THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2018-02524

IN THE MATTER OF AN APPLICATION BY STEVE FERGUSON, ISHWAR GALBARANSINGH, PETER CATEAU, BRIAN KUEI TUNG AND TYRONE GOPEE FOR AN ADMINISTRATIVE ORDER PURSUANT TO PART 56 OF THE CIVIL PROCEEDINGS RULES, 1998 AND THE JUDICIAL REVIEW ACT

BETWEEN

STEVE FERGUSON

ISHWAR GALBARANSINGH

PETER CATEAU

BRIAN KUEI TUNG

TYRONE GOPEE

Claimants

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

Defendant

Appearances:

Claimant: Mr. Fyard Hosein S.C, Mr. Edward Fitzgerald Q.C., Ms. Sasha Bridgemohan, Mr. Aadam Hosein and Ms. Annette Mamchan.

Defendant: Ms. Elaine V. Green.

Before the Honourable Mr. Justice Devindra Rampersad

Date of delivery: November 14, 2019.

JUDGMENT

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Introduction

1. The legislative event which eventually led to the filing of this claim by the claimants for certain declaratory relief took place on the 15 September 2005, when the Government of the Republic of Trinidad and Tobago brought into force the Indictable Offences (Preliminary Enquiry) (Amendment) Act, 2005 (the Amendment Act)[1] which amended, *inter alia*, section 23 of the Indictable Offences (Preliminary Enquiry) Act, Chapter 12:01 ("the IOPEA").

2. Section 23(8) of the IOPEA provides, as follows:

> *"Notwithstanding subsections (5), (6) and (7), the Director of Public Prosecutions or the Deputy Director of Public Prosecutions may prefer an indictment whether or not a preliminary enquiry has been conducted only in the following instances:*
>
> *(a) …*
>
> *(b) …*
>
> *(c) where a Magistrate has heard evidence and the depositions taken before him disclose a prima facie case and he is unable to complete the preliminary enquiry because of his:*
>
> *(i) physical or mental infirmity;*
>
> *(ii) resignation;*
>
> *(iii) retirement; or*
>
> *(iv) death;"*

[1] Act No. 23 of 2005.

3. The Amendment Act, limited the retrospective effect of section 23(8), by virtue of section 23H, which provides:

> *"Sections 16, 16C, 16D, 17, 17A, 18, 23(8) and 23A to 23G shall not apply to a preliminary enquiry that began before 15th September 2005."*

4. The Magistrate presiding over the preliminary enquiry (Piarco No. 2 proceedings) in which the claimants are the accused retired without having completed the preliminary enquiry. The claimants are seeking inter alia a declaration that the defendant be prevented from exercising the power under section 23(8) of the IOPEA.

5. The simple issue for determination is whether the preliminary inquiry, which is the subject of these proceedings, began before 15 September 2005.

The Claim

6. On the 16 July, 2018 the claimants filed a Fixed Date Claim Form pursuant to Part 56 of the Civil Proceeding Rules, 1998 (CPR, 1998) and the Judicial Review Act, Chapter 7:08 against the defendant, seeking the following reliefs:

   6.1. A declaration that the Defendant cannot lawfully exercise the power to prefer an indictment under [section] 23(8) of the Act because the Preliminary Enquiry had begun before 15 September,

2005, and as such, the exercise of powers conferred by section 23(8) is expressly barred by section 23H of the Act.

6.2. A declaration that the Claimants can only be lawfully committed to a trial for the offences, first inquired into in the Preliminary Enquiry, after the institution and conduct of a fresh preliminary inquiry before a new Magistrate.

6.3. Costs and such further directions and or orders as the Court considers just and as the circumstances warrant.

Grounds for Reliefs

7. The grounds for seeking these reliefs are contained in the joint affidavit of the claimants in support of the claim as well as the affidavit of Steve Ferguson, both filed on the 16 July, 2018. The claimants has outlined both factual grounds as well as legal grounds for seeking the reliefs. These grounds can be summarized as follows:

The Factual Context before 15 September 2005

8. The claimants were all defendants in a preliminary enquiry colloquially known as "Piarco No. 2". The preliminary enquiry was concerned with allegations of conspiracy to defraud and corruption arising out of the construction of the Piarco International Airport. The charges in the preliminary enquiry were laid indictably, pursuant to the Indictable Offences (Preliminary Enquiry) Act, in May 2004 and on the 17th May 2004, warrants of apprehension pursuant to section 8 of the said Preliminary Enquiry Act were issued against the claimants. Many of these charges are

no longer extant. The outstanding charges against the claimants collectively are set out in Information Nos. 6408/04, 6409/04, 6410/04, 6412/04, 6413/04, 6415/04, 6417/04, 6418/04 and 6419/04, and amended Information Nos. 1874/05, 1875/04, 1876/05 and 1878/05 and Appendix B.[2]

9. The other defendants in Piarco No. 2 are Amrith Maharaj, Raul Gutierrez, Ronald Birk, Eduardo Hillman, Sadiq Baksh, Ameer Edoo, Edward Bayley (now deceased), Renee Pierre and 5 companies namely, Maritime General Insurance Company Limited, Maritime Life (Caribbean) Limited, Fidelity Finance and Leasing Company Limited, Northern Construction Limited and Calmaquip Engineering Corporation.

10. The claimants were first brought before the Magistrate on various dates in May 2004 and were granted bail and the matters were adjourned. There were a number of hearings in the matter shortly thereafter, one of which was on the 3 June 2004, when lead prosecuting counsel Sir Timothy Cassel QC, informed the Magistrate that he was opening his case for the Prosecution and in furtherance of this he provided a brief introduction to the matter and sought approval from the court to make an opening statement. He also sought approval to provide the court with a bundle of documentary exhibits.

[2] See SF 2 attached to the affidavit of Steve Ferguson filed 16th July, 2018.

11. Attorneys representing certain defendants, including the claimants Brian Kuei Tung and Steve Ferguson, expressed their objection to the opening address proposed. The Magistrate then adjourned the preliminary enquiry to accommodate the hearing of fuller arguments as to the entitlement of Mr. Cassel QC to make an opening address. The Magistrate, after hearing arguments, and receiving written skeleton submissions on adjourned dates of the preliminary enquiry, eventually ruled, on 10 June 2005, that he was not so entitled.

12. On the 1 April 2005, the Magistrate was called upon to deal with the question of whether the enquiry into the charges against certain of the corporate defendants, namely Maritime General Insurance Company Limited, Maritime Life (Caribbean) Limited and Fidelity Finance and Leasing Company Limited (the "said corporate defendants"), could proceed notwithstanding that they had not appointed representatives. The Magistrate heard submissions from counsel on the above stated issue and eventually ruled that the charges could not proceed because they were unrepresented. That decision was ultimately reversed by the Court of Appeal in **Application No 10 of 2005 Director of Public Prosecutions and The Senior Magistrate Her Worship Ms Ejenny Espinet**. The Court of Appeal referred to the Magistrate's decision as one that had been made "during a preliminary enquiry" and having allowed the appeal directed the Magistrate to "proceed with the preliminary enquiry".

