JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 125/2007

BEFORE: THE HON. MR. JUSTICE SMITH, J.A.
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE DUKHARAN, J.A. (Ag.)

BETWEEN	PHYLLIS MAE MITCHELL	APPELLANT
AND	DESMOND GREGORY MAIR	1ST RESPONDENT
AND	DERRICK MAIS	2ND RESPONDENT
AND	THE ATTORNEY GENERAL OF JAMAICA	3RD RESPONDENT

Abraham Dabdoub, Gayle Nelson, Mrs. Donna Scott-Mottley and Chumu Paris instructed by Scott, Bhoorasingh & Bonnick for the Appellant.

Ransford Braham and Ms. Daniella Gentles instructed by Livingston, Alexander & Levy for the 1st Respondent.

Mrs. Nicole Foster-Pusey and Ms. Danielle Archer instructed by Director of State Proceedings for the 2nd and 3rd respondents .

11th, 13th, 14th, 15th, 18th February, 2008 and May 16,2008

SMITH, J.A.

This is an appeal against an order of Mrs. Marva McIntosh, J. made on October 12, 2007 whereby the learned trial judge held that a Notice of Presentation of Petition dated October 1, 2007 and the accompanying

documents were not served on the 1st respondent in accordance with the provisions of the law and that the matter was not properly before her.

During the last General Election, the appellant and the 1st respondent represented the People's National Party and the Jamaica Labour Party respectively in the constituency of North East St. Catherine. The 1st respondent emerged victorious and was eventually sworn in as a Member of the House of Representatives.

On the 1st October, 2007 the appellant filed a Notice of Presentation of Election Petition and security for costs, a Fixed Date Claim Form (Election Petition) and an affidavit in the Supreme Court.

The Petition, which was filed pursuant to the Election Petitions Act, seeks an order that the 1st respondent was not qualified to be elected to the House of Representatives and that his nomination as a candidate for the constituency of North East St. Catherine was invalid, null and void as on nomination day he was a Venezuelan National.

The 2nd respondent is the Returning Officer for the said constituency. The 3rd respondent, the Attorney General, is sued pursuant to the provisions of the Crown Proceedings Act.

On the 2nd October, 2007 the 1st respondent was handed a sealed envelope whilst he was sitting in Parliament which was in session. This envelope

contained the abovementioned Notice of Presentation of Election Petition, the Fixed Date Claim Form (Election Petition) and the affidavit of the appellant.

On the 9th October, 2007 the 1st respondent's attorneys-at-law filed and served an Acknowledgement of Service of the said documents. On the 17th October, 2007 the 1st respondent's attorneys-at-law filed a Notice of Application for Court Order to strike out the Election Petition documents and/or their service on the 1st respondent. The Notice of Application to strike out was served on the appellant on the 22nd October, 2007 for hearing on the 31st October.

On the 31st October, 2007 affidavit evidence was put before the court below to the effect that the Election Petition documents were sent by registered mail on the 9th October, 2007 to the 1st respondent at the address given on his nomination paper. (See affidavit of Lescine Prendergast sworn to on the 23rd October, 2007).

The learned judge held that:

(i) The service of the documents on the 1st respondent in Parliament when it was in session was null and void.

(ii) The Election Petition was not served in accordance with the provisions of the law and, accordingly the matter was not properly before the court.

As stated at the outset, this appeal is against the above decision.

Grounds of Appeal

The grounds of appeal filed are as follows:

1. "The learned judge erred in stating that the Petition was not served in accordance with the law for the following reasons:

   (i) The Petition was presented to the Supreme Court on the 1st day of October 2007 and there was evidence in the Affidavit of Donna Scott-Mottley of the Petitioner's Attorney-at-Law seeking to have the Registrar give a date for first hearing which was not obtained until the 9th day of October 2007.

   (ii) There was evidence in the Affidavit of Lescine Prendergast that service was effected by registered post on the 9th day of October 2007 by addressing same to the 1st Respondent at the address given by the Respondent on his nomination paper.

   (iii) Section 6 of the Election Petitions Act specifically provides for service to be effected either by personal service or by registered post addressed to the respondent at the address given on his nomination paper."

2. "The Learned Judge ought to have rejected the 1st Respondent's contention that service by registered post was out of time in view of the provisions of the Civil Procedure Rules 2002 and in particular Rule 6.6 which states that "a document served by registered post in the jurisdiction in accordance with these rules shall be deemed to be served 21 days after the date indicated on the post office receipt.

The Learned Judge erred in accepting this contention in failing to realize that this contention is expressly negated by the express provision of Rule 2.2 (3) (c) of the Civil Procedure Rules 2002 particularly since Section 6 of the Election Petitions Act provides for a specific method of service by registered post to a specific address and therefore the Civil Procedure Rules 2002 do not apply in this regard."

3. "The Learned Trial (sic) further erred in not appreciating that The Election Petitions Act requires that service take place within ten (10) days of the date of presentation of the Petition and therefore the application of Rule 6.6. of the Civil Procedures Rules 2002 would render the express statutory provision in Section 6 of The Election Petitions Act in respect to service being effected by registered post absurd, nugatory and impossible to be effected in accordance with section 6 of the Election Petitions Act."

4. "The Appellant contends that Section 52 of the Interpretation Act is not applicable and that the Learned Judge further erred in placing any reliance on Section 52 of The Interpretation Act as such reliance must depend, in the first instance, on evidence from which the period of time for delivery in the ordinary course of post and there was no such evidence available to the Court."

5. "The Learned Judge erred in applying Section 52 of the Interpretation Act as the said Section 52 states clearly that it applies to delivery being deemed 'in the ordinary course of post' and registered post is not delivered 'in the ordinary course of post'."

6. "The Learned Judge further erred in applying Section 52 of the Interpretation Act as she failed to appreciate that once the Petitioner/ Appellant has done what is required by section 6, namely effect service by registered post in the manner and time set out specifically described in the said Section 6 of The Election Petitions Act, the Petitioner/Appellant cannot, should not and ought not to be penalized for any failure of the postal service in any particular case."

7. "The Learned Judge further erred in placing any reliance on the said Section 52 of the Interpretation Act as clearly the words in the said Section 52 of the said Act, 'unless a contrary intention appears', applies in these circumstances where Section 6 of the Election Petitions Act clearly sets out a specific method of post be 'registered post' and to a specific address derived from a specific document prescribed by law, namely, the address given by the Respondent on his nomination paper."

8. "If, which it is not admitted, the Civil Procedure Rules 2002 applies (sic) to these circumstances then the Learned Judge was wrong in not exercising her discretion to abridge the time set out in Rule 6.6 of the Civil Procedure Rules for the following reasons:

(i) The Appellant/Petitioner in effecting service, within ten days of the date of presentation of the petition, by registered post to the address of the 1st Respondent given on his nomination (sic) did all that is required of the Appellant/Petitioner to effect service within the time specified in Section 6 of The Election Petitions Act.

(ii) That the Court has an overriding objective to exercise its powers and discretion in order to ensure that, in the interests of justice, matters are disposed of justly and on their merits rather than on technicalities."

9. "The learned Judge erred in failing to appreciate that the Affidavit of Phyllis Mae Mitchell made it clear that a Notice of Presentation of Petition and the security together with a copy of the Petition was left addressed to the 1st Respondent at Gordon House, Duke Street, Kingston on Monday the 1st October 2007, a day when the House of Representatives was not sitting, and therefore leaving of same was in keeping with the Election Petitions (Service of Notices) Directions, 1974 Section 2 (b)."

These grounds embrace two (2) broad issues:

(1) Service of process in Parliament; and

(2) Service by registered mail

Service in Parliament

The appellant claims that on the 1st day of October, 2007 she sent sealed copies of the Election Petition documents to Gordon House, Duke Street, Kingston, in an envelope addressed to the 1st respondent. Although the petition had no date for first hearing, this was done, she said, with a view to bringing to the 1st respondent's attention the fact that an Election Petition had been filed against him.

In an affidavit sworn to on the 12th October, 2007 the 1st respondent swore that on the 2nd October, 2007 whilst he was seated in Parliament which was in session, one of the ushers of the House of Parliament placed an envelope containing the Election Petition documents on his desk in front of him. These documents, he said, were apparently copies of documents filed in the Supreme Court on the 1st October, 2007.

