[2020] JMCA App 15

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 99/2015

MOTION NO COA20200MT00002

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MISS JUSTICE P WILLIAMS JA
THE HON MISS JUSTICE SIMMONS JA (AG)

BETWEEN	**BOBETTE SMALLING**	**APPLICANT**
AND	**DAWN SATTERSWAITE**	**RESPONDENT**
AND	**JANET RAMSAY**	**1ST INTERVENOR**
AND	**PAULETTE HIGGINS**	**2ND INTERVENOR**

Mrs Caroline Hay QC, Nigel Parke, Neco Pagon, and Miss Camesha Campbell instructed by Caroline P Hay attorneys-at-law for the respondent

Anthony Pearson for the respondent and Dawn Satterswaite in person

Ian Wilkinson QC and Lenroy Stewart instructed by Wilkinson Law for the 1st and 2nd intervenors

11, 12, 27 March and 3 April 2020

PHILLIPS JA

[1] This was an application for conditional leave to appeal to Her Majesty in Council from the judgment of the Court of Appeal delivered on 20 December 2019. This court had allowed an appeal in part against a decision made by Straw J (as she then was)

with regard to the manner in which documents obtained utilising a search warrant from Miss Dawn Satterswaite (the respondent and an attorney-at-law), were to be examined by a judge of the Supreme Court in an attempt to ascertain whether those documents attracted legal professional privilege. Miss Bobette Smalling (the applicant) had also sought orders staying a part of the decision of this court pending the said appeal and an order that the costs of the application be costs in the appeal to Her Majesty in Council.

[2] After hearing the application, on 27 March 2020, we made the following orders:

> "1. The application for leave to appeal to Her Majesty in Council is refused.
>
> 2. The application for a stay of the judgment of the Court of Appeal delivered on 20 December 2019 is also refused.
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> 3. Costs to the respondent and the intervenors to be taxed if not agreed."

[3] We promised to give reasons for our decision and this judgment is a fulfilment of that promise.

Background

[4] The applicant is a Detective Sergeant of Police attached to the Major Organised Crime and Anti-Corruption Agency (MOCA) and she is also the investigating officer in cases involving the respondent, the intervenors and other parties. Mr Andrew Paul Hamilton was convicted of various drug tracking offences in the United States of America and it was alleged he was sending substantial amounts of cash to Jamaica to

purchase various assets in breach of the Proceeds of Crime Act 2007 (POCA). Among Mr Hamilton's alleged facilitators were the respondent (his attorney-at-law) and Miss Janet Ramsay and Paulette Higgins (his sisters). It was further alleged that the respondent had assisted Mr Hamilton to "conceal, disguise and dispose of benefits flowing from his criminal conduct".

[5] A search and seizure warrant was issued pursuant to the applicant's application and it was executed at the respondent's residence and her office "Chambers Consultants". Material that had been seized was bagged, tagged and labelled in the respondent's presence. A sifting exercise was conducted to remove material not related to Mr Hamilton. The applicant thereafter made an application to unseal the documents and other material obtained pursuant to the search and seizure warrant to ascertain whether they could assist in her investigations. The respondent claimed that these documents attracted legal professional privilege and ought not to be reviewed by the court. Straw J, who heard the said application, made orders that the seized material ought to be examined by the court to ascertain whether they attracted legal professional privilege, and any material examined to which that privilege did not attach would be turned over to MOCA. She also granted leave to appeal, and a stay of those orders pending the determination of the said appeal.

[6] As indicated, the appeal to this court against Straw J's decision was allowed in part. This court found that since section 2 of the POCA defines "criminal conduct" as conduct occurring on or after 30 May 2007, only material subsequent to 30 May 2007 could be examined by the court. It therefore varied the orders made by Straw J in that

respect; made an order that all documents which run afoul of section 2 of POCA (the definition of 'criminal conduct') should be returned forthwith to the respondent and the intervenors; ordered that reasonable efforts should be made to secure the presence or representation of the person entitled to legal professional privilege during examination; and also ordered that there should be no participation by members of the prosecution in the examination process.

[7] The applicant then sought conditional leave to appeal that decision to Her Majesty in Council pursuant to section 110(2)(a) of the Constitution of Jamaica (the Constitution).

