

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

TERRITORY OF THE VIRGIN ISLANDS

BVIMCRAP2020/0001

BETWEEN:

THE COMMISSIONER OF POLICE

Appellant

and

MEDICAL MANAGEMENT COMPANY LIMITED

Respondent

Before:

The Hon. Mr. Mario Michel
The Hon. Mde. Gertel Thom
The Hon. Mr. Dexter Theodore

Justice of Appeal
Justice of Appeal
Justice of Appeal [Ag.]

Appearances:

Ms. Patrice Hickson for the Appellant
Ms. Reynela Rawlins for the Respondent

2021: October 6;
2022: May 26.

Magisterial criminal appeal – Mutual Legal Assistance (Tax Matters) Act No.18 of 2003 as amended – Section 5(6)(i) of Mutual Legal Assistance (Tax Matters) Act – Limitation period – Magistrate’s Code of Procedure Act No. 8 of 2006 – Section 73 of the Magistrate’s Code of Procedure Act – Recognisance – Section 165 of Magistrate’s Code of Procedure Act – Prosecution’s failure to enter recognisance – Whether an appeal may be struck out due to the prosecution’s failure to enter recognisance in accordance with section 165 of the Magistrate’s Code of Procedure Act – Whether Crown and its representatives must enter recognisance – Mandatory nature of section 165 of the Magistrate’s Code of Procedure Act – Whether section 165 of the Magistrate’s Code of Procedure Act binds the Crown – Statutory interpretation – Presumption that statutes do not bind the Crown unless express provision to that effect or necessary implication – Continuing offence – Whether offence created under section 5(6)(i) of Mutual Legal Assistance (Tax Matters) Act is a continuing one – Court’s reluctance to find continuing offences created by statute – ‘Do notice’ – Offence triable either way – Whether the offence created under section 5(6)(i) of Mutual Legal Assistance (Tax Matters) Act is triable either way – Section 230(a) of the Magistrate’s Code of Procedure Act – Whether time limit prescribed by section 73 of the Magistrate’s Code of Procedure Act is inapplicable in the circumstances

On 14th November 2016, the International Tax Authority (“ITA”) of the Territory of the Virgin Islands (“the BVI”) issued and served a ‘Notice to Produce Information’ on Medical Management Company Limited (“Medical Management”), through its registered agent, seeking information believed to be in its possession. The ‘Notice’ required Medical Management to provide the information requested within 10 working days of the date of its issuance. Failure to comply with the Notice “without lawful or reasonable excuse” would deem Medical Management as having committed an offence pursuant to section 5(6)(i) of the Mutual Legal Assistance (Tax Matters) Act (“MLAA”). However, despite having acknowledged receipt of the Notice, Medical Management did not produce the requested information. Consequentially, the Commissioner of Police filed a complaint in the Magistrate’s Court on 19th May 2019, that Medical Management failed to comply with a notice contrary to section 5(6)(i) of the MLAA.

The matter was brought before the Magistrate’s Court and heard by the learned magistrate who considered the arguments of both counsel for the Commissioner of Police and counsel for Medical Management. Counsel for Medical Management advanced submissions that the complaint had been filed by the Commissioner of Police outside of the limitation period prescribed under section 70 of the Magistrate’s Code of Procedure Act (“Magistrate’s Code”). However, counsel for the Commissioner of Police argued that the offence created under section 5(6)(i) of the MLAA was a continuing offence, and that as long as Medical Management failed to comply with the Notice filed on 14th November 2016, a new breach occurred every day. Therefore, the complaint would have been filed within the prescribed time limit under section 70 of the Magistrate’s Code. The learned magistrate in rendering her oral decision, held that the offence created under section 5(6)(i) of the MLAA was not a continuing offence and that Medical Management’s failure to provide the information to the ITA by 29th November 2016, meant that Medical Management was only in breach as of 29th November 2016. The learned magistrate also held that the complaint was to be brought within 6 months of that date, the latest being 29th May 2017 in accordance with section 70 of the Magistrate’s Code. As such, she dismissed the complaint filed by the Commissioner of Police.

The Commissioner of Police, being dissatisfied with the learned magistrate’s decision has appealed relying on two grounds. Medical Management, in response to the grounds filed, has raised in their submissions a preliminary issue, namely: that the appeal should be struck out due to the prosecution’s failure to enter recognisance in accordance with section 165 of the Magistrate’s Code. In addition to the preliminary issue, the main issues that arise for determination before this Court are: (i) whether the learned magistrate erred in finding that the offence created under section 5(6)(i) of the MLAA is not a continuing offence; and (ii) whether the offence created under section 5(6)(i) of the MLAA is triable either way thereby making the time prescribed under section 73 of the Magistrate’s Code inapplicable in the circumstances.

Held: allowing the appeal; remitting the matter to the magistrates’ court to be heard before a different magistrate; and ordering each party to bear its own costs, that:

1. Section 165 of the Magistrate’s Code provides that an appellant shall enter recognisance within 7 days before a magistrate in order to prosecute an appeal.

Section 165 of the Magistrate's Code is mandatory in nature and an appellant's failure to comply with this section will result in his/her appeal being struck out.

Section 165 of the **Magistrate's Code of Procedure Act** No. 8 of 2006, Revised Laws of the Territory of the Virgin Islands applied; **Tomy v Agdoma** (1968) 12 WIR 490 applied; **Daniel v Elva (No. 1)** (1970) 17 WIR 177 applied; **Tai v Charles** (1959) 1 WIR 346 applied and **Ramdwar v Weeks Ors.** Julien Reports. Vol. 20, Pt.1, 97 applied.

2. The Magistrate's Code does not bind the Crown in the BVI and therefore there is no requirement that the Crown or its representatives must enter into recognisance in accordance with section 165 of the Magistrate's Code to prosecute an appeal. The general presumption in statutory interpretation is that statutes do not bind the Crown unless there is an express provision to that effect, or it arises by necessary implication. In the Magistrate's Code, there are no words to the effect that: "This Act binds the Crown". The legislature would have included that express provision if it so intended that the Magistrate's Code should bind the Crown. Furthermore, the Magistrate's Code does not bind the Crown by necessary implication. Upon considering the surrounding provisions within the act and comparable legislation, it is apparent that there is no need for the Director of Public Prosecutions or Commissioner of Police in the BVI to enter into a recognisance in accordance with section 165 of the Magistrate's Code to prosecute an appeal.

Sections 73 and 165 of the **Magistrate's Code of Procedure** No. 8 of 2006, Revised Laws of the Territory of the Virgin Islands applied; Section 5(6)(i) of the **Mutual Legal Assistance (Tax Matters) Act** No. 18 of 2003 as amended by Acts No. 16 of 2005, No. 11 of 2011, No. 11 of 2012 and No. 10 of 2013, Revised Laws of the Territory of the Virgin Islands applied; **Province of Bombay v Municipal Corporation of the City of Bombay** [1947] AC 58 applied; **Lord Advocate v Dumbarton District Council** [1990] 2 AC 580; **R (Revenue and Customs Comrs) v Liverpool Coroner** [2014] EWHC 1586 (Admin) applied and **R (Black) v Secretary of Justice** 27 UKSC 81 applied.

3. The court is cautious not to create a formula to differentiate a continuing offence from a single offence. Instead, the court determines this on a case-by-case basis. The court is also cautious in its approach to finding continuing offences within statute without express words which make it clear that that was the intention of parliament when the statute was passed. In this case, when looking at the wording of section 5(6)(i) of the MLAA it is clear that there is no obligation that the offence continues indefinitely where requirements of the notice remain unfulfilled. Section 5(6)(i) is simply crafted to state that a person who fails to comply with a notice is liable to be tried summarily or indictably. It goes no further to set out an obligation nor are there surrounding provisions within the legislation that give an indication that the offence is to be interpreted as a continuing one. The learned magistrate did not err in finding that the offence created under section 5(6)(i) of the MLAA was a single offence.

Section 73 of the **Magistrate's Code of Procedure** No. 8 of 2006, Revised Laws of

the Territory of the Virgin Islands applied; Section 5(6)(i) of the **Mutual Legal Assistance (Tax Matters) Act** No. 18 of 2003 as amended by Acts No. 16 of 2005, No. 11 of 2011, No. 11 of 2012 and No. 10 of 2013, Revised Laws of the Territory of the Virgin Islands applied; **British Telecommunications plc v Nottinghamshire County Council** [1998] EWHC Admin 989 considered; **John Mann International Limited v. Vehicle Inspectorate** [2004] EWHC 1236 (Admin) considered; **R. v. Wimbledon Justices ex parte Derwent** [1953] 1 QB 380 considered; **Hodgetts v Chiltern District Council** [1983] 2 AC 120 applied and **Chandra Silochan et al v Rickie Cedeno** POSMG Appeal No. P092 of 2019 applied.

