[2021] JMFC Full 04

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE FULL COURT

CLAIM NO. 2018 HCV 03743

CORAM: THE HONOURABLE MR. JUSTICE C. STAMP
THE HONOURABLE MRS. S. JACKSON-HAISLEY
THE HONOURABLE MRS. A. PETTIGREW-COLLINS

BETWEEN	**ROHAN FISHER**	**CLAIMANT**
AND	**ATTORNEY GENERAL OF JAMAICA**	**1ST DEFENDANT**
AND	**ASSETS RECOVERY AGENCY**	**2ND DEFENDANT**

IN OPEN COURT

Mr. Hugh Wildman and Ms. Faith Gordon instructed by Hugh Wildman & Company for the Claimant.

Ms. Faith Hall instructed by the Director of State Proceedings for the 1st Defendant.

Ms. Alethia Whyte for the 2nd Defendant.

Heard: June 14 and 15 and September 23, 2021

CONSTITUTIONAL CLAIM- APPLICATION FOR CONSTITUTIONAL RELIEF- BREACH OF FUNDAMENTAL RIGHTS AND FREEDOMS- RIGHT TO PROTECTION OF PROPERTY FROM COMPULSORY ACQUISITION- SECTION 15 CONSTITUTION OF JAMAICA- CLAIMANT PROPERTY SEIZED BY ASSETS RECOVERY AGENCY (ARA) PURSUANT TO A CIVIL RECOVERY ORDER- WHETHER THE ORDER WAS

WRONGFULLY MADE- WHETHER THE CONSTITUTIONAL COURT IS THE PROPER FORUM HAVING REGARD TO THE CIRCUMSTANCES OF THE CASE-WHETHER THERE IS AN ALTERNATIVE REMEDY AVAILABLE TO THE CLAIMANT- ABUSE OF PROCESS- RES JUDICATA-THE PROCEEDS OF CRIME ACT, SECTIONS 3, 55(1) & (2), 57 AND 71

STAMP J

[1] I have had the benefit of reading draft copies of both of my sisters' judgments. I concur with their reasoning and conclusions and there is nothing useful that I can add.

JACKSON-HAISLEY J

INTRODUCTION

[2] This matter concerns an application by way of a Fixed Date Claim Form filed on September 27, 2018 seeking the following orders:

i. A declaration that the acquisition of the Claimant's property, situated at Lot 696, 21st Avenue, West Cumberland, in the parish of St. Catherine registered at Volume 1323 Folio 55 of the Register Book of Titles on the 6th September, 2017 by the 2nd Defendant is in breach of section 15(1)(a) of the Charter of Fundamental Rights and Freedom (Constitutional Amendment) Act 2011, in that the said property was acquired by the 2nd Defendant in breach of the Proceeds of Crime Act, 2007, and in particular, section 2 of the said Act and the Claimant has not been compensated for the said property.

ii. A declaration that the Claimant is entitled to have the said property situated at Lot 696, 21st Avenue, West Cumberland, in the parish of St. Catherine registered at Volume 1323 Folio 55 of the Register Book of Titles taken by

the 2nd Defendant, returned to the Claimant or in the alternative, that the Claimant be adequately compensated for the taking of the said property by the 2nd Defendant.

iii. Damages to be assessed for the unlawful taking of the Claimant's property situated at Lot 696, 21st Avenue, West Cumberland, in the parish of St. Catherine registered at Volume 1323 Folio 55 of the Register Book of Titles on the 6th September, 2017 by the 2nd Defendant in breach of section 15(1)(a) of the Charter of Fundamental Rights and Freedom (Constitutional Amendment) Act 2011.

iv. Such further and other relief as this Honourable Court thinks fit

v. Costs

[3] On the morning of trial, the claimant sought and was granted in the absence of objection, an amendment to delete section 2 of the Proceeds of Crime Act (hereinafter referred to as the POCA) and substitute section 55 as the section being relied on in the first declaration sought.

BACKGROUND

[4] The affidavit in support of the Fixed Date Claim Form and the 2nd Defendant's affidavit in response reveals the following facts.

[5] In 2007 the Asset Recovery Agency (ARA) filed civil recovery proceedings in this court pursuant to section 57 of the Proceeds of Crime Act (POCA) in relation to properties held by the Claimant, his mother, Deloris Miller and other individuals. The property in question is one of several properties against which the civil recovery proceedings were initiated and was owned by the Claimant but at the time of the application was occupied by his mother and was believed to be proceeds of the Claimant's unlawful conduct.

[6] Neither the Claimant nor his legal representative was present at the proceedings which took place on the 30th November 2010. The Claimant alleges that he was unaware of the proceedings and denied being served with any documents relating thereto. However, there was an Order for Service by Specified Method requiring that service on the Claimant be effected through service of the claim form and other documents on his mother. This was done on August 17, 2007 and as such the Claimant was deemed to be served by the learned judge, McIntosh J.

[7] The learned judge proceeded to hear the matter and indicated that he was satisfied that the Claimant was served and after considering the evidence placed before him concluded that the properties sought by the ARA including the subject property were obtained through unlawful conduct. Consequently, a civil recovery order was granted on February 17, 2012 against the properties of the Claimant and the other defendants including the subject property.

[8] The Claimant's mother appealed the decision of the learned judge. However, on May 9, 2016 the Court of Appeal dismissed this appeal. She then sought leave from the Court of Appeal to apply to the Judicial Committee of the Privy Council but this was also refused.

[9] On the 6th September 2017 the 2nd Defendant took possession of the property which has now been transferred to the Commissioner of Lands and a new Certificate of Title issued. Further, a purchaser was selected for the subject property and a sale agreement prepared.

[10] The Claimant alleges that having been made aware of the proceedings he filed an application to set aside the Civil Recovery Order on February 23, 2018. However, he discontinued this application. Thereafter, he filed this claim seeking constitutional relief on September 27, 2018.

SUBMISSIONS ON BEHALF OF THE CLAIMANT

[11] Mr. Wildman submitted that though it is well established by the authorities of **Maharaj v AG of Trinidad and Tobago (No.2)**[1] and **Chokolingo v AG of Trinidad and Tobago**[2] that a constitutional challenge should not be used to mount a collateral attack on a final decision where there is otherwise available adequate means of redress, this principle has been somewhat ameliorated over the years by cases coming out of the Caribbean. He relied on the authorities of **Bernard Coard v AG of Grenada, Jennifer Gairy and another v AG of Grenada**[3] and **Viralee Bailey-Latibeaudiere v the Minister of Finance and Planning, the Financial Secretary, the Public Service Commission and the Attorney General of Jamaica** [4] where the courts have taken the approach that a collateral attack can be launched in certain circumstances such as where there is a breach of a constitutional right. Counsel indicated that in these cases the courts have not been constrained by the principles of **Chokolingo v AG** so as to prevent them from delving into constitutional issues. He asserted that instead they have sought to give effect to fundamental rights by fashioning a remedy to protect these rights. He further submitted that like the above mentioned cases the court should fashion a remedy to protect the Claimant's constitutional right.

[12] Further, Counsel submitted that the proper alternative approach is not to appeal as was contended by the Defendants but instead to set aside a default judgement. He submitted that an appeal would only be in circumstances of a contested hearing. However, as the Claimant was served but was not present at the proceedings to contest it or even present when the order was made he asserted that this was not an appealable case. He relied on the cases of **Evans v Bartlam**[5]

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[1] [1978] 2 All ER 670
[2] [1981] 1 All ER 244
[3] [2002] 1 AC 167
[4] [2013] JMSC Civ. 127
[5] [1937] AC 473

and Leymon Strachan v The Gleaner Company Ltd and another[6] where the approach of the court in setting aside a default judgement was set out.

[13] However, he contended further that even the option to set aside was not available at the time the matter was brought to the Claimant's attention as the matter was far gone, that is, the property was transferred to the Commissioner of Lands, consequently the claimant would be at the mercy of the discretionary power of the Judge to set aside. Therefore, it was submitted that the Constitution was the most appropriate means of vindicating the Claimant's right to the property.

[14] It was submitted further that the granting of the civil recovery order and the further acquisition of the Claimant's property pursuant to that order was in breach of section 2 of the POCA and was not justified under section 57 of the said Act, thereby violating the Claimant's fundamental right as enshrined in section 15 of the Charter. He contended that the critical feature of section 55 of the POCA, which deals with the civil recovery regime, is that the 2nd Defendant must first show that the property in question represents proceeds of unlawful conduct before obtaining an order for civil recovery. He stated that it is only after this is established that the 2nd Defendant can then rely on section 55(3) which allows for the Claimant's properties to be confiscated even though acquired before the appointed day on May 30, 2007. However, he noted that there is a twenty years limitation period within which to bring the proceedings from the time of acquisition through unlawful conduct.

[15] Mr. Wildman also contended that the definition of criminal conduct under section 2 of the Act is subsumed in the definition given to unlawful conduct. As such, it is his contention that the time restriction on what is considered criminal conduct, that is, conduct which occurs on or after the appointed day May 30, 2007 is applicable

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[6] Supreme Court Civil Appeal No. 54/97

in the determination of unlawful conduct. The importance of the appointed day was recognized by Lord Hughes in **Assets Recovery Agency (Ex parte) (Jamaica)**[7].

[16] On that basis he contended that the 2nd Defendant would then be required to show that:

1. the Claimant had committed a crime in Jamaica, or a crime in a foreign state that is also unlawful in Jamaica prior to the purchase of the property;

2. the crime occurred on or after May 30, 2007; and

3. the Claimant used proceeds of a crime to pay for the property.

He submitted that otherwise the conduct could not qualify as an unlawful conduct for the purposes of the POCA.

[17] It was also asserted that the evidence presented by the 2nd Defendant in the civil recovery proceedings failed to establish any such breach by the Claimant of the criminal law of Jamaica or a foreign state nor did it establish the acquisition of the property by the Claimant from unlawful conduct to warrant the 2nd Defendant obtaining a civil recovery order to take the Claimant's property. He stated that the Affidavit evidence of Dean Roy Bernard relied on by the 2nd Defendant in the proceedings was the only evidence that could possibly incriminate the Claimant but contended that it too showed no evidence of unlawful conduct on the part of the Claimant. His observation was that Mr. Bernard's affidavit only provided expressions of his belief that the Claimant was engaged in unlawful conduct and that he obtained properties through this conduct without sufficient information of the said conduct. He submitted that this approach was emphatically rejected in

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[7] [2015] UKPC 1

The Assets Recovery Agency v Adrian Foga[8] where Sykes, J stated at paragraph 55 that:

> *…it is not permissible for ARA to state their belief that the property was obtained through unlawful conduct. The reason is that it is the court that must be so satisfied and this can only be done, as a practical matter, by stating some information that is sufficient to enable the court to draw that conclusion.*

[18] He further submitted that the discovery of cash in the house and other evidence of a lavish lifestyle and no known source of income to support its existence or the acquisition of the property cannot be a basis to make the order. Further, that even the Claimant's criminal conviction in the USA could not trigger a civil recovery order as it was outside of the appointed time. Accordingly, he contended there was no criminal conduct and by extension no unlawful conduct for the property to be considered as being obtained by the Claimant from unlawful conduct.

[19] Therefore, he submitted there was no basis in law for the grant of the civil recovery order which deprived the Claimant of the right to his property as provided for under the Constitution. Based on the foregoing he has asked this court to grant relief under the Constitution.

[20] In his response to the arguments of the Defendants Mr. Wildman presented the case of **Belfonte v the Attorney General of Trinidad and Tobago**[9]. He submitted that this case has demonstrated that the court will permit a collateral constitutional challenge in certain circumstances. These circumstances are where: (1) the right being asserted under the constitution is a right that cannot be vindicated under the common law, (2) there is no parallel proceedings in existence at the time of the constitutional challenge, and (3) the findings that are not in dispute will permit the

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[8] [2014] JMSC Civ 10
[9] Civ App 84 of 2004

constitutional court to grant the relief. It is his contention that there was no parallel remedy, no right of appeal and setting aside the default judgment would not provide compensation. Therefore, the Claimant would have to file a claim under administrative law or under the constitution.

SUBMISSIONS ON BEHALF OF THE 1ST DEFENDANT

[21] Ms. Hall submitted that the claim failed to disclose any proper basis for joining the 1st Defendant as a party to the proceedings. She contended that there was no evidence connecting the 1st Defendant to the matter but instead the allegations were against the 2nd Defendant for whose actions the 1st Defendant was not responsible.

[22] She further contended that the provisions of the POCA make it clear that the 2nd Defendant can sue and be sued in its own right. Section 59(3) of the POCA in conjunction with the Third Schedule provides that the 2nd Defendant has the power to start, carry on and defend any legal proceedings in respect of the property. Support for this point was also taken from **Andrew Hamilton v Assets Recovery Agency; Andrew Hamilton Construction Ltd V Assets Recovery Agency**[10] where Morrison JA in considering the legal status of the ARA and whether it could commence proceedings found that *"POCA has plainly given the ARA the authority to commence and maintain proceedings in the manner indicated*."

[23] She pointed out that the proper procedure is not for the AG to be joined as a party but for them to be served with the claim and given an opportunity to make submissions.

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[10] [2017] JMCA Civ 46

[24] On the substantive issue, Ms. Hall submitted that the Claimant's right to protection of the property from compulsory acquisition under section 15 is limited by subsection 2 which preserves the operation of any law that provides for the acquisition of property by way of penalty for breach of the law, whether it be under civil process or after conviction of a criminal offence. She contended that the very purpose of the POCA is to achieve this result.

[25] She reminded the Court that the POCA focuses on taking proceeds (real estate, cash etc.) acquired through crime and unlawful conduct so as to remove any advantage to be gained from these activities. Specifically, she submitted that the civil recovery regime under the Act authorizes the seizure of specified property as penalty for unlawful conduct. It therefore follows that if the seizure of property obtained through unlawful conduct is allowed under the Charter any taking of possession of the Claimant's property pursuant to the civil recovery order obtained under section 58 of the POCA would not be in breach of the Claimant's constitutional right to property and as such the Claimant could not be compensated for this property.

[26] Additionally, Ms. Hall indicated that the challenges to the recovery order ought to have been by way of an appeal and not by this constitutional claim. She contended that the constitutional court was not the proper court to determine the issues as to service, or whether there was evidence of unlawful conduct to justify the making of the civil recovery order and the applicability of the definition of criminal conduct and the appointed day to the definition of unlawful conduct for the purpose of civil recovery proceedings. It is her contention that this evidence is not before this court for an informed decision to be made.

[27] She also asserted that had the Claimant opted to use the other forms of redress, that is, through appeal or even the setting aside of the judgment given in the party's absence as provided for in Rule 39.6, the Court of Appeal or Supreme Court (in the case of a setting aside) would have been able to determine if the judgment was

improperly made and make several consequential orders such as compensation or even a re-transfer.

[28] Accordingly, Counsel submitted that allowing such a constitutional challenge six years after the civil recovery order was made, in the face of alternative remedies amounts to a collateral attack on the court's order and represents a misuse of section 19 of the Charter. In the circumstances she submitted that this court should decline to exercise its jurisdiction. She drew support from a number of cases such as **Beverley Pierre and the AG of Trinidad and Tobago**[11], **Deborah Chen v UWI**[12] and **Durity v AG**[13].

[29] Counsel noted that the **Beverly Pierre** case concerned a criminal matter but indicated that the constitutional principles are equally applicable as they concern the use of the constitutional redress process generally. It was argued also that although the time within which the alternative means of redress could have been utilized has passed, a constitutional claim cannot be used as a substitute without cogent explanation for his failure to avail himself of an appeal.

[30] In response to the Claimant's submission regarding the nature of the civil recovery she posited that the matter been determined on its merits, it could not be considered a default judgment which is an act which is done administratively.

[31] With respect to the **Bernard Coard** case Counsel submitted that the case is clearly distinguishable from the instant case and does not assist the Claimant's case. She highlighted that the critical distinction in that case was that there was no alternate means of redress. This she contended led to the court concluding that the constitutional court can make such pronouncements protecting the Claimant's right under the Constitution.

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[11] Claim No CV 2014 00014
[12] [2021] JMSC Civ 01
[13] [2002] UKPC 20

[32] Despite this, Counsel noted that the court in **Bernard Coard** also reaffirmed the **Chokolingo** principle. She also highlighted that another distinction is seen in the subject of the constitutional challenge. In **Bernard Coard** the claimant was attempting to challenge the constitutionality of the mandatory death sentence while in the instant case the cCaimant is not challenging the POCA but instead the interpretation of the evidence.

[33] Ms. Hall submitted that the distinction in the case of **Jennifer Gairy** is that the case dealt with compulsory acquisition of property and the right to compensation pursuant to the Grenadian Constitution. The instant claim however is dealing with the right to property under section 15 of the Charter of Jamaica which she contends is different from that provided in the Grenada Constitution because of the exception at section 15(2) in the Charter. She also noted that in that case the court also fashioned a remedy to vindicate the claimant's right but indicated this was done in the context of there being no other remedy. She submitted that the case of **Viralee Latibeaudiere** was irrelevant to the proceedings.

[34] She further submitted that the determining factor is not really the existence of a parallel remedy but where they did not pursue the remedy they must demonstrate some special feature showing that the parallel remedy would not be adequate which they have failed to do.

SUBMISSIONS ON BEHALF OF THE 2ND DEFENDANT

[35] Counsel, Ms. Whyte submitted that the first issue for the court to consider is whether the instant proceedings are an abuse of the process of the Court. If this is so determined she further submitted that the court should go no further to consider or make any determination on the substantive arguments. Instead the court should dismiss the claim with costs to the Defendants.

[36] It was also Ms. Whyte's submission that the instant claim is an attempt by the Claimant to re-litigate the civil recovery proceedings, and a collateral attack on the order of McIntosh J. She pointed out that while section 19(1) of the Charter allows a person to apply for constitutional relief without prejudice to any other action that is available to them section 19(4) maintains the inherent jurisdiction of the Supreme Court to control its processes by declining to exercise its constitutional jurisdiction and remit the matter to the appropriate court if satisfied that there are otherwise adequate means of redress. She has asserted therefore that section 19(4) allows the court to ensure that its constitutional jurisdiction is only exercised in appropriate circumstances.

[37] It was her contention that the arguments raised by the claimant in the instant claim were an inappropriate use of the court's constitutional jurisdiction as they were arguments on errors of fact and substantive law for which the remedy is in an appeal and not by making a constitutional motion. She indicated that the Claimant's main arguments were the application of section 2 of the POCA (meaning of criminal conduct) to civil recovery proceedings and also there being no evidence of unlawful conduct to justify making the civil recovery order. She relied on the case of **Maharaj v AG of Trinidad and Tobago (No.2)** in support of her contention that the Claimant's argument ought to have formed the basis of an appeal. This principle was again followed in **Chokolingo v AG; Dabdoub and Clough v The Disciplinary Committee of the General Legal Council**[14]. Even as recently as May 2021 the principles were applied in the decision of **Brandt v Commissioner of Police and others**[15] where the Privy Council discussed the issue of abuse of process. She highlighted the words of the court at paragraph 40:

> *The Board considers that giving any advice or guidance or granting any declaration is contingent on the existence of valid proceedings. If the proceedings are an abuse of the process of the court, then they*

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[14] [2018] JMCA App 33
[15] [2021] UKPC 12

> *do not satisfy that contingency. The High Court and the Court of Appeal were effectively being invited to interfere in the criminal trial process by making rulings as to the future conduct of the trial. The Board respectfully considers that if, as both the High Court and the Court of Appeal found, the administrative proceedings were an abuse of the process of the court, then no obiter comments should have been made in those proceedings as to applicable principles in relation to the admissibility of the WhatsApp data in the criminal proceedings.*

[38] Following from those authorities Ms. Whyte submitted that the Claimant in commencing these proceedings and not availing himself of the parallel remedy of appeal otherwise available to him to address his grievances had abused the process of the court. She also submitted that the Claimant had not advanced any special feature showing this remedy was not adequate so as to take the proceedings out of that category. Further, she submitted that the fact that this remedy was no longer available to the Claimant today is no excuse for instituting these proceedings and does not make the proceedings any less an abuse of process.

[39] In response to the Claimant's argument on the alternative remedy of setting aside the default judgement, she highlighted that the Claimant did try to avail himself of this remedy however, he discontinued the matter on the basis that it was risky and would possibly produce an unfavourable result. She indicated that it was on that basis the Claimant commenced the constitutional proceedings. She submitted that this was no basis on which to approach the constitutional court.

[40] In addition, Ms. Whyte submitted that the doctrine of res judicata in its wider sense applies to the arguments of the Claimant as the arguments could have been raised and be litigated upon in the civil recovery proceedings. She stated that the Claimant was properly served in the proceedings and the arguments were relevant to the subject matter of the litigation, as such they ought to have been made in those proceedings. She submitted further that the fact that the Claimant did not advance his case and has started new proceedings in respect of them is an abuse of process and he should not obtain the benefit of re-litigating the matter in the

instant claim. She examined the doctrine of res judicata in its wider sense in the cases of **Yat Tung Investments Co. Ltd. V Dao Heng Bank Ltd and another**[16]; and **Ilene Kelly v The Registrar of Titles**[17]. In **Yat Tung Investments** their Lordships had this to say at

> *The second question depends on the application of a doctrine of estoppel, namely res judicata. Their Lordships agree with the view expressed by McMullin J. that the true doctrine in its narrower sense cannot be discerned in the present series of actions, since there has not been, in the decision in no. 969, any formal repudiation of the pleas raised by the appellant in no. 534. Nor was Choi Kee, a party to no. 534, a party to no. 969. But there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings."*

[41] In responding to the Claimant's authorities Ms. Whyte's submissions were similar to that of Ms. Hall. She too contended that the **Bernard Coard Case** and **Jennifer Gairy Case** can be distinguished from the instant case. She indicated that both cases challenged the law while the instant case challenges the interpretation and application of the law by the Judge. She also submitted that the cases still lend support to all the cases of abuse of process and as such the cases of **Maharaj** and **Chokolingo** are still good law.

[42] As it relates to the argument that the definition of criminal conduct is applicable to civil recovery and the definition of unlawful conduct, Ms. Whyte argued that the definition of criminal conduct and unlawful conduct are separate and distinct and are applicable to separate regimes under the POCA. She noted that in the definition of unlawful conduct there is no mention of the word crime nor even a reference to criminal conduct.

