[2010] JMCA Civ 27

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 165/2009

BEFORE: THE HON. MR JUSTICE PANTON, P.
THE HON. MRS JUSTICE HARRIS, J.A.
THE HON. MR JUSTICE DUKHARAN, J.A.

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| BETWEEN | IAN HAYLES | APPELLANT |
| AND | DONOVAN HAMILTON | RESPONDENT |

**Abraham Dabdoub and Gayle Nelson instructed by Gayle Nelson & Co for the appellant**

**Ransford Braham, Mrs Nesta-Claire Smith-Hunter and Mrs Suzanne Risden-Foster instructed by Ernest A Smith & Co for the respondent**

**3, 4 February and 17 June 2010**

**PANTON, P.**

[1] This appeal is from the decision of Donald McIntosh J on 4 December 2009, dismissing an application by the appellant to strike out a fixed date claim form and particulars of claim filed by the respondent.

**The fixed date claim form**

[2] In view of the decision at which we have arrived, it is important to set out the claim in full. It is dated 19 August 2009, and was filed in the Supreme Court on 3 September 2009, by the respondent who was the unsuccessful candidate

for the constituency of Western Hanover, in the General Elections held on 3 September 2007. The following are the reliefs that are being sought:

"1. **A Declaration** pursuant to Section 44(2) of the ***Constitution of Jamaica***, that the Respondent, Ian Hayles, Member of Parliament being a citizen of the United States of America, has by virtue of that status taken an Oath and/or made a Declaration and/or Acknowledged allegiance, obedience or adherence to a foreign Power or State in contravention of Section 41 of the *Constitution of Jamaica* rendering him ineligible to continue to sit as a Member of Parliament of the House of Representatives.

2. **A Declaration** pursuant to Section 44(2) of the *Constitution of Jamaica*, that the Respondent, Ian Hayles, Member of Parliament being a citizen of the United States of America and the holder of a United States of America Passport numbered 140882861 issued by the Government of that country, has by virtue of that act and status acknowledged allegiance, obedience or adherence to a foreign Power or State in contravention of Section 41 of the ***Constitution of Jamaica*** rendering him ineligible to continue to sit as a Member of Parliament of the House of Representatives.

3. Further and/or in the alternative a **Declaration** pursuant to Section 44(2) of the **Constitution of Jamaica**, that the Respondent, Ian Hayles Member of Parliament being a citizen of the United States of America and/or the holder of a United States of America Passport numbered 140882861 issued by the Government of that country, is by virtue of his own act, under an acknowledgment of allegiance, obedience or adherence to a foreign Power or State in contravention of section 40(2)(a) of the ***Constitution of Jamaica*** which, by virtue of such status rendered him disqualified for election as a Member of the House of Representatives.

4. Further and/or in the alternative, a **Declaration** pursuant to the inherent jurisdiction of the Supreme Court as guardian of the ***Constitution of Jamaica*** that the Respondent, Ian Hayles Member of Parliament being a citizen of the United States of America and/or the holder of a United States of America Passport numbered 140882861 issued by the Government of that country, has by virtue of that status taken an Oath and/or made a **Declaration** and/or acknowledged allegiance, obedience or adherence to a foreign Power or State in contravention of Section 41 and/or Section 40(2)(a) of the ***Constitution of Jamaica*** rendering him disqualified to be elected as a Member of Parliament and/or rendering him ineligible to continue to sit as a Member of Parliament of the House of Representatives.

5. **An Order** that consequent on the Declarations made herein that the seat presently occupied by the Respondent as Member of Parliament in the House of Representatives for the Constituency of Western Hanover be declared vacant and that the Speaker of the House be so advised.

6. A further **order** that consequent on the Order herein that the said seat be declared vacant that there be a by-election in respect of the Constituency of Western Hanover.

7. Costs to the Claimant/Applicant to be agreed if not taxed."

**The particulars of claim**

[3] In the particulars of claim (para. 2), it is stated that the appellant herein was at the time of the General Elections a citizen of the United States of America and the holder of a United States of America passport, and that thereby he has infringed section 41 of the Constitution of Jamaica in respect of the qualifications

for sitting members of the House of Representatives. In paragraph 4 of the particulars, it is stated that at the time of nomination and at the time of the General Elections, he was a citizen of the United States of America and in possession of a United States of America passport, thereby infringing section 40(2)(a) of the Constitution of Jamaica governing the qualification for election of persons as Members of the House of Representatives. Paragraph 5 of the particulars states that section 44(2) of the Constitution of Jamaica empowers the Supreme Court to determine any question as to the qualification of members of Parliament, and that on a proper interpretation of that section the jurisdiction of the Supreme Court is unlimited.

