IN THE SENIOR COURTS OF BELIZE

IN THE HIGH COURT OF BELIZE

CLAIM NO. 55 OF 2019

IN THE MATTER of the Constitution of Belize

AND

IN THE MATTER OF s. 1, s. 6, s. 90 and s. 95 of the Belize Constitution

AND

IN THE MATTER OF Schedule I of the Representation of the People Act, Cap 9

BETWEEN:

[1] FRANK EDWARD PACO SMITH JR.
[2] HUBERT DENNIS ENRIQUEZ
[3] PAUL MARCEL MORGAN
[4] WILLIAM MAHEIA
[5] GODWIN BERNARD SUTHERLAND
[6] LISTON MCKENZIE
[7] IRVIN NEAL
[8] ANTONIO GIOVANNI DE LA FUENTE
[9] LLOYD ARMSTRONG JONES
[10] ROBERTO ANTONIO LOPEZ (As Registered Voters)

Applicants

and

[1] THE ATTORNEY GENERAL OF BELIZE
[2] CHAIRMAN OF THE ELECTIONS AND BOUNDARIES COMMISSION as and representing the Elections and Boundaries Commission

Respondents

[1] LORD MICHAEL ASHCROFT

Interested Party

Appearances:

Mr. Arthur Saldivar for the Applicants

Ms. Samantha Matute for the Respondents

2024: May 22;

August 8

APPLICATION TO ENFORCE CONSENT ORDER

JUDGMENT

[1] **NABIE J.:** Vox populi, vox Dei. Free and fair elections are important to any democracy as it is the foundation for a legitimate government. I have examined the evidence and oral submissions of the parties. There is a Consent Order and the parties are bound by it. It is my finding that the respondents have complied with the Consent Order. The application is therefore dismissed.

History of Proceedings

The Substantive Claim

[2] The applicants in this matter filed constitutional proceedings alleging that Schedule 1 to the Representation of the People Act (ROPA) is unconstitutional and in breach of section 90 of the Constitution. Belize is divided into 31 electoral districts and, in accordance with section 90 of the Constitution, each electoral district as far as possible should have equal number of voters. The Elections and Boundaries Commission (EBC) is the public authority which makes recommendations to the

National Assembly for redistricting. Schedule 1 to the ROPA provides the boundaries and the registered voters. The parties had agreed to have expert evidence in the matter and this was provided by the Sean P. Trende Report (the Expert Report). The applicants' claim was compromised by way of a consent order. They now seek to enforce that consent order. I will now provide the background on how the matter reached to this point.

In 2019 the applicants/claimants filed a fixed date claim form regarding the redivisioning of the electoral districts and sought constitutional relief pursuant to Rule 56 of the Supreme Court (Civil Procedure) Rules for the following:

> "(1) "A declaration that given the current distribution of registered voters in Belize, the electoral divisions as defined in Schedule 1 of the Representation of the People Act run contrary to Section 1 of the Belize Constitution to the extent that it undermines the practice of democracy in Belize and/or is undemocratic;
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> (2) A declaration that the Defendants have failed to make proposals for dividing Belize into electoral divisions which meet the requirements of the Constitution in breach of section 90 of the Constitution;
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> (3) A declaration that the continued violation of Section 90(1)(a) is a violation of Section 6 of the Constitution;
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> (4) A declaration that the Defendants are precluded by section 93 of the Belize Constitution from having resort to the electoral divisions as defined by Schedule 1 of the Representation of the People Act to conduct General Elections in Belize;
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> (5) An order of mandamus compelling the defendants to make proposals to the National Assembly, pursuant to section 90 of the Constitution, for the distribution of eligible electors to be as equal as possible;
>
> (6) An injunction restraining the Defendants, whether by themselves or by their servants or agents or howsoever, from conducting General Elections in Belize unless and until they comply with section 90 of the Belize Constitution; and
>
> (7) Costs."

[3] After much negotiation and intervening court proceedings[1] it was by consent ordered as follows on 11th November 2022:

> "1. All further proceedings in this claim be stayed upon the terms set out in the Schedule hereto except for the purpose of carrying those terms into effect.
>
> 2. Liberty to apply as to carrying such terms into effect.
>
> **SCHEDULE ABOVE REFERRED TO**
>
> 1) The Parties acknowledge that given the current distribution of registered voters in Belize it is necessary for the Elections and Boundaries Commission to consider the distribution of voters and make recommendations for the amendment of the First Schedule to the Representation of the People Act to re-define current electoral boundaries.
>
> 2) The Elections and Boundaries Commission shall identify and explain in a written report its recommendations and all proposals considered necessary for re-districting as provided by the Belize Constitution generally and section 90 of the Belize Constitution in particular, and shall share the report with the Claimants on the date the report is laid before the National Assembly or the 17th July, 2023, whichever is earlier, or such other extended date as agreed between the Parties.
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> 3) The First Defendant shall cause the preparation of a draft bill pursuant to section 90 of the Belize Constitution to amend the First Schedule of the Representation of the People Act to reflect the recommendations of the Elections and Boundaries Commission as made in its said report, and the Elections and Boundaries Commission shall lay the proposals before the National Assembly before July 31st, 2023.
>
> 4) The Parties agree that in this process, the Defendants shall consult the guidelines set out in the Court's EXPERT REPORT OF SEAN P. TRENDE dated October 14, 2020.
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> 5) The Defendants shall bear the reasonable costs of the Claimants to be taxed if not agreed."

[1] Claim No. 55 of 2019, decision of CJ Arana dated 26th April 2022 (application to strike out)

[4] The Applicants have applied to this Honourable Court by application dated 3rd October 2023, pursuant to paragraph 2 of the Consent Order, Rule 27.7 (3), (4); 1.1 (2) (b), (c), (d) of the Supreme Court (Civil Procedure Rules), 2005 and/or the inherent jurisdiction of the Court, for the following orders namely:

> "(1) A declaration that the First Schedule to the Representation of the People Act is unconstitutional and unsuitable for the holding of general elections in Belize in light of the Parties acknowledgment contained in term 1 of the Schedule to the Consent Order.
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> (2) An order of mandamus to compel the Respondents to carry into effect terms 2 and 3 of the Schedule contained in the Consent Order in so far as it relates to compliance with section 90 of the Constitution in the laying of proposals that meets Constitutional standards.
>
> (3) An injunction restraining the Defendants, whether by themselves or by their servants or agents or howsoever, from using the current distribution of registered voters in Belize's electoral divisions as defined in Schedule 1 of the Representation of the People Act, to conduct General Elections in Belize.
>
> (4) That the ELECTIONS AND BOUNDARIES COMMISSION, represented by the Defendants, be precluded whether by themselves or through their servants, officers, agents, servants or otherwise howsoever from relying on the FIRST SCHEDULE to the Representation of the People Act, for conducting General Elections in Belize, given that the definition of electoral divisions as set out in the said Schedule remains in breach of section 90 of the Belize Constitution.
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> (5) That the ELECTIONS AND BOUNDARIES COMMISSION represented by the Defendants, be restrained whether by themselves, their officers, agents, servants or otherwise howsoever from holding General Elections until the Consent Order is enforced or further order by this Court.
>
> (6) The time for service and hearing of this Application be abridged.
>
> (7) Such further or other relief that may be just.
>
> (8) Costs be in the cause."

[5] **The Application is supported by the following grounds:**

"Enforcement of the Consent Order

(1) That the Consent Order filed on November 11th, 2022 between the parties has been materially breached by the Respondents to the extent that the proposals in the July 2023 Redivisioning Report does not comply with Section 90(1)(a) of the Belize Constitution since the applied deviation threshold (25% to 35%) is arbitrary and outside the established international standard for holding democratic elections.

(2) That the findings in the Court's EXPERT REPORT OF SEAN P. TRENDE dated October 14, 2020, clearly informed the Consent Agreement that formed the basis of the Consent Order between the Parties and which however was totally ignored by the Respondents in bad faith.

(3) That on July 26th, 2023, the Applicants wrote to the EBC Chairman expressing objection to the July 2023 Redivision Report but have to date received no response.

(4) That the Respondents have in essence admitted in court and in a signed Consent Order that the electoral divisions as currently defined in Schedule 1 of the Representation of the People Act, requires amendment in order to comply particularly with section 90(1)(a) of the Belize Constitution.

(5) That this matter has been before this Honourable Court for over 46 months which has placed an unfair time and financial burden on the Applicants, who are ordinary working citizens with limited resources.

(6) That there is a wider public interest beyond the parties in this case.

