EASTERN CARIBBEAN SUPREME COURT
SAINT CHRISTOPHER AND NEVIS
SAINT CHRISTOPHER CIRCUIT

IN THE HIGH COURT OF JUSTICE

CLAIM NO. SKBHCV2015/0011

In the Matter of Sections 49 and 50 of the Constitution of St. Christopher and Nevis

And in the Matter of an intended Application for Declaratory, Injunctive and Other Relief pursuant to Section 96 of the Constitution of St. Christopher and Nevis

And in the matter of an Application for Leave to Apply for judicial review of the decision of the Constituency Boundaries Commission made on 16th January 2015 to submit a report to the Governor General pursuant to Section 50 of the Constitution

BETWEEN:

DR. KELVIN DALY (in his personal capacity and in his capacity as a representative of the Nevis Reformation Party).

1st Applicant

JANICE WILLIAMS (in her personal capacity and in her capacity as a registered voter who is likely to be affected by the injustice created in the disproportionate number of voters between Nevis Constituency 9 and Nevis Constituency 10 and as a representative of said class of voters for the purposes of these proceedings).

2nd Applicant

AND

1. **HON. MARK BRANTLEY** (in his personal capacity and in his capacity as a representative of the Concerned Citizens Movement)
2. **DR. HON. TIMOTHY HARRIS** (in his personal capacity and in his capacity as a representative of the Peoples Labour Party).
3. **HON. SAM CONDOR** (in his personal capacity and in his capacity as a representative of the Peoples Labour Party).
4. **HON. SHAWN RICHARDS** (in his personal capacity and in his capacity as a representative of the People's Action Movement)

Respondents/Claimants

AND

1. **CONSTITUENCY BOUNDARIES COMMISSION**
(being Mr. R.A. Peter Jenkins, Hon. Asim Martin, Marcella Liburd, Hon. Vance Amory, and Hon. Vincent Byron) **1st Defendant**

2. **THE ATTORNEY GENERAL OF ST. CHRISTOPHER AND NEVIS**
(as representative of His Excellency the Governor General)
2nd Defendant

Before: **The Hon. Mr. Justice Trevor M. Ward QC**

Appearances:-

Dr. David Dorsett instructed by Ms. Angela Cozier for the Applicants.
Mr. Christopher Hamel-Smith SC and Mr. Douglas L. Mendes SC instructed by Ms. Talibah Byron for the Claimants.
Mr. Eamon Courtenay SC, Ms. Iliana Smith and Mr. Jerome Rajcoomar instructed by Mrs. Sherry-Ann Liburd-Charles for the First Defendant.
Mrs. Simone Bullen-Thompson, Solicitor General, for the Second Defendant.

2020: June 03, 04, 22

JUDGMENT

[1] **WARD, J**.: Pursuant to the Civil Procedure Rules (CPR) Part 19, the applicants by Notice of Application dated and filed 27th May, 2020 sought leave to be added as interested parties to the claim previously instituted by Mr. Mark Brantley et al, and, if so permitted, sought further orders and declarations. The history of the underlying claim is important in order to provide context to the current application and to highlight the complexity of the issues which the applicants sought to litigate at very short notice. In chronicling that history circa 2015, I have chosen to draw heavily upon the succinct rehearsal of what appeared to their Lordships to be the uncontested facts as recorded in the Privy Council judgment of **Brantley et al v Constituency Boundaries Commission et al**[1] and upon which I cannot improve.

[2] Over the years, Constituency Boundaries Commission (CBC) Reports have been beset by legal challenges in Saint Christopher and Nevis. 2015 was no different. An earlier CBC Report of 5th September, 2013 had been subject to legal challenge and quashed on the ground of inadequate consultation on 31 July, 2014. After the CBC produced revised recommendations, members of the CBC who had been appointed on the advice of the Leader of the Opposition, expressed concern whether those recommendations complied with the requirements of Schedule 2 of the Constitution. On 18 December, 2014 counsel for representatives of the opposition parties indicated to the Prime Minister that they had been instructed to challenge the revised recommendations contained in a forthcoming CBC Report. Thereafter, on 13 January, 2015 the CBC met and by a majority of 3:2 approved the maps of the revised constituency boundaries.