4. The non-compliance with a notice under section 5(6)(i) of the MLAA is triable either way. Section 230(a) of the Magistrate's Code states that matters triable either way are to be dealt with as indictable offences. Further, indictable offences do not have a limitation period or prescribed time within which matters should be prosecuted. In this case, where section 5(6)(i) of the MLAA is a triable either way offence and section 230(a) of the Magistrate's Code provides that these offences are to be treated as indictable offences, there is no time limit for the prosecution of the non-compliance with a notice under section 5(6)(i) of the MLAA. The Commissioner of Police therefore succeeds in their argument that the limitation period prescribed by section 73 of the Magistrate's Code does not apply as it relates to the offence created under section 5(6)(i) of the MLAA. This means that complaint filed on 19th May 2019 by the Commissioner of Police was incorrectly dismissed by the learned magistrate for being filed beyond 29th May 2017, (the 6-month time period mandated by section 73 of the Magistrate's Code). The learned magistrate erred in her determination of this issue.

Section 73 of the **Magistrate's Code of Procedure** No. 8 of 2006, Revised Laws of the Territory of the Virgin Islands applied; Section 5(6)(i) of the **Mutual Legal Assistance (Tax Matters) Act** No. 18 of 2003 as amended by Acts No. 16 of 2005, No. 11 of 2011, No. 11 of 2012 and No. 10 of 2013, Revised Laws of the Territory of the Virgin Islands applied; **Interpretation Act** Cap. 136 Revised Laws of the Territory of the Virgin Islands considered; **R. v Thames Metropolitan Stipendiary Magistrate Ex p. Horgan** [1998] 1 All ER 559 at 562 considered; **Karamchand Bridgemohan v Suresh Hardeo** CV 2015-03059 applied; **Kemp v. Liebherr (Great Britain) Ltd** [1987] 1 All ER 885 considered and **R v Clerk to the Medway Justices, ex parte DHSS** (1986) 150 JP 401 applied.

JUDGMENT

- [1] **THOM JA:** This is an appeal against the decision of learned magistrate dismissing a complaint filed under section 5(6)(i) of the **Mutual Legal Assistance (Tax**

Matters) Act¹ (“MLAA”) by the appellant, The Commissioner of Police (“the COP”), against the respondent, Medical Management Company Limited (“Medical Management”). The complaint was dismissed by the learned magistrate on the basis that it had been filed by the COP outside of the limitation period prescribed under section 70 of the **Magistrate’s Code of Procedure Act** (“Magistrate’s Code”).²

Background

- [2] Medical Management is a company incorporated in the Territory of the Virgin Islands (“BVI”) having been incorporated through another BVI company, Commonwealth Trust Limited (“Commonwealth Trust”) in 2014. Commonwealth Trust has since been transferred to New Haven Corporate Services (BVI) Limited (“New Haven”), which has a registered office in the BVI.
- [3] In January 2014, the International Tax Authority (“ITA”) of the BVI, received a request from the Government of India seeking information believed to be in the possession of Medical Management. To facilitate this request, the ITA issued a ‘Notice to Produce Information’ dated 21st July 2016 and served it on Commonwealth Trust on 22nd July 2016. Commonwealth Trust was at that time Medical Management’s registered agent.
- [4] Following Commonwealth Trust’s transfer to New Haven, a fresh ‘Notice to Produce Information’ was issued and served on New Haven, Medical Management’s new registered agent, on 14th November 2016. Both ‘Notices to Produce Information’ were acknowledged as having been received by each respective registered agent when served.
- [5] The ‘Notices to Produce Information’ required that the information requested be produced within 10 working days of the date of the issuance of the respective

¹No. 18 of 2003 as amended by Acts No. 16 of 2005, No. 11 of 2011, No. 11 of 2012 and No. 10 of 2013, Revised Laws of the Territory of the Virgin Islands.

²No. 8 of 2006, Revised Laws of the Territory of the Virgin Islands.

Notices. Failure to comply with the Notices “without lawful or reasonable excuse” by Medical Management, would deem it as having committed an offence pursuant to section 5(6)(i) of the MLAA.

- [6] Despite having acknowledged receipt of both Notices, Medical Management did not produce the requested information. As a result, the COP filed a complaint in the Magistrates’ Court on 19th May 2019, that Medical Management failed to comply with a notice contrary to section 5(6)(i) of the MLAA. The particulars of the complaint filed read:

“**Medical Management Company Limited** on a day unknown between the period 15th day of October 2018 and 15th March 2019, in the Territory of the Virgin Islands failed to comply with a Notice to Produce Information issued to you by the International Tax Authority on the 14th day of November, 2016.”

- [7] The matter having been brought before the Magistrates’ Court, was heard by the learned magistrate who considered the arguments of both counsel for the COP and Medical Management. Counsel for Medical Management in resisting the charge brought against it, advanced submissions that the complaint had been filed by the COP outside of the limitation period prescribed under section 70 of the Magistrate’s Code.³ Counsel for Medical Management argued that the MLAA does not itself provide a time limit in which a charge should be brought. However, section 70 of the Magistrate’s Code which mandates that a charge should be made within 6 months from the time when the matter of the charge arose, would be applicable in the circumstances. Medical Management also advanced the argument that upon the application of section 70 of the Magistrate’s Code, it was clear that the complaint brought by the COP was brought well beyond 6 months from the time when the matter of the charge arose. Therefore, the complaint should be dismissed.

- [8] The COP in response, argued that the offence created under section 5(6)(i) of the MLAA was a continuing offence and as long as Medical Management failed to comply with the Notice filed on 14th November 2016, that a new breach occurs every

³ No. 8 of 2006, Revised Laws of the Territory of the Virgin Islands.

day. Therefore, the complaint would be within the prescribed time limit under section 70 of the Magistrate's Code.

- [9] The learned magistrate in rendering her oral decision, held that the offence created under section 5(6)(i) of the MLAA was not a continuing offence and that Medical Management's failure to provide the information to the ITA by 29th November 2016, meant that Medical Management was only in breach as of 29th November 2016. The offence was completed and concluded, and the complaint was to be brought within 6 months of that date, the latest being 29th May 2017 in accordance with section 70 of the Magistrate's Code. As such, the learned magistrate dismissed the complaint filed by the COP.

The Appeal

- [10] The COP, being dissatisfied with the learned magistrate's decision has appealed. The COP has filed 2 grounds of appeal challenging the learned magistrate's decision on the bases that: (i) the learned magistrate erred in ruling that the COP was statute barred from laying the charge against Medical Management within 6 months of the expiry of the 10-day compliance period given in the Notice; and (ii) the learned magistrate's decision was unreasonable having regard to all the circumstances and the law. Medical Management, in response to the grounds filed, has raised in their submissions a preliminary issue. Medical Management has argued that the COP is in breach of section 160 of the Magistrate's Code as no recognisance has been entered by the COP to prosecute the appeal. Consequentially, Medical Management seeks to have the appeal struck out.
- [11] Considering the above, I am of the view that the preliminary issue of whether an appeal may be struck out due to the prosecution's failure to enter recognisance in accordance with the Magistrate's Code should be considered first, as it may be determinative of the appeal.

The Preliminary Issue

- [12] Counsel for Medical Management, Ms. Rawlins, raised in her written submissions, the preliminary issue of the COP's failure to enter a recognisance in accordance with section 160 of the Magistrate's Code to prosecute the appeal.
- [13] Ms. Rawlins in her written and oral submissions relied on the cases of **Tomy v Agdoma**,⁴ **Daniel v Elva (No. 1)** ⁵ and **Tai v Charles**,⁶ as good authority as to why the Director of Public Prosecutions or a representative of the Crown was mandated to enter a recognisance and in the absence of such recognisance, the appeal should be struck out, having not been properly before the Court of Appeal. These cases will be discussed in greater detail later in this judgment.
- [14] Counsel for the COP, Ms. Hickson, in reply to the preliminary issue raised, argued that there is neither constitutional or legislative requirement nor any established practice, that mandates that the Director of Public of Public Prosecutions or any other representative of the Crown, enter a recognisance pursuant to section 160 of the Magistrate's Code to prosecute an appeal. Ms. Hinkson further argued that upon a reading of section 160 of the Magistrate's Code, that the section appears to only apply to those appellants who are individuals or civilians and not to the Office of the Director of Public Prosecutions or the Commissioner of Police. Learned counsel drew reference to the **Criminal Procedure (Amendment) Act**,⁷ which amended the **Criminal Procedure Act**⁸ to give the Attorney General the right of appeal in criminal matters. Learned counsel stated that this amendment, like section 160 of the Magistrate's Code, does not require a recognisance to be entered into by the Attorney General. Any recognisance required is in relation to an appellant who is an individual. Further, learned counsel highlighted to the Court that there was no such practice, in other Commonwealth jurisdictions, whereby the

⁴ (1968) 12 WIR 490.

⁵ (1970) 17 WIR 177.

⁶ (1959) 1 WIR 346.

⁷ No. 3 of 2006 of the Revised Laws of the Territory of the Virgin Islands.

⁸ Cap. 18 of the Revised Laws of the Territory of the Virgin Islands.

Director of Public Prosecutions, or a representative of the Crown was required to enter into a recognisance in order to prosecute an appeal.

- [15] As it related to the cases relied on by Medical Management to support that the appeal should be struck out, Ms. Hickson submitted that there was an important distinction to be noted, namely that none of those authorities relied on by Medical Management, dealt with or highlighted instances where the Director of Public Prosecutions or a representative of the Crown failed to enter into a recognisance. In each case, the appellant, an individual, was the party in breach of the respective statutory provisions requiring recognisance to be entered. Therefore, these authorities could not advance the position that the failure of the Director of Public Prosecutions or any of the Crown's representatives to enter into a recognisance would amount to the appeal being struck out.

