

TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim: CV 2008-1228

CV 2008-1268

CV 2008-1269

**IN THE MATTER OF THE JUDICIAL REVIEW ACT NO. 60 OF 2000 AND OF
APPLICATIONS FOR LEAVE TO APPLY FOR JUDICIAL REVIEW IN RESPECT OF THE
DECISION OF THE CHIEF MAGISTRATE MADE ON 7TH JANUARY, 2008 INFORMATIONS
NUMBERS 7648 OF 2002 AND 3686 TO 3705 OF 2002**

BETWEEN

- (1) Fidelity Finance and Leasing Company Limited**
- (2) Maritime General Insurance Company Limited**
- (3) Steve Ferguson (Cv 2008-1228)**

- (4) John Henry Smith**
- (5) Barbara Gomes (CV 2008 –1268)**

- (6) Ishwar Galbaransingh**
- (7) Amrith Maharaj**
- (8) Northern Construction Limited (Cv 2008 – 1269)**

AND

HIS WORSHIP SHERMAN MC NICOLLS

First Respondent

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

Second Respondent

Appearances: Mr. Krolick and Ms H. Singh for Claimants 1, 2, 4 & 5

Claimant No. 3 representing himself

Mr. D. Maharaj for Claimants 6, 7 & 8

JUDGMENT

Introduction

- [1] These three applications for leave to file for judicial review were heard together because all of the claimants are jointly charged for the same offences. They were charged indictably (together with other persons and companies) with several corruption offences arising out of the construction of the Piarco International Airport. On June 13th 2002, the preliminary inquiry into the charges began before the first respondent at the Port of Spain Magistrates' Court. The matter did not conclude until 13th July, 2007, when the first respondent committed them to stand trial. The claimants now challenge their committals in these applications.
- [2] As to CV 2008 -1268, the claimants make varying allegations of bias against the first respondent in the conduct of the preliminary inquiry, alleging that he breached their constitutional rights under section 4(a) and (b) and that there was unfairness and abuse of process. They seek declaratory relief. They also seek certiorari to quash the committal, first contending that one charge is unknown to law and that in respect of the other charges, no offence is disclosed nor is there any evidence to support them. They contend that no crime of any description has been committed by any of them. The complaints about the charges are common to all three applications.
- [3] All the claimants (except the corporate entities) have filed affidavits in support. In the case of claimants John Smith and Barbara Gomes, both swore affidavits of 7th April, 2008, in which they adopted the facts recited in the grounds of the application and deposed that those facts were true and correct. Claimants Galbaransingh and Maharaj have done the same. Mr. Ferguson filed a more substantial affidavit on behalf of the

three claimants in CV 2008 – 1228 setting out his evidence therein. As to CV 2008-1269, the facts relied on by these applicants are virtually identical to that of CV 2008-1268. The reliefs sought are virtually the same except that the claimants make no claim of bias against the first respondent. They seek the same relief as the claimants in CV 2008 – 1268 at paragraphs vi, vii, viii, ix and x of the latter application for judicial review.

- [4] As to CV 2008 – 1228, the three claimants in this action also challenge on essentially the same grounds as in CV 2008 – 1269, the first respondent’s decision to commit, although the reliefs sought are expressed along more traditional lines. There is no allegation of bias made against the first respondent. There is however, the additional complaint that in committing the claimants, the first respondent contravened the requirements of the Indictable Offences (Preliminary Inquiry) Act Chap. 12:01 (in particular sections 17 and 23).
- [5] The action is supported by three affidavits of Steve Ferguson, the third claimant in this action (claimant #3 for the purposes of this judgment), two filed on behalf of the first two claimants and the third on his own behalf. His evidence essentially repeats the facts upon which all the claimants rely particularly towards the conclusion of the preliminary inquiry. However, in support of his contention that the first respondent contravened the requirements of the Indictable Offences (Preliminary Inquiry) Act, he deposed at paragraphs 34 to 49 of his affidavit in support, about unsuccessful attempts to have the Director of Public Prosecutions, Mr. Henderson; Senior legal executive of the Central Authority, Mr. David West; and Permanent Secretary, Ministry of the Attorney General, Mrs. Cheryl Blackman, testify on his behalf and of the decision of the first respondent, after hearing arguments on his (the 3rd claimant’s) behalf and on behalf of the public officers summoned, to set aside the summonses issued for the three public officers.
- [6] The summonses had been served on the officers requiring their attendance. On 7th January 2008, the prosecution submitted that the summonses were invalid and the witnesses should not appear to give evidence in relation to the summonses. The first respondent, having heard argument, decided that the summonses should be set aside and called upon the third claimant’s counsel to proceed. She (Counsel) informed him she

needed an opportunity “to ascertain what was the position of those witness summonses” and in response the first respondent then ruled that:

“no plausible reason has been advanced for the non-service or the non-production of witnesses called by Mr. Ferguson in which circumstances he was satisfied that a prima facie case had been made out against each accused on such substituted charge that he read to each accused person at the time of the caution.”

[7] The third claimant alleged that the first respondent in committing them to trial acted irregularly and in breach of the rules of natural justice, contravened the Indictable Offences (Preliminary Inquiry) Act Chap. 12:01, and in particular sections 17 and 23. He also alleges that the first respondent –

- (a) acted *ultra vires* and contrary to law when ruling that there was a *prima facie* case made out against each accused on each of the substantiated charges;
- (b) acted unreasonably and irrationally in making the ruling and in failing to adequately specify the charges on which he committed them to trial;

The History

[8] The allegations as to the charges, which are common to all three claims, require a recitation of the facts put forward by the claimants in respect of the conduct of the preliminary inquiry by the first respondent. The facts to which I refer are taken from CV 2008-1268 but are common to all three actions. Where there is material differentiation I shall set it out.

[9] The claimants allege that upon the close of the case for the prosecution, counsel for the claimants indicated that they wished to make no case submissions, contending that insufficient evidence had been led to justify the establishment of a *prima facie* case on any of the twenty-one charges before the court, but that they needed time to prepare written submissions given the volume of evidence before the court. The prosecution

replied that it would wish to respond in writing within five days of receipt of these submissions. On 11th October, 2006 the prosecution served formal notices of the following:

- (i) its intention to invite the first respondent to commit the accused on any such charge as he finds disclosed on the evidence and on which he finds there is a case to answer;
- (ii) its intention to amend the wording of seven charges, two of which referred to the claimants;
- (iii) its intention to invite the first respondent not to commit on twelve charges;
- (iv) its intention not to seek a committal on two charges;

The notice also disclosed the additional offences which the prosecution stated were disclosed by the evidence (three charges). The proposed amended charges (six) were also disclosed. The claimants allege that the proposed amendments required that none of the original charges would remain intact and that consequently, they would be called upon to answer to a fundamentally different set of accusations. They also contend that having been served with the notice, their counsel “*arrested*” their preparations on the no case submissions and did not file any when the matter resumed on 27th November, 2006. The prosecution however had filed written submissions on 23rd November, 2006.

[10] On 27th November, 2006, leading counsel for the prosecution formally withdrew his application to amend the charges after vigorous argument on the merits of the application. The claimants thereafter filed substantial written submissions on 8th February, 2007 which were buttressed by oral submissions. The prosecution responded by written and oral submissions on 26th February, 2007 and 13th March, 2007. On 7th July, 2007, the first respondent committed the claimants on ten charges all of which were charges which the prosecution either proposed as new or amended charges. The original charges against the claimants were all discharged. The claimants allege that these “*substituted*” charges required particularisation but a request for the same was summarily and categorically

refused by the Magistrate, and they further alleged that they were denied due process of law, because:

- (i) they were not allowed to know in a timely manner or with precision, or with sufficient particularity, what were the charges they needed to answer;
- (ii) they were denied an opportunity to deal with the charges with respect to which committals were ordered.

