[2018] JMSC CIV 33

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2016HCV05124

BETWEEN	**CONSTANTINE D BOGLE**	**PETITIONER**
AND	**DEAN RIPTON JONES**	**FIRST RESPONDENT**
AND	**FRANKLYN HOLNESS**	**SECOND RESPONDENT**
AND	**MARVALYN PITTER**	**THIRD RESPONDENT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**FOURTH RESPONDENT**

IN OPEN COURT

Bert Samuels, Bianca Samuels and Dana Daynia instructed by Knight Junor and Samuels for the petitioner

Marvalyn Taylor-Wright, Anwar Wright and Christal Brown (received judgment) instructed by Taylor-Wright and Company for the first respondent

Susan Reid Jones and Carla Thomas instructed by the Director of State Proceedings for second and fourth respondents

July 4, 6, 7, 8, October 12, 2017, and March 20, 2018

ELECTION PETITION – WHETHER CANDIDATE ELIGIBLE FOR ELECTION – MEANING OF 'HAS RESIDED' IN AREA FOR TWELVE MONTHS IMMEDIATELY PRECEEDING DAY OF ELECTION – WHETHER CANDIDATE IS PUBLIC OFFICER WITHIN THE MEANING OF SECTION 3 OF CIVIL SERVICE ESTABLISHMENT ACT

– EFFECTIVE DATE OF RESIGNATION – REPUDIATORY BREACH OF EMPLOYMENT CONTRACT - WHETHER CANDIDATE RESIGNED FROM JOB BEFORE DATE OF LOCAL GOVERNMENT ELECTION

SYKES J

Mr Constantine Bogle and Mr Dean Jones

[1] Mr Constantine Bogle and Mr Dean Jones faced the electorate in the Yallahs Division of St Thomas Municipal Corporation in the local government elections held on November 28, 2016. Mr Dean Jones was victorious. Mr Bogle is challenging that victory on the ground that Mr Jones was not eligible for nomination and election.

[2] Mr Bogle says that Mr Jones was eligible to be nominated because (a) he was not resident in the division as is required by law and (b) he was a public servant at the time of his nomination. Mr Jones refutes both of these attacks on his election. The court now needs to decide whether Mr Bogle's assertions are true. Both issues are addressed in the order stated in this paragraph.

The residency requirement

[3] The Local Government Act ('LGA') and the Eighth Schedule to the Representation of the People Act ('RPA') contain all the relevant provisions for the resolution of this issue.

[4] Local Authority is defined in section 2 (1) of the LGA. It says:

> *Local Authority means a body categorised as such under section 6.*

[5] Section 6 states:

> *Local Authorities shall be categorized as –*

(a) Municipal Corporations, constituted in accordance with section 7; and

(b) City Municipalities or Town Municipalities constituted in accordance with section 8

[6] Section 7 states:

> *A Municipal Corporation shall be a body corporate, having a perpetual succession, to which section 28 of the Interpretation Act shall apply.*

[7] There is no need to refer to section 8 because it is not contended that the Local Authority in St Thomas is a City Municipality or Town Municipality.

[8] From what has been said so far the genus is Local Authority and the species are Municipal Corporations, City Municipality or Town Municipality.

[9] The LGA speaks to the composition of the Municipal Corporation. In the parish of St Thomas the Local Authority is a Municipal Corporation. Section 10 (1) states that:

> *(1) The Council of a Municipal Corporation shall be comprised of one Councillor for each electoral division in the area within the jurisdiction of the Municipal Corporation.*

[10] Section 13 (1) provides:

> *Subject to subsection (2), the Councillors entitled to sit on the Council or a Local Authority are the Councillors elected from the electoral divisions wholly contained within the boundaries of the Local Authority.*

[11] Under section 2 (1) of the LGA:

> *Councillor means a person who, by virtue of being elected in accordance with the Eighth Schedule of the Representation of the People Act, is entitled to sit on the Council of Municipal Corporation, City Municipality or Town Municipality.*

[12] These are the relevant provision for the issue under discussion. From what has been said, the St Thomas Municipal Corporation is comprised of councillors who are entitled to be elected from the electoral divisions wholly within the boundaries of the area governed by the St Thomas Municipal Corporation. Yallahs is one such division.

[13] To be elected, Mr Jones must pass the residency standard found in paragraph 4 (4) of the Eighth Schedule of the RPA. This Schedule was added by the LGA. Paragraph 4 (4) states:

> *No person shall be capable of being elected a member of a Council or, having been so elected shall sit or vote in a Council unless the person **has resided** in the area within the jurisdiction of the relevant Local Council for twelve months immediately preceding the day of election.*

[14] There is no definition of 'reside' in the Eighth Schedule and neither is there one in the LGA or the RPA. Both sides have cited case law to support their interpretation of 'has resided.'

The respondent's position

[15] In seeking to arrive at the meaning of 'reside' in this context, Mrs Taylor Wright for Mr Jones has placed before the court several authorities. The court now examines them. There is **Inland Revenue Commissioners v Lysaght** [1928] AC 234. The issue where was the meaning of 'resident' and 'ordinarily resident' for the purpose of section 46 (1) of the Income Tax Act 1918. Mr L was born in England to Irish parents. He was living in England up to 1919 when he partially retired and went to live in the Irish Free State. Until he retired, he was the managing director of an English company. After 1919 he did not maintain a definite place of residence in England but he came to England every month and remained for about one week for consultations with the other directors regarding the company's business. When he came on his monthly visits he stayed in a hotel. His wife did not accompany him. In respect of Ireland, he had no business

interest except his estate. He had a bank account there and a small account in England. On these facts, the income tax commissioners levied taxes on him. His response was that he was not liable because he was 'not ordinarily resident' in England and neither was he a resident in the United Kingdom. The commissioners did not agree with him. He went to court. The trial judge agreed with him. The Court of Appeal reversed the trial judge. The House of Lord agreed with the trial judge.

[16] Viscount Sumner in examining the provision of the statute began by examining the word 'ordinarily' in the phrase 'ordinarily resident.' His Lordship noted that the statute did not say 'usually' or 'most of the time' or 'exclusively' or 'principally' and neither did it say 'occasionally' or 'exceptionally' or 'now and then.' The learned Law Lord added that the opposite of 'ordinary' is 'extraordinary.' Then his Lordship went on to observe that 'that part of the regular order of a man's life, adopted voluntarily and for settled purposes is not 'extraordinary'.' The court understands Viscount Sumner to be saying that that which is not extraordinary is ordinary. Then comes this important understanding from his Lordship. At page 244 his Lordship observed:

> *Grammatically the word "resident" indicates a quality of the person charged and is not descriptive of his property, real or personal. To ask where he has his residence is often a convenient form of inquiry but only as leading to the question "then where is he resident himself?"*

[17] This important statement is saying that residence is not about property ownship but about the person himself distinct from any property he may own. He can be resident at a place though he has no property where he resides.

[18] Viscount Sumner's analysis reinforced this point by saying that a person may be homeless but there is no doubt about their residence. His Lordship took account of Mr L's home in Ireland where his family was as was his demesne lands and farm but that attachment to Ireland did not preclude a finding that he was resident

or ordinarily resident in England. The fact that he stayed in a hotel or even several hotels did not negate a finding that he was resident in England.

[19] Viscount Sumner also took account of the proposition that in ordinary language a person is resident at his usual place of abode. His Lordship concluded that '[r]esidence here may be multiple and manifold' (page 245).

[20] His Lordship examined the argument that Mr L only came for short periods (one week). This was his observation at page 245:

> *There is again the circumstance that Mr. Lysaght only comes over for short visits. Does this make any conclusive difference? If he came for the first three months in the year for the purpose of his duties and then returned home till the next year, would there not be evidence that he was resident here, and, if so, how does the discontinuity of the days prevent him from being resident in England when he is here in fact, if the obligation to come, as required, is continuous and the sequence of the visits excludes the elements of chance and of occasion. If the question had been one of "occasional residence" abroad in the language of General rule 3 these facts would have satisfied the expression, for residence is still residence, though it is only occasional, and I see no such fundamental antithesis between "residence" and "temporary visits" as would prevent Mr. Lysaght's visits, periodic and short as they are, from constituting a residence in the United Kingdom, which is "ordinary" under the circumstances.*

[21] Thus on the facts, the commissioners were entitled to hold that monthly visits lasting one week were sufficient to make the person ordinarily resident in England for tax purposes. Viscount Sumner noted that the brevity of the visits did not affect the principle though his Lordship did conclude that there may well be visits of such short duration that it could not be said that he was resident in England but that was not the case before his Lordship.