Point in limine

[8] Before the court embarked upon the hearing of the application for conditional leave to appeal to Her Majesty in Council, counsel for the intervenors, Mr Ian Wilkinson QC, filed a point in limine challenging the notice of motion. He submitted, in reliance on **Challenge International Airlines Inc v Challenge International Airlines Jamaica Ltd and Another** (1987) 24 JLR 228 and **The Assets Recovery Agency v Robert Sylvester Dunbar and Another** [2017] JMSC Civ 47, that applicant's notice of motion which is dated 7 January 2020 is irreparably defective, irregular and null and void, as the affidavit filed in support of the same dated 6 January 2020, predates the said notice of motion. He further submitted that the new affidavit of Bobette Smalling filed 9 March 2020, could not cure that defect as it had been filed without the court's permission after the motion had been set down for hearing and adjourned. He contended that the motion itself indicated that the applicant intended to rely on the

impugned affidavit, and although the intervenors were not taken by surprise as to the contents of the affidavit, they were surprised by the service of the new affidavit, which was short served in any event.

[9] Queen's Counsel further submitted that it was expected under the Civil Procedure Rules (CPR), that an affidavit would accompany the original process. Without any authority to support his contention and in spite of the wording of rule 3 of the Jamaica (Procedure in Appeals to Privy Council) Order in Council 1962, he argued that an affidavit must accompany the motion, and must state the reasons/bases why conditional leave to Her Majesty in Council was being sought. The motion *per se* could not address that. He also submitted that the affidavit filed in support of the stay was silent as to the evidence in support of that application.

[10] In response, Mrs Caroline Hay QC submitted that rule 3 of the Jamaica (Procedure in Appeals to Privy Council) Order in Council 1962 does not specifically require that an affidavit in support of the motion be filed. The motion was filed in the time stipulated by that rule and so could not be considered null and void. Although counsel accepted that the affidavit sworn on 6 January 2020 was irregular, she relied upon the cases submitted by Queen's Counsel for the intervenors in support of his point in limine, to support her contention that the said irregularity could be cured, as the intervenors had themselves responded to the said affidavit, and an undertaking could be given to file the correct affidavit subsequently. An affidavit was indeed filed subsequent to the motion and it was in exact terms as the affidavit filed earlier. In response to a query from the court, she indicated that the applicant was entitled to rely

on either affidavit, particularly since rule 3 of the Jamaica (Procedure in Appeals to Privy Council) Order in Council 1962 does not require any affidavit to be filed accompanying the motion. She said that the applicant could, in any event, rely entirely on the motion as filed, as it contained all the necessary and substantive information for the consideration of the court under section 110(2)(a) of the Constitution.

[11] On 11 March 2020, we dismissed the point in limine and ruled that the motion for conditional leave to Her Majesty in Council should proceed. We promised to give reasons for that decision which we do now.

[12] Rule 3 of the Jamaica (Procedure in Appeals to Privy Council) Order in Council 1962 states:

> "Applications to the Court for leave to appeal shall be made by motion or petition within twenty-one days of the date of the judgment to be appealed from, and the applicant shall give all other parties concerned notice of his intended application."

There is no mention in that rule or any of the other rules stated in the Jamaica (Procedure in Appeals to Privy Council) Order in Council 1962 requiring any affidavit to be filed with reference to the motion. As an aside, rule 14 of the Judicial Committee (Appellate Jurisdiction) Rules 2009, although not relevant to this application, also makes no mention of an affidavit being filed in support of the application, but states that the application must be filed with a copy of the order appealed from and (if separate) a copy of any order refusing permission to appeal.

[13] Mrs Hay was indeed to correct to concede that the affidavit of Bobette Smalling, which predated the motion it was filed intending to support, was irregular. However, she was also correct in her submission that the authorities referred to and relied on by Mr Wilkinson of **Challenge International Airlines Inc** and **The Assets Recovery Agency v Robert Sylvester Dunbar**, indicate that that irregularity is indeed one that could be cured and give guidance as to how it can be cured.

[14] **Challenge International Airlines Inc** is a decision of this court which concerned an action for damages for trespass and injunction by the respondent against the appellant. The respondent, as a tenant of the Airports Authority, sought to restrain the appellant from entering certain parts of the Norman Manley International Airport. There were issues with regard to the appellant being a subtenant of the 2nd respondent. In making the decision to grant an interlocutory injunction against the appellant, Reckord J (Ag) (as he then was) took into consideration an affidavit sworn to by the respondent on the day before the writ of summons was filed. This was challenged on appeal as being inadmissible evidence as it was in breach of the rules of procedure. The court held (as stated in the headnote) that:

> "though as a general rule an affidavit which predates a writ is inadmissible, in the instant case the affidavit was properly considered because the appellant had effectively introduced it into evidence by a properly sworn affidavit after the action was brought."

