[76] At paragraph 32 of her witness statement on the 7th June, 2018 she reiterated:-

*“I re-affirm that the ballot papers did not have the official mark pre-printed on them. I supervised the preparation of the template of the ballot papers for all constituencies which were sent to the printer for printing. I gave no instructions to place the official mark on any of the ballot papers. I saw the templates which were sent to the printer. They did not have the official mark on them. I also had cause to visit the printers to examine the ballot papers which were being printed because of certain problems that had arisen. There was no official mark printed on any of the ballot papers I saw. When the ballot papers were returned to me from the printer, I examined some of them. There was no official mark printed on any of the ballot papers I **examined.**”*

[77] The Petitioner Exeter under cross-examination by Learned Senior Counsel Mr. Mendes on this issue said:-

*“I do not recall having seen any ballot with the official stamp pre-**printed.**”*

The witness was directed to, and inspected, the ballots exhibited to his witness statement namely **‘BX11’**, **‘BX14’** and **‘BX15’** and accepted that there was no indication that the official stamp was pre-printed. He further said under cross-examination that he had polling agents in all fifteen divisions and none of the agents reported to him that he/she saw a ballot with the official stamp pre-printed. **BX11’**, **‘BX14’** and **‘BX15’** are included in the Appendix to this judgment.

[78] Notwithstanding the assertion that the ballot papers were pre-printed with the official mark, no polling or counting agent gave evidence that the ballots used on polling day were pre-printed with the official mark. The Court would have expected such evidence to be forthcoming from Ms. Eustace and/or Ms. Barnwell, who both testified to having held ballots. Neither of them alleged that the ballots which they held were pre-printed with the official mark. The Petitioner has contradicted himself on the allegation in paragraph 326 where he alleged that over ninety (90) percent of the votes bore the official mark and presiding **officer's** initials in a manner contrary to Rule 31(2).

[79] In the OAS Report on the 2015 Election, exhibited to the witness statement of Shirlan Zita Barnwell, there is no mention of pre-printed ballots. In fact, the OAS Mission under the heading The Voting Process at page 9 expressly stated that;

“Electoral workers verify and deliver ballots which are stamped and signed by the presiding officers.”

[80] The Supervisor of Elections has given evidence at the trial of these petitions and has explained in great detail the process employed in the printing of ballot papers and has asserted affirmatively that the ballot papers were not pre-printed with the official mark. The Petitioner himself tendered photographs of ballots which he took at the final count. Those photographs showed conclusively that the official mark was not pre-printed on the ballots as alleged by him or at all.

[81] Derrick Smart in paragraph 6 of his witness statement said that when Ms. Veronica John, the presiding officer issued him with the ballot to vote it was already stamped. The Court accepts the evidence of the Supervisor of Elections and rejects the statement made by the witness Derrick Smart.

[82] The Petitioners having presented no evidence in support of the allegation that ballots were pre-printed with the official mark the Court finds the complaint is unmeritorious.

ABSENCE OF FIRST RESPONDENT – WINSTON GAYMES

[83] Mr. Winston Gaymes the Returning Officer for Central Leeward who served a witness statement did not appear at the hearing to give evidence and no explanation was proffered to the Court for his

absence. In this regard, the Court must respect the direction given by Henry J in these proceedings by Order dated 19th April 2018 that “All witnesses shall attend the trial for cross-examination unless such attendance has been dispensed with by notice in writing by the other **sides.**” Learned **Queen’s** Counsel for the Petitioner Mr. Stanley John in his written closing submissions drew the **Court’s** attention to the provisions of CPR 29.8 which provides as follows:

(1) If a party –

(a) has served a witness statement or summary; and

(b) wishes to rely on the evidence of that witness;

that party must call the witness to give evidence unless the court orders otherwise.

(2) If a party –

(a) has served a witness statement or summary; and

(b) does not intend to call that witness at the trial;

that party must give notice to that effect to the other parties not less than 28 days before the trial.

Relying on the above rule, Mr. John submitted that in the circumstances, the witness statement of Winston Gaymes cannot be relied upon as evidence in these proceedings.

[84] Learned **Queen’s** Counsel Mr. John further submitted that the Court is entitled to draw adverse inferences from his absence. He referred to the cases of Bury and Bell Gouinlock Ltd¹⁵ and Wisniewshi (A Minor) v. Central Manchester Health Authority¹⁶. I have carefully considered the two cases. The Court does not derive any assistance on this issue from the former case. The latter case concerned an appeal by the defendants Health Authority from a judgment in favour of the plaintiff in a medical negligence case. One of the two doctors who attended the patient did not give evidence at the trial. However, the trial judge admitted into evidence his statement as hearsay and said that he was not willing to give its contents much weight. In the course of his judgment, adverse inferences were drawn from the **defendant’s** statement. That case in my view is easily distinguishable from the instant case in which no written statement of the First Respondent was admitted into evidence. Accordingly, the Court finds itself in disagreement with the submission of Learned **Queen’s** Counsel.

¹⁵ (1984) 48 O.R. (2d) 57 (H.C.)

¹⁶ (1998) EWCA Civ 596

FAILURE OF RESPONDENTS TO PROVIDE A PAPER TRAIL – FORM 16 STATEMENT OF THE POLL
AFTER COUNTING THE BALLOTS

[85] The Petitioner Benjamin Exeter complained that contrary to the provisions of Rule 41(7) no Form 16 Statement of the Poll was presented at the Final Count for Polling Station CLI-1 and in the case of others, the Form 16 Statement of the Poll presented, manifested various errors and inconsistencies including the following:

- (a) In the Form 16 Statement, the total number of ballots cast and the number of names on the voters' list, appeared to have been a 100% voter turnout in polling stations CLA-1, CLE, CLF-1 and CLH and
- (b) In polling station CLD-1 where 485 ballots are stated to have been counted by the Returning Officer but there were only 480 names stated on the official list of electors used at the polls, there had been a 101% voter turnout.

[86] The success of this complaint depends to a large extent on the authenticity of the evidence provided by Ms. Maia Eustace, a roving agent for the Petitioner Exeter and a person who attended at the final count at the Layou Police Station. In her witness statement she said:

*“Ms. Morris Cummings asked for the Form 16 Statement of the Poll after counting the ballots of the Presiding Officer for CLA and Mr. Gaymes replied that we did not need it because Mr. Robinson had written all of the results on his notepad and could supply us a results therefrom. Ms. Morris Cummings insisted upon production of the Form 16 Statements and Mr. Gaymes replied that the forms were in his car and that he “**did not feel like**” going for them. I supported Ms. Morris in insisting upon production for the Form 16 statements. After some time Mr. Gaymes relented. Mr. Gaymes showed us the Form 16 Statement for CLA, which Mr. Exeter photographed with his smart phone, and from which Ms. Morris Cummings and I each copied salient information, albeit hurriedly. When sought, we were denied photocopies of the Form 16 Statements. Among other things I noted that the statement indicated that some 185 ballots had been cast in favour of Mr. Exeter. Our inspection of the Form 16 Statement for CLA-1 revealed that the Presiding Officer had failed and/or refused to enter the number of ballots she received from the Returning Officer. Examining solely the information contained in the Form 16 Statement,*

where available, in particular the total number of ballots cast and the number of names in the **voters'** list, it appeared to us that there had been a 100% voter turnout in polling stations CLA-1, CLE and CLH; and that in polling station CLD-1, where 485 ballots had been cast 480 names stated to be on the **voters'** list, there had been a 101% voter turnout. When we arrived at the final ballot box, which was labeled CLI-1, Mr. Gaymes could not produce the respective Form 16 Statement. He stated dismissively that there was none. We objected to the count proceeding as there was no return on which to base the final count. Our objection was denied.

