[2012] JMCA Civ 38

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 13/2009

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MRS JUSTICE HARRIS JA
THE HON MISS JUSTICE PHILLIPS JA

BETWEEN	**THE DIRECTOR OF PUBLIC PROSECUTIONS**	**APPELLANT**
AND	**MARK THWAITES**	**1ST RESPONDENT**
AND	**JAMES MORRISON**	**2ND RESPONDENT**
AND	**CATHERINE PARKE THWAITES**	**3RD RESPONDENT**
AND	**DEBBIE HYDE**	**4TH RESPONDENT**

CONSOLIDATED WITH
SUPREME COURT CIVIL APPEAL NO 14 /2009

BETWEEN	**THE ATTORNEY GENERAL**	**APPELLANT**
AND	**MARK THWAITES**	**1ST RESPONDENT**
AND	**JAMES MORRISON**	**2ND RESPONDENT**
AND	**CATHERINE PARKE THWAITES**	**3RD RESPONDENT**
AND	**DEBBIE HYDE**	**4TH RESPONDENT**

Jeremy Taylor and Mrs Annmarie Feurtado-Richards for the Director of Public Prosecutions

Miss Stephanie Orr and Miss Tova Hamilton for the Attorney General

Winston Spaulding QC and Garth McBean for the 1st and 3rd respondents

Frank Phipps QC and Miss Katherine Phipps for the 2nd respondent

Patrick Atkinson and Miss Deborah Martin for the 4th respondent

Miss Pauline McKenzie watching proceedings for the Financial Services Commission

26 and 28 April 2010 and 31 July 2012

PANTON, P

[1] I have read the draft of the judgment that has been written by my learned sister, Phillips JA. In my view, she has dealt extensively with all the issues that have been raised and discussed by the parties in these appeals. I fully agree with her reasoning and conclusion and have nothing to add.

HARRIS, JA

[2] I too have read in draft the judgment of Phillips JA. I agree with her reasoning and conclusion and have nothing to add.

PHILLIPS, JA

[3] These are consolidated appeals arising from the decision of the full court delivered on 18 December 2008 granting specific declarations on consolidated applications by the respondents for judicial review of the decision of the Director of

Public Prosecutions (the DPP) to charge them with certain criminal offences. The issues in the case relate, inter alia, to whether the offences with which the respondents were charged were offences at the material time, and whether the Financial Services Commission was clothed with the statutory authority to act as it did, and, if not, whether any actions undertaken by it could be validated and confirmed subsequently by legislation.

[4] In the court below, the respondents filed fixed date claim forms requesting more or less similar reliefs, accompanied by affidavits deposed by them in support of their respective claims. The declarations prayed for read as follows:

> "1. A Declaration that paragraph (a) of the definition of 'financial services' in Section 2 of the Financial Services Commission Act and the provisions of the Fourth Schedule of the Financial Services Commission Act which were purportedly brought in effect as law by the Financial Services Commission Act 2001 (Appointed Day) (Insurance Provisions) Notice 2005 are in breach of the Applicant's rights under Section 20 (7) of the Constitution of Jamaica and null and void on the ground that in respect of the Applicant and the offences with which he is charged those provisions rendered acts which did not constitute an offence in December 2004 and January 2005, a criminal offence as of the 4th March 2005, thereby having a retroactive effect in relation to criminal offences.
>
> 2. A Declaration that the power delegated to the Minister of Finance by Section 1 of the Financial Services Commission Act passed by Parliament and assented to by the Governor General on the 3rd May 2001 was exercised and spent when the Minister brought into operation provisions of the Financial Services Commission Act by the Financial Services Commission Act 2001 (Appointed Day) Notice published in the Jamaica

Gazette Supplement, Proclamation Rules and Regulations dated Monday the 30th July 2001.

3. A Declaration that the Minister had no power to bring into operation the provisions of the Financial Services Commission Act relating to the insurance industry when he purported to bring same into effect by the Financial Services Commission Act 2001 (Appointed Day) Notice 2005.

4. Further or alternatively, a Declaration that the provisions of the Financial Services Commission (Insurance Services) Validation and Indemnity Act, which was purportedly brought into operation on the 11th day of August 2006 are contrary to Section 20(7) of the Constitution and therefore unconstitutional, null and void, to the extent that it purportedly renders retroactively criminal acts allegedly done by the applicant.