[11] They allege further that *“as a consequence they did not focus their submissions on these additional charges but on the twenty-one (21) original charges and ‘even more fundamental (ly) these additional charges’ were not introduced until after the close of the prosecution’s case, thus denying the claimants an opportunity to cross-examine witnesses on issues pertinent to these new formulations. This manoeuvre by the prosecution and endorsed by the first respondent contradict basic principles of due process”*. The claimants in CV 2008-1268 next state at paragraph 44 of their grounds that:

“Between July 19, 2000 and October 19, 2000, proceedings in the preliminary inquiry were stayed by orders of the High Court following upon certain applications for judicial review which had been filed by two of the corporate defendants, Maritime General Insurance and Fidelity.”

Nothing else is stated as to the outcome of those proceedings. It was a significant and fatal omission to which I shall return. Moreover, the claimants in CV 2008-1269 make the identical reference at paragraph 45 of their ground but there is no mention of those proceedings in CV 2008-1228, despite the fact that Maritime and Fidelity, claimants (1) and (2) were the litigants who moved the High Court, Court of Appeal and Privy Council to obtain judicial review in those proceedings. I note that CV 2008-1228, even though it has now been heard together with the other two applications, was filed as a separate action (as were the other two applications). As such, the judge to whom CV 2008-1228 was assigned, would not have known of the earlier judicial review proceedings which engaged the Court of Appeal. In my judgment, this was a quite serious omission.

- [12] The allegation of bias is quite elaborate. It draws from a report of the Sunday Express newspaper of looming disciplinary charges against the first respondent because of his refusal to testify in the Magistrates' Court in respect of criminal charges brought against the then Chief Justice. Those criminal charges had been instituted as a result of allegations made against the Chief Justice by the first respondent himself. It was in respect of that refusal that the Sunday Express reported that the Judicial and Legal Service Commission (JLSC) had decided to institute disciplinary proceedings. The report also stated that the JLSC had decided that the first respondent's suspension should be deferred until he completed the preliminary inquiry involving the claimants. They say that the report was subsequently verified when the first respondent was granted leave to file for judicial review of the JLSC's subsequent decision to institute disciplinary proceedings against him and to interdict him from duty. They contend that there was apparent bias as a result of those disciplinary proceedings and because the first respondent had received significant financial and other advantages at the behest of the Attorney General who had an "*interest*" in their prosecutions.
- [13] The claimants also contend that it emerged during the Mustill Tribunal (commissioned under section 137 of the Constitution to investigate the first respondent's allegations against the Chief Justice) that the first respondent had been made the beneficiary of favourable interventions by the then Attorney General, Mr. John Jeremie, which had come to light and had been placed in the public domain as a consequence of a judgment of the Court of Appeal in **Panday v Virgil**, Mag. App. 75 of 2006 and in other matters disclosed before the Mustill Tribunal. The claimants contend that the first respondent "*might have become so obligated to the Attorney General as to be incapable of adjudicating in matters in which the latter had an interest without there being present the appearance of bias*". They say that the preliminary inquiry was manifestly one such matter.
- [14] By written submission filed on 21st December, 2007, the claimants thus sought to have the first respondent recuse himself from the preliminary inquiry on the ground of apparent bias:

- (a) arising from his having received significant financial and other advantages at the behest of the Attorney General;
- (b) because the JLSC had taken a decision to institute disciplinary proceedings against him for misconduct and had determined that it was in the public interest that he should be interdicted from the further performance of his functions;
- (c) because this was also a breach of the claimant's constitutional rights and if he considered it appropriate, he should refer the question to the High Court for determination.

The claimants allege that the first respondent declined to allow defence counsel to develop their recusal submissions orally, rather, on 7th January, 2008 the first respondent, on resuming the preliminary inquiry:

- (a) summarily and without giving any reasons at all rejected all recusal applications,
- (b) refused to refer any constitutional questions upon which the applications had been based to the High Court for determination;
- (c) refused all requests made on behalf of the defendants to so refer the applications, deeming same to be without merit, and only when pressed by counsel deemed them to be frivolous and vexatious;
- (d) refused counsel for the applicants' request to have the preliminary inquiry stood down so as to provide an opportunity to their attorneys to approach the High Court for constitutional relief and interim protection by way of a conservatory order;
- (e) issued a pre-emptive policy ruling that he would not stand down the case to facilitate anyone;

- (f) refused to hear defence counsel, on the recusal matter or to allow any time to consider the cases put forward by prosecution counsel that morning;
- (g) did not allow himself or any counsel time to consider the several authorities submitted to him that morning by counsel;
- (h) refused to hear any witnesses called by the defence and proceeded instead straight to committal; and
- (i) in his haste failed to state any of the charges on which he was committing each defendant, but instead he cavalierly referred them to “*what I read out at time of the caution*”. The date of the caution was July 9th, 2007 which was six months earlier.

[15] The claimants say that those circumstances evidenced the inordinate haste to dispose of the preliminary inquiry such as to suggest to the independent observer that he was not concerned with proper or considered adjudication but rather, with beating the clock and racing the matter to a conclusion so as to pre-empt the possibility that the accused’s attorneys might return from the High Court with a conservatory order.

[16] The argument continues that the first respondent was aware that the JLSC considered the finalization of the preliminary inquiry to be pertinent to his suspension. This awareness would necessarily have affected his mind either consciously or unconsciously and he would not be completely objective. The claimants state that –

“One can only speculate as to how the learned magistrate determined to deal with this information, whether by protracting the inquiry or bringing it to an inordinately quick conclusion. It is reasonable to assume that whichever course he chose to follow such course would have been influenced consciously or unconsciously by a desire to adjudicate in a manner which would best serve his own interests. In any event, as it turned out, there is reason to suspect that his first response was deliberately to frustrate (so as to postpone the moment when the

JLSC might suspend him) and later, when the Maritime General Insurance Company Limited and the Fidelity Finance and Leasing Commission considered unacceptable, the first respondent changed his strategy and determined to race the preliminary inquiry to a conclusion. This decision was also influenced by the overt threat that his personal integrity as an adjudicator would be examined by a constitutional motion in the High Court.

The professional conduct and integrity of the Chief Magistrate was being called into question by the Commission which was known by him to be of the opinion that the preliminary inquiry was critical and needed to be concluded.

In addition, an explanation for the conduct and decisions of the first respondent is strongly suggested by revelations which were made in the course of the Mustill Inquiry when he under cross-examination revealed that he had been directed by the then Chief Justice that he should follow Mr. Jenkins as he was there to guide him. The Chief Magistrate never informed the applicants of this advice or directions but from the history of this matter there is good reason to suspect that the Chief Magistrate did fully accept that injunction”.

Submissions on behalf of the Claimants

[17] In summary, the allegations of bias against the first respondent are multi-pronged; the first respondent was given a direction by the then Chief Justice to follow a particular course of action which would have serious repercussions on the lives of the claimants; he appeared to have followed this direction when he proceeded to adopt the prosecution’s submissions on the charges uncritically and robotically, without giving them his independent consideration. The disciplinary charges against him, so compromised the credibility of the first respondent, that any respectable magistrate would have had no difficulty in voluntarily recusing himself. Finally, the first respondent, because he had received significant financial and other advantages from the then Attorney General, was incurably contaminated by the appearance of bias and should have recused himself.