[22] Lord Buckmaster (judgment delivered by Lord Atkinson) made the point that 'residence' in the income tax law was used in its common sense meaning. The importance of Lord Buckmaster's opinion is that it scotched the idea that the

Court of Appeal had that Mr L could not be resident in England because he was forced be in England in order to attend the consultations. At page 248, Lord Buckmaster noted:

> *A man might well be compelled to reside here completely against his will; the exigencies of business often forbid the choice of residence, and though a man may make his home elsewhere and stay in this country only because business compels him, yet none the less, if the periods for which and the conditions under which he stays are such that they may be regarded as constituting residence, as in my opinion they were in this case, it is open to the Commissioners to find that in fact he does so reside, and if residence be once established ordinarily resident means in my opinion no more than that the residence is not casual and uncertain but that the person held to reside does so in the ordinary course of his life.*

[23] Thus a person can be resident even if he is there by force of circumstances and not free choice provided it is not illegal or unlawful. This passage from Lord Buckmaster establishes that the fact that a person makes his home in one place does not preclude the conclusion that he may reside in another.

[24] Lord Warrington stated at page 249 – 250:

> *I have reluctantly come to the conclusion that it is now settled by authority that the question of residence or ordinary residence is one of degree, that there is no technical or special meaning attached to either expression for the purposes of the Income Tax Act, and accordingly a decision of the Commissioners on the question is a finding of fact and cannot be reviewed unless it is made out to be based on some error in law, including the absence of evidence on which such a decision could properly be founded.*

[25] Thus the word ‘residence’ is not one of technicality in the then income tax law. Lord Warrington found that the fact that Mr L had a permanent home in Ireland and his visits to England were purely for business purposes did not mean that he was not resident in England. The court concluded that Mr L was resident in England though his home was in the Irish Free State.

[26] On the same day, the same appellate panel delivered the judgment of **Levene v Commissioner of Inland Revenue** [1928] AC 217. The facts were that Mr Levene lived in London until 1919 when he left to live abroad. He returned each year until 1925 for the purpose of securing medical advice, visiting relatives and participating in religious observances as well as dealing with tax matters. He was assessed for taxes during the year 1920/21 and 1924/25. He said that not 'resident' nor 'ordinarily resident' in the United Kingdom for income tax purposes.

[27] Viscount Cave LC at pages 222-224:

> *My Lords, the word "reside" is a familiar English word and is defined in the Oxford English Dictionary as meaning "to dwell permanently or for a considerable time, to have one's settled or usual abode, to live in or at a particular place." No doubt this definition must for present purposes be taken subject to any modification which may result from the terms of the Income Tax Act and Schedules; but, subject to that observation, it may be accepted as an accurate indication of the meaning of the word "reside." In most cases there is no difficulty in determining where a man has his settled or usual abode, and if that is ascertained he is not the less resident there because from time to time he leaves it for the purpose of business or pleasure. Thus, a master mariner who had his home at Glasgow where his wife and family lived, and to which he returned during the intervals between his sea voyages, was held to reside there, although he actually spent the greater part of the year at sea: In re Young; Rogers v. Inland Revenue. Similarly, a person who has his home abroad and visits the United Kingdom from time to time for temporary purposes without setting up an establishment in this country is not considered to be resident here - although if he is the owner of foreign possessions or securities falling within Case IV. or V. of Sch. D, then if he has actually been in the United Kingdom for a period equal in the whole to six months in any year of assessment he may be charged with tax under r. 2 of the Miscellaneous Rules applicable to Sch. D .* ***But a man may reside in more than one place. Just as a man may have two homes - one in London and the other in the country - so he may have a home abroad and a home in the United Kingdom, and in that case he is held to reside in both places and to be chargeable with tax in this country****. Thus, in Cooper v.*

> *Cadwalader, an American resident in New York who had taken a house in Scotland which was at any time available for his occupation, was held to be resident there, although in fact he had only occupied the house for two months during the year; and to the same effect is the case of Loewenstein v. de Salis, The above cases are comparatively simple, but more difficult questions arise when the person sought to be charged has no home or establishment in any country but lives his life in hotels or at the houses of his friends. If such a man spends the whole of the year in hotels in the United Kingdom, then he is held to reside in this country; for it is not necessary for that purpose that he should continue to live in one place in this country but only that he should reside in the United Kingdom. But probably the most difficult case is that of a wanderer who, having no home in any country, spends a part only of his time in hotels in the United Kingdom and the remaining and greater part of his time in hotels abroad. In such cases the question is one of fact and of degree, and must be determined on all the circumstances of the case: Reid v. Inland Revenue Commissioners. If, for instance, such a man is a foreigner who has never resided in this country, there may be great difficulty in holding that he is resident here. But if he is a British subject the Commissioners are entitled to take into account all the facts of the case, including facts such as those which are referred to in the final paragraph above quoted from the case stated in this instance. Further, the case may be different, and in such a case regard must be had to r. 3 of the General Rules applicable to all the Schedules of the Income Tax Act, which provides that every British subject whose ordinary residence has been in the United Kingdom shall be assessed and charged to tax notwithstanding that at the time the assessment or charge is made he may have left the United Kingdom, if he has so left the United Kingdom for the purpose only of occasional residence abroad.*(emphasis added)

[28] This passage requires careful reading and even more thoughtful analysis in order to understand its true import. His Lordship began by citing the dictionary definition which stated that ‘reside’ meant ‘to dwell permanently or for a considerable period of time.’ However, by the time one gets to the end of this passage it is clear that the learned Lord Chancellor had developed a nuanced meaning of the word reside that did not quite match the dictionary meaning. This

is borne out by the example of a person living in one place for two months out the year and the rest elsewhere. Where he was for the two months could hardly be described as the place he resided for 'a considerable period of time.' It is also important to observe that the Lord Chancellor in this case, like Viscount Sumner, in the **Lysaght** case, did not think that owning property in any particular place was a strong indicator of where one resided. Later cases have borne this out. The case of the student being eligible for benefits based on residence will show that ownership of property is not a reliable guide to residence.

[29] In the passage the Lord Chancellor was making the point that 'reside' is a normal English word and unless the income tax statutes suggested otherwise it should receive its ordinary meaning. Subsequent cases have held that there was nothing in the income tax legislation that prevented these two cases from being of general application. From his Lordship's references to decided cases it is entirely possible that a person may reside somewhere even though he spends the greater part of a year somewhere else as in a seaman. His Lordship also noted and this is vital that a person may have more than place of residence which opens the possibility that Mr Jones may reside in St Thomas and in St Catherine.

[30] Lord Warrington observed that the 'resident' had no special or technical meaning in the income tax legislation. Neither did the expression 'ordinarily resident.' His Lordship eschewed defining 'resident' but stated that a 'member of the House of Lords may well be said to be ordinarily resident in London during the Parliamentary session and in the country during the recess.' His Lordship added that if 'it has any definite meaning I should say it means according to the way in which a man's life is usually ordered.' Lord Warrington held at page 232:

> *I will assume that, for the purpose of determining whether in any year he is ordinarily resident, the usual ordering of his life must be judged by what he does in that and preceding years only, still in the first year the circumstances show that the stay in England was as much in the ordinary course as his previous residence, and in subsequent years he developed habits of periodical changes of*

abode, each one of which may be said to be in accordance with the usual ordering of his life.

[31] Here we see the blue print for analysing whether anyone is resident where the word 'resident' does not have any special or technical meaning. This is the analytical method this court proposes to use in this case.

[32] Mrs Taylor Wright cited **Gout v Cimitian** [1922] 1 AC 105. That case simply said 'that the words "ordinarily resident" cannot be interpreted by such considerations and must be given their usual and ordinary meaning.'