Section 30 of the Senate and House of Representatives (Powers and Privileges) Act provides:

> "Notwithstanding anything to the contrary, no process issued by any court of Jamaica in the exercise of its civil jurisdiction shall be served or executed within the precincts of either House while such House is sitting or through the President or the Speaker, the Clerk or any Officer of either House".

Section 48 (5) of the Constitution of Jamaica provides:

> "No process issued by any court in the exercise of its civil jurisdiction shall be served or executed within the precincts of either House while such House is sitting or through the President or the Speaker, the Clerk or any Officer of either House".

It is as clear as can be that the service of the Election Petition documents on the 1st respondent in Parliament whilst Parliament was in session was in breach of the above provisions. The intention of the appellant is, in my view, irrelevant. Such service is null and void and this cannot be relied on.

Counsel for the appellant sought to rely on Section 2 of the Election Petitions (Service of Notices) Directions 1974 which states:

> "2. Service of any notice required to be served under the provisions of the Election Petitions Law may be effected –
>
> (a) by delivering the notice to the person on whom it is required to be served, wherever it is practicable or
>
> (b) by leaving the notice at the usual or last known address of the person required to be served or at his address for service, stated in accordance with section 10 of the Election Petition Law, or
>
> (c) ..."

The appellant relied particularly on 2 (b).

Section 10 of the Election Petitions Act provides as follows:

> "10. The petitioner shall in his petition state his address for service within three miles of the Court House of Kingston. Similarly a respondent shall, within ten days after service on him of notice of the petition as aforesaid furnish an address for service within the distance aforesaid".

I need only state the provisions of section 10 to demonstrate that this section is not relevant to the issue in question. The appellant is asking the court to hold that by placing the documents in an envelope addressed to the 1st respondent and leaving it at Gordon House, Duke Street, Kingston, on a day when Parliament was not sitting, was proper service pursuant to Section 2 (b) (supra).

This submission is only tenable if "Gordon House, Duke Street, Kingston" could be described as the "usual or last known" address of the 1st respondent and it was shown that the documents were not delivered during a sitting of Parliament. I agree with Counsel for the respondents that the submissions of the appellant in this regard are untenable for the following reasons:

(i) The undisputed evidence of the 1st respondent is that the documents were delivered to him during the sitting of Parliament by an Usher.

(ii) It is the duty of the appellant to ensure that the documents were served in accordance with the law.

(iii) The claim that the "usual or last known address" of the 1st respondent was "Gordon House, Duke Street, Kingston" is, to say the least, unfounded and misconceived.

Waiver of Parliamentary Privilege

Counsel for the appellant submitted, alternatively, that the filing and serving of the acknowledgement of service by the 1st respondent constituted a waiver of his immunity. The short answer to this submission is provided by rule 9.5 of the Civil Procedure Rules 2002 (CPR). This rule provides that "a defendant who files an acknowledgement of service does not by doing so lose any right to dispute the court's jurisdiction". Rule 9.6 (2) provides that a defendant who wishes to dispute the court's jurisdiction must first file an acknowledgement of service. Rule 9.6 (3) gives a defendant forty-two (42) days to file an application setting out the nature of the challenge. Otherwise, a defendant will be treated as having accepted that the Court has jurisdiction.

Counsel for the respondents contended correctly, in my view, that the filing of the acknowledgement of service by the 1st respondent cannot be treated as a waiver of the privilege. Such a waiver could only arise if the respondent took no steps to challenge the court's jurisdiction.

Discretion to Dispense with Service

Mr. Dabdoub for the appellant further submitted, as a last resort I venture to say, that this was a fit and proper case for the court to dispense with service.

Rule 6.8 of the CPR provides:

> "(1) The court may dispense with service of a document if it is appropriate to do so.
>
> (2) An application for an order to dispense with service may be made without notice".

In this regard I must say that apparently there was no application under rule 6.8 before McIntosh, J. Indeed, there is no ground of appeal concerning the judge's refusal to dispense with service.

It seems that Counsel for the appellant is asking this court to exercise its own discretion. I agree with Mr. Braham that rule 6.8 may not be applied in a manner which would derogate from section 6 of the Election Petitions Act (EPA) which specifically requires that the Notice of Presentation of and a copy of the Petition shall within ten (10) days of the presentation be served on the

respondent by the petitioner. It seems to me that to dispense with the service of the Election Petition documents would derogate from Section 6 of the EPA. This is not permissible.

As regards an application for the dispensation of service, the English Court of Appeal in applying a rule similar to our rule 6.8 identified two different kinds of case – see ***Wilkey v BBC*** (2002) 4 ALL ER 1177. First, an application by a claimant who has not even attempted to serve a claim form in time by one of the methods permitted by the rules. In such a case the claimant is in effect seeking permission to serve the defendant out of time. Second, an application by a claimant who has in fact already made an ineffective attempt in time to serve a claim form by one of the methods allowed. Here, it is not in dispute that the defendant has in fact received and had his attention drawn to the claim form by a permitted method of service.

In referring to the second kind of case Simon Brown, L.J. said at page 1181 b:

> "In the circumstances of the second case the claimant does not need to serve the claim form on the defendant in order to bring it to his attention, but he has failed to comply with the rules for service of the claim form. His case is not that he needs to obtain permission to serve the defendant out of time in accordance with the rules, but rather that he should be excused altogether from the need to prove service of the claim form in accordance with the rules. The basis of this application to

> dispense with service is that there is no point in requiring him to go through the motions of a second attempt to complete in law what he has already achieved in fact".

In the instant case the appellant, by leaving the documents at Gordon House, did not attempt to use a permitted method of service. Section 30 of the Senate and House of Representatives (Powers and Privileges) Act prohibits service within the precincts of the House. The court cannot dispense with service where such a dispensation would in effect result in permitting that which is specifically prohibited by the law.

Further, as stated before, the dispensing discretion under 6.8 may not be invoked to supersede the clear requirements of section 6 of the Election Petitions Act.

Service by Registered Mail

According to the appellant it was not until the 9th of October, 2007 that his attorney-at-law was able to get a date from the Registry of the Supreme Court for the first hearing of the petition. On that same day the appellant's attorney-at-law sent the petition documents to the 1st respondent by registered post to the address stated in the respondent's nomination paper.

This was of course done pursuant to Section 6 of the EPA which provides:

> "**6.** Notice of presentation of a petition and the security (if any) accompanied by a copy of the petition shall, within ten days after the presentation

> of the petition, be served by the petitioner on the respondent.
>
> Service of the petition may be effected either by personal service or by registered post to the address of the respondent stated in the respondent's nomination paper."

The petition was filed in the Supreme Court on the 1st day of October, 2007. Thus by virtue of section 6 the petition documents ought to be served by the 11th October, 2007. The documents were sent by registered post on the 8th day of the 10-day limitation period. The question for the learned judge below was whether the documents were duly served the moment the mail was registered. The learned judge held that the petition documents were not served in accordance with the provisions of the law. By applying section 52 of the Interpretation Act the learned judge came to the view that the documents sent by registered mail on the 9th October, 2007 were unlikely to reach the designated destination in two days. Hence her conclusion that the documents were not duly served.

Before us, Mr. Dabdoub for the appellant argued that by virtue of Section 6 of the EPA the service was duly effected at the time of the posting of the registered mail addressed to the respondent in the manner prescribed. He submitted that section 52 of the Interpretation Act is not relevant.

Counsel for the parties all agree that an examination of the legislative development of the relevant sections of the Election Petitions Act will help to resolve this issue. In this regard, I find the written submissions of Mrs. Nicole

Foster-Pusey most helpful. The original section 6 of the Election Petitions Act CAP 107 (as expressed in the Laws of Jamaica in force on the 1st day of June, 1953 stated:

> "Notice of the Presentation of a petition and of the nature of the proposed security, accompanied by a copy of the petition, shall, within ten days after the presentation of the petition, be served by the petitioner on the respondent.
>
> It shall be lawful for the respondent, when the security is given or partly by recognizance, within ten days from the service on him of the notice, to object in writing to such recognizance, on the ground that the sureties or any of them are insufficient, or that a surety is dead, or that he cannot be found or ascertained from the want of a sufficient description in the recognizance, or that a person named in the recognizance has not duly acknowledged the same."