[18] Particulars of the financial advantages, as set out by the claimants, were drawn from evidence given before to the Mustill Tribunal. In summary, the financial advantage accorded to the first respondent by the Attorney General was made in the following context. The first respondent was deeply in debt, having borrowed a large sum of money to purchase a property which he had then sought unsuccessfully to resell, over a period of six months. He eventually accepted a down payment on the sale of the property but became uncomfortable about the circumstances of the payment of the down payment. He repaid the down payment through additional borrowing from the bank which left him further in debt. The first respondent was thereafter “*passionately interested*” in selling the property so as to get out of his indebtedness to the bank.

[19] The Attorney General pressured one of the senior officials of the company which had initially sold the property to the first respondent into having the property re-purchased, with the result that it could reasonably be suspected that the first respondent was so beholden to the Attorney General that his impartiality in adjudicating in matters in which the Attorney General had an interest might well be compromised.

[20] Particulars of the “*other advantages*” gained by the respondent from the Attorney General included:

- (a) public support from the latter via a press release in which the Attorney General defended him against allegations levelled by the Chief Justice;
- (b) the Attorney General’s personal intervention in the criminal charges against the Chief Justice, at the first respondent’s request, in an attempt to ensure that the first respondent did not give evidence in those proceedings.

[21] As to the Attorney General’s interest in matters at hand, the Attorney General had vigorously investigated what he declared to be fraud in the Piarco Airport Development Project and the charges in the preliminary inquiry were various formulations of a central allegation of fraud alleged to have been committed by the claimants arising out of the airport project. As to the first respondent’s continued sitting despite the JLSC taking

steps to interdict him from duty, it was submitted by counsel as follows. (I have reproduced virtually verbatim what was submitted):

The JLSC having taken the decision to interdict the first respondent, is deemed to have acted in “*the public interest*” because:

- (i) it is the public to whom justice is being dispensed which must be protected. The public includes the defendants. The JLSC’s position is analogous to an *order nisi*. The reputation of the first respondent has been damaged by this decision and this is a relevant consideration in the instant recusal application only insofar as such damage to his reputation must impact negatively on the confidence which the public, and the defendants herein, will impact on his suitability to sit as a judicial officer. A responsible magistrate would be concerned to preserve this confidence and would have no difficulty in voluntarily recusing himself;
- (ii) the first respondent himself knows and accepts that his credibility as a magistrate has been so damaged that he cannot perform his duties. This acknowledgement appears from his own submissions in his judicial review claim against the JLSC. If the first respondent believes that he is compromised as a witness, he must also believe that the independent and fair minded observer would readily believe that he is certainly compromised as a magistrate;
- (iii) their constitutional right to “*the protection of the law*” was violated. “*The protection of the law*” is a fundamental right to have access, for the resolution of one’s legal issues, to a court of law which is fair and impartial. It is necessarily to be implied that such a right contemplates access to a court of law which enjoys the unqualified confidence, if not of the public at large, certainly of that constitutional organ which is vested with the power to appoint, monitor and discipline the court’s judicial officers;

- (iv) the rejection of the recusal submission and the first respondent's determination to continue to sit in spite of being informed of the matters hereinabove is unreasonable and infringes their right to a fair trial as he is clearly biased on a number of fronts.

[22] In relation to the validity of the substituted charges, the submissions of Mr. Krolick on behalf of Smith and Gomes, which were adopted by the claimants in CV 2008 - 1269 were as follows:

- (a) by discharging all the accused on all charges originally laid and committing them on the three additional charges and seven new charges (the substituted charges) as proposed by the prosecution, the first respondent had permitted the prosecution to resurrect or had himself resurrected amendments which the prosecution had expressly abandoned;
- (b) these substituted charges needed to be particularised in order to be understood but the first respondent refused to entertain any such application because he was intellectually unable to assist since the charges were never the product of his own independent adjudication nor was he able to tell the defence to whom the request for particulars should be directed (whether to the prosecution or to the court itself);
- (c) consequently, either through mismanagement or perversity of the court or the prosecution, the claimants were denied due process in that –
 - (i) they were not allowed to know in a timely manner or with precision or sufficient particularity what were the charges they needed to answer;

(ii) they were denied an opportunity to deal with the charges with respect to which the committals were ordered;

(d) as to c (ii), because of the first respondent's misdirection, the claimants did not focus their submissions on these additional charges but on the twenty-one original charges and given that the substituted charges were introduced after the close of the prosecution's case they were denied the opportunity to cross-examine witnesses on issues pertinent to these new charges.

[23] Mr. Krolick further submitted that there was no admissible evidence adduced by the State which supported any of the charges against the claimants and in each case the first respondent:

- (a) acted without jurisdiction in committing each of the claimants;
- (b) erred in law in failing to discharge each applicant from the proceedings.

These were appropriate grounds for a judicial review court ordering that the committal for trial be quashed. He submitted that the conduct of the case for the prosecution became confused and muddled, largely because it did not fully understand that given the volume and complex nature of the documentation, the same evidence before a jury is likely to take considerably longer; about seven to eight months. The prosecution's case at trial would in any event involve very substantial expenditure on legal expenses and court time.

[24] It was thus expeditious that the important issues of law and commercial practice which are fundamental to the prosecution be finally resolved by a superior court, thus saving costs. The court should hear both the application for leave and the substantive judicial review application because –

- (i) the application has a realistic prospect of success and it is highly likely that leave would be granted;

- (ii) the issues raised are largely matters of law and commercial practice and it is highly likely that the unsuccessful party would appeal. Hearing both matters would obviate the prospect of a successful appeal causing the matter to be returned to the High Court for a substantive hearing.

Submissions on behalf of the Respondents

[25] Both respondents made written submissions. Mr. Daly for the Director of Public Prosecutions in his written and oral submissions which were adopted by Mr. Marcus, Senior Counsel for the first respondent, submitted as follows:

- (1) In breach of section 11(1) of the Judicial Review Act Chap. 7:08 (the JRA) the application has not been made promptly in respect of any of the decisions complained against.
- (2) The breach is a grievous one in respect of the complaint of apparent bias because the facts alleged in support of the claim were known to the claimants prior to July 9th 2007, principally by reason of the following:
 - (a) The facts and matters, upon which the claimants seek to rely, were in the public domain on or before April 4th 2007, on which date judgment in **Panday -v- Virgil**, Mag. App. 75 of 2006 was delivered by the Court of Appeal;
 - (b) the matters relating to the apparent bias in respect of the JLSC proceedings were, on the evidence as sought to be relied upon by the claimants, in the public domain as early as June 17th 2007. Any application contingent upon those matters ought to have been made to the first respondent or, if necessary, the High Court, as soon as possible and in the later case, promptly and in any event within three months from the date upon which the said grounds arose;

