



In The Supreme Court of Bermuda

CIVIL JURISDICTION

2024: No. 278

BETWEEN:

**LEADER OF THE OPPOSITION
CARL D. NEBLETT**

Applicants

- and -

**THE ATTORNEY GENERAL AND MINISTER OF LEGAL AFFAIRS
(acting on her own behalf and on behalf of the Government of Bermuda and the
Parliamentary Registrar)**

Respondent

REASONS

Application for judicial review of the portion of the Writ of Election issued by the Parliamentary Registrar specifying the Polling Place appointed for a parliamentary election pursuant to section 27(6) of the Parliamentary Elections Act 1978

Neutrality, Whether the appearance of a connection of a candidate for election to the Polling Place makes the specification of it unlawful

Date of Hearing: 2 October 2024

Date of Decision: 2 October 2024

Date of Reasons: 3 October 2024

Appearances: **Henry Tucker, HWR Limited, for the Applicants**
Shakira Dill-Francois, Solicitor General, Lauren Sadler-Best, Attorney
General’s Chambers, for the Respondent

JUDGMENT of Mussenden CJ

Introduction

1. In these proceedings dated 26 September 2024 the Applicants seek judicial review of the portion of the Writ of Election issued by the Parliamentary Registrar (the “**Registrar**”) dated 22 August 2024 (the “**Writ of Election**”) specifying Allen Temple AME Church Hall (the “**Allen Temple Hall**”) as the place (“**Polling Station/Place**” or “**Election Room**”) appointed for the parliamentary bye-election (the “**Bye-Election**”) in Constituency 36 (“**C36**”), Sandys North due to be held on Friday, 4 October 2024 pursuant to Section 27(6) of the Parliamentary Elections Act 1978 (the “**Act**”).
2. On 1 October 2024, I granted leave for the Applicants to issue an Originating Notice of Motion seeking judicial review. Due to the immediacy of the bye-election, the parties appeared before me at 9:30am on 2 October 2024 for directions for a substantive hearing at 2:30pm later the same day.
3. At the end of the hearing on 2 October 2024, I took some time to consider the matter and I issued my decision that I was not satisfied to grant the application for judicial review. I stated that due to the Bye-Election being held within two days, I would give my reasons the next day. These are my reasons.

The Parties

4. The Leader of the Opposition Mr. Jarion Richardson, is an elected member of Parliament and holds his office as Leader of the Opposition, having been appointed to the constitutional role

by Her Excellency the Governor (the “**Governor**”) on 10 August 2023. He is also the party leader of the political party, One Bermuda Alliance (the “**OBA**”).

5. Mr. Neblett is a member of the OBA and is the approved candidate for the OBA, currently contesting the Bye-Election in C36.
6. The Registrar is appointed by the Governor pursuant to section 6 of the Act. She has a range of powers and duties in respect of the holding of parliamentary elections and bye-elections in Bermuda.
7. At this stage it would be useful to identify the candidates in the Bye-Election (the “**Candidates**”). They are:
 - a. The Reverend Dr. Emily Gail Dill (“**Dr. Dill**”), the candidate for the Progressive Labour Party (“**PLP**”), currently the majority party in Parliament and serving as the Government of Bermuda;
 - b. Carl D. Neblett (“**Mr. Neblett**”), the OBA candidate;
 - c. Marc A. Bean (“**Mr. Bean**”), the candidate for the Free Democratic Movement (“**FDM**”); and
 - d. Ci’re Tyler Bean (“**Mr. Bean**”), the candidate affiliated with a group of candidates running as ‘independents’.

The Judicial Review Application and the Relief Sought

8. As a result of the Writ of Election, in particular, the specification of Allen Temple Hall as the Election Room, the Applicants seek judicial review on the basis that the specification is unlawful and unfair.
9. The Applicants seek relief as follows:
 - a. An order of certiorari quashing the decision to specify Allen Temple Hall as the Election Room under the Act and directing the Registrar to re-issue the Writ of Election specifying another location to serve as the Election Room and/or such other relief the Court thinks fit.