[15] Rowe P, in delivering the judgment of the court, referred to the dictum of Wooding CJ in a decision of the Court of Appeal of Trinidad and Tobago in **Adanac Industries Ltd v Black** (1962) 5 WIR 233, where he stated:

> "On 15 November, that is to say, five days later, he sought and obtained an *ex parte* injunction restraining the defendants in the terms of the injunction sought by the writ of summons. That application was made *ex parte*. It was supported by affidavit which was sworn to on 7 November 1962, that is to say, three days before the writ was filed. The rules are very clear. An affidavit can only be sworn in matters of this kind after the writ of summons has been duly issued because, as required by O 38, r 2, of the RSC [T], every affidavit must be intituled in the cause or matter in which it is sworn, and it cannot be so intituled unless and until there is a cause or matter. The affidavit having been prematurely sworn to, the learned judge should never have acted upon it unless or until he had had it re-sworn or had got an undertaking from the proper party that it would be re-sworn and re-filed: so that was one major error which the learned trial judge committed."

[16] The learned President, however, accepted the submission of WK Chin-See QC, for the appellant, that there were certain circumstances when an affidavit which predated the writ could be looked at and acted upon, for instance, once the attorney gives an undertaking to have the affidavit re-sworn, which meant that the affidavit, though irregular initially, could be cured. Queen's Counsel also indicated that such an affidavit could be used it had been effectively introduced into evidence by a properly sworn affidavit after the action had been brought. In that case, Rowe P said that the court would not have been able to understand the affidavit of the appellant without perusing that of the impugned affidavit of the respondent in respect of which it had

made full reference. The court found that the irregular affidavit had been incorporated into the affidavit which had referred to the same extensively.

[17] In **Assets Recovery Agency v Robert Sylvester Dunbar** a similar situation arose and counsel took the point that the affidavit in support of the application had preceded the claim and the application by several months. The former was dated 14 May 2015 and the latter 8 March 2016. Relying on the dictum in **Challenge International Airlines Inc**, counsel asked that the application be dismissed. Batts J stated that he agreed that, save and except in exceptional circumstances, the affidavit in support ought not to predate the application and its originating process. If it does, he said, it cannot be relied on. However, Batts J, in reliance on the dictum of Rowe P, said that a similar situation obtained before him, in that, the irregular affidavit had been responded to, and that satisfied the exception to the principle that the affidavit could not be relied on.

[18] In the instant case, although the affidavit of Bobette Smalling predated the motion for conditional leave as it was dated 6 January 2020 and the motion was dated 7 January 2020, both documents were filed on 8 January 2020. It appears they were both served together. Of great significance is the fact that in paragraph 2 of the respective affidavits filed by each intervenor in opposition to the application for conditional leave, they deponed that they had read the notice of motion for leave to appeal to Her Majesty in Council and the affidavit of Bobette Smalling in support of the motion, both of which were filed on 8 January 2020. They referred to both documents cumulatively as "the application"; craved leave to respond to the same; indicated in

paragraph 3 of their respective affidavits that they had read the application; and proceeded thereafter to respond to the same. The respondent in her affidavit filed 5 March 2020, also stated that she had read the applicant's notice of motion for conditional leave and the affidavit of Bobette Smalling filed in support; craved leave to answer the same; and answered the same.

[19] So, although the affidavit of Bobette Smalling would have been irregular and prematurely sworn, in my view, it could have been referred to, considered and acted on by the court. No prejudice could therefore have been suffered by the respondent and the intervenors. They could not have, in any way whatsoever, been taken by surprise, as they had been served with the motion and the affidavit and had responded to it. The affidavit, which was re-sworn and re-filed on 9 March 2020, would also have cured the filing of the irregular affidavit.

[20] As a consequence, on all these bases, but specifically as rule 3 of the Jamaica (Procedure in Appeals to Privy Council) Order in Council 1962 does not require an affidavit to be filed in support of the motion, the point in limine, in the particular circumstances of this case, had absolutely no merit whatsoever and had to be dismissed.

The application for conditional leave to appeal to Her Majesty in Council

[21] As indicated, the applicant sought conditional leave to appeal to Her Majesty in Council pursuant to section 110(2)(a) of the Constitution. The applicant attempted to persuade the court that certain questions involved in the appeal were of such great

general or public importance or otherwise that they ought to be submitted to Her Majesty in Council. The questions were as follows:

> "(a) Whether, in the case of a money laundering investigation, 'background evidence' (the Pettman principle) must amount a criminal offence to be relevant to the investigation; and
>
> (b) Whether, in the case of a money laundering prosecution, 'background evidence' (the Pettman principle) must amount to 'criminal conduct' within the meaning of section 2 of the Proceeds of Crime Act, 2007."

