EASTERN CARIBBEAN SUPREME COURT
SAINT CHRISTOPHER AND NEVIS
NEVIS CIRCUIT

IN THE HIGH COURT OF JUSTICE
(CIVIL)

Claim Number**: NEVHCV2021/0118**

Between **Michael Prest**

Applicant/Respondent

-and-

The Magistrate of District "C"
Corporal Randolph Diamond
The Attorney General
The Director of Public Prosecution

Respondents/Applicants

Before: **His Lordship Justice Ermin Moise**

Appearances:

Mr. Peter Foster Q.C with Ms. Jackie Hunkins-Taylor of counsel for the applicant/respondent
Mr. Douglas Mendes S.C. with Ms. Simone Bullen-Thompson of counsel for the 1st respondent/1st applicant
Mr. Reginald Armour S.C with Mrs. Sherry-Ann Liburd-Charles of counsel for the 2nd respondent/2nd applicant
Ms. Simone Bullen-Thompson of counsel for the 3rd respondent/3rd applicant
Mr. Reginald Armour S.C with Ms. Simone Bullen-Thompson of counsel for the 4th respondent/4th applicant

2022: March, 18th

JUDGMENT

[1] **Moise, J:** Before me are a series of applications all seeking to set aside the grant of leave for the applicant to file a claim for judicial review. In addition, the Attorney General has filed an application for the claim against him to be struck out on the grounds that he has made no decision which is up for review in any event and therefore ought not to have been a party to the proceedings in the first place. Corporal Randolph Diamond has filed a similar application to that of the Attorney General. The matter involves two warrants which had been issued by the Magistrate of District "C" for the arrest of Mr. Michael Prest as applied for by Corporal Diamond acting on the instructions of the Director of Public Prosecutions. Mr. Prest seeks to engage the discretion afforded this court in its powers of judicial review to set aside the

magistrate's decision on the grounds that there was insufficient evidence to substantiate the substance of the warrant, the charges against him are frivolous and vexatious and that they amount to an abuse of process. The Director of Public Prosecutions was not initially a party to the proceedings but has been so added on account of the submission that his discretion to prosecute Mr. Prest is also essentially up for review.

[2] After careful consideration of the submissions of counsel for all parties, and mindful of the fact that the discretion to set aside a grant of leave to apply for judicial review is one which ought to be exercised sparingly, I have determined that the leave granted ought to be set aside and the interlocutory injunction granted in favour of Mr. Prest should be lifted. In addition, I have decided that the Fixed Date Claim and affidavit attached filed on 14th September, 2021 ought also to be struck out as well as the application for specific disclosure. These are the reasons for my decision.

The Facts

[3] A useful starting point in addressing the facts in this case is a review of the application for leave which had been filed on 27th August, 2021 in which Mr. Prest sought the following orders:

1. An order quashing the decision of the First Respondent made on 21st July, 2021 to issue an arrest warrant in the first instance against the applicant for an alleged contravention of section 19(d) of the Larceny Act of Saint Christopher and Nevis.

2. An order quashing the decision of the First Respondent made on 21st July 2021 to issue an arrest warrant in the first instance against the applicant for an alleged contravention of section 20 of the Larceny Act of Saint Christopher and Nevis.

[4] The application is grounded on a number of assertions being made on behalf of Mr. Prest. In the interest of brevity they can be summarized as follows:

(a) That the evidence presented to the magistrate was not sufficient for a warrant to have been granted in the 1st place;

(b) That the case against Mr. Prest is frivolous and vexatious; and

(c) That the prosecution of Mr. Prest amounts to an abuse of process and a breach of his rights pursuant to section 10(4) of the Constitution.

[5] Despite arguments to the contrary being put forward by counsel for Mr. Prest, I am in agreement with counsel for the respondents where they have pointed out that, although the judicial review proceedings seeks to set aside the orders of the learned magistrate, the grounds upon which this claim is based inherently touch and concern the very decision to charge Mr. Prest and the substance of the charges which have been laid against him. In raising the question of whether the charges are frivolous or vexatious and an abuse of process, Mr. Prest would therefore seek an assessment of the evidence upon which the charge is based and require this court, in judicial review proceedings, to determine that there is insufficient evidence for the charges to have been laid against him in the first place. The substance of the claim also seeks to raise questions about the constitutionality of the prosecution of the charges, rather than merely question the process by which the learned magistrate came to her decision in the exercise of a judicial discretion which has been afforded her.

[6] I note however that, despite the substance of what has been raised, Mr. Prest has not sworn an affidavit in this case. Instead the affidavit in support of the application was sworn to by Gleniella Hobson who is an administrative supervisor in the law firm which acts on Mr. Prest's behalf. Although she claims to have had Mr. Prest's authority to swear to the affidavit, she has exhibited no documents to substantiate this assertion. Yet, the substance of the affidavit is somewhat detailed in relation to facts and assertions which may very well be in dispute in an actual criminal trial if it gets to this point. Be that as it may, this is the affidavit evidence before the court and in it Ms. Hobson states that Mr. Prest had informed her of the following:

(a) The warrant issued by the First Respondent under section 19(d) of the Larceny Act is frivolous, vexatious and constitutes an abuse of process, because the evidence in the possession of the Director of Public Prosecutions establishes that the Applicant did not receive and was not in possession of the US$2,530,000.00, which is an essential ingredient of the offence of conversion.

(b) That Corporal Diamond had applied for various production orders in case number NEVHCV/2001/0065. He provided affidavit evidence in that suit which made it clear that there was no evidence that Mr. Prest had received Mr. Kutcher's funds. Corporal Diamond was therefore aware that Mr. Prest had not received the funds when he made the application for the arrest warrant;

(c) That there was a legitimate commercial contract between two corporations of which neither Mr. Kutcher nor Mr. Prest was a party. It is further alleged that the regulator of international banking had made it clear that Mr. Kutcher was not approved for a share transfer to him as had been agreed to;

(d) That the evidence on the file of the director of public prosecutions does not show an intent on the part of Mr. Prest to defraud;

(e) That Mr. Prest was guided by his handling of the transactions involving the funds by 4 legal opinions which he had sought;

[7] Ms. Hobson subsequently filed what was described as an amended affidavit on 30th August, 2021. I wish however to point out that one cannot amend an affidavit. An affidavit is a sworn statement which is complete once it is attested to and sealed. I take it therefore that Ms. Hobson's intention was to file a supplemental affidavit to correct an error which was contained in the first one. That was to simply point out that reference to case number NEVHCV/2001/0065 was an error and ought to have been NEVHCV/2001/0089. I do note however that case number NEVHCV/2001/0065 was in fact a case in which a production order had been sought in what is now a series of cases involving the substance of what is currently before the court. Much of the allegations referred to by Ms. Hobson touched and concerned facts which were exhibited in both cases.

[8] On the same day, that is 30th August, 2021, Ms. Hobson filed a supplementary affidavit in which she states that Mr. Prest informed her of the fact that the issuing of the arrest warrants had caused significant reputational damage to him, notwithstanding the fact that case NEVHCV/2001/0089 was subject to a sealing order. I state at this stage however, that the sealing of case NEVHCV/2001/0089 was in no way designed to fetter the discretion of the Director of Public Prosecutions to pursue criminal actions against Mr. Prest. That much would be obvious to the parties participating in that case. The substance of what

was applied for in that case was the cause for concern for which the sealing order was made and not the intention to prosecute Mr. Prest, nor the evidence which would have influenced the discretion exercised by the Director of Public Prosecutions. A criminal prosecution is an inherently public affair which the court would be very slow to conduct in private.