[87] The witness was cross-examined extensively on this important issue by Mr. Mendes SC. She said that although she was present at the final count she was not permitted sufficient time to record all of the information on the Form 16 when they were shown to her. She however did take notes at the final count. She was shown a number of Form 16 Statement of the Polls and this is what followed:

- Q. Are these the Form 16 presented to you on the night of 9th December 2015?
- A. I do not accept CLA because the information recorded in my notes show 504 and on Form 16 504 and 385 appear to be superimposed.
- Q. Do you accept CLA-1?
- A. I accept but I do not accept CLB. CLB-1, CLC, CLD and CLD-1
- Q. Do you accept CLE?
- A. Yes, I do.
- Q. Do you accept CLE-1 and CLF?
- A. No, I **don't** but I accept CLF-1 and CLH.

[88] In his written submissions Senior Counsel Mr. Mendes, said that in the case of CLE, the witness Maia Eustace recorded:

<i>Ballot received from Presiding Officer</i>	510
<i>Votes for NDP</i>	171
<i>Votes for ULP</i>	197
<i>Rejected Ballots</i>	1
<i>Unused</i>	138

<i>Spoilt Ballot</i>	3
<i>Number of names on official list</i>	369

Again, the number of persons who voted (171 + 198 + 4 = 369) was inserted in the space for the number of names on the voters list. The number of names on the official list was in fact 472.

The Form 16 Statement of the Poll for polling station '**CLE**' and the notes recorded by Ms. Eustace marked '**Notes** of Ms. Maia Eustace for **CLE**' are included in the Appendix.

[89] In the case of CLH, the witness Maia Eustace recorded the following from the Statement of the Poll presented to her at the final count:

<i>Ballot received</i>	540
<i>Votes for NDP</i>	142
<i>Votes for ULP</i>	200
<i>Rejected Ballots</i>	4
<i>Spoilt Ballots</i>	4
<i>Unused Ballots</i>	190
<i>Names on list</i>	346

As with CLE, the number of persons who voted (142 + 200 + 4 = 346) was inserted in the space reserved for the number of names on the official list. The number was in fact 494.

The Form 16 Statement of the Poll for polling station '**CLH**' and the notes recorded by Ms. Eustace marked '**Notes** of Ms. Maia Eustace for **CLH**' are included in the Appendix.

[90] In the case of CLD-1, the witness Maia Eustace recorded the following from the Statement of Poll presented to her at the final count:

<i>Ballot received from Returning Officer</i>	480
<i>Votes for NDP</i>	155
<i>Votes for ULP</i>	173
<i>Rejected Ballots</i>	1

<i>Spoilt Ballots</i>	155
<i>Unused Ballots</i>	3
<i>Names on list</i>	480

The Form 16 Statement of the Poll for polling station **'CLH'** and the notes recorded by Ms. Eustace marked **'MEE6'** are included in the Appendix.

[91] It is to be noted that the number 480 recorded as the number of ballots received from the returning officer was confirmed by the evidence of Mrs. Findlay-Scrubb, who exhibited the record of the Ballot Papers issued to each polling station. The number of ballots issued to Polling Station CLD-1 was 480. The complaint in relation to this box CLD-1 is that it records a 101% voter turnout, that is to say that there were 485 ballots stated to have been used by the 480 names stated to be on the official list of voters. The witness Eustace confirmed that this was the complaint. The final count has been confirmed as accurate in each case. Ms. Eustace agreed that the final count for CLA-1 was 173 for ULP, 168 NDP; for CLE, 197 for ULP, 171 for NDP; for CLD-1, 172 for ULP, 156 for NDP; and for CLF-1, 121 for ULP and 101 for NDP. All of these final results were recorded in the final count of votes. For CLH, the Statement of the Poll recorded 200 votes for the ULP and 142 for the NDP, while the final count is 1200 for the ULP and 140 for the NDP. The Statement of the Poll for polling stations **'CLA'**, **'CLA-1'**, **'CLF'**, **'CLE-1'** and **'CLI'** and the notes recorded by Ms. Maia Eustace for these polling stations and marked **'Notes** of Ms. Maia Eustace for **CLA'**, **"Notes** of Ms. Maia Eustace for **CLA-1'**, **'Notes** of Ms. Maia Eustace for **CLF'**, **'Notes** of Ms. Maia Eustace for **CLE-1'** and **'Notes** of Ms. Maia Eustace for **CLI'** respectively, are included in the Appendix.

[92] Undoubtedly, several errors were made by the Presiding Officer in the recording of final votes on the Statement of Polls. The question now is; does it appear that the breaches are sufficient either by themselves or with other breaches that have occurred in Central Leeward to invalidate the election in that constituency. The Court must be guided by section 60 of the RPA which specifically provides that *"any mistake in the use of the forms prescribed under this Act"* will not result in the invalidation of an election *"if it appears to the Court ... that the election was conducted in accordance with the principles laid down in this Act, and that such non compliance or mistake did not affect the result of the election."*

[93] The Court must also consider section 33(3) of the RPA which provides:

“.....no election shall be declared invalid because of any act or omission by the Returning Officer or any other person in breach of his official dutyif it appears to the Court.”

[94] The learning from the authorities demonstrates that it is not every breach or transgression that would avoid an election. It must be an irregularity which affects the result of an election. The authorities are replete with examples of irregularities which by themselves do not avoid an election unless it is shown that because of the irregularity the result would have been different. In the *Islington, West Division Case*¹⁷, Kennedy J. said:

“Our opinion is that an election ought not to be held void by reason of transgressions of the law committed without any corrupt motive by the returning officer or his subordinates in the conduct of the election, where the court is satisfied that the election was, notwithstanding those transgressions, an election really and in substance conducted under the existing election law, and that the result of the election, i.e. the success of the one candidate over the other, was not and could not have been affected by those transgressions.”

THE REQUEST FOR A RECOUNT

[95] The Petitioner Benjamin Exeter has alleged in paragraph 3(19) of his petition that the 1st respondent refused to conduct the recount and failed to provide any reasons for his refusal and as such it was unreasonable within the context of the rules.