Injunctive Relief

(7) That the Parties are aware that General Elections are always constitutionally imminent in Belize since the Prime Minister may advise the Governor General to issue a writ for elections at a time of the Prime Minister's choosing in accordance with Section 84 of the Belize Constitution.

(8) That the status quo engendered by the Respondents continues to offend the rights of citizens and in particular the Applicants under Section 6 of the Constitution, Protection of the Law.

(9) The Defendants are precluded by section 93 of the Belize Constitution from having resort to the electoral divisions as defined by Schedule 1 of the Representation of the People Act to conduct General Elections in Belize."

The Evidence

[6] This application is supported by affidavits deposed to by two of the applicants, Paul Marcel Morgan and Hubert Dennis Enriquez both sworn to on the 2nd October 2023. The affidavits in support of the application allege that the terms agreed by the parties in the Consent Order have not been carried out by the respondents. The Chairman of the Election and Boundaries Commission (EBC), Oscar Sabido filed one affidavit in response on the 19th January 2024 "the Sabido affidavit". Mr. Sabido set out the actions taken by the respondents pursuant to the Consent Order. The applicants thereafter filed a reply affidavit of Paul Marcel Morgan on 3rd March 2024. The applicants' main contention is that the EBC proposals to National Assembly are still not compliant with section 90 of the Constitution and further that the respondents did not take into account the contents of the Expert Report and as a result the voting population within the electoral districts are not constitutionally apportioned or malapportioned.

[7] The EBC Chairman swore to and filed a second affidavit dated 6th June 2024 after the hearing of this matter. He deposed that the Attorney General's Ministry has caused on the 21st May 2024, the Representation of the People (Amendment) Bill 2024 to be placed on the Orders of the Day for the next sitting of the House of Representatives.

Issues

1. Whether the respondents have complied with the terms of the Consent Order?
2. Is the application misconceived?
3. Whether the reliefs sought in the application ought to be granted?
4. Was the Expert Report considered by the EBC in formulating its proposal to the National Assembly?

The Applicants' Arguments

[8] The applicants have filed this notice of application because they allege that the terms of the Consent Order have not been carried into effect. It was submitted that Paragraph 1 of the Schedule to the Consent Order is an acknowledgement that the First Schedule to the ROPA is no longer suitable. They argued that in relation to Paragraph 2 of the Schedule to the Consent Order, the proposals laid by the EBC were not in conformity with section 90 of the Constitution and that this is evidenced by the parliamentarians. With respect to Paragraph 3 of the Schedule to the Consent Order, it was submitted that this was not done. Lastly, the applicants say that there is no evidence that the Sean Trende Report/ Expert Report was ever considered in the proposal.

[9] The applicants underscored the need for free and fair elections in a democratic society. It was pointed out that the next election is constitutionally due in November 2025 and the matter before me was filed in 2019 and that it has made its way through the court system for more than 5 years with a consent order after the generation of an expert report. Counsel recapped the reason for the filing of the claim, namely, that it was brought pursuant to section 20 of the Constitution.

[10] The applicants pointed out that the Expert Report was submitted without objection from the defendants and it was to provide:

> "an objective view as to whether the electoral divisions as presently constituted are sufficiently equal or malapportioned".

Mr. Saldivar referred to point 5 of the Executive Summary Report which states:

> "Particular standards vary across nations and organizations" and "most organisations urge countries to draw electoral boundaries such that the maximum deviation is 10% with additional allowances to districts drawn over sparsely populated areas."

[11] Mr. Saldivar went into detail and read the newspaper article where the Prime Minister and other Parliamentarians commented on the Expert Report and the EBC Proposals. He submitted that for four election cycles that there had been unconstitutional elections. The applicants disagree with Mr. Sabido in that his duty on behalf of the EBC ended with laying the proposals before the National Assembly. Mr. Saldivar pointed out that the proposals of the EBC must be made pursuant to section 90 of the Constitution and that Mr. Sabido's duty just does not end there pursuant to the Consent Order. The applicants argued that the Parliamentarians and the EBC are content to 'kick the can' down the road and flout the express provisions of the Constitution.

[12] Mr. Saldivar also pointed out in the Expert Report about the operation of electoral management bodies. It stated:

> "EMBs should operate independently, transparently and impartially. Once formed, an EMB must impartially serve the interests of all citizens and electoral participants. The primary objective of a legal framework is to guide the EMB and enable it to achieve the delivery of a free and fair election to the electorate[2]."

[13] The applicants alluded to the political influence on the EBC and urged the court to deal with the parties justly in accordance with CPR1.1 "the Overriding Objective". The applicants closed their arguments by referring to page 29 of the Expert Report which stated that permissible deviations were 10- 15 % with allowances for rural and sparsely populated areas.

[14] The applicants emphasized the need for the court's intervention under its inherent jurisdiction to allow for the enforcement of the Consent Order and as a result of the doctrine of separation of powers for the court to grant a declaration as was sought in the substantive matter being that Schedule 1 to the ROPA is unconstitutional. Mr. Saldivar submitted that this was the only way in which there can be free and fair elections in Belize so that Schedule 1 of the ROPA is prohibited from being used in

[2] Paragraph 42 of the Expert Report

the upcoming election. It was further submitted that the malady that the Consent Order was envisioned to address has not been addressed.

The Respondents' Arguments

[15] Ms. Matute began her case by submitting that the application was misconceived and that it was a 'backdoor attempt' to have the court make a declaration sought in the substantive matter. The respondents say that there has been compliance with the Consent Order. Counsel relied on the Sabido Affidavit.

[16] As it relates to paragraph 2 of the Schedule to the Consent Order, it was submitted that a report (EBC proposal) has been generated and has been laid before the National Assembly.

[17] With regard to the applicants' arguments that the EBC proposal is not in conformity with section 90 of the Constitution based on the comments of some parliamentarians and the Expert Report, Ms. Matute countered by asserting that the applicants want the EBC to fully adopt the Expert Report to say that it is constitutional and consistent with section 90. The court was reminded that the EBC is an independent body and not subject to the control of anyone[3]. Counsel stressed that the EBC in submitting its proposals had referred to the Expert Report but also had to consider section 90(2) and the considerations contained therein, namely transport and other facilities and physical features. It was pointed out that the expert had reviewed data or information and not these other grounds in section 90(2).

[18] The respondents went on to say that the proposals that were presented are consistent with section 90. It was highlighted that there was no visit by the expert to Belize, he used information supplied by the respondents and thus it was submitted that the expert did not contemplate what should go into the proposal.

[3] Section 88 of the Constitution

[19] With respect to the constitutionality of the EBC recommendations, the respondents' position is that that determination is outside of the application but for the National Assembly to make a determination of whether it will accept those proposals or reject them.

[20] On the issue of the court's inherent jurisdiction, the respondents say that the jurisdiction is not in fact inherent but the court is guided specifically by the Constitution and it is for Parliament to define the contours of that jurisdiction.

[21] In closing, Ms. Matute reiterated that the application was misconceived because the consent order has been complied with, and further, the applicants have made no attempt to vary or discharge the Consent Order.

Law and Discussion

The Consent Order – Compliance?

[22] **Paragraph 1 of the Schedule to the Consent Order**:

> "The Parties acknowledge that given the current distribution of registered voters in Belize it is necessary for the Elections and Boundaries Commission to consider the distribution of voters and make recommendations for the amendment of the First Schedule to the Representation of the People Act to re-define current electoral boundaries."

This establishes that the parties are at consensus ad idem on the main issue in the claim. This matter was filed in 2019 and the Consent Order was dated 29th November 2022. It has been identified that the EBC should consider the current electoral boundaries and make proposals for adjustment in light of the provisions of the Constitution and the ROPA. The necessary inference is that there was merit in the claim.

[23] **Paragraph 2 of the Schedule to the Consent Order**:

> "2. The Elections and Boundaries Commission shall identify and explain in a written report its recommendations and all proposals considered necessary for re-districting as provided by the Belize Constitution generally and section 90 of the Belize Constitution in particular, and shall share the report with the Claimants on the date the report is laid before the National Assembly or the 17th July, 2023, whichever is earlier, or such other extended date as agreed between the Parties."