[9] The court heard the ex parte application for leave, along with an application for an interim injunction on 1st September, 2021 and granted leave to file a claim for judicial review. At the time of the hearing of the application, neither Corporal Diamond, nor the Director of Public Prosecutions was added as parties to the claim. This has since changed and they have appeared as respondents herein. The applicant filed a Fixed Date Claim on 14th September, 2021 along with an affidavit in support. He also filed an application for specific disclosure from the learned Magistrate requesting a full account of the evidence which was before her when the application for the warrants was made. I again make the point here that Mr. Prest did not attest to the affidavit filed in his substantive claim for judicial review. That was again attested to by Ms. Hobson, despite the fact that an affidavit in such a circumstance stands as the pleadings in the case and can in fact be used as evidence to decide the substantive judicial review proceedings. When one examines the express provisions of the CPR in relation to affidavits in Judicial Review claims, this is a cause for concern. I am of the view that given the peculiarities in this case, this is a matter which the court should give some consideration in its deliberations on the various submissions being made before it. I will do so later on in this judgment.

The applications to set aside leave and strike out the claim

[10] Subsequent to the grant of leave, various applications have been filed seeking to set this order aside and to strike out the claim. I will deal with each application in turn.

[11] On 10th October, 2021, the Learned Magistrate filed an application to set aside the grant of leave and sought an order striking out the Fixed Date Claim. The application was based on the following grounds:

(a) The High Court has an inherent jurisdiction to set aside ex parte orders, including the grant of leave to apply for Judicial Review;

(b) The Applicant/1st Respondent is authorized to issue Warrants in the First Instance by section 37 of the Magistrates Code of Procedure Cap 3:17 which states:

"In all cases where a charge is made in respect of an offence punishable either on indictment or on summary conviction the Magistrate, if he or she thinks it expedient that a warrant be issued in the first instance, may take an information and require such evidence in that behalf as he or she considers necessary to substantiate the matter of the information and may issue his or her warrant in the first instance to apprehend such person as aforesaid and to cause him or her to be brought before him or her or any other Magistrate in the State to answer the charge and to be dealt with according to law."

(c) The Applicant/1st Respondent issued the Warrants in the First Instance charging the Respondent/Claimant with the offences of fraudulent conversion by a trustee and fraudulent conversion upon the sworn evidence and information of the 2nd Respondent.

(d) The test for the grant of leave to apply for Judicial Review is that the applicant must establish an arguable case with a realistic prospect of success that is not subject to a discretionary bar such as delay or an alternative remedy.

(e) The Respondent/Claimant's application for judicial review is in substance and effect a challenge to the evidential basis of the decision to prosecute;

(f) The Respondent/Claimant has available to him alternative remedies in the criminal proceedings in relation to the grounds on which he seeks to impugn the Applicant/1st Respondent's decision to issue the Warrants in the First Instance.

(g) The Respondent/Claimant failed to disclose to the court that judicial review of a decision to prosecute is a highly exceptional remedy of last resort and failed to put before the court any exceptional circumstances which justify the grant of leave to apply for judicial review in his favour.

(h) In the premises, these proceedings are an abuse of the process of the court in these and in the pending criminal proceedings.

(i) Leave to apply for judicial review was granted in breach of Rule 56.4(3)(b) of CPR 2000 which indicates that the Judge must direct that a hearing in open court be fixed if the application includes a claim for immediate interim relief.

(j) Given the foregoing the leave to apply for Judicial Review granted to the Respondent/Claimant should be set aside.

[12] In relation to the application to strike out the Fixed Date Claim, the Learned Magistrate grounds this application on Rule 26.3(1) (b) & (c) of the Civil Procedure Rules 2000 (CPR 2000) and argues that the claim for Judicial Review has no merit and the Fixed Date Claim should be struck out as it does not disclose any reasonable ground for bringing the claim and the claim is an abuse of the process of the court.

[13] On 11th November, 2021 Corporal Diamond filed his own application to set aside the grant of leave and to strike out the claim. His application was based on grounds which are, for the most part, in line with what has been argued on behalf of the Learned Magistrate. I will therefore not repeat the grounds in any detail. He argues further that his actions are not capable of being judicially reviewed since he made no decision in the granting of the warrant. He too, as in the case of the Attorney General, would wish to be removed as a party to the proceedings.

[14] The Director of Public Prosecutions filed an application of his own on 18th November, 2021. Again, the grounds for his application are similar to those of the Learned Magistrate and Corporal Diamond. However, he also argues that there was a failure to disclose the fact that in claim number NEVHCV2021/0089, the court had in fact already determined that there were reasonable grounds to suspect that a criminal offence had been committed. He further grounds his application on the fact that the leave was granted ex parte in circumstances where he was not a party to the proceedings which are in effect an attempt to circumvent and/or usurp his constitutionally vested prosecutorial powers and discretion.

The Submissions and the Court's Analysis

[15] Counsel for the parties are generally not in dispute as to the applicable legal principles to be considered when setting aside a grant of leave to pursue judicial review. Given the current stage of these proceedings, the issue can be summarized with the words of Lord Bingham in the Privy Council decision of ***Sharma v. Browne-Antoine et al***[1] where the following was stated:

> ***"Where leave to move for judicial review has been granted, the court's power to set aside the grant of leave will be exercised very sparingly... But it will do so if satisfied on inter partes argument that the leave is one that plainly should not have been granted... These passages were cited by Simon Brown J in R v Secretary of State for the Home Department, ex p Sholola [1992] Imm AR 135 and the Board does not understand him, in his reference to delivering 'a knockout blow' at p139 to have been propounding a different test."***

[1] [2007] 1 WLR

[16] Counsel for Mr. Prest also refers the court to the case of ***R v. Secretary of State ex p Chinoy***[2] where this principle was reinforced. There Lord Bingham also noted that ***"[t]he only purpose (of such an approach) would be increase costs and lengthen delays both of which would be regrettable results."*** In the English case of ***Gordon v. DPP***[3] the English Court of Appeal also stressed that ***"the applicant for the order to set aside carries a heavier burden than the original applicant for leave. The former has to establish that leave should not have been granted..."*** The court there observed that the application for leave is a filtering process and that the judge at the ex parte hearing should scrutinize the applications. Therefore leave should only be set aside ***"where clearly unmeritorious applications have slipped through the net."***

[17] Counsel argues therefore that the test of establishing whether there is a real prospect of success, as outlined in the case of ***Sharma v. Browne Antoine*** had been met. The issue is that *"the 1st defendant issued warrants for [Mr. Prest's] arrest without having first been satisfied that there was any or any sufficient evidence that [he] had committed the offences for which the warrants were issued."* It is argued that there is an absence of evidence upon which the decision of the Learned Magistrate was based.

