

JAMAICA

IN THE COURT OF APPEAL

**BEFORE: THE HON MISS JUSTICE STRAW JA
THE HON MRS JUSTICE V HARRIS JA
THE HON MRS JUSTICE G FRASER JA (AG)**

SUPREME COURT CIVIL APPEAL NO COA2019CV00100

BETWEEN THE INDEPENDENT COMMISSION OF INVESTIGATIONS APPELLANT

AND DELMOND GRANT RESPONDENT

Mrs Tana'ania Small Davis QC and Mikhail Jackson instructed by Livingston, Alexander & Levy for the appellant

Chukwuemeka Cameron instructed by Carolyn C Reid & Company for the respondent

Ms Keisha Simpson representing the appellant

12, 13, 14 October 2021 and 29 April 2022

STRAW JA

Introduction

[1] This is an appeal filed by the Independent Commission of Investigations ('INDECOM'), against the following order of the Full Court (Simmons, Jackson-Haisley and Y Brown JJ) made on 17 September 2019:

“(1) The powers conferred on the Commissioner by section 21(5) of the [Independent Commission of Investigations] Act are adjudicative and non-delegable and as such the ruling of the Presiding Officer that the claimant was compellable to give evidence of the Act[sic], is quashed;”

Background

[2] The order which now forms the subject of this appeal was made in respect of judicial review proceedings brought by the respondent, Mr Delmond Grant. Mr Grant is a Constable of Police who received a notice from INDECOM (pursuant to section 21 of the Independent Commission of Investigations Act ('the INDECOM Act')). This notice informed him that:

- a) INDECOM was investigating the fatal shooting of Alvin Allen, which occurred in the Pear Tree River/Bath district of Saint Thomas on 18 May 2015 at about 11:35 am;
- b) The purpose of the investigation was to determine whether there were reasonable grounds to suspect that any member of the Jamaica Constabulary Force ('JCF') contravened the law;
- c) He was required to attend INDECOM's office on 21 September 2017 and report to investigator Charmaine Dawkins to answer questions on oath concerning the investigation; and
- d) He was not a suspect for the purpose of the proceedings.

[3] Upon hearing the respondent's application for judicial review, all three members of the panel provided detailed written concurring reasons for judgment in this matter and the factual background has been set out multiple times. First at paras. [1] to [12] by Simmons J (as she then was), then at paras. [307] to [308] by Jackson-Haisley J, and finally at paras. [471], and [481] to [489] by Y Brown J. For context and ease of comprehension, it is convenient to adopt the following summary of Y Brown J (which the parties have not challenged):

"[482] [Mr Grant], along with his team, was responding to a complaint of a citizen in the Pear Tree River area of St. Thomas, when three men fired at them. They returned the

fire and it was later discovered that one of the men, Alvin Allen, was dead. His two counterparts escaped. But one of them, Dorshan Prince, later surrendered to the police. Dorshan Prince is now before the St. Thomas Circuit Court, charged for [sic] shooting with intent. [Mr Grant] is a witness in that case.

[483] As a result of this fatal shooting, [Mr Grant] received a notice from INDECOM informing him that he would be questioned on oath in respect of this incident. According to him, the request was '*somewhat strange*' as it countered his belief, (based on his training), that where there was an ongoing trial, a witness should not be questioned without the authorization of the Clerk of Courts.

[484] In keeping with his conviction, [Mr Grant] sought a lawyer's intervention which led to correspondence dated September 21, 2018, wherein [Mr Grant's] objections to participate in a Question and Answer (Q & A) session was [sic] indicated. Notwithstanding this written protest, [Mr Grant] states that the INDECOM investigator in the exercise of his adjudicative power, determined that the objections were not valid in law. Hence, he was 'compelled' by the Presiding Officer, Mr. Roderick Shea, to engage in the Q & A session. After being sworn to participate in this Q & A session, [Mr Grant] restated his objection in this way:

'I am a witness in a criminal proceeding R v Dorshan Prince and only the Director of Public Prosecutions or Clerk of Courts can instruct me to give a statement.'

[485] He maintained this stance in relation to all the questions that were asked and this prompted the Presiding Officer, Mr. Shea, to compel him to answer the questions of the Investigating Officer, Miss Dawkins.

[486] His responses though, did not meet the expectations of the Investigating Officer, and so he was the recipient of a letter from INDECOM dated November 27, 2017 where the Presiding Officer's position for overruling [Mr Grant's] objections to participate in the Q & A session was repeated.

[487] [Mr Grant] also said he was warned for prosecution by virtue of section 33 of the [INDECOM] Act, after he responded to the questions posed by the Investigating Officer.”

(Emphasis added)

[4] I would just add to the summary of the background that Ms Charmaine Dawkins, an investigator employed to INDECOM, pursuant to section 8 of the INDECOM Act, was the interviewing officer on the material date, and the Presiding Officer was Mr Roderick John Shea ('Mr Shea'). In his affidavit, filed on 15 May 2018, Mr Shea indicated that “[p]ersons appointed as Presiding Officers act on instructions from the Commissioner of INDECOM...” and “are... trained to make rulings on objections...raised during an interview”. He indicated, also, that on receiving a letter handed to Ms Dawkins by Mr Grant’s attorney, he gave instructions to Ms Dawkins not to commence the interview until he sought advice from the Legal department. He obtained the advice then returned to the interview room. Upon Mr Grant’s refusal to answer any of the questions posed by Ms Dawkins, Mr Shea stated as follows:

“Upon such refusal, I reminded [Mr Grant] and his Attorney-at-Law that the interview was a witness interview under Section 21 and for such purposes refusal or failure to answer questions could only be legal where it fell under privilege against self-incrimination and legal profession privilege.”

[5] Mr Shea stated that Mr Grant’s attorney indicated, “[w]e haven’t raised any of those two objections”. He said that he also advised Mr Grant of his right to seek judicial review, albeit he mistakenly attached a month’s limit as the period available for Mr Grant to take this action.

[6] By way of judicial review (recognised by section 24 of the INDECOM Act), Mr Grant sought a number of declarations, as well as an order for *certiorari* quashing the decision to compel him to participate in the question and answer session/exercise and to answer the questions being asked by the investigator. He was almost completely unsuccessful, save for one order made in his favour, which is now the subject of this appeal.

The grounds of appeal

[7] Based on the amended notice of appeal (filed 6 May 2021), there are three grounds of appeal:

“i. The learned judges of the Full Court erred in finding that the Commission’s authority to compel attendance of a witness or production of documents is an exercise of adjudicative power and therefore one which requires the consideration of a person with legal training. In doing so, the learned judges failed to properly take into account the fact that:

(a) that determination is procedural and is subject to a final determination by the court in the event of an objection; and

(b) non-compliance with an order compelling a witness is enforced through the court and not by INDECOM itself. Further, the learned judges failed to have any regard to the fact that the power to compel witnesses is a common feature of commissions of enquiry, disciplinary bodies and other tribunals, comprised of persons who are not required to have legal training.

ii. The learned judges erred in finding that the function under section 21(5) is not delegable because it is a judicial function. In so finding, the learned judges did not have proper regard to the established legal principle that even a judicial function may be delegable by express provision or necessary implication. Section 26(1) of the Independent Commission of Investigation Act asserts without limitation that the functions of the Commission may be performed by any member of its staff or by any other person (not being a member of the Security Forces or a specified official) authorized for that purpose by the Commission.

iii. In holding that to apply section 26(1) of the Independent Commission of Investigations Act to section 21(4) and (5) would be absurd as it would permit any member of staff of the Commission to exercise a judicial power, the learned judges erred in their interpretation of and failed to properly

consider the scheme of operation of the Independent Commission of Investigation Act as a whole.”

INDECOM’s position

[8] Queen’s Counsel, Mrs Small-Davis, made comprehensive submissions and referred to a number of authorities which assisted the court. She quite helpfully distilled the ratio of the Full Court’s lengthy decision and referred to the relevant portions of the reasons for judgment as follows:

- A. The issue of whether a witness is compellable is a legal one akin to a judicial ruling; therefore, the function is adjudicative (paras. [218], [422], [435], [559] and [561]);
- B. It is, therefore, one that requires the consideration of a person with legal training. Under the Act, only the Commissioner of INDECOM (‘the Commissioner’) is required to have the qualifications of a Supreme Court Judge (paras. [218], [228], [420], [422], [560]);
- C. Only the Commissioner can exercise the adjudicative power under section 21(5) of the INDECOM Act and cannot delegate his judicial function (paras. [217], [234], [235], [236], [410], [420], [422], [435] and [561]; and
- D. Although section 26 of the INDECOM Act literally provides for such delegation, it could not have been the intent of Parliament to delegate the judicial function of compelling a witness as provided for by section 21(4) (paras. [419], [421] and [559]).

[9] The thrust of Mrs Small-Davis’ submission is that the proper interpretation and application must be that the power to compel attendance and examination of witnesses, pursuant to section 21 of the INDECOM Act, is not an adjudicative function. Rather, this is a procedural tool for the effective investigation of actions of the security forces that result in death or injury or damage and loss of property. In the alternative, Mrs Small-

Davis submitted that if the exercise of the power under section 21 is limited to the Commissioner, it was one that he could delegate and that this was properly done in the instant case. Mr Shea, one of the directors of complaints, was a suitable officer. Reliance was placed on section 26(1) of the INDECOM Act.

The respondent's position

[10] In brief, Mr Cameron's position was that the Full Court did not err in its findings. Namely, the section 21 powers were adjudicative and judicial functions are generally non-delegable. He rounded out his submission by stating that there was no evidence to support a view that "delegation by implication" was necessary. Neither was there anything to suggest that the instant case was so exceptional that the adjudicative functions should be delegable.

[11] Further, it was submitted that the learned judges correctly interpreted section 26 of the INDECOM Act in finding that the Act does not permit the Commissioner to delegate his judicial function. A literal interpretation would be absurd and contrary to the mandate of INDECOM and Parliament's intention.

The issue to be resolved

[12] The issue to be resolved on appeal is a narrow one that turns on the interpretation of the INDECOM Act; in particular, sections 21 and 26 (the evidence gathering and the delegation sections), as well as whether the investigative function and the powers under section 21 can be classified as adjudicative.