[24] The Elections and Boundaries Commission (EBC) in its evidence given by its Chairman Mr. Sabido confirmed it had in fact complied with the Consent Order in that it has submitted proposals for re-districting. These proposals were laid before the National Assembly on 11th July 2023. A copy of the proposals was provided to the applicants on even date. Mr. Sabido deposes as follows in his affidavit:

> "5. Pursuant to Section 88(12) of the Constitution, between December 2021 and February 2022, the Constitution set up a task force and appointed 5 members to assist the Commission in the discharge of its functions to carry out a re-division exercise in accordance with Section 90(1), (2), (3) and (4) of the Constitution, as the Commission does not have the requisite technical knowledge and expertise, having to consider such matters such as transportation and physical features of the area. The Task Force was also mandated to provide the Commission with a detailed report to assist the Commission in identifying and explaining the Commission's proposals for re-districting.
>
> …….
>
> 9. The Commission has, in compliance with paragraph 2 of the Consent Order Schedule and pursuant to Section 90 and its relevant subsections, made its proposal for re-districting in a written report (the 'Report') and has laid its report before the National Assembly on 11th day of July, 2023.
>
> 10. On the same day, the Commission provided a copy of the written report to the Claimants. A copy of the letter to the Claimants with proof of receipt is hereto exhibited and marked 'OS3.'"

[25] An issue before me is whether the respondents have complied with the Consent Order. In reviewing the terms of paragraph 2 of the Schedule to the Consent Order, I am of the view that the respondents have complied with this paragraph of the Schedule to the Consent Order. The evidence of Mr. Sabido is clear and

unequivocal and unchallenged. There was no attempt to cross examine Mr. Sabido. The principle from **Browne v Dunn (1893) 6 R 67** is that if in the course of a case it was intended to suggest that a witness was not speaking the truth, his attention must be directed to the fact by cross-examination showing that that imputation was intended to be made, so that he might have an opportunity of making any explanation. Further in **Allied Pastoral Holdings Pty Ltd v Commr of Taxation [1983] 1 NSWLR 1 (at 16-18)** I note the following: "it is necessary to put to an opponent's witness in cross-examination the nature of the case upon which it is proposed to rely in contradiction of his evidence, particularly where that case relies upon inferences to be drawn from other evidence in the proceedings. Such a rule of practice is necessary both to give the witness the opportunity to deal with that other evidence, or the inferences to be drawn from it, and to allow the other party the opportunity to call evidence either to corroborate that explanation or to contradict the inference sought to be drawn." Thus in the absence of any cross examination, it is my view that the requirements of this paragraph have been satisfied, namely:

(i) the EBC has provided a written report which identifies and explains its proposals for redistricting;

(ii) the report was sent to the applicants as prescribed;

(iii) the EBC chairman has laid the report containing the proposals before National Assembly within the identified timeframe.

[26] **Paragraph 4 of the Schedule to the Consent Order**:

> "The Parties agree that in this process, the Defendants shall consult the guidelines set out in the Court's EXPERT REPORT OF SEAN P. TRENDE dated October 14, 2020."

The applicants argue that the EBC Report laid before the National Assembly was not in conformity with **section 90 of the Constitution**. They also contend that the parliamentarians had also recognized that the report was not in conformity with section 90. The affidavit of Hubert Denis Enriquez has exhibited newspaper clippings reporting commentary from three members of the ruling party. It is on this

basis that the applicants ground the application. The Affiant has annexed articles from Love Fm News with reported statements from the Honourable John Briceno, Prime Minister of Belize on 12th July 2023[4], the Honourable Cordel Hyde, Deputy Prime Minister on 13th July 2023[5] and Julius Espat, Area Representative, Cayo South on 13th July 2023[6]. Mr. Enrique deposed as follows:

> "11. That based on statements made by the Chairman of the Elections and Boundaries Commission in the Executive Summary of the Commission's Redivisioning Report indicating that a 25% to 35% deviation from the national mean of registered electors is proposed, it is clear to me that the deviation in the number of electors among the Electoral Divisions far exceeds the international threshold of 10% recommended by the court appointed Expert Witness."

[27] The applicants contend that the respondents did not adhere to the contents of the Expert Report in the proposals contained (EBC report) in the report to the National Assembly. At this juncture, it is important to be reminded of the provisions of **section 90 of the Constitution**. In addition to the voter distribution, the EBC must, in making proposals to the National Assembly, take into consideration transport and other facilities and physical features of the division.

Section 90 of the Constitution of Belize states:

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[4] Hon. John Briceno, Love FM News:"Raising grave concerns because one of the reasons why we had to go to redistricting exercise is to ensure that we can keep the percentages, the variances between different divisions I think within 15 percent, I think that's the worldwide average. I think that's they're trying to best, how best they could accommodate or to get this done. It seems that they did not manage to do that all over. There's still areas like Belmopan, Stann Creek, Cayo District, San Pedro, where we still have these huge variances and so we have already expressing some concerns about that. So we will be able to discuss that."

[5] Cordel Hyde, Love Fm News: "We have some major concerns. You know we had a major concern with the, I believe it's the deviation rate, I think. …. Its the deviation rate that that proposal is looking at 25 percent when globally, across the world, the acceptable rate is somewhere closer to 15 percent. So that immediately sent off alarm bells. We also want to be in compliance with the Constitution that says each constituency, each division is supposed to have as close a number as possible equal numbers as possible in terms of electors. That's what we want. And what we saw on Tuesday did not pass that smell test. So ultimately this thing will, the Commission will end up having to have a do-over but that's where we are, that's our initial reaction to it, we just didn't like what we saw."…..

[6] Julius Espat, Love FM News: "My concern is equitable distribution. If we are going to do this exercise, you have to follow international norms that determines what your range is and you can't play with it…."

"90 (1) The Elections and Boundaries Commission shall, after considering the distribution of the population throughout Belize, make proposals from time to time for dividing Belize into electoral divisions in such a way that –

(a) each electoral division shall have as nearly as may be an equal number of persons eligible to vote;

(b) the total number of electoral divisions shall be not less than twenty-eight.

(2) In fixing the boundaries of electoral divisions the Commission shall have regard to the transport and other facilities of the division, and to its physical features.

(3) The proposals of the Commission made pursuant to this section shall be laid before the National Assembly by the Chairman of the Commission, and the electoral divisions specified in those proposals shall be the electoral divisions of Belize for the purposes of any law for the time being in force relating to the election of members of the House of Representatives when, and shall not be such electoral divisions until, enacted as law by the National Assembly.

(4) When the Elections and Boundaries Commission considers it necessary to increase the number of electoral divisions as specified in subsection (1), it shall make proposals to the National Assembly, and the National Assembly may enact a law to give effect to such proposals, with such amendments and modifications as may seem appropriate to the National Assembly."

[28] Paul Marcel Morgan deposed in his affidavit in support of the application as follows:

"7. That the recommendations and proposals in the said Redivisioning report do not comply with section 90(2) of the Belize Constitution in that there exist a clear bias where 100% of the divisions in the Belize city area covering only 14 square miles have voter populations that are below the national mean while having an overwhelming advantage in transportation and other facilities over all other divisions in Belize."

[29] The respondents through the EBC chairman stated that in the process of redistricting, they consulted with the Expert Report as per paragraph 4 of the Schedule to the Consent Order. It was further pointed out that the EBC was only required to consult the guidelines in the Expert Report, but was not bound by it. The

EBC chairman stated that Paragraph 4 of the Schedule to the Consent Order is not contrary to **section 88(14) of the Constitution**.

Section 88(14) of the Constitution provides:

> "(14) In the exercise of functions, the Commission shall not be subject to the direction or control of any other person or authority and shall, subject to provisions of this Constitution, act in accordance with the Representation of the People Act, Cap. 9, or any other law, rule or regulation relating to elections".

[30] It now falls to be considered whether the Defendants have consulted the guidelines in the Expert Report. Mr. Sabido did not expand on the issue of consultation with the Expert Report, but stated that it had been done and that the EBC was not bound by it. In fact, the EBC established a task force of 5 persons pursuant to section 88(12) of the Constitution. This task force advised the EBC in carrying out its functions as the EBC does not have the requisite knowledge and expertise on transportation and physical features of an area. Ms. Matute in her arguments pointed out that the EBC has primarily to consider the provisions of the Constitution in arriving at is proposals. Counsel highlighted that the Expert Report was based on voter population distribution and it had not taken into consideration the factors in the Constitution such as transportation and other facilities and the physical features of the area. The EBC report also does not expand into the details of its consultation with the Expert Report, but did list it as one of the considerations in making its proposals.