[96] In his witness statement the Petitioner said that at the final count, it was drawn to his attention that in respect of polling station CLD-1 the Presiding **Officer's** figures on the Form 16 statement showed that more ballots were counted (485) than were stated as having been received from the 1st Respondent (480). He said that he told the 1st Respondent about it and asked him for a recount of the votes and he was denied the request before he gave him his reason. He said further that one of his representatives asked him to state the reason for the record and he did so but the 1st

¹⁷ (1901)5 O'M & H 120, p. 125

Respondent still denied his request. He stated further at paragraph 34 that he also requested a recount for polling stations CLA-1, CLE and CLF.

[97] The number of ballots issued to polling station CLD-1 by the 4th Respondent was 480. This was confirmed by the Supervisor of Elections in her records of the ballot papers issued to each polling station. The count of the ballots as recorded by Ms. Eustace was consistent with the official record. Mr. Exeter accepted that what occurred was no more than an arithmetical error, that is to say, the Presiding Officer Ms. Kathleen Jeffers miscounted and recorded an inaccurate figure on the Form 16.

[98] Under cross-examination by Mr. Mendes SC, Mr. Exeter was shown the Statement of the Poll for polling station CLE. He was further directed to the notes recorded by Ms. Maia Eustace. He was also shown the statement of the Supervisor of Elections for the polling station CLE. Ms. Maia Eustace recorded the following from the Statement of the Poll:

<i>Ballot received from Presiding Officer</i>	<i>510</i>
<i>Votes for NDP</i>	<i>171</i>
<i>Votes for ULP</i>	<i>197</i>
<i>Rejected Ballots</i>	<i>1</i>
<i>Unused</i>	<i>138</i>
<i>Spoilt Ballot</i>	<i>3</i>
<i>Number of names on official list</i>	<i>369</i>

The number of persons who voted ($171 + 197 + 1 = 369$) was inserted in the space for the number of names on the **voters'** list.

[99] In relation to CLA-1 Mr. Exeter said in his witness statement:

In polling station CLA-1 the number of ballots given to the Presiding Officer by the First Respondent Mr. Gaymes was not stated and based on the information in the Form 16 Statement for that Polling Station, there was a 100% voter turnout in relation to the number of names on the official list used at the poll.

There is no evidence that a recount was requested in this polling station.

[100] There is no evidence of a complaint having been made in relation to CLE-1 and consequently the claim to have requested a recount falls away. In any event there is no right to a recount. The decision rests with the Returning Officer who may refuse a request for a recount if the request is unreasonable. In light of the evidence adduced in relation to CLD-1 and CLE the Court is satisfied that the request was unreasonable.

[101] Mr. Astaphan SC in his written submissions referred to R Narayanan v. S. Semmalai¹⁸ a case in which the Supreme Court of India considered the conditions for the recount. There, the Supreme Court held:

*“it is well settled that a court would be justified in ordering a recount of the ballot papers only where (1) the election petition contains an adequate statement of all the material facts on which the allegations of irregularity or of illegality in counting are founded, (2) on the basis of evidence adduced such allegations are prima facie established, affording a good ground for believing that there has been a mistake counting and (3) the court trying the petition is prima facie satisfied that the making of such an order is imperatively necessary to decide the dispute and to do complete and effectual justice between **the parties.**”*

In this case there is no pleading, particulars or evidence of any counting errors at the final count or errors which affected the result of the election.

REQUEST TO INSPECT COUNTERFOILS

[102] The Petitioner Exeter complained that at the Final Count he was denied the opportunity to scrutinize the counterfoils generally and in particular in relation to Polling Stations CLD-1, CLA-1 and CLF, as well as other documents such as unused ballots. Both Ms. Maia Eustace and Ms. Shirlan Zita Barnwell in their witness statements said that they made similar requests of the First Respondent and he denied their requests.

[103] Rule 42 sets out the procedure to be adopted at the Final Count:

¹⁸ (1980) SCR (1) 571

It requires the Returning Officer in the presence of the candidate or his agents to count the votes cast allowing the candidates to see such votes, count the votes rejected, allowing the candidates to see such votes, and then add up the votes. The only documents which the Returning Officer must allow the candidate to see therefore are the ballots containing the votes.

Implicit in the rule is that the candidate is not entitled to see the counterfoil. Both Mr. Mendes SC and Mr. Astaphan SC submitted that there is no right to inspect the counterfoil. The Court agrees with their submission and accordingly finds that there was no breach of Rule 42 or any other Rule relating to this complaint.

BREACH OF SECRECY – CENTRAL LEEWARD

[104] Section 27(2) and (3) of the Constitution of Saint Vincent and the Grenadines confers a right to vote in elections and at the same time mandates how the right or entitlement should be exercised. The votes shall be given by ballot in such a manner as not to disclose how any particular person voted. Rule 31(2) of the rules reflects the constitutional provision. It follows therefore that the secrecy of the vote is one of the fundamental values that inform the electoral process in St. Vincent and the Grenadines.

[105] The evidence in support of the Petitioner **Exeter's** complaint on this issue came from the Petitioner himself, Shirlan Zita Barnwell, Esla Sam. Shirlan Zita Barnwell at paragraph 10 of her witness statement stated:-

“Throughout the count I observed that each ballot bore at least one crease less than halfway up the ballot. 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.

[106] Under cross-examination by Learned Senior Counsel Mr. Mendes she was shown a copy of a ballot paper to which all parties agreed. Following the **witness'** observation of at least one crease less than half way up the ballot, it was demonstrated that folding the ballot at a crease less than halfway up would result in the top part of the ballot where the official mark and initial was presumed to be located, being uncovered, with the result that the presiding officer could examine the ballot to find his or her initial and official mark without opening the ballot and invading the secrecy of the ballot. The ballot was tendered and marked '**SZB3**' and is included in the Appendix.

[107] The Petitioner at paragraph 59 of his witness statement said:-

*"Upon an examination of a complete ballot paper from the Central Leeward election I contested, it is evident that they were not designed appropriately so as to achieve this critical objective, which is fundamental to the conduct of elections under the election laws of St. Vincent and the **Grenadines.**"*

[108] Ms. Esla Sam at paragraph 10 of her witness statement said:-

*"When I went to vote, I had a much closer view of her procedure. The counterfoil and ballot met at the dotted line on which is printed "**Do not fold beyond this line**". She pulled the flap up at least an inch high towards herself. It appeared to be opened wide enough that she could see for whom I had voted. I told myself that seeing that I was an agent of the NDP she ought to have known how I would have voted and as such her action was **strange.**"*

Under cross-examination by Mr. Astaphan SC, Ms. Sam admitted that she did not in fact see the Presiding Officer lift the lid. She merely saw her come with the box and empty its contents on the table.

[109] Mr. John QC submitted that the line of cross-examination by Mr. Mendes SC did not produce clarity on the issue and on the testimony given in the witness statements about the state of the ballots on the final count but rather left the Court to draw an inference. He further submitted that the only reasonable inference the Court can draw on the evidence is that the ballots were folded as instructed on the ballot papers, and as a consequence in the ballots counted at the final count, the Presiding Officer would have unavoidably seen for whom votes were cast.