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[16] [1975] AC 581
[17] [2011] JMCA Civ 42

[43] In fact, she highlighted that section 55(3) of the Act makes it clear that unlawful conduct is not restricted to conduct that occurred during a certain time but provides for retroactivity any time before the appointed day in civil recovery proceedings unlike in the criminal regime. Limitation is only seen at section 71(2) which provides that civil recovery proceedings must be brought within twenty years from the date the property was obtained through unlawful conduct.

[44] She indicated that the differences in the criminal and civil regimes and the inapplicability of the appointed day time restriction to civil recovery proceedings was explained by Sykes J in **Adrian Foga**. She argued further that the Court of Appeal in **Nembhard v The Assets Recovery Agency**[18] also dismissed similar arguments made by Mr. Wildman as made by him in the instant case and approved the decision in **Adrian Foga**.

[45] On that note Counsel submitted that the Privy Council decision of **Assets Recovery Agency (Ex-parte) (Jamaica)** cited by the Claimant has no bearing on civil recovery proceedings, the matter being based on criminal conduct which has the appointed day time restriction.

[46] In response to Mr. Wildman's submission that there was no evidence of unlawful conduct, counsel Ms. Whyte submitted that there were four Affidavits of Dean Roy Bernard which provided additional information on the Claimant's unlawful conduct. In addition to that the court also made specific reference to the Affidavit of a George Da Silva, a US Drug Enforcement Agent that also assisted the court in coming to it decision. The other set of circumstances that allowed the court to come to its decision were the conviction of the Claimant in 2000, the large sum of cash found in the freezer among meat, no explanation of the source of the money as well as the fact that the Claimant along with his brother being registered as unemployed

[18] [2019] JMCA App 3

and having no legitimate employment in the United States. In the circumstances, she submitted that the court had sufficient basis to make the recovery order.

[47] She also pointed out that there was still an existing parallel remedy at the time of filing the constitutional claim and that this parallel remedy was before the court at the institution of the constitutional claim.

ISSUES

[48] When the submissions are considered along with the prevailing law and the facts of the case, the emerging issues can be identified as follows:

- **Can the Court fashion a remedy under the Constitution?**
- **Is the confiscation of the Claimant's property in breach of the POCA and therefore in breach of section 15 (1)(a) of the Charter of Rights?**
- **Is there an alternative remedy available to the Claimant and has he exhausted it?**
- **Is the Claimant's application an abuse of the process of the court?**

PRELIMINARY POINT

[49] Before examining these issues, a preliminary point was raised by Counsel for the Attorney General which must be decided. This point challenged the joinder of the Attorney General as a party to the proceedings now before this court. Let me begin by looking at the provision allowing the Attorney General to be so named as a party to the proceedings. Section 13(2) of the Crown Proceedings Act reads:

> "Civil proceedings against the Crown shall be instituted against the Attorney-General."

[50] By virtue of this Act the Attorney General is the proper party to be sued where an action is brought against the Crown or a Crown Servant. In the **Attorney General**

v Gladstone Miller[19] Bingham J.A. in examining the provisions of sections 3(1)(a) and 13 of the Crown Proceedings Act said this:

> *Although claims in tort could still be brought against the Crown - servant or employee alone, once it was established that he was acting within the course or the scope of his employment, the proper defendant to be sued was the Attorney General, he being the official representative of the Crown by virtue of his office. A suit against the servant or employee alone therefore would be meaningless, as the Attorney General could enter an appearance and take over the defence of the suit. It is in this vein that section 13(2) of the Crown Proceedings Act mandates that "Civil Proceedings against the Crown shall be instituted against the Attorney General."*

[51] Turning now to the instant case. The very definition of the ARA under section 3 of the POCA indicates that it is a servant or office of the Crown. The ARA is described as the Financial Investigations Division of the Ministry of Finance and Planning or any other entity so designated by the Minister to use the powers under POCA.

[52] Counsel for the Attorney General asserted that POCA has specifically given the ARA the authority to file and maintain an action in court. This, counsel argues was accepted in the consolidated appeals of **Andrew Hamilton v Assets Recovery Agency; Andrew Hamilton Construction Ltd V Assets Recovery Agency**. I will give a brief account of this case. In this case the appellants appealed decisions of Sykes J (as he then was) in the first instance proceedings brought by the ARA against the appellants pursuant to the provisions of the POCA. These decisions dismissed the appellants' preliminary challenge to the legal status of the ARA to commence proceedings and the issue of the misuse of the Court's process by this entity. After a detailed examination of the provisions of the POCA the Court of Appeal in the judgment of Morrison JA, (as he then was) agreed with the judge's dismissal on the preliminary point. He stated his position quite succinctly at paragraph 55 of the judgment in these terms:

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[19] SCCA 95/97 (delivered on the 24th day of May 2000)

> *"In this case, as it seems to me, the various powers conferred on ARA by POCA - to apply or initiate court proceedings for forfeiture orders and other pecuniary penalty orders, restraint orders, civil recovery orders, and to take and defend proceedings in respect of property vested in it as a result of a recovery order – are clear indicators that Parliament must necessarily have intended that it should enjoy legal status for these purposes. Similarly, in my view, the reference in section 71(2) to ARA"s "cause of action", in the context of a provision relating to limitation of actions, is only explicable on the basis that Parliament intended that ARA should have the power to file and maintain an action in court."*

[53] In coming to its decision the Court of Appeal had referenced the case of **L.C. McKenzie Construction Ltd v The Minister of Housing and the Commissioner of Lands**[20] where Duffus CJ determined that although the Minister of Housing was a corporation sole under the Housing Act 1968 and could hold land, he was still a servant or agent of the Crown and even importantly was not authorized under the statute to sue or be sued in his own name. Therefore, he concluded that the provisions of the Crown Proceedings Act applied to the Minister and any suits against the Minister had to be prosecuted against the Attorney General under the Crown Proceedings Act.

[54] He also discussed **Linton Thomas v The Minister of Housing and Ivanhoe Jackson v the Minister of Housing**[21] judgment delivered 22 June 1984, in which Rowe JA (as he then was) approved the decision of Duffus CJ. He stated at page 11:

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[20] (unreported Supreme Court Suit No E200/1972) delivered 13 November 1972
[21] (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal Nos 60 & 61/1983

> *"Each statute creating a Corporation Sole must be individually examined to discover whether from its terms the Corporation Sole is empowered to sue and is liable to be sued."*

[55] At paragraph 47 of the judgment he also referred to the decision at first instance of F. Williams J (as he then was) in **Nichola Bryan and Others v St. Mary Parish Council, National Works Agency and The Attorney General**[22] F. Williams J (as he then was) considered the status of the National Works Agency which had been created under the Executive Agencies Act for the purpose of determining whether injunctive relief could be granted against the body. At paragraph 41 of the judgment F. Williams J concluded that:

> *"... where the legislature intends to accord a body a separate and distinct legal persona, with the power to sue and be sued, it does so in clear terms by using a variety of legislative provisions. That it has not done so in the creation of the NWA as an executive agency, leads to the inference that it was not the intention of the legislature to give such separate legal existence to the NWA: - it remains a part of the Ministry under which it falls, and so also remains a part of the Crown. It has no separate legal existence; but exists as a semi-autonomous body created for administrative expediency."*

[56] The decision of the Court of Appeal in **Andrew Hamilton** referred to above has clearly shown that the first step to determining whether the ARA can institute and maintain proceedings in its own name is to scrutinize the statute to discern the intent of Parliament under the POCA. It was further confirmed that under the POCA the ARA is granted the power to exist as a separate legal entity with the capacity to be a party in a private legal action. I therefore think there was no need for the Attorney General to be joined as a party to the suit where the ARA is already given

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[22] (unreported), Supreme Court, Jamaica, Claim No 2011HCV06108, judgment delivered 3 February 2012

the right to conduct proceedings and in fact to join the Attorney General as a party in these circumstances where it is unnecessary to do so may very well have implications as to cost. I also agree with the submission of Counsel for the 1st Defendant that service of a courtesy copy of the necessary documents should be done to afford them the opportunity to make submissions on the matter as the ARA is still a Government entity.

Can the Court fashion a remedy under the Constitution?

[57] Battles have been fought, wars have been declared to assert the right to property. So fundamental is this right that it is entrenched in the Jamaican Constitution and in other Constitutions throughout the region. The amendment to the Jamaican Constitution in 2011 to bring into effect The Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011 (The Charter) brought with it the preservation of the protection of property rights. Section 15(1) of The Charter embraces the protection of property rights and provides:

> *"No property of any description shall be compulsorily taken possession of and no interest in or right over property of any description shall be compulsorily acquired except by or under the provisions of a law that-*
>
> > *(a) prescribes the principles on which and the manner in which compensation therefor is to be determined and given; and*
> >
> > *(b) secures to any person claiming an interest in or right over such property a right of access to a court for the purpose of-*
> >
> > > *(i) establishing such interest or right (if any);*
> > >
> > > *(ii) determining the compensation (if any) to which he is entitled; and*

(iii) enforcing his right to any such compensation."

[58] The right to the protection of property is not an absolute one but rather is subject to not only compensation but also must be subject to the operation of law as is provided for in section 15(2) as follows:

> *"Nothing in this section shall be construed as affecting the making or operation of any law so far as it provides for the taking of possession or acquisition of property-*
>
> *(a) in satisfaction of any tax, rate or due;*
>
> *(b) by way of penalty for breach of the law, whether under civil process or after conviction of a criminal offence;*
>
> *…"*

[59] As guardians of the Constitution, judges are constantly called upon to protect fundamental rights and so the arguments of counsel for the Claimant require careful thought and deliberation. He has approached the court pursuant to its constitutional jurisdiction which is founded under section 19 of the Constitution. Section 19(1) permits any person to apply to the Supreme Court for constitutional redress and reads:

> *"If any person alleges that any of the provisions of this chapter has been, is being or is likely to be contravened in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress".*

[60] The Claimant asserts that his right to the protection of property has been contravened by the civil recovery order, which resulted in the confiscation of his property and so Counsel has called upon the court to fashion a remedy under the

Constitution. He argues that this has been done before in Jamaica, in other jurisdictions such as Grenada and in Trinidad and Tobago and that this has been sanctioned at the level of the Privy Council.

[61] The fashioning of a remedy under the Constitution gives rise to an interesting argument. It begs the question whether Judges should not only be keen to decide cases based upon a faithful interpretation of the law or whether they should be flexible in their approach when it comes to constitutional principles. After all, the Constitution is a living, breathing document which stands supreme over all other laws. This counsel, argues was the essence of the decision of the Privy Council in **Bernard Coard et al v AG**, the celebrated Grenadian case where the appellants were charged and convicted of the murder of the Prime Minister Maurice Bishop and ten others. They sought to mount a constitutional challenge as the court had pronounced the death sentence on them after they were convicted and argued that the mandatory death sentence was unconstitutional.

[62] Their Lordships in the Privy Council in allowing the appeal emphasized the principle that the Constitution is a living creature and they have to give effect to the fundamental rights if to do otherwise would result in a manifest injustice.

[63] At paragraph 33 of the judgment Lord Hoffman referred to the decision of **Hinds v Attorney-General of Barbados**[23] commenting that Lord Bingham had qualified the principle stated by Lord Diplock in **Chokolingo** with this observation:

> *"it would be undesirable to stifle or inhibit the grant of constitutional relief in cases where a claim to such relief is established and such relief is unavailable or not readily available through the ordinary avenue of appeal. As it is living, so must the Constitution be an effective instrument"*

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[23] [2002] 1 AC 854, 870

[64] The essence of the decision in **Bernard Coard** which presents an essential distinguishing feature from the instant case is that the relief that was sought was never really available to the appellants through the ordinary avenue of an appeal. Therefore, but for constitutional redress the appellants would have been without a remedy in a case where the mandatory sentence of death imposed on them was clearly found to be unconstitutional.

[65] The **Hinds** case is a seminal case in Caribbean constitutional jurisprudence and concerned two important questions, firstly, whether the denial of free legal representation breached rights guaranteed to the appellant and secondly whether if his constitutional right was breached he is entitled to a declaratory relief under section 24 of the Constitution of Barbados. Section 24(1) of the Barbadian Constitution is similar to section 19(1) of the Jamaican Constitution and provides:

> *"Subject to the provisions of subsection (6), if any person alleges that any of the provisions of sections 12 to 23, has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (of that other person) may apply to the High Court for redress."*

[66] The appellant Mr. Hinds had been convicted of the offence of arson and sentenced to eight years' imprisonment. He was unrepresented at trial. He was not afforded any legal aid. The proceedings at trial were found to be complex, there being a *voire dire* and issues regarding an incriminating statement. The appellant appealed to the Court of Appeal against his conviction on the basis that his constitutional rights had been breached as he had been denied legal representation, in particular legal representation funded by the Crown and that as a consequence he had been deprived of the right to a fair trial. His appeal was dismissed. He thereafter filed a constitutional motion in the Supreme Court pursuant to section 24 of the Constitution seeking declarations similar to what he had claimed in the Court of Appeal. His motion was denied and he appeal to the Privy Council.

[67] The Board's main concern was the appellant's claim that his constitutional right to a fair hearing was infringed by the denial of legal aid at trial. Their Lordships made the point that:

> *"The constitution is to be read not as an immutable historical document but as a living instrument, reflecting the values of the people of Barbados as they gradually change over time. But the courts, including this Board must give effect to its terms."*

[68] Despite what appeared to be an acknowledgment of the appellant's rights to legal representation being breached the Board made the point that the ordinary processes of appeal offered the appellant an adequate opportunity to vindicate his constitutional right. The Board referred to authorities such as **Maharaj v the Attorney General of Trinidad**, and **Gairy v the Attorney General of Grenada** in assessing the merits of the appellant's case. At paragraph 21 of the judgment the Board highlighted the **Gairy** case in which 'the Board sought to ensure that a party who had established a claim to constitutional relief obtained substantial legal redress'.

[69] Despite a reliance on the principle enunciated in the foregoing case, the Board in the **Hinds** case arrived at the following conclusion at paragraph 24 of the judgment:

> *"It would be undesirable to stifle or inhibit the grant of constitutional relief in cases where a claim to such relief is established and such relief is unavailable or not readily available through the ordinary avenue of appeal. As it is a living, so must the constitution be an effective, instrument. But Lord Diplock's salutary warning remains pertinent: a claim for constitutional relief does not ordinarily offer an alternative means of challenging a conviction or a judicial decision, nor an additional means where such a challenge, based on constitutional grounds, has been made and rejected. The appellant's complaint was one to be pursued by way of appeal against conviction, as it was; his appeal having failed, the Barbadian courts were right to hold that he could not try again in fresh proceedings based on section 24.*

[70] Throughout the region the **Gairy** case has gained notoriety. In 1979 when Sir Eric Matthew Gairy, the then Prime Minister of Grenada was overthrown by a coup, this resulted in the suspension of the Grenadian Constitution. Following this, a new law was enacted to confiscate certain property of Sir Gairy and to vest the properties in the then government. In 1987 Sir Gairy issued proceedings seeking a declaration that the law confiscating his property was null, void and of no effect as the law contravened section 6 of the Constitution. He succeeded in obtaining orders for the return of his property and for compensation for the unlawful confiscation. Following unsuccessful appeals of this decision his property was returned to him however the compensation due to him was not paid. The issues surrounding the property of Sir Eric Gairy were the subject of contention in the Privy Council decision of **Jennifer Gairy (as administratix of the estate of Eric Matthew Gairy, deceased) v The Attorney General of Grenada**, Privy Council Appeal No. 29 of 2000. By then Sir Gairy was deceased and his estate was represented by Jennifer Gairy.

[71] The main issue considered by the Privy Council was the power or duty of the courts to grant an effective remedy against the state for such a violation. It was argued on behalf of the Gairy's estate that section 16 of the Grenadian Constitution had ample power to ensure that effective redress is granted to any person whose right has been violated. Further, that there was no other means of redress available and the historic immunities available to the Crown could not operate to constrain the power of the court to grant effective constitutional relief. On behalf of the Attorney General it was contended that the relief sought was in the form of a coercive relief against the government and such a relief may not be granted against the Crown. Lord Bingham, who delivered the judgment on behalf of the Board, stated:

> *"By Chapter I and section 106 of their constitution the people of Grenada established a new constitutional order. The constitution has primacy (subject to its provisions) over all other laws which so far as inconsistent with its provisions must yield to it. To read down its provisions so that they accord with pre-existing rules or principles is to subvert its purpose. Historic common law doctrines restricting the liability of the crown or its amenability to suit cannot stand in the way*

> *of effective protection of fundamental rights guaranteed by the constitution."*

[72] Lord Bingham went on to say at paragraph 23 of the judgment:

> *"Having proved a breach of a right protected by the constitution, having obtained a money judgment and having failed to obtain full payment, the appellant now seeks an effective remedy, not merely a nominal remedy. The court has power to grant such a remedy. And if it is necessary to fashion a new remedy to give effective relief, the court may do so within the broad limits of section 16. Whereas, in granting a person constitutional relief not related to Chapter I, the court may under section 101(3) "grant to that person such remedy as it considers appropriate, being remedy available generally under the law of Grenada in proceedings in the High Court", the court's powers under section 16(2) are not so limited. The court has, and must be ready to exercise, power to grant effective relief for a contravention of protected constitutional right"*

[73] What stood out in the **Gairy** case and which distinguishes it from the instant case was the fact that the Claimant had successfully established a blatant breach of his protected constitutional right. It had clearly been established that he was entitled to compensation but yet there was a failure on the part of the government to provide this.

[74] Back in Jamaica in the case of **Viralee Latibeaudiere** Sykes J, as he then was, applied the principles extracted from the **Gairy** case, in considering the question as to whether or not an injunction granted against the Respondents should be dissolved. Counsel appearing on behalf of the Respondents submitted that under the famous American Cyanamid principles an injunction should not be granted in particular that an injunction should not be granted against the Attorney General. Sykes J noted that this was a case that involved possible serious breaches of the Constitution of Jamaica by state actors and one such person may well be the Attorney General. Like Lord Bingham, Sykes J (as he then was) did not follow the historic common law doctrine restricting the liability of the Crown, and did not allow it to stand in the way of the effective protection afforded under the Constitution. He emphasized the point made by Lord Bingham that all principles of law, and all

procedures must conform to the Constitution and proceeded to grant the injunction against the Crown.

[75] In the recent Court of Appeal decision of the consolidated cases of **Satterswaite v the ARA and Allen v ARA**[24] the Court saw it fit to set out some basic tenets and canons of constitutional interpretation which have provided invaluable guidance at paragraphs 157 to 161 as follows:

> *"[157] It is important to set out succinctly for ease of reference and convenience for this appeal, some basic principles, tenets, and canons of constitutional interpretation, which may be useful for the disposal of these grounds of appeal.*
>
> *[158] The Constitution is a sui generis instrument to be interpreted in a broad and generous way. The learned authors of Fundamentals of Caribbean Constitutional Law state that "[t]he rules applicable to [constitutional] interpretation should be broader and more purposive than those relevant to interpreting ordinary legislation or other legal instruments" (see paragraph 3-017). Lord Bingham of Cornhill in Reyes v R [2002] UKPC11 states that the language of a Constitution should not be treated "as if it were found in a will or a deed or a charter party".*
>
> *[159] The learned authors of Fundamentals of Caribbean Constitutional Law also referred to several powerful statements made in various cases by eminent jurists relating to the proper approach to the interpretation of Caribbean Constitutions. The authors made it clear that: "[t]he principle of generous interpretation, though strongly associated with the construction of constitutional bills of rights, is relevant to the interpretation of Caribbean Constitutions in general" (see paragraph 3-017). They continue with the*

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[24] [2021] JMCA Civ 28

powerful words of Byron CJ in Attorney General of Grenada v The Grenada Bar Association (unreported), Court of Appeal, Grenada, Civil Appeal No 8/199, judgment delivered 21 February 2000, where he understood the Constitution of Grenada to demand that: "… a broad, generous and purposive approach be adopted to ensure that its interpretation reflects the deeper inspiration and aspiration of the basic concepts on which the Constitution is founded…" (See paragraph 7)

The learned authors, in quoting dictum from Lord Hope of Craighead in Lambert Watson v R [2004] UKPC 34; (2004) 64 WIR 241 as to why it is important to give a generous interpretation to the bill of rights, said that "[t]he objective is to secure the realisation of the 'full measure of the rights and freedoms'" (see paragraph 3-018).

[160] The authors also make it clear that, "[t]he flipside of a generous interpretation of guaranteed rights is that derogations from rights must be construed narrowly in an effort to secure meaningful protection for the guaranteed rights" (see paragraph 3-020). The authors also noted Pollard J's statement in R v Mitchell Ken O'Neal Lewis [2007] CCJ 3 (AJ) that Caribbean Constitutions are organic "living instrument[s]" that are "always speaking". Indeed, the authors recognised and underscored the dictum of Jackson JA who accepted in Inland Revenue Commissioner and Attorney General v Lilleyman and others (1964) 7 WIR 496 that the Constitution's: "…full import and true meaning can often only be appreciated when considered as the years go on, in relation to the vicissitudes of fact which from time to time emerge…" (See page 506)

[161] Indeed, the Jamaican Charter was promulgated on 8 April 2011 to provide "more comprehensive and effective protection for the fundamental rights and freedoms of all persons in Jamaica". Of significance, Lord Hoffmann in Lennox Boyce and another v R [2004] UKPC 32; (2004) 64 WIR 37, when commenting on the role of judges with his usual

insightfulness, states that:"… [judges] in giving body and substance to fundamental rights, will naturally be guided by what are thought to be the requirements of a just society in their own time. In so doing, they are not performing a legislative function. They are not doing a work of repair by bringing an obsolete text up to date. On the contrary, they are applying the language of these provisions of the Constitution according to their true meaning." (See paragraph 28)."