13. On the 10 June 2005, the issue of joinder of the charges against the defendants, including the claimants was raised and discussed, however the Magistrate indicated that she would await the submissions of Mr. Rajiv Persad, the defence attorney representing the defendant Mr. Amrith

Maharaj, as well as the claimant Ishwar Galbaransingh, before determining this issue. The Magistrate ultimately ruled that all charges should be heard together.

14. The issue of disclosure was also raised before the Magistrate on the 10 June 2005, and consequent upon the Magistrate's directions, the prosecution disclosed documents to the defendants. On the 10 June 2005 the Magistrate issued summonses to the said corporate defendants[3] to appear before the court. At this point, the ruling of the Court of Appeal in **Application No 10 of 2005 Director of Public Prosecutions and The Senior Magistrate Her Worship Ms Ejenny Espinet**, had not yet been delivered and the issuing of the fresh summons arose when the Magistrate indicated that the presence of a representative from the said corporate defendants would be required. In connection with this, on 15 July 2005 PC Nanan gave evidence on behalf of the prosecution with respect to the service of the summonses on the said corporate defendants. The evidence of PC Nanan was taken down in writing by the Magistrate, read out and signed, in accordance with section 16 of the Act.[4]

[3] Maritime General Insurance Company Limited, Maritime Life (Caribbean) Limited and Fidelity Finance and Leasing Company Limited.

[4] See SF 3 attached the affidavit of Steve Ferguson filed 16 July, 2018.

15. Thereafter, the preliminary enquiry spanned **more than 12 years** until 24 January 2018, when the Magistrate indicated that she would be proceeding on pre-retirement leave. The hearing before her subsequently ceased.

16. Prior to that point, evidence on behalf of the prosecution was heard and various prosecution witnesses were cross-examined. The prosecution began leading its evidence in May 2008. Numerous witnesses were called by the prosecution and cross-examined, including Richard Saunders, Ronald Birk of Birk Hillman Consultants, Justin Paul, Lynette Stephenson (the Solicitor General), Margaret Mc Dowall Thompson, Simon Cement, Sonia Francis, Rae Furlonge and James Pantina. On 17 May 2010, the prosecution eventually closed its case and the claimants and other defendants made submissions that there was no case to answer, which was opposed by the prosecution. In response to the no case submissions, the prosecution indicated to the court that it did not intend to proceed with certain charges and that they wanted to re-open their case to lead further evidence. Despite objections by the defence, the Magistrate allowed the prosecution to re-open their case which they did in April 2011. It was closed for a second time in February 2012. Shortly after this the preliminary enquiry was halted by the institution of constitutional proceedings which challenged the continuance of the preliminary enquiry. These proceedings were however unsuccessful and in 2016 the prosecution resumed its case. Between April and September 2016, the claimants and other defendants made further written and oral submissions that there was no case to answer. Over the course of three days, that is, 6

January 2017, 27 January 2017 and 10 February 2017, the Magistrate gave her ruling on the no case submissions and rejected them.

17. Judicial review proceedings were launched in relation to that ruling on the grounds including the appearance of bias on the part of the Magistrate, but the application for judicial review was dismissed by the Honourable Madam Justice Wilson. That decision was appealed in ***P042-2018, CV2017-01642 Between Northern Construction Limited and others and Her Worship Senior Magistrate Ejenny Espinet v The Director of Public Prosecutions***, and is still before the Court of Appeal. However, matters progressed during the hearing of the judicial review application, and certain defendants, including the claimant Peter Cateau, adduced evidence in rebuttal of the prosecution's case before the Magistrate went on pre-retirement leave on 24 January 2018. The issue then arose as to what course should be taken with regard to the incomplete preliminary enquiry. On the 13 May 2018, the Magistrate went into full retirement.

18. After the Magistrate went on pre-retirement leave, various possibilities were canvassed as to how the matter would be dealt with. These included the re-appointment of the Magistrate for a limited period to complete the preliminary enquiry; the defendant should commence fresh proceedings; and the invocation of the defendant's powers to prefer an indictment pursuant to section 23(8) of the Act. The claimants shared the view that a fresh preliminary enquiry should be commenced.

19. On the 1 June 2018, at the adjourned hearing of the preliminary enquiry before Magistrate Narine, the defendant indicated through his counsel,

Mr. Gilbert Peterson SC, that he intended to obtain the depositions taken in the preliminary enquiry and consider his powers under section 23(8) of the Act. Further, in a letter dated 29 May 2018, from the defendant to the Chief Magistrate, Her Worship, Maria Busby-Earle Caddle, the defendant made reference to section 23(8) of the Act and appeared to be contemplating the exercise of his powers under the subsection. In that letter, reference was also made to an earlier letter dated 15 May 2018, from the Chief Magistrate Busby-Earle Caddle to the defendant. The claimants obtained a copy of this letter. In this letter, Chief Magistrate Busby-Earle Caddle indicated that Magistrate Espinet had heard the evidence, depositions were taken and "Her Worship had determined that a prima facie case had been established against the accused on the 10 February 2017."

20. The only point at which a Magistrate is authorised to determine that a prima facie case has been established is at the conclusion of a preliminary inquiry (see section 23(1))[5], having heard evidence from both the prosecution and the defence. In this case the Magistrate had heard no evidence from the defence as of 10 February 2017, and she had not asked the defendants if they wished to give evidence. The defence were still leading evidence in the preliminary enquiry when the Magistrate went on pre-retirement leave on 24 January 2018. At that point both Mr. Baksh

[5] Section 23 (1) provides: "When all the witnesses on the part of the prosecutor and of the accused person, if any, have been heard, the Magistrate shall, if, upon the whole of the evidence, he is of opinion that no prima facie case of any indictable offence is made out, discharge him; and in such case any recognizance taken in respect of the charge becomes void."

and Mr. Cateau had begun to give evidence, but neither had finished doing so.

21. In her letter of 15 May 2018 the Chief Magistrate also addressed the following inquiry to the defendant: "As Ms. Espinet has now officially retired, kindly advise as to what course of action you propose to adopt, having regard to section 23(8) (c) of the [Act]". This was the first time the claimants knew that the Magistrate had in fact retired and would not be returning to complete the preliminary enquiry.

22. When the claimants were charged in 2004 there was obviously no suggestion that the prosecution might have the power to circumvent the committal process by preferring an indictment since the amendment did not come until 2005 allowing that power. Thereafter the claimants spent many years engaging with the committal proceedings in order to secure a judicial determination that there was insufficient evidence to commit them for trial.

23. On the 1 February 2018 and the 5 June 2018, Mr Fitzgerald wrote to the defendant on behalf of Mr. Ferguson, to the effect that it would be unlawful to prefer indictment in the preliminary enquiry under section 23(8). The defendant did not reply.