- (c) There was no requirement for the claimants to have waited until the Mustill Tribunal's findings to make their application for recusal. It is clear that the facts and matters upon which they sought to rely were within the public domain well before that. They were in as good as a position to come to their conclusions that there was apparent bias without the need for the Mustill Tribunal to assist them to come to their separate and independent conclusions;
 - (d) The delay in the claimants making their recusal application and subsequently making the present application for judicial review on the same grounds, is clearly prejudicial to good administration.
- (3) There has been undue delay in making the application and the grant of the relief sought will be detrimental to good administration.
 - (4) On a proper application of section 25 of the Interpretation Act Chap. 3:01, the leave application has been made later than three months from the date used by the claimants to identify when grounds for complaint first arose, namely January 7, 2008 which puts the application out of time and therefore, in breach of Part 56.3(3)(g) of the Civil Procedure Rules, 1998 (CPR) which requires the applicant to state whether the time limit for making the application was exceeded and why.
 - (5) No application has been made to the court to extend the period within which the out of time application shall be made and the applicants have provided no reason for extending the time;
 - (6) In disregard of section 9 of the JRA and in breach of Part 56.3(3)(e) of the CPR, the application has failed to deal with

whether an alternative form of redress exists and to show, if the applicants can, why judicial review is more appropriate in circumstances where it is submitted, in accordance with three judgments of the Privy Council, that the complaints of the claimants can be fairly or properly resolved within the criminal process;

- (7) The claimants have failed to make full and frank disclosure of material facts, in that they have not brought to the court's attention previous relevant judicial review proceedings commenced by Fidelity Finance and Leasing Company and Maritime General Insurance Company Limited supported by an affidavit of Steve Ferguson against the first respondent save and except for the briefest of mentions at paragraph 45 of the claimants' leave application. The previous proceedings are CV 2007-02483, (a leave application before Tiwary-Reddy J, an appeal therefrom), Civil Appeal No. 127 of 2007, *His Worship Sherman Mc Nicolls, Chief Magistrate v Fidelity Finance and Leasing Company Limited and Maritime General Insurance Company Limited* and J.P.C. 90/2007 (the Judicial Committee of the Privy Council's dismissal on December 6th 2007, of a petition for special leave to appeal against the judgment of the Court of Appeal in the Civil Appeal No. 127 of 2007) which have a material bearing on the proceedings herein;
- (8) The claimants have no arguable case for judicial review on the ground of apparent bias.
- (9) Further or alternatively to (7) above, the circumstances of this case are such that the claimants' case must cross the hurdle of a case that is likely to succeed, and it is clear that their case cannot cross that hurdle;

- (10) The legislative and CPR scheme of judicial review applications in Trinidad and Tobago, which is different from the United Kingdom's scheme, prohibits the substantive application from being heard together with the leave application in circumstances where breaches of the JRA and/or the CPR specifically relating to the grant of leave to apply for judicial review are alleged or appear on the fact of the proceedings. Further, that in the circumstances of this case and in light of the grounds upon which the grant of leave is opposed, it would be wrong in law and destructive of the clear intention of the legislature, with regard to the grant of leave, for the court to hear the leave application and the substantive application together.

Law and Conclusions

[26] As to all three applications, leave is refused. I agree with Mr. Daly that –

- (1) The applications have not been made promptly as required by section 11(1) of the JRA, Chap. 7:08.
- (2) There has been undue delay in making the applications and the applicants have provided no reasons for extending the time.
- (3) The applicants have failed to make full and frank disclosure of material facts by failing to inform the court of previous relevant judicial review proceedings commenced by Fidelity and Maritime i.e. CV 2007 – 2482, Civil Appeal, No. 127 of 2007 and JPC 90/2007, which had a material bearing on all three proceedings now before me.
- (4) In any event I do not consider that any of the claimants' grounds is arguable or has any realistic basis of success.
- (5) In relation to the contention that the continued participation of the first respondent in the preliminary inquiry is a deprivation of the

applicants' rights to due process of law and the protection of the law, that is not a basis upon which leave for judicial review can be granted. The necessity to apply for constitutional relief pursuant to section 14(1) of the Constitution is not a matter for which it is necessary to seek leave. The applicants can apply for leave in the usual way if they allege that their constitutional rights have been infringed. Indeed, claimants (1) and (2) in HCA 2008 – 1268 have done so and that matter is set for hearing later in January.

Lack of promptitude

[27] Section 11 of the JRA provides as follows:

“11(1) An application for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose unless the Court considers that there is good reason for extending the period within which the application shall be made.

(2) The court may refuse to grant leave to apply for judicial review if it considers that there has been undue delay in making the application, and that the grant of any relief would cause substantial hardship to, or substantially prejudice the rights of any person, or would be detrimental to good administration.

(3) In forming an opinion for the purpose of this section, the Court shall have regard to the time when the applicant became aware of the making of the decision, and may have regard to such other matters as it considers relevant.

(4) Where the relief sought is an order of certiorari in respect of a judgment, order, conviction or other decision, the date when the ground for the application first arose shall be taken to be the date of that judgment, order, conviction or decision.”

The requirement of promptness is well known and much discussed. In ***R v Oxford City Council*** (2002) EWCA Civ. 990, Pill L.J. commenting on the English Order 53 provision stated that the word “*promptly*” in the rule “*should not be ignored*”, adding that –

“Those who seek to challenge the lawfulness of planning permission should not assume whether as delaying tactics or for other reason, that they can defer filing their claim form until near the end of the three-month period in the expectation that the word ‘promptly’ in the rule is a dead letter”.

[28] In this case all the claimants collectively complain of a number of matters done by the first respondent. These include:

- (i) his adoption of the prosecutor’s submissions in respect of charges in apparent compliance with the advice of the then Chief Justice. The claimants refer to a statement made by the first respondent on 19th September, 2007 during the Mustill Tribunal’s Inquiry. The first respondent alleged that the then Chief Justice told him to “*pay particular attention to Mr. Jerkins because he is there to guide me*”;
- (ii) his refusal to recuse himself from the preliminary inquiry and his finding that the recusal application was frivolous and vexatious. The recusal application was made on 10th December, 2007 and rejected on 7th January, 2008;
- (iii) his continued adjudication in the preliminary inquiry after the Commission’s letter of 2nd August, 2007 to him indicating that the Commission proposed to interdict him from duty;
- (iv) his direction to the claimants to address their no case submissions to the original charges but then committing them to stand trial on the substituted charges which were earlier proposed and withdrawn. That direction was given on 27th November, 2007.

The first respondent's finding that the evidence supported the substituted charges was made eight months later on 9th July, 2007 and his committal order given on 7th January, 2008;

- (v) his decision on 9th July, 2007 that the claimants all had a case to answer in respect of the substituted charges per the prosecution's notice dated 11th October, 2006;
- (vi) the orders of committal made by the first respondent on 7th January, 2008.

As can be seen, some of the complaints of the claimants are directed at actions of the first respondent which date back to July 2007. Some relate to November 2007. These are in respect of a preliminary inquiry which began in 2002 and which has been much delayed. Even if I accept that the preparation of the application was difficult in light of the bulky documentation, to have waited until the last day of the three month period is simply too long. I do not accept that that is a sufficient justification for the delay. Time limits are to be respected. Nor do I accept that no prejudice accrues to the respondents. The prejudice in this case is to the public interest which is ultimately served by an expeditious prosecution. Any action which delays the trial of this matter negatively impacts the public interest.

[29] Further, as I have indicated earlier, the applications were outside the three month limit since the last day for filing the applications was 4th April, 2008. The claimants are thus guilty of undue delay and have given no reasons for it except (from the bar table) that the preparation of the applications was onerous. I have already rejected that submission. In my judgment, such a delay is detrimental to the proper administration of justice.