[3] At about 2 pm on 16 January 2015, the CBC met to consider a draft report which was then tabled. The majority of the CBC signed the draft report; the minority refused to sign. Thereafter, the Clerk of the National Assembly, acting on the instructions of the Speaker, issued a letter summoning an emergency meeting of the National Assembly for 4:15 pm. Once members of the National Assembly had gathered at approximately 4:35 pm, a draft proclamation to give effect to the CBC

[1] [2015] UKPC 21

report was tabled and, after a heated debate, the National Assembly approved the draft proclamation at about 6:10 pm.

[4] The Attorney General promptly took the draft proclamation to the Governor-General, who at about 6:20 pm signed both it and a proclamation dissolving Parliament. The proclamation was gazetted and, at about 6:35 pm, the Attorney General at Government House received a printed copy of an Extraordinary Gazette containing the proclamation. At some time between 6:30 pm and 6:50 pm the Prime Minister broadcast an announcement that the impugned proclamation had been gazetted and that he had advised the Governor-General to dissolve the Parliament with effect from that day. His announcement and the texts of both the impugned proclamation and a proclamation dissolving the Parliament were placed on the government website. The Prime Minister's press secretary sent copies of the proclamations to the media.

[5] The claimants applied to the High Court for an interim injunction prohibiting the Governor-General from making the impugned proclamation until the determination of their substantive legal challenge or further order of the court. After representations were made, the court ordered that the application should proceed ex parte. At 7:38 pm, Carter J granted the ex parte injunction, which was served at the home of the Attorney General at about 8:40 pm, although he did not read the order until later that evening.

[6] The claimants produced evidence in affidavits that members of the public were not able to obtain printed copies of the Gazette from the Government Information Service, the official provider of the Gazette, until 20 January 2015. The defendants did not deny this assertion. The Privy Council accordingly proceeded on the basis that the Gazette containing the impugned proclamation and the proclamation dissolving the National Assembly with effect from 16 January 2015 was not available in printed form to the general public until 20 January 2015.

[7] On 19 January 2015, the claimants filed proceedings seeking leave to apply for judicial review, in which they sought relief including an order quashing the CBC report and an injunction prohibiting the Governor-General from making the

impugned proclamation. On the same day, the Attorney General applied to discharge the interim injunction on the basis that the proclamation had already been made by the time Carter J granted the ex parte injunction.

[8] Carter J granted the Attorney-General's application and discharged the interim injunction in a ruling dated 27 January 2015. She held that the proclamation did not rely for its validity on being in the public domain so long as it became so available within a reasonable time after it was included in the Gazette. She held that the interim injunction came too late because the proclamation had been made and published by its appearance in the Gazette by 6:35 pm on 16 January 2015, before the interim injunction was served on the Attorney General.

[9] The claimants appealed. On 29 January 2015, the Court of Appeal granted the appellants interim relief pending their appeal. But, on 5 February 2015, the Court of Appeal refused the appeal. The court held that section 50 was a self-contained regime for the review of constituency boundaries and interpreted section 50(6) purposively, to provide that changes to constituency boundaries should not come into force during a subsisting parliamentary term. The court agreed with Carter J that the act, which she had sought to prohibit, had already occurred by the time she made the order and that the injunction therefore fell to be discharged. The Court of Appeal granted leave to appeal to the Privy Council.

[10] On appeal to the Privy Council, their Lordships held that the impugned proclamation, *if valid*, did not govern the election which was held on 16 February 2015. In its view, the case turned on (a) the correct interpretation of section 50(6) and (b) an analysis of when a proclamation is "made".

[11] As to that issue their Lordships held that upon a proper construction, "the impugned proclamation was made no earlier than 20 January 2015, when it became available to the public by publication in the Gazette on the authority of the Governor-General. The proclamation dissolving Parliament was published at the same time. In that proclamation (which, like the impugned proclamation, was erroneously stated to be published on 16 January 2015) the Governor-General dissolved the Parliament "as from the 16 day of January, 2015". That dissolution,

which unquestionably occurred with effect from 16 January, predated the "making" of the impugned proclamation. As a result, the impugned proclamation, if valid, will have effect only on the dissolution of the Parliament that was elected on 16 February 2015 (section 50(6))."