Section 9 (ibidem) provided:

> "Service of any notices required to be served shall be effected in accordance with the rules in force in the Supreme Court with reference to service."

In 1963 section 6 was amended by the insertion of the words "if any" immediately after the word "security". Section 9 was also amended to read:

> "Service of any notices required to be served shall subject to any direction given by the Chief Justice be effected in accordance with rules in force in the Supreme Court or in the Court of Appeal as the case may be with reference to service."(emphasis supplied)

Pursuant to the amendment, the Chief Justice in February, 1974 issued the Election Petitions (Service of Notice) Directions 1974. The next amendment to section 6 was made in February, 1997 by paragraph 6 of the Election Petitions (Amendment) Act 1997. By this Act the former provisions of section 6 were repealed and replaced with the current provisions which I will repeat for convenience.

> "6. Notice of the presentation of a petition and the security (if any) accompanied by a copy of the petition shall, within ten days after the presentation of the petition, be served by the petitioner on the respondent.
>
> Service of the petition may be effected either by personal service or by registered post to the address of the respondent stated in the respondent's nomination paper."

It was said that this amendment became necessary because of the difficulties experienced after the 1993 General Elections in serving various respondents with petitions within the limitation period of 10 days.

Before the 1997 amendment, section 6 only provided a time limitation for the service of the election petition documents. It was silent as to the method of service. The pre-1963 section 9 stated the method of service of notices and the 1963 amendment made the provisions of section 9 subject to any directions which may be given by the Chief Justice. We have seen that in 1974 the learned Chief Justice issued a set of directions. Thus the method of service set out in the 1974 directions were available at the time of the passing of the 1997 amendment.

The 1974 directions did not remove all the difficulties attendant on the service of a petition within 10 days after its presentation. On many occasions petitioners had to apply to the Court for substituted service. The 1997 amendment of section 6, which was enacted on the advice of the Electoral Advisory Committee, was intended to remove the difficulties encountered in serving evasive respondents. This amendment expressly provides two means of effecting service of the election petition documents. I agree with the submissions of Mrs. Foster Pusey that these provisions override the directions given by the Chief Justice in 1974. The special provisions of section 6 also supersede the general provisions of section 9 of the EPA in so far as they are inconsistent. The applicable principle is **specialia generalibus derogant.** Thus the new section 6 is the primary enactment and generally there will be no need to apply the directions given by the Chief Justice or the Rules of the Supreme Court.

The submissions of Mr. Braham and Miss Gentles for the first respondent are that whereas section 6 provides that service may be effected by personal service or by registered post, it does not provide for the mechanics as to how either method of service is to be carried out. Consequently, they contend that one is entitled to look to the rules of court for assistance. They refer to rule 5.3 of the CPR which provides for the method of personal service and rules 5.19 and 6.6 which prescribe the day on which a document is deemed to be served.

Rule 5.19 states:

> " (i) A claim form that has been served within the jurisdiction by prepaid registered post is deemed to be served, unless the contrary is shown on the day shown in the table in rule 6.6."

The election petition in the instant case would be the claim form (see section 24(3) of the EPA). Rule 6.6(1) reads (in part):

> "A document which is served within the jurisdiction in accordance with these Rules shall be deemed to be served on the day shown in the following table:

Method of service	**Deemed date of service**
Post	21 days after posting.
Registered Post	21 days after the date indicated on the Post Office receipt."

Counsel for the 1st respondent contend that although rule 5.19 permits rebuttal of the deemed date in respect of the service of a claim form (petition) it does not permit rebuttal in respect of the service of the Notice of Presentation of the Petition and security. Therefore, counsel argue, since rule 5.19 of the CPR does not apply to the Notice of Presentation of the Petition or security the deeming provisions of rule 6.6 of the CPR cannot be rebutted by evidence. Counsel rely on ***Godwin v Swinden BC*** [2001] EWCA Civ. 478 and ***Alderton v Clwyd County Council*** [2002]EWCA 933.

If the submissions of counsel for the 1st respondent are correct then pursuant to rule 6.6 the election petition documents which were posted on the 9th October, 2007 would be deemed to have been served on the 30th October, 2007 and , in the words of counsel, would be incurably flawed and void.

I cannot accept the submissions of counsel for the 1st respondent in this regard. As counsel for the appellant contends, an application of the deeming provision of rule 6.6 of the CPR 2002 would have the inevitable effect of rendering service by registered post within the 10-day limitation period of section 6 of the EPA impossible. In such a situation the only means of serving an election petition would be by personal service. The 1997 amendment of section 6 would be completely nugatory.

It should be noted that although section 24 (3) of the EPA provides that the CPR and rules of court shall apply to election petitions, it specifically states that they are "subject to the provisions" of the Election Petitions Act (EPA) and any directions given by the Chief Justice. Further, the subsection provides that the CPR and the rules of court shall apply to election petitions "so far as practicable".

It cannot, in my view, be reasonably contended that it is practicable to apply the provisions of rule 6.6 as stated above to section 6 of the EPA. I agree with Mr. Dabdoub that the application of rules 5.19 and 6.6 of the CPR in the manner contended by counsel for the 1st respondent would render the specific provisions enacted by Parliament for the service of election petition documents ineffective and impractical.

As Mrs. Foster-Pusey for the 3rd respondent correctly pointed out, the cases relied on by the 1st respondent, particularly ***Godwin v Swindon*** (supra) concerning the application of the deeming provision, related to matters with

limitation periods of three (3) years or more and claim forms with lives of 4 months or more. In addition the lives of the claim forms can be extended. In those circumstances, she submitted, to apply a deeming provision of 21 days after posting for the date of service is not impracticable or unworkable. It is a different issue, she continued, where a document has a limitation period of 10 days for service. The deeming provisions of rule 6.6 would never allow for the document to be served by post within the time contemplated.

Counsel for the 3rd respondent referred to section 24(3) of the EPA and submitted that it is clear that the substantive provisions of this Act ought to prevail and that the CPR 2002 apply only as far as is practicable. Mrs. Foster-Pusey submitted that the tension between the CPR and the EPA could be resolved by accepting the primacy of the latter as was done in ***Ahmed v Kennedy*** (2003) 2 All ER 440.

I think there is merit in the submissions of counsel for the 3rd respondent. In my judgment, in so far as the service of the election petition is concerned section 6 is first in the hierarchy of provisions; next is any direction given by the Chief Justice pursuant to section 9 of the EPA and last are the CPR Rules so far as they are practicable.

In this regard it may be useful to state the provisions of rule 2.2(3) (c) of the CPR:

> "(3) These rules do not apply to the following proceedings –
>
> a) ...
>
> b) ...

> (c) any other proceedings in the court instituted under any enactment in so far as rules made under that enactment regulate those proceedings."

Now that I have concluded that the deeming provisions of the CPR are not applicable to section 6 of the EPA, the next question is whether service is effected on the mere posting of the registered letter containing the documents, as Mr. Dabdoub submitted. Mrs. Foster-Pusey does not agree. She submitted that a petitioner who desires to serve the petition by registered post must post it in such a time as would allow for its delivery within the stipulated time. It is her contention that the Interpretation Act is relevant in ascertaining when mail sent by registered post is delivered. This she said is particularly so in the absence of a deeming provision within the EPA.

The burden of Mr. Dabdoub's submission is that Parliament enacted the present section 6 of the EPA with a view to providing specific methods of service in respect of election petitions. Once the Notice of Presentation of Petition and the security, together with copy of the Petition, was sent by registered post to the respondent at the address given on his nomination paper, then service was effected at the very moment of posting. He referred to section 2 (d) (ii) of the Election Petitions (Service of Notices) Directions 1974, (1974 Direction), and submitted that if service was not effected at the moment the registered mail was posted, then section 6 of the Act would be "redundant" in that Parliament would have enacted a provision which already existed. Section 2(d) (ii) of the 1974 Directions provides for service " by post directed to

the address specified..." whereas section 6 provides for service by registered post to the address stated. It is his view that Section 52 (1) of the Interpretation Act is not relevant to section 6 of the Election Petitions Act.

Section 52(1) of the Interpretation Act provides:

> "**52.**(1)Where any Act authorizes or requires any document to be served by post whether the expression 'serve', 'give, or 'send' or any other expression is used, then, unless a contrary intention appears, the service shall be deemed to be effected by properly addressing, preparing and posting a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post."

