[2016] JMSC Full 8

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE FULL COURT

CLAIM NO. 2014 HCV04144

COR: The Hon. Mr. Justice L. Campbell
The Hon. Mrs. Justice S. Thompson-James
The Hon. Mrs. Justice C. Brown Beckford

BETWEEN	**GORSTEW LIMITED**	**APPLICANT**
AND	**HER HON. MRS. LORNA SHELLY-WILLIAMS SITTING AS CORPORATE AREA RESIDENT MAGISTRATE'S COURT (CRIMINAL) HOLDEN AT HALF WAY TREE**	**1ST RESPONDENT**
AND	**PATRICK LYNCH**	**2ND RESPONDENT**
AND	**JEFFREY PYNE**	**3RD RESPONDENT**
AND	**CATHERINE BARBER**	**4TH RESPONDENT**

D. Leys QC, H. Wildman, B. Hines, K. Tennant instructed by H. Wildman and Co. for the Applicant.

C. Larmond instructed by the Director of State Proceedings for the 1st Respondent.

Stacy Knight instructed by Knight Junor and Samuels for the 2nd Respondent.

B. Samuels, S. Knight instructed by Knight Junor and Samuels for the 3rd Respondent

D. Martin, S. Usim instructed by Usim Williams and Co. for the 4th Respondent.

Heard: September 16 and 22, 2015 and November 4, 2016

Judicial Review – Renewal of application for leave to apply for judicial review – Whether there is an arguable ground for judicial review with a realistic prospect of

success – Whether Resident Magistrate erred in upholding no case submission – Whether decision of Resident Magistrate unreasonable in a Wednesbury sense – Whether order of Certiorari should be granted quashing decision of Resident Magistrate – Whether alternative remedy exists – Whether Declaration amounts to adequate alternative remedy – Whether declaration sought would have same effect as order for certiorari - Costs

Campbell, J.

[1] I have read in draft the judgments of Thompson-James and Brown Beckford JJ. I agree with their reasoning and conclusion and I have nothing to add.

Thompson-James, J.

BACKGROUND

[2] This matter involves the renewal of an application by the Applicant, Gorstew Limited, for leave to apply for Judicial Review in relation to a decision made by Her Honour Lorna Shelly Williams (as she then was) in the Resident Magistrate's Court for the Corporate Area on June 3, 2014 upholding a no case submission and dismissing all charges against the Defendants Patrick Lynch, Jeffrey Pyne and Catherine Barber.

[3] The Applicant first applied for leave to apply for Judicial Review August 28, 2014, which was subsequently heard by Her Ladyship Mrs. Justice Carol Lawrence Beswick, and dismissed December 10, 2014.

[4] The Applicant filed Notice of Intention to Renew Application for Leave to Apply for Judicial Review December 19, 2014, seeking the following orders (as stated in the initial Notice filed August 28, 2014):

i. A declaration that the 1st respondent made a jurisdictional error in stating that she needed more time to go through the evidence and that it was a work in progress, thus rendering the verdict null and void;

ii. A declaration that the 1st respondent's verdict was so unreasonable that no tribunal properly directed could have arrived at that verdict; and

iii. An order of certiorari quashing the verdict of the 1st Respondent.

ISSUES

[5] I agree with the reasoning and decision of my learned sister, but I think it is necessary to deal with the issues of :

i. Whether leave is required to apply to the court for a declaration.

ii. Whether the granting of the declarations sought would have the same result as the granting of an order of certiorari, so that there would be an adequate alternative remedy available to the applicant.

iii. Costs.

The Applicant's Submissions

[6] Attorneys for the Applicant argue that a declaration sought in a public law context should not be confused with a declaration sought in private law proceedings where no restrictions apply, and that the declaration in a public law context is subject to the requirements of an application for judicial review, such as meeting the arguability threshold. For this proposition, the applicant relies on the House of Lords authority of O'Reilly v Mackman [1983] 2 AC 237, submitting that Lord Diplock made it clear that since 1977, the remedies of declaration and injunction have become available interchangeably with the prerogative remedies of certiorari, prohibition and mandamus under the unified system of procedure of application for judicial review.

[7] It is further argued that there are no alternative remedies as (1) an acquittal cannot be appealed, and (2) the declaratory relief sought is an available, not an alternative remedy: see Pearlman v Harrow School [1979] 1 QB 56 at 68 D-E per Lord Denning MR.

The 1st Respondent's Submissions

[8] The 1st Respondent submits that, as leave is not required for declaratory relief, the proceedings now before the court ought to be restricted to the hearing of the application for leave to pursue the order for certiorari. The Civil Procedure Rules 2002 (CPR) makes no provision for the grant of leave to pursue a claim for declarations.

[9] It is noted that CPR 56.1 lists declaratory relief separately from the relief of Judicial Review and CPR 56.1(1) lists them as separate applications for administrative orders. It is also noted that CPR 56.1(3) provides the remedies that judicial review includes, namely, certiorari, prohibition and mandamus.

[10] Counsel for the 1st Respondent then points out that CPR 56.3 and 56.4 outline the procedure in applying for leave to apply for judicial review, whilst CPR 56.9(1) treats with how an application for an administrative order is to be made, and specifically, the procedure in relation to applying for a declaration. Nowhere in part 56 is there any requirement for an applicant who wished to obtain a declaration to seek leave.

[11] Counsel rejects the argument of Mr. Leys Q.C for the Applicant, that based on *O'Reilly v Mackman* declarations must go through the leave process. She submitted that that case made no such pronouncement and is inapplicable since it is concerned with rules of court and legislation that are different from those which obtain in this jurisdiction.

[12] In response to the Applicant's argument that if leave were not required to pursue declarations this would result in a situation where persons would seek to challenge the actions of public bodies long after the time has passed, the 1st Respondent submits that this fear is unfounded in the context of Part 56 of the CPR for the very reason that a claim for a declaration under rule 56 is a claim for an administrative order and is not an ordinary action, and, that the court has the power to manage its processes and it is trite law that the grant of declaratory relief is discretionary. It is contended that, should such abuse come before a court, whereby declaratory relief

is used to circumvent the safeguards of judicial review, the court can properly and speedily treat with it. The court ought not to read into clear and unambiguous rules, a requirement for leave that does not exist.

The 2nd & 3rd Respondent's Submissions

[13] Mr. Samuels for the 2nd & 3rd Respondents agreed with and adopted the submissions of Ms. Larmond that the scope of Part 56 makes the pursuit of reliefs other than judicial review disjunctive and "free standing" from the relief of judicial review.