[18] Counsel refers firstly to section 37 of the **Magistrate's Code of Procedure Act** which I have outlined in full at paragraph 11(b) of this judgment. Counsel for Mr. Prest also refers the court to the **Archbold, Magistrates' Court Criminal Practice**[4] where it was noted that ***"before a summons or warrant is issued the information must be laid before a magistrate and he must go through the judicial exercise of deciding whether a summons or warrant ought to be issued or not; if a magistrate authorizes the issue of a summons or warrant without applying his mind to the information then he is guilty of a dereliction of duty.."*** Counsel also submits that case law outlines the procedure to be adopted by a magistrate when considering whether to grant such a warrant. In the case of ***R v. Wilson; Ex Parte Battersea Borough Council***[5] it was stated that ***"a summons is the result of a judicial act. It is the result of a complaint which has been made to a magistrate, on which a magistrate must bring his judicial mind to bear and decide whether or not on the information or complaint before him he is justified in issuing the summons."***

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[2] [1991] COD 381
[3] [2002] 2 IR 369
[4] 2021 edition
[5] [1947] 2 All ER 569

[19] It was therefore submitted that the learned magistrate failed in her duty to *"require the 2nd defendant to substantiate the allegations made by him"* against Mr. Prest and to properly ascertain whether there were reasonable grounds to suspect that a crime had been committed in accordance with the sections under which Mr. Prest was charged. In considering whether this test was met, counsel argues that the magistrate had to have given consideration to sections 19(d) and 20 of the **Larceny Act** and that had she done so it would have been obvious that there was no evidence that Mr. Prest had received property for or on account of another person; neither did he fraudulently convert it to his own use or benefit. Further it is argued that had the Magistrate followed the proper procedure she would have observed that there is no evidence that Mr. Prest was a trustee within the meaning of the **Larceny Act**. Neither did he have an intent to defraud or convert property to his own use.

[20] In addition to these submissions, counsel for Mr. Prest also argues that had the learned Magistrate ensured that all the evidence which was before the court on the restraining order application was disclosed to her it would have been obvious that this was purely a civil dispute and there was no evidence that a crime had been committed. She therefore failed to apply the proper procedure. In further submissions in response, filed on 16th March, 2022, counsel for Mr. Prest referred the court to the case of ***Wingrove George v The Senior Magistrate et al*** where Thom JA drew a distinction between a case where judicial review of a decision to prosecute is sought and one where the senior magistrate and the Director of Public Prosecutions even had jurisdiction in relation to the warrants. It was argued therefore that what is before the court in this case is not a question of the DPP's discretion but rather whether proper procedure was followed by the learned Magistrate.

[21] Despite these very forceful submissions, the court must be cautious to point out that the assertions made about the magistrate's actions are somewhat speculative. There is no assertion here that Corporal Diamond did not appear before the Magistrate and swore to the information he provided to her. She swore to an affidavit and in it one can discern nothing procedurally outside of what the legislation required. She has been given a broad discretion, after the information has been laid to require any information, which in her mind, is necessary to the making of the decision. The magistrate issued a warrant which states on the face of it that information on oath was laid by Corporal Diamond and that based on that information the warrants were issued. To my mind, one must start from the presumption that this was done. One would not assume that a magistrate had simply failed to take information on oath before issuing the warrant. In issuing the warrant, the legislation does not mandate that the information be

laid in writing; neither does it mandate that the execution of the warrant upon Mr. Prest must contain a detailed analysis of all of the evidence which was before the magistrate at the time. The process is not necessarily designed for the magistrate to conduct a preliminary inquiry or a trial but to ensure that there is sufficient information on oath upon which to justify the issuing of the warrant.

[22] In light of this it is difficult to conclude that the review which is being sought is limited to the procedural steps being taken by the magistrate as opposed to the sufficiency of the evidence which was, or ought to have been, presented to her and the question of whether this entire prosecution is frivolous, vexatious and an abuse of process. Those were specifically stated to be the grounds upon which this application is based. It surely cannot be the magistrate who is being frivolous or vexatious; neither is she abusing the process here. Those issues relate directly to the decision to bring the charge in the first place and the evidence in the possession of Corporal Diamond and the Director of Public Prosecutions which would have influenced their decision.

[23] Without more, it would be difficult to effectively embark on a process where the High Court would simply place a hold on the execution of the warrant and assume that a magistrate, in the exercise of her discretion, simply did not have enough evidence before her at the time. The applicant in this case filed an interlocutory application seeking disclosure of all evidence which was before the magistrate whilst in the meantime wishing for the enforcement of the duly executed warrant to be placed in abeyance. I must confess for my part, that having considered this more closely at an inter partes level, even this particular process adopted is somewhat unprecedented and perhaps ought not to have been done on an ex parte basis in the first place.

[24] In the case of ***Attorney-General v. Williams (Danhai) and Another***[6] the Privy Council highlighted the important role which the magistrate plays in the issuing of warrants. Though the case addressed the issue of search warrants, to a certain extent, the principles espoused may very well apply to all circumstances in which a judicial determination of this nature ought to be made. However, Lord Hoffman there also addressed the fact that such warrants may be issued on the basis of information on oath which is not required to be in writing. In such circumstances "***for practical purposes the issue of the warrant is often likely to be incapable of effective review".*** Therefore ***"the courts have to do the best they can***

[6] [1997] UKPC 22

with such inferences as can be drawn from the terms of the warrant itself and such other evidence as is available."

[25] In the search warrant under review in that case, the warrant explicitly stated that the magistrate was satisfied that there were reasonable grounds upon which the warrant ought to have been granted. Although such a declaration was not made in the warrants under review in this case, it was stated that evidence was provided on oath and on the basis of that evidence the learned magistrate issued the warrants. What counsel for Mr. Prest now seeks to do is to place information regarding Corporal Diamond's investigation before the court and to argue that had this information been before the magistrate she would not or ought not to have made the decision she made as it would have proven that the charges were frivolous or vexatious and an abuse of process. There is however no evidence that all or even part of that evidence was not before the magistrate when she made her decision and I express serious doubt that a warrant should be placed in abeyance to allow a potential defendant to embark on a fishing expedition regarding the evidence which was before the magistrate when the very warrant was issued to ensure that he appears before the very court to answer to the charge. He is entitled to full disclosure of the evidence against him in the criminal proceedings.

[26] However, counsel for the respondents all argue that when one examines the substance of the allegations being made in the application for leave and the various affidavits filed, what is really being challenged here is the decision made by the Director of Public Prosecutions to commence criminal proceedings against Mr. Prest. The affidavit evidence makes assumptions regarding the exercise of the magistrate's decision but seeks further disclosure as to what precisely was before her at the time of the application. The issues raised therefore all center on the sufficiency of the evidence upon which the charges were laid in the first place. According to the respondents therefore, this is a question of prosecutorial discretion and not necessarily the exercise of the magistrate's judicial discretion for which the grant of leave to apply for judicial review is itself an exceptional course to pursue.

[27] However, having already granted leave for Mr. Prest to pursue his claim for judicial review, the court should note that the discretion to set aside this grant must be used sparingly. Despite this admonition, this is a discretion which the court can exercise, if it is satisfied on an *inter partes* hearing that leave ought not to have been granted in the first place. Indeed, as pointed out by counsel acting on behalf of the learned magistrate, the Privy Council in ***Sharma v. Browne Antoine*** considered that case to have been an

appropriate one in which to exercise such a discretion and criticized the first instance judge for failing to do so. It is submitted that the issue in that case hinged on matters which are similar to what this court is called upon to consider in substance when an examination of the facts outlined in the affidavits is done. The arguments touched and concerned questions relating to the appropriateness of a judicial review of the decision to institute a criminal prosecution and the sufficiency of the evidence upon which the information was laid before the Magistrate.