5. An order that the criminal proceedings instituted against the Applicant by information ... in the Resident Magistrate's Court, for the Corporate Area held at Half Way Tree be discontinued by the 1st Respondent."

[5] The affidavits in support of the claims set out, inter alia, the particular offences with which the respondents were charged, and the bases for the claims that the charges were unconstitutional, null and void.

Re: Mark Thwaites, that:

(i) He was arrested and charged on six informations, on 12 July 2005. The second set of three informations laid on 12 July 2005 replaced the first set, and charged him with two offences, which were said to have been committed between 17 December 2004 and 21 January 2005. He was charged for (a) breach of section 147 (1)(a) of the Insurance Act, for failing to comply with directions of the Financial Services Commission and (b) breach of section 147(1)(c)(ii) for supplying information to the Financial Services Commission which was false in a material particular and in

purported compliance with the directions of the Financial Services Commission to provide proof of the injection of capital into Dyoll Insurance Company Limited.

Re: James Morrison, that:

(ii) He was arrested and charged on 12 October 2005 for breach of section 147 (1)(a) of the Insurance Act, for failing to comply with the directions of the Financial Services Commission to provide proof of the injection of $150,000,000.00 capital in the Dyoll Insurance Company as authorized by sections 46 and 53 of the Insurance Act and given by the Financial Services Commission on diverse days between 17 December 2004 and 21 January 2005.

Re: Catherine Parke-Thwaites, that:

(iii) She was arrested and charged on 13 October 2005 for breach of section 147(1)(a) of the Insurance Act for failing to comply with the directions as set out at (ii) above given on the said diverse days between 17 December 2004 and 21 January 2005.

Re: Debbie Ann Hyde, that:

(iv) She was arrested and charged on 25 January 2006 for breaches of section 147(ii)(a) and 147(1)(c) of the Insurance Act for offences committed on 17 December 2004 and 21 January 2005.

All respondents claimed that the Financial Services Commission at the time of the commission of the alleged offences, had no authority in respect of insurance services.

[6] The full court granted the orders at 1 and 4 in paragraph [4] above, with no mention of any award as of costs, and additionally in respect of the 3rd and 4th respondents, declared somewhat similarly to the effect that:

> "... the Applicant is being charged with offences ex post facto as the Information charging her alleges act committed

> in December 2004 and January 2005, when those acts alleged against her did not become criminal offences until 4th March 2005."

[7] An application for an award of damages on behalf of the 3rd respondent was denied.

[8] This matter will be determined by the true and proper interpretation to be accorded the relevant statutes and subsequent instruments relative to the same.

Relevant Statutory Provisions

1. The Financial Services Commission Act

   a. The Financial Services Commission Act was passed on 3 May 2001.

      Section 1 provides:

      > "This Act may be cited as the Financial Services Commission Act, 2001 and shall come into operation on a day to be appointed by the Minister by notice published in the Gazette."

   b. On 30 July 2001, the Minister of Finance and Planning issued the Financial Services Commission Act, 2001 (Appointed Day) Notice. Section 2 of the Appointed Day Notice provides:

      > "The 2nd day of August 2001 is hereby appointed as the day on which the provisions of the Financial Services Commission Act, 2001, other than:
      > (a) paragraph (a) of the definition of 'financial services' in section 2; and
      > (b) the provisions of the Fourth Schedule to the Act in respect to the Insurance Act'
      > shall come into operation."

c. Section 2 of the Financial Services Commission Act states:

"'financial services' means services provided or offered in connection with

(a) insurance; …

'prescribed financial institution' means an institution or person offering or providing financial services to the public."

d. The Financial Services Commission is a body corporate established under section 3 of the Financial Services Commission Act.

e. Section 6 of the Financial Services Commission Act states:

"6 - (1) For the purpose of protecting customers of financial services, the Commission shall -
(a) supervise and regulate prescribed financial institutions;
(b) ……. (c)……. (d)…… (e)……."

f. Section 8(1)(b) of the Financial Services Commission Act provides:

"(1) Where the Commission believes that any of the conditions specified in paragraph 1, 2 or 3 of Part A of the Third Schedule exists in relation to a prescribed financial institution, the Commission may--

(a) ...
(b) give directions to the institution under this section; …"

2. The Insurance Act

a. On 21 December 2001 the Insurance Act came into effect pursuant to the Insurance Act, 2001 (Appointed Day) Notice. Section 2 of the said notice provides:

