IN THE SUPREME COURT
TURKS & CAICOS ISLANDS

ACTION CL No. 26/03

IN THE MATTER OF THE ELECTIONS ORDINANCE 1994 (THE ORDINANCE)

AND IN THE MATTER OF THE ELECTION OF SEAN RICKARD ASTWOOD AS THE MEMBER OF THE LEGISLATIVE COUNCIL FOR ELECTORAL DISTRICT NUMBER 12, FIVE CAYS, PROVIDENCIALES, TURKS & CAICOS ISLANDS, IN THE GENERAL ELECTIONS HELD ON THE 24TH DAY OF APRIL 2003.

BETWEEN:

LILLIAN ELAINE BEEN

Petitioner

- and -

(1) SEAN RICKARD ASTWOOD
(2) STANLEY WILLIAMS
(3) WILLIAM CLARE
(4) STUART TAYLOR

Respondents

Mr. A. Misick QC and Mr. C. Greene for the Petitioner;
Mr. R. Mahfood QC; Mr. P. Davis; Mr. S. McCann; Mr. B. Duncanson; and Mrs. S. Cartwright-Robinson for the first Respondent; and
Mr. D. Woolgar and Ms. K. Astwood for the 2nd 3rd and 4th Respondents.

JUDGMENT

INTRODUCTION

1. This matter arises out of the election held in Electoral District No. 12 (Five Cays, Providenciales) as part of the General Election held on 24th April 2003. The petitioner and the first respondent were the only candidates, and they received 263 and 268 votes respectively, so that the respondent was declared duly elected to the seat. The petitioner now brings an election petition to challenge that.

2. Election petitions are the only way of challenging an election. They are provided for, and governed by, Part IV of the Elections Ordinance ('the Ordinance'). They may be brought on the grounds of an undue election or an undue return. Without going into all that is encompassed by that, an irregularity on the part of election officials is sufficient to

produce an undue election if it is such as to affect the result: Morgan & Ors. -v- Simpson & Ors. [1974] 3 All ER 722. I have dealt with what that means in my judgment which I delivered today in action number CL 25/03, McAllister Hanchell -v- Noel Skippings & Ors.

3. The Petition alleges various errors and irregularities against the election officials. It also alleges "various acts of bribery and/or corruption or illegal practices" against the first respondent and his agents, and pleads that they –

> ". . . engaged in illegal or corrupt practices which prevailed so extensively that they may be reasonably supposed to have affected and in fact did affect the election result for the 12th electoral district to the detriment of the Petitioner, and the electorate of the 12th electoral district."

4. Sections 60 and 61 of the Ordinance govern the consequences of corrupt and/or illegal practices. They provide:

> "60. If a candidate who has been elected is certified by the Judge who tried the election petition questioning the return or election of such candidate to have been personally guilty or guilty by his agents of any corrupt or illegal practice his election shall be void.
>
> 61. Where on an election petition it is shown that corrupt or illegal practices or illegal payments or employments committed in reference to the election for the purpose of promoting or procuring the election of any person thereat have so extensively prevailed that they may be reasonably supposed to have affected the result, the Judge shall certify that the election of that person, if he has been elected, shall be void and he shall be incapable of being elected to fill the vacancy or any of the vacancies for which the election was held."

5. The basic difference between those provisions is that, under s. 60 one act alone will suffice to cause the election to be set aside and held again, but the guilty candidate may stand again. Under s. 61 more is required, in that the corruption or illegality shown must be such as "may be reasonably supposed to have affected the result," but the candidate concerned is then debarred from standing again. Both sections are draconian, in that personal guilt does not have to be shown against the candidate. It is sufficient if his people commit prohibited acts, and in this context agent does not just mean one of the agents formally appointed for the purposes of the election, but means anyone acting on his behalf. I will deal with that further below, but it seems to me that the policy of the law is to put the onus on the candidates to ensure that their people behave, and respect the laws, and if they fail to do that they must suffer the consequences. Although that may seem harsh, it makes eminent sense in a situation where the candidate could otherwise excuse himself by simply saying he did not know what was going on, and it is entirely reasonable to expect potential legislators and leaders of the country to enforce propriety and respect for the law in their own camps.

COMPLAINTS AGAINST ELECTION OFFICIALS

6. As originally pleaded the Petition alleged that -

(i) Of the 10 rejected ballots, at least five were clearly marked for the petitioner and should not have been rejected.

(ii) Two persons had been improperly registered so as not to give effect to the outcome of the claims and objections process, they being:

(a) Laverne Walkin

(b) Claudius Williams

(iii) Eight names submitted by the petitioner for late registration under section 23(2) of the Ordinance were omitted from the final version of the Register.

although the Supervisor had agreed in writing to include them. At trial that number was reduced to five persons, being:

(a) Joanal Germeus

(b) Rolyn Almonte

(c) Gregory Bain

(d) Daverine Simmons

(e) Alvin Forster Rigby

(iv) Two persons submitted by the first respondent had been included on the final Register, although they were not qualified:

(a) Nadege Parker

(b) Sandy Odena Butterfield

7. At the trial the petitioner abandoned the claim in respect of Laverne Watkin and Claudius Williams, on the basis that they did not in fact vote. Her counsel also attempted to abandon the claim in respect of the rejected ballots, but the respondent asserted a recriminatory case that four of the rejected ballots were properly cast for him, or alternatively that all of the rejected ballots claimed by the Petitioner were properly rejected. I will, therefore, have to deal with that also.

(1) THE REJECTED BALLOTS

8. The law as it stands is mandatory as to the requirement that a vote should be signified:

". . . by marking with a black lead pencil and not otherwise a cross within the space opposite the name of the candidate for whom he intends to vote,"

9. In England, and in many other places, the rigours of this provision have been ameliorated by a provision that a ballot paper should not be invalidated by a failure to comply with these directions if the intent of the voter can nevertheless be ascertained. We do not have such a provision here. In the absence of it, the common law (which has been

in part developed in the region) has insisted on the making of a cross with a black lead pencil:

> "The construction which we adopt would have the effect of disfranchising those who deliberately ignore the directions given to them. We can see no hardship in such person being disfranchised. Indeed we think it right that they should be. If a man who has been told to make a cross deliberately makes an 'O' or a tick he is not doing or attempting to the act which records a vote." Ragoobir -v- Punch & Dass, Trinidad, Suit 176 of 1956; cited with approval in Cato -v- Allen (1958) 1 WIR 68, FSC.