[28] In ***Sharma v. Browne Antoine*** Lord Bingham stated the following at paragraph 14(5) of his judgment:

> ***(5) It is well established that a decision to prosecute is ordinarily susceptible to judicial review, and surrender of what should be an independent prosecutorial discretion to political instruction (or, we would add, persuasion or pressure) is a recognised ground of review; Matalulu, above, at pp 735, 736, and Mohit v Director of Public Prosecutions of Mauritius [2006] UKPC 20 at paras [17] and [20]. It is also well established that judicial review of a prosecutorial decision, although available in principle, is a highly exceptional remedy. The language of the cases shows a uniform approach: 'rare in the extreme' (R v Inland Revenue Commissioners, ex parte Mead [1993] 1 All ER 772 at 782), 'sparingly exercised' (R v Director of Public Prosecutions, ex parte C [1995] 1 Cr App Rep 136 at 140), 'very hesitant' (Kostuch v Attorney-General of Alberta (1995) 128 DLR (4th) 440 at 449), 'very rare indeed' (R (on the application of Pepushi) v Crown Prosecution Service [2004] EWHC 798 (Admin), [2004] Imm AR 549 at para [49]), and 'very rarely' (R (on the application of Bermingham) v Director of the Serious Fraud Office [2006] EWHC 200 (Admin), [2006] 3 All ER 239 at para [63]. In R v Director of Public Prosecutions, ex parte Kebilene [2000] 2 AC 326 at 371, Lord Steyn said:***
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> > ***'My lords, I would rule that absent dishonesty or mala fides or an exceptional circumstance, the decision of the Director to consent to the prosecution of the applicants is not amenable to judicial review.'***

With that ruling, other members of the House expressly or generally agreed; see pp 362, 372, 376. We are not aware of any English case in which leave to challenge a decision to prosecute has been granted.

[29] Whilst the Privy Council recognized that the decision to prosecute is amenable to judicial review, the court also noted that a grant of leave of such a decision should only be made in extreme cases. In fact, so rare was the exercise of this discretion, that their Lordships could not find one example of such a review being pursued. What was obtained in research were cases in which the decision not to prosecute was pursued on account of the fact that there would inherently be no alternative remedy for the aggrieved party to pursue. However, in the case of a decision to prosecute, their Lordships were of the view that the criminal procedure provided adequate safeguards to the complaints being made by the applicant, sufficient to find that judicial review would not be an appropriate course to pursue. In her contribution to the decision in ***Sharma v. Brown Antoine*** Baroness Hale stated that:

Viewing the matter generally, the present is clearly a case where all issues should if possible be resolved in one set of proceedings. There are potential disadvantages for all concerned, including the public, in a scenario of which one outcome might be long and quite probably public judicial review proceedings followed by criminal proceedings. We add that, in our view, it will in a single set of criminal proceedings be easier to identify and address in the appropriate way the different issues likely to arise. The suggestion of improper political interference in or influence over the prosecuting decision is distinct in principle from the question whether the proposed charge has any basis - the decision to charge may have been entirely proper, without the charge being in any way sustainable. But there is in this case some potential overlap in some of the evidence relevant to each of these matters, and a risk that they would not be easily severable in the evidence or judgment given on any judicial review hearing. A criminal judge would we think be better placed to manage the different potential issues, such as whether the decision to charge was politically influenced, whether there is evidence fit to be left to the jury (both matters for him at separate stages of any trial) and, if the case gets that far, how the evidence should be left to the jury. The court is entitled to weigh all such disadvantages in the balance along with any possible advantage that the

Chief Justice might hope to gain by judicial review proceedings. That was, as we see it, the approach taken by Lord Steyn in Ex parte Kebilene.

[30] Whilst there is clearly a slight divergence of approach taken by Lord Bingham and Baroness Hale, the judges of the Privy Council all came to the same conclusion; that judicial review proceedings were not appropriate in the circumstances. It also seems to me to be clear that their Lordships were not merely concerned with the question of whether there was a real prospect of success as it relates to the remedies which the learned Chief Justice wished to pursue. Their Lordships expressed a concern with the very decision to grant leave in the first place in that judicial review proceedings were not appropriate, given the inevitable overlap with the criminal justice process. Baroness Hale here suggests that the time and very public nature of the judicial review process coupled with the potential for the court to embark on an assessment of evidence which may be available in a criminal trial weighs against the public interest in pursuing such a review. I would also add that the use of state resources in a judicial review trial for matters which may be more suitable for a criminal trial is also a significant factor to take into account.

[31] At paragraph 14 of his judgment, Lord Bingham highlighted 5 factors which made it exceptional for the court to grant leave to pursue such a review. I will not repeat all he had to say as I have already highlighted the substance of a few of those factors. However, two issues stand out to me as being worth some deeper consideration. His Lordship warned against the blurring of the lines between the executive function of the prosecutor and the judicial function of the court. Whilst it is true that the court stands in the gap in order to ensure that justice is done and that the powers of executive bodies are not abused, the one thing it never does is to usurp the authority of the executive branch of government. The constitution does not give the court the right to decide on whether a criminal prosecution should be pursued or not. That discretion has been granted to the Director of Public Prosecutions and in some instances the police. Lord Bingham therefore referred to the case of ***Matalulu*** where it was stated that ***"the great width of the Director of Public Prosecutions' discretion and the polycentric character of official decision-making in such matters including policy and public interest considerations which are not susceptible of judicial review because it is within neither the constitutional function nor the practical competence of the courts to assess their merits".***

[32] There are not only constitutional, but practical limitations to the court's competence. It is within the powers and perhaps resources of the office of the Director of Public Prosecutions to give consideration to matters of policy and the public interest in deciding whether to prosecute. I am of the view that the peculiar facts of the case before me are such that the court should be slow to interfere with the exercise of this discretion in judicial review proceedings, unless it can be satisfied that there are exceptional reasons for doing so. The question is whether this is what the court is being asked to do in light of the fact that the specific orders sought are for the setting aside of the warrants issued by the learned magistrate. However, in my view, though the claim is couched as a review of the magistrate's decision, it ultimately seeks to move this court into finding that the decision to prosecute is of no merit and an abuse of process based on the evidence in the possession of the Director of Public Prosecutions and an interpretation of various documents which have been submitted.

[33] The second issue which Lord Bingham considered was the blurring of the lines between the criminal and civil courts. It is important to note that whilst the constitution gave certain powers to the Director of Public Prosecutions it did not leave the criminal justice system to the mercy of the Director. The constitution, as well as Parliament and even the courts, have imbedded certain safeguards in the criminal justice system which are specifically designed to protect the rights of persons who the Director has decided to prosecute. The very decision of the magistrate is a filter process. It is not designed to punish but to bring a potential defendant to the court to answer to a charge. As senior counsel for the learned magistrate pointed out, Mr. Prest may even circumvent the need for an arrest by reporting to the magistrate himself. There he will no doubt be given the information which he seeks regarding the evidence upon which the charges are based and is capable of applying for bail pending a full trial. What he is not entitled to do is to demand that the magistrate be brought to the high court to account for her actions before her orders can be complied with. That may very well be an abuse of process.

