REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. C.V. 2008-00829

BETWEEN

RICHARD BOODHAN

Claimant

AND

HER WORSHIP, MAGISTRATE DEBRA QUINTYNE

Defendant

Before The Honourable Mr. Justice des Vignes

Appearances:

Mr. Jagdeo Singh
Mr. Alvin Ramroop
Instructed by Mr. Brent Ali for the Claimant

Ms. Ayanna Humphrey
Instructed by Mr. Nairob Smart for the Defendant

J U D G M E N T

The Proceedings

1. On the 6th March 2008, the Claimant filed these proceedings against the Defendant seeking leave to make a claim for judicial review in respect of the following:
   (a) The decision of the Intended Defendant on the 11th February 2008 to proceed with summary trial of the Applicant/ Intended Claimant (In the matter of Police v. Richard Boodhan charge of stealing motor vehicle)
   (b) The decision of the Intended Defendant when she acted in excess of jurisdiction when she proceeded with the summary trial of the Applicant/Intended Claimant, notwithstanding that the Applicant/Intended Claimant did not consent to be tried summarily;
   (c) The decision of the intended Defendant on the 11th February 2008 in failing and/or refusing to consider and/or inquire or ascertain or at all the circumstances/reasons for the Applicant/Intended Claimant's withdrawal of his wish to be tried summarily and instead of being tried by a jury;
   (d) The decision of the Intended Defendant on the 11th February 2008 to rely solely on the fact that the Applicant/Intended Claimant had previously, before another sitting Magistrate, elected to proceed with his matter summarily;
   (e) The continuing refusal of the Intended Defendant to reconsider her decision to proceed with summary trial of the Applicant/Intended Claimant notwithstanding that the Applicant/Intended Claimant did not consent to be tried summarily.

2. This application was supported by an affidavit in the name of the Applicant/Intended Claimant filed on the 6th March 2008.

3. On the 6th March 2008, leave was granted by the Honourable, Mr. Justice Moosai to the Applicant to make a claim for judicial review. The reliefs sought by the Applicant may be summarized as follows:

    (i) Declarations that the decision of the Intended Defendant on the 11th February 2008 to proceed with the summary trial of the Applicant was illegal and/or null and void and of no effect and/or in excess of jurisdiction; (paragraphs 2.1, 2.3, 2.5, 2.7 of Claim Form)

    (ii) A declaration that the Intended Defendant acted unreasonably and improper (sic) in the exercise of her discretion in refusing to allow the Applicant/Intended Claimant to re-elect trial by jury (paragraph 2.9)

    (iii) An order of certiorari to remove into this Court and quash the decision of the Intended Defendant on the 11th February 2008;

    (iv) A declaration that the continuing refusal of the Intended Defendant to reconsider her decision to proceed with the summary trial is unlawful, illegal, null and void and of no effect; (paragraph 2.11)

    (v) An order of certiorari to quash the decision and/or action referred in 2.11;

    (vi) Declarations that the decisions and/or actions of the Intended Defendant infringe the Applicant's right to a fair hearing and/or to protection of the law guaranteed under sections 4 and 5 of the Constitution;

    (vii) An order that the Magistrate's Court proceedings Police v. Richard Boodhan commenced by the Defendant be heard de novo before another Magistrate;

    (viii) Damages;

    (ix) Costs

4. On the 11th March 2008, the Claimant filed the application for judicial review and this application was supported by the Claimant's affidavit filed on the same day.

5. On the 16th June 2008, the Defendant filed an affidavit in opposition to the Application for judicial review and on the 18th August 2008, the Claimant filed an affidavit in reply.

6. On the 19th February 2009, the Claimant filed submissions in support of the Application and on the 2nd March 2009 the Defendant filed submissions in opposition.

7. On the 6th March 2009, the Claimant filed a Notice to cross examine the Defendant but on the 15th June 2009, the Claimant sought and obtained leave to withdraw this application.

8. On the 15th June 2009 I directed the parties to file supplemental submissions on or before the 6th July 2009 as to the effect upon the reliefs sought in the application for judicial review filed herein of the Claimant's application to re-elect made on the 27th February 2008 and the 5th March 2008 and the Defendant's ruling on that application.

9. On the 6th and 7th July 2009, the Claimant and the Defendant respectively filed their supplemental submissions in compliance with my direction.

10. On the 13th July 2009, I heard oral submissions from both parties and reserved my decision.

Summary of Facts

11. On or about 12 May 2004 the Claimant was charged with the offence of larceny of a motor vehicle during the period 31 July 1999 to 01 August 1999, contrary to section 4 (a) of the Larceny Act, Chap. 11:12. The charge was laid indictably. The Claimant first appeared in the Magistrate's Court to answer the said charge on 26 May 2004.

