[2016] JMFC Full 10

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE FULL COURT

CLAIM NO. 2013 HCV 05366

BEFORE: The Hon. Mrs. Justice C. Lawrence–Beswick

The Hon. Ms. Justice J. Straw

The Hon. Mr. Justice D. Fraser

BETWEEN	**BRENTON HENRY**	**CLAIMANT**
AND	**HER HONOUR MRS. D. GALLIMORE-ROSE**	**1ST DEFENDANT**
AND	**ATTORNEY GENERAL OF JAMAICA**	**2ND DEFENDANT**

IN OPEN COURT

Mr. Hadrian Christie instructed by Mr. Jerome Spencer of Patterson Mair Hamilton for the Claimant

Ms. Lisa White from December 1st - 3rd, 2014 and then Mrs. Nicole Foster-Pusey QC, Ms. Carlene Larmond and Ms. Carla Thomas instructed by the Director of State Proceedings for the Defendants

Heard: December 1st, 2nd and 3rd 2014, February 2nd, April 9th and 10th, July 10th 2015, and December 20th 2016

Administrative Law – Constitutional Relief – Judicial Review – Application for Certiorari – Assault and Battery – False Imprisonment – Resident Magistrate's Court Procedure – Committal for Non-payment – Liability of a Resident Magistrate – Jurisdiction of the Resident Magistrate – Natural Justice – Costs – Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act –

Maintenance Act – Judicature (Resident Magistrates) Act – Justices of the Peace Jurisdiction Act – Bail Act

LAWRENCE-BESWICK J

[1] I have had the privilege of reading the draft judgment of the Honourable Ms. Justice Straw which has discussed and analysed the several and varied issues in this matter. I agree and need add nothing further.

STRAW J

THE PARTIES

[2] The claimant, Mr. Brenton Henry, is a British national who fathered a child ('BH') with Ms. Paulette Rhamjus on one of his visits to Jamaica. The 1st defendant, Her Honour, Mrs. Dionne Gallimore-Rose, is a Resident Magistrate for the Family Court for the parish of Saint James. The 2nd defendant, the Attorney-General of Jamaica is being sued in his capacity as the Director of State Proceedings in respect of the actions of Her Honour Mrs. Gallimore-Rose acting in the course of her duty as the servant or agent of the State.

[3] Mr. Henry is seeking judicial review of decisions made against him by the Resident Magistrate, Her Honour Mrs. Gallimore-Rose, ('the Magistrate') in proceedings in the said Family Court and for the resulting assault, battery, false imprisonment and breaches of his fundamental rights and freedoms under the **Constitution of Jamaica**. These are listed in the Fixed Date Claim Form filed on the 21st of November 2013 and are set out below:

1. An order for certiorari, quashing the decisions of the 1st Defendant to impose bail conditions on the Claimant on diverse days.
2. An order of certiorari, quashing the order of the 1st Defendant refusing to grant the stay and to remit the application for stay before another Judge of the Family Court;

3. An order of certiorari, quashing the decisions of the 1st Defendant to commit the Claimant to prison on diverse days;
4. Declarations that the 1st Defendant has infringed the Claimant's Fundamental Rights and Freedoms to:
   (a) liberty (section 13(3)(a));
   (b) freedom of movement (section 13(3)(f));
   (c) equality before the law (section 13(3)(g));
   (d) freedom of the person (section 13(3)(p)); and
   (e) due process (section 13(3)(r));
5. Damages for assault, battery and false imprisonment;
6. Constitutional/Vindicatory Damages;
7. Interest on damages
8. Costs; and
9. Such other remedies as this Honourable Court may see fit.

BACKGROUND

[4] On the 28th of June 2007, Ms. Rhamjus commenced proceedings for the maintenance of BH in the Family Court for the parish of Saint James. This was done by way of an information and complaint 1674/2007 issued against Mr. Henry. He appeared before Resident Magistrate, Her Honour Mrs. Feurtado-Toby pursuant to a Warrant of Disobedience of Summons that was issued on the 15th of April 2009 owing to his failure to appear in the maintenance matter.

[5] On the 30th of June 2009, DNA results confirmed that Mr. Henry was the father of the child BH and on the 9th of September 2009, he agreed to a maintenance order of $5,375.00 weekly along with half costs for school and medical expenses for the said child. The court documents indicate that a Collecting Officer's order was made in relation to this amount. A second order was also made on the same date for payment by Mr. Henry of $200,000.00 on or before the 12th of October 2009 for the maintenance of BH from birth to the 4th of September 2009, as well as payment of USD$185.00 as half DNA test cost on or before the 11th of

September 2009. This latter order was not the subject of a Collecting Officer's order.

[6] Mr. Henry's long and tortuous history with the Family Court began thereafter as none of the above payments were honoured. On the 17th of November 2009, Ms. Rhamjus laid an information and complaint 3349/09 against Mr. Henry for disobedience of maintenance in respect of the order where no Collecting Officer's order was made. Mr. Henry was served with summons issued on the 17th of November 2009 in relation to the disobedience of maintenance order for $200,000.00 and US$185.00.

[7] On the 15th of December 2009, Mr. Henry failed to appear in court and a Warrant of Disobedience of Summons was issued which was executed on him on the 14th of June 2010 when he was apprehended and brought before the court.

[8] However, between the 17th of November 2009 and the 14th of June 2010, the documentary trail as contained in the affidavits of the Magistrate revealed that other actions were taken against Mr. Henry. A Collecting Officer's application for a Warrant of Distress was made on 22/12/09 in respect of the outstanding sum of $80,625.00 for the period 11/9/2009 to18/12/09 where Mr. Henry had failed to pay any maintenance in respect to the order made subject to a Collecting Officer's order. A Warrant of Distress on the Application of the Collecting Officer in respect of these sums due was granted by the Judge of the Family Court on the same day.

[9] On the 14th of June 2010, the Warrant of Distress was taken out for levying but it is noted that there was insufficient distress. On that same day, Her Honour Mrs. Feurtado-Toby made a Forthwith Order against Mr. Henry for the payment of $150,000.00 or 30 days imprisonment. This order related to the maintenance order made without a Collecting Officer's order. It is noted that if payment was made, Mr. Henry was to be offered bail in the sum of $20,000.00 with surety to return to court on the 12th of July 2010.

[10] On the 15th of June 2010, a Warrant of Arrest was issued for Mr. Henry in respect of the outstanding sum of $80,625.00 as a result of the failure to levy the amount due to insufficient distress. On the 12th of July 2010, Mr. Henry failed to appear in Court and on the 20th of July 2010, a Bench Warrant was issued for his arrest which was executed on him on the 23rd of November 2010.

[11] Apparently Mr. Henry was taken before the court on that warrant on that same day and a Forthwith Order made for the payment of $25,000.00 or 15 days imprisonment. He was offered bail. On that same day however, there was an application by the Collecting Officer for the outstanding sum of $258,000.00 for the period of 22/01/10 to 19/11/10 in respect of the maintenance order made with a Collecting Officer's order. The corresponding Warrant of Distress on application of the Collecting Officer was issued and signed on that same day.

[12] On that day the warrant was endorsed that there was insufficient distress. That day was a busy one for Mr. Henry, as a Warrant of Arrest was issued for him due to the insufficient distress in respect of the amount noted in the above paragraph. This Warrant is endorsed as executed.

[13] There were two mention dates of the 7th and 15th of December where no payments were made by Mr. Henry. On the 21st of December he paid $6,000.00 in respect of the first Collecting Officer's order for $80,625.00. On the 6th of January 2011 he failed to attend court and a Bench Warrant was ordered for his arrest. Between that date and May 2013, this warrant was not executed as Mr. Henry could not be located. However on the 6th of June, 2013, the said warrant was executed on him and he appeared before, Her Honour Mrs. Gallimore- Rose for the first time.

[14] Mr. Henry appeared before the Magistrate on various dates up to the 8th of July 2013, during which he was committed to prison as several committal orders were made against him. During that time, he was also offered bail to return to court.

On the 15th of October 2013, my brother, Anderson K.J stayed all committal proceedings in the Family Court until the further orders of the Supreme Court.

PRELIMINARY OBSERVATIONS

Is the Magistrate personally liable for torts committed against Mr. Henry?

[15] It is to be noted that the claim is not only for judicial review and constitutional relief but also for damages for the torts of assault, battery and false imprisonment. In her submissions, counsel for the respondents, Ms. Carlene Larmond (who replaced counsel, Ms. Lisa White during the course of the hearing) made some preliminary observations in relation to the orders requested by the Claimant. She has submitted that the scope of relief considered by this court be narrowed to judicial review ,declarations that certain constitutional rights have been infringed and the issue of constitutional and vindicatory damages.

[16] She stated that the statement of case contained no grounds or evidence in support of the claim for assault and battery. She submitted further that the Claimant's submissions did not advance arguments in that regard neither as to liability nor damages so the only conclusion to be drawn is that these causes of action have not been pursued. It is to be noted that Mr. Hadrian Christie, counsel for the claimant, has not contradicted this submission and in any event, no such evidence has been put before this court in relation to those torts.

[17] In relation to the issue of false imprisonment, it is Ms. Larmond's contention that it is not actionable pursuant to section 3 (5) of the **Crown Proceedings Act** which is set out below:

> *3 (5) -No proceedings shall lie against the Crown by virtue of this section in respect of anything done or omitted to be done by any person while discharging or purporting to discharge any responsibilities of a judicial nature vested in him, or any responsibilities which he has in connection with the execution of judicial process.*

[18] She has submitted that the action of false imprisonment lies in tort and by virtue of the provisions of section 3(5) of the said Act, the claimant is precluded from

pursuing this cause of action against the respondents. Counsel has submitted further that the Magistrate is a judicial officer as she is a Judge of The Family Court for the parishes of St. James, Hanover and Westmoreland and she was at all material times discharging responsibilities of a judicial nature. She referred the court to the **Judicature (Family Court) Act**, Part 11 of which establishes Family Courts outside the corporate area.

[19] However, in relation to the claim of false imprisonment, Mr. Christie has submitted that Resident Magistrates are personally liable at common law and were akin to Justices of the Peace. He made reference to section 79 of the **Justices of the Peace Jurisdiction Act** that states that Justices of the Peace are liable for acts done without or in excess of jurisdiction. Counsel also made reference to section 15 of **the Judicature (Resident Magistrates) Act** in support of the submission that since every Resident Magistrate is ex officio a Justice of the Peace, then Resident Magistrates are summarily liable for acts done without or in excess of jurisdiction. He also stated that as a result, they do not enjoy immunity from suits granted to judges of the Supreme Court and higher courts. Section 15 of the said Act provides as follows:

> *Every Magistrate shall be ex officio a Justice of the peace for every parish in the island.*

[20] Mr. Christie has cited the Constitution of Jamaica and is relying also on the cases of **McC v Mullan** [1984] 3 All ER 908, **Maharaj v AG of Trinidad and Tobago**[1978] 2 All ER 670 as well as **Tesfa Joseph v Superintendent of Prisons, the Chief Magistrate and the Attorney General,** Claim No. ANUHCV 2011/0602.

[21] Ms. Larmond has submitted that neither section 79 of the **Justices of The Peace Jurisdiction Act** nor **McC v Mullan** can properly ground the reliance placed on them by Mr. Christie. She states that the reliance on section 15 of the **Judicature (Resident Magistrates) Act** may be premised on a misconception of the term ‘ex officio’. She referred the court to the definition of that term in **Black’s Law**

Dictionary which speaks to *"By virtue or because of an office".* She contends that it simply means that the Magistrate is a Justice of the Peace by virtue of her status as a Resident Magistrate.

[22] Counsel maintained her submissions that the Magistrate is a judicial officer and stated that this is clearly borne out as one considers section 6(c) of the **Family Court Act** as well as section 112 of the **Constitution** and regulation 2 of the **Judicial Services Regulations**, 1961. She states that there is therefore no place for the common law in ascertaining her role and the nature of her functions as the Magistrate is appointed by the **Family Court Act**. She pointed out that **McC V Mullan** was decided by the Northern Irish Court with specific reference to a statutory provision which expressly provided that no action would lie against a magistrate unless he had acted without jurisdiction or in excess of jurisdiction She stated that the court in that case had to try as a preliminary issue whether the magistrate had acted without or in excess of jurisdiction. She stated that the specific provision is unknown to the Jamaican jurisprudence.