> "The 21st day of December 2001 is hereby appointed as the day on which the Insurance Act 2001 shall come into operation."

b. Section 2 of the Insurance Act states that "Commission" means the Commission appointed under section 3 of the Financial Services Commission Act.

c. Section 3 of the Insurance Act states that the Act is applicable to all insurance intermediaries and all insurers whether established in or outside of Jamaica.

d. Section 4 of the Insurance Act provides that "the Commission shall be responsible for the general administration of this Act".

e. Section 46 of the Insurance Act provides that the Financial Services Commission may demand from-

(a) any local company, information relating to any matter in connection with its insurance business;

(b) a foreign company, information relating to any matter in connection with the insurance business carried on by it in Jamaica.

f. Section 53 of the Insurance Act provides:

> "Subject to the provisions of this Act, a registered insurer shall be deemed to be insolvent if at any time the value of its assets does not exceed its liabilities by such amount as the Commission may prescribe, having regard to the types of risks to which the company may be subjected, including insurance, credit or investment risks."

g. The respondents were arrested and charged under section 147 of the Insurance Act which states, where relevant:

> "(1) A person commits an offence if he--
>
> (a) contravenes or fails to comply with any provision of this Act or any direction, condition, obligation or requirement given, imposed or made under any such provisions;
>
> (b) …
>
> (c) in purported compliance with a requirement imposed under any provision of this Act to supply information or provide an explanation or make a statement--
>
> (i) supplies information, provides an explanation or makes a statement which he knows to be false in a material particular; or

(ii) recklessly supplies information, provides an explanation or makes a statement which is false in a material particular."

3. The Financial Services Commission Act, 2001 (Appointed Day) (Insurance Provisions) Notice 2005

a. On 7 March 2005, the notice was issued by the Minister of Finance and Planning and published in the Jamaica Gazette Supplement as follows:

"In exercise of the power conferred upon the Minister by section 1 of the Financial Services Commission Act, 2001, the following Notice is hereby given:--

1. This Notice may be cited as the Financial Services Commission Act (Appointed Day) (Insurance Provisions) Notice, 2005

2. The 4th day of March is hereby appointed as the day on which the following provisions of the Financial Services Commission Act, namely-

(a) paragraph (a) of the definition of 'financial services' in section 2;

(b) the provisions of the Fourth Schedule to the Act relating to the Insurance Act

shall come into operation."

4. The Financial Services Commission (Insurance Services) (Validation and Indemnity) Act, 2006

    a. On 11 August 2006 the Financial Services Commission (Insurance Services) (Validation and Indemnity) Act, 2006 (hereinafter referred to as "the Validation and Indemnity Act") came into operation.

    b. The long title to the Act (No 8 of 2006) indicated that the Act was to validate and confirm all acts done in good faith in supervision of the insurance service sector between 21 December 2001 and the commencement of the Act by the Financial Services Commission and its staff and others in support of those acts and to indemnify them from liability in respect of such acts.

    c. There were several preambles to the Act, namely, it recognized that: (i) the Financial Services Commission Act had been enacted in May 2001 to empower the Financial Services Commission to supervise and regulate non-deposit-taking institutions operating in the financial services sector, including insurance businesses; (ii) on 2 August 2001 the Financial Services Commission Act other than the provisions relating to insurance services had been brought into operation by an appointed day notice; (iii) on 21 December 2001, the Insurance Act, 2001 came into operation; (iv) on that date and subsequently the provisions of the Financial Services Commission Act relating to insurance services were not brought into operation (incorrectly);

acting in good faith the Financial Services Commission and its officers and staff had purported to exercise authority over the insurance industry in the absence of a notice bringing the Act into operation with regard to insurance services; and (v) it was desirable to validate and confirm such acts undertaken by the Financial Services Commission, its staff and other persons who purported to exercise those functions during the period between 21 December 2001 and the commencement of the Act.

d. Section 2 of the Act provides:

> "Notwithstanding anything to the contrary in any enactment, all acts done in good faith, between the 21st day of December, 2001 and the commencement of this Act, by
>
> (a) the Financial Services Commission, its officers and staff, in the purported exercise of the powers conferred upon the Financial Services Commission in relation to the insurance industry by the Financial Services Commission Act and the Insurance Act, 2001 and by all other persons acting in connection with or in support of such acts;
>
> (b) any other persons having an official duty or being employed in the administration of the Financial Services Commission Act in relation to the insurance industry,
>
> are hereby declared to have been validly, properly and lawfully done and are hereby confirmed; and the Financial Services Commission, its officers and staff and the other persons specified are hereby freed,

> acquitted, discharged and indemnified as well against The Queen's Most Gracious Majesty, Her Heirs and Successors as against all persons whatever from all legal proceedings of any kind, whether civil or criminal."