12. During the period from 26 May 2004 to 08 February 2008 the matter was called approximately 18 times in the Magistrate's Court and was set down to proceed (whether by way of summary trial or preliminary inquiry) on 8 of those occasions. However, the matter was adjourned on each occasion as either the Prosecution or the Defence was not ready to proceed.

13. Throughout the entire period May 2004 to February 2008 the Claimant was represented by several Attorneys at Law, although his Attorneys at Law did not attend Court on every occasion on which the matter was called.

14. On 02 October 2007 the Claimant appeared before Her Worship Magistrate Joanne Connor to answer the said charge. His Attorney-at-Law was absent. The Magistrate called upon the Claimant to choose between summary trial and trial on indictment in the High Court and the Claimant responded that he would like the matter to be heard in the Magistrate's Court and pleaded not guilty. The Magistrate then set the trial to commence on 29 November 2007.

15. The trial did not commence on the date fixed for trial but was adjourned to 11 February 2008 for trial.

16. On 11 February 2008 the Claimant again appeared before the Defendant. Once again, his Attorney at Law was not present. After standing down the matter to allow the Claimant to contact his Attorney at Law and to await the arrival of the said Attorney at Law, the Defendant commenced the hearing of the matter at or about 1.00pm on the 11 February 2008.

17. The Defendant read the charge to the Claimant, informed him that the prosecution had recommended summary trial and called on him to choose whether he wanted to have the matter heard in the Magistrate's Court or before a Judge and jury in the High Court. The Claimant responded that he wanted to have his matter heard in the High Court. The Defendant then told him that the preliminary inquiry would commence right away.

18. However, on checking the Court file the Defendant observed that the Claimant had elected summary trial on 02 October 2007. She then told him that having elected summary trial before he was not allowed to change his election unless he could advance some good argument or reason as to why he wanted to change his election. The Defendant then called upon the Claimant to plead. He pleaded not guilty and the Defendant proceeded to hear the evidence in chief of the first prosecution witness.

19. Shortly before the Defendant had completed hearing the evidence-in-chief of the first prosecution witness, Mr. Brent Ali, Attorney-at-Law, appeared in Court and indicated that he was holding for Mr. Ramadhar who was required to be at the San Fernando Assizes. Upon completion of the evidence-in-chief of the first prosecution witness the Defendant called upon Mr. Ali to cross-examine the witness. Mr. Ali indicated that he wished to reserve his cross-examination. The Defendant indicated to him that it was a summary trial whereupon Mr. Ali stated that it was his understanding that it was a preliminary inquiry. The Defendant told him

that the Claimant had elected summary trial since 02 October 2007. Mr. Ali stated that he was not in a position to cross-examine the witness.

20. The Defendant then asked the Claimant whether he wished to cross-examine the witness and explained to him that if he did not do so the Court could conclude that he had admitted to everything the witness had said. Mr. Ali then applied for an adjournment of the proceedings stating that he was not sufficiently instructed to cross-examine the witness. The Defendant refused the application for an adjournment and again called upon the Claimant to cross-examine the witness. The Claimant indicated that he did not wish to cross-examine the witness whereupon the Defendant relieved the witness and adjourned the trial to continue on 27 February 2008.

21. The Claimant appeared before the Defendant on the adjourned date of 27 February 2008. He was again represented by Mr. Ali who was holding for Mr. Ramadhar. Mr. Ali made an application to the Court that the Claimant be allowed to re-elect between summary trial and indictable trial on the ground that the Claimant had not understood the nature and significance of the election which he had been called upon to make. He stated that the fact that on 2 October 2007 the Claimant chose summary trial and then on 11 February 2008 he chose trial on indictment showed that he did not understand the nature and significance of the election. Mr. Ali produced written submissions in support of the application which he presented to the Defendant. The Defendant adjourned the matter to 5th March 2008 and relieved the complainant and other witnesses until a decision was made in respect of the said application.

22. On the 5th March 2008 the Claimant appeared before the Defendant represented by Mr. Ramadhar. The prosecution and Mr. Ramadhar both made oral submissions before the Defendant in respect of the application

that the Claimant be allowed to change his election. The Defendant considered the said oral submissions as well as the written submissions produced by Mr. Ali on behalf of the Claimant on 27 February 2008, and refused the application. The Defendant then adjourned the trial to continue on 07 March 2008.

23. On 06 March 2008 the Claimant sought and obtained from the High Court leave to apply for judicial review of the decision of the Defendant refusing to allow him to change his election from summary trial to trial on indictment.

