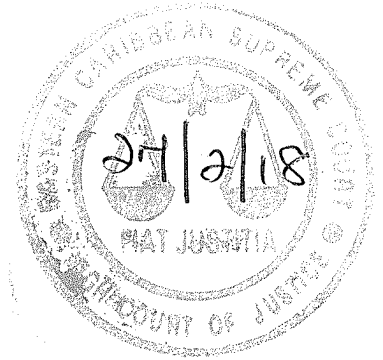


THE EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES



IN THE HIGH COURT OF JUSTICE

CLAIM NO. 202 of 2015

BETWEEN

LAURON BAPTISTE

PETITIONER

and

VIL DAVIS

Returning Officer

and

VERONICA JOHN

Presiding Officer

and

MONTGOMERY DANIEL

and

SYLVIA FINDLAY-SCRUBB

Supervisor of Elections

RESPONDENTS

CONSOLIDATED WITH

CLAIM NO. 203 of 2015

BETWEEN

BENJAMIN EXETER

PETITIONER

and

WINSTON GAYMES

Returning Officer

and

KATHLEEN JEFFERS

Presiding Officer

and

SIR LOUIS STRAKER

and

SYLVIA FINDLAY-SCRUBB

Supervisor of Elections

and

THE ATTORNEY GENERAL OF SAINT VINCENT AND THE GRENADINES

RESPONDENTS

Appearances – Claim No. 202 of 2015:

Mr. Bertram Commissiong Q.C. with Mrs. Kay Bacchus Baptiste, instructed by Ms. Maia Eustace for the petitioner.

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

Mr. Grahame Bollers and Mr. Carlos James for the 4th respondent.

Appearances – Claim No. 203 of 2015:

Mr. Stanley John Q.C., with him Mrs. Kay Bacchus Baptiste, Mr. Keith Scotland (absent), Mrs. Zhingia Horne-Edwards (absent) instructed by Ms. Maia Eustace for the petitioner.

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

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

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

2017: Dec. 12 & 13

2018: Feb. 27

DECISION

INTRODUCTION

- [1] **Henry, J.:** This decision arises from an election petition initiated by Mr. Benjamin Exeter, a candidate in the general elections held on 9th December, 2015 in St. Vincent and the Grenadines. Mr. Exeter ran on the ticket of the main opposition party, the National Democratic Party ('NDP') in the constituency of Central Leeward. The candidate fielded by the incumbent Unity Labour Party ('ULP') - Sir Louis Straker, was declared the winner.
- [2] On 31st December 2015, Mr. Benjamin Exeter filed an election petition challenging the results. He has contended that the outcome was tainted by major irregularities in the polls, which rendered it invalid. He is seeking a declaration that the election is void and that Sir Louis Straker was not duly elected or returned.
- [3] The other respondents are the returning officer Mr. Winston Gaymes, the presiding officer Ms. Kathleen Jeffers, Mrs. Sylvia Findlay-Scrubb the Supervisor of Elections ('Supervisor'), and the Honourable Attorney General. They have refuted the allegations of irregularities and strenuously resist the petition.
- [4] By Notice of Motion filed on 29th June 2017, Mr. Exeter applied for an order:-
- '1. directing the Supervisor of Elections to deliver forthwith to the Registrar of the High Court documents relating to the election held in the Constituency of Central Leeward on the 9th day of December 2015;
 2. that the said ballot boxes be opened by the Registrar ... and that permission be ... granted for the Registrar and [Mr. Exeter] ... to inspect all ballot papers contained in the ballot boxes with a view to determining the accuracy of the allegations ...' that:
 - i. the ballots were pre-printed with the official stamp or stamped by the Presiding Officers;

- ii. some 222 ballots at Polling Station CLF and 99 at Polling Station CLF1 appeared defective and/or willfully cut in such a manner that a portion of the ballot paper was absent and that they bore neither the stamp nor initials of the Presiding Officers; and/or
- iii. 238 ballots at Polling Station CLB and 210 at Polling Station CLB1 bore the Presiding Officer's initials below the line which should have separated the names of the candidates from the remainder of the top portion of the ballot paper and were deliberately cut in an irregular manner, whereby the top portion of the ballot which should have contained the space for the endorsement of the Presiding Officer's initials and the official mark was severed or absent; and/or
- iv. the official mark and the Presiding Officer's initials were endorsed on the counterfoils of those defective ballots.'

[5] Mr. Exeter filed an amended Notice of Motion 5 months later¹, in which he supplemented those allegations. He deleted the assertion that the official mark and the Presiding Officer's initials were endorsed on the counterfoils. He alleged further that:

1. the referenced ballots appeared to have been willfully mutilated in such a manner that they were contrary to the rules;
2. there were similar looking ballots in ballot boxes from various polling stations which were ruled invalid by the returning officer even after he accepted similar looking ballots in 'CLF' and 'CLF1';
3. a majority of over 90% of the ballots counted at the 'purported final count' bore the official mark and the Presiding Officer's initials in a manner which is contrary to the rules; and
4. If the presiding officer folded the ballot paper to the line marked '*Do Not Fold Beyond this Line*' she could have examined her initial and the official mark to verify that it was the same ballot, only by opening the ballot thereby invading the secrecy of the poll contrary to the law²; and
5. That contrary to the Rules³, no Form 16 Statement of the Poll was presented at the Final Count for Polling Station CL11 and in the case of others, the Form manifested various errors and

¹ On 9th November 2017.

² Specifically section 54 (3) of the Representation of the People Act ('RPA') and rule 31(2) of the House of Assembly Elections Rules.

inconsistencies such as the total number of ballots cast and the number of names on the voter's list⁴.