As I have stated on several occasions, section 6 of the EPA refers to registered post. Section 52 of the Interpretation Act speaks to post and ordinary course of post. We have seen that section 2(d)(ii) of the 1974 Directions refers to post. There can be no doubt that the provisions of the Interpretation Act apply to the 1974 Directions.

The Civil Procedure Code, that is the predecessor of the CPR 2002, had no deeming provisions as to the service of documents by post. If personal service could not be effected a claimant would have to apply for substituted service. In making an order for substituted service by registered post, the court would direct that the moment the letter containing the documents was registered, service was effected in accordance with the court order. Therefore, the time of service would be the registration of the letter. Mr. Dabdoub submitted, correctly in my view, that once the court made such an order that

would be a contrary intention and section 52 of the Interpretation Act would not apply.

It is not disputed that the mischief the legislature intended to cure by the enactment of the present section 6 of the EPA was that service of petitions was being evaded by the respondents making it difficult for the petitions to be served within the prescribed 10 day period under the then available procedure.

Section 52 of the Interpretation Act provides that "service shall be deemed to be effected by properly addressing, prepaying and posting a letter..." Section 6 of the EPA states that "service may be effected by personal service or by registered post to the address..." One must ask why should it be necessary to invoke the deeming provisions of section 52 of the Interpretation Act as to service of a petition when section 6 clearly states the manner in which service may be effected. If the Interpretation Act is applicable, would the mischief at which section 6 was aimed, be cured? Would it not be necessary in each case for the court to determine the time it would be delivered in the "ordinary course of post?" I am inclined to agree with the appellant's contention that the language of section 6 of the EPA shows a "contrary intention" and section 52 of the Interpretation Act does not apply.

Is the contention of counsel for the 1st and 3rd respondents that section 6 only states the method of effecting service but does not state the time when service is effected, correct ?. I think not. In my view section 6 provides a statutory method of serving the Notice of Presentation and copy of Petition so

that when the documents have been "served" as directed, it is not necessary to show that the addressee has received them. Once the service is effected within the time prescribed and in the manner stated such service is valid. Since the validity of service does not depend on receipt, the date of receipt is irrelevant. (See page 25 below- comment of Wilkin, J on Woodfall's Law of Landlord and Tenant, Vol. 2 para 22. 068.) If the contentions of the respondents were correct then in each case evidence would have to be adduced as to when the registered mail would be delivered in the "ordinary course of post." It seems to me that it would be difficult to determine the time at which a registered letter would be delivered in the "ordinary course of post" since a signature is necessary for its receipt. The interpretation of section 6 in the manner contended for by the respondents is fraught with many difficulties and would certainly not give effect to the intention of the legislature. There is no doubt that statutory provisions may lead to the position that a valid notice has been given even though the addressee does not know of the notice. The object of section 6 in providing that service may be effected by registered post to a specified address, is not to protect the right of the addressee to receive the notice. It is intended to assist the person who is obliged to serve the notice. This point was made by Slade L.J. in ***Galinski v McHugh*** [1988] 57 P &CR 359, 365.

The decision of the English Court of Appeal in ***Blunden v. Frogmore Investments Ltd.*** [2002] EWCA Civ 573 is instructive. The Court had to consider section 23(1) of the Landlord and Tenant Act 1927 which provides as follows:

> "Any notice, request, demand or other instrument under this Act shall be in writing and may be served on the person on whom it is to be served either personally, or by leaving it for him at his last known place of abode... or by sending it through the post in a registered letter addressed to him there..."

It is important to note that the words of section 7 of the English Interpretation Act 1978 are the **ipsissima verba** of section 52 of our Interpretation Act. At para. 34 of his judgment in the ***Blunden*** case Walker L.J made reference to ***Railtrack plc. v. Gojra*** [1998]1EGLR 63 and observed:

> "The case is significant for the citation by Wilson J (with whom Evans L.J agreed) of what Megaw L.J . had said in ***Chiswell v Griffon Land & Estates Ltd.*** [11975] 1 WLR 1181 1188-9:
>
> > "Section 23 of the Landlord and Tenant Act 1927 lays down the manner in which service of a notice can be effected. It is provided, as what I may call at any rate the primary means of effecting service, that it is to be done either by "personal" service or by leaving the notice at the last-known place of abode, or by sending it through the post in a registered letter, or (as now applies) in a recorded delivery letter. If any of those methods are adopted, they being the primary methods laid down, and, in the event of dispute, it is proved that one of those methods has been adopted, then sufficient service is proved. Thus, if it is proved, in the event of dispute, that a notice was sent by recorded delivery, it does not matter that that recorded delivery letter may not have been received by the intended recipient. It does not matter, even if it were to be clearly established that it had gone astray in the post. There is the obvious, simple way

> of dealing with a notice of this sort. But, as I think may be assumed for the purposes of this appeal, if the person who gives the notice sees fit not to use one of those primary methods, but to send the notice through the post, not registered and not by recorded delivery, that will nevertheless be good notice, if in fact the letter is received by the person to whom the notice has to be given. But a person who chooses to use that method instead of one of the primary methods is taking the risk that, if the letter is indeed lost in the post, notice will not have been given."

At para. 35 , Walker L.J referred to the following comment of Wilson J:

> "I agree with the tentative conclusion in ***Woodfall's Law of Landlord and Tenant,*** Vol. 2, para 22.068, that, since the primary methods of service do not depend on receipt, the date of receipt is irrelevant and, to take the third method that the notice is served — and given — on the date when it is sent by registered post or recorded delivery. When, however, as here notice is sent by a primary post instead of by a primary method, it is served — and given — on such a date, if any, as it is received. "

The above passages support the contention of Mr. Dabdoub that the notice of the presentation of the petition and the other documents were served and given on the date when they were sent by registered post pursuant to section 6 of the EPA. What I have said so far is sufficient to dispose of this appeal, however, because of the extensive submissions on the operation of section 52 of the Interpretation Act, I will address that issue.

The Operation of Section 52 of the Interpretation Act

It is the contention of Mrs. Foster-Pusey for the 3rd respondent that a petitioner who wishes to serve a petition by registered post must post it in such time as would allow for its delivery within the stipulated time. She relies on section 52 of the Interpretation Act and ***R v Appeal Committee of the County of London Quarter Sessions ex parte Rossi*** [1956]1All ER 670 at 676 and ***A/S Catherineholm v Norequipment Trading Ltd.*** [1972] 2WLR 149.

Exparte Rossi concerns an appeal from a magistrate to quarter sessions. On the 13th August, 1954 the date set for hearing, both parties, M& R attended, but R was not present when the case was called on and he was not represented. On an application made by M in the absence of R the case was adjourned sine die. On September 21, letters were sent by registered post to M & R giving notice that the hearing of the appeal had been fixed for September 28. The letter to R was addressed to him at his last known address, but was never delivered. It was returned marked "no response". On September 28, M attended the court. The appeal was heard in R's absence and a decision made against him. R applied for an order of certiorari to quash the order made by quarter sessions on the ground that although the letter was sent to him by registered post pursuant to section 3 (1) of the Summary Jurisdiction (Appeal) Act yet notice had not been given to him within that enactment and section 26 of the Interpretation Act, 1889, as the letter had returned undelivered.

Section 3(1) of the Summary Jurisdiction (Appeal) Act provided that:

> "... A notice required by this subsection to be given to any person may be sent by post in a registered letter addressed to him at his last or usual place of abode."

Section 26 of the Interpretation Act provided that:

> "Where an Act passed after the commencement of this Act authorizes or requires any document to be served by post, whether the expression 'serve'; or the expression 'give' or 'send' or any other expression is used, then, unless the contrary intention appears, the service shall be deemed to be effected by properly addressing , prepaying and posting a letter containing the document and unless the contrary is proved to have been effected at the time at which the letter would be delivered in the ordinary course of post."

The provisions are identical to our section 52. Denning L.J. (as he then was) after stating that it had to be proved that R had, in due course, been given notice of the date, time and place of the hearing, continued (p.675 c):

> "This could be done by proof that a notice had been sent to him in good time by post in a registered letter which had not been returned, for it could then be assumed that it had been delivered in the ordinary course of post see the Interpretation Act, 1889, s. 26. When, however, it had appeared that the letter had been returned undelivered, then it was quite plain that Mr. Rossi had not been given notice at all of the date, time and place of the hearing. In short service had not been effected; and the court should not have entered on the hearing at all."