Issues

24. The Claimant has submitted that the following issues arise for determination in this matter:
    (a) Was the Claimant's consent required to hear the matter against him summarily?
    (b) What was the effect of the Claimant indicating on a prior occasion to another Magistrate, whilst unrepresented, that he wanted his mater to be heard summarily?
    (c) What was the effect of the Claimant indicating to the Defendant that he wished to have his mater proceeded with indictably?
    (d) What was the Defendant's duty in the circumstances where the Claimant had indicated that he wanted to have his matter proceeded with indictably having chosen summary trial before another Magistrate on a prior occasion whilst unrepresented?
    (e) Did the Defendant err[ed] in law or act[ed] unreasonably when she refused the Claimant's request to have his matter heard indictably?
    (f) Did the Defendant err[ed] in law or act[ed] unreasonably when she refused the Claimant's application, via his Attorney to re-elect his mode of trial?

(g) If the Defendant erred in law or acted unreasonably, what is the effect on the continued hearing of the matter?
(h) Was the process of election by the accused a mandatory requirement to [be] complied with by the Defendant?

25. The Defendant, on the other hand, submitted that "the issues which arise for determination by this Court are whether the Defendant in refusing to allow the Claimant to change his election acted in excess of jurisdiction and/or failed to observe procedures required by law and/or acted in breach of the principles of natural justice and/or exercised her discretion in a manner which was unreasonable, irregular or improper.

26. In my opinion, the concise statement of issues put forward by the Defendant encapsulates the primary issues raised in this application and I am satisfied that it covers the issues identified by the Claimant in its more detailed version.

Analysis of Facts

2nd October 2007

27. On this day, when the Claimant appeared in the Arima Magistrates' Court before Magistrate Jo-Anne Connor, he was unrepresented. The Claimant, in his affidavit filed on the 6th March 2008, said that he was asked by the Magistrate whether he wanted his matter to be *"done in this court"*, that is the Magistrates' Court, or if he wanted it to be heard *"by judge and Jury"*[1]. The Claimant responded that he wanted the matter heard in *"her Court"*. According to him, he thought that his matter would be heard in the Magistrates' Court and then after in the High Court. (para. 4) He was then called upon to plead, and he pleaded not guilty to the charge. His matter was set for trial on 29th November 2007.

[1] Para 4 of the Claimant's Affidavit filed 6th March 2008

28. This was confirmed by the Defendant at paragraph 6 of her Affidavit filed on 16th June 2008. It was clear from that paragraph, however, that the Defendant's knowledge of what transpired when the Claimant appeared before Magistrate Connor on 2nd October, 2007 was gleaned from the notes on the Court file for that day[2] and not from any other sources such as Magistrate O'Connor or the clerk of the Court on the 2nd October 2007.

11th February 2008

29. When the matter was called on this day, it was initially stood down to allow the Claimant's Attorney to attend. When the Attorney had not yet arrived up to 1.00 p.m., the Defendant commenced the matter. After reading the charge to the Claimant, the Defendant informed him that the Prosecution had recommended summary trial and she asked him whether he wanted to have his matter done in the Magistrates' Court or in the High Court before a Judge and jury. The Claimant responded that he wanted to have his trial in the High Court and the Defendant told him that she would commence the preliminary enquiry. However, after checking the Court file, the Defendant realized that on 2nd October 2007, the Claimant had elected summary trial. She then informed the Claimant that having elected to have his trial done summarily, he was not allowed to change his election, unless he could advance some good argument as to why he should be allowed to change.

30. The Claimant's evidence is that he was never asked by the Defendant whether he had any reason to offer for wanting to change his election nor did she give him an opportunity to provide any reasons[3]. His evidence is that, the Defendant never enquired whether he understood the difference between the two different and conflicting elections that he made[4].

[2] Exhibited to the Defendant's Affidavit as "DQ 1".
[3] See Para. 3 of Claimant's Affidavit in Response filed on 18th August 2008.
[4] Ibid

31. The Defendant did not say in her Affidavit that she had in fact asked the Claimant or afforded him the opportunity to explain why he wished to change his election. Neither does the Court Transcript for 11th February 2008[5] reflect that the Defendant gave the Claimant that opportunity. Instead, as appears from the Transcript, after the Defendant told the Claimant that he would not be allowed to change his election, she immediately proceeded to take his plea and then began hearing the evidence of the first prosecution witness. The following is an extract from the Court Transcript of 11th February 2008:

"HER WORSHIP:	*Richard Boodhan, it is alleged that during the period, Saturday 31st July and Sunday 1st August 1999, at Goodwill Crescent, Paradise East, Arouca, you stole one white Mazda pickup van, Registration No. PTA 6959 valued eighty-five thousand dollars, the property of Acostini Limited. The charge is laid indictable, however the Prosecution has asked for your case to be done in this court. You have a choice; the matter could be done here or you can go to the High Court to have a trial by Jury. Where do you want your case to be done?*
MR. BOODHAN:	*High Court, Ma'am.*
HER WORSHIP:	*You want it done in the High Court, very well. Have a seat right where you are. The inquiry commences now.*
SGT. MAHARAJ:	*Prosecution first calls…*
HER WORSHIP:	*Mr. Boodhan, on the 2nd October 2007, you elected summary trial. So, at this point and time you are not allowed to change that, unless, you could advance some good argument as to why do you want to change that, Mr. Boodhan. So, how do you plead, Mr. Boodhan.*

[5] Exhibited to the Defendant's Affidavit as "DQ 2"

MR. BOODHAN: *Not guilty, ma'am.*

HER WORSHIP; *Good. Sit. This just a formality, because since the 2nd October you elected summary trial (2nd October '07) have a seat right where you are."*

32. It is clear from this extract of the Transcript, therefore, that the Defendant having realized that the Claimant had elected summary trial on an earlier date and having informed him that he would need to provide some good argument as to why he wished to change, did not give the Claimant an opportunity to provide any reason for his change of election. It has not been suggested by the Defendant that the proceedings were incorrectly transcribed nor has she sought to clarify the notes referred to above.

33. Further, from the affidavit of the Defendant and the transcript, it is evident that the Defendant did not receive any evidence from any source as to whether the statutory requirements of S.100 of the Summary Courts Act had been fully complied with by Magistrate O'Connor. In particular, the Defendant did not ask for or receive any evidence as to whether prior to asking the Claimant whether he wished to be tried by a jury or consented to be tried summarily, Magistrate O'Connor had explained to him what it meant for his matter to be tried summarily.

34. Based on this sequence of events, I am of the opinion that on this day the Claimant signified to the Defendant his desire to withdraw his consent to summary trial that he had given on 2nd October 2007 before Magistrate O'Connor. The Defendant did not receive any evidence as to what had transpired on the previous occasion from the clerk of the court but refused to allow the Claimant to change his election, despite not hearing the Claimant's reason for wanting to do so or giving him an opportunity to provide her with any reason(s).

27th February 2008

35. The Court transcript shows that on this day, Mr. Ali again held for Mr. Ramadhar, on behalf of the Claimant. Mr. Ali made an application that the Claimant be allowed to re-elect his mode of trial. He made submissions to the Court which were also in writing[6]. Mr. Ali submitted that the fact that on one occasion the Claimant chose summary trial and on another he said he wanted his matter to be tried in the High Court showed that he did not understand the nature and significance of the election put to him on 2nd October 2007.

36. The Prosecution, who at the time was not yet served with a copy of the Claimant's submissions, responded by asking Mr. Ali to provide evidence to the Court that the Claimant did not understand the nature and significance of his election. Counsel's reply, when the question was put to him by the Defendant was that there was no need to provide evidence. An extract of what took place in Court follows:

"MR ALI:	*But ma'am, what we have before you is an application for him to re-elect.*
HER WORSHIP:	*Why should he be allowed to change his election that is…*
MR. ALI:	*Because he, clearly as I have set out in the submissions did not…*
HER WORSHIP:	*No*
MR. ALI:	*The fact that there's a dispute on one occasion he choose summary trial and on another occasion he said High Court. Shows that there is a conflict which shows that he did not understand the nature and the significance of the election. I've set out the authorities,*

[6] Exhibited to the Claimant's Affidavit filed 6th March 2008, as "R.B.1"

which show that it is a vital importance in deciding whether or not to refuse summary trial…

HER WORSHIP: *The Statute also gives him a right to elect summary trial, Mr. Ali.*

MR. ALI: *Yes Ma'am, but the authorities show that he must understand the nature of the election otherwise it would be invalid.*

HER WORSHIP: *Does the Prosecution wish to respond?*

SGT. MAHARAJ: *Your worship, I have not had the courtesy of being provided with a copy of any of those documents. But what immediately comes to mind, Your Worship, is where is the evidence that will suggest that he did not understand.*

HER WORSHIP: *Just his instructions to counsel.*

MR. ALI: *And the conflict with what he said on the last occasion, he wants the matter to be dealt with in the High Court, conflicts with the previous election. That conflict suggests that he did not understand.*

HER WORSHIP: *Where is the evidence to that, that is what the prosecutor asking about. Where is the evidence?*

MR. ALI: *We don't have to provide evidence there.*

HER WORSHIP: *What you need to do just your say so from the bar Table.*

MR ALI: *Evidence comes if…*

HER WORSHIP: *Your say so from the Bar table, Mr. Ali?*

MR. ALI: *At this stage, yes Ma'am. Evidence comes if we seek judicial review."*

37. The proceedings of this day are important because on this day, notwithstanding the position she had taken on the 11th February 2008 (that the summary trial had commenced and she was proceeding with the hearing), the Defendant entertained the application made by the Claimant's Attorney to dispense with the Claimant's previous election and that he be permitted to re-elect his mode of trial.