[110] Mr. Mendes SC submitted first of all that there was no evidence led where a Presiding Officer opened a ballot and invaded the secrecy of the ballot in attempting to verify whether the official mark and initials were on the ballot. Secondly, he submitted that the **Petitioner's** theory is that if the Presiding Officer folded the ballot up to the line marked "**Do Not Fold Beyond this Line**", she could only verify that the official mark and her initials were on the ballot by pulling back the ballot and in so doing she would see how the voter voted. The assumption is that the official mark and initial would have been placed below the line marked "**Do Not Fold Beyond this Line.**"

[111] Mr. Mendes SC further submitted that the **Petitioner's** theory was based on the supposition that the ballot would be folded right up to the line and would therefore cover the official mark and initial, making it necessary to peel back the ballot to see the official mark and initial. But the fact is that the instruction is merely not to fold beyond the line. There is no instruction to fold right up to the line, which means that it was permissible to fold the ballot to a point below the line which exposed the official mark and initial but yet still concealed the way the voter voted.

[112] Mr. Astaphan SC, counsel for the 5th Respondent while associating himself with the submission of Mr. Mendes SC went on to submit that the mere breach of secrecy does not invalidate the election as Parliament has created a specific criminal offence. Additionally he said there was no pleading or evidence to show that any one was disenfranchised, or that the result of the election was affected.

[113] In support of his submissions, he placed reliance on *Tannis v. Robertson*¹⁹ and *Williams v. Giraudy*²⁰. The Court considered both authorities but did not find *Williams v. Giraudy* helpful on this issue. However, much guidance was derived from *Tannis v. Robertson*. The facts there were that after a general election in St. Vincent and the Grenadines in 1972, the Respondent Robertson an unsuccessful candidate filed an election petition in which one of the grounds was that the **appellant's** agent had infringed the secrecy of the voting at a certain polling station.

¹⁹ (1973) 20 WIR 560

²⁰ (1978) 25 WIR 529

[114] The respondent sought a declaration that the appellant was not duly elected and that his election and return were wholly null and void. The trial judge found that there was an infringement of the secrecy of the poll. That was an offence under section 70 of the House of Assembly (Elections) Ordinance 1951 for which a person was liable on summary conviction to imprisonment for six months or a fine of \$240.00. The Trial Judge on the basis of his findings declared the **appellant's** election void. The appellant appealed.

[115] In delivering the judgment the Court of Appeal found that there was sufficient evidence before the trial judge to justify his finding that there was a breach of secrecy. However, the crucial question was whether under the provisions of the section 70 of the Ordinance the finding could be used to invalidate an election. Upon an examination of section 70, the Court held that the only sanction provided by the legislature in respect of the commission of an offence under section 70 is that prescribed in sub-section (4) namely a fine or imprisonment. Section 70 is identical to section 54 of the RPA.

[116] In the Bolton Case (*Omerod v. Cross*)²¹ the facts were:

It was proved that on the polling-day the returning officer visited the various polling stations in company with the Town Clerk . At each of the polling stations he remarked that the personation agents for the Respondent Cross were furnished with a register of the voters to which tickets were attached opposite the name of each voter. As soon as a voter had voted the agent stealthily tore off the ticket and put it in his pocket, and subsequently conveyed it to some person outside the polling station, and by this means persons outside knew while the poll was going on, who had voted and who had not voted. After calling the attention of the Town Clerk to what he had observed the returning officer communicated with Mr. Winder, the **Respondent's** agent, who on the night before the election, upon hearing that something of the kind was contemplated, had expressly forbidden it to be done. Mr. Winder immediately wrote to each of the personation agents to request them to desist from what they were doing, and the returning officer observed, on again visiting the various polling stations, that some of the agents had desisted, but some had not. The

²¹ (1874), 31 LT 195

returning officer subsequently communicated what he had observed to the Home Secretary.

[117] Mellor J in his judgment said:

There is no doubt that the Legislature, when it passed the Ballot Act, did intend that that should be a perfectly secret mode of voting, as far as any instrumentality or machinery which it could provide could make it so. It was new in the English law, it was new in the law of elections, nothing of the kind had occurred before; and therefore when the Legislature for the first time enacted that voting should take place by ballot, and prescribed in very careful language and terms, so far as they could, the precise machinery by which it should be carried into effect, they did intend that secrecy should be preserved as far as it was possible. But when the Legislature was for the first time creating the machinery of voting by ballot, (and there was no then-existing machinery which this could supplement, it was entirely new in its principle and entirely new in its machinery) it was for the Legislature to provide the safeguards by which that secrecy should be protected and maintained, and if the Legislature have failed in doing that, the misfortune may be the misfortune of the public, but the fault at all events lies at the door of the Legislature.... But as it seems to me, no foundation for attacking the seat can arise from the act of the personation agent, or any other officer connected with the election. The punishment is specified by the Legislature; it must be found within the four corners of the Act of Parliament, and I have no power, neither has the common law any power, to supplement any additional penalty upon either the persons who transgressed the law or the persons for whose sake or in whose favour such an act may have been done.

[118] Notwithstanding that the Court has found that there was no breach in relation to Central Leeward even if there were, applying the principles enunciated therein, the Court could not invalidate the election.

BREACH OF SECRECY – NORTH WINDWARD

[119] The complaint in relation to this constituency centered around allegations made by Neleon Adams and Kendall Sandy directed towards the Presiding Officer Ms. Veronica John. Kendall Sandy said:-

*“When the voter returned 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**”*

He went on to say that he 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 well known ULP or NDP. It was clear to me she was checking the votes of persons she was not sure of.

[120] Under cross-examination by Mr. Mendes SC he said that when the Presiding Officer cut off the counterfoil she did not open it. Then he went on to say that she did unfold it. He was further questioned about the manner in which he was able to see through the space of the ballot paper; Mr. Mendes SC gave the witness a blank sheet of paper and asked him to demonstrate how he was able to see through the space. Having observed the manner in which the witness demonstrated he was able to see, the Court finds it unlikely that the witness was able to see how persons voted.

[121] The witness Neleon Adams said inter alia that when the voters returned the ballot paper to the Presiding Officer the vote was exposed. He further said when the vote was exposed he would see who the person voted for and he saw the Presiding Officer open at least 15 **voters'** ballots. During the voting he also saw the Presiding Officer willfully open the ballot of Hazan Williams, Charles Quashie, Eswal Guy and other persons whose names he could not recall. The witness went on to say that when some voters came in to vote the Presiding Officer would say at times **“show me your voting finger”** which is a known ULP slogan and a ULP campaign song. She did that several times.