- [6] Mr. Exeter outlined 15 grounds on which the application is founded. Among them, he asserted that the orders are required for the purpose of determining issues in the election petition. He indicated that he relied in support of his Motion, on the relevant respects of all of the several affidavits filed in support of his petition.
- [7] Learned Senior Counsel Mr. Mendes filed written submissions and made oral arguments on behalf of Mr. Gaymes, Ms. Jeffers and Sir Louis. He argued that the alleged purpose of the requested inspection sought by Mr. Exeter is not borne out in the pleadings and that there are alternative ways of establishing what he has pleaded in the petition. He contended further that there is no evidence to support the pleadings and that the motion is perhaps a fishing expedition. He submitted that it was an abuse of the court's process. He did not transmit an electronic copy of his submissions to the court as ordered and he provided no reasons for such default.
- [8] Learned counsel Mr. Grahame Bollers filed no written submissions on behalf of the Supervisor of Elections and he made no oral submissions. By Notice of Intention filed on 20th July 2017, he signaled Sir Louis Straker's intention to adopt the arguments of the first, second, fourth and fifth respondents.
- [9] Learned Senior Counsel Mr. Astaphan filed written submissions on behalf of the Honorable Attorney General. He submitted that the motion is an abuse of the process of the court, because an earlier decision had been made by the court in December 2015, in respect of a similar application for inspection filed in identical circumstances.

³ Rule 41(7) of the rules.

⁴ Where there appeared to have been a 100% voter turnout in polling stations CLA1, CLE, CLF1 and CL; and in polling station CLD1 where 485 ballots are stated to have been used by the 180 names stated to be on the official list of electors used at the poll, if there had been a 101% voter turnout.

- [10] By Notice filed on 4th December 2017, the Honourable Attorney General signified that he intended to object to the validity and hearing of the Amended Notice of Motion on a number of grounds including that it is in substance and effect a new application and raises allegations not pleaded by Mr. Exeter. He canvassed each of those grounds in his submissions.
- [11] Before proceeding to hear the parties, the court asked each respondent through their respective legal representatives whether they had objections to the court hearing the Amended Motion. They each responded in the negative.
- [12] It should be noted that the 2015 proceeding was initiated by Notice of Application while that which was brought in 2017 was started by Motion. For ease of reference and convenience, the terms 'motion' and 'application' might be used interchangeably in this decision to describe both processes, unless the context indicates otherwise.

ISSUES

- [13] The issues which arise are whether:
1. This motion is an abuse of the process of the court?
 2. The court should make an order:
 - (a) directing the Supervisor of Elections to deliver to the Registrar of the High Court ('the Registrar') documents relating to the election held in the constituency of Central Leeward on 9th December, 2015?
 - (b) that the referenced ballot boxes be opened by the Registrar in Mr. Exeter's presence and permission be granted for the Registrar and Mr. Exeter to inspect all ballot papers in the ballot boxes to determine the accuracy of the stated allegations?

LAW AND ANALYSIS

Issue 1 – Is the Motion an abuse of the process of the court?

- [14] On behalf of Mr. Gaymes, Ms. Jeffers and Mrs. Findlay-Scrubbs, learned Senior Counsel Mr. Mendes submitted that the present motion is an abuse of the process of the court. He contended that Mr. Exeter filed an application on December 17th 2015 for orders permitting inspection of all ballot papers and counterfoils for the Constituency of Central Leeward, which was dismissed by

Justice Cottle. He remarked that the application would have addressed ballot boxes and papers from the polling stations mentioned in the current Motion.

[15] He noted that on that previous occasion, Mr. Exeter's grounds included an assertion that he was denied inspection of the counterfoils at the final count and that more than 300 ballots were found to be defective in that there was no sufficient mark or initial of the presiding officer on them. He pointed out that these are the identical grounds on which Mr. Exeter relies in support of his more recent motion for inspection of ballots from polling stations CLF and CLF1.

[16] He contended that Mr. Exeter has presented no new evidence nor pointed to any new matter which would justify a fresh look at the question of inspection. He submitted that as with the previous application, there is still no evidence before the court as to who was the chosen candidate in any of the impugned ballots; as to how the result might be affected; and no suggestions as to what the outcome of the election would be.

[17] In this context and in support of those contentions, he quoted and emphasized part of the judgment where Cottle J. opined:

'At the hearing of the application, Mr. John QC explained to the court that the Respondent and his three legal representatives were objecting to certain disputed ballots at the final count, those described as mutilated, and did not count them as the final count (sic) of the ballots. **They therefore have no evidence as to for whom these ballots had been counted. They were not able to suggest that the inclusion and exclusion of these ballots would have affected the outcome of the election.** This to my mind describes the present application succinctly. The applicant had the opportunity to inspect all the ballots and satisfy himself of the accuracy of the count. He says he failed to do so because he was objecting to certain ballots. He does not identify these ballots. Instead he seeks an order for the production and inspection of all the ballots. **No suggestions have been made as to what the outcome of such an exercise will be. To my mind, the application on the grounds presented and on the evidence adduced epitomizes a fishing expedition.** The court is also concerned about the application to inspect the counterfoils as well as the ballots. If this is allowed, it will be possible for the applicant to identify individual voters and see how they voted.' (bold added)