[33] In **R v Barnet LBC Ex parte Shah** [1983] 2 AC 309. The issue that arose was whether foreign students met the legal standard of 'ordinary residence in the United Kingdom' in order to benefit from certain statutory payments. To answer this question Lord Scarman further refined the question by asking whether the phrase was to be given its natural or ordinary meaning or whether the context required a special meaning. His Lordship held that the income tax cases of **Lysaght** and **Levene** established that the words 'ordinarily resident' had a definite meaning that transcended the arcane world of income tax law. Lord Scarman said this at pages 343 – 345:

> *Unless, therefore, it can be shown that the statutory framework or the legal context in which the words are used requires a different meaning, I unhesitatingly subscribe to the view that "ordinarily resident" refers to a man's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or of long duration.*
>
> *There is, of course, one important exception. If a man's presence in a particular place or country is unlawful, e.g. in breach of the immigration laws, he cannot rely on his unlawful residence as constituting ordinary residence (even though in a tax case the Crown may be able to do so): In re Abdul Manan [1971] 1 W.L.R. 859 , and Reg. v. Secretary of State for the Home Department, Ex parte Margueritte [1982] 3 W.L.R. 753 , C.A. There is, indeed, express provision to this effect in the Act of 1971, section 33 (2) .*

But even without this guidance I would conclude that it was wrong in principle that a man could rely on his own unlawful act to secure an advantage which could have been obtained if he had acted lawfully.

There are two, and no more than two, respects in which the mind of the "propositus" is important in determining ordinary residence. The residence must be voluntarily adopted. Enforced presence by reason of kidnapping or imprisonment, or a Robinson Crusoe existence on a desert island with no opportunity of escape, may be so overwhelming a factor as to negative the will to be where one is.

And there must be a degree of settled purpose. The purpose may be one; or there may be several. It may be specific or general. All that the law requires is that there is a settled purpose. This is not to say that the "propositus" intends to stay where he is indefinitely; indeed his purpose, while settled, may be for a limited period. Education, business or profession, employment, health, family, or merely love of the place spring to mind as common reasons for a choice of regular abode and there may well be many others. All that is necessary is that the purpose of living where one does has a sufficient degree of continuity to be properly described as settled.

The legal advantage of adopting the natural and ordinary meaning, as accepted by the House of Lords in 1928 and recognised by Lord Denning M.R. in this case, is that it results in the proof of ordinary residence, which is ultimately a question of fact, depending more upon the evidence of matters susceptible of objective proof than upon evidence as to state of mind. Templeman L.J. emphasised in the Court of Appeal the need for a simple test for local education authorities to apply: and I agree with him. The ordinary and natural meaning of the words supplies one. For if there be proved a regular, habitual mode of life in a particular place, the continuity of which has persisted despite temporary absences, ordinary residence is established provided only it is adopted voluntarily and for a settled purpose.

[34] His Lordship pointed out the error of the majority of the Court of Appeal at page 347:

> *My Lords, the basic error of law in the judgments below was the failure by all the judges, save Lord Denning M.R., to appreciate the authoritative guidance given by this House in Levene v. Inland Revenue Commissioners [1928] A.C. 217 and Inland Revenue Commissioners v. Lysaght [1928] A.C. 234 as to the natural and ordinary meaning of the words "ordinarily resident." They attached too much importance to the particular purpose of the residence; and too little to the evidence of a regular mode of life adopted voluntarily and for a settled purpose, whatever it be, whether study, business, work or pleasure. In so doing, they were influenced by their own views of policy and by the immigration status of the students.*
>
> *The way in which they used policy was, in my judgment, an impermissible approach to the interpretation of statutory language. Judges may not interpret statutes in the light of their own views as to policy. They may, of course, adopt a purposive interpretation if they can find in the statute read as a whole or in material to which they are permitted by law to refer as aids to interpretation an expression of Parliament's purpose or policy. But that is not this case.*

[35] This passage from Lord Scarman has not been given the prominence it deserves. It applies to all statutes. His Lordship stressed that the purpose of the statute is to be gathered from reading the whole statute. It is not found by coming up with one's own views about the purpose and then reading that purpose into the statute. Importantly, this approach by Lord Scarman excludes, necessarily, ministerial statements during the passage of the Bill.

[36] Finally, there is the Jamaican Court of Appeal decision in **Quant v The Minister of National Security** [2015] JMCA Civ 50. The provision that arose for interpretation was rule 24.3 of the Civil Procedure Rules. Under that rule a court may make an order for security for costs if satisfied that the 'claimant is ordinarily resident out of the jurisdiction.' Her Ladyship Sinclair Haynes JA (Ag) (as she was at the time) approved of **Shah** and **Lysaght**. Her Ladyship quoted extensively from **Shah** to show that the proper test for 'ordinarily resident' is

whether the person as a regular mode of life adopted voluntarily and for a settled purpose a place of residence.

[37] Although Mr Samuels did not say so explicitly the court did not get the impression that he was in fundamental disagreement with the cases cited by Mrs Taylor Wright and by Mrs Reid Jones. Mrs Reid Jones relied heavily on **Fox v Stirk and Bristol Electoral Registration Officer** [1970] 2 QB 463 for the proposition that a person can have two places of residence. Mrs Taylor Wright also cited that case. In that case two students appealed against a refusal to have them registered as electors on the ground that they did not qualify as 'resident' for the purpose of the Representation of the People Act. In each case both students arrived in October at the university for the academic year where they were required to be for the next six to seven months. The judge in the county courts affirmed the decision of the registrars. The students appealed. Lord Denning MR after reviewing cases including **Levene** held at page 476:

> *I would also take into account, as the statute says, the general principles formerly applied and have regard to the purpose and other circumstances of his presence at or absence from the address. Hence I derive three principles.* ***The first principle is that a man can have two residences. He can have a flat in London and a house in the country. He is resident in both. The second principle is that temporary presence at an address does not make a man resident there.*** *A guest who comes for the weekend is not resident. A short-stay visitor is not resident. The third principle is that temporary absence does not deprive a person of his residence. If he happens to be away for a holiday or away for the weekend or in hospital, he does not lose his residence on that account.* (emphasis added)

[38] This passage along with others shows that it is a matter of fact and degree in order to determine whether the person 'has resided' in the particular geographical location.

[39] The provision the LGA does not say that the person must reside at any particular house. It simply says that the person is to reside in the area for the immediately

preceding twelve months of the day of election. The section does not qualify 'resided' with the adverb 'ordinarily.' While it's true that some of the case referred to above have words qualifying the verb 'reside' that does not mean that the person's residence can be transient as in a visitor for a holiday.

[40] What is established by the cases is that a person can have multiple places of residence. Where a person resides is independent of whether he or she owns property in the place of residence. In the usual course of things if the person is in a location illegally or unlawfully, then he is not regarded as resident at that location. However, that consideration does not arise in this particular case. The determination of where a person resides is arrived at by examining all the circumstances placed before the court. The ultimate question is whether the person has a sufficient degree of connection with a particular location that it can be said that he is there as part of the habitual way in which he/she organises himself/herself. As the cases have shown, once per month for a week is sufficient to establish residence. A seaman who spends the majority of the year on the high seas is regarded as resident at the place he is as part of the manner in which he organises his life.

The evidence on residence

[41] Mrs Taylor Wright's analysis began with an examination of the credibility of the petitioner and his witnesses. The ultimate submission was that they had not adduced sufficient evidence to establish their case. The court will look at all the evidence including that of the respondents. It is not unheard of that in civil proceedings a litigant who might have otherwise failed on his case may succeed because material is found in the opponent's case that support the case of the litigant in question. The court also bears in mind that this is a case of rival political parties and thus partisanship is to be expected and this may well have had an impact on the quality of the evidence produced by both sides.

[42] The court needs to make the point that having regard to the nature of the challenge, unless the evidence adduced by the person who has the burden of

proof on a particular issue meets the requisite standard there is nothing for other person to refute. This is in keeping with the concepts of the burden and standard of proof. In this case, Mr Bogle has the legal and evidential burden to prove the negative – that is that Mr Jones had not resided in Brandsbury District for the requisite time period. It is not for Mr Jones to prove that he has unless the evidence adduced by Mr Bogle has that level of intrinsic reliability that casts an evidential burden on Mr Jones.