[34] In addition to that, there are committal proceedings which have recently replaced preliminary inquiries. During these proceedings it may be perfectly acceptable for Mr. Prest and his legal team to raise issues regarding the sufficiency of the evidence. Even after he has been committed to stand trial, the trial judge retains judicial supervision of the process. Applications can be made to stay the proceedings as an abuse of process. No case submissions can be made at the end of the prosecution's case and even if this is not upheld it is still for a jury to decide, when properly directed by the judge, whether there is sufficient evidence to substantiate the charges. Whilst the learned Director has the constitutional authority to

prosecute, he does not control the trial process, neither does he convict. There are therefore numerous safeguards which operate as a check on the potential abuse of this function.

[35] The civil justice system is however designed for a different purpose. It is not expedient in my view to allow for a pre-litigation of a criminal matter in order to test the veracity of the evidence beforehand. There are inherent dangers in embarking on such a process. Neither is it desirable to engage this process in order to argue in favour of the very safeguards which are inherent in the criminal justice system unless there are exceptional reasons for doing so. As Lord Steyn noted in the case of ***R. v. Director of Public Prosecutions exp Kebilene***[7], ***"absent dishonesty or mala fides or an exceptional circumstance, the decision of the Director to consent to the prosecution of the applicant is not amenable to judicial review."***

[36] The court was also referred to the case of ***Wingrove George v. The Senior Magistrate et al***[8] where Thom JA stated the following:

> ***"… whether the DPP can establish a prima facie case on the charges against Mr. George or more specifically whether Mr. George has breached any of his duties, if such duties existed, is an evidentiary matter to be determined in the criminal court. The criminal court is well equipped with its plenitude of powers to deal with the complaints by the appellant. All of his complaints can be resolved within the criminal process itself, either at trial or possibly by application for a stay of proceedings as an abuse of process. The judicial review process is not appropriate to deal with such matters."***

[37] There seems to therefore be a very clear line of authority that unless there are exceptional reasons, judicial review is not available to one who seeks to review the decision of a competent authority to prosecute an alleged crime. Even if the claim is couched otherwise, this is in substance what Mr. Prest is attempting to do.

[38] Counsel for the Director of Public Prosecutions also points the court to the more recent Privy Council decision in the case of ***Brandt v. Commissioner of Police***[9] where it was stated that administrative law

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[7] HL 28 Oct 1999
[8] SKBHCVAP2019/0004
[9] [2021] UKPC 12

proceedings ***"are an abuse of the court's process in the absence of some feature 'which at least arguably indicates the means of legal redress otherwise available' in the criminal proceedings would not be adequate…"*** In that case, the Privy Council went further to suggest that the use of administrative law procedures will be an abuse of process where the motive is to cause delay or disruption in a criminal trial process. The obvious distinctions between ***Brandt*** and the present case are that firstly it was a constitutional motion with no filtering process such as an application for leave; and secondly it related to the admissibility of specific evidence in a trial which was already underway.

[39] However, the principles are equally applicable. The court is similarly warned, as it was in the case of ***Sharma v. Browne Antoine***, to be mindful of the impact that delay can have on an eventual criminal trial. Equally so is the potential for judicial review to be used as a means of circumventing or delaying the criminal prosecution. When one examines the nature of the powers of the magistrate to issue the warrant, for example, one would not have to be deeply imaginative to appreciate the potential for abuse if the court were to encourage judicial review proceedings as a means of circumventing the execution of a warrant on grounds which are essentially designed to argue against the sufficiency of evidence and the motive behind the Director of Public Prosecution's decision to prosecute in the first place. In ***Brandt*** it may have served the purpose of delaying the trial. However, in a case such as the present it may derail the execution of a warrant and defeat the purpose of bringing an alleged defendant before the court to answer a criminal charge altogether. When one weighs the potential for abuse of this process against the fact that there are sufficient safeguards within the criminal justice system, the bar is raised high in moving the court to entertain judicial review proceedings in such circumstances.

[40] Having considered the submission of the parties, I express some concern that a potential defendant in a criminal matter can simply move the matter into this court in an administrative action and demand of the magistrate that she justifies her judicial discretion in issuing the warrant prior to its execution. I am persuaded that to embark on such a process would very well take us back into the realm which the Privy Council warned against in ***Sharma v. Browne Antoine*** and open up the floodgates to potential abuse of this process in a bid to delay or circumvent criminal prosecution by effectively placing a hold on the execution of the warrant from the onset. There are clear public policy reasons to be cautious about such an approach and I accept that the court ought not to have granted leave on an ex parte basis in those circumstances.

[41] In light of that finding, I therefore examine the case of ***Attorney-General v. Williams (Danhai) et al*** to which I referred earlier. I am again mindful of two distinctions between that case and the one before me. Firstly that was a constitutional motion for which there is no filtering process in the need for leave to commence such an action. Secondly it related to a search warrant and not one which is similar to that which was granted in the present case. However, Lord Hoffman highlighted the fact that "***in proceedings commenced, as these were, during the course of the investigation, the courts are handicapped in their ability to protect the high constitutional right conferred on the citizen by section 19(1) because, as Lord Diplock said in Rossminster (at page 1011) they have to try to reconcile two competing and conflicting public interests…"*** These public interests are among the very issues which the Privy Council highlighted in the case of ***Sharma v. Browne Antoine***. On the one hand there is the right of the citizen against abuse of prosecutorial powers for which the magistrate's discretion in issuing the warrant is a judicial filter. On the other hand it is within the purview of the Director to commence criminal proceedings and that discretion is one which the court should be slow to interfere with as there is an inherent need to bring persons who have committed criminal acts to justice. A delay in the execution of a warrant can significantly undermine that objective; especially if it is done on a mere speculation of what the magistrate may or may not have had before her at the time.

[42] In the present case we may very well have moved past the investigative stage and a decision has been taken to prosecute Mr. Prest for what are essentially allegations of fraud and breach of trust. Upon that decision being made the process is commenced by placing information on oath before the magistrate to direct that Mr. Prest be brought before her or any other court to answer to the charge. What has been placed before this court as the main grounds upon which to set aside the warrants is a contention that the evidence in the possession of the Director of Public Prosecutions would have been insufficient information upon which the magistrate ought to have issued the warrants in the first place. To my mind, it is therefore inescapable that judicial review proceedings in those circumstances would inherently entail the very exercise which the court has been warned to be wary of in the case of ***Sharma v. Browne Antoine***.

[43] However, Lord Bingham in that case encouraged some scrutiny of the evidence in order to determine whether any of these two rather forcefully competing admonitions should be adhered to. Should the rare circumstance of the grant of leave being set aside take precedence over the equally forceful admonition against judicial review of what is effectively the discretion to prosecute? How then do we balance what is

at stake in the public interest to ensure on the one hand that people who commit crimes are brought to justice expeditiously with the need to guard against the potential trampling of basic constitutional rights?