[76] The common thread running throughout these cases is the tendency to grant constitutional relief so as to give full effect to the protection that the law affords. The courts have demonstrated some flexibility in the approach to constitutional matters in the sense that where any laws conflict with the constitution, the court will bend over backwards to ensure that constitutional principles are given primacy. This is especially so where there is no other remedy available. According to Mr. Wildman, it is necessary to fashion this remedy as there was no evidence of unlawful conduct to trigger an application under the POCA and also based on the fact that the proceedings took place in the absence of the Claimant. These arguments however are not convincing as these are factors that could have been sufficiently addressed by a process of appeal or an application to set aside.

[77] The cases relied on are clearly distinguishable. The Claimant has not established that any manifest injustice would occur as was established in the **Bernard Coard** case. Nor has he reached the standard of the claimant in the **Gairy** case where the Court has already established the need for compensation and the unavailability of any other means of redress. There is also no resulting absurdity as was evident in the case of **Viralee Latibeaudiere**.

[78] What also rings clear is the fact that any fashioning of a remedy should only be done where there is no other remedy available and only in the clearest of cases, that is to say cases where on a clear interpretation of the law some absurdity would result or where for example a fundamental rule of natural justice has been infringed or where there exist some special circumstances. The Constitutions of the

Caribbean may afford judges some latitude to interpret provisions with some degree of flexibility but not to the extent to which Mr. Wildman suggests. Judges are constrained by the text of the Constitution and precedents as it is always a judge's charge to interpret the law and not to add to its creation.

[79] Although the constitutional court is empowered to grant constitutional relief where there is a need for it, there is a burden on the Claimant to establish that he is entitled to the relief he has sought. The Claimant has failed to demonstrate that any absurdity has resulted or would result by a strict application of the law nor has he established any other basis on which the Court could go out on a limb and fashion a remedy under the Constitution.

Is the confiscation of the Claimant's property in breach of the POCA and therefore in breach of section 15 (1)(a) of the Charter of Rights?

[80] The provisions under Section 15(2) are clear in that where the confiscation of property is by way of a penalty for breach of the law, in this case under civil process, then the compulsory acquisition is within the bounds of the Constitution.

[81] Despite this exception to the general principle provided for in subsection 2, counsel for the Claimant has argued strenuously that the property was acquired in breach of the POCA, in particular sections 55 and 57 of the POCA. Section 57 provides that:

> *"The enforcing authority may take proceedings in the Court against any person who the enforcing authority believes holds recoverable property"*

[82] Recoverable property is provided for under section 84(1) which stipulates as follows:

> *"Property obtained through unlawful conduct is recoverable property"*

[83] Unlawful conduct is defined under section 55 to mean

"(a) conduct that occurs in, and is unlawful under the criminal law of, Jamaica; or

(b) conduct that-

(i) occurs in a country outside of Jamaica and is unlawful under the criminal law of that country; and

(ii) if it occurred in Jamaica would be unlawful under the criminal law of Jamaica."

[84] The basis upon which the 2nd Defendant sought and obtained the recovery of the property was *under section 58 (1) of the POCA which states:*

"If in proceedings under this Part the Court is satisfied that any property is recoverable, the Court shall make an order under this section (hereinafter called a recovery order)."

[85] It is the position of the 2nd Defendant that the Claimant acquired the property through unlawful conduct and that that unlawful conduct took place prior to the acquisition of the property.

[86] The Claimant has argued that based on the date on which his property was acquired it could not have been acquired by criminal conduct and by extension unlawful conduct. Having considered this argument, it seems to be flawed. It has long been established that the definition accorded to unlawful conduct is different from that accorded to criminal conduct. With respect to a matter such as this within the regime of the civil recovery the court's mandate pursuant to section 55 of the POCA would be to determine if the property was obtained through unlawful, not criminal conduct. To establish unlawful conduct there seems to be no need to prove that a crime has been committed. Another distinction between the two types of conduct is with respect to the lack of a limitation period within which the unlawful conduct would have taken place for it to feature as relevant to the court's determination. Whereas conduct which took place before May 30, 2007 could not

be designated criminal conduct there is no such restriction in relation to unlawful conduct.

[87] The dicta of Sykes J in the case of **The Assets Recovery Agency v Adrian Fogo et al** provides clear guidance on this issue. This case had to do with an application by the ARA for a restraint order pursuant to section 32 of the POCA. Among the bases for this application was the ARA's assertion that the defendant had acquired property through a criminal lifestyle. At paragraph 19 of the judgment this was said:

> *"[19] In resolving this application it is important to understand the confiscation regimes in POCA. POCA has established two systems for removing property from either convicted criminals or persons who hold property derived from unlawful conduct. POCA also allows forfeiture of the instrumentalities of crime and cash that may be used for the commission of crime. The two systems are (a) conviction-based and (b) civil recovery. Taking the conviction-based system first. This requires a conviction of a defendant in any of the courts named in section 5 of POCA. These courts are the Supreme Court, all divisions of the Gun Court except the Resident Magistrate's Court Division and the Resident Magistrate's Court. Under section 5 (3) the court must conduct a benefit hearing to find out whether he benefited from his criminal conduct."*

The court continued at paragraphs 32 to 35 as follows:

> *"[32]… In support of its contention that it could support a restraint order on the basis of the civil recovery claim even though some the properties were acquired before POCA was passed into law ARA relied on section 71 of POCA. This section must also be read along with section 55 (3).*
>
> *[33] Section 71 (1) provides that the Limitation of Actions Act does not apply to any proceedings under Part IV which deals with civil recovery claims. Section 71 (2) states that civil recovery proceedings may be brought up to twenty years after ARA's cause of action accrued. Section 71 (3) describes when ARA's cause of action accrues. The cause of action accrues at the time when the original property obtained from unlawful conduct was first acquired. If the original property has been converted to other forms of property, then the cause of action accrues when the original property was first acquired. Property obtained through unlawful conduct is called recoverable property (section 84)1))*

> *[34] Section 55 (3) states that in 'deciding whether or not property was recoverable at any time, including any time before the appointed day [May 30, 2007], it shall be deemed that this Part was in force at that and any other relevant time.' This means that in deciding whether property was obtained through unlawful conduct the court is to assume that that POCA was in fact in force at the time the property was acquired. This assumption is to be made even if the property was acquired before the Act was in force.*
>
> *[35] The practical result of this is that property acquired before POCA was passed can be seized through civil recovery proceedings if it can be shown that it was obtained through unlawful conduct. The limitation period is twenty years from the time of acquisition. This stands in sharp contrast to section 2 (10) which provides in that nothing in the sections that assist in conviction-based recovery of property applies to 'conduct occurring, offences committed or property transferred or obtained, before the appointed day.'"*

[88] The Claimant has also sought to rely on the Privy Council case of **Asset Recovery Agency (Ex parte) (Jamaica)** however this case does not advance the Claimant's case as this case concerned an application for a customer information order and in fact their Lordships were careful to point out at paragraph 4(ii) of the judgment that its decision had nothing to do with civil recovery'.[25]

[89] On the other hand, the ARA's position was strengthened in the case of **Nembhard v The Assets Recovery Agency** where the Court of Appeal endorsed the reasoning of Sykes J in the **Foga** case and at paragraph 37 indicated as follows:

> *"At the core of the civil recovery regime is property which is, or which represents, property obtained through unlawful conduct. Of special note, unlawful conduct is defined in the POCA at section 55(1)…"*
>
> *"Miss Whyte was correct in her submissions that the only criteria to be satisfied for a civil recovery order is that the predicate or antecedent conduct being relied on by the respondent occurred in Jamaica and is unlawful under*

[25] Paragraph 46 of Nembhard

the criminal law of Jamaica or, if it occurred outside of Jamaica, would be unlawful under the criminal law of that country."

The court continued at paragraph 41:

"Not only is Parliament obviously deliberate in speaking to 'criminal conduct' as distinct from 'unlawful conduct', it has also defined both concepts in separate and discrete provisions. It also went, even further to make specific provisions concerning the limitation of action under Part IV of the POCA, in relation to unlawful conduct."

[90] This position was further reiterated when the Court of Appeal dealt with the application for leave to appeal to the Privy Council in respect of the same appellant, Norris Nembhard, and affirmed the position at paragraph 27 of the judgment that both '*this court (referring to the Court of Appeal) and the Supreme Court have made it clear that there are two particular regimes set out in POCA'*. It was further emphasized that *'there is absolutely no issue regarding any clarity in relation to those provisions*'.

[91] Counsel for the Claimant has also argued that the 2nd Defendant failed to establish that the property was acquired as a result of unlawful conduct and that there is no evidence to show that he ran afoul of the provisions of the POCA. Although strictly speaking not necessary, I will examine the evidence relied on by the 2nd Defendant in support of its application for this civil recovery order and which was before McIntosh J who made the civil recovery order. This can be gleaned from the judgment of the learned Judge. At paragraph 19 of the judgment he accepted that the now Claimant had previous convictions for drug related activities and was involved in the cocaine trade. Further, at paragraph 27, he found that the Claimant and his mother who are recorded as unemployed and were alleged to be a 'construction worker' and a 'higgler' respectively could not have amassed this amount of wealth given their income and expenses. Further, that the assets listed in the Particulars of Claim are recoverable property because they represent directly

or indirectly the proceeds of unlawful conduct or they represent items which have been purchased with the proceeds of the unlawful conduct over a period when the lawful income of the Defendants was insufficient to fund the purchase of the properties listed.

[92] Among the arguments advanced by the Claimant, in his affidavit in support of the Claim herein, was that he had not migrated to the USA until after he acquired the property. This position caused this Court some disquiet however, it was pointed out by counsel for the 2nd Defendant that among the evidence presented before McIntosh J was the evidence contained in the affidavit of Jorge Da Silva. McIntosh J at the beginning of the judgment at paragraph one alluded to the defendants' indication that the parties are in agreement on the facts. McIntotsh J in his summary again alluded to this fact at paragraph 57 (6) and (7) where he stated:

> *"[6] The issue for the court to decide is whether the properties seized are recoverable property that is "property obtained through unlawful conduct"*
>
> *[7] To decide this question, one has to look at the evidence which the parties agreed were not in issue."*

[93] Although McIntosh J did not go on to specifically delineate the evidence against the Claimant as he did in the case of Deloris Miller, he continued later on in paragraph 57:

> *"[17] Even though these proceedings are quasi Criminal in nature there is an evidential burden of proof on the Defendant. It is incumbent on them to demonstrate evidentially how they lawfully came into possession of the assets seized….*
>
> *[18] The only reasonable and inescapable inference based on all the evidence is that the properties seized are properties obtained through unlawful conduct and are therefore Recoverable Properties.*
>
> *[22] The court finds Applicants(sic) case proved and will make a Recovery Order in respect of the properties seized as per the Freeing Order dated the 14th August, 2007."*

[94] The court considered the evidence relating to the Claimant emanating also from Mr. Da Silva who highlighted the Department of Homeland Security Border Crossing Records as showing various border crossings by Rohan Anthony Fisher under other names from as far back as 1995 leading up to 2003. It is also noted that based on investigations Rohan Fisher was enjoying a criminal lifestyle facilitated by his involvement in the narcotics trade that operated in the USA and that he had been previously prosecuted for drug related charges on many occasions and that he used many aliases in order to disguise himself. Further that, he does not have any legal means of subsistence and it is believed that he accumulated his assets through his illegal narcotics operation for which he has several convictions in the USA.

[95] In addition, although the property was said to have been obtained through a loan from the National Housing Trust and was acquired on the 7th July 2000, the Certificate of Title reflects that the mortgage was discharged less than four years later, on the 4th February 2004. What is also of note in the Certificate of Title is that Rohan Anthony Fisher, on the 11th day of July 2000, is noted as having an address in New York.

[96] Based on the above, the arguments made by counsel for the Claimant that there was no evidence on which the judge could have arrived at the findings that the property was recoverable property is unfounded. On the face of it there would have been sufficient evidence for the judge to have decided in the way he did.

[97] What is clear is that the confiscation of this property was done through due process every step of the way. It could not therefore be said to be in breach of the POCA. The very purpose of the POCA is to take away any profit derived from unlawful conduct. The POCA has very carefully set out how this is to be done and its provisions are consistent with what due process would dictate.

[98] Be that as it may, it should be made clear that this Court does not sit as a review court or any sort of appellate body over the decision of McIntosh J. It is not the

function of this Court to determine the nature of the evidence and its sufficiency. The mandate of the court in a hearing such as this is to determine whether the property was confiscated through a process authorized by law and I so find. In fact, what the Claimant has asked the Court to do, as was submitted by counsel for the 2nd Defendant is in effect to re-open the civil recovery proceedings and to make its own determination on these matters which amounts to launching a collateral attack on the judgment of McIntosh J. That issue which will be dealt with shortly in the course of this judgment.

Is there an alternative remedy available to the Claimant and has he exhausted it?

[99] While section 19(1) gives standing to any person alleging a contravention of the Charter to make an application to the Court for redress, section 19(4) permits the Supreme Court to decline to exercise its powers if it is satisfied that adequate means of redress for the contravention alleged are available outside of the Constitution. This means that where there is the availability of adequate means of redress outside the Constitution for an alleged infringement it will be a misuse of the court's process to initiate constitutional proceedings. This was recognized from as far back as 1978 by the Privy Council in the decision of ***Maharaj (No.2)*** where the Privy Council ruled that the appellant's claim for redress fell within the original jurisdiction of the High Court of Trinidad and Tobago since it involved an enquiry into whether the procedure adopted by the Judge before committing the applicant to prison had contravened the applicant's right to liberty without due process. The court had this to say in coming to its decision:

> *"In the first place, no human right or fundamental freedom recognised by Chapter I of the Constitution is contravened by a judgment or order that is wrong and liable to be set aside on appeal for an error of fact or substantive law, even where the error has resulted in a person's serving a sentence of imprisonment. The remedy for errors of these kinds is to appeal to a higher court. When there is no higher court to appeal to then none can say that there was error. The fundamental human right is not to a legal system that is infalliable but to one that is fair. It is only errors in procedure that are capable of constituting infringements of the rights protected by s 1(a), and no*

> *mere irregularity in procedure is enough, even though it goes to jurisdiction; the error must amount to a failure to observe one of the fundamental rules of natural justice. Their Lordships do not believe that this can be anything but a very rare event."*

[100] This principle was also adopted in the **Hinds** case and also in **Chokolingo** where the court noted as follows at page 248:

> *"Even if it were possible to persuade their Lordships that publication of written matter which has these characteristics no longer constituted a criminal contempt of court in Trinidad and Tobago in 1972, it would merely show that the judge had made an error of substantive law as to a necessary ingredient of the genus of common law offences which constitute contempt of court. In their Lordships' view there is no difference in principle behind this kind of error and a misinterpretation by a judge, in the course of an ordinary criminal trial, of the words of the Act of Parliament creating the offence with which the accused is charged. If the former is open to collateral attack by application to the High Court under s 6(1) of the Constitution so must the latter be.*
>
> *…The convicted person having exercised unsuccessfully his right of appeal to a higher court, the Court of Appeal, he could nevertheless launch a collateral attack (it may be years later) on a judgment that the Court of Appeal had upheld, by making an application for redress under s 6(1) to a court of co-ordinate jurisdiction, the High Court. To give to Chapter I of the Constitution an interpretation which would lead to this result would, in their Lordships' view, be quite irrational and subversive of the rule of law which it is a declared purpose of the Constitution to enshrine."*

[101] The issue was also considered recently in our courts in the case of **Deborah Chen** where Henry McKenzie J expressed the same view at paragraph 35 where she stated that "*a constitutional remedy is one of last resort and not to be used when there is available an adequate alternative remedy"*.

[102] Similarly, in the Privy Council decision of **Brandt v Commissioner of Police,** the Montserrat police obtained from a magistrate a warrant to search premises occupied by Mr. Brandt, who was suspected of having committed various offences under the Montserrat Penal Code. During the search, the police seized various mobile phones which the police subsequently searched. They were found to

contain potentially incriminating evidence. Mr. Brandt was charged, in September 2016, with offences relating to the sexual exploitation of minors. In May 2019, Mr. Brandt filed a claim for constitutional relief seeking, among other things, a declaration that the evidence obtained as a result of the searching of his mobile phones is inadmissible in his trial. That claim was dismissed by the High Court as an abuse of process and it was noted that the use of constitutional motions in such circumstances to derail criminal proceedings is wholly inappropriate. The Court of Appeal upheld that ruling, but also held that the search of Mr. Brandt's mobile phones was unlawful, although not in breach of his constitutional rights. Mr. Brandt appealed to the Judicial Committee of the Privy Council. In discussing the issue of abuse of process their Lordships stated at paragraph 35 that:

> *First, to seek constitutional relief where there is a parallel legal remedy will be an abuse of the court's process in the absence of some feature "which, at least arguably, indicates that the means of legal redress otherwise available would not be adequate".*

[103] From the cases discussed the principles to be distilled are that constitutional relief is a measure of last resort and that where there is otherwise available adequate means of redress, constitutional relief, should not be sought unless the circumstances include some special feature that makes it appropriate to take this action. In the absence of this feature it would be considered a misuse of the court's process to seek constitutional relief.

[104] Counsel for the 2nd Defendant has submitted that the Claimant had the option of appealing the decision of the Court but chose not to do so. What transpired was that his mother the 2nd Defendant in the matter appealed the decision and this is the subject of the appeal in **Delores Elizabeth Miller v The Assets Recovery Agency**[26]. What is clear from a reading of that judgment is that there was nothing to indicate that Ms. Miller had filed any appeal on anyone else's behalf. The appeal

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[26] [2016] JMCA Civ. 25

was filed in her name alone. In light of the grounds filed the issues addressed by the Court of Appeal were issues relating to the seizure, detention of cash in the sum of US$1,350,300.00 and the granting of a recovery order in respect of it. It was the finding of the Court of Appeal that it could not be said that the learned judge was palpably wrong in making a recovery order in respect of this cash. There was no issue raised or any grounds of appeal filed in respect of the recovery order made in respect of the property in question here or any other real or personal property for that matter. In fact, the Court of Appeal commented on that at paragraph 57 of the judgment as follows:

> *"I cannot help but mention that I find I rather curious that the appellant did not seek to impugn the learned judge's decision to grant a recovery order in respect of the real and personal properties (vehicles and cash in the bank) held solely by her or jointly with the other defendants".*

[105] The ARA is therefore correct when they say that the Claimant here had the option of filing an appeal but chose not to do so. However, let us assume that the Claimant was correct when he said he was not made aware of these proceedings, would it be correct then to say that he had the right of appeal? The Court of Appeal rules sets down timelines within which to file a Notice of Appeal. Pursuant to Rule 1.11(1), a prospective appellant who is seeking to appeal a matter within the jurisdiction of the Supreme Court has the options set out below:

> *(1) …notice of appeal must be filed at the registry and served in accordance with rule 1.15-*
>
> *(a) in the case of an interlocutory appeal where permission is not required, within 14 days of the date on which the decision appealed against was made;*
>
> *(b) where permission is required, within 14 days of the date when such permission was granted.; or*

(c) in the case of any other appeal, within 42 days of the date on which the order or judgment appealed against was made.

(2) The court below may extend the times set out in paragraph (1).

[106] The Claimant would therefore have had the option, at least under Rule (1) c, to file and serve a notice of appeal within 42 days of the date on which the judgment was made. There is no indication from him as to when he was made aware of this judgment however there is power resident in the Court to extend any of the times set out in Part 1. There is no indication in the Claimant's affidavit or anywhere in any of the documents before this Court, that the Claimant had taken any steps to file any appeal in respect of this decision regarding the property in question or taken any steps to apply for an extension of time to do so.

[107] The Claimant's first move had been to apply to set aside the default judgment which he subsequently discontinued and thereafter proceeded to file the Fixed Date Claim Form which is the subject of the matter herein. When taxed about this during the course of the arguments being made before the Full Court, Mr. Wildman expressed that it was discontinued as they did not think they would succeed. That might very well have been so but that is not a factor that should be taken into account in determining the availability of an alternative remedy.

[108] The Claimant might very well have faced the arguments that no default judgment had been entered against him. A Judgment in Default is provided for by virtue of the provisions of Rule 12 of the CPR which stipulates:

12.1 (1) This Part contains provisions under which a claimant may obtain judgment without trial where a defendant -

(a) has failed to file an acknowledgment of service giving notice of intention to defend in accordance with Part 9; or

(b) has failed to file a defence in accordance with Part 10.

(2) Such a judgment is called a "default judgment"

[109] In either case pursuant to Rule 12(4) the Registry can enter judgment in default on the request of the Claimant once the stipulated conditions are satisfied. Neither the Registry nor the court can enter Judgment in Default without a request being made by the Claimant. In the instant case no such request was made and so it is safe to say that no default judgment was entered. What transpired was a decision given after a consideration of the merits of the case.