Legislative Framework

- [16] The Magistrate's Code came into force in the BVI on 10th February 1892. It has since been amended numerous times, with its latest amendment in 2006. Section 160 of the Magistrate's Code was first introduced by virtue of Act No. 16 of 1989, providing that recognisance should be entered to prosecute an appeal before this Court. Section 160 of the Magistrate's Code⁹ states:

"160. The appellant shall within seven days after the day on which he served notice of his intention to appeal, enter into a recognisance before a Magistrate with one or more sufficient sureties as the Magistrate may direct conditioned to appear before the Court of Appeal and to prosecute the appeal and to abide the judgment thereon of the Court of Appeal and to pay such costs as may be awarded by the said Court, or if the Magistrate thinks it expedient the appellant may instead of entering into a recognisance give such other security by payment of money into Court or otherwise as the Magistrate deems sufficient, except in cases where a sentence imposed involves the payment of a fine, such recognisance or security shall be in a sum not less than the amount of the fine; and the Magistrate shall without delay transmit to the Registrar of the Court of Appeal all papers relating to such appeal together with a concise memorandum of the reasons for his decision."

⁹ As amended by Act No. 16 of 1989.

[17] However, in the current iteration of the Magistrate's Code, as amended by No. 8 of 2006, section 160, no longer provides for recognisance to prosecute an appeal. Instead, section 165 of the Magistrate's Code makes provision for this. Like its predecessor, section 165 of the Magistrate's Code provides that an appellant shall enter into a recognisance within 7 days of serving his notice of intention to appeal. It states:

“165.(1) The appellant shall within 7 days after the day on which he or she served notice of his or her intention to appeal, enter into a recognisance before a Magistrate with one or more sufficient sureties as the Magistrate may direct, conditioned to appear before the Court of Appeal and to try the appeal and to abide the judgment thereon of the Court of Appeal and to pay such costs as may be awarded by the said Court, or if the Magistrate thinks it expedient the appellant may instead of entering into a recognisance give such other security by payment of money into Court or otherwise as the Magistrate deems sufficient, but in cases where a sentence imposed involves the payment of a fine, the recognisance or security shall be in a sum not less than the amount of the fine.

(2) The Magistrate shall without delay transmit to the Registrar of the Court of Appeal all papers relating to the appeal together with a concise memorandum of the reasons for his or her decision.”

There are no material differences between the two provisions, save in section 165, where there are two subsections.

Discussion

[18] A recognisance is an obligation or bond acknowledged before the court, whereby the person bound is to secure the performance of some act. In this matter, the act to be performed is the prosecution of the appeal without delay.

[19] Section 165(1) of the Magistrate's Code provides that a recognisance is to be entered into by an appellant and the prescribed time within which such recognisance shall be entered. However, it does not detail the effect or consequence to be incurred by the appellant who fails to either file the recognisance in the prescribed time or fails to file the recognisance entirely.

[20] Notwithstanding this, this provision makes use of the word “shall” which automatically triggers the question of whether or not the section is mandatory or discretionary in nature. This determination would no doubt assist in resolving the overarching issue of whether the appeal should be struck out due to the COP’s failure to enter into a recognisance in accordance with section 165 of the Magistrate’s Code.

[21] Counsel for the respondent has relied on two judicial pronouncements of this Court to demonstrate the consequences of an appellant’s failure to adhere to enter into a recognisance to prosecute an appeal as prescribed by legislation. In **Tomy v Agdoma**,¹⁰ the appellant sought to appeal against two convictions and as such lodged two appeals. Like section 165 of the Magistrate’s Code, section 1119 of the **Criminal Code**,¹¹ of Saint Lucia states:

“The appellant shall also, after giving or serving notice of appeal, and within fifteen days after the pronouncing of the decision, enter into a recognisance, with at least one sufficient surety, to the satisfaction of the magistrate, conditioned for the due prosecution of the appeal and for abiding the result thereof, including the payment of all costs of the appeal and otherwise, or he may, if the nature of the case admits of his so doing, instead of entering into a recognisance, lodge with the clerk the amount awarded by the decision and the amount of the costs, including the sum of forty dollars to abide the costs of the appeal, or the amount of costs only, as the case may be, and pay to the clerk all fees in respect of the appeal, if any.”

[22] However, the appellant entered into only one recognisance in respect of the two appeals lodged. On the question of whether only one recognisance could appropriately be entered into in respect of two appeals, Lewis CJ (as he then was) held that:

“It is perfectly clear from these provisions that assuming, without deciding, that one notice of appeal may be given in respect of two convictions, there is no authority for entering into one recognisance in respect of appeals against two convictions or orders.

The result is that this appeal has not been perfected and must be dismissed and the decisions appealed from affirmed.”

¹⁰ (1968) 12 WIR 490.

¹¹ Cap. 250 as amended by Acts 38 of 2006 and 11 of 2008 of the Revised Laws of Saint Lucia.

- [23] It was a requirement that each appeal lodged must be accompanied by a recognisance and failure to do so would mean that the appeal would not be perfected and the appeal struck out.
- [24] In another decision of this Court, **Daniel v Elva (No. 1)**, His Lordship Lewis CJ held that where an appellant failed to sign the recognisance, the recognisance was in breach of the condition laid down in section 1119 (1) of the Criminal Code of Saint Lucia, and that unless that condition is complied with, the appeal was not perfected and the Court had no alternative but to strike it out. The appeal was accordingly struck out.
- [25] In the Trinidad and Tobago Court of Appeal decision of **Tai v Charles**, the Court of Appeal held that determining whether the recognisance provision was mandatory or discretionary was necessary to determine whether an appeal should be struck out. In **Tai**, the appellant lodged an appeal against an order for possession made against him in Summary Court but failed to enter recognisance to prosecute the appeal in accordance with section 133 of the then Summary Court Ordinance, which is strikingly similar to section 165 of the Magistrate's Code. Section 133 of the Summary Court Ordinance states:
- “Within nine days after the pronouncing of the decision, the appellant shall, unless he remains in custody under the provisions of section 135, enter into a recognizance with one or more sureties acknowledged before a Magistrate or Justice and conditioned to appear and prosecute the appeal and abide by the judgment of the Supreme Court thereupon and pay such costs as may be by the Supreme Court awarded. Such recognizance shall be as in form 3 in the Fourth Schedule hereto: Provided that the Court may accept a deposit of money from or on account of any person in lieu of such surety or sureties and in such case, upon the deposit of the sum prescribed by the Court, the appellant shall enter into a recognizance in the form 4 in the Fourth Schedule.”
- [26] The court, engaging in an exercise of statutory interpretation, found that the Summary Court Ordinance did not contain any provision that could empower the court to enlarge time and that until the conditions of section 133 of the Summary Court Ordinance were satisfied, there was no appeal before the Full Court,

notwithstanding that the records had already been transmitted to the Registrar. It was not a question of a defective process capable of being remedied by the court. It was a question of no process appearing at all. As such the appeal was struck out.

- [27] It is clear from the authorities above that the use of the word “shall” in provisions such as section 165 of the Magistrate’s Code, denotes that the provision is mandatory in nature and that the conditions within the provision must be satisfied in order for an appeal to be considered perfected. It is also clear that the effect of failing to comply with section 165 is that the appeal will be struck out. However, these authorities do not themselves resolve the issue of whether the Director of Public Prosecutions or any representative of the Crown is bound to enter into a recognisance to prosecute an appeal in the BVI.
- [28] Learned counsel for the COP in her submissions sought to distinguish the above cases on the basis that the appellants in each case were individuals. This was a crucial point in her argument, that the absence of case law where the Director of Public Prosecutions or the Crown’s representative’s appeal was struck out for failure to file a recognisance was indicative of there being no requirement that a recognisance be entered into.
- [29] There is indeed a dearth of authority treating with this issue. This is perhaps a reflection that it is a point rarely taken. Through some industry, one case, emanating out of Trinidad and Tobago was found which speaks to the prosecution’s or a state representative’s failure to enter into a recognisance to prosecute the appeal, albeit in passing.
- [30] In **Ramdwar v Weeks Ors.**,¹² the Court of Appeal of Trinidad and Tobago makes a passing reference to an appeal brought by the appellant, the Deputy Commissioner of Police, that was dismissed due to his failure to comply with provisions of section 133 of the Summary Courts Ordinance. This excerpt of Rees JA states:

¹² Julien Reports. Vol. 20, Pt.1, 97.

“...The Deputy Commissioner appealed against the magistrate’s refusal to convict George Weekes, Raffique Shah and Basdeo Panday and some defendants appealed against their convictions.

During the course of the hearing, the appeal of the Deputy Commissioner was dismissed because he failed to comply with provisions of s.133 of the Summary Courts Ordinance Ch.3 No.4 which provides that within 9 days after the pronouncing of a magistrate’s decision, an appellant shall enter into a recognizance with one or more sureties conditioned to appear and prosecute the appeal. One of the law officers signed the bond on behalf of the Commissioner but the entering of the recognizance by the appellant himself is a condition precedent to the prosecution of the appeal.”