At page 676 C & D he concluded:

> "To sum up, when service of process is allowed by registered post, without more being said on the matter, then if the letter is not returned, it is assumed to have been delivered in the ordinary course of post and any judgment or order by default, obtained on the faith of that assumption is perfectly regular"

Morris L.J. had this to say (page 679A-B):

> "Applying the provisions of the Interpretation Act 1889, s. 26, since no contrary intention appears from the Act of 1933, the sending of the notice to Mr. Rossi was deemed to be effected by properly addressing, prepaying and posting the letter which contained the document. Then by the concluding words of section 26 the sending of the notice was deemed, unless the contrary was proved to have been effected at the time at which the letter would have been delivered in the ordinary course of post. Here however, the contrary was proved. It was proved not merely that the letter was not delivered in the ordinary course of post but that the letter was not delivered at all. Service cannot in this case be deemed 'to have been effected at some particular time i.e. in the ordinary course of post: service was proved not to have been effected at all. When considering the giving of a notice of a hearing of an appeal the element of time is clearly of importance; the notice must be given at such a time as will enable a party to be present at a hearing."

Thus the object with which the document was sent is of great importance in construing the particular enactment in question. In ***exparte Rossi*** Parker LJ had this to say concerning section 26 of the Interpretation Act, 1889 (681 A,B & C):

> "The section it will be seen is in two parts. The first part provides that the dispatch of a notice or

> other document in the manner laid down shall be deemed to be service thereof. The second part provides that unless the contrary is proved, that service is effected on the day when in the ordinary course of post the document would be delivered. This second part therefore, dealing as it does with delivery comes into play and only comes into play in a case where under the legislation to which the section is being applied the document has to be received by a certain time. If in such a case 'the contrary is proved' i.e. that the document was not received by that time or at all, then the position appears to be that, though under the first part of the section the document is deemed to have been served, it has been proved that it was not served in time.
>
> Accordingly, the question is whether s. 3(1) of the Act of 1933 on its true construction provides that notice must be given within a certain time, and whether that time relates to receipt or merely to dispatch the notice. Notice is to be given in due course, and, in its context, this must mean that it is to be given in a reasonable time after the hearing is fixed. But does this reasonable time apply to the receipt of the notice or merely to the dispatch of the notice?... Each case must depend on the exact words used in the legislation in question and on the object with which the document is sent."

Applying the analysis of Parker L.J., the question is whether on a true construction of section 6 of the EPA the 10 day period within which notice must be served relates to the receipt or merely to the dispatch of the notice. As I have stated before Section 6 of the EPA lays down the manner in which service may be effected. Personal service and service by registered post are the primary means of effecting service. Once any of those methods is adopted, then sufficient service is proved. It does not matter that the letter may not have

been received by the intended recipient – see the ***Chiswell*** case (supra). Accordingly, the 10 day period within which notice must be served relates to the dispatch of the notice and not to its receipt. Thus the second part of section 52 of the Interpretation Act does not come into play.

Another case cited by Mrs. Foster-Pusey is ***A/S Catherineholm v Norequipment Trading Ltd.*** [1972] 2 WLR 1242. In this case a specifically endorsed writ was sent by first class prepaid post to the registered office of the defendant company. The company had moved office and had asked the post office to redirect correspondence but had not notified the companies registrar as required by law. By the time when the letter would have been received "in the ordinary course of post" the premises were derelict. The letter was not returned to the plaintiff. Judgment was entered in default. The issue was whether or not the defendants were entitled to have the judgment set aside as of right on the ground that the defendant was not served.

The relevant statutory provisions were section 437(1) of the Companies Act 1948 and section 26 of the Interpretation Act 1889. Section 437 (1) states:

> "A document may be served on a company by leaving it at or sending it by post to the registered office of the company."

Section 26 of the English Interpretation Act is identical to section 52 of its Jamaican counterpart.

Lord Denning M.R., after observing that section 26 falls into two parts, said (at page 1246H):

> "In this case we are only concerned with the first part, namely the fact of service not with the second part, that is, the time of service. The fact of service is deemed to be effected by properly addressing, preparing and posting the letter. That was done. So service was effected quite regularly..."

Later the learned Master of the Rolls said (and this is what Mrs. Foster- Pusey relies on) page 1247c:

> "Accordingly when the plaintiff sends a copy of the writ by prepaid post to the registered office of the company, and it is not returned – and he has no intimation that it has not been delivered- it is deemed to have been served on the company and to have been served on the day on which it would ordinarily be delivered."

In considering the effect of section 52 of the Interpretation Act on section 370 of the Company's Act, which is identical to section 437(1) of the English Act , this Court in ***A.C.E. Betting Company Ltd. v. Horseracing Promotions Ltd.*** SCCA Nos. 70 & 71 of 1990 accepted and applied the ***Catherineholm*** case. These two cases concerned the service of a Writ. As Morris LJ and Parker LJ said in ***exparte Rossi***, the object with which the document is sent is important in determining whether the mere dispatch of the notice in the manner prescribed shall be deemed to be service thereof or whether service shall be deemed to be effected on the day when, in the ordinary course of post, the document

would be delivered, unless the contrary is proved. This will involve the construction of the relevant legislative provisions. In the words of Parker L.J. each case must depend on the exact words used in the legislation in question and the object with which the document was sent.

Finally, another case referred to by Mrs. Foster-Pusey is ***Yusuf Abdul Rahman v Abdul Ajis Bin Abdul Majeed et al*** in the High Court in Sabah and Sarawak (Malaysia) Elections Petition Nos. 20-26-1 and 20-26-2 of 1996. In that case the Court examined rule 15 of the Malaysian Election Petition Rules which reads:

> "15. **Notice of petition and copy of petition to be served on respondent.**
>
> Notice of the presentation of the petition, accompanied by a copy thereof, shall, within fifteen days of the presentation of the petition, be served by the petitioner on the respondent. Such service may be effected either by delivering the notice and copy aforesaid to the advocate appointed by the respondent under rule 10 or by posting the same in a registered letter to the address given under rule 10 at such time that, in the ordinary course of post, the letter would be delivered within the time above mentioned, or if no advocate has been appointed, or no such address given, by notice published in the Gazette or in a newspaper circulating within the constituency or electoral ward in which the election is held, or posted on the notice board of the High Court in the State in which that constituency or electoral ward is situated, stating that such petition has been presented, and that a copy of the same may be

> obtained by the respondent on application at the office of the Registrar."

The Malaysian Court interpreted this rule to mean that one of the methods of serving the notice of the election petition was by posting the notice in a registered letter to the address given at such time that, in the ordinary course of post, the letter would be delivered within the time specified.

Counsel for the 3rd respondent contends that this case "illustrates that it is not unreasonable to contemplate that registered mail is delivered within the ordinary course of post." It further illustrates, she says, that "the rule concerning the ordinary course of post can be applied to matters concerning election petitions." I must confess that I find it difficult to appreciate how a registered letter can be delivered in the "ordinary course of post" since, as I said before, the signature of the addressee is necessary for its receipt. What is important to note is that the language of rule 15 makes it abundantly clear that the 15 day period within which the notice must be served relates to the delivery of the notice and not merely to its dispatch . The language of this rule is in a striking contrast to that of section 6 of the EPA.

Conclusion

1. Service of the election papers in Parliament while in session is invalid and void.

2. By virtue of rule 9.5 of the CPR, the acknowledgement of service by the 1st respondent did not constitute a waiver of the irregularity in the service of the notice or of the privilege.

3. The discretion to dispense with service under rule 6.8 may not be invoked to supersede the clear requirements of section 6 of the EPA.

4. In my judgment, it is not necessary to invoke the deeming provisions of section 52 of the Interpretation Act in determining the validity or otherwise of service pursuant to section 6 of the EPA.

5. Section 6 of the EPA provides the primary method of service.

6. On a true construction of section 6 of the EPA the notice of presentation of the petition and that other documents were served and given on the date when the letter containing them was dispatched by registered post. ***Blunden v Frogmore Investments Ltd.*** (supra)

7. If section 52 is applicable, the second part thereof would not come into play, since the time within which the notice must be served under section 6 relates only to its dispatch and not to its receipt – ***Exparte Rossi*** (supra).