Consultation:

[31] Although the matter of **National Carnival Bands Association of Trinidad and Tobago v Dr. Nyan Gadsby-Dolly, the Minister of Community Development, Culture and the Arts and Trinidad and Tobago Carnival Bands Association**[7]**,** is a judicial review application**,** it may provide some guidance on consultation. In this matter, there was a challenge to the quality of the consultation in that it was alleged

[7] Claim No. CV 2018- 03359 (Trinidad and Tobago)

that it fell below the standard required by the Minister, having regard to the background of the National Carnival Bands Association and its lengthy representation on the board of the National Carnival Commission. Similarly in this matter, the applicants question the quality of consultation made by the EBC with the Expert Report. Kokaram J (as he then was) stated:

> "112. Where a decision maker conducts a consultation exercise voluntarily (despite not being subject to a duty to engage in consultation) the consultation process must be carried out properly. The proposition in R. v North and East Devon HA ex p Coughlan [2001] QB 213 is that even though a body is under no duty of consult, if that body embarks on a process of consultation, it will then be taken to be subject to a duty to comply with the full requirements of lawful consultation:
>
> '108. It is common ground that, whether or not consultation of interested parties and the public is a legal requirement, if it is embarked upon it must be carried out properly. To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken: R v. Brent London Borough Council, Ex p. Gunning (1985) 84 LGR 168.'
>
> 113. The 'Gunning requirements' are a useful summary of some key features of a lawful consultation process: See R v Brent LBC ex p Gunning [1985] 84 LRG 168, QBD:
>
> ……..
>
> (iv)The decision maker gives conscientious consideration to consultee's responses.
>
> Where a public authority charged with a duty of making a decision promises to follow a certain procedure before reaching that decision, good administration requires that it should be bound by its undertaking as to procedure provided that this does not conflict with the authority's statutory duty (Attorney General for Hong Kong v Ng Yuen Shiu [1983] 2 AC 629, [1983] 2All ER 346, [1983] 2 WLR 735, especially at p 638 G)[8]."

[8] Claim No. CV 2018- 03359 (Trinidad and Tobago) p. 46 para 110(8)

In order to examine whether the EBC consulted with the Expert Report, I will now consider the contents of both documents.

The Expert Report

[32] The Interested Party procured Sean Patrick Trende to prepare an expert report that:

(a) "provides "an objective view as to whether the electoral divisions as presently defined and constituted are sufficiently equal or malapportioned; assess(es) the impact of any malapportionment; and …identify(ies) and quantify(ies) discriminatory effects, if any raising therefrom."

(b) identifies "international standards of democracy and express(es) a view as to whether the electoral divisions as currently defined and constituted meet those standards and demonstrate(s) the extent of any non-conformity or non-compliance with such standards."

(c) present "suggestions for the re-drawing of electoral boundaries so that any malapportionment or discriminatory effects of malapportionment or non–conformity or non-compliance with international democratic standards are avoided or cured and set(s) forth the advantages and disadvantages of each suggestion.""

[33] Mr. Trende expressed his view that he was required to do three distinct tasks:

(1) Identifying international standards of democracy;

(2) Identifying and assessing the impact of any malapportionment to determine if the present electoral divisions of Belize comply with these international standards; and

(3) Providing suggestions for the re-drawing of boundaries.

[34] In the Executive Summary the following observations should be noted:

(1) The particular standards utilized vary across nations and organisations. Most international organisations urge countries to draw electoral

boundaries such that as the maximum deviation is 10%, with an additional allowance for districts drawn over sparsely populated areas.[9]

(2) Overall, most countries seem to employ an allowable deviation of between 10% and 15%.[10]

(3) The degree of malapportionment present in Belize today far exceeds any threshold suggested in other countries, or by international standards.[11]

(4) Using the 10% deviation standard suggested by international organizations, only four of Belize's current electoral divisions are not severely malapportioned. Even utilizing the most liberal standard employed in South Korea, 71% of Belize's electoral divisions are severely malapportioned.[12]

(5) Fortunately, these deviations can be addressed, and can be addressed in very short order. Although I had difficulty obtaining the requisite information from governmental entities, notwithstanding the fact that these entities had much of the information that I desired, I was nevertheless able to produce maps that substantially ameliorate the malapportionment in the country. With access to better information, it would be possible to draw divisions even more in line with international norms.

(6) …international standards of democracy emphasize the importance of equally populated divisions. This secures the right to vote by helping to ensure that no vote counts more than any other votes. Permissible deviations vary by country, but center on a range of 10% to 15%. Larger

[9] Paragraph 5 of Executive Summary – Expert Report
[10] Paragraph 9 of the Executive Summary - Expert Report
[11] Ibid Paragraph 10
[12] Ibid Paragraph 12

deviations are sometimes allowed in remote or sparsely populated areas.[13]

(7) …passive malapportionment in Belize is extreme, under any existing standard for malapportionment. It exceeds even the threshold that prompted the Supreme Court to act in *Wesberry*.[14]

(8) In short, malapportionment in Belize is severe, to the point where it "debase[s] the weight of the [electors'] votes." Wesberry, 376 U.S. at 4. It would be difficult to consider elections held under these maps consistent with international standards of democracy.[15]

[35] Under the third task, the expert drew 3 maps for the realignment of the electoral boundaries. He indicated that Map 2 was the preferable map.

> "Map 2 respects district boundaries and attempts to redistribute divisions more equitably both among and within districts. This naturally produces a larger variation in population, but the within-district variations are reduced, and overall malapportionment is substantially less severe. This map awards 8 divisions to the Cayo District and 9 divisions to Belize District and is sometimes referred to as the '8/9 Cayo/Belize' map."

[36] Based on international standards referred to in the Expert Report, it was found that there was severe malapportionment in many of the 31 districts based on population distribution. Mr. Trende drew maps as suggestions for the redistricting.

The EBC Proposal

[37] The EBC proposal has been put into evidence through its chairman as exhibit "OS2".

The proposals in the Executive Summary are as follows:

> "The proposals of the Commission, detailed in Chapter 5 and emanating from the Situation Analysis, are summarised as follows:
>
> - That the total number of electoral divisions remain at 31.

[13] Ibid Paragraph 103
[14] Ibid Paragraph 105
[15] Ibid Paragraph 117

- That a national mean of registered electors, (threshold limit), with a deviation of (+/-) 25% from the national mean, be applied to allow for up to 25% increase or decrease in the number of registered electors in all electoral divisions, except Belize Rural South, where a deviation of (+/-) 35% is proposed.

- That 2 electoral divisions in Belize District be eliminated, decreasing the total from 13 to 11. The reduction would be achieved by consolidating electoral divisions in Belize City, thereby reducing the number from 10 to 8.

- That 1 electoral division be added to the Cayo District, increasing the total number from 6 to 7. The expansion would be achieved by the addition of a new electoral division in the City of Belmopan and surrounding villages.

- That Corozal District maintain its 4 electoral divisions.

- That Orange Walk District maintain its 4 electoral divisions.

- That 1 electoral division be added to Stann Creek District, increasing the total number from 2 to 3.

- That Toledo District maintain its 2 electoral divisions.

- That the proposal for the 31 electoral divisions and adherence to the (+/-) 25%/35% threshold limit be accepted. This would demonstrate, a commitment to the as nearly as equal principle; ensure effective representation with consideration for transport and other facilities, physical features and access to facilities; and ensure that the votes of all registered electors carry equal weight in shaping democratic outcomes."

[38] For the purposes of the issues in this matter, the evidence is that the EBC established the mean which was 6107 voters and the total number of registered voters as of March 2023 was 189,306.

[39] On the issue of consultation, I have reviewed chapter 1 of the EBC Report (proposals) and it has listed "the Trende Report" as one of its considerations. This, in my view is clear evidence that the EBC did take the Trende Report/ Expert Report

into consideration in developing report with the proposals. This is also the evidence of the Sabido affidavit[16].

[40] From the **Gadsby Dolly** matter (supra) which points out the **Gunning** requirements on consultation, it speaks about "conscious consideration to the consultee's responses". This is provided that the consideration does not offend or conflict with the EBC statutory duty. The EBC is bound by the Constitution in section 90 to perform its statutory duties in a certain way.

[41] I have noted the EBC proposals and the Expert Report. I find that the EBC consulted with the Sean Trende Report/ Expert Report in arriving at its proposals submitted in its report laid in the National Assembly. I find that the respondents are in compliance with paragraph 4 of the Schedule to the Consent Order.

[42] **Paragraph 3 of the Schedule to the Consent Order:**

> "The First Defendant shall cause the preparation of a draft bill pursuant to section 90 of the Belize Constitution to amend the First Schedule of the Representation of the People Act to reflect the recommendations of the Elections and Boundaries Commission as made in its said report, and the Election and Boundaries shall lay the proposals before the National Assembly before July 31st 2023."