[22] The notice of motion indicated that the applicant intended to rely on the affidavit of Bobette Smalling sworn 6 January 2020. The applicant stated that the questions posed were of great general or public importance because: (i) it would help to determine the manner in which investigators utilise information unearthed which predate POCA in money laundering investigations and whether the prosecution is allowed to adduce that evidence in a trial; (ii) it would explore the issue as to whether the Court of Appeal's interpretation of the interplay between POCA and the Interpretation Act had the effect of restricting the operation of the common law in any prosecution where similar fact or background evidence is being elicited; and (iii) this is the first case in Jamaica which considered these novel issues and so the answer to those questions would impact not only the applicant, but MOCA in its operations and the general public.

[23] A stay was also being sought in relation to order 2(5) of the Court of Appeal's decision which stated that documents which run afoul of section 2 of POCA should be returned forthwith. The stay was being sought on the basis of Mrs Hay's submission that there was a risk that the material would be dissipated if it was returned to the respondent, as she was implicated in the investigations.

[24] In an affidavit sworn to on 5 March 2020, the respondent deponed that she was opposing the application for conditional leave as it had no merit. She stated that the applicant was essentially seeking permission from the court to breach the provisions of POCA. She contended that the questions which the applicant wished to submit to the Privy Council did not arise in the appeal and, in any event, were irrelevant. She deponed that any relevant investigation should have preceded any charges being made, and the applicant should not be permitted to file new charges under POCA seven years after her investigation commenced. The respondent also stated that no evidence was placed before the court in support of the application for a stay, and as a consequence, the said application ought to be refused. She set out the hardship, experience and prejudice suffered by her as a result of the prolonged investigation and prosecution against her, in circumstances where, she stated, no prejudice had even been alleged on behalf of the applicant and MOCA.

[25] The intervenors were also objecting to the motion for leave on the basis that the questions posed by the applicant for submission to Her Majesty in Council were not questions of any great general or public importance. Their objection was supported by two affidavits where, in essence, they claimed that the judgment of the court was

comprehensive, had dealt with all issues fully, and had given guidance on all relevant issues to the public and the legal profession. They further contended that the questions posed were irrelevant as they did not arise on the judgment. The application for a stay of execution, they contended, also had no merit and was not supported by any evidence. The intervenors deponed that they would be severely prejudiced and suffering tremendous hardship as the proceedings in the court below had caused them stress, considerable expense and had tarnished their reputations. They therefore urged this court to dismiss the application with costs to them.

Submissions on the application for conditional leave

The applicant's submissions

[26] Mrs Hay submitted, in reliance on **Rosh Marketing Limited v Capital Solutions Limited** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 63/2008, judgment delivered 10 December 2009, that the questions submitted fall within the rubric of "great general or public importance or otherwise". She submitted that the questions posed require a definite statement of the law from the highest judicial authority.

[27] She indicated that the Court of Appeal found that the only way to ascertain whether the unlawful conduct had taken place before the effective date of POCA would be to conduct an investigation under the repealed Money Laundering Act. So, unless one intended to charge under the repealed Money Laundering Act, any conduct which offended that Act, was irrelevant to the charge under POCA. She challenged the interpretation of this court in respect of the words "a contrary intention" in section 25 of

the Interpretation Act as it relates to POCA, and insisted that that approach constricts the trial court in its assessment as to what was "relevant" evidence, which was always an issue to be determined at trial, depending on the purpose for which the evidence was sought to be adduced. This, she said, was "an important question both of statutory construction and the operation of the common law", that "reaches beyond the 'litigants' into investigative and prosecutorial practice". Indeed, Queen's Counsel insisted that under POCA, the prosecution can utilise background information going back 10-20 years.

[28] Queen's Counsel submitted that the ruling by this court was in conflict with previous decisions such as **R v Illham Anwoir and Others** [2008] EWCA Civ 1354, and referred particularly to paragraphs [23] and [24] of that decision. Queen's Counsel argued that in that case, the English Court of Appeal had allowed the prosecution at trial to lead evidence in relation to matters which had occurred before the commencement of the United Kingdom Proceeds of Crime Act 2002 (UK POCA 2002), which she contended was a legislation similar to the Jamaican POCA. She also indicated that the dictum and ratio decidendi in **Anwoir** had been followed by several cases recently, which supported the applicant's contention that the issue should be clarified by Her Majesty in Council. The pre-POCA evidence in **Anwoir**, counsel submitted, was relevant to establishing a course of conduct attributed to the defendants which would have been permissible under the principle in **R v Pettman** [1985] Lexis Citation 1520.

[29] Queen's Counsel submitted that there were no previous decisions on this issue, and she indicated that it was important for officers charged with the responsibility to

conduct money laundering investigations to be clear as to how to execute their powers. She indicated that this court had introduced a different standard on this issue, that is, that pre-POCA conduct was irrelevant to proof of any POCA charge and "that its only use was to support investigation and ultimate prosecution under a different statute in place at that time". These issues were therefore likely to be of substantial value to investigations being conducted under POCA. Queen's Counsel referred to the principles set out clearly in **Kuruma v R** [1955] AC 157 and **R v Sang** [1979] 2 All ER 1222 to underscore the principle that relevance and admissibility were a matter for the trial court and therefore these issues required examination and review by the Law Lords in Judicial Committee of the Privy Council.

