**[2017] JMCA Civ 17**

**JAMAICA**

**IN THE COURT OF APPEAL**

**SUPREME COURT CIVIL APPEAL NO 130/2011**

**BEFORE: THE HON MR JUSTICE MORRISON P**
**THE HON MISS JUSTICE PHILLIPS JA**
**THE HON MR JUSTICE BROOKS JA**

**IN THE MATTER** of the Mutual Assistance (Criminal Matters) Act 1995

AND

**IN THE MATTER** of the Mutual Assistance (Criminal Matters) (Foreign States) Order 2007

AND

**IN THE MATTER** of a request from the Central Authority of the Kingdom of the Netherlands for the taking of evidence of Mr Norton Wordworth Hinds, Mr Phillip Feanny Paulwell, Mr Collin Randolph Campbell, Mr Robert Dixon Pickersgill and Mrs Portia Lucretia Simpson-Miller

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| **BETWEEN** | **NORTON WORDWORTH HINDS** | **1ST APPELLANT** |
| | **PHILLIP FEANNY PAULWELL** | **2ND APPELLANT** |
| | **COLLIN RANDOLPH CAMPBELL** | **3RD APPELLANT** |
| | **ROBERT DIXON PICKERSGILL** | **4TH APPELLANT** |
| | **PORTIA LUCRETIA SIMPSON-MILLER** | **5TH APPELLANT** |
| **AND** | **THE DIRECTOR OF PUBLIC PROSECUTIONS** | **RESPONDENT** |

**Seymour Stewart and Miss Yanique Douglas instructed by Knight, Junor & Samuels for the 1st appellant**

**Patrick Atkinson QC and Miss Deborah Martin instructed by Knight, Junor & Samuels for the 2nd appellant**

**Bert Samuels and Miss Stacey Knight instructed by Knight, Junor & Samuels for the 3rd appellant**

**KD Knight QC and Miss Bianca Samuels instructed by Knight, Junor & Samuels for the 4th and 5th appellants**

**Mrs Andrea Martin-Swaby, Miss Sheryl-Lee Bolton and Miss Kameisha Johnson instructed by the Director of Public Prosecutions for the respondent**

**17, 18, 19 January and 23 June 2017**

**MORRISON P**

## Introduction

[1] This appeal is concerned with whether Campbell J ('the judge') was correct in ordering that evidence to be taken from the appellants pursuant to a request for assistance made by the Kingdom of the Netherlands ('the Netherlands') under the Mutual Assistance (Criminal Matters) Act 1995 ('MACMA') should be given in open court. The appellants contend that the judge fell into error in so ordering and seek an order from this court that the evidence in question should be taken by a judge in chambers. The respondent submits on the other hand that the judge correctly exercised his discretion and that his order ought not to be disturbed. The appeal therefore engages the well-known principle of 'open justice' and poses the question whether and, if so, to what extent it is applicable in the context of requests for assistance under MACMA.

[2] In considering the matter, I propose to (i) outline the regime created by MACMA ('the MACMA regime') as it relates to this appeal; (ii) give a brief account of the background to the matter, including its procedural history; (iii) consider the judge's decision; (iv) summarise the arguments; (v) discuss the applicable legal principles; and (vi) seek to apply the principles.

**The MACMA regime**

[3] An obligation on states to provide mutual legal assistance is now an accepted feature of several international instruments in the global battle against transnational criminality and corruption. Principal among these is the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988. Article 7.1 of this seminally important convention records the obligation of State Parties to "... afford one another, pursuant to this article, the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to criminal offences established in accordance with [this Convention]". Article 7.2 provides that, among other things, mutual legal assistance may be requested for the "[t]aking of evidence or statements from persons"[1]. Virtually identical provisions are to be found in a number of other international instruments to which Jamaica is a party.[2]

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[1]Article 7.2(a)

[2]See, for instance, the United Nations Convention against Transnational Organized Crime and the United Nations Convention against Corruption. See also Schedule 2 to MACMA where a number of others are listed.

[4] MACMA seeks to give effect in the domestic law of Jamaica to the country's international obligations under these instruments. To this end, it establishes a regime under which (i) Jamaica may enlist the aid of certain foreign states in relation to pending criminal investigations in Jamaica; and (ii) certain foreign states may enlist the aid of the Jamaican authorities in relation to pending criminal investigations in those states.

[5] Section 2 of MACMA makes provision for the designation of a Central Authority to be the body responsible for, among other things, receiving and considering requests from foreign states for assistance in the investigation of criminal offences, and providing such assistance.

[6] Section 15 makes provision for assistance to a foreign state, in response to a request made in writing to the Central Authority, in respect of investigations and proceedings in relation to criminal matters. Assistance may be provided in relation to, among other things, "the examination and taking of testimony of witnesses"[3] and "the making of arrangements for persons to give evidence or assist investigations"[4].

[7] However, section 16 provides that a request for assistance by a foreign state shall be refused by the Central Authority in certain stated circumstances. Among these are where, in the opinion of the Central Authority, "compliance with the request would contravene the provisions of the Constitution, or prejudice the security, international

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[3]Section 15(3)(b)
[4]Section 15(3)(d)

relations or other essential public interests of Jamaica"[5]; and where "any confidentiality requested in relation to information or evidence furnished by Jamaica would not be protected by the relevant foreign state"[6]. In certain other cases, the Central Authority may in its discretion refuse a request for assistance. These are where "(i) the request relates to conduct which would not constitute an offence under any law in force in Jamaica; [and] (ii) the use of information or evidence furnished by Jamaica would not be restricted by the relevant foreign state to the purposes stated in the request"[7].

[8] Sections 19, 20 and 21 make important provisions as regards the manner of execution of requests for assistance by a foreign state. Section 19(1) provides that, subject to the provisions of MACMA, "requests to Jamaica shall be executed in accordance with the relevant laws in force in Jamaica and the procedures applicable under those laws", while section 19(2) makes it clear that, where a request contains particulars of the procedures to be followed in execution of a request, "those procedures shall be followed to the extent possible under the relevant laws in force in Jamaica".

[9] Section 20 deals specifically with requests for the taking of evidence and the production of documents:

> "20 (1) Subject to the provisions of this Act, where a request is made to Jamaica for-

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[5]Section 16(1)(a)(i)
[6]Section 16(1)(a)(vii)
[7]Section 16(1)(b)(i) and (ii)

(a) the taking of evidence; or

(b) the production of documents (other than judicial or official records referred to in section 22) or other articles,

the Central Authority may, in its discretion, in writing authorize the taking of the evidence or the production of the documents or other articles, and the transmission of the evidence, documents or other articles to the relevant foreign state.

(2) Where the Central Authority authorizes the taking of evidence or the production of documents or other articles under subsection (1), a Judge of the Supreme Court or a Resident Magistrate-

(a) in the case of a request for the taking of evidence, may take the evidence on oath of each witness appearing before the Judge or Resident Magistrate to give evidence in relation to the matter; and shall-

(i) cause any evidence so taken to be put in writing and certify that it was so taken; and

(ii) cause the writing so certified to be sent to the Central Authority;

(b) may, in the case of a request for the production of documents or other articles, require such production and shall send to the Central Authority any articles so produced or any such documents or copies thereof, and shall certify that-

(i) the documents or articles so sent are the documents or articles produced to the Judge or Resident Magistrate; or

(ii) any copies of documents are true copies of documents so produced.