[13] Also highly relevant is section 2, which defines the "Commission" and the "Commissioner" by reference to section 3, as well as section 4, which provides the functions of INDECOM. Generally speaking, it is necessary to consider the scheme of operation of the INDECOM Act as a whole.

[14] In dealing with the grounds of appeal, it is convenient to consider grounds ii and iii jointly, as the specific issue raised is whether section 21(5) of the Act, if determined

to be an adjudicative function, is delegable within the context of the statutory framework.

Relevant provisions of the INDECOM Act

[15] Based on the submissions of both counsel and the issues identified, setting out a number of the provisions of the INDECOM Act is unavoidable. It is hoped that greater clarity will be achieved by setting out these provisions, ahead of the submissions and the subsequent discussion and analysis.

[16] In particular, it is necessary to have regard to the interpretation of certain terms, as set out in section 2 (customarily referred to as the interpretation section):

“‘Commission’ means the Independent Commission of Investigations constituted under section 3;

‘Commissioner’ means the person appointed pursuant to section 3 as Commissioner;

...

‘functions’ includes powers and duties;

...

‘investigation’ means an investigation into any occurrence carried out by the Commission, for the purposes of this Act;

‘investigator’ in relation to an investigation under this Act means an employee or part of the Commission assigned duties in relation to that investigation; ...”

[17] Turning to Part II of the INDECOM Act, sections 3 and 4 are relevant. Section 3 expounds on the definition of the “Commission” and the “Commissioner”, which are used distinctively throughout the INDECOM Act:

“3-(1) For the purposes of this Act, there is hereby constituted a Commission of Parliament to be known as the Independent Commission of Investigations.

(2) The Commission shall consist of a Commissioner, who shall be appointed by the Governor-General by instrument under the Broad Seal, after consultation with the Prime Minister and the Leader of the Opposition, from persons of high integrity, who possess the qualifications to hold office as a Judge of the Supreme Court of Judicature of Jamaica.

(3) ...”

[18] Section 4, which follows, details the functions of the Commission:

“4. (1) Subject to the provisions of this Act, the functions of the Commission shall be to –

(a) conduct investigations, for the purposes of this Act;

(b) carry out in furtherance of an investigation and as the Commission considers necessary or desirable –

(i) inspection of a relevant public body or relevant Force, including records, weapons and buildings;

(ii) periodic reviews of the disciplinary procedures applicable to the Security Forces and the specified officials;

(c) ...

(2) In the exercise of its functions under subsection (1) the Commission shall be entitled to –

(a) have access to all reports, documents or other information regarding all incidents and all other evidence relating thereto, including any weapons, photographs and forensic data;

(b) require the Security Forces and specified officials to furnish information relating to any matter specified in the request; or

(c) make recommendations as it considers necessary or desirable for –

(i) the review and reform of any relevant laws and procedures;

- (ii) the protection of complainants against reprisal, discrimination and intimidation; or
 - (iii) ensuring that the system of making complaints is accessible to members of the public, the Security Forces and specified officials;
 - (d) take charge of and preserve the scene of any incident.
- (3) For the purpose of the discharge of its functions under this Act, the Commission shall, subject to the provisions of this Act, be entitled –
- (a) upon the authority of a warrant issued in that behalf by a Justice of the Peace –
 - (i) to have access to all records, documents or other information relevant to any complaint or other matter being investigated under this Act;
 - (ii) to have access to any premises or other location where the Commission has reason to believe that there may be found any records, documents or other information referred to in sub-paragraph (i) or any property which is relevant to an investigation under this Act; and
 - (iii) to enter any premises occupied by any person in order to make such enquiries or to inspect the documents, records, information or property as the Commission considers relevant to any matter being investigated under this Act; and
 - (b) to retain any records, documents or other property if, and for so long as, its retention is reasonably necessary for the purposes of this Act.
- (4) **For the purposes of subsection (3), the Commission shall have power to require any person to furnish in the manner and at such times as may be specified by the Commission, information which, in the opinion of the Commission, is relevant to any matter being investigated under this Act.**” (Emphasis added)

[19] In order to discharge its function, which clearly includes investigation, section 8 provides the Commission or INDECOM with the ability to appoint and employ employees and agents that it considers necessary to assist it in the proper performance of its functions under the INDECOM Act.

[20] Under Part III, sections 13 and 14 add to the Commission's investigatory function and are worth setting out along with section 4 since they will be referred to in another relevant section. Section 13 provides:

"13. An investigation under this Act may be undertaken by the Commission on its own initiative."

[21] Section 14 adds:

"14. (1) The Commission shall, for the purpose of deciding the most appropriate method of investigation, make an assessment of –

(a) the seriousness of the case;

(b) the importance of the investigations;

(c) public interest considerations;

(d) the particular circumstances in which the incident occurred.

(2) The Commission may manage, supervise, direct and control an investigation carried out by the Security Forces or the relevant public body in relation to an incident, where, in the opinion of the Commission, it is necessary to direct and oversee that investigation.

(3) Where the Commission takes action under subsection (2), it shall notify the responsible head or the responsible officer, as the case may be, and direct that no action shall be taken until the Commission has completed its investigation."

[22] Section 20 must also be highlighted; it refers to sections 4, 13, and 14, all of which have been set out above:

“20. For the purpose of giving effect to sections 4, 13, and 14, the Commissioner and the investigative staff of the Commission shall, in the exercise of their duty under this Act have the like powers, authorities and privileges as are given by law to a constable.”

[23] The critical section 21, that is, the section under which Mr Grant received the notice, reads:

“21. (1) Subject to subsection (5), the Commission may at any time require any member of the Security Forces, a specified official of any other person who, in its opinion, is able to give assistance in relation to an investigation under this Act, to furnish a statement of such information and produce any document or thing in connection with the investigation that may be in the possession or under the control of that member, official or other person.

(2) The statements referred to in subsection (1) shall be signed before a Justice of the Peace.

(3) Subject to subsection (4), the Commission may summon before it and examine on oath –

(a) any complainant; or

(b) any member of the Security Forces, any specified official or any other person who, in the opinion of the Commission, is able to furnish information relating to the investigation.

(4) For the purposes of an investigation under this Act, the Commission shall have the same powers as a Judge of the Supreme Court in respect of the attendance and examination of witnesses and the production of documents.

(5) A person shall not, for the purpose of an investigation, be compelled to give any evidence or produce any document or thing which he could not be compelled to give or produce in proceedings in any court of law.

(6) Section 4 of the Perjury Act shall apply to proceedings under this section in relation to an investigation as it applies to judicial proceedings under that section.” (Emphasis added)

[24] Finally, under Part IV of the INDECOM Act, which is headed ‘General’, is the delegation section. Section 26 provides:

“26. (1) The functions of the Commission may be performed by any member of its staff or by any other person (not being a member of the Security Forces or a specified official) authorized for that purpose by the Commission.

(2) Nothing in subsection (1) shall be construed as affecting the responsibility of the Commission for any functions performed on its behalf under subsection (1).”

[25] Section 33 gives teeth by creating offences; it reads:

“33. Every person who –

(a) willfully makes any false statement to mislead or misleads or attempts to mislead **the Commission, an investigator or any other person in the execution of functions under this Act;**

(b) without lawful justification or excuse –

(i) obstructs, hinders or resists the Commission or any other person in the exercise of functions under this Act; or

(ii) fails to comply with any lawful requirement of the Commission or any other person under this Act; or

(iii) wilfully refuses or neglects to carry out any duty required to be performed by him under this Act; or

(c) ...

commits an offence and shall be liable on summary conviction in a Resident Magistrate’s Court to a fine not exceeding three million dollars or to imprisonment for a term

not exceeding three years or to both such fine and imprisonment.” (Emphasis added)

Ground i – The learned judges of the Full Court erred in finding that the Commission’s authority to compel attendance of a witness or production of documents is an exercise of adjudicative power and therefore one which requires the consideration of a person with legal training. In doing so, the learned judges failed to properly take into account the fact that:

- (a) that determination is procedural and is subject to a final determination by the court in the event of an objection; and**
- (b) non-compliance with an order compelling a witness is enforced through the court and not by INDECOM itself. Further, the learned judges failed to have any regard to the fact that the power to compel witnesses is a common feature of commissions of enquiry, disciplinary bodies and other tribunals, comprised of persons who are not required to have legal training.**

Submissions on behalf of INDECOM

[26] The detailed nature of this ground foretells much of the submissions made by Mrs Small Davis. She commenced by reminding the court of the reason for the establishment of INDECOM and its mandate. Suffice to say, it was widely recognised that there were a worrying number of allegations of abuse by agents of the state (members of the security forces) that required impartial investigation. The solution was the establishment of INDECOM, an independent body which replaced the Police Public Complaints Authority.

[27] Before turning to the section 21 power, which is the subject of the instant appeal, Mrs Small Davis invited the court’s attention to four other provisions of the INDECOM Act. These provisions include (i) section 4 (set out above), which gives INDECOM wide powers of investigation and access to information, (ii) section 12 which empowers INDECOM to compel a report from the relevant security force on incidents which are likely to have a significant impact on the public confidence, (iii) section 17(9) twinned with section 23, which empowers INDECOM to make recommendations that must be acted upon, and (iv) section 20 (set out above) which confers the

Commissioner and INDECOM's investigators with the like powers, authorities and privileges of a constable.

Section 21 of the INDECOM Act

[28] It was submitted that INDECOM's "judge-like" power under section 21(4) is limited to summoning witnesses to attend and be examined on oath or produce relevant documents. This function is not judicial. The power is merely intended to give effect to INDECOM's objective, which is to conduct investigations. Further, INDECOM's authority to compel witnesses is limited by section 21(5) insofar that the exercise of the power cannot exceed that of a court of law. Notwithstanding the reference to a court of law, it was contended that INDECOM is not an adjudicator and, as such, the exercise of the power remains an investigative function. In support of this point, Queen's Counsel referred to the interpretation of section 21 by Lawrence-Beswick J in **Gerville Williams and others v The Commissioner of the Independent Commission of Investigations and others** [2012] JMFC Full 1 ('**Gerville Williams**'), wherein it was accepted at para. [82] that, in an INDECOM investigation, section 21 would prohibit a person charged with the offence from being compelled to testify against himself or make an admission of guilt, but persons not charged would be compellable.