10. However, in respect of the placing of the cross the law is less clear. In Cato -v- Allen (*supra*) it was said:

> "With regard to the second group of disputed votes, those where the cross is made in an ambiguous position, I accept as a useful guide the principle cited by Mr. Hughes from Fraser on Parliamentary Elections, namely, that if one strikes out all that is unessential for the cross, does what remains clearly indicate an intention to vote for the candidate who claims it as such ?"

11. I find that a *non-sequitur*. The principle cited has nothing to do with the placement of the cross, but with its form. Nor do I see why, if the requirements are mandatory, the direction as to the placement of the cross should be any less mandatory than anything else. Mr. Woolgar, who appeared for the election officials, in an elegant argument urged me to find that only the requirement that the voter mark his ballot secretly is mandatory and that the rest is directory, and so not requiring strict compliance. He bases that on the English antecedents of this provision, in which only the requirement to mark the ballot secretly was contained in the Act, the other requirements as to how to mark it being contained in the directions for the guidance of voters. While that is attractive, I think I am bound to assume that the framers of the legislation, by incorporating the ancillary requirements in the body of the Ordinance, must have intended to make them mandatory, perhaps seeking the

advantages of certainty. I think that it would require an express provision, along the lines of that now contained in the English legislation, to allow a more flexible approach. Whether or not that is desirable is a matter for the legislature, not me.

12. Applying that to the disputed ballots, and identifying them by the number on the back, I find as follows:

(i) 6001 – for the Petitioner is good, and not invalidated by the voter having written out the candidate's name in full.

(ii) 5922 – for the Petitioner is bad - the cross has been made through the shell, and not in the box "opposite the name".

(iii) 5771 – for the Petitioner is bad – it is a tick and not a cross.

(iv) 5706 – for the Petitioner is bad – it is an 'S' and not a cross.

(v) 5879 – for the Petitioner is bad – it seems to contain the voter's name, which the principles of a secret ballot absolutely forbid.

(vi) 5981, 5955, 5888, and 5906 – are all marked for the Respondent by a cross either in the box with the name or below it. I find that all of these are bad, the cross not being in the box opposite the candidate's name.

(vii) 5714 – is not marked for anyone and is plainly bad.

I therefore add one vote for the Petitioner, and none for the Respondent.

(II) THE OMITTED VOTERS

13. Section 23(2) of the Ordinance allows the late registration of any person whom the Supervisor thinks is qualified. I have considered the section in more detail in my judgment in CL 25/03, but wish again to say that it is a most unhappy provision, which the legislature would do well to reconsider. It serves no real purpose – if a voter cannot be troubled to get his name on the register the first time around, I see no reason why the whole system of claims and objections should be subverted to allow him to get on late. If there are circumstances which the legislature thinks would justify a late registration – such as illness or temporary absence overseas at the time of the registration process – it would

be better to specify them. As it is, in practice the section seems to be used as a safety net for anyone whom the candidates can discover did not get on the register. Because of this, most of the 'applicants' are put forward by the candidates in a partisan process, and the Supervisor's decision on them is not subject either to public scrutiny or appeal. It is hard to think of a provision more calculated to cause dissension.

14. In this case the evidence is that the candidates met with the Supervisor on the 16th April (just eight days before the election) with a view to considering the applications for late registration. They were given a handwritten list, prepared by the Supervisor's office, of all the new applicants. They met again the next day, by which time the Petitioner had typed up the same list, adding her comments as to which were good and which were bad. At the end of the list she had the following paragraph:

> "If the corrections made are to your satisfaction please indicate so by signing below in the space provided."

15. She says that at the second meeting the Supervisor agreed that those that she indicated as good would be accepted, and signed her list to that effect, as did Mr. Astwood. The Petitioner also says that the first respondent produced three extra names at the second meeting, and these were added in manuscript on the back of her typed list, it being agreed that in respect of those, and those only, the Supervisor would carry out further investigations as to their qualification before deciding whether to include them. However, it is the respondents' case that the Supervisor was not agreeing to include the names shown as good on the typed list, but was only agreeing to consider them.

16. I think that the parties were not of the same mind on this. I accept the Petitioner's evidence as to her understanding: it is hard to see what the purpose of the meetings was, unless it were to decide on the various applications. The original list had come from the Supervisor's office, so he had had the opportunity before the meeting to investigate and consider. The second meeting was only a week before the election, and was really too late for him to be embarking on an investigative exercise at that stage. On the other hand, the

Supervisor could not bind himself, either by contract or bare promise, to include someone on the register who was not properly qualified, or to exclude someone who was. He was still obliged to exercise his statutory discretion, and I have no doubt that he understood that. It may well be that he did not make his intention plain, and signed the list carelessly, but I do not think that that amounts to evidence of bad faith on his part, and I find that there was none.

17. I held in CI. 25/03 that the decisions taken on late registration are final and may not, in the absence of bad faith, be enquired into on an election petition. However, because of the allegations of bias against the Supervisor I have briefly reviewed each case below. I have come to the conclusion that the applications for Gregory Bain and Alvin Foster Rigby were lost; that the rejection of Daverine Simmons was correct; that the decisions in respect of Joanal Germeus and Rolyn Almonte may have been wrong in fact, but were entirely justifiable on the evidence then before him. It would have been preferable had he carried out a more extensive investigation in those two cases to ascertain the true facts, but given the constraints of time and the number of late applications throughout the country, I do not think that his failure to do so exposes his decision to review. There is no irregularity in respect of any of these decisions, and none of them is now reviewable on this Petition.