(3) The Judge of the Supreme Court or the Resident Magistrate conducting a proceeding under subsection (2)-

(a) may, subject to section 22, order any person to attend the proceeding and to give evidence or to

produce any documents or other articles at that proceeding;

(b) may permit-

(i) the relevant foreign state;

(ii) the person to whom the proceeding in that state relates; and

(iii) any other person giving evidence or producing documents or other articles at the proceeding,

to have legal representation during the proceeding;

(c) shall afford to the person referred to in paragraph (b) (ii) facilities to examine in person or by his legal representative, any person giving evidence at that proceeding.

(4)...

(5) ..."

[10] Section 21 provides that "[n]o person shall be compelled, in relation to a request referred to in section 20, to give evidence or to produce documents or other articles which he could not be compelled to give or produce in criminal proceedings in Jamaica or in the relevant foreign state". While section 22 provides that "[w]here a request relates to the production of judicial or official records relevant to a criminal matter arising in the relevant foreign state, the Central Authority- (a) shall provide copies of such records which are publicly available; [and] (b) may provide copies of such records which are not publicly available to the like extent and under like conditions as apply in the case of the production of such records to law enforcement agencies or prosecution or judicial authorities in Jamaica".

[11] I should also refer to section 31(2), which provides that, where any relevant treaty has been made with a foreign state, the minister responsible for MACMA may by order, subject to exceptions, adaptations or modifications specified in the order, "declare that the provisions of this Act shall apply in respect of such foreign state ...".

[12] Finally, I must mention sections 32 and 33, which respectively provide for the making of regulations by the minister "for giving effect to the purposes and provisions of this Act"; and the making of Rules of Court "dealing generally with all matters of practice and procedure in proceedings under this Act". As of the date of the hearing of this appeal, no such regulations or rules of court had been made.

[13] Pursuant to section 15(4) of MACMA, further details of the information which requests for assistance are required to contain are set out in the First Schedule. In the case of a request by a foreign state, section 1(1)(f) of the First Schedule provides that the request shall specify details of the procedure that the relevant foreign state wishes to be followed, "including details of the manner and form in which any information, document or thing is to be supplied to ... the relevant foreign state ...". Section 3 requires that every request relating to the examination and taking of testimony of witnesses and production of documents shall specify –

> "(a) the names and addresses of [sic] official designations of witnesses;
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> (b) the subject-matter in relation to which witnesses are to be examined;
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> (c) the questions to be put to witnesses;

(d) the manner in which any testimony is to be taken and recorded;

(e) whether it is desired that witnesses give evidence on oath or on affirmation;

(f) any provisions of the law of –

(i) ...

(ii) the relevant foreign state, in the case of a request by that state,

relating to privilege or exemption from giving evidence, which, in the opinion of the Central Authority, or as the case may be, the appropriate authority of the relevant foreign state, is relevant to the request;

(g) such special requirements of the law of –

(i) ...

(ii) the relevant foreign state, in the case of a request by that state,

in relation to the manner of taking evidence as may be relevant to its admissibility in Jamaica or the relevant foreign state, as the case may be."

[14] The general scheme of MACMA is therefore reasonably clear. In so far as it relates to requests for assistance from a foreign state to which the Act is applicable, it may be summarised as follows:

I. The request must be made in writing to the Central Authority, which decides whether or not the request should be granted.

II. The request may contain particulars of the procedures to be followed in executing it and, where it does so, the Central Authority will follow those procedures to the extent possible under Jamaican law.

III. In arriving at its decision, the Central Authority will consider whether, among other things, compliance with the request will contravene the provisions of the Constitution, or prejudice the security, international relations or other essential public interests of Jamaica and may also consider whether the request relates to conduct which would not constitute an offence under Jamaican law.

IV. Upon the authorisation of a request for the taking of evidence and/or the production of documents by the Central Authority, a judge of the Supreme Court or of the Parish Court may (a) in the case of a request for the taking of evidence, take the evidence on oath of each witness who appears before him or her, ensure that the evidence is taken in writing, certify the evidence as having been so taken and transmit the record of that evidence to the Central Authority; and (b) in the case of a request for the production of documents or other articles, require such production and send the documents or other articles, or copies of them, so produced under certificate to the Central Authority.

V. The judge of the Supreme Court or of the Parish Court conducting the proceeding may (a) order any person to attend the proceeding and to give evidence, or to produce any documents or articles at the proceeding; (b) permit the relevant foreign state, the person to whom the proceedings in that state relates, and any person giving evidence or producing documents or other articles to be legally represented during the proceeding; and (c) must afford the person to whom the proceedings in the foreign state relate, facilities to examine in person, or by his or her legal representative, any person giving evidence in the proceeding.

VI. No person shall be compelled to give evidence or produce documents or other articles pursuant to a section 20 request, if he or she could not be so compelled in criminal proceedings in Jamaica or the relevant foreign state.

VII. In the case of a request for the production of judicial or official records relating to a criminal matter in the requesting state, the Central Authority (a) shall provide copies of records which are publicly available in Jamaica; and (b) may provide copies of such records as are not publicly available on the same conditions which apply to their production in Jamaica.

VIII. In relation to a request to Jamaica for assistance, the relevant foreign state shall specify, among other things, the procedure which it wishes to be followed in the fulfilment of the request, the names of the witnesses whom it wishes to be examined and the questions which it wishes to be put to those witnesses.

**The factual background**

[15] In October 2006, the People's National Party ('PNP') formed the Government of Jamaica ('GOJ'). The appellants were at all material times members of the PNP: the 1st appellant was described as "a businessman with sympathies for the [PNP]"; the 2nd appellant was a member of the House of Representatives and a minister of government; the 3rd appellant was a member of the Senate, a minister of government, and the general secretary of the PNP; the 4th appellant was a member of the House of Representatives, a minister of government and the chairman of the PNP; and the 5th appellant was a member of the House of Representatives, the president of the PNP and the Prime Minister of Jamaica.

[16] The respondent was, and is, the Central Authority designated by the Minister of Justice[8] under section 2 of MACMA.

[17] By letter dated 23 October 2006, Mr Bruce Golding, then the Leader of the Parliamentary Opposition of Jamaica, which was at that time comprised of members of

[8]Instrument of Designation of Central Authority No 28/96, made pursuant to MACMA, dated 20 April 1997

the Jamaica Labour Party ('JLP'), wrote to the National Investigation Unit ('NIU') of the Netherlands. Mr Golding asked the NIU to investigate a payment of some €466,000.00 by a Dutch company, Trafigura Beheer BV Amsterdam ('Trafigura'), to a Jamaican company known as CCOC Association. The stated purpose of the requested investigation was to determine if and/or to what extent the payment contravened Dutch law relating to contributions to political parties; the Organisation for Economic Co-operation and Development ('OECD') Convention on Combating Bribery of Foreign Public Officials in International Business Transactions; and the OECD Guidelines for Multinational Enterprises.

[18] Mr Golding set out the background to his request as follows. Under a 1978 bilateral agreement between the Government of Nigeria and the Government of Jamaica, the Petroleum Corporation of Jamaica ('PCJ'), a government company, had the right to purchase Nigerian crude oil on concessionary terms. Nigerian crude oil is too light to be used in the Jamaican refinery and so, with the approval of the Nigerian government, the oil was sold on the international market through a trader and an amount of oil determined by a fixed premium per barrel was remitted to Jamaica. Since 2000, Trafigura was the lifter of oil on record registered with the Nigerian authorities, under contract with the PCJ. The contract expired at the end of 2005 and was accordingly up for renewal.