[110] The Claimant having failed to appear, despite the finding that there was proper service, the Judge proceeded with the hearing and proceeded to deliver a judgment and made orders averse to the Claimant. The learned Judge took this into account when he said this at paragraph one of the judgment:

> *"There was clear indications that the second Defendant Deloris Miller had little or no credibility and the court would not accept any suggestion by her that she has lost contact with any of the other three Defendants named in this suit. They were served in accordance with a Court Order for substituted service and must be deemed served."*

[111] Although what transpired was a hearing and the section refers to trial it should be applicable in the case of the hearing. The learned judge exercised the option of proceeding with the matter once he was satisfied that service had been effected. He was acting in accordance with the provisions of Rule 39.5 which provide as follows:

> *"Provided that the judge is satisfied that notice of the hearing has been served on the absent party or parties in accordance with these Rules -*
>
> *(a) if no party appears at the trial the judge may strike out the claim and any counterclaim; or*
>
> *(b) if one or more, but not all parties appear the judge may proceed in the absence of the parties who do not appear."*

[112] It would therefore be open to the Claimant to avail himself of the provisions of Rule 39.6 which stipulate as follows:

> "*(1) A party who was not present at a trial at which judgment was given or an order made in its absence may apply to set aside that judgment or order.*
>
> *(2) The application must be made within 14 days after the date on which the judgment or order was served on the applicant.*
>
> *(3) The application to set aside the judgment or order must be supported by evidence on affidavit showing -*
>
> *(a) a good reason for failing to attend the hearing; and*
>
> *(b) that it is likely that had the applicant attended some other judgment or order might have been given or made."*

[113] Although the Claimant was not served personally and even if he was not aware of the proceedings as they transpired, he could have availed himself of the provisions of this section once he became aware of the judgment or order made against him. Having become aware of this order or judgment against him he therefore had two options available to him. He could have sought to appeal the decision of the Court or he could have sought to apply to set aside a judgment made in his absence. It is not necessary for me to decide whether these options are still available to him as the fact of their availability or unavailability at this current time does not take away from the fact that he had alternate available remedies. I therefore agree with the submissions of counsel for the 1st Defendant that regardless of whether or not the time within which the alternative means of redress could have been utilized, has passed, a constitutional claim cannot be used as a substitute without cogent explanation for the failure to avail himself of an appeal. The case **Durity v AG**

served to further strengthen this point where the Privy Council stated at paragraph 35 that:

> *"When a court is exercising its jurisdiction under s 14 of the Constitution and has to consider whether there has been delay such as would render the proceedings an abuse or would disentitle the claimant to relief, it will usually be important to consider whether the impugned decision or conduct was susceptible of adequate redress by a timely application to the court under its ordinary, non-constitutional jurisdiction. If it was, and if such an application was not made and would now be out of time, then, failing a cogent explanation the court may readily conclude that the claimant's constitutional motion is a misuse of the court's constitutional jurisdiction. This principle is well established."*

[114] In the instant case the Claimant has not provided any cogent explanation for the failure to pursue an application to set aside or to file an appeal or to see any other remedy. It therefore renders this application as one which is intended to misuse the court's constitutional jurisdiction

[115] In the decision of **Deborah Chen v The University of the West Indies** Henry-McKenzie J was faced with the issue of whether proceedings under the Constitution ought really to be invoked in a case where there is an obvious available recourse at common law. In this case the Claimant had also relied on section 19(4) of the Charter. Henry-McKenzie noted the warning of Lord Diplock in **Harrikissoon** against the use of constitutional claims where there is a parallel remedy to invoke judicial control of administrative action. She also made reference to the dicta of the court in **Ramanoop** where the Board expressed a similar view that constitutional relief should not be sought unless the circumstances include some special features. In the absence of any such features she went on to find that:

> *"As was pointed out by the court in Ramanoop, an alternative remedy is not inadequate remedy because it is slower or more costly than constitutional proceedings. A constitutional remedy is one of last resort and not to be used where there is available an adequate alternative remedy"*

[116] What is evident from the cases referred to is that although the Courts have a somewhat flexible approach when it comes to constitutional matters the flexibility only comes into play where there are some special features in the case. So therefore, it is not impossible to invoke the constitutional jurisdiction of the court even where there is an alternative remedy, however there must be some special feature. It would therefore be incumbent on the Claimant to demonstrate the existence of this special feature in his case, which he has failed to do. The Claimant has therefore failed to establish that he has exhausted all available alternative remedies.

[117] Section 19(1) allows a person to apply for constitutional redress without prejudice to any other action with respect to the same matter which is lawfully available however this is subject to the provisions of section 19(4) which stipulate as follows:

> *"Where any application is made for redress under this Chapter, the Supreme Court may decline to exercise its powers and may remit the matter to the appropriate court, tribunal or authority if it is satisfied that adequate means of redress for the contravention alleged are available to the person concerned under any other law".*

[118] In the recent Court of Appeal decision of **Satterswaite v ARA** the Court in addressing the issue as to the proper forum to address questions that touch and concern the appellants' constitutional rights set out in a very clear manner the way in which section 19 should be interpreted at paragraph 81 of the judgment"

> *"Section 19 of the Charter deals with applications for redress. If any person alleges that any of the provisions of the Charter has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter, which is lawfully available, that person may apply to the Supreme Court for redress…The Supreme Court may, however, decline to exercise its powers where any application is made for redress under the Charter, and may remit the matter the appropriate court, tribunal, or authority if the court is satisfied that adequate means of redress for the*

> *contravention alleged, are available to the person concerned (section 19(1), (3) and (4)."*

[119] At paragraph 241 of the said **Satterswaite** judgment the following statement is made:

> *"However, the court will always review the circumstances and determine the matter in the interest of justice even if there is an alternate available process."*

[120] Although the availability of an alternative remedy is not an absolute bar, this has to be examined in light of all the other factors such as the adequacy of the alternative remedy in order to determine whether, in the interest of justice, such a remedy ought to be granted. The Court is aware however, that the mere existence of an alternative remedy does not mean there is an abuse of the court's process.

[121] Counsel Mr Wildman also relied on the dicta of Sharma CJ in **Belfonte v the Attorney General of Trinidad and Tobago** where the learned judge stated that 'the determining factor in deciding whether there has been an abuse of process is not merely the existence of a parallel remedy, but also the assessment that the allegations grounding constitutional relief are being brought for the sole purpose of avoiding the normal judicial remedy for unlawful administrative action'. The Court in **Belfonte** pointed out that the power to decline jurisdiction arises only where the alternative means of redress is considered to be adequate. If there is an adequate parallel remedy, constitutional relief is only appropriate where some additional "feature" presents itself. This includes, without being exhaustive, arbitrary use of state power or where there are breaches of multiple rights. This brings me to the pivotal question of whether the Claimant's application is an abuse of the process of the court.

Is the Claimant's application an abuse of the process of the court?

[122] It is the position of the 2nd Defendant that the Claim is a blatant abuse of the court's process as the Claimant is seeking to re-litigate the civil recovery process

and mount a collateral attack on the civil recovery order. Further, that the Claim should not be entertained as the doctrine of res judicata applies.

[123] In order to address the issue of an abuse of process an appreciation of what is an abuse of the process is important. The nineteenth century case of **Henderson v Henderson**[27] provides a useful starting point in understanding what is meant by an abuse of the process. One aspect of abuse of process is raising a line of argument in a case which could and should have been raised in earlier proceedings. The **Henderson v Henderson** abuse of process principle was applied in the recent case of **Johnson v Gore Wood & Co (a firm)**[28]**.** The Jamaican Court of Appeal decision of **Andrew Hamilton et al v The Assets Recovery Agency consolidated with Andrew Hamilton Construction Limited v The Assets Recovery Agency** demonstrated an appreciation of the principles set out in the above cases and highlighted **Johnson v Gore Wood & Co (a firm)** as being the leading authority on the topic.

[124] In the **Andrew Hamilton** case Morrison JA conducted a careful analysis of the first instance judgment of Sykes J (as he then was) and in doing so endorsed the fundamental principles which should always be borne in mind when considering the question of abuse of process:

> *"(a) courts exist for the determination of disputes that the parties cannot resolve and so litigants, without scrupulous care, ought not to be denied the opportunity to have the courts decide their issues ...;*
>
> *(b) access to the courts is a fundamental right ...;*
>
> *(c) there should be finality in litigation and a party should not have to answer for the same matter twice ...;*

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[27] [1843-60] All ER Rep 378
[28] [2002] 2 AC 1

(d) the public interest emphasizes efficiency and economy in the conduct of litigation ....

(e) abuse of process is not limited to cases of dishonesty or collateral attack on a previous decision and it is not necessary to establish any of these factors before conduct is held to be an abuse of process. However, their presence will make it easier to conclude that there is an abuse of process but even then there is no inevitability about this because what is involved is a discretion ...;

(f) a distinction must be drawn between abuse of process and the doctrine of res judicata or issue or cause of action estoppel ...;

(g) abuse of process is capable of applying to cases where the first matter did not proceed to judgment or may have ended in a settlement ...;

(h) there is no presumption against bringing successive actions ....

(i) the Henderson v Henderson rule does not extend to cases where the defendants in the second case is [sic] different from the first…"

[125] At paragraph 99 of the judgment a synopsis is provided of what a court should be concerned with when determining whether there in fact is an abuse of the process of the court in this manner:

> *"There is, as Lord Bingham pointed out in Johnson v Gore Wood & Co (a firm), no hard and fast rule to determine whether, on given facts, abuse is to be found or not". Rather, it is for the judge hearing the application in each case to determine "whether in all the circumstances a party's conduct is an abuse".*

[126] On this issue the Defendants relied on the **Dabdoub** case where the court dealt with the issue of the effect of a collateral attack. Brown-Beckford J after a review

of cases dealing with the principle of collateral attack arrived at the conclusion that where issues raised are the same as those that were raised previously then it was a misuse of the process of the court. She found the claim to be an abuse of the process of the courts and ordered that it be struck out. At paragraph 14 the following was said:

> *"The learned judge referred to the overriding objective, stating that duplication in the litigation process, that is, the matter relating to the same facts and claiming essentially the same reliefs or result before the Committee and before the court, was not a good use of the courts time".*

[127] The rationale behind this rule is one of public policy in the sense that there should be finality in litigation and this was the principle enunciated in the case **Barrow v Bankside Members Agency Ltd** [29]as follows:

> *"…It is a rule (referring to the rule in Henderson v Henderson) of public policy based on the desirability in the general interest as well as that of the parties themselves, that litigation should not drag on for ever and that a defendant should not be oppressed by successive suits when one would do. That is the abuse at which the rule is directed"*

[128] In the 2020 decision of **Koza Limited and Hamdi Akin Ipek v Koza Altin Isletmeleri As**[30] the English Court of Appeal also brought some clarity to the question of exactly what is meant by a collateral attack and when it amounts to an abuse of the process of the court and how the court should approach the question of making a determination as to whether it amounts to an abuse of process. The court conducted a detailed analysis on the law of abuse of the process by first extracting the salient points discussed in previous authorities such as **Hunter v**

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[29] (1996) 1 All ER 981 at page 983
[30] [2020] EWCA Civ 1018

Chief Constable of the West Midlands Police[31], Henderson v Henderson, Johnson v Gore Wood & Co.

[129] At paragraph 36 specifically on the point of a collateral attack this was said;

> *A further recognised category of abuse is where a collateral attack is made on a previous decision of the court. Hunter's case is one example of where a collateral attack was held to be abusive. Six defendants who came to be known as "the Birmingham Six" were convicted of a terrorist bombing of two public houses after a Judgment Approved by the court for handing down. Koza Ltd and Anr v Koza Altin trial in which they had challenged the admissibility of alleged confessions on the grounds that they had been extracted by the police by the application and/or threat of violence. Those allegations were investigated by the trial judge, Bridge J, in a lengthy voir dire and rejected. The defendants were convicted and unsuccessfully appealed. They were much later acquitted, upon a further reference of their case to the Court of Appeal Criminal Division. But long before that, they brought proceedings against the police for damages for assault, making the same allegations of violence and threats of violence which were directly contrary to the findings of the criminal trial judge on the voir dire. The claim was struck out as an abuse of process. Lord Diplock stated the principle being applied in the following terms at p. 541B-C: "The abuse of process which the instant case exemplifies is the initiation of proceedings in a court of justice for the purposes of mounting a collateral attack upon a final decision against the intending plaintiff which has been made by another court of competent jurisdiction in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made."*

[130] The court in **Koza v Koza** pointed out at paragraph 40 of the judgment that "every case is fact specific and must be measured by the twin public and private interests which underpin the jurisdiction of the court to prevent misuse of its procedures.

[131] This brings me back to the **Chokolingo** case which I find to be quite instructive on the issue and despite the submissions of counsel for the Claimant, to still be

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[31] [1982] AC 529

applicable. A reminder of the facts may serve to provide a fuller understanding of the significance of the case. The appellant was found guilty of criminal contempt of court for having published a newspaper article which suggested that the judiciary of Trinidad and Tobago was corrupt. Upon his conviction he was sentenced to a term of imprisonment which he served and did not appeal. Almost three years later the appellant applied for a declaration under the Constitution alleging that his committal was unconstitutional and void because it contravened the provisions of the Constitution in that due process was not followed. His application was dismissed and he appealed to the Court of Appeal. He was again unsuccessful and so he exercised his right to appeal to the Privy Council. The Court frowned on the ability of an appellant to not only be able to appeal a decision by the court and when unsuccessful be able to turn around and to challenge the same decision through a constitutional motion. This would be essentially providing a parallel remedy on a criminal case where he would have a right of appeal and also a right to invoke constitutional avenues.

[132] The case of **Beverly Pierre v the Attorney General of Trinidad and Tobago**, followed the principles established in **Chokolingo**. Ms. Pierre had been convicted of the offence of manslaughter and sentenced to a term of imprisonment. Her main contention is that the court in sentencing her failed to take into account the time she spent prior to being convicted and also that the Court of Appeal failed to take this into account. Her attorney advised her of his intention to appeal to the Privy Council however he never did so. Consequently, she brought a constitutional motion under section 14 of the Constitution, before the High Court seeking to impugn the decision of the Court of Appeal. At the time she brought this motion she had long since missed the deadline for appealing to the Privy Council. It was the view of the court that the section 14 action could not be used as a substitute where the door had been closed, by delay in challenging a decision by way of an appeal. She was also not allowed to use the application to launch a collateral attack. The court quite rightly pointed out that to do so would virtually be hearing an appeal from the Court of Appeal.

[133] From an examination of the foregoing cases the salient principles extracted are that a collateral attack on a judgment is one which seeks to attempt to avoid the effect of a judgment in some incidental proceedings for the express purpose of attacking it and therefore a constitutional challenge may not be used as a collateral attack. The essence of the rule against collateral attack operates to protect the integrity of the justice system and guard against an abuse of the processes of the court.

[134] The court in attempting to identify whether what is taking place is a collateral attack should engage in a close "merits based" analysis of the facts. The steps taken by the Claimant have to be examined in order to make this determination. In the Claimant's affidavit he asserts that he was not present at the time the proceedings relating to the confiscation of his property took place and that the 2nd Defendant applied for and obtained an Order for the taking of his property. He was therefore not aware of any proceedings against him. Further, that he was advised that the seizure of his property by the 2nd Defendant was a violation of his rights under Section 15(1)(a) of the Charter. Further, that he has not been convicted of any criminal offence and he has been advised by his Attorney-at-law and verily believes that the 2nd Defendant had no basis to make the application to seize the said property, as the said property was owned by the Claimant long before May 2007 which is the relevant period governing the application of the POCA.

[135] A perusal of his affidavit reflects that the application is grounded on the basis that the proceedings took place in his absence and without his knowledge, that the confiscation is contrary to his rights under the Charter and that he has not been convicted of any criminal offence and therefore no criminal conduct can be attributed to him.

[136] The question is therefore whether he could have raised these points in the substantive matter. Separate and apart from the issue of his absence at trial, the points raised relate squarely to the nature of the evidence that the Court would have had to consider. His representative at trial was his mother on whom the claim

had been served and who the Court recognised as his representative. Although the Claimant was not present and so could not be said to have the full opportunity of contesting the decision, he having subsequently been made aware of the proceedings and the orders made averse to him, he then had the full opportunity to contest the proceedings and so this claim that he has brought is tantamount to a collateral attack on the decision of the court. Could it be that he could stand on the side lines and choose not to participate and then after the issues are fully ventilated he comes forward to raise them? He would essentially be given a second bite at the cherry, a second opportunity to re-litigate, a position frowned upon by the court for the very reason that it undermines the integrity of the justice system. The essence behind this rule is to encourage finality in litigation and to prevent the bringing of several claims against the same defendant dealing with the same issues.

[137] When the points raised by the Claimant are closely examined it is clear to me that all those points could have been raised at the hearing by his representative and so he is attempting to cause the court to re-litigate the civil recovery proceedings and mount a collateral attack on the Order made by McIntosh J. Even if he did not then have the full opportunity of contesting the decision being made against him due to his absence, as soon as he found out about it he had the opportunity to do so.

[138] There is a fine line between the question of a collateral attack and res judicata. The court in **Yat Tung Co v Dao Heng Bank** described the principle of res judicata in these terms:

> *"But there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings. The locus classicus of that aspect of res judicata is the judgment of Wigram V.C. in Henderson v Henderson…"*

[139] The court in **Greenhalgh v Mallard**[32] made the following statement on res judiciata:

> *"…res judicata for this purpose is not confined to the issue which the court is actually asked to decide, but …it covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them".*

[140] Res judicata has to do more with litigating the same claim whereas a collateral attack has to do more with re-litigating the same issues. Res judicata is sometimes concerned with both the claim and the issue however it seems to apply even in a case where the issues raised are different, once the claim is the same. It is not necessary for the purpose of this judgment to make this fine distinction between the two issues. Regardless of whether it is res judicata or a collateral attack what cannot be denied is that the proceedings here when taken together are an abuse of the process of the court. The fact that the Claimant had or has the option of either appealing the decision or seeking to set it aside and has not exercised any of those options coupled with the fact that he instead has sought to launch a collateral attack on the judgment of the court obtained through due process are demonstrative of this claim being an abuse of the process of the court. Allowing such a constitutional challenge after the civil recovery order was made, in the face of alternative remedies amounts to a collateral attack on the court's order. There being other means of redress available the court declines to exercise its constitutional jurisdiction

COSTS

[141] Part 64 of the CPR provides that the general rule is that an unsuccessful party should be ordered to pay the costs of the successful party.[33]

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[32] [1947] 2 All ER 255 at page 257
[33] Rule 64.6(1) of the CPR

[142] The court has a wide discretion in deciding who should be liable to pay costs. There is however a general rule against making an order for cost against an applicant in an administrative matter. However, if the court finds that the applicant acted unreasonably in making the application or even in the way the applicant conducted the proceedings, the court can make an order for cost against the applicant. [34]

[143] It is the duty of the court to pay regard to all the circumstances and, in particular, to the conduct of the parties both before and during the proceedings. It is also open to the court to consider factors such as whether it was reasonable for a party to pursue a particular allegation or to raise a particular issue and also even whether it was appropriate to include a particular party.

[144] When all the circumstances of this case are examined, we are of the view that an order for costs should be imposed against the Claimant.

PETTIGREW-COLLINS, J

[145] I have had the benefit of reading the judgment of my sister Jackson-Haisley J. I therefore do not find it necessary to set out the declarations sought and the background to this claim.

THE CLAIMANT'S AFFIDAVIT EVIDENCE

[146] According to the claimant, in 1999 he purchased a house from Gore's Development with a mortgage from the National Housing Trust through Mortgage No. 1114633 registered on the 11th day of July 2000. He stated that he migrated to the United States in 2003 and he was not aware of the proceedings brought in

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[34] Rules 64.6(3), 64.6(4)(a), (b), (d)(i) and (ii), (e)(i), (ii) and (iii), 64.6(4)(f) and 64.6(4)(g) of the CPR, Rules 64.3 and 56.15(4) and (5) of the CPR

2007 and so was not represented in those proceedings. He went on to explain about the subsequent confiscation of the property and averred that his constitutional rights were breached.

THE DEFENDANTS' AFFIDAVIT EVIDENCE

[147] Ms Karlene Barnaby gave two affidavits on behalf of the second defendant. The first defendant provided no affidavit evidence as it was not in the circumstances necessary to do so. In her affidavits, Ms Barnaby outlined the history of the civil recovery claim and its outcome both at first instance and on appeal. She deponed that Ms Miller's appeal was dismissed. She spoke of events which transpired subsequent to the conclusion of those proceedings to include the fact that Ms Miller, the claimant's mother and occupant of the premises in question was evicted from the premises pursuant to a court order and that the property is now in the possession of the Commissioner of Lands. She exhibited documents relative to those proceedings to include the affidavit of Mr Dean Roy Bernard, on whose evidence McIntosh J evidently placed great reliance in coming to his decision. She also exhibited a copy of the judgment of the court of appeal relative to Ms Miller's appeal.

THE ARGUMENTS

[148] All three Attorneys at Law made detailed written submissions which were supplemented by oral submissions. Although I think it necessary to set out those submissions, I do not propose to set out all the details of each submission as they all contain lengthy quotations, some of which will be reproduced in the body of the judgment as seen to be necessary.

THE CLAIMANT

[149] The claimant through his Attorney at Law Mr Wildman argued that the taking of his property cannot be justified under the provisions of section 15(2)(b) of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011. He

submitted that the second defendant's reliance on section 57 of the POCA is misplaced. He argued that the second defendant could not properly have obtained a civil recovery order without first showing that the property in question represented the proceeds of unlawful conduct. He asked the court to have regard to the provisions of section 55(1) and (3) as well as section 84(1) of the POCA. He submitted that the second defendant had failed to show that he had committed a crime prior to the purchase of the house in question or that he used the proceeds of crime to pay for the house. The claimant further submitted that it was incumbent upon the second defendant to demonstrate that he had breached section 55(1)(a) and section 84(1) of the POCA which was a precondition to invoking the provisions of sections 57 and 55(3).

[150] Mr. Wildman conducted a close scrutiny of the affidavit evidence of Mr Dean-Roy Bernard which was filed in support of the civil recovery claim against the claimant and others, with a view to demonstrating that there was not before McIntosh J. sufficient evidence on which he could have determined that the property in question had been obtained by unlawful conduct. He relied heavily on the decision of Sykes J in **The Assets Recovery Agency v Adrian Fogo et al** [2014] JMSC Civ. 10 in assessing the nature of the evidence that would be adequate to establish unlawful conduct.

[151] Mr Wildman also submitted that there was nothing in the evidence to show that the claimant in 1999, when he acquired the property, had committed a breach of the criminal law of Jamaica, or the criminal law of a foreign state which amounted to a breach of the criminal laws of Jamaica. Any alleged conviction he said, came subsequent to the acquisition of the property. In any event he said, there was no admissible evidence before the court regarding any such conviction. The argument continued that based on section 2 of the POCA, the definition of crime, whether for the purposes of civil or criminal proceedings, meant a crime committed after May 30, 2007. Accordingly, any criminal conduct which occurred prior to May 30, 2007 (the appointed day), would not qualify as unlawful conduct for the purposes of making a civil recovery order. He contended that up to the time that the claim was

filed against the claimant, resulting in the seizure of his property, the second defendant had not provided the court with any evidence that the claimant had committed any criminal (and it follows), unlawful conduct which would render the claimant's property liable to be taken. According to Mr Wildman, based on the scheme of section 55 as a whole, it is only after the commission of a crime has been established that section 55(3) can be prayed in aid. He went on to say that section 55(3) of the act may be invoked once the requirement of unlawful conduct is satisfied but that it was not established that there was unlawful conduct in this case. Mr Wildman acknowledged that there was a 20 years' limitation period in relation to the bringing of civil recovery proceedings.