[29] The court was reminded that, in the matter at bar, Mr Grant's objection was that he was a witness in criminal proceedings against the civilian charged. Mr Grant himself was not charged with any offence, and it was repeatedly communicated to him that he was not a suspect. Accordingly, the determination made by the Presiding Officer required no legal consideration or any adjudication.

[30] Reference was also made to para. [109] of **Gerville Williams**, wherein it was concluded that where the INDECOM Act required anyone to provide a statement, such a requirement would be demonstrably justified. In that same case, the argument was rejected that section 21 of the INDECOM Act was unconstitutional because it breached the doctrine of separation of powers. The unmeritorious argument was that section 21

wrongfully combined judicial and investigative functions in one person. Reference was made to paras. [245] and [266], where Sykes J (as he then was) characterised INDECOM as being an independent agency designed to conduct thorough, impartial, and independent investigations into allegations of misconduct by state agents. Sykes J stated that INDECOM is neither a prosecutorial agency nor an evidence-gathering entity for the purpose of prosecuting persons.

[31] In support of the argument that INDECOM has no judicial function, reference was made to para. [253] where Sykes J stated that INDECOM is subject to the rule of law and could not be the final arbiter of its own powers. In very clear terms, he stated that INDECOM “is not a court and does not determine civil rights and liabilities. Neither does it determine criminal culpability”.

[32] To reinforce the point that INDECOM was not an adjudicating body but an investigative one, it was noted that at para. [325] of **Gerville Williams**, F Williams J (as he then was) recognised that section 21(4) gives the Commissioner the powers of a judge in an investigation.

[33] Reliance was also placed on the case of **R v Parliamentary Commissioner for Administration, ex parte Balchin and another** [1998] 1 PLR 1 (**R v Parliamentary Commissioner**), which Mrs Small Davis contended the Full Court did not properly consider insofar that at para. [214] of the judgment of Simmons J, it was expressed that the case was not concerned with similar facts, and its helpfulness was limited. A parallel was drawn between the Parliamentary Commissioner and the Commissioner of INDECOM as the former was also statutorily empowered with the same powers as the court in respect of the attendance and examination of witnesses. Queen’s Counsel referred the court to para. 17, where Sedley J stated that the Parliamentary Commissioner was an investigative officer and not an adjudicative tribunal. It was submitted that this was the correct conclusion, which Sedley J could reach after properly reviewing the statute and the Parliamentary Commissioner’s powers.

[34] In support of the contention that the Commissioner of INDECOM did not perform a judicial function, the court was referred to the description of the term “judicial functions; in general” from the Halsbury’s Laws of England/Constitutional and Administrative Law (Volume 20 (2014)). With regard to the Commission, it was similarly submitted that INDECOM’s function did not match any of these functions. Reference was made to the extract from De Smith’s Judicial Review (6th edition), which was set out at para. [216] of the judgment of Simmons J.

[35] To emphasise that INDECOM does not perform an adjudicative function, it was pointed out that INDECOM’s decision to compel the attendance of witnesses is subject to judicial review and that even though the failure to comply is an offence, if such a charge were laid, it would be a matter for the court to determine culpability (per section 33 of the INDECOM Act (as set out at para. [25])).

[36] Extensive reliance was also placed on an appeal to the Privy Council from the Bahamian Court of Appeal, **Sir William Randolph Douglas and others v Sir Lynden Oscar Pindling** [1996] AC 890 (**‘Douglas v Pindling’**), where there was a challenge to summonses issued by a commission of inquiry (set up to look in the expenditure of public funds and allegations of corruption). In that case, it was recognised that the function of a commission of inquiry was inquisitorial and not adversarial, and regard was had to the investigatory character. The nature of the investigation was that it was “searching” and was characterised as an inquisition as distinct from the determination of an issue.

[37] Finally, the court was referred to a number of enactments where a similar power was conferred on holders of various offices. This will be set out and discussed subsequently.

Submissions on behalf of Mr Grant

[38] Mr Cameron accepted as correct that, in general, INDECOM's function is investigative rather than adjudicative. However, he submitted that the real issue for this court's determination was "whether the act of Mr Shea in determining whether [Mr Grant] is compellable is adjudicative in nature [,] as opposed to the general role of INDECOM".

[39] It was contended that, in reality, an entity can be clothed in a general function but play several other roles in pursuance of its primary role, which is true of INDECOM.

[40] By reference to the same extract from Halsbury's Laws of England, Mr Cameron submitted that the Presiding Officer's actions could be categorised as judicial functions as described in Halsbury's. In support of this, the following observations were made:

- (i) Mr Shea sought to provide for the orderly resolution of the dispute as to whether Mr Grant was compellable. This dispute existed between Mr Grant and the investigating officer acting on behalf of INDECOM. Put another way, Mr Shea was determining an issue, not investigating anything.

- (ii) In making the determination that Mr Grant was compellable, Mr Shea provided the mechanism through which the coercive powers of the State may be exercised as Mr Grant was then warned for prosecution.

[41] Mr Cameron contended that the case of **Douglas v Pindling** was of no assistance since Mr Grant did not seek to challenge the power of the investigator to summon him. It was submitted that it was never argued that the power to compel attendance or order the production of information or documents was an adjudicative function. Further, the Full Court did not determine this issue.

Discussion and analysis

[42] Having regard to Mr Cameron's submission, an appropriate starting point in respect of this ground is to revisit the precise issue that the Full Court had to determine and how it was resolved. This is set out in the third order sought by Mr Grant in his fixed date claim form (filed 19 April 2018), which reads:

"3. A declaration that the adjudicative function of the **Commissioner** of [sic] determining whether a witness is compellable under section 21(5) of the Act is non-delegable and as such the actions of the presiding officer in compelling Mr. Grant to answer the questions were ultra vires, unlawful and illegal." (Emphasis added)

[43] Though worded with some slight differences, the Full Court essentially granted this order at para. (1) of its orders. This order has already been set out (at para. [1] above); however, it will be reproduced now for ease of comparison:

"(1) The powers conferred on the **Commissioner** by section 21(5) of the [INDECOM] Act are adjudicative and non-delegable and as such the ruling of the Presiding Officer that the claimant was compellable to give evidence of the Act [sic], is quashed;" (Emphasis added)

[44] An immediate observation is that by the use of the word "Commissioner", both Mr Grant and the Full Court have interpreted section 21(5) as conferring a power specifically and exclusively to the Commissioner, although section 21 refers only to the Commission. This may be understandable to some degree, as the INDECOM Act states that the Commission "shall consist of a Commissioner...who possess the qualifications to hold office as a Judge of the Supreme Court..." (section 3(2)). It is to be noted, however, that reference to the Commission, in further provisions of the Act, is not to a personal pronoun, as representing the person appointed to the office of Commissioner but the impersonal - "it". This is of some significance, as the very wording of this ground by INDECOM, which refers to the "Commission's authority" and not the Commissioner's authority clearly demonstrates that INDECOM takes a different interpretation.

[45] A second observation is that, as Mr Cameron submitted, the Full Court's finding was not precisely represented by the wording of INDECOM's ground i. That ground suggests that the Full Court determined that the Commission's power to compel the attendance of a witness and the production of documents was an adjudicative function. The Full Court did not come to such a determination but limited their conclusion to section 21(5), that is, the compelling of a witness to give evidence was an adjudicative function bestowed on the Commissioner.

[46] The wording of ground i is not regarded as an attempt by INDECOM to be misleading. Instead, it brings into sharp focus the issue of statutory interpretation and raises these questions - who is it that Parliament intended to give the power to decide whether a person is compellable to give evidence or produce documents? Is this power to compel a witness even to be found in section 21(5)?

[47] I would start by adopting Brooks JA's (as he then was) fastidious summary of the principles relevant to statutory interpretation at paras. [53] and [54] of **Jamaica Public Service Company Limited v Dennis Meadows and others** [2015] JMCA Civ 1:

"[53] ... **The major principles of statutory interpretation, currently approved, include the use of the plain and ordinary meaning of words in the document, the application of the context of the document and the rejection of any interpretation that makes nonsense of the document.**

[54] The learned editors of Cross' Statutory Interpretation 3rd edition proffered a summary of the rules of statutory interpretation. **They stressed the use of the natural or ordinary meaning of words and cautioned against 'judicial legislation' by reading words into statutes.** At page 49 of their work, they set out their summary thus:

'1. The judge must give effect to the grammatical and ordinary or, where appropriate, the technical meaning of words in the general context of the statute; he must also

determine the extent of general words with reference to that context.

2. If the judge considers that the application of the words in their grammatical and ordinary sense would produce a result which is contrary to the purpose of the statute, he may apply them in any secondary meaning which they are capable of bearing.

3. The judge may read in words which he considers to be necessarily implied by words which are already in the statute; and **he has a limited power to add to, alter or ignore statutory words in order to prevent a provision from being unintelligible, absurd or totally unreasonable, unworkable, or totally irreconcilable with the rest of the statute....**' (Emphasis supplied [and as in original])

This summary is an accurate reflection of the major principles governing statutory interpretation."

[48] Assuming that the power to compel a witness is granted to the Commission (pursuant to section 21(5) of the INDECOM Act), is it a proper interpretation to limit this power to the Commissioner? Throughout the INDECOM Act, there are a number of references to the Commission as distinct from the Commissioner. For example, section 3(2) clearly states that the Commission consists of the Commissioner, so while any reference to the Commission must sensibly include or embrace the Commissioner, should the reference to the Commission only be interpreted to mean the Commissioner? Put another way, where the legislation specifies or singles out the Commissioner, this must be interpreted as being deliberate. A practical demonstration of this is to be found in sections 4, 13 and 14, which all refer to the Commission. However, in section 20, Parliament sought fit to legislate that for the purpose of giving effect to these three sections (4, 13 and 14 – all set out above at paras. [18], [20] and [21]), the "Commissioner and the investigative staff of the Commission" should be conferred with the powers of a constable.