38. The Claimant's Attorney advanced from the Bar table that the reason for this change of election was that the Claimant did not understand the nature of his election on 2nd October, 2007. However, no evidence was given by the Claimant to establish his lack of understanding and when the the Defendant drew to the Claimant's Attorney's attention that she did not have any evidence from the Claimant to support his lack of understanding, he indicated that such evidence was not necessary at this stage but only at the stage of judicial review. This exchange between the Claimant's Attorney and the Defendant suggests a willingness on the part of the Defendant to hear evidence from the Claimant and a decision by the Claimant's Attorney not to lead evidence from the Claimant. However, it is also clear that on this occasion the Defendant again did not receive evidence to satisfy herself as to what had occurred in Court on the 2nd October 2007.

39. The matter was then adjourned to 5th March 2008, for a decision on the application.

5th March 2008

40. On this day, Mr. Ramadhar appeared on behalf of the Claimant. The prosecutor responded to Mr. Ali's submissions made on the 27th February 2008.

41. Mr. Ramadhar sought to ascertain from the court whether the Court was aware of the circumstances under which the Claimant elected summary trial when the choice was put to him by Magistrate Connor on 2nd October 2007. Counsel asked the Court whether Magistrate Connor would be a witness in any hearing to determine what happened in court on that day.

42. The Defendant's response was the Magistrate *"would have done what was proper in all the circumstances, which is why she would have affixed her signature to this, saying that he elected summary trial and pleaded not guilty…"*[7]

43. In the final analysis, the Defendant refused the application on the basis that the Claimant did not submit reasons as to why he should be allowed to change his election.

44. In my opinion, it may be considered that the Defendant's enquiry of the Claimant's Attorney as to evidence to support the Claimant's lack of understanding and the response from the Claimant's Attorney amounted to an opportunity being given by the Defendant to the Claimant to give evidence which he declined through his Attorney. However, in any event, the Defendant chose to rely on a presumption of regularity in respect of the actions of Magistrate O'Connor on 2nd October, 2007 and did not, prior to making her decision to refuse the application, receive any evidence as to what occurred on 2nd October, 2007.

[7] See page 10 of Court transcript of 5th March 2008, exhibited to the Defendant's Affidavit as "DQ3"

Analysis of the Law

Election of summary trial and consent of the accused

45. Section 100(2) of the Summary Courts Act authorizes a Magistrate to proceed to deal with an indictable offence listed in the Second Schedule of the Act summarily if it appears to the Magistrate, having regard to representations made in the presence of the accused either by the prosecutor or by the accused and to the nature of the case, that the punishment that the Court has power to inflict under the section is adequate and that the circumstances do not make the offence one of serious character and do not for other reasons require trial on indictment.

46. In order to proceed in this manner, by section 100(3), a Magistrate must do the following:
    (1) cause the charge to be written down, if this has not yet been done;
    (2) cause the charge to be read to the accused;
    (3) inform the accused that he may, if he consents, be tried summarily instead of being tried by a jury;
    (4) explain what is meant by being tried summarily.

47. Thereafter, by section 100(4) the Magistrate must ask the accused whether he wishes to be tried by a jury or consents to be tried summarily. If the accused consents, the Magistrate shall proceed to the summary trial of the accused.

48. If the Magistrate decides to proceed to summary trial, therefore, it is clear that the accused must be told that he must give his consent before the matter can be dealt with summarily. In the absence of such consent, the Magistrate cannot proceed to deal with the matter summarily and must continue with the hearing of a preliminary enquiry.

49. The requirement that the Magistrate must explain what is meant by being tried summarily casts a heavy burden upon the Magistrate which must be discharged prior to calling upon the accused to answer whether he wishes to be tried by a jury or consents to be tried summarily.

Discretion to permit change of election

50. Magistrates have a discretion to permit a person to change an election as to mode of trial[8]. In **Archbold's Criminal Pleading, Evidence and Practice 2009, at para. 1-75d,** the existence of this discretion is confirmed in the following passage:

> ***"Application to change election***
> ***Magistrates have a discretion to permit a change of election as to mode of trial. When considering how to exercise that discretion a fundamental question is whether the defendant properly understood the nature and significance of the choice which he had made at his initial election. Unless he had such and understanding he should be permitted to re-elect. On an application to change an election for summary trial, where a not guilty plea has been entered, the fact that prosecution witnesses are ready to give evidence and that it is undesirable to delay the trial further are not relevant to the understanding of the applicant, but once it is established that he understood the nature and significance of his original choice these are matters that can properly be taken into account in the exercise of the justices' discretion: R. v. Bourne JJ, ex p. Cope [1989] C.O.D. 304, DC. An accused person is not lightly to be deprived of a right to trial by jury: R. v. Craske, ex p. Metropolitan Police Commnr [1957] 2 Q.B. 591, DC. ……The***

[8] R v Southhampton Justices, ex parte Briggs [1972] 1 WLR 277

fact that the Magistrates consider the case more suitable for summary trial is irrelevant in such circumstances. R. v. Birmingham JJ., ex p. Hodgson [1985] Q.B. 1151."