[4] In paragraph 8 of the particulars of claim, there is an assertion of the right of the respondent herein, pursuant to section 44 of the Constitution, to seek constitutional redress in respect of the appellant's status as "dual citizen and holder of a United States of America Passport" and to seek an order declaring the seat held by the appellant vacant, with the consequence that a by-election be held to fill the vacancy.

[5] In an affidavit filed in support of the fixed date claim form, the respondent exhibited the copy of the front page of a passport which he says was issued by the government of the United States of America to the appellant. He swore that at the time the nominations and General Elections were held he was

not aware of the appellant's status in this regard, and that the information as to the passport came to his knowledge several months after the General Elections.

**The application to strike out the claim**

[6] In a notice of application for court orders, filed on 22 October 2009, the appellant sought an order for the claim to be struck out. He listed the following as his reasons for making the application:

> "(a) That the Supreme Court of Jamaica lacks jurisdiction to hear the claim;
>
> (b) That the claim discloses no cause of action;
>
> (c) That the claim is an abuse of the process of the Court; and
>
> (d) That the Claim, being substantially a claim which questions the election of a member of the House of Representatives, is not brought in accordance with the provisions of Section 44 of the Constitution of Jamaica and in accordance with the Election Petitions Act."

**The decision of the Supreme Court**

[7] In arriving at his decision, Donald McIntosh J reasoned that the inherent power of the court at first instance to strike out a suit should be exercised with great care and due diligence, and should only be exercised in clear-cut cases of abuse of process. He said that striking out is not encouraged by the constitution, is not in keeping with the main objectives of the Civil Procedure Rules, and does not meet readily with the approval of courts of appellate jurisdiction. Further, he

said, the power should not be exercised when there are vexed, diverse or serious issues of facts and or law to be decided. He saw the application as one in which there was an attempt to oust the jurisdiction of the court by impliedly suggesting that a statute supersedes the constitution. He expressed himself thus at page 15 of the record:

> "It cannot be thought that a statute so obliterates the rights of the citizen to petition the Court that that citizen cannot even bring his application to the Court. The Constitution gives the citizen the right to bring a petition before the court in any Constitutional matter. It is for the Court to decide whether that citizen should be allowed to go to the Constitutional Court. The right of the citizen to petition the Court for Constitutional Redress has not been summarily aborted or abrogated by any statute."

It was against this background that the learned judge dismissed the application to strike out the claim, with costs to the respondent to be taxed if not agreed.

**The grounds of appeal**

[8] In seeking to set aside the judgment of the learned judge, the appellant filed the following nine grounds of appeal:

> "(a) The Learned Trial Judge erred when he failed to recognize that on the Claimant's own pleadings, the Claimant, as a matter of law has no cause of action.
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> (b) The Learned Trial Judge erred when he failed to recognize that on the facts as pleaded the Claimant has failed to establish any cause of action.

(c) That the Learned Judge failed to give Counsel for the Applicant/Appellant his full and undivided attention and spent the entire time during the submissions of Counsel for the Applicant/Appellant reading through other unrelated files and doing other unrelated work thereby failing to comprehend and understand the nature of the application. By contrast, the Learned Judge gave the Claimant's Attorney-at-Law his full and undivided attention by reading her submissions while she was delivering same.

(c) (sic) That the Learned Judge erred in failing to give the applicant a fair hearing by an independent and impartial tribunal.

(d) That the Learned Trial Judge erred in law by failing to recognize that the application is grounded in the provisions of the Constitution in that the Supreme Court only has jurisdiction to question the election of a member of Parliament pursuant to the jurisdiction conferred on it by Section 44 of the Constitution of Jamaica which requires that the jurisdiction be exercised in accordance with the provisions of any law for the time being in force in Jamaica.

(e) That the Learned Judge erred in law in deciding that because the application engaged the Court for a day with Counsel making lengthy submissions and praying in aid volumes of authorities, the matter speaks for itself and begs for a hearing.

(f) That the Learned Judge erred in failing to recognize that Section 44 of the Constitution of Jamaica shall be exercised in accordance with any law for the time being in force in Jamaica, and subject to any such law.