[12] At paragraphs 25 to 35 of the judgment, their Lordships discussed and expressed a tentative view regarding certain important constitutional questions that it considered relevant to the continued validity of the impugned Proclamation No. 2 of 2015. For present purposes, only a concise summary of their Lordships' views is necessary. After reviewing the relevant Constitutional provisions and the structure of the Constitution, the Board stated that there was a strongly arguable case that a deliberate attempt by one branch of government, in the control of a governing party, to prevent individuals from obtaining access to the High Court for a constitutional adjudication under section 96 would be unconstitutional as it would deny the protection of the law contrary to section 3(a). In such circumstances it would be strongly arguable that section 2 would nullify the impugned proclamation and section 50 (7)[2] would not apply. Further, on ordinary principles of judicial review their Lordships thought it arguable that the making of the proclamation would be open to challenge, notwithstanding the ouster clause, if the power to do so were exercised for an improper purpose. Thirdly, in circumstances where the interlocutory injunction had been granted in the context of a constitutional challenge, the foregoing factors might provide another basis for invalidating the impugned proclamation.

[13] The effect of the Privy Council's judgment, therefore, was that the injunction granted by Carter J remained in force. It is common knowledge that the 2015 General Elections were accordingly conducted using the constituency boundaries existing prior to the impugned proclamation. The question of the validity of Proclamation No. 2 of 2015 remains to be determined.

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[2] Section 50(7) provides: "The question of the validity of any proclamation by the Governor-General purporting to be made under subsection (6) and reciting that a draft thereof has been approved by resolution of the National Assembly shall not be enquired into in any court of law except upon the ground that the proclamation does not give effect to rule 1 in Schedule 2."

Post 2015 election developments

[14] On 23rd June, 2015 the Claimants' attorneys wrote to the Registrar of the High Court indicating the Claimants' desire to have the claim proceed and requesting that the proceedings be brought on for hearing and directions. The court listed the matter for hearing on 2 October 2015, on which date, the application for leave for judicial review was granted and directions were given. On 19 October 2015, the Fixed Date Claim Form/Originating Motion and affidavits of Hon. Mark Brantley, Hon. Shawn Richards, Hon. Vance Amory and Mr. Stedmond Tross were duly filed and served. On 20 October 2015, the Claimants filed and served an application to amend its Fixed Date Claim Form/Originating Motion in order to seek additional reliefs based on certain pronouncements made by the Judicial Committee of the Privy Council. .

[15] Between October, 2015 and March, 2020 various applications and documents were filed on both sides, procedural steps taken and directions given by the court. The last such activity occurred as recently as 16 March 2020, when the Claimants' legal team finalised a draft order to be circulated for the agreement of all parties. The draft order set timelines for the filing and service of supplemental affidavits and written submissions, provided for the cross-examination of deponents and estimated that the trial of the claim would last three days. The trial date was to be set by the court.

[16] As is now a matter of record, on 17 March 2020 the High Court advised legal practitioners that, effective immediately, normal sittings of the Civil Court would be suspended and that only urgent applications would be heard using teleconferencing or video conferencing facilities. The Covid-19 pandemic precipitated these developments.

[17] On 12 May, 2020, the National Assembly was dissolved. Friday 5 June was named as the date for the holding of General Elections in Saint Christopher and Nevis. 27 May, 2020 was appointed as the day for nomination of candidates.