The Substantive Ground for Relief

24. The claimants' substantive ground for the relief sought stems from the amendment to the IOPEA.

25. The IOPEA was amended in 2005 by the Indictable Offences (Preliminary Enquiry) (Amendment) Act, 2005, which came into operation on 15 September 2005. Section 23(8) of the Act was brought into force by virtue of the Amendment Act, and amongst other things gives to the defendant the power to prefer *"an indictment whether or not a preliminary enquiry has been conducted"* in certain defined instances, including, *"where the Magistrate has heard evidence and the depositions taken before him disclose a prima facie case and he is unable to complete the preliminary enquiry"* due to his/her retirement (section 23(8) (c) (iii)).

26. However, the Amendment Act, limited the retrospective effect of a number of its provisions including section 23(8), by virtue of section 23H which provides: *"Sections 16, 16C, 16D, 17, 17A, 18, 23(8) and 23A to G shall not apply to a preliminary enquiry that began before 15th September 2005."*

27. The claimants say that whether from a literal, purposive or contextual interpretation, it is plain that that the preliminary enquiry in this case "began before 15th September 2005", within the meaning of that expression as used in section 23H of the Act. Indeed, although there is no ambiguity on this point, had there been doubt, this conclusion is supported by statements made during the parliamentary debates on this issue. Accordingly, any purported exercise by the defendant of the powers conferred by section 23(8), would be unauthorised or contrary to the law and in excess of his jurisdiction.

28. On a statutory contextual analysis, the claimants say that a preliminary enquiry begins no later than when the accused first appears before the Magistrate and the charges are read to him.

29. The claimants went on to assert that Piarco No 2 preliminary enquiry had begun before 2005 and as such the Defendant (DPP) is barred by virtue of section 23H of the Act from exercising the powers under section 23(8).

30. The claimants, relying on ***Pepper v Hart***[6], relied on the assertion that Parliament had clarified that the provisions under section 23(8) would not apply to the Piarco prosecutions and would not have retrospective effect.

31. Looking ahead at the defendant's case, the claimants went on to say that this court is not bound by the decision of Justice Ibrahim in the case of ***Ameer Edoo v Ejenny Espinet and the DPP,***[7] ("**Edoo**") which is heavily relied on by the defendant. Even in applying the ruling in **Edoo**, the preliminary enquiry had begun because the prosecution had opened its case and PC Nanan had given evidence.

The Issues

32. The issue for this court to determine is whether the Piarco No 2 preliminary enquiry is subject to section 23(8) (c) (iii) of the Indictable Offences (Preliminary Enquiry) Act as amended by the Indictable Offences (Preliminary Enquiry) (Amendment) Act, 2005.

[6] [1993] AC 593

[7] CV2006-03973

33. Simply put, when did the preliminary enquiry in the Piarco No. 2 proceedings begin?

The Claimants' Submissions

34. The claimants' submission is that the preliminary enquiry had not concluded before the Magistrate departure on leave on 24 January, 2018 and her full retirement in May 2018. Based on the ruling of Madam Justice Gobin in ***Attorney General v Her Worship Maria Busby Earle-Caddle and Ors***[8], a preliminary enquiry in such an instance would have to be commenced again before another Magistrate.

35. The claimants submitted the following on the relevant statutory provisions:

    35.1. The DPP's power to prefer indictments under section 23(8) is a power introduced by amendments made by the Indictable Offences (Preliminary Enquiry) (Amendment) Act, No 23 of 2005. In particular, section 9 of the Amendment Act introduced a new section 23(8) of the principal Act. This authorizes the DPP to prefer an indictment where a preliminary enquiry has begun but the Magistrate is prevented from completing the proceedings by reason of, among other things, retirement, and where the evidence discloses a prima facie case

[8] CV 2017-03190

35.2. This amendment and the others effected by the Amendment Act were subject to the transitional provisions set out in section 16 of the Amendment Act: *"This Act shall not apply to a preliminary enquiry that began before the commencement of the Indictable Offences (Preliminary Enquiry) (Amendment) Act 2005."*

35.3. The commencement date of the Amendment Act was 15 September 2005, so the effect of section 16 of the Amendment Act was that the DPP's powers under the new section 23(8) of the principal Act were not applicable to preliminary enquiries that began before 15 September 2005.

35.4. A transitional provision to the same effect is set out in section 23H of the principal Act, which provides as follows: "Section 16, 16C, 16D, 17, 17A, 18, 23(8) and 23A to 23G shall not apply to a preliminary enquiry that began before 15 September 2005.

35.5. The text of the Amendment Act did not, in fact, include a provision to insert section 23H into the principal Act, and nor did any amending statute. Section 23H seems to have been inserted as an editorial revision to reflect section 16 of the Amendment Act.

36. The claimants submitted that in determining whether the new section 23(8) applies, the question is not whether the magistrate has begun to inquire into the matter as an examining magistrate before the relevant date. That was the question in ***R v Worcester Magistrates' Court, ex parte***

Bell[9], applying different provisions in English law. The claimants contend that the legislation in Trinidad and Tobago is different and the only question here is whether the process identified by the Act as a "preliminary enquiry" was one that "began" before 15 September 2005. That is the question arising from section 23H of the Act, and it is the same question arising from section 16 of the Amendment Act.

37. The claimants contend that they are entitled to the protection of section 23H of the Act and section 16 of the Amendment Act because the preliminary enquiry had begun before 15 September 2005. That is because they had already appeared before the Magistrate, she had begun to hold the preliminary enquiry, the prosecution and defence had made rival submissions on preliminary points of law and procedure and the Magistrate had already begun to exercise her powers as an examining Magistrate conducting a preliminary enquiry in the various ruling that she had made. In those circumstances, whether the statutory language is given its natural meaning or a purposive reading, the preliminary enquiry had begun before the 15 September 2019.

38. The Defendant on the other hand submitted that the preliminary enquiry had not begun before the 15 September 2015. He submitted that it had not begun until the Magistrate started to hear the prosecution evidence to establish a prima facie case in 2008, and he relied on the decision of Mr. Justice Ibrahim to that effect in ***Edoo***.

[9] [1992] 157 JP 921

Statutory Basis for Saying When It Began

39. The claimants' argument is that the preliminary enquiry had begun before the 15 September 2005 for the following six (6) reasons.

40. Firstly, for the purposes of section 23H, a preliminary enquiry begins as soon as the defendant appears before the magistrate empowered to deal with the preliminary enquiry, and the claimants in this case had already appeared before the Magistrate between May and June 2004. The claimants relied on the case of **R v Bow Street Magistrate, ex parte Kray [1968] 3 All ER 872**. In this case, Lord Widgery held:

> *"The magistrates begin to act as examining justices not from the time when the evidence is opened, but from the time when the accused is brought before the court" [page 876 G].*

Comments and Discussion

40.1. This decision, however, rests on the particular statutory provision that applies in that case.

40.2. Widgery LJ said[10]:

> *"Regulations have been made under this Act, and I think it appropriate to deal with the one which is relevant to this matter. They are the Magistrates' Courts Rules, 1967. …*
>
> *…. Finally, section 35 says:*

[10] [1968] 3 WLR 1111 at 1114

> *"It is hereby declared for the avoidance of doubt that a magistrates' court before which a person is charged with an indictable offence begins to act as examining justices as soon as he appears or is brought before the court, except where before that time the court has determined under section 18 of the Magistrates' Courts Act 1952 to try him summarily".*

40.3. Quite obviously, he formed the respectful view that these words were sufficiently clear to mean exactly what it says. Of course, we do not have the same provision in our jurisdiction.