[49] There are other provisions that broadly specify the Commissioner and persons concerned with the administration of the INDECOM Act (see sections 27 and 28); or another formulation is the "Commission, an investigator or any person in the execution of functions under [the INDECOM] Act" (see section 33). This makes sense bearing in mind sections 8 and 26, which provide the Commission with the ability to employ staff or appoint agents to assist it in performing its statutory functions and expressly permit the Commission to delegate its functions to staff members or authorised persons.

[50] Returning to section 21(5), as indicated previously, there is absolutely no mention of the Commissioner. In fact, the Commissioner is not referred to in any of the provisions set out under section 21. Rather, this is one of the sections which repeatedly refers to the Commission. Sensibly so, since section 21 essentially provides for evidence gathering, which is in furtherance of investigations, one of INDECOM's functions (see section 4). By virtue of section 8, the Commission is empowered to appoint and employ persons **it** considers necessary for the proper performance of its functions. By dint of the first rule of statutory interpretation - the plain and ordinary meaning of the words - it could be concluded that it is the Commission and not merely the Commissioner, to whom Parliament gave these powers. This view is reinforced by the other references to Commission using the impersonal "it" as mentioned above.

[51] This is seen again, for example, at section 4(2) "[i]n the exercise of **its** functions under subsection (1), the Commission shall be entitled to-...". Also, at section 21(1), it speaks to the Commission being empowered to require a person who, "in **its** opinion, is able to give assistance in relation to an investigation ... to furnish a statement...".

[52] In a further analysis of this point, this court also considers the definition of the word "investigator" in section 2, set out at para. [16] above. It speaks to an employee or a part of the Commission assigned duties in relation to a particular investigation.

[53] The obvious conclusion to be drawn is that there are persons, apart from the Commissioner, who are to be considered **as part of the Commission** for investigatory purposes.

[54] I have also considered similar evidence gathering provisions, including those similar to section 21(4) of the INDECOM Act (which confers on the Commission the powers of a Supreme Court Judge for the purposes of an investigation), contained in the five enactments referred to by Queen's Counsel. These statutes and the relevant sections are set out below for the purpose of comparison:

(i) the Political Ombudsman (Interim) Act, which states in section 16:

"16. (1) Subject to subsection (5), the Political Ombudsman may at any time require any officer, member or supporter of a political party or any person who, in his opinion, is able to give any assistance in relation to the investigation of any matter, to furnish such information and produce any document or thing in connection with such matter, which may be in the possession or under the control of that officer, member, supporter or person.

(2) Subject as aforesaid, the Political Ombudsman may summon before him and examine on oath –

(a) any complainant; or

(b) any officer, member or supporter of a political party or any other person who, in the opinion of the Political Ombudsman, is able to furnish information relating to the investigation,

and such examination shall be deemed to be a judicial proceeding within the meaning of section 4 of the Perjury Act.

(3) For the purposes of an investigation under this Act, the Political Ombudsman shall have the same powers as a Judge of the Supreme Court in respect of the attendance and examination of witnesses and the production of documents.

(4) ...

(5) No person shall for the purpose of an investigation, be compelled to give evidence or produce any document or thing which he could not be compelled to give or produce in proceedings in any court of law.” (Emphasis added)

(ii) the Contractor-General Act, in which section 18 (now repealed) provided:

“18. (1) Subject to the provisions of subsection (5) and section 19(1), a Contractor-General may at any time require any officer or member of a public body or any other person who, in his opinion, is able to give any assistance in relation to the investigation of any matter pursuant to this Act, to furnish such information and produce any document or thing in connection with such matter as may be in the possession or under the control of that officer, member or other person.

(2) Subject as aforesaid, a Contractor-General may summon before him and examine on oath –

(a) any person who has made representations to him;
or

(b) any officer, member or employee of a public body or any other person who, in the opinion of the Contractor-General, is able to furnish information relating to the investigation,

and such examination shall be deemed to be a judicial proceeding within the meaning of section 4 of the Perjury Act.

(3) For the purposes of an investigation under this Act, a Contractor-General shall have the same powers as a Judge of the Supreme Court in respect of the attendance and examination of witnesses and the production of documents.

(4) Any obligation to maintain secrecy or any restriction on the disclosure of information or the production of any document or paper or thing imposed on any person by or

under the Official Secrets Act, 1911 to 1939 of the United Kingdom (or any Act of the Parliament of Jamaica replacing the same in its application to Jamaica) or, subject to the provisions of this Act, by any other law (including a rule of law) shall not apply in relation to the disclosure of information or the production of any document or thing by that person to a Contractor-General for the purpose of an investigation; and accordingly, no person shall be liable to prosecution by reason only of his compliance with a requirement of the Contractor-General under this section.

(5) No person shall, for the purpose of an investigation, be compelled to give any evidence or produce any document or thing which he could not be compelled to give or produce in proceedings in any court of law.” (Emphasis added)

(iii) the Integrity Commission Act, which provides in section 48:

“48. (1) Subject to the provisions of subsection (5), and section 50, the Director of Investigation may, by notice in writing, require a person who is the subject matter of an investigation or any other person who in the opinion of the Director of Investigation, is able to give assistance in relation to the investigation of a matter to –

(a) submit such information and produce any document or thing in connection with such matter which may be in the possession or under the control of the person;

(b) attend on the Commission, at such time as may be specified in the notice, to be heard by the Director of Investigation on any matter relating to the investigation.

(2) The Director of Investigation may summon before him and examine on oath --

(a) a person who has made a complaint, given information or a notification about a matter before the Commission; or

(b) any public official, parliamentarian or other person who in the opinion of the Director of Investigation is able to provide information relating to the investigation,

and the examination shall be deemed to be a judicial proceeding within the meaning of section 4 of the *Perjury Act*.

(3) **For the purposes of an investigation, the Director of Investigation shall have the same powers as a Commissioner pursuant to the provisions of the *Commissions of Enquiry Act* in respect of the attendance and examination of witnesses and the production of documents,** and the provisions of sections 11B, 11C, 11D, 11E, 11F, 11G, 11H, 11I, 11J, 11K and 11L of that Act shall apply, *mutatis mutandis*, in relation thereto:

Provided that no prosecution for an offence as stated herein shall be commenced, except by the direction of the Director of Corruption Prosecution.

(4) Subject to the provisions of this Act, any obligation to maintain secrecy or any restriction on the disclosure of information or the production of any document or thing, imposed on any person –

(a) by or under the *Official Secrets Act, 1911, 1920 and 1939* of the United Kingdom in its application to Jamaica; or

(b) by any other law,

shall not apply in relation to the disclosure of information or the production of any document or thing by that person to the Director of Investigation for the purpose of an investigation; and accordingly, no person shall be liable for prosecution for any offence under the *Official Secrets Act, 1911, 1920 and 1939* or any other law, by reason of his compliance with a requirement of the Director of Investigation under this Act.

(5) No person shall, for the purpose of an investigation, be compelled to give any evidence or produce documents which are subject to legal professional privilege or which he otherwise could not be compelled to give or produce in proceedings in any court of law.

(6) Nothing in this section shall be deemed to remove the right of a person against self incrimination." (Emphasis added) (Italics as in the original)

(iv) the Commission of Enquiry Act, section 10 of which provides:

"10. Commissioners acting under this Act shall have the powers of a Judge of the Supreme Court of this Island, to summon witnesses, and to call for the production of books, plans, and documents, and to examine witnesses and parties concerned on oath, and no Commissioner shall be liable to any action or suit for any matter or thing done by him as such Commissioner. All summonses for the attendance of witnesses, or other persons, or the production of documents, may be in the Form given in the Schedule, and shall be signed by one of the Commissioners, and oaths may be administered by one of the Commissioners, or by their Secretary." (Emphasis added)

and (v) the Financial Administration and Audit Act, which provides in section 25:

"25. (1) ...

(2) ...

(3) For the purpose of the examination of any account the Auditor-General shall be entitled at all reasonable times –

(a) to have access to all books, records, vouchers, documents, returns, reports, information storage devices, cash, stamps, securities, stores or other Government property in the possession of any officer;

(b) to request in writing and be given custody, for such time as he may require, of any books, accounts, vouchers or papers under the control of any officer relating to or concerning public accounts, so, however, that the Auditor-General shall give to that officer a written receipt acknowledging delivery of such accounts, vouchers or papers;

(c) to call upon any officer for any explanation and information that the Auditor-General may require in order to enable him to discharge his duties;

(d) to require any accounting officer to furnish him from time to time or at regular periods with accounts of the transactions for which that officer is responsible, up to such date as the Auditor-General may specify;

(e) without payment of any fee, to cause search to be made in and extracts to be taken from any book, document or record in any public office and to require such extracts to be certified;

(f) to require every person employed in his office who has to examine the accounts of a department to comply with any security requirements applicable thereto and to take any oath of secrecy required to be taken by persons employed in that department;

(g) to station members of his staff in any department to facilitate the conduct of the audit and the accounting officer concerned shall provide such facilities as the Auditor-General may reasonably require for that purpose.

(4) Any officer required by the Auditor-General to furnish information or documents shall comply with that request as soon as may be reasonably practicable in the circumstances.

(5) Where any officer fails to comply with any requirement of subsection (3), the Auditor-General may, if the circumstances so warrant, report the matter to the Minister and shall send a copy of that report to the accounting officer concerned and to the Chief Personnel Officer.

(6) The Auditor-General shall be entitled to summon and examine on oath, declaration or affirmation (which oath, declaration or affirmation the Auditor-General is hereby empowered to administer) all persons whom he shall think fit to examine respecting the receipt or payment of money or the receipt or issue of any Government supplies affected by the provisions of this Act and respecting all other matters and things whatever necessary for the due performance and exercise of the duties and powers vested in him.

(6A) Any person summoned under the provisions of subsection (6) who without reasonable excuse makes default in obeying such summons shall be guilty of an offence and shall be liable on summary conviction in a Resident Magistrate's Court to a fine not exceeding five thousand dollars or, in default of payment, to imprisonment for a period not exceeding six months.