[23] **McC v Mullan**, is a House of Lords decision concerning an action brought against a resident magistrate and two lay justices ('the magistrates') claiming for false imprisonment. At the hearing of the appeal before the House a question arose as to the extent to which magistrates were liable to an action for damages if they did not have jurisdiction or exceeded their jurisdiction, such a cause of action being expressly recognised by section 15 of the **Magistrates' Court Act (Northern Ireland)**, 1964.

[24] Lord Bridge noted at page 913, that **McC v Mullan** was the first case ever to come before the House specifically relating to the civil liability of justices arising from the performance or purported performance of their duties. It was held as follows:

> i. *In Northern Ireland, as in England and Wales, magistrates, or any other court of summary jurisdiction, were not liable in damages for the consequences of an unlawful sentence imposed by them which could be quashed for irregularity, if they had jurisdiction and duly acted within it.*

However, magistrates were liable for the consequences of imposing a sentence which they had no jurisdiction to so impose;

ii. *The quashing of a magistrates' decision or order by certiorari for excess of want of jurisdiction was not conclusive against the magistrates on the issue of their civil liability for acting without jurisdiction, since an excess of jurisdiction affording sufficient grounds for judicial review was not to be equated with an excess of jurisdiction for the consequences of which magistrates were personally liable.*

iii. *The failure to observe a certain statutory pre-condition amounted to an act without or in excess of jurisdiction, not a mere procedural irregularity. The statute required that the respondent be informed of his right to legal aid.*

[25] It should be noted that Lord Templeman opined at page 929 –

> *This appeal demonstrates that the time is ripe for the legislature to reconsider the liability of a magistrate and the rights of a defendant if an unlawful sentence results in imprisonment. There is no liability on a judge of the High Court acting as such and no right for a defendant to damages for an unlawful sentence imposed by a High Court judge; harm may be prevented or cut short by bail and an appeal procedure which results in the sentence being quashed... On the other hand a magistrate is personally liable where an innocent error of law or fact results in an unlawful sentence or imprisonment imposed without jurisdiction. A magistrate is not personally liable for an innocent error of law or fact which results in an unlawful sentence or imprisonment within jurisdiction.*

[26] Ms. Larmond also contends that Mr. Christie's submission that damages may lie against the Magistrate under the **Constitution of Jamaica** and any reliance on **Maharaj** is also misplaced as the damages awarded in that case were not against the judge that made the committal order nor were they awarded for the tort of false imprisonment. She pointed out that the Board emphasised that the claim was not one in private but in public law for deprivation of liberty alone.

[27] **Maharaj** was a majority decision of the Privy Council which was concerned with the issue of whether the failure of the judge, (i.e. a High Court Judge not a Magistrate) to inform the appellant of the nature of the contempt with which he was being charged before committing him to prison constituted deprivation of liberty without due process of law, and thereby entitled the appellant to redress by way of monetary compensation.

[28] For the purpose of the case at bar, it may be noted that both the Attorney-General and Maharaj J were named as respondents to the notice of the motion but only the Attorney-General was served and from the outset the motion had proceeded against the Attorney-General alone. It was argued for the Attorney-General that even if the High Court had jurisdiction, he is not a proper respondent to the motion.

[29] It was held by the majority, *inter alia*, that –

> *i. the Attorney-General was a proper respondent to the motion, by virtue of section 19(2)of the* ***State Liability and Proceedings Act****, 1966 since the redress claimed under section 6 was against the state for contravention by its judicial arm of the appellant's constitutional rights; and*
>
> *ii. the entitlement to apply to the High Court for redress under section 6(1) in respect of his imprisonment, did not subvert the rule of public policy that a judge could not be made liable for anything done by him in the exercise of his judicial functions for it was only errors in procedure amounting to failure to observe the rules of natural justice, which were likely to be rare, that were capable of constituting infringement of the rights protected by section 1.*
>
> *iii. Moreover, the claim for damages under section 6 (1) was a claim against the state directly and not vicariously for something done in the exercise of its judicial power, and a failure by a judge to observe the rules of natural justice would bring the case within the scope of section 6 only if the deprivation of liberty had already been undergone.*
>
> *iv. The measure of damages recoverable under section 6(1) where the contravention consisted of deprivation of liberty otherwise than by due process of law was not at large since the claim was in public law and not for a tort in private law, but it would include loss of earnings consequent on the imprisonment and recompense for the inconvenience and distress suffered during the imprisonment.*

[30] It is clear, based on the majority decision of the Board that this authority does not advance Mr. Christie's submissions in relation to the personal liability of the Magistrate. However, if this court were to find that there has been a breach of the claimant's constitutional rights, then damages could be awarded against the State.

[31] Similarly, Ms. Larmond has also submitted that the case of **Tesfa Joseph** is inapplicable to assist Mr Christies' assertions. In that case, which is a Court of

Appeal decision from Antigua and Barbuda, the applicant who was committed to prison for being delinquent in the payment of maintenance for his child, was granted declaratory relief and compensation for the deprivation of his right to personal liberty. It was held that the Chief Magistrate, who was joined as the Second Defendant, unlawfully issued a Committal Warrant for the applicant, insofar that it violated the proviso contained in section 127 of the **Magistrate Code of Procedure Act**.

[32] It is important to note that Court in **Tesfa Joseph**, refused to grant a declaration that the detention of the applicant constituted the tort of false imprisonment as well as damages for the said tort.

[33] Ms. Larmond also referred the court to **Gladstone Jemmison v Kay Beckford**, Suit No. CL 1992/J349, a decision of Harrison K.J (as he then was).This matter related to a summons to strike out the plaintiff's statement of case and to dismiss the action. The plaintiff had filed the action against the defendant in respect of certain orders she had made against him in her capacity as Resident Magistrate for the parish of St. James. The claim was for false imprisonment and the plaintiff's counsel argued that the Resident Magistrate had exceeded her jurisdiction in relation to certain provisions of the Recognizance and Sureties of the Peace Act by failing to follow the process mandated by the said Act.

[34] Counsel for the plaintiff also submitted that as a result, the magistrate ought not to be afforded protection under section 3(5) of the **Crown Proceedings Act** as she was not acting as a servant or agent of the Crown at the material time. It is to be noted that Harrison K.J struck out the Statement of Claim on the basis of section 13(2) of the said Act as the Attorney General had not been joined as a defendant to the suit. He stated however that the issue of whether the magistrate was personally liable would have had to be determined at a trial, as the issue would turn on whether she knew she had no jurisdiction to do what she did.

[35] Harrison K.J said he found the cases of **Sirros v Moore and Others** [1974] 3 All E.R. 776, **McC v Mullan** and **McCreadie v Thompson** (1907) S.C. 1176 helpful. He referred to the fact that the court in **McC v Mullan** held that the failure of the magistrates to observe the condition precedent was not a mere procedural irregularity but resulted in acting without jurisdiction or in excess of jurisdiction. In **McCreadie**, although the trial and conviction had been within the jurisdiction of the magistrate, he had no power to imprison the plaintiff without giving him the option of a fine.

[36] Harrison K.J stated that the facts in **McC v Mullan** were comparable to the circumstances before him. Similarly, it could be advanced that any failure by the Magistrate to follow procedures as laid out in the **Maintenance Act** would not merely be a procedural irregularity but could be described as acting without or in excess of jurisdiction in spite of the fact that there is no express statutory provision of personal liability as in **McC v Mullan**. It does appear however, that the common law position could be described as somewhat ambivalent in finding that a magistrate should be personally liable.

[37] In **Sirros,** Lord Denning MR stated the position in these instructive words at page 785 -

> *In the old days, as I have said, there was a sharp distinction between the inferior courts and the superior courts. Whatever may have been the reason for this distinction, it is no longer valid. There has been no case on the subject for the last one hundred years at least. And during this time our judicial system has changed out of all knowledge. So great is this change that it is now appropriate for us to reconsider the principles which should be applied to judicial acts. In this new age I would take my stand on this: as a matter of principle the judges of superior courts have no greater claim to immunity than the judges of the lower courts. Every judge of the courts of this land — from the highest to the lowest — should be protected to the same degree, and liable to the same degree. If the reason underlying this immunity is to ensure "that they may be free in thought and independent in judgment," it applies to every judge, whatever his rank. Each should be protected from liability to damages when he is acting judicially. Each should be able to do his work in complete independence and free from fear. He should not have to turn the paces [sic] of his books with trembling fingers, asking himself: "If I do this, shall I be liable in damages?" So long as he does his work in the honest belief that it is within his jurisdiction, then he is not liable to an action... Nothing will make him liable except it be shown that he was not acting judicially, knowing that he had no jurisdiction to do it.*

[38] It is this final statement of Lord Denning MR that provided the rationale for Harrison K.J's decision that he would not strike out the claim on the basis that the magistrate could not be held personally liable. He stated that the allegations set out in the statement of claim would be a matter to be decided by a trial court.

[39] Ms Larmond has submitted that this court should bear in mind that the consideration given to the issue by the court in **Jemmison** was on an interlocutory application which did not include the constitutional element inherent in **Maharaj** and the case at bar. She is contending therefore that, having regard to the principles outlined in **Maharaj**, any such claim for damages ought not to lie in tort and the provisions of section 3(5) of the **Crown Proceedings Act** precludes relief of that nature. While I would agree with her that the preclusion exists, **Maharaj** did not involve consideration of personal liability against a Resident Magistrate.

[40] It is to be noted that Parliament has now placed this issue of personal liability of Resident Magistrates (now Judges of the Parish Court) beyond dispute since the passage of the **Judicature (Resident Magistrates) (Amendment and Change of Name) Act**, 2016 which came into operation on the 24th of February 2016. Section 7A of the principal Act provides-

> *7A. Judges of the Parish Court shall enjoy the same immunity from liability as Judges of the Supreme Court.*

[41] However, this provision is not retroactive and the decision whether the Magistrate in this case can be personally liable would be dependent on the application of the common law. It is my opinion that section 79 of the **Justices of the Peace Jurisdiction Act** and section 15 of the **Judicature (Resident Magistrates) Act** do not demonstrate a clear basis for Mr. Christie's conclusion of liability. If this were Parliament's intention, I would expect that a similar provision of liability would be expressed in the latter Act or at least some reference that the provisions in section 79 would apply in like manner.

[42] It is my opinion that the state of the common law on the issue and the subsequent passage of the law (in relationship to the personal liability of the Parish Judge) would seem to support both Lord Denning's and Lord Templeman's views as expressed in **Sirros** and **McC v Mullan**, respectively. In all the circumstances, it does appear that Mr. Henry would have a difficult task to convince this court that the Magistrate could be personally liable unless he is able to satisfy the court that the Magistrate was not acting judicially and knew that she had no jurisdiction to do the acts which he claims resulted in the tort of false imprisonment.

THE APPLICATION

[43] It is to be noted that Mr. Henry is not disputing the amount of money owed or whether Bench Warrants were properly ordered for him. He is also taking no issue with any committal orders made before the date of his appearance before the Magistrate. It is to be noted also that Ms. Larmond has submitted that the respondents are not challenging the application in relation to the issue of alternative remedies. I will therefore not be treating with Mr Christie's submissions on this point. The Fixed Date Claim Form seeks the orders for certiorari in a particular way, however, I have grouped the orders and declarations sought as the evidence arose and where there are overlapping submissions.

Order No. 3 – Certiorari to quash the decisions of the 1st Defendant/Magistrate to commit the claimant to prison on diverse days

SUBMISSIONS OF THE CLAIMANT

[44] It is the claimant's contention that the proceedings before the Magistrate were improperly instituted, therefore she was without jurisdiction and acted ultra vires when making the various orders challenged including the various committal orders.

[45] In relation to the above, the claimant has posed three (3) questions in the Fixed Date Claim Form:

1. Could the proceedings before the 1st Defendant be properly instituted by Ms. Paulette Rhamjus in circumstances where the Maintenance Act 2005 only makes provisions for such proceedings to be commenced by the collecting officer – not the payee under the maintenance order?
2. Could the proceedings before the 1st Defendant be brought by an information?
3. Were the committal orders made by the 1st Defendant against the Claimant unlawful in all the circumstances?