At paragraphs 11-13 of the Sabido affidavit, he stated that the Attorney General had caused to be drafted a bill in accordance with the EBC recommendations for re-districting as required by Section 90(3) of the Constitution to amend the Schedule to the ROPA. Thereafter, the National Assembly may enact a law to give effect to such electoral divisions in the Report. He went on to say that the draft bill had been submitted to Cabinet on 9th day of January 2024.

[43] In his second affidavit, Mr. Sabido, in paragraph 6 indicated that the Attorney General's Ministry on May 24th 2024 caused the Representation of the People (Amendment) Bill 2024 to be placed on the Orders of the Day for the next sitting of

[16] Affidavit of Oscar Sabido filed on 19th January 2024

the House of Representatives. He further informed that the said Bill was presented in the House of Representatives by the Minister of Public Service on May 30th 2024.

[44] I find that paragraph 3 of the Schedule to the Consent Order has been complied with by the respondents. There can be no dispute about that.

The Application

[45] The applicants argue that the EBC report (proposal) appears not to be compliant with the provisions of the Constitution. The applicants complain that the proposed Schedule 1 to the ROPA are contrary to the Constitution as the variances are in some districts higher or lower than the international standard identified in the Sean Trende Report/Expert Report. As a result, they have filed the instant application for enforcement.

[46] Counsel for the defendant argues that the application was misconceived. The instant application was filed pursuant to certain rules namely Rule 27.7 (3), (4); 1.1 (2) (b), (c), (d) and paragraph 2 of the Consent Order, the liberty to apply provision which I will address later on.

Enforcement of Consent Orders Generally

[47] In the Trinidadian case of **Kisundya Soogrim v Indar Singh**[17], Mr. Justice Kokaram discussed the nature of Consent Orders. The following paragraphs are noteworthy:

> "6. The consent order entered represented a final order compromising the claim in its entirety. Bowen LJ curtly summarised the effect of a compromise in the following terms: 'As soon as you have ended a dispute by a compromise you have disposed of it (Knowles v Roberts (1888) 38 Ch.D. 263 page 272.)'. In a pure sense, the consent order is premised on a contract made between the parties with the consent order being evidence of that contract. See paragraph 63.11 **Blackstone's Civil Practice 2016**. The issues of law or fact which formed the subject matter of the dispute are now 'buried beneath the surface of the compromise' and the Court would not allow them to be resurrected (The Law and Practice on Compromise by

[17] Claim no. CV 2015-03713

David Foskett, 5th Edition, para 6-01). This principle of law is premised on two principles of public policy: The need for there to be an end to the dispute and the desirability that parties are to be held to their bargain. The termination of their dispute by compromise now represents an entirely new set of circumstances that arises between the parties giving rise to a new cause of action. See McCallum v Country Residences Ltd [1965] 1 WLR 657 at 660.

……

17. One effect in law of this consent order (being a genuine consent order) is that it represents a real contract by the parties having been entered which is binding on both parties until it is set aside. However, fresh proceedings must be commenced if it is sought to set aside a final judgment order by consent. See The Law of Practice and Compromise by David Foskett, 5th Edition, page 110, Huddersfield Banking Co Ltd v Henry Lister & Son Ltd [1895] 2 Ch 273, Kuwait Airways v. Iraqi Airways [2001] 1 Lloyd's Rep 161, Hassim Mohammed v Safferan Balkaransingh H.C. 2370/2007. As Jones J observed in Joash Morris v Curtis Johnson and Capital Insurance Limited CV2007-00987 "Once a judgment or order is entered the Court's jurisdiction in the action is at an end. The Court is 'functus officio'. No appeal to the Court's inherent jurisdiction can salvage an application to set aside a final order made by consent. In Halsbury's Laws of England 4th Edition Vol 37 page 286 para 390:

> 'Once a consent judgment or order has been entered or passed it cannot be set aside by the Court of first Instance in the original action even if it was entered by mistake, but it may be set aside or extended or altered with the consent of the parties. …It may also be set aside in a fresh action brought for that purpose on any ground which may invalidate the agreement on which it is founded. …'"

[48] It should be noted that the aforementioned passages relate to general consent orders. As Mr. Justice Kokaram stated at paragraph 8 of the judgment, "In this case the parties elected to reduce the compromise in the terms of an order and **did not elect to utilise the mechanism of a Tomlin Order**." Again, at paragraph 12 of his judgment, he observed: "…The parties elected to inform the Court that they had arrived at an agreement, to disclose its terms and make it an order of the Court. **They did not choose the option of entering a "Tomlin order"** nor state that there was a settlement on "counsel's brief". The agreement as reflected in the Court's order represent a valid, binding and enforceable order and an undoubted compromise of the entirety of the parties rivalling claims".

[49] In **Baptiste-Primus v Harrison and Ors**[18] there was an application to vary and replace a consent order. The claimant in that matter also sought to enforce an order for prescribed costs. The court was of the view that the aspect of enforcement of the costs order though the application filed was inappropriate and amounted to an abuse of process (Paragraph 9 of the judgment). At Paragraphs 10-11 of the judgment, Seepersad J highlighted:

> "10. The provisions of the Civil Proceedings Rules 1998 (as amended) ("CPR") are clear and unequivocal as to the various processes of enforcement that are available to a litigant and in this regard and in relation to this particular issue, it is inappropriate and unacceptable to invite the Court to deal with the issue of enforcement of a prescribed costs order in the manner in which the Claimant has invoked the Court's jurisdiction.
>
> 11. The issue as to whether she was paid the requisite prescribed costs must be determined by the filing of the appropriate enforcement application and not pursuant to an application to vary the existing consent order."

The judgment went on the deal with variation of a consent order. The Learned Judge also referred to **Soogrim v Singh (supra)** in this regard.

[50] Seepersad J, in **Baptiste-Primus** referred to the Jamaican case of **Leslie Williams v Teleith Williams**[19] which summarized at paragraph 85 of that judgment the principles from numerous cases on **variation of consent orders** and which I would also repeat:

> "85. … (iv)Where parties to a claim enter into a compromise agreement, that agreement supersedes the claim. Where there is a failure to comply with the terms of the compromise agreement, the injured party must seek his remedy by bringing a fresh action to vary or set aside the compromise agreement: Green v Rozen and others [1955] 2 ALL ER 797.
>
> (v.) Where parties to a claim arrive at a settlement agreement which is in the nature of a contract and that agreement is made the subject of a consent order made by the court, that order is enforceable by application for enforcement of the order without resort to a fresh action on the agreement:

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[19] [2022] JMCA Civ 30

Patrick Allen v Theresa Allen. Such an order will not be interfered with by the court, unless on grounds which would vitiate a contract and a fresh action will have to be brought to set it aside on those grounds: Purcell v Trigell; Siebe Gorman and CoLtd v Pneupac Ltd.

(vi.) Where a consent order embodies a contract between the parties, and as drawn up, it requires clarification or interference by the court for the proper working out of the existing terms of the order, the court may intervene under the "liberty to apply" provision expressed or implied in the agreement. Possibly, only in exceptional circumstances or an unforeseen change in circumstances, will a court be justified in using the "liberty to apply" provisions to vary or alter the terms of the order: Causwell v Clacken; Cristel v Cristel.

(vii.) Consent orders which embody a real contract between the parties will, generally, not be interfered with but under the "liberty to apply" provisions, terms may be implied in the contract or it may be varied only where it is necessary to provide a mechanism for the proper working out of the consent order: Causwell v Clacken.

(viii.) Consent orders may be interfered with under the wide powers given to the court under the CPR to extend time, but possibly only where it does not embody a real contract between the parties, or rarely, where there is a real contract between the parties, and it is appropriate to do so. This, however, will only be for the purpose of imposing or extending time where the provisions of the order can accommodate it: Ropac; Chaggar v Chaggar; Pannone and Safin."

[51] Again, like in **Soogrim,** the aforementioned principles are in relation to general consent orders and not the specialized Tomlin Order. Additionally, there are a few other things to be borne in mind when dealing with the case of **Baptiste-Primus:**

(i) First, the claimant contended that the order she sought to enforce was a "Tomlin order" as the proceedings were stayed on terms set out in the Schedule to the Order and she suggested that the Schedule existed as a binding contract between the parties. However, the judgment of Seepersad J did not touch on any special considerations for enforcement of a Tomlin Order. Apart from the excerpt from **Leslie Williams,** the judgment of Seepersad J also did not make reference to the "liberty to apply" provision. This may

be because the order that the claimant sought to enforce did not contain a "liberty to apply" provision.