[14] Counsel intertwines the issue of whether an alternative remedy is available barring leave, with the issue of the necessity of leave for declaratory relief, arguing that the grant of the two declarations sought by the Applicants would have the same effect as the proposed order of certiorari, making the former true alternatives of the latter'. Thus, since leave is not required for the declarations sought, there is in fact an alternative remedy available to the Applicant which they ought to first pursue, and as such should not be in the judicial review court. CPR 56.3(1) and the case of Sharma v Browne-Antoine [2007] W.L.R 780 is relied on for the proposition that the relief of judicial review should only be sought as a last resort, so that once an alternative remedy is identified, it must be pursued, unless good reason is shown as to why it is not being sought.

[15] The 4th Respondent made no submissions specifically in relation to the declarations sought, but did during oral submissions, adopt the submissions of Ms. Larmond and Mr. Samuels.

LAW AND ANALYSIS

Procedure to apply for Declarations

[16] I am in full agreement with Ms. Larmond's submissions that the present proceedings ought to be restricted to the hearing of the application for leave to pursue the order for certiorari, since leave is not required for declaratory relief. It Is

clear from the way in which the rules in **Part 56** of the Civil Procedure Rules are framed, that declarations are to be treated as a type of relief separate and apart from that of judicial review, and as such ought to be treated differently.

[17] **CPR 56.1** lists declaratory relief separately from the relief of Judicial Review and **CPR 56.1(1)** lists them as separate applications for administrative orders. It is also noted that **CPR 56.1(3)** restricts the remedies that judicial review includes to certiorari, prohibition and mandamus.

[18] **CPR 56.3** and **56.4** outline the procedure in applying for leave to apply for judicial review, whilst **CPR 56.9(1)** treats with how an application for an administrative order is to be made, and specifically, the procedure in relation to applying for a declaration. **CPR 56.3** makes it clear that leave is required for judicial review but nowhere in the CPR does it similarly require leave to apply for a declaration.

[19] Further, **CPR 56.11**, which deals with the service of a claim form for an administrative order, makes specific mention of a copy of the application for leave being served where leave has been given in respect of judicial review. There is no such requirement in respect of other forms of administrative orders.

[20] I am fortified in my view by the words of Brooks JA in **Carlton Smith v Lascelles Taylor, Commissioner of Police and the Attorney General** [2015] JMCA CIV 58, wherein he noted at para. [21] that 'it is clear from the Rules that orders for judicial review and declarations are separate administrative orders available to a claimant and as such the rules do not place on applications for declarations the restrictions they place on applications for judicial review'.

[21] Issue has been raised by Counsel for the 2nd & 3rd Respondents, Mr. Bert Samuels, that 'the grant of the two declarations sought would have the same effect as the proposed order for certiorari, making the former true alternatives of the latter, and therefore there is in fact an alternative remedy available to the Applicant' barring judicial review.

Power of Court to make Declarations

[22] Though the *Judicature (Supreme Court) Act* speaks to the power of the court to grant the administrative orders of mandamus, prohibition and certiorari, there is no reference to the power of the court to grant declarations in public law.

[23] The *Crown Proceedings Act*, pursuant to sections 2(2) and 16(1), speak cursorily to the availability of declarations against the Crown.

[24] The genesis of the power is derived from the Common Law, specifically mid-nineteenth century statutory reform in the United Kingdom, when in 1883 *Order 25*, *r5* of the *Rules of the Supreme Court* expressly provided that the High Court could make a merely declaratory judgment whether or not any consequential relief could be claimed. [Para. 17.7.1, Supperstone, Walker & Goudie QC, **Judicial Review**, 4th Edition, London: LexisNexis]

[25] The UK Court of Appeal as early as 1912 recognized in **Dyson v. Attorney-General** [1911] 1 K.B. 410 (also later case of same name cited at [1912] 1 Ch. 158), that the court had jurisdiction to make a declaratory order against the Attorney-General as representing the Crown.

[26] The power has also been recognized as having emanated from the inherent jurisdiction of the court to exercise supervisory control over inferior tribunals (unless legislation has been passed by Parliament ousting that jurisdiction in particular circumstances) [**Anisminic Ltd. V Foreign Compensation Commission and Another** [1969] 2 A.C. 147 (H.L.) & [1969] 2 A.C. 223 (Q.B. D)

Effect of Declarations generally/Effect of Declaration of nullity

[27] "A declaration is usually advisory in the sense that it merely informs and does not itself compel any particular course of action." [para. 17.18.1, pg. 598 - Supperstone, Walker & Goudie QC, **Judicial Review**, 4th Edition, London: LexisNexis]. The nature of the relief was extensively discussed by McDonald Bishop J (as she then

was) at paras 161 and 162 of **Legal Officer's Staff Association et al v The Attorney General and the Minister of Finance and Planning** [2015] JMFC FC 3.

[28] In my view, though public authorities are usually expected to abide by a declaration of the court, and usually do, they cannot be compelled by virtue of a declaration to act. A declaration is simply a formal pronouncement by the court as to the legal state of affairs in particular circumstances. Thus, where there is uncertainty that there will be compliance, and to avoid uncertainty as to what is to obtain and non-compliance, an order of mandamus, prohibition or certiorari is typically sought to direct the actions of the public authority in accordance with the declaration of the court.

[29] In light of the above, it would be apparent that ordinarily, a declaration would be an inadequate remedy depending on the particular outcome desired by the applicant. Generally speaking, in order for a decision of an inferior tribunal to cease to have effect, it is usually necessary for a court to set it aside: **R v Panel on Take-overs and Mergers, ex parte Datafin plc** [1987] QB 815, [1987] 1 All ER 564 (Pg 558 16.3.4).

[30] This is so even where that decision is found to contain an error of law. Where a decision of an inferior tribunal is found to be a nullity however, there is no need for said decision to be quashed by an order of certiorari. Browne J in **Anisminic Ltd.** (Q.B. D), a decision that was reinstated and approved by the House of Lords after having been initially overturned by the United Kingdom Court of Appeal, noted the distinction between the effect of a decision that contained an error of law and a decision that was found to be a complete nullity. He stated the following (at pg. 232):

> *"**When a decision of an inferior tribunal is brought up on certiorari it can, if found to contain error of law, be quashed, but if a declaration is made that a decision of the inferior tribunal is wrong in law it still stands, unless the error is such as to make the decision a complete nullity**. The result of making a declaration in a case where the inferior decision was not a nullity*

would be to leave standing two inconsistent decisions, of which the effective one would be the decision of the inferior court". [**Emphasis mine**]

[31] He further stated at pg. 233:

"This jurisdiction of the High Court is normally exercised by means of the prerogative writs of certiorari, mandamus or prohibition, but it has been established in late years that it can also be exercised by means of declarations in suitable cases. When the High Court quashes a decision of an inferior tribunal on certiorari, it may be doing either of two things; if the decision of the inferior tribunal was given without jurisdiction or in excess of jurisdiction, the quashing is merely a formal recording of what is already the position, namely, that the decision is a nullity, but where a decision is quashed for error of law within jurisdiction it remains a good decision until it is quashed..."