Statement of Grounds on which Relief is Sought

10. The Applicants' grounds on which relief is sought are set out in the Notice of Application for Leave to Apply for Judicial Review, and further in the affidavits of the Applicants, including that the decision to specify Allen temple Hall as the Election Room was procedurally unfair, substantively unfair, Wednesbury unreasonable, and/or contrary to the express or implied provisions of the Act and the Bermuda Constitution in that inter alia:
- a. Allen Temple Hall does not meet the implied requirements of section 27(6) of the Act read together with the fundamental rights and freedom provisions of the Bermuda Constitution in that the Polling Place is not a neutral location ensuring an appearance of a fair electoral process.
 - b. Allen Temple Hall does not meet the implied requirement of Section 27(6) of the Act read together with the fundamental rights and freedoms provisions of the Bermuda Constitution in that the Polling Place is not a building or place which is a neutral and independent premises and appears to be so.
 - c. Allen temple Hall does not meet the express requirements of Section 27(6) of the Act read together with the fundamental rights and freedoms provisions of the Bermuda Constitution in that the Polling Place is not a "convenient" place in the meaning of the Act as that term is construed together.

The Evidence of the Applicants

11. The Applicants filed affidavits sworn 26 September 2024 with similar content. They set out the grounds for their application and state that the Registrar's decision should be quashed because Allen Temple Hall is the place of business of Dr. Dill as she is the Assistant Pastor at the adjacent Allen Temple Church and where her husband serves as the senior pastor and as Presiding Elder of the entire AME congregation in Bermuda. They stated that adjacent to Allen Temple Church is 4 Temple Lane, the residence where Dr. Dill is registered to vote. They stated that to select and to continue to use Allen Temple Hall as the Polling Place is demonstrably unfair because it gave the appearance of partiality in favour of the candidate representing the party of the present Government. They added that once it was known that

Dr. Dill was the candidate and her connection to Allen Temple Church, then the decision to use Allen Temple Hall could no longer stand as it was unjust and incompatible with the fundamental concepts of a free and fair election.

12. Their application was also supported by the affidavit of Geoffrey Faiella who is a member of the OBA. He stated that on 27 September 2024 he was present at the advanced poll at Allen Temple Hall when he heard some comments by the husband of Dr. Dill which were later correctly reported in the media outlet TNN. He exhibited the TNN media report which reported that *“During conversation, [Rev. Dill] referred to the OBA as “idiots” and dismissed concerns raised about the neutrality of the polling station’s location, stating that the OBA was ‘making a big deal out of nothing’”* he further commented that *“politics is evil”* and asserted ownership over the church, adding. *“I’m not shutting up and being direct, but you are forgiven.”*. He stated that the incident was witnessed by several other candidates and their representatives. Mr. Faiella also set out that the Allen Temple Hall was approximately 25 to 30 feet from the Allen Temple Church. He provided a picture that was taken at the advance poll. He stated that one has to walk by Allen Temple Church to follow the path to Allen Temple Hall although it is possible to enter Allen Temple Hall taking another route.

The Evidence of the Registrar

13. The Registrar filed an affidavit sworn 2 October 2024. She set out the background to the impending Bye-Election, the Writ of Election issued by the Governor which named the election date, the nomination date and the Polling Station. She set out a number of duties including that prior to the Writ of Election she drafted a calendar of election events in accordance with section 27 of the Act, and she and her staff began to assess possible locations for a polling station. As schools were in session, she ruled out West End Primary and Somerset Primary as to use them for two consecutive Fridays was considered unduly disruptive. She found that St. James Church was not available for the required dates. She then considered neighboring constituencies and found that Allen Temple Hall was available and although it was in C34, it was the closest option to the boundary of C36 as required by section 27(6) of the Act. The only other option was to use the lodge hall at Hog Bay Level in C31.

Thus, as Allen Temple Hall was clearly the closer location and compliant with the Act, it was chosen as the Election Room.

14. The Registrar set out her other actions. She stated that when the Writ of Election was issued she did not know the identity of the PLP candidate for the Bye-Election. On 31 August 2024 when she learned that Dr. Dill was the PLP candidate she had no knowledge that Dr. Dill was in any way affiliated with Allen Temple Church. She set out that Allen Temple Hall was approximately 15 to 20 feet from Allen Temple Church. Also, there was a dwelling in a separate building on the premises (the “**Residence**”), about 15 to 20 feet from Allen Temple Hall which was unoccupied for about a year. She exhibited the Parliamentary Registrar’s Bye-Election Information Booklet for C36 (the “**Booklet**”) which included pictures of the buildings on the premises.
15. The Registrar set out some details about discussions and meetings with the Governor and the Candidates as well as correspondence with counsel for the OBA. She stated that neither of the Candidates objected to the election room on the basis of Dr. Dill’s association with Allen Temple Church.
16. The Registrar set out some of the requirements pursuant to section 27(6) for an Election Room in the event the Court decided that she needed to find another location, including being accessible, equipped with proper facilities for election staff, and have adequate indoor and outdoor lighting as well as sufficient parking. Further, she had to coordinate with the Bermuda Police Service about security needs and she needed to ensure safety of the location. She stated that at this stage it would be exceedingly difficult to secure a new location that met the requirements and that, as the advanced polling was conducted at Allen Temple Hall on 27 September 2024, changing the polling place at this stage would confuse voters and risk disenfranchising them.