(ii) Further, what the claimant was trying to enforce was an order for prescribed costs against the defendants. This is different in nature from what the Claimants in the present case are seeking to enforce. They are not seeking to enforce payment of a monetary amount as was the case in **Baptiste-Primus.**

Tomlin Orders

[52] **Kodilyne and Kodilyne, The Commonwealth Caribbean Civil Procedure,** Third Edition at pp 202-203 provided as follows on **Tomlin orders:**

> "A Tomlin order is a consent order staying proceedings upon terms, agreed between the parties, which are scheduled to the order. Such an order is particularly useful (a) where complex terms of settlement are agreed, (b) where the parties wish to avoid publicity of the agreed terms, or (c) where they wish to agree terms which extend beyond the boundaries of the action.
>
> The order should be drawn thus:
>
> And the claimant and the defendant having agreed to the terms set out in the annexed schedule, it is ordered that all further proceedings in this action be stayed, except for the purpose of carrying such terms into effect. Liberty to apply as to carrying such terms into effect.
>
> The effect of a Tomlin order is **to stay the action whilst at the same time keeping it alive as between the parties for the sole purpose of enabling any party to apply to the court to enforce the agreed terms.** It is not part of the judge's function to approve or disapprove the terms of the agreement, and he has no power to make such an order in terms other than those agreed, though the court has an inherent power to rectify a Tomlin order which, by mistake, does not reflect the parties' true agreement.
>
> **In the event of breach of the agreed terms, the action can be restored under the 'liberty to apply' and an order obtained requiring compliance by the defaulting party. Provision in the schedule can be enforced even if they extend beyond the boundaries of the original action.**"

[53] In the instant case, the Consent Order dated 11th November 2022 fits the definition of a Tomlin Order as it stays proceedings upon the terms set out in the Schedule. It also contains the 'liberty to apply' provision to bring those terms into effect. The following authorities are also instructive on the nature of Tomlin Orders.

[54] **In <u>Regina (WWF-UK and others) v Secretary of State for Environment, Food and Rural Affairs and another</u>** [2021] EWHC 1870 (Admin) it was stated as follows:

> "33 In my judgment, the claimants are correct to submit that the CO **was not a simple consent order which brought the claim to an end on agreed terms incorporated in an order of the court.** Instead, the claimants correctly characterize the CO as akin to a Tomlin order, first proposed by Tomlin J in Practice Note (Consent order) [1927] WN 290, and now embodied in CPR r 40.6(3)(b)(ii). The helpful commentary in Civil Procedure 2021, vol 1, at p 1586, CPR r 40.6.2 (part of which was approved in Community Care North East v Durham County Council [2012] 2012] 1 WLR 338) analyses the authorities and draws out t**he key features of a Tomlin order, as follows**:
>
> *(i)* When terms of settlement are reached, the proceedings are stayed on agreed terms which are scheduled to the order, save for the purpose of carrying such terms into effect.
>
> *(ii)* **The agreed terms in the schedule are not part of the order, and cannot be directly enforced as if they were an order of the court. In the event of an alleged breach of the agreed terms, a further application to the court for an enforcement order is required** (Community Care North East v Durham County Council, per Ramsay J at paras 23–26). **However, neither fresh proceedings nor an amendment to the pleadings are required** (Bostani v Pieper [2019] 2019] 4 WLR 44, per Jacob J at para 57).
>
> *(iii)* The agreed terms in the schedule are a binding contract between the parties. Applying contractual principles, the terms may be capable of rectification or may be held to be unenforceable, but generally, in the absence of express provision, they cannot be varied or set aside by the court (Community Care North East v Durham County Council, per Ramsay J at paras 24, 28–36).

(iv) If the terms in the schedule are too vague, the court may decline to enforce them (Wilson & Whitworth Ltd v Express & Independent Newspapers Ltd. [1969] 1969] 1 WLR 197).

(v) The terms in the schedule must be construed as a commercial instrument, not to probe the real intentions of the parties, but to ascertain the contextual meaning of the relevant contractual language. The inquiry is objective: the question is what a reasonable person, circumstanced as the actual parties were, would have understood the parties to have meant by the use of specific language. The answer is to be gathered from the text and its relevant contextual scene (Sirius International Insurance Co (Publ) v FAI General Insurance Ltd. [2004] 1 WLR 3251, per Lord Steyn at para 18).

(vi) **Where the scheduled terms are clear, an order to give effect to them can be obtained, notwithstanding that the compromise goes beyond the ambit of the original dispute and the provision sought to be enforced is an obligation which arose for the first time under the compromise (EF Phillips & Sons Ltd v Clarke [1970] Ch 322, per Goff J at p 325f–g).**

(vii) As the agreed terms in the schedule are contractual in nature, a limitation period of six years applies from the date of breach (Bostani v Pieper)."

[55] In the following passage from **Vision Express (UK) Ltd v Wilson and another** [1995] 2 BCLC 419 at 426, Knox J in the Chancery Division stated as follows:

> "So far as Tomlin orders are concerned it is fairly trite law that the schedule to the order contains terms which do not of themselves constitute an order of the court. And it is from that that one derives the well-known proposition that one cannot apply to commit a person who has failed to comply with the terms of a Tomlin order. There has to be a further order made before any application to commit can be properly launched. It is also on that basis that the court pays no attention, unless one or more of the parties to the proceedings is under a disability, to what goes into the Schedule. That is accepted as being a matter for the parties themselves and therefore the court has no power to interfere with the terms that are contained in the Schedule. The Supreme Court Practice 1995 vol. 2, para 4616, p 1456 contains this:

'If the terms which are scheduled to a consent order in the Tomlin form are too vague or not sufficiently precise the court will decline to enforce them under the liberty to apply contained in the order' [and there is a reference to a case to which I was not referred] 'but on an application strictly to enforce the terms embodied in the Tomlin order and the Schedule, an order to give effect to those terms may be obtained under the liberty to apply in the original action, notwithstanding that they go beyond the ambit of the original dispute and could not have been enforced in the original action and even if the obligation did not then exist but arose for the first time under the compromise' and there is a case to which I was given the reference as authority for that, E F Phillips & Sons Ltd v Clarke [1969] 3 All ER 710, [1970] Ch. 322, and that proposition was not challenged. So jurisprudentially speaking the effect of a Tomlin order is that it is a contract between the parties which is incorporated into a court order staying the proceedings, and the effect of the court order is to provide, in a suitable case, for a more expeditious form of enforcement than would be available to the parties if all they did was to have a contract without going near the court. But essentially it is a contractual operation."

[56] With respect to enforcement of Tomlin Orders, in **E F Phillips & Sons Ltd and Others v Clarke [1970] Ch 322**, it was held:

> "…that where, as here, there was an order in the normally appropriate form, with a qualified stay and liberty to apply, and the application to the court was strictly to enforce the terms embodied in the order and schedule, an order giving effect to those terms could be obtained under the liberty to apply in the original actin, notwithstanding that they might go beyond the ambit of the original dispute and could not have been enforced in the original action."

[57] Though **E.F. Phillips & Sons Ltd and others v Clarke** (supra) is of some vintage, it was recently cited with approval in 2021 by the Queens Bench Division of the England and Wales High Court in **Trebisol Sud Ouest Sas and another v Berkley Finance Ltd and others [2021] All ER (D) 26 (Sep):**

> *"Accordingly, the present court could enforce the terms of the schedule embodied in the settlement agreement by way of the liberty to apply provisions in the Tomlin order; and the court was not concerned by the fact*

that the amount agreed therein might have gone beyond what might have been directly recoverable in the original action" (see [78] of the judgment).

[58] The earlier case of **Dashwood v Dashwood [1927] WN 276** (which was referred to in the judgment of **E.F. Phillips & Sons Ltd** (supra) is instructive as to the remedies that a Court can make for breach of the terms of the Schedule to a Tomlin Order. In **Dashwood v Dashwood** (supra) by a consent order made in the plaintiff's partnership action against the defendants, all further proceedings were stayed 'except so far as may be necessary for the purpose of carrying this order and the terms agreed between the parties and set out in the schedule hereto into effect'. The scheduled terms confirmed the defendants' right to purchase the plaintiff's share in the capital, goodwill and assets of the partnership. The Chancery Division held that the court was staying the action on terms which the parties agreed, and only keeping it alive to the extent necessary to enable any party thereafter to enforce the terms. Accordingly, the terms in the schedule were not an order of the court which ought directly to be enforced by proceedings for contempt. **The proper course was to apply for specific performance or an injunction and then to base proceedings for contempt on any subsequent breach.**

Liberty to Apply

[59] The application states that it was made pursuant to paragraph 2 of the Consent Order - "Liberty to apply as to carrying such terms into effect."