[32] The House of Lords in **Anisminic** at p. 196 (per Lord Pearce) approving Browne J's analysis of the issue stated the following:

*"**Where a decision is found to be in excess of or without jurisdiction, there is strictly no need to quash it, since it is a nullity**, before issuing a writ of prohibition or mandamus. But on these technical matters the courts have not always been wholly consistent. And it has been argued that certain decisions may have a temporary validity until quashed and only then become a true nullity. These technical matters are not of importance until one comes to consider the effect of what have been referred to as "ouster" or "no certiorari" clauses in Acts of Parliament and in particular the article to that effect in the present case.*

In 1883 the courts were given wide discretionary powers to make declarations. In recent years, partly owing to the technical difficulties which have formerly beset the procedure with regard to prerogative writs, there has been an increasing tendency for the courts simply to make declarations without issuing prerogative writs. Pursuant to that practice a declaration was claimed and given in the present case.

There is no need to deal with all the many cases on this subject which have been referred to by counsel and have been carefully, and in my opinion, correctly, analysed in the judgment of Browne J. with which I agree." [**emphasis mine**]

[33] The inescapable conclusion of these words, it seems to me, is that a decision of an inferior tribunal found to contain an error of law stands until and unless it has been quashed by a superior court. However, where the decision is deemed to be a nullity, it does not stand and there is no need for it to be quashed.

[34] In the premises, I am of the view that if the court were minded to make a declaration that the impugned decision is null and void, it would not be necessary for the court to make a quashing order. The declaration would suffice to achieve the desired outcome, that is, that the impugned decision would no longer stand. Thus, there would be no decision to quash.

[35] In any event, since the court has decided to refuse leave, the issue is inconsequential.

Basis of Costs Order

[36] It is to be noted that though the parties filed written submissions in relation to costs in respect of the previous application for leave in this matter, they have not done so in relation to the present application. I nevertheless feel compelled to address this point, since the court is in agreement that, based on the circumstances of this case, costs ought to be awarded to the Respondents.

[37] The general rule as to costs in Administrative proceedings is provided in **Rule 56.15(5)**, wherein it is stated:

> *"…no order for costs may be made against an applicant for an administrative order unless the court considers that the applicant has acted unreasonably in making the application or in the conduct of the application."*

[38] The court may however make such orders as to costs as appear to the court to be just, including a wasted costs order [**CPR 56.15(4)**].

[39] Though it may appear from the wording of those rules that they only apply in circumstances where there has been a substantive hearing, the Full Court in **Danville Walker v. The Contractor General [2013] JMFC Full 1(A)** ruled that

costs for the application at the leave stage could be determined within the parameters of **part 56.15(4)** and **(5)** [para. 32]. It is to be noted that whilst Sykes J found that the rules did not apply and **part 64** alone was to be relied on, the majority of the court, Straw and Campbell JJ, agreed that rules **56.15(4)** and **(5)** are in fact applicable to leave applications/hearings.

[40] All judges however unanimously agreed that the formulation by Auld J in ***Mount Cook*** [2014] 2 Costs LR 211 as to what would amount to exceptional circumstances could be considered as helpful in determining what may be unreasonable conduct of an applicant' [para. 33]. These are:

a) *The hopelessness of the claim;*

b) *The persistence in it by the claimant after having been alerted to facts and/or of the law demonstrating its hopelessness;*

c) *The extent to which the court considers that the claimant, in the pursuit of his application, has sought to abuse the process of judicial review for collateral ends – a relevant consideration as to costs at the permission stage, as well as when considering discretionary refusal of relief at the stage of substantive hearing, if there is one; and*

d) *Whether, as a result of the deployment of full argument and documentary evidence by both sides at the hearing of a contested application, the unsuccessful claimant has had, in effect, the advantage of an early substantive hearing of the claim.*

[41] In ***Danville Walker***, the court consequently decided that costs were to be granted to the respondent on a limited basis, owing to the unreasonable conduct of the applicant, in seeking to renew its application for leave, since the application was hopeless and bound to fail, and that the applicant persisted with the renewal in spite of this [para. 29].

[42] Based on the foregoing, and the reasoning set out in ***Danville Walker***, I see no reason to depart from the finding of the majority of the court, and therefore find that the rules in part 56.15 (4)(5) are applicable to the case at bar. I also bear in mind that though the circumstances set out by Auld J in ***Mount Cook*** are indeed useful, they are not exhaustive, and what amounts to 'unreasonable conduct' still ultimately rests in the court's discretion, once exercised judicially.

Did the Applicant act unreasonably?

[43] The Applicant renewed its application after having been refused leave by Beswick J on December 10, 2014, following a full ventilation of issues in its initial application.

[44] I agree with Brown Beckford J that the application is vexatious and the applicant's conduct in renewing the application was highly unreasonable, being so against the weight of authority that it was hopeless and bound to fail. The legal hurdles facing the applicant, particularly in respect of the issue of *autre fois* were insurmountable based on the law in our jurisdiction which is well settled.

[45] Further, there was absolutely no credible evidence before the court of the allegations levied against the Resident Magistrate. Not only was the applicant alerted to this in its initial application by the submissions of the respondents, but Beswick J, in her written decision of April 2015, gave a lengthy detailed discourse on the law surrounding the issues and the reasons for which the application was bound to fail, reasons with which this court agrees.

[46] Despite this the Applicant persisted in renewing the application, bringing the four respondents back before the court to expend time, effort and expense to defend the application for a second time.

In the premises, it is only fair that the applicant pays costs.

Brown Beckford, J.

BACKGROUND

[47] The Applicant Gorstew Limited founder of the Appliance Traders Group Pension Fund (the Fund). Mr. Patrick Lynch was the Chairman of the Fund, Dr. Jeffrey Pyne was a previous Managing Director of Gorstew and Ms. Catherine Barber was the General Manager of the Fund.

[48] The three (now the 2nd, 3rd and 4th Respondents) were charged in the Resident Magistrates Court for the Corporate Area (now Parish Court but for these purposes I will continue to use the relevant terminology before the Judicature (Resident Magistrates) (Amendment and Change of Name) Act, 2016) on an indictment containing 16 counts on allegations that on or about the 15th or the 16th day of December, 2013, the 3rd Respondent forged four letters which allegedly purported that Gorstew Limited had consented to certain distributions by the Fund when the Respondents knew that it was not true, that the 4th Respondent uttered them and they, along with the 2nd Respondent used the letters to conspire to defraud the Applicant and to falsify its accounts. The prosecution of the accused was brought by the Applicant with the fiat of the Director of Public Prosecutions.