[43] In support of the proposition that Mr Jones resided in St Catherine and not in Bransbury District, St Thomas during the relevant time, Mr Bogle relied on the following documentary evidence:

(a) Mr Jones' driver's licence issued on February 20, 2012 has the civic address at 6 Charles Smith Close;

(b) Mr Jones lives at 8 Perch Way, New Town, St Catherine with his wife and two children;

(c) a Jamaica Public Service ('JPS') utility bill due dated November 23, 2016 for his Braeton home in the parish of St Catherine in the sum of $14,398.79;

(d) a JPS bill due dated January 11, 2016 for the Bransbury District home in the sum of $1,028.14;

(e) a JPS bill due dated February 11, 2016 for the Bransbury District home in the sum of $648.84;

(f) a JPS bill due dated March 12, 2016 for the Bransbury District home in the sum of $1,128.26;

(g) a JPS bill dated due dated December 12, 2016 the Bransbury District home in the sum of $808.98;

(h) Mr Jones' National Water Commission water bill dated December 20, 2016 for his Braeton home in the parish of St Catherine in the sum of $16,001.78.

[44] That was the documentary evidence. The court now turns to the affidavit and oral evidence adduced under cross examination Mr Bogle's witnesses.

[45] Mr Bogle's personal evidence on the point of Mr Jones residence consisted solely of the fact that he went to where Mr Jones was alleged to be resident to canvas votes for the 2012 Local Government Elections and on that visit he did not see Mr Jones. Regarding electricity consumption, Mr Bogle accepted that he did not know about Mr Jones' personal electricity consumption habits.

[46] There is evidence that Mr Jones applied to transfer his voter registration from St Catherine to the St Thomas Western constituency. This led to verification visits by electoral officials in 2014. The purpose of these visits, as the adjective suggests, was to determine whether Mr Jones now resided in Brandsbury District as he claimed. There is no evidence that Mr Bogle himself was not present at any of the visits. His answers under cross examination suggests that he received information about the visits after they had taken place. The electoral officials found Mr Jones at the home in April 2014.

[47] The next witness for Mr Bogle was Miss Maxine Minott who describes herself as a scrutineer of the People's National Party ('PNP'). Her affidavit and answers in cross examination spoke to the visit of a verification team of which she was a part. This visit was made in April 2014. She stated that she made enquiries of neighbours and residents of the area about Mr Jones during the April 2014 visit but no one confirmed his residence or even seemed to know him.

[48] She said that she returned to the address on October 9, 2014 and saw Mr Jones. She states that she concluded that he did not reside at the address and was a visitor. Her affidavit does not say why she formed that view. She was opposed to him being registered as an elector.

[49] Miss Minott says that she returned again on February 10, 2016. She made enquiries about him. He was not at the address and neither could she garner any useful information about him from anyone nearby.

[50] She concludes her affidavit by saying that based on her observation on April 13, 2014, October 2014 and February 10, 2016 Mr Jones did not live in Brandsbury District. In answer to the court, Miss Minott was saying that she knew that Mr Jones did not live in the area because she was born in the area, she visited the community from time to time and based on that she could safely say that Mr Jones did not live in the area. To put her evidence in the form of the statutory language, from her knowledge acquired through, visits on occasions other than the days specifically mentioned and information gathered in her specific capacity as scrutineer she concluded that Mr Jones had not resided in the area within the jurisdiction of the relevant Local Council for twelve months immediately preceding the day of election.

[51] The court will say that the visits of April 2014 and October 2014 are not of great evidential value because they occurred outside of the statutorily required twelve month's residency requirement of the LGA. Thus for the purpose of determining whether Mr Jones met the statutory standard the 2014 visits by Miss Minott cannot be taken into account. Thus of her three visits the only relevant one is that of February 10, 2016.

[52] In answer to the court Miss Minott indicated that she visited the Brandsbury District area at times other than in her capacity as a scrutineer. At the end of the court's questions counsel were asked if they have any questions arising and both counsel declined the invitation. This means that there was no further expansion on her answers when she said she visited the area from time to time. There was no evidence of when these other visits were made, the length of time of each visit, where she went and who she saw. Her evidence about her visits other than those in April and October 2014 and February 2016 did not narrow down itself to the crucial twelve months 'immediately preceding the day of election.' This

means that Miss Minott's evidence has not been able to establish that Mr Jones had not 'resided in the area within the jurisdiction of the [St Thomas Municipal Council] for twelve months immediately preceding the day of election.'

[53] The law is quite clear that a person can have two places of residence. Residence is not about property holding but about the person's habits. The fact that Mr Jones has a permanent home in St Catherine, like Mr Lysaght, in **Lysaght v IRC**, does mean he cannot reside in Brandsbury District, St Thomas for the purpose of the LGA. The statute does not have qualifying words such as 'ordinarily' 'usually' 'most of the time' 'exclusively' 'principally' 'occasionally' 'exceptionally' or even 'extraordinary.' There is nothing in the LGA to suggest that the past participial verb 'has resided' has any special or unique meaning other than its ordinary meaning which is where a person habitually present as part of his ordinary course of life and habit. This means that Mr Jones may have short visits to Brandsbury District and depending on their brevity and frequency

[54] The court wishes to point that this is not a case about whether the electoral officials reached the correct conclusion about Mr Jones' residence. They have come to their conclusion but that decision is not directly in issue because the petition is not a direct challenge by way of judicial review. What is being said is that as a matter of law Mr Jones' did not meet the residency requirement because he did not 'live' in Brandsbury District for the relevant period.

[55] The court takes the point made that the difference between the bills is striking. There is at least a $14,000.00 difference between the Braeton JPS bill and the Brandsbury District JPS bill. However, that does not mean by itself or with the other evidence that he cannot be resident in the district during the relevant time.

[56] Neither is the fact that his driver's licence bears the address of 6 Charles Smith Close which is in Kingston 3 proof of lack of residence. The driver's licence evidence is not helpful because it was issued in 2012 and no one has contended that he now resides at the address on the licence. The relevant time is twelve months before the day of election not five years before the election day.

[57] It should also be noted that Mr Jones transferred his voter registration to the Brandsbury Division. Miss Minott paid two visits to the community she says on the April 13, 2014 and October 2014. Clearly these two visits in and of themselves are not sufficient to show that Mr Jones was not resident in the division for the purposes of being an elector. It is not clear how frequently she visited the area between her two visits in 2014. Equally it is not clear how frequently, if at all, she visited the district in 2015 or even 2016. As noted earlier she said that she is a frequent visitor to the district but she did not volunteer and neither was she asked to provide sufficient details to assess the reliability of the conclusion Mr Bogle wishes the court to draw which is that Mr Jones did not reside in the community.

[58] The fallacy of Mr Bogle's proposition on the residency issue is this: proof that Mr Jones resided in Kingston is not proof that he did not reside in Brandsbury because the neither the LGA or the Representation of the People Act require exclusive residence in any particular geographical location. Once there is the lawful possibility that a person can have more than one residence Mr Bogle's case was always going to struggle. Proof of a negative is always difficult and so it has proven for Mr Bogle.

[59] The evidence put forward by Mr Bogle that Mr Jones did not meet the residency standard was not 'clear, definite and certain' to the requisite civil standard.

[60] Mr Bogle has therefore failed to prove that Mr Jones' did not reside in Brandsbury District during the relevant twelve-month period. The lack of specificity in Miss Minott's evidence about the frequency, duration and location in the district when she visited served to undermine Mr Bogle's case.

[61] Mr Bogle's next point of was that Mr Jones was a civil servant at the time he was nominated and therefore he is disqualified from being a candidate. It is to that aspect of the case that the court now turns its attention.

Whether Mr Jones was the holder of public office under section 3 of the Civil Service Establishment Act

[62] The LGA added the Eighth Schedule to the RPA. In that Schedule is paragraph 3 (1) (h) which reads as follows:

> *A person is not qualified to be elected as, or to be or continue to be a Councillor of any Council of a Local Authority or a Mayor of a City Municipality, if the person –*
>
> *(h) holds any office for the time being constituted a public office pursuant to section 3 of the Civil Service Establishment Act*

[63] Section 3 of the Civil Service Establishment Act ('CSEA') states:

> *(1) Subject to the provisions of the Constitution of Jamaica relating to the holders of public offices and of this Act, the power to constitute or abolish offices in the public service shall be exercised by the Minister by order.*
>
> *(2) An order under this section may from time to time –*
>
> *(a) determine the numbers of any office specified thereunder;*
>
> *(b) determine the emoluments to be attached to any office; and*
>
> *(c) make such incidental, consequential and supplemental provisions as the Minister thinks necessary or expedient to give full effect to the order and, without prejudice to the generality of the foregoing, any such order include provisions -*
>
> *(i) making in any enactment regulating the number of offices in respect of which, or the number of office holders in respect of whom, emoluments may be paid, such modifications as may be expedient; and*
>
> *(ii) amending any enactment relating to the appointment, powers, duties, rights or liabilities of any officer holding any office specified in an order or bearing the same style and title as an officer appointed to any office specified in the order.*

(3) An order under this section may provide that it shall effect from such date, not earlier than the 1st day of February 1976, as may be specified therein.