[31] Rees JA said no more on that hearing of the appeal, and there is no record of this appeal to be found.

[32] As section 165 when read in its entirety does not provide any express or implied provision to enlarge time for entering into a recognisance, an appellant, who fails to enter into a recognisance within 7 days of filing their notice of appeal, is in breach of section 165 of the Magistrate’s Code. However, the issue of whether the Crown and its representatives are required to comply with section 165 of the Magistrate’s Code remains to be resolved.

Definition of the word ‘Appellant’

[33] The word “appellant” is neither defined within the Magistrate’s Code nor the **Interpretation Act**.¹³ There is also no express provision within the Magistrate’s Code which states that the Crown’s representatives are required to enter into a recognisance to prosecute the appeal or exempt from entering into a recognisance to prosecute the appeal. Further, there is no provision within the Magistrate’s Code which gives any indication of whether it binds the Crown.

[34] While there may be no indication of whether the Magistrate’s Code binds the Crown, the general presumption in statutory interpretation is that statutes do not bind the Crown unless there is express provision to that effect or it arises by necessary

¹³ Cap. 136 of the Laws of the Territory of the Virgin Islands.

implication. This presumption has been crystalised in several cases, namely **Province of Bombay v Municipal Corporation of the City of Bombay**,¹⁴ **Lord Advocate v Dumbarton District Council**,¹⁵ **R (Revenue and Customs Comrs) v Liverpool Coroner**¹⁶ and **R (Black) v Secretary of Justice**.¹⁷

- [35] In **Province of Bombay v Municipal Corporation of the City of Bombay**, the Privy Council considered whether an Act giving the municipality power to lay water mains for the purpose of water supply through, across or under any street and into, through or under any land in the city allowed it to lay a water main in a private road belong to the government. Lord du Park, giving the judgment of the Board, stated:

“The general principle to be applied in considering whether or not the Crown is bound by general words in a statute is not in doubt. The maxim of the law in early times was that no statute bound the Crown unless the Crown was expressly named therein, ‘Roy n’s lie par ascun statute si il ne soit expressement nosme.’ But the rule so laid down is subject to at least one exception. The Crown may be bound, as has often been said, ‘by necessary implication.’ If, that is to say, it is manifest from the very terms of the statute, that it was the intention of the legislature that the Crown should be bound, then the result is the same as if the Crown had been expressly named. It must then be inferred that the Crown, by assenting to the law, agreed to be bound by its provisions.”

- [36] As there was no express provision within the Act that the Crown was bound by it, the Board turned its focus to ‘necessary implication’. The Board rejected the view that the ‘necessary implication’ could be found if the law could not operate “efficiently and smoothly” if the Crown were not bound.¹⁸ The Board also rejected the view, that the Crown must be held to be bound by any statute enacted “for the public good”,¹⁹ because every statute must be supposed to be for the public good. Nevertheless, the Board acknowledged that the purpose of the statute is an element to be considered when an intention to bind the Crown is alleged. The Board stated that:

“Their Lordships prefer to say that the apparent purpose of the statute is one

¹⁴ [1947] AC 58.

¹⁵ [1990] 2 AC 580.

¹⁶ [2014] EWHC 1586 (Admin).

¹⁷ 27 UKSC 81.

¹⁸ [1947] AC 58 at p. 62.

¹⁹ [1947] AC 58 at p. 63.

element, and may be an important element, to be considered when an intention to bind the Crown is alleged. If it can be affirmed that, at the time when the statute was passed and received the royal sanction, it was apparent from its terms that its beneficent purpose must be wholly frustrated unless the Crown were bound, then it may be inferred that the Crown has agreed to be bound.”²⁰

- [37] In **Lord Advocate v Dumbarton District Council**, Lord Keith of Kinkel, in considering whether the Ministry of Defence was entitled to close off a section of road without the permission of the roads authority under the Roads (Scotland) Act 1984 or the local planning authority under the Town and Country Planning (Scotland) Act 1972, cited with approval the dictum of Diplock LJ in **British Broadcasting Corporation v Johns**:²¹

“The modern rule of construction of statutes is that the Crown, which today personifies the executive government of the country and is also a party to all legislation, is not bound by a statute which imposes obligations or restraints on persons or in respect of property unless the statute says so expressly or by necessary implication.”

- [38] Lord Keith later went on to consider in detail the language of the two statutes, before concluding that they did not bind the Crown.

“Accordingly it is preferable, in my view, to stick to the simple rule that the Crown is not bound by any statutory provision unless there can somehow be gathered from the terms of the relevant Act an intention to that effect. The Crown can be bound only by express words or necessary implication. The modern authorities do not, in my opinion, require that any gloss should be placed upon that formulation of the principle.”

- [39] In **R (Revenue and Customs Comrs) v Liverpool Coroner**²² the coroner, who was conducting an investigation into the death of the deceased, issued notices under paragraph 1(2) of Schedule 5 to the Coroners and Justice Act 2009 requiring the Revenue and Customs Commissioners to provide historical occupational information concerning the deceased for the purpose of investigating whether he had died as a result of an industrial disease. The commissioners sought judicial review of the decisions to issue the notices, arguing the 2009 Act, which did not expressly bind the

²⁰ Ibid.

²¹ [1965] Ch 32, at 78-79.

²² [2014] EWHC 1586 (Admin).

Crown, did not do so by necessary implication. The court held that the Act did bind the Crown, as it was intended to strengthen the powers of coroners and to enable them to conduct an effective investigation into deaths for which the state might bear some responsibility. That legislative purpose would be frustrated if it was not binding on the Crown in that instance.

[40] Most recently, in the 2017 UK Supreme Court case of **R (Black) v The Secretary of Justice**, the Supreme Court dealt with an allegation of an Act's intention to bind the Crown. In **R (Black) v The Secretary of Justice**, the appellant was a prisoner who was a non-smoker with several health issues which were exacerbated by tobacco smoke. He requested that the National Health Service Smoke-free Compliance Line ("SFCL") be put on the prison phone system for all prisoners, so that prisoners would be enabled to report breaches of the 'smoking ban' contained in Ch 1 of Pt 1 of the Health Act 2006, within the prison, to the local authorities. The appellant issued a pre-action protocol letter to this effect. However, the respondent, the Secretary of State, in answer to the pre-action protocol letter, countered that Pt 1 of the Act did not bind the Crown. The appellant therefore launched proceedings seeking judicial review of the Secretary of State's refusal to provide confidential and anonymous access to the SFCL to prisoners. The first instance judge held that the Act did bind the Crown and quashed the Secretary of State's decision. However, the Court of Appeal held that the Act did not bind the Crown. The appellant dissatisfied, appealed to the Supreme Court to determine whether the Crown was bound by the smoking ban. The appellant contended that the presumption that a statutory provision did not bind the Crown save by express words or 'necessary implication', should be revisited, modified or applied in such a way that the smoking ban would bind the Crown.

[41] While the UK Supreme Court in rendering its judgment did acknowledge that the appellant provided some strong arguments in favour of the conclusion that Parliament did indeed mean the Crown to be bound by the smoking ban, the court held that there were powerful indicators in the language of the Act itself that the Crown was not to be bound by the smoking ban. Lady Hale stated:

“...First and foremost, it does not say so and it would have been easy enough so to do. Secondly, in Acts with comparable structures and enforcement powers, there are provisions dealing expressly with exactly how and to what extent the Act is to apply to the Crown.”

[42] At paragraphs 49 and 50 of the judgment, Lady Hale also stated:

“49. It might well be thought desirable, especially by and for civil servants and others working in or visiting government departments, if the smoking ban did bind the Crown. But the legislation is quite workable without doing so. It cannot be suggested, in the way that it could be suggested in the Liverpool Coroner’s case, that a major plank of the Act’s purpose would remain unfulfilled if the Act did not bind the Crown. The Crown can do a good deal by voluntary action to fill the gap. The Commissioners were not able to fill the gap unless their obligations under the Act overrode their duty of confidentiality.

50. Thus, not without considerable reluctance, I am driven to the conclusion that this appeal must fail. There is a presumption that Acts of Parliament only bind the Crown by express words or necessary implication. Necessary implication entails that Parliament must have meant to bind the Crown. The fact that where Parliament did mean to do so in this Act, it said so, and made tailored provision accordingly, is to my mind conclusive of the question.”

[43] In the BVI section 245 of the Magistrate’s Code prescribes how the Act should be applied. It states:

“Application of this Act

245. Where by any past or future Act of the Virgin Islands -

(a) any offence is directed or authorised to be prosecuted summarily or “under the Magistrate’s Summary Jurisdiction Acts” or any words are used implying that the offence is to be prosecuted summarily;

(b) where any sum of money is directed or authorised to be recovered;

(c) where a Magistrate is authorised to order or require a person to do or abstain from doing any act or thing other than the payment of money;

(d) where any thing is declared capable of being enforced summarily or by summary order; or

(e) where any amount is declared to be recoverable summarily as a civil debt, then this Act shall apply accordingly and where in the past or future Acts the expression “Magistrate’s Summary Jurisdiction Acts” is used, the expression shall mean this Act and any Act amending the same.”