[46] Counsel, Mr. Hadrian Christie, has submitted on behalf of the claimant that the proceedings before the learned Magistrate was a nullity, having been improperly commenced by the wrong party and wrong originating document. Counsel has submitted further that the proceedings failed to comply with the statutory preconditions of the **Maintenance Act**, 2005. He referred the court to **Margaret Gardener v Rivington Gardene**r [2012] JMSC CIV 160, a judgment delivered by my brother, Anderson K.J. This matter concerned committal for breach of a court order pursuant to Part 53 of the **Civil Procedure Rules**. My brother (at paragraph 13) adopted the reasoning of the court in **Gordon v Gordon** [1946]1 All ER 247 where Lord Greene MR said as follows at page 250:

> *Attachment and committal are very technical matters, and as Orders for committal and attachment affect the liberty of the subject, such rules as exist in relation to them must be strictly obeyed. However disobedient the party against whom the order is directed may be, unless the process of committal and attachment has been carried out strictly in accordance with the rules, he is entitled to his freedom.*

[47] Mr. Christie's attack on the process is therefore three-fold. I will consider first whether the proceedings were commenced by the proper party. He referred the court to sections 20 and 21 of the **Maintenance Act**, 2005 which require the Collecting Officer to make an application for a Warrant of Distress before any committal can be ordered for non-payment. He submits therefore that the learned

Magistrate acted without jurisdiction in committing Mr. Henry to prison during the period June 6 to July 22, 2013 on the sole information of Ms Rhamjus.

[48] Sections 20 and 21 of the said Act are set out below:

> ***20****-(1) Where any amount ordered by a maintenance order to be paid to the Collecting Officer is fourteen clear days in arrears, a Resident Magistrate may, on the application of the Collecting Officer, issue a warrant directing the sum due under the order or since any commitment for disobedience as hereinafter provided and the costs in relation to the warrant, to be recovered by the respondent.*
>
> *(2) If upon the return of the warrant issued under subsection (1) it appears that no sufficient distress can be had, the Resident Magistrate may issue a warrant to bring the respondent before the Court.*
>
> *(3) If the respondent neglects or refuses without reasonable cause to pay the sum due under the maintenance order and the costs in relation to the warrant, the Resident Magistrate may commit the respondent to an adult correctional institution for any period not exceeding three months unless the sum and costs and the costs of commitment, be sooner paid.*
>
> *(4) Where a respondent is committed to an adult correctional institution under subsection (3), the provisions of section 21(3) shall apply.*
>
> *(5) Notwithstanding anything to the contrary in any enactment limiting the time within which summary proceedings are to be taken, such limitation shall not apply to proceedings for enforcing the payment of sums under an order made under this Act.]*
>
> ***21****-(1) A person shall not be committed to an adult correctional institution for default in payment under a maintenance order unless the Court is satisfied that the default is due to the willful refusal or culpable neglect of that person.*
>
> *(2) For the purposes of subsection (1), if the person liable to make payment is not before the Court, the Court may, if it thinks necessary or desirable, issue a warrant to bring that person before the Court.*
>
> *(3)Where a person is committed to an adult correctional institution for default then-*
>
>> *(a) unless the Court otherwise directs, no arrears shall accrue under the maintenance order during the time that the person is in the correctional institution; and*
>>
>> *(b) the committal shall not operate to discharge the liability of the person to pay the sum in respect of which he is so committed, but at any subsequent hearing relating to the enforcement, revocation, revival, variation or discharge of the order, the Court may, if in its opinion the circumstances so warrant, remit the whole or any part of the sum due under the order.*

[49] Section 20 of the **Maintenance Act** sets out clearly the procedure to be followed by the court where there is an outstanding amount due to be paid to the Collecting Officer. Section 21(1) speaks to issues the court should be satisfied about before committal to prison. However, section 21(2) empowers the Magistrate to issue a warrant to bring an absent respondent before the court separate and apart from the process involving the Collecting Officer.

[50] Mr. Christie's submission on this point is based on two factors, firstly that Ms. Rhamjus had no legal status to commence the proceedings leading to any warrants being ordered and secondly, that the proper party, the Collecting Officer, made no applications as required by law to ground any warrants being issued for the claimant. It is important therefore to consider other relevant provisions of the Act.

[51] Section 3 of the **Maintenance Act** states that a person may apply to the Family Court for a maintenance order in accordance with the provisions of the Act.

[52] Section 11 of the **Maintenance Act** provides that the court may order a respondent to maintain a dependant on an application by or on behalf of a dependant. Section 13(1) of the said Act states that proceedings for maintenance in the Family Court are to be by way of summons.

[53] Section 19 of the Act is also relevant and is set out below:

> *19.-(1) Where a Resident Magistrate's Court or Family Court makes a maintenance order it shall, upon the application of-*
>
> *(a) a person entitled to be maintained by any other person under this Act; or*
>
> *(b) any person having the actual care and custody of any child so entitled,*
>
> *either at the time of making the order or subsequently on an ex parte application for variation of the order, provide in the order that all payments thereunder be made to the Collecting Officer and payments under such order shall thereafter be made to the Collecting Officer.*
>
> *(2) Payments of any amount ordered by a court under this Act may be made to the Collecting Officer for the parish in which the order is made, or to such other Collecting Officer as the Resident Magistrate or Judge of the Family Court may direct, in person or by letter sent by registered post properly addressed to the*

Collecting Officer and posted in time to be delivered to the Collecting Officer on the day appointed for payment.

(3) It shall be the duty of the Collecting Officer to –

(a) receive all payments directed to be made to the Collecting Officer under this Act; and

(b) make to the person named in the maintenance order fortnightly payments of the sum directed to be paid under the maintenance order or such part of the payment as is received by the Collecting Officer, without making any deduction therefrom.

(4) Payment shall be made by the Collecting Officer-

(a) directly to the person named in the maintenance order at the office of the Collecting Officer if the person so named is resident in the town in which the office is situated; or

(b) in any other case, by sending to the postmaster at the post office of the person named in the maintenance order, an original and a duplicate order specifying the amount to be paid.

(5) In a case to which subsection (4)(b) applies, the person named in the maintenance order shall attend at the post office and sign the receipt on the original and duplicate orders in the presence of the postmaster or responsible officer who shall then pay out the amount.

(6) The postmaster shall keep the duplicate order and return the original to the Collecting Officer.

(7) Where a maintenance order provides for payment to be made to a Collecting Officer, the applicant for the order shall thereupon notify the Collecting Officer of the post office nearest to the applicant.

[54] It is to be noted that this section does not state that a Collecting Officer's order is to be made as of course at every application for maintenance by a relevant person. Section 19(1) states that a Collecting Officer's order shall be made upon the application of the relevant person either at the time of making the order for maintenance or subsequently. Mr. Christie's contention that the process was commenced by the wrong person is patently incorrect. Ms. Rhamjus would have been, by virtue of section 19(1)(b), a person having the actual care and custody of a child entitled to be maintained by Mr. Henry and she was entitled to apply and the proceedings is to be by way of summons.

[55] Section 20 sets out the process to be followed when there is actually a Collecting Officer's order. Once the respondent appears before the Resident Magistrate on a warrant initiated through the Collecting Officer, section 20(3) speaks to the power of the Magistrate to commit to prison. However, section 21(1) speaks to the factors that the court must be satisfied with before committing a person in default. This is made clear as section 21(2) empowers the court to issue a warrant if the person is not before the court as stated previously. Mr. Henry could therefore have been committed for default in payment separate and apart from any application by the Collecting Officer if no Collecting Officer's order had been made. The Act makes it clear that such an order is optional.

THE INFORMATION OR COMPLAINT

[56] Mr. Christie's second complaint relates to the process used to commence the proceedings. In the documents exhibited, Ms. Rhamjus' application was commenced by way of an 'Information' which contains the subsequent words 'The Information and Complaint of Paulette Rhamjus.' As a result of this, a summons was issued to Mr. Henry to appear before the court. When Mr. Henry subsequently failed to pay the pre-maintenance order of $200,000.00 and US$185.00, Ms. Rhamjus laid a second information and complaint against him for this disobedience. It is Mr. Christie's submission that the application ought not to have commenced by way of an 'Information' but possibly, an application for a Judgment Summons by Ms. Rhamjus, and that, in any event the use of the information was improper.

[57] He referred the court to section 4(4) of the **Judicature (Family Court) Act** which specifies that the "like process, procedure and practice" as relate to the exercise of jurisdiction of a Resident Magistrate's Court are to be observed as far as they are applicable in relation to the exercise of jurisdiction of the Family Court. He then referred the court to sections 213 – 230 of the **Judicature (Resident Magistrates) Act**,1928 which sets out the methods of enforcement of an order or

judgment in the Resident Magistrate's Court, none of which he contends contemplates the use of an information.

[58] Ms. Larmond has stated that she disagrees with counsel's interpretation that Ms. Rhamjus would have needed to apply for a Judgment Summons pursuant to section 213-230 of the **Judicature (Resident Magistrates) Act** based on a reading of section 4(4) of **the Judicature (Family Court) Act**.

[59] She stated that the Court must consider what is the' process, procedure and practice' referred to in that subsection for the enforcement of an order for payment of a sum of money. She also stated that it is necessary to consider how the procedure for enforcing maintenance orders came into being. Counsel referred to **Act 26/1965** that amended the **Maintenance Act** and stated that up until that amendment, two Justices of the Peace made and enforced maintenance orders. Pursuant to **Act 26/1965**, one Resident Magistrate replaced both Justices of the Peace at each instance in respect of the making and enforcement of maintenance orders. She pointed out that **Act 26/1965** was also significant because it prescribed that,

> *"Save in so far as is inconsistent with anything for the time being provided in rules made under section 15, the practice and procedure relating to proceedings in the Resident Magistrate's Court in pursuance of this law shall, mutatis mutandis, be the practice and procedure which related to proceedings before Justices in pursuance of this Law prior to the commencement of the Maintenance (Amendment) Act, 1965, and, without prejudice to the generality of the foregoing, an order of maintenance may from time to time be enforced in the Resident Magistrate's Court, in the event of any default in any payment required by it to be made, in the manner prescribed by Parts I and III of the Justices of the Peace Jurisdiction Law for the enforcing of orders of Justices requiring the payment of a sum of money, as if the same were an order for the payment of money made by Justices under that Law"*

[60] Counsel pointed out, however, that by **Act 10/1987**, the provision previously included by way of **Act 26** was further amended. By virtue of **Act 10/1987**, Section 17 outlined that the manner prescribed in Parts I and III of the **Justices of the Peace Jurisdiction Act** for enforcing orders of Justices for requiring the payment of a sum of money would still apply to enforcement of an order for maintenance.

[61] She referred the court to Section 2(1) of Part I, which gives the power to issue summons:

> *2(1) In all cases where any information shall be laid before one or more of Her Majesty's Justices of the Peace for any parish within this Island, that any person has committed, or is suspected to have committed, any offence or act within the jurisdiction of the Justice or Justices for which he is liable by law, upon a summary conviction for the same before a Justice or Justices to be imprisoned or fined or otherwise punished; and also in all cases where a complaint shall be made to any such Justice or Justices upon which they have or shall have, authority by law to make an order for the payment of money or otherwise, then and in every such case it shall be lawful for such Justice of Justices to issue his or their summons (according to Form (1) in the First Schedule), directed to such person, stating shortly the matter of the information or complaint, and requiring him to appear at a certain time and place before the same Justice or Justices...*(emphasis supplied)

[62] Counsel stated that at the time the **Judicature (Family Court) Act** came into force (that is, 1975) the prescribed manner was that as outlined in Parts I and III. It is her submission therefore that, notwithstanding the fact that the **Maintenance Act**, 2005 did not retain the provisions of Section 17, a Resident Magistrate in enforcing orders for maintenance would be employing the process, procedure and practice as relate to the exercise of jurisdiction of a Resident Magistrate's Court in enforcing orders for maintenance in the like manner as if the same were an order for the payment of money.