(a) Joanal Germeus

He had attached his father's Belonger certificate to his application, and this had caused confusion as it was in a different name. He also produced a page from his passport showing a Belonger stamp, but the Supervisor says that he was not able to connect that to the applicant – it could have been a stamp in any passport. He is right in that respect, as he did not have a photocopy of the complete passport, and there is no name of the holder on the Belonger stamp. I have had the benefit of seeing the original passport, and I find that he is a Belonger and otherwise qualified, but that the mistake of the elections office was not unreasonable, and is certainly not indicative of the bias alleged against it by the Petitioner and her party. It is not now capable of being re-opened, it being one of the perils of late registration that there is no mechanism for correcting errors and omissions such as

this. If Mr. Germeus wanted to be sure of being on the list he should have applied at the proper time.

(b) Rolyn Almonte

This man had been born in the Dominican Republic, but was a naturalised British Dependent Territories Citizen, and he produced his certificate of naturalisation and a BDTC passport. That is not evidence of Belongership, that being a status quite distinct from citizenship, and the Supervisor was right to reject it. I would have expected him to give reasons for doing so and afford an opportunity for the omission to be addressed, but he did not do so. Mr. Almonte now seeks to establish Belongership through the marriage of his mother to a Belonger and her subsequent acquisition of that status when he was still a child, but there was nothing to tell the Supervisor that, and it is now unnecessary for me to decide the question of his status.

(c) Gregory Bain

The Petitioner complains of a failure to register this man in ED 12. A man of this name was registered in ED 13, and on discovery an application was produced in that name for registration in that district. It was a late application, his Form #1 being dated 7th April, and Form #4 being dated 9th April. At trial the Petitioner produced a man of that name, resident in ED 12, who said that the application form did not relate to him, the particulars being different, and the signature not his. However he said that he had given Mrs. Been's office an application, which she told him had been submitted. I accept Mr. Bain's evidence on this. Indeed I was impressed by him as a witness of truth. I think that a slip occurred somewhere, with the result that Mr. Bain's form either did not reach the Supervisor's office, or if it did, was lost or discarded. Having seen the way they worked, I think the probability is the latter, but if it occurred it occurred innocently because of a genuine confusion and not because of a partiality or a deliberate attempt to disenfranchise Mr. Bain. I held in CL 25/03 that merely losing an application form

is not such an irregularity as can be inquired into on an election petition. It is now, therefore, too late to correct his omission.

(d) Daverine Simmons

This was a late application which was put in on Mr. Simmons's behalf by Mrs. Been's office, but in fact he was already registered. In the preliminary list he had been registered in Middle Caicos, where he had appeared on the register since 1999. At the claims and objections hearings in Middle Caicos he had been objected to and moved to ED 11 (Blue Hills), where he admits he was living in November 2002. Given that he was registered in Blue Hills, the attempt to register him late was inappropriate and doomed to failure, and on the evidence his registration in ED 11 appears to have been the appropriate one.

(e) Alvin Forster Rigby

I have no evidence from this man himself, although Mr. Astwood in his evidence said that he knew him, that he was the brother of Benson Rigby, and that he was qualified. His name was on the manuscript list prepared by the Supervisor's office. That had been compiled by a Mr. Leo Missick, who was an assistant in the office at the time, and the evidence is that he did so from a pile of applications for ED 12. The fact of the inclusion of the name in the list is strong evidence that an application for him existed at that time which was subsequently lost or misplaced. I think that this was an error on the part of the office, but I do not think that it goes beyond that.

(III) UNQUALIFIED ADDITIONS

18. Of the 2 allegedly unqualified additions, one was a late entry, but the other had been on the voters list from the outset.

(a) Nadege Parker

This is one of the late applications put forward by Mr. Astwood which were listed on the back of the Petitioner's typed list. The application is dated 3rd April 2003,

and it gave Ms. Parker's date of birth as 17th July 1985, as did the attached copy of her passport. The Petitioner also produces a birth certificate that shows that she was born in Haiti on 17th July 1985, so that she would not attain 18 years until 17th July 2003. There is nothing to contradict that, and indeed it is confirmed by the application itself. She was, therefore, qualified to be pre-registered under s. 21, but if that had been done properly would not have been qualified to vote at an April election. There was also a complaint about her immigration status, but that was not pursued. I held in CL 25/03 that I could not enquire into the constitutional validity of s. 21. However, in this case that section was not complied with, and this young lady was, therefore, irregularly on the register. She should not have voted, and she cannot legally vote until 17th July of this year.

(b) Sandy Odena Butterfield

The Petitioner says she is not a Belonger. However, she was not one of the late applications. Her name had been on the preliminary list, and no objection was taken at the claims and objections. In CL 25/03 I held that the Register was final on such matters, and that is particularly so if no objection was made at the proper time. She could still have been challenged by requiring her, pursuant to s. 48(2) of the Ordinance, to take the oath of qualification at the poll, but apart from that the register is final on the question of her qualification.

19. In summary, having reviewed the petitioner's complaints I find that the count should be changed to 264 for her and 268 for the first respondent, thus narrowing the margin to 4 votes. I find that one voter, Nadege Parker, was improperly entered on the Register, as it did not show the date when she would attain the age of 18. Had it done so it would have been apparent that she was not qualified to vote on the day of this election. The Register should now be rectified to correct that. However, that irregularity could not possibly have effected the result, and there is therefore no basis in any of the alleged defalcations of the Supervisor for avoiding the election.

THE ALLEGED ILLEGAL AND CORRUPT PRACTICES

19. It is plain that the Petitioner and her supporters were aggrieved by the conduct of their opponents on election day, and what they perceived as the failure of the police to restrain them. A lot of this centred around campaign members accompanying people to the polling station, or being allowed to drive into the yard of the school where poll was held, to drop off passengers. Much of this discontent arises from a misunderstanding of the significance of the 100 yard line. A line had been marked on the road 100 yards from the polling station. This had obviously derived from section 52(1) of the Ordinance, which makes it an offence for people to "assemble or congregate within one hundred yards of any building in which is situate any polling station."

20. Both sides had erected tents just outside this line, on either side of the access road to the school. They were described as being for the assistance of voters, in that voters arriving at the polls could make enquiries there, and be given their voter number. The latter seems to have been a particularly useless activity, as the register of voters is arranged alphabetically, and not in a numbered sequence. I have little doubt that both tents were erected for the reception of supporters and the shelter of party workers. I am bound to say I think it rather unfortunate, as it meant that voters approaching the polls had to run the gauntlet of the tents and the campaign workers they contained. However, it was a practice common to both sides, and neither complains of it.