- [18] Learned Senior Counsel Mr. Mendes observed that the results in the four selected polling stations are now known. In this regard, he referred to exhibit 'BE 14' which was attached to Mr. Exeter's affidavit filed on 2nd March 2016. He noted that it shows that the votes were split between Mr. Exeter and Sir Louis and further that even if the impugned ballots were invalid, the result would not have been different.
- [19] He reasoned that consequently, there has been no change in the circumstances which presented themselves to Cottle J. in the days just before the petition was filed. He submitted that Mr. Exeter's motion to inspect the four boxes is an attempt to re-litigate an issue which has already been determined and amounts to an appeal against a final decision of the High Court to a judge of concurrent jurisdiction.
- [20] He contended that there has been no appeal and accordingly Cottle J.'s decision is final and binding. Learned counsel Mr. Mendes argued that as a result, the part of the motion which seeks an inspection of the ballots and counterfoils in polling stations CLB, CLB1, CLF and CLF1 ought to be dismissed.
- [21] Learned Senior Counsel Mr. Astaphan echoed those submissions and remarked that in its decision delivered on June 30, 2017, this court ruled that the respondents were precluded from pursuing their motions to strike out the petition as it amounted to an abuse of the court. He submitted that based on the underlying principles including *res judicata*, the present motion must be struck out as being an abuse of the court's process.
- [22] He submitted further that the 2017 application is seeking substantially the same or similar orders to those claimed in the 2015 application. He contended that they are both grounded in the same counts which occurred immediately after the election, prior to the 2015 application. He argued that the Motion and supporting affidavits contain no new evidence or fact that has come to light since the hearing by Cottle J. of the earlier motion for inspection. He submitted that Mr. Exeter is seeking essentially to raise the same, or re-litigate the central issues which were considered by Cottle J.. He argued further that in doing so, Mr. Exeter has not addressed the findings made by Cottle J..
- [23] He noted for example, that there are no particulars or evidence relating to objections to specific votes at each count; any counting error by the presiding or returning officer; or any assertion as to

whether the result of the election was or will be affected. He contended that the only new allegation by Mr. Exeter relates to violation of the oath of secrecy.

[24] Learned Senior Counsel Mr. Astaphan contended that nothing has arisen which suggests that the factual basis for the motion was not available to Mr. Exeter and his legal practitioners in December 2015 when the application was made. He added that the *ratio decidendi* and findings by Cottle J. remain unchallenged and therefore the Motion should be dismissed as an abuse of the court's process.

[25] He cited the decision of the Caribbean Court of Justice ('CCJ') in the Belizean case of **Belize Bank v Attorney General of Belize**⁵ as authority for his submissions. In that case, the court observed that the Honourable Attorney General had the opportunity to raise a particular issue before the Court of Appeal and chose not to, but instead attempted to do so before the CCJ panel. Their Lordships ruled:-

'To now allow the Respondent Attorney General to raise that issue would expose the judicial process to the intolerable evil of litigation in increments and undermine a decision of the highest appellate court of Belize.'

Learned Senior Counsel Mr. Astaphan also relied on the case of **Henderson v Henderson**⁶, without articulating further submissions on the point.

[26] Learned Queens Counsel Mr. Stanley John countered that this 'abuse' challenge should be rejected because it is not supported by the circumstances and the applicable principles. He submitted that the respondents are essentially asking the court to invoke its discretion under the court's inherent jurisdiction to dismiss the motion. He argued that they would have the court conclude that it is unfair to them and would bring the administration of justice into disrepute, if Mr. Exeter's request for delivery and inspection of the ballots is heard on its merits.

[27] He submitted that the rule *in Henderson v Henderson*⁶ applies where a case does not fall within the rules relating to *res judicata*. He did not direct the court's attention to the part of the judgment from which he so concluded.

⁵ [2017] CCJ 18 at para. 24.

⁶ 3 Hare 100 (This citation appears on the copy of the judgment supplied by the Honourable Attorney General).

[28] However, he quoted and adopted a description of the 'rule in Henderson' from Halsbury's Laws of England where the learned authors explained:

'The rule provides that a claimant is barred from litigating a claim that has already been adjudicated upon or which could and should have been brought before the court in earlier proceedings arising out of the same facts'. Parties are expected to bring their whole case to the court and will in general not be permitted to re-open the same litigation in respect of a matter which they might have brought forward but did not, whether from negligence, inadvertence or even accident. The abuse in question need not involve the re-opening of a matter already decided in proceedings between the same parties, but may cover issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow new proceedings to be started in respect of them.⁷

[29] Mr. John Q.C. emphasized the latter part of the passage which states:

'It is, however, wrong to hold that because a matter could have been raised in early proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive; the question is whether in all the circumstances a party's conduct is an abuse.'⁷

[30] He argued that notwithstanding its inapplicability for present purposes, the court may exercise its discretion under its general inherent jurisdiction, to prevent a party from abusing its process by raising an issue which was or could have been determined in earlier proceedings.

[31] He submitted that the rule (against abuse of the court's process) seeks to advance the underlying public interest that there should be finality in litigation and that a party should not be twice vexed in the same matter, much as in the case of cause of action estoppel and issue estoppel which both have commonalities with the '**Henderson**' rule.

⁷ Vol. 32, 5th Ed. Para. 1166-1167.

[32] It is instructive at this stage to examine the rule in **Henderson v Henderson**⁶ to extract the principles enunciated in it. In delivering the decision, the Vice Chancellor Sir James Ingram expressed them as follows:

... I believe I state the rule of the Court correctly when I say that, where a given matter becomes the subject of litigation, and of adjudication by, a Court of Competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and **will not (except under special circumstances)** permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject of contest, but which was not brought forward, only because they from negligence, inadvertence, or even accident, omitted part of their case. **The plea of *res judicata* applies**, except in special cases, **not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to** every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time. ... I conceive it to be the duty of this Court to apply the same reasoning, ... in the absence of charges ... showing that a different principle ought to be applied.⁸ (bold added)

[33] Sir James Ingram noted that this general principle was applied in a number of cases including **The Marquis of Breadalbane v The Marquis of Chandos 2 Myl & Cr. 732; Farquharson v Seton 5 Russ. 45; Patridge v Osborne Id. 195; and Chamley v Lord Funsany 2 Sch. & Lef. 718**. He observed that litigation would be 'interminable if such a rule did not prevail'. I accept that his formulation of the rule accords with long established practice and the law as re-stated by the legal practitioners for the petitioner and respondents. I accordingly adopt that formulation for present purposes.