[19] In August 2006, representatives of Trafigura met, firstly, with the 2nd and 3rd appellants in New York; and, secondly, with government ministers, including the 2nd, 3rd

and 5th appellants in Jamaica. In early September 2006 (just prior to the PNP's annual conference), Trafigura transferred €466,000.00, or more than J$31,000,000.00, from its account in the United Kingdom to the account of CCOC Association in a Jamaican bank. The 3rd appellant was a signatory to this account. Shortly after these funds were received into the account, two cheques totalling J$30,000,000.00 were issued payable to 'SW Services (Team Jamaica)'. The signatories to the account of SW Services (Team Jamaica) included the 2nd and 3rd appellants. A third cheque drawn on the account of CCOC Association was made payable to the 3rd appellant.

[20] On 3 October 2006, Mr Golding made public the details of the payment by Trafigura to the account of CCOC Association. On 5 October 2006, the 4th appellant, by way of a press release, confirmed payment of this amount by Trafigura, describing it as an unsolicited donation to the PNP for its upcoming election campaign. In another press release issued the following day, Trafigura stated that "it has a commercial agreement with CCOC Association/Collin Campbell and payments are made under that agreement". And, in a debate in the Parliament of Jamaica on 16 October 2006, the 5th appellant stated that the payment by Trafigura was a political donation to the PNP.

[21] Against this background, Mr Golding's letter concluded as follows:

> "Having regard to all the factual circumstances, it would seem to be appropriate for an investigation to be undertaken to determine whether Trafigura is in breach of:
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> (a) the Dutch Penal Code governing contributions to political parties;

(b) the Dutch Penal Code governing the offence of False Accounting;

(c) the Dutch Penal Code which prohibits the false preparation or falsification of a document;

(d) the Dutch Penal Code governing bribery, in that Trafigura made the payment to CCOC Association to conceal the fact that this was payment to Colin Campbell a Minister of Government in anticipation of and to encourage the renewal of his [sic] exclusive licence to lift Nigerian crude;

(e) the provisions of the **Convention on combating Bribery of Foreign Public Officials**;

(f) the **OECD guidelines for multinational enterprises** in the conduct of its [sic] affairs with Jamaica?"

(Emphases in the original)

[22] As at the date of Mr Golding's letter to the NIU, the Netherlands was not one of the countries which had been designated as a foreign state to which MACMA applied. However, on 9 November 2007, by which time there had been a change of government in Jamaica and Mr Golding had succeeded the 5th appellant as Prime Minister, the Mutual Assistance (Criminal Matters) (Foreign States) Order, 2007 was issued by the Minister of Justice. By virtue of that order, the provisions of MACMA were made applicable to the Netherlands.

[23] This development was followed in short order by the issuance by the National Public Prosecutor's Office ('NPPO') of the Netherlands to the respondent, in her capacity

as the designated Central Authority, of a Letter of Request dated 3 December 2007 ('the first letter of request').

[24] In the first letter of request, the NPPO sought the respondent's assistance in connection with an investigation which was then underway in the Netherlands, relating to alleged breaches by Trafigura of sections 177 and 178(a) of the Dutch Criminal Code. Section 177 provides for punishment of up to four years' imprisonment, or a fine, for the making of a gift or a promise, or the provision or offer of a service to a civil servant, (a) with a view to getting him to carry out or fail to carry out a service in violation of his duty, or (b) in response to or in connection with a service, past or present, that the official carried out or failed to carry out in violation of his duty. Section 177a provides for punishment of up to two years' imprisonment or a fine in circumstances not involving a violation of his duty by the civil servant. And section 178a provides that, with regard to sections 177 and 177a, "persons working in the public service of a foreign state or an organisation governed by international law are equivalent with civil servants".

[25] The first letter of request, which was approved by the respondent in her capacity as the Central Authority on 10 January 2008, was followed by a series of supplementary letters of request, not all of which are relevant for present purposes. It suffices to say that, on 4 and 5 March 2008, pursuant to the Fifth Supplementary Letter of Request

issued on 24 January 2008, interviews with the appellants[9] were conducted by Dutch investigators at the law offices of Messrs Knight, Junor & Samuels. It appears from the so far uncontradicted narrative set out in the eighth supplementary letter of request that, during the interviews, the appellants were not prepared to answer the questions and that each of them responded with a similar statement, that is, "If my assistance is requested in an investigation of bribery I can not be of any assistance because I do not know anything about that".

[26] In the Eighth Supplementary Letter of Request issued on 14 April 2009, the NPPO stated that Trafigura "is believed to be guilty of having bribed public officials of a foreign state, i.e., Jamaica". The NPPO requested that summonses be issued to the appellants[10], pursuant to section 20 of MACMA, to appear before a judge of the Supreme Court or a Resident Magistrate, and to give evidence or produce documents or other articles in connection with the Trafigura investigation. However, the request did not specify whether the taking of evidence should be done in private, as it might have done pursuant to the First Schedule to MACMA.

[27] Finally, in the Ninth Supplementary Letter of Request issued on 25 May 2009, in response to a request from the Central Authority for additional information in relation to section 3 of the Schedule to MACMA, the NPPO requested, among other things, "that witnesses give evidence on oath or affirmation". In addition, the NPPO indicated, "We

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[9]And one other person, Mr Donald Buchanan, who is now deceased.
[10]And Mr Buchanan.

wish the evidence to be taken by hearing conducted by a judge in court."[11] The letter concluded that "[t]here are no special requirements concerning the manner in which this evidence is to be taken, other than the evidence is given under oath or affirmation".[12]

**The respondent goes to court**

[28] On 11 November 2010, the respondent filed a fixed date claim form seeking orders in terms of the Eighth Supplementary Letter of Request. After a without notice hearing a few days later, Roy Anderson J ordered that the appellants should appear before a judge of the Supreme Court to give evidence on oath in answer to the questions set out by the NPPO in the Eighth Supplementary Letter of Request. I will refer to the proceedings which followed on from this order as 'the MACMA proceedings'.

[29] The MACMA proceedings came on for hearing on 14 November 2011 before Campbell J ('the judge'). But by that time the appellants had already filed a fixed date claim form on 9 November 2011, seeking reliefs under the Jamaica (Constitution) Order in Council, 1962 ('the Constitution') ('the constitutional proceedings').

[30] The appellants therefore applied to the judge for, among other things, a stay of the MACMA proceedings pending the determination of the constitutional proceedings. In a ruling given orally on 15 November 2011, the judge refused this application. The

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[11]Ninth Supplementary Letter of Request, page 2, items (b) and (d)
[12]Item (e)

judge also refused the appellants' applications for orders that the MACMA proceedings should be heard in chambers and for a stay of those proceedings pending appeal against his ruling.

[31] Three weeks later, on 5 December 2011, pursuant to leave to appeal granted by the judge, this court ordered a stay of the MACMA proceedings pending the determination of the constitutional proceedings. However, the court did not determine the question of whether the MACMA proceedings ought or ought not to be conducted in open court.

[32] The constitutional proceedings were in due course heard by the Full Court of the Supreme Court in 2012 and, in a unanimous judgment given on 20 September 2013, they were dismissed on all grounds.[13] In particular, the court rejected the appellants' contention that the judge's decision to conduct the MACMA proceedings in open court was in breach of their constitutionally guaranteed right to due process and a fair hearing. Although the appellants filed an appeal against this decision, it was subsequently withdrawn[14]. I will, nevertheless, have to come back to the constitutional proceedings in due course.