5. The Constitution of Jamaica

Section 20 (7) of the Constitution of Jamaica reads as follows:

> "No person shall be held to be guilty of a criminal offence on account of any act or omission which did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for any criminal offence which is severer in degree or description than the maximum penalty which might have been imposed for that offence at the time when it was committed."

Section 20 (9) reads as follows:

> "Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of any provision of this section other than subsection (7) thereof to the extent that the law in question authorizes the taking during a period of public emergency of measures that are reasonably justifiable for the purpose of dealing with the situation that exists during that period of public emergency."

The decision of the full court

[9] In making the orders set out in paragraphs [4] and [6] herein, McCalla CJ in delivering the judgment of the court, indicated that it was necessary for the court to make a determination on two issues: namely, whether the law under which the respondents were charged existed at the time the offences were alleged to have been

committed; and whether the Validation and Indemnity Act retroactively created the offences for which each respondent had been charged. The learned Chief Justice set out certain findings which she arrived at, which were endorsed by McIntosh and Hibbert JJ. They are as follows:

> "…It seems to me that until the provisions of the Financial Services Commission Act were brought into operation in relation to the Insurance Industry section 4 of the Insurance Act was ineffective and inoperative..
>
> I hold that the power of the Financial Services Commission to act in relation to the criminal matters with which the applicants are charged must reside in that Act and on August 2 2001 the Financial Services Commission had no authority under that Act to perform any function in relation to the Insurance industry.
>
> I do not agree … that section 4 of the Insurance Act confers on the Financial Services Commission powers to act in relation to the Insurance Act in circumstances where the provisions of that Act in relation to the insurance were not in force at the material time. The responsibility conferred under the insurance Act must be subject to the Financial Services Commission having the power given to it in the Financial Services Commission Act which established it..."
>
> The Validating Act itself therefore recognized that the Financial Services Commission had no authority to exercise any powers in relation to Insurance. If as contended by the respondents the Financial Services Commission derived power over the Insurance industry by virtue of section 4 of the Insurance Act then there would have been no need for Parliament to pass the validating Act in 2006 in relation to the insurance Industry.
>
> If, as I have found, the Financial Services Commission was not authorized or empowered to give directions at the time that the offences were allegedly committed in those

circumstances the criminal charges which were laid against the applicants under the Insurance Act for failure to comply with a direction would be invalid.

By virtue of section 20(7) of the Constitution the Validating Act of 2006 would therefore be ineffective in relation to the criminal offences with which the applicants were charged."

The appeal

[10] The appellants filed their respective notices and grounds of appeal, and on 4 November 2009, both appeals No 13 (where the appellant is the DPP) and No 14 of 2009 (where the appellant is the Attorney General) were ordered to be heard as consolidated appeals. The appellants in their grounds of appeal stated that the full court had erred in respect of the specific findings. These grounds are:-

"1. The Full Court erred in holding that:-

'...until the provisions of the Financial Services Commission Act were brought into operation in relation to the Insurance Industry, section 4 of the Insurance Act was ineffective and inoperative.'

2. The Full Court erred in holding that in relation to The Financial Services Commission Act:-

'...the power of the Financial Services Commission to act in relation to criminal matters must reside in that Act.'

3. The Full Court erred in holding that:-

'The responsibilities conferred under the Insurance Act must be subject to the Financial Services Commission having the powers given to it in the Financial Services Commission Act which established it.'

4. The Full Court erred in holding that:-

'The Validating Act itself recognized that the Financial Services Commission had no authority to exercise any powers in relation to Insurance.'

5. The Full Court wrongly held and without reasoning that it was implicit in the passage of the Financial Services Commission (Insurance Services) Validation and Indemnity Act 2006 that Parliament accepted that Section 4 of the Insurance Act was incapable of giving authority to the Financial Services Commission to regulate the Insurance Industry.