[49] During the period of trial before the 1st Respondent Her Honour Mrs. Lorna Shelly-Williams (as she then was), several witnesses testified on behalf of the Prosecution. At the end of the Prosecution's case, the Learned Resident Magistrate upheld no case submissions made on behalf the accused persons and found each accused not guilty.

[50] On August 28, 2014, an initial application for leave to apply for judicial review of the Learned Resident Magistrate's decision was made to the Supreme Court by the Applicant. The relief sought were as follows, *inter alia*:-

> *(a) a declaration that the 1st Respondent made a jurisdictional error in stating that she needed more time to go through the evidence and that it was a work in progress, thus rendering the verdict null and void;*

(b) *A declaration that the 1st Respondent's verdict was unreasonable that no tribunal properly directed could have arrived at that verdict;*

(c) *An order of certiorari quashing the verdict of the 1st Respondent.*

[51] This application was heard by a single judge in the Supreme Court Beswick J who refused leave. The decision of the Court was based on the hearing of preliminary points made by counsel for the 2nd Respondent K. Knight Q.C. which were adopted by counsel for the other Respondents. The preliminary points as summarized by the Applicant were:

(a) *The substratum of the Application is based on falsehoods.*

(b) *There is no official record of the decision of the 1st Respondent before the court.*

(c) *The quashing of the acquittal would breach the constitutional rights of the 2nd 3rd and 4th Respondents.*

[52] By Notice of Intention to Renew Application for Leave to Apply for Judicial Review under Civil Procedure Rules 2002 Rule 56.5, the Applicant renewed its Application for Leave to Apply for Judicial Review. In support of its application the Applicant has filed an Affidavit and Supplemental Affidavit of Barbara Hines.

[53] My failure to allude to all of the submissions of Counsel is in no way indicative of my appreciation of the depth and breadth of those submissions.

THE SUBMISSIONS

Applicant's Case

Proper parties

[54] Counsel for the Applicant submitted that the right to make this application is grounded in having sufficient interest in these proceedings which supported the grant of a *fiat* from the Director of Public Prosecutions (DPP) to participate in the criminal trial of the 2nd to 4th Respondents. Additionally, the Applicant submitted that the Respondents are properly named as parties because they are likely to be

affected by any order of the Court made on this application. This was resisted by Counsel for the 2nd to 4th Respondents.

Arguable Case with Realistic Prospect of Success

[55] Counsel for the Applicant advanced arguments that the decision of the 1st Respondent in upholding a no case submission at trial was faulty for being unreasonable and irrational on the evidence presented by the prosecution. The basis of this unreasonableness was argued to be a resulting consequence of insufficient time taken by the Learned Resident Magistrate to consider the case; the Learned Resident Magistrate's failure to exercise her jurisdiction to hear the defence's case, and the Learned Resident Magistrate's usurpation of jurisdiction in considering facts at the point of the submission of no case to answer submission.

[56] It is the submission of Counsel that the insufficiency of time to consider the case and the inherent unreasonableness of the decision to uphold the no case submission is evidenced in the utterances of the Learned Resident Magistrate during her delivery of that decision. The submissions of Counsel refer to various parts of the transcript of the trial to include pages 19 and 23 where the Learned Resident Magistrate mentions a constraint of time. The Applicant was permitted to refer to the transcript of the trial produced by the Applicant.

[57] This view informs grounds 10 and 12 of this application which state:

> *"10. At the commencement of her ruling and during her ruling on the 3rd June 2014, the 1st Respondent stated that she really needed more time to go through the evidence and that it was a work in progress.*
>
> *"12. The Applicant contends that the statement of the 1st Respondent amounts to a jurisdictional error which vitiates her ruling on the no case submission, rendering her verdict null and void and of no effect."*

[58] Counsel also argued that the Learned Resident Magistrate made an egregious error with respect to jurisdiction in determining the factual issue of *mens rea* for the charge of conspiracy to defraud at the close of the prosecution's case. The basis of this argument is that she acted outside her jurisdiction to adjudicate in accordance

with Section 280 of the Judicature (Resident Magistrates) Act. The gravamen of the submissions is that by virtue of Section 280 she was obliged to hear all the evidence, which meant hearing the defence's case, and to sum up the case, before making a decision. A submission of no case to answer was therefore an anomaly in the Resident Magistrates Court.

[59] To have declined to hear from the defence, and having regard to the 'overwhelming' evidence led by the prosecution, to have upheld a submission of no case to answer amounted to the Learned Resident Magistrate declining jurisdiction. She acted irrationally and unreasonably by (a) failing to consider relevant evidence which pointed 'inescapably to guilt' and (b) asking herself the wrong question "was there an absence of mens rea?" which was a question of fact for her jury mind. This was a breach of public law principles rendering her decision a nullity.

[60] This latter argument the Applicant contended had not been advanced or argued before Beswick J and so was a new and free standing ground for this Court's consideration.

1st Respondent's Case

Alternative remedy

[61] The 1st Respondent has raised an objection to the application for leave to apply for declarations in an application for judicial review on an assertion that this is not provided for in the CPR. It was suggested by Counsel that the proper procedure was to have proceeded by way of application for administrative order under CPR Rule 56.9(1).

Arguable Case with Realistic Prospect of Success

[62] The 1st Respondent further answers the Applicant's claim that the 1st Respondent made a jurisdictional error vitiating her ruling to uphold the no case submission as being an incorrect construction of statements made during the delivery of the

judgement of the Learned Resident Magistrate, which in reality had no bearing on the merit of her decision.

[63] It is also argued that there is no allowance in law for the prosecution to appeal against an acquittal, as is the effect of the 1st Respondent's decision which is the subject of this application. The 1st Respondent further advanced an argument that there is no basis in law for an order of certiorari as the Applicant has not made out an error in law or fact, but rather contends dissatisfaction with the decision at which the 1st Respondent arrived. It was therefore submitted that the Court should be minded to properly reject the application as an appeal parading as an application for judicial review.

2nd and 3rd Respondents' Case

Arguable Case with Realistic Prospect of Success

[64] Counsel for the 2nd and 3rd Respondents have pointed out that there is no statutory obligation for Magistrates to give reasons for upholding a no case submission, or for the finding of a verdict of not guilty, dissimilar to the case of a conviction where the accused is entitled to an appeal. Counsel then moved on to outline the status of the law relating to a Magistrate's power to stop a case by his own motion or upon the making of a no case to answer submission by the defence as is found in the Privy Council case of **R v Daley** [1993] 4 All ER 86, PC.