[30] Finally, she submitted, that even if the issues did not fall under the rubric of "great general and public importance", they should nonetheless be captured by the phrase "or otherwise" in section 110(2)(a) of the Constitution. She relied on the dicta of Downer and Wolfe JJA in **Olasemo v Barnett Ltd** (1995) 51 WIR 191 to argue that these were matters which because of their general importance, the Court of Appeal should grant conditional leave to appeal to Her Majesty in Council in any event.

The respondent's submissions

[31] The respondent, in her written submissions, stated with reference to the questions posed by the applicant, that if there was a criminal investigation under POCA, it must be a criminal investigation as to whether a criminal offence has been committed. She argued that the issue of conduct occurring before the commencement date of POCA had been dealt with by the Privy Council in **Assets Recovery Agency**

(Ex-parte) Jamaica [2015] UKPC 1, where Lord Hughes had made it clear that criminal conduct under POCA was conduct occurring after 30 May 2007, as set out in section 2 of POCA. Counsel therefore stated that the applicant could not be seeking to "gather evidence" that could not amount to criminal offences. She reminded the court that in **R v Pettman**, background evidence was utilised to show continuity of the criminal conduct to pursue the charge against the accused person. The background evidence must be established in order to be able to proceed on the charge and not be speculative. The charges, she said, are clearly and specifically set out in POCA, and in any event, the question of fairness must always be a consideration.

[32] Counsel for the respondent, Mr Anthony Pearson, in oral submissions stated that as the applicant had brought charges under POCA, the investigations ought to have been pursued within the provisions of POCA. It cannot be important to ask Her Majesty in Council to answer questions that would relate to conduct which would be in breach of the provisions of POCA, under the guise that it would help prosecutors in future investigations. That, counsel said, would be a "fishing expedition". As the Law Lords had already addressed the subject in **Assets Recovery**, no useful purpose would be served by submitting the suggested questions to them for consideration. He therefore urged this court to dismiss the application with costs.

Intervenors' submissions

[33] Queen's Counsel submitted that the questions posed by the applicant for submission to the Privy Council were not questions of great general or public importance. Indeed, Queen's Counsel argued that the questions raised by the applicant

in the motion were irrelevant to the essence of the Court of Appeal's decision, and were therefore unnecessary.

[34] Queen's Counsel referred to **The Commissioner of the Independent Commission of Investigations v The Police Federation and Others** [2018] JMCA App 43, a decision of this court, which involved an application for conditional leave to Her Majesty in Council. He stated that in that case Pusey JA (Ag), on behalf of the court, set out the court's understanding of section 110(2)(a) of the Constitution. Based on that reasoning, he submitted that the decision of this court had not stated anything which could raise a doubt in respect of the two questions posed by the applicant.

[35] Mr Wilkinson referred to paragraphs [86], [87] and [115] of the judgment of this court. He was adamantine that with regard to the first question posed it was far too wide, and in any event there was nothing stated therein which had arisen in the appeal. The court, he stated, had dealt with money laundering investigations in the context of POCA, and not money laundering generally. He pointed out that in the judgment of this court, any alleged criminal activity occurring prior to 30 May 2007 which was the subject of any on-going money laundering investigations or prosecutions, could still be pursued under the Money Laundering Act, the repealed statute. This relates, he argued, to the second question posed also, as the dicta of the Court of Appeal states that money laundering prosecutions can be pursued depending on the facts and context under the repealed Money Laundering Act and also under POCA.

[36] Queen's Counsel submitted that the Court of Appeal's decision does not suggest that background evidence cannot be led in a trial of any statutory offence, but said that background evidence relating to alleged criminal activities which occurred before 30 May 2007, would be irrelevant in a POCA investigation, as a result of the definition of criminal property in section 2 of POCA. Additionally, he submitted, that the applicant was not prevented from using similar fact evidence or relying on the hallowed common law principles. Nor did it preclude the applicant or any other prosecuting authority from investigating any relevant evidence, which would as always be subject to the well-known discretionary bar relating to adducing evidence. The applicant, he said, has merely been circumscribed to evidence of matters occurring after 30 May 2007.