[30] Moreover, Mr. Daly, in his written submissions, argued that on a proper application of section 25 of the Interpretation Act, the leave application was made later than three months from the date on which the complaint arose – 7th January, 2008, with the result that the application was out of time and no reason was given for the lateness or for a request for an extension of time. I agree. Section 25(7) of the Interpretation Act defines

month as “calendar month”. **Stroud’s Judicial Dictionary of Words and Phrases quotes Brett L.J. in Migotti v. Colville 4 C.P.D. 233** as holding that, “one calendar month’s imprisonment is to be calculated from the day of imprisonment to the day numerically corresponding to that day in the following month less one”. Three calendar months thus would have expired on 4th April, 2008 with the result that the claimants were out of time in their filing by at least three days. They have advanced no reasons why they were late although in their written submissions a request has been made to extend the time. In fact, as Mr. Daly submitted, the claimants have wrongly stated in the leave application that “no time limit has been exceeded. The claim has been made promptly”. This is clearly wrong and in breach of part 56.3 of the CPR 1998.

[31] Mr. Krolick in response to these submissions had submitted that the matter must be taken in context and neither respondent has asserted when the application ought to have been made. It is for them to show lack of promptitude. In any event the court should not punish the claimants for delays unless there is some prejudice to the respondents. Whatever may have been the appropriate date from which it could be said that the applicants were not prompt, any subsequent delay must be “*de minimis*” and no prejudice has been suffered, compared with the “*huge*” prejudice which could be suffered if the trial process were continued without any hope of a conviction being recorded.

[32] Mr. Maharaj in addition, submitted that preparing an application of this nature was no easy task to complete. The charges were complex and the documentary evidence bulky. He noted that the first respondent took four months to give his decision.

[33] I reject these submissions. Even if I accept that the preparation was difficult, I cannot accept that such a task should have taken three months. We live in an age of technological sophistication in which documents can be reproduced en masse by the push of a button. There is no excuse for the delay. Indeed, my own view of the matter and it is a matter to which I shall come, is that the claimants have done their best to prolong these charges because it is to their advantage to do so. Even if 7th April were the appropriate date (it was not), the applications still were not prompt. In **R v. Stratford on Avon D.C. ex p. Jackson** [1985] 1 W.L.R 1319, it was held that the fact that an application has been made within three months does not necessarily mean that it has been

made “*promptly*”, rather, there can well be cases where a court may have to consider whether or not to extend the time for making the application even though the application has been made within the three month period. It was further held that whenever there was a failure to act promptly there was “*undue delay*” even though there might be good reason for that failure.

Non-disclosure

[34] The claimants were also guilty of non-disclosure. It is trite that the court frowns upon any failure to disclose material facts. In this case the claimants failed to disclose that Fidelity and Maritime had pursued to the Privy Council a challenge by way of judicial review, of the very decision of the first respondent to commit Fidelity and Maritime to stand trial on the very charges all the claimants now seek to challenge. Those proceedings were CV 2007 – 2483 **Fidelity Finance and Leasing Company Limited and Maritime General Insurance Company Limited v His Worship Sherman McNicolls, Chief Magistrate**. The claimants in that case, (claimants #1 and 2 in CV 2008 – 1228) had been granted leave to apply for judicial review of the first respondent’s finding that the prosecution’s case established the substituted charges, (now again under challenge). Tiwary J. granted leave and on appeal the grant of leave was set aside. Weekes J.A. who delivered the judgment of the Court of Appeal, stated that at the hearing before Tiwary J. “*the sole argument before the judge was that the appellant, having discharged the respondents on all the original informations, lacked the jurisdiction to call upon them to answer any additional charges*”. It is effectively the same argument now being put before me albeit differently worded. Weekes J.A. went on to hold that:

“The general position on magisterial jurisdiction being conferred strictly by statute is beyond dispute and well understood and accepted. Ms. Lucky stressed the wording of s. 17(1) in particular ‘unless he discharges the accused person’ to argue that this suggested an incapacity in the Magistrate to ‘institute’ new charges. I find two areas of difficulty with her arguments.”

Firstly, a Magistrate does not ‘institute’ new charges when acting under s.23(2). What the Magistrate does is to find that there is material from which a charge not laid in the information has been established prima facie – at least to a sufficient degree to proceed under s. 17(1) and then onto committal, if warranted. The Magistrate then commits for trial on whatever (original and/or additional) charges the evidence discloses. The Magistrate cannot therefore be seen to have ‘instituted new charges’ as if these were pulled out of a hat. Secondly, Ms. Lucky isolates the underscored words and in so doing gives them a meaning outside of their context. S.17 does nothing more than lay out the procedure to be followed at the close of the prosecution case. The section recognizes that a no case submission or ex proprio motu the Magistrate may bring a Preliminary Inquiry to an end at that stage so nothing further need be done, but if not, the Magistrate must proceed in a certain manner. Nothing more can be read into the section, that is why I suggest that the marginal note might be of assistance.

The weakness in the respondents’ position was exposed when Ms. Lucky made the curious submission that in order not to be rendered functus, a Magistrate, who finds a no case submission to be sound in law, must employ the disingenuous method of overruling it to preserve his jurisdiction and allow him to proceed to exercise his powers under s.23(2). This is wholly unacceptable and cannot bear the scrutiny of common sense or justice. The Magistrate is bound to uphold any valid no case submission and discharge the accused on the original charge, but by virtue of s.23(2) is still able to proceed as per s.17(1) in respect of other offences disclosed on the prosecution case.

The subsequent petition for special leave to appeal to the Privy Council, JPC 90/2007, was refused by the Privy Council.

[35] The submission of the claimants in response to Mr. Daly's objections was that the challenges in these actions were not the same. Moreover, the claimants in Cv 2008-1268 and 1269 say that they were not parties to the action. Neither submission is valid. The challenges to the charges in these applications are virtually identical to that rejected by the Court of Appeal. It is also not a good answer to say that some claimants were not parties to the appeal. A successful outcome to the judicial review application would have affected the entire prosecution of all of the accused. They are all guilty of non-disclosure. Certainly in the cases of Maritime and Fidelity they are also guilty of abuse of process.

[36] The non-disclosure is sufficiently grave to warrant refusal of the entire applications. See ***R v Jockey Club Licensing Committee ex p. Wright [1991] COD 306*** in which at page 307, Potts J, in setting aside the granting of leave to file for judicial review, quoted from the *1991 Supreme Court Practice* (at page 832) stating that the position under Order 53 rule 1, as set out therein, was that the applicant must show *uberrima fides* and if leave is obtained on false statements or a suppression of material facts in the affidavit, the court may refuse an order on this ground above. He then added:

The position which obtains where an application is made under Order 53, rule 1 is set out in the note to that rule at page 832 of the Supreme Court Practice 1991. The applicant "must show uberrimae fides, and if leave is obtained on false statements or a suppression of material facts in the affidavit, the Court may refuse an order on this ground alone."

Where the application is made on paper the applicant must take the greatest care to ensure that the court is acquainted with all matters material.