(4) An order under this section shall be subject to affirmative resolution of the House of Representatives.

[64] The definition section is important. In section 2 there are the following definitions:

"officer" means an officer in the public service;

"public service" means the service of the Crown in a civil capacity, permanent in nature, in respect of the Government of Jamaica, so, however, that the Minister may, by order, deem service with any statutory authority or other body specified in the order to be public service for the purposes of this Act.

[65] The effect of all this is that the fact that someone may be employed to a body carrying out public functions, that is functions on behalf of the government, that person is not necessarily an office in the public service. Even if the person is paid from public funds or out of the government's coffers that fact is not conclusive. Article 3 (1) (h) of the Eighth Schedule was careful to narrow down the expression 'holder of public office' to the holder of an office being a public office under section 3 of the CSEA. The ultimate question is whether Mr Jones was, at the time of the election, not only employed by the government of Jamaica, through the Court Management Services ('CMS') but whether that office of judge's orderly is a public office within section 3 of the CSEA at the material time.

[66] The Court of Appeal decision in **Karen Thames v National Irrigation Commission Ltd** [2015] JMCA Civ 43 is instructive on the question of who is the holder of a public officer. In that case it was held that section 1 (1) of the Constitution of Jamaica defines 'public office' as any office in the public service and a 'public officer' as the holder of any public office and includes any person appointed to act in any such office (**[54]**). It was also stated that section 125 (1) of the Constitution of Jamaica provides that power to make appointments to public office is vested with the Governor General acting on the advice of the

Public Services Commission. On this reading, any person not appointed by the Governor General acting on the advice of the Public Service Commission is not a public officer within the meaning of section 1 (1) of the Constitution.

[67] Having regard to section 3 (1) of the CSEA section 1 (1) of the Constitution of Jamaica is not exhaustive as to who is an officer in the public service. That's why the section begins by saying that subject to the Constitution the power to constitute and abolish offices in the public service resides in the Minister. Also the definition of public service under section 2 of the CSEA extends to any statutory body or other body deemed as public service by the Minister. This means that for the purpose of CSEA there are two ways one can become an officer in the public service. The first is (a) as stated by the Constitution of Jamaica and (b) deemed by order of the Minister. Before going on it is crucial to note that the Court of Appeal in **Thames** held that there were two requirements that must be met. These are the person must be appointed by the Governor General and that the Governor General in so appointing is acting on the advice of the Public Services Commission. The implication of this is that not all appointments by the Governor General are appointments to the public service within the meaning of section 1 (1) of the Constitution of Jamaica. If the appointment is not one done acting on the advice of the Public Services Commission, then such an office holder is not the holder of public office within the meaning of section 1 (1) of the Constitution of Jamaica but that does not mean that for other purposes he is not a public officer. Whether a person is a public officer all depends on context, purpose and any legislation, primary or subsidiary, that is under consideration. There is no single catch all universal definition of holder of public office or public officer.

[68] It must be noted that there was no discussion in **Thames** of whether the National Water Commission was deemed as part of the public services under section 2 of the CSEA.

[69] In the written speaking notes of Mrs Taylor Wright dated December 5, 2017 the point was taken that there is no evidence that Mr Jones was employed in a public office within the meaning of section 3 of the CSEA. Until this point was made in the speaking notes the court, like Mr Samuels, was of the view that it was not disputed that Mr Jones was a public officer within the meaning of section 3 of the CSEA. The only issue, the court thought, was whether he had resigned in time and so was not a public officer within the meaning of section 3 on the date of the election.

[70] This court's position is supported by the affidavit evidence on the point. Mr Bogle made the specific assertion at paragraph 17 of his affidavit dated December 6, 2016, that Mr Jones was a public servant and therefore ineligible to be elected. The petition itself pleaded that Mr Jones was the holder of a public office and therefore was ineligible to be elected as a councillor. Mr Jones' response to was to say that he resigned his position by letter dated October 25, 2016 with effect from October 26, 2016. Thus the issue was not whether he was a section 3 holder of public office but whether he resigned. Issues cannot be joined in submissions. Pleadings are the place for that.

[71] Mrs Taylor Wright overlooked exhibit 11 which is a memorandum from Mrs Kamaya Thompson Scott to Mr Lascelles Ellis, the Principal Financial Officer. That memorandum stated that 'Mr Dean Jones, Judge's Orderly (LMO/TS 2) in the Resident Magistrate's Court, Corners (sic) Court' is not to be paid any more salary with effect from October 24, 2016.' The designation of LMO/TS 2 is found only in the CSEA Order published in 2016. That order lists all the posts in the public service pursuant to sections 3 and 4 of the CSEA.

[72] The court has done its own research and has found out that the 2016 Civil Service Establishment Order issued under section 4 of the CSEA lists judges' orderly as a post established under section 3 of the legislation and therefore Mr Jones was an employee in a public office within the meaning of both section 3 of the CSEA and article 3 (h) of the Eighth Schedule of the Representation of the

People Act. That legal question is now settled. The only remaining issue is the factual question of whether he was so employed at the time of his election. The resolution of this turns on when his letter of resignation was received and when it became effective. The court now turns to the evidence.

[73] The court sets out the letter of October 25, 2016 in full from Mr Jones. This is the only letter that purports to be the resignation letter of Mr Jones. It reads:

> *Mrs Bobbett Dawkins*
>
> *Principal Executive Officer*
>
> *Court Administration Division*
>
> *25 Dominica Drive*
>
> *Kingston 5*
>
> *Thru' His Hon Mr Charles Pennycooke*
>
> *Parish Judge*
>
> *Dear Mrs Dawkins*
>
> ***Re: Resignation of Mr Dean Jones***
>
> *Please accept this letter as my formal notice of resignation from the Coroners Court effective 26th October 2016. I have enjoyed my employment here and appreciate all I have learned.*
>
> *I hope that this two-week notice is sufficient for you to find a replacement.*
>
> *Thank you very much for the opportunity.*
>
> *Yours respectfully*
>
> *Dean Jones*

[74] The letter has the signature of Mr Jones. One would think that whether this letter was true resignation letter was simple enough that was the case. It turned out that there were three copies of the same letter before the court. One copy was exhibited to the witness statement of His Honour Mr Charles Pennycooke, the Coroner, to whom Mr Jones was an orderly. Another exhibited by Mr Jones to his affidavit and a third exhibited by Mrs Morgan Rogers the Court Administrator at Sutton Street where the Coroner's Court is located. His Honour Mr Pennycooke was the Coroner at the material time and the immediate supervisor of Mr Jones.

[75] The letters exhibited by Mr Pennycooke ('the Pennycooke exhibit) and Mr Jones ('the Jones exhibit') do not have Mrs Morgan Rogers' signature ('the Morgan Rogers exhibit) and neither do they have the stamp of Court Management Services ('CMS'). CMS is the administrative support unit of the courts of Jamaica which deals with all personnel issues including resignations for non-legal persons. The letter referred to by Mrs Morgan Rogers has her handwriting on it as well as the date stamp of CMS. All three copies purport to bear the signature of Mr Pennycooke which would indicate that he saw the letter. Neither Mr Pennycooke's exhibited letter nor Mr Jones' exhibited letter has any handwritten date by Mr Pennycooke. Both gentlemen insist that their copy is the real letter of resignation and both men discount the copy referred to by Mrs Morgan Rogers despite the fact that it has her handwriting noting the date she saw and that it has the CMS stamp.

[76] Mr Pennycooke insists that the signature on the Morgan Rogers copy is not his signature. In effect, the signature of Mr Pennycooke that appears on the Morgan Rogers copy is a forgery. There is no need for the court to resolve whether Mr Pennycooke's signature was forged. But even if it was forged that forgery does not affect the conclusion that the Morgan Rogers copy was the only copy that lawfully terminated the employment of Mr Jones. The reasons for this are now given.

