IN THE SUPREME COURT OF BERMUDA
CIVIL JURISDICTION
2006 No. 357

IN THE MATTER OF THE MUNICIPALITIES ACT 1923

AND IN THE MATTER OF THE PARLIAMENTARY ACT 1978

AND IN THE MATTER OF AN EXTRAORDINARY MAYORAL ELECTION OF THE CITY OF HAMILTON HELD ON THURSDAY, 26TH DAY OF OCTOBER 2006

Date of Hearing: 26th February to 2nd March 2007
Date of Judgment: 12th March 2007

A. Newman QC and D. Duncan for the Petitioner;
A. Dunch for the 1st and 2nd Respondents; and
J. Pachai for the 3rd Respondent.

JUDGMENT

INTRODUCTION

1. On 26th October 2006 Mr. Sutherland Madeiros was elected as Mayor of the City of Hamilton by a majority of 37 votes. There were only two candidates and the number of votes cast was 161 to 124. By an Election Petition filed on 20th November 2006 the defeated candidate, Ms. Sonia Grant ('the Petitioner'), seeks to challenge Mr. Madeiros' election, and have it declared void. The Petition was also served on the Returning Officer, John Cooper, and the Secretary to the Corporation of Hamilton, Kelly Miller, who thereby also became respondents to it.

2. The Petition is brought under the provisions of the Municipalities Act 1923 ('the Act'). Paragraph 30 of the First Schedule to the Act specifies the following grounds for challenging an election:

> "30. (1) The election of a Mayor, Alderman or Common Councillor may be questioned by an election petition on the ground—
>
> (a) that the election was avoided by general bribery, treating, or undue influence; or
> (b) that corrupt or illegal practices have or may reasonably be supposed to have affected the result of the election; or
> (c) that the person elected was not duly elected by a majority of lawful votes; or
> (d) that the person whose election is questioned was at the time of the election disqualified."

3. The Petition is a lengthy and confused document, which seeks to bring itself under each of the heads in the Act. It appears that it was pleaded by the Petitioner herself, who is a lawyer. In it she made allegations of undue influence, fraudulent contrivance and corruption against the respondents, all of which were rightly abandoned at the outset of

the hearing on Monday 26th February 2007, when Mr. Newman was instructed and took over conduct of the case. At that stage he also made it clear that no personal allegations remained against Mr. Madeiros himself, and that no allegations of deliberate wrongdoing remained against the other two respondents.

4. After the abandonment of those allegations there were seven remaining live issues[1], based on alleged irregularities in the election process, but many of those points were progressively abandoned as the trial progressed, while others underwent a sea-change, with the result that, at the end of the day, the points left for decision were:

> (i) whether the election was void because the Secretary only decided to allow municipal electors to change their nominees late on the day before the election, thus (a) depriving the Petitioner of the opportunity of canvassing those whose change was registered or soliciting further changes, and (b) depriving an unknown number of electors from changing their nominee.
>
> (ii) whether the election was void because the ballot papers were numbered sequentially, either on the ground that this amounted to undue influence by the second respondent on all voters, or on the ground that this violated the principle of a secret ballot.

THE LAW

5. Before turning to the details of these remaining issues, I need briefly to consider the law applicable to Municipal Elections and to Petitions of this sort. The provisions governing the franchise, registration, conduct of elections and election petitions are set out in paragraphs 1 to 35 of the First Schedule to the Act. Whenever I refer to a paragraph I am, therefore, referring to that Schedule and not to the body of the Act. If that

---

[1] As summarized in the skeleton argument on behalf of the Petitioner dated 23rd February 2007, these were:
(i) that in a number of instances the 2nd/3rd Respondent permitted the First Respondent to hand in a bundle of Registration Forms for municipal electors who wished to change their nominees even though, pursuant to Municipalities Act 1923 Schedule 1, Part III, paragraph 21, Notice of Municipal Election had been published. The Petitioner, on the other hand, was told that such change would not be permitted right up until the late afternoon before the election day. As a result the Petitioner was prevented herself from obtaining changes of nominees in respect of people abroad.
(iii) that the Third Respondent wrongly advised a Ms Iva E Jones that she was on the municipal Register, which fact was not true, thereby depriving her of a vote.
(iv) that the Third Respondent failed to register the names of three voters, thereby depriving them of a vote, namely Alaine M Darooyan, Janita Hendrickson and Carol D Swan.
(vi) that each of the ballot papers was printed with a number, thereby giving rise to undue influence by the Second Respondent on all voters.
(vii) that three individuals, whose names should not have been added to the Municipal Register after Notice of Municipal Election had been given, were wrongly allowed to vote, namely Mr. Mark Grant, Mrs. Dalton Burgess and an unknown gentleman.
(x) that the 2nd/3rd Respondents failed to provide a ballot box with a secure lock and key.
(xi) that in the course of the election the 2nd Respondent removed all the ballot papers from the polling station and took them with him to another part of the City Hall premises, and then carried them back with him into the polling station when he returned, thereby leaving the ballot box unmanned.
This statement of the issues is taken from the skeleton argument on behalf of the Petitioner dated 23rd February 2007, and retains the original sub-paragraph numbering.