[65] Critical to its arguments is the point made that the law governing the power of a Magistrate to prematurely end a case has advanced to the point where there need not be a no case submission, but rather there is an obligation on a Magistrate, in the appropriate case, to consider whether the prosecution has led evidence sufficient to be sent to the jury, or whether it would be proper to put an end to the proceedings.

[66] The arguments of the 2nd and 3rd Respondents also include an assertion that the Applicant's application must fail for the fact that it fails to establish unreasonableness on an analysis of the reasons given for the Learned Resident Magistrate's decision. This against the background of the law governing no case to

answer submissions as found in the case of **R v Galbraith** [1981] 1 WLR 1039. The 2nd and 3rd Respondents have argued that the submission of the Applicant that the Learned Resident Magistrate erred in the exercise of her jurisdiction when she considered a no case to answer submission without hearing the defence to determine *mens rea,* is flawed. This is so for the reason that it is the prosecution's duty to establish a prima facie case which includes all the elements of the offence being tried at the time of closing its case; and the fact that a defendant has a right to remain silent for the entire trial.

Anticipatory Breach

[67] The 2nd and 3rd Respondents in answer to the application have called upon the Court, through Section 19(1) of the Constitution, to protect their constitutional rights against the possibility of a breach of the right under Section 16(9) of the Constitution not be retried for the same criminal offence for which they have already been convicted or acquitted in a competent court. Reliance was placed on the case of **Millicent Forbes v The Attorney General** [2009] UK PC 13 where the Privy Council held that to grant leave for judicial review of a decision of the Supreme Court to acquit an accused contemplates a challenge of the doctrine of autrefois acquit and in addition would be tantamount to determining a question which is rightly a decision of the Director of Public Prosecutions.

4th Respondent's Case

Arguable Case with Realistic Prospect of Success

[68] The 4th Respondent has adopted the arguments of the other Respondents and further submits that the grant of leave to apply for judicial review in this matter would be a futile effort that will amount to a waste of the court's time, given that the Director of Public Prosecutions having all the powers to re-indict the 2nd to 4th Respondents has not shown any interest in, approved or consented to these proceedings.

ISSUES

[69] The issues to be considered are as follows:

Whether there are discretionary bars such as delay or alternative remedies to judicial review.

Whether there is an arguable ground for judicial review with a realistic prospect of success.

Whether the decision of the 1st Respondent in upholding the no case submission was unreasonable in a 'Wednesbury' sense that is:

Whether the 1st Respondent properly directed herself on the law.

Whether the 1st Respondent called to her attention the matters which she was bound to consider.

Whether the 1st Respondent took into consideration matters which were irrelevant to the issue under consideration.

THE LAW

Arguable Case with Realistic Prospect of Success

[70] Rule 56.3(1) of the CPR states that in order to initiate a claim for judicial review, leave must first be obtained. The rules however do not provide a threshold to be obtained for leave to be granted. The case law from this jurisdiction to include **Digicel (Jamaica) Limited v The Office of Utilities Regulations** [2012] JMSC Civ.91, which makes reference to the case of **R v IDT Exparte Wray and Nephew Limited** [2009] HCV 04798, a decision of Sykes J delivered 23 October 2009, states that the test is that which was contemplated by the Judicial Committee of Privy Council in the case of **Sharma v Brown-Antoine** [2007] 1 WLR 780.

[71] The Privy Council in that case held that there must be an arguable ground with a realistic prospect of success. Lord Bingham and Lord Walker at pages 787 stated as follows:

"The ordinary rule now is that the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic

prospect of success and not subject to a discretionary bar such as delay or an alternative remedy..."

[72] Therefore, the question to be determined is whether the Applicant has established the existence of an arguable ground for judicial review with a realistic prospect of success, to include the question of whether there are any discretionary bars such as an alternative remedy, delay or a failure to satisfy CPR Rule 56 that should preclude the use of the court's time to review this matter.

'Wednesbury' Unreasonableness

[73] The concept of 'Wednesbury unreasonableness' is derived from the decision of the Court of Appeal of England in the case **Associated Provincial Picture Houses Ltd v Wednesbury Corporation ('Wednesbury')** [1948] 1KB 223. In summarizing the applicable principles, Lord Greene in his delivery stated that:

> *"The court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which they ought not to take into account, or, conversely, have refused to take into account or neglected to take into account matters which they ought to take into account. Once that question is answered in favour of the local authority, it may be still possible to say that, although the local authority have kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case, again, I think the court can interfere. The power of the court to interfere in each case is not as an appellate authority to override a decision of the local authority, but as a judicial authority which is concerned, and concerned only, to see whether the local authority have contravened the law by acting in excess of the powers which Parliament has confided in them."*

[74] An authority in the exercise of its discretionary power must therefore do so in a reasonable manner, this is to say that such authority must:

(a) direct herself properly in law,

(b) call her own attention to the matters which she is bound to consider, and

(c) exclude from her consideration matters which are irrelevant to what she has to consider.

Where the authority circumvents these rules or there is the absurd occurrence that no sensible person could fathom that it resides within the powers of the authority, such authority can be said to have acted unreasonably, and in such instance, an aggrieved person will be entitled to leave for judicial review on the premise that the decision of the Authority was unreasonable.

[75] The House of Lords in the later case of **Council of Civil Service Unions and others v Minister for The Civil Service** [1984] 3 ALL ER 935 ('CCSU') has also notably categorized the grounds upon which administrative action might be subject to judicial review namely:

(a) illegality, where the decision-making authority has been guilty of an error of law, e.g. by purporting to exercise a power it does not possess;

(b) irrationality, where the decision-making authority has acted so unreasonably that no reasonable authority would have made the decision;

(c) procedural impropriety, where the decision-making authority has failed in its duty to act fairly.

[76] The principles relating to 'Wednesbury' unreasonableness as emanating from common law have been adopted in this jurisdiction as seen in the case of **Jamaicans for Justice v Police Service Commission & Attorney General of Jamaica** [2015] JMCA Civ 12 where at paragraph 117 these principles were ventilated and applied to the circumstances of that case concerning an appeal instituted by Jamaicans for Justice regarding the refusal by the Supreme Court to grant orders of certiorari and mandamus against the Police Service Commission's decision to recommend to the Governor General of Jamaica the promotion of Superintendent D. Hewitt, to a higher rank in the Jamaica Constabulary Force.