(7) The Auditor-General may authorize any officer of his department to perform on his behalf any of his functions under this Act or any other enactment, other than the administration of oaths and certifying and reporting of accounts for the House of Representatives." (Emphasis added)

[55] It is noted that the holders of these offices (the Political Ombudsman, former Contractor-General, Director of Investigation of the Integrity Commission and the Auditor General) have been conferred with similar powers to summon and examine on oath, with no requirement to have the qualifications of a Supreme Court Judge. (Interestingly, the Auditor General is given powers to summon and examine on oath, but there is no express provision that the powers shall be the same as a Supreme Court

Judge). Further, the Political Ombudsman Act, the Integrity Commission Act and the repealed Contractor-General Act have similar provisions to section 21(5) of the INDECOM Act. However, essentially, the powers to summon and examine on oath are vested in the persons appointed to those offices, as they refer to the actual officeholders. This is to be contrasted to the INDECOM Act, where the evidence-gathering powers pursuant to section 21 are vested in the Commission.

[56] Therefore, no inescapable conclusions as to Parliament's intention can be drawn from these comparisons, except, in so far that it can be said, that the holders of the offices with similar evidence-gathering powers (with the same restrictions as to compellability) are not required to have the qualifications of a Supreme Court Judge. However, to that same extent (that there are similar provisions to section 21(5) of the INDECOM Act), there is no valid basis to conclude that it is the Commissioner and the Commissioner alone, by virtue of his qualifications, who would be authorised to make an assessment under section 21(5) on the point of non-compellability. Any such conclusion would have to be grounded on a different premise. As such, it is not sustainable within the context of the statutory framework. However, one such premise to be considered is whether section 21(5) is an adjudicative function, and if so, should the category of persons having such a remit be limited?

Is section 21(5) of the INDECOM Act an adjudicative function?

[57] The case of **R v Parliamentary Commissioner**, a decision of the England and Wales High Court, was referred for this court's consideration. The Parliamentary Commissioner was appointed by virtue of the Parliamentary Commissioner Act of 1967 ('the UK Act') and given investigative and evidence gathering functions (similar to that which is contained in the INDECOM Act). Section 8(5) of that UK Act contains a similar provision in relation to non-compellability (as found in section 21(5)). The court, having considered the powers and functions of the Parliamentary Commissioner as set out at section 5 of the UK Act, stated that the Parliamentary Commissioner is an investigative officer, not an adjudicative tribunal (see para. 17). Section 8 of the UK Act (which

speaks to evidence gathering) refers only to the empowering of the Parliamentary Commissioner; however, it is not expressed that the Parliamentary Commissioner requires legal qualifications. What can be gleaned from a comparison with the UK Act and with the Acts above (which provide similar evidence-gathering powers), is that section 21(5) of the INDECOM Act should not be determined as an adjudicative function merely because it requires an assessment as to whether a witness is compellable.

[58] Further, the plain wording of this subsection (section 21(5) of the INDECOM Act) does not specifically confer any power on anyone or any entity. Rather, it is an express restriction on the power conferred on the Commission in section 21(1), which states that INDECOM's power to require the furnishing of statements or produce documents/things is "[s]ubject to subsection (5)". This is the same restriction on the powers of the Political Ombudsman and other statutory officers who are empowered to acquire evidence for the purposes of an investigation. In my view, when one considers the totality of the INDECOM Act, there is no reason to interpret any power of determination given to the Commission under section 21(5) as being given exclusively to the Commissioner on the basis that it is adjudicative.

[59] It appears that the relief sought by Mr Grant was premised on this incorrect presupposition, that section 21(5) conferred a power on the Commissioner, and that the focus of the Full Court appeared to be unduly concentrated on section 21(4), as well as section 3(2) of the INDECOM Act, and the pronouncements made at paras. [94] and [118] of the judgment of Lawrence-Beswick J in **Gerville Williams**. To demonstrate this, it is useful to have regard to the reasoning of each member of the Full Court.

[60] Starting with the judgment of Simmons J at paras. [218], [227], [228], and [234] to [236]:

"[218] The issue of whether a witness is compellable, is in my view, one which requires the consideration of a person with legal training. It is akin to a judicial ruling. I say akin, because the matter does not stop there. It is a limited adjudicative power in that, the Presiding Officer's recourse in

the event of non-compliance lies with the court and not with INDECOM. (Footnote: section 33 of the Act)

...

[227] **INDECOM** is an independent body established by Parliament to investigate questions of fact. On the whole, it performs an investigative function as opposed to a decision making function similar to that of a court of law (or a tribunal).

[228] **Its** process is for the most part, inquisitorial although it may involve preliminary decision-making. Section 21 (5) [sic] of the **Act** charges **it** with the responsibility of determining whether a person can be compelled to give evidence or produce a document for the purpose of its investigation. Such persons can't be compelled unless they could be compelled in a court of law. Such a decision requires the input of a legal mind. That is an adjudicative function although **INDECOM** does not have the power to determine the fate of a person who disagrees with its ruling under section 21 of the **Act**. By virtue of section 33 (b) (2) [sic] it is cast in the role of a complainant where a person disobeys its lawful requirement without justification." (Emphasis added)

[61] Having referred to INDECOM (that is, the Commission) in the reasoning above, the learned judge goes on to conclude in respect of the Commissioner specifically:

"[234] Although an adjudicative function usually involves the power to enforce an order, in the case of INDECOM, I am [of] the view that it is a limited adjudicative function which has been bestowed on the **Commissioner**. I am however of the opinion that although limited it is still non-delegable. The Presiding Officer ought to have obtained a ruling from the Commissioner before proceeding to inform the claimant that he was compellable. In this regard I have noted that the transcript of the proceedings only indicate [sic] that Mr. Shea sought and acted on the advice of the Director of Complaints as well as the legal department. The Commissioner's letter dated November 27, 2017 in which he indicated that there was a prima facie case that the claimant breached section 33 of the **Act** by his failure to answer

questions pursuant to a section 21 Notice cannot validate what was done on September 21, 2017.

[235] I have also considered this issue in the context of section 20 of the **Act** ... Those sections [sections 4, 13 and 14] deal with the investigation of incidents and complaints, the preservation of the scene of an incident and the retention of documents or other property. There is no provision which permits the delegation of the powers of the **Commissioner** under section 21 of the **Act**. It is my view, that if Parliament had had any such intention, it would have been stated.

[236] In the circumstances, I am of the view that the power given to the **Commissioner** under section 21 (5) [sic] of the **Act** is non-delegable. In the circumstances, I find that the ruling of the Presiding Officer is ultra vires, unlawful and illegal." (Emphasis added)

[62] In so finding, there was no discussion by Simmons J in relation to section 26 of the INDECOM Act, which is the section dealing with delegation.

[63] The approach of Jackson-Haisley J was to refer to the Commission and the Commissioner in an interchangeable manner. This is demonstrated in the reasoning at para. [406] which followed the heading "[w]hether the adjudicative function of INDECOM is delegable":

"[406] The essential questions are whether the adjudicative functions of the **Commission/er** are delegable and whether the power exercised by presiding officer Mr. Shea was in fact an adjudicative function. This issue pre-supposes that there are adjudicative functions resident in the **Commission/er**. If there was any issue in this respect this was set to rest by Lawrence-Beswick J in the **Gerville Williams** case when at para. 118 she indicated that the Act provided for the creation of a Commission headed by an independent commissioner who has judicial and administrative roles." (Emphasis added)

[64] Consideration was then given to the dictum of Sykes J at paras. [205] to [207] of **Gerville Williams**, as follows:

“[408] Although Sykes J spoke about the practical working of the section [21(5)] he was silent as to who was to carry out this function. However, Lawrence-Beswick J stated quite succinctly [at para. [94]] that when the **Commission** is exercising an adjudicative function the **Commissioner** is the adjudicating officer in this regard. The Claimant argues that such a power is a judicial power and could not have been delegated to Mr. Shea hence, the actions of Mr. Shea were without delegated authority, therefore it is a nullity and asks the Court to quash his decision.

...

[410] ... the ruling of my sister Lawrence-Beswick J which has the effect of saying that the judicial/adjudicatory power of the **Commission** is one that is resident only in the **Commissioner** and is such that he cannot delegate it.”
(Emphasis added)

[65] Jackson-Haisley J had regard to section 26 of the INDECOM Act and found at paras. [419] to [422]:

“[419] In section 20 of the Act, it is expressed that the Commissioner and his investigative staff are said to have the like powers, authorities and privileges as are given to a constable for the purpose of giving effect to sections 4, 13, and 14. However, in section 21 no such express stipulation is made with respect to the powers of a judge. Section 21(4) provides further that for the purposes of an investigation under the Act, the Commission shall have the same powers as a Judge of the Supreme Court in respect of the attendance and examination of witnesses and the production of documents. I take the view that if it was the intention of Parliament to give the Commissioner and his staff the powers of a judge that would have been expressly provided for. It therefore stands to reason that it is the **Commissioner alone** who has been bestowed the powers as a Judge of the Supreme Court.

[420] S[ub]section 5, I believe must be read in conjunction with [sub]section 4 as it provides that a person shall not, for the purpose of an investigation, be compelled to give evidence or produce any document or thing which he could not be compelled to give or produce in proceedings in a

court of law. It would clearly require someone with a legal mind to be able to make the determination as to, in what circumstances and in relation to what documents a person is compellable. A person making this determination would no doubt have to be conversant with the provisions of the Evidence Act. S[ub]section 6 of the [INDECOM] Act provides that section 4 of the Perjury Act shall apply to proceedings under this section in relation to an investigation as it applies to judicial proceedings under this section, again another legal issue.

[421] On a literal interpretation of section 26 of the [INDECOM] Act, the functions, powers and duties of the Commission may be performed by any member of its staff. If this were to be read literally it would mean even an ancillary worker could be called upon to determine the question of competence and compellability. It is interesting to note that in section 20 which gives officers of INDECOM the powers of a constable, this power is expressly restricted to the Commissioner himself and the investigative staff. In contrast, there is no such express restriction for the judicial powers. So read literally any member of staff of INDECOM could exercise a judicial power. This interpretation would run afoul of the intention of Parliament and the exercise of the functions of the Commission.