were not complicated enough, paragraph 28 also incorporates by reference sections 41 to 55 inclusive of the Parliamentary Elections Act 1963[2] ('the 1963 Act').

6. Both of the remaining challenges to this election are made under paragraph 30(1)(c) of the Act, which provides that an election may be challenged on the ground "that the person elected was not duly elected by a majority of lawful votes". That provision is much broader than may appear at first glance, for it allows not just a challenge to the count, but also to the lawfulness of the votes cast, and, because of the use of the word "duly," to the procedure at the election. Thus errors by election officials can be the basis of a Petition under this sub-paragraph without the need to allege fraud or corruption on their part. The complaint about numbering is also put on the alternative ground of 'undue influence', and I have dealt with that further below.

7. The test for when an election should be avoided for procedural irregularities at the poll was considered in the leading case of Morgan & Ors. v Simpson & Ors [1974] 3 All ER 722, where Lord Denning formulated it at p.728 as follows:

> "Collating all these cases together, I suggest that the law can be stated in these propositions:
>
> 1. If the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated, irrespective of whether the result was affected or not. That is shown by the *Hackney* case, 2 O'M. & H. 77, where two out of 19 polling stations were closed all day, and 5,000 voters unable to vote.
>
> 2. If the election was so conducted that it was substantially in accordance with the law as to elections, it is not vitiated by a breach of the rules or a mistake at the polls – provided that it did not affect the result of the election. That is shown by the *Islington* case, 17 T. L. R. 210, where 15 ballot papers were issued after 8 p.m.
>
> 3. But, even though the election was conducted substantially in accordance with the law as to elections, nevertheless if there was a breach of the rules or a mistake at the polls – and it did affect the result – then the election is vitiated. That is shown by *Gunn v. Sharp* [1974] Q.B. 808, where the mistake in not stamping 102 ballot papers did affect the result."

8. Although Lord Denning came to that decision by construing a specific section in the then English legislation, he was in my judgment also stating the common law, so that the

[2] The 1963 Act has since been repealed, and before being repealed was variously amended, but the version of the 1963 Act referred to is, by virtue of section 1(3) of the Act, the version in force on 1st January 1978. References in this judgment are to that version. Because the Act is specific on this there is no room for reading references to the 1963 Act as references to its replacement, the Parliamentary Election Act 1978, as was contended by the Petitioner. The reference in the title of the petition to the 1978 Act is, therefore, incorrect, as well as incomplete.

principle is of general application[3]. As an added refinement, in Bermuda, while section 44 of the 1963 Act contains a similar statutory provision to that in Morgan v Simpson, it is ostensibly limited to a failure to comply with the Rules for the taking of the poll contained in the Second Schedule to that Act. However, to the extent that this Petition requires me to consider matters prior to the polling day, I consider that the common law test as stated in Morgan v Simpson, also applies.

CHANGE OF NOMINEES

9. The franchise for municipal elections is limited to persons called 'municipal electors'. There is a property qualification based on either ownership or occupation of property within the City. Because, in the nature of things, many owners and occupiers are composite entities (whether corporations, partnerships, unincorporated associations or joint owners), and because there is an obvious practical difficulty with such persons casting a single, indivisible vote, all such persons are required to vote by means of a nominee: see paragraph 3(1) of the First Schedule to the Act. In the case of companies the nominee has to be a director or senior employee of the company, and in the case of partnerships and associations, he has to be a member. However, it is important to appreciate that in all such cases the municipal elector remains the elector: it is just that their vote has to be cast by a nominee.