The Chronology and Background

17. On 22 August 2024 a Writ of Election was issued by the Governor for there to be a Bye-Election in C36.

18. On 22 August 2024, the Candidates were sent a pdf document with an election timetable showing that the Election Room would be Lefroy House. As it turns out, the location of Lefroy House was an error which was corrected the next day to indicate that the location of the Election Room would be Allen Temple Hall.
19. On 31 August 2024 Dr. Dill was announced as the candidate for the PLP.
20. On 11 September 2024, Mr. Richardson sent a letter to the Governor in respect of Allen Temple Hall being specified as the Election Room. In essence his position was that Dr. Dill was and is an assistant pastor at Allen Temple Church and she is married to the Senior Pastor at Allen Temple Church. As Allen Temple Hall is a part of the Allen Temple Church, it was unfair for Allen Temple Hall to be the nomination and polling place. He made various points and asked for the Registrar to change the location of the nomination place and Election Room to be unassociated with any candidate in the Bye-Election.
21. On 19 September 2024 the Governor informed Mr. Richardson in writing that she had been advised that the Registrar has no power to nominate an Election Room and once the Writ of Election had been issued the Governor did not have an explicit power to change the Election Room, in the circumstances that prevailed. The Governor also made reference to section 27A(1) of the Act and indicated that in narrow and specific circumstances between the date of the Writ of Election and Polling Day: (i) she could cancel the Polling Day and appoint another day; and (ii) in the event the another polling day had been appointed, and she was of the opinion that the Election Room was not available for the election, then she could appoint a substitute Election Room under section 27A(7) of the Act.
22. On 24 September 2024 Mr. Richardson invited Dr. Dill to withdraw her church as the Election Room.
23. On 25 September 2024 the letter before action was sent to the Registrar.
24. On 26 September 2024 these proceedings were filed in the Supreme Court.

The Legal Framework

25. Section 27 of the Act provides as follows:

Issue of writs of election

27 (1) *Every parliamentary election in a constituency shall commence with the issue by the Governor of a writ of election under the Public Seal of Bermuda.*

(2) *A writ of election shall be addressed to one or more Justices of the Peace, who subject to section 29 shall be charged with the duty of holding the parliamentary election in accordance with the terms of the writ and Parts V, VI, VII and VIII:*

Provided that two or more concurrent writs of election shall not be addressed to the same Justice of the Peace.

(3) *Subject to this section, every writ of election shall appoint the nomination day, the polling day and the election room for the parliamentary election.*

(4) *The nomination day appointed for a parliamentary election shall not be an excepted day and shall, subject to section 27A, be a day at least fourteen days before the polling day.*

(5) *The polling day appointed for a parliamentary election shall not be an excepted day and shall, subject to section 27A,—*

(a) *in the case of a general election be the day appointed for the holding of the general election by proclamation pursuant to section 51(1) of the Constitution [title 2 item 1], which shall be a day not earlier than 40 days after the issue of the writ;*

(b) *in the case of a bye-election be a day not earlier than 40 days after the issue of the writ nor later than two months after the occurrence of the vacancy which occasioned the issue of the writ.*

(6) *The place appointed for a parliamentary election shall be some convenient building or part of a building within, or, in the opinion of the Registrar, conveniently near the boundary of, the constituency concerned, not being a building licensed for the sale of intoxicating liquor.*

(7) *The several writs of election issued in the case of a general election shall bear the same date, shall be issued on the same day and shall appoint the same nomination day and the same polling day respectively for each constituency.*

26. Section 27A of the Act provides as follows:

Power to postpone elections

27A (1) *Where at any time between the issue of a writ of election and the polling day appointed by that writ the Governor is satisfied that it is expedient so to do by reason of—*

(a) *Bermuda having become, or being likely to become, engaged in any war; or a state of emergency having been proclaimed under section 14(3) of the Constitution; or*

(b) *the occurrence of an earthquake, hurricane, flood or fire, or the outbreak of a pestilence or an infectious disease or other calamity whether similar to the foregoing or not; or*

(c) the likelihood that the voters' list will not be available before the polling day;
or

(d) the occurrence of rioting, open violence or other civil disturbance which has caused, or is likely to cause, such interruption or abandonment of the electoral process as to prejudice the holding of a fair election,

he may by proclamation published in the Gazette cancel the polling day appointed by the writ and appoint another day, not being more than thirty days after that day (but subject in any event to the limits set forth in section 51(1) and (2) of the Constitution), to be the polling day instead.