[33] The MACMA proceedings then remained in abeyance until 1 June 2016, when the respondent applied to this court for an order striking out this appeal for want of

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[13]**Portia Simpson-Miller, Robert Pickersgill, Collington Campbell, Phillip Paulwell, Norton Hinds v The Attorney-General of Jamaica and The Director of Public Prosecutions** [2013] JMFC Full Crt 4

[14]On 1 December 2014

prosecution; or, alternatively, an order fixing a date for the hearing of the appeal. On 3 June 2016, after hearing counsel on the effect of the orders made by this court on 5 December 2011 and the status of the appeal, the court dismissed the respondent's application[15]. Thereafter, at a case management conference held on 17 June 2016, the appeal was set for hearing in the week of 16 January 2017. It is in these circumstances that the appellants now seek this court's determination of the single issue which arises on this appeal, which is whether the judge's ruling that the appellants should be examined in open court was correct.

**The judge's decision**

[34] The written reasons for the decision which the judge gave orally on 15 November 2011 were not produced until after the appeal was reactivated by the respondent's application to dismiss the appeal in 2016. But nothing turns on this and the court is grateful to the judge for the obvious care and effort which he took to ensure that a faithful record of his reasons was made available for our consideration on this appeal.

[35] After referring to various authorities and the provisions of the Constitution, the judge observed[16] that, "[t]he open justice system having been nurtured in the common law has now been enshrined and guaranteed by Section 16(3) of the Jamaican Constitution". Referring to section 16(4) of the Constitution, the judge recognised that

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[15]See [2016] JMCA App 18
[16]At para [35]

the principle is "nonetheless, not absolute by any measure", but pointed out that none of the exceptions set out in the subsection had been articulated before him on behalf of any of the appellants. Having taken the view that the question whether to conduct the hearing in public or not was a matter that fell within the court's discretion, the judge explained his conclusion that no reason had been shown why the MACMA proceedings should be held in private as follows[17]:

> "[44] In considering the exercise of the courts [sic] discretion, the nature of the matter looms large. It concerns a criminal investigation of bribery of Jamaican public official [sic]. The witnesses are public officials. The witnesses are aware of the questions to the asked. As public officials, four of the witnesses have had their hands on the principal instrument of policy and constitute persons who along with others are charged with the general direction and control of the government of Jamaica. To my mind the more pressing question should be, why should they not be required to answer in an open court [sic] a court, which provides access to the people, they are sworn to serve. Why not?
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> [45] From the submission of counsel it is acknowledge [sic] that there is considerable interest on the part of the public to know the questions and answer in this matter. In **Hodgson** [[1998] 2 All ER 673], Lord Woolf speaks of the considerable interest of the media to know. It is therefore, important for this court to weigh the conflicting public interests involved. Those interests involve, the need to protect the administration of justice, recognising and protecting the freedom of the press, and the right of the public to be informed about matters of national importance. It seems to me that where the investigation is shown to be concerned with issues in the public sphere [sic] that will tilt the scales in favour of a public hearing. The matter is not a private one, the legal entity being investigated is incorporated abroad. The business that Trafigura is involved

[17]At paras [44]-[47]

in is not private. The question as to whether there is substance to the suspicion of the Dutch prosecutors, as to whether or not a Jamaican official has been bribed is important in whatever direction the investigation takes. It will serve to dispel rumour and arm the public with facts. In a country where many persons are reluctant to assist the police in their investigation of crime, it will be a salutary move on behalf of these public officials to demonstrate to the populace at large the necessity of cooperation with law enforcement to achieve the aims of justice.

[46] I have not been shown any authority or precedent that would lead me to find that secluded private interview [sic] would better serve the due administration of justice. There has been no reason shown why the normal open justice which all the authorities that I have examined support, and deem the hallmark of democracy should not be followed. The constitutional exceptions are not applicable. I respectfully concur with the decision of the Full Court that however, articulated the strongest point for consideration in the application, would be the protection of their private person. With respect, nothing was raised before me to demonstrate why these public officials should be treated, in this matter in their private capacity. The contention that potential witnesses [sic] evidence are [sic] not taken in open court falls before the everyday practice of the Coroners Court and preliminary examinations.

[47] However, of no lesser consideration was the opportunity afforded the witnesses to have the enquiry done in private, and their responses thereto. The procedure adopted on the failed occasions, echo strongly the fierce criticism of Sir Jack Jacob, 'as being secretive, behind closed doors, hidden from the view of the public and the press and sheltered from public accountability'. The Claimant complains of the expense incurred, and despite these meetings after all these years, the criminal investigation is incomplete."

[36] The judge therefore concluded[18] that "the proper administration of justice demands that the hearing be done in open court to which members of the public have access along with the media".

**The argument on appeal**

[37] Leading the charge for the 4th and 5th appellants, Mr Knight QC submitted, firstly, that the power of a judge of the Supreme Court under section 20(3)(a) of MACMA to order any person to attend and to give evidence or to produce any documents or other articles, is subject to the prior requirement that that person must have given a statement. In this regard, Mr Knight pointed out that, generally speaking, witness statements are taken in private, in the same way as the analogous police question and answer sessions are, as a matter of fairness, conducted outside of the public glare. Further, Mr Knight observed, in accordance with Jamaican law and practice, it was not possible to compel the attendance of a witness at court without a statement having previously been voluntarily given by that witness. Nor is it possible for a judge acting pursuant to a request under MACMA to compel a witness to give evidence.

[38] Secondly, Mr Knight questioned the judge's reliance on section 16(3) of the Constitution, which provides for hearings in public of "[a]ll proceedings of every court and proceedings relating to the determination of the existence or the extent of a person's civil rights or obligations before any court or other authority". It was submitted

[18]At para [49]

that what was proposed to be conducted before the judge in this case was not a hearing, in the sense of an exercise calling for the resolution of any dispute, but a purely investigative procedure. Further, if the appellants had taken the position before the judge that they were not co-operating and/or had nothing to say, that would have been the end of the matter. The judge had therefore misconceived the nature of the proceedings, since a judge in proceedings under section 20 of MACMA had no role to play beyond seeing to it that the proper oath was administered to witnesses and that proper certification was provided for the purpose of transmitting the evidence taken from them to the requesting state.

[39] Accordingly, Mr Knight submitted, section 16(3) of the Constitution had no application to proceedings pursuant to section 20 of MACMA and such proceedings, because of their nature and Jamaican practice, should not be held in open court. But, in the alternative, Mr Knight submitted, in the event that the court were to find that the judge had a discretion in the matter, his exercise of his discretion in favour of open court proceedings in this case was irrational and ought to be set aside.

[40] For the 2nd appellant, Mr Atkinson QC was careful to emphasise that, to the extent that the investigation being carried out by the Dutch authorities related to the alleged bribery of public officials in Jamaica, it is misleading to maintain that no one in Jamaica is under suspicion. Observing that questions put to witnesses in cross-examination can be as damaging as the answers they give, Mr Atkinson complained that, in this case, the courts were being used as a political playing field. He further

submitted that the judge's only role in a hearing conducted pursuant to section 20 is to record evidence, amounting essentially to no more than the collection of a statement. In these circumstances, given the absence of any regulations made pursuant to the power given by section 32 of MACMA, it is important that the statement-taking exercise be conducted in accordance with Jamaican law and practice, under which it is only after someone has given a statement that anything can be done in law to compel them to give evidence. In any event, Mr Atkinson pointed out, it was necessary to keep in mind section 21 of MACMA, which has the effect of preserving the right to legal professional privilege in this context. Accordingly, Mr Atkinson submitted that the judge had no discretion to order that the appellants' evidence should be taken in open court; but, as Mr Knight had done, he further submitted that, on the assumption that the judge did have discretion in the matter, he exercised it in this case without taking into account all the relevant factors.