6. The Full Court failed to review or consider one of the principal submissions advanced by the Respondent, viz, that it was entirely within the powers of Parliament when it passed the Insurance Act to assign powers to the Financial Services Commission in relation to the Insurance Industry.

7. The Full Court also failed to review or consider the Respondent's submission that no provision in the Appointed Day Notice of July 30, 2001 could affect the capacity of Parliament to assign responsibilities to the Financial Services Commission under the Insurance Act.

8. The Full Court failed to set out a reasoned basis for either rejecting the submissions advanced by the Respondents or for arriving at the holdings made in the Judgment.

9. The delay of 13 months between the close of arguments and the delivery of the judgment must have contributed to the Court's ability to review the arguments and to give a reasoned judgment."

[11] The respondents, Mark Thwaites, Catherine Parke-Thwaites and Debbie Hyde, all filed counter-notices of appeal, in which their only challenge to the order of the full court was that the court had not awarded costs to them. The ground of appeal was that the full court had erred in failing to award costs in favour of them, having regard to the general rule that costs follow the event, and that the successful party (the

respondents in this case) is entitled to costs against the unsuccessful party. No reason had been given for not making an award of costs and in the absence of any specific reason, the respondents were entitled to their costs. They asked that they be awarded costs in respect of the appeal and costs in the court below.

[12] At the hearing of the appeal, Mrs Pauline Mckenzie, the attorney-at-law watching proceedings for and on behalf of the Financial Services Commission, (hereinafter called "the Commission" or "the FSC") drew the court's attention to a letter dated 22 April 2010 from the FSC indicating that having had sight of the decision of the full court, it had decided to withdraw from the appeal but indicated that the DPP and the Attorney General "to whom they had applied for leave to prosecute, have decided to proceed with the matter nevertheless". The counsel for the DPP indicated to the court that the appeal related to the interpretation of certain instruments of legislation and it was important to obtain this court's ruling to "bring certainty to the law". Counsel representing the Attorney General informed the court that she would rely on the submissions advanced on behalf of the DPP.

Issues

[13] It seems clear to me that there are three main issues on these consolidated appeals, namely:

(a) Whether the offences for which the respondents were charged existed as criminal offences at the time of their alleged commission.

(b) Could the Validation and Indemnity Act affect the actions taken by the Commission?

(c) Were the provisions of the Validation and Indemnity Act, in any event, contrary to the provisions of Section 20(7) of the Constitution and therefore null and void?

Submissions

For the appellants - Issue (a)

[14] Mr Taylor for the DPP submitted that on review of all the instruments of legislation, the FSC had the regulatory power over the insurance industry at the time the offences were committed. Further, when the FSC was exercising powers in relation to laying criminal charges against the respondents, it was not acting pursuant to provisions of its enabling statute, that is the FSC Act, but was acting pursuant to the jurisdiction conferred by the provisions contained in the Insurance Act, which was in effect when the alleged offences were committed. Counsel referred specifically to sections 3 and 4 of the Insurance Act, and submitted that when the Insurance Act came into effect and up until the alleged offences were committed, the Act by its clear and unambiguous provisions gave the FSC administrative functions over the insurance industry, and it was within the power of Parliament to grant the FSC, a properly constituted body corporate, such administrative power. Counsel contended that whereas Parliament sought to bring only certain provisions of the FSC Act into effect in August 2001, excluding section 2(a) and the fourth schedule, Parliament did not do so in respect of the Insurance Act. There was no indication that the provisions of the Insurance Act would await the provisions of the FSC Act, he argued. Further, he

contended, had it been Parliament's intention that the Insurance Act was to be subject to the restrictions enacted in the FSC Act, it would have said so expressly and not left it up to implication and inference. Counsel relying on the basic rules of statutory interpretation submitted that "we are not entitled to read words into an Act of Parliament unless clear reason for it is to be found within the four corners of the act itself" (**Vickers Sons & Maxim Ltd v Evans** [1910] AC 444).

[15] It was argued further that since the Insurance Act was later in time, it must be taken as illustrative of the intention of Parliament that the passage of the Insurance Act was to confer regulatory jurisdiction over the insurance industry by the FSC, and as long as the FSC was acting under and in pursuance of the provisions of the Insurance Act, its actions were valid and lawful. It was argued that the FSC had issued directions pursuant to section 46 of the Insurance Act, and the respondents were obliged to comply with them and their failure to do so, or having done so falsely, resulted in them being arrested and charged under section 147 of the Insurance Act. The powers, it was submitted, granted to the FSC under the Insurance Act were independent of any power granted to the FSC under the FSC Act. It was further submitted that as the FSC in this matter had exercised its jurisdiction pursuant to the provisions of the Insurance Act and not the FSC Act, the view that the FSC had no powers in relation to the insurance industry because of the FSC Act, 2001 (Appointed Day) Notice 2001, was misconceived.