10. It is the duty of the Secretary to the Corporation to maintain a register of municipal electors, including the nominees of such electors. The Act provides:

> **"Registration of persons in municipal register**
> 9 (1) Subject to sub-paragraph (4), a person (in this paragraph referred to as an "applicant") may at any reasonable time apply to the secretary to be registered in a municipal register as a municipal elector.
>
> (2) Where the secretary is satisfied that an applicant is entitled to be so registered, then, subject to sub-paragraph (4), the secretary shall register him by entering the following particulars in the municipal register—
>
> (a) the name of the applicant;
> (b) the date of registration;
> (c) where the applicant has appointed a nominee, the full name of the nominee;
> (d) a concise description, sufficient to identify it, of the valuation unit in respect of which the applicant claims to be registered.
>
> (3) Subject to sub-paragraph (4), a municipal elector who has appointed a nominee may at any reasonable time apply to the secretary, in accordance with sub-paragraphs (1)(b) and (2) of paragraph 8, to change his nominee.
>
> (4) After notice of a municipal election has been given in accordance with paragraph 21 —

[3] I explain in detail why this is so in Hanchell v Skippings & Ors., (Judgment of 19th June 2003 in CL 25/03, a Judgment of the Supreme Court of the Turks & Caicos Islands) at paragraphs 29 to 31. A copy of this judgment was at Tab J of the Respondents' bundle of authorities in this case.

> (a) the secretary shall not register any person in the municipal register as a municipal elector unless, before the notice was given, that person had applied to the secretary for registration and had satisfied the secretary that he fulfilled all the requirements for registration;
> (b) the secretary may, if he thinks fit, refuse to receive any application to be registered or to change a nominee."

11. It was initially the Petitioner's case that those provisions prohibit absolutely the changing of a nominee pursuant to an application made after notice of an election had been given. She relied upon sub-paragraph 4(a). Had that been right, the effect would have been that any changes to existing nominees resulting from such an application would be unlawful. The exact consequences of that may be arguable, but on the assumption that that rendered their votes void, it would mean on the facts of this case some 15 votes[4] would have been bad, which, in the circumstances, could not have affected the result. Had the law been, therefore, what the Petitioner believed it to be, the Petition would inevitably have failed. When this became apparent after the close of the evidence, the Petitioner performed a remarkable *volte face* and, through her counsel, accepted that the limitation in sub-paragraph 4(a) only applied to the registration of new municipal electors and not to a change of nominees. The argument then became that inadequate notice of that fact had been given to the candidates and the electorate.

12. Notwithstanding the Petitioner's concession I need first to decide whether it was rightly made and accurately reflects the law. I have no difficulty in saying that it does. There is no real reason why an elector should be disenfranchised because its nominee happens to be absent, if there is some other member of the organisation present in the jurisdiction and willing to act as nominee. It also makes sound practical sense that different considerations should apply to the registration of a new elector, and the mere change of the nominee of an elector who is itself already on the register. Nor is there any real ambiguity or difficulty in the wording of the Act itself, which draws a quite clear and consistent distinction between 'municipal electors' and 'nominees'. Both of those terms are afforded a separate definition in section 1 of the Act, and there is no possible way of construing the words "municipal elector" in sub-paragraph 4(a) as including "nominee". This was recognized and understood by all the attorneys consulted by the Secretary before the election, and to the extent that the Petition persisted in the opposite view it was, frankly, wrong-headed.

13. It appears, however, that a practice or understanding had grown up that no change of nominee could be registered after notice of election had been given. This had been in place for as long as anyone can remember, and certainly for all recent elections, and the

[4] The figure was not agreed. The Petitioner originally claimed 19: see paragraph 9 of the Petition. At the close of the evidence Mr. Newman accepted the number was reduced to 17, and Mr. Dunch contended for 15. The matter was not then gone into further in argument, as Mr. Newman then abandoned any case based on the numbers. I prefer Mr. Dunch's case on this, striking out the following from the original 19 – Natalie Rego (entered late due to an error over the seal on her appointment as nominee); Ralph Galloway (not a nominee but an elector); Cindy Morris (her registration as nominee of a new occupant was held up by the late production of a landlord's certificate); David Sullivan (a nominee whose registration had been held up by a tax question: see HKM 6).

Petitioner subscribed to it. No-one knows the origin of this practice, but it does not necessarily follow that it sprang from a failure to understand the law, although that is what it had become. It may originally have started because the secretary would, pursuant to sub-paragraph 4(b) and as a matter of convenience or good order, decline to accept applications to change a nominee after the announcement of an election. In principle there would be nothing wrong with that if it is was done consistently and as the exercise of a discretion rather than the blind application of a misunderstood rule. However, it is plain that by the time that the present Secretary assumed her office, it had become hardened into a rule whose origin was attributed to sub-paragraph 4(a).