41. Secondly, by September 2005 the Magistrate had plainly begun to exercise her jurisdiction as an examining magistrate. So even applying the test under English law, a preliminary enquiry in this case had begun. It was in exercise of that broad jurisdiction that she had made a series of rulings. The following chronology of events and rulings were made before 15 September 2005.

41.1. In May 2004, charges were laid against the claimants. They were brought before the Magistrate on various dates during the month and the charges were read to them. They were granted bail by the Magistrate and the proceedings were adjourned.

41.2. On 3 June 2004 Sir Timothy Cassel QC, leading the prosecution counsel, informed the Magistrate that he was opening his case. He introduced the case briefly and sought the court's approval to make an opening statement and to place a bundle of documentary exhibits before the court. Objection was taken to this course and the Magistrate adjourned the proceedings to provide for the hearing of fuller arguments as to the Prosecution's entitlement to

make an opening statement. The Magistrate eventually ruled in June 2005 that the prosecution were not entitled to make an opening statement.

41.3. On 8 September 2004 submissions were filed by the prosecution on the issue of the proposed opening statement.

41.4. The Magistrate then made a series of legal rulings during the period up until June 2005.

41.5. On 1 April 2005 the Magistrate was called upon to deal with the question of whether the inquiry into charges against certain corporate defendants could proceed in the absence of appointed representatives. Having heard submissions she ruled that they could not. That decision was reversed by the Court of Appeal in ***DPP and Senior Magistrate Her Worship Ms. Ejenny Espinet, Application No. 10 of 2005***.

41.6. On 10 June 2005 the Magistrate ruled that the prosecution was not entitled to make an opening statement. On that day, the issue of joinder of the charges against the defendants was raised and discussed. The Magistrate however indicated that she would await the submissions of counsel for two of the accused before making a determination on this issue. Ultimately, the Magistrate ruled that all charges should be heard together.

41.7. Also, on this date, consequent upon the Magistrate's directions, the prosecution disclosed documents to the defendants.

41.8. On the said 10 June 2005 the Magistrate issued fresh summonses to the corporate defendants to appear before the court.

41.9. On 15 July 2005 the Magistrate heard evidence from PC Nanan on the service of fresh summonses on the corporate defendants.

42. The claimants submitted that from the above, the Magistrate exercised the powers conferred on her under the Act, and exercised her jurisdiction as an examining justice in a number of significant ways during the period from June 2004 to 15 September 2005. That remains the case despite the fact that no evidence had yet been adduced by the prosecution to establish a prima facie case on the charges. It is the claimants' submission that the safeguard contained in section 23H applies because the preliminary enquiry had begun and the Magistrate was already holding a preliminary enquiry.

43. Thirdly, a contextual statutory analysis of the Act leads to the conclusion that a preliminary enquiry begins no later than the accused's first appearance before a Magistrate exercising her powers under the Act. From that point, the process identified as a "preliminary enquiry" in the Act has begun. The claimants submitted that the contextual arguments can be seen in the following provisions:

43.1. Section 2(2) refers to a Magistrate's jurisdiction to: "issue summonses, warrants and other processes of court, to grant bail and to fix the amount, to take recognisances, and to bind over parties and witnesses and to administer oaths."

43.2. The claimants submitted that Magistrates have no inherent jurisdiction and no inherent powers to conduct any kind of

proceedings. They can only conduct proceedings and exercise their powers in those proceedings as expressly envisaged in legislation. There is nothing in the Act to suggest that a preliminary enquiry should not be regarded as beginning until the point when the prosecution begins to lead the evidence relied on to establish their case.

43.3. Section 3 confers the first procedural stage under the Act. This is for a Magistrate to issue a summons or warrant to compel the appearance of a person accused of an indictable offence "for the preliminary examination" of that person (section 3). Further, provision for a person's arrest under the Act is made in section 8. The language used in the Act indicates that if a person is produced in response to a summons or warrant, he is being produced for preliminary examination or for a preliminary enquiry. He is not being produced for any other purpose. On that basis, too, the preliminary enquiry begins when the person is first produced in court, which in this case was in 2004.

43.4. In subsection 10(1) of the Act, the term "preliminary enquiry" is first used in the Act itself. It provides:

> *"When any person is apprehended upon a warrant he shall be brought before a Magistrate as soon as practicable after he is arrested, and the Magistrate shall either proceed with the preliminary enquiry or postpone the enquiry to a future time, in which latter case he may grant him bail or commit him to prison according to the provisions hereinafter contained."*

44. The claimants submitted that unless the Magistrate makes a decision to postpone the preliminary enquiry, the text in the statute is clear. From the accused's first appearance onwards, the Magistrate is proceeding with the preliminary enquiry, and the preliminary enquiry must therefore have begun. In the instant case the claimants were brought to court in May 2004 and at that point during the first appearance, the magistrate purported to postpone the preliminary enquiry.

45. Section 13(1) allows a *"Magistrate holding a preliminary enquiry"* to order an autopsy or a medical investigation of a serious injury:

> *"The Magistrate holding a preliminary enquiry shall make or cause to be made such local inspection as the circumstances of the case may require; and in the case of homicide or serious injury to the person, the Magistrate shall cause the body of the person killed or injured to be examined by the duly qualified medical practitioner …"*

46. The claimants explained that this power is intended to be exercisable as a matter of urgency, but it is only conferred on the Magistrate when he/she is holding a preliminary enquiry, i.e. when the preliminary enquiry has already begun. The Act does not prevent the Magistrate from exercising this power until such time as the prosecution start to lead their evidence. It is the claimants' submission that this is another categorical indication that the approach in ***ex parte Bell*** does not apply to the question of when a preliminary enquiry has begun under the Act.

47. Section 14 is headed *"Proceedings at preliminary enquiry"*, and provides that a Magistrate may "*from time to time adjourn a preliminary enquiry if he considers it expedient to do so"*. The claimants contended that this is significant, because the only power to adjourn proceedings that have been

brought under the Act is the power to adjourn a preliminary enquiry under section 14. This is what Senior Magistrate Espinet was doing at the end of each hearing, adjourning the preliminary enquiry because she considered it expedient to do so. There was nothing else, and the court notes no other power, to adjourn. This, too, leaves no doubt that the preliminary enquiry had begun before September 2005.

48. Section 16(1) requires the prosecution witness's evidence to be taken down in writing. The power to take evidence in both the section 16(1) prior to the 2005 Amendment as well as the version after the Amendment, is only conferred when an accused *"is before a Magistrate holding a preliminary enquiry"*. The claimants submitted that it is clear from the statutory language that when this particular process takes place, the preliminary enquiry is already being held and has begun.