[41] For the 1st and 3rd appellants respectively, Miss Douglas and Mr Samuels were content to adopt the submissions made by Mr Knight and Mr Atkinson.

[42] For the respondent, Mrs Martin-Swaby referred us to dictionary definitions of the word 'proceeding', as well as to the language of section 20, to make the point that what was before the judge was a proceeding within the meaning of section 16(3) of the Constitution. She submitted that this was so irrespective of the fact that the matter did not relate to the determination of rights and the judge was nevertheless required to play a judicial role in determining the procedure to be followed in the matter. Mrs

Martin-Swaby also referred us to a number of authorities, including the decision of the Full Court in the constitutional proceedings, to demonstrate the strength of the open justice principle. I will come to a consideration of the authorities to which Mrs Martin-Swaby referred us in a moment.

[43] In these circumstances, it was accordingly submitted that (i) the judge indeed had a discretion and that, in accordance with well-established doctrine, this court ought not to disturb his exercise of that discretion unless satisfied that he had acted on some wrong principle; and (ii) an analysis of the judge's reasons demonstrated that he took all relevant factors into consideration and there was therefore no basis for this court to interfere with his decision.

[44] In brief replies, both Mr Knight and Mr Atkinson observed that it was clear from the authorities to which Mrs Martin-Swaby referred us that those were matters involving contested hearings and that the open justice principle was not absolute. In this case, as Mr Knight put it, there were no issues joined between the parties.

**The open justice principle**

[45] The principle that justice should generally be administered in the courts in public is now usually attributed as an aspect of the rule of law. Thus, in the definitive modern exposition on the subject of the rule of law[19], Lord Bingham defined the existing principle as being that "all persons and authorities within the state, whether public or

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[19]Tom Bingham, The Rule of Law, Penguin Books, 1st edn 2010, page 8

private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future **and publicly administered in the courts**"[20].

[46] Although the principle itself is much older than this, most contemporary discussions on the topic of open justice now begin with the decision of the House of Lords in **Scott and another v Scott**[21]. The issue in that case was whether the petitioner in a suit for nullity had been properly found to be in contempt of court for publishing copies of the transcript of the proceedings to certain persons in breach of an order directing that the cause should be heard *in camera*. In a unanimous decision, the House of Lords held that the order that the matter should be heard in camera was made without jurisdiction and that the order pronouncing the petitioner to be in contempt should therefore be discharged.

[47] All of their Lordships started from what Viscount Haldane LC described[22] as "the broad principle … that the Courts of this country must, as between parties, administer justice in public …". Stating the principle even more generally, the Earl of Halsbury declared[23] that "every Court of justice is open to every subject of the King". In similar vein, Earl Loreburn stated[24] that "[t]he inveterate rule is that justice shall be administered in open Court", although he qualified this somewhat by adding that, "I speak of the trial of actions including petitions for divorce or nullity in the High Court".

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[20]My emphasis
[21][1913] AC 417
[22]At page 437
[23]At page 440
[24]At page 445

Lord Atkinson observed[25] that "[t]he hearing of a case in public may be, and often is, no doubt, painful, humiliating, or deterrent both to parties and witnesses, and in many cases, especially those of a criminal nature, the details may be so indecent as to tend to injure public morals, but all this is tolerated and endured, because it is felt that in public trial is to found [sic], on the whole, the best security for the pure, impartial, and efficient administration of justice, the best means for winning for it public confidence and respect".

[48] And, lastly on this aspect of the matter, Lord Shaw, resorting to perhaps the most evocative language, said this:[26]

> "It is needless to quote authority on this topic from legal, philosophical, or historical writers. It moves Bentham over and over again. 'In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice.' 'Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial.' 'The security of securities is publicity.' But amongst historians the grave and enlightened verdict of Hallam, in which he ranks the publicity of judicial proceedings even higher than the rights of Parliament as a guarantee of public security, is not likely to be forgotten: 'Civil liberty in this kingdom had two direct guarantees; the open administration of justice according to known laws truly interpreted, and fair constructions of evidence; and the right of Parliament, without let or interruption, to inquire into, and obtain redress of, public grievances. Of these, the first is by far the most indispensable; nor can the subjects of any State be reckoned

[25]At page 463
[26] At page 477

> to enjoy a real freedom, where this condition is not found both in its judicial institutions and in their constant exercise.'"

[49] The remainder of the judgments in **Scott and another v Scott** were principally concerned with whether there were any exceptions to the rule and, if so, what were their limits. While there was general agreement that the principle might in an appropriate case be subject to exceptions, no clear statement of a universal rule of thumb emerges from the case. But Viscount Haldane mentioned[27] two clear cases based on the authorities: firstly, cases concerning wards of court and lunatics, in which "the Court is really sitting primarily to guard the interests of the ward or the lunatic"; and secondly, cases involving litigation as to a secret process, where the effect of publicity would be to destroy the subject matter. In such cases, Viscount Haldane observed[28] –

> "As the paramount object must always be to do justice, the general rule as to publicity, after all only the means to an end, must accordingly yield. But the burden lies on those seeking to displace its application in the particular case to make out that the ordinary rule must as of necessity be superseded by this paramount consideration. The question is by no means one which, consistently with the spirit of our jurisprudence, can be dealt with by the judge as resting in his mere discretion as to what is expedient. The latter must treat it as one of principle, and as turning, not on convenience, but on necessity."

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[27] At page 437
[28] At pages 437-438

[50] And Earl Loreburn considered[29] that –

> "… in all cases where the public has been excluded with admitted propriety the underlying principle, as it seems to me, is that the administration of justice would be rendered impracticable by their presence, whether because the case could not be effectively tried, or the parties entitled to justice would be reasonably deterred from seeking it at the hands of the Court."

[51] **Scott and another v Scott** has often been applied in a variety of contexts. In **Attorney General v Leveller Magazine Ltd and others**[30], for instance, a case concerned with whether the identity of a witness in committal proceedings should be suppressed on the ground of national security, Lord Diplock restated the principle in this way:

> "As a general rule the English system of administering justice does require that it be done in public: **Scott v Scott**. If the way that courts behave cannot be hidden from the public ear and eye this provides a safeguard against judicial arbitrariness or idiosyncrasy and maintains the public confidence in the administration of justice. The application of this principle of open justice has two aspects: as respects proceedings in the court itself it requires that they should be held in open court to which the Press and public are admitted and that, in criminal cases at any rate, all evidence communicated to the court is communicated publicly."

[52] However, with respect to the possibility of exceptions to the principle of open justice, Lord Diplock introduced a consideration which, although clearly implicit in **Scott**

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[29] At page 446
[30] [1979] 1 All ER 745, 749-750

**and another v Scott**, had not been fully developed; that is, the nature or circumstances of the particular proceeding:

> "... since the purpose of the general rule is to serve the ends of justice it may be necessary to depart from it where the nature or circumstances of the particular proceeding are such that the application of the general rule in its entirety would frustrate or render impracticable the administration of justice or would damage some other public interest for whose protection Parliament has made some statutory derogation from the rule."