[60] In the case of a general Consent Order, Kokaram J. (as he then was) had this to say in **Soogrim**:

> "(31) The Court retains a wide jurisdiction to work out the mechanics of its orders. ……It is clear by this consent order that the necessity for subsequent applications were foreseen by the parties expressly reserving a 'liberty to apply'. This declaration permits persons having an interest under the judgment to apply to the Court touching their interest in a summary way without setting the case down. While the Court would not have the jurisdiction to alter or vary rights accrued under the order it retains the jurisdiction to deal with matters which arise in working out the order or varying its terms where there is a change in circumstances. See *Poisson and Woods v Robertson and Turvey* (1902) 50 WR

260 CA. *Cristel v Cristel* [1951] 2 KB 725 and Halsbury Laws of England paragraph 1602 VOL 12 A. Although *Cristel* dealt with matrimonial proceedings, the principle that a court can vary the terms of a consent order in limited circumstances is of general application. It also accords with the wide discretion of the Court under the CPR as discussed in *Roper* (Ibid). In *Cristel*, in addressing the scope of the express liberty to apply, Sommervell LJ stated at 728 that:

> 'Liberty to apply' is expressed, and if not expressed will be implied, where the order drawn up is one which requires working out, and the working out involves matters on which it may be necessary to obtain the decision of the court. Prima facie, certainly, it does not entitle people to come and ask that the order itself shall be varied."

Denning LJ further went on to say at 731 that:

> "If there were an unforeseen change of circumstances, for instance, if the wife were left by will another house, or if she took an adulterer to live with her in this house, I should have thought that the 'Liberty to apply' would enable the court to remedy the position."

(32) In **S v S (Ancillary Relief: Consent Order)** [2002] EWHC 223 (Fam), [2003] Fam 1, [2002] 1 FLR 992 the Court had to consider the basis on which the terms of an ancillary relief order on divorce could be varied. There was a consent order and Bracewell J stated as follows at paragraphs 4 and 5:

> "The authorities cited before me demonstrate that the grounds for setting aside a consent order fall into two categories.
>
> > (1) Cases in which it is alleged there was at the date of the order an erroneous basis of fact e.g. misrepresentations or misunderstanding as to the position or assets.
> >
> > (2) Cases in which there has been a material or unforeseen change in circumstances after the order so as to undermine or invalidate the basis of the consent order, as in *Barder v Barder* [1988] AC 20, and known as a supervening event.
>
> In many of the decided authorities, contractual terms such as 'fraud' and 'misrepresentation' are used, but it is important to remember that court orders for financial provisions in matrimonial proceedings derive their authority not from the agreement of the parties but from the approval of the court and the resulting consent order: see *Jenkins v Livesey* [1985] AC 424 and *Xydhias v Xydhias* [1999] 2 All ER 386."

(33) Gray J's judgment in **Fivecourts Ltd v Jr Leisure Development Co Ltd** (2000) 81 P & CR 292 is also instructive on the jurisdiction of the Court to "interfere" with a consent order. In that case which concerned a dispute between landlord and lessee in relation to

the execution of repairing covenants a consent order was entered providing for relief for forfeiture if the work identified in the schedule of the order was carried out in three phases. In default of compliance there will be liberty to enter judgment in the action for passions. There was an express liberty to apply provision in the order. Although the Court dismissed an application by the defendants to extend the time for compliance with the order the judgment confirmed the following principles:

> "(a) the flexibility of the CPR permits the Court in appropriate circumstances to interfere with a consent order even if the consent order touches upon the substantive rights of the parties;
>
> (b) the Court will be slow to interfere with a genuine consent order which details a firm agreement between the parties as to acts to be taken with a specified time;
>
> (c) **the inclusion of the liberty to apply provision permits applications which are necessary to supervise the execution of the consent order and does not permit applications which alter substantive rights established by terms of the consent order."**

[61] With respect to a Tomlin Order, the case of **Regina (WWF-UK and others) v Secretary of State for Environment, Food and Rural Affairs and another (supra)** provides guidance. In that case, the defendants/respondents submitted that the claimants'/applicants' application to enforce a consent order was misconceived. The defendants/respondents argued that (i) the schedule to the consent order could not be enforced as if it were a Tomlin Order in a private law dispute, as it was a judicial review claim; and (ii) the consent order could not have the effect of binding the defendants to do what the law did not require them to do in 2015 or at the time of hearing of the matter in 2021. They also pointed out that no fresh complaint of unlawfulness was made. However, the England and Wales High Court disagreed with the defendants/respondents, finding that the consent order was in fact a Tomlin Order notwithstanding that it was made in the context of a judicial review/public law claim as opposed to a private law dispute. Further, the order was enforceable on application to the court without the need for a fresh claim to be commenced. As to whether the application was misconceived, the court specifically held as follows:

> ***"40** Therefore I conclude, for the reasons set out above, that the claimants' application is **not misconceived,** as the defendants allege, and the commitment in the schedule in respect of DWPPs is capable of being enforced."*

[62] In the instant case the parties are contractually bound by the terms of the consent order. This is an application to enforce the consent order. If the Consent Order in the instant case were in the general form as in **Soogrim**, then the Court making the Consent Order would have been functus officio and fresh proceedings (e.g. for breach of contract) would have been the proper way to enforce the terms of the Schedule to the Consent Order. However, as this is a Tomlin Order, in accordance with **E.F. Phillips & Sons Ltd and others v Clarke (supra)** the 'liberty to apply' provision allows for an order to be obtained in the original proceedings requiring compliance by the defendants with the provisions in the Schedule. The proceedings are reopened to give effect to the terms embodied in the Schedule as was the case in **Regina (WWF-UK and others) v Secretary of State for Environment, Food and Rural Affairs** and another (supra). However, as illustrated by unchallenged evidence, there has been compliance by the respondents with the terms of the Schedule thereto.

[63] Notwithstanding that the instant application can well be made to reopen the substantive matter which has already been resolved by a consent/Tomlin order, the reliefs sought by the applicants herein go beyond mere enforcement of the terms of the Schedule thereto. They are the substantive reliefs and are outside the remit of an application to merely enforce the terms of the Schedule to the Consent Order.

[64] The applicants seeks declarations, mandamus and injunctive relief. These are all based on the applicants' view that the consent order was breached in that the EBC proposals laid in July 2023 do not comply with section 90 of the Constitution as it suggests a 25-35 % deviation threshold from the mean. The application for enforcement is therefore seeking orders prayed for in the substantive claim. I am unable to grant such orders in these proceedings.

[65] In their bid to enforce the consent order the applicants are seeking a declaration that the Schedule to the ROPA is unconstitutional. This is outside the

remit of the application. In seeking such a declaration the applicants are trying to take the matter to a point that has passed. That stage of the matter has already concluded, these are proceedings for enforcement and not for determination of whether or not to grant the substantive relief in the main claim. I am unable to grant such a declaration on the application before me. For the avoidance of doubt even if the respondents had not complied with the Consent Order (i.e. if they were in breach of their obligations contained in the Schedule), I would still be unable to grant the reliefs sought in the application. The proper course of action would be to file fresh proceedings to obtain these desired reliefs.

[66] The applicants also ask for an order of mandamus. This is not a judicial review application. The requirements of CPR 56 have not been followed. Mandamus is a prerogative order for administrative law claims in judicial review proceedings.

[67] The Injunctive reliefs are also outside the remit of the application. These reliefs were also sought in the substantive claim. This is an attempt to have a "do over" of the substantive claim. The applicants are essentially asking this court to restrain the EBC from holding elections because they are of the view that both the current and proposed Schedule 1 of the ROPA are inconsistent with section 90 of the Constitution. As aforesaid, the application as presented is for enforcement of the terms of the Schedule to the Consent Order. If a party were in breach of any terms of the Schedule to the Consent Order, an injunction or further order of the Court could be made to direct the party in breach to comply with the terms of the Schedule (**Dashwood v. Dashwood** (supra)). However, this is not what the applicants are seeking the injunction for. The injunction which they seek is not intended to strictly give effect to the obligations contained in the Schedule. Therefore, no injunctive relief of the particular nature sought by the applicants herein can be obtained at this juncture. I refer to the relevant sections of the Constitution regarding the holding of a general election:

"Sections 85, 84 and 88 of the Constitution provide:

85(1) A general election of the members of the House of Representatives shall be held at such time within three months after every dissolution of the National Assembly as the Governor-General, acting in accordance with the advice of the Prime Minister, shall appoint.

84 (1) The Governor-General may at any time prorogue or dissolve the National Assembly.