49. The Magistrate took evidence from PC Nanan on the 15 July 2005. It is the claimants' submission that she did so under section 16. In the judgment of ***Edoo*** the judge noted that PC Nanan's evidence "*was taken and recorded in the same manner as prescribed in sec. 16 of the Act*". Therefore, the Magistrate was undoubtedly holding a preliminary enquiry, because otherwise she would have had no power to take the officer's statement and the preliminary enquiry must therefore have begun.

50. The claimants also contend that section 41 of the Act also supports the principle that a preliminary enquiry begins no later than when the accused is first brought before the Magistrate. This provision deals with the

publicity surrounding a preliminary enquiry and places a general embargo on publications "in relation to any preliminary enquiry under this Act".[11]

51. Fourthly, the fundamental principle of non-retrospectivity supports a broad and expansive interpretation of the protection from retrospective application contained in section 23H. That section is designed to protect those with a legitimate expectation that they would be dealt with in accordance with the old procedures from a series of novel provisions that restrict the rights of the defence at a preliminary enquiry and favour the convenience of the prosecution.

52. Fifthly, the claimants' analysis is supported by the legislative history of the Amendment Act.

53. Sixthly, the claimants' analysis is supported by the analogous position in the Administration of Justice (Indictable Proceedings) Act, 2011, as to when proceedings are instituted or begin for the purposes of the transitional provisions in the Act.

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[11] Section 41(1) provides that: No person shall print or publish or cause or procure to be printed or published, in relation to any preliminary enquiry under this Act, any particulars other than the following:

(a) The names, address and occupation of the accused person and the witnesses;

(b) A concise statement of the charge and the defence in support of which evidence has been given;

(c) Submissions on any point of law arising in the course of the enquiry, and the decision of the Magistrate thereon.

Section 23H

54. The claimants submitted that there is no ambiguity in the language used in section 23H of the Act or section 16 of the Amendment Act, so there is no need to look beyond the natural meaning of the statutory text. However, in the alternative, if the court finds that there is ambiguity, the claimants submitted that it is clear from the parliamentary debates that the Amendment Act was intended not to be retrospective. The claimant, therefore is relying on the principle that courts can look at parliamentary debates on the legislation as a guide to both its purpose and its meaning, applying the mischief rule in ***Pepper v Hart*** (supra). In looking at the parliamentary debates, the claimants contended that the clear purpose of the transitional provisions was to exclude cases such as the claimants' case that were already before the Magistrates' Court, and the meaning of "began" in section 23H was intended to encompass those cases.

Disapplication of Edoo

55. The claimants have invited this court not to follow Ibrahim J's decision in **Edoo** and his reasoning and his adoption of the test applied in ***ex parte Bell*** for the following reasons:

    55.1. Firstly, the decision of Ibrahim J in ***Edoo*** is not binding on the court. The court is free to depart from it if it is plainly wrong.[12] The court

[12] See **R v Greater Manchester Coroner, ex parte Tal** [1985] 1 QB 67 and **R v Governor of Brockhill Prison, ex parte Evans** (No. 1) [1997] QB 443.

should be prepared to depart from such an earlier decision where the consequences of not doing so would be to perpetuate an injustice in a case where the fundamental rights and liberty of a citizen is at stake.[13]

55.2. Secondly, Ibrahim J's decision was *per incurium*. The judge was not referred to the specific statutory history of section 23H or the Hansard debates on the 2005 Amendment Act, which introduced section 23H. When applying ***ex parte Bell***, the judge was not referred to and did not acknowledge the specific statutory provisions in the Act. The decision in ***ex parte Bell*** concerned different statutory provisions with a different legislative rationale. The question in that case concerned the statutory provisions governing *"a Magistrates' Court inquiring into an offence as examining justices"*. The case turned on a conceptual distinction between a decision whether to conduct a preliminary enquiry at all (the abuse of process decision) and the actual exercise of the jurisdiction to inquire. That distinction has since been discredited,[14] in any event it has no application to the different test in the present case of whether a preliminary enquiry is one that "*began*" before the relevant date.

55.3. Thirdly, even if the reasoning in ***ex parte Bell*** were applied to the present case, the test might well be satisfied. That is because Rose

[13] See **R v Parole Board and another, ex parte Wilson** [1992] QB 740.

[14] See **Re Ashton & Ors** [1994] 1 AC 9, which held that the approach adopted in **R v Randle and Pottle** was wrong.

LJ ruled that a court would have begun to enquire into the case as examining justices once the prosecution has opened their case. In the present case, it may be said that the prosecution had already opened their case, because they had already introduced the case, laid certain exhibits before the court, and sought permission to give a formal opening of the case.

Reliance on Cottier; Halsbury and Act No 20 of 2011

56. The claimants relied on the case of ***DPP v Cottier***[15]. In this case the Divisional Court was considering a statutory requirement that *"no proceedings … for an offence shall be begun in any court*" unless certain notices had been given. The justices took the view that the proceedings began when the defendant made his first appearance at court and the Divisional Court confirmed that they were right to do so.

57. Further, the claimants relied on ***Halsbury's Laws of England***[16] which stated: *"The enquiry is commenced by calling the name of the accused. If he appears, the charge or charges against him are read over"*.

58. The claimants also relied on the analogous position under the ***Administration of Justice (Indictable Proceedings) Act*** **No. 20 of 2011.**

[15] [1996] 1 WLR 826

[16] 4th Ed, para. 828

Like section 23H of its predecessor, the 2011 Act seeks to ensure a fair and just transition to the new regime with appropriate transitional provisions. In particular, section 4(1) of the 2011 Act creates a general rule that the Act *"shall apply to proceedings which are instituted on or after the coming into force of this Act"*. The claimants contend that there is an obvious parallel between that provision and section 23H of the preceding Act, which disapplies the specified new provisions to a preliminary enquiry that began before 15th September 2005, when the Amendment Act entered into force.

The Defendant's Submissions

The Provisions of the 2005 Amendment Act

59. The defendant submitted that the 2005 Amendment Act introduced new procedures for the conduct of preliminary enquiries under the IOPEA. Further, these provisions are procedural in nature and are not substantive changes. The defendant examined sections 16, 16C, 16D, 17, 17A, 18, 23(8), 23A to 23G and 23H and made submissions on them as follows:

Section 16

59.1. In examining section 16 the defendant compared the original section 16[17] of the IOPEA to the amended section 16 and

[17] Section 16 of the IOPEA provides:

(1) When an accused person is before a Magistrate holding a preliminary enquiry, the Magistrate shall take or cause to be **taken down in writing** the evidence of the witnesses on the part of the prosecutor apart from each other, unless the Magistrate thinks it is necessary or conducive to the

contended that the changes brought about by the 2005 Amendment Act was in allowing the evidence for the prosecution not only to be taken down in writing but to be recorded by electronic audio recording, video recording or Computer Aided Transcription.[18] The defendant further contended that there is

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ends of justice that any of the witnesses should be permitted or required to be present during the whole or any part of the examination of any of the other witnesses.

(2) The evidence of each such witness shall be given in the presence of the accused person, or, if taken in his absence, shall be read over to the accused in the presence of the witness; and the accused person is entitled to cross examine him.