14. In respect of the October 2006 election, the Returning Officer says that on 17th October an elector raised the question of what could be done about a nominee who would be absent on the day of the election[5]. He then looked into the matter, and, having read the relevant provisions of the Act, he came to realise that it did not prohibit an application to change such a nominee. As a result, the next day he advised the Corporation that in his view nominees could be changed after notice of the election had been given. It is not entirely clear whether he regarded himself as giving that advice as Returning Officer or as the Corporation's attorney, but nothing really turns on that. The advice was given by letter of 18th October 2006, addressed to the Corporation but marked for the attention of the Secretary. It was on his firm's notepaper, and was signed with the firm name. It correctly identified and interpreted the relevant provisions, and suggested guidelines for the exercise of the discretion conferred by the legislation.

15. The Secretary deposes, and I accept, that she did not look at that advice until after the nomination of candidates for the election, which occurred the next day, Thursday 19th October. However, on that day she became aware of the substance of the advice from a discussion held after nominations, as did Mr. Madeiros, who was present. Also on that day, after the conclusion of the nominations, the Returning Officer proceeded to give a television interview, on the steps of City Hall, in which he announced his views as to the acceptability of late changes of nominees. Mr. Madeiros would have had a further opportunity to become aware of the issue when it was discussed in Council on the 24th October. The Petitioner on the other hand, says that she was not aware of the television interview, and was not told of the Returning Officer's advice until a conversation with the Secretary on Monday 23rd, after the weekend, and I accept that from her. When told of the advice, she rejected it.

16. There is a conflict over the exact nature of that conversation. It appears that the Petitioner contacted the Secretary over another issue, and during the course of the conversation the Secretary brought up the issue concerning the change of nominees. The Petitioner alleges that the Secretary told her that she would not be making any changes.

[5] It transpires that it was Mr. Dunch, who now represents Mr. Madeiros and the Returning Officer, who raised this question on behalf of his firm.

The Secretary, on the other hand, does not believe that she said that, although her memory of the exact course of the conversation is not clear. At some point she accepts that the told the Petitioner that she had not yet made any changes, but she thinks that may not have been until a telephone conversation in the late afternoon of the 25th October.

17. It is the Secretary's evidence, which I accept, that she did not in fact make up her mind to accept or refuse the 15 late applications to change nominees until late in the evening of the 25th October, the day before the election. This was after seeking a further legal opinion from a lawyer friend some time after 5.30 p.m. She then returned to the office at about 7.30 p.m. and stayed there making the changes until about 1.30 a.m. on the day of the election. To the extent that the printout shows the changes as made on the 26th October, she says that means the early hours of that date, and reflects the lateness of the hour. I accept her evidence on that, and I accept that the delay was due to her anxious consideration of what she felt was a difficult legal point. Against that background, I think it unlikely in the extreme that in her conversations with the Petitioner on the 23rd and the 25th she would have said she would not be making any changes, and to that extent I reject the Petitioner's version of those conversations. I think, however, that the Secretary may well have told her that she had not yet made any changes, for at that stage she had not.

18. The Petitioner faces certain difficulties in advancing the case she now does. Not only is it absolutely inconsistent with the position she actually took in the immediate run up to the election, it is also not pleaded that way in the Petition. The nearest the Petition comes to it is in the first section where it alleges that the respondents fraudulently contrived

> ". . . to prevent the Petitioner from obtaining changes of nominees of various municipal electors who were abroad by not advising the Petitioner in a timely manner and prior to the 26th day of October 2006 that electors would be allowed proxy votes[6] and that the nominees of municipal electors would be allowed a change of nominee if it could be legally done."

She then give particulars of that, including a summary of the history, and in paragraph (8)x. of those particulars she alleges "That in the premises the Petitioner was prevented by the 3rd Respondent from obtaining proxy voters and change of nominees for the following people who were abroad . . ." and she then lists 13 names. Those particulars are then repeated by reference at paragraph 22 of the Petition, under the heading of "Not Duly Elected by a Majority of Lawful Votes", although it is by no means clear to what effect.