[63] Counsel pointed out that under the **Maintenance Act**, there is provision for rules to be made (pursuant to section 26) but stated that she was unaware of rules having been made (there are apparently none at this time). She submitted also that it is of note also that section 135(5) of the **Judicature (Resident Magistrates) Act** provides that the rules, forms and practice in force in the Courts as of the 1st day of October 1987 shall remain in force until such rules, forms and practice are amended or revoked pursuant to this section. She submitted that the absence of rules is not fatal and that the process, practice and procedure employed by the Family Court is effective and properly advanced in this matter. She referred the court to **Peters (Winston) v Attorney General and Another; Chaitan (William) v Attorney General and Another** (2001) 62 WIR 244. She stated that in **Peters,** the Court of Appeal in Trinidad had to consider

the situation where there was a failure by the Rules Committee in making the necessary rules of court regarding election petitions. Counsel quoted from the judgement of Georges JA at page 510 :

> *To hold that the power cannot be exercised in the absence of a prescribed code of rules would mean that parties to disputes would be deprived of the benefit of the exercise of the power because of the court's failure to produce a code-a circumstance over which they have no control. I do not think this could have been intended.*

[64] Ms. Larmond submitted that are numerous other authorities which point in the same direction and the failure to provide rules or regulations for statutory provision which grants to a court a new jurisdiction or power does not necessarily prohibit the court from exercising that jurisdiction or power. She stated that this would only occur if the rules or regulations are needed to complete the definition of the power or jurisdiction or that intention can be discerned from what Parliament has enacted. On this point, counsel concluded by stating that the process invoked by Ms. Rhamjus is contemplated and permitted under the practice and procedure currently in force under the maintenance orders.

[65] It is to be noted that section 26 of the **Maintenance Act** confirms Ms Larmond's view on this issue as it merely states that the Minister may, not shall, make rules and prescribe forms for carrying into effect the provisions of the Act. I agree therefore that the absence of rules would not prevent the court from exercising its powers under the **Maintenance Act**. The weightier issue to be considered is whether there was any procedural irregularity adopted that led to Mr. Henry's committal.

[66] If Ms. Larmond's submissions have any cogency, then I consider firstly that the process under the **Justices of The Peace Jurisdiction Act** prescribes that summons be issued to bring the respondent to court upon a complaint being made. This is actually what took place in relation to Mr. Henry upon his failure to pay the pre-maintenance amount. However when one examines section 213 and the following sections of the **Judicature (Resident Magistrates) Act**, the process is clearly not in accordance with the spirit of the **Maintenance Act**, 2005

that actually speaks to the Magistrate being satisfied that the default is due to wilful refusal or culpable neglect before any committal is ordered.

[67] In relation to the issue of judgement summons and the process as laid out under section 213, there is no requirement for the resident magistrate to be so satisfied. In fact when one examines section 221, the Resident Magistrate has the power, on the application of the judgement creditor, to order the sale of the estate or interest of the judgement debtor in any lands in the parish if there are insufficient goods and chattel for levying. Again, this power is not available under the **Maintenance Act** and in any event, Ms. Rhamjus would not be considered to be a judgment creditor. I accept therefore the submissions of Ms. Larmond that the procedure invoked by Ms. Rhamjus is contemplated by and permitted under the practice and procedure currently in force in respect of enforcement of maintenance orders.

Was the Information itself presented by Ms. Rhamjus improper?

[68] As indicated previously, the document by which Ms. Rhamjus commenced the proceedings is described as an 'Information'. Mr. Christie submits that civil proceedings should begin by Complaint and criminal proceedings by Information. He referred the court to **Re DC, An infant** [1966] 9 JLR 568 in support of his submissions and stated that the Court of Appeal held that criminal proceedings should begin by way of Information and civil proceedings by Complaint. Counsel submitted that, since enforcement proceedings for outstanding amounts under the maintenance order were civil proceedings, it ought to have been commenced by 'Complaint'. He submitted further that this failure meant that the learned Magistrate had no jurisdiction to commit Mr. Henry to prison and is liable to him in damages for false imprisonment. He referred the court again to **Margaret Gardener** where proceedings were brought in the Supreme Court for disobedience of a maintenance order by way of Notice of Motion. My brother, Anderson K.J ruled that it failed to comply with the **Civil Procedure Rules** and

that it ought to have been brought by way of a Notice of Application. He rightly held that such a failure, without more, would render the proceedings invalid.

[69] Counsel for the defendants, Ms. Larmond, has submitted that Mr. Christie is in error in relation to his submissions in relation to the ruling of **Re DC**. She has stated that the Court of Appeal did not so hold as submitted by Mr. Christie. She has stated that the consideration for the distinction in that case between 'Information' and 'Complaint' was in a defined context and cannot be stretched to embrace the meaning asserted by the claimant.

[70] She stated that the Court of Appeal referred to section 2 of the **Justices of the Peace Jurisdiction Act** and Duffus P, at page 570b stated as follows:

> *This section makes it clear that an 'information' has to be laid in order that a summons may be issued to any person who has committed or is suspected to have committed an offence for which he is liable to be imprisoned or fined...but that it is not necessary for an 'information' to be laid in those cases which are not offences whereby the justices have authority to make orders for the payment of money or otherwise. In those latter cases the justices issue their summons upon a 'complaint' being made.*

[71] Ms. Larmond submitted that what the court said in effect was that it is not necessary for an Information to be laid in cases which are not offences, that in those cases the Justices issue summons upon a Complaint. She further stated that there is therefore nothing precluding the issue of the summons pursuant to an Information and in any event, when one examines the said Information in the case at bar, it is clear it is in substance a complaint.

[72] Ms. Larmond further submitted that the summons issued would have been pursuant to section 2 of the **Justices of the Peace Jurisdiction Act** and that this is the process, procedure and practice as it relates to the jurisdiction of the Resident Magistrate in enforcing a maintenance order as if the same were an order for the payment of money. She has requested that the court reject the submission that the Magistrate was without jurisdiction by virtue of the Information and Complaint laid by Ms. Rhamjus.

[73] In her affidavit, the Magistrate indicated the practice for initiating maintenance proceedings. She states that an Information and Complaint (but not a Number 1 Information which is typically used in criminal matters) is completed and thereafter a summons will be issued accordingly. The said summons will then be served on the respondent in order for him to attend court. It is her position that this was duly complied with in relation to the claimant, Mr. Henry.

ANALYSIS BY THE COURT

[74] In **Re DC** the issue of whether the right of appeal given by section 293 of the **Judicature (Resident Magistrate's) Law** from a judgment of a Magistrate in any case tried by him on indictment or on information, by virtue of a special statutory summary jurisdiction applied to an adoption order made by the Resident Magistrate under the **Adoption of Children Law**, 1956.The Court of Appeal held that it did not apply to an adoption order made under section 9 of the **Adoption of Children Law**,1956.

[75] Duffus P, who delivered the judgment of the court, examined whether an Information and a Complaint can be said to be the same thing for the purpose of conferring that right of appeal under section 293 of the above mentioned Law. He stated, at page 569h, that both words have been in common use in English criminal jurisprudence for a very long time. He traced their origin in Jamaica to the **Justice of the Peace Jurisdiction Law, Cap. 188**. Having examined the particular section of that Law, Duffus P. stated as quoted above in paragraph [73]. He stated further at 570d:

> *Clear examples of "complaints" are to be found in Jamaica in the Bastardy Law, Cap. 35, which authorises a single woman to make a "complaint" on oath... and the Maintenance Law, Cap. 232, as amended by Act 26 of 1965, which authorises certain persons to make "complaints." The primary object of these two laws is to enable the courts to make orders for the payment of money and come within the courts' civil jurisdiction rather than the criminal jurisdiction...*

[76] Duffus P. went on to examine the history of the distinction between the two words but remarked that the distinction had become somewhat blurred in England due

to the indiscriminate use of the two words in some statutes but that the distinction still exists. The understanding differentiates civil and criminal jurisdiction.

[77] The issue being argued was whether the word “Information” was synonymous with the word “Complaint” for the purpose of the appellate court having a right to hear the appeal. Based on the law as it applied to the distinction, the Court of Appeal ruled that there was no right of appeal to that court. It was held that the only powers which the Court of Appeal had in respect of appeal under section 293 concerned criminal cases on which there has been a conviction and not cases which are quasi-criminal or civil (as the Magistrate’s authority to hear complaints when exercising his Petty Sessions jurisdiction). Any appeal therefore, would go to the Circuit Court of the parish or the Judge of the Supreme Court (page 572, at paragraphs B – C).

[78] The submissions of Ms. Larmond on this point therefore also have great weight. It is to be noted that there is no evidence that the ‘Information’ laid by Ms Rhamjus is not the proper form to be used. Certainly no other form has been exhibited by the claimant to contradict the Magistrate’s evidence that the proper form was used. Secondly, even if the right form was not used, the court would be ultimately concerned with the processes following its use and not merely whether the heading of the form has the proper terminology. Certainly it is to be borne in mind, as it is conceded in **Re DC** that the terms have been used indiscriminately at times (per Duffus P at page 570).

[79] In essence, the form used contained a complaint as described in the document. At the end of the day, what followed the process initiated by Ms. Rhamjus’ “Information” which had been laid as a complaint against Mr. Henry? If the proper process was followed, it cannot be seriously argued that the Magistrate had no jurisdiction to commit Mr. Henry to prison. The committal to prison would have been on the basis of Mr. Henry’s failure to obey the orders of the court in relation to the payment of money. Mr. Henry was brought to court by the issuance of summons, as per section 13 of the **Maintenance Act** which states

that proceedings for maintenance shall be by way of summons. His failure to pay the amount ordered as the pre maintenance order resulted in an Information and Complaint (3349/09) being lodged by Ms. Rhamjus. As a result, summons were issued and served on Mr. Henry on the 23rd of November 2009. He failed to appear in court on the relevant date and a Warrant of Disobedience to Summons was executed against him on the 14th of June 2010.

[80] As far as this court is concerned, Mr. Henry was brought before the court properly by means of summons based on the Information and Complaint of Ms. Rhamjus, Any issue of procedural irregularity could only arise based on the process leading to his committal to prison.

Was there any irregularity once Mr. Henry appeared before the Resident Magistrate?

[81] Thirdly, Mr. Christie has submitted that the proper process relevant to a Collecting Officer's order was not followed prior to Mr. Henry being committed to prison. It has already been noted that section 20 of the **Maintenance Act**, 2005 describes the process to be followed in relation to a Collecting Officer's order.

[82] Based on section 20, the procedure is as follows:

i. If the money to be paid to the Collecting Officer is fourteen (14) days overdue, the Collecting Officer is to make an application to the Resident Magistrate (Application For Warrant of Distress) and the Resident Magistrate may issue a warrant for the sum due to be recovered by the respondent.

ii. On the return of the warrant issued by the Magistrate (which is the Warrant of Distress on Application of Collecting Officer) if it is indicated that there is no sufficient distress, the Resident Magistrate may issue a warrant for the arrest of the respondent (i.e. the Warrant of Arrest Where no Sufficient Distress).

iii. When the respondent appears in court on this warrant, if he neglects or refuses to pay without reasonable cause the sum due the Resident Magistrate may commit the respondent to an adult correctional institution for a period not exceeding three (3) months, unless the sum be sooner paid. Section 20(3) is to be read in light of section 20(1) which mandates that the person is not to be so committed unless the court is satisfied that the default is due to the wilful refusal or culpable neglect.

[83] When one examines section 21(2), it is apparent that Parliament intended that a defaulter could be dealt with through the process described above via the Collecting Officer's application or where it is applicable, through a warrant to bring the person before the court. When one considers this section in light of sections 11 and 19, a person can be committed to prison for wilful refusal or culpable neglect independent of a Collecting Officers' Order as stated previously. However, once a Collecting Officer's order is granted, the process described under section 20, in order to lead to a committal, must be adhered to.