[152] With regard to the defendants' submission that the claimant ought to have availed himself of the appeal process to challenge the order of McIntosh J., Mr. Wildman asserted that the claimant was not aware of the proceedings and therefore could not have challenged it by way of an appeal.

[153] In answer to the second defendant's submission that the constitutional jurisdiction is being used for an improper purpose, and that in cases such as **Maharaj v Attorney General of Trinidad and Tobago (No. 2)** [1978] 2 All ER 244, and **Chokolingo v Attorney General of Trinidad and Tobago** [1981] 1 All ER 244, the Judicial Committee of the Privy Council made pronouncements against improper use of the court processes, Mr. Wildman said those principles have been ameliorated by subsequent developments. He cited the cases of **Coard & Ors. v The Attorney General (Grenada)** [2007] UKPC 7 as well as **Jennifer Gairy (as administratrix of the estate of Eric Matthew Gairy, deceased) v The Attorney General of Grenada** Privy Council Appeal No. 29 of 2000 in support of this proposition. According to him, in the **Gairy** case, Lord Bingham agreed that it would be proper to launch a collateral attack in order to protect property rights and that the principle of res judicata would not operate to prevent the granting of an appropriate relief where the fundamental right to property had been breached. Accordingly, the argument continued, the court had to fashion a remedy to meet the case in the **Gairy** matter.

[154] It was Mr. Wildman's contention that Sykes J. (as he then was) adopted Lord Bingham's approach in **Gairy** in the case of **Viralee Bailey-Latibeaudiere v The Minister of Finance and Planning and Others** [2013] JMSC Civ. 127. This Mr Wildman said was done in order to give an effective remedy in the circumstances of the case. He observed that an injunction was granted against the Crown in the latter case although the law had hitherto been that an injunction cannot be granted against the Crown.

[155] Mr. Wildman urged the court to 'fashion a remedy' in order to protect the claimant's constitutional rights which according to the claimant were breached by virtue of the order of McIntosh J. which was made in breach of section 55 of POCA.

[156] It was also the submission of Mr Wildman that if it is that the appropriate course of action was an application to set aside the judgment, then the claimant would have been required to satisfy the discretionary aspect of the rule dealing with setting aside a default judgment since he would not have been entitled to have the judgment set aside ex debito justitiae. He further submitted that it would have been risky for the claimant to rely on the exercise of the court's discretion where what he is asserting is a right which is guaranteed under the constitution. He said in essence that the judgment against the claimant had been spent, in the sense of being executed (as opposed to an executory judgment) and so it would have been late to obtain an order to set aside the judgment. He likened the circumstances of the present case to what according to him occurred in the **Gairy** case.

[157] According to Mr Wildman, the course adopted by the claimant is the most appropriate course to vindicate the breach of his property rights and the claimant has chosen this path on the basis that the Constitution is the supreme law and any act/law which is inconsistent with the Constitution is void and in this context, he posited, law includes the order of the court and by extension the order of McIntosh J which collided with the claimant's right to his property.

[158] He cited the case of **Beverly Levy v Kensales** Privy Council Appeal No 87 of 2006 for the proposition that rules of court should not be allowed to eclipse fundamental rights, as rules of court were merely designed to regulate jurisdiction.

[159] Mr Wildman concluded his submissions by asking the court to find that the first defendant was properly joined as a defendant in the claim as the ARA is an arm of the state and the Attorney General is an interested party since, along with the Supreme Court, she is the guardian of the Constitution.

SUBMISSIONS OF THE FIRST DEFENDANT

[160] The first defendant's Attorney at Law opened her submissions by asking the court to say that the first defendant is not a proper party to this claim. She observed that all the allegations in the affidavit sworn by the claimant concern the actions of the second defendant and further, that the first defendant is not responsible for the actions of the second defendant who can sue and be sued in its own right. She directed the court's attention to sections 5(1), 33 and 59(3) as well as the Third Schedule of the POCA. These provisions she pointed out, detail the capacity of the ARA to institute and defend proceedings. She also directed the court's attention to the case of **Andrew Hamilton & Ors v The Assets Recovery Agency; Andrew Hamilton Construction Ltd v Assets Recovery Agency** [2017] JMCA Civ. 46 which is authority for the position that the ARA indeed has legal status. Ms. Hall stated therefore that while it was prudent to have served the first defendant so that she would have the opportunity to make submissions in the matter, she ought not to have been joined.

[161] Ms. Hall also submitted that the sole issue for this court to decide is whether the claimant's constitutional right to property as guaranteed by section 15 of The Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011 has been breached by the second defendant. She cited the provisions of The Charter which established the basis of locus standi of an individual to bring a

constitutional claim. She specifically directed the court's attention to section 19(4) which entitles the Supreme Court to decline to exercise its powers and remit the matter to an appropriate court, tribunal or authority if the court is satisfied that there is adequate means of redress available to a claimant who alleges that his constitutional rights have been breached. Ms Hall went on to point out that the same section 15 of The Charter that the claimant relies on, makes clear provision for property to be taken possession of by way of penalty for breach of the law in civil proceedings or after conviction for a criminal offence. She submitted that it was common ground between the claimant and the second defendant that the claimant's property was taken possession of pursuant to a civil recovery order.

[162] Ms Hall further submitted that the question to be answered therefore is whether property possessed under provisions of the POCA would be property taken by virtue of the provisions of section 15(2)(b) of The Charter. She directed the court's attention to the provisions of sections 57, 58 and 84 of the POCA. She further pointed out that based on the statutory framework of the POCA, which the Judicial Committee of the Privy Council helpfully summarized in the case of **Assets Recovery Agency (Ex parte) (Jamaica)** [2015] UKPC 1, the statute clearly provides for the seizure of property specifically identified and which is the product of unlawful conduct, by way of civil recovery orders. Further, that such orders may be made against any person in possession of the property and independently of any prosecution for any crime.

[163] It was also Ms Hall's submission that the claimant's property having been taken through the route of civil recovery proceedings, and pursuant to a civil recovery order, there was no breach of his constitutional rights.

[164] She asked the court to consider that the claimant was properly served in respect of the proceedings leading to the confiscation of his properties but chose not to participate in those proceedings. She pointed out that the learned judge, McIntosh J. in the course of his judgment, made the following finding:

> *"There was clear indications that the second Defendant Deloris Miller had little or no credibility and the court would not accept any suggestion by her that she has lost contact with any of the other three Defendants named in this suit. They were served in accordance with a Court Order for substituted service and must be deemed served."*

[165] This finding she said made it abundantly clear that the claimant was for all proper purposes served. She observed that the claimant's affidavit evidence was silent as to when he is saying he was advised of the civil recovery claim and of the fact that his mother was represented by Mr Harold Brady in those proceedings. She also submitted that there is also a paucity of information from the claimant as to why he did not pursue the route of an appeal.

[166] She said, therefore, that any argument made by the claimant to the effect that property that he acquired prior to May 2007 could not be properly seized ought not to be raised in a constitutional claim but ought to have been the subject of an appeal. She stated that there were in fact two separate courses open to the claimant but that she was of the view that an appeal was the more appropriate course, since despite the claimant's absence from the proceedings, the claim was determined on its merits. Besides the option of an appeal, she said that the claimant could have pursued a course of applying to set aside the judgment and that, had he done so and the court ruled in his favour, there are a number of consequential orders that a court could have made upon setting aside the judgment, including ordering compensation to be paid to the claimant or re-transferring the land to him. She opined that the claimant still has the option open to him to apply to set aside the judgment.

[167] Ms Hall took the view that in any event, there was no merit in the argument made by the claimant that property which he acquired prior to May 2007 could not be properly seized as the limitation in relation to May 2007 only applies to criminal conduct. This is evident she said, based on the definition of criminal conduct in section 2 of POCA which is "conduct occurring on or after May 2007." She pointed out that this is distinct from unlawful conduct which is defined by section 55 of the Act.

[168] She submitted that not all of the evidence that was placed before the court to ground the civil recovery order has been made available to this court and thus even if this court was in a position to assess the evidence that was before McIntosh J, it would not have been able to make a proper assessment.

[169] She further opined that even if the claimant were to be correct that the judge's decision was wrong, he should not be allowed to launch a collateral attack on the decision of McIntosh J. to grant the civil recovery order. She asked the court to consider the cases of **Beverly Pierre and the Attorney General of Trinidad and Tobago** Claim No.CV 2014-00014 and **Durity v The Attorney General of Trinidad and Tobago** [2002] UKPC 20. She posited that there are two relevant principles from **Beverly Pierre**, the first one being that section 19 of The Charter (the equivalent of section 14 of The Constitution of Trinidad and Tobago) cannot be used as a substitute where the door has been closed by delay to challenge a decision by way of an appeal. The second principle is that an application under section 19 of the Constitution is a measure of last resort and that an applicant was therefore required to exhaust all alternative remedies before availing himself of section 19.

[170] She submitted that although the case of **Beverly Pierre** was a criminal matter, the two principles identified are applicable to the circumstances of this case since what we are here concerned with is the use of the process of constitutional redress. She observed that in the case of **Deborah Chen v The University of the West Indies** [2021] JMSC Civ. 1, Henry-McKenzie J. applied the principle that the constitutional remedy is a remedy of last resort in a civil case.

[171] Ms Hall adverted to a passage extracted from **Durity** to the effect that where a constitutional motion is brought and a court is considering delay as a basis for saying that there has been an abuse of process, the court will take into account whether there would have been redress if a timely application had been made under the ordinary non-constitutional jurisdiction of the court. Further, the fact of

such application being out of time, is not by itself a good reason to allow a constitutional motion.

[172] She thereafter asserted that the claimant has not provided a cogent explanation for the failure to avail himself of the appeal process and is therefore not entitled to any relief under the Constitution. He ought not to be allowed to raise a constitutional challenge some six years after the civil recovery order was made, as allowing him to do so would be to permit a misuse of section 19 of the Charter.

SECOND DEFENDANT'S SUBMISSIONS

[173] Ms Whyte's first salvo is that the present claim is an abuse of process. She submitted that if the court agrees with this proposition, then the court should not go on to consider the substantive arguments advanced by the claimant in support of the declarations sought. The main basis for saying that the claim is an abuse of the process of the court is the contention that the claim represents an attempt on the part of the claimant to re-litigate the civil recovery proceedings and mount a collateral attack on the civil recovery order and the affirmation of that order by the court of appeal.

[174] She acknowledged that section 19(1) of The Charter allows a person to apply for constitutional redress without prejudice to any other action that is available to them but insists that by virtue of section 19(4), the Supreme Court has the inherent jurisdiction to control its processes in order to ensure that the constitutional jurisdiction is exercised in appropriate circumstances.

[175] She observed that the claimant has failed to acknowledge in his claim the provisions of section 15(2)(b) of The Charter which permits the existence and operation of any law which provides for the taking of property by way of penalty for breach of the law, whether by civil process or after conviction for a criminal offence. She submitted that POCA is one such law which allows for the acquisition of property consistent with section 15(2).

[176] She further submitted that the claimant's submission that there was no evidence in the civil recovery proceedings to ground the civil recovery order is a submission in furtherance of the abuse of process since the claimant is inviting the constitutional court to reopen the civil recovery proceedings and make its own determination on the matter. She further asserted that all the arguments that are now being made should have been advanced in the civil recovery proceedings in 2012 before McIntosh J or should have formed the basis of an appeal from the civil recovery order.

[177] Ms Whyte commended to the court the decision of **Maharaj v Attorney General of Trinidad and Tobago** (No. 2) [1978] 2 All ER 670 for the principle that no human right or fundamental freedom is contravened by a judgment or order that is wrong and liable to be set aside on appeal for an error of fact or substantive law even where the error resulted in the individual being imprisoned and that the remedy for such error lies in an appeal from the impugned decision. She said that the claimant's arguments regarding the recovery proceedings is that the court made errors of fact and substantive law.

[178] She proffered that the principle enunciated in **Maharaj** was confirmed in the decision of **Chokolingo v Attorney General of Trinidad and Tobago** [1981] 1 All ER 244. The case of **Dabdoub and Clough v The Disciplinary Committee of the General Legal Council (ex-parte Dirk Harrison, Contractor General of Jamaica** [2018] JMCA Civ. App 33 was cited as a local decision in which the same principle was applied. Ms Whyte also cited the case of **Brandt v Commissioner of Police and Others** [2021] UKPC 12 in which the Judicial Committee of the Privy Council pronounced that to seek constitutional relief where there is a parallel legal remedy is an abuse of the process of the court unless there is some feature of the case which indicates that the other means of legal redress would not be adequate.

[179] Ms Whyte also submitted that whilst it may be noted that the process of appeal is no longer available to the claimant due to the passage of time, it does not mean that bringing the present proceedings is any less an abuse of process. She urged

the court to consider the pronouncement in **Brandt** that constitutional redress must not be used to bypass restrictions in the appellate process.

[180] In her submissions, Ms Whyte also asked the court to note, as pointed out in Ms Barnaby's affidavit in response to this claim, that the claimant had filed proceedings to set aside the judgment which she says he had wrongly considered to be a default judgment but that he had not proceeded with the application. Such act she said, makes it clear that the claimant had the opportunity to pursue an alternative remedy. According to her, he gave up his alternative remedy. She also posited that Mr Wildman's stated reason that it would be 'risky' for the claimant to pursue an application to set aside the judgment since he would then have been at the mercy of the court, is not a good enough reason for him to pursue this claim and that in any event, whichever route the claimant pursued, would involve the exercise of the court's discretion. She pointed out that the claimant has been silent as to when he became aware of the civil recovery order and that the time when he became aware would be relevant in determining the remedy he would choose.

[181] In response to Mr. Wildman's submission that there were no parallel proceedings in the instant case, she said that that was simply not true as the Notice of Application to set aside the default judgment was discontinued after the present claim was filed.

[182] As it relates to the authorities Mr Wildman relied on to say that the decision in **Chokolingo** has been ameliorated, Counsel noted in particular that **Bernard Coard** challenged the mandatory nature of the death sentence and so that case is distinguishable and in any event the ratio in **Chokolingo** was confirmed in that case as representing good law. Of **Jennifer Gairy,** she said that it was the constitutionality of a law that was being challenged, not the judges' interpretation of the law.

[183] It is the further submission of the second defendant that the doctrine of res judicata in the wider sense **(Henderson v Henderson** principle) applies to the claimant's

arguments, so that it is an abuse of process to raise in subsequent proceedings matters which could or should have been addressed in earlier proceedings. Counsel made reference to the case of **Ilene Kelly and Errol Milford (Executors of Estate of Evelyn Francis, Deceased v The Registrar of Titles** [2011] JMCA Civ. 42 in which the decision in **Hunter v Chief Constable of West Midlands et al** [1981] 3 All ER 727 was referenced for the proposition that to initiate proceedings for the purpose of mounting a collateral attack on a final decision made by another court of competent jurisdiction in previous proceedings in which there was full opportunity to contest the decision, was an abuse of process.

[184] She pointed to dicta in the latter case to the effect that if re-litigation was permitted in such circumstances as those of the present claim, it would bring the administration of justice into disrepute. She submitted that the arguments now being raised by the claimant, are arguments that should have been raised in the civil recovery proceedings.

[185] Ms Whyte also advanced arguments in relation to the substantive matter. I do not find it necessary to set out the details of those submissions, suffice it to observe that she discussed the provisions and application of section 2, as it relates to the definition of criminal conduct, sections 55, 57, 58 (1), 84 to 89, and 71 (2) and (3), of the POCA. In the discussion, she noted the following: that there is a distinct and separate regime dealing with proceedings based on criminal conduct as distinct from the regime providing for forfeiture of assets based on unlawful conduct; in essence that there can be no superimposition and/or conflation of the terminologies ‘criminal conduct’ and ‘unlawful conduct’ onto or with one another; that the restriction relating to conduct occurring on or after May 30, 2007 is relevant to criminal conduct only; that the only time restriction relevant to unlawful conduct is that imposed by section 71 (2) and (3), requiring that proceedings be brought within 20 years of the date when the cause of action arose, and noting that the cause of action accrues at the time when the original property obtained from unlawful conduct was first acquired, which therefore means that that date could be a time before May 30, 2007 the time of the coming into effect of the POCA.

[186] Ms Whyte also alerted the court to the fact that the same arguments now being put forward by Mr Wildman in relation to his interpretation of criminal conduct and unlawful conduct were put forward by him in the matter of **Norris Nembhard v Assets Recovery Agency** [2019] JMCA Civ. App 30 and that the Court of Appeal rejected those arguments. Further, that he was refused leave to appeal to the Judicial Committee of the Privy Council by the Court of Appeal and the Privy Council also refused him leave to appeal on the basis that the appeal did not raise an arguable point of law. That argument is to the effect that the definition of criminal conduct under section 2 and the imposition of a time restriction limiting criminal conduct to conduct occurring on or after May 30, 2007 is applicable to unlawful conduct which is the type of conduct necessary to ground civil recovery proceedings.

[187] In her oral submissions, Ms Whyte suggested that Mr Wildman shifted gears and essentially abandoned this line of argument. I do not necessarily take that view as Mr Wildman was quite clear during the course of the hearing that he was adopting his written submissions. He did not do so with any exception or reservations.

[188] Ms Whyte quoted extensively from the decision of Sykes J in **The Assets Recovery Agency v Adrian Fogo et al** in order to demonstrate that there should be no attempt to reconcile unlawful conduct with criminal conduct and that the operation of the two regimes under POCA are separate and discrete.

[189] As regards Mr Wildman's submission focusing on McIntosh's J interpretation of the law and its application to the evidence, she submitted as Ms Hall did that there was before McIntosh J, material that is not before this court and noted that the conviction of the claimant was only one aspect of the evidence of unlawful conduct on the part of the claimant. She examined other aspects of the evidence and concluded that there was material before the learned Judge from which he could properly have concluded that the property was recoverable property.

[190] Ms Whyte submitted that the court looked at a set of circumstances that are detailed at paragraphs 8 to 15 of the judgment of McIntosh J. She also noted that the learned judge had considered that the parties agreed on the evidence so that it was issues of the application of the law to the facts as agreed that had to be determined. She said that even if the claimant were to take issue with that assertion of the evidence being agreed, that would have been a ground of appeal.

[191] In relation to queries whether the property in question was specifically referred to in the judgment, Ms Whyte pointed out that the learned judge made reference to the properties listed in the freezing order and stated in essence that the civil recovery order was being made in respect of property mentioned in the freezing order.

THE ISSUES

[192] The question of whether the first defendant is a proper party to this claim does not touch and concern the substantive issues to be decided but must be addressed since it was raised by the first defendant. The substantive issues are:

1. **Whether there was as far as the claimant is concerned, a breach of procedural fairness in the civil recovery proceedings. The answer to this question in the circumstances of this case, is in my view largely determinative of the outcome of this claim.**

2. **Whether there is an alternative remedy available to the claimant.**

3. **Whether the matter is res judicata and therefore an abuse of the process of the court.**

4. **Whether Bringing the claim amounts to an abuse of the process of the court on any other ground.**

Whether the first defendant is a proper party to this claim?

[193] By virtue of section 79 of the Constitution of Jamaica, the Attorney General is the principal Legal Advisor to the government. Section 13(2) of the Crown Proceedings Act stipulates that civil proceedings against the Crown shall be instituted against the Attorney General.

[194] The question arises as to what is the status of the ARA. It must firstly be acknowledged that the ARA is the Financial Investigations Division within the Ministry of Finance (see section 3 of the POCA). The Ministry of Finance is one of the central departments of the executive arm of government. Morrison P (as he then was) addressed the question of the legal status of the ARA in the case of **Andrew Hamilton and others v The Assets Recovery Agency** [2017] JMCA Civ. 46. In that case, the Attorneys at Law for the appellants took a preliminary point that the ARA was not a legal entity and could therefore not be a party to the proceedings in its own right. In resolving the matter, Morrison P examined section 3 of the Financial Investigation Division Act as well as sections 3, 5, 33, 57, 59 (3) and 71 of the POCA and concluded at paragraphs 55 and 56 of his judgment that

> *[55]…"In this case as it seems to me, the various powers conferred on ARA by POCA- to apply or initiate court proceedings for forfeiture orders and other pecuniary penalty orders, and to take and defend proceedings in respect of property vested in it as a result of a recovery order- are clear indicators that Parliament must necessarily have intended that it should enjoy legal status for these purposes. Similarly in my view, the reference in section 71(2) to ARA's "cause of action" in the context of a provision relating to limitation of actions, is only explicable on the basis that Parliament intended that ARA should have the power to file and maintain an action in court.*
>
> *[56] So whether, as section 3(1) of POCA puts it "the ARA means – (a) the FID or (b) any other entity so designated by the Minister by order", it seems to me that the statute has plainly given the ARA the authority to commence and maintain proceedings in the manner indicated…"*

[195] There is no question that the ARA being a division within the Ministry of Finance, is a State/Crown agency. The Attorney General as the principal legal advisor to

the government with a mandate to provide independent legal advice, should also through her legal officers, appear on behalf of the government of Jamaica in litigation matters other than in criminal proceedings. The Attorney General may be regarded as the guardian of the public interest and on that basis the Attorney General has a duty to intervene or ought to be invited to intervene in certain matters with a view to protecting the public interest. Protecting the public interest must certainly involve ensuring that the Constitution is properly interpreted and it is to that end that the Attorney General's Department will be asked to make its input in a constitutional claim such as this one.

[196] Given the authority of the ARA to bring and defend court proceedings, then it was not strictly necessary for the claimant to have joined the Attorney General as a party in these proceedings. When a party is unnecessarily joined in proceedings as a defendant, it involves incurring expenses in order to defend same. Whereas expenses will be incurred where the Attorney General is asked to intervene or make submissions in a claim, those expenses will necessarily be greater where she is made a party to the claim.

Whether there was a breach of procedural fairness

[197] Section 15(1) (a) and (b) of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011 states:

> *"No property of any description shall be compulsorily taken possession of and no interest in or right over property of any description shall be compulsorily acquired except by or under the provisions of a law that-*
>
> *(a) prescribes the principles on which and the manner in which compensation therefore is to be determined and given; and*
>
> *(b) secures to any person claiming an interest in or right over such property a right of access to a court for the purpose of –*
> *(i) establishing such interest or right (if any):*
> *(ii) determining the compensation (if any); to which he is entitled and*
> *(iii) enforcing his right to any such compensation.*

[198] Section 15 (2) (b) states:

"Nothing in this section shall be construed as affecting the making or operation of any law so far as it provides for the taking of possession or acquisition of property-

(a) …..