...

(7) Where the polling day appointed by a writ of election is postponed by a proclamation by virtue of this section, the Governor may by that proclamation or by a later proclamation published in the Gazette if, in his opinion, the election room appointed by the writ ("the original election room") will not be available for the purposes of the election, appoint another election room (a "substitute election room") for those purposes instead; and, where a substitute election room has been so appointed, any reference in this Act or in any Rules made under this Act to the original election room shall, if the context so requires, be construed as a reference to the substitute election room and not the original election room.

27. Section 30 of the Act provides as follows:

Notice of election

30 (1) On the issue of every writ of election, the Deputy Governor shall notify the Registrar and the Registrar shall forthwith give notice of the issue of the writ by publication in two successive issues of the Gazette and in at least one other newspaper circulating in Bermuda.

(2) Every such notice shall specify the nomination day and the polling day and the location of the election room appointed for the parliamentary election.

28. Section 47 provides as follows:

Premises not to be used as committee rooms

47 (1) No premises which are situated above, below, adjacent to or within the same curtilage as the election room shall be used by any person at any time on the polling day in a parliamentary election for any of the purposes of a committee room.

(2) Any person who uses or permits any other person to use any premises in contravention of subsection (1) commits an offence:

Punishment on summary conviction: a fine of \$500.

(3) In this section, "the purposes of a committee room" means any of the purposes

of a political party or other association of persons interested or concerned in promoting the election of any candidate nominated in any parliamentary election.

29. Part IX deals with offences under the Act. Section 61 provides for misconduct at elections and creates relevant offences.
30. Section 76 provides for the Governor to make Rules. The Schedule to the Act provides Rules for various aspects of elections and voting which includes the layout of polling places, required furniture, the flow of people, and the admission or restriction of people in the Election Room.

Case Law

31. Both parties cited the judgment of Chief Justice Kawaley (as he then was) in *Centre for Justice v The Attorney General and Minister of Legal Affairs et al* [2016] SC (Bda) 72 Civ (11 July 2016) which was in respect of a referendum on same sex marriage. The relevant issue was whether six named churches could be used as polling places or election rooms for the referendum when they had stated a position in respect of the subject question of the referendum.
32. At paragraphs 90, 91, 95 and 96 Kawaley CJ stated as follows:

“90. I granted an Order quashing this decision. I found that the statutory scheme by necessary implication must be read as requiring polling to take place at neutral locations to ensure an appearance of a fair electoral or referendum process. As I stated in my Judgment of June 10, 2016, in construing the statutory scheme and applying what some may well view as overly high standards of fairness, I had in mind not just the civil and political rights of Bermudian voters of all persuasions to be able to participate in a credible referendum process. I also approached this issue conceiving of Bermuda as leading international financial centre with an economy primarily dependent on international business. Bermuda is a domicile serving a clientele which relies upon the courts to uphold the highest standards of good governance and respect for the rule of law.

91. I was bound to find that the decision to designate the churches in question as polling rooms was unreasonable and/or irrational in the recognised public law sense. When the main hearing began, I was somewhat bemused that the Respondent was not

willing to concede what seemed to me to an obvious objection raised by the Applicant. However, in hindsight, the point emerged in a somewhat confusing way which makes it entirely understandable that the point was seemingly misunderstood. In these circumstances, the criticisms made of the Respondent's counsel for contesting this issue (paragraph 21 of my June 10, 2016) were not entirely warranted."

95. Mr Potts aptly characterised the flaw as involving an appearance of unfairness. Not only might some "yes" voters be unhappy about voting on church property. Some church members who might be inclined to vote "yes" might be discouraged from voting against church policy on church property. As this argument did not in any way depend on establishing any actual impediment to a free voting process, I viewed these examples as helpful illustrations as to why there was an appearance of unfairness. It mattered not that the 2012 Act did not expressly require polling rooms to be independent. In fact, I preferred to view the problem as being a breach of an implied requirement to designate polling rooms which were and appeared to be neutral. In *R (Plantagenet Alliance Ltd)-v- Secretary of State for Justice et al* [2014] EWHC 1662 (QB), it was noted that:

"85 In *Lloyd v McMahon* [1987] 1 AC 625, 702-3, Lord Bridge of Harwich said:
'[I]t is well established that when a statute has conferred on any body the power to make decisions affecting individuals, the courts will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness.'"