[18] The 1st applicant was nominated as the candidate for the Nevis reformation Party for Nevis Constituency No. 9. The 2nd applicant is a registered voter in the said constituency. By their application they seek the following orders and declarations:

> (a) An Order that the 1st and 2nd applicants be added as parties, pursuant to Part 19, Rule 19.3 CPR 2000 (as amended), to the proceedings filed herein on 19th October 2015;
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> (b) A declaration pursuant to Rule 56.1 (1) that the claim filed on 19th October 2015 is abandoned;
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> (c) An Order pursuant to Part 26, Rule 26.3 (1)(c) that the claim constituting substantive challenge in these proceedings be struck out as an abuse of the process of the court or dismissed for want of prosecution by the claimants/respondents by reason of its being abandoned for over three years;
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> (d) A declaration that the substantive claim having been struck out, that there is no challenge remaining to Proclamation No. 2 and that the interim injunction falls away.;
>
> (e) A declaration that Proclamation No. 2 of 2015 is legally binding and valid in its description of the boundaries described therein;
>
> (f) A further Order that Proclamation No. 2 of 2015 be declared to have come into effect upon the dissolution of the Parliament that was sworn in on the 14th of May, 2015, and dissolved on the 14th of May, 2020;
>
> (g) Costs.

[19] The application was accompanied by a Certificate of Urgency which asserted that the matter was urgent because, "the matter is one of great public importance as it concerns the list of voters that is to be used in elections due to be held on the 5th June 2020…and "the 1st and 2nd applicants are persons interested in the elections as one is a Candidate and the other a voter who is in danger of suffering great prejudice."

[20] The court set the matter down for hearing at 11:00 a.m. on 4 June 2020 and notified the parties that morning of the hearing.

The claimants' submissions

[21] At the hearing, Mr. Christopher Hamel-Smith SC took objection to the hearing of the application on an urgent basis and submitted that it could not properly be proceeded with for a number of reasons. First, for non-compliance with **CPR 11.8 (1)** which requires that every respondent be given notice of the application; with **CPR 11.10 (1)** which requires that the notice must state the date, time and place when the application is to be heard and with **CPR 11.11 (1)** which requires the notice to be served as soon as practicable after the day on which it is issued and at least 7 days before the court is to deal with the application. While the application was filed since 27th May, no notice of the date of hearing was contained therein. The respondents only received notice of the date of the hearing when the court sent the invitation to join the hearing of the matter on the ZOOM platform. Mr. Hamel-Smith submitted that no proper basis was presented to the court to enable it to exercise its discretion to abridge the time for service of notice and that, based on the facts, no such proper grounds were shown to exist to justify abridgement of the time. The fact that the court did not fix a date for the hearing until 4th June did not absolve the applicants of their obvious obligations which made it incumbent upon them to communicate with the claimants and defendants notifying them of their intention to seek a date for the hearing so that they could adequately prepare themselves.

[22] But such procedural non-compliance was said by Mr. Hamel-Smith to be the least of the applicants' difficulties. Even more problematic for them, he submitted, was that at the time of filing the application on 27 May, the applicants would have known of the underlying claim since at least 2015. They would have known that the voters list published every January since 2015 was compiled by reference to

existing boundaries. Mr. Hamel-Smith submitted that having taken no steps to intervene between 2015 and 27 May, 2020, the applicants were now seeking to create an artificial emergency with the objective of derailing the impending elections. Finally, submitted Mr. Hamel-Smith, on a consideration of the merits of the application, it would be seen to be devoid of substance as it is founded on two erroneous premises: first that the claimants did nothing to prosecute the claim and had abandoned it; and secondly, that Proclamation No. 2 of 2015 became valid and effective upon the dissolution of Parliament on 12 May, 2020. These propositions, he submitted, were debunked by the contents of the affidavit in opposition to the application sworn by Ms. Talibah Byron and by the observations of their Lordships regarding the validity of the said proclamation in the **Brantley case**.

The Applicants' submissions

[23] On behalf of the applicants, Dr. David Dorsett submitted that the court should look past the "arid technicalities" relating to the question of notice and have regard instead to the realities of the instant situation. The applicants could not provide the date of the hearing prior to the date when the matter was listed because they themselves only became aware of the date when the court sent out the invitation to join the hearing remotely. Upon becoming aware of this they promptly notified the other parties.

[24] Dr. Dorsett sought to justify the timing of the application by arguing that the applicants could not seek to be added as parties unless and until they had proper standing. In the case of the 1st applicant, it was said that he only acquired such standing, at the earliest, on Nomination Day when he became the NRP's candidate for Nevis Constituency No. 9. As to the 2nd applicant, it was submitted that it was the dissolution of Parliament on 12 May that triggered her fear that the elections would be contested using the existing boundaries. Accordingly, that was the moment when she acquired standing to seek to be added as a party to the claim. Dr. Dorsett submitted that had the applicants sought to move the court any

earlier, they might have been met with the argument that general elections were not imminent and so be dismissed as busy bodies.