In Brink's Mat Ltd v Elcombe [1998] 1 W.L.R. 1350, the Court of Appeal had been concerned with nondisclosure on the making of a

Mareva injunction but the principles there laid down were relevant in the present case. These included:

- (a) *The duty to make a full and frank disclosure of all the material facts, see R. v Kensington Income Tax Commissioners, ex p Princess Edmond de Polignac [1917] 1 K B 486.*
- (b) *The material facts were those which it was material for the judge to know and materiality was to be decided by the court and not by the assessment of the applicant or his legal advisers, see, in particular, Thermax Ltd. v Schott Industrial Glass Ltd. [1981] F.S.R. 289.*
- (c) *The applicant must make proper inquiries before making the application, see Bank Mellat v Nikpour [1985] F.S.R. 87. The duty of disclosure therefore applied not only to material facts known to the applicant but also to any additional facts which he would have known had he made such inquiries.*
- (d) *The extent of the inquiries which would be held to be proper, and therefore necessary, must depend on all the circumstances of the case including the nature of the case, the order for which the applicant contended, the degree of legitimate urgency and the time available for the making of inquiries.*
- (e) *Where material non-disclosure was established the court would be “astute to ensure that a plaintiff who obtains [ex parte relief] without full disclosure is deprived of any advantage he may have derived by that breach of duty” per Donaldson L J in Bank Mellat v Nikpour.*
- (f) *Whether the fact not disclosed was of sufficient materiality to justify or require immediate discharge of*

the order without examination of the merits depended on the importance of the fact to the issues which were to be decided by the judge on the application. Finally, the court had a discretion and it was not for every omission that an ex parte order would be automatically discharged.”

[37] The claimants in CV 2008 – 1268 well knew of the existence of the decision of the Court of Appeal, since at paragraph 44 of their grounds, they make evasive reference to the fact that a stay of the preliminary inquiry was granted by the High Court without saying why it was granted. It was an obvious reference to the earlier action by Maritime and Fidelity which avoided stating the outcome so as to conceal that the viability of the charges upon which the claimants were committed, had already been affirmed by the Court of Appeal. The claimants in CV 2008 – 1269 were also aware of that decision since they too make evasive reference to it at paragraph 45 of their grounds. In CV 2008-1228 Maritime and Fidelity who were applicants in CV 2008-2483 before Tiwary J., avoided any reference to those proceedings at all. Mr. Ferguson, the other applicant in CV 2008-1228, also did not mention CV 2007-2483. Given the close relation of these charges, he cannot be said to not have known of it. But even if he did not know, he ought to have made proper inquiries before bringing this application, since such inquiries would have revealed that prior proceedings had been filed.

[38] Further, the claimants in CV 2008 – 1268 have also filed a constitutional motion, 2008-00667, which preceded these actions. In that action both claimants have sought constitutional relief alleging, inter alia, that:

- (a) the first respondent’s oral decision of 10th December, 2007, not to recuse himself from the preliminary inquiry into the matter of **Piggott v. Brian Kuei Tung, Ishwar Galbaransingh, Amrith Maharaj, Renee Pierre, Russell Huggins, Steve Ferguson, Barbara Gomes, John Smith, Fidelity Finance and Leasing Company Limited**, is unconstitutional in that it was likely to

contravene their right not to be deprived of their liberty except by due process and their right to a fair and public hearing in accordance with the principles of fundamental justice and by an independent and impartial tribunal;

- (b) that the preliminary inquiry is null and void because it is incurably contaminated by the appearance of bias as a result of the first respondent's receipt of significant financial and "*other advantages and favours from the then Attorney General*" and as such his adjudication is a contravention of their right not to be deprived of liberty except by due process and their right not to be deprived of a fair and public hearing in accordance with the principles of fundamental justice, and by an independent and impartial tribunal;
- (c) that the committal of the claimants (Gomes and Smith) be quashed because the first respondent's continued participation in the preliminary inquiry after the JLSC had decided to interdict him was unconstitutional and a breach of their rights under section 4(b) and their right not to be deprived of a fair and public hearing by an independent and impartial tribunal.

[39] Those reliefs coincide verbatim, with reliefs (ii), (iv) and (v) of the judicial review application #2008-1268. The allegations of bias and unfairness are effectively the same in both matters. CV 2008-1268, having been filed subsequently, the claimants ought in this leave application, to have stated the existence of that motion which sought virtually the identical relief, *moreso*, because both actions were docketed to separate judges.

[40] The claimants, in my judgment, are all guilty of a cynical manipulation of the legal process. They have filed multiple but separate actions in respect of the same preliminary inquiry all seeking virtually the same relief. It was no doubt an attempt, albeit

unsuccessful, at forum shopping. The fact that the Court of Appeal has already dealt with the legality of the first respondent's decision to commit, adds to the cynical abuse.

Arguability

[41] I also do not consider that any of the claimants' contentions in the applications before me are arguable or have any realistic chance of success. The issue of arguability was discussed by Lord Diplock in **R v Inland Revenue Commissioners ex parte National Federation of Self Employed and Small Businesses Ltd** [1982] AC 617 at page 643-44, where he said:

“The whole purpose of requiring that leave should first be obtained to make the application for judicial review would be defeated if the court were to go into the matter in any depth at that stage. If, on a quick perusal of the material then available, the courts think that it discloses what might on further consideration turn out to be an arguable case in favour of granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for that relief. The discretion that the court is exercising at this stage is not the same as that which it is called upon to exercise when all the evidence is in and the matter has been fully argued at the hearing of the application.”

[42] Having read the claimants' arguments fully, I do not consider that the grounds on which the claimants' applications are based, together with the supporting documentation, made out any arguable case. It is convenient to begin with the arguments of Mr. Krolick that there was no admissible evidence adduced by the State which supported the charges and that consequently, there was no case against the claimants. The submissions were a disingenuous adaptation of the facts in **R v. Bedwelty Justices ex parte Williams** [1996] 3 WLR 361.

[43] In that case, the applicant and four others were charged with conspiracy to pervert the course of justice. The complaints were that they agreed to provide false details to police

officers and to lie on oath in a court of law. Those allegations related to an earlier charge against the applicant that she and another had assaulted and caused actual bodily harm to the complainant in the earlier proceedings in question. The appellant had denied the charge and supporting evidence in her favour was provided by two of the applicant's co-accused. That evidence was alleged to have been falsely given and led to the charges of conspiracy to pervert justice being brought against the applicant and her four accomplices. At the trial of the conspiracy charges, no witnesses were called but the prosecution produced written material, including extracts from transcripts of tape-recorded police interviews, conducted under caution with each of the five accused. The four other accused pleaded guilty but the applicant continued to deny participating in any conspiracy, maintaining that the supporting evidence had been called in good faith.

[44] The applicant was committed to trial by justices, who appeared to have treated all the written material as statements admissible under the relevant statute. The applicant's solicitor had submitted that the papers did not reveal a sufficient case to commit her. This was resisted by the prosecutor who contended otherwise. In an affidavit in judicial review proceedings the prosecutor conceded that his reliance on the interview records was wrong but maintained that there was other evidence upon which the justices could properly have found a *prima facie* case against the applicant.

[45] In the judicial review proceedings before the House of Lords, counsel for the Crown Prosecutor Service conceded that there was no admissible evidence of guilt against the applicant. It was held by the House of Lords *inter alia* that-

- (i) a committal for trial by jury at the Crown Court was liable to be quashed in judicial review proceedings where there had been a procedural error by the justices in performing their functions;
- (ii) that, although certiorari was at the discretion of the court, it will normally be applied where there had been no admissible evidence before the justices, of the accused's guilt, or, where the committal

had been so influenced by inadmissible evidence, as to amount to an irregularity having substantial adverse consequences for the defendant; whereas, the court would be slow to interfere on a complaint that evidence had been admissible but insufficient because that was more appropriately dealt with at trial.