[34] Significantly, Sir James Ingram referred to the rule as 'the plea of *res judicata*'. It is important to note that this contradicts the position taken by learned Queen's Counsel Mr. John. In summary, His Lordship's distillation of the applicable principles arising in the case of **Henderson v Henderson**⁶ may be enumerated as follows:-

⁸ At page 115 of the report.

1. parties involved in matters before the Court must ensure that they lay out their whole case at the first available opportunity;
2. If a party fails to do so due to negligence, inadvertence, or even accident, he will not except in special circumstances, be permitted to re-litigate with the identical party(ies), the same issues or any part of the case which he could have made in the earlier proceeding;
3. This rule is not restricted to issues or points on which the parties previously sought a ruling or opinion from the court, but extends to every conceivable aspect of the case which the parties with reasonable diligence could have discovered and advanced.

[35] Mr. John Q.C. submitted further that the burden of establishing abuse of process rests on the party asserting it. He cited the ruling of Master Actie in **Ferguson v Ferguson**⁹ where the learned Master pointed this out and stressed that in each case the question in light of all the circumstances, is whether applying a broad merits based approach, the conduct complained about constitutes an abuse of process.

[36] The learned Master noted that: -

‘... The principles that are engaged in an application to strike out a claim made on the basis of abuse of process are summarized by Lord Bingham of Cornhill in **Johnson v Gore Wood** in the following pronouncement

"The[re] is [an] underlying public interest ... that there should be finality in litigation ... This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim ... in later proceedings may, without more, amount to abuse if the court is satisfied ... that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court

⁹ SLUHCV2012/0387 (unreported).

regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which **takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before.** ... [I]t is in my view **preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances.** Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice."⁸ (bold added)

[37] Learned Queens Counsel Mr. John submitted that in light of those principles, the onus rests on the respondents to satisfy the Court that in all the circumstances, Mr. Exeter's conduct in making this application is an abuse of the process in that it involves what the court regards as unjust harassment of the respondents. He argued that the principles necessitate that the prior ruling was made by a competent court. He contended that the ruling by Cottle J. in 2015 was not made in exercise of the court's jurisdiction to hear the merits of the Petition which challenged the returns or the validity of the election, but rather for the purpose of bringing a Petition.

[38] He submitted that this is borne out in Cottle J.'s pronouncement that:

'This is not an election petition. This is an application for an order to produce election documents which are at present in the custody of the Supervisor of Election. No suggestion has been made that there exists any danger that those documents are in any way at risk of being tampered with. The learned authors of Halsbury's Laws of England (4th Edition Re issue) Vol. 15 at paragraph 851 had this to say.

'Strong grounds for making an order must be shown, and the court must be satisfied that the application for it is made in good faith, and will rarely, if ever,

grant it unless a petition or prosecution has been instituted or is about to be instituted and it is shown to be really required.'

One example of the approach a court takes in consideration (sic) this question can be found in *Lancashire, Darwen Division Case (1885) 2 TLR 220* where the court refused to allow an inspection before an election petition was lodged. Denman J. considered the application to have been in the nature of a fishing expedition. That case can be contrasted with *Gough v London Sunday Newspaper (2003) 1 WLR 1836* where there was an admitted error in the court (sic) of the votes. An entire packet of postal votes had been overlooked. There the court felt that grounds existed for permitting an inspection to see whether or not the presentation of an election petition was merited.

In the case before this court there is no issue of overlooked votes. There has been no complaint about the preliminary vote. There has been no complaint about the accuracy of the court (sic). The applicant was represented at the final count. He now wishes another opportunity to inspect the ballots "to conclusively assess the validity of the final count."¹⁰

- [39] Mr. John Q.C. contended that regardless of the accuracy of the learned Judge's analysis of the strength of the applicant's case in the pre-petition application, he made a clear distinction in his ruling 'between those proceedings where according to him, the application was made to conclusively assess the validity of the final count before a petition was lodged and an election petition proceedings brought pursuant to and for a purpose as prescribed by statute'.
- [40] Mr. John argued that the distinction is of significance because the Petition is specifically intended among other things, to determine conclusively the validity of the final count and whether or not the election was void. He added that on a proper interpretation of Rule 53 of the House of Assembly Election Rules ('HAER')¹¹, the court does not have the jurisdiction in a pre-petition application to adjudicate conclusively the issues related to these latter controversies, which underlie the application for delivery and inspection in the election petition proceedings.

¹⁰ Cottle J.'s Judgment in the instant case, dated 28th December, 2015 at page 8.

¹¹ Cap. 9 of the Revised Laws of Saint Vincent and the Grenadines, 2009.

Presumably the expression 'latter controversies' refers to the dispute surrounding validity of the final count and election.

[41] Learned Queens Counsel Mr. John contended further that based on principle and practice, even after an unsuccessful application for inspection, it is not an abuse of process, if after oral evidence is given in the course of hearing of the petition, necessary orders allowing inspection are made where the evidence brings facts to the court's attention from which it appears that inspection should be allowed in the interest of justice.

[42] He argued that in the final analysis, the application should be heard on its merits. He labeled as 'not maintainable' the suggestions by the respondents that the application is merely an attempt to re-litigate an issue which has already been determined that amounts to unjust harassment. He concluded that in any event, there is no strict rule or principle which compels the court to accede to the request to dismiss the application for abuse of the process.

ANALYSIS

Competent Court

[43] Learned Queens Counsel Mr. Stanley John has raised the issue of the court's competency in respect of the present Motion. In this regard, he suggests that having regard to the timing of the 2015 application that the court could not at that time, conceivably entertain the 2017 motion. Learned Queens Counsel points to the fact that the application was made before a petition was filed, while the instant motion was filed after.