EVIDENCE OF MR. BRENTON HENRY

[84] The claimant, Mr. Henry, in general, has no quarrel with the history of the matter as set out above. He agrees that on the basis of Ms. Rhamjus information dated the 28th of June 2009, Her Honour Mrs. Feurtado-Toby made an order for him to contribute $5,375.00 per week to BH in addition to half medical and educational expenses. This would have been on the 10th of September 2009. However, he makes no reference to the order of Her Honour Mrs. Feurtado-Toby made on the 10th of September 2009 for him to pay a sum of $200,000.00 for the maintenance of BH from birth to the 4th of September 2009 and US$185.00 representing half the DNA costs in relation to determining the paternity for the said BH.

[85] It is to be noted that on the 17th of November 2009, Ms. Rhamjus laid an Information for the disobedience of Mr. Henry to pay the latter sums on the dates ordered. He filed two (2) affidavits dated the 21st of November 2013 and the 22nd

of October 2014 respectively in this matter. It is to be noted that he was committed to prison firstly on the 23rd of November 2010 for failure in relation to payments and again on the 24th of May 2011.

[86] Mr. Henry has stated that on the 6th of June 2013, during one of his visits to Jamaica, Police Officers entered and searched his house without a search warrant. His motorcar was seized by the Court Bailiff under a Warrant of Distress. It is his contention that he was arrested and taken before the Magistrate on that same day. This would have been his first appearance before her.

[87] On that day, he states that she committed him to prison for four (4) days unless he paid the sum of $218,315.00 in respect of Ms. Rhamjus' information and $258,000.00 for which he alleges there was no information before the court. According to Mr. Henry, he spent two (2) days in prison, paid $20,000.00 and was again sent to prison for two (2) days if he failed to pay $258,000.00. On the 12th of June 2013, he paid $100,000.00 and was then offered bail with certain conditions:

- *$300,000.00 bond with surety*
- *Daily reporting to Coral Gardens Police Station*
- *Stop Order at all ports of entry*

[88] Mr. Henry stated that he took up this offer on the 13th of June 2013. On the 18th of June 2013, he appeared before the Magistrate again at which time he was arrested pursuant to another Warrant of Arrest (attached as **BH6**). It is to be noted that this document is a "Warrant of Arrest where no Sufficient Distress" and is for the amount of $709,500.00 in relation to arrears of the amount of $5,375.00 for the period 26th of November 2010 to 31st of May 2013.

[89] Based on this warrant, Mr. Henry stated that he was ordered to pay $200,000.00 or be committed to prison for sixteen (16) days, however if the sum was paid he was to be released on bail in the sum of $15,000.00 with surety. On the 20th of June 2013, the said sum was paid on his behalf and he was released on bail.

[90] On the 4th of July 2013, the hapless Mr. Henry appeared before the Magistrate. He was ordered to pay $50,000.00 with a further bail offer of $15,000.00 or be committed to prison for fourteen (14) days. He was able to take up the bail offer on the 8th of July 2013.

[91] In June 2013, Mr. Henry stated that he requested a copy of his file. According to him the last information on the file was the information by Ms. Rhamjus in relation to his failure to pay the sums of $200,000.00 and US$185.00. He stated that there was no application by the Collecting Officer on the file, however Warrants of Arrest were nevertheless issued in his name.

SUBMISSIONS BY COUNSEL FOR THE CLAIMANT

[92] It is Mr. Christie's submission that, based on the evidence of Mr. Henry, there were no originating documents filed in the Family Court for his subsequent committals to prison and in particular that there was no application by the Collecting Officer for a Warrant of Distress. Counsel asks the court to take note of the fact that the defendants filed two (2) affidavits on the 29th of October 2013 and the 8th of January 2014 and both were silent on the issue of who applied for Mr. Henry to be committed to prison. He submitted also that the Magistrate did not contradict the evidence of Mr. Henry that the only originating document (seen on his file) for the committal proceedings was the information of Ms. Rhamjus laid in November 2009.

[93] Mr. Christie has submitted further that it is only on the 28th of May 2014, seven (7) days before the commencement of the Full Court hearing, that the defendants filed another affidavit to which they attached documents purporting to be applications by a Collecting Officer. It is his contention that since no explanation has been given as to why these documents were submitted so late, this court is to find that on a balance of probabilities, the applications were not made by the Collecting Officer at the relevant time. According to counsel, there has been no

affidavit by any Clerk of Court to state that these documents were kept from Mr. Henry or filed in another location.

[94] Based on all of the above circumstances, it is the submission of Mr. Christie that the Magistrate acted without jurisdiction in committing Mr. Henry to prison between June and July 2013 on the sole information of Ms. Rhamjus. He has asked the court to examine the reverse side of the relevant information which shows committal orders were made in relation to this information and not the belated applications purportedly of the Collecting Officer which bear no endorsement of the court. He has argued that the Magistrate therefore committed Mr. Henry in the face of two (2) condition precedents which were not met, i.e. (1) Ms. Rhamjus was the improper party and (2) the failure to use the appropriate document to commence the proceedings under the **Judicature (Resident Magistrates) Act**. She is therefore liable to him for damages for false imprisonment.

[95] It is on the totality of all these circumstances that counsel has submitted that the proceedings before the Magistrate were a nullity as she had no jurisdiction to commit Mr. Henry. He has stated that although there is conflicting evidence in relation to the factual issue (whether or not an application was made by the Collecting Officer at the relevant times) the court should treat the claimant's evidence "with a measure of generosity" (per **R (on the application of) MH v SSHD** [2009] EWHC 2506 (Admin) and appealed in [2010] EWCA Civ 1112) since it was not challenged in cross-examination. He has asked that the court evaluate it critically by reference to other statements made by the Magistrate and inherent probabilities.

[96] In **R (on the application of) MH v SSHD**, a substantial dispute of fact had arisen in a judicial review hearing. The parties had not sought to call witnesses or have them cross-examined as in the case at bar. In determining how to resolve the issues, Sales J did state that the evidence of the witness statement of the claimant should be treated with a "measure of generosity". However, Sales J at

paragraph 10, also stated that counsel for the defendant was entitled to invite the court to evaluate the claimant's evidence in the witness statements *"critically by reference to other contemporaneous records, other statements made by the claimant and inherent probabilities"*

[97] Finally, in relation to this issue, Mr. Christie has asked that the court consider that the Magistrate provided no reasons for failing to mention the said applications in her first two (2) Affidavits and the lack of any explanation as to why these documents were missing from the file. He has stated also that there is no explanation as to how she came into possession of them since there is no evidence that she had seen them before. In light of all of this, Mr. Christie has submitted that the evidence of the claimant on the point is to be preferred and the court should make a finding that no application was ever made by the Collecting Officer at the material time. (**R v Highbury Corner Magistrates' Court, ex parte Di Matteo** [1992] 1 All ER 102, 105)

EVIDENCE OF THE DEFENDANTS

[98] The Magistrate has stated that she inherited Mr. Henry's maintenance matter when he appeared before her for the first time on the 6th of June 2013 and that he came before her on the strength of three (3) executed Bench Warrants. The first was related to the disobedience of maintenance matter in relation to the pre-maintenance order and the second, a Collecting Officer's warrant in respect of $80,625.00 for the period 11th of September to 18th of December 2009 (he had failed to pay anything in relation to these orders). A second Collecting Officer's warrant had also been executed on him on the 23rd of November 2010 for the amount of $258,000.00 in respect of the period 22nd of January 2010 to 19th of November 2010.

[99] In relation to the first warrant, she referred the court to the Information and Complaint 1674/2007 on which the maintenance order was made as well as a Collecting Officer's order. The Magistrate also referred the court to a copy of the

court sheet of the relevant date and stated that the said Collecting Officer's order was noted in the court sheet. While she admits that the said order was not noted on the Formal Order perfected by Her Honour Mrs. Feurtado-Toby, she states that it is her information and belief that the court sheet and the Information and Complaint are the sources of record for the said court.

[100] The Magistrate also exhibited a certified copy of the Formal Order issued by one Mrs Lillieth Martin, Clerk of Court, on or about the 5th of August 2013, which corresponds to the information noted on both the court sheet and Information and Complaint. She asserts therefore that it was incorrect to state that any member of staff belatedly added the words 'Collecting Officer's order made' to the Formal Order. She is also questioning Mr. Henry's assertion that no such order was made as she was informed that Mr. Henry had previously made a direct payment to the Collecting Officer in December 2010. A copy of the said record of payment is exhibited.

[101] It is to be noted that during oral submissions, Mr. Christie indicated that he is no longer taking any issue with the fact that a Collecting Officer's order was made as it is noted in the court sheet.

[102] It is noted in relation to both Collecting Officers' warrants, that the documents relevant to these - Application For Warrant Of Distress (Form 20), the Warrant of Distress on Application of The Collecting Officer (Form 21) and the Warrant of Arrest where Insufficient Distress (Form 22) were not attached and exhibited to the Magistrate's earlier affidavits dated the 29th of October 2013 and the 8th of January 2014 respectively, but to her final affidavit filed on the 28th of May 2014. In relation to the first set, the Application for Warrant and Warrant of Distress on Application dated the 22nd of December 2009 are noted as well as the Warrant of Arrest signed on the 15th of June 2010. In relation to the second set, the Application for Warrant of Distress and Warrant of Distress on Application as well as the Warrant of Arrest dated the 23rd of November 2010 respectively are noted.

[103] The Magistrate outlined the procedure in dealing with a Collecting Officer's Warrants which is basically a summary of the procedure set out in section 20 of the **Maintenance Act** as set out previously. She stated that her information and belief is that the Collecting Officer would first make an application for a Warrant of Distress pursuant to section 20 of the **Maintenance Act**. The Warrant of Distress would thereafter be issued by the Magistrate. This warrant would then be taken by the Bailiff/Police for levying on the goods of the relevant person. In event of insufficient distress, the Warrant goes back to the Collecting Officer in order that a Warrant of Arrest could be issued by the court.

[104] It is her evidence that based on these warrants and the failure of Mr. Henry to honour his commitments as revealed on the documents, she issued Forthwith Orders on the 6th and 10th of June 2013. She stated that payments of $20,000.00 and $100,000.00 were made on the 10th and 12th of June respectively. Mr. Henry was incarcerated on these Forthwith Orders between the 6th and 12th of June 2013.

[105] On the 12th of June 2013, the Magistrate granted bail to Mr. Henry in the sum of $300,000.00 with a surety with reporting conditions daily at the Coral Gardens Police Station. She also placed stop orders at the ports of entry to the island of Jamaica. She stated that she did this, as in her view Mr. Henry presented a flight risk having had a history of leaving Jamaica without notifying the court and at times when previous court dates were set with his knowledge.

[106] The Magistrate spoke also of a third Collecting Officer's warrant which was executed on Mr. Henry on the 18th of June 2013. This was for non-payment of the amount of $709,000.00 concerning the period of the 26th of November 2010 to the 31st of May 2013. These documents are also exhibited – Application for Warrant of distress dated the 6th of June 2013, Warrant of Distress on Application dated the 6th of June 2013 and the Warrant of Arrest dated the 18th of June 2013.On that date, she stated that she proceeded to make a Forthwith Order for $200,000.00 and an order for bail in the sum of $150,000.00 with a follow up

mention date on the 4th of July 2013. At this time, Mr. Henry would have owed a total of about $1.1 Million Dollars in outstanding maintenance for BH. She perfected these orders on the Warrant of Arrest dated the 18th of June 2013. On the 8th of July 2013, she made a Forthwith Order for $50,000.00 or fourteen (14) days. Mr. Henry was offered bail in the sum of $15,000.00 in his own surety and the order was perfected on information 3349/09.

[107] The Magistrate states that she was informed and verily believes that the proper procedure was engaged pursuant to the **Maintenance Act** each time a Collecting Officer's Warrant was issued in respect of Mr. Henry.

SUBMISSIONS BY COUNSEL FOR THE DEFENDANTS

[108] Counsel, Ms. Larmond has submitted that the relevant enforcement proceedings began by way of the applications of the Collecting Officer and the claimant's assertion that these applications were not on his file is not indicative that they were made belatedly. It is her further submission that he is inviting the court to draw the inference that no such applications were made and that this is borne out by an examination of the reverse side of the Information, which contains the committal orders. She states it is his contention that this should be compared to the applications themselves which bear no endorsements.