(3) The evidence of every such witness shall be taken down in writing in the form of a deposition.

(4) Such deposition shall be read over to the witness and shall be signed by the witness and the Magistrate; or if the witness refuses to sign or is incapable of signing, then by the Magistrate; the accused person, the witness, and the Magistrate being all present together at the time of such reading and signing.

(5) Any witness who refuses, without reasonable excuse, to sign his deposition may be committed to prison by warrant by the Magistrate holding the enquiry, there to be kept until after the trial or until the witness signs his deposition before a Magistrate; but if the accused person is afterwards discharged, any Magistrate may order any such witness to be discharged.

(6) The signature of the Magistrate shall be at the end of the deposition of each witness, in such a form as to show that it is meant to authenticate the deposition.

[18] Section 3 of the Indictable Offences (Preliminary Enquiry) Act provides: "Section 16 of the Act is repealed and the following new section is substituted:

16. (1) When an accused person is before a Magistrate holding a preliminary enquiry, the Magistrate shall take or cause to be **taken down in writing, or have recorded**, the evidence of the witnesses on the part of the prosecution apart from each other.

(2) If the Magistrate thinks it is necessary or conducive to the ends of justice that any of the witnesses shall be permitted or required to be present during the whole or any part of the examination of any of the witnesses, the Magistrate shall take or cause to be **taken down in writing, or have recorded**, the evidence of the witnesses in their presence accordingly.

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nothing in the new section 16 which is restrictive in the sense contended by the claimants. Counsel said that the changes are plainly a procedural one and not a substantive provision. The defendant states that this new section 16 was applied in the Piarco No.2 proceedings in a number of ways, for example:

59.1.1. to record those witness for the prosecution who gave their evidence viva voce;

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(3) If the evidence is being taken down in writing, the following shall apply:

(a) the evidence of each such witness shall be taken down in the form of a deposition;

(b) such deposition shall be read over to the witness and shall be signed by the witness and the Magistrate; or if the witness refuses to sign or is incapable of signing, then the deposition shall be signed by the Magistrate, and the accused person, the witness and the Magistrate shall be present together at the time of such reading and signing;

(c) any witness who refuses, without reasonable excuse, to sign his deposition may be committed to prison by warrant by the Magistrate holding the enquiry, there to be kept until after the trial or until the witness signs his deposition before a Magistrate, but if the accused is afterwards discharged, any Magistrate may order any such witness to be discharged; and

(d) the signature of the Magistrate shall be at the end of the deposition of each witness, in such a form as to show that it is meant to authenticate the deposition.

(4) If the evidence is recorded by electronic audio recording, video recording or Computer Aided Transcription (CAT), a transcript of the recorded evidence shall be prepared and verified by the certificate of those responsible for the accuracy of the recording of the proceedings and of the transcript in accordance with the Recording of Court Proceedings Act, 1991.

(5) The evidence of each such witness shall be given in the presence of the accused person, or, if taken in his absence, the authenticated deposition or verified transcript shall be read over to the accused in the presence of the witness, and the accused person is entitled to cross-examine him."

59.1.2. to record the evidence of cross-examination of prosecution witness whose evidence in chief was tendered in the form of written statements; and

59.1.3. to take by video recording the evidence of two witness in Canada.

Sections 16C, 16D, and 17A

59.2. The defendant submitted that the provisions of sections 16C, 16D and 17A of the IOPEA, which were brought into effect by section 4 and 7 of the 2005 Amendment Act, govern the admissibility of written statements by witnesses both for the prosecution and the accused. These provisions, which the claimants contend are more restrictive, were applied to the Piarco No. 2 proceedings. The witness statements tendered on behalf of the prosecution were filed pursuant to those provisions.

Section 17

59.3. Section 17 of the IOPEA came into effect by section 5 of the 2005 Amendment Act and makes provision for the procedure to be followed by a Magistrate at the close of the case for the prosecution where the accused has not been discharged. The defendant submitted that the new conditions imposed by the amendment, which the claimants say are restrictive, allows for what an accused person says to be recorded by electronic audio recording, video recording or computer Aided Transcription.

Section 18

59.4. Section 18 of the IOPEA was repealed and replaced pursuant to section 8 of the 2005 Amendment Act and permits the evidence of witnesses for an accused to be taken in the same manner as the evidence of witnesses for the prosecution. That is, not just taken down in writing but recorded by electronic audio recording, video recording or Computer Aided Transcription.

Section 23(8)

59.5. Section 23(8) permits the defendant to prefer an indictment, whether or not a preliminary enquiry has been conducted, in certain circumstances. For present purposes, the challenge to the application of section 23(8) arises from subsection (c) (ii).

Sections 23A to 23G

59.6. Sections 23A to 23G, were brought into effect by section 10 of the 2005 Amendment Act. The defendant submitted that section 23A has no application to this claim of the Piarco No. 2 proceedings, while sections 23B to 23G allows, inter alia, for the cross examination of prosecution witnesses whose evidence takes the form of a written statement; and the making of a submission of no case and of a reply thereto.

Section 23H of the IOPEA

60. Section 23H of the IOPEA provides that: "*Section 16, 16C, 16D, 17, 17A, 18, 23(8) and 23A to 23G shall not apply to a preliminary enquiry that began*

before 15th September 2005." Section 23H was given effect to by section 16 of the Amended Act.

61. The defendant, having concluded that the changes introduced by the 2005 Amendment Act being procedural in nature, submitted that section 23H of the IOPEA is properly regarded as a purely transitional provision. Further, there is nothing in the Amendment Act, including 23(8), which affects the vested rights of the claimants or imposed upon them any detriment or penalty retrospectively. Therefore, section 23H does not, engage the rule against retrospectivity.

62. The defendant's counsel relied on the case of ***R v Secretary of State for Social Security ex parte Britnell***,[19] for her submission that section 23H was intended to aid examining magistrates in making the transition from the

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[19] [1991] 1 W.L.R. 198 (HL) at p. 202 where Lord Vide Bridge stated: *"The purpose of a transitional provision being to facilitate the change from one statutory regime to another, it could not properly be regarded as authorising innovation by widening the ambit of the substantive legislation.*

As Staughton L.J. observed in the Court of Appeal, it is not possible to give a definitive description of what constitutes a transitional provision. In Thornton on Legislative Drafting, 3rd ed. (1987), p. 319, it is said:

> *"The function of a transitional provision is to make special provision for the application of legislation to the circumstances which exist at the time when that legislation comes into force."*

One feature of a transitional provision is that its operation is expected to be temporary, in that it becomes spent when all the past circumstances with which it is designed to deal have been dealt with, while the primary legislation continues to deal indefinitely with the new circumstances which arise after its passage."

old regime where the evidence in preliminary enquiries were required to be written by hand to the new scheme where evidence might be recorded in writing and by electronic audio recording, video recording or Computer Aided Transcription.

63. The defendant submitted that such transition allowed, therefore, for Magistrates to complete all preliminary enquiries in which, on the 15 September 2005, the evidence and subsequent proceedings relevant to the committal of accused persons were already being recorded by hand.