[44] He contended that Cottle J. was therefore not asked to and could not have been approached to make the orders sought in the motion. I have outlined the statements from Cottle J.'s judgment on which Mr. John Q.C. anchored this argument. He has cited no other legal authority in support. This contention is diametrically opposed to those made by learned Senior Counsels for the Honourable Attorney General and the election officials. They have submitted that both applications are substantively the same.

[45] I do not understand or interpret Mr. John's submissions to be impugning Cottle J.'s authority to preside over the 2015 or 2017 application. Rather, I understand him to be arguing that in a pre-petition application the court is not concerned with and cannot make rulings or final determinations

on substantive issues which arise in an election petition. If his reference to 'conclusive determination' refers to a decision as to whether an election is valid, clearly this is so.

[46] Nonetheless, Cottle J.'s statement does not appear to me to be an authoritative statement regarding the competence or lack thereof, in the Court to make an order for production of election documents prior to the presentation of an election petition. His statement appears merely to be by way of observation. I do not understand it to mean that a court cannot make an order for production and inspection of election documents which may be required for the purposes of a yet-to-be-filed election petition. On the contrary, by quoting from Halsbury's Laws of England Cottle J. appeared to be endorsing the learned authors' pronouncement that, like the courts in England, those in this jurisdiction when considering applications for inspection of ballots:

'... must be satisfied that the application ... is made in good faith, and grant it [if] a petition ... has been instituted or is about to be instituted ...'

[47] The Rules in this jurisdiction empower the Court to make orders for inspection and production of ballot papers before or after a petition is lodged. Subrule (1) of Rule 53 provides:

'53 (1) An order-

(a) for the inspection or production of any rejected ballot papers, including ballot papers rejected in part, in the custody of the Supervisor of Elections;
or

(b) for the opening of a sealed packet of the counterfoils or **for inspection of any counted ballot papers in his custody,**

may be made by **the Court** if it is satisfied, by evidence on oath, that the order is required for the purpose ... of an election petition **lodged, or to be lodged,** in accordance with the law thereunto applicable.' (bold added)

[48] It is worth noting that section 2(1) of the RPA defines 'Court' as the 'High Court'. Learned Queens Counsel Mr. John argued that the present application arises in proceedings which are 'intended to determine conclusively the validity of the final count and hence whether or not the election was void.' He noted that Cottle J. made a distinction between such proceedings and a pre-petition application which is concerned with 'conclusively assessing the validity of the final count,' and is made prior to the launch of the related petition.

[49] The very language of Rule 53 makes it abundantly clear that both scenarios is accommodated by the provision. A petitioner may elect to bring an application before or after he files an election petition. Irrespective of his election, the High Court is vested with the requisite power to make an order for:

1. production or inspection of rejected ballot papers [Rule 53(1)(a)]; or
2. inspection of counted ballot papers [Rule 53(1)(b)];

if satisfied that such an order is required for the purpose of (a) an already filed election petition; or (b) one which is yet to be filed. Therefore, even before a petition is filed, the Court may order inspection of counted ballot papers if the applicant demonstrates that they are required for the purposes of a yet unfiled elections petition.

[50] The Rule is silent about the specific purposes which are contemplated. I imagine that they are many, varied and comprise a non-exhaustive list. I harbor no doubt that Cottle J. had the requisite authority and the Court so constituted was competent to make an order for production and inspection of the sought ballot papers and counterfoils, if the evidence before it established the pertinent facts and circumstances. It could do so at that stage even if the application was made on the basis that the inspection was required for the purposes of a future elections petition. I therefore reject the contention that the Court was not competent in the respects described by Learned Queens Counsel Mr. John.

Abuse of Court's Process

[51] The parties have individually outlined certain principles which guide the court in determining whether proceedings or any part thereof constitute an abuse of the court's processes. Collectively, those submissions accurately rehearse the legal principles which the Court considers when deciding whether a course of conduct constitutes an abuse of the court's process. They include the principles extracted from **Johnson v Gore Wood** as adopted by Master Actie in **Ferguson v Ferguson**. I therefore adopt and apply them for the purposes of this decision.

[52] In deciding if the present motion is an abuse of the court's process, this court must ask itself whether the motion before it is identical or similar to the application over which Cottle J. presided and rendered the referenced decision. This court must consider whether the present motion is

substantively the same as the previous proceeding; whether any 'new allegations' in the 2017 Motion could properly have been included and dealt with at that time; or whether the two applications are distinct from each other and bear little or no resemblance and could not have been subsumed under and disposed of as part of the earlier proceeding. Fundamentally, the court must have regard to all the circumstances and decide whether the petitioner by filing this motion, has conducted himself in manner which amounts to an abuse of the court's process.

[53] In the first scenario, the court would be entitled to find that the motion is an abuse of the court's process. In the second, the court's determination may go either way depending on whether there are special or exceptional circumstances which render the doctrine inapplicable; and in the third case it would be entitled to find that no abuse of process arises.

[54] A useful starting place in assessing the parties' respective contentions is a comparison of the orders sought and the grounds on which they are based, in both the 2015 application and 2017 motion. In conducting this exercise, it is imperative to have regard to the relevant contents of the petition, particularly as they relate to the allegations and the grounds.

[55] It is perhaps easier to appreciate similarities and differences in the pleadings if they are set out alongside each other in a table. I propose to take that approach. The data from the 2015 application will be set out in the left column while those from the 2017 motion are captured in the right column.