[122] Under cross-examination the witness submitted that he could not recall how the Presiding Officer folded the ballot but when it was returned to her he could see how the person voted. Under further cross-examination he admitted that he did not see Hazan Williams, Eswal Guy vote as they had

voted during the morning and the evidence he gave was what was told to him by a third person. He further admitted that he never saw the Presiding Officer open the ballot of either Ms. Williams or Guy and in fact that is what he told his lawyer.

[123] In answer to another question he said he saw the Presiding Officer open the ballot of Charles Quashie and in the same vein he said that it was Charles Quashie who handed the ballot to the Presiding Officer open.

[124] The Presiding Officer had this to say about the allegation:

*“At no time did I open any **person’s** ballot to see how they voted. I know Elford Burke and Eswal Guy. I remember Elford and Eswal coming to vote. Eswal is in fact my cousin. I did not open their ballots. Neither of them complained to me about opening their ballots. I do not know who Hazan Williams is but nobody complained to me that I opened their ballots. And neither of the polling agents made any objection to me about breaching any secrecy so there was no objection to make a note of. I Never said the words “**show** me your voting **finger**” in a loud manner. I did ask some voters to show me their fingers in order to make sure that they had not already voted, but it was not my intention to repeat **anybody’s political slogan.**”*

[125] Mr. Scotland contended that the Presiding Officer Ms. Veronica John breached the secrecy of the ballot by opening the ballot paper as voters returned them to her before depositing them in the ballot box, which is tantamount to a substantive departure from the law with regard to the conduct of elections and specifically, section 54(3) of the RPA and Rule 31(2) of the Rules respectively. Counsel further submitted that the violation of secrecy of the vote is inimical to one of the core principles for the conduct of election.

[126] The submission of Mr. Scotland is sound in law. However, there must be an evidential basis upon which the Court can find favour with his submissions. Having seen the demeanor of the witness Kendall Sandy on the several occasions on which he hesitated in answering and the inconsistencies in his evidence, the Court attaches little or no weight to his testimony. The evidence of Neleon Adams must now be balanced against the evidence given by the Presiding

Officer who the Court finds was forthright in her answers. The Court accepts as truthful the evidence given by the Presiding Officer that she did not open the ballot of Elford Burke and Eswal Guy. Further, the Court accepts the testimony that no complaints were made to her that she opened their ballots. Accordingly, the Court is of opinion that there is no reliable evidence on which it can find the Presiding Officer breached her oath of secrecy. In the event that there was a breach as a matter of law, the Court cannot invalidate the election.

PARTIALITY

[127] The allegations here were directed towards the 1st Respondent Winston Gaymes and the 2nd Respondents Veronica John and Kathleen Jeffers. The Petitioner Benjamin Exeter at paragraph 18 of his pleadings sets out the following matters:

“The Petitioner contends that the 1st Respondent conducted the counts in a partial and or improper manner by:

- (a) repeating the objections made by the agents of the 3rd Respondent and adopting them as his own;*
- (b) failing to note many of the objections of the Petitioner and/or his representatives;*
- (c) allowing mutilated ballots to be included in the counts but rejecting the same type of ballots in other polling divisions.*
- (d) saying on a telephone conversation that he 'preferred Mr. Straker (the 3rd Respondent herein) to come' in spite of the agents for the 3rd Respondent being present at the counts;*
- (e) asking the agents of the 3rd Respondent to buy him a drink while he purported to conduct the counts;*
- (f) failing to afford the Petitioner the opportunity to scrutinize the counterfoils generally and in particular in relation to over three hundred mutilated ballots for Polling Stations CL F and CLF1, as well as other documents such as ballot accounts.*

- (g) *in breach of Rules 42 (6) and (7) failed to properly consider the Petitioner's request for a recount and proceeded to purport to complete the final count;*
- (h) *repeatedly indicating that he was under pressure from the 4th Respondent and that he was anxious to complete the counts as he had to go to 'Government House'*
- (i) *proceeding to finalise the count in the absence of the Form 16 Statement of the Poll after Counting the Ballots for Polling Station CLI-1, in spite of the Petitioner's objections.*
- (j) *falling to properly consider and or accede to the Petitioner's request to recount the votes as provided for under Rule 42(6) in respect of:*
 - (i) *CLD-1: where the number of ballots used (485) exceeded the number of ballots received (480) from the First Respondent as certified by the presiding officer on the Form 16 Statement of the Poll after Counting the Ballots;*
 - (ii) *CLA-1: where there was no indication of the number of ballots received from the First Respondent on the Presiding Officer's Statement of the Poll after Counting the Ballots and the number of votes cast equalled the number of names on official list of electors used at the poll as certified by the presiding officer on the aforesaid Statement;*
 - (iii) *CLF: where all the ballots appeared mutilated and the 1st Respondent had refused sight of the counterfoils*
 - (iv) *and CLE: where there was 100% voter turnout based on the number of names on official list of electors as certified by the presiding officer on the Form 16 Statement of the Poll after Counting **the Ballots.**"*

[128] He also referred to the OAS Report exhibited to the witness statement of Shirilan Zita Barnwell under the rubric Partiality of the Returning Officer. Mr. Exeter further relied on the matters pleaded by Ms. Maia Eustace at paragraph 48 of her witness statement where she referred to two

unidentified men who came into the polling station ostensibly representing one of the 3rd Respondents namely Sir Louis Straker.

[129] She stated at paragraph 48.1 – 48.6

- i. The men and Mr. Gaymes conferred in whispers on about three (3) occasions, despite our objections, ceasing only when the Organization of American States (OAS) Observers arrived.
- ii. When Mr. **Gaymes'** cell phone rang he would have the men answer for him.
- iii. In more than one instance they too conferred with the caller(s)
- iv. On at least two(2) occasions when Ms. Morris-Cummings asked for closer inspection of a rejected ballot, Mr. Gaymes leaned over, shoved the ballot in her face, grunting as he did so, to the sniggers of the two men; ceasing only when the OAS Observers arrived.
- v. Mr. Gaymes asked one of the men to buy him some refreshment. The man returned with drinks for Mr. Gaymes, himself and his colleague, in spite of our objections. Mr. Gaymes asked rhetorically whether he was entitled to wet his throat.
- vi. In particular, one of the men who Mr. Exeter referred to as Nash seemed to be the arbiter of the Final Count, because whenever we objected, Mr. Gaymes deferred to him, including the odd time he instructed Mr. Gaymes to **'let them have that one man.'**

[130] Ms. Shirlan Zita Barnwell at paragraph 8 of her witness statement said that during the count Mr. Gaymes did not listen to their concerns or their objections but he entertained the interjections of Mr. Nash who at times was shouting. At no time did Mr. Gaymes ask Mr. Nash to be quiet or settle down even though Mr. **Nash's** behavior was very disruptive. She further said that Mr. **Nash's** behavior influenced Mr. **Gaymes'** decision to count the mutilated ballots.