(g) The learned Trail (sic) Judge erred in failing to recognize that the exercise of any jurisdiction

in relation to Section 41 of the Constitution of Jamaica must be exercised in accordance with the jurisdiction conferred on the Supreme Court in accordance with any law for the time being in force in Jamaica and that the Claimant failed to bring his Claim in accordance with the law for the time being in force in Jamaica.

(h) The Learned Trail (sic) Judge erred in failing to recognize that Section 41 of the Constitution of Jamaica is only applicable to Members of the House of Representatives who have been duly elected and seated and that the said Section 41 of the Constitution of Jamaica is not applicable to the Appellant/Respondent."

**Complaint as to inattentiveness on the part of the judge**

[9] Ground of appeal (c) was not argued. However, seeing that it was not abandoned, we instructed the Registrar at the conclusion of the hearing, to invite the comments of the trial judge on the substance of the ground as well as the affidavit filed by the appellant in support. In the affidavit, the appellant complains of inattention on the part of the learned judge while Mr Dabdoub was addressing him. According to the appellant, the learned judge was reading other unrelated files during Mr Dabdoub's submissions. This situation, said the appellant, caused Mr Dabdoub to pause on more than one occasion, only for him to be told by the judge to continue. Mr Dabdoub told the judge that he was awaiting his attention and the learned judge replied that he was listening and that he had already told counsel that he can do many things and listen at the same time. Thereupon, Mr Dabdoub said he wished for his lordship's undivided

attention. The appellant said that Mr Dabdoub continued his submissions while the learned judge "continued dealing with the files to his right which were unrelated to the application before him". On the other hand, according to the appellant, the judge gave his undivided attention to the submissions made by Mrs Smith-Hunter for the respondent.

[10] In a written response, copies of which the Registrar sent to the attorneys, the learned judge said that prior to the hearing both parties had filed written submissions which he had read in preparation for the hearing, he said that at the hearing he asked both parties if they wished to amplify their written submissions. Mr Dabdoub, he said, took over four hours to do so, repeating himself at times, whereas the respondent's attorney took less than half an hour to do her amplification. The learned judge was of the view that he afforded the appellant's attorney every opportunity to make his presentation, and he (the judge) "demonstrated great patience and tolerance and was even solicitous towards him throughout the hearing". In responding to the comments of the learned judge, the appellant has vigorously challenged the judge's statement as to the time allowed to his attorney and has placed it at no more than two hours. He has also challenged the judge's statement that written submissions had been provided by the respondent prior to the hearing.

[11] It is significant, I think, that the learned judge has not said a word as regards the complaint that he was reading other unrelated files during counsel's

submissions. It goes without saying that a judge should at all times concentrate on the matter at hand. No party can be expected to feel comfortable with the idea that the judge who is adjudicating on his case is engaged in reading an unrelated file while purporting to listen to submissions by that party's attorney-at-law. However skilful a judge may think he is, such a practice is unacceptable and must be eschewed. Were the instant case one which involved the trying of facts by McIntosh, J there would be no doubt that the matter would have had to be retried before another judge, seeing that he would not have been in a proper position to assess the demeanour and credibility of the person or persons testifying as to the facts. In the instant situation, the fact that the matter involves interpretation of particular sections of the law and the constitution and does not involve the assessment of evidence being given by witnesses viva voce does not excuse the behaviour of which the appellant complains. A judge is required "to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth": ***Jones v National Coal Board*** [1957] 2 All ER 155 at 159 g – per Denning, LJ.

[12] The Supreme Court of Jamaica has an enviable reputation when it comes to erudition and the determination of tough and uncommon legal and constitutional issues. Discourtesy is not, and has never been, a part of the intellectual armoury of the judges of that court. It therefore behoves all who are privileged to serve as judges to uphold the high standards that have been set since 1962.

**Length of hearing does not determine whether there is a case**

[13] Ground (e) arises from the following passage in the reasons for judgment handed down by the learned judge:

> "This court takes the common sense approach that when the matter engages the Court for a day, with Counsel making lengthy submissions and praying in aid volumes of authorities, the matter speaks for itself and begs for a hearing. If it is that this view is regarded as simplistic, one only has to look at the grounds of (sic) applicant and his reasons for seeking the orders in this application, which reads:
>
> 'The claimant is aware or ought to have reasonably been aware that the Defence of the Claim would involve complex legal issues and that any Application to strike out the Claim would of itself involve complex legal issues'.
>
> If that were not sufficient it is made evenmore (sic) explicit in paragraph 2 of that application just how controversial (sic) the applicant regards the issues." (p.14-15, record)