[37] Queen's Counsel also relied on the dictum of Lord Hughes in **Assets Recovery**, specifically paragraph 22 (iv) therein, and submitted that the Privy Council had clearly pronounced on the issues raised on the motion before the court. He submitted, therefore, that any relevance to the **Pettman** principle was misconceived in the circumstances, and in any event, the instant case was distinguishable from the facts in **R v Pettman**. He also indicated that **R v Anwoir** was distinguishable from the instant case as, it was based on different facts, with different statutory provisions and regimes.

[38] Queen's Counsel argued further that the suggestion by the applicant that every other money laundering investigation relating to conduct that predated POCA would be affected, was speculative, and without merit. He also stated that references to other statutes, such as the Criminal Justice (Suppression of Criminal Organizations) Act 2014, the Law Reform (Fraudulent Transactions) (Special Provisions) Act 2013 and the Sexual

Offences Act, was also misconceived, as those statutes did not have the constriction as set out in section 2 of POCA in the definition of "criminal conduct".

[39] Queen's Counsel concluded that the questions raised did not merit discussion before the Her Majesty in Council, either by failing to fall within the rubric of "great general and public importance" or the phrase "or otherwise". It was not appropriate, he argued, to submit the matter to Her Majesty in Council just to see if they would agree with the decision of this court. He therefore urged this court to dismiss the application with costs.

Submissions on the application for a stay

[40] Queen's Counsel urged this court to grant a stay of the portion of the court's order that required material which predates POCA to be returned to the respondent since, she argued, the respondent is an attorney-at-law who was implicated, and so any orders for disclosure made, may not be complied with, or the material could be dissipated. She argued that the information placed before the court in support of the application for a search and seizure warrant was sufficient for these purposes, and once the court was satisfied that the requirements had been met in the rules, there was no need for any further information to be supplied. She indicated that the administration of justice would suffer if the stay of the proceedings in the court below was not granted.

[41] The respondent and the intervenors submitted that the information obtained was readily available otherwise, for example, from the Office of Titles and/or other attorneys-at-law representing the purchasers in the transactions. Additionally, they say

that the prejudice and hardship they would suffer is too great to contemplate further delay in the proceedings before the court. Seven years had elapsed since the commencement of the proceedings and any further delay would be extremely harmful to their emotional health, reputation and would result in great expense.

[42] Queen's Counsel for the intervenors emphasized that there were no paragraphs in the affidavits filed by the applicant in support of the motion, and/or in the written submissions, providing any support for the application for a stay of proceedings. There was simply no evidence, whatsoever, to warrant a consideration of a stay and additionally, there was nothing from the applicant to suggest any prejudice being suffered at all by anyone. That application, he argued, must also be refused.

Discussion and analysis

[43] This application is made pursuant to section 110(2)(a) of the Constitution of Jamaica. It reads thus:

> "An appeal shall lie from decisions of the Court of Appeal to Her Majesty in Council with the leave of the Court of Appeal in the following cases-
>
> (a) where in the opinion of the Court of Appeal the question involved in the appeal is one that, by reason of its great general or public importance or otherwise, ought to be submitted to Her Majesty in Council, decisions in any civil proceedings."

[44] The phrase "of great general or public importance" has been explained in several authorities out of this court. In **Norton Hinds and Others v The Director of Public Prosecutions** [2018] JMCA App 10 at paragraph [32], the court put it this way:

> "...A question 'of great general or public importance' is one that is regarded as being subject to serious debate. It must be not just a difficult question of law but an important question of law that not only affects the rights of particular litigants but one whose decision will bind others in their commercial and domestic relations. It must not merely be a question that the parties wish to have considered by the Privy Council in an effort to see whether the Law Lords would agree with the decision of the Court of Appeal. It must be a case of gravity involving a matter of public interest, or one affecting property of a considerable amount or where the case is otherwise of some public importance or of a very substantial character (see **Georgette Scott v The General Legal Council (Ex-Parte Errol Cunningham)** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 118/2008, Motion No 15/2009, judgment delivered 18 December 2009; **Vick Chemical Company v Cecil DeCordova and Others** (1948) 5 JLR 106; **Dr Dudley Stokes and Gleaner Company Limited v Eric Anthony Abrahams** (1992) 29 JLR 79); and **Daily Telegraph Newspaper Company Limited v McLaughlin** [1904] AC 776)."

[45] The word "otherwise" has been described in **Olasemo v Barnett** by Downer JA at page 197 as follows:

> "So the ample phrase 'or otherwise' must be given a generous construction as to accord the court discretion to grant leave to appeal in interlocutory matters not covered by the specific phrase 'by reason of its great general or public importance'. The phrase 'or otherwise' therefore enlarges the category of appeals. To my mind one such category is where an interlocutory order is conclusive of the action."