8. The learned judge erred in applying the deeming provisions of the second part of section 52 of the Interpretation Act.

Accordingly, I would allow the appeal.

HARRISON, J.A:

Introduction

1. This is an appeal from an order made by Mrs. Justice Marva McIntosh whereby she found that the Notice of Presentation of an Election Petition and of Security, Fixed Date Claim Form (Election Petition) and Affidavit of Phyllis Mae Mitchell ("the Appellant") were not served in accordance with the Civil Procedure Rules 2002, and the provisions of the Election Petitions Act (in particular Section 6 of the said Act).

2. The 1st Respondent contends in an amended Notice of Application that:

> (i) the election documents were delivered to him in a sealed envelope addressed to him at Gordon House during a sitting of Parliament which was in breach of section 30 of the Senate and House of Representatives (Powers and Privileges)Act; and
> (ii) that the purported service of the said documents by registered post was invalid, void and of no effect, they having been served out of time and contrary to section 6 of the Election Petitions Act.

3. The two major issues which therefore arise in this appeal are: (i) whether the documents were effectively served on the 1st respondent at Parliament (Issue 1); and (ii) whether service was properly effected by registered post (Issue 2). These two issues depend on the construction of section 6 of the Election Petitions Act, section 30 of the Senate and House of Representative (Powers and Privileges) Act and section 52(1) of the Interpretation Act. It is not in dispute that the Fixed Date Claim Form (the

Election Petition) and Notice of Presentation of Election Petition were filed in the Supreme Court on the 1st October 2007.

The legislative provisions

4. Section 6 of the Election Petitions Act provides as follows:

> "6 - Notice of the presentation of a petition and the security (if any) accompanied by a copy of the petition shall, within ten days after the presentation of the petition, be served by the petitioner on the respondent".
>
> Service of the petition may be effected either by personal service or by registered post to the address of the respondent stated in the respondent's nomination paper.

5. Section 30 of the Senate and House of Representative (Powers and Privileges) Act states:

> "30 - Notwithstanding anything to the contrary, no process issued by any court of Jamaica in the exercise of its civil jurisdiction shall be served or executed within the precincts of either house while such House is sitting or through the President or the Speaker, the Clerk or any officer of either House.

6. Section 52(1) of the Interpretation Act provides:

> "52 (1) - Where any Act authorises or requires any document to be served by post whether the expression "serve", "give" or "send" or any other expression is used, then, unless the contrary intention appears, the service shall be deemed to be effected by properly addressing, pre-paying and posting a letter containing the document,
> and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post."

Issue No. 1

7. The Appellant deposes in her affidavit sworn to on the 2nd day of November 2007 that a sealed copy of the Fixed Date Claim Form along with the other required documents for service, were sent to Parliament in an

envelope addressed to the 1st Respondent in order to bring to his attention the fact that an Election Petition had been filed against him. She contends that the documents were sent to the 1st Respondent on the 1st October 2007, at a time when Parliament was not sitting and that they were left in a letter box marked "M" in which mails and other correspondence would be placed for parliamentarians whose surnames begin with the letter "M".

8. The 1st Respondent contends however, that he had received the said documents from an Usher who works at Gordon House, on October 2, 2007 during a sitting of Parliament. He subsequently filed and served an Acknowledgement of Service of the Petition on the 9th October 2007.

9. Mr. Dabdoub for the Appellant submits that the Appellant had complied with section 2(b) of the Election Petitions (Service of Notices) Directions 1974, which provides that the service of election documents may be effected by leaving the notice at the usual or last known address of the person required to be served or at his address. He argues that the last business address of the 1st Respondent is Gordon House so there was proper service. I disagree with these submissions for the simple reason that there is no evidence supporting the contention of the Appellant apart from her mere 'say so', that a letter was placed in a letter box at Gordon House. For my part, I find no merit in this submission.

10. What is abundantly clear, however, is that there is uncontradicted evidence that the Election Petition, Notice of Presentation of the Petition and affidavit in support, were handed to the 1st Respondent by an Usher during

the sitting of Parliament. In my judgment, this service is invalid and is in breach of section 30 of the Senate and House of Representative (Powers and Privileges) Act.

11. It is also submitted by Mr. Dabdoub that since the 1st Respondent had filed an acknowledgement of service of the election petition documents and had given no notice of his intention to bring any action to set service aside, he was deemed to have waived the privilege provided for members of parliament in section 30 (supra).

12. I do agree with Mr. Braham, Counsel for the 1st Respondent, that the issue of waiver cannot arise. The clear intention of the provisions of the Constitution and the Senate and House of Representative (Powers and Privileges) Act is to protect parliament and its operations while the House is sitting. Section 30 (supra) also makes it abundantly clear that "Notwithstanding anything to the contrary, no process issued by any court of Jamaica in the exercise of its civil jurisdiction shall be served or executed within the precincts of either house while such House is sitting ...". It means therefore, that an acknowledgement of service cannot amount to a waiver of the protection given by statute. It does not matter if the respondent failed to file process indicating that service would be challenged. In the circumstances, the 1st Respondent would not and did not lose any right to dispute the court's jurisdiction.

Issue No. 2

13. This issue is concerned with whether the 1st Respondent was effectively served by registered post on October 9, 2007. This depends on how one construes section 6 of the Election Petitions Act which provides:

> "6 - Notice of the presentation of a petition and the security (if any) accompanied by a copy of the petition shall, within ten days after the presentation of the petition, be served by the petitioner on the respondent.
>
> Service of the petition may be effected either by personal service or by registered post to the address of the respondent stated in the respondent's nomination paper."

14. There is unchallenged evidence that Lescine Prendergast had sent the letter containing the relevant documents by registered post to the 1st Respondent on October 9, 2007. The envelope bore the address of the 1st Respondent and was sent to Dover Castle District, Redwood P.O, St. Catherine. This was the address provided by the 1st Respondent in the nomination papers and was therefore in compliance with section 6 of the Act.

15. On behalf of the Appellant, Mr. Dabdoub submits that in interpreting section 6 of the Act, words must be given their ordinary meaning in order to avoid any ambiguity. He submits that the word "effected" mentioned in section 6, must be given its ordinary meaning. He referred to the New Webster's Thesaurus Vest Pocket Edition which defines the word "effected" as follows:

> "achieved, accomplished, attained, completed, concluded, consummated, done, executed, finished, fulfilled, performed and realized."

16. He submits that if the ordinary meaning of the word is ascribed, then it is clear that Parliament intended that service would be "achieved, accomplished, attained, completed, consummated, done, executed, finished, fulfilled, performed and/or realized" once the envelope containing the petition was addressed in the manner prescribed in Section 6 of the Act, and sent by registered post to the 1st Respondent within the ten days after presentation of the petition. He submits that in these circumstances section 52(1) of the Interpretation Act is not relevant in the present case.

17. Mr. Dabdoub further argues that one should bear in mind the mischief that the Electoral Advisory Committee of Parliament intended to cure. He said that the amendment to section 6 of the Act in 1997, had introduced service by registered post as an alternative to personal service thereby making it easier to effect service since it was difficult at times to effect personal service. It is clear, he said, that service was properly effected from the moment that the petition was registered to the respondent at the address given by him on his nomination paper. He submits that if Parliament meant that the registered letter is deemed to be received during the normal course of post it would have said so since it provided for service by "registered post" and not "ordinary post".

18. For the 1st Respondent, Mr. Braham submits that service by registered post has always been treated as a two part process which includes the dispatch of the documents and the receipt of the documents or the deemed receipt of the documents. Some support for that submission was said to be

found in ***Austin Rover Group Ltd v Crouch Butler Savage Associates (a firm) & Others*** [1986] 3 ALL ER 50, a case decided in the English Court of Appeal. That case turned on the true construction of the phrase 'sending by post' where it appears in RSC Ord. 81.

19. It is true Mr. Braham said, that the wording of the provisions in the **Austin Rover** case is somewhat different from that used in section 6 of The Election Petitions Act but he submits that dicta in the case could be applied generally.

20. Mr. Braham also submits that "The Supreme Court Practice 1988" (The White Book) states that service of any document by virtue of section 5 may be effected by post. He argues that the Editors' comments which follow thereafter, do not suggest that the use of the word "effected", permitted service to be completed by mere posting. Rather, he said that the Editors have indicated that the provisions of the Interpretation Act, deem service to be done in the usual course of post. He submits that the use of the word "effected" in section 6 of the Act, does not change the nature of service by post and was not intended to do so.