[14] I am surprised that the learned judge expressed these sentiments, given the fact that, sometimes, lengthy arguments and copious authorities do result in a matter being struck out or the making of a ruling of no case to answer. It is perhaps helpful to be reminded of the well-known words of Brightman J in ***Arenson v Arenson and another*** [1972] 2 All ER 939 at 946 f – h:

> "It is well established that the power of the court to strike out a statement of claim on the ground that it discloses no reasonable cause of action is one which should only be exercised in clear and obvious cases. A reasonable cause of action is one with some chance of success. If, on examination of the cause of action, the court considers that the action is certain to fail, the pleading

> should be struck out. The question whether a point of law is plain and obvious does not depend on the length of time it may take to argue it but whether, when argued, the answer is plain and obvious. *Rondel v Worsley* [1967] 3 All ER 993 took seven days to argue in the House of Lords; over 100 cases were cited; and it occupies over 100 pages of the law reports. Yet it was held that no reasonable cause of action was disclosed."

I am further surprised by the fact that it was thought justifiable to make this point a ground of appeal, when it ought to have been recognized that the learned judge had based his decision on the points mentioned earlier in the quotations from his judgment. After all, whatever the amount of time consumed in hearing the matter in the court below, and whatever the number of authorities cited then, this court has to examine all the relevant circumstances and the law in order to determine whether the learned judge erred in his decision. There is surely no merit in advancing this ground of appeal, as the result of the appeal cannot depend on the judge's unfortunate use of the words that have sparked this complaint.

**The real points on appeal**

[15] The main submission of Mr Abraham Dabdoub for the appellant was that the Supreme Court of Jamaica has no jurisdiction to adjudicate on a claim in respect of the validity of the election of a member of the House of Parliament, if the claim is filed after the expiration of twenty-one days of the date of the return made pursuant to section 49 of the Representation of the People Act. In the

instant case, the fixed date claim form was filed approximately two years after the elections were held and the return made. Hence, he argued, the claim is bound to fail and should be struck out without giving the parties the opportunity to be heard.

[16] The appeal requires consideration of sections 40, 41 and 44 of the Constitution, as well as the Election Petitions Act. It is therefore necessary at this stage to set out the relevant portions of these sections. Section 40 (2) (a) reads:

> "40. - (2) No person shall be qualified to be appointed a Senator or elected as a member of the House of Representatives who –
>
> (a) is, by virtue of his own act, under any acknowledgment of allegiance, obedience or adherence to a foreign Power or State"

The relevant portion of section 41 of the Constitution is subsection 1(d), which reads:

> "41. - (1) The seat of a member of either House shall become vacant-
>
> (a)
> (b)
> (c)
>
> (d) if he ceases to be a Commonwealth citizen or takes any oath or makes any declaration or acknowledgment of allegiance, obedience or adherence to any foreign Power or State or does, concurs in or adopts any act done with the intention that he shall become a subject or citizen of any foreign Power or State."

Section 44, so far as is relevant, reads:

> "44. - (1) Any question whether -
>
> (a) any person has been validly elected or appointed as a member of either House; or
>
> (b) ...
>
> shall be determined by the Supreme Court or, on appeal, by the Court of Appeal whose decision shall be final, in accordance with the provisions of any law for the time being in force in Jamaica and, subject to any such law, in accordance with any directions given in that behalf by the Chief Justice.
>
> (2) Proceedings for the determination of any question referred to in subsection (1) of this section may be instituted by any person (including the Attorney-General) and, where such proceedings are instituted by a person other than the Attorney-General, the Attorney-General if he is not a party thereto may intervene and (if he intervenes) may appear or be represented therein."

[17] The Election Petitions Act defines an election petition as "a petition complaining of an undue return or undue election of a member of the House of Representatives or a councillor of a Parish Council or the Kingston and St. Andrew Corporation, presented to the Supreme Court under the provisions of this Act."

Section 4 of the said Act reads:

"4. The following provisions shall apply to the presentation of an election petition -

(a) The petition shall be signed by the petitioner, or all the petitioners if more than one

(b) The petition shall be presented to the Registrar of the Supreme Court within twenty-one days after the return has been made of the member to whose election the petition relates, unless it question the return or election upon an allegation of corrupt practices, and specifically alleges a payment of money or other reward to have been made by any member, or on his account, or with his privity, since the time of such return, in pursuance or in furtherance of such corrupt practices, in which case the petition may be presented at any time within twenty-eight days after the date of such payment.