96. The designation of polling rooms was an administrative decision clearly amenable to judicial review which was made under the following statutory provision:

"Notice of referendum by Registrar

8 (1) The Registrar shall, as soon as practicable after a referendum notice is published under section 7, also give notice of the holding of the referendum by publication of a notice in two successive publications of the Gazette and in at least one other newspaper circulating in Bermuda.

(2) Every such notice shall specify—

(a) the polling day;

(b) the polling room, or polling rooms, for the holding of the referendum; and

(c) the question or questions to be answered at the referendum.

(3) A polling room appointed for a referendum shall be a building or part of a building which is not licensed for the sale of intoxicating liquor." [Emphasis added]

33. At paragraphs 98 and 99 Kawaley CJ stated as follows:

98. An essential ingredient, it seemed to me, of a credible referendum was a voting process which was not only managed by independent persons (the Registrar and Returning Officers) but which took place on independent premises. It was self-evident that in an election or referendum being contested by two political parties that one could not lawfully designate the branch offices of one party as polling stations across

50% of the total number of constituencies . In the present instance, the relevant churches were, in appearance terms, the equivalent of party branch offices in a 40 General Election, all linked with one and not the other party. The Respondent had no coherent response to this argument. The importance of the appearance of fairness in the electoral or referendum context was similar, as I observed in the course of arguments, to the requirements of fairness in relation to court proceedings. It would be unthinkable for a court adjudicating a commercial dispute involving two banks to sit in the boardroom of one of the two protagonists. Even Mr Duncan, on behalf of PML, was unable to muster any defence of the fairness of polling rooms decision as regards churches who were likely to be actively involved in the Referendum campaign. I required no assistance from judicial or other authority to conclude that the impugned decision of the Parliamentary Registrar should be quashed.

99. The requirement of neutral voting locations appears to be too well recognised to be the subject of extensive comment or debate. However I have since found at least one good practice electoral guides, apparently aimed at emerging democracies, which supports this analysis. The 'Electoral Knowledge Network' states:

"The location of polling stations must be in an ideologically neutral site in order not to discourage the free expression of the vote. In this sense, polling stations should not be located in police stations, army barracks, headquarters of political parties, offices of religious groups and government buildings in times of political transition..." {Emphasis added by Kawaley CJ}

Submissions by the Applicants

34. Mr. Tucker drew parallels between the Act and the Referendum Act on which Kawaley CJ had based his *Centre for Justice* judgment. He argued that there were similar provisions in the two Acts. Thus Mr. Tucker relied on the *Centre for Justice* judgment for various principles including: (i) the decision to appoint a polling place/election room was an administrative decision clearly amenable to judicial review; (ii) that there was an implied requirement in the Act that the Registrar's powers to appoint a polling place/election room were subject to an implied obligation to have regard to the needs of both actual and apparent bias; as a result any polling place/election room must be and appear to be neutral. In order to preserve an appearance of neutrality, it was required that voting take place on independent premises. He argued that the task was to determine whether or not it was sufficiently linked to one candidate or another so as to render it unlawful and that the Court should have in mind the established approach of the Court as set out by Kawaley CJ when he spoke of the civil and

political rights of Bermudian voters of all persuasions to be able to participate in a credible referendum process.

35. Mr. Tucker submitted that in assessing what will impact the credibility of the process, the Court should heed the judgment of Kawaley CJ when he said that church members who otherwise might be inclined to vote against the stated position of a church would be discouraged from voting this way if they were required to do so on church property. He also referred to the example of an unlawful venue given by Kawaley CJ when he said “*It would be unthinkable for a court adjudicating a commercial dispute involving two banks to sit in the boardroom of one of the two protagonists*”. Mr. Tucker referred to Rule 4(1), Rule 6 and section 61(c) as further examples, such provisions which respectively excluded candidates from being within 7 metres of an election room, excluded all people from being the election room during voting and prohibited gatherings within 50 metres unless on separate private property. He also referred to section 47 which prohibited the use of premises which are situated above, below and adjacent to, or within the same curtilage¹ as the election room being used on polling day for the purposes of a political party or others concerned with promoting a candidate. To that point, Mr. Tucker argued that the Allen Temple Church and the Residence were all under the same “curtilage” as the Allen Temple Hall.
36. Mr. Tucker submitted that the facts rise to the standard required to demonstrate that Allen Temple Hall is one which is sufficiently linked to Dr. Dill so as to render its appointment as unlawful. He argued that it was not disputed that voting is taking place: (i) on the premises of Allen Temple Church where Dr. Dill is an Assistant Pastor and her husband serves as Presiding Elder of the AME congregation in Bermuda; (ii) on premises which are adjacent to and within the same curtilage as where Dr. Dillis registered to vote and to have at one time resided; and (iii) within 50 metres of where Dr. Dill is registered to vote and to have one time resided.