21. The evidence is fairly clear that, partly because of the siting of the tents, the general area of the poll was not well ordered and was the scene of various Hogarthian goings on. In this respect I accept the evidence of Mr. Gregory Bain, who said he was by the tents from 10 a.m. to 3 p.m.. He was called by the Petitioner on an entirely different point, but in cross-examination said:

> "I saw guys serving beers and doing other things. Viewing the place, there was guys smoking dope and drinking beer and hanging out. There was a little arguing

back and forth, between the candidates – it wasn't my concern what about. There were several arguments, off and on. There would be rest periods and it would start again. The lady was asking the police to assist – I do not recall who, but it was a bunch of ladies right under the [PNP] tent. It was mostly guys under the PDM tent. The ladies was trying to get the police attention. I heard one say, 'officer do your job, you are supposed to maintain law and order and you are letting these guys do what they want to do' . . . it was my concern also – guys smoking and drinking in a polling area where no contraband or alcohol is allowed. The police were there to handle all of that."

22. On the other hand, a lot of the discontent from the PNP side seems to have centred on PDM supporters crossing the 100 yard line. But, as noted above, the Ordinance does not prohibit people from crossing the line, whether they have voted or not, and whether they belong to the constituency or not. Anyone is free to drive or walk across it, or to approach the poll, provided that they do not congregate beyond it, or commit some other offence against either the Ordinance or public order generally. That is the approach the police seem to have taken to the line, but that generated suspicion and discontent with the Petitioner's supporters, who wrongly thought that only people going to vote could cross it.

23. Against that general background, I now turn to the specific allegations. In considering them I have applied the criminal standard of proof – in other words the Petitioner must make me satisfied so that I am sure of the truth of the allegations. Put another way, I have to be satisfied beyond reasonable doubt of their truth. There is no burden on the First Respondent to prove their falsity.

24. There are a few preliminary points I need to make concerning the petitioner's witnesses. Many are party faithful, who would have a strong motivation to support their side, and I have therefore treated their evidence on contested matters with caution. Some of the voters who were alleged to have been bribed either admittedly or plainly abused drugs, and were not model citizens. That goes to their credibility, but it has to be born in mind that it not doctors, lawyers or accountants who are likely to be offered bribes – it is

those on the fringes of society, who are indifferent to its rules, who provide the prime target for anyone seeking to suborn a vote.

25. It is the Petitioner's case that various individuals were offered bribes. Two other incidents of money changing hands had been pleaded, and were covered in the evidence, but Mr. Misick in his closing argument said that they are now relied upon as establishing a background where money was available and passing between PDM campaign workers. It is also said that various PDM workers either displayed or wanted to display their vote. That is not an illegal or unlawful practice under the Ordinance, though plainly wrong and contrary to the requirements of a secret ballot. Again, Mr. Misick relies upon it as background and evidence of attitude which prevailed among the PDM's supporters. I am going to consider the evidence on the exposed ballots first, then that of money changing hands, and finally the specific instances of bribery.

(I) EXPOSED BALLOTS

26. The polling agent for the Petitioner, Mrs. Janesta Messam, said that several people asked to vote by open ballot, including Benson Rigby, Lofton Morley, and Paula Arthur. In her cross-examination she added Travis Adderley, although it seems that what she meant was that he asked to vote in the presence of another person, Staven Rigby, a former PDM representative for the constituency. She also said that Benson Rigby and Travis Adderley exposed their ballots. The former to Mr. Astwood, who was in the polling station at that time, and the latter to the polling agent. Her evidence is contested, although it is accepted that she complained of Mr. Rigby at the time, in the presence of Mr. Astwood.

27. Mr. Astwood says he was present during the incident with Benson Rigby, as he was there "speaking briefly to my polling agent". However, he denies seeing the ballot. Mr. Benson Rigby denies showing his ballot, but accepted that he did ask to vote by open ballot. He said that it was because he wanted people to know who he voted for and that he was "an open sort of guy". He was a recent recruit from the PNP – indeed in the last campaign he had been the Petitioner's campaign manager.

28. Of the others said to have asked for an open ballot, Paula Arthur was not called to give evidence. Mr. Adderley gave evidence and denied showing his ballot, however, he accepts that he wanted Staven Rigby to go in with him 'to make sure that I did not make a mistake', and when that was refused he further accepts that he then asked for an open ballot. Mr. Morley is a former supporter of the Petitioner, who campaigned for her in 1999. He now supports the other side. He denies asking for an open ballot, and denies the suggestion that as a PDM newcomer he had to prove himself.

29. Of the officials, Mr. Clare, the returning officer, recalls the fuss over Benson Rigby showing his ballot, but did not himself see it. In his witness statement he did not mention either him or Travis Adderley asking for an open ballot, but in cross-examination he said he recalled that Lofton Morley did that, but no-one else. Mr. Taylor, the presiding officer, recalls the accusation against Benson Rigby, but did not see him open his ballot. He recalls that one person asked to vote by open ballot, but cannot say who. He did not recall Lofton Morley or Travis Adderley asking, although he recalls the latter asking for someone to assist him, which was refused.

30. One of the Petitioner's witnesses, Jamy Williams, claimed that he was in the polling station when Rigby exposed his ballot and saw it. Nobody else puts him in the polling station at that time, and it was apparent from his cross-examination that he could not have seen it by looking as he says he looked – to his right when the booth was to his left. In any event I was not impressed by his demeanour, and I reject his evidence on this.

31. However, I accept Mrs. Messam's evidence. I was impressed by her demeanour, and her evidence about who asked for an open vote was confirmed in part by Mr. Clare and partly by Benson Rigby's admission. Similarly Travis Adderley confirms what she said about his asking to have someone go in with him. I accept that the officials did not see the exposure of the votes, but from her description the action would have been obscured by the booth, and in any event they could have been occupied on other things. In the case of

Benson Rigby, it may well be that Mr. Astwood did not see it – he was there speaking to his agent, and I accept that he may not have been looking.