[422] It has led me to the view that the functions which are by their nature adjudicatory or judicial should be performed by someone with a legal mind. Only such a person would be familiar with the processes of the Court and the rules of evidence and be able to say under what circumstances a person is compellable in a court of Law. The only individual named in the Act as having the powers of Judge of the Supreme Court is the Commissioner. In fact, nowhere else in the **INDECOM Act** is there any other provision for any other member of INDECOM's staff to be someone possessing legal knowledge. This had led me to agree with my sister's opinion in **Gerville Williams** case that the Commissioner is the adjudicating officer in this regard." (Emphasis added)

[66] The learned judge then went on to explain the practical working of this interpretation at para. [423]. It is unnecessary to set it out. Ultimately, the learned

judge concluded that the ruling of Mr Shea, which could not be ratified, ought to be quashed. Her reasons were set out at para. [435]:

“[435] It is therefore clear to me that the indication to [Mr Grant] that Mr. Shea would determine whether an exception is applicable was wrong. The power to make a decision as to whether or not a person is compellable is an adjudicatory power, not an administrative one and therefore in these circumstances, should only have been exercised by the Commissioner.”

[67] Even though the same conclusion was arrived at by Y Brown J, it must be pointed out that she took a different view as to whether the Commissioner was vested with the powers of a judge. She soundly reasoned as follows:

“[554] Evidently, the aforestated provision [section 3(2) of the INDECOM Act], while prescribing that the Commissioner should have the qualifications of a Judge of the Supreme Court, **it does not vest him with the powers of a judge of the said Court. Such powers are vested in a limited way in the Commission itself** and this is in accordance with section 21(4) of the Act...Inherent in this provision is the issue of compellability. Nevertheless, the only provision that speaks specifically to a function to be carried out by the Commissioner is section 20...” (Emphasis added)

[68] The learned judge found that section 26 of the INDECOM Act ran contrary to the principle that judicial functions generally ought not to be delegated. Her conclusions are to be found at paras. [559] to [561]:

“[559] Beyond that stance, when section 26 of the Act is pitted against the expressed provision of the Commission’s mandate, it could not be envisioned that Parliament intended that the functions of the Commission which have legal attributes should be performed by all and sundry. Although the legislation seems open to ambiguity, in my opinion, the provisions of section 21(4) (vesting the Commission with the powers of a judge of the Supreme Court), section 3(2) (qualifications of Commissioner) and section 20 (Commissioner endowed with powers of a Constable) ought not to be viewed singularly, but must be interpreted within the context of the Commission’s edict.

[560] Undoubtedly, the question of compellability resides in the legal domain and must be addressed by a person with the requisite legal training. In the Commission, that would be the Commissioner **and his legal staff**. Thus we must resolve the conflict existing where on the one hand, the judicial function resides in the Commission itself, while on another, any of its functions can be performed by any member of staff, and further, the Commissioner being assigned the powers of a Constable.

[561] In conformity with ratiocination, the inference that must be drawn is that the Commissioner who is the possessor of the qualifications of a Supreme Court Judge would be the only eligible member of the Commission's staff to execute the duties of adjudication on behalf of the Commission. It is he who ought to have determined the question of compellability in relation to the Claimant's engagement at the Q&A session." (Emphasis added)

[69] From the dicta above, it is evident that the Full Court regarded the determination of the compellability of witnesses not just as a legal question but as an adjudicative or judicial function that could only be exercised by the Commissioner. The reasoning was that since the holder of the office of Commissioner was required to have the qualifications of a Supreme Court Judge, then he or she was the only individual who could determine this legal question. This was so even in the face of the wording of sections 21 and 26.

[70] As stated previously, section 21(5) does not confer any power on anyone. Rather, it serves as an express restriction on the Commission's evidence gathering powers for the purposes of its investigative function. I find there is merit in Queen's Counsel's description that this section is an investigatory tool. How then is section 21(5) to be treated as an investigatory tool that forms part of the process of evidence gathering? Should it be seen as an adjudicative or of a limited adjudicative function?

[71] The question of compellability is indeed a legal question, which every member of the Full Court recognised. Moreover, the category of non-compellable witnesses is a

narrow one (legal advice, self-incrimination, public interest and the treatment of spouses under section 6 of the Evidence Act). However, should the determination of such a question be deemed to be an adjudicative or judicial function on the basis that it is a legal question?

[72] Certainly, it is “akin to a judicial ruling” in the sense that it is the sort of question that a judge may be called upon to decide in the course of a trial. This is true of both Judges of the Supreme Court as well as Parish Court Judges (formerly referred to as Resident Magistrates). The latter are not required to possess the qualifications to hold the office of the former (in terms of years of practice). Indeed, as Queen’s Counsel aptly pointed out, this is a question certain office holders with “investigatory characters” are also called upon to determine, and these office holders are not required to have the qualifications of a Supreme Court Judge.

[73] The respondent is relying on **Gerville Williams** as support for his contention that the function is adjudicative and further that the Commissioner is the adjudicating officer. Lawrence-Beswick J in **Gerville Williams** at para. [94] under the heading ‘[c]laiming the right’:

“Where a person seeks to rely on Section 21 (5), of the Indecom Act that is, to claim that he is not compellable, he must claim it himself and on oath. This allows for a determination by an adjudicating officer as to whether in the circumstances presented, the person from whom the statement should be taken, should in fact not be compelled. It is not sufficient that his attorney-at-law states that claim on his behalf in his absence. **The Commissioner is the adjudicating officer in this regard.**”

[74] I accept as correct the contention of Queen’s Counsel that in that specific case, it was the Commissioner who conducted the interviews, and there is no basis to take this finding to mean that the court decided in all cases and for the purpose of all interviews, the Commissioner is the only adjudicating officer. The specific issue was never addressed by that court. In any event, there is significant doubt as to the soundness of the learned judge’s characterisation of the functions of INDECOM (and by

extension, the Commissioner) as adjudicative, which connotes the settling or determining of issues judicially.

[75] It is perhaps appropriate to have regard to the definition of 'adjudication' as well as the description of the term "Judicial functions; in general" from the Halsbury's Laws of England. Starting with the ordinary definition, the Oxford Advanced Learner's Dictionary defines the term 'adjudication' as "the process of making an official decision about who is right when two groups or organizations disagree; the decision that is made". The extract from the Halsbury's, which was relied on by both counsel, at para. 127, reads:

"The principal functions of the judiciary may be described as to:

- (1) provide for the orderly resolution of disputes, whether between private individuals or bodies or involving public bodies or the exercise of public or governmental functions by public or private bodies;
- (2) uphold the principle of legality or the rule of law;
- (3) provide the mechanism through which the coercive powers of the state may be exercised;
- (4) protect the individual against unlawful state activity; and
- (5) develop the common law, and to interpret parliamentary statutes, in which activity they exercise a quasi-legislative function."

[76] I agree with the submissions of Queen's Counsel that the functions of INDECOM do not align with an adjudicative or judicial function in this regard. In particular, I accept that any decision or determination by INDECOM (through its officers) on the issue of compellability is procedural or merely preliminary. What is telling is that it is subject to a final determination by the court in the event of a disagreement between INDECOM and the witness. Therefore, the function is still in the realm of investigation. If the witness resists the determination of INDECOM through its officers, no evidence

can be garnered at that point. I also find Sykes J's characterisation of INDECOM at para. [253] in **Gerville Williams** to be apt:

"...As I have said Indecom is subject to the rule of law and cannot be the final arbiter of its own powers. **It is not a court and does not determine civil rights and liabilities. Neither does it determine criminal culpability.**" (Emphasis added)

[77] In my view, the practical working of section 21(5) of the INDECOM Act, as explained by Sykes J at paras. [206] and [207], is correct:

"[206] As a practical matter this is how I see section 21(5) working. Before getting into the practical working of the section some other provisions need to be highlighted. Indecom has the power to administer oaths to the persons summoned (section 21(3)). **Section 21(4) gives Indecom the same power as a Supreme Court Judge but that power is limited.** Section 21 (6) says that section 4 of the Perjury Act applies to 'proceedings under this section in relation to an investigation as it applies to judicial proceedings under that section.' Section 4 of the Perjury Act criminalises the making of statements known by the lawfully sworn witness to be false or does not believe to be true. The risk of prosecution for perjury is to bring home to the person summoned that truth telling is important.

[207] Now to the practical working. Indecom summons a person to attend up on it for the purpose of being examined or producing documents under section 21(4). The witness arrives. This person, unless there is evidence to suggest otherwise is within Lord Mustill's category one. He cannot claim protection under section 16 (6) (f) [sic] of the Constitution. The only protection he can claim is under section 21(5). The person may be sworn. **What is expected is that Indecom, in the event that a claim is made on the ground of the risk of self-incrimination, is to make an initial decision on this. If it agrees with the claim then the answer is not insisted on. If Indecom does not accept the claim and the person insists then it has to be resolved by the courts.**" (Emphasis added)

[78] I would, however, add that the position would be the same if the person claims non-compellability on some other ground apart from that mentioned by Sykes J. In other words, the court would be the agency by which the final determination is made between the Commission and the witness as to the issue in contention. Simmons J expressed this at para. [228] of her judgment (quoted above at para. [60] and restated here for convenience), "INDECOM does not have the power to determine the fate of a person who disagrees with its ruling under section 21 of the **Act**. By virtue of section 33 (b) (2) [sic], it is cast in the role of a complainant when a person disobeys its lawful requirement without justification".

[79] Once this limitation is accepted, Mr Cameron's assessment that Mr Shea made a determination that is adjudicative, in the sense of settling the dispute on the issue, is plainly incorrect.

[80] Interestingly, Simmons J referred to a passage in **Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd** [2015] HCA 7 (delivered 4 March 2015) ('**Australian Communications and Media Authority**'). At paras. [229] - [230], she set out the factual circumstances as follows:

"[229] ...the High Court of Australia had to decide whether, in the absence of a criminal court finding that the offence had been proven, the Australian Communications and Media Authority... was entitled to make a finding that a licensee had breached the clause... licence condition and take enforcement action arising out of the breach.