64. The defendant, having concluded that section 23H is transitional in nature, supported its submissions from the case of ***R v Worcester Magistrates' Court ex parte Bell and Ors***[20] that the phrase "*a preliminary enquiry that began before 15th September 2005"* is to be interpreted as referring to a preliminary enquiry in which, by the 15th September 2005 the prosecution had either opened its case, called witnesses or the magistrate had taken some step pertinent to the committal of an accused to stand trial.

[20] [1992] 157 J.P. 921, Vide Rose, L.J. stated that: "*The first and crucial question is whether Mr Goldberg is right in saying that once magistrates are sitting as examining justices, they are from that moment necessarily inquiring "into an offence" in the words of s 6(1) or "into the information" in the words of s 19(4) or "into the case" in the words of s 4(1)(c). In my judgment, they are not. As Card v Salmon shows, from the time when the decision as to mode of trial is made, magistrates sit as examining justices, but it does not seem to me to follow that they embark on the inquiry to which the three statutory provisions refer* ***until either the prosecution open the case or witnesses are called or, it may be, some other step pertinent to the actual committal of the case for trial is taken.*** *Logically, and as a matter of practicability, a submission of abuse of process can and should, as it seems to me, be made prior to that embarkation. If it is successful, there can be no committal. The defendants will be discharged and costs are likely to be saved. Equally, as it seems to me, magistrates are not, by hearing submissions on abuse of process, inquiring into an offence …"*

65. The defendant contends that an opening statement was never made by the prosecution in the Piarco No. 2 proceedings. In its affidavit in opposition to the claim filed on the 23 January 2019, the Director of Public Prosecution deposed the following regarding the opening statement:

> *"8. It was the Prosecution's intention to make an opening statement before the commencement of the preliminary enquiry. This course was objected to by the Accused. On the 3rd of June 2004 Sir Timothy Cassel QC, who then led the team for the Prosecution, appeared in Court and indicated to Senior Magistrate Espinet that he had just been briefed in the matter and that he wished inter alia to review the charges. Sir Timothy also indicated that he wished to prepare an opening statement and a bundle of documents for the Court and Counsel for the accused. Counsel for the Accused did not agree to an opening statement, and further submitted that until there had been disclosure by the Prosecution any consideration of an opening statement would be premature. The matter was then adjourned to the 8th of September 2004.*
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> *9. By the hearing on the 8th of September 2004 the Prosecution had filed submissions on the opening statement. From the 8th of September 2004 the matter was adjourned to the 30th of November 2004. At the hearing on that date Sir Timothy raised the following issues before Senior Magistrate Espinet:*
>
> *(i) Further charges;*
>
> *(ii) The absence from the jurisdiction of some of the accused, namely Ronald and Eduardo Hillman;*
>
> *(iii) The opening statement; and*
>
> *(iv) Disclosure.*
>
> *Sir Tim therefore suggested to Senior Magistrate Espinet that the matter be adjourned to early January 2005 for preliminary matters*

to be completed as a date needed to [be] fixed for the start of the preliminary enquiry.

10. The issue of whether the Prosecution could deliver an opening statement was resolved by senior Magistrate Espinet on the 10th of June 2005 when Her Worship ruled that the Prosecution was not permitted to make an opening statement. It is therefore incorrect to say that the Prosecution's case was opened on the 3rd of June 2004 as the claimants' assert in paragraph 5 of their joint affidavit."

66. With respect to the evidence of PC Nanan, the defendant contend that his evidence was not given in support of the Prosecution's case for committal to trial. The Director of Public Prosecution deposed, as follows:

> *"7. The delay in the commencement of the preliminary enquiry in Piarco No. 2 arose because several preliminary issues had to be resolved before evidence could be led by the Prosecution. These issues included disclosure, whether the Prosecution could make an opening statement, joinder, the representation of corporate defendants, and the non-appearance of overseas defendants. It is in respect of this latter issue that Police Constable Nanan gave evidence on the 15th of July 2005. Police Constable Nanan did not give evidence on that date in support of the Prosecution's case for committal to trial."*

67. In comparing the ***ex parte Bell*** case to the Piarco No 2 case, the defendant contended that the submission of abuse of process in ***ex parte Bell*** is akin to the preliminary issues dealt with by the Presiding Magistrate prior to the 28 May 2008, which include the appearance and representation of the corporate defendants. By dealing with those issues, the Presiding Magistrate had not begun the preliminary enquiry in the Piarco No. 2 proceedings. On the other hand, if the claimants are correct it would mean that the preliminary enquiry in the Piarco No. 2 proceedings began at different times for the claimants and their co-accused as different accused

had their first appearances on different dates. Accused Ronald Birk and Eduardo Hillman had not appeared in the proceedings by the 30 November 2004.

68. The defendant submitted that the case of ***ex parte Kray*** does not assist the court in determining when a preliminary enquiry has begun. This is so having regard to section 35 of the Criminal Justice Act 1967 (UK)[21].

69. The defendant avers that the case of ***DPP v Cottier***, which is relied on by the claimants to determine when "proceedings begin" is consistent with the proceedings in the Piarco No. 2 proceedings having commenced when charges were first laid and the commencement of the preliminary enquiry at a subsequent date. Therefore, a case management conference or pre-trial review in the civil jurisdiction of the High Court is not a trial.

70. In order to avoid the decisions in ***ex parte Bell*** and ***Edoo***, the claimants relied upon the rule in ***Pepper v Hart***,[22] and therefore relied upon the words used by the former Attorney General and the former Minister of Legal Affairs when the 2005 Amendment Act was debated to bind the

[21] That point was referred to earlier and is accepted by this court

[22] [1993] AC 593 (HL). Vide Lord Brown-Wilkinson stated at page 640: *"I therefore reach the conclusion, subject to any question of Parliamentary privilege, that the exclusionary rule should be relaxed to as to permit references to Parliamentary materials where (a) legislation is ambiguous or obscure, or leads to an absurdity; (b) the material relied upon consists of one or more statements by a Minister or other promoter of the Bill together if necessary with such other Parliamentary material as is necessary to understand such statements and their effect; (c) the statements relied upon are clear."*

defendant in the exercise of powers under section 23(8) of the IOPEA. The defendant contend that it is not a member of the executive.