(c) Presentation of an election petition shall be made by filing it in the Registry of the Supreme Court.

(d) At the time of the presentation of the petition, or within three days afterwards, security for the payment of all costs, charges and expenses that may become payable by the petitioner -

(i) to any person summoned as a witness on his behalf; or

(ii) to the member whose election or return is complained of (who is hereinafter referred to as the respondent),

shall be given on behalf of the petitioner except where the petitioner is the Clerk of the House of Representatives or the Attorney-General.

(e) The security shall be an amount of five thousand dollars for a petition and shall be deposited in the Consolidated Fund to the credit of the petition to abide the order of the Court."

[18] As said earlier, the appellant is contending that on the expiration of twenty-one days after the return has been made pursuant to section 49 of the Representation of the People Act, an action of this nature cannot be entertained by the Supreme Court. In the written submissions by the appellant, it is put in this way:

> "By seeking to bring these proceedings, after the expiration of the 21 day mandatory period set forth in the Election Petitions Act, and in the form of a constitutional action, rather than by way of an election petition, the Respondent/Claimant seeks to bypass the express provisions of section 44 of the Constitution of Jamaica which expressly states in clear and unambiguous language that the Supreme Court's jurisdiction is exercisable in accordance with the provisions of any law for the time being in force in Jamaica and, subject to any such law, in accordance with any directions given in that behalf by the Chief Justice. That law is the Election Petitions Act which was enacted in 1885."

[19] Mr Dabdoub placed before us for consideration the historical development of election petitions, as he sees it. The theme has been, he said, that the courts have a limited time frame within which to consider whether a person has been

validly elected or not. He placed great store on the nineteenth century Privy Council decision in ***Theberge v Laudry*** (1876) 2 App. Cas. 102, a case from Quebec, Canada. He quoted the following from the judgment of the Lord Chancellor:

> "These two Acts of Parliament ... are Acts peculiar in their character. They are not Acts constituting or providing for the decision of mere ordinary civil rights, they are Acts creating an entirely new, and up to that time unknown, jurisdiction in a particular Court of the colony for the purpose of taking out, with its own consent, of the Legislative Assembly, and vesting in that Court, that very peculiar jurisdiction, which up to that time, had existed in the Legislative Assembly of deciding election petitions, and determining the status of those who claimed to be members of the Legislative Assembly. A jurisdiction of that kind is extremely special, and one of the obvious incidents or consequences of such a jurisdiction must be that the jurisdiction, by whomsoever it is to be exercised, should be exercised in a way that should as soon as possible become conclusive, and enable the constitution of the Legislative Assembly to be distinctly and speedily known."

[20] Mr Dabdoub contends that there is nothing in either the Election Petitions Act or section 44 of the Constitution of Jamaica that suggests an intention to depart from what he describes as "the principles laid down in ***Theberge v Laudry***", namely, that this special jurisdiction "should be exercised in a way that should as soon as possible become conclusive, and enable the constitution of the Legislative Assembly to be speedily and distinctly known". Mr Dabdoub goes further by submitting that there is nothing in the Election Petitions Act, the

Parliament (Membership Questions) Act, or the Constitution that suggests "that it was intended to allow a different procedure, additional to the petition procedure established by law, in accordance with the provisions of section 44 of the Constitution of Jamaica, by which a person could challenge the outcome of elections or the right of a member to sit in the House of Representatives". According to Mr Dabdoub, apart from the process of an election petition, there is no other method that is permissible for seeking a declaration as to whether a person has been validly elected.

[21] On the other hand, the respondent is contending that an election petition is not the only way by which a challenge may be mounted as to the validity of the election of a member of the House. According to the respondent, any question as to whether a person has been validly elected or is disqualified for election, is within the jurisdiction of the Supreme Court as provided by section 44 of the Constitution. Mr Braham contends that the Constitution does not provide any time limit. He said if someone is not qualified to be elected, it is possible to apply at any time to have the matter so declared. The Election Petitions Act, he said, is therefore irrelevant when considering a question for determination under section 44 of the Constitution. He further submitted that when section 44 is construed, particularly with reference to the phrase "in accordance with the provisions of any law for the time being in force", that law that is for the time being in force must facilitate, rather than hinder, the Constitution. Parliament,

he said, did not pass a law (The Election Petitions Act) to make lawful that which is unlawful under the Constitution.