[109] She submitted further that this is a misunderstanding in relation to the procedure of the court as the Application for the Warrant of Distress is first issued. Once the Warrant is granted and if it is returned for no sufficient distress, then the Warrant of Arrest is issued. The Warrant of Arrest would then come before the Magistrate and it is on those warrants that she would conduct proceedings to determine whether the claimant should be committed. Counsel pointed out that it is on those Warrants of Arrest that the Magistrates' endorsements as to her rulings are to be found. The court notes that there are various endorsements with multiple dates and Forthwith Orders on each of these warrants. She has also asked the court to note the endorsements in June 2013 on the Information taken out by Ms.

Rhamjus which relates to the pre-maintenance order and is not to be confused with the sum due under the maintenance order. The court does note that there are endorsements on this Information in relation to the pre-maintenance sums and also Forthwith Orders in relation to these sums.

ANALYSIS BY THE COURT

[110] Mr. Henry's contention rests heavily on the fact that at the time he obtained a copy of his file in June 2013 and even up to the 18th of June 2014, the applications were missing and, in fact, the last information seen on the file related to the disobedience of the pre-maintenance payments. It is on this basis that he asserts that there was no application by the Collecting Officer to issue either a Warrant of Distress or Warrant of Arrest. Mr. Christie has also submitted that these relevant documents were missing from the first two (2) affidavits of the Magistrate and the defendants have given no explanation as to the late production. It is to be noted however that Mr. Henry has not alleged that the various Warrants of Distress or Warrants of Arrest did not exist although he gave no evidence of seeing these on his file.

[111] It is to be noted that after the matter was commenced before the Full Court, it was part heard as it was not completed in the time originally assigned. On the date of continuation the defendants filed further affidavits without the permission of the court seeking to deal with this issue (the missing documents which were not attached to the Magistrates' earlier affidavits). Mr. Christie objected to the belated application to allow the affidavits into evidence. The court carefully considered submissions on the matter by both counsel and ruled against granting the application.

[112] It is also to be noted that the parties had waived their right to cross-examine the affiants. However, even if the court were to treat the claimants' allegations with a "measure of generosity", they remain in my opinion, merely allegations and are not at the standard that one could accept as proven fact, even on the balance of

probabilities. It is clear that a Collecting Officer's order was made by a previous magistrate and the documents exhibited do show that Mr. Henry had made payments to the Collecting Officer previously. I would have to assume that the previous Magistrate negligently made committal orders against Mr Henry also without the proper originating documents as these would also have been missing from his file in 2013.

[113] Secondly, the documents, albeit only filed with the 3rd affidavit, are before the court. I have examined them, and in particular, the first two (2) sets which the Magistrate stated would have been before her in June 2013, i.e. in relation to the amount of $80,625.00 and $258,000.00 respectively and both carry relevant endorsements.

[114] The earlier Application is signed purportedly by the Collecting Officer or agent and is dated the 22ndof December 2009. The second Application is signed on the 23rd of November 2010 by the Acting Accountant of the Family Court. I note also that both relevant Warrants of Distress have endorsements on the back signed and dated by the relevant officers who are the ones who would have visited the location associated with Mr. Henry in order to obtain goods for the purpose of the levy. The Warrant of Distress dated the 22nd of December 2009 is endorsed by one Corporal Ferryman who indicated that he visited the location and was unable to find sufficient goods. His signature bears the date the 14th of June 2010. Similarly, the Warrant of Distress dated the 23rd of November 2010 is endorsed by one Constable Juanita Hanson on the same date who states that she also made diligent search for goods and chattels in relation to Mr. Henry and was unsuccessful.

[115] The respective Warrants of Arrest carry the endorsements as stated above by Ms. Larmond in her submissions. I note several mention dates purportedly endorsed on the earlier Warrant including dates of 2010, 2011 and 2013. In relation to the second warrant, there are dates including June and July 2013.

[116] Based on these documents with contemporaneous dates relating to the court's activity with Mr. Henry, it would be extremely difficult for me to come to a conclusion that the Collecting Officer's applications did not exist at the time, as those applications would have initiated the process for the Warrants of Distress and Warrants of Arrest, respectively. These documents predate the Magistrate's dealings with Mr. Henry and I do not accept that she had them manufactured after this claim was filed to meet the subtle accusation of improper procedure. It is my opinion that the documents in themselves have sufficient weight to counter Mr. Henry's beliefs and assertions. I accept therefore that he was properly before the Magistrate on the strength of three (3) sets of warrants and that the proper procedure had been followed in relation to the Collecting Officers' Warrants. The Magistrate was therefore not acting ultra vires by making the various committal orders against Mr Henry as long as she did so within the mandate of the **Maintenance Act**.

Order 1- Certiorari to Quash the decision of the Magistrate to impose bail conditions on Mr. Henry

Did the Magistrate have jurisdiction to impose bail conditions on Mr. Henry?

[117] Mr. Christie has submitted that the Magistrate's decision to impose bail conditions on Mr. Henry was ultra vires as she had no power either at common law or under the **Bail Act** to impose bail conditions. He has submitted further that she breached Mr. Henry's fundamental rights and freedoms as enshrined under section 13 of the **Constitution of Jamaica**. These rights include liberty (section 13 (3)(a)), freedom of movement (section 13 (3)(f)) and freedom of the person (section 13 (3) (p)).

[118] Counsel has submitted that when one examines the **Bail Act**, it deals only with criminal proceedings and the maintenance hearings are either civil or quasi criminal proceedings. He referred the court to **Garvin v Domus Publishing Limited and Another** [1989] 2 All ER 334,349 as well as **Pooley v Whetham**

(1880)15 Ch D 435 in which Brett LJ, at page 443, described attachment proceedings as a civil process and was not to be classified as a criminal offence. Counsel also referred to **OB v Director of the Serious Fraud Office** [2012] 3 All ER 999 and **Halsbury's Laws of England**, 5th Edn. 2012, Volume 22, at paragraph 2 where civil contempt is defined as a contempt in procedure consisting of disobedience to the judgments, orders, or other processes of the court and involving a private injury. In **OB**, Gross LJ at page 1015d, affirmed **Pooley** and stated that a civil contempt is not a criminal offence.

[119] Mr. Christie based his submission on the interpretation of the **Bail Act** and stated that on an examination of the sections, including sections 2(1), 2(2), 3(1) and 3(3), it is essentially dealing with bail in criminal proceedings. In particular, he stated that section 2(2) of the said Act explicitly excludes civil proceedings from its operation. He has also asked the court to compare this position with the **UK Bail Act** which specifically limits the Act to criminal proceedings. He referred the court to **Archbold Criminal Pleading, Evidence and Practice,** 2nd Edition at page 229. Section 2 (2) of the Jamaican **Bail Act** reads as follows:

> *(2) References in sections 3 (3) and 4 (1) and (4) to "imprisonment" does not include a committal in default of payment of any sum of money, or for want of sufficient distress to satisfy any sum of money, or for failure to do or abstain from doing anything required to be done or left undone.*

[120] In relation to the stop order, Mr. Christie referred the court to **B v B (injunction: restraint on leaving jurisdiction)** [1997] 3 All ER 258, where Wilson J held that the High Court of the UK had a limited jurisdiction (by virtue of section 37(1) of the **Supreme Court Act**,1981) to restrain a party from leaving the jurisdiction in order to enforce a judgment. He also referred the court to the England and Wales Court of Appeal decision in **Gough and another v Chief Constable of the Derbyshire Constabulary** [2002] 2 All ER 985 which approved **B v B**. Section 37(1) of the UK **Supreme Court Act**,1981 is to be compared to section 49(h) of our **Judicature (Supreme Court) Act**, 1880.

[121] According to counsel, the Magistrate who is a creature of statute, therefore had no jurisdiction to impose conditions of bail. He referred to the Magistrate's reasons for imposing bail conditions which included her understanding that Mr. Henry could not be released from custody without bail as being incorrect. He submits that once Mr. Henry is brought before the Court, the warrant effecting his appearance comes to an end. He contends that section 20(2) of the **Maintenance Act** is limited in scope and empowers the Magistrate only to issue a warrant to bring him before the court, not to detain or arrest him.

[122] Counsel further submits that while Mr. Henry may be in contempt of court, he can be committed for three (3) months but after he serves his time or pays the required sum, he is free to go until his next scheduled court appearance. The Magistrate erred therefore in imposing bail conditions that would take effect after the required sums were paid or the time served, as there was no basis for his detention. He referred the court to the English Court of Appeal decision in **Stellato v Ministry of Justice** [2011] 3 All ER 251 as offering some guidance on the point. In that case, Stanley Burnton LJ stated as follows at paragraph 24 in relation to the issue of bail:

> *[24] A grant of bail may be conditional or unconditional. A condition of bail does not impose an obligation on the person granted bail. It is a true condition. It qualifies the grant of liberty made by the grant of bail. If the person granted bail does not comply with the conditions of his bail, he is liable to be returned to custody. If so, the legal authority for his detention is not the grant of bail, or his breach of the conditions of his bail, but the authority for his detention apart from the order for bail. All that his breach of the conditions of his bail does is to disentitle him to bail.*

[123] It is counsel's submission that the Magistrate erred and exceeded any jurisdiction she had by these actions. He has also argued that she similarly erred when she failed to inform Mr. Henry of his right to appeal her decision. Counsel relies on **McC v Mullan** where the House of Lords held a Justice's order for committal to be without jurisdiction due to the defendant not being advised of his right to legal aid.

[124] Mr. Christie contends also that Mr. Henry was falsely imprisoned on the island of Jamaica as a result of the imposed stop orders or alternatively, it was an infringement of his liberty. He argues that the other conditions of bail restricted his freedom of movement as he needed a surety and had to report to the Coral Gardens Police Station.

SUBMISSIONS BY COUNSEL FOR THE DEFENDANTS

[125] Counsel, Ms. Larmond challenges Mr. Christie's submission that the **Bail Act** only applies to criminal proceedings although she conceded that there is no explicit reference to civil proceedings in the said Act. She stated that when one examines the Act, section 2 gives a definition of "bail in criminal proceedings" and that particular term is used on several occasions throughout the Act. She therefore posed the question as to why the drafters would see fit to define "bail in criminal proceedings" if the Act is meant only to operate in criminal proceedings.

[126] She has also asked the court to note that there are also occasions when the term "bail" is used without any qualification and in those instances "bail in criminal proceedings" is also used in the same section or within the same subsection. She gave the examples of sections 6(1) and 7(1)(c) –

> *6. – (1) A person who is granted bail in criminal proceedings shall surrender to custody.*
>
> *7. – (1) Subject to subsection (2), where –*
>
> > *(c) a Court varies any condition of bail or imposes conditions in respect of bail in criminal proceedings,*
>
> *that Court or police officer shall make a record of the decision and, where requested to do so by the defendant, shall cause copy of the record of the decision to be given to him as soon as practicable after the record is made.*

[127] Ms. Larmond contends that that since the Act uses the term "bail in criminal proceedings" in specified circumstances, it is reasonable to conclude that bail could arise in other circumstances and that the reference to bail must be bail in proceedings other than criminal. She submits further that section 2(2) as pointing

to specific circumstances where the use of the word “imprisonment” does not apply and is meant to aid in the definition of “imprisonment” and no more.

[128] Counsel is also relying on the **Justices of The Peace Jurisdiction Act** that the Magistrate had indicated she relied on. This included section 4 where a warrant is issued after failure to comply with/obey a summons issued under section 2. She stated further that the summons is issued after an Information in criminal proceedings or Complaint (as it relates to an order for payment of money). Counsel argues that it would be illogical for the power to grant bail under section 4 of the **Justices of The Peace Jurisdiction Act** to apply only to a warrant issued on Information only.

[129] Finally, it is her submission that the Magistrate would have the power to grant bail and impose bail conditions when a person is brought before her on a warrant and that since she has the power to imprison she is similarly positioned to grant bail.

ANALYSIS OF THE LAW

[130] The court must first take note that a defendant can be brought before the Magistrate on a Warrant for Disobedience of Summons. If she has no right at common law or under the **Bail Act** to offer bail to secure his further attendance, what then is the alternative? She would have to release him without restriction or keep him in custody pending a determination of the issue as to whether there has been a default to make ordered maintenance payments due to wilful refusal or culpable neglect.