[230] If there was no such preclusion, the High Court had to determine whether the provisions of the **Broadcasting Services Act**... which empowered the Authority to determine if a licensee has used the broadcasting service in the commission of a relevant offence, and to take consequential enforcement action, were an invalid attempt to confer judicial power...on the Authority.

[81] Simmons J then quoted the following passages from the judgement at paras. [231] and [232] on the issue of judicial power:

"[231] ...

'[A] judicial power involves, as a general rule, a decision settling for the future, as between defined persons or classes of persons, a question as to the existence of a right or obligation, so that an exercise of the power creates a new charter by reference to which that question is in future to be decided as between those persons or classes of persons.'

...

On the hearing of the appeal in this Court, Today FM's constitutional argument was refined. Today FM acknowledges that it is open to an administrative body to form an opinion as to the legal rights of an individual as a step in that body's ultimate determination. It accepts that the formation of such an opinion does not involve the exercise of judicial power. It does not contend that the Authority's finding in its report is a final determination giving rise to any issue estoppel or merger...

[232] The court then said:

...

It is well settled that functions may be judicial or administrative depending upon the manner of their exercise. Edmonds J rightly concluded that none of the features of the power conferred on the Authority to investigate and report on breach of the... licence condition and to take consequential administrative enforcement action support the conclusion that it is engaged in the exercise of judicial power."
(Emphasis added)

[82] Having considered these passages, Simmons J stated that she appreciated the differences between the Commission and the Authority and the particular provisions under consideration but found that the case was relevant, as Mr Shea's decision that the respondent was compellable was a determination that was made as a preliminary step to the taking of enforcement action. However, she went on to conclude,

incorrectly, in my opinion, that the function under section 21(5) was a limited adjudicative function, and although limited, it was non-delegable.

[83] The essence of the Commission's function under section 21(5) can best be described as set out in the court's judgment in **Australian Communications and Media Authority**. It is no more than the forming of "an opinion as to the legal rights of an individual as a step in that body's ultimate determination". However, this does not mean it is an exercise of judicial power.

[84] The incongruity with a genuine judicial function is also borne out in De Smith's Judicial Review, 6th edition on pages 984 to 989 as set out by Simmons J at para [216] of the judgment of the Full Court:

"[216] ...

'The more closely a statutory body resembles a court in the strict sense, the more likely is it that that body will be held to act in a judicial capacity...But it must not be assumed that because a body closely resembles a court, each and every one of its functions will be characterised as judicial. Even functions performed by courts are not necessarily characterised as judicial... In short, the answer to the question whether a body is acting in a judicial capacity when performing a particular function does not necessarily depend upon the degree in which that body's general characteristics resemble those of an ordinary court, although the degree of resemblance may be a major factor influencing a decision that the function in question is judicial.'

...

The first test that may be applied for distinguishing judicial functions from other classes of functions turns upon whether the performance of the function terminates in an order that has conclusive effect. The decisions of courts are binding and conclusive, inasmuch as they have the force of law without the need for

confirmation or adoption by any other authority and cannot be impeached (if the court has acted within its jurisdiction) indirectly in collateral proceedings. This characteristic is generally regarded as one of the essential features of judicial power. And a body exercising powers which are of a merely advisory, deliberative, investigatory or conciliatory character, or which do not have legal effect until confirmed by another body, or involve only the making of a preliminary decision, will not normally be held to be acting in a judicial capacity..." (Italics as in original)
(Emphasis as in original)

[85] In the round, having regard to all of the above, the process of the initial determination on the issue of compellability by the Commission cannot, within the context of the INDECOM Act, be deemed to be adjudicative. Section 21(5) merely acts as a protection or a statutory right that may be invoked where the person summoned is of the view that he would not be compellable in a court of law. As Sykes J said in **Gerville Williams**, an initial decision has to be made if there is the claim of non-compellability. Where there is a difference in opinion, that is, the Commission decides that the witness is compellable and the witness is of the opposite view, the court will be called upon to intervene to resolve this issue. It is the court that will ultimately adjudicate whether a person is compellable, and it is the court that can impose a penalty for the failure to comply with the Commission's lawful requirement.

[86] For these reasons, ground i succeeds to the extent that the Full Court determined that section 21(5) operates as an adjudicative function and is only exercisable by the Commissioner.

Ground ii - The learned judges erred in finding that the function under section 21(5) is not delegable because it is a judicial function. In so finding, the learned judges did not have a proper regard to the established legal principle that even a judicial function may be delegable by express provision or necessary implication. Section 26(1) of the [INDECOM] Act asserts without limitation that the functions of the Commission may be performed by

any member of its staff or by any other person (not being a member of the Security Forces or a specified official) authorized for that purpose by the Commission.

Ground iii - In holding that to apply section 26(1) of the [INDECOM] Act to section 21(4) and (5) would be absurd as it would permit any member of staff of the Commission to exercise a judicial power, the learned judges erred in their interpretation of and failed to properly consider the scheme of operation of the [INDECOM] Act as a whole.

Submissions on behalf of INDECOM

[87] Having taken the position that the functions of INDECOM are not adjudicative, ground ii served as an alternative ground. Queen's Counsel contended that section 26 of the INDECOM Act was clear in that it asserts without limitation that the functions of INDECOM may be performed by any member of staff or by any other person (not being a member of the security forces or specified official) authorised for that purpose by the Commission. This being so, even if section 21 was held to be a judicial function, it could be delegated given the clear unambiguous words of section 26.

[88] Reference was made to a number of cases which considered the delegation of functions. These included **Barnard and others v National Dock Labour Board and others** [1953] 2 QB 18 ('**Barnard v National Dock Labour Board**'), **Noon v Matthews** [2014] EWHC 4330 ('**Noon**'), **R (on the application of the Chief Constable of the West Midlands Police) v Birmingham Justices** [2002] EWHC 1087, **Director of Public Prosecutions v Haw** [2007] EWHC 1931 ('**DPP v Haw**') and **McKee and others v The Charity Commission for Northern Ireland and another** [2019] NICH 6 ('**McKee**').

[89] The point was made by reference to the decisions in **McKee** and **Noon v Matthews** that the determination of whether functions were delegable must be made in the context of the scheme of the legislation and the functioning of the relevant body. It was submitted that even if the express words of section 26 were disregarded, the

functions of INDECOM were intended to be delegable and, indeed, inevitable given the heavy workload of the Commission.

[90] In relation to ground iii, the submission was, essentially, an expansion on the previous submissions made in respect of the other grounds. In particular, it was contended that the delegation of the section 21 function would not result in an absurdity, and, in fact, the restricted interpretation by the Full Court would prevent the proper execution of INDECOM's functions. Queen's Counsel invited the court's attention to the structure of the INDECOM Act as a whole.

[91] It was submitted that on a proper interpretation of the INDECOM Act, it is clear that delegation was contemplated for the proper functioning of the Commission. For instance, it was submitted that section 6 provides for the establishment of regional offices, and section 7 establishes five directors of complaints for these regional offices. Queen's Counsel contended that it would be an absurd interpretation if the directors of complaints were limited in the exercise of INDECOM's functions pursuant to the INDECOM Act when these directors were clearly contemplated as being part of the hierarchical execution of INDECOM's functions. This was evident by the division of the country into regions, and for such a structure to be effective, this clearly contemplated the need for delegation. Hence the express provision in section 26.

[92] It was also pointed out that in section 28, the same oath taken by the Commissioner is also taken by the officers. This is significant because Parliament determined that INDECOM's staff should be subject to the same oath of secrecy as the Commissioner himself.

Submissions on behalf of Mr Grant

[93] Mr Cameron submitted that the learned judges correctly concluded that the INDECOM Act does not permit the Commissioner to delegate his judicial function, having applied the rules of statutory interpretation to section 26(1). It was contended

that a literal interpretation would be absurd and contrary to INDECOM's mandate and the intention of Parliament.

[94] It was further contended that the adjudicative function of INDECOM can only be exercised by the Commissioner, as he is deemed to possess the qualifications of a Supreme Court Judge.

[95] Mr Cameron submitted, "in light of INDECOM's mandate as expressed in the [INDECOM] Act's Preamble, which is to investigate the actions of state agents that result in the deprivation of rights of persons, it would be absurd to conclude on solely the literal meaning of the words in section 26(1), that Parliament intended for anyone and everyone to exercise the powers of the high office of a Judge of the Supreme Court in investigations. Such a conclusion would result in a deprivation of the rights of subjects of investigations, the same form of mischief the Act attempts to remedy".

[96] While acknowledging that delegation is permissible in some instances, it was contended that a rare case was not made out, nor was the high standard met to facilitate delegation by necessary implication. Mr Cameron pointed out that this position was supported by the Commissioner's letter, where he sought to ratify the actions of the Presiding Officer after the application for judicial review was filed. It was submitted that if the Commissioner was of the view that the power was delegated by necessary implication, he would not have sought to ratify the decision.

[97] Mr Cameron's submissions under ground iii have already been set out with respect to ground ii. His submissions were premised on the correctness of the Full Court's finding that the function of determining compellability was adjudicative and thus could not be delegated. Reference was again made to the decision of Lawrence-Beswick J in **Gerville Williams**.

[98] It was submitted that the Full Court was correct in its conclusion that the INDECOM Act did not permit the Commissioner to delegate his function and that the

correct rules of statutory interpretation were applied to section 26(1). Further, it was submitted tersely that a literal interpretation would be absurd and contrary to the mandate of INDECOM and Parliament's intention.

Discussion and analysis

[99] Based on the conclusion in respect of ground i, that the functions of INDECOM by virtue of section 21(5) are not adjudicative, it is unnecessary to engage in any lengthy discourse in respect of grounds ii and iii. However, the issues will be considered to the extent that any determination pursuant to section 21(5) can be seen as adjudicative or of a limited adjudicative function.