[56] The table is utilized to compare the orders sought in each case. It is important to note that the Supervisor of Elections Sylvia Findlay-Scrubb was the only named respondent in the 2015 application. In the 2017 Motion, four other respondents are joined. Three orders were sought in the 2015 application and 2 were outlined in the 2017 motion. The second relief claimed in the motion contained 8 distinct parts, in which certain allegations were pleaded. They will be addressed seriatim.

TABLE 1

2015 Application	2017 Motion
<p><u>ORDERS SOUGHT:</u></p> <p>(1) 'an order that the Respondent [Sylvia Findlay</p>	<p><u>ORDERS SOUGHT:</u></p> <p>I. 'An order that the 4th respondent [Sylvia</p>

<p>Scrubb, Supervisor of Elections] produce forthwith all <u>ballot boxes</u> ... for all 15 polling stations in the Constituency of Central Leeward and deliver said ballot boxes to the Registrar - [para. (1)] (bold and underlining added)</p>	<p>Findlay Scrubb, Supervisor of Elections] deliver forthwith to the Registrar ... <u>documents</u> relating to the election held in Constituency of Central Leeward' to the Registrar - [para. II] (bold and underlining added)</p>
<p>(2) 'an order that the said ballot boxes be opened by the Registrar' in Mr. Exeter's or his representatives' presence, And permission be granted to Mr. Exeter to inspect all ballot papers in the ballot boxes - [para. (2)] (bold added)</p>	<p>II. 'an order that the said ballot boxes be opened by the Registrar' in Mr. Exeter's or his representatives' presence, And permission be granted for the Registrar and Mr. Exeter 'to inspect all ballot papers contained in the ballot boxes with a view to determining the accuracy of the allegations¹² following: - [para. II] (bold added)</p>
<p>(3) 'the sealed packets containing counterfoils and contained in the aforesaid ballot boxes be opened by the Registrar' in Mr. Exeter's or his representatives' presence, (bold added) And permission be granted for Mr. Exeter and/or his representatives to inspect and open such packets of the counterfoils. [para. (3)] (bold added)</p>	

First relief – paragraph I of the Motion

[57] The first order claimed in the 2015 application is for the production and delivery of all ballot boxes for all 15 polling stations (in the Central Leeward Polling Station) to the Registrar. The

¹² They are omitted from the table, and outlined elsewhere in this decision.

corresponding prayer in the 2017 motion seeks the delivery to the Registrar, of 'documents relating to the election held in Constituency of Central Leeward'.

[58] In assessing substantive commonalities or differences in those two the court must have regard to the HAER, for an appreciation of the contents of the ballot boxes and as to what constitutes 'documents relating to the elections'. The RPA defines 'election documents' to mean:

'the documents which a returning officer is required to transmit to the Supervisor of Elections;'¹³

[59] Rules 41, 50 and 51 address that subject. Respectively, they impose statutory obligations on the presiding and returning officers relative to the security of ballots and ballot boxes. At the conclusion of counting of the votes following an election, the presiding officer must place certain documents (including counterfoils) into a large envelop provided for that purpose. After sealing the envelop, the presiding officer is required to put the envelop into the ballot box (for the relevant polling station); lock it and deliver it to the returning officer, pursuant to Rule 41(8).

[60] The large sealed envelop contains the:

1. register of votes;
2. several envelopes containing the ballot papers, whether unused, spoilt, rejected or counted for each candidate;
3. packets of counterfoils which should remain intact – each lot in its proper envelop; and
4. envelop containing the register of voters and other documents used at the poll.

[61] On receipt of the sealed and locked ballot boxes, the returning officer must deliver them to the Supervisor (within 7 days after the final count) along with an envelop containing the key, the preliminary statement of the poll and the polling station account.¹⁴

[62] The returning officer is expressly mandated by Rule 51 of the HAER to also deliver to the Supervisor, the ballot papers in his possession; the ballot paper accounts; statements of rejected ballot papers and the verification of the ballot paper accounts; the list of blind and incapacitated

¹³ Section 2 (1).

¹⁴ Rule 50 of the HAER.

voters assisted by companions; the list of votes marked by the presiding officer, the statements relating to them and the declaration made by those companions; the packets of counterfoils; the packets containing marked copies of the registers; the packets containing transfer certificates of presiding officers and poll clerks; and all other documents used for the election.¹⁵ The Supervisor is charged with keeping all such documents in safe custody unless ordered by a judge of the High Court to deliver them to the Registrar in the course of election petition proceedings questioning the validity of any election or return.¹⁶ Barring any such court order, the Supervisor of Elections may after the expiration of 12 months from the related elections, destroy the election documents by burning.¹⁶

[63] Rule 51 seems to contain an exhaustive list of the election documents which the returning officer must turn over to the Supervisor within 7 days of the elections. The catch-all phrase 'all other documents used for the election' employed in paragraph (g) of Rule 53(1) is wide enough to cover all of the documents listed in rule 41(8) that the presiding officer must place in the ballot boxes (in envelopes) and deliver to the returning officer.

[64] Having regard to the language used in the two applications, it appears that at a superficial level, the order sought in the first paragraph of the 2015 application to 'produce and deliver all ballot boxes for all 15 polling stations' was concerned only with the contents of the ballot boxes. Since the referenced rule¹⁷ stipulates what the sealed ballot boxes should contain, it strikes me that the application was concerned with those documents, namely the register of votes; all of the several envelopes containing the unused, spoilt, rejected or counted ballot papers; the packets of counterfoils; and the register of voters **and** other documents used at the poll.

[65] Similarly, by specifying 'documents relating to the election held in Constituency of Central Leeward', the 2017 motion employed the descriptive terminology used in the RPA's definition of 'election documents', thereby directing the court's attention to the documents identified in rule 51 of the

¹⁵ Rule 51 of the HAER.

¹⁶ Rule 52 of the HAER.

¹⁷ Rule 41(8) of the HAER.