32. It is not in fact an illegal practice or an offence under the Ordinance to expose a ballot. It is an offence under s. 76(3) to induce someone to expose their ballot, but there is no direct evidence here that Mr. Astwood induced this behaviour, and the two instances are insufficient for me to infer that, or to infer that it was part of a course of pre-planned conduct. At its highest it shows a certain anxiety on the part of some PDM campaign workers that their loyalty be put beyond doubt.

(II) MONEY CHANGING HANDS

33. Jamy Williams gave evidence that he saw Benson Rigby bribing a police officer, who was stuffing the money into his pocket as fast as he could. For the reasons given above when considering that young man's evidence in respect of the open ballots, I doubted his evidence generally, and therefore reject this allegation outright. There is no other evidence of impropriety by the police, although as noted above the misunderstanding over the 100 yard line brought them into a degree of conflict with the Petitioner and her campaign. If I have a criticism it is that the officers by the gate were, for most of the day until joined by the Sergeant in charge in the afternoon, somewhat junior and inexperienced, and perhaps not able to project the authority and control necessary to reassure the Petitioner and her people.

34. A Mr. Sidney Stuart, who was working as a driver for the Petitioner's campaign, said that between 12.30 and 1 p.m. on election day he saw Jason Francis, the brother of Mr. Astwood and one of his campaign stalwarts, give Mr. Samuel Been money. In his statement he said "what appeared to be money", but in his evidence he was clear that it was money. I think that the affectation in his original expression derives from the fact that he used to be a police officer in the Bahamas. He told Porter Ewing this. He says that he thought that it was not a bribe but that they were probably using the money to bribe other voters. He thought that they behaved suspiciously, as they went behind a vehicle to do it. However, it is fair to say that he had a suspicious frame of mind, in that he says that he saw

Benson Rigby driving people into the yard and walking with them to the polling station, and that he formed the view he was trying to bribe them as they were capable of walking on their own. Both Mr. Francis and Mr. Been deny this incident. However, having seen all those involved, I accept Mr. Stuart's evidence.

35. Thomas Porter Ewing, to whom Mr. Stuart had reported his observation, says he saw Samuel Been hand money to Chesney Rigby at about 2.30 pm. Mr. Ewing has been an active supporter of the PNP for 20 years and is the uncle of the Petitioner. He said he saw Rigby drive into the road with his truck and park, and that he got out and went round the back of his truck, while Mr. Been, who had been in the PDM tent, got up and came to meet him and passed him money. He says he shouted out "man Sammy I see you buying people", and then went to get the police. Sgt. Charles then came, but Mr. Ewing was disappointed with the way he handled it. He also says that some time later Mr. Rigby came back and showed some money, which he flipped, and which appeared to be $200 - $300 in $20 notes, and said "this is money I had in my pocket – nobody can buy me out."

36. A Mr. Philip Robinson, the Petitioner's brother, says he was present for this, and gives a similar version, although the details differ. I do not think that any of the discrepancies are particularly significant – as I am always telling juries, different people see the same thing in different ways, and their strengths of observation and recall may differ. However, he does say that when Rigby came back he said, "nobody can buy me, Sammy only gave me a few dollars to buy a couple of beers."

37. Sgt. Charles says that Ewing did indeed make a complaint to him, although he says he specified the sum of $100, and did not just say money as Ewing maintains. The Sgt. went over and spoke to Been, who denied it and said he had been passing Rigby a viagra pill, and the officer pursued it no further, feeling that Ewing had been unable to substantiate his claim. That seems a reasonable conclusion to me, as Robinson did not back it up to the officer at the time.

38. Mr. Chesney Rigby did not give evidence, but I accept on the evidence that he is a strong PDM supporter, who had campaigned for the party. Mr. Samuel Been did give evidence. He is the former husband of the Petitioner, who has changed sides to the PDM. He accepts that Ewing accused him, but denies giving Rigby any money. He also says that he did not tell the officer it was viagra, but merely told him to tell Mr. Ewing it was viagra as a joke, because Mr. Ewing was always asking for viagra.

39. I accept Mr. Ewing's evidence. I have some doubts about the purported corroboration from Philip Robinson, largely because of his failure on the day to support the story when the police came. Nevertheless, Mr. Ewing did report it at the time, and I find that Mr. Been gave Chesney Rigby something in the circumstances described by Mr. Ewing. He also says that Rigby later showed it to him, and in the absence of any refutation by Rigby, I accept that and find that it was a wad of money, in the region of $200 - $300, that was passed that day. I do not think that it was a bribe. Mr. Rigby was one of the party faithful and you do not bribe such people. Indeed, Mr. Misick seemed to accept that in his closing argument, when he relied on this incident as simply part of the context of, or background to, the other specific allegations of bribery. I cannot follow that approach. For these incidents to have any relevance I would have to be sure that the money was provided for the purpose of funding bribes (which in itself would amount to the offence of bribery under s. 68(1)(c) of the Ordinance). I am not sure of that - there is no direct evidence that that was the purpose of these transaction, and nothing substantial from which I could infer it. I therefore consider that these allegations, although suggestive, lead nowhere.

(III) SPECIFIC INSTANCES OF BRIBERY

40. The specific allegations of bribery primarily concern four people – (a) Akishna Arthur, who gives evidence of an offer from Benson Rigby concerning a third person, Sean Holbert; (b) Rubien Adams who says that Samuel Rigby, Clevie Rigby and Carl Been each gave him money on his way to the polls; (c) Theophilus Williams who said that Travis Adderley offered him $100; (d) and Jason Moore who says that Samuel Been offered him cocaine, and Jason Francis offered him $100, and gave him $60. Each is uncorroborated by other direct evidence – in other words no-one else speaks to each individual incident.

However, to the extent that three of them are similar and might be said to form part of a pattern of conduct on that day, I think that each is capable of standing in support of the other. I have considered each in turn below, but it is first necessary to determine whether those alleged to have been concerned were, properly considered, the agents of the candidate Mr. Astwood.