And by Wolfe JA at page 201:

> "Clearly, the phrase 'or otherwise' was added by the legislature to enlarge the discretion of the court to include matters which were not necessarily of great general or public importance, but which in the opinion of the court might require some definitive statement of the law from the highest judicial authority of the land. The phrase 'or otherwise' does not *per se* refer to interlocutory matters. The phrase 'or otherwise' is a means whereby the Court of Appeal can in effect refer a matter to their lordships' Board for guidance on the law. The matter requiring the guidance of their lordships' Board may be of an interlocutory nature, but it does not follow that every interlocutory matter will come within the rubric 'or otherwise'."

[46] The question therefore is whether the applicants in this case have passed that threshold. It may be useful to set out the paragraphs of the judgments of this court which refer to the particular areas of alleged concern of the applicant, to wit, paragraphs [84]-[87] and [115] of the judgment. For convenience they are set out below:

> "[84] This Pettman principle was referred to and endorsed by another more recent case out of the criminal division of the Court of Appeal in England, namely, **Regina v Alun Charles Phillips** [[2003] EWCA Crim 1379]. In applying the Pettman principle, the court held at paragraph 29 of the judgment that:
>
> > '...To a great extent, they turn on their own facts. The essential question in every case is whether the evidence passes the test of relevance. If it is relevant, then it is admissible unless, in the exercise of its discretion, the court decides that fairness requires it to be excluded. The argument in the present case has been directed to the first rather than the second of these questions.'

[85] And, in **Regina v M (T)**, a case from the English Court of Appeal, it was stated in the headnote that:

> '...[W]here it was necessary to place before the jury evidence of a continual background of history relevant to the offence charged in the indictment and without the totality of which the account placed before the jury would be incomplete or incomprehensible, then the fact that the whole account involved including evidence establishing the commission of one or more offences with which the defendant was not charged was not of itself a ground for excluding the evidence; and that the evidence of a continuous family history of sexual abuse was relevant to the particular offences charged against M and not simply to show propensity and was therefore admissible....'

[86] In conclusion, in my opinion, being cognisant of the interplay of the provisions of POCA and the Interpretation Act, there is no doubt that the court could examine any alleged criminal behaviour/activities which could lead to an inference of money laundering offences having occurred. Additionally, there is no requirement to prove a prior conviction or any specific connection with criminal property in order to ground examination of the documents seized. However, to be relevant under POCA, the alleged criminal activities must have occurred after 30 May 2007, otherwise, they cannot be considered criminal conduct generating criminal property. That would also refer to and include background information, if occurring prior to the appointed date of 30 May 2007, even though it could be said that the evidence was incomprehensible without it.

[87] With regard to this case, therefore, the properties purchased before 30 May 2007 and the transactions occurring before that date, and as indicated, any allegations of criminal behaviour/activity are irrelevant to the application before the court and ought to be returned to the appellant/intervenors forthwith. In my opinion, those offences and/or investigations would have to be pursued under the repealed Money Laundering Act, as sections 25(2)(d) and (e) of the Interpretation Act preserve that process.

...

> [115] In the light of the above, the appeal should only be allowed in part. The learned judge was correct in ordering that the documents seized should be examined by the court for the determination as to what material attracted legal professional privilege. In that exercise the court should apply a prima facie standard of proof. The issue whether a strong prima facie or a prima facie standard of proof is required is however immaterial, as the test under POCA does not require that the primary fact of the offence be proved. The prosecution is only required to show that there are objectively reasonable grounds for believing that the offence exists. In a money laundering investigation, the person specified does not therefore have to be proved to have some connection with criminal property. There is also no requirement to prove a prior conviction to ground examination of the documents seized. However, to be relevant under POCA, the alleged criminal activities must have occurred after 30 May 2007, otherwise, they cannot be considered criminal conduct generating criminal property. This, in my opinion, must of necessity include background information if occurring prior to the appointed date."

[47] It appears to me that these paragraphs do not in any way state or convey the interpretation it seems Queen's Counsel for the applicant has ascribed to them. It may be of significance to note that similar fact evidence is only admissible in certain exceptional circumstances. Background information/evidence must be applicable to the relevant offence. If the purpose of the money laundering charge is that the offender has benefitted from criminal property under POCA, it must relate to "criminal conduct" which has occurred after 30 May 2007, and so any relevant background information must refer to that charge. If the information is otherwise, it would not relate to criminal conduct as defined under POCA, and would be irrelevant to the money laundering investigation/prosecution under POCA. As a consequence, the questions posed do not

arise under the judgment. The judgment has not stated at any time, nor can it be inferred, that background information in either a money laundering investigation or prosecution must be a criminal offence or criminal conduct respectively. The applicant's position in that regard is clearly misconceived.