No Case Submission

[77] Guidance for Magistrates in summary trials considering a no case to answer submission is given in ***Practice Direction (Criminal Consolidated) - Submission***

***of No Case*,**[1] otherwise known as ***Lord Parker's Practice Direction*,** which was issued by the Divisional Court of England for the guidance of Justices in that jurisdiction, and has been held to be applicable in this jurisdiction. See for example **Elorda Smith & Everton Goulbourn**e **v R** [2012] JMCA 49, an appeal from the Resident Magistrate Court. In the judgment of McIntosh JA at paragraph 13 she reiterates the applicable law as follows:

> *[13] We are of the view that the learned Resident Magistrate was well within her right to reject his no case submission and to call upon the appellant Goulbourne to answer the charge. Our courts have approved and consistently applied the principle in Lord Parker's Practice Direction when determining whether or not such a submission should be upheld. According to Lord Parker's formulation of the principle: "A submission that there is no case to answer may properly be made and upheld: (a) when there has been no evidence to prove an essential element in the alleged offence; (b) when the evidence adduced by the prosecution has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict upon it." Authorities such as R v Galbraith [1981] 2 All ER 1060 and Taibo (Ellis) v R (1996) 48 WIR 74 reinforce the principle providing further guidance to trial judges whether sitting alone or with a jury...And in Taibo it was held, following Galbraith, that on a submission of no case to answer the criterion to be applied by the trial judge is whether there is material on which a jury could, without irrationality, be satisfied of guilt; if there is, the judge is not only entitled but is required to allow the trial to proceed. This criterion would be of general application whether the tribunal of fact to be satisfied is a judge sitting alone or a jury.*

[78] The essence of Lord Parker's Practice Direction is that a submission of no case may properly be upheld by a Magistrate:

> (a) when there has been no evidence to prove an essential element in the alleged offence;
>
> (b) when the evidence adduced by the prosecution has been so discredited as a result of cross-examination or is so manifestly unreliable, that no reasonable tribunal could safely convict on it.

[79] Where the trial is on an indictment, the approach traditionally adopted has been based on the rules provided in **Galbraith,** a decision which has been adopted

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[1] [1962] 1 WLR 227

whole-heartedly in this jurisdiction by Her Majesty's Judicial Committee of the Privy Council in ***Daley*****.** See also **Elorda Smith** affirming its applicability in the Resident Magistrates Court.

[80] **Galbraith** established that on a submission of no case to answer at the end of the prosecution's case, the trial judge should stop the case and direct an acquittal if there is no evidence that the crime alleged against the accused was committed by him. However, where there is some evidence but it is of a tenuous character, such as inherent weakness or vagueness or because of inconsistency with other evidence, it is the judge's duty, on a submission of no case, to stop the case if he comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict on it. But, where the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability or on other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence on which a jury could properly come to the conclusion that the accused is guilty, then the judge should allow the matter to be tried by the jury.[2]

[81] In the words of Lord Lane at page 1042-D

> *"(1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge comes to the conclusion that the Crown's evidence, taken at its highest, is such that a jury properly directed could not properly convict on it, it is his duty, on a submission being made, to stop the case. (b) Where however the Crown's evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence on which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury. It follows that we think the second of the two schools of thought is to be preferred."*

[82] In **Daley** Lord Mustill summarized this position by stating thus:

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[2] p1062

> *"It has for many years been recognized that the trial judge has the power and duty to withdraw the issue of guilt from the jury if he considers that the evidence is insufficient to sustain a conviction. The judge had, and still remains today, the power so to intervene of his own motion.* ***Much more commonly, however, the intervention of the judge is prompted by a formal submission on the part of counsel for the defendant****, in the absence of the jury,* ***at the close of the prosecution case****. This practice has no statutory warrant, but the background to its exercise was provided by s.4(1) of the Criminal Appeal Act 1907, which required the Court of Criminal Appeal to quash a conviction 'if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence." (Emphasis mine.)*

[83] In **R v Colin Shippey** et al 8 [1988] Crim L.R. 767 Turner J in considering the second limb of Galbraith assessed the evidence as a whole and took the view that taking the prosecution's case at its highest did not mean "picking out the plums and leaving the duff behind." His Lordship did not interpret Galbraith as intending to say that if there are parts of the evidence which go to support the charge then no matter what the state of the rest of the evidence that is enough to leave the matter to the jury.

[84] In **Director of Public Prosecutions v Varlack** [2008] UKPC 56, Lord Carswell with reference to a judgment of King CJ of the Supreme Court of Australia, in **Questions of Law Reserved on Acquittal (No 2 of 1993)** (1993) 61 SASR 1 at 5, which his Lordship regarded as an accurate statement of the law, adopted the following passage:

> *"… I would re-state the principles, in summary form, as follows. If there is direct evidence which is capable of proving the charge, there is a case to answer no matter how weak or tenuous the judge might consider such evidence to be. If the case depends upon circumstantial evidence, and that evidence, if accepted, is capable of producing in a reasonable mind a conclusion of guilt beyond reasonable doubt and thus is capable of causing a reasonable mind to exclude any competing hypotheses as unreasonable, there is a case to answer. There is no case to answer only if the evidence is not capable in law of supporting a conviction. In a circumstantial case that implies that even if all the evidence for the prosecution were accepted and all inferences most favourable to the prosecution which are reasonably open were drawn, a reasonable mind could not reach a conclusion of guilt beyond reasonable doubt, or to put it another way, could not exclude all hypotheses consistent with innocence, as not reasonably open on the evidence."*

[85] Therefore, the status of the law is that a Magistrate is under duty to evaluate the evidence that has been put before the court by the prosecution at the close of the

prosecution's case, and on his own or by the prompting of the defence, to put an end to the matter where no prima facie case against the defendant has been made out.

Burden of Proof

The legal burden of proof that an offence has been committed in a criminal case is that of the prosecution. The standard of proof is beyond reasonable doubt. The common law position on this point of law was properly enunciated in the case of **Woolmington v DPP** [1935] AC 462. It is only in the cases of exception, that is, where the defence advances a plea of insanity, or statute has imposed a duty of proof/reverse burden, that the burden of proof is on the defendant. In what has become known as the "Golden thread" speech, Lord Sankey delivering the judgment for a unanimous Court said:

> *"Throughout the web of the English Criminal Law one golden thread is always to be seen that it is the duty of the prosecution to prove the prisoner's guilt subject to... the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner... the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."*

DISCUSSION

[86] The requirement to seek leave to apply for judicial review serves the overarching objective of the CPR, to *inter alia*, ensure efficiency of the court's processes and resources including the avoidance of waste of the court's time.

[87] The arguments of the 2nd and 3rd Respondents on the non-obligation of Magistrates to provide reasons for the upholding of a no case to answer submission or the entry of a not guilty verdict for an acquittal is noted as the correct status of the law. However, as reasons were provided and now form the basis of this application this point is moot and I will move on to consider the merits of the submissions made by all sides.

Proper Parties

[88] Rule 56.11 (1) of the CPR speaks to service of the claim form and the affidavit in support on all persons directly affected by the application. The Court will accept that the Respondents being directly affected are interested parties and they are properly named as Respondents in this matter. By ruling of the Court, the Director of Public Prosecutions was served with the application. Though present, the Office of the Director of Public Prosecutions took no part in the proceedings.