[53] **Hodgson and others v Imperial Tobacco Ltd and others**[31], a decision of the Court of Appeal of England and Wales, was concerned, among other things, with the correctness of an order made by a judge preventing comments to the media by the parties and their advisers in relation to proceedings held in chambers. It was held that what happened during proceedings in chambers was private, but not confidential or secret, and information about such proceedings could, and in the case of any judgment or order should, be made available to the public when requested. Explaining the rationale for the decision, Lord Woolf MR said this:[32]

> "Proceedings in chambers, however, are always correctly described as being conducted in *private*. The word 'chambers' is used because of its association with the judge's room so as to distinguish a hearing in chambers from a hearing in open court. While the public in general are normally free to come into and go from a court (as long as there is capacity for them to do so) during court hearings

[31][1998] 2 All ER 673
[32]At page 686

> the same is not true of chambers hearings. Other than the parties and their representatives the public need the permission of the judge to attend.
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> ...
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> However it remains a principle of the greatest importance that, unless there are compelling reasons for doing otherwise, which will not exist in the generality of cases, there should be public access to hearings in chambers and information available as to what occurred at such hearings. The fact that the public do not have the same right to attend hearings in chambers as those in open court and there can be in addition practical difficulties in arranging physical access does not mean that such access as is practical should not be granted. ... As long as he bears in mind the importance of the principle that justice should be administered in a manner which is as open as is practical in the particular circumstances, higher courts will not interfere with the judge's decision unless there is good reason for doing so."

[54] For present purposes, the decision is of further interest because of Lord Woolf MR's reference[33] to a published lecture by Sir Jack I H Jacob QC[34], to which the judge in this case made special reference. In the lecture, after extolling the well-known virtues of public justice, Sir Jack described its opposite, deprecatingly, as "the administration of justice in private and in secret, behind closed doors, hidden from the view of the public and the press and sheltered from public accountability". Sir Jack identified two prevailing exceptions to the open justice system as (i) the hearing of pre-trial proceedings in chambers, at which only the parties and their advisers are entitled to be

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[33]At page 685
[34]Hamlyn Lectures (38th series), *The Fabric of English Justice*, page 22

present and from which the public and the press are excluded; and (ii) hearings *in camera*, where the court orders that the court should be closed or cleared and the public or press excluded. Sir Jack explained the justification for these exceptions as follows:

> "Both these exceptions may be necessary in matters which require protection from publicity, such as matters concerning national security, those relating to persons under disability, *i.e.* minors and mental patients, or those relating to secret processes and other special matters, such as hearings before the Commissioners of Inland Revenue relating to tax affairs and such like matters. Subject to these exceptions, the principle of publicity should prevail throughout the whole range of civil proceedings."

[55] Lastly in this brief series of citations, I must refer to **Hogan v Hinch**[35], a decision of the High Court of Australia. The issue in that case was whether a statutory power to prohibit disclosure of the identity of sex offenders who were subject to extended supervision orders was in breach of the open justice principle. It was held that it did not, in that, while an essential characteristic of courts was that they sit in public, the principle was not absolute and that, where it was necessary to secure the proper administration of justice, the courts had an inherent jurisdiction at common law to limit its application, as did Parliament. Delivering the leading judgment, French CJ held that "[t]he character of the proceedings and the nature of the function conferred upon the court may also qualify the application of the open court principle". As an example of

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[35][2011] HCA 4, para [21]

such a case, the Chief Justice pointed out that "[p]roceedings not 'in the ordinary course of litigation', such as applications for leave to appeal, can also be determined without a public hearing".

[56] As Harris JA pointed out in **William Clarke v The Bank of Nova Scotia Limited**[36], the common law principle of open justice also finds expression in section 16(3) of the Constitution:

> "(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 obligations before any court or other authority, including the announcement of the decision of the court or authority, shall be held in public."

[57] However, section 16(3) is subject to section 16(4):

> "16. - (4) Nothing in subsection (3) shall prevent any court or any authority such as is mentioned in that subsection from excluding from the proceedings, persons other than the parties thereto and their legal representatives -
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> (a) in interlocutory proceedings;
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> (b) in appeal proceedings under any law relating to income tax; or
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> (c) to such extent as -
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> (i) the court or other authority may consider necessary or expedient, in circumstances where publicity would prejudice the interests of justice; or

[36][2013] JMCA App 9, para [59 ]

> (ii) the court may decide to do so or, as the case may be, the authority may be empowered or required by law to do so, in the interests of defence, public safety, public order, public morality, the welfare of persons under the age of eighteen years, or the protection of the private lives of persons concerned in the proceedings."

[58] Despite some initial hesitation as to the true ambit of section 16(3), on my part at any rate, I now think it is plain that the word "and", after the words "proceedings of every court" in the first line of the subsection must be read disjunctively. The result of this is, as it now seems to me, that the general rule prescribed by section 16(3) is that (i) all proceedings of every court; **and** (ii) proceedings, whether of a court or of some other authority, for the determination of the existence or extent of a person's civil rights or obligations, must generally be held in public.

[59] This naturally begs the further question: to what does the word "proceedings" refer? Urging us to apply the ordinary dictionary meaning of the word, Mrs Martin-Swaby referred us to Black's Law Dictionary[37], in which a proceeding is defined as, among other things, "[t]he business conducted by a court or other official body; a hearing". The learned editor of Black's also refers to an extract from a venerable work on civil procedure[38], in which a 'proceeding' is described as "a word much used to

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[37] 8th edn, page 1241

[38] The Law of Pleading Under the Codes of Civil Procedure 3-4, by Edwin E Bryant, 2nd edn, 1899

express the business done in courts … an act done by the authority or direction of the court, express or implied …".

[60] In my view, these definitions are clearly wide enough to bring the MACMA proceedings within the ambit of section 16(3) of the Constitution. It may be open to doubt, though, whether it is even necessary to have resort to them, given the number of references in the body of section 20 of MACMA itself to the process of taking evidence and producing documents or other articles in court pursuant to the section as a "proceeding"[39].

[61] However, the general rule enshrined in section 16(3) is expressly qualified by section 16(4), which permits a judge hearing the proceedings to exclude members of the public from a hearing in interlocutory proceedings, income tax appeals, and to any extent that it is necessary or expedient to do so to avoid prejudice to the interests of justice, or in the interests of defence, public safety, public order, public morality, the welfare of persons under the age of 18 years, or the protection of the private lives of persons concerned in the proceedings.

[62] One question which arises from all of this is whether the effect of section 16(3), when read together with the limited exceptions set out in section 16(4), is that any matter falling outside the purview of the latter must necessarily be held in open court. In **William Clarke v The Bank of Nova Scotia Limited**, speaking for the unanimous

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[39]Section 20(3), (3)(a), (3)(b)(iii), (3)(c)

court[40], Harris JA answered this question in the negative, stating[41] that "... a departure from the open court principle, may be justified in some instances ... depending on the nature of the proceedings and the type of function conferred upon the court". Thus, in that case, where what was at issue was whether it was permissible for this court to consider and determine certain types of appeals without an open court hearing, that very learned judge held[42] that "... the court may depart from the strictures of a public hearing where in a particular case, economy and efficiency so dictate".