¹ The curtilage is the court-yard in the front or rear of a house, or at its side, or any piece of ground lying near, enclosed and used with, the house, and necessary for the convenient occupation of the house. *Free Online Legal Dictionary • Featuring Black’s Law Dictionary, 2nd Ed.*

37. Mr. Tucker submitted that it cannot be seriously disputed that that Allen Temple Hall is: (i) under the direct influence of Dr. Dill in her capacity as Assistant Pastor of Allen Temple Church; under the indirect influence of her husband being he is the Presiding Elder of the AME Church in Bermuda; and has at least the appearance of not being an “independent premises” or being “neutral” by reason of fact that it is so closely linked to one of the candidates by both physical proximity and legal relationship. He argued that although the Allen Temple Church has not expressly supported one position or another, it is a case where Allen Temple Hall is intrinsically linked to a single candidate such as to render their as being unavailable to be used as an Election Room in accordance with law. He submitted that this case was on all fours with *Centre for Justice*.
38. Further, Mr. Tucker submitted that although there may be grey areas in future cases which require balancing the requirement for neutrality against practical considerations which may have an adverse impact on procedural fairness requirements, the present case was not such a case. He stressed that the present case was one where there was no doubt that there was an obvious linkage between the place appointed and a candidate so as to render it unlawful;

Submissions by the Respondent

Powers of the Registrar

39. Mrs. Dill-Francois submitted that the powers of the Registrar were clearly defined by the Act and that although the Governor had some limited powers in specific circumstances to cancel the polling day and appoint another day and another Election Room, the Registrar did not have the power to change the Election Room.

Comparison with the Referendum Act 2012

40. Mrs. Dill-Francois referred to *Centre for Justice*, in particular paragraph 95, to highlight the differences in the factual matrix between that case and the present case. *Centre for Justice* involved the Referendum Act 2012 rather than the Act which suggested less flexibility in the Act on the part of the Registrar as follows:

- a. Under section 5 of the Referendum Act, the Registrar was responsible for the supervision and control of returning officers as well as the conduct of the referendum. Under section 6(5) of the Act, her power was more limited to supervision and control of the conduct of returning officers.
- b. Under section 53 of the Referendum Act there is provision for an *ad hoc* committee to advise the Premier on matters relating to a referendum. In *Centre for Justice* at paragraph 100, Kawaley CJ stressed that the *ad hoc* committee should have been used to assist with the question of polling places. In the Act, there is no such mechanism which implied a stricter regime.
- c. Under section 51(2) of the Constitution, a bye-elections is subject to strict time limits, namely upon a vacancy a bye-election must be held within 2 months of the vacancy occurring. The Referendum Act does not have such a time limit.
- d. There are other strict time limits. Nomination Day must be at least 14 days before polling day (section 27(4)). For a bye-election, polling day must be not less than 40 days after the Writ of Election nor later than 2 months after the vacancy. She added that the current polling day is at that time limit.

Neutrality

41. Mrs. Dill-Francois submitted a number of factors to highlight the principle of neutrality in this case:
 - a. In *Centre for Justice*, the 6 churches were actively engaged in the campaign against the very question of the referendum. It was agreed that in the present case there was no evidence that the AME Church had taken a position on Dr. Dill's candidacy.
 - b. Allen Temple Hall was separate from Allen Temple Church;
 - c. The Residence had been unoccupied for approximately 1 year and was also separate from Allen Temple Hall.
 - d. The school locations not being available, Allen Temple Hall was a closer location to C36 and fulfilled the statutory requirements set out in section 27(6) of the Act.
 - e. Allen Temple Hall met the requirements for election rooms set out in section 27(6) of the Act. When the Writ of Election was issued neither the Governor nor the

Registrar had access to information that would have given rise to any concerns about the neutrality or fairness of the venue.

42. Mrs. Dill-Francois referred to the Registrar's view that it would be exceedingly difficult to secure a new location with the Bye-Election polling day being less than 2 days away.