19. Traditionally the rules of pleading are strictly applied to Election Petitions, and changes after the expiry the period for filing a Petition are not allowed:

[6] There are various references to 'proxy votes' in the Petition, all of which are misconceived and which were duly abandoned. There is no provision for such votes in the Act or the 1963 Act.

> "The High Court has no jurisdiction to allow an amendment of a petition after the time prescribed by statute by the introduction of a fresh substantive charge, nor to allow a petitioner to change the grounds on which he claims he has capacity to bring the petition, nor to convert an offence charged under one statutory provision into an offence against another related provision, although the facts might support the latter offence. It is submitted that there is no jurisdiction to allow an amendment introducing a fresh charge, whether the charge sought to be added is one of a fresh nature, or whether it is one only of a fresh instance not covered by the allegations in the petition as standing."
> Halsbury's Laws, 4th ed. Reissue, Volume 15, paragraph 760

20. On that basis the Petitioner is tied to the 13 names (three of which fell away during the evidence, because they transpired to be municipal electors in their own right and not nominees), and cannot now say that other persons unknown should be added to the list of those for whom she was unable to secure a change of nominee, nor can she assert that an unknown number of unknown municipal electors were deprived of the opportunity of changing their nominees, that being a different case from that pleaded.

21. However, lest it be thought wrong to dispose of this on a pleading point, I have gone on to consider the merits. As I find above, there were in fact 15 applications to change nominees after notice of the election was given. Very late in the day on 25th October, the Secretary decided to accept them. There are only two possible categorizations of that decision, neither of which is capable of affecting the outcome of the election. It was either a proper exercise of her discretion, in which case the votes stand, or it was improper, in which case the votes should be disallowed. Either way that is incapable of affecting the outcome, given that the margin of victory was 37. In order to succeed, therefore, the Petitioner is compelled to argue that those changes were properly admitted, but that the Secretary's failure to announce to the candidates and the electorate that late changes of nominees might be allowed deprived the Petitioner of an opportunity to procure other changes, and also deprived an unknown number of electors of the opportunity of changing their nominees.

22. Much of the argument on this at trial turned upon the supposed existence of a discretion to admit late changes of nominee. That is not in fact a correct statement of discretion conferred by the Act. Every municipal elector has a right 'at any reasonable time' to apply to change their nominee: sub-paragraph 9(3). However, the Secretary has, under sub-paragraph 9(4)(b), a discretion to *refuse to receive* an application to make such a change after notice of an election has been given.

23. Against that background, I do not think that it is the duty of either the Secretary or the Corporation to inform the candidates or the electorate of the law. The franchise and the rules governing registration are set out in the Schedule to the Act, which is a public document and which anyone can look at. A municipal elector who wants to change their nominee can apply to do so. It is up to them to apply, not up to the Corporation or the Secretary to encourage them to do so. If they apply, and are wrongly refused, then they

have a remedy by way of appeal to a Magistrate under paragraph 16[7], or, in principle at least, the court could inquire into that on an Election Petition[8]. But if they do not apply, then there is nothing for the court to inquire into.

24. This is the approach adopted in the Australian case of Re Federated Liquor and Allied Industries Employees' Union of Australia; Ex parte Huxtable (1979) 40 FLR 418, which was not itself put before me, but which is quoted in the case of Hibbert v Federated Clerks Union (1983) 76 F.L.R. 372 at 400, which was[9]. It concerned the nomination of candidates not the registration of voters, but there is no reason why the principles should be different. At p. 427, Northrop J said:

> "A member of an organisation must decide for himself whether to nominate for an office or not. He must look to the rules of the organisation. If he considers he is eligible to nominate, and he desires to nominate, he should nominate irrespective of any expressions of opinion by a returning officer or any other person. The returning officer thereafter is under a duty to accept or reject the nomination in accordance with the rules of the organisation. The action by a returning officer in either accepting or rejecting the nomination provides a foundation for an inquiry under Pt IX of the Act. If the court finds that a returning officer relied upon the wrong rule, or upon a rule which was contrary to s. 140(1) of the Act, the court may conclude that an irregularity has occurred. Thereafter the court has wide powers to make orders rectifying the irregularity, s. 165 of the Act."