[22] Both parties to this appeal cited in support of their arguments the case ***Regina v Soneji and Another*** [2005] UKHL 49, in which the central issue for determination by the House of Lords was whether the Court of Appeal (Criminal Division) of England had acted on the correct legal principle when it quashed two confiscation orders made by the Crown Court pursuant to the Criminal Justice Act 1988, as amended by the Proceeds of Crime Act 1995. The Court of Appeal had certified for the consideration of the House of Lords the following points of law of general public importance:

> "(i) Is the court's common law jurisdiction to adjourn confiscation proceedings subject to a mandatory time limit of six months from the date of conviction save where 'exceptional circumstances' are present?
>
> (ii) Once the court has assumed jurisdiction under section 71 of the Criminal Justice Act 1988, is its jurisdiction thereafter extinguished by failure to comply either with the provisions of section 72A of the Act or any common law requirements relating to the postponement/adjournment of the proceedings?"

[23] The appellant herein used this House of Lords opinion to say that non-compliance by a litigant as regards statutory time limits will result in the ousting of the jurisdiction of the courts. On the other hand, the respondent contended that the question is whether Parliament intended to leave potential petitioners without a remedy. Frankly, and with the greatest respect to the attorneys, I do

not see the relevance of this judgment to the point that is before this court for determination. However, as sometimes happen, judgments that do not relate to the point in question provide interesting reading, and the opinion grounding the judgment did not disappoint. Lord Steyn's opinion, which seems unfinished in the version cited to us, quoted healthily from the judgments in other cases. Of particular interest was the lengthy quote from Lord Hailsham's analysis in ***London & Clydeside Estates Ltd v Aberdeen District Council*** [1980] 1 WLR 182, 189E-190C. There, Lord Hailsham said:

> "When Parliament lays down a statutory requirement for the exercise of legal authority it expects its authority to be obeyed down to the minutest detail. But what the courts have to decide in a particular case is the legal consequence of non-compliance on the rights of the subject viewed in the light of a concrete state of facts and a continuing chain of events ...
>
> In such cases, though language like 'mandatory,' 'directory,' 'void,' 'voidable,' nullity,' and so forth may be helpful in argument, it may be misleading in effect if relied on to show that the courts, in deciding the consequences of a defect in the exercise of power, are necessarily bound to fit the facts of a particular case and a developing chain of events into rigid legal categories or to stretch or cramp them on a bed of Procrustes invented by lawyers for the purposes of convenient exposition. As I have said, the case does not really arise here, since we are in the presence of total non-compliance with a requirement which I have held to be mandatory. Nevertheless I do not wish to be understood in the field of administrative law and in the domain where the courts apply a supervisory jurisdiction over the acts of subordinate authority purporting to exercise statutory powers, to encourage the use of rigid legal classifications. The jurisdiction is inherently discretionary and the court is frequently in

the presence of differences of degree which merge almost imperceptibly into differences of kind."

[24] The idea that the Constitution is subject to the Election Petitions Act is misconceived as the Act is a creature of the Constitution. It can only entertain the exercise of powers as are allowed by the constitution. In this regard, it permits the challenging of an undue return or the validity of the election of a member of parliament. Section 4 of the Act, in imposing a time constraint in respect of the issuing of the petition, provides that it must be presented within twenty-one days after the return has been made in respect of the member of parliament to whom the petition relates. The legislature, in its wisdom, clearly contemplated that, in circumstances where the facts forming the basis for the challenge are known, the imposition of a time line was imperative.

[25] The constitution provides for the qualification of persons for election as members of the House of Representatives. There is no time limit specified in the Constitution for a challenge to be mounted in respect of someone who has been elected but did not have the necessary qualifications for such election at the time of the election. A time line not having been stipulated, one has to look at the intent and spirit of sections 40 and 44 of the Constitution. The intent of the legislature in this regard is clear. It intends to withhold qualification for election as a member of the House of Representatives from certain categories of persons. It follows therefore that the legislature also intends the preservation of the right to challenge the election of those who do not qualify, where the facts signifying

disqualification only emerged or became known after the time limit prescribed by the Election Petitions Act has expired. It should be open to any Jamaican who has good reason to question whether an elected member was qualified for such election to seek a declaration under the Constitution at any time, at least during the period of time for which the person has been elected. No one who is unqualified or disqualified should be allowed to sit in the House of Representatives if the lack of qualification is only known after the election.