[131] It is to be noted also that the Warrant could be ordered as a result of the respondent failing to attend court once served with the summons before any maintenance order is made. Again, such a person would have to be remanded in custody or released without restriction. If the **Bail Act** does not apply, there must be some implied authority in common law for the Magistrate to grant bail in civil/quasi-criminal proceedings. The **Bail Act** itself was only brought into force in

2000. The courts therefore would have been operating under common law principles previously. This is actually alluded to in the Memorandum of Objects and Reasons which accompanied the Bill but was not included in the **Bail Act** when it was subsequently passed. It was noted in that Memorandum that bail is presently being administered in accordance with common law principles. It was also noted that the Parliament had concerns in relation to the appearance of arbitrariness in the grant of bail and sought to enact legislation to preserve the common law rules regarding bail and to make other provisions in recognition of the correlation between a right to bail and presumption of innocence. The Memorandum then states as follows:

> *This Bill therefore seeks to provide the grant of bail to persons who are charged or convicted of an offence.*

[132] It appears therefore that the concern of Parliament was to safeguard the right to bail and spoke specifically concerning persons involved in criminal proceedings. However, I note that in the UK **Bail Act**, the preamble specifies that it is *"An Act to make provision in relation to bail in or in connection with criminal proceedings in England and Wales..."* I would therefore agree with the submissions of Ms. Larmond that the **Bail Act**, when examined on the whole, does not necessarily preclude bail in civil/quasi criminal proceedings. While I would agree that the majority of the provisions are centred around bail in criminal proceedings, I am not prepared to conclude that Parliament intended to completely exclude the application of the said Act to civil/quasi-criminal proceeding as it is not so expressly stated.

[133] If the **Bail Act** does apply to civil/quasi- criminal proceedings, then the Magistrate would be authorized to impose conditions as set in section 6(2) including the obtaining of a surety (section 6(2)(a)), surrender of travel documents (section 6(3)(a)), reporting at specified times and reports to the police station(section 6(3)(c)). Section 6(3)(d)(i) also empowers the court to mandate other requirements as appear to the court to be necessary to ensure that the person surrenders to custody. All those issues would be determined by the Magistrate

dealing with the defendant appearing before her and the particular circumstances existing. However, if the **Bail Act** does not apply, then the Magistrate would still be able to apply common law principles which are essentially codified in our **Bail Act** which would include the imposition of restrictions on a defendant's liberty. The fact that she is a creature of statute would not prevent her applying these principles.

[134] I am also of the opinion that although the **Justices of the Peace Jurisdiction Act** may not specifically apply in the situation as it relates to maintenance orders, the analogy raised by Ms. Larmond is cogent as any court should be able to consider bail when it is dealing with the liberty of the subject. As was expressed by Stanley Burnton LJ in **Stellato**, the grant of bail qualifies the grant of liberty and the legal authority for the detention of the person is not the grant of bail but must be based on some other authority.

[135] However, this court must distinguish between bail offered when the defendant has been brought before the court on the warrants and bail offered after committal orders. I believe this is the pressing issue for determination. All the parties are in tandem as to what occurred in relation to the committal proceedings.

[136] Mr. Henry was arrested and taken before the Magistrate on the 6th of June 2013 at which time she committed him to prison for four (4) days, unless he paid the sum of $218,315.00 in respect of Ms. Rhamjus' Information(s) and the sum of $258,000.00.

[137] Mr. Henry states that he was able to pay only $20,000.00 (which he received from a friend) prior to appearing before the Magistrate on the 10th of June 2013 (some four days later). Despite the payment, she committed him for two (2) days unless he paid $258,000.00.

[138] On the 12th of June 2013, Mr. Henry states that he was brought before the Court and that he paid $100,000.00 (received from the same friend that previously

assisted him). On this occasion the Magistrate offered him bail with the following conditions-

a. $300,000.00 bond with surety;
b. Daily reporting to the Coral Gardens Police Station between 9 a.m. and 7 p.m.; and
c. Stop order at all ports of entry and exit.

[139] Mr. Henry remained in custody until the 13th of June 2013 when he was able to obtain a surety. He states that on the 18th of June 2013 when he appeared before the Magistrate, he was arrested pursuant to a Warrant of Arrest issued by her. She committed him to prison for sixteen (16) days unless the sum of $200,000.00 was paid and if so, bail was set in the amount of $150,000.00 with surety. As a result, Mr. Henry was again committed and released on the 20th of June 2013 with the assistance of another friend who paid the $200,000.00 as ordered and a further $150,000.00 for the bail bond.

[140] Mr. Henry appeared again before the Magistrate on the 4th of July 2013, when she ordered that he be committed to prison for fourteen (14) days unless $50,000.00 was paid and a further bail condition of $15,000.00 was imposed. He was able to meet both conditions on the 8th of July 2013 (with the assistance of the same friend).

[141] When he was offered bail on the 12th of June 2013 with the conditions as stated above, it is to be noted that he still owed money based on the warrants that had been executed. Since monies still owed, the Magistrate had the authority to commit him on each occasion that he appeared before her unless the full amount on the warrants were satisfied. Section 21 (3) (b) of th**e Maintenance Act** states that the committal does not operate automatically as a discharge of liability. Based on the evidence, he was committed to four (4) days on the first occasion unless he paid the sums of $218,315.00 and $258,000.00 respectively. When he was offered bail, he had only paid the sums of $20,000.00 and $100,000.00 respectively.

[142] The provisions of section 13 of the **Constitution** of Jamaica, which contains our **Charter of Fundamental Rights and Freedoms,** are also instructive. Section 13(3)(a) grants the right to liberty and section 13(3)(f) freedom of movement. The right to freedom of the person is provided in section 14 (as per: section 13 (3) (p)). Section 14 (1) (d) provides as follows:

> *14 (1) No person shall be deprived of his liberty except on reasonable grounds and in accordance with fair procedures established by law in the following circumstances -*
>
> *(d) in execution of the order of a court made in order to secure the fulfilment of any obligation imposed on him by law.*

[143] When all of the above is considered, it is my opinion that the Magistrate could make an order depriving Mr. Henry of his liberty during the various committal proceedings in order to secure the fulfilment of his obligation to pay the maintenance amount ordered by her. These orders could include a stop order as well other reporting conditions as permitted by the **Bail Act** and this is even so if the **Bail Act** does not apply as it is my opinion that if there is power to impose confinement in maintenance proceedings, there must be some equivalent common law power to grant bail qualifying the act of liberty instead. I am not reviewing at this point whether she applied all the correct procedures but whether she had the authority to do what she did.

[144] In relation to the final issue raised by Mr. Christie, i.e. the notification in relation to any right of appeal, I see no merit in it at all. In **McC v Mullan**, the respondent had been convicted of the offence of failing to comply with an order to attend an attendance centre which had been imposed on him as a result of a previous offence. He was ordered to be detained at a young offenders centre without first being informed of his right to apply for legal aid, as required by art. 15(1) of the **Treatment of Offenders (Northern Ireland) Order** 1976.The distinguishing feature in **McC v Mullan** is that the requirement to inform the respondent of his right to legal aid was a statutory condition precedent to the court having the jurisdiction to pass an otherwise appropriate sentence.

[145] In the case at bar, there was no statutory condition precedent that the Magistrate had to inform Mr. Henry of his right to appeal her decision before his committal. What she was required to do is set out in section 21(1) of the **Maintenance Act**– i.e. she must be satisfied that his default was due to his wilful refusal or culpable neglect. It is my opinion therefore that there is no merit in the submissions of the claimant that the Magistrate acted ultra vires and that his constitutional rights as described have been breached.

Order 2 –Certiorari to quash the order of the Magistrate to grant the stay and to remit the application before another Judge.

Did the 1st Defendant/Magistrate breach the rules of natural justice by receiving inadmissible evidence against Mr. Henry and refusing to receive admissible and highly relevant evidence on his behalf?

Was the decision of the 1st Defendant/ Magistrate in refusing Mr. Henry's application for a stay of proceedings ultra vires in light of her duty to allow an application under the Maintenance Order (Facilities for Enforcement) Act?

THE CLAIMANT'S CONTENTION

[146] I will consider both the breach of natural justice and the issue of the stay of proceedings under this heading. It is contended that in breach of natural justice and Mr. Henry's right to a fair trial, the Magistrate received and acted upon hearsay evidence from Ms. Rhamjus, but refused to receive admissible evidence offered in Mr. Henry's defence. Further, the learned Magistrate disregarded evidence of Mr. Henry in support of his application for a stay of proceedings pending an application by Ms. Rhamjus under the **Maintenance Order (Facilities for Enforcement) Act**.

[147] In his affidavit in support of the Fixed Date Claim Form (filed on the 20th of November 2013) Mr. Henry states that the Magistrate considered several pieces of hearsay evidence from Ms. Rhamjus, namely:

a. persons saw him driving a new car and told her that he had recently bought the vehicle;
b. persons told her that his daughter was attending an expensive private school; and
c. that he was financing work being done by his ex-wife on a house being held on trust for the children of their marriage.

[148] Mr. Henry contends that the Magistrate considered the above-mentioned hearsay evidence from Ms. Rhamjus in making her decisions to commit him to prison. While Mr. Henry cannot say what weight was placed on this information, he however contends that the Magistrate enquired into this information despite being told that they were received from third parties. Mr. Henry states that at no stage of the proceedings did the Magistrate give any indication that this information was not considered nor did she state what enquires were made.

[149] Mr. Henry also contends that when he sought to provide tape-recorded evidence that Ms. Rhamjus was abusing the court's process, the Magistrate refused to receive this information. She instead instructed a Probation Officer to listen to it. He stated that prior to the recording being heard by the Probation Officer, the Magistrate refused the application for a stay of the proceedings before her, which is the very application that the evidence was to support.

SUBMISSIONS BY COUNSEL FOR THE CLAIMANT

[150] Mr. Christie submitted that Mr. Henry's right to a fair hearing and the rules of natural justice were breached as a result of the above-mentioned acts which he has summarized as follows:

a. Ms. Rhamjus was permitted to provide hearsay evidence to the learned Magistrate; and

b. The learned Magistrate refused to receive relevant information from Mr. Henry.

[151] He submitted that it is settled law that a decision arrived at in breach of natural justice is a nullity; and that natural justice involves a defendant being afforded a fair hearing (per section 16(2) of the **Constitution**).

[152] Mr. Christie also submitted that the Magistrate failed to state what enquiries were made based on Ms. Rhamjus' statements to the court, nor did she address the other allegations of hearsay evidence raised by Mr. Henry. It was submitted that this failure is material to the submission that the Magistrate received hearsay evidence from Ms. Rhamjus.

[153] Further, in reference to the hearsay point, Mr. Christie submitted that –

i. Ms. Rhamjus repeated hearsay evidence to the Department of Correctional Services and the report (which was included in the Magistrate's affidavit filed on the 28th of May 2014) lists pieces of hearsay evidence mentioned as Ms. Rhamjus' basis for saying that Mr. Henry could afford to comply with the maintenance order. The pieces of evidence have already been listed in the summary of Mr. Henry's evidence.

ii. The Magistrate provided no evidence as to how she was able to recall evidence such as a record of the proceedings or notes.

iii. The Magistrate responded to only one item of hearsay evidence mentioned without denying that the other evidence was provided to the Court by Ms. Rhamjus.

iv. The Magistrate did not have enough evidence upon which to commit Mr. Henry without accepting the hearsay evidence.

[154] In all the circumstances, Mr. Christie submitted that the admission of hearsay statements was a breach of Mr. Henry's right to a fair hearing and cited the case of **R (on the application of Bonhoeffer) v General Medical Council** [2011] All ER (D) 141 (Jun).

[155] Mr. Christie has also submitted that, in breach of his right to a fair hearing, the learned Magistrate refused to allow Mr. Henry to produce information in his defence and in support of his application for a stay of proceedings.

[156] He made mention in particular to the Magistrate's refusal to hear the tape-recorded evidence provided by Mr. Henry. He stated that she instructed the Probation Officer to listen to evidence and proceeded to refuse the application for a stay of proceedings before her. Mr. Christie submitted that in so doing the Magistrate disregarded the evidence of Mr. Henry and that the hearing of evidence is a non-delegable task for a presiding Judge/Magistrate. He emphasized that the information was relevant as it would demonstrate the malice with which the proceedings were brought, the usefulness of the stay and also the credibility of Ms. Rhamjus.