[48] Equally, the judgment does not say that material lawfully obtained under warrant but which predates POCA, would be restricted from review in a money laundering investigation and use in a trial. What the judgment says is that material uplifted under a warrant concerning a money laundering investigation under POCA (sections 91, 92 and 93), relating to criminal property generated from criminal conduct, must relate to the specific definition set out in section 2 of POCA, which is criminal conduct occurring after 30 May 2007. The judgment referred to both investigations and potential prosecutions under the repealed Money Laundering Act, which was preserved by section 25 of the Interpretation Act. Furthermore, Queen's Counsel has not addressed the court as to whether material obtained pursuant to restraint orders under POCA could be utilised in money laundering investigations.

[49] I agree with Mr Wilkinson with regard to his submissions on **Anwoir** that that case is distinguishable from the instant case being based on different facts and a different statutory provision and regime. So, although paragraph 3 of the United Kingdom Proceeds of Crime Act 2002 (Commencement No 4 Transitional Provisions and Savings) Order 2003, may have suggested that the offence could be laid under the repealing Act, even if the activity occurred before the commencement of that Act, this is unhelpful, as the provision in the UK is different from the definition section in the

Jamaican legislation of criminal conduct. So, although criminal conduct is defined somewhat similarly in the UK legislation, it is without the time specification, and the definition of criminal property stated therein is very instructive. It states:

> "(3) Property is criminal property if—
>
> (a) it constitutes a person's benefit from criminal conduct or it represents such a benefit (in whole or part and whether directly or indirectly), and
>
> (b) the alleged offender knows or suspects that it constitutes or represents such a benefit.
>
> (4) It is immaterial—
>
> (a) who carried out the conduct;
>
> (b) who benefited from it;
>
> (c) whether the conduct occurred before or after the passing of this Act."

This is therefore entirely different from the Jamaican POCA, where the definition of criminal conduct makes it clear in section 2, that criminal conduct only occurs on or after 30 May 2007, which generates criminal property, and it is therefore not immaterial as stated above, "whether the criminal conduct occurred before or after the passage of the Act".

[50] It is of even more significance, that Lord Hughes has already stated clearly in **Assets Recovery**, the Privy Council case concerning an appeal out of Jamaica, that when referring to assertions of suspected criminal behaviour which had taken place before 30 May 2007, "it could not have been criminal conduct, and could not have

generated criminal property, for the purposes of the Proceeds of Crime Act 2007 - see section 2(1)".

[51] Equally, I do not think any useful purpose is served to attempt to draw an analogy with other statutes creating other offences as the provisions including definitions contained therein, may be completely dissimilar as there may be no specific time constraints, and so the comparisons would be unhelpful.

[52] So, in keeping with the principles identified by McDonald-Bishop JA in **The General Legal Council (ex parte Elizabeth Hartley) v Janice Causwell** [2017] JMCA App 16, I would conclude that the proposed questions did not arise in the judgment of the Court of Appeal, and therefore could not be subject to any serious debate before Her Majesty in Council. Equally, they do not pose any difficult or important questions of law, and it is not appropriate to send questions to Her Majesty in Council, just to see whether the Law Lords agree with the view taken by the Court of Appeal. The questions posed by the applicant are misconceived, as there is no uncertainty with regard to the "**Pettman** principle", as it was argued in extenso and clarified in the judgment of the court. The issue of background information and how to treat it is set out clearly in the paragraphs in the judgment referred to earlier. It seems to me that the position adopted by the applicant with regard to the intended questions, sets out a position that has been created by the applicant in order to develop a debate which is not currently existing. The questions do not pose "questions of any great general or public importance or otherwise".

[53] As a consequence, I would refuse the application for conditional leave to appeal to Her Majesty in Council with costs to the respondent and the intervenors to be taxed if not agreed.

[54] The issue of the stay of the Court of Appeal's decision, or part thereof, is governed by rule 6 of The Jamaica (Procedure in Appeals to Privy Council) Order in Council 1962. The applicant is required to do an act, and so the decision of the court of Appeal falls within the rule. However, I need say no more about the application, as once the application for permission for conditional leave to appeal to Her Majesty in Council is refused, there is no necessity in my view to consider the elements of the stay of proceedings. The substratum of that application would have fallen away. In any event, I do not think that the applicant had put any information, material or evidence before us which would have persuaded me to grant such an application. The application for a stay should also be refused.

[55] It is for all these reasons that we made the orders stated in paragraph [2] herein.

P WILLIAMS JA

[56] I have read in draft the reasons for judgment of my sister Phillips JA. I agree with her reasoning and conclusion and have nothing to add.

SIMMONS JA (AG)

[57] I too have read the reasons for judgment of my sister Phillips JA and agree with her reasoning and conclusion.