41. There is no direct evidence that Mr. Astwood was involved in any of these incidents, or that he had commissioned or ordered them in some way. His evidence is that he was up at the poll, standing outside the door, all day and not down at the tent, and I accept that. It might be argued that it could be inferred that they were done with his knowledge or to his order, being for his benefit, but that is not an inference that I would draw on the evidence. Nor is it necessary for me to do so. The effect of bribery is so pernicious, that it is the policy of the law to fix a candidate with liability for the acts of his agents, thus avoiding the necessity of proving complicity on his part:

> "A candidate's liability to have his election avoided under the doctrines of election agency is distinct from, and wider than, his liability under the criminal or civil law of agency. Once the agency is established, a candidate is liable to have his election avoided for corrupt or illegal practices committed by his agents even though the act was not authorised by the candidate or was expressly forbidden. The reason for this stringent law is that candidates put forward agents to act for them; and if it were permitted that these agents should play foul, and that the candidate should have all the benefit of their foul play, without being responsible for it in the way of losing his seat, great mischief would arise." Halsbury's Laws, 4th ed., Vol. 15, para 697.

42. What is an agent for these purposes? It is not limited to the specific agents who can be appointed under the Ordinance: a polling agent and a counting agent. It is not limited to a person who would be regarded as an agent for the purposes of the commercial law or the law of contract. It is not limited to the candidate's campaign committee. Instead it

embraces anyone who, with the candidate's knowledge and approval, played an active part in his campaign – in other words, it means one of his team:

> "In order to prove agency it is not necessary to show that the person was actually appointed by the candidate or that he was paid. The crucial test is whether there has been employment or authorisation of the agent by the candidate to do some election work or the adoption of his work when done. The candidate, however, is not only liable for the acts of the agents whom he has himself appointed or authorised, but also for the acts of agents employed by his election agent or by any other agent having authority to employ others. . . Employment in the business of the election is a question of degree, but it has never yet been distinctly and precisely defined what degree of evidence is required to establish such a relationship between the candidate and the person guilty of corruption as should constitute agency. No one has yet been able to go further than to say that, as to some cases, enough has been established, but as to others, enough has not been established, to vacate the seat. All the circumstances of the case must be taken into consideration, and the evidence may be regarded cumulatively as establishing agency." Ibid. para 698.

43. As to the evidence, in their witness statements, which were made and served late on 4th June, each of those alleged to have been involved recites in identical terms that on election day he "was one of the volunteers assisting the voters on behalf of Sean Astwood." Only Benson Rigby goes beyond that, for he says that his main duty was to provide rides for and generally help voters who asked for help.

44. There was also the evidence elicited in cross-examination about the role of the various individuals in the campaign. Mr. Astwood said that he would meet volunteers at the campaign offices (of which there were two) and discuss the campaign and plans and strategies. He seemed shy of saying it was an election committee, but others described it as that. He said the campaign manager was Carl Bain and the assistant campaign manager was Benson Rigby. The committee did not include Lofton Morley or Travis Adderley,

who never attended such meetings. On election day he said he had a team of volunteers at the tent, and they were charged with checking the lists to see who voted; giving out voter numbers; contacting supporters who had not yet voted; and "keeping an eye on the opposition." These included Carl Bain, Jason Francis, Benson Rigby, and Clevie Rigby. He also had drivers to pick up voters who needed assistance getting to the polls, and these included Benson Rigby, Clevie Rigby and Mervyn Cox. He did not know that Lofton Morley or Travis Adderley had any role, although he saw Morley by the tent when he went down there. He later said that Travis Adderley had never worked on his campaign.

45. Benson Rigby had been the Petitioner's campaign manager in the last campaign but had changed sides. He said he worked closely with the campaign manager, Carl Bain. He said that only he and Bain were on the campaign committee 'as agents'. He said that, as far as he knew, Samuel Been did not work for the campaign, and did not work for it on election day. On election day he was "campaign agent", and he was engaged in taking people back and forth to the polling station. He said he did not see Samuel Been, Jason Francis or Travis Adderley at the tent that day. He saw Lofton Morley, but said he was not on the campaign that day. He said that he did not know that Samuel Been, Jason Francis or Lofton Morley were volunteers that day. In view of the evidence from the others I find that he was not telling the truth about their involvement, but was deliberately down-playing it.

46. Jason Francis (who is the candidate's brother) accepted that he could be considered one of the candidate's agents -- he said he was on the campaign committee. He said Samuel Been helped with the campaign. He said Morley and Adderley were volunteers. When asked what they did he said they were at the polling station doing volunteer work much the same as him, but he also said there was no clearly defined role or job description for what a volunteer did.

47. Samuel Been said that he was not one of Atwood's agents during the campaign, nor listed on his committee, although he went to one or two meetings. He accepted he helped him, by putting in a good word in fortuitous political conversations rather than actively

campaigning or canvassing. Indeed, he said he was never on any campaign trail. On election day he accepted he was lending his assistance as a volunteer, although he would not accept that as working for the campaign. He said other volunteers included Morley and Adderley. He described his duties as assisting all voters on behalf of Astwood – he would ask them if they wanted their number.

48. Lofton Morley said that he was sitting at the tent showing people where to go to get their numbers. He said it was just him and Samuel Been helping with the numbers, and that he did not see Travis Adderley that day. I should note that, with the non-appearance of Harold Arthur, there is no surviving allegation against Mr. Morley which I need consider.

49. Travis Adderley said that he was at the tent assisting the guys there giving people their voter numbers. With him were Carl Bain and Clevie Rigby. As noted above, Carl Bain was the campaign manager, but there is no statement from him. Nor is there a statement from Clevie Rigby.

50. On that evidence I find that each of Carl Bain, Benson Rigby, Jason Francis, Samuel Been, Travis Adderley and Clevie Rigby were working as volunteers for the campaign that day, and were actively involved on Astwood's behalf in various election related tasks such as giving out numbers, or collecting voters. As such they were all agents of Sean Astwood for the purpose of section 60 of the Ordinance. I turn then to the evidence against them.