(b) by way of penalty for breach of the law, whether under civil process or after conviction of a criminal offence;

[199] A citizen of Jamaica has the right to protection from being deprived of property by virtue of the fundamental rights and freedom guaranteed by the Constitution. That right, like all other constitutional rights is not absolute. Constitutional rights are guaranteed to the extent that those rights and freedoms do not prejudice the rights and freedoms of others. There may also be derogation from those rights to the extent that such derogation may be demonstrably justified in a free and democratic society. (See section 13(2) of the Constitution). Section 57 of the POCA is but one example of such derogation from an individual's right to property that may be demonstrably justified.

[200] It is noteworthy that the claimant is not in this case challenging the constitutionality of section 57 or any of the other relevant sections of the POCA. It may fairly be said that in an oblique way, he challenges whether he was afforded a fair hearing in accordance with section 16(2) of the Constitution, in that he contends that he was not served in the proceedings. The claimant's attack on the decision of McIntosh J is essentially two pronged. He is in essence saying that there was a breach of procedural fairness in that he was deprived of the right to be heard. His Attorney at Law however did not develop his main argument around that point. His salvo was primarily aimed at the decision on the basis of the judge's interpretation and application of the relevant law to the facts found by him.

[201] It is consequent on the rights guaranteed that section 19 of the Constitution provides an avenue to a citizen to vindicate those rights if any of them has been, is being, or is likely to be infringed. Section 19 of the Constitution states as follows:

(1) "If any person alleges that any of the provisions of this chapter has been, is being or is likely to be contravened in relation to him, then, without

prejudice to any other action with respect to the same matter, which is lawfully available, that person may apply to the Supreme Court for redress."

(2) "Any person authorized by law, or, with the leave of the Court, a public or a civic organization, may initiate an application to the Supreme Court on behalf of persons who are entitled to apply under subsection (1) for a declaration that any legislative or executive act contravenes the provisions of this chapter.

(3) The Supreme Court shall have original jurisdiction to hear and determine any application made by any person in pursuance of subsection (1) of this section and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of this chapter to the protection of which the person concerned is entitled.

(4) Where any application is made for redress under this chapter, the Supreme Court may decline to exercise its powers and may remit the matter to the appropriate court, tribunal or authority if it is satisfied that adequate means of redress for the contravention alleged are available to the person concerned under any other law.

[202] It is presupposed that there must at least be some proper basis for an argument that a constitutional right has been contravened before subsection (1) of section 19 may be activated. Consideration must therefore be given to whether the property in question was taken "by way of penalty for breach of the law whether under civil process or after conviction" in accordance with section 15(2) of the Constitution.

[203] Section 15(1) allows for the compulsory taking of property only where a law prescribes the process for making compensation for such acquisition. Subsection (1) is wholly inapplicable to the present proceedings. Any taking of property must be done in accordance with the provisions of section 16 (2) and (3) of The Charter, (bearing in mind the exceptions provided for in section 4, permitting the holding of proceedings in camera).

[204] Section 16 (2) and (3) of The Charter state:

(2) "In the determination of a person's civil rights and obligations, or of any legal proceedings which may result in a decision adverse to his interests,

he shall be entitled to a fair hearing within a reasonable time by an independent and impartial court or authority established by law."

(3) "All proceedings of every court and proceedings relating to the determination of the existence or the extent of a person's civil rights or obligation before any court, or other authority, including the announcement of the decision of the court or authority, shall be held in public.

[205] In the case of **Attorney General and Others v Joseph (Jeffrey) and Boyce (Lennox)** 2006 CCJ (AJ), (2006) 69 WIR 104 at paragraphs 62 and 63 of the judgment, the concept of the right to due process and an act or proceedings being done in accordance with law was explained thus:

[62] The wide scope of the protection of the law can be demonstrated by reference to the authorities. In Ong Ah Chuan v Public Prosecutor, for example, Lord Diplock noted that:' a Constitution founded on the Westminister model and particularly in that part of it that purports to assure to all individual citizens the continued enjoyment of fundamental liberties or rights, references to law in such contexts as in accordance with law, equality before the law, protection of the law and the like, in their lordships' view, refer to a system of law which incorporates those fundamental rules of natural justice that had formed part and parcel of the common law of England that was in operation in Singapore at the commencement of the Constitution.'

*[63] More recently, in Thomas v Baptiste, Lord Millett, in reference to the expression 'due process of law' found in the Trinidad and Tobago Constitution, stated: 'In their lordships' view, due process of law is a compendious expression in which the word law does not refer to any particular law and is not a synonym for common law or statute. Rather, it invokes the concept of law itself and the universally accepted standards of justice observed by civilised nations which observe the rule of law; see the illuminating judgment of Phillips JA in **Lasalle v Attorney-General** (1971) 18 WIR 379, from which their lordships have derived much assistance. 'The clause thus gives constitutional protection to the concept of procedural fairness '.*

[206] It was accepted in the case of **Beverly Pierre v The Attorney General of Trinidad and Tobago** Claim No. CV2014-00014 that a claimant may invoke section 14 of the Constitution (the equivalent of section 19 of the Jamaican Constitution) where

there has been a breach of procedural fairness such as bias or a breach of the right to be heard (see paragraph 58 of the judgment).

[207] The cases of **Maharaj v Attorney General of Trinidad and Tobago (No. 2)** [1978] 2 All ER 670, and **Chokolingo v Attorney General of Trinidad and Tobago** [1981] 1 All ER 244 are relevant to this aspect of the discussion. Those two cases address three separate principles which are applicable to this claim. One of the principles distilled from those cases is that a judge's error on matters of substantive law and of fact will not give rise to a breach of an individual's constitutional rights but that the consequences of an error in procedure where that error amounts to a failure to observe one of the fundamental rules of natural justice may be quite different if that error results in a person being deprived of liberty and among other things, the enjoyment of property. The other aspects of those cases will be addressed later.

[208] In **Maharaj v Attorney General of Trinidad and Tobago (No. 2),** the appellant brought a claim for redress for contravention of his right not to be deprived of liberty except by due process of law under the Constitution of Trinidad and Tobago. He had been committed to prison for 7 days for contempt of court. He claimed among other remedies, an order for his immediate release from prison. He was ordered released forthwith pending a final determination of the motion. Upon the hearing of the substantive motion, it was dismissed and the appellant was ordered to serve the remaining time, which he did. He appealed to the court of appeal. Whilst the appeal was pending, he obtained special leave to appeal to the Judicial Committee of the Privy Council against the committal. The Privy Council set aside the committal order on the basis that the judge who made the committal order had failed to specify sufficiently the nature of the contempt and so the committal order was invalid. His appeal to the court of appeal was however dismissed on the basis that the breach of the rules of natural justice did not constitute a violation of section 1 (a) now 4 (a) of the constitution.

[209] The appellant appealed that decision of the court of appeal to the JCPC. The JCPC determined that the claim for redress in the motion, being a claim involving the question of whether the procedure adopted by the judge contravened the appellant's constitutional right, and not an appeal on fact or substantive law from the judge's decision that he was guilty of conduct amounting to contempt of court, fell within the original jurisdiction of the court under section 6(2)(a) of the Constitution.

[210] At page 679 of that judgment, Lord Diplock giving the judgment on behalf of the Board said:

> *"In the first place, no human right or fundamental freedom recognized by Chapter 1 of the Constitution is contravened by a judgement or order that is wrong and liable to be set aside on appeal for an error of fact or substantive law, even where the error has resulted in a person's serving a sentence of imprisonment. The remedy for errors of these kinds is to appeal to a higher court. When there is no higher court to appeal to, then none can say that there was error. The fundamental human right is not to a legal system that is infallible but to one that is fair. It is only errors in procedure that are capable of constituting infringements of the rights protected by s 1(a), and no mere irregularity in procedure is enough, even though it goes to jurisdiction; the error must amount to a failure to observe one of the fundamental rules of natural justice. Their Lordships does not believe that this can be anything but a rare event…*
>
> *In the third place, even a failure by a judge to observe one of the natural rules of fundamental justice does not bring the case within section 6 unless it has resulted, is resulting or is likely to result in a person being deprived of life, liberty, security of the person or enjoyment of property. It is only in the case of imprisonment or corporal punishment already undergone before an appeal can be heard that the consequences of the judgment or order cannot be put right on appeal to an appellate court. It is true that instead of, or even as well as, pursuing the ordinary course of appealing directly to an appellate court, a party to legal proceedings who alleges that a fundamental rule of natural justice has been infringed in the course of the determination of his case could in theory seek collateral relief in an application to the high court under s 6(1) with a further right of appeal to the Court of Appeal under s 6(4). The High Court, however, has ample powers both inherent and under s 6(2) to prevent its process being misused in this way; for example, it could*

> *stay proceedings under s 6(1) until an appeal against the judgment or order complained of had been disposed of."*

[211] The facts of **Chokolingo** are that the appellant was found guilty of criminal contempt of court before the High Court of Trinidad and Tobago in respect of an article he published attacking the judiciary. He was ordered committed to prison for 21 days. He served his sentence and did not appeal. Two and half years later, the appellant applied to the High Court for constitutional redress on the basis that the order of the High Court committing him was unconstitutional and that his imprisonment based on that order was in breach of his fundamental freedoms guaranteed under the Constitution. His application was dismissed at first instance, by the court of appeal and also by the Judicial Committee of the Privy Council.

[212] At page 248 of the judgment, Lord Diplock made the following pertinent observation:

> *"The normal way in which this interpretative and declaratory function is exercised is by judges sitting in courts of justice for the purpose of deciding disputes between parties to litigation (whether civil or criminal), which involves the application to the particular facts of the case the law of Trinidad and Tobago that is relevant to the determination of their rights and obligations. It is fundamental to the administration of justice under a Constitution which claims to enshrine the rule of law (preamble, paras (d) and e)) that if between the parties to the litigation the decision of that court is final (either because there is no right of appeal to a higher court or because neither party has availed himself of an existing right of appeal) the relevant law as interpreted by the judge in reaching the court's decision is the 'law so far as the entitlement of the parties 'due process of law' under Section 1(a) and 'protection of the law' under Section 1(b) are concerned. Their Lordships repeat what was said in* ***Maharaj v Attorney General for Trinidad and Tobago (No 2.)*** *The fundamental right guaranteed by S 1(a) and (b) and S2 of the Constitution is not to a legal system which is infallible but to one which is fair."*

And later, that:

> *"Even if it was possible to persuade their Lordships that publication of written matter which has these characteristics no longer constitute a criminal contempt of court in Trinidad and Tobago in 1972, it would*

> *merely show that the judge had made an error of substantive law as to the necessary ingredient of the genus of common law offences which constitute contempt of court. In their Lordships' view, there is no difference in principle behind this kind of error and a misinterpretation by a judge, in the course of an ordinary criminal trial, of the words of the Act of Parliament creating the offence with which the accused is charged. If the former is open to collateral attack by application to the High Court under section 6(1) of the constitution, so must the latter be.*

[213] His Lordship further postulated that:

> *Acceptance of the appellant's argument would have the consequence that in every criminal case in which a person who had been convicted alleged that a judge had made any error of substantive law, as to the necessary characteristics of the offence there would be parallel remedies available to him…. The convicted person having exercised unsuccessfully his right of appeal to a higher court… he could nevertheless launch a collateral attack (it might be years later) on a judgment that the Court of Appeal had upheld, by making an application for redress under Section 6(1) to a court of coordinate jurisdiction… To give Chapter 1 of the Constitution an interpretation which would lead to this result would, in their Lordship's view be quite irrational and subversive of the rule of law which it is the declared purpose of the Constitution to enshrine."*

[214] As the affidavit evidence put forward by the claimant as well as the second defendant demonstrate, the ARA initiated civil recovery proceedings in the Supreme Court. On the question of whether the property in respect of which it is alleged that the claimant's constitutional rights have been infringed was one of the properties in relation to which the civil recovery proceedings was brought and in respect of which the order was ultimately made, Ms Whyte directed the court's attention to a freezing order made in earlier proceedings. She stated that the property in question was a subject of the freezing order and that the civil recovery order was made in respect of all properties named in the freezing order. It is noted that a particulars of claim was filed in the civil recovery proceedings and it may be discerned from the judgment of McIntosh J that the properties, the subject of the civil recovery proceedings were particularized in that document, although it was not exhibited in these proceedings. In any event, it was not suggested or argued

by the claimant that the property in question was not a subject of those proceedings. At item 6 of the civil recovery order, the property in question, lot 696 West Cumberland is listed as one of the properties in respect of which the order was made.

[215] It is also noteworthy that the question of service of the claimant in respect of those proceedings was expressly dealt with by the learned judge. He found that the claimant was deemed to have been served. The fact of his non-participation in those proceedings in circumstances where the court found that he was served with the claim form and other relevant documents, cannot without more mean that the property was not taken by due process. The learned judge acted in accordance with rule 39.5 of the Civil Procedure Rules which empowered him to proceed with a trial in the absence of a party or parties where he is satisfied that notice of the hearing has been served on the absent party.

[216] It would be wrong for this court to conclude that the claimant was deprived of the right to be heard, having regard to the learned Judge's determination that the claimant was deemed served. To so conclude would be tantamount to setting aside and substituting a different decision or reversing the decision of the learned judge.

[217] The main thrust of the claimant's argument was confined to a challenge to the correctness of the judge's interpretation and application of certain sections of the POCA, in particular, sections 57 and the aspect of section 2 defining criminal conduct. He also challenges the sufficiency of the evidence on which the order was made. I do not propose to address in detail the question of the correctness of the judge's decision as the ensuing discussion will render it abundantly clear that it is neither necessary nor appropriate to do so in the present proceedings. For that matter, neither do I see it necessary to address the very obvious flaws in Mr Wildman's submissions on the interpretation and application of certain aspects of the POCA, for example, his view of the interrelationship between unlawful conduct and criminal conduct.

[218] Even if there was factual basis to say that the judge's decision was wrong in law, (and I am not in any way making any such pronouncement) the Full Court exercising its constitutional jurisdiction has no authority to make any such pronouncement. The Full Court does not sit as a court of review and cannot therefore determine whether the decision of a judge of coordinate jurisdiction exercising his functions in the civil court erred on matters of substantive law. For that matter the Full Court cannot decide if the judge erred on matters of procedure. The matter was settled in the case of **Leymon Strachan v The Gleaner Company and Another** (PC Appeal no. 22 of 2004), a decision of The Judicial Committee of the Privy Council. It was there decided that a judge of coordinate jurisdiction has no authority to set aside the decision of another judge even if the order was made without jurisdiction. A fortiori, such a judge has no authority to set aside a judgment or order that was within the judge's jurisdiction to make, unless of course it was an order that the party was entitled to have set aside ex debito justitiae.

[219] The duty of the court when exercising its constitutional jurisdiction is to hear a claim and determine whether there is an infringement of an individual's constitutional right or rights as alleged. The claimant is asking this court to say that McIntosh J was in error and that error resulted in a breach of his constitutional rights, and therefore this court should make orders and declarations to vindicate the breach of those rights. The claimant so far, is not on good ground.

Whether the claimant had an alternative remedy available to him.

[220] Another principle derived from **Maharaj** and which was applied in **Chokolingo**, is that the constitutional remedy (afforded by section 14 of the Constitution of Trinidad and Tobago which is the equivalent of section 19 of the Constitution of Jamaica) is a measure of last resort, therefore a claimant will be expected to exhaust other available remedies before he resorts to constitutional measures. As posited in **Maharaj**, a court will be inclined to say that even if procedural fairness is breached, a claimant should pursue a right of appeal except in the case of

imprisonment or corporal punishment already undergone before an appeal can be heard, and so the consequences of the judgment or order could not thereafter be put right on appeal. (See **Demerieux v AG of Barbados** Civil Suit No. 734 of 1981). This area will be more fully explored in the **Bernard Coard** case.

[221] The question of the appropriateness of the use of a constitutional remedy was looked at in **The Attorney General of Trinidad and Tobago v Ramanoop** [2005] UKPC 15. The following principles were set out at paragraphs 23 to 26 of the judgment:

> *23."The starting point is the established principle adumbrated in Harrikissoon v Attorney-General of Trinidad and Tobago [1980] AC 265. Unlike the Constitutions of some other Caribbean countries, the Constitution of Trinidad and Tobago contains no provision precluding the exercise by the court of its power to grant constitutional redress if satisfied that adequate means of legal redress are otherwise available. The Constitution of the Bahamas is an example of this. Nor does the Constitution of Trinidad and Tobago include an express provision empowering the court to decline to grant constitutional relief if so satisfied. The Constitution of Grenada is an instance of this. Despite this, a discretion to decline to grant constitutional relief is built into the Constitution of Trinidad and Tobago. Section 14(2) provides that the court "may" make such orders, etc, as it may consider appropriate for the purpose of enforcing a constitutional right.*
>
> *24. In Harrikissoon the Board gave guidance on how this discretion should be exercised where a parallel remedy at common law or under statute is available to an applicant. Speaking in the context of judicial review as a parallel remedy, Lord Diplock warned against applications for constitutional relief being used as a general substitute for the normal procedures for invoking judicial control of administrative action. Permitting such use of applications for constitutional redress would diminish the value of the safeguard such applications are intended to have. Lord Diplock observed that an allegation of contravention of a human right or fundamental freedom does not of itself entitle an applicant to invoke the section 14 procedure if it is apparent this allegation is an abuse of process because it is made "solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right": [1981] AC 265, 268 (emphasis added).*

> *25. In other words, where there is a parallel remedy constitutional relief should not be sought unless the circumstances of which complaint is made include some feature which makes it appropriate to take that course. As a general rule there must be some feature which, at least arguably, indicates that the means of legal redress otherwise available would not be adequate. To seek constitutional relief in the absence of such a feature would be a misuse, or abuse, of the court's process. A typical, but by no means exclusive, example of a special feature would be a case where there has been an arbitrary use of state power.*
>
> *26. That said, their Lordships hasten to add that the need for the courts to be vigilant in preventing abuse of constitutional proceedings is not intended to deter citizens from seeking constitutional redress where, acting in good faith, they believe the circumstances of their case contain a feature which renders it appropriate for them to seek such redress rather than rely simply on alternative remedies available to them. Frivolous, vexatious or contrived invocations of the facility of constitutional redress are to be repelled. But "bona fide resort to rights under the Constitution ought not to be discouraged": Lord Steyn in Ahnee v Director of Public Prosecutions [1999] 2 AC 294, 307, and see Lord Cooke of Thorndon in Observer Publications Ltd v Matthew (2001) 58 WIR 188, 206.*

[222] The learning from **Maharaj** that alternative remedies should be exhausted before a constitutional motion is resorted to is not to say that the court's discretion is fettered once it has been determined that there is an alternative remedy. As some of the cases cited by the claimant will show, there is a degree of flexibility in the approach to be taken when a constitutional claim is made. For one, this is in keeping with the broad and purposive approach to Constitution interpretation and secondly, by the very wording of section 19(4), claims are not expressly excluded on the basis that an alternative remedy may exist. The Jamaican Constitution, like that of Grenada, is one of those which expressly invests the court with a discretion to decline to exercise its power to grant constitutional relief if other means of redress are otherwise available. What this means therefore is that the circumstances of each case must be closely examined. The point was quite recently emphasized in the case of **Dawn Satterswaite v The Assets Recovery Agency consolidated with Terrence Allen v Assets Recovery Agency** SCCA Nos. 30/2014 and 51/2015.

[223] The principle that a constitutional claim is a measure of last resort was examined and applied in the Trinidadian case of **Beverly Pierre** (supra) as well as by Henry McKenzie J in the local case of **Deborah Chen v University of the West Indies** [2021] JMSC Civ. 01

[224] In **Beverly Pierre**, the claimant had been convicted and she appealed her conviction. The court of appeal varied her sentence but failed to take into account time spent in prison prior to trial. There was no appeal from that decision although her Attorney at Law had promised to file an appeal. Years later, when the claimant became aware of the right to have had time spent in custody prior to trial taken into account, she brought the constitutional motion on the basis of the failure of the Court of Appeal to take the time spent into consideration. The claim was struck out on the bases that a constitutional claim is a measure of last resort and could not be used as a substitute for an appeal even where the door to an appeal had been closed and further, that the claim amounted to a collateral attack on the decision of the court of appeal.

[225] In **Deborah Chen** Henry-McKenzie J refused to allow the claimant to pursue her constitutional claim by striking out same in circumstances where she determined that the claimant had an alternative common law remedy.

[226] The decision in **Beverly Pierre** is demonstrative of the pronouncement made in **Durity v the Attorney General of Trinidad and Tobago** [2002] UKPC 20 that where an application under the ordinary jurisdiction of the court could have been made but is now out of time, unless some cogent explanation is offered, the bringing of a constitutional claim will be regarded as a misuse of the court's constitutional jurisdiction.

[227] The case of **Durity**, also dealt with the question of whether the claimant had an alternative remedy and therefore whether the claim was an abuse of process. In that case, the appellant was suspended from duties as a Magistrate in 1989. He remained on suspension and in 1992 the Legal Service Commission, after

communication from the appellant's Attorney at Law, advised the appellant that disciplinary charges would be preferred against him on the basis that he had conducted himself in a manner that brought the judicial and legal service into disrepute. In 1993 the appellant sought leave of the High Court to apply for judicial review of the decision to bring disciplinary proceedings. Leave was refused. His application for leave in the court of appeal was refused. During the course of the hearing in the court of appeal, he sought to amend his application to include a challenge to the decision to suspend him. That application to amend was refused. He was also refused leave to appeal to the Judicial Committee of the Privy Council.