HAER; namely the packets of ballot papers in his possession, the ballot paper accounts, statements of rejected ballot papers and the verification of the ballot paper accounts; the list of blind and incapacitated voters assisted by companions, the list of votes marked by the presiding officer, the statements relating to them and the declaration made by the companions of the blind; the packets of counterfoils; the packets containing marked copies of the registers; the packets containing transfer certificates of presiding officers and poll clerks; **and all other documents used for the election**. It follows that in this respect, the 2017 motion casts a wider net than the 2015 application. The first paragraph of the reliefs sought seeks respectively, production and/or delivery to the Registrar of the 'ballot boxes' on the one hand; and the 'documents relating to the election' on the other.

[66] The parties accept that the court may make such an order pursuant to Rule 53 of the HAER. The rule authorizes the court to make an order for:

1. inspection or production of any rejected ballot papers, included ballot papers rejected in part, in the Supervisor's custody; or
2. the opening of a sealed packet of the counterfoils or for the inspection of any counted ballot papers in the Supervisor's custody;

if it is satisfied by sworn testimony, that such an order is required for the purpose of an election petition lodged, or to be lodged in accordance with the law applicable thereto.

[67] Having regard to the applicable legislative provisions, I conclude that paragraph I of the 2017 Motion covers documents additional to those mentioned in the corresponding paragraph of the 2015 Application. This notion will be explored further. Suffice it to say that both paragraphs seek delivery of the specified items to the Registrar.

Second Relief – Paragraph II of the Motion

[68] The second order sought in both applications is almost identical. In essence, Mr. Exeter seeks an order for inspection of all ballot papers in the ballot boxes. In this relief, he restricts his 'claim' to the 'ballot papers in the ballot boxes' and has made no prayer for inspection of the other election documents mentioned in the first relief claimed.

- [69] The 2015 and 2017 prayers as framed in the second paragraph differ in three material respects:
1. Mr. Exeter is referred to as 'Applicant/Intended Petitioner' in the 2015 Application and as 'Petitioner' in the 2017 Motion;
 2. The 2017 Motion includes the Registrar as one of the persons to whom the court should grant permission to inspect the ballot papers. In the 2015 Application, permission was sought only for Mr. Exeter and his representatives to do so; and
 3. A deadline of 18th December 2015 is included in the 2015 Application and the prayer records no purpose or objective. However, the objectives were set out in the grounds and will be addressed later. The 2017 Motion contains no timeline and its stated objective is to determine the accuracy of certain allegations; including that the 'ballots' were pre-printed with the official mark, or stamped by the Presiding Officer and in some instances printed on the counterfoil; that some of the 'ballots' appeared defective or were willfully cut or were willfully mutilated contrary to law.
- [70] The first divergence in framing the orders is not significant and nothing turns on it. It merely describes the capacity in which Mr. Exeter moved the court. The second difference is self-explanatory. It seemingly contemplates inspection of the ballot papers and other documents only by Mr. Exeter or his representative on the one hand; or a joint inspection by him and the Registrar on the other.
- [71] With the third change, Mr. Exeter appears to be suggesting that an inspection of the 'ballots' is necessary to enable him, the Registrar, and by extension the court, to determine if his several allegations about the 'mutilated and defective' ballots, etc. are accurate. This will be examined fully in due course.
- [72] The 2015 Application sought a third relief which appears not to be captured in the 2017 Motion. It requested that the court order the Registrar to open the 'sealed packets containing counterfoils and contained in the aforesaid ballot boxes' in Mr. Exeter's presence to enable him or his representative(s) to 'inspect and open such packets of the **counterfoils**'. The counterfoil is that part of the ballot paper which the presiding officer removes before depositing the related cast ballot

paper into the ballot box. For completeness, it is prudent to ascertain whether Mr. Exeter's choice of words in the instant Motion contains an application for inspection of the counterfoils.

- [73] The rules¹⁸ make provision that after a voter has cast his ballot, the presiding officer is to remove the counterfoil from the ballot paper before depositing it into the ballot box. All such removed counterfoils must by law be placed into an envelop (which is then deposited into the large envelop prescribed by Rule 41) which is secured in the relevant ballot box at the end of the elections, and after all counting has taken place.
- [74] The Act and Rules contain no definition of 'ballot paper' or 'counterfoil'. Both are described in the Rules. Rule 15 of the HAER specifies how the ballot paper is to be formatted. It states that the ballot paper must be in Form 7; contain the names and symbols of the candidates; be capable of being folded; have a space for the presiding officer's initials on its face; have an attached counterfoil and stub; and have a line or perforations between the ballot and the counterfoil and between the counterfoil and stub as in Form 7.
- [75] Rules 31 and 41 stipulate that the presiding officer must remove the counterfoil either when the voter exits the voting compartment in the polling station, after casting his vote; or during counting, in the exceptional case where the presiding officer discovers that it was not detached at the earlier specified time.
- [76] In light of the descriptions of 'ballot paper' and 'counterfoil', it is apparent that they are separate and distinct 'documents' or 'items' which are supposed to be detached from each other at some point during an election. In his 2015 application, Mr. Exeter pointedly highlighted the distinction between the counterfoil and the ballot paper by asking for separate orders of inspection in respect of each. He thereby signaled his acknowledgment and recognition that they are different election documents.
- [77] Form 7 is set out in the Appendix to the Rules. It is useful to include a representation of it in this decision for ease of reference and completeness. A reasonable reproduction is as follows:

¹⁸ Rule 31 of the HAER.

'FORM 7
[Rule 15.]
Ballot Paper

GENERAL ELECTION.....

..... constituency

Voter's number on roll

Polling day space for initials of presiding officer

Do not fold beyond this line

* 1. BABULAH, Conrad D

Chancery Lane,
Engineer.