[44] What is indeed noticeably absent are the words “This Act binds the Crown”. Given the

authorities referenced above, there is no doubt, that the absence of the words “This Act binds the Crown” goes to the heart of the presumption that unless otherwise expressly stated, statutes do not bind the Crown. As stated by Lady Hale in **R (Black) v Secretary of Justice**, it would have been “easy enough” for the legislature to include those words if it so intended that the Magistrate’s Code would bind the Crown.

[45] Furthermore, the Magistrate’s Code does not bind the Crown by necessary implication. In **R (Black) v The Secretary of Justice** Lady Hale stated that “Necessary implication entails that Parliament must have meant to bind the Crown”. This can be gleaned by looking at surrounding provisions within the Act in question and other legislation with comparable structures and enforcement powers.

[46] When one looks at the Magistrate’s Code and its use of the word “appellant” it becomes clear that the Legislative Council of the BVI did not intend that the Magistrate’s Code would bind the Crown and its servants. Its only intention would have been to bind civilians. Section 166, a section which follows section 165, the provision at the centre of this appeal, is a clear example of this. Section 166 of the **Magistrate’s Code** provides:

“166. Where the appellant is in custody the Magistrate before whom the appellant appears to enter into a recognisance may on his or her so doing or on giving such other security as aforesaid, release the appellant from custody.”

[47] It would no doubt be ludicrous that the Legislative Council would have foreseen a possibility that the Crown, through its servants could be in custody, in need of recognisance and thus drafted legislation to this effect. The Crown and its servants such as the Commissioner of Police and the Director of Public Prosecutions do not prosecute or appeal decisions of a lower court, in their personal capacity. They do so on behalf of the office that they hold; an office to which they were appointed, and which exists in perpetuity regardless of their departure from such office. It would therefore be absurd that such an individual holding such an office would be for any reason in custody acting on behalf of the Crown.

[48] Further, a recognisance is a bond taken by an individual to ensure that an act is

performed. In this case, it is to ensure that the appeal is duly prosecuted. However, there is no need for the Crown or any of its representatives such as the Director of Public Prosecutions or the Commissioner of Police to undertake such a bond, promising to prosecute an appeal, because the Crown and its servants are already bound by the Constitution.²³ The Crown and its servants are constitutionally mandated by virtue of their offices to perform these duties. As such, there is no need for the Legislative Council to further bind the Crown. The Legislative Council only intended to bind civilians as they themselves have no mandate under the Constitution or otherwise to prosecute their appeals.

[49] In addition to this, when one looks at other legislation within the BVI legislation such as the **Audit Act**,²⁴ the **Physical Planning Act**,²⁵ the **Counter-Terrorism Act**,²⁶ and the **Data Protection Act**²⁷ there are express provisions which state that “This Act binds the Crown”. These words are absent in the Magistrate’s Code, the **Criminal Code**,²⁸ and the **Eastern Caribbean Supreme Court (Virgin Islands) Act**.²⁹ It is therefore pellucid that the Legislative Council of the BVI is within the habit of including the words “This Act binds the Crown” when it so intends that it should.

[50] Further, in other Eastern Caribbean States, such as Antigua and Barbuda,³⁰ The Commonwealth of Dominica,³¹ Saint Lucia,³² Saint Vincent and the Grenadines,³³ and Saint Christopher and Nevis,³⁴ legislative provisions analogous to that of section 245 of the Magistrate’s Code, do not contain a provision which states expressly that “This Act binds the Crown”. With these legislative provisions a similar conclusion can be arrived at, that, each representative Parliament did not intend to bind the Crown or

²³ Section 59(2) of the Virgin Islands Constitution Order 2007.

²⁴ Section 3 of Act No. 13 of 2003 of the Revised Laws of the Virgin Islands.

²⁵ Section 3 of Act No. 15 of 2004 of the Revised Laws of the Virgin Islands.

²⁶ Section 4 of Act 33 of 2021 of the Revised Laws of the Virgin Islands.

²⁷ Section 4 of Data Protection Act 2019 of the Revised Laws of the Virgin Islands.

²⁸ No. 1 of 1997 of the Revised Laws of the Virgin Islands.

²⁹ Cap. 80 of the Revised Laws of the Virgin Islands.

³⁰ Cap. 225 of the Laws of Antigua and Barbuda.

³¹ Cap. 4:20 of the Laws of the Commonwealth of Dominica.

³² Cap. 3:01 of the Revised Laws of Saint Lucia.

³³ Cap. 172 of the Laws of Saint Vincent and the Grenadines.

³⁴ Cap. 3:17 of the Revised Laws of Saint Christopher and Nevis.

State to those respective Acts.

[51] In Montserrat, Saint Vincent and the Grenadines, Saint Lucia, Grenada and the Commonwealth of Dominica there are express exemptions included for the Crown and its representatives from entering into a recognisance to prosecute the appeal.

[52] In Montserrat, section 247(2) of the **Criminal Procedure Code**³⁵ provides:

“Recognizance for security to be taken

247. (1) Within three days after he serves notice of his intention to appeal, the appellant shall—

(a) enter into a recognizance before a magistrate, with or without sureties as the magistrate may direct, conditioned to prosecute the appeal to judgment, and to pay any costs awarded; or

(b) give another security by deposit of money with the magistrate’s court or otherwise as the magistrate considers sufficient, if the magistrate thinks it expedient.

(2) **However, if the complainant acts on behalf of the Crown, the Director of Public Prosecutions, the Commissioner of Police or a department of the Government or is a public officer acting in his official capacity he shall not be required to be bound by any recognizance or to give any security.**” (Emphasis added)

[53] In Saint Vincent and the Grenadines, section 216 of the **Criminal Procedure Code**³⁶ provides:

“216. Recognisance to be taken

The appellant shall, within seven days after the day on which he served notice of his intention to appeal, enter into a recognisance before a magistrate, with or without sureties as the magistrate may direct, conditioned to prosecute the appeal to judgment thereon of the court, and to pay such costs as may be awarded by it. If the magistrate thinks it expedient, the appellant may instead of entering into recognisances give such other security by deposit of money with the magistrate’s court or otherwise as the magistrate deems sufficient: **Provided that if the complainant is acting on behalf of the Crown, the Director of Public Prosecutions, the Commissioner of Police or any department of the Government or is a public officer acting in his official capacity, he shall not be required to be bound by any recognisance or to give any security.**” (Emphasis added)

³⁵ Cap. 4:01 of the Laws of Montserrat.

³⁶ Cap. 172 of the Laws of Saint Vincent and the Grenadines.

[54] In Saint Lucia, section 733(6) of the **Criminal Code**³⁷ provides:

“733. RECOGNIZANCE OR OTHER SECURITY BY APPELLANT

- (1) The appellant may, after he or she has served notice of appeal, and within 15 days after the decision of the Court, enter into a recognizance, with at least one sufficient surety, to the satisfaction of the magistrate, for the due prosecution of the appeal and for abiding by the result of the appeal, including the payment of all costs of the appeal.
- (2) The appellant may, if the nature of the case admits of his or her so doing, instead of entering into a recognizance, lodge with the clerk of the Court the amount awarded by the decision as well as the amount of the costs, together with the sum of \$500 to abide the costs of the appeal or the amount of costs of the appeal only, as the case may be, and in addition, shall pay to the clerk of the Court all fees in respect of the appeal, if any.
- (3) If the appellant is in custody, he or she may be released from custody on the order of the magistrate if he or she complies with the requirements of this section.
- (4) A person aggrieved by the decision of the magistrate pursuant to subsection (3) may appeal to a judge of the High Court in chambers who may confirm, reverse or vary the decision of the magistrate.
- (5) The magistrate may, when he or she deems it expedient so to do, dispense with the requirement of such recognizance, deposit, or fees, under subsection (1) or (2).
- (6) **The person prosecuting or defending or appearing as a public officer, or in the public interest, shall not be bound or required to enter into any recognizance or make the deposit, or pay any fees under subsection (1) or (2)."** (Emphasis added)

[55] In Grenada, section 5(2) of the **Magistrates Judgments (Appeals) Act**³⁸ provides:

“5. (1) The appellant shall also, within fourteen days after the judgment appealed against is pronounced, enter into recognisance, in Form B in the First Schedule hereto, before the Magistrate, with or without sureties in the discretion of the Magistrate, conditioned for due prosecution of the appeal and for abiding the order of the Court, or if the Magistrate thinks it is expedient the appellant may, instead of entering into a recognisance, give other such security by deposit of money with the Magistrate or otherwise as the Magistrate deems sufficient.

³⁷ Cap. 3:01 of the Revised Laws of Saint Lucia.

³⁸ Cap. 178 of the Laws of Grenada.