Alternative Remedies

[89] There is a consideration of whether there are any discretionary bars such as an alternative remedy or a failure to satisfy CPR Rule 56 that should preclude the use of the court's time to review this matter (**Sharma v Brown-Antoine**).

[90] As established above, the use of judicial review for any matter is an option of last resort with CPR Rule 56.3 (d) requiring that an application for leave to apply for judicial review address the matter of the existence of an alternative form of redress, and if so why the alternative has not been pursued. In this matter while the Applicant seeks declaratory orders, these are entwined with the application for an order of certiorari which is available only through the process of judicial review.

Arguable Case with Realistic Prospect of Success

[91] The primary question to be determined is whether the Applicant has established the existence of an arguable ground for judicial review with a realistic prospect of success.

[92] It was within the purview of the Learned Resident Magistrate to find that a prima facie case had not been made out against the Respondents on the evidence of the prosecution at the end of the prosecution's case. The law as rehearsed in the preceding paragraphs could be considered trite. The Learned Resident Magistrate was entitled to examine **Queen v Gosh** 1982 QB 1053 to see what the elements of the offence being tried were and to use it as a guide post as to the elements that the

prosecution had a duty to prove. There had to be evidence which, depending upon the view taken, could have been taken as intent to deceive. The questions of "what is it the crown has to prove?" and "was there evidence capable of amounting to *mens rea?"* were the correct questions to be asked.

[93] Counsel for the Applicant is incorrect in saying that whether there is evidence of *mens rea* as an element of the offence of fraud could only have been decided after evidence is adduced from the defence given the crown's burden of proof. By saying *mens rea* could only have been established once the defence gave evidence suggests it had not been established on the prosecution's case. There must be some evidence upon which the conclusion of *mens rea* could be found. There was no evidence to that effect identified. The evidence which is referred to by counsel for the Applicant as being 'overwhelming' goes to the element of the *actus reus*, and not the *mens rea*.

[94] The interpretation of section 280 of Judicature (Resident Magistrates) Act by Counsel for the Applicant is also flawed. That section of the Act does not go to jurisdiction but goes to procedure. It places no burden upon the defence to adduce any evidence in the case from which the Learned Resident Magistrate could then make a finding on the elements of the crime.

[95] It is a correct argument that the Magistrate ordinarily has no jurisdiction for fact finding before the end of all evidence to be presented in a trial. However, the question of whether there is any evidence upon which the fact in issue could be found is a question which the Magistrate applying **Galbraith** must ask at the point of a no case to answer submission.

[96] The Learned Resident Magistrate did direct her mind properly to the question of whether there was any evidence of intent to defraud. Page 34 of the transcript records the Learned Resident Magistrate asking herself the question, "did the accused have an intention to defraud?" The transcript on pages 38 -39 also shows that she was trying to determine if there was any evidence at all upon which such a finding could be made, rather than applying her jury mind as Counsel has argued. It

is also clear that having seen no direct evidence of an intent to defraud she examined if the intention could be inferred from the circumstances of the case as presented by the crown.

[97] She then went on to consider the question the court should examine on a no case submission. She correctly quoted the principle of **Galbraith** and this must be taken to indicate that she directed her mind to the correct application of the test to the facts of the case. Her conclusion was clearly along these lines to say that the crown has not proven its case, and that taken at its highest that there was no evidence of an intent to defraud. Her reason that while the evidence clearly pointed to irregularities regarding the procedure for the distribution of funds in that the distributions were effected without the requisite approval, the other equally essential element of the crime charged, the *mens rea* to deceive was not made out, cannot be challenged. Equally so her finding that the evidence of the prosecution that attempts were made by the parties to regularize the payments by having the necessary documentation completed after the irregularity became the subject of a complaint and that there is no indication these attempts were clandestine, or had the purpose of covering up what had already been a faulty administering of the funds.

[98] The submission of the Applicant that the Learned Resident Magistrate should be precluded from considering the merit of the case at the close of the prosecution's case, or alternatively that the defendants should be compelled to offer a case of their own, in effect giving up their right to remain silent, cannot be accepted. Where no statute, or common law defence proffered compels the defendant to speak the Magistrate will be restricted to the evidence of the prosecution unless the defence voluntarily participates in providing evidence to the court. The Magistrate therefore as tribunal of law and fact would be placed in a position to determine the case at the end of the prosecution's case and more so upon a no case to answer submission from the defence. The Court is compelled to agree with the submission of the 2nd and 3rd Respondents on this point, that if it were otherwise the law would not only

run afoul of itself, but a case could never be determined under such circumstances. This is clearly not the law.

[99] The law as stated in **Woolmington** is the basis of the decision in **Galbraith**, which stipulates that where any element of the offence is not proved the court must uphold a submission of no case to answer.

[100] Consistently throughout his submissions Mr. Wildman makes the point that the Learned Resident Magistrate could not have made a finding of no *mens rea* because such a finding is one of fact, and further that such a finding of fact could only be made after hearing from the accused. He also states that the question she asked herself was if there was any *mens rea*.

[101] With respect, this is not the question she asked herself. What she asked was, is there *any* evidence of an intention, *any* evidence of the *mens rea* required in proof of the offence. As to Counsel's submission that the Learned Resident Magistrate asked herself the question of *mens rea* at the wrong time, guidance is taken from **Blackstone's Criminal Practice** 1999 which states at page 1372:

> *"If there is some evidence which – taken at face value – establishes each essential element, then the case should normally be left to the jury. The Judge does, however, have a residual duty to consider whether the evidence is inherently weak or tenuous. If it is so weak that no reasonable jury properly directed could convict on it, then a submission should be upheld."*

[102] In **Daley** it was made clear that although a trial judge ought not to withdraw a case from the jury merely because he considered the prosecution evidence as unworthy of credit, since it was the jury's and not the judge's function to assess the credibility of witnesses, the judge ought to withdraw the case from the jury if it was based on evidence which, even if taken to be honest, was so slender that it was unreliable and therefore not sufficient to found a conviction.