Bias

43. Mrs. Dill, in arguing that in the present case there was no appearance of bias, cited the case of *Porter v Magill* [2001] UKHL 67 which had been referred to locally in *R v Wallington* [2022] Bda LR 18 at paragraph 33 as follows:

“The test

33. It is undoubtedly the case that the test for recusal is the one set out in Porter v Magill [2001] UKHL 67, namely “whether a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility of bias”. Guidance as to the characteristics of this notional observer is to be found in Helow v Home Secretary [2008] UKHL 62 where Lord Hope of Craighead pointed out [2] that the fair-minded observer:

“is the sort of person who always reserves judgment on every point until she has seen and fully understood both sides of the argument. She is not unduly sensitive or suspicious... Her approach must not be confused with that of the person who has brought the complaint. The “real possibility” test ensures that there is this measure of detachment.”

And [3]

“Then there is the attribute that the observer is informed. It makes the point they, before she takes a balanced approach to any information she is given she will take the trouble to inform herself on all matters that are relevant,””

Analysis

44. I declined the Applicants' application for judicial review for several reasons.
45. First, in my view the Registrar does not have the power to change the location of the Bye-Election. Pursuant to section 27(3) the Governor has the authority to issue a Writ of Election which must state the nomination day, the polling day and the Election Room. Thereafter, the Governor has the power, pursuant to section 27A, to postpone an election if one of the

conditions in section 27A(1)(e) to (f) (the “**Conditions**”) occur. Section 27A(7) does allow for the Governor to change the election room, but in my view, only when a writ of election is postponed by a proclamation arising out of one of the Conditions. I do not accept the argument of Mr. Tucker that, section 27A(7) should be interpreted to read that, in the absence of any of the Conditions, the Governor, if in her opinion, the original election room will not be available for an election, holds the power to appoint another election room. To my mind, it is clear that one of the Conditions has to be engaged before appointing a substitute election room.

46. Second, I accept that the decision to designate the location of the Election Room is amenable to judicial review.
47. Third, I have considered the various parts of the judgment of Kawaley CJ in the *Centre for Justice* case. I agree with his statements in paragraph 90 when he spoke about the high standards of fairness, the civil and political rights of Bermudian voters and the reputation of Bermuda. I also agree with his views as set out in paragraph 95 that even though the Referendum Act did not expressly require polling rooms to be independent, he viewed the problems in that case as being a breach of an implied requirement to designate polling rooms which were and appeared to be neutral. In my view, these principles apply equally to elections and the provisions under the Act.
48. Fourth, I accept that Dr. Dill has a connection to the Allen Temple Church on which premises the Allen Temple Hall exists. That connection arises as she is an Assistant Pastor for the Allen Temple Church and her husband is the Presiding Elder of the AME congregation of Bermuda. I also accept that she is registered to vote at the Residence which is near to the Allen Temple Church and Allen Temple Hall. To those points, I accept the evidence of the Registrar that when she researched locations for an election room and by the time the Writ of Election was issued, she was not aware of the connections of Dr. Dill to Allen Temple Church, only finding out later. To these points, I should add that in the context of Bermuda, which has small constituencies and a relatively small number of voters per constituency, it is likely that there will be connections between candidates and places in their community which can be used for Election Rooms. It seems commonsensical that it is highly likely that political

parties will run in a constituency someone who hails from the constituency and who has links to it, for example by way of school ties, club ties, church ties, lodge ties and other charitable ties. In my view, not every connection leads to making a potential election room ineligible to be one.

49. Fifth, it is not in dispute that the Allen Temple Church and the AME Church of Bermuda have not taken a position on the candidacy of Dr. Dill or on any other of the Candidates. This is a sharp distinction from *Centre for Justice* where the six churches in question had taken a position on the very subject question of the referendum. As set out in paragraph 91, Kawaley CJ had no hesitation to find that the decision to designate those churches as polling rooms was unreasonable and/or irrational in the recognized public law sense. In paragraph 95 he accepted Mr. Potts submission that some “yes” voters might be unhappy about voting on church property and also that some church members who might be inclined to vote “yes” might be discouraged from voting against church policy on church property. However, in the present case, the circumstances are entirely different. The Bye-Election involves 4 Candidates. To that point, it is of strong significance that the Allen Temple Church and/or the wider AME Church of Bermuda have not expressed any view about any of the Candidates. To my mind, these circumstances meet the test referred to by Kawaley CJ when he cited the *Electoral Knowledge Network* article about the location of the polling station being an ideologically neutral site in order to not discourage the free expression of the vote. Thus, I am not satisfied that any voter that attends the Allen Temple Hall will be affected one way or the other by the fact that the election is in the Allen Temple Hall. Further, the Booklet sets out various guidelines for all Candidates to follow in respect of their conduct at Allen Temple Hall on the polling day.
50. Sixth, I have considered the layout of the premises which include the Allen Temple Church, the Allen Temple Hall where voting will take place and the Residence. Although Dr. Dill’s registered voting address is at the Residence, the evidence shows that the Residence has been unoccupied for over a year, meaning that Dr. Dill does not live there presently. Thus, to my mind, the fact of the registered voting address has no bearing on the issue of neutrality. In my view, physical proximity of premises used for voting has to be viewed through the lens of the