[228] In 1997 the appellant brought constitutional proceedings, claiming the decision to suspend him breached certain constitutional rights. The Attorney General filed a cross motion raising certain preliminary objections, namely delay, that the action was time barred and res judicata and that it was an abuse of process. The constitutional motion was dismissed though the judge found that there was no abuse of process and the motion was not res judicata. He appealed to the court of appeal. His appeal was dismissed. He appealed to the Judicial Committee of the Privy Council. His appeal was allowed. As highlighted by Ms. Hall, it was observed during the course of the judgment that-

> "*When a court is exercising its jurisdiction under s 14 of the Constitution and has to consider whether there has been delay such as would render the proceedings an abuse or would disentitle the claimant to relief, it will usually be important to consider whether the impugned decision or conduct was susceptible of adequate redress by a timely application to the court under its ordinary, non-constitutional jurisdiction. If it was, and if such an application was not made and would now be out of time, then, failing a cogent explanation the court may readily conclude that the claimant's constitutional motion is a misuse of the court's constitutional jurisdiction. This principle is well established. On this it is sufficient to refer to the much repeated cautionary words of Lord Diplock in Harrikissoon v A-G of Trinidad and Tobago* [1980] AC 265*,* [1979] 3 WLR 62*, 268 of the former report. An application made under s 14 solely for the purpose of avoiding the need to apply in the normal way for the appropriate judicial remedy for unlawful administrative action is an abuse of process.*

[229] In **Abraham Dadoub and Raymond Clough v The Disciplinary Committee of the General Legal Council (Ex p Dirk Harrison Contractor General of Jamaica)** [2018] JMCA App 33, like in **Durity** the court considered the question of whether the claimant had an alternative remedy and whether the claim was an abuse of process.

[230] In **Dabdoub,** the Contractor General made a complaint against the applicants in their capacities as Attorney at Law to the Disciplinary Committee of the General Legal Council. Upon examining the complaint, the Committee found that there was a prima facie case to answer and set a trial date, and the application was adjourned. The applicants filed a Fixed Date Claim Form in the Supreme Court where they sought various declarations and an injunction. Included were declarations that there was no or no sufficient evidence to ground a prima facie case against the applicants and that there was breach of their constitutional right to a fair hearing. They also sought an injunction.

[231] The Committee filed an application to strike out the claim on the basis that the claim was an abuse of process on the ground that the Legal Profession Act prescribes the process if the applicants were dissatisfied with the decision of the Committee. Brown Beckford J made an order striking out the claim on the basis that it was an abuse of process, and the appropriate course was for the applicants to have filed an appeal, a right which was given under the LPA. She also refused leave to appeal.

[232] The applicants sought permission to appeal in the court of appeal. One issue before the court was whether the learned judge erred when she ruled that the proper course for the applicants to have taken is an appeal against the decision of the committee that a prima facie case had been made out, or an application for a judicial review of that decision. A further issue was whether she erred in refusing to accept the applicants' submission that they can properly pursue declaratory relief under part 8 of the CPR. The third issue was whether the learned judge was

correct when, in respect of the alleged constitutional breaches, she ruled that the jurisdiction of the court was being prematurely provoked.

[233] Phillips JA determined at paragraph 28 that the applicants had an avenue of redress by way of appeal based on section 16 of the Legal Profession Act and that based on the wording of section 19(4) of the Constitution, it would be difficult for the applicants to demonstrate that the learned judge had erred in declining to exercise her powers to otherwise remit the matter to the appropriate authority, having been satisfied that there was adequate means for redress for the alleged contravention.

She continued at paragraph 30 and 38

> *[30] "The ruling by the court that any effort to proceed by way of declaratory relief under Part 8 of the CPR was merely a means of attempting to have the court re adjudicate what had already been decided by the Committee and also to effect a collateral attack on its previous decision, appeared quite sound."*
>
> *[38] "...The issues arising from the decision of the Committee are matters which ought to be the subject of an appeal pursuant to section 16(1) of the LPA, and the fixed date claim seeking similar reliefs by way of declarations, can only be described as an abuse of the process, and was therefore correctly struck out by the learned trial judge..."*

[234] The claimant in the instant case has said that had he pursued an application to set aside the decision of McIntosh J, he would have been subject to the court's discretion, since it was not a judgment he was entitled to have set aside ex debito justitiae. In any proceedings, a litigant is subject to the court's discretion. I will only say that this reason is not a sufficiently good one to invoke the constitutional jurisdiction of the court. Indeed, in invoking the constitutional jurisdiction, the claimant is asking the court to exercise its discretion.

[235] The learned judge's finding that the facts were agreed and that it was only questions of law that were to be determined is questionable as far as the claimant is concerned, as he did not participate in the proceedings and neither was he represented. This issue was also a matter to be addressed in an appeal or it could

have formed part of the basis of an application to set aside the judgment, although I can't help but add the obvious, which is that the learned judge could properly have made findings of fact in relation to the claimant in his absence, hence nothing would turn on an adverse finding in relation to the judge's decision in this regard.

[236] The claimant through his Attorney at Law has proffered as a reason for deciding to not pursue an appeal or application to set aside the judgment, the fact that the property in question had already been transferred. If I understood the point correctly, he was in essence saying that it would have been late to have the property transferred back to the claimant. The remedies that the claimant seeks in this constitutional claim are a declaration that the taking of his property is unconstitutional, to have the property transferred back to him or in the alternative compensation for the property, as well as damages for the wrongful taking of his property. What was required in the circumstances of this case was a determination as to the correctness or otherwise of the decision of McIntosh J.

[237] It was argued by Ms Whyte that the judgment in question against the claimant was not one by default because the case was decided on its merits. It is arguable whether it was. I say so because of the claimant's position that he was not aware of the proceedings. Deemed service is effective service until and unless it has been shown to be otherwise. The onus was on the claimant to establish to the court's satisfaction that he was not served and was not aware of the proceedings. There might well have been a very slender basis on which he could successfully present an argument that he was not served. This court has been presented with the claimant's untested affidavit evidence to that effect, with no explanation as to how it is that the documents were served on his mother, yet he was not made aware of the proceedings. It has not escaped notice that the claimant's mother was available to give evidence on his behalf in these proceedings. This observation is made because she attended these proceedings in person as the claimant's representative. Evidently, at some point he did become aware of the proceedings. He has not really said when he became so aware.

[238] Clearly the claimant's stance that he was not served is information that would have been very pertinent to an application to set aside the judgment. Assuming the judgment was one by default, the applicable procedure is set out in rule 13 of the Civil Procedure Rules, an application which falls within the non-constitutional jurisdiction of the court.

[239] One plausible argument is that the order was a final order which could only have been the subject of an appeal. Another plausible position is that, since the claimant was not present at the proceedings and was unrepresented, and since it could be said that a trial had taken place, a course open to him was an application to set aside the judgment. On the basis of the court's determination that the claimant had been served, there was the route of an application to set aside the judgment based on the provisions of rule 39 of the CPR.

[240] Rule 39.6 provides an avenue for a party who was not present at a trial, and at which trial judgment was given or an order made in his absence, to apply to set aside that judgment or order. That application must be made within 14 days of the date on which that judgment or order was served on him. There is no indication from the claimant as to if and when such service on him was effected. There was the option of applying for an extension of time if the circumstances warranted it.

[241] By the time of the filing of the application to set aside what he had perceived to be a default judgment, the claimant may have been out of time with regard to the filing of an appeal. Based on the Court of Appeal Rules, his ability to file an appeal in the circumstances would have been dependent on the time the court determined that he had been served with the judgment of McIntosh J. As observed in **Durity** and **Beverly Pierre,** even if the claimant would now be out of time in making an application under the court's ordinary non-constitutional jurisdiction, the failure to utilize such channel is not a basis for allowing a claimant to pursue a constitutional claim unless a cogent explanation for the failure is offered.

[242] This court does not have to decide which route was most appropriate for the claimant to pursue. Whether it was an application to set aside a default judgment, or an application pursuant to section 39 of the Civil Procedure Rules, or by way of an appeal, what is pellucid, is that the claimant had an alternative remedy available to him and a remedy that would have been more appropriate based on the nature of, and reason for his challenge to the decision.

[243] The claimant in the instant case in my view has not offered a cogent explanation as to why he has failed to utilize the non-constitutional jurisdiction to seek redress. It could hardly be properly argued that adequate redress would not have been available by a timely application to the court under its ordinary, non-constitutional jurisdiction.

[244] The claimant has asked the court to consider a number of cases which he contends, support his claim that he is entitled to a constitutional remedy. He cited the cases of **Bernard Coard and others v Attorney General of Grenada** [2007] UKPC 7, **Jennifer Gairy (as administratrix of the estate of Eric Gairy, Deceased) v The Attorney General of Grenada [2001] UKPC 30, Belfonte v The Attorney General** (2005) 68 WIR 413, **Viralee Latibeaudiere v Minister of Finance and Planning and others [2013] JMSC Civ. 127** and **Beverley Levy v Ken sales and Marketing Limited** [2008] UKPC 6**.**

[245] With the exception of **Beverley Levy v Ken sales and Marketing Limited,** these cases may most conveniently be looked at in the context of the existence or otherwise of an alternative remedy. Clearly, those cases also raise issues of res judicata and abuse of process because of the logic that a discussion on whether there is an alternative remedy necessarily involves a discussion on whether there is an abuse of process. According to the claimant, the **Chokolingo** principle has been ameliorated by decisions in the cases on which he places reliance.

[246] In **Bernard Coard**, the thirteen appellants were convicted in 1986 of the murders of 11 persons which occurred in 1983 during a violent confrontation between

factions of the revolutionary party who seized power from the constitutional government following a revolution in Grenada in 1979. They were sentenced to death. After conviction and sentence, they appealed to the Grenada Court of Appeal, however, their appeals were dismissed.

[247] Prior to the 1979 revolution, Grenada shared a supreme court with other associated states pursuant to the West Indies Associated States Supreme Court (Grenada) Act. When the revolutionary party took government, this Act was repealed and replaced with the People's Law No. 4 which established the Supreme Court of Grenada which consisted of the High Court and the Court of Appeal. People's Law No. 84 of 1979 abolished appeals to the Privy Council. When the constitutional government was restored, it passed an Act which confirmed the validity of all laws made by the revolutionary government. At the time of the appellants' indictment, People's Law No. 4 was still in effect. The appellants brought a constitutional motion challenging the validity and jurisdiction of the High Court but this motion was dismissed. An appeal to the Court of Appeal was likewise dismissed. The Appellants then petitioned the Judicial Committee of the Privy Council for special leave to appeal but leave was refused in July 1985 on the ground that the right of appeal had been abolished.

[248] Since the appellants were sentenced to death, the Minister, in accordance with section 74(1) of the Grenada Constitution, referred the appellants' case to the Advisory Committee of the Prerogative of Mercy for it to give its advice. The Governor General in 1991 commuted the Appellants' sentences from one of death to one of life imprisonment. Since then the appellants remained in custody. However, when the Judicial Committee of the Privy Council in **R v Hughes** [2002] UKPC 12 affirmed that the mandatory death penalty was an inhuman or degrading punishment and unconstitutional, the appellants filed a constitutional motion claiming that the sentences imposed upon them had been unlawful. That was the primary contention but they also challenged the constitutionality of the conviction.

[249] Lord Hoffman considered the application for leave to challenge the constitutionality of the convictions. He reasoned and concluded at paragraph 22-25 as follows:

> *[22] "Their Lordships refused the application. It is simply an attempt to use the procedure of a constitutional motion to obtain from the Privy Council a review of the 1991 decision of the Court of Appeal. As the law then stood, the decision of the Court of Appeal was final and s 7(4) of the 1991 Act made it clear that it was not to be any less final because an appeal to the Privy Council had been restored. All the points raised by Mr Fitzgerald in support of his application and supported by the new affidavits were or could have been taken in the appeal. The use of a constitutional motion to avoid the finality of a decision dismissing a criminal appeal is ordinarily impermissible, for the reasons explained by Lord Diplock in Chokolingo v A-G of Trinidad and Tobago [1981] 1 All ER 244, [1981] 1 WLR 106, 111-112, [1981] Crim LR 40:*

[250] The above passage was followed by the quotation at paragraph 69 above to the effect that if the appellant's argument was accepted, it would have the effect of permitting a convicted person whose appeal had been denied, to bring a constitutional claim so as to mount a collateral attack upon the judgment of the court of appeal and it would be wrong to interpret the constitution in such a way.

[251] The principle in **Chokolingo** was affirmed in **Bernard Coard**, albeit with some qualification. It was strictly applied certainly as it relates to the challenge to the constitutionality of the conviction as demonstrated above. However, in relation to the challenge to the constitutionality of the death sentence, although the Board acknowledged that there was some logic in the argument of counsel for the Attorney General to the effect that the validity of the sentence of death was as much res judicata as the validity of the conviction, the Board noted that the legality of the mandatory death sentence as far as the appellants were concerned had never been the subject of judicial decision.

[252] Important to the determination of the Board, was the consideration that the validity of the life sentence which the appellants were now serving was dependent on the validity of the sentence of death. The Board observed that there had never really been any judicial input into the decision to impose the life sentence. It was also

postulated that if the appellants were still at the risk of execution, "the Board would not allow the principle of res judicata to stand in the way of granting relief to prevent the carrying into effect of an unlawful sentence" (see paragraph 29 of the judgment). The Board also considered that there was no adequate mechanism in Grenada to allow for a judicial sentencing procedure to which the appellants were entitled. Lastly, the Board considered the political circumstances surrounding the case and opined (although this was clearly speculation) that it would be unlikely that any government of Grenada would take an objective view of the matter.

[253] All that the **Bernard Coard** case demonstrates (as did **Maharaj**) is that when it is beyond doubt that there has been an infringement of a constitutional right, and particularly when that infringement touches and concerns the liberty of the subject, the courts will adopt a very flexible approach in order to ensure that there is no continued infringement of that right and that a remedy will be afforded. This approach demonstrates the primacy of rights protected by the constitution. To that end, the Board noted at paragraph 33 of **Bernard Coard,** that in **Hinds v Attorney General of Barbados** [2002] 1 AC 854 Lord Bingham qualified the principle in **Chokolingo** by observing that:

> *"It would be undesirable to stifle or inhibit the grant of constitutional relief in cases where a claim to such relief is established and such relief is unavailable or not readily available through the ordinary avenue of appeal. As it is a living, so must the Constitution be an effective, instrument."*

[254] **Jennifer Gairy (as administratrix of the estate of Eric Gairy, Deceased) v The Attorney General of Grenada** also manifests the flexible approach that the court is expected to adopt, in this instance where property rights were concerned and where it was amply demonstrated that there had been a breach. The deceased Eric Gairy was the Prime Minister of Grenada. On March 13, 1979, his government was overthrown by armed coup and the Constitution was suspended. Power was seized by the People's Revolutionary Government (PRG) who implemented the People's Law No 95 of 1979. Under this law, certain real property belonging to the appellant was confiscated and vested in the government. The PRG was

subsequently overthrown by a military coup. Later, the Constitution was restored, elections were held, and democracy was restored.

[255] In May 1985, the appellant issued proceedings claiming a declaration that the law confiscating his property was void and of no effect. The appellant later discontinued his proceedings and placed his claim before a Commission of Inquiry established to receive and consider claims by persons who had been deprived of property by the state without compensation. The commission recommended the return of his property unlawfully confiscated and payment of compensation. However, the appellant's property was not returned and he was not compensated.

[256] Accordingly, the appellant issued proceedings in the Supreme Court of Grenada against the Attorney General. At the hearing, the Attorney General conceded the claimant's point that People's Law No 95 of 1979 contravened the Constitution. Compensation was ordered and was to be determined by an arbitrator, it was also ordered that the applicant's property which was confiscated be returned forthwith. The appellant's properties were returned to him and an arbitrator duly determined the compensation to which the appellant was entitled.

[257] It was agreed upon return of the matter to court that the arbitrator's report be adopted, that judgment with interest be entered for the applicant and that the minister be directed to issue a warrant for the prompt payment of the amount from the consolidated fund. The Attorney General appealed from this order. One of his grounds was that the Minister of Finance could not be directed to issue a warrant for the prompt payment of the specified sum from the consolidated fund. Counsel for the appellant in the court of appeal conceded that the mandatory order against the Minister of Finance should not have been made. In a judgment of the court of appeal, no ruling was made in relation to this ground. The parties agreed on a wording of the order that did not ring as an injunction. The order was amended accordingly. Some payment in accordance with the order was made but a large amount remained outstanding.

[258] The appellant in a new motion in the same proceedings, sought and obtained leave for an order of mandamus directed to the Minister of Finance requiring him to make prompt payment of the balance of the compensation ordered. In February 1999, the appellant's application was dismissed. The judge had no difficulty in finding that the balance due on the judgment debt was a charge on and payable out of the consolidated fund but he concluded that a mandatory order against the minister, enforceable by contempt or other coercive proceedings, would be an order against the crown, and in reliance on **Jaundoo v Attorney-General of Guyana** [1971] AC 972, [1971] 3 WLR 13, he held that the court had no jurisdiction to make such an order.

[259] The appellant's appeal to the court of appeal was dismissed and the court concluded that an order of mandamus could be made to compel performance by a minister of a statutory duty binding on him in his official capacity. Ultimately however, the court said that the appellant's remedy, which was enforceable by mandamus, lay against the Permanent Secretary (Finance) and not the Minister of Finance. The appeal was dismissed because the minister was not the public official obligated to make payment of the money which the court had ordered the state to pay the appellant. Dismissal of the appeal would also have been justified, it was held, on the ground of *res judicata* as the liability of the minister had already been the subject of a consent order of the court of appeal on 6 July 1994 and the issue could not be raised again.

[260] Before the Judicial Committee of the Privy Council one of the submissions of the Attorney General was that the appellant's claim against the minister is barred on grounds of *res judicata*. It was also suggested that the appellant's revived claim was an abuse of process within the rule in *Henderson v Henderson* (1843) 3 Hare 100, as recently explained by the House of Lords in *Johnson v Gore Wood & Co*, [2001] 1 All ER 481, [2001] 2 WLR 72. At paragraph 27 of the judgment Lord Bingham of Cornwall said:

> *"There is authority, which was not challenged, that a consent order may found a plea of res judicata even though the court has not been asked to investigate and pronounce on the point at issue (see Spencer Bower and Turner and Handley, Res Judicata, 3rd ed 1996, Ch 2, para 38), and it may well be abusive to raise in later proceedings an issue or claim which could and in all the circumstances should have been raised in earlier proceedings. But these are rules of justice, intended to protect a party (usually, but not necessarily, a defendant) against oppressive or vexatious litigation. Neither rule can apply where circumstances have so changed as to make it both reasonable and just for a party to raise the issue or pursue the claim in question in later proceedings. Whatever the basis of the concession made by the appellant in the Court of Appeal on 6 July 1994, the appellant could reasonably have regarded the change as one of form and cannot have doubted that payment would be made of the sum which was mandatorily ordered to be paid promptly. When the appellant issued his present application in January 1997 it was plain that a more effective remedy was required and, although substantial payments on account have been made, a large part of the debt remains outstanding. In these changed circumstances it would not be just to shut the appellant out from relief because of a formal concession made in July 1994."*

[261] The **Gairy** case is wholly distinguishable from the case at bar. It was clearly agreed in that case that the appellant's constitutional right to property had been breached and that he was entitled to compensation. His travails lay in being able to recover that compensation. The focus was therefore to provide a remedy in the face of the blatant breach. The JCPC clearly recognized that the appellant was essentially being stone walled in seeking to enforce his judgment in the very same court that had awarded the judgment. He had exhausted all avenues locally within the judicial system. The JCPC determined that res judicata did not apply to bar the appellant because the circumstances had so changed so as to make it reasonable and just for the appellant to raise the issue or pursue the claim in question in new proceedings.

[262] The above cannot be said of the present case. This is not a case where it has already been determined that the claimant's constitutional rights were breached. The claimant so asserted and has asked the court to so declare but has not established that there is a breach of his constitutional rights which requires that

there be some redress. In the present case, there were clearly other avenues open to the claimant to test the accuracy of the findings of the learned judge in the recovery proceedings. It may fairly and readily be said as Ms Hall observed, that unlike the claimant in the present case, the claimant in the **Gairy** case had no alternative form of redress available to her. (I have used the pronouns 'him' as well as 'her' with reference to the appellant simply because by the time the constitutional motion was before the JCPC, Sir Eric Gairy had died and the claim was being pursued by his administratrix).

[263] In **Belfonte v The Attorney General** (2005) 68 WIR 413, the appellant filed a constitutional motion against the state seeking relief for breaches of his fundamental rights while incarcerated. The trial judge found that the appellant was lawfully arrested under a valid warrant for non-payment of fines. He also found that certain treatment meted out to the appellant amounted to a breach of his fundamental right to security of the person and freedom of conscience and religious beliefs. Also, that parallel remedies in tort, such as assault and battery, were associated with these unlawful acts and the appellant should have used the common law procedure rather than pursue constitutional proceedings which were only to be invoked in exceptional circumstances, therefore the proceedings were an abuse of process.

[264] One of the issues for determination on appeal was whether the appellant should be denied relief on the basis that he brought an originating motion against the state pursuant to s 14 of the Constitution (for breach of fundamental human rights) if there was a parallel remedy in private law. In giving judgment in the court of Appeal, Sharma CJ, considered the case of **Thakur Persad Jaroo** where the Judicial Committee of the Privy Council determined that a section 14(1) application should be permitted only in exceptional circumstances where a parallel remedy exists**.** The decision in **Kemraih Harrikissoon** that the mere allegation that a human right or fundamental freedom was contravened was not sufficient to invoke the constitutional jurisdiction of the court was affirmed. Further, that if it appeared that the allegation was frivolous or vexatious, or an abuse of the process of the

court, in that it is being made only for the purpose of circumventing an application in the normal way for an appropriate judicial remedy for unlawful administrative action, it would also not be sufficient basis. The principles already referred to which were expounded in **Maharaj** and **Chokolingo** were also affirmed.

[265] It was observed in **Belfonte** that there was a sharp contrast between cases which stressed the need to guard against abuse of the procedure for redress under the constitution and cases in which there was a clear infringement of a constitutional right. The case also emphasized the point that unless there is a special feature which suggests that in the particular circumstances a common law remedy would not be adequate, it is an abuse of process to issue constitutional proceedings where a litigant has a parallel common law remedy. On the facts of **Belfonte**, it was decided that there was no collateral remedy available to the appellant and in the light of the undisputed breach of his constitutional rights, the matter was properly begun by way of originating motion and that the case would be remitted to the judge in the High Court for judgment to be entered in favour of the appellant against the state.