[103] Addressing the separate but complementary functions of a judge and a jury, the Privy Council in **Crosdale v R** (1995) 46 WIR 278 stated that the Judge carries out a filtering process to decide what evidence is to be placed before the jury. The court

in its reasoning referred to the words of Lord Devlin in *Trial by Jury* (The Hamlyn Lectures) (1956, republished in 1988) at page 64 where he said:

> *"… there is in truth a fundamental difference between the question whether there is any evidence and the question whether there is enough evidence. I can best illustrate the difference by analogy. Whether a rope will bear a certain weight and take a certain strain is a question that practical men often have to determine by using their judgment based on their experience. But they base their judgment on the assumption that the rope is what it seems to the eye to be and that it has no concealed defects. It is the business of the manufacturer of the rope to test it, strand by strand if necessary, before he sends it out to see that it has no flaw; that is a job for an expert. It is the business of the judge as the expert who has the mind trained to make examinations of the sort to test the chain of evidence for the weak links before he sends it out to the jury; in other words, it is for him to ascertain whether it has any reliable strength at all and then for the jury to determine how strong it is…"*

The court therefore concluded that "[t]he important point is that the jury cannot assist the judge in his decision as to whether there is sufficient evidence for the judge to place the case before the jury. [That] part of the proceedings is conducted by the judge alone."

[104] Morrison JA in the Court of Appeal of Belize in the case **Enrique Montejo v R** Crim App 4/2011 at paragraph 51 said in respect of that passage that:

> *"to the extent that Devlin's LJ observation that is it the judge's role on a no case submission "to test the chain of evidence" before he sends it to the jury, was intended to convey that the judge's role is to ensure that evidence which does not match up to the minimum required by law for the particular offence, then it is obviously unexceptionable."*

In relation to **Shippey,** commenting on the words of Turner J, Morrison JA at paragraph 52 said:

> *"What was necessary, Turner J said, was for the judge to make an assessment of the evidence as a whole, a proposition with which we could not possibly have any difficulty."*

[105] The real issue in the instant case was not whether the Learned Resident Magistrate was wrong to have asked the question she did, but whether she asked the question at the wrong stage of the trial. I find that she was entitled to ask the question, and that she asked it at the appropriate time, and it is not within the purview of a review court to question the answer at which she arrived. Her conclusion at page 46 of the

transcript is therefore entirely reasonable and the entirety of her reasons shows that she accorded it the proper consideration.

[106] I also find against the submission of Counsel for the Applicant that the brevity of the Learned Resident Magistrate's delivery of her reasons was an indication of the time she spent in coming to that decision. Counsel has misunderstood the words captured in the transcript. Whereas the Learned Resident Magistrate speaks of a 'work in progress' there is no mention of more time being needed to consider the evidence. In fact, taken as a whole, the repeated references to time in the judgment as delivered appear to be in reference to the production of copies of her decision and not the decision itself. Particular reference is to be made to the Learned Resident Magistrate's words at the beginning of her delivery,

> *"Let me just say first of all that I think I have given myself too little time in relation to this matter. I had hope (sic) to give persons copies of the decision; it's not going to be possible. In fact, we do have a court reporter in court so whatever is going to be said will be recorded so, you can in fact get it from the court report. Okay?"*

[107] I find that the Learned Resident Magistrate did sufficiently direct herself and approached the question of the no case to answer submission as directed by Lord Lane CJ in Galbraith in answer to his question, "How then should the judge approach a submission of 'no case?"

[108] The transcript provided points to her correctly enunciating the test to be applied in a no case to answer submission and addressing her mind to the entire body of evidence presented by the prosecution. Her summation of the evidence was comprehensive as was her analysis of the issues in respect of the law and the facts considered in arriving at her decision to uphold the no case to answer submission.

[109] It is also clear the Learned Resident Magistrate's references to time was in relation to a prior plan of hers to have her reasons fully written out to facilitate the distribution of copies to the parties. The constraint of time was clearly in reference to its effect on the format of her presentation to the parties as she gave her decision and reasons, and not in reference to an inadequacy of time spared to consider the issues raised about the prosecution's case on the defences' submission.

[110] I find it was eminently reasonable for the Learned Resident Magistrate to have found that the evidence which Counsel for the Applicant suggests is 'overwhelming' goes to the *actus reus* of the crime, that is, the procedure relating to the distribution of the funds was breached. However, it does not extend to prove on the crown's case the other required element of *mens rea*, that is, that there was an intention to defraud. Based on this state of the evidence the Learned Resident Magistrate could have found on the second limb of Galbraith that a jury properly directed could not properly convict on the prosecution's case, for the absence of the essential element of the *mens rea.*

[111] The Prosecution must adduce sufficient evidence upon which a finding of guilt can be made. The Learned Resident Magistrate was entitled at the end of the prosecution's case to ask herself the question of whether the prosecution has presented enough evidence to make out a *prima facie* case. It is only if her answer is yes that she is entitled to continue the trial. Where the answer is no, she is duty bound to put an end to the proceedings.

[112] In respect of the question of jurisdiction to determine the state of the prosecution's case at the point of the no case submission, for the foregoing reasons I find merit in the submission of Counsel for the Respondents that the Learned Resident Magistrate did have proper jurisdiction and moreover was duty bound on the application of the defence to consider the withdrawal of the matter from consideration of her jury mind.

[113] The court is also guided by the decision of the Privy Counsel in **Millicent Forbes v Attorney General** to be mindful that it would be inappropriate to entertain judicial review proceedings against a court's decision to acquit an accused, since it is for the Director of Public Prosecutions to decide whether to re-indict the accused, and that body is not bound by the decision of a court on judicial review.

CONCLUSION

[114] Leave to apply for judicial review is only granted if the Applicant satisfies the Court that there is an arguable ground for judicial review having a realistic prospect of success. The Applicant has not met that threshold in that there is no arguable case with any hope of success.

[115] The Applicant in its submissions has not identified on the evidence presented any failure on the part of the Learned Resident Magistrate to apply the applicable law in the proper manner. The issue of unreasonableness is neither concerned with subjective opinions, or the favourability of a decision to either party. It is concerned with whether the Learned Resident Magistrate has correctly applied the law in substance and procedure to make her decision a valid one.

[116] On the evidence the Learned Resident Magistrate had and exercised properly jurisdiction in the trial and also applied the correct law to the submission of no case to answer made by the defence. Judicial Review would serve only to review the proceedings to that extent, with no jurisdiction by the Full Court to substitute her decision where the process leading to her conclusion has not been found to be faulty.

[117] Additionally, judicial review into the decision to uphold the submission of no case to answer, and the consequent nullification of the acquittal of the 2nd, 3rd, and 4th Respondents would amount to allowing the prosecution to appeal an acquittal where this is impermissible under law and would be in breach of their constitutional right to be tried only once for the offences charged against them. The decision of Beswick J that judicial review of this matter would be an exercise in futility, there being no arguable ground with a realistic prospect of success is beyond reproach.

[118] The Application for Leave to Apply for Judicial Review is accordingly refused.

COSTS

[119] I find that the application is vexatious for being so against the weight of authority that there could have been no reasonable expectation that it would have succeeded. Pursuant to CPR Rules 56.15 (4) and (5), cost of this application is to the Respondents.