[16] Counsel for the Attorney General, however, did concede that the FSC lacked the authority to proceed under the FSC Act, at the material time, and had the respondents been subjected to the process specified under the fourth schedule to the FSC Act, it

would have been conceded that they had been charged under that Act without authority, but the respondents had been charged and brought forthwith before the court under the Insurance Act, so any argument that the FSC had acted unlawfully was without merit.

For the respondents - Issue (a)

[17] Counsel for the respondents, on the other hand, submitted that the FSC was a creature of statute established under section 3 of the FSC Act and the scope of its powers and jurisdiction was circumscribed by the FSC Act which created it. As a consequence, since the FSC Act when passed, exempted provisions relating to the insurance industry, one must look to the legislative instrument the provisions of which brought the insurance industry under the jurisdiction of the FSC. It was submitted that the FSC Act (Appointed Day) (Insurance Provisions) Notice 2005 endeavoured to do that. Counsel submitted that as a creature of statute, the FSC had no powers and jurisdiction over the insurance industry until March 2005, a date after the commission of the alleged offences.

For the appellants -Issue (b)

[18] Counsel argued that if the offences were not in existence at the material time, then the Validation and Indemnity Act would have made lawful those acts done in good faith by the FSC in the exercise of its regulatory powers over the insurance industry. Counsel referred to and relied on the decision of this court, namely **Lowell Lawrence v Financial Services Commission** SCCA No 129/2005 delivered 29 March 2007 which determined as a preliminary issue the effect of the Validation and Indemnity Act on the

issue of a penal notice by the FSC, pursuant to the fourth schedule of the FSC Act, when the offence in question had been committed before the insurance provisions of the FSC Act took effect. The penal notice was upheld on the basis that the Validation and Indemnity Act made it lawful. Counsel submitted, in reliance on the decision of the Privy Council in that matter (2009 UKPC 49), that since there was no allegation that the FSC in the exercise of its powers had not acted in good faith, then those actions would have been validated by the provisions of the Act. Counsel further argued that since the decision of this court was given prior to the decision of the full court, which in giving its decision did not consider the effect of the decision of this court, the decision of the full court was *per incuriam*.

For the respondents -Issue (b)

[19] Counsel contended that on a review of the recitals to the Validation and Indemnity Act it was clear that Parliament had recognized that between 2001 and 4 March 2005, the FSC had no authority or jurisdiction over the insurance industry. It was also submitted that there cannot be "retroactive criminality to create an offence at the time the FSC had been requiring the Appellants [sic] without jurisdiction to provide information or do any act. The FSC did not have such authority and the Act could not retroactively have conferred that authority to create criminal consequences for the respondents…" Counsel submitted that the circumstances in the **Lowell Lawrence** case were not similar to the case at bar, as, bearing in mind the above, the real issue before this court and the court below, was, "Did the court have jurisdiction to try the offence?"

For the appellants -Issue (c)

[20] Counsel submitted, relying on **Campbell v Robinson** (1939) 3 JLR 173 and **Yew Bon Tew v Kenderaan Bas Mara** [1983] AC 553, that statutes should not ordinarily be construed to have a retrospective effect unless the intention of the legislature is clearly expressed. In the instant case, it was clear that the Validation and Indemnity Act was to have a retrospective effect, and this could be seen from its language, which was plain. The intent was to validate all acts which the FSC and its staff had undertaken prior to the Act being promulgated. However, counsel argued, the Validation and Indemnity Act is "not a criminal or penal Statute" and "does not create any offence and therefore does not infringe the respondent's constitutional rights". Counsel contended that the offences under which the respondents were charged existed under the Insurance Act at the time the Validation and Indemnity Act came into existence. He said that to be in breach of section 20(7) of the Constitution, the Act "must have the effect of criminalizing acts or omissions which did not, at the time they took place, constitute an offence". Counsel maintained that if Parliament had intended that the Act should have retrospective effect in relation to criminal offences it would have said so. He submitted further, that there are no provisions in the Act indicating either expressly or impliedly that a retrospective effect was to be given to any of the offences under the Insurance Act. The Act, he submitted, therefore is not in breach of section 20 (7) of the Constitution, and is no bar to the prosecutions under section 147 of the Insurance Act.