51. In **Blackstone's Criminal Practice 2007, at Section D.4.48** the manner of exercising that discretion is described as follows:

"D4.48 (b) In exercising their discretion whether or not to accede to an application to reelect, magistrates must have regard to the 'broad justice' of the situation (per Lord Widgery CJ in Southampton Justices, ex parte Briggs [1972] 1 WLR 277). They are entitled to take into account: (1) that the defendant had his rights as to mode of trial fully explained to him; (ii) that he understood those rights; (iii) that he voluntarily consented to be tried summarily; and (iv) that there were no unusual, difficult or grave features in the case (Lambeth Metropolitan Stipendiary Magistrate, ex parte Wright [1974] Crim. LR 444, as explained by McCullough J in Ex parte Hodgson [1985] QB 1131 at 1140 A-C) The fact that the accused was unrepresented when he elected summary trial is not sufficient by itself to compel the court to allow a withdrawal of election, even if he is subsequently advised that trial on indictment would be preferable (see, e.g., Metropolitan Stipendiary Magistrate, ex parte Zardin (14 May 1971 unreported) Conversely, although his having had legal advice before electing would obviously be a very powerful argument against an application to re-elect, there is no reason to suppose that it must inevitably be decisive.

(c) Where the material before the magistrates shows that the accused, when he elected summary trial, did not properly understand the nature and significance of the choice put to

him, the broad justice of the situation demands that he be allowed to reelect. Although it is still a matter for the court's discretion, in such a case the discretion may be properly exercised in only one way, that is, in favour of the accused. Therefore, refusal of the accused's application will be quashed by certiorari (see Ex parte Hodgson; Highbury Corner Metropolitan Stipendiary Magistrates, ex parte Weekes [1985] QB 1147 and D4.26 et seq.).……

D. 4.49 Concerning the procedure that justices should follow at an application to re-elect, the Divisional Court has stated that they should inform themselves of what happened on the occasion of the original election. If they themselves were then sitting, their unaided recollection may be sufficient. If not the clerk should provide the information (e.g., through consulting the court files). If the accused is arguing that he did not understand the consequences of his original election, it is for him to establish that, whether by his own evidence or other means (see Forest Magistrates' Court, ex parte Spicer [1988] Crim. LR 619, a case in which the justices' decision was set aside because they made it without the necessary evidence).

52. From the passages cited above, the leading case on the exercise of discretion in relation to an application to re-elect is **R. v. Birmingham Justices, Ex parte Hodgson & Ors. [1985] 2 W.L.R. 630**. In that case, McCullough J. examined the factors to be taken into account when justices are faced with an application to re-elect:

"***What did the broad justice of the case require in this case?***

These last two authorities, Reg. v. Highbury Corner Metropolitan Stipendiary Magistrate, ex parte Hassan Ali (unreported) and Reg. v. Derwentside Justices, Ex parte Hemmingway (unreported) focus if I may respectfully say so upon what seems to me to be the central factor to which attention should be paid when justices are faced with an application to re-elect, namely the state of mind of the defendant at the time he made his election. Did he properly understand the nature and significance of the choice which was put to him? Like Watkins L.J., I believe that it is unrealistic to do other than to recognize that one of the most important factors in the mind of the defendant himself, when he is deciding which court he would like to deal with his case, is whether or not he believes he has any defence. In many cases, he may not know whether he has a defence in law until he has had the benefit of legal advice. This is certainly one factor which would lead me, were I sitting as a justice, to look favourably on an application to re-elect made by a defendant who when unrepresented elected summary trial and pleaded guilty at a later stage said that a solicitor had told him that he had a defence and should plead not guilty. The other vital factor in my estimation is the one emphasized in Reg. v. Craske, Ex parte Metropolitan Police Commissioner [1957] 2 Q.B. 591 namely that a defendant is not lightly to be deprived of a right to trial by jury. In the case of an offence triable either way a defendant has such a right. Regardless of the fact that the justices have said that they regard summary trial as the more appropriate, section 20(3) of the Act of 1980 gives him an absolute right to refuse to consent o such a trial…… If the defendant demonstrates that his original choice was exercised when he did not properly understand the nature and

significance of the choice which he was making, then it is as if he had never made that choice and I repeat that Parliament conferred on a defendant the right to make that choice regardless of the justices' view about which was the more suitable court to deal with the case. …."