[266] The common features in **Bernard Coard, Jennifer Gairy,** and **Belfonte** where the constitutional claims were permitted are the clear breach of a constitutional right, the absence of a collateral remedy and the existence of a special feature that necessitated the use of the constitutional jurisdiction of the court.

[267] The **Viralee Lattibudiere** case is not helpful to the claimant. That case involved an application for leave to apply for judicial review and to extend an injunction which had been granted against the respondents restraining them from terminating her contract of employment. In the course of explaining why the injunction which was in essence an injunction against the crown would be extended, Sykes J, as he then was, stated that he was applying the learning from the case of **Gairy** (supra).

[268] He referenced Lord Bingham's postulation that the *"common law doctrine restricting the liability of the crown or its amenability to suit cannot stand in the way of effective protection of fundamental rights guaranteed by the Constitution*" and further observed that certain principles predating the Constitution needed to be reconsidered. Sykes J went on to say that although the case did not involve breach of Charter rights, it involved constitutional protection of employment. (see paragraph 31 of the judgment).

[269] This was not a case of Sykes J fashioning a remedy that did not previously exist, or granting one where it was not clearly demonstrated that the claimant was deserving of one. The decision in **Gairy** had long debunked the supposed principle that an injunction cannot be granted against the crown. It was made clear in that case that such an injunction could be granted if the purpose was to protect constitutional rights. It had been demonstrated in **Viralee Lattibudiere** that the state had acted in such a manner that required that the claimant be afforded an interim remedy. Indeed, the concept of fashioning a remedy as manifested in **Gairy,** arises where there is need to give effective relief in the face of a proven breach which a court is permitted to give within the very broad parameters of section 16(1) of the Grenadian Constitution (the equivalent section19(1) of the Jamaican Constitution. (See paragraph 23 of the judgment).

[270] Mr Wildman's reliance on the case of **Beverley Levy v Ken sales and Marketing Limited** is misplaced. All that was said in that case that could in some remote and oblique way be referenced in this context was that rules are made merely to regulate the exercise of an existing jurisdiction and cannot themselves confer jurisdiction. This is not a case of the claimant simply utilizing an incorrect format to bring his case or being in breach of a technical rule, either of which would have been simply an irregularity.

[271] Counsel in his submission has also equated a decision of the court with an act of parliament when he said that since the Constitution is the supreme law and any act which is inconsistent with the Constitution is void, therefore it follows that a

wrong decision of the court is void. According to Counsel, law includes an order of the court. This point does not require much discussion, suffice it to say that a wrong decision of the court is not void but is to be addressed by the appellate process or in certain circumstances an Application to Set Aside.

Whether the matter is res judicata

[272] I discuss this aspect of the case as a separate issue, fully recognizing that if the claim or any issue involved in the claim is determined to be barred by a plea of res judicata, then the logical consequence is that such finding will most likely result in the court also finding that there is an abuse of process. My separation of the issues is done solely out of convenience.

[273] In **Andrew Hamilton et al v The Assets Recovery Agency consolidated with Andrew Hamilton Construction Limited v The Assets Recovery Agency** [2017] JMCA Civ. 46, Morrison JA (as he then was) in expounding on the principle of res judicata said at paragraphs 74, 75 and 76:

> *[74] The phrase res judicata is apt to denote three distinct, though related, ideas. In its first, narrower, sense, it describes the species of estoppel ("cause of action estoppel") which prevents a party to an action from asserting or denying, as against the other party, the existence of a particular cause of action, the non-existence or existence of which has been determined by a court of competent jurisdiction in previous litigation between the same parties. So, if the cause of action was determined by a judgment of the court to exist, or not to exist, the matter is res judicata and no action can subsequently be brought by the losing party to assert the opposite.*
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> *[75] In its second, perhaps looser, sense, it speaks to a situation in which a particular issue forming a necessary ingredient in a cause of action has been litigated and decided; but, in subsequent proceedings between the same parties, involving a different cause of action to which the same issue is relevant, one of the parties seeks to re-open that issue. In such circumstances, the doctrine of issue estoppel is said to apply to prevent the reopening of the particular issue. However, the principle of issue estoppel is subject to an exception in special circumstances where further material becomes available, whether factual or arising from a subsequent change in the*

law, which could not by reasonable diligence have been deployed in the previous litigation.

[76] Then thirdly, as Lord Kilbrandon pointed out in the judgment of the Privy Council in Yat Tung Investment Co Ltd v Dao Heng Bank Ltd and Another "... there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings". This is what is sometimes described as Henderson v Henderson abuse of process, deriving as it does from the classic statement of Wigram VC in the nineteenth century case of Henderson v Henderson: "…

> *"where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."*

[274] At paragraphs 80 and 81, Morrison JA quoted Lord Bingham of Cornhill as well as Lord Millet who concurred with Lord Bingham in the case of **Johnson v Gore Wood & Co (a Firm)** as follows:

[80]"… Henderson v Henderson abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional

> *element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in early proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not.*
>
> *[81]: "It is one thing to refuse to allow a party to relitigate a question which has already been decided; it is quite another to deny him the opportunity of litigating for the first time a question which has not previously been adjudicated upon. This latter (though not the former) is prima facie a denial of the citizen's right of access to the court conferred by the common law and guaranteed by article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (1953). While, therefore, the doctrine of res judicata in all its branches may properly be regarded as a rule of substantive law, applicable in all save exceptional circumstances, the doctrine now under consideration can be no more than a procedural rule based on the need to protect the process of the court from abuse and the defendant from oppression."*

[275] The claimant was named as a party to the proceedings before McIntosh J. The question arises as to whether in circumstances where he did not participate in the proceedings, it can be said that res judicata, whether in the wider or the narrow sense applies to him as Ms Whyte contends.

[276] In **House of Spring Gardens Ltd v Waite and others** [1991] 1 QB 241, the plaintiff obtained judgment against three defendants in an Irish court for misuse of information and breach of copyright. The defendants appealed and their appeals were dismissed. Two of the three defendants issued proceedings claiming that the previous judgment was obtained by fraud. That claim was dismissed. Their appeal

from that decision was also dismissed. The plaintiff sought to enforce the Irish judgment in England and the three defendants alleged that the Irish judgment was obtained by fraud. The plaintiff countered that the three defendants were estopped from reopening the issue of fraud. The judge at first instance found for the plaintiff and said that the third defendant (Mr McLeod) who had not participated in the fraud proceedings was bound by estoppel because of privity of interest between himself and the other defendants. The defendants appealed.

[277] The court of appeal considered whether the defendant who did not participate in the fraud proceedings in Ireland was bound by the decision. The court held that the defendant was well aware of the proceedings and could have joined in them but chose not to do so without explanation. He was content to sit back and allow others to fight his battle at no expense to himself and that is sufficient to make him privy to the estoppel. Mr. McCleod was therefore bound by the decision reached that the judgment was not obtained by fraud.

[278] Stuart-Smith LJ who gave the judgment of the court at page 252 considered the principles propounded by Sir Robert Megarry V.-C in **Gleeson v J. *Wippell & Co. Ltd.*** [1977] 1 W.L.R. 510, 515,. He then said "*There is a further principle which in my judgment supplements what was said in that case by the Vice-Chancellor. It is to be found in the judgment of the Privy Council in Nana Ofori Atta II v. Nana Abu Bonsra II [1958] A.C. 95, 102-103, where Lord Denning said:*

> *"Those instances do not however cover this case, which is not one of active participation in the previous proceedings or actual benefit from them, but of standing by and watching them fought out or at most giving evidence in support of one side or the other. In order to determine this question the West African Court of Appeal quoted from a principle stated by Lord Penzance in Wytcherley v.Andrews (1871) L. R. 2 P. & D. 327, 328. The full passage is in these words: 'There is a practice in this court, by which any person having an interest may make himself a party to the suit by intervening; and it was because of the existence of that practice that the judges of the Prerogative Court held, that if a person, knowing what was passing, was content to stand by and see his battle fought by somebody else in the same interest, he should be bound by the*

> *result, and not be allowed to re-open the case. That principle is founded on justice and common sense..."*

[279] In my view, it cannot be said that the issue of the claimant's criminal convictions and other matters relative to the personal conduct of the claimant was litigated. As observed before, those are hardly matters in relation to which someone could have agreed as far as the claimant's case was concerned. To that extent, I am doubtful that it can be said that res judicata on the basis of issue estoppel is applicable. As to whether res judicata is applicable on the basis that he is seeking to raise in the present proceedings matters which could or should have been raised in the earlier proceedings, is dependent on the view taken of the claimant' position that he had not been aware of the proceedings.

[280] Whether the principle of res judicata is strictly applicable or not, there are other bases for saying that the claimant should not succeed in this claim.

Whether the bringing of the claim is a collateral attack and therefore an abuse of the process of the court

[281] In **Hunter v Chief Constable of West Midlands Police** [1982] AC 529**,** Lord Diplock in his judgment, explained a collateral attack by citing excerpts from the judgments of A.L. Smith LJ in Stephenson v Garnett (1898) 1 QB 677 at 680-681, and from that of Lord Halsbury LC in Reichel v MaGrath (1889)14 App. Cas 665 at 668 as follows:

> *"… the court ought to be slow to strike out a statement of claim or defence, and to dismiss an action as frivolous and vexatious, yet it ought to do so when, as here, it has been shewn that the identical question sought to be raised has been already decided by a competent court."*
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> *"… I think it would be a scandal to the administration of justice if, the same question having been disposed of by one case, the litigant were to be permitted by changing the form of the proceedings to set up the same case again."*

[282] Earlier, in dealing with the issue of whether there was basis for saying that there was a breach of procedural fairness in the trial which led to the confiscation of the

property in question, I observed that there were three separate principles derived from **Maharaj** and **Chokolingo** which are applicable to this claim**.** I now address the third which is that a constitutional claim will generally not be permitted where it is being used as a collateral attack on a judgment and that such use of the constitutional motion will be an abuse of process. The concept of a collateral attack is much narrower in scope than the principle of res judicata. A collateral attack is confined to raising the same issue in different proceedings.

[283] This point that a constitutional claim will not be permitted if it amounts to a collateral attack on a judgment requires clarification, but before embarking on that task, the case of **Brandt v Commissioner of Police and others (Montserrat)** [2011] UKPC 12, should be examined. **Brandt** dealt with the question of what amounts to an abuse of process in a context where the appellant was seen to have attempted to launch a collateral attack. The interconnectedness with the availability of an alternative remedy was also explained.

[284] In **Brandt,** the police obtained from a Magistrate a warrant to search the premises of the appellant based on reasonable suspicion that he had committed sexual offences. Among the items recovered from his premises were cell phones. When those phones were searched, they revealed potentially incriminating communication via whatsapp messages which the appellant subsequently admitted that he had sent. The appellant was criminally charged. The prosecution sought to rely on the information contained in the appellant's cell phones. It was anticipated that there would be objections to the admissibility of the information garnered from the phones. The appellant failed to utilise the opportunities given to him in the course of the criminal prosecution to challenge the admissibility of the incriminating information from the phones. He instead commenced separate proceedings in the High Court seeking constitutional relief on the basis that his right to privacy guaranteed under the Constitution had been breached.

[285] The judge at first instance found that the application for constitutional relief was an abuse of process and dismissed the application. On appeal to the court of appeal,

the appeal was allowed in part. The court of appeal found that the search of the cell phones was unlawful but not unconstitutional but dismissed the aspect of the appeal against the finding that the application for constitutional relief was an abuse of process. The appellant appealed to the Judicial Committee of the Privy Council. In dismissing the appeal, the JCPC observed that since the court of first instance as well as the court of appeal found that the proceedings for constitutional relief was an abuse of the process of the court, then no obiter comments should have been made as to the applicable principles in relation to the admissibility of the whatsapp data in the criminal proceedings.

[286] In enunciating the legal principles relevant to an abuse of process Lord Stephens who gave the judgment on behalf of the Board, said at paragraphs 34,35, and 40:

> *[34] "The boundaries of what may constitute an abuse of process of the court are not fixed. As Stuart-Smith LJ said in Ashmore v British Coal Corporation [1990] 2 QB 338 at 348, the categories are not closed and considerations of public policy and the interest of justice may be very material. Lord Diplock's speech in Hunter v Chief Constable of the West Midlands Police [1982] AC 529 at 536 underlines this point. He stated:*
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> > *'My Lords, this is a case about abuse of the process of the High Court. It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied; those which give rise to the instant appeal must surely be unique. It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power.'*
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> *Abuse of process must involve something which amounts to a misuse of the process of litigation. However, whilst the categories of abuse of process of the court are not fixed there are clear examples which are relevant to this appeal.*

> *[35]. First, to seek constitutional relief where there is a parallel legal remedy will be an abuse of the court's process in the absence of some feature "which, at least arguably, indicates that the means of legal redress otherwise available would not be adequate". The correct approach to determining whether a claim for constitutional relief is an abuse of process because the applicant has an alternative means of legal redress was explained by Lord Nicholls, delivering the judgment of the Board in Attorney General of Trinidad and Tobago v Ramanoop [2006] 1 AC 328…..*
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> > *'There are examples of the application of that approach in cases such as Harrikissoon v Attorney General of Trinidad and Tobago [1980] AC 265 at 68, Jaroo v Attorney General of Trinidad and Tobago [2002] 1 AC 871 at para 39 and most recently, in Warren v The State (Pitcairn Islands) [2018] UKPC 20 at para 11. ...This approach also promotes the rule of law and the finality of litigation by preventing a claim for constitutional relief from being used to mount a collateral attack on, for example, a judge's exercise of discretion or a criminal conviction, in order to bypass restrictions in the appellate process (see eg* ***Chokolingo v Attorney General of Trinidad and Tobago*** *[1981] 1 WLR 106 at 111–112.'*
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> *40. The Board considers that giving any advice or guidance or granting any declaration is contingent on the existence of valid proceedings. If the proceedings are an abuse of the process of the court then they do not satisfy that contingency. The High Court and the Court of Appeal were effectively being invited to interfere in the criminal trial process by making rulings as to the future conduct of the trial. The Board respectfully considers that if, as both the High Court and the Court of Appeal found, the administrative proceedings were an abuse of the process of the court, then no obiter comments should have been made in those proceedings as to applicable principles in relation to the admissibility of the WhatsApp data in the criminal proceedings."*

[287] I now embark on the discussion regarding the permissibility or otherwise of a constitutional claim when it amounts to a collateral attack on a judgment or may otherwise be an abuse of process. It must readily be accepted that the filing of the constitutional motion by the appellant in **Maharaj** was a collateral attack on the order of the judge committing him for contempt and that that collateral attack was found ultimately to be permissible in the circumstances of that case.

[288] That posture must however, be understood in its proper context. Four observations may be made about the decision in **Maharaj.** That case involved a scenario where

there was a clear breach of a constitutional right. That breach of constitutional right also involved the liberty of the subject. Thirdly, the aspect of the proceedings which it was ultimately held had been properly subject to a collateral attack involved a breach of procedural fairness, which resulted in the deprivation of liberty of the subject as distinct from simply being a case in which there were errors of substantive law. Fourthly, this was a case where time was of the essence. The appellant was being punished by a term of imprisonment being inflicted upon him and there would naturally have been some concern with that punishment taking effect before an appeal could be heard (that in fact happened).

[289] The distinction was drawn in the case of **Duncan and Jokhan v The Attorney General of Trinidad and Tobago** [2021] UKPC 17, between a scenario where the liberty and security of the subject was at stake and there was no avenue to apply promptly for bail as happened in that case and in **Maharaj**, and a scenario where there was an error in the application of the substantive law. In the first mentioned case, the subjects, whose appeals against conviction were unsuccessful, were imprisoned for a substantial period after they should have been released because the court of appeal had failed to correctly apply the provisions of a statute relating to the calculation of loss of time. The Judicial Committee of the Privy Council determined that the appellants' constitutional rights had been infringed because they were penalized by the imposition of an additional period of imprisonment for bringing proper and legitimate appeals and this additional period of imprisonment amounted to arbitrary detention without justification.

[290] **Gairy's** notice of motion to secure payment based on the amended consent order was not a collateral attack in the strict sense (because the motion was issued in the same proceedings). In **Gairy**, the JCPC seemed to have been willing to accept that there was a good argument that the matter was res judicata which in other circumstances would amount to an abuse of the process of the court. The statement that the JCPC determined that it would be proper to launch a collateral attack in order to protect property rights and that the principle of res judicata would not operate to prevent the granting of an appropriate relief because the

fundamental right to property had been breached is only partly correct. It is correct to the extent that it has been demonstrated that the court will allow a collateral attack to guard against breach of a constitutional right though the clear instance (Maharaj) did not involve property rights. I would not wish to split hairs in the sense that, as already explained, the courts will exercise a high degree of flexibility and be quite accommodating where it determines that a fundamental right has been breached even if that flexibility and accommodation allows a claim that would otherwise be an abuse of process by whichever route.

[291] The defendants have argued that the bringing of this claim amounts to an abuse of process as it is an attempt to re litigate the civil recovery claim and mount a collateral attack on the judgment of McIntosh J. Without addressing in detail the arguments of the claimant, it is plain that he is asking this court to say that the evidence on which McIntosh J came to the conclusion that the property in question was recoverable property, was not sufficient to justify such a finding.

[292] Mr Wildman examined in some detail the judgment of Sykes J in **The Assets Recovery Agency v Adrian Fogo et al**. [2014] JMSC Civ. 10 and pointed out that based on the reasoning of Sykes J in that case, the nature of the evidence relied on by the ARA against the claimant in the civil recovery proceedings could not prove the allegations against him. He very clearly demonstrated that the substance of the claimant's complaint was a matter of the judge:

1. accepting evidence which was inadmissible, for example hearsay evidence of Mr Dean Roy Bernard and Jorge Da Silva which should only have been admissible in interlocutory proceedings or which contained mere assertions or conjecture and was therefore not properly admitted as proof of the assertions made.

2. drawing conclusions which could not properly have been drawn from the evidence accepted, for example, inferring that

maintaining an opulent lifestyle without proof of income was evidence of unlawful conduct and

3. wrongly misinterpreted and therefore wrongly applied the relevant law, for example, that the learned judge did not appreciate the interrelationship between unlawful conduct and criminal conduct.

[293] There is no question that the relevant law was fully and correctly explained by Sykes J. but the claimant's complaints amount to allegations of errors of substantive law on the part of the learned trial judge. These errors according to the claimant, resulted in him being deprived of his right to property. He has chosen the wrong forum in which to articulate his dissatisfaction.

[294] Contrary to Ms Whyte's contention, the court of appeal did not affirm the civil recovery order in its entirety. As observed earlier, the appeal was only concerned with the cash recovered. Nothing however turns on this inaccurate assertion. If anything, the fact that an appeal has not been pursued puts the defendants on firmer ground in saying that there were other avenues open to the claimant to pursue.

[295] It is abundantly clear that launching a collateral attack on a judgment **may** be an abuse of process. Having regard to the substance of the complaint raised by the claimant, it could hardly be said that he was not seeking to launch a collateral attack on the civil recovery proceedings if the view is taken that he had an opportunity to participate in the earlier proceedings. Whether the claimant had the opportunity or not, it is evident that his avowed purpose in these proceedings is for the court to arrive at a different outcome to his case from that reached by the learned judge in the civil recovery proceedings. He is seeking to do so by a route that is clearly not permissible and for that reason, the bringing of this claim is an abuse of the process of the court. It is less clear as to whether the use of the terminology 're-litigate' is apt to describe what the claimant is attempting to do. To

say he is seeking to re-litigate the matter, is suggestive of earlier participation by him in litigation in different proceedings. Whilst there is basis on which it can be said that the present proceedings are a misuse of the court's constitutional jurisdiction, I decline to use the terminology re-litigate or any derivative therefrom to describe the claimant's conduct in bringing this claim.

[296] Counsel for the first defendants in these proceedings urged the court not to consider the substantive issues if this court finds that the bringing of this Fixed Date Claim Form amounts to an abuse of the process of the court. I do not necessarily form the view that it is in all cases that the court must never comment on the substantive issues raised in the claim if it finds that the claim amounts to an abuse of process. In **Brandt**, the criminal trial was still pending. Any declaration by the judge of first instance or the court of appeal in that case as to the admissibility of evidence in the criminal trial, would have had the effect of usurping an aspect of the trial judge's function. The circumstances are not quite the same in this case. In any event, that point is academic since, as observed earlier, I do not find it necessary in the circumstances of this case to address the merits of the claimant's substantive arguments regarding the correctness or otherwise of the decision of McIntosh J.

CONCLUSION

[297] The claimant need not have joined the first defendant as a party to this claim, as the substance of the complaint was against the second defendant who possesses the capacity to institute and defend proceedings. It was sufficient that the Attorney General be invited to make submissions. The bringing of this claim amounts to an attempt by the claimant to launch a collateral attack on the judgment of McIntosh J in circumstances where there is no basis for asserting that he is entitled to a remedy and is being deprived of same and is therefore an abuse of the process of the court. The substance of the complaint was not that there had been a breach of procedural fairness on the part of the learned trial judge but rather that he had made an error in the interpretation of the relevant law and its application to the

facts of the case and that there was not before him a sufficient factual basis for the decision he made. There were other avenues of redress open to the claimant which he has failed to utilize. Even if it is now late to access those other options, that factor in the context of this case cannot be the gateway to the constitutional process. The cases cited by the claimant as being helpful in establishing that his constitutional right has been breached and that he is entitled to a remedy are distinguishable, and to the contrary support the defendants' position that the claim is an abuse of process.

[298] In the light of the principles discussed and the circumstances of this claim, the declarations sought by the claimant should be refused.

[299] I am in agreement with the conclusion of my sister on the issue of costs.

DISPOSITION

STAMP J

[300] It follows from the foregoing that the judgment of the Court is that the declarations sought and the claim for an award of damages made in the Fixed Date Claim Form filed on 27 September 2018 are refused. Costs are awarded to the 1st and 2nd defendants to be taxed if not agreed.

…….....	……	……
Stamp J	Jackson-Haisley J	Pettigrew-Collins J