(a) Akishna Arthur

51. This lady says that on the afternoon of the election Benson Rigby came to her house looking for her boyfriend, Shaun Holbert. In her written witness statement she says that Benson Rigby told her:

> ". . . that Sean Astwood sent him for Shaun and that Mr. Astwood said that if it is money he wanted, then that's no problem, he said whatever amount, just call it. He said that things looking shabby down by the poll and Shawn must call him as soon

as he makes up his mind because he only have an hour and a half to come and vote."

In cross-examination she stood by that, except that she accepted that Rigby did not attribute the remark about money to Astwood, but rather that it came directly from him.

52. Mr. Rigby, in his witness statement, accepts that he went to the house and had a conversation with Ms. Arthur about getting Holbert to the polls, but he denies saying anything about money. He was one of the people charged with getting voters to the poll, and he said he had been sent by either Carl Bain (the campaign manager) or Chesney Rigby, who were the people keeping the list of who had and who had not voted.

53. I see no reason to disbelieve Ms. Arthur. She was an unwilling witness, who when she gave her statement did not realise she had to go to court, and she was obviously not happy with being there. Nevertheless she largely stuck by her story. Otherwise she struck me as disinterested, and as telling the truth. I cannot say the same for Mr. Rigby, whose evidence as a whole was very unsatisfactory. She accepted one correction to her written statement, but I do not think that that undermines her credibility – rather it improves it, as she corrected it in Mr. Astwood's favour. The fact that Ms. Arthur's original statement was taken down by the boyfriend of the Petitioner may explain that mistake, but it is not a reason for disbelieving her. I therefore find as a fact that Rigby offered an unspecified sum of money to Holbert, through the medium of Ms. Arthur, in order to induce him to vote.

(b) Rubien Adams

54. This man says that on his way to the polls Samuel Been gave him $30 and asked him to vote for Astwood; Clevie Rigby gave him $10 and told him "to vote for the bell and not to look at the shell" (referring to the symbols of the respective parties); and Carl Been (*sic*) also gave him $20 and told him to vote for the PDM because this time the PDM is going to do better. Samuel Been denies doing this, saying that Adams came to the tent where he was and he gave him his number, and that was all. Clevie Rigby has not given evidence. There is some confusion about who is meant by 'Carl Been' – the campaign manager for

Astwood was Carl Bain. The probability is that it is that man to whom he refers, but I cannot be certain, so I do not proceed on that basis. However, neither a Been nor a Bain has come forward to deny it.

55. Mr. Adams placed this at about 2.30 p.m. he said that Samuel Been was in front of John Robinson's gate; Clevie Rigby was at the corner of Delancy's wall; Carl Been was in the same place – they were side by side. The evidence does not tell me where the gate was, but the corner of the wall was near the PDM tent.

56. Mr. Adams is a youngish man, of no fixed employment, whose appearance and manner suggests habitual drug abuse. Mr. Samuel Been says that he has a drug problem, and I believe that, although Adams himself says that he does not think he has a problem with drugs. That says as much about his lack of insight into his own condition as his honesty, but I have treated his evidence with additional caution because of it. Nevertheless, he came across as credible, and there is nothing implausible in the pattern he describes. He is just the sort of man to whom small amounts of money might be offered as an inducement, and any drug problem he has makes that more, rather than less, likely. I reminded myself that, by accepting the money, he himself committed the offence of bribery, but I do not think that that detracts from the credibility of his story. He cannot read or write, but when asked to repeat his statement in court he did so accurately. I felt that he was remembering and not parroting. I believed him, and despite the difficulties presented by his likely drug abuse, am sure that he was telling the truth.

(c) Theophilus Williams

57. He tells of two incidents. He says that as he passed the northern end of Mattie Delancy's wall a man he knows as 'Trevis' offered him $100, saying "T.J. here I got you." Williams told him that he did not need it and went on down the street. In cross-examination, but not in his witness statement, he identified this person as Travis Adderley, Angela Tucker's son. He said that it was after he got off work, at about 4.45 p.m.

58. Mr. Williams then says that, as he came by the tents, Jason Francis, Astwood's brother, came and took him by the arm and walked with him and gave him his voter's number. When Williams then tried to go to Mrs. Been's tent Francis tried to pull him away, whereupon Mrs. Been took his other arm and something of a tug of war ensued. After a few minutes of this, with Williams insisting he wanted to be with Mrs. Been, Francis desisted and left.

59. As to the alleged offer, Travis Adderley gave evidence and denied this. He is one of those alleged by Mrs. Messam to have displayed his ballot, and I preferred her evidence to his on that. On this incident I prefer the evidence of Mr. Williams, who impressed me as an honest man doing his best to tell the truth whatever the consequences.

60. This is as good a place as any to deal with the evidence of Angela Tucker, Travis Adderley's mother, who had an argument with her son on the afternoon of election day, and accused him of accepting $300 for his vote, to which she says he replied that he had only got $10 so far, but will get the rest later. She also says that he admitted displaying his ballot (which I find to be true anyway, independently of that alleged admission). Mrs. Tucker is an ardent PNP supporter, and she is plainly angry with her son, who supports the PDM. Although she struck me as a formidable but very decent lady, I feel that she is too partisan for it to be safe for me to rely on her. She was obviously, from her own evidence, very agitated that day and bitterly resentful over what she felt was the dishonest behaviour of the PDM. Because of that I have felt it safer to disregard her evidence, rather than struggle to come to a conclusion about its truth or otherwise. For that reason I have also disregarded her evidence that she saw Mervyn Cox give Floyd Astwood money, and some hearsay that she attributes to Samuel Rigby about a third person, who was a PNP supporter, being bribed to stay away from the poll.