Bermuda context. I accept the evidence of the Registrar that election rooms need to meet certain criteria. In reality, in Bermuda, the premises that are available to her are schools, churches, lodges and sports clubs all which in some form have the combination of parking, large halls, facilities, accessibility and security but which may not have a huge geographical space. The Registrar stated that Allen Temple Hall met the criteria to be an Election Room. In my view, I find no reason to criticize her decision based on the physical layout of the premises. To that point, I am satisfied that the proximity of Allen Temple Church and the Residence to Allen Temple Hall where voting will take place in no way impacts on the neutrality of the Election Room. I do not accept Mr. Tucker's arguments that because the Allen Temple Church, the Residence and the Allen Temple Hall are all under the same "curtilage" that it makes a difference to the process in the Election Room. I refer again to the Rules which set limits for activity on polling day and I refer to the Booklet which gives guidelines on the conduct of Candidates, their political parties and supporters for events and activities on polling day.

51. Seventh, I have considered the test in *Porter v Magill* as cited by the Bermuda Court of Appeal in *Wallington*. In my view, the fair minded and informed observer, having considered the facts in this matter, would not conclude that, by holding the election at Ellen Temple Hall, there was a real possibility of bias for or against any of the Candidates.
52. In light of the circumstances and the above reasons, I am not satisfied that the principles of independence and neutrality of the election room have been undermined such that I should exercise my discretion to quash the decision to specify Allen Temple Hall as the election room. Thus, I am not satisfied that specifying Allen Temple Hall as the Election Room was unlawful and unfair or as otherwise complained of.
53. Eighth, although I have already decided that I will not grant the Applicants' application, the lateness of the judicial review application has caused me some concern. From the outset, Mr. Tucker's submission was that the Applicants did not wish for the Bye-Election to be delayed or adjourned to some other date by any action of this Court. I disagree with the Applicants' submissions that they were pursuing other avenues for resolution in a timely manner before commencing judicial review proceedings. In my view, there was considerable time since 31

August 2024 when Dr. Dill's candidacy was announced to pursue other avenues in a more expedited manner and then to commence the judicial review application.

54. My concern was that if the Court took the view that the application should succeed and another Election Room needed to be selected, there was only one day, namely today, to do so. I accept the Registrar's evidence that it would be extremely difficult to secure a new location. Mr. Tucker took the view that the Registrar did not say it was impossible. However, it is not in dispute that the voter has a right to participate fully in the electoral process and in my view, the process should be without confusion to any person or entity. I posed the question of what would happen if the Court granted the application for a new Election Room, but the Registrar was unable to secure and prepare a new location. The outcome would likely be that the parties return to the Court today to seek further relief, with a possible outcome that a new order be made to restore Allen Temple Hall as the Election Room. Every aspect of these circumstances would have been disastrous such that it might have rendered the Bye-Election an impossibility and thus disenfranchising the voter, and causing a serious dent in the reputation of Bermuda that Kawaley CJ had in mind. In my view, the Court must take into account the issues of delay to ensure that it avoids steps that can make an orderly process a shambles.

55. Ninth, when considering the reasons advanced in this case to quash the decision to specify Allen Temple Hall as the Election Room, I was concerned that if I granted the application, that the Court would be adding a duty to the Registrar of vetting any possible connections between all electoral candidates and all potential election rooms as and when either were announced. This would be an enormous task for a Registrar in one bye-election and would be a mammoth to even impossible task in a general election especially in the terms of the various deadlines that must be met and the amount of work it takes in practical terms to ensure that an election is conducted properly. In my view, the Registrar does not have a positive duty to conduct such vettings as and when candidates are announced for election, although she may be required to respond to queries or Court proceedings accordingly.

Conclusion

56. In light of the above reasons, I declined the application of the Applicants for judicial review.

57. I will hear the party on costs if necessary.

Dated 3 October 2024



**HON. MR. JUSTICE LARRY MUSSENDEN
CHIEF JUSTICE OF THE SUPREME COURT**