21. Mrs. Foster-Pusey, for the 2nd and 3rd Respondents, submits that it was clear from the authorities, that service by mail is not complete by merely posting the letter but is complete when delivered or deemed to be delivered during the ordinary course of post. She was of the view (likewise Mr. Braham) that since sending of the relevant documents by post is authorized, then section 52(1) of the Interpretation Act is engaged.

22. She argues that delivery is bound up with the process of sending and that the words "effected ... by registered post" must be determined by section 52(1). She contends that service is deemed to have been effected when the letter is delivered in the ordinary course of post. She submits that the learned judge could take judicial notice of the length of time that it takes for letters to be delivered in Jamaica and that certainly time would have run in excess of two days. It would therefore mean that when the letter was registered on October 9, there was non-compliance with the provisions of section 6 of the Act.

23. The authorities have made it abundantly clear that election petition statutes have always been strictly construed. See ***Stewart v Newland and Edman*** (1972) 19 WIR 271. The provisions of section 6 of the Act are mandatory when they provide that election documents "shall within ten days after the presentation of the petition, be served by the petitioner on the respondent ...". The court has no jurisdiction to extend time for service of the petition and if an application for substituted service is made it must be made within the time limited for service.

24. Section 6 lays down the manner in which service of the election documents can be effected. It may be done either by "personal" service or by sending the relevant documents "by registered post to the address of the respondent stated in the nomination paper". It was said in ***Chiswell v Griffon Land & Estates Ltd*** [1975] 1 W.L.R. 1181 at 1188-89:

> "... If any of those methods are adopted, they being the primary methods laid down, and, in the event of dispute, it is proved that one of those methods has been adopted, then sufficient service is proved. Thus, if it is proved, in the event of dispute, that a notice was sent by recorded delivery, it does not matter that that recorded delivery letter may not have been received by the intended recipient. It does not matter, even if it were to be clearly established that it had gone astray in the post."

25. The cases on service by post are too numerous to mention. They touch and concern various rules and statutes and the application in some instances, of the Interpretation Act. I have already mentioned ***Austin Rover Group Ltd.*** (supra) and ***Chiswell*** (supra) but there are two other cases which I ought to consider. They are: ***Bikeworld Limited v The Director-General of the Mauritius Revenue Authority***, Privy Council Appeal No 65 of 2005 delivered the 23rd January 2007, and ***Beanby Estates Ltd v Egg Stores (Stamford Hill) Ltd*** [2003] 1 WLR 2064. The former case was sent to us by Mr. Dabdoub after judgment was reserved. It is observed that copies of the judgment were also sent to the Respondents' Attorneys but up to the point of writing this judgment we have had no comments on the case from the Respondents. ***Beanby*** is a case which I have come across when I was preparing to write this judgment.

26. Let me turn first to the ***Beanby*** case. The headnote reads as follows:

> "The tenant was in occupation of business premises and entitled to the security of tenure protection under Part II of the Landlord and Tenant Act 1954. On 7 January 2002 the landlord sent a notice to the tenant under section 25 of the 1954 Act informing it of the termination of the tenancy. That notice was sent by recorded delivery to the tenant at the premises and was received by it on 9 January 2002. The tenant served a

counter-notice on 28 January 2002 informing the landlord that it was not willing to give up possession of the premises and, on 8 May 2002, it applied to the county court for a new tenancy. By section 29(2) of the 1954 Act that application had to be made within four months of the service of the landlord's notice. On the tenant's application, the judge held that the effect of section 23 of the Landlord and Tenant Act 1927 (as extended by Recorded Delivery Service Act 1962), read with section 7 of the Interpretation Act 1978, was that the notice was served on the date it was delivered, accordingly, the tenant's application for a new tenancy was made just inside the four-month period.

On the landlord's appeal-

Held, allowing the appeal, that the effect of section 23 of the Landlord and Tenant Act 1927 was that where a notice served under section 25 of the 1954 Act was sent through the post by recorded delivery to the addressee at his place of abode it was irrebuttably deemed to have been served; that service was deemed to have been made at the date that the notice was put in the post and not the date of actual receipt; that section 23 was not subject to section 7 of the Interpretation Act 1978; further, it was not necessary in order to protect the tenant's rights under the Convention for the Protection of Human Rights and Fundamental Freedoms to change the ordinary meaning of section 23 by applying section 7 of the 1978 Act; and that, accordingly, the tenant's application for a new tenancy was made outside the four-month time limit (post, paras 12, 17, 63, 72, 74, 86, 87)."

27. Neuberger J delivering the judgment of the court said inter alia:

"11. The precise point at issue in the present case, namely, the deemed date of service, has not been the subject of any decision, albeit it has been the subject of one observation in the Court of Appeal. However, there are a number of cases to which I have been referred where the court has been concerned with the effect of section 23. Miss Siri Cope, who appears on behalf of the landlord, contended that those cases establish the proposition that, if a notice is posted by recorded delivery and addressed to the recipient at his "place of abode", then it is irrevocably deemed to have been served on the addressee by virtue of the posting.

> 12. I accept her submission that, if the effect of section 23 is that where a notice is sent through the post by recorded delivery to the addressee at his place of abode it is irrevocably deemed to have been served, then it follows that service is deemed to have been made on the date the notice was put in the post for recorded delivery, and not the date of actual receipt."

28. In ***Bikeworld Ltd.*** Lord Bingham of Cornhill delivering the judgment of the Board said inter alia:

> "10. The company did not respond to the assessments posted to its registered office on 11 September 1997, and later insisted that they had not been received. The Tax Appeal Tribunal was, in due course, sceptical about this assertion, which it described in its Determination as "most surprising and alarming" and "unacceptable", and it twice noted that the assessments had not been returned to the postal authorities. <u>But it is clear (despite the argument of Mr Said Toorbuth for the company to the contrary) that under the relevant legislation service was deemed to have been effected whether in fact the assessments had been received or not</u>."
>
> (emphasis supplied)

Section 155(3) of the 1995 Act provided:

> "(3) Any notice of assessment, determination or other notice required to be served on or given to any person by the Commissioner may be served or given by
> . . .
> (b) ... sending it to his usual or last known business ... address."

29. The controversy in the instant case arises from the construction of section 6 of the Act and whether section 52 (1) ought to be taken into consideration when construing the former section.

30. The evidence reveals that the letter containing the relevant documents was sent by registered post to the 1st Respondent at his Dover Castle District residence on October 9, 2007. This is the address stated on the nomination

paper. Mr. Dabdoub argued that the documents were therefore served on the 1st respondent within the ten day period prescribed by section 6 of the Act. It would seem from the ratio of the above cases that service would be effected whether in fact the documents had been received or not. The learned judge below held otherwise. She was of the view that the interpretation held by Mr. Dabdoub was not practical or reasonable and that it was doubtful whether Parliament had intended it to be so. She said inter alia:

> "The Interpretation Act S. 52(1) which provides that "service" shall be deemed to be effected by properly addressing, prepaying and posting a letter containing the document, and unless the contrary is proved, to have been effected at the time at which the letter would be delivered "in the ordinary course of post", gives assistance to the Court in determining when the time of service ought to be calculated and the fact that the Act speaks to "mail" does not exclude "registered mail.
>
> In Jamaica mail registered on the 9th October 2007 containing documents filed on the 1st October 2007 are most unlikely to have reached the designated destination in two days and in the circumstances this Court finds that the Election Petition was not served in accordance with the provisions of the law and this matter is not properly before the Court".

31. Both Mr. Braham and Mrs. Foster-Pusey have expressed sentiments similar to the learned judge in relation to section 52 (1). They have also submitted that service of the documents is deemed to be effected when the documents are delivered in the ordinary course of post.

32. On my reading of section 52(1), it is abundantly clear that it falls into two parts. The first part concerns the fact of service which is deemed to be effected by "properly addressing, pre-paying and posting a letter containing

the document". That was done in this case. The second part deals with the time of delivery, that is, the time of service. Support for this construction is to be found in ***R v Appeal Committee of County of London Quarter Sessions, ex parte Rossi*** [1956] 1 All E.R 670 at 681.