53. In **Forest Magistrates' Court, ex parte Spicer (ibid)**, the applicant sought judicial review of a decision not to allow him to change his election to be tried summarily. The applicant had been charged with going equipped for theft. After advance disclosure of the prosecution evidence the applicant appeared before the justices and consented to summary trial, having pleaded not guilty. The case was adjourned for hearing. At the adjourned hearing before different justices, the applicant was represented by a solicitor who asked that the previous election be dispensed with and the applicant be permitted to re-elect as to mode of trial. It was asserted that the applicant had not understood the consequences of his election. The application was opposed. No evidence was given as to the earlier hearing and the applicant was not invited to give evidence to the justices. Without retiring, the justices refused the application.

54. The Queen's Bench Divisional Court allowed the application and remitted the matter to the justices. They held that a person who seeks to re-elect on the basis that he did not understand what he was doing has to establish that fact to the satisfaction of the justices. He may do so by providing evidence, if any, from other sources of his lack of comprehension and by giving to the justices evidence on his own account as to why he lacked the necessary comprehension. The justices need to know before they consider their decision what happened on the earlier occasion when the election was made. If the same justices are sitting on both occasions, they may have that information by remembrance. However, if they did not sit earlier, the justices must receive evidence as

to what occurred. That evidence is best provided by the clerk who sat on the earlier occasion. Where the defendant is unrepresented, the justices should not only ensure that they have evidence of what happened at the time of election, but should also invite the defendant to give evidence before them as to his reasons for the application to re-elect. (emphasis mine) The Court concluded, therefore, that since the evidence necessary for a proper determination of the issue was not before the justices, their decision had to be set aside.

Applying the Law to the Facts

55. Having regard to the facts as outlined above and the issues identified by the parties, I now proceed to apply the law to the facts.

56. The Claimant's consent to be tried summarily was mandatory and this is not really in dispute between the parties.

57. On the 2nd October 2007, when the Claimant appeared before Magistrate O'Connor, he was unrepresented. It is not clear from the evidence of the Claimant or the Defendant whether Magistrate O'Connor explained to the Claimant what was meant by being tried summarily as she ought to have done in compliance with the mandatory requirement stipulated by Section 100(3). Although he has stated at paragraph 4 of his affidavit filed on the 11th February 2008 that he thought that his matter would be heard in the Magistrate's Court and then after in the High Court, the Claimant has not complained that Magistrate O'Connor failed to give him such an explanation and has admitted that he told Magistrate O'Connor that he wanted the matter heard "in her Court" whereupon he was called upon to plead and he pleaded not guilty. Prima facie, therefore, the legal effect of this choice exercised by the Claimant was that, provided the Defendant satisfied herself by evidence that a proper election had been made by the

Claimant on the previous occasion, she was entitled to proceed to hear and determine the matter summarily based on the previous election made by the Claimant before a different Magistrate. If the Claimant wished to change his election, he would need to intimate to the Defendant that he wished to change his election and he needed to provide proper grounds to the Defendant. **Chadee v. Santana (1987) 42 W.I.R. 365.**

58. On the 11th February 2008, when the matter was called before the Defendant, the Claimant responded to the Defendant that he wanted to have his trial in the High Court and the Defendant indicated that she would proceed with the preliminary enquiry. This response from the Claimant was in clear conflict with the Claimant's earlier election. When the Defendant observed from the Court file that the Claimant had made a different election before Magistrate O'Connor on the 2nd October 2007, she quite properly informed him that she would not allow him to change his election unless he could advance some good argument as to why he should be allowed to change his election. This was in accordance with the discretion which the Defendant had to permit the Claimant to change his election.

59. However, there were two problems with the action of the Defendant at this stage:
    (a) Firstly, she did not receive any evidence as to what had transpired on the previous occasion when the election was made, to satisfy herself that the requirements of section 100 of the Summary Courts Act had been strictly complied with.
    (b) Secondly, bearing in mind that the Claimant was unrepresented before her, she did not invite the Claimant to give evidence before her as to his reasons why he was now saying that he wanted to be tried in the High Court when he had earlier consented to be tried summarily. The Claimant's evidence is that he was never asked by

the Defendant whether he had any reason to offer for wanting to change his election nor did she give him an opportunity to provide any reasons. On the other hand, the Defendant in her affidavit did not state that she in fact asked him for his reasons or afforded him an opportunity to explain why he was now saying he wanted to be tried in the High Court. The Court transcript also supports the view that the Defendant did not give the Claimant an opportunity to explain.