[44] Lord Bingham made three criticisms of the judge's assessment of the facts in the application to set aside the leave which had been previously granted. He noted firstly that ***"the judge approached the question of arguability without any recognition of the very ambitious case the Chief Justice was seeking to establish. Nor did she consider which, if any, of the Chief Justice's complaints could not be adequately resolved within the criminal process itself, either at the trial or, possibly, by application for a stay of the proceedings as an abuse of process."*** Even in examining the issue of arguability, this court, although having already granted leave, is encouraged to be mindful of the ambitious case which Mr. Prest seeks to mount here. This process, though couched as an attack on the exercise of the magistrate's judicial discretion, is no doubt designed to circumvent an actual criminal prosecution in the first place. There is no way this court, in a judicial review hearing, will be able to effectively address the assertions being made on behalf of Mr. Prest, without declaring the very decision to prosecute as being frivolous and vexatious and an abuse of process.

[45] Secondly, Lord Bingham stated the following:

> ***"The judge was wrong to assume, for the purpose of ascertaining whether there was an arguable case, that the facts as raised by the Chief Justice were true. This was not a demurrer, but an application for exceptional relief, to be judged on all the evidence (and it is perhaps surprising that the matter was ever thought suitable for decision ex parte). If the facts raised by the Chief Justice were taken as true, it necessarily followed that the Chief Magistrate's statement was false, a conclusion which would indeed raise very disturbing and far-reaching questions."***

[46] It seems to me that Lord Bingham was encouraging a closer scrutiny of the evidence even though the court had already granted leave to file a claim for judicial review. Again the underlying issue here is the exceptional nature of the relief which is being sought and the public policy interests which are inherently challenged in pursuing such a claim. One cannot simply assume that the magistrate did not exercise her judicial discretion properly and allow for a fishing expedition if the only purpose of this would be to derail the criminal prosecution and cause unnecessary delay. There may also be a limited extent to which this

court can simply substitute its own assessment of the evidence for that of the magistrate. After all, this is not an appeal against the decision of a judicial officer.

[47] Thirdly, Lord Bingham noted that ***"by referring compendiously to 'the totality of the evidence raised by the [Chief Justice]' the judge gave no indication of the particular evidence which she found persuasive."*** There therefore seems to be an encouragement, even at this stage, for the court to consider the evidence carefully in order to determine whether the claim for judicial review should continue in light of the application to set it aside. Though the very high burden is on the respondents to show that leave should be set aside, the court must give consideration to the evidence and clearly articulate that which it finds persuasive so as to justify the decision which it comes to. This is an approach which may not be entirely in keeping with Baroness Hale's views in ***Sharma***.

[48] Although she was in the majority in that case, it is not entirely clear to me as to the extent to which the judge at this stage should go in analyzing the evidence. I believe that a balance must therefore be struck in that some assessment of the evidence is necessary to explain the additional reasons why I am of the view that this is not an appropriate case for judicial review. I do however underscore the fact that no firm findings of fact are made at this stage, but merely observations which are relevant to the decision I have to make at this stage in the process. Having done so I have become all the more persuaded that the respondents are correct in stating that the judicial review process in this case is not an appropriate course to pursue and this court ought not to have granted leave in the first place. I will therefore examine the evidence in order to explain the decision I have come to.

[49] In her affidavit filed in support of the application for leave, Ms. Hobson states that she was informed by Mr. Prest that the warrant issued under section 19(d) of the Larceny Act is frivolous or vexatious and an abuse of process because the evidence in the possession of the DPP establishes that Mr. Prest did not receive and was not in possession of Mr. Kutcher's funds; neither was he in custody or control of it. The Affidavit goes on to say that having applied for and obtained information by way of a production order, Corporal Diamond provided evidence which makes it clear that at no time did Mr. Prest receive the money as alleged. Further, the affidavit goes on to state that in his affidavit of 25th June, 2021 Corporal Diamond was aware that at no time did Mr. Prest receive the funds.

[50] The argument is that had the magistrate considered that evidence it would have been obvious to her that a key ingredient in a charge for fraudulent conversion under section 19(1)(d) of the Larceny Act was not established. The section states as follows:

(1) A person who,…

> ***(d) having either solely or jointly with any other person received any property for or on account of any other person, fraudulently converts to his or her own use or benefit or the use or benefit of any other person, the property or any part of the property or any proceeds of the property,***

> ***commits a misdemeanour, and, on conviction, is liable to imprisonment with or without hard labour for a term not exceeding seven years.***

[51] The evidence presented by Corporal Diamond, as referred to by Ms. Hobson, was that Mr. Kutcher personally wired $2,530,000.00US from his own account in Canada to BMO for onward transmission to an account to be held in escrow by an attorney acting on behalf of Petrodel Investments Advisors Nevis Limited (PIAN). It is asserted that Mr. Prest is the sole shareholder, main beneficiary of and directing will and mind of PIAN. He had personally negotiated the contract upon which Mr. Kutcher was acting. It is further asserted that the funds were to have been held in escrow until such time as Mr. Kutcher had obtained regulatory approval for him to acquire a 49.9% shareholding in the Bank of Nevis International Ltd. That was Corporal Diamond's assertion.

[52] Corporal Diamond also asserted that at the direction of Mr. Prest, the funds were transferred from the attorney's escrow account into an account at the Bank of Nevis Ltd. and subsequently used to purchase shares in the name of PIAN. It is further asserted that Mr. Prest is the sole shareholder of PIAN and therefore the main beneficiary of this transaction. Corporal Diamond further asserts that this transaction was not designed to ensure that Mr. Kutcher had acquired the shares, which was the main purpose for which the funds were to have been held in escrow, but to benefit Mr. Prest or his company in acquiring the shares through the use of Mr. Kutcher's funds.

[53] These are disputed facts and may be subject to interpretation based on the provisions of the legislation and the various documents provided. However, taking this evidence at its highest I am not of the view that the assertions raised on behalf of Mr. Prest are matters which are best suited for judicial review. It must

be observed that the nature of the transactions which were conducted and Mr. Prest's relationship of proximity to PIAN and PIAN's attorney all make these issues better suited to be addressed at a criminal trial. Rather than being merely procedural, these are substantive evidential issues.

[54] A jury may very well reject the argument for the DPP or a judge in a criminal trial may find on a no case submission that it is insufficient. However, that would not be enough for this court to interfere with the judicial discretion of the magistrate and effectively estopp a criminal prosecution by way of judicial review this way. I see no reason for this court to derail the potential criminal prosecution on the assertion that this was not sufficient evidence to prove that Mr. Prest had received the funds. No doubt, this may be his defence but I see no reason not to find that the criminal trial process is an adequate forum within which to raise such issues. It is not merely a question of whether he would succeed in that argument in judicial review but that it is an argument which is best suited for a criminal trial.

[55] Ms. Hobson goes on in her affidavit to state that Mr. Prest informed her that there was a legitimate commercial transaction governed by a written contract to which neither Mr. Kutcher nor himself was a party. The parties were companies. This contract was predicated upon the payment of certain funds in exchange for shares in a company. Those shares could have only been issued to Mr. Kutcher's company upon successful application for regulatory approval to hold the shares. According to Ms. Hobson, the evidence is that the regulators did not approve this. She exhibits a letter from Mr. James Simpson in order to substantiate this.