(1) Where the Crown is the appellant it shall be sufficient for the officer acting on behalf of the Crown to give notice in writing to the Magistrate and to the other party without entering into recognisance; and if the Crown fails to prosecute the appeal to a final determination, the other party shall be entitled to recover his or her costs of the appeal from the Crown on the production of a taxed bill of costs signed by the Registrar.” (Emphasis added)

[56] In the Commonwealth of Dominica, section 145(1)(b) of the **Magistrates Code of Procedure Act**³⁹ provides:

“145. (1)(a) The appellant shall also, within fourteen days after the judgment appealed against is pronounced, enter subject to paragraph (b) of this subsection, into recognisance in the Form B in the Third Schedule hereto before the Magistrate, with or without sureties in the discretion of the Magistrate, conditioned for due prosecution of the appeal and for abiding the order of the Court, or if the Magistrate thinks it is expedient the appellant may instead of entering into a recognizance, give other such security by deposit of money with the Magistrate or otherwise as the Magistrate considers sufficient. And the Magistrate shall without undue delay transmit to the Registrar of the High Court all papers relating to the appeal.

(b) Where the State is the appellant, it shall be sufficient for the officer acting on behalf of the State to give notice in writing to the Magistrate and to the other party without entering into a recognizance.”
(Emphasis added)

[57] This does not undermine the presumption that statute does not bind the Crown unless there is express provision to that effect. On the contrary, it serves to bolster the presumption that legislation will make its intention clear as to the extent the Act is to apply to the Crown.

[58] In light of the above, the Magistrate’s Code does not bind the Crown in the BVI and as such, there is no requirement that the Crown or any of its representatives, including the Commissioner of Police or the Director of Public Prosecutions must enter into a recognisance in accordance with section 165 of the Magistrate’s Code to prosecute an appeal. Accordingly, this preliminary point fails.

³⁹ Cap 4:20 of the Laws of the Commonwealth of Dominica.

[59] The COP has filed two grounds in support of their appeal. These grounds as detailed in paragraph 10 above can be reduced into two issues: (i) whether the learned magistrate erred in finding that the offence created under section 5(6)(i) of the MLAA is not a continuing offence; (“Continuing offence issue”) and (ii) whether the offence created under section 5(6)(i) of the MLAA is triable either way thereby making the time prescribed under section 73 of the Magistrate’s Code inapplicable in the circumstances (“Triable either way issue”).

[60] I now turn to address these issues.

Issue 1 – Continuing offence issue

[61] Ms. Hickson on behalf of the COP asserted in both her written and oral submissions that the learned magistrate erred in finding that the offence created under section 5(6)(i) of the MLAA is not a continuing offence. She stated that the learned magistrate incorrectly applied the reasoning in **British Telecommunications plc v Nottinghamshire County Council**⁴⁰ in arriving to that conclusion. Ms. Hinkson argued that the learned magistrate’s application of **British Telecommunication plc** was inapposite as that case dealt with a “do-notice” created under legislation which created a single offence, complete once and for all when the period for compliance with notice expired.

[62] Ms. Hinkson contended, **Hodgetts v Chiltern District Council**⁴¹ was the correct case to be applied. Counsel for the COP argued that had the approach by **Hodgetts** been taken, looking at the language of the section and the purpose of the MLAA, the learned magistrate would have arrived at the correct conclusion that the offence created by section 5(6)(i) of the MLAA was a continuing one.

[63] Learned counsel for Medical Management countered that the learned magistrate ruled correctly that section 5(6)(i) of the MLAA did not create a continuing offence and that

⁴⁰ [1998] EWHC Admin 989.

⁴¹ [1983] 2 AC 120.

the offence, being a single offence, is one which would be completed on the first day after the prescribed time under section 70 of the Magistrate's Code expired. Ms. Rawlins relied on the case of **Greene v Henry**⁴² to support this submission. In that case, this Court ruled that failure to pay on a periodic maintenance order created an offence for each failure.

Discussion

[64] To determine the issue of whether the offence created under section 5(6)(i) of the MLAA is a continuing one, this Court must construe both the MLAA and applicable case law.

[65] The MLAA is Act which ratifies the **Convention on Mutual Administrative Assistance in Tax Matters** in the BVI. It is a Convention which was crafted to ensure that States party to it "carry out measures or supply information, having regard to the necessity of protecting the confidentiality of information, and taking account of international instruments for the protection of privacy and flows of personal data".

[66] Section 5(6)(i) of the MLAA provides:

"(6) A person who, without lawful or reasonable excuse, fails to comply with -
(a) a notice issued to him under subsection (1), or

(b) any request made of him by the Authority in exercise of any power pursuant to section 3(4), commits an offence and is liable –

(i) on summary conviction to a fine not exceeding five thousand dollars or to imprisonment for a term not exceeding two years or both, or

(ii) on conviction on indictment, to a fine not exceeding one hundred thousand dollars or to imprisonment for a term not exceeding five years, or both."

Section 5(6)(i) of the Act was specifically amended by Act No. 12 of 2014 to make the offence triable either way.

⁴² Saint Christopher and Nevis, Magisterial Criminal Appeal No. 3 of 2006.

[67] The determination of whether an offence is a continuing or single offence is a quite common exercise in courts across England and Wales and the Commonwealth. This is evident by the plethora of case law on the issue. I will now review several cases below which provide guidance on distinguishing such offences.

[68] In **British Telecommunications plc v Nottinghamshire County Council**, Bingham LJ said:

“Whether a statutory provision creates a continuing obligation such that failure to comply with it creates a continuing offence necessarily depends on the language of the provision in question and on its correct construction. For that reason it seems to me that caution is called for when applying the observations in one case with reference to one statute, to different provisions of a different statute in another case.”⁴³

[69] In **R. v. Wimbledon Justices ex parte Derwent**,⁴⁴ however, Croom-Johnson J said:

“As a general rule, the court is not, I think, eager to find continuing offences created by a statute, and certainly not without express words which make clear that that was the intention of the legislature when the statute was passed. That seems to me to be consistent with the general approach in these matters that conduct is not to be criminalized unless Parliament has made plain its intention that it should.”⁴⁵

[70] In **Hodgetts v. Chiltern District Council**, Hodgetts was served with a planning enforcement notice under section 87 of the Town and Country Planning Act 1971 (“TCPA”) requiring steps to be taken to discontinue the use of certain land and buildings within three months of 27th February 1980. He was subsequently convicted on an information which alleged that “on and since May 27th 1980” he permitted that use contrary to section 89 of the TCPA. Section 89(1) of the TCPA states:

“89. (1) Subject to the provisions of this section, where an enforcement notice has been served on the person who, at the time when the notice was served on him, was the owner of the land to which it relates, then, if any steps required by the notice to be taken (other than the discontinuance of a use of land) have not been taken within the period allowed for compliance

⁴³ Ibid at para 17.

⁴⁴ [1953] 1 QB 380.

⁴⁵ Ibid at page 390.

with the notice, that person shall be liable on summary conviction to a fine not exceeding £400 or on conviction on indictment to a fine.

...

(4) If, after a person has been convicted under the preceding provisions of this section, he does not as soon as practicable do everything in his power to secure compliance with the enforcement notice, he shall be guilty of a further offence and liable –

(a) on summary conviction to a fine not exceeding £50 for each day following his first conviction on which any of the requirements of the enforcement notice (other than the discontinuance of the use of land) remain unfulfilled; or

(b) on conviction on indictment to a fine.

(5) Where, by virtue of an enforcement notice, a use of land is required to be discontinued, or any conditions or limitations are required to be complied with in respect of a use of land or in respect of the carrying out of operations thereon, then if any person uses the land or causes or permits it to be used, or carries out those operations or causes or permits them to be carried out, in contravention of the notice, he shall be guilty of an offence, and shall be liable on summary conviction to a fine not exceeding £400, or on conviction on indictment to a fine; and if the use is continued after the conviction he shall be guilty of a further offence and liable on summary conviction to a fine not exceeding £50 for each day on which the use is so continued, or on conviction on indictment to a fine.”

[71] The House of Lords in determining whether the offence was a single or continuing offence differentiated between the two classes of enforcement notice dealt with in section 89 of the TCPA. Lord Roskill noted that both section 89(1) and (4) dealt with penalties when the notice required the owner of land to do something, this he characterised as a “do notice”. By contrast, section 89(5) dealt with a notice which required the user of land to stop doing something, a “desist notice”. Lord Roskill concluded:

“It is not an essential characteristic of a criminal offence that any prohibited act or omission, in order to constitute a single offence, should take place once and for all on a single day. It may take place, whether continuously or intermittently, over a period of time. The initial offence created by [s.89(1)] in the case of non-compliance with a 'do notice', is complete once and for all when the period for compliance with the notice expires; but it is plainly contemplated that the further offence of non-compliance with a 'do notice' created by [s.89(4)], though it too is a single offence, may take place over a period of time, since the penalty for it is made dependent upon the number

of days on which it takes place. Similarly, as respects non-compliance with a 'desist notice', it is in my view clear that the initial offence (as well as the further offence) though it too may take place over a period, whether continuously or intermittently (eg. holding a Sunday market), is a single offence and not a series of separate offences committed each day that the non-compliance prior to the first conviction for non-compliance continues. If it were otherwise it would have the bizarre consequence that upon summary conviction a fine of £400 *per diem* could be imposed for each such separate offence committed before the offender received his first conviction, whereas for any further offence committed after the offender against a 'desist' notice had been convicted, a daily fine of only £50 could be inflicted. Uniquely a previous conviction would be a positive advantage to the offender. This can hardly have been Parliament's intention."⁴⁶ (Emphasis added)

- [72] As a result of the *obiter dicta* by Lord Roskill, **Hodgetts** has been taken as authority that generally failure to comply with a "do notice" gives rise to a "once and for all" offence, whereas non-compliance with a "desist notice" is a "continuing" offence. However, Lord Roskill, clearly sought not to create a formula which would be applicable to all legislation. Nonetheless, in the absence of express provisions in legislation, **Hodgetts** can be persuasive and decisive.
- [73] In **John Mann International Limited v Vehicle Inspectorate**,⁴⁷ the company was served a notice, in February 2002, under section 99(1) of the Transport Act 1968 requiring the production of all tachograph record sheets, for a three month period, by 26th February 2002. Not all the records were produced and the Vehicle Inspectorate made a further request resulting in the production of additional records. Some records were still missing and the Vehicle Inspectorate made a third request for those outstanding records to be produced by 2nd August 2002. When no further record sheets were produced, the Vehicle Inspectorate laid informations alleging that on 3rd August 2002, the company had failed to produce tachograph records within the time specified, contrary to section 99 of the Transport Act 1968. Before the court, the company submitted that the offence was committed when it failed to produce the records, in response to the first notice, by 26th February 2002, that the

⁴⁶ Ibid page 128.