Lord Cooke of Thorndon who delivered the judgment of the House of Lords applied the dictum of Lord Mustill in Neill v North Antrim Magistrates Court [1992] 1 WLR 1220, to the effect that it was only in the case in which the error (which resulted in the admission of inadmissible evidence) was a really substantial error leading to a demonstrable injustice that the court should intervene to quash a committal. He then said this:

“On analysis, Lord Mustill’s speech in Neill’s case will be found to differentiate two classes of case: first, the reception by examining justices of important evidence which influences the committal but is in truth inadmissible; secondly, a simple insufficiency of evidence to justify the committal. The speech leaves open the law as to the second class of case. Some observations are included which perhaps point towards a power to quash on judicial review, but Lord Mustill goes on to say that on the facts of that case he would not have thought it proper, on the ground of insufficiency alone, to exercise whatever power of intervention the court might possess. No doubt that view is to be explained by the fact that Lord Mustill accepts that there was other material on which the Magistrate could properly have committed the defendant for trial.

As for the first class of case, exemplified by Neill’s case, his Lordship propounds the tests, already mentioned, of really substantial error leading to manifest injustice, and irregularity having substantial adverse consequences for the defendant. He also points out that, if there had

been no evidence in any form from the youths, it is impossible to say whether the Magistrate would have chosen to commit.

My Lords, in my respectful opinion it would be both illogical and unsatisfactory to hold that the law of judicial review should distinguish in principle between a committal based solely on inadmissible evidence and a committal based solely on evidence not reasonably capable of supporting it. In each case there is in truth no evidence to support the committal and the committal is therefore open to quashing on judicial review. Nonetheless there is a practical distinction. If justices have been of the opinion on admissible evidence that there is sufficient to put the accused on trial, I suggest that normally on a judicial review application a court will rightly be slow to interfere at that stage. The question will more appropriately be dealt with on a no case submission at the close of the prosecution evidence, when the worth of that evidence can be better assessed by a judge who has heard it, or even on a pre-trial application grounded on abuse of process. In practice successful judicial review proceedings are likely to be rare in both classes of case, and especially rare in the second class”.

[47] In my judgment this case falls within the second class of case described by Lord Cooke. The preliminary inquiry in this case, proceeded over one hundred and seventy-eight days of hearing. Twenty-eight witnesses testified and six hundred and eighty eight exhibits were tendered. Witnesses for the State were cross-examined. After the close of the prosecution’s case, no case submissions were made by the claimants’ counsel on the original charges, after the prosecution had withdrawn its notice to amend the charges. The first respondent ultimately committed the claimants on seven charges which were based on seven amendments proposed by the prosecution as well as three new charges. He found that the evidence adduced by the prosecutor established these charges. In my judgment he was entitled to do so having regard to section 23(2) of the **Indictable Offences (Preliminary Inquiry) Act** Chap. 12:01.

[48] The claimants all make varying allegations against the committal on the substituted charges; that the first respondent acted *ultra vires* and contrary to law in ruling that there was a *prima facie* case, that he acted unreasonably and irrationally in making the ruling and in failing adequately to specify the charges on which he committed them; that they had no opportunity to cross-examine on these new charges. These allegations are all effectively dealt with by the decision of the Court of Appeal in Civ. App. 127 of 2007 (it makes the non-disclosure all the more egregious). The dictum of Weekes J.A. to which I have referred at paragraph 34 bears directly on the matter.

[49] Weekes J.A. found that a magistrate is bound to uphold any valid no case submission and to discharge the accused on the original charge but by virtue of section 23(2) is “*still able to proceed in respect of other offences disclosed on the prosecution’s case.*” Since the Act permits the magistrate this option at the end of the prosecution’s case, there can be no complaint that the claimants had no opportunity to cross-examine on the new charges. They would have had such an opportunity during the course of the preliminary inquiry on the original charges.

[50] Moreover, counsel for the claimants ought to have been aware of the powers of the magistrate under section 23(2) and by themselves should have considered the possibility that other charges could have been disclosed on the evidence. To that extent the opportunity to cross-examine was always available to them. I have not itemised them all but I consider the complaints of all the claimants in respect of the substituted charges utterly baseless. The judgment of the Court of Appeal is a complete answer to all aspects of the allegations of the claimants with respect to the substituted charges. They are nothing but variations of the arguments put forward on behalf of Fidelity and Maritime before the Court of Appeal.

[51] In so far as Mr. Krolick sought to persuade me that a civil court should consider these charges and the evidence on which it is based, I consider him to be wrong. The case of **R. v. Heston-Francois** [1984] Q.B. 278 is instructive. In that case the police had carried

out a search of the appellant's home and removed files he had prepared for use in his defence to a charge of burglary. The officers showed the documents to prosecution witnesses. The appellant argued on appeal that this was an abuse of process which should have been determined by the judge as a pre-trial issue, either on agreed facts or after hearing all the relevant evidence. However, it was held that the judge was not under a duty to conduct a pre-trial inquiry and that such conduct fell to be dealt with during the trial. Watkins L.J. at page 290 said:

“A pre-trial inquiry, such as the appellant contends the judge in this case was under a duty to embark upon, would itself be open to abuse by unscrupulous and dishonest accused persons. The criminal trial system would be placed in jeopardy. The facts of the present case demonstrated the importance of, among other things, discovering during the trial whether alleged misconduct by the police had had any effect upon the evidence and any likely bearing on the result. It had had none.”

Moreover, in Sharma v. Antoine [2006] UKPC 57, the Privy Council per Lords Bingham and Walker spoke of the court's reluctance to use the judicial review process to disturb decisions to institute criminal prosecutions. That was a case in which the challenge was to the D.P.P's decision to prosecute (as opposed to a decision of a Magistrate to commit), but I consider the reasons they give for such “*extreme reluctance*” to be equally valid in this case. These include the following (and I quote from the judgment at page 9):

“(iii) ...*the delay inevitably caused to the criminal trial if it proceeds...*

(iv) *‘the desirability of all challenges taking place in the criminal trial or on appeal’... In addition to the safeguards afforded to the defendant in a criminal trial, the court has a well-established power to restrain proceedings which are an abuse of its process, even where such abuse does not compromise the fairness of the trial itself (R v Horseferry Road Magistrates’ Court, Ex p*

Bennett [1994] 1 AC 42). But, as Lord Lane CJ pointed out with reference to abuse applications in Attorney- General's Reference (No. 1 of 1990) [1992] QB 630,642,

'We should like to add to that statement of principle by stressing a point which is somewhat overlooked, namely, that the trial process itself is equipped to deal with the bulk of complaints which have in recent Divisional Court cases founded applications for a stay.'

- (v) *the blurring of the executive function of the prosecutor and the judicial function of the court, and of the distinct roles of the criminal and the civil courts: Director of Public Prosecutions v. Humphrys [1977] A1, 24, 26, 46, 53; Imperial Tobacco Ltd v Attorney General [1981] AC 718, 733, 742; R v. Power [1994] 1 SCR 601, 621 - 623; Kostuch v Attorney General of Alberta (1995) 128 DLR (4th) pp 449-450; Pretty [2002] 1 AC 800, para 121."*

[52] To the extent that the claimants contend that there is not sufficient evidence before the magistrate, it is more appropriate for the criminal trial to address that issue, given the volume of evidence to be considered. The prosecution also will be better versed in the material and will be able to assist the trial judge on the claimants' contentions. To the extent that they say the charges are not known to law that is also a matter to be taken at the trial. To the extent that they allege that the charges lack specificity that can also be addressed at the trial.