[56] Ms. Hobson goes further to state that the evidence in the possession of the Director of Public Prosecutions would show that Mr. Prest had no intent to defraud and that in his conduct of the transactions relating to the funds he had sought legal advice and obtained the opinion of 4 lawyers in his handling of the transactions. She exhibits the opinion of 4 attorneys to substantiate this assertion. In relation to this however, I am not persuaded that such issues are appropriate to be addressed in judicial review proceedings.

[57] Firstly, it seems to me to be quite clear on the face of it that there is a genuine dispute as to whether the very purpose of the funds being held in escrow was to ensure that they were not used by anyone until such time as regulatory approval was granted. Even in reliance on the letter of Mr. Simpson Mr. Prest is arguing that no regulatory approval was granted. Yet, there seems to be very little doubt that the funds were transferred out of the escrow account and Corporal Diamond argues that this was done on Mr.

Prest's instructions. If Mr. Prest was correct in saying that there was no regulatory approval, then it is still a matter of dispute as to whether that the funds ought not to have been used unless and until the regulators had approved Mr. Kutcher or his company for the purchase of the shares. Even in the information disclosed there is an email from Mr. Hoffman dated 13th October, 2020, who expressed the view that the funds may have been misappropriated based on the fact that it was to have been held in escrow. It is not that the court is expressing an opinion one way or another, but that is a matter which is best suited for interpretation by a trier of fact after hearing all the evidence and giving due consideration to the full meaning and effect of the contract; unless of course a judge in a criminal trial takes a different view in a no case submissions after hearing all of the evidence. I don't believe that judicial review would be the appropriate forum within which to reconcile these issues.

[58] An assessment of Corporal Diamond's affidavit and that of Mr. Kutcher, which were exhibited in this case, seems to dispute whether there was ever an actual formal rejection of Mr. Kutcher or his company being approved by the regulator. Though no formal application for regulatory approval was exhibited, there is evidence of some due diligence searches having been done on Mr. Kutcher. Mr. Simpson's letter appears to be a somewhat preliminary view of the situation. However, if Mr. Prest was right that there was no approval the question is whether that would necessarily address the fact that the funds were withdrawn out of the escrow account without what is alleged to be any legal justification. That is a matter for a criminal trial as to the full extent of the implications of what transpired would have to be addressed in judicial review proceedings in order to determine whether that was sufficient evidence upon which the magistrate would have acted.

[59] Further to this, Mr. Prest exhibited the opinions to which he refers. All of them were obtained after the funds were transferred out of the escrow account. The evidence which Mr. Prest has himself provided indicates that the shares were purchased in December, 2019 whereas the opinions were sought in October, 2020. At least one of those opinions was not received until November, 2020. Even then the evidence exhibited also indicates that these opinions were sought after Mr. Kutcher had raised certain concerns with the board of directors of BONI. To my mind therefore, the question of whether this stands as evidence that Mr. Prest was guided by these opinions in his dealings with the funds so as to negate the *mens rea* necessary for the commission of the offence as Ms. Hobson asserts, is an issue best left for trial in the criminal proceedings; as it appears to me to be an issue which is subject to dispute.

[60] It was stated in one of the opinions that, in the event that there was no regulatory approval, the funds were to have been returned to Mr. Kutcher's company from PIAN's *"lawyer's trust account to which it was transferred by BMO*." It seems to me to be clear that, whether the funds belonged to Mr. Kutcher or his company and whether he or his company was a party to the agreement, the fundamental argument by the Director of Public Prosecutions is that the funds ought to have remained in the escrow account until such time as regulatory approval was granted. Whilst there seems to be some divergence of views expressed in the 4 legal opinions on that issue I am of the view that it is essentially a matter for trial as to venture into such an interpretation in judicial review would not be appropriate; but it would nonetheless be necessary in order to draw the inferences which Mr. Prest would have the court draw at this stage in the process.

[61] I make just one other point here. Ms. Hobson states, and counsel argues, that Mr. Prest was guided in his dealings with the funds by the opinion of these lawyers. Yet it is unclear to me from Ms. Hobson's evidence as to what precisely are the dealings she is referring to? On the one hand it is argued that he never received the funds in the first place. On the other there is an argument that the *mens rea* is absent due to his reliance on legal opinions. It would be necessary therefore to reconcile these issues in the judicial review trial and this adds to the court's view that all such issues are best left to be dealt with at a criminal trial.

[62] It is also argued that there is no evidence that Mr. Prest was ever in a position of trust as it relates to Mr. Kutcher's funds. Ms. Hobson's affidavits raise these issues. The court was pointed to the definition of a trustee in the **Larceny Act** which states as follows:

> ***"trustee" means a trustee on some express trust created by some deed, will, or instrument in writing, and includes the heir or personal representative of any such trustee, and any other person upon or to whom the duty of such trust shall have devolved or come, and also an executor and administrator, and an Official Receiver, assignee, liquidator, or other like officer acting under any present or future enactment relating to companies or bankruptcy;***

[63] The argument is that by this definition Mr. Prest was not a trustee for the purpose of section 20 of the **Larceny Act**. The section states as follows:

A person who, being a trustee of any property for the use or benefit either wholly or partially of some other person, or for any public or charitable purpose, with intent to defraud, converts or appropriates the same or any part of the property to, or for his or her own use or benefit, or for the use or benefit of any person other than the person entitled to the property, or for any purpose other than such public or charitable purpose, or otherwise disposes of or destroys such property or any part of the property, commits a misdemeanour, and, on conviction, is liable to imprisonment with or without hard labour for a term not exceeding seven years:

Provided that no prosecution for any offence included in this section shall be commenced

(a) by any person without the sanction of the Director of Public Prosecutions;
(b) by any person who has taken civil proceedings against such trustee, without the sanction also of the court or Judge before whom such civil proceedings were heard or are pending.

[64] Despite the arguments being made, one of the very opinions exhibited by Mr. Prest assesses the nature of the escrow account into which Mr. Kutcher's funds were to have been placed. In that opinion it was made clear that the attorney was of the view that Mr. Kutcher was not parting with his interest in his money and that it was paid in trust with all of the legal implications of an escrow account. The attorney went on to say that on the totality of the agreement he was of the view that a trust was created, the terms of which were set out in the written agreement between the parties. To my mind, the lawyer's opinion is not binding on the court or the DPP and I agree that the specific wording of the legislation must be taken into account. As I stated earlier, that was a divergent view from some of the other attorneys who gave an opinion on the matter. But it raises a significant question as to why such issues are not best left for trial in the criminal court. For Mr. Prest to be allowed to argue in judicial review proceedings that no trust was created when one of the opinions presented by him states otherwise fortifies my view that judicial review is not the best avenue within which to address those issues and the broad allegations being made by the

Director of Public Prosecutions. It is not that he may not succeed in that argument but it is best left for the criminal courts.

[65] Corporal Diamond asserts that Mr. Prest is the directing will and mind of PIAN. He also asserts that Mr. Prest is the main shareholder and beneficiary of that company. The very letter Mr. Prest exhibited from Mr. Simpson states that the only reason the regulators agrees to sell an interest in BONI to PIAN was on the basis that Mr. Prest was the owner of PIAN. After conducting its own assessment the regulators were satisfied that Mr. Prest was the directing will and mind and sole shareholder of PIAN. Therefore, the question of whether a trust instrument was created by a written agreement signed on behalf of PIAN is a matter for trial in the criminal courts. If the court were to embark on a judicial review process it would have to decide on those issues and I am not of the view that it would be an appropriate forum within which to do so.