33. I now turn to the words, 'unless the contrary is proved'. In my judgment these words are very crucial in the determination of the issue under consideration. Those words, prima facie mean "unless the contrary is shown by evidence to the satisfaction of the court" – see ***Hodgson and Another v Hart District Council*** [1986] 1 All E.R 400. Since delivery in the ordinary course of post would become a relevant consideration in the second part of section 52(1) a rebuttable presumption could arise as to the time of delivery.

34. The "contrary intention" referred to in section 52(1) does appear in section 6 of the Act. Section 6 makes reference to a relevant address in relation to service – "by registered post to the address of the respondent stated in the respondent's nomination paper." It simply means that section 52(1) of the Interpretation Act would not apply to the service provisions in section 6. This section clearly sets out a specific method of service and to a specific address. See ***Austin Rover v Crouch Butler Savage Associates*** [1986] 1 W.L.R. 1102 at pages 1111 and 1112.

35. The Malaysian Election Petition Rules provide a good precedent where service of election documents may be effected by registered post. In ***Yusuf Abdul Rahman v Abdul Ajis Bin Abdul Majeed & Liaw Foon Eng*** the High Court in Sabah & Sarawak (Malaysia) at Sibu, Election Petition No. 20-

26-1 of 1996 & Election Petition No.20-26-2 of 1996, examined rule 15 of the Malaysian Election Petition Rules which reads:

> 15. **Notice of petition and copy of petition to be served on respondent**
>
> "Notice of the presentation of the petition, accompanied by a copy thereof, shall, within fifteen days of the presentation of the petition, be served by the petitioner on the respondent. Such service may be effected either by delivering the notice and copy aforesaid to the advocate appointed by the respondent under rule 10 or by posting the same in a registered letter to the address given under rule 10 at such time that, in the ordinary course of post, the letter would be delivered within the time above mentioned, or if no advocate has been appointed, or no such address given, by notice published in the Gazette or in a newspaper circulating within the constituency or electoral ward in which the election is held, or posted on the notice board of the High Court in the State in which that constituency or electoral ward is situated, stating that such petition has been presented, and that a copy of the same may be obtained by the respondent on application at the office of the Registrar."
>
> [emphasis mine]

36. Mrs. Foster-Pusey had referred to the ***Yusuf Abdul Rahman*** case (supra). She submitted that that case illustrates that it is not unreasonable to contemplate that registered mail is delivered within the ordinary course of post. This may be so, but to my mind, the case also clearly illustrates what was the intention of Parliament that is, that the time for service of election documents by registered post is deemed to be effected in the ordinary course of post.

37. Maxwell on the Interpretation of Statutes (12th Edn. 1969) pp 28, 33 and 43 sets out quite clearly the elementary principles of construction of statutes. The primary rule is that words must be given their literal or ordinary

meaning and nothing qualifying the ordinary meaning is prima facie to be read into them. In cases where a literal construction produces a result manifestly unintended by Parliament the primary rule may have to be qualified. This is not the case in this appeal.

38. I agree with Mr. Dabdoub that the words in section 6 of the Act, when given their literal meaning would mean:

> "(a) That the Notice of Presentation of Election Petition and of the security deposit together with a copy of the petition must be served on the respondent within ten days after presentation of the petition.
>
> (b) That service on the respondent may be effected by personal service or
>
> (c) That service on the respondent may be effected by registered post.
>
> (d) That the address for registered post is the address of the respondent stated in the respondent's nomination paper."

39. In my judgment, the 1st Respondent was effectively and validly served on October 9, 2007. The learned judge was therefore in error when she held that the election documents were not served in accordance with the provisions of the law and that the matter was not properly before the Court.

40. It is also my considered view that Rule 6.6 of the Civil Procedure Rules 2002 cannot avail the 1st Respondent. He sought to have the Court apply the rule which provides that service is deemed to be effected 21 days after the documents are registered to the 1st respondent. I am in agreement with Mr. Dabdoub when he submitted that any application of the deeming provision of

rule 6.6 in relation to section 6 of the Act "would have the inevitable effect of rendering a means of service, specifically provided for in the Act, never being able to be used. Such an outcome would render the legislation impracticable, unworkable and an absurdity". The law is abundantly clear that the petition shall be served within 10 days after presentation. One should also bear in mind that section 24(3) of the Act provides for Rules of the Supreme Court to apply only in so far as is practicable. There is certainly no need in the circumstances of the present case to resort to the rules since section 6 of the Act is unambiguous.

Conclusion

41. For my part, I would allow the appeal.

DUKHARAN, J.A. (Ag.)

I have read in draft the judgments of Smith J.A. and Harrison, J.A. and agree with their reasoning and conclusions. However, I wish to add some comments on the construction of section 6 of the Election Petitions Act (hereinafter referred to as the Act) and on service by registered mail.

Prior to 1997 Section 6 of the Act provided that:

> "Notice of a presentation and of the proposed security (if any) accompanied by a copy of the petition shall, within ten days after the presentation of the petition be served by the petitioner on the respondent.
>
> It shall be lawful for the respondent, when the security is given wholly or partly by recognizance within ten days from the service on him of the notice, to object in writing to such recognizance on the ground that the sureties or any of them are insufficient..."

This posed a difficulty as Election Petitions had to be served on the respondents within ten days after the presentation of the petition. All that a respondent had to do was to evade service during the ten day period. As it became clear that there was a deficiency in this procedure, in 1997 the legislature with a view to curing the mischief, effectively amended Section 6 of the Act to provide as follows:

> "Notice of presentation of a petition and the security (if any) accompanied by a copy of the petition shall within ten days after the presentation of a petition, be served by the petitioner on the respondent.
>
> Service of the petition may be effected either by personal service or by registered post to the address of the respondent stated in the respondent's nomination paper."

It is quite clear that section 6 provides for two methods of service of the petition which is effected either by personal service or by registered post.

Mr. Dabdoub for the appellant submitted that the words in Section 6 must be given their ordinary meaning to avoid any ambiguity. He submitted that the word "effected" in the Act must be given its ordinary meaning. He referred to The New Webster's Thesaurus Vest Pocket Edition which sets out the meaning of the word "effected" as follows:

> "achieved, accomplished, attained, completed, concluded, consummated, done, executed, finished, fulfilled, performed and realized."

Mr. Dabdoub further submitted that if the ordinary meaning of the word "effected" is given then once the petition was addressed to the Respondent and sent by registered post to the respondent within the ten

days after the presentation of the petition, then it would be effectively served on the respondent. The evidence of Lescine Prendegast is that the documents were sent by registered post to the 1st respondent on the 9th October, 2007 with his address as Dover Castle District, Redwood, P.O. St. Catherine. This was the address given by the 1st respondent in the nomination papers. Mr. Dabdoub further submitted that Section 52(1) of the Interpretation Act is not relevant to Election Petition matters as section 6 of the Act has its own mechanism to deal with service.

Section 52(1) of the Interpretation Act states::

> "**52.**(1)Where any Act authorizes or requires any document to be served by post whether the expression 'serve', 'give, or 'send' or any other expression is used, then, unless a contrary intention appears, the service shall be deemed to be effected by properly addressing, preparing and posting a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post."

Mr. Braham for the 1st respondent submitted that service is not effected when the documents are registered but includes the receipt of the documents. He submitted that section 52(1) of the Interpretation Act is relevant. He cited ***Austin Rover Group Ltd. v Crouch Butler Savage Associates (a Firm) and Others*** [1986] 3 All ER 50.

Mrs. Foster -Pusey submitted that service is not complete when the letter is registered but only when delivered or deemed to be delivered during the ordinary course of post. She too was of the view that section 52(1) of the Interpretation Act should be applied.

I accept the submissions of Mr. Dabdoub that once the petition was registered to the address given by the respondent then service was effected. Section 6 of the Act as I have said before has its own mechanism as to how service should be effected. It sets out two methods of service, that is, personal service or by registered post. In my view section 52(1) of the Interpretation Act does not apply in Election Petition matters.

In my judgment the respondent was effectively served when the documents were registered on the 9th October, 2007. The learned judge in my view erred when she found that the documents were not served. She also erred in applying the deeming provisions of section 52 of the Interpretation Act.

I too would allow the appeal.

SMITH, J.A.:

ORDER:

The appeal is allowed. The order of the learned judge is set aside. No order as to costs.