[26] In the instant case, there is an allegation that the appellant was not qualified for election. The allegation is one that he is in a position to refute, and he may do so before trial, if he can. It ought not to be allowed to remain in the air without a decision. Furthermore, it borders on the heretical for the appellant to argue that in a matter of this nature, the Supreme Court of Jamaica does not have jurisdiction. Parliament does not belong to the Parliamentarians. It belongs to the people of Jamaica. Consequently, any Jamaican may at any time in a matter of this nature seek to have the Supreme Court rule on the question of the qualification of a member of the House of Representatives. There is good reason, by virtue of its history, to feel and accept that the Supreme Court will strike out frivolous suits, so there is no need for any undue apprehension on the matter. In the meantime, Parliament and the electoral authorities would do well to give serious thought to instituting a system whereby appropriate declarations as to qualification for election are made by candidates, with such declarations being backed up by appropriate penal sanctions for falsity.

[27] Mr Dabdoub submitted that it was not fair to confront the appellant with a fixed date claim form, challenging the constitutionality of his election, two years after the election. I am of the view that this is not simply a matter of fairness to the appellant. Lapse of time is of no moment, if there were disqualifying facts known to the appellant but they were not disclosed by him prior to the election. If there is any unfairness, it would be to the members of the public who would have been deceived into giving an unqualified individual the honour of representing them in Parliament. This is all the more reason why the matter ought to be aired. The learned judge was clearly right in refusing to strike out the claim and the particulars of claim.

[28] Earlier, I said that the case ***Regina v Soneji and Another*** was irrelevant to the issues in the instant matter on appeal. The same applies to ***Stewart v Newland*** [1972] 12 JLR 847, a case presided over by Rowe, J (as he then was) sitting in the Supreme Court. That matter was in the form of an election petition alleging illegal practices in connection with the conduct of the 1972 General Elections in the constituency of Eastern St. Thomas. At the time the facts giving rise to the challenge were known, and there was nary a word on the constitution in that case.

[29] There are two cases that were cited that merit mention. In ***The Attorney-General of Grenada v David and Another*** [GDA HCV 2006/0018

(12 September 2006)], the Attorney-General brought proceedings under the constitution of Grenada by way of a fixed date claim form to have the respondent David declared ineligible for nomination as a candidate in the General Elections held on 27 November 2003, and so his subsequent election was null and void and of no effect. There were supporting affidavits as to Mr David's acquisition of Canadian citizenship, with the assertion that he had sworn allegiance, obedience or adherence to a foreign power and so was disqualified for election. Mr David applied for the fixed date claim form to be struck out. The main ground on which he relied was that the High Court had no jurisdiction to entertain the claim since the special jurisdiction conferred by the constitution to determine the validity of the election of a member of the House of Representatives may not be invoked by fixed date claim form as employed by the Attorney-General. Incidentally, the grounds set out by Mr David in his application to strike out the fixed date claim form were substantially reproduced by the appellant Hayles in his application before McIntosh J. I make no comment on this coincidence except to say that Lord Hailsham's comments as to "rigid legal classifications", referred to earlier, come to mind.

[30] In paragraph 9 of the judgment of Benjamin J of the Supreme Court of Grenada and the West Indies Associated States, it is stated that the Attorney-General of Grenada conceded that had the facts alleged come to the knowledge of the Attorney-General in the context of an election, then the matter would properly have had to be brought by way of election petition. In other words, the

Attorney-General conceded that in the normal course of events a fixed date claim form may not be used – proceedings have to be by way of an election petition. Having made that concession, the result of the case was inevitable. And therein is the difference with the instant matter before us. In our jurisdiction, ***Dabdoub v Vaz and Others*** SCCA nos 45 and 47/2008 delivered 13 March 2009 is authority for proceeding by way of fixed date claim form.

[31] Quite apart from the concession by the Attorney-General of Grenada, it has to be noted that Benjamin J found it significant that the scheme devised by the relevant sections of the Representation of the People's Act emanates from the constitution itself. The jurisdiction created, he said, was special and sui generis. Disputes as to membership of the House of Representatives must be determined under that legislation, and it was not open to the Attorney-General to sidestep the legislative scheme. In the context of the relevant sections of the Representation of the People's Act emanating from the constitution itself, there is a fundamental difference between the legal and constitutional framework in Grenada and that in Jamaica. There is therefore no basis for applying the reasoning of Benjamin, J to Jamaica.