[77] The evidence in the case is that the expected practice of public servants is that they date any document on which they place their signature to indicate the date they saw the document. Mr Pennycooke's signature is not dated on either his copy or Mr Jones' copy. Neither is his signature dated on the Morgan Rogers copy. The result is that Mr Pennycooke's signature is not dated on any of the three copies dated October 25, 2016, not even the one which he insists that he signed.

[78] The date on the Morgan Rogers copy is December 13, 2016. In oral evidence she did say that she signed it on December 12, 2016. She also said that December 12 was also the date on which she saw Mr Jones in her office handing in the resignation letter. As her evidence progressed it became evident that Mrs Morgan Rogers placed her handwriting on the letter on either December 12 or 13, 2016. Mr Pennycooke insists that he signed the letter on October 25, 2016 despite the absence of any date by his signature. So too Mr Jones is adamant that he signed and took the letter to Mr Pennycooke on October 25, 2016.

[79] Mr Pennycooke's witness statement is dated May 19, 2017, more than eighteen months after October 25, 2016. There is no evidence of any contemporaneous note made by him consistent with his assertion of the date he signed. In his witness statement no reason is given why that date would stand out after eighteen months. Mr Pennycooke states in his witness statement that after he signed the letter he 'instructed [Mr Jones] to take the letter to the Court Administrator.' If this is correct then Mr Pennycooke did not hand in the letter himself to Mrs Morgan Rogers. This is consistent with Mrs Morgan Rogers' evidence that she received the letter from Mr Jones albeit that she puts it in December 2016 and not October 2016. If Mr Pennycooke's evidence is correct that he handed the letter to Mr Jones on October 25 with instructions to take it to Mrs Morgan Rogers and Mrs Morgan Rogers only received the letter in December 2016, then this must mean that Mr Jones kept the copy until after the Local Government elections in November 2016.

[80] There is another part of the context of the events of October 2016 that must be stated. There is documentary evidence that Mr Jones had applied for leave. The application for leave is dated October 24, 2016 and it is signed by Mr Pennycooke and that application was sent to CMS. This means that up to October 24, 2016 there is no documentary evidence that Mr Jones was thinking of resigning his post. There is no evidence that Mr Pennycooke was expecting Mr Jones to resign. The effect of this is that as far as CMS and Mrs Morgan Rogers were concerned they were dealing with Mr Jones' vacation leave application.

[81] Mrs Morgan Rogers, in accordance with established practice, sent Mr Jones' resignation letter with her own cover letter dated December 15, 2016 addressed to Mrs Dawkins by Mrs Morgan Rogers. Mrs Morgan Rogers' letter stated that she received the letter December 12, 2016 advising of his resignation. What we have then is another official record consistent with Mrs Morgan Rogers' assertion that she received the resignation letter in December 2016.

[82] The court has not found any evidence to remotely suggest that Mrs Morgan Rogers would have had any motivation to forge or be a party to the forgery of Mr Pennycooke's signature on the Morgan Rogers copy. This court concludes that Mrs Morgan Rogers was mistaken about the date Mr Jones handed in his resignation. It might have been December 12 or 13, 2016. The court is quite certain that Mr Jones handed in his letter on either December 12 or 13, 2016. At the time the resignation was received she placed her hand writing on it and that hand writing had a December 2016 date. Her error in the date does not undermine her credibility. Mr Jones' case on this aspect of the matter was that Mrs Morgan Rogers received the letter of the resignation in October 2016 but did not send it off until she was prompted because of an enquiry about a P 45 form. That prompt led her to send off the form in December 2016. There was no evidence to support this. It was at best intelligent speculation but unsupported by evidence.

[83] She was acting in the ordinary course of her employment and did what she did before anyone was contemplating litigation. The CMS stamp post-dated her hand writing. There is no credible evidence showing why she would deliberately date the letter in December 2016 if she in fact received it in October as Mr Jones suggests. No reason is present in the evidence to raise the possibility that she falls within the class of suspect witnesses. Of the three persons involved in this aspect of the case, Mr Pennycooke has no reason to be deliberately lying about the date he received the letter of resignation. The court is of the view that Mr Pennycooke is mistaken about the date. He is relying on his memory some eighteen months after the event. What the court can say is that Mr Pennycooke has no objective reference point for him to be so sure he signed the letter on October 25, 2016 whereas Mrs Morgan Rogers wrote on and dated her copy and passed it on through the normal route of communication. There is no evidence that she had access to her copy after it left her possession. This means that the court concludes, on a balance of probability that she added her hand writing in December 2016. She followed the system and for that reason her evidence on the date she received the letter from Mr Jones is reliable and accepted by the court. As noted earlier Mr Pennycooke cannot assist with the date the letter of resignation was handed to Mrs Morgan Rogers.

[84] An important witness is Mrs Bobette Dawkins, Senior Director of Human Resource Management of CMS. She said that Mr Jones' letter of resignation letter came to her department on December 15, 2016. That would be the Morgan Rogers copy. There is no evidence that any other copy got to CMS. According to Mrs Dawkins even though the letter said that he resigned from October 2016 he would have been paid up to December 2016. The reason from the totality of the evidence is that the letter of resignation got to CMS December 15, 2016 and until that date Mr Jones was treated as an employee on leave.

[85] There was the evidence of a letter dated November 16, 2017 addressed to Mr Jones from the CMS stating that Mr Jones was given permission to proceed on 33 days' vacation leave for the period November 14, 2016 to December 30,

2016. There was also the application for leave by Mr Jones. According to the evidence Mr Jones' supervisor recommended that leave be granted to Mr Jones and the date of the recommendation is October 24, 2016. It was processed by a Miss Lawrence. The internal instructions to her to commence processing of Mr Jones' leave application is dated October 31, 2016. There is no evidence from CMS that Mr Jones cancelled his leave. Mrs Dawkins' evidence to this point is that up to December 15, 2016 Mr Jones was regarded as an employee of CMS. This necessarily includes November 2016, the month of the Local Government Elections. She also said that his leave application and grant of leave were not cancelled.

[86] In cross examination, Mrs Dawkins was unable to say why the resignation letter dated October 25, 2016 did not reach CMS before December 15, 2016. Of course the answer is that, as the court will find, that the letter that got to CMS was only received by Mrs Morgan Rogers in December 12 or 13, 2016. Mrs Dawkins agreed that Mr Jones, based on the documentation, did not take up the vacation leave. She also said that if the employee resigns before the date of the leave approval then there is no need to cancel the leave that was granted. The reason is that the employee resignation would supersede the leave application.

[87] When it was suggested to Mrs Dawkins that the first point of contact with 'management' when resigning would have been Mr Jones' supervisor, that is to say Mr Pennycooke, she disagreed. Mrs Dawkins said that the first point of contact would be Mrs Morgan Rogers, the Court Administrator. Until that communication comes from Mrs Morgan Rogers, CMS and its accounting department would not know of the resignation of Mr Jones. Mrs Dawkins also resisted the suggestion that best person to assist with when Mr Jones last attended work would be the supervisor. She said that the attendance register would be the better source of evidence for that kind of information. It is this court's view that Mr Pennycooke would, at best, be a conduit for the resignation. Mr Pennycooke is not the employer of Mr Jones and was not constituted as having any authority to accept resignations on behalf of CMS. Mr Pennycooke

has no power to contract, terminate or discipline his orderly and so notification to Mr Pennycooke could not possibly constitute a lawful termination of employment by resignation on the part of Mr Jones.

[88] Importantly, Mrs Morgan Rogers indicated that whether the letter had the consequence of effecting Mr Jones' resignation would rest with whether CMS accepted it. The next vital piece of evidence from Mrs Morgan Rogers is that the letter on which she wrote was the only letter was the only one she received from Mr Jones. There is no suggestion or evidence that she received any resignation letter from any other person or other source other than Mr Jones. There is no reliable evidence controverting her testimony and the inference to be drawn from her testimony. Mr Jones is not saying that he gave her two copies of the letter. Mr Pennycooke is not saying that he gave her a copy of the letter. In light of all that has been said this court concludes that Mr Jones did not hand in his letter of resignation to Mrs Morgan Rogers until December 12 or 13, 2016. CMS received the letter on December 15, 2016.