⁴⁷ [2004] EWHC 1236 (Admin).

informations had not been laid within six months as specified in section 127 of the Magistrates' Courts Act 1980 ("MCA"), and that the failure to respond to the second and third notices could not give rise to further criminal offences as they related to the same records. The Vehicle Inspectorate responded that the offences were continuing ones and, alternatively, that the company should have complied with the third notice, which was the one in respect of which the informations were laid, in time. The court did not accept that the offences were continuing offences, but considered that they were entitled to convict in relation to the third notice. The company appealed to the Divisional Court against conviction. Owen J first looked at whether the justices were right in concluding that, although there was a continuing obligation to retain and produce tachograph records, "it is a once only obligation to produce on each order for production whether or not this results in a prosecution." Owen J held that:

"Lord Roskill's analysis in *Hodgetts* plainly applies to the offence created by s.99(4) of the Transport Act 1968. It is an offence of non-compliance with a 'do notice' which is 'complete once and for all when the period of compliance with the notice expires'. It follows that ... the Justices were correct in their conclusion that the offence did not continue beyond the date specified in the notice for production of the records."

- [74] Lastly, in the Trinidad and Tobago Court of Appeal case of **Chandra Silochan et al v Rickie Cedeno**⁴⁸ a development control inspector laid a complaint against the appellants on 9th October 2008, that during the period 16th January 2006 and 4th August 2008 the appellants failed to demolish and remove from their land several concrete structures and as such were in breach of section 18(1) of the Town and Country Planning Act. The magistrate presiding over the matter found that the appellants were guilty of the offence charged and fined the appellants for the initial offence committed on 17th January 2006. The magistrate also found that it was a continuing offence and further fined the appellants for the period 18th January 2006 to 17th March 2017. The appellants aggrieved by that decision appealed to the Court of Appeal on the principal ground that the magistrate had no jurisdiction to hear the complaint laid on 9th October 2008 because it had not been made within the 6

⁴⁸ POSMG Appeal No. P092 of 2019.

months prescribed by section 33 of the Summary Courts Act from the time the offences had been committed (16th January 2006).

[75] Section 18(1) of the Town and Country Planning Act ("TCPA") stated:

"18. (1) Subject to this section, where an enforcement notice has been served under section 16 on the person who was, when the notice was served on him, the owner of the land to which the enforcement notice relates and within the period specified in the enforcement notice, or within such extended period as the Minister may allow, any steps required by the enforcement notice to be taken (other than the discontinuance of any use of land) have not been taken, that person is liable on summary conviction to a fine of one thousand five hundred dollars and, in case of a continuing offence, to a further fine of three hundred dollars for every day after the first day during which the requirements of the enforcement notice (other than the discontinuance of any use of land remain unfulfilled." (Emphasis added)

[76] Section 19 of the TCPA stated:

"19. (1) Compliance with an enforcement notice, whether as respects –
(a) the demolition or alteration of any buildings or works;
(b) the discontinuance of any use of land; or
(c) any other requirements in the enforcement notice,
shall not discharge the enforcement notice."

[77] Section 33 of the Summary Courts Act stated:

"33. (1) Every proceeding in the Court for the obtaining of an order against any person in respect of a summary offence or for the recovery of a sum by this Act or by any other written law recoverable summarily as a civil debt shall be instituted by a complaint made before a Magistrate or Justice.

(2) In every case where no time is specially limited for making a complaint for a summary offence in the Act relating to such offence, the complaint shall be made within six months from the time when the matter of the complaint arose, and not after."

[78] The Court of Appeal recognised that the determination of this issue involved a consideration of the nature of the offence created by section 18 of the TCPA, namely whether it was a continuing offence or not.

[79] The court turned to **Hodgetts** for guidance on this issue stating that:

“It is important to bear in mind that in coming to the conclusion that the offence under the first part of section 89 (5) could be a single continuing offence, Hodgetts did not lay down any general principle that an offence based upon non-compliance with a statutory “do notice” was always to be treated as a once and for all offence. The House of Lords held that a continuing failure to comply with a “do notice” was plainly a continuing offence under section 89 (4). It all depends upon the language used by Parliament in the legislation: see *Russnak-Johnston v Reading Magistrates’ Court* [2021] EWHC 112 (Admin) at paragraph 75 per Holgate J.”

[80] Upon examining section 18(1) of the TCPA and applying **Hodgetts**, the court was of the view that in construing section 18 (1) of the TCPA, the offence was in fact a continuing one. Moosai JA in delivering the court’s judgment stated:

“21. [W]here within the period specified in the enforcement notice any steps required by it to be taken have not been taken, the initial offence, applying Hodgetts, created by the first part of our section 18 (1) in the case of non-compliance with a ‘do notice’ is complete once and for all when the period for compliance with the notice expires. The first part of section 18 (1) reflects both a positive duty to do something and a defined time by which it is to be done (“... within the period specified in the enforcement notice... any steps required by the enforcement notice to be taken... have not been taken...”) ...However it is plainly contemplated under the second part of section 18 (1) that the further offence of non-compliance with a “do notice” created by the statute, though it too is a single offence, may take place over a period of time, since the penalty for it is made dependent on the number of days on which it takes place. Properly analysed, the offence under the first part of section 18 (1) is only complete and crystallises once the period for compliance has expired, a one-off act, but that thereafter the offence under the second part of section 18 (1) is a continuing one. The legislation appears designed to capture a one-off offence as well as continuing offences (sic).

22. Where, as here, the respondent alleges a failure to comply with the enforcement notice, which non-compliance continued after the first date and at least up to trial, I am of the view that the nature of the offence created by Parliament under the first part of section 18 (1) is an initial offence; but that the second part of section 18 (1) creates a continuing offence. As Hodgetts makes clear, it is not an essential characteristic of a single criminal offence that the prohibited act or omission takes place once and for all on one single day, since it can take place continuously or intermittently over a period of time. The position, however, with respect to the prosecution for the continuing offence created by the second part of section 18 (1) is different. As stated in paragraph 19 above, Parliament has imposed a continuing obligation which appears to continue indefinitely where the requirements of the enforcement notice remain unfulfilled. Until fulfilled the appellants were in breach of the criminal law. Consequently, the appellants would be liable for this continuing obligation from

the time of its creation on 17 January 2006 until the requirements of the notice had been met.”

- [81] Moosai JA also considered section 19 of the TCPA in coming to the conclusion that the offence created under section 18 was a continuing offence. He stated that section 19 of the TCPA “makes clear, this obligation continues as compliance with an enforcement notice shall not discharge it”.⁴⁹
- [82] It is clear that the determination of this issue is to be done on a case-by-case basis and that there is need to look first and foremost at the wording of the particular legislation creating each offence. Further, that the court is not eager to find continuing offences created by a statute, and certainly not without express words which make clear that that was the intention of the legislature when the statute was passed.
- [83] Both in **Chandra Silochan** and in **Hodgetts**, the legislation examined created a single offence which crystallised once the period of compliance expired and a continuing offence in the latter half of the provisions.
- [84] There was a clear contemplation in the latter half of section 18(1) of the TCPA in **Chandra Silochan** that the offence may take place over a period of time. Further, section 19 of the TCPA makes it clear that compliance with the notice would not discharge the obligation under section 18(1). It would continue. This is unlike section 5(6)(i) of the MLAA where there is no such provision, which resembles a “desist notice” or that imposes an obligation which continues indefinitely where requirements of the enforcement notice remain unfulfilled. Section 5(6)(i) is simply crafted to state that a person who fails to comply with a notice is liable to be tried summarily or indictably. It goes no further to set out an obligation nor is there surrounding provisions within the legislation that give an indication that the offence is to be interpreted as a continuing one. Given the courts reluctance to interpret offences as continuing unless expressly

⁴⁹ See para. 22 of the judgment.

stated and the MLAA's silence in this regard, I find that section 5(6)(i) of the MLAA falls squarely in line with "do-notices" as contemplated by Lord Roskill in **Hodgetts**.