(2) Subject to the provisions of subsection (3) of this section the National Assembly, unless sooner dissolved, shall continue for five years from the date of the first sitting of the House of Representatives after any dissolution and shall then stand dissolved.

……..

(4) In the exercise of his powers to dissolve the National Assembly, the Governor-General shall act in accordance with the advice of the Prime Minister.

88(14) The Commission shall be responsible for the direction and supervision of the registration of voters and the conduct of election, referenda and all other matters connected therewith."

[68] The importance of free and fair elections is of paramount importance in any democracy. I now refer to dicta from English and Canadian authorities on redistricting.

[69] In **Boundary Commission for England Ex Parte Foot** [1983] 1 All ER 1099 the Master of the Rolls, Sir John Donaldson had cause to discuss the role of the Honourable Court in reviewing reports of the Boundary Commission in the United Kingdom. He opined as follows:

> "When it comes to advising Parliament and the Secretary of State on these matters, it is for Parliament and Parliament alone to decide what advice, if any, it requires and the nature of that advice. Parliament has thought it right to set up independent advisory bodies, the Boundary Commissions, to advise it and, in so doing, it has given the Commissions instructions as to the criteria to be employed in formulating that advice. For good reasons, which we

> can well understand, Parliament has not asked the courts to advise it and it has not provided for any right of appeal to the courts from the advice or proposed advice of the commissions."
>
> This does not mean that the courts have no part to play. They remain charged with the duty of helping to ensure that the instructions of Parliament are carried out. *This is done by a procedure known as judicial review.* Precisely what action, if any, should be taken by the courts in any particular case depends upon the circumstances of that case including, in particular, the nature of the instructions which have been given by Parliament to the minister, authority or body concerned."[20]
>
> "It is for the appellants to satisfy us that **the Commission are doing other than faithfully obeying the instructions of Parliament**."[21]

In **Ex Parte Foot (supra),** in the context of a challenge to recommendations made by the Boundary Commission, their Lordships also opined that the Boundary Commission was under a duty in law to only consider relevant matters in the exercise of its discretion:

> "The situation of the commission differs from that of many other public authorities in that even at the very end of their inquiries and deliberations, they make no final decision; they merely make a recommendation to the Secretary of State who, after making any modifications to their report which he thinks appropriate, has to pass it on to Parliament for final approval or rejection. This distinctive nature of the function of the commission might well make the court in the exercise of its discretion more slow to intervene in regard to their activities than it would be in relation to those of many other public authorities. **Nevertheless, it has not been suggested before this court, and in our opinion could not be correctly suggested, that the Commission are above the law, in the sense that their activities are never susceptible to review by the courts**."[22]
>
> "For present purposes it will suffice to say that the Wednesbury principle would or might in our opinion **entitle the court to intervene if it was satisfied that the Commission had misdirected themselves in law, or had failed to consider matters which they were bound to consider or had taken into consideration matters**

[20] Page 1117 (b) to (c)
[21] Page 1118 (h)
[22] Page 1110 (d)

which they should not have considered. It would not, however, entitle it to intervene merely because it considered that, left on its own, it might (or indeed would) have made different recommendations on the merits; if the provisional conclusions of the commission are to be attacked on the grounds of unreasonableness, they must be shown to be conclusions to which no reasonable commission could have come. The onus falling on any person seeking to attack their recommendations on the courts must thus be a heavy one, which by its very nature may be difficult to discharge."[23]

[70] Reference is made to **Re Prov. Electoral Boundaries (Sask.)**, [1991] 2 S.C.R. 158 **(The AG of Saskatchewan v. Roger Carter QC and Ors.)** from the Judgment of Mc Lachlin J., giving the leading judgment in Supreme Court.

> **"**Notwithstanding the fact that the value of a citizen's vote should not be unduly diluted, it is a practical fact that effective representation often cannot be achieved without taking into account countervailing factors.
>
> First, absolute parity is impossible. It is impossible to draw boundary lines which guarantee exactly the same number of voters in each district. Voters die, voters move. Even with the aid of frequent censuses, voter parity is impossible.
>
> Secondly, such relative parity as may be possible of achievement may prove undesirable because it has the effect of detracting from the primary goal of effective representation. Factors like geography, community history, community interests and minority representation may need to be taken into account to ensure that our legislative assemblies effectively represent the diversity of our social mosaic. These are but examples of considerations which may justify departure from absolute voter parity in the pursuit of more effective representation; the list is not closed.
>
> It emerges therefore that deviations from absolute voter parity may be justified on the grounds of practical impossibility or the provision of more effective representation. Beyond this, dilution of one citizen's vote as compared with another's should not be countenanced. I adhere to the proposition asserted in *Dixon*, *supra*, at p. 414, that "only those deviations should be admitted which can be justified on the ground that they contribute to better government of the populace as a whole, giving due weight to regional issues within the populace and geographic factors within the territory governed."[24]

[23] Page 1110(j)
[24] Pages 184 to 185

Conclusion

[71] It is my finding that the respondents have complied with the terms of the Schedule to the Tomlin Order. I have considered the evidence by the parties and the oral submissions made by counsel and I thank them for their assistance. In my view, this application is only partially misconceived. I agree with the respondents in that there was compliance with their obligations in the Schedule to the Consent Order, however, that does not render the application misconceived. Based on the authorities on the Tomlin Orders such as **Regina (WWF-UK and others) v Secretary of State for the Environment, Food and Rural Affairs and another** (supra), an application to strictly enforce the terms of the Schedule to a Tomlin Order can well be made under the 'liberty to apply' provision in the order, without the need to bring fresh proceedings. The application is misconceived only insofar as the applicants have sought to go outside strict enforcement of the terms of the Consent Order to seek certain reliefs (declarations, mandamus and injunctive relief). The applicants have made heavy weather of the validity and constitutionality of the EBC proposals. The evidence of the respondents which has not been challenged tells us that the proposals were provided to the applicants. At that point when the applicants had become aware of the proposals, they had the option of filing judicial review proceedings as identified in **ex parte Foot** (supra). The authorities suggest and the applicants must bear in mind that to challenge the EBC proposals will undoubtedly be a difficult task.

[72] It is unclear on what basis CPR 27 was used to bring the application. The authorities of **ex parte Foot** and the **Saskatchewan case** emphasise and clarify the roles of the election management bodies, the parliament and the courts.

[73] Mr. Sabido swore to a second affidavit that the Attorney General's Ministry had caused on the 21st May 2024, the Representation of the People (Amendment) Bill 2024 to be placed on the Orders of the Day for the next sitting of the House of Representatives. He opined in that affidavit that the matter was otiose. I would say

that the respondents have complied with the consent order. I also have no evidence that the Bill has been passed by the National Assembly.

[74] The applicants in this matter felt aggrieved by the EBC's proposals and hence made this application. The Expert Report which was based on international standards stated that the deviations are in the range of 10 to 15 % while the EBC proposals which are now reduced into a Bill to amend the ROPA utilize a 25 to 35% deviation. There are newspaper reports on the commentary of certain parliamentarians about this. I do not attach much weight to these as they are not the official position of the Cabinet and further, the Bill is still before the National Assembly. However, this application was not the avenue to challenge those proposals.

[75] I bear in mind the guidance of the court in **ex parte Foot**. It is clear that courts must be careful in inquiring into the workings of an election management body such as the EBC. Certainly, it is not for the courts to be drawing boundary lines. The applicants alluded to political bias and I reject that assertion. Parties must be mindful in making such accusations in the absence of cogent evidence. I also reject the submission made by the respondents that the court has no place in such matters. The courts are the guardians of the Constitution and quite rightly, it is for the National Assembly to accept the proposals by the EBC and not the Court. However, the court still has a role if a proper case is mounted under section 20 of the Constitution and/or on judicial review applications of the administrative actions/ decisions of such public authorities as the EBC.

[76] By virtue of the Constitution, the EBC should ensure that boundary lines are drawn with the aim to have as much equality as possible between districts but it would be impossible to achieve absolute parity. The EBC's constitutional role is therefore vital in a democratic society. In this matter, where the parties had agreed that it was necessary for there to be an amendment to Schedule 1 of the ROPA, the applicants' cause of action was one of merit. This affects all citizens of Belize in that the applicants are trying to make sure that elections are free and fair and

that each vote has as equal weight as possible and that malapportionment is avoided or reduced. I bear in mind that this is a matter of public interest and of constitutional importance as it touches and concerns the election process. Accordingly, there shall be no order as to costs.

Disposition:

[77] I hereby order as follows:

1. The application is dismissed.
2. There shall be no order as to costs.

Nadine Nabie

Judge