[131] The Petitioner Lauron Baptiste in his pleadings set out the following:

The 1st Respondent ignored objections by the **Petitioner's** representatives in that

- i. He failed to note objections by the **Petitioner's** agents that counterfoils in polling division NW1 exceeded the ballots cast by 39 and that the excess counter foils could not be explained. When objected to by the **Petitioner's** agent the 3rd respondent replied "**I don't** have time for that I have my paper work to **do**".
- ii. The 2nd Respondent failed to note the objections of the **Petitioner's** agents regarding her breach of the secrecy of the ballot contrary to Rule 41(4) of the RPA
- iii. The 2nd respondent was openly biased throughout the voting procedure and in particular was very rude to one of the **Petitioner's** agents Mrs. Kay Bacchus-Browne when she attempted to replace an inside agent at polling division NW-1. She refused to let her replace the agent even though she was shown the relevant papers.
- iv. As some persons came to vote at NW-1 the 2nd Respondent would say loudly "**show** me your voting **finger**". This is a well known ULP slogan for the elections.

[132] At page 17 of the OAS report under the rubric Partiality of the Returning Officer, the report states:-

The bias of the Returning Officer towards the ULP candidate and agents was clear. During the period witnessed by the OAS Observers, the returning officer routinely ignored attempts by the NDP agents to gain his attention, responded to their concerns or objections in a dismissive or exasperated fashion, or complained that they were wasting his time. On the other hand, concerns voiced by the ULP agents were immediately addressed and in one particular instance converted by the Returning Officer into a new instruction for the counting process. It was notable that the instruction was revoked only after a lead ULP agent agreed that it should be.

[133] This is a very serious castigation and indictment against the electoral process. If the populace is to have confidence in the electoral process, elections must be free and fair. The right to vote is enshrined in the constitution and the citizenry in the exercise of that right, must not feel intimidated in any way. Partiality towards any party by an official performing an important function in an

election cannot be condoned. Free and fair elections conducted properly under the existing laws is a constitutional mandate in St. Vincent and the Grenadines and nothing must be done to affect public confidence in the impartiality of an election. The Court trusts that this condemnation will not go unnoticed.

[134] In the absence of any evidence from the 1st Respondent challenging the allegations made by Mr. Exeter and Ms. Eustace the Court must therefore accept their evidence. In relation to the matters set out in the pleadings of the Petitioner Lauron Baptiste, the Court does not accept such of the evidence of Ms. Cheryl Sutherland who said that upon making a request to the 1st Respondent Vil Davis, he responded, “*I **don’t** have time for that I have my work to **do.**” Further, the Court recalls that under cross-examination this witness said*

“I saw no Form 6 as prescribed in the RPA advertising the date, place and the time of the final count. “

However, under cross-examination Ms. Sutherland admitted to not knowing what a Form 6 was and went on to say:

*“**The only Form 6 I know is in school.**”*

[135] The Court has earlier in this judgment alluded to the evidence and request by Mrs. Kay Bacchus-Browne when she attempted to have an agent replaced shortly before polling time. The Court finds that the refusal was not unreasonable in the circumstances and cannot be considered as partiality towards the ULP. Was Ms. John rude towards Mrs. Kay Bacchus-Browne? This was evidence of Kendall Sandy, on the evidence there was an exchange between the parties, however the Court is unable to make a finding that the presiding officer was rude.

[136] The Court has addressed the allegations of Neleon Adams “**show me your voting finger**” and has rejected the evidence of this witness. Accordingly the issue of partiality does not arise here.

[137] Mindful of the allegations made against Mr. Gaymes and the presiding officers the crucial issue is whether the election was carried out substantially in accordance with the laws as to elections. In other words, would the man on the minibus going into Kingstown condemn the election as a sham or travesty in light of the evidence? The proper and applicable test must always be ... on the

known facts, would the ordinary and informed citizen condemn the election in the constituency of Central Leeward and North Windward? The Court thinks not. The Court cannot say that the evidence of partiality has affected the election to the extent that there was no real electing at all in those constituencies.

DISENFRANCHISEMENT OF DERRICK SMART

[138] The evidence is that the Presiding Officer Ms. John, refused to allow the voter Derrick Smart to deposit his ballot because she was of the view that he had taken a photograph of his ballot in the voting booth. The voter has denied that he took any photograph. This Court is not being asked to determine whether or not he took a photograph. The question is whether or not the presiding officer was correct in what she did.

[139] The Court has not found any rule which precludes a person from taking a photograph. It follows therefore that the presiding officer fell into error. There is, however, no evidence that she acted deliberately or with a malicious intent. She was genuinely of the view that the taking of a photograph was not allowed in the voting booth. The Court therefore adds the vote of Derrick Smart to the tally. Having done so, the result of the election is not affected.

THE VIDEO

[140] During the course of the trial the Court had the opportunity to view a video clip shot by Ms. Maia Eustace. It was taken at the final count at the Layou Police Station. The clip evidenced a boisterous exchange between the Petitioner Mr. Exeter, Mr. Gaymes and other persons present. The Court draws no conclusions from the video clip that would assist in resolving the issues for consideration.

THE LAW

[141] A good starting point is the onus of proof. Unlike Civil and Criminal proceedings, in election petitions, there is no burden of proof placed on either party. In Saifi v. The Governor of Brixton

Prison & the Union of India ²² the Court observed that the absence of a reference to any standard was **deliberate.**”It leaves the matter open and untrammelled by rigid evidential **consideration**”.

[142] At the core of the statutory provisions governing the conduct of Parliamentary elections in St. Vincent and the Grenadines is the intent of Parliament to ensure that the democratic will of the electors prevail. That the candidate representing the choice of the majority of the electors be returned as the duly elected member. To this end, Legislators have prescribed the manner in which the democratic will must be expressed. The following dictum in Re Tanjong Puteri Johore State Election Petition; Abdul Razak Bin Ahmad v. Datuk MD Yunos Bin Salaimon & Anor (1988) ML²³ is instructive:

*“To my mind; an election does not merely symbolize the **citizens’** right to free franchise but entails public participation in selecting the government of their choice through a process which not only guarantees absolute fairness, secrecy, impartiality and regularity but which also encompasses public trust and confidence in the manner in which the process is carried out. For these reasons, various legal guidelines have been enacted to regulate the formalities of an impartial election. Any serious departures from these procedures will strike at the very foundation of our free and democratic system of political representation and affect public confidence in the impartiality of **our election.**”*

[143] Under the common law, an election could be vitiated if the Court is satisfied that either of two grounds was present: there was no real electing at all or that the election was not really conducted or subsisting under election laws. In St. Vincent and the Grenadines, the Court is of the opinion and so holds that there are two(2) streams by which an election could be invalidated: under the common law and by operation of the enabling provisions of the (RPA).