[63] So, finally, I come back to the constitutional proceedings. The Full Court held, as I have already indicated, that the judge's decision to hear the MACMA proceedings in open court did not infringe the appellants' right to a fair hearing. One of the explicit findings of the court was that, in relation to section 16(3) and (4), the judge enjoyed a discretion as to whether the proceedings should be conducted in open court or in private; and, in a judgment with which Marsh and Pusey JJ agreed, McDonald-Bishop J (as she then was) explained her conclusion in this way[43]:

> "[218] In the case of the MACMA, no specific provision is made that the taking of evidence from persons in Jamaica, on behalf of a requesting state, should be in public or private. So, there is no requirement in the relevant statutory regime that the proceeding for the taking of the evidence of the claimants should be conducted in chambers or in private as the claimants are contending it should be. Also, there is no evidence that the Kingdom of the Netherlands has

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[40]Harris, Morrison, Dukharan, Phillips and McIntosh JJA
[41]At para [59]
[42]At para [63]
[43]At paras [218]-[219]

> requested the taking of evidence to be in private as it could have done as provided for in the MACMA under the First Schedule to section 15(4).
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> [219] In the absence of these special provisions as to the procedure to be used in the taking of the evidence, Campbell, J [sic] had a discretion to deal with the hearing in private as can be seen from the relevant constitutional provisions in section 16(4) of the Charter of Rights. He, however, opted for an open court hearing in keeping with the provisions of the Constitution that, as a general rule, all proceedings of any court should be held in public. This is in keeping with an existing common law rule."

[64] While McDonald-Bishop J's conclusion on this point related specifically to the judge's power pursuant to section 16(3) and (4), it is difficult, as a matter of principle, to see why the position should be any different in respect of the common law. For, as has been seen, all formulations of the principle of open justice, from **Scott and another v Scott**, through to **William Clarke v The Bank of Nova Scotia Limited,** have reserved to the court a power to, exceptionally, sanction a departure from the principle in certain circumstances. It accordingly seems to me that it must be for the judge in each case to determine, as a matter of discretion, whether, based on either section 16(4) or other more general criteria, there should be a departure from the principle.

[65] During the argument in this case, and for some time after that, I was strongly inclined to think that, as counsel for the appellants submitted, the nature of the MACMA proceedings, which do not involve the resolution of any dispute between contesting parties or the trial of any action, might be such as to exclude them altogether from the

application of the open justice principle. In this, I was probably encouraged by some of the language used in **Scott and another v Scott**, with Earl Loreburn, for instance, observing that, in propounding the "inveterate rule" that justice should be administered in open court, he had in mind specifically the trial of actions, including petitions for divorce or nullity, in the High Court.[44] But, be that as it may, I am now fully satisfied that, given in particular the imperative language of section 16(3) ("[a]ll proceedings of every court ... shall be held in public"), the nature of the proceedings does not modify the principle itself. Rather, it is a factor which may qualify its application in a particular case. In my view, this approach is fully consistent with that stated by French CJ in **Hogan v Hinch** ("[t]he character of the proceedings and the nature of the function conferred upon the court may also qualify the application of the open court principle"); and by Harris JA in **William Clarke v The Bank of Nova Scotia Jamaica Limited** ("... a departure from the open court principle, may be justified in some instances ... depending on the nature of the proceedings and the type of function conferred upon the court"). In other words, I think that the character or nature of the proceedings is among the matters to be taken into account in any case in which the court is urged, as a matter of discretion, to exclude the operation of the open justice principle.

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[44]See para [46] above.

[66] In her admirable judgment in the constitutional proceedings, McDonald-Bishop J went on to indicate[45] what might have been required of the appellants in order to justify a hearing in private:

> "[222] In order to better justify a hearing in private, in accordance with the Constitution, (albeit that there is no constitutional right to a private hearing) the claimants would, perhaps stand a better chance, by establishing that their situation is one that would fall within the one or other of the circumstances specified under section 16(4) of the Charter of Rights. That is to say that a hearing in chambers is reasonably required for the protection of one or other of the interests referred to in that subsection.
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> [223] In seeking to establish a basis for hearing *in camera* or in chambers, the claimants, through the submissions of their counsel, rather than through any evidence, have put forward the contention that the hearing in chambers would be necessary for their protection. The point was made that to expose them to giving evidence in open court would expose them to danger or is likely to expose them to danger of reprisal since they would be testifying in respect of persons to be charged for a criminal offence.
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> [224] Within this context, the Constitution does provide that although the general rule with respect to 'all proceedings of every court' is that they be held in public, there is nothing to preclude a judge from hearing the matter in private if it is necessary or reasonably required for the 'protection of the private lives of persons involved in the proceedings'. This seems to be the consideration that the claimants would wish to invoke as there is nothing put forward by them about a hearing in chambers being reasonably necessary or required for public safety or public order."

[45]At paras [222]-[224]

[67] Against this extended background, it seems to me to be possible to draw at least the following conclusions as regards the open justice principle for the purposes of this appeal. First, the fundamental rule of the common law, which is also enshrined in section 16(3) of the Constitution, is that all proceedings of every court should be held in public. The rule applies equally to proceedings conducted in chambers, in respect of which, save in cases in which there are compelling reasons for doing otherwise, there should generally be public access to, and information available as to what occurred at, such hearings. This requirement may be regarded as a material aspect of the rule of law, in that it secures to the public a guarantee of impartial and even-handed justice, conducted in full view of the public and open to comment from the press. Second, both at common law and under section 16(4) of the Constitution, the court has a limited discretion to exclude members of the public from its hearings as an exception to the general rule. Third, while section 16(4) of the Constitution sets out a set of circumstances in which the court may exclude members of the public, the court's discretion is wider than this and, in a proper case, it may be exercised taking into account matters relating to the nature of the proceedings and the type of function conferred upon the court in the particular proceedings. And fourth, while the decision whether or not to exclude the public will in any case ultimately be one for the court, it will usually be helpful, even if only as a counsel of prudence, for the party seeking to justify such exclusion to provide the court with some kind of material to justify a departure from the fundamental principle of open justice.

**Applying the principles**

[68] It will already have been seen that, based on the above analysis, I cannot accept Mr Knight and Mr Atkinson's primary submission, which was that the judge had no discretion to order that the MACMA proceedings should be conducted in open court. Both at common law and under the Constitution, open justice is, as the judge held, the norm. The principle is, however, as the judge also accepted, subject to exceptions, both at common law and under section 16(4) of the Constitution. In the absence of any relevant regulations having been issued under section 32 of MACMA (which is, it goes without saying, a matter for regret), the question whether the public should be excluded in a particular case is accordingly one for the court to determine. I therefore think that the judge was plainly correct to assume a discretion to decide whether or not the public should be excluded from the MACMA proceedings.

[69] But, in the alternative, the appellants invite us to say that, in the event that their primary submission should fail, the judge exercised his discretion incorrectly. It is not in dispute that, in urging this conclusion, the appellants bear a heavy burden. The oft-cited decision of the House of Lords in **Hadmor Productions Ltd and others v Hamilton and others**[46], upon which Mrs Martin-Swaby naturally places heavy reliance, is clear authority for the proposition, repeatedly applied by this court[47], that an appellate court must ordinarily defer to the exercise of a judge's discretion and will not

[46][1982] 1 All ER 1042
[47]See, for example, **The Attorney General of Jamaica v John MacKay** [2012] JMCA App 1

interfere with it merely on the ground that the members of the appellate court might have exercised the discretion differently. Accordingly, as a matter of strong general principle, this court will only interfere with a judge's exercise of his discretion where it can be shown that the judge misunderstood the law or the evidence before him, or that his decision was "so aberrant that it must be set aside on the ground that no reasonable judge regardful of his duty to act judicially would have reached it"[48].