[157] Mr. Christie submitted that by refusing the application for a stay of proceedings pending an application by Ms. Rhamjus pursuant to the **Maintenance Order (Facilities for Enforcement) Act**, the Magistrate erred in law and acted without jurisdiction. He submitted that Mr. Henry's application for a stay of the proceedings of disobedience of the maintenance order was refused on the premise that the learned Magistrate would not consider an application being made by Ms. Rhamjus under the **Maintenance Order (Facilities for Enforcement) Act**.

[158] Section 12 of this Act allows for a person entitled to payments under a maintenance order to request that the order be enforced abroad. The court's duty upon such a request is expressed in mandatory language –

> *"the court shall, upon a request of the payee, send a certified copy of the order to the Minister for transmission through the appropriate authority to the appropriate court in that state for registration and enforcement."*

[159] He has submitted therefore that the Magistrate erred in law and acted without jurisdiction when she rejected this consideration as she would have no discretion if an application was made by Ms. Rhamjus. He also contends that by extension,

the subsequent decision to refuse Mr. Henry's application on that basis was without jurisdiction.

[160] Further, it was submitted that the Magistrate merely stated that she doubted the efficacy of the Act and did not communicate any reasons why. Mr. Christie has also challenged her subsequent evidence concerning letters from the Official Solicitor in London which spoke to the fact that facility is only available if the parties are married. He contends that the letters were never communicated to Mr. Henry as the basis for her decision. Mr. Christie has submitted therefore that her decision was not motivated by the letters which represent a belated attempt to support the dismissal of Mr. Henry's application and should not be considered by this court.

THE DEFENDANTS' EVIDENCE

[161] The Magistrate takes issue with the Claimant's assertion and alleges that at no time did she consider any hearsay evidence. Contrary to the evidence of Mr. Henry, she states that Ms. Rhamjus informed the court about things she perceived, such as seeing Mr. Henry in a new vehicle and as such the court made enquires as to the basis of the belief.

[162] At paragraph 32 of her affidavit (filed on the 28th of May 2014) she stated that,

> *"Each time Mr. Brenton Henry and Ms. Rhamjus appeared before me, I gave each of them equal opportunity to be heard and did not rely on hearsay evidence…Any points made by Ms. Rhamjus were adequately addressed and countered by Mr. Brenton Henry or the Attorney-at-Law, acting on Mr. Henry's behalf. Ms. Rhamjus spoke to matters personally perceived by her in that she indicated among other things, seeing Mr. Henry in a new vehicle. As the sitting Judge, I merely made enquiries as to the basis of her belief, based on her statements to the Court, which the Court is entitled to do."*

[163] The Magistrate also expressed that it is incorrect that she ignored what Mr. Henry said or what was said on his behalf by his Attorney-at-Law or that he was constrained in the presentation of his defence. His Attorney was given the opportunity to make extensive submissions in relation to Mr. Henry's case

whereas Ms. Rhamjus was unrepresented and spoke for herself. To that end, the Magistrate stated that she had to "balance the scales of justice in this regard."

[164] With regards to the tape recording, the Magistrate contends that she did not refuse to consider it; instead she requested that the Probation Officer listen to the tape and report to her. The explanation given was that the business of the court could not at that moment be placed on hold and as such she instructed the Probation Officer, who was charged by the court to investigate the matter of a means report, to listen to the tape and advise the court with the requisite information on the following court date. The Magistrate stated that in any event, the tape recording was not relevant as to whether the **Maintenance Order (Facilities for Enforcement) Act** was to be considered.

SUBMISSIONS BY COUNSEL FOR THE DEFENDANTS

[165] Ms. Larmond submitted that this court must first resolve the issue of whose account is to be believed. It is submitted further that on the Magistrate's account, the statements which were in relation to things Ms. Rhamjus perceived would not amount to hearsay. Therefore the Magistrate was entitled to enquire as to the basis of this information and it was based on the response given that the Magistrate would be able to make the determination as to whether the information was hearsay. Counsel further submitted that there is no evidence that the Magistrate relied on hearsay statements in determining that Mr. Henry should be committed and her enquiries as to the source of the information cannot be regarded as an acceptance of or reliance on the information.

[166] It was further submitted that the Magistrate was entitled to consider Mr. Henry's conduct and his lack of credible information to support his failure to make the maintenance payments in coming to the conclusion that he satisfied the statutory conditions for failure to pay. Therefore, Ms. Larmond contends that there was sufficient basis on which the Magistrate could have satisfied herself that Mr. Henry should be committed. In support of this submission, she commended to

the court paragraph 29 of Dukharan JA's judgment from ***Ableton Lawes v The Attorney General of Jamaica; and Uton Fairweather v The Attorney General of Jamaica*** [2014] JMCA Civ 40 -

> *Further, it is in my view that the answer to the question of whether there is wilful refusal or culpable neglect is not confined to ascertaining the defaulting person's means on the day when the committal order is made. The Act does not provide any guidance on when the information in relation to the person's circumstances is to be ascertained. Therefore, a magistrate is entitled to consider the circumstances of the matter as may be gleaned from the history particularly when the matter involves several appearances in court by the person in arrears in which there were exchanges between the bench and that person. Also, it should be borne in mind that the section provides that once there has been default for 14 days and the warrant of distress is not satisfied upon execution then the person in arrears may be committed. Therefore where the circumstances are of such that a person has been in arrears for a period well in excess of the 14 days, information as to the person's circumstances over that period, including the pattern of payment, would certainly be of relevance.*

[167] Ms. Larmond has asked this Court to have regard to what she calls the "egregious circumstances" before the Magistrate. This would have included the fact that only $31,000.00 was paid by Mr. Henry between 2009 and 2013 and that by the time the matter was before her in 2013, there was approximately $1,100,000.00 outstanding in child maintenance. Further, none of the court orders had been complied with and Mr. Henry had previously left the jurisdiction in the middle of proceedings and successfully managed to evade the execution of Bench Warrants on him and was eventually brought before the court by virtue of warrants.

[168] With regards to the tape recording, Ms. Larmond submitted that even if the court were to find that the Magistrate ought to have listened to it and considered it prior to ruling on the application, this would not have amounted to a breach of the rules of natural justice. It was submitted that this tape recording was relevant only to the issue of the stay insofar that it was Mr. Henry's evidence that he relied on it as one of the grounds in support of his application for the stay. She stated however that this information would not have been relevant to the question of whether a stay should be granted as the Magistrate had no evidence or document before her which indicated that Ms. Rhamjus would be making an

application under the **Maintenance Order (Facilities for Enforcement) Act**, nor is there a provision in the said Act which mandates that course of action.

[169] The issue of the application for the stay of proceedings need not detain the court as the Act makes it clear that any such application would have to be made Ms. Rhamjus. Section 12 the said Act reads as follows:

> *12. Where before or after the 1st day July, 1988 –*
>
> *(a) a court in Jamaica has made a maintenance order against a person; and*
>
> *(b) it is proved to the court that such person is resident in a reciprocating state,*
>
> *the court shall, upon the request of the payee, send a certified copy of the order to the Minister for transmission through the appropriate authority to the appropriate court in that state for registration and enforcement.*

[170] There is no evidence, neither has Mr. Henry alleged that Ms. Rhamjus sought to make any such request to the court. The Magistrate would therefore be under no duty to consider such a request for a stay in those circumstances, I would also agree with the submission of counsel, Ms. Larmond that the tape recording would have no relevance to the consideration of any such request of Mr. Henry.

[171] In relation to the issue of the reception of hearsay evidence, it is to be noted that the probation report placed before the Magistrate contained these “pieces of evidence” received from Ms. Rhamjus. It also contained an interview with Mr. Henry that refuted the various reports of Ms Rhamjus. At the end of the report, the probation officer noted that the reasons given by Ms. Rhamjus for Mr. Henry’s ability to pay proved very difficult to ascertain. In relation to that issue, the Magistrate noted that Ms. Rhamjus spoke to her of matters she personally perceived including seeing Mr. Henry in a new vehicle. She further stated that as the sitting Judge, she made enquiries as to the basis of her belief.

[172] It is noted that the Magistrate has set out in her final affidavit (filed on the 28th of May 2014), in particular paragraphs 32 to 43, her consideration of the history of the matter and the conduct of Mr. Henry including the lack of any verifiable information to determine his means. This court is not concerned with the

correctness of her decision but only with the manner in which her decision was taken. It is trite law that the scope of judicial review pertains to 'illegality, irrationality or procedural impropriety'' (per Brooks JA in **Industrial Disputes Tribunal v University of Technology** and **University and Allied Workers Union** [2012] JMCA Civ 46).

Is there any evidence to suggest that Mr. Henry did not have an opportunity to be heard?

[173] The only contention put before this court is the issue of the reception of hearsay evidence. The Magistrate has indicated how she dealt with that issue and, it is my opinion that there is no merit in this complaint. Dukharan JA's statement in **Ableton Lawes** as quoted by Ms. Larmond succinctly sets out parameters allowed in hearings of this nature. At paragraph [29] of that judgment, Dukharan JA stated as follows:

> *[29] ...Therefore, a magistrate is entitled to consider the circumstances of the matter as may be gleaned from the history particularly when the matter involves several appearances in court by the person in arrears in which there were exchanges between the bench and that person...*

[174] It is fitting that I close my analysis of this issue also with the words of Dukharan JA at paragraph [26] of the abovementioned matter:

> *[26] ...I agree with the Full Court that an individual ought not to be deprived of his or her liberty without the opportunity to be heard ...; this position accords with natural justice. Also, it is by allowing the person in arrears the opportunity to be heard that the magistrate will obtain information as to the circumstances surrounding the person's non- payment.*

[175] As far as I am concerned, the totality of the evidence speaks to the fact that Mr. Henry had all opportunity to be heard and to answer all relevant issues brought up by Ms. Rhamjus. Accordingly, I see no merit in this ground of complaint by Mr. Henry.

Purpose of Certiorari

[176] There is a final matter to be dealt with as it relates to whether certiorari ought to be granted in cases where it would be an act of futility. Both counsel had made submissions before us in relation to this issue. It is useful to have regard to the purpose of certiorari which was succinctly stated by the learned authors of **Wade and Forsyth, Administrative Law** (8th edn), 2000, 600 -

> *"Certiorari thus performs a function not unlike that of a declaratory judgment; by quashing the Court declares that some purported decision or determination is irregular or futile and therefore of no effect in law. The question at issue has not been lawfully determined, and the responsible authority must start again and determine it properly."*

[177] Ms. Larmond has submitted that the court ought not to grant any of the prerogative orders for certiorari as it would be acting in vain. She has stated that these orders are already spent i.e. the time periods that Mr Henry spent in custody. It is her further submission that, if the court were considering any relief, it should merely be declarative as to the lawfulness of the Magistrate's actions and referred to **Tesfa Josephs**. In that case, the applicant for judicial review, who had already served the period of time sought declaratory orders. Counsel submitted also that Mr. Henry is also seeking compensation and prerogative orders would not be required to facilitate that. In **Maharaj**, Lord Diplock pointed out at page 679b, that the only practicable form of redress for the applicant who had been deprived of his constitutional right to liberty but had already served the period of incarceration was monetary compensation.

[178] In my opinion it may have been unnecessary and futile to grant an order of certiorari quashing the decisions of the Magistrate to commit Mr. Henry to prison bearing in mind that the claimant had requested other remedies that the court saw fit. However it is not necessary to fully ventilate this issue as the court is of the view that the Magistrate acted judicially.

D. FRASER J

[179] I have read the judgment of my sister Straw J and agree with her findings and have nothing to add.

DISPOSITION

LAWRENCE-BESWICK J

[180] The above analysis of the many issues concerned with this application for judicial review shows that the 1st defendant acted in accordance with the principles of law. Accordingly the orders of the court are:

1. Judicial Review refused;
2. Orders for Certiorari are refused;
3. Declarations are refused;
4. Damages are refused; and
5. The issue of costs reserved for submissions to be made in writing by counsel.