[25] Provided the applicants managed to hurdle this first obstacle, Dr. Dorsett submitted that they were entitled to the orders and declarations sought. However, having seen the affidavit in opposition to the application sworn by Ms. Byron in relation to the steps taken to progress the claim between 2015 and 2020, Dr. Dorsett was forced to concede that the applicants' contention that the claimants had abandoned the matter was ill-founded.

[26] Nonetheless, Dr. Dorset maintained that on a proper construction of the Privy Council's judgment, the court should proceed on the assumption that Proclamation No. 2 of 2015 became effective and that the applicants would be entitled, in effect, to a declaration that the boundaries delineated therein should govern the 2020 elections.

Issue:

[27] The first and decisive issue which the court considered was whether the application merited being deemed fit for an urgent hearing. Uppermost in my mind was the overriding objective of dealing with cases justly.

Discussion and analysis

[28] I closely examined the reasons proffered by the applicants for the lateness of their application. Having done so I was not persuaded that they passed muster. The contentious issue of constituency boundaries in St. Christopher and Nevis has been well publicized over the years and especially from 2015 onwards. While I make no findings on the merits of the application to be added as parties at this time, it must be said that the argument that the applicants had to wait until Parliament was dissolved or until nominated as a candidate before either's interest could accrue sufficient to enable them to seek to be added as parties is misconceived. Indeed, the basis on which the 2nd applicant sought to be added

was in her capacity as a voter; a status she enjoyed prior to the dissolution of the National Assembly. The Constitution clearly prescribes the life of the Parliament at section 47. Both applicants must therefore have known for some time that the dissolution of the Parliament and the holding of general elections were imminent. There was therefore no need to wait until the eleventh hour to file this application.

[29] Dr. Dorsett's argument that had the applicants approached the court any earlier they might have been labelled as officious busy bodies is without evidential foundation as none of the applicants posited this as a reason for not making the application sooner. It is therefore merely speculative.

[30] Moreover, as Mr. Hamel-Smith submitted, the applicants must have known that the List of Voters published annually in January between 2015 and 2020 was based on the existing boundaries. Yet, with elections imminent, they took no steps to intervene prior to their application of 27 May 2020.

[31] Even worse, as the evidence revealed, the applicants made no effort to contact the claimants or defendants in the underlying claim to ascertain the status of the matter. In the event, a critical premise of their application – that the claim was abandoned - was grounded on an erroneous perception.

[32] Furthermore, I consider the failure by the applicants to liaise much earlier with counsel on record for the claimants and defendants (as opposed to merely serving the claimants personally with notice of the application) to put them on notice of their intention to move the court for an urgent listing of the matter was regrettable.

[33] Having considered the history of the matter as outlined above and the reasons advanced by the applicants for their dilatoriness in approaching the court, I considered that it would not meet the overriding objective of dealing with cases justly to entertain such an application filed mere days before the general elections were scheduled to be held and which was eventually heard on the day before the elections. While the courts are always willing to accommodate at very short notice

genuinely urgent cases catalyzed by new or sudden developments, I was sure that this was not such a case.

[34] I find myself in complete agreement with Mr. Hamel-Smith's characterization of the circumstances surrounding the filing of this application situation as an "artificial emergency" created by the applicants.

[35] For all of the foregoing reasons I did not deem the matter fit for an urgent hearing and declined to hear the substantive application on 4 June 2020.

[36] The applicants' desire to see the case resolved is understandable. They have, however, not been driven from the seat of justice. In the event that they are desirous of pursuing their application and the reliefs sought, the court, in declining to hear the matter on an urgent basis, did order that the application be listed by the Registrar of the High Court and the parties were invited, and did undertake, to collaborate in identifying a mutually convenient date for a hearing.

Trevor M. Ward, QC
High Court Judge

By the Court

Registrar