[53] As to the allegations of bias, I consider them to be far-fetched at best. The test for apparent bias is whether the fair minded observer having considered the facts, would conclude that there was a real possibility that the tribunal was biased. See Basdeo Panday v. Superintendent Wellington Virgil Mag. App. 75 of 2006; Steve Ferguson &

Ishwar Galbaransingh v. John Jeremie, Attorney General of Trinidad and Tobago & His Worship Sherman McNicolls Chief Magistrate C.A. No. 60 of 2007; and *Web and Hay v The Queen* (1994) 181 CLR 41. A summary of the allegations against the first respondent which the claimants contend would have led a fair minded observer to conclude that there was a real danger that he was biased, were:

- (i) the first respondent was given a direction by the Chief Justice;
- (ii) his adoption of the proposals of the prosecution and apparent compliance with the advice of the Chief Justice;
- (iii) his credibility was compromised by impending disciplinary proceedings;
- (iv) his very adjudication on the application for his recusal was biased because the first respondent received financial and other advantages from the then Attorney General and because the JLSC decided to initiate disciplinary proceedings against him.

[54] As to the contention that the first respondent was directed by the Chief Justice to pay particular attention to Mr. Jenkins, the conclusion that the decisions of the first respondent reflect that advice is speculative. It also ignores the fact that the evidence of the first respondent was in support of his complaint against the Chief Justice of improper interference with the conduct of a preliminary inquiry. It is hardly likely that the first respondent would have accepted the Chief Justice's advice and then complain about it. But in any event, the advice of the Chief Justice was innocuous at best and of itself does not disclose bias.

[55] As to their contention that the first respondent adopted the proposals of the prosecutor, I am not persuaded that even if he did, this betrays any bias on his part. Many adjudicators adopt the submissions of counsel. Their reasons for adoption of the submissions by adjudicators are manifold. They may include an inability to better express the point, or simple expediency. In this case, the preliminary inquiry had been proceeding since 2002. The first respondent may well have been trying to bring the inquiry to a conclusion. The argument is speculative and has no basis in law.

[56] As to the argument that the credibility of the first respondent was undermined, that too is speculative and ignores the presumption of innocence. The first respondent is presumed innocent until the allegations against him are proven; until then they remain only allegations. The existence of such allegations could not so completely destroy the first respondent's credibility in the eyes of the public as to have rendered him unable to conduct the inquiry. It would have been a more cogent argument had the allegations been proven but without such proof, the presumption of innocence would have been sufficient to sustain the first respondent's credibility. Moreover, this is a preliminary inquiry in which the first respondent is simply required to discover whether a *prima facie* case exists in respect of the charges. It is not a trial.

[57] As for the allegations of significant financial or other advantages having been received by the first respondent from the then Attorney General, they are fanciful at best. In the first place the evidence does not establish any such fact; secondly, the facts as recited by the Court of Appeal in **Panday v Virgil** have no relation whatsoever to this case. None of the persons referred to have any connection, financially or otherwise, with the present charges or the preliminary inquiry. Moreover, while the Attorney General is accountable to Parliament for the administration of the criminal justice system, it is the sole responsibility of the Director of Public Prosecutions to institute criminal charges. In this case the original charges were instituted by the Director of Public Prosecutions and in that regard the Attorney General can have no "*interest*" in them since the DPP's office is a constitutionally independent office.

Breach of constitutional rights

[58] The claimants in CV 2008 – 1228 & 1269 allege that their rights to a fair hearing and to due process have been breached. They file no separate constitutional action. The right to seek constitutional relief is a right specifically provided for by section 14(1) of the Constitution. In this case the claimants appear to raise the alleged breach as a ground of judicial review. Part 56.7(1) of the CPR provides specifically for the manner in which an administrative order must be made, identifying whether the application is by way of judicial review or under section 14(1). Moreover, Part 26.7(2) also provides for the

manner in which a constitutional motion is to be pleaded. Nothing of the kind has been done in this case. Rather, the applications all purport to be by way of judicial review with the alleged constitutional breaches thrown in as an afterthought.

[59] In my judgment, Part 56.7(1) and Part 26.7(2) of the CPR are drafted in recognition of the fact that judicial review proceedings and constitutional motions are separate processes. Judicial review is directed at abuse of power and unfairness in the public administrative process. Constitutional motions are concerned with substantive rights and are far more comprehensive in scope. Where there is overlap, judicial review proceedings should be pursued especially where this is adequate enough to right any wrong committed. This is consistent with the directions of the Privy Council in **Attorney General of Trinidad and Tobago v Ramanooop** 2005 UKPC 15 at 337 that a constitutional relief should summarily not be sought where a parallel public law remedy exists (except for the existence of some special feature which compels the bringing of a constitutional motion).

[60] Indeed, the pursuit of judicial review proceedings is very much an exercise of the “*due process*” and “*protection of the law*” provisions set out in section 4(a) and (b) of the Constitution and ought to have been sufficient to protect the rights of these claimants, had there been a proper basis for bringing these proceedings. It was unnecessary to seek constitutional relief, nor do I believe it appropriate to have sought joint relief by pursuing both constitutional and judicial review proceedings in the same claim. The legal considerations are generally not the same.

Breach of sections 17 and 23 of the Indictable Offences (Preliminary Inquiry) Act Chap 12:01.

[61] Mr. Krolick submitted that by refusing to permit Maritime, Fidelity and Mr. Ferguson to call witnesses, the first respondent had contravened the **Indictable Offences (Preliminary Inquiry) Act** Chap. 12:01 because he had committed those claimants:

- (1) without hearing the whole of the evidence as required by the Act;

- (2) by denying Fidelity the opportunity to call witnesses which it had indicated it would do at the time of the caution;
- (3) by denying Fidelity the opportunity to cross-examine witnesses called on behalf of other accused.

[62] The fact that an accused is entitled to call witnesses under section 18 of the **Indictable Offences (Preliminary Inquiry) Act** does not entitle the accused to indefinite and multiple adjournments to permit the attendance of witnesses. Moreover, the first respondent, in deciding to strike out the summonses issued to the public officers sought by Mr. Ferguson, was exercising his judicial discretion. The fact that in doing so, he rejected Mr. Ferguson's submissions, cannot amount to a breach of the **Indictable Offences (Preliminary Inquiry) Act**. When the Act speaks of the "*whole of the evidence*", it means all such evidence as is admitted and heard by the magistrate. In the course of hearing a preliminary inquiry, the magistrate will be required to rule on matters which affect the admissibility of evidence. A ruling which results in evidence being excluded is not a breach of the Act. Moreover, the magistrate is not bound to adjourn matters, at the convenience of the accused or his counsel, moreso, a matter which had been proceeding since 2002.

[63] Finally, I can see no useful purpose to be served by calling, as witnesses for the defence, the public officers sought by Mr. Ferguson. That is a well known tactic, which became popular in the recent past, designed to do nothing more than to prolong a preliminary inquiry, to frustrate the process and to obfuscate. The first respondent was well entitled to set aside the summonses. The applications are dismissed. The claimants are to pay the respondent's costs certified fit for one senior and one junior counsel.

NOLAN P.G. BERAUX
Judge

12th January, 2009