[89] Mrs Morgan Rogers produced the attendance register. The register records that Mr Jones attended upon his job on October 26 and 27, 2016. She also pointed that Mr Jones attended work on October 31, 2016 as well as November 1, 2016. It shows him coming in on both days at 0900hrs and leaving on 1700hrs on both days. The register shows him coming in on November 2, 2016 at 0900hrs but no time of leaving. She also testified that if he had been on leave it is not expected that he would sign the register.

[90] Mrs Morgan Rogers did say that while on leave he and his supervisor, Mr Pennycooke, may have had an arrangement whereby Mr Jones would attend and orient his successor. However, she was clear that it would not be proper for him to sign the register if he was on leave. She said that as far as she was aware Mr Jones took up his leave on November 14, 2016 and any cancellation of leave would have been done through her. She never received any document cancelling Mr Jones' leave. Mrs Morgan Rogers identified the cover letter dated December

15, 2016 which she sent to CMS along with the letter she had received from Mr Jones on December 12, that is to say, the first October 25 letter.

[91] Under cross examination, Mrs Morgan Rogers accepted that the word 'resigned' was written beside Mr Jones' name for the date December 19, 2016. It appeared that the word 'resigned' was written by a Miss Dennis who worked at the court. Mrs Morgan Rogers took the view that the word 'resigned' was written based on what Miss Dennis was advised.

[92] Mr Jones is a business man. He operates a business of some significance in St Catherine. He was worked in the courts for several years and so he would have imbibed the importance of documents simply by being in a formal legal environment. He is used to appreciating the significance of documents and what signing them means. Neither he in evidence nor through his counsel was able to produce a rational explanation for signing an attendance register after the date he claimed to have resigned.

[93] The court is aware that CMS has treated the October 25, 2016 letter received in December 15, 2016 from Mrs Morgan Rogers as being effective October 26, 2016. CMS made that decision in December 2016. It is this court's view that Mr Jones was an employee of CMS during October and November 2016, that is to say, during the Local Government Elections.

[94] Mrs Taylor Wright resists this conclusion by pointing out that there is not much evidence regarding how Mr Jones ought to have ended his contract, that is to say, whether it was legally correct to give immediate notice or two weeks' notice. She also said that the staff orders of the public service were not very clear on the matter. It is this court's view that the common practice of giving notice at least equivalent to the frequency of payment should apply. Mr Jones was paid every two weeks and in this court's view he should give at least two weeks' notice. Mrs Taylor Wright submitted that even if he were required to give two weeks' notice

but failed to do he would have committed a fundamental breach. [1] She added that his resignation was effective October 26 and even if his letter was ambiguous CMS treated October 26 as the effective date of resignation and therefore Mr Jones was lawfully nominated and elected. This submission reflects what is called in employment cases the automatic termination theory. Under this theory if the employer or employee commits a fundamental breach the contract of employment is at an end as of the moment of the fundamental breach because the courts do not enforce contracts of employment by way of specific performance. The court profoundly disagrees for the following reasons.

[95] The court relies on **Geys v Société Générale, London Branch** [2013] 1 AC 523. Neither party cited this case. In that case one of the important issues was the date the contract between the bank and Mr Geys was terminated. The bank purported to end the contract on November 29, 2007 but was prepared to accept a later date of December 18, 2007 when it paid into Mr Gey's bank account an amount corresponding to the payment in lieu of notice. Mr Gey contended for the termination date being January 6, 2008. The Supreme Court of the United Kingdom held that the date was January 6, 2008. The court had to choose between the automatic termination and the elective theories of contractual termination. By majority (4:1) their Lordships held that the elective theory applied and the contract was not terminated until the wrongful termination by the bank was accepted by Mr Geys. Lord Sumption made a strong case for the automatic theory but in the end this court does not agree with Lord Sumption. His Lordship did not answer effectively, the points of principle made by the majority. Lord Sumption held that traditionally courts did not enforce contracts of service then it would pointless saying that a wrongful termination of contract was not effective until the innocent party accepted it. This court agrees with the majority when their

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[1] Bowers, John, Employment Law (4th ed); Horwood v Lincolnshire County Council UKEAT/04621/11/RN (delivered April 3, 2012); Heaven v Whitbread Group PLC UKEAT/0084/10 (delivered April 8, 2012)

Lordships said that the inability to secure a particular remedy should not lead to irrationality in logic in this area of law. The principle that is applicable in other types of contracts namely that the innocent party may affirm or declare that they are ready and willing to perform the contract or accept the breach and sue for damages is applicable to contracts of employment.

[96] This court adopts the view expressed by Lord Hope. At paragraph 16 his Lordship said:

> *I also think that there are cases, of which this case is a good example, where it really does matter which of the two theories is adopted. The automatic theory can operate to the disadvantage of the injured party in a way that enables the wrongdoer to benefit from his own wrong. The law should seek to avoid such an obvious injustice. Where there is a real choice as to the direction of travel, the common law should favour the direction that is least likely to do harm to the injured party. I agree that we should be very cautious before reaching a conclusion whose result is that a breach is rewarded rather than its adverse consequences for the innocent party negatived: see para 66.*

[97] Lord Hope stated at paragraph 18:

> *The fact that an application of the automatic theory may produce an injustice is, for me, the crucial point.*

[98] Lord Wilson gave the most extensive treatment of the elective and automatic termination theories. This court agrees with and adopts the following passage from his Lordship. At paragraphs 63 - 66 Lord Wilson states:'

> ***63*** *…, the court is required to make a difficult and important choice between a conclusion that a party's repudiation (albeit perhaps only an immediate and express repudiation) of a contract of employment automatically terminates the contract ("the automatic theory") and a conclusion that his repudiation terminates the contract of employment only if and when the other party elects to accept the repudiation ("the elective theory"). It is common ground that, whichever theory be chosen, it should apply equally to wrongful repudiations by employers (ie wrongful dismissals) and wrongful*

repudiations by employees (ie wrongful resignations); and it is only for convenience, and because it is reflective of the facts of the present case, that I will, at times, refer to the wrongful repudiator as the employer and to the innocent party as the employee.

64 *In light of the fact that a central incident of the automatic theory is that, upon the automatic termination of the contract, the innocent party has a right to damages, the first question must be whether it matters that the contract is terminated forthwith upon repudiation or, instead, survives until some further, terminating, event? The answer is that sometimes it does matter. It depends on the terms of the contract. The date of termination fixes the end of some contractual obligations and, sometimes, the beginning of others. An increase in salary may depend on the survival of the contract until a particular date. The amount of a pension may be calculated by reference to the final salary paid throughout a completed year of service or to an aggregate of salaries including the final completed year. An entitlement to holiday pay may similarly depend on the contract's survival to a particular date. In some cases an award of damages will compensate the employee for any such loss. But often it will fail to do so. Such failure flows from application of the "least burdensome" principle, namely that damages should reflect only the losses sustained by the employer's decision to repudiate the contract unlawfully rather than by his having hypothetically proceeded, in the manner "least profitable to the plaintiff, and the least burthensome to the defendant", to terminate the contract lawfully: see Cockburn v Alexander (1848) 6 CB 791, 814 (Maule J), and McGregor on Damages, 18th ed (2009), para 8-093. So, where under the terms of the contract it had been open to the wrongfully repudiating employer to have taken a course which would have terminated the contract quickly as well as lawfully, the damages will be small.*

...

66 ...*I find it helpful to stand back and to remind myself of the overall effect of the automatic theory. It is to reward the wrongful repudiator of a contract of employment with a date of termination which he has chosen, no doubt as being, in the light of the terms of the contract, most beneficial to him and, correspondingly, most detrimental to the other, innocent, party to it. We must, I suggest,*

be very cautious before turning basic principles of the law of contract upon their head so that, in this context, breach is thus to be rewarded rather than its adverse consequences for the innocent party negatived. It is, says Professor Freedland in The Personal Employment Contract (2003), p 390 "a matter of concern if the common law of wrongful dismissal functions so as to invite opportunistic breach of contract". My view of the location of the justice of the case is opposite to that of Lord Sumption JSC: it is that, in that the bank failed to operate its own PILON clause lawfully until after 31 December 2007, it should not be able to revert to its unlawful act on 29 November as the reason why the contract did not survive for the final 32 days of the year.