- [85] The learned judge did not err in finding that the offence created under section 5(6)(i) of the MLAA was a single offence. Her reasoning was in line with good authority and is unassailable. The learned magistrate was correct in finding that Medical Management's failure to provide the information to the ITA by 29th November 2016, meant that Medical Management was only in breach as of 29th November 2016.

Issue 2 – Triable either way offence issue

- [86] Counsel for the COP, Ms. Hickson argued that even if this Court found that the offence created under section 5(6)(i) of the MLAA was not a continuing offence, the 6-month limitation period prescribed under section 70 of the Magistrate's Code was inapplicable. This was due to an amendment of the MLAA by Act No. 12 of 2014 which made the non-compliance of a notice under section 5(6)(i) of the MLAA triable either way. This meant that the prosecution of such offence would not be subject to any time limit. Counsel relied on the authority of **Kemp v Liebherr (Great Britain) Ltd**⁵⁰ to support this position.
- [87] Ms. Hickson in the conclusion of her arguments submitted that the learned magistrate who erred in concluding that the offence was subject to the time limit as prescribed by section 70 of the Magistrate's Code, should have acted pursuant to section 22(o) of the Magistrate's Code and amended the complaint to resolve the limitation problem.
- [88] In resisting counsel for the COP's submissions, Ms. Rawlins argued that while in **Kemp** the court held that there was no time limitation in respect of either way offences, this was because specific legislation, namely the Magistrate Court's Act 1980 which had provided so that indictable offences would be exempt from the time limit and further the **Interpretation Act** expressly provided that either way offences were to be treated as indictable offences. This however was not the case in the BVI as there was no specific

⁵⁰ [1987] 1 All ER 885.

legislation that provided those indictable offences would be exempt from the time limit as in **Kemp**. In the totality of the circumstances, counsel argued that the learned magistrate's judgment was unassailable, and this ground should fail.

Discussion

- [89] As stated earlier at paragraph 17, the Magistrate's Code was amended by No. 8 of 2006. As a result, section 70 no longer prescribes the time limit for commencing the prosecution of a summary offence. Instead, section 73 of the Magistrate's Code makes provision for this. Section 73 states:

"Limitation 6 months unless otherwise provided

73. In all cases where no time is specially limited for making any charge in the Act or law relating to the particular case such charge shall be made within 6 months from the time when the matter of the charge arose."

- [90] This is analogous in effect to section 127(1) of the UK's Magistrate Court's Act 1980. Section 127(1) states:

"(1) Except as otherwise expressly provided by any enactment and subject to subsection (2) below, a magistrates' court shall not try an information or hear a complaint unless the information was laid, or the complaint made, within 6 months from the time when the offence was committed, or the matter of complaint arose."

- [91] However, subsection 2(b) of section 127 provides that where an offence is indictable, no such time limit shall apply. It states:

"(2) Nothing in—

(a) subsection (1) above; or

(b) subject to subsection (4) below, any other enactment (however framed or worded) which, as regards any offence to which it applies, would but for this section impose a time-limit on the power of a magistrates' court to try an information summarily or impose a limitation on the time for taking summary proceedings, shall apply in relation to any indictable offence."

- [92] In the case of **R. v Thames Metropolitan Stipendiary Magistrate Ex p. Horgan**⁵¹ the court confirmed that Schedule 1 to the Interpretation Act 1978 provides that 'indictable

⁵¹ [1998] 1 All ER 559 at 562.

offence' means an offence which, if committed by an adult, is triable on indictment, whether it is exclusively so triable or triable either way. Therefore Section 127(2)(b) applies to an offence which is triable either way.

[93] In **Kemp**, the court stated that:

“Section 127(2) of the Magistrates' Courts Act 1980 re-enacts s 18(1) of the Criminal Law Act 1977. The language is the same, and so is the effect. The result is that there is no time limit on proceedings which are triable either way.”

[94] In the BVI, the **Interpretation Act**⁵² is silent as to the meaning of an indictable offence or the meaning of an offence triable either way. However, section 230(a) of the Magistrate's Code makes clear that matters triable either way are to be dealt with as indictable offences until such time as the court assumes the power to deal with them summarily. Section 230(a) states:

“230. Where an indictable offence is under the circumstances in this Act mentioned authorised to be dealt with summarily—

(a) the procedure shall until the Magistrate assumes the power to deal with the offence summarily, be the same in all respects as if the offence were to be dealt with throughout as an indictable offence but when and so soon as the Magistrate assumes the power to deal with the offence summarily the procedure shall be the same from and after that moment as if the offence were an offence punishable summarily and not on indictment and the provisions of this Act shall apply accordingly...”

[95] In Trinidad and Tobago, section 97 of the Summary Courts Act is the equivalent of section 230(a) and in **Karamchand Bridgemohan v Suresh Hardeo**,⁵³ that court confirmed that such a provision “makes clear that from the outset matters triable either way are to be dealt with as indictable offences until such time as the Court assumes the power to deal with them summarily”.⁵⁴

[96] Counsel for Medical Management argues that because there is no specific provision in the BVI like section 127(2)(b) stating that there is no time limit for an indictable offence, that the COP's argument cannot succeed. However, by virtue of the

⁵² Cap. 136 Revised Laws of the Territory of the Virgin Islands.

⁵³ CV 2015-03059.

⁵⁴ Ibid p.10.

authorities detailed above, either way offences such as section 5(6)(i) of the MLAA are in accordance with section 230(a) of the Magistrate's Code to be considered indictable offences.

[97] It is true that there is no express provision which dictates a limitation period in which to prosecute an indictable offence in the BVI. However, in other Commonwealth jurisdictions, including the Eastern Caribbean States, this is the same. There is no express provision that dictates a limitation period for the prosecution of indictable offences. In the absence of such, it has been understood that there is no time limit for the prosecution of indictable offences.

[98] While there appears to be no known authority which explicitly articulates this, courts in dealing with matters that concern the delay in the prosecution of an indictable offence acknowledge periodically that the time limitation of a summary offence and that of an indictable offence is not the same. Further, that it is not for the court to create "an artificial limitation" so to circumvent delays with respect to indictable offences. One such case is **R v Clerk to the Medway Justices, ex parte DHSS**⁵⁵ where Woolf J stated:

"[I]t appears to me that the later authorities indicate that this Court has taken a rather more stringent view of delay than was taken by the court in the case of Graham. However, as Lloyd LJ, points out, that was a case where the trial was on indictment where there is not the same limitation of time which applies to summary trials, which were the type of trials under consideration in the earlier cases and which is under consideration in this case. However, although the court should certainly not seek to lay down any form of artificial limitation period, I would respectfully agree with what May, LJ, said about the importance of those concerned in criminal proceedings bringing them to trial and to verdict as swiftly and as efficiently as possible." (Emphasis added)

[99] There is no limitation period as it relates to indictable offences. As it relates to either way offences such as section 5(6)(i), section 230(a) of the Magistrate's Code provides that these offences are to be treated as indictable offences. As there is no time limit for the prosecution of indictable offences, the COP succeeds in their argument that

⁵⁵ (1986) 150 JP 401.

the limitation period prescribed by section 73 of the Magistrate's Code does not apply as it relates to the offence created under section 5(6)(i) of the MLAA. This means that complaint filed on 19th May 2019 by the COP was incorrectly dismissed by the learned magistrate for being filed beyond 29th May 2017, (the 6-month time period mandated by section 73 of the Magistrate's Code). While the offence created under section 5(6)(i) of the MLAA is not a continuing offence, it was an offence triable either way and the COP was still entitled to file its complaint on 19th May 2019. The COP was entitled to have its case heard before the magistrate on the substantive issue as to whether Medical Management was in breach of section 5(6)(i) of the MLAA. As section 5(6)(i) was specifically amended so that the offence would be triable either way, there is no time limit for instituting proceedings in this matter. The learned magistrate erred in her determination of this issue and as such the appeal should be allowed.

- [100] The COP also submitted that the learned magistrate should have acted pursuant to section 22(o) of the Magistrate's Code and amended the complaint to resolve the limitation problem. Much like the other provisions referenced in this judgment, I am of the view that this provision was also incorrectly referenced by the COP and that the intended provision is section 21(o) of the Magistrate's Code. However, section 21(o) of the Magistrate's Code does not grant a magistrate this power to amend. Section 21(o) of the Magistrate's Code grants the magistrate the power to "to enforce the payment of any fine imposed by the Magistrate by warrant of distress or imprisonment". I would allow this appeal and remit this matter to the Magistrates' Court to have the substantive issue of whether Medical Management was in breach of section 5(6)(i) of the MLAA, heard before a different magistrate.

Conclusion

- [101] For the reasons stated above, I would allow this appeal and remit this matter to the Magistrates' Court to have the substantive issue of whether Medical Management was in breach of section 5(6)(i) of the Mutual Legal Assistance (Tax Matters) Act, heard before a different magistrate.

[102] I would order the following:

- i. The appeal is allowed.
- ii. The matter is remitted to the Magistrates' Court to be heard before a different magistrate.
- iii. Each party shall bear its own costs.

I concur.

Mario Michel
Justice of Appeal

I concur.

Dexter Theodore
Justice of Appeal [Ag.]

By the Court



Chief Registrar