60. In my opinion, therefore, these were crucial omissions on the part of the Defendant since she did not make sufficient enquiries to ascertain whether the Claimant properly understood the nature and significance of the choices, which were put to him.

61. Further, she did not pay sufficient attention to the fact that the Claimant was not lightly to be deprived of his right to a trial by jury. Given the fact that the Claimant had clearly responded to the Defendant's enquiry as to his choice of trial by saying that he wanted to be tried in the High Court, she was now faced with a clear contradiction between his earlier election and what he was now saying to her. Based on his answer, the Defendant ought to have done more to determine whether the Claimant properly understood the different options before insisting that he was bound by the earlier election.

62. The nub of the Defendant's case in relation to what transpired on the 11th February 2008 is that the Claimant gave his consent to summary trial before Magistrate O'Connor on the 2nd October 2007 and that when he appeared before her on the 11th February 2008 she held him to that election and embarked on the hearing of the evidence at a summary trial. Insofar as she recounted what occurred on the 2nd October 2007, however, the Defendant made it clear that her evidence with respect to

that date was based on the information recorded on the Court file. It is evident from a perusal of paragraph 6 of the Defendant's affidavit herein that the Defendant did not say that the facts contained therein were based on information provided to her directly by Magistrate O'Connor or by the clerk of the Court on that day. She also did not say that Magistrate O'Connor had complied strictly with section 100 (3) and, in particular, had explained to the Claimant what was meant by being tried summarily. The absence of such evidence as well as the Claimant's evidence as to what transpired before Magistrate O'Connor leads me to conclude that the evidence as to the Claimant's understanding of the nature and significance of the choice put to him by Magistrate O'Connor is unsatisfactory. Since the Defendant refused to permit the Claimant to re-elect, she ought to have satisfied herself that at the time of his election, the Claimant understood clearly the choice he was called upon to make.

63. On the 27th February 2008, the Claimant's Attorney made an application that the Claimant be allowed to re-elect his mode of trial. It is clear from the evidence of the Claimant and the Defendant that the Defendant entertained this application on the 27th February and 5th March 2008 because not only did she hear Counsel for the Claimant but she also heard submissions from the prosecution. However, in light of the fact that the Claimant was unrepresented at the time he made his election for summary trial, the Defendant still needed to know before she made her decision what happened on 2nd October 2007 before Magistrate O'Connor. Even if it may be argued that the Defendant gave the Claimant the opportunity to give evidence on his own account as to why he did not understand the nature and significance of his initial election and that he declined that opportunity, the Defendant did not receive evidence, other than what was written on the Court file, as to what occurred before Magistrate O'Connor. In my view, that was not sufficient. The evidence

necessary for a proper determination of the application to re-elect was not before the Defendant.

Conclusions

64. Having reviewed the Claim Form filed on the 11th March 2009, I am satisfied that the reliefs sought therein are widely drafted and permit the Claimant to challenge the actions of the Defendant on the 5th March 2008. In particular, the Claimant has sought judicial review of the decision of the Defendant to refuse to allow the Claimant to re-elect jury trial and this relief is wide enough to cover the decision made by the Defendant on the 5th March 2008. Insofar as the Claimant sought to challenge the "continuing refusal of the Defendant to re-consider her decision to proceed with a summary trial notwithstanding the Claimant's lack of consent", I am of the view that on the 27th February and 5th March 2008, the Defendant re-considered her decision made on the 11th February 2008 and exercised her discretion afresh. Therefore, any errors or omissions made by the Defendant on the 11th February were overtaken by the re-consideration of the application to re-elect and it would not be appropriate to grant relief in respect of the decisions made by the Defendant on the 11th February 2008.

65. In the light of my earlier analyses, I am of the opinion that the evidence necessary for the proper determination of the issue of whether or not the Claimant should be permitted to re-elect was not before the Defendant when she considered the Claimant's application to re-elect on the 5th March 2008.

66. Having regard to the broad justice of the situation herein and bearing in mind especially that a defendant is not lightly to be deprived of the right to trial by jury, I am of the opinion that the Defendant did not properly

exercise her discretion when on the 5th March 2008 she refused to allow the Claimant to re-elect.

67. Accordingly, for these reasons, I would allow the application for judicial review of the refusal of the Defendant to allow the Claimant to re-elect trial by jury and make a declaration, as sought at paragraph 2.9 of the Claim Form, to the effect that the Defendant acted improperly in the exercise of her discretion. I also hereby quash the refusal of the Defendant to allow the Claimant to re-elect and remit the case for re-consideration by another Magistrate in the light of the principles stated herein.

Dated this 6th day of November 2009.

André des Vignes
Judge