[99] On the issue of remedies, this court agrees with Lord Wilson's analysis at paragraph 77:

77 *Equity took the view that the remedy of specific performance, or analogous injunction, should not be available so as to require an employee who had wrongfully resigned to go back to work or to require an employer who had wrongfully dismissed the employee to take him back. "[T]he courts," said Sir George Jessel MR, in Rigby v Connol (1880) 14 Ch D 482, 487, "have never dreamt of enforcing agreements strictly personal in their nature, whether they are agreements of hiring and service, being the common relation of master and servant, or ..." In Chappell v Times Newspapers Ltd. [1975] 1 WLR 482, 506, Geoffrey Lane LJ explained that "if one party has no faith in the honesty or integrity or the loyalty of the other, to force him to serve or to employ that other is a plain recipe for disaster". This has made a contract of employment into a special case--but only in terms of remedies. Indeed where, notwithstanding an employer's wrongful repudiation, trust and confidence between the parties have not been forfeit, an injunction, analogous to specific performance, may be granted to restrain implementation of its purported notice: Hill v C A Parsons & Co Ltd [1972] Ch 305. The big question whether nowadays the more impersonal, less hierarchical, relationship of many employers with their employees requires review of the usual unavailability of specific performance has been raised, for example by Stephenson LJ in the Chappell case, at p 503, but is beyond the scope of this appeal.*

[100] This passage suggests that the time has come when the remedies offered by the law in employment contracts may not have to be revisited. His Lordship is advocating the grant of an injunction analogous to an order for specific performance of an employment contract may well be open to employees in certain circumstances.

[101] If Mr Jones' letter of resignation was effective October 26, 2016, then the lack of notice would amount to a fundamental breach and would be of no effect unless and until it was accepted by CMS. The court moves now to the question of notice and what the law says about it.

[102] On the issue of notice, this court also adopts this passage from Baroness Hale in **Gey** at paragraph 52:

> *In support of his argument, Mr Cavender relies on the general principle that notices to determine contracts should be unambiguous and unequivocal and leave the recipient in no doubt as to the contractual right being invoked. He relies in particular upon the well-known passage in the opinion of Lord Steyn in Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd [1997] AC 749, 768:*
>
> > *"Making due allowances for contextual differences, such notices [under a break clause in a lease] belong to the general class of unilateral notices served under contractual rights reserved, eg notices to quit, notices to determine licences and notices to complete: Delta Vale Properties Ltd v Mills [1990] 1 WLR 445, 454 E- G. To those examples may be added notices under charter parties, contracts of affreightment, and so forth. Even if such notices under contractual rights reserved contain errors they may be valid if they are 'sufficiently clear and unambiguous to leave a reasonable recipient in no reasonable doubt as to how and when they are intended to operate:' the Delta case at p 454 E- G, per Slade LJ and adopted by Stocker and Bingham LJJ; see also Carradine Properties Ltd v Aslam [1976] 1*

> *WLR 442, 444. That test postulates that the reasonable recipient is left in no doubt that the right reserved is being exercised. It acknowledges the importance of such notices. The application of that test is principled and cannot cause any injustice to a recipient of the notice."*
>
> *Although that case was concerned with the effect of a mistake in an otherwise clear and unambiguous notice, the principle is clear. The reasonable recipient has to be told that the right is being exercised, how and when it is intended to operate. This was not done in this case.*

[103] Baroness Hale continued in paragraph 57:

> ***Whatever the test to be applied, it seems to me to be an obviously necessary incident of the employment relationship that the other party is notified in clear and unambiguous terms that the right to bring the contract to an end is being exercised, and how and when it is intended to operate.*** *These are the general requirements applicable to notices of all kinds, and there is every reason why they should also be applicable to employment contracts.* ***Both employer and employee need to know where they stand. They both need to know the exact date upon which the employee ceases to be an employee.*** *In a lucrative contract such as this one, a good deal of money may depend upon it. But even without that, there may be rights such as life and permanent health insurance, which depend upon continuing to be in employment. In some contracts there may also be private health insurance. A person such as the claimant, going on holiday over Christmas and the New Year, needs to know whether he should be arranging these for himself. At the other end of the scale, an employee who has been sacked needs to know when he will become eligible for state benefits.* (emphasis added)

[104] As applied to this case Mr Jones' notice was neither clear not unambiguous. The first paragraph of Mr Jones' letter stated that the resignation was to be effective October 26. The second paragraph stated that he is giving two-weeks' notice. This court holds that the notice was ambiguous and such ambiguity should be resolved against Mr Jones. The notice was ineffective to terminate the contract

on October 26. It has also been decided that the letter was handed in on December 12 or 13 2016 and it was only then that notice was given to CMS.

[105] In cross examination Mrs Morgan Rogers stated that even though she received the letter of resignation in December 2016 it was up to CMS to say when it had effect. From this the court concludes that Mrs Morgan Rogers herself could not terminate the contract simply by accepting the letter of resignation. She, like Mr Pennycooke, was a conduit for the letter which was sent to CMS which would then decide what it would do. Only CMS has the authority to accept or reject the letter of resignation.

[106] CMS decided to treat October 26, 2016 as the date of resignation. Can this response by CMS, in December 2016, have the effect of making Mr Jones eligible for election? The answer is no. A resignation is not effective until it is received and accepted by the other party. If the letter of October 25, 2016 was a repudiatory as suggested by Mrs Taylor Wright and the breach occurred on October 25, 2016, then until CMS accepted the breach and regarded the contract. But CMS would have only had that opportunity in December 2016 when the letter was handed in to Mrs Morgan Rogers and not before because Mr Pennycooke has no authority to decide whether Mr Jones' repudiatory breach was accepted by CMS. Mrs Morgan Rogers does not have that authority either. Since the letter was only handed in formally on either December 12 or 13, 2016 then it means that CMS was not properly informed of Mr Jones' resignation until the earliest December 15, 2016 when the letter arrived at CMS. But even if it is said that when Mrs Morgan Rogers received the October 25, 2016 letter it was effective - that would be December 12 or 13 at the earliest - this would be after the Local Government Elections which were held on November 28, 2016. Either way, at the time of the Local Government Elections, Mr Jones was the holder of a public office within the meaning of section 3 of the CSEA. The back dating of the date of resignation cannot validate Mr Jones' eligibility because until that decision was made he was in fact employed to CMS.

Conclusions

[107] The court's findings are:

i) There is no evidence that Mr Jones was not residing in Brandsbury District for twelve months before the election day;

ii) Mr Jones' letter of resignation was not effective until it brought to the attention of CMS and that was not done until either December 15, 2016;

iii) Mr Jones did not hand in the letter of resignation to Mrs Morgan Rogers until either December 12 or 13, 2016;

iv) Mr Jones did not hand in any letter to Mrs Morgan Rogers before either December 12 or 13, 2016;

v) Mr Pennycooke did not hand in any letter purporting to be the resignation letter directly to Mrs Morgan Rogers and so cannot assist with the date the letter was actually handed to her;

vi) Of the three witnesses who can speak to the letter Mrs Morgan Rogers' evidence is the most reliable because she actually made a note on the date she actually the letter;

vii) It matters not whether Mr Pennycooke's signature on the Morgan Rogers letter was forged because his signature had no legal consequence for the date of the resignation because he had no authority to accept the resignation on behalf of CMS and end the employment relationship between CMS and Mr Jones;

viii) Mr Pennycooke's signature was simply to say that he had seen the letter;

ix) Mr Jones was the holder of a public office under section 3 of the CSEA on November 28, 2016 when the Local Government Elections were held;

x) Mr Jones was not eligible to be elected as a councillor for the Yallahs Division of the St Thomas Municipal Corporation;

xi) Mr Jones is not eligible to continue to be the councillor for the Yallahs Division of the St Thomas Municipal Corporation.

Disposition

[108] Mr Samuels has asked that the court declare that Mr Bogle was and is the lawfully elected representative for the Yallahs Division. The court does not agree. There is no evidence that the electors were aware of ineligibility of Mr Jones. The evidence from the electoral officials is that Mr Jones had met the legal standard to be selected and elected as a candidate. This court is bound by the approach of the Court of Appeal in **Dabdoub v Vaz and others** SCCA no 45 & 47/2008 (unreported) (delivered March 13, 2009). To impose on the electors a candidate who was not chosen by them would be contrary to democratic principles. The court orders that an election be held in the Yallahs Division at the earliest opportunity.

[109] Written submissions on (a) costs and (b) whether there should be repayment of all emoluments and benefits received by Mr Jones to be submitted within twenty one days of the date of this judgment.