[144] In Woodward v. Sarson the common law grounds were explained by Lord Coleridge, CJ by formulating two (2) specific questions. In respect of the first ground Lord Coleridge said:

²² [2000] EWHC QB 33 (21st December 2000)

²³ Lexis 545; (1988) ML, 111

*“As to the first, the tribunal should be so satisfied i.e. that there was no real electing by the constituency at all, if it were proved to its satisfaction that the constituency had not in fact had a fair and free opportunity of electing the candidate which the majority might **prefer.**”*

[145] As to the second ground, that is to say the election was not conducted under subsisting election laws at all, Lord Coleridge formulated the question in this way:

*“...**the** question must be in like manner, whether the departure from the prescribed method of elections is satisfied ... that the election was not an election under the existing **law...**”*

[146] Lord Coleridge provided examples of situations which would satisfy each of the grounds, to which he alluded. Examples of the first ground included the instances where the majority of electors were prevented from voting by general corruption or general intimidation or by the unavailability of the materials for voting according to law. Lord Coleridge also included fraudulent counting of votes or false declaration of numbers by returning officers.

[147] A stark example of an election which was “no real **election**” occurred in 1874, in the case of The Borough of Hackney²⁴. In that case, many polling stations had been closed for the entire day. As a result five thousand (5,000) people were unable to vote and the election was invalidated under Section 13 of the Ballot Act 1872.

[148] As to the second ground, Lord Coleridge, C.J. provided examples of an election not conducted according to law. An example provided by the Learned Lord Chief Justice was where, with the consent of the whole constituency, a candidate was selected by the tossing of a coin. Such election would be by the free will of the people, but not according to law. The Learned Lord Chief Justice had this to say:

*“...**it** is not enough to say that great mistakes were made in carrying out the election under those laws: it is necessary to be able to say that either willfully or erroneously, the election was not carried out under those laws, but under some other method.*

²⁴ [1874] 2 O'M & H Election petitions

[149] At length, the Learned Lord Chief Justice circumscribed the power of the Court, to declare an election void, in these words:

*“But if in the opinion of the tribunal the election was substantially an election by ballot then no mistakes or misconduct however great in the use of the machinery of the Ballot Act, could justify the tribunal in declaring the election void by the common law of **Parliament.**”*

[150] Accordingly the Learned Lord Chief Justice locked the jurisdictional door where there was a finding of substantial compliance. If there was substantial compliance, the Court would not be justified in declaring the election void.

[151] In the case of *Gunn v. Sharpe*²⁵, the failure of officials to stamp ballot papers constituted substantial non-compliance, since the error disenfranchised more than half of the voters. By contrast, the Court in *Borough of Drogheda*²⁶ found that there was substantial compliance even where polling stations were opened forty-five (45) minutes late since not a single voter had been prevented from voting and the whole community was polled out.

[152] In the case of *Fitch v. Stephenson and others*²⁷ the Petitioner was a defeated candidate at a local election. The first respondent was the returning officer for the election and the second, third and fourth respondents were the successful candidates. It was common ground that only 4930 of the 9099 votes cast in the election were counted for the purpose of declaring the result and it was not disputed that the failure to count the remaining votes did not affect the result. However, the petitioner contended that the failure to count what amounted to 45.8% of the votes constituted such an irregularity in the conduct of the election, that it could not be said to have been conducted substantially in accordance with the law as to elections, contrary to s 48(1) of the Representation of the People Act 1983. He issued an election petition. The respondents argued that there were procedural flaws in relation to the petition, which were not amenable to amendment, and thus, they contended the petition should be struck out.

²⁵ [1974] 2 All ER 1058

²⁶ [1874] 2 OM & H 252

²⁷ [2008] All ER (D) 13 (Apr)

[153] In the course of delivering her judgment Mrs. Justice Cox said:

“... The decided cases, including those which Lord Denning considered in Morgan v. Simpson, establishes that the Courts will strive to preserve an election as being in accordance with the law, even where there have been significant breaches of official duties and election rules providing the result of the election was unaffected by those breaches.”

[154] The Learned Judge then referred to the cases of Marshall v. Gibson²⁸ and Harris v. Gilmour²⁹. In the former case Colman J giving the judgment of the Court said as follows:

“The effect of section 48(1) of the 1983 Act is that an election will not be declared invalid merely because there has been a breach of official duty in connection with the election or of the rules by the returning officer or any other person. There cannot be a declaration of invalidity unless it appears either that the election was so conducted that there was substantial non-compliance with the law as to elections or that there was a breach of official duty or of the Rules which affected the result. It is clear now that the ‘result’ means the question which person or persons are elected as distinct from the number of votes cast for each person. Thus if the consequence of a breach of the Rules is that one or more of the candidates would have polled more or less votes than were recorded at the count, but the same candidate or candidates would still have been elected, the result will not have been affected and the election can only be declared invalid if it appears to the Court that the election was not so conducted as to be substantially in accordance with the law as to elections.

[155] That case was followed by Harris v. Gilmour in which a number of breaches of the Rules occurred in the conduct of the count and in dealing with the ballot papers following the count. Moore-Bick J., giving the judgment of the Court, described them as ‘**serious breaches of duty**’ on the part of the Deputy Returning Officer, but held nevertheless that they did not mean that the election must necessarily be declared invalid. It was possible on the evidence to ascertain with confidence exactly what happened to the ballot papers between the completion of the original count and the

²⁸ Divisional Court Judgment of 14 December 1995: Cited in Fitch v. Stephenson and others

²⁹ Divisional Court Judgment of 11 December 2000: Cited in Fitch v. Stephenson and others

recount. After referring to section 48 of the RPA and to the decision in *Marshall v. Gibson* the Court expressed itself satisfied that the election was conducted substantially in accordance with the law and that the breaches of the rule did not in the event affect its result.

[156] The locus classicus in the region on the true meaning of substantial compliance continues to be the judgment of Rawlins C.J. in *Quinn Leandro v. Jonas* where he had this to say:

*“An election court would not invalidate an election on the ground that there was substantial non-compliance with electoral law, pursuant to section 32(4) of the RPA, if the breach of elections procedure stipulated by law was trivial. There had to be such a substantial departure from elections procedure stipulated by law that would cause an ordinary person to condemn the election as a sham or travesty. A considerable departure was required. Accordingly, an election court would usually only invalidate an election on that ground if the judge was really satisfied that the breach was **serious.**”*

[157] Later on at paragraph 180 of the judgment he said:

“However, I think that, for good reason, the authorities seem to show that where there is evidence that includes statistical data and other relevant information from which a court may determine, even inferentially, that the breach did not affect the result, proposition (iv) is not to be applied without first attempting to determine whether the result was affected. This is because an election in a democratic society is for the purpose of determining the will of the voters. The court must seek to determine this as far as it is possible when an election is challenged.

The Learned Chief Justice then referred to the approach adopted by Newman J in *Considine v Didrichse*³⁰.