[32] Mr Dabdoub also relied on the Cayman Islands case ***Solomon and Others v Scotland and Another*** (Cause No 288 of 2009 – judgment delivered 24 July 2009). This was an action under the constitution of the Cayman Islands seeking a declaration that the defendants were not qualified to be elected, they

having failed to disclose their interests in certain public service contracts within the one month deadline prescribed by the constitution for the notification to the public of such interests. The question for determination was whether the plaintiffs were entitled to bring an action seeking such a declaration under the constitution, otherwise than by way of a petition under the Elections Law.

[33] Chief Justice Smellie, in reviewing the constitution and the Elections Law of the Cayman Islands, noted that it was immediately apparent that the Elections Law reproduces the categories of persons who may challenge the validity of an election as identified by section 23(3)(a) of the Constitution, except for the Attorney-General. He said that the exclusion was a helpful guide for construing the true nature of the statutory scheme. The learned Chief Justice found that the right of challenge invoked by the plaintiffs was not a personal right, but rather one to be exercised primarily in the public interest in the due conduct and process of elections. He concluded that the operation of the Elections Law, including its mandatory procedural rules, was an exclusive code for the bringing of electoral challenges by the categories of persons entitled to do so, other than the Attorney-General. In the final analysis, the Chief Justice held that the plaintiffs, not being the Attorney-General, are required to bring a challenge to the validity of an election, including as to the qualification of a candidate, by election petition under the Elections Petitions Law. However, he held, this does not affect the standing of the Attorney-General to bring a motion, if it is appropriate, in the public interest, irrespective of the time or other limitations

imposed by the Elections Law. This case does not help the appellant as it confirms that under the Cayman Islands' particular provisions a motion may be brought at any time to challenge the validity of an election so far as qualification of a candidate is concerned, albeit by the Attorney-General only. Indeed, this is a case that seems to support the position of the respondent except that the right to bring the motion is, in the case of the Cayman Islands, restricted to the Attorney-General.

**Section 41(1)(d) of the Constitution**

[34] It will be noted from the text of section 41 quoted above (see para. 16) that it deals with the seat of a member becoming vacant during his term of office. This means that there must be something allegedly done by the sitting member while in office which brings about the vacancy. There are no particulars that indicate that the member in this case (the appellant) has done any of the disqualifying acts since his election in September 2007. Consequently, paragraphs 1 and 2 of the fixed date claim form are misconceived. This means that there is merit in ground (h), and also ground (g) to the extent that it bears a relationship with ground (h). This would also mean that grounds (a) and (b) are made out so far as section 41 is concerned in that the learned judge erred by failing to recognize that on the respondent's own pleadings, as a matter of law there is no cause of action in this respect.

**Section 40(2)(a) of the Constitution**

[35] The declarations sought in paragraphs 3 and 4 of the fixed date claim form are for alleged contravention of section 40(2)(a) of the constitution by the appellant. The nature of the contravention has been particularized in paragraph 4 of the particulars of claim and in the affidavit of the respondent dated 19 August 2009 and filed in the Supreme Court on 3 September 2009. These declarations are clearly within the jurisdiction of the Supreme Court, and so these proceedings may be pursued.

**Summary of conclusions**

[36] (A) The particulars of claim filed with the fixed date claim form do not disclose or allege that the appellant did any disqualifying act while sitting as a member of the House of Representatives. Section 41 of the constitution is therefore irrelevant for the purpose of the instant proceedings. Consequently, paragraphs 1 and 2 of the fixed date claim form cannot be proceeded with.

(B) There is an allegation that section 40(2) (a) of the constitution has been breached. The Supreme Court has jurisdiction to deal with this. The respondent may therefore proceed with the action in respect of the declarations being sought in paragraphs 3 and 4 of the fixed date claim form.

(C) The learned judge was correct in refusing to strike out the claim.

**Disposition of the appeal**

[37] For the foregoing reasons, I would dismiss the appeal and award costs to the respondent, such costs to be agreed or taxed.

**HARRIS, J.A.**

I have read the draft judgment of Panton P and I am in full agreement with his reasons and conclusions.

**DUKHARAN, J.A.**

I too agree.

**PANTON, P.**

**ORDER**

Appeal dismissed. Paragraphs 1 and 2 of fixed date claim form are not to be proceeded with. The other paragraphs of the fixed date claim form are in order and may be proceeded with. Costs to the respondent to be agreed or taxed.