25. I do not consider, therefore, that there was any irregularity by the Secretary in not announcing that she would accept late applications to change nominees. Nor do I think it irregular of her to decide not to reject those she had received until so late in the day. The argument that it deprived the Petitioner of the opportunity to canvass the substituted nominees cannot stand, as it is the municipal elector who remains the elector – the nominee merely casts its vote – and the Petitioner could have canvassed the electors in any event. It may be that she and others were deprived of the opportunity to object to the new nominees, but the grounds for objecting to a nominee are fairly limited, and in any event no objection to the qualification of any of the nominees is now advanced, although

---

[7] **Appeals from secretary to magistrate**
16 (1) Where any person is aggrieved —
(a) by any decision of the secretary on or in respect of any application or objection submitted to him in relation to—
(i) the registration of any person registered, or the intended registration of any person applying to be registered, in the municipal register;
. . .
then, subject to this paragraph, that person may appeal to a magistrate.

[8] The Register is final on the Returning Officer: see paragraph 1(1) of the First Schedule to the Act. I do not think that the Register is final as respects inquiry on an Election Petition because paragraph 1(2), and the proviso to paragraph 16(6), expressly declare that decisions as to Registration may be reviewed on an Election Petition. The Act is in that respect rather anomalous.

[9] It was put before me by the Petitioner on another point, but Mr. Dunch drew my attention to the passage quoted.

it could have been: see paragraph 1(2) of the Act. And in any event, any irregularity occasioned by the late acceptance of those applications could be cured by disallowing those votes, which in the circumstances of this case could have no effect on the outcome. One can compare that with the Islington case, where the 14 irregular votes could not effect the result, the difference between the candidates being 19. That is what distinguishes Morgan v Simpson itself, where the rejected votes would have altered the outcome.

26. If I were wrong, and it was irregular of the Secretary not to make some announcement, the Petitioner would still face grave difficulties. There is no dispute but that the Returning Officer did give an interview on 17th October, which was broadcast on VSB television, in which he said that it was still possible for nominees to be changed. Of the 15 late registrations only one appears to have been actually submitted by Mr. Madeiros, and, on his evidence, at least eight were not canvassed or solicited by him[10]. The word must have got out to them by some means so that they could apply.

27. In any event, for the court, in the absence of hard evidence, to consider whether a number of electors sufficient to affect the result were deprived of the opportunity to change their nominee, is an exercise in speculation. In this respect, one can readily distinguish the Hackney case, where 12% of the electorate (5,000 out of 41,000) could not vote because two polling stations were not opened, because there the number disenfranchised appears to have been both substantial and readily quantifiable. In contrast to that, in this case the Petitioner identifies thirteen names of persons who were abroad, and in respect of whom she "was prevented by the [Secretary] from obtaining proxy votes and change of nominees": Petition, paragraph (8)x. That was reduced to ten by the evidence. Of those remaining, none gave evidence (although the Petitioner had witness statements from two of them, which in the event she did not apply to call), and in any event that number is not enough to affect the outcome. Instead, Mr. Newman relied on some statistics: there were 425 persons on the register, of which 221 were individuals and 204 nominees. In rough terms (for the figures do not quite add up) 165 individuals voted, as against 115 nominees. There were, therefore, some 89 nominees who did not vote. I am asked to assume that a significant proportion of those must have failed to vote because they were away. In the absence of some real evidence on this, I can do no such thing.

[10] The number may have been higher, but paragraph 8 of his first affidavit is framed in relation to an incomplete list.

NUMBERING OF BALLOT PAPERS

28. Each of the ballot papers was numbered sequentially in black numbering in the top left hand corner: an example was put in evidence at Exhibit P2. The numbers did not cross-refer to any other list or pre-existing record. They did not, for instance, refer to the voters' list, which was not numbered in any event. However, the evidence is that the Returning Officer did note the number of the ballot papers issued to certain voters in two categories which he thought might be in dispute later. Thus he noted the names of eight nominees who had been changed late and of ten persons whose names had been omitted from the register, but who were allowed to vote[11]. I accept (and indeed it was not suggested otherwise) that the recording of these names was done *bona fide*, and for the purpose of resolving any later dispute relating to the entitlement of these persons to vote, and not for any other purpose, and certainly not for any corrupt or improper purpose.

29. There is some dispute as to how this numbering came about. The Secretary attributes it to the advice of the Returning Officer, but he denies that, saying that he had doubts about the practice as he was aware that "such numbering might be regarded as a means by which the confidentiality of a vote could be compromised". The Secretary also says that she found the practice in place when she took over as secretary on 6th October 2003 in the run up to the election held on 9th October 2003, when the ballots were numbered for the first time. I do not think that I need resolve the question of who instituted the practice of numbering the ballots - it is enough that it was done for this election, and the two previous ones.