[66] In the recent case of ***Delpleache v. the Commissioner of Police***[10] the Caribbean Court of Justice addressed the issue of whether a director who performs the actions of the company and forms the *mens rea* necessary to constitute an offence can hide behind the doctrine of separate corporate personality to escape a criminal prosecution. JCCJ Barrow, with whom the majority agreed, was not of the view that the corporate veil was a criminal law concept which even needed to be pierced. If the actions of the director and his mental state were such that the crime was committed then he may be prosecuted for the crime. I note that there were dissenting opinions in that case. I am of the view that some of the issues raised in Ms. Hobson's affidavit would take us into the realm of having to address issues of this nature in judicial review proceedings. This underscores the need for such an issue to be addressed in one set of proceedings and, in my view, the criminal trial is the most appropriate forum within which to address this issue. No doubt prosecutions of cases of this nature are not simple and an assessment of ***Delpleache*** would make this all the more obvious. But it is within the discretion of the Director of Public Prosecutions to determine whether this should commence and the test of the strength of that case is best suited for the criminal process.

Further Issues

[10] [2021] CCJ 10 (AJ) BB

[67] In support of the Fixed Date Claim an affidavit was filed by Ms. Hobson. However rule 56.7(5) of the CPR states that insofar as judicial review claims are concerned ***"[t]he general rule is that the affidavit must be made by the claimant or, if the claimant is not an individual, by an appropriate officer of the body making the claim."*** While sub-rule 6 allows for the affidavit to be signed by someone else on behalf of the claimant, it goes further to state that the affiant ***must state why the claimant is unable to do so.*** In this case, the affidavit simply states that Mr. Prest is overseas. Given that there are specific provisions within rule 30.5 which allows for affidavits which have been sworn overseas to be filed in our courts, I do not accept that merely residing overseas is sufficient to state exactly why Mr. Prest could not swear to this affidavit or even appear in these proceedings. In an era where there are technological advances to assist with such processes and the court is sitting via zoom I find it difficult to appreciate why these proceedings should be conducted via proxy in this way. Emails can be used in order to ensure that affidavits are signed and filed with the court. The court's e-litigation portal can be accessed from anywhere in the world. I do not accept that merely because Mr. Prest is in the UK he is unable to swear to the affidavit himself.

[68] When one examines the peculiar nature of this case, this issue does cause me some concern. Lord Bingham warned about the disparity between criminal and civil proceedings and the impact of the judicial review process on these processes. The very basis of seeking a warrant to commence criminal proceedings is to bring a defendant before a court to answer to the charges against him. One does not defend a criminal charge via proxy. Therefore there are good reasons to be concerned about a judicial review process which seeks to circumvent the criminal trial altogether where substantive pleadings and evidence are being led by employees of the chambers appearing on record for the potential defendant while he keeps the warrant in abeyance. To accept such an approach by merely stating that the claimant is overseas can create a rather troublesome precedent and undermine the very public interests which the Privy Council has warned against. As I have stated earlier, one does not have to be too imaginative to see the broad implications of such an approach. If it becomes the norm for one to simply challenge a warrant on the sufficiency of the evidence even before it is even executed, then defendants can use this as a means of evading justice without having to ever appear before a court at all. This is something the court should be guarded against.

[69] In addition to that, something must be said about the impact such an approach can have on the integrity and judicial independence of the magistracy. Whilst there are cases in which a warrant executed by a

magistrate has been reviewed, the majority if not all of the cases that I could find show that these decisions were reviewed after the fact. To my mind, to set the precedent that a magistrate's order can immediately be curtailed whilst she is brought before to the high court to account for the evidence upon which she made this order, prior to it being enforced, would undermine the integrity of that court. It is true that the magistracy is not a superior court of record, but it is a court nonetheless and an independent court which plays a significant role in the administration of justice overall. It is not for the high court to substitute its own views on the evidence for that of the magistrate.

[70] This process adopted by Mr. Prest can undermine the certainty and the authority of the orders of the magistracy and is a factor to be taken into account. It is almost as if Mr. Prest is arguing that upon obtaining knowledge of the issue of a warrant a person can take steps to evade its execution and immediately demand of the magistrate that she appears before the high court and be scrutinized on evidence upon which she made her decision. That is a dangerous path to follow and in hindsight I am disinclined to encourage such an approach in the future unless there are exceptional reasons for doing so. Having heard submissions from counsel inter partes, I am satisfied that there are no exceptional reasons to pursue this course and agree that leave ought not to have been granted.

[71] I also wish to briefly address a submission made by counsel for the learned magistrate. The court was referred to Rule 56.4(3)(b) of CPR. It is argued that given that the application for leave was accompanied by an application for interim relief, leave ought not to have been granted as it was. However, an assessment of the rule would indicate that the judge is prohibited from granting leave on paper if there is also an application for interim relief. What the judge must do is list the matter for hearing in open court. However, that open court hearing is not mandated to be an *inter partes* hearing. Rule 56.4(4) states that it is within the discretion of the judge to direct that notice be given of the hearing to the other side. Therefore the application can in fact be heard ex parte in open court despite there being an application for interim relief.

[72] In the instant case, the court did request that the matter be scheduled for a hearing in open court and granted leave at that hearing. Therefore there would have been no inherent breach of the rules. However, having heard the parties on the *inter partes* applications I am satisfied that this was not an appropriate case to have been heard ex parte and that leave in fact ought not to have been granted.

Conclusions

[73] In conclusion I am of the view that there are exceptional reasons to set aside the leave which had been granted to Mr. Prest to commence a claim for judicial review. The issues raised are matters best addressed in the criminal justice system and it would be inappropriate for this court to hear a claim for judicial review on the grounds outlined in the various applications and affidavits filed on behalf of Mr. Prest. He has alternative remedies available to him.

[74] For the same reasons I am of the view that the claim should be struck out as the leave has been revoked. In addition to this, I am of the view that the application for specific disclosure should also be struck out as well as the interim injunction against the execution of the warrant which had been granted.

[75] As it relates to the application of the Attorney General to be removed from the claim I agree with the submission put forward on his behalf. Given that the claim is dismissed and leave has been set aside I will say no more than that he has made no decision and the **Crown Proceedings Act** does not provide a basis for the claim against him.

[76] As it relates to Corporal Diamond's request for him to be removed as a party, had I not made the decisions I have come to I would not have agreed with his application. I believe that the substance of what is under review here touches and concerns his investigation and his application for the warrants. He would have therefore been a proper party to the proceedings.

[77] As has been requested by various counsel in the matter I would certify this as a proper case for Queen's Counsel and Senior Counsel to appear. However, given the express provisions of the CPR in relation to costs in judicial review proceedings, I will hear the parties in further submissions on whether costs ought to be awarded to the respondents. The submissions are to be in writing and filed on the e-litigation portal within 14 days from the date of delivery of this judgment.

[78] Finally I would like to express my thanks to counsel who appeared in this matter and the assistance they provided with the submissions which they have presented to the court.

Ermin Moise
High Court Judge

By the Court

Registrar