“Does it appear that the breach did not affect the result? The most relevant facts are the following. The majority was only seven. The number of Derringham Ward voters who received Marfleet ballot papers is not known. Seventeen persons have made statements saying that they did not receive ballot papers for the Derringham Ward. Another 68 voters did not initially receive ballot papers for the ward but then applied for them and received

³⁰ [2004]EWHC 2711(QB)

them. 779 voters were registered in Moorhouse Road and Wold Road, which were the roads most affected. An unknown number of voters did not apply for replacement papers because they understood that they did not need to do so. I can only conclude that the breach may well have affected the result and, therefore, that it does not appear that it did not affect it. Section 48(1)(b) is not satisfied. So the election must be declared void. I appreciate that this conclusion is one which is not to be reached lightly, because, apart from other aspects, an election is an **expensive matter.**”

[158] A sound statement to recall the proof that one is required to meet in order to succeed on a plea that breach of electoral law affected the result was provided by Newman J in Edgell v. Glover³¹ as follows:

“...**having** regard to the consequences of having an election, for the Court to conclude the result is affected there will need to be a preponderance of evidence supporting that **conclusion.**”

Newman J further said:

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

[159] In treating with section 48(1) of the 1983 Ballot Act, as an enabling section Newman J held that Section 48(1) can be translated and understood as creating a positive duty with the consequence that an election must be declared invalid by reason of any act or omission of the returning officer if it appears that the election was not so conducted as to be substantially in accordance with the law as to elections or that the act or omission did affect the result and the negative form of the section means that both substantial compliance with the law and no effect upon the result are required to save breaches of duty or the rules, from voiding the election. Section 33(3) of the RPA is *in pari material* to section 48(1) of the 1983 Ballot Act.

³¹ [2003]EWHC 2566 (QB)

[160] It follows therefore that section 33(3) of the RPA prohibits the Court from declaring an election invalid where the Court finds a breach or breaches of an official duty or of (The Rules) and it appears to the Court that the breach did not materially affect the result of the election.

[161] Succinctly, if there is substantial compliance with the law as to elections, but it can be shown that the acts or omissions affected the result of the election, the election will be voided. Similarly, if there has not been substantial compliance with the law as to elections, even if the acts or omissions have not affected the result of the election, the election will also be voided.

[162] In *Wayne Munroe and Others v. Maxie Cuffie and Others*³² Jamadar JA in the course of his judgment posed the question:

What is the proper interpretation to be given to subsection 35(3) of the ROPA [Section 33(3) of the (RPA)]?

He opined at paragraph 87:

In my opinion, the construction that is most legitimate is to limit its application to breaches of official duty, and to do so generally in relation to the Election Rules. That is to say, it is only in the limited and specific circumstances where what is alleged and proven to have occurred are acts constituting breaches of official duty as statutorily prescribed, that subsection 35(3) can be relied on to save an election from invalidity.

[163] Section 35(3) of the Trinidad and Tobago legislation uses the word “**materially**” whereas section 33(3) uses the adverb ‘**substantially**’. As the Learned Justice of Appeal said at paragraph 95....the adverb ‘**materially**’ introduces both qualitative and quantitative elements of significance. Thus, to ‘**not materially affect**’ means not significantly or appreciably or fundamentally or substantially or essentially have an effect on the election of a member of the House of Representatives.

CONCLUSION

[164] The Court has been taken through several authorities both by Mr. Stanley John QC for the Petitioner Exeter and Mr. Keith Scotland for the Petitioner Baptiste as they endeavored to

³² CA No. S 229 – 234 of 2015 & CA No. S 235 – 240 of 2015

persuade the Court that in light of the breaches the Court ought to find that there was substantial non-compliance. The Court has carefully analyzed all the authorities.

[165] The cases have all clearly established that the Courts will strive to uphold an election as being substantially in accordance with the law, even where there have been serious breaches of the Rules, or of the duties of the election officials provided that the result of the election was unaffected by those breaches.

[166] The voter turnout in Central Leeward was 76%. By any stretch of the imagination, that is considered very high. In *Halstead v Simon*³³, Redhead J. made the point that:

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

[167] Like Central Leeward there was an overwhelming expression of the will of the electorate in North Windward. There was a voter turnout of 81.5%. Mr. Montgomery Daniel gained 2713 of the votes cast as against the Petitioner Lauron Baptiste who gained 2390 votes. The high voter turnout in this Constituency is an expression of the will of the electorate and which the Court will not lightly disturb.

[168] The Court has already alluded to its findings of fact in the trial. The Petitioners have failed to satisfy the Court on direct creditable and compelling evidence on the many serious allegations that they have pleaded. As Redhead J said in *Halstead v. Simon*,

*“it is not the **Court’s** function to say who should win or lose. The **Court’s** function is to declare on the basis of the evidence and the law whether the result was affected or might have been affected by the **irregularities**”.*

³³ [1989] 1 OECS L.R.

[169] The Court holds that the breaches which took place during the General Election in the constituencies of Central Leeward and North Windward did not affect the result of the election from a qualitative or quantitative perspective.

[170] Accordingly, these two Petitions must fail on the basis that it appears to the Court that having considered all the evidence that the election was conducted substantially in accordance with the law as to elections. Further, the Court is satisfied that the acts and omissions either separately or collectively for which the 1st Respondent Winston Gaymes and other elections officials were responsible in connection with the election did not affect the result of the election in either of the two constituencies.

[171] The Petitions are hereby dismissed.

[172] On the question of costs, the Court applies the usual order that costs follow the event. The Petitioners will pay the Respondents costs, to be assessed if not agreed.

[173] The Court takes the opportunity to thank all counsel for their immeasurable assistance during the trial. This trial has been conducted by all the parties in the highest traditions of the Bar. The level of professionalism displayed is highly commendable. It augurs well for the legal profession in St Vincent and the Grenadines.

[174] This case has highlighted the need for proper training of persons who perform official duties in elections. That, the Court believes will alleviate the many irregularities which have arisen in this case.

Stanley John
High Court Judge (Ag.)

By the Court

Registrar

APPENDIX

MEE2..... Paragraph 61

MEE4..... Paragraph 61

FORM 7..... Paragraph 66

BX11..... Paragraph 77

BX14..... Paragraph 77

BX15..... Paragraph 77

STATEMENT OF THE POLL **CLE**..... Paragraph 88

NOTES OF MS. MAIA EUSTACE FOR **CLE**..... Paragraph 88

STATEMENT OF THE POLL **CLH**..... Paragraph 89

NOTES OF MS. MAIA EUSTACE FOR **CLH**..... Paragraph 89

STATEMENT OF THE POLL CLD-1..... Paragraph 90

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STATEMENT OF THE POLL **CLA**..... Paragraph 91

NOTES OF MS. MAIA EUSTACE FOR **CLA**..... Paragraph 91

STATEMENT OF THE POLL CLA-1..... Paragraph 91

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NOTES OF MS. MAIA EUSTACE FOR **CLF**..... Paragraph 91

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STATEMENT OF THE POLL **CLI**..... Paragraph 91

NOTES OF MS. MAIA EUSTACE FOR CLI..... Paragraph 91

ELECTION SCORE SHEET Paragraph 91

SZB3..... Paragraph 106