30. The Petitioner advances two separate grounds based on this numbering. First, that it amounted to undue influence by the Returning Officer on all voters, and that that would be an illegal practice within paragraph 30(1)(b). Second that it contravened the requirements of a secret ballot. The latter argument was put both on that general ground, and also on the basis of two statutory provisions, namely:

(i) that, by reason of the addition of the numbering, the ballot papers were not in accordance with the prescribed form; and

(ii) that in any event each and every numbered ballot paper was void by reason of section 50(1)(c) of the 1963 Act.

31. I can deal quite briefly with the undue influence point. The Petitioner relies upon the definition of that expression in section 60(3) of the 1963 Act[12]:

> "A person shall also be guilty of undue influence if he directly or indirectly, by himself or through any other person, by abduction, duress, or any fraudulent device or contrivance –
>
> (a) impedes or prevents any person from freely exercising his right to vote at a parliamentary election or register in a parliamentary register, or

[11] The challenge in respect of this group was eventually abandoned.
[12] One gets there by way of section 11(3) of the Act, which incorporates sections 59 and 60 of the 1963 Act.

(b) compels, induces or prevails upon any person either to vote or refrain from voting at a parliamentary election."

32. Counsel for the Petitioner stresses that he does not allege actual fraud or dishonesty on the part of Secretary or the Returning Officer, but simply that the numbering of the ballots might deter or impede voters from voting. He argues that the numbering is a "contrivance", and that a contrivance does not have to be fraudulent. However, in my judgment, in order to succeed on this point the Petitioner has to allege fraud, because "contrivance", in the section quoted above, is qualified by "fraudulent". That is plainly the effect of the first "or", which precedes "fraudulent". That "or" would have to be omitted for the section to bear the meaning ascribed to it by Mr. Newman. As the Petitioner does not now allege actual fraud, that is the end of the argument based on undue influence. In any event, there is nothing in the evidence to show that anyone was in fact deterred or impeded from voting: the evidence is that no-one changed their minds and refused to vote once they saw the ballot paper, and there were no spoiled ballots

33. Turning to the general secrecy of the ballot, there is in fact no express requirement in the Act or the incorporated provisions of the 1963 Act, that municipal elections be conducted by secret ballot, but I have no difficulty inferring that from various provisions, and in particular from the requirements of secrecy in the act of voting contained in section 43 of the 1963 Act, and from section 15(a)(iii) of the Act, which makes it a criminal offence to obtain or attempt to obtain "in the place of election information as to any candidate for whom a voter is about to vote or has voted". An infringement of the principle of secrecy would, on the basis of Morgan v Simpson (*supra*), avoid an election if it meant that the election was not conducted substantially in accordance with the law as to elections or if it affected the result.

34. As to the form of the ballot paper, this is prescribed by section 5 of the 1963 Act as applied by paragraphs 28(1) and 28(2)(g), and the annexure thereto. Suffice it to say that the prescribed form does not contain numbers. However, the divergence will only vitiate the ballot papers if it is significant, because of the effect of section 38 of the Interpretation Act 1951:

> "Except as otherwise expressly provided, whenever in any Act or statutory instrument any form is specified, required or prescribed, then slight deviations therefrom, not affecting the substance or calculated to mislead, shall not vitiate anything done in connection with the use of any such modified form."

For the purposes of this ruling I consider that the question whether the deviation affects the substance, and whether it breaches the requirement of secrecy, are essentially the same. I will return to that below.

35. The other specific provision on which the Petitioner relies is section 50(1)(c) of the 1963 Act, which provides:

> "(1) Any ballot paper –
> . . .
> (c) on which anything is marked by which the voter can be identified;
> . . .
> shall be void and shall not be counted."

It seems to me that that provision is primarily aimed at the count – it is concerned with whether or not a ballot is to be counted, and it clearly contemplates specific ballots as it refers to "the" voter and not "a" voter. It also seems to me that it contemplates an actual situation, rather than a hypothetical one. The question is then whether, in respect of each ballot, it is in fact possible to identify the person who voted with that ballot.