2. OCEAN, Francis

Hayes Street,
Merchant.

3. RONSON, Emmanuel

Marli Street,
Insurance Broker.

* These are specimen entries.

[78] The relevant portions of rules 31 and 41 provide respectively:

'31. Voting procedure

(1) A ballot paper shall be delivered to a voter who applies therefor, and immediately before delivery-

(a) the **ballot paper shall be marked with the official mark**, either stamped or perforated, **and the initials of the presiding officer**;

(b) the number, name and description of the voter as stated in the copy of the register of voters shall be called out;

- (c) the number of the voter shall be marked on the counterfoil; and
 - (d) a mark shall be placed in the register of voters against the number of the voter to denote that a ballot paper has been received but without showing the particular ballot paper which has been received.
- (2) **The voter**, on receiving the ballot paper, shall forthwith proceed into one of the compartments in the polling station and there secretly mark his ballot paper by marking, with the black lead pencil provided, a cross within the space containing the name and symbol of the candidate for whom he intends to vote. He **shall then fold the ballot paper so that the initials of the presiding officer and the official mark can be seen without opening it**, and hand the paper to the presiding officer who shall, **without unfolding it, ascertain by examination of the initials, the numbers and the official mark appearing thereon** that it is the same paper as that delivered to the voter and, if it is the same, **he shall subject to rule 31A in full view of the voter and all others present remove the counterfoil and deposit the ballot paper in the ballot box.**
- (3) ...

'41. Procedure during count

- (1) If, in the course of counting the votes, any ballot paper is found with the counterfoil still attached thereto, the presiding officer shall (**carefully concealing the numbers thereon from all persons present and without examining them himself**), **remove such counterfoil**. He shall not reject the ballot paper merely by reason of his former failure to remove the counterfoil.
- (2) **If, in the course of counting the votes, the presiding officer discovers that he has omitted to affix his initials to any ballot paper**, as provided by rule 31(1) (a) and as indicated in Form 7 in the Appendix, he shall, in the presence of the poll clerk and the agents, if any present, of the candidates, **affix his initials to such ballot paper and shall count such ballot paper as if it had been initialed by him in the first place** provided that he is satisfied that the ballot paper is one that has been supplied by him and that such an omission has really

been made and also that every ballot paper supplied to him by the returning officer has been accounted for as provided by rule 39.

(3)

(4) The presiding officer shall keep a record, on the special form printed in the register of votes, of every objection made by any candidate, or of his agent or any voter present, to any ballot paper found in the ballot box, and shall decide every question arising from out of the objection. The decision of the presiding officer shall be final, subject to reversal on the final count by the returning officer or on petition questioning the election or the return; and every such objection shall be numbered and a corresponding number placed on the back of the ballot paper and initialed by the presiding officer.' (bold added)

[79] In the allegations appended to the second paragraph of his prayer, Mr. Exeter refers to 'ballots' and 'ballot papers'. For example, in the first of those allegations he asserted 'That all of the said ballots were pre-printed with the official stamp or stamped by the Presiding Officers or otherwise as the case may be and in some cases the official mark was printed on the counterfoil.' He appears to use the word 'ballot' interchangeably with 'ballot paper' in reference to the part of the document which contains the candidates' names, particulars and symbols, as distinct from the counterfoil and stub.

[80] This accords with similar use in the rules. For example rule 15(2)(d) provides:

'A ballot paper shall be in Form 7 in the Appendix and shall be printed in accordance with the directions therein and shall-

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

[81] The upshot of this observation is that:

1. to the extent that Mr. Exeter has attempted to incorporate in his Motion, allegations, particulars or evidence which effectively invoke the court's discretion to grant an order for inspection of the counterfoils, they are inconsistent with the relief sought in paragraph II of the Motion, because it restricts the 'claim' to ballot papers; and

2. The Order sought excludes them from consideration. The court's jurisdiction has not been invoked in relation to them. Accordingly, those parts of his allegations, particulars and evidence must and will be disregarded for the purposes of this Motion, as they do not arise from the prayer.

[82] In view of the foregoing, it appears more logical and reasonable to examine the second of the two orders before addressing the first. I propose to now recite them in their entirety and to concurrently evaluate the allegations, the accuracy of which Mr. Exeter contends can be determined by an inspection of the ballot papers. This part of the analysis will be aimed at ascertaining whether similar allegations were made in the 2015 application, if so to what effect and whether it can be described as an abuse of the court's process to seek the referenced order at this juncture.

Paragraph II i.

[83] The first allegation which Mr. Exeter indicates must be evaluated to determine its accuracy is:

'... all of the ballots in the ballot boxes were pre-printed with the official stamp or stamped by the Presiding Officers or otherwise as the case may be and in some instances the official mark was printed on the counterfoil.'

As stated previously, the court will not concern itself with that part of any assertion which relates to the counterfoils, since the prayer did not seek inspection of counterfoils. Accordingly, the clause '... and in some instances the official mark was printed on the counterfoil' will be disregarded.

[84] Mr. Exeter did not allege in the 2015 application proper, that the ballots in the ballot boxes were pre-printed with the official stamp or stamped by the Presiding Officers or otherwise. Neither he nor his witness testified to such effect. Neither Mr. Exeter nor Ms. Eustace provided affidavit testimony in 2015 or 2017 that they observed any ballots pre-printed with the official stamp or stamped by the Presiding Officers. This assertion was first made in the petition filed on 31st December 2015.

[85] In paragraph 3 (22) of the Petition, Mr. Exeter asserted that contrary to Rule 31(1) (a) of the rules, 'all of the ballot papers issued to presiding officers by the 4th respondent had the official mark pre-printed on them and in some instances the official mark was printed on the counterfoil.' He noted that this is in violation of the procedure which states that 'The Presiding Officer puts the official