61. Returning to Mr. Williams's evidence, I accept his version of the incident with Jason Francis, and reject the spin put upon it by the respondents, that Mr. Francis was merely assisting him in some way. Mr. Williams is not a man who needs assistance. However, he does not say that Mr. Francis actively canvassed him. Indeed he said that he just held his

arm and walked along with him, and gave him his voter number on a small piece of paper. He knew Mr. Francis as he had worked for him once for a short period. I think that Francis was attempting to steer him past the PNP tent, but I do not think that that amounts to seeking to influence a voter in a public place within the meaning of s. 54(1), nor to such restraint or duress as to amount to undue influence as defined by s. 70. I do not, therefore, have to go on to consider whether a breach of section 54(1) would be an illegal practice for the purposes of sections 60 and 61, although I think that there was force in Mr. Woolgar's submission that not everything made an offence by the Ordinance is necessarily an "illegal practice" for the purpose of those sections. It would be preferable if the legislature removed this ambiguity by deciding what amounts to illegal practices for the purpose of deciding whether their commission avoids an election, and then indicating that by inserting a definition of the expression which lists them.

(d) Jason Moore

62. This man says that Samuel Been offered him cocaine to vote for the PDM; and that Jason Francis offered him $100, of which he gave him $60. He also says that two people attempted to go with him into the polling station to ensure he kept to his side of the bargain, but that on each occasion Angela Tucker shouted out and stopped them.

63. Mr. Moore is a self-confessed cocaine user, who admits to having been in and out of prison for most of his adult life, beginning when he was about 16. He admitted buying and using crack cocaine later that day. He gave a convincing impression of having used it before going into the witness box, as his evidence was given in a disjointed and erratic manner. When asked why he did not tell the police about the offers made to him, he said, "these are things I was looking forward for – why would I tell the police to stop that?" He said that Francis had taken back the $60 afterwards, by tricking him into giving it back on the promise of a $100 bill, although that was not in his witness statement. Mr. Francis denies all this, and says that if anyone did that to Jason Moore there would be a serious fight.

64. I do not think it necessary to go into the exercise of balancing the credibility of Mr. Moore and those he accuses. His demeanour, character and history are such that I do not think I can safely rely upon his evidence, and I reject it.

(IV) CONCLUSIONS ON ILLEGAL AND CORRUPT PRACTICES

65. A person is guilty of bribery for the purposes of the Ordinance if, *inter alia*, he gives or offers any money to any voter in order to induce him to vote for a particular candidate: ss. 68 and 71(2) of the Ordinance. I have no doubt that bribery amounts to a corrupt practice within the meaning of s. 60 of the Ordinance. On the evidence I find that Benson Rigby offered a bribe to Shaun Holbert through Akishna Arthur; that Samuel Been, Clevie Rigby and Carl Been (*sic*) gave bribes to Rubien Adams; and that Travis Adderley offered a bribe to Theophilus Williams. I find that, with the exception of Carl Been (who was not positively identified as the same person as Carl Bain), each of those doing the offering or giving was an agent of the candidate, Sean Astwood, for the purposes of s. 60 of the Ordinance.

66. Because of my findings on the question of bribery, I do not need to consider the issue of illegal practices or the detailed evidence about alleged canvassing in the voters' line, and other irregularities complained of by the Petitioner. Nor do I have to decide what would amount to an illegal practice. As I indicated above, the law on that is not clear and requires clarification.

67. I have, however, considered whether corrupt and/or illegal practices so extensively prevailed that they may be reasonably supposed to have affected the result. That obviously has more serious consequences for the candidate. I am bound to say that the evidence, when looked at as a whole, suggests that they did prevail extensively, and may well have affected the result. However, I cannot be sure of that to the criminal standard of proof, and insofar as the Petition is based on s. 61 of the Ordinance, I dismiss it.

68. There is a cross-allegation that Mrs. Been offered a Haitian, Charles Odena, $300 to register and vote for her. This man was the father of Sandy Odena Butterfield, who was

alleged to have been improperly registered and with whom I have dealt above. I do not strictly need to deal with it, but having seen Mr. Odena and heard his evidence, I think it proper to record that I did not believe him and absolutely reject this allegation.

SUMMARY

69. In summary I make the following findings:

(i) I find that the rejected ballots were properly rejected, with the exception of ballot number 6001, which should be counted as a vote for the Petitioner.

(ii) I think that, in the absence of evidence of impropriety by the Supervisor and his staff, that the Register is final in respect of the five people omitted from it, and there is no evidence of such impropriety as would change that.

(iii) I think that the Register is not final in respect of Nadege Parker, as she was entered irregularly in that it should have shown the date when she attained 18 years of age, but did not do so. Had it done that it would have been apparent on its face that she was not qualified to vote on the day of the election. However this is the only irregularity that I find, and it is not capable of affecting the outcome of the election. The Register should now be rectified to show the date (17th July 2003) when she will become 18.

(iv) The Register is final as to the entitlement of Sandy Odena Butterfield to vote, save that she could have been (and still can be) required to take the oath prescribed by s. 48(2) to test her qualification.

(v) I find that Mr. Astwood was guilty by his agents of corrupt practices, in that they offered bribes to Sean Holbert, and Theophilus Williams, and gave bribes to Rubien Adams.

(vi) I do not find that corrupt or illegal practices so extensively prevailed that they may be reasonably supposed to have affected the result

70. In consequence of the finding at (v) above, I find that the election of Sean Astwood is void, and I will forthwith certify that finding to His Excellency the Governor in accordance with s. 62(2) of the Elections Ordinance.

71. It is common ground among the parties, and I hold it to be the law, that such a finding does not mean that the seat should be declared for Mrs. Been. Harre CJ in the Cayman Islands came to that conclusion on similar provisions in Thompson-Murphy -v- Pierson [1997] CILR 61, at 69, 70. I respectfully adopt his argument and conclusions, which seem to me to be correct. That means that there will have to be a new election.

72. To avoid any future difficulty, I heard argument as to whether this finding disqualifies Mr. Astwood from standing in the new election that will now have to be held. In my judgment it does not, and Mr. Misick does not contend otherwise. Harre CJ reached the same conclusion is Thompson-Murphy -v- Pierson (*supra*), at p. 70, l. 10. It appears that, in the English legislation from which this provision derives, there are specific provisions which provide for the disqualification of a candidate in such circumstances. However, when s. 60 was imported into the local law those provisions were omitted. This leads to the apparent disharmony with s. 61, which expressly provides that the candidate is disqualified from standing in the new election. However, there is nothing that can be done about that now.

Dated this 19th day of June 2003.

Richard Ground
Chief Justice