[70] As McDonald-Bishop J observed in her judgment in the constitutional proceedings (from which, it may be relevant to recall, there is now no extant appeal), the appellants put forward no evidence to bring themselves within any of the exceptions set out in section 16(4) of the Constitution. It is therefore clear that an order for a hearing in private in this case would have to be justified on the basis of some other, more general, consideration; such as that, if I may borrow and adapt Lord Diplock's language in **Attorney-General v Leveller Magazine Ltd and others**[49], the nature of the MACMA proceedings is such that the application of the general rule would frustrate or render impracticable the administration of justice, or would damage some other public or private interest.

[71] In my view, the appellants' contention that, in essence, the MACMA proceedings amount to mere "statement taking", notwithstanding the force and great skill with which it was advanced by Mr Knight, falls far short of anything that could possibly

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[48]Per Lord Diplock, at page 1046
[49]See para [50] above

dislodge the application of the open justice principle in this case. For, even if the appellants are justified in their dismissive characterisation of the process, the fact is that, in enacting MACMA in the terms in which it did, Parliament did not consider it either necessary or desirable to exclude proceedings under section 20 from the ambit of the principle enshrined in section 16(3) of the Constitution.

[72] Mr Knight's further point that it is not possible for the court to compel compliance by witnesses in a section 20 proceeding, at any rate without their having previously given a statement, is completely met by section 20(3)(a) of MACMA, which provides that the judge conducting such a proceeding "may, subject to section 22, order any person to attend the proceeding and to give evidence or to produce any documents or other articles at that proceeding". Section 22, to which the power given to the judge under section 20(3)(a) is subject, deals solely with a request relating to the production of judicial or official records relevant to a criminal matter arising in the relevant foreign state. It therefore does not apply in this case, with the result that the judge has an unrestricted power to order the attendance of witnesses; and, subject to any applicable question of privilege, to order them to give such evidence as they may be able to give. Accordingly, in my judgment, whatever may be the usual practice for which Mr Knight contends, it is plainly overtaken in this context by the language of MACMA.

[73] Perhaps closer to the point, it seems to me, would have been some suggestion that a hearing of the MACMA proceedings in public might be likely to prejudice the

appellants or jeopardise some legitimate interest of theirs. Possibly in recognition of this, Mr Atkinson strongly implied that the appellants themselves might be regarded as being under suspicion in connection with the Trafigura investigation and that they might accordingly be at risk of hostile questioning at a hearing before the judge. But, unlike in the usual case of witnesses preparing themselves for cross-examination, the appellants have now known the precise questions to which the Dutch authorities will seek answers from them for some considerable time. Whether the questioning takes place in open court or in private, they will, in common with every other citizen, be fully protected by their right to legal representation while giving evidence. They will also be free, if they are so advised, to assert a claim of privilege. And further, and hardly least, they will have the assurance, implicit in court proceedings of any nature, of the inherent authority of the judge to prevent unfairness or undue prejudice to all persons who appear before the court, whether as parties or as witnesses. This last consideration must surely be, in my view, the last and most effective line of resistance to any attempt to convert the proceedings into the political playing field which Mr Atkinson predicts that it is likely to become.

[74] The ultimate question is therefore whether, given these considerations, the appellants have made good their alternative submission that the judge's exercise of his discretion was fatally flawed. As has been seen[50], the judge took into account various factors in arriving at his decision in this case. These include, and I list them now in no

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[50]Para [34] above

particular order of priority, the fact that (i) in the light of section 16(3) of the Constitution, "a matter of this nature as a general rule ought to be heard in open court"[51]; (ii) no reason had been shown why the normal open justice principle should not apply in this case; (iii) the Trafigura investigation, as a matter concerned with a criminal investigation of bribery of a Jamaican public official, is a matter in the public domain in which the public have a legitimate interest; (iv) as public officials, "four of the witnesses have had their hands on the principal instrument of policy"[52]; (v) the question of whether or not there is any substance to the suspicion of the Dutch prosecutors as regards bribery of a Jamaican public official is a matter of importance; (vi) a public hearing "will serve to dispel rumour and arm the public with facts"[53]; (vii) the public have a right to be informed about matters of national importance; (viii) "the proper administration of justice demands that the hearing be done in open court to which members of the public have access along with the media"[54]; and (ix) given the general reluctance of persons to assist the police in investigating crime, "it will be a salutary move on behalf of these public officials to demonstrate to the populace at large the necessity of cooperation with law enforcement to achieve the aims of justice"[55].

[75] I can say at once that, had I had it to do afresh, I might have given less weight to factors relating to the appellants' status, since, as citizens, just as their status does

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[51]Para [42]
[52]Para [44]
[53]Para [45]
[54]Para [49]
[55] Para [45]

not entitle them to any special consideration, they are equally entitled to the same fair consideration as any other citizen. But this is, of course, as **Hadmor Productions Ltd v Hamilton** makes clear, hardly a decisive factor and this court must consider the matter as a whole, assessing all relevant factors together. Taking this broader view, the court must, in my judgment, keep in mind the fundamental importance to the administration of justice of the open justice principle and the public interest involved in maintaining it in a society governed by the rule of law, unless cogent reasons are shown to justify a departure from it. On this basis, in the absence of any material consideration that can possibly compel a different result, I have come to the clear conclusion that, in ordering that the MACMA proceedings should be conducted in open court, it cannot be said that the judge's exercise of his discretion was such as to warrant this court's interference.

**Conclusion and disposal of the appeal**

[76] In general, proceedings under section 20 of MACMA are subject to the principle of open justice, as formulated at common law and captured in section 16(3) of the Constitution. However, the principle is subject to exceptions, in particular those set out in section 16(4) of the Constitution and, more generally, where the application of the general rule would frustrate or render impracticable the administration of justice, or would damage some other public or private interest. It will be a matter for the judge in each case, in the exercise of his or her discretion, to determine whether the proceedings should be conducted in public or in private. In this case, the appellants

have not been able to demonstrate that, in ordering that they should give evidence in open court, the judge's exercise of this discretion was sufficiently flawed, in the **Hadmor** sense, as to attract the intervention of this court.

[77] In my view, this appeal must therefore be dismissed. I would propose that, unless a contrary submission in writing is received from the appellants within 14 days of the court's order, the respondent should have the costs of the appeal, such costs to be agreed or taxed. If the appellants seek a different order for costs than that set out above, the respondent will be at liberty to file written submissions in response within a further 14 days; and the court will give its ruling on costs in writing within 21 days of receipt of the respondent's submissions.

**PHILLIPS JA**

[78] I agree with the learned President's thorough and comprehensive analysis of this matter. There is nothing that I can usefully add.

**BROOKS JA**

[79] I too have read the draft judgment of the learned President. I agree with his reasoning and conclusion and have nothing to add.

**MORRISON P**

**ORDER**

Appeal dismissed. Unless a contrary submission in writing is filed and served on the respondent by the appellants within 14 days of the date hereof, costs are awarded to the respondent to be agreed or taxed. In the event that submissions on costs are received from the appellants within the time limited above, the respondent will be at liberty to file and serve written submissions in response within 14 days of the service of the appellants' submissions. The court will give its ruling on costs in writing within 21 days of receipt of the respondent's submissions.