[100] In **Barnard v National Dock Labour Board**, the labour board was empowered by statute to delegate all appropriate functions to local boards, which were comprised of an equal number of representatives of workers and employers. A local labour board purported to delegate disciplinary functions entrusted to it to an official called the port manager. The English Court of Appeal held that the local board had no power, expressed or implied, to delegate its quasi-judicial disciplinary functions to the port manager or to ratify his purported exercise of those functions. Denning LJ reasoned at page 40 that the board was put in a judicial position between the men and the employers; they were to receive reports from the employers and investigate them; they had to inquire whether an employee has been guilty of misconduct; and if they found against him, they could suspend him or even dismiss him summarily. It was held that in those circumstances, they were exercising a judicial function. Denning LJ stated on page 40:

“While an administrative function can often be delegated, a judicial function rarely can be. No judicial tribunal can delegate its functions unless it is enabled to do so expressly or by necessary implication. In *Local Government Board v. Arlidge*, the power to delegate was given by necessary implication; but there is nothing in this scheme authorizing the board to delegate this function, and it cannot be implied. It was suggested that it would be impracticable for the

board to sit as a board to decide all these cases; but I see nothing impracticable at all; they have only to fix their quorum at two members and arrange for two members, one from each side, employers and workers, to be responsible for a week at a time: probably each pair would only have to sit on one day during their week.

Next, it was suggested that even if the board could not delegate their functions, at any rate they could ratify the actions of the port manager; but if the board have no power to delegate their functions to the port manager, they can have no power to ratify what he has done. The effect of ratification is to make it equal to a prior command; but just as a prior command, in the shape of a delegation, would be useless, so also is a ratification."

A clear quasi-judicial and non-delegable function was determined to exist in the above case.

[101] In **Noon**, a decision of the Queen's Bench Division Administrative Court, the issue of the power of conservators to delegate their powers to prosecute was under consideration. It was common ground that they had the power to delegate some of their functions. What was actually being considered was the question of whether statutory provisions can impliedly authorise delegation.

[102] Lord Justice Beatson, in his reasoning, examined factors relevant to any such determination at paras. [25] - [32]. Below is a summary of the most salient factors in this consideration:

1. The starting point is, the principle that powers conferred by statute should be exercised by the person or authority on whom they are conferred, "even where [this] causes administrative inconvenience, except in cases where it may be reasonably inferred that the power was intended to be delegable': Wade and Forsythe, *Administrative Law*, 11th ed., 259, and see also de Smith's *Judicial Review* 7th ed, 5-148ff."

2. The approach of the courts to the question, whether statutory provisions impliedly authorise delegation, is likely to vary according to the context and the nature of the power. There is a strong presumption against interpreting a grant of legislative power as empowering delegation. There is also a tendency to adopt a more restrictive approach to implied authority to delegate in the cases of proceedings of courts and cases involving other “judicial” and “disciplinary” powers. A strict approach is also likely if the power is conferred on the holder of a public office because of the personal qualifications and experience that those who hold the office can be expected to have (**Re Bell’s Application for Judicial Review** [2000] NI 245).

3. But where the exercise of the power in question is not final or conclusive, and the power is given to the head of an organization which is itself hierarchically structured, and where the responsibilities of the person or body named in the statute are such that the court considers delegation is inevitable, a less strict approach is taken and authority to delegate is likely to be implied.

[103] The starting point on this issue of delegation is to underscore that section 26(1) of the INDECOM Act gives an express power of delegation to the Commission in relation to its functions (which include investigation and evidence gathering). The only restriction is to the category of persons who cannot be authorised. By virtue of section 8, the Commission is empowered to appoint and employ persons as it considers necessary to assist in the proper performance of its functions. When this is considered within the context of section 21, which speaks to the Commission and not merely the Commissioner, it can be concluded that delegation is expressly provided.

[104] This view is also reinforced when one considers section 7 of the INDECOM Act, which speaks to the establishment of five directors of complaints. Each would be responsible for a regional office and ensuring that investigations in relation to the relevant region are carried out under this Act. It is difficult to conceive that Parliament would intend that every investigator assigned to specific cases in each of these regions must seek the approval of the Commissioner in the initial determination of compellability. But even if it can be said that the process of determining compellability is a limited adjudicative function and on that basis, it should be excluded from the express delegation provision, the statutory framework gives sufficient latitude to a finding that this limited adjudicative function is delegable by necessary implication. As Lord Justice Beatson stated in **Noon**, “where the responsibilities of the person or body named in the statute are such that the court considers delegation is inevitable, a less strict approach is taken and authority to delegate is likely to be implied”.

[105] In **DPP v Haw**, a decision of the Queen’s Bench Division, the court considered the issue of delegation. Lord Phillips of Worth Matravers CJ stated at para 33:

“...Where a statutory power is conferred on an officer who is himself the creature of statute, whether that officer has the power to delegate must depend upon the interpretation of the relevant statute or statutes. Where the responsibilities of the office created by statute are such that delegation is inevitable, there will be an implied power to delegate. ...”

[106] In addition to section 7 of the INDECOM Act, I would also point out two other provisions which support the criticism of the Full Court’s interpretation and failure to properly consider the scheme of operation of the INDECOM Act as a whole.

[107] Firstly, section 8 of the INDECOM Act (which was referred to at para. [19] above) provides the Commission with the ability to appoint and employ employees and agents that it considers necessary to assist it in the proper performance of its functions under the INDECOM Act. While this is subject to approval by a committee, it perhaps

explains why “nowhere else in the **INDECOM Act** is there any other provision for any other member of INDECOM’s staff to be someone possessing legal knowledge”, as Jackson-Haisley J observed (at para. [422] of the judgment). Such a provision was perhaps unnecessary. In any event, there was a clear recognition by Y Brown J that INDECOM has members of staff with legal training/knowledge (see para. [560] of her reasons, set out at para. [68] above).

[108] To my mind, when one considers the statutory scheme of operations holistically, section 8 clearly dovetails with section 26(1). The harmonious effect is this, the Commission, where it considers necessary, is permitted to employ persons (employees or agents) to assist with the performance of its functions, and coupled with that is the express provision allowing authorised members of staff or other authorised persons to perform the functions of the Commission.

[109] Secondly, section 35 of the INDECOM Act gives the Commission the power to make regulations generally for giving effect to the provisions of the Act. This includes matters such as, among other things, the practice and procedure to be adopted in relation to the making and investigation of complaints, as well as matters necessary for the operation of regional offices (per subsections (a) and (e)). It does not appear that any regulations have been promulgated; however, it would seem that this could be an avenue for the Commission’s procedures to be established and codified for greater clarity and certainty.

[110] In the round, there is no basis to limit the expressed delegation powers granted in section 26 as it relates to section 21(5), considering the full context of the INDECOM Act. But, even if it were to be regarded as limited due to section 21(5) being considered to be an adjudicative function, it could be concluded that delegation of that function is necessary by implication.

[111] However, I would agree with the Full Court in its recognition that the assessment of compellability is a legal question that has implications for the legal status

of persons requested to give evidence. For example, the issue of self-incrimination is a constitutionally protected right but is not the only category of non-compellability. Therefore, to the extent that an initial assessment of compellability has to be made, I am firmly of the view that the power to make that decision should be restricted to specific persons who possess the requisite legal mind.

[112] Also, it is for these reasons that I would reject the assertion that any delegation (of the section 21(5) function) would or should result in unsuitable persons being appointed to fulfil such a role. Section 26 speaks to the functions of the Commission being performed by a member of staff or other person "authorized for that purpose by the Commission". Reasonableness requires that the initial determination as to compellability must be made in consultation with an individual, while not required to possess the qualifications of a Supreme Court Judge, who appreciates the legal ramifications and restrictions. It almost goes without saying that delegation of any function (capable of delegation) must be done sensibly. One does not expect that the investigative and evidence gathering function of the Commission is to be delegated to the cleaning lady or that the initial determination as to compellability is to be made without resort to a relevant person capable of making that determination.

[113] This may very well be someone with formal legal training (as suggested by Simmons J, at para. [218]) or a legal mind, as Y Brown J stated. The decision may even be taken by an officer in consultation with another officer who has this legal training, as obtained in the present case. However, in interpreting section 26(1), there really is no reason to deviate from the plain and ordinary meaning or to ignore the concluding words "authorized for that purpose by the Commission".

[114] Naturally and impliedly, the Commission would be expected to authorise the delegation of functions only to capable staff members or other capable persons. However, in the event that the view is taken that a delegation was improper, unreasonable, or irrational, certainly, this could be challenged by way of judicial review.

[115] It is for the above reasons that grounds ii and iii must succeed.

Conclusion

[116] Based on the statutory context of the INDECOM Act, the issue of determining compellability by virtue of section 21(5) is not restricted to the Commissioner. It is not an adjudicative function but a restriction on the evidence gathering capacity of the Commission. However, it is to be exercised by the properly authorised officers and should only be delegated to suitable persons with legal training or undertaken in consultation with officers of INDECOM who possess the requisite legal training. I would therefore propose that the appeal be allowed; and the order of the Full Court made on 17 September 2019 that the powers of the Commissioner by section 21(5) of the INDECOM Act are adjudicative and non-delegable and the quashing of the ruling of the Presiding Officer that the respondent, Mr Grant was compellable to give evidence, be set aside.

V HARRIS JA

[117] I have read the draft judgment of my sister Straw JA. I agree with her reasoning and conclusion and have nothing useful to add.

G FRASER JA (AG)

[118] I too have read the draft judgment of my sister Straw JA. I agree with her reasoning and conclusion and have nothing useful to add.

STRAW JA

ORDER

- 1) The appeal is allowed.
- 2) The order of the Full Court made on 17 September 2019 that the powers conferred on the Commissioner by section 21(5) of the

Independent Commission of Investigations Act are adjudicative and non-delegable and the quashing of the ruling of the Presiding Officer that the respondent, Mr Delmond Grant, was compellable to give evidence, is set aside.

- 3) The order of the court below in relation to costs shall stand.
- 4) The respondent shall have 14 days from the date of this order to submit in writing why costs should not follow the event. If no such submissions are received, the respondent shall pay the appellant's costs of this appeal, such costs to be taxed if not sooner agreed.