36. I am supported in this view by the English case of Ruffle v Rogers & Anor. [1982] QB 1220, which was decided on similar provisions.[13] In that case a voter had written on his ballot paper the name of the candidate. The question was whether the voter could be identified from his handwriting. While this was always a possibility there was no evidence in the case that this particular voter could in fact be identified that way (and indeed an attempt to do so had failed). In rejecting the argument that the ballot paper was void, Mais J at first instance said:

> "In my judgment the onus is on Mr. Rogers to show that the voter can be identified other than by means of the number on the back of the ballot paper[14], i.e., by the mark he made on the ballot paper. Mr. Rogers did not show this at the count nor has he subsequently shown it. Further I consider that even if the onus is not on him it has not been shown that the voter can be identified by the mark he made on the ballot paper. It is further to be observed that the word "can" is used and not the word "might"."

In the Court of Appeal, Lord Denning said:

> "He cannot be identified by his handwriting. The ballot paper should not be rejected simply because somebody says that he might possibly be identified by his handwriting. I think that the returning officer was absolutely right to accept the ballot paper as valid."

And Eveleigh LJ concurred, noting that "The statute does not say "might"; it says "can"".

37. Against that, Mr. Newman relied upon a series of Australian cases in which the secrecy of the ballot had been emphasized, and in particular Hibbert v Federated Clerks Union of Australia (1983) 76 FLR 372, in which numbered ballots had been held to

---

[13] Local Elections (Principal Areas) Rules 1973 (S.I. 1973 No. 79)

[14] In that case there was a statutory provision for numbering ballot papers on the back. That number also appeared on a counterfoil on which the voter's number was written at the time he was given the ballot paper. That was, of course, done pursuant to the Rules governing elections, but it does indicate that requirements of secrecy may not necessarily be absolute, and that the ability of an election official to identify a voter from the ballot paper is not necessarily fatal.

breach a requirement for a secret ballot. I am bound to say that I find the reasoning in that last case hard to follow, as the learned judge leapt from the citation of authority concerning the placing of the voter's number on the ballot paper, to his finding that a sequential number, which was not the voter's number, had the same effect. I do not think that I am required to follow it, and prefer the reasoning of Lord Denning and the English Court of Appeal.

38. I think, therefore, that in order to invalidate the individual ballots or to infringe the principle of a secret ballot, the numbering must in fact allow a voter to be identified. It would do so if there was some list of the numbers issued to individual voters, and it would do so if there was some evidence that someone had done something to ascertain the numbers issued to individual voters. There is no such evidence in this case, save that the Returning Officer had noted 18 numbers. It may be that he was wrong to do so, although he acted for the right reasons. It may also be that those votes should be rejected, although that is by no means clear on the authorities, there being a conflict as to the effect of an election official's knowledge. Had they been capable of affecting the result, I would have had to decide that question, but they are not[15]. I would hope, however, that in future the dangers inherent in numbering the ballots will deter the Corporation, or any one else, from doing it again without express statutory authority.

CONCLUSIONS

39. The original Petition contained a raft of serious allegations of undue influence, fraudulent contrivance, and corrupt and illegal practices. These were all summarily dropped at the outset of the case, and rightly so, for there was nothing in the evidence to support them, and they should never have been pleaded in the first place. Other allegations were abandoned as the case proceeded. At the end of day it came down to two points – (i) whether the failure of the Secretary to announce that she would accept changes of nominee after notice of the election had been given was an irregularity which may have affected the result, and (ii) whether the numbering of the ballot papers infringed the secrecy of the ballot.

40. I do not think that the Secretary was required to say or publish anything about the acceptance of applications to change nominees. Her failure to do so was not, therefore, an irregularity. As to the numbering of the ballot papers, I do not think that the presence of sequential numbers on the face of the ballot papers amounted to a substantial departure from the law governing secret ballots, nor did it invalidate the individual votes cast on those ballots. There are 18 exceptions to that, where the Returning Officer did note the numbers. If that was an irregularity, it was not such as to effect the outcome. It may also

[15] Even when added to the 15 nominee changes admitted late these 18 could not effect the result, although in fact eight of them overlap, thus reducing the cumulative total of void votes further. Had it been necessary to reject them, and had the total been sufficient to affect the outcome, I would first have scrutinized the 18 ballots identified by the Returning Officer and adjusted the tally for each candidate accordingly.

have avoided those 18 ballots, but disallowing them would, again, not affect the outcome, even assuming they were all cast for Mr. Madeiros.

41. I therefore determine that Mr. Madeiros was validly elected as Mayor of the City of Hamilton, and dismiss the Petition. I will hear the parties on costs.

Dated this 12th day of March 2007

Richard Ground
Chief Justice