71. The defendant submitted that the conditions laid down in ***Pepper v Hart*** are cumulative and cited the case of ***R v Secretary of State for the Environment, Transport and the Regions*** to support this contention.[23]

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[23] [2001] 1 AC 349 (HL). At pages 392-392 Vide Lord Bingham of Cornwall stated: *"In Pepper v Hart the House (Lord Mackay of Clashfern LC dissenting) relaxed the general rule which had been understood to preclude reference in the courts of this country to statements made in Parliament for the purpose of construing a statutory provision. In his leading speech, with which all in the majority concurred, Lord Browne-Wilkinson made plain that such reference was permissible only where (a) legislation was ambiguous or obscure, or led to an absurdity; (b) the material relied on consisted of one or more statements by a minister or other promoter of the Bill together, if necessary, with such other parliamentary material as might be necessary to understand such statements and their effect; and (c) the effect of such statements was clear (see pp 640B, 631D, 634D). In my opinion, each of these conditions is critical to the majority decision.*

> *(1) Unless the first of the conditions is strictly insisted upon, the real risk exists, feared by Lord Mackay of Clashfern LC, that the legal advisers to parties engaged in disputes on statutory construction will be required to comb through Hansard in practically every case (see pp 614G, 616A). This would clearly defeat the intention of Lord Bridge of Harwich that such cases should be rare (p 617A), and the submission of counsel that such cases should be exceptional (p 597E).*
>
> *(2) It is one thing to rely on a statement by a responsible minister or promoter as to the meaning or effect of a provision in a bill thereafter accepted without amendment. It is quite another to rely on a statement made by anyone else, or even by a minister or promoter in the course of what may be lengthy and contentious parliamentary exchanges, particularly if the measure undergoes substantial amendment in the course of its passage through Parliament.*
>
> *(3) Unless parliamentary statements are indeed clear and unequivocal (or, as Lord Reid put it in R v Warner [1969] 2 AC 256, 279E, such as "would almost certainly settle the matter immediately one way or the other"), the court is likely to be drawn into comparing one statement with another, appraising the meaning and effect of what was said and considering what was left unsaid and why. In the course of such an exercise the court would come uncomfortably close to questioning the proceedings in Parliament contrary to article 9 of the Bill of Rights 1688 (1 Will & Mary, sess 2, c 2) and might even violate that important constitutional prohibition.*

… I think it important that the conditions laid down by the House in Pepper v Hart should be strictly insisted upon.

72. The claimants having conceded on their submissions that there is no ambiguity in the language of section 23H, it is the submission of the defendant that there is no basis for the application of the rule in ***Pepper v Hart*** to permit reference to be made by His Lordship to the Parliamentary debate on the precursor Bill to the 2005 Amendment Act. Accordingly, ***ex parte Bell*** and the decision of Ibrahim J in ***Edoo*** remain good law. The defendant submitted therefore that section 23H of the IOPEA, limited to the application of section 23(8) thereof, does not apply to the Piarco No. 2 proceedings.

73. The defendant contends that the claimants' challenge to the application of section 23(8) amounts to a claim that the claimants may only be indicted in the Piarco No. 2 proceedings after the conduct of a preliminary enquiry. However, the issue of whether a preliminary enquiry affects the fair trial rights of the claimants is not raised in these proceedings, nor did the claimants seek any relief on that basis.

Discussion and Analysis

74. The court is of the respectful view that the claimants' point as to the jurisdiction and powers of the magistrate in a preliminary enquiry as being based on statute is well taken.

75. Obviously, any proceedings brought before a magistrate includes matters which involve both administrative and judicial considerations. The learning in ***ex parte Bell*** and the rationale adopted by Ibrahim J in ***Edoo*** focus only on the latter. However, there is no taking away the fact that the magistrate is not in a position to act on her own as, respectfully, she is bereft of any residual or inherent jurisdiction. Therefore, every step, every order, every consideration, every adjournment, every summons, every bit of evidence taken are all in pursuance of the powers and the jurisdiction given to her by the Act which are obviously activated by the start of the preliminary enquiry. To my mind, therefore, once the process is engaged by the accused appearing before her, then the preliminary enquiry has begun notwithstanding the fact that she may not at the time be actively engaged in the consideration of the judicial aspect of her function under section 23. To my mind, case management involves an administrative/judicial function as well and making decisions for the conduct of the case which do not touch upon the merits of the case are all done in the context of a preliminary enquiry being actively conducted before her.

76. None of the steps referred to and relied upon by the claimants go to the judicial merit of the case. Further, there is disagreement by the parties as to whether the prosecution actually opened its case prior to 15 September 2005. The claimant is saying that it did and on the other hand the defendant has denied this. There are no transcripts or Magistrate Case Book Extract or even counsel's notes confirming that the prosecution formally opened its case. What is clear is that the prosecution wanted to make an opening statement, which was objected to by the claimants' attorneys. The Magistrate eventually ruled that the prosecution could not make an opening statement. The court is therefore unable to come to a

finding on a balance of probabilities on this issue in light of the indeterminate state of the evidence in this regard. But, as mentioned, that is of no moment.

77. On the issue of the evidence of PC Nanan, which was taken in the same manner as any prosecution witness, the court accepts, as does all of the parties, that PC Nanan's evidence was taken pursuant to section 16 of the Act. There are no other provisions in the Act that allows the Magistrate to take evidence from a witness, no matter how routine the evidence. Even though it had to do with the mere service of summonses, it is all part of the case management of the preliminary enquiry.

78. For reasons given above, the court is of the respectful view that ***ex parte Bell***, and ***Edoo***, do not address the issue for determination in this case against the background of the statutory framework which has been so ably and efficiently and persuasively highlighted by the claimants. As a result, the court does not feel compelled to follow those cases and, instead, holds that the statute intended for the beginning of the preliminary enquiry to be upon the appearance of the accused before the magistrate. Any other interpretation would be to render the administrative or case management steps as existing in limbo without any statutory underpinning as to powers and jurisdiction. There is nothing unduly complex with respect to this finding. All of the accused would have been charged and would have appeared at different times. That does not preclude the magistrate from case managing preliminary enquiry to have it dealt with in such a manner as she deems fit in the circumstances, including through consolidating all of the separate charges to be dealt with as one.

79. Further, the court is of the respectful view that the wording in the Amendment Act is clear and unambiguous and there is no need to resort to the parliamentary debates. In any event, however, if even the court is wrong on that, it is obvious that the parliamentary debates supported this very same conclusion.

80. Accordingly, the claim must succeed.

The Order

81. In the circumstances the court makes the following declarations and orders:

81.1. It is declared that the defendant cannot lawfully exercise the power to prefer an indictment under section 23(8) of the Indictable Offences (Preliminary Enquiry) Act, Chap. 12:01 because the Preliminary Enquiry in the Piarco No. 2 proceedings had begun before the 15 September 2005 and, as such, the exercise of powers conferred by section 23(8) is expressly barred by section 23H of the Act.[24]

81.2. It is declared that the claimants can only be lawfully committed to trial for the offences, first inquired into in the Preliminary Enquiry, after the institution and conduct of a fresh preliminary enquiry,

[24] A further relief was sought in submissions but was not part of the relief on the Fixed Date Claim Form and so is not part of this court's Order i.e. "It is declared that the beginning of the Preliminary Enquiry in the Piarco No. 2 proceedings to be upon the first appearance of the accused before the Magistrate."

pursuant to the Indictable Offences (Preliminary Enquiry) Act Chap 12:01, before a new Magistrate.

81.3. The defendant shall pay to the claimants their prescribed costs of the claim to be assessed by the Assistant Registrar pursuant to Part 67.12 of the CPR in default of agreement.

/s/ D. Rampersad J.

Assisted by
Sumintra Singh
Attorney-at-Law
Judicial Research Counsel