[21] Counsel for the Attorney General in her written submissions posited the arguments slightly differently. Counsel indicated that the purpose of the FSC Act (Appointed Day) (Insurance Provisions) Notice 2005 was to bring into operation the insurance provisions of the FSC Act, and counsel reiterated, what she had already conceded, which was that prior to this notice the FSC had no authority to exercise any power conferred on it under the FSC Act in relation to the insurance industry. However, counsel submitted that the FSC had the authority to regulate the insurance industry through its empowerment under the Insurance Act. Counsel maintained that the provisions of the Insurance Act had retrospective effect which could be discerned from its unambiguous provisions. What was of importance, submitted counsel, was that the respondents were not charged under the FSC Act, but the Insurance Act, and the Validation and Indemnity Act was not promulgated to give effect to the Insurance Act, or to create any offences, or to give authority to any charges laid under that Act or any other Act. It was promulgated to validate acts undertaken by the FSC and its staff under the FSC Act, in relation to the insurance industry, when the FSC had no authority to act. The actions taken by the FSC under the Insurance Act were protected by the provisions of that Act itself, and the provisions of the Insurance Act, though having retrospective application, did not create offences ex post facto and were therefore not in breach of section 20 (7) of the Constitution.

For the respondents -Issue (c)

[22] Counsel submitted that making the provisions of the FSC Act applicable to the insurance industry could not be done retroactively so as to create offences on the part of the respondents as this would be in breach of section 20(7) of the Constitution of Jamaica, which he stated, prohibits the making of an act criminal, retroactively. Counsel referred to section 20 (7) and (9) of the Constitution and submitted that it was clear that no law could be made which was in breach of sub-section 7, and no person could be held guilty of a criminal offence which was not an offence at the time the act took place. Counsel also referred to and relied on the case of **Commissioner v Woods** (1999) 54 WIR 1, for the proposition that legislation which retroactively creates a criminal offence, is contrary to the constitutional law of the independent Commonwealth Caribbean States. Counsel further submitted that there is a presumption against retroactive legislation which is of a penal nature, and referred to the well known text of Driedger on the Construction of Statutes.

[23] Counsel referred to the definitions of "prescribed financial institution" and "financial services" in the FSC Act, as set out herein, and sections 6(3)(b) and 8(b) of the FSC Act to posit a submission that the respondents were charged under the Insurance Act for failing to comply with the directions of the FSC, and in the case of the 1st and 4th respondents, for supplying information to the FSC which was false in a material particular, but the FSC did not have any power to give such directions, and had no regulatory power over the insurance industry, since at the material time, the definition of "prescribed financial institution" under the FSC Act did not apply to an

insurance company. Thus, none of those actions could have constituted an offence. It was therefore submitted that until 4 March 2005, since "financial services" as defined in section 2 of the FSC Act did not include insurance, the FSC could not exercise its powers in connection with section 6 and section 8(1)(b) of the FSC Act. It was contended that this position was supported by the enactment of the Validation and Indemnity Act, the provisions of which clearly recognized that the provisions of the FSC Act relating to insurance services were not in effect from 2001 until 2005 and that the officers of the FSC had no authority over the insurance industry during that period. Furthermore, counsel submitted, the preamble to the Validation and Indemnity Act, when promulgated in 2006, asserted that the FSC Act was not in force in relation to the insurance industry.

[24] Additionally, counsel submitted that if Parliament had intended to give the FSC powers outside of the FSC Act, it would have said so expressly, as has been done in other legislation such as the Revenue Administration Act. Also, counsel insisted, when Parliament establishes a commission and states in the clearest terms that the commission has been established "for the purposes of the particular statute", it imposes a limitation on the functions of the commission which are within the limits of the statute itself.

[25] It was conceded that the Insurance Act was in existence at the material time. However, as the FSC was forbidden under its own Act to have responsibility for insurance, the later Act (Insurance Act) could not give it power to do what Parliament had previously prohibited it from doing. So, although section 4 of the Insurance Act

stated that the FSC would be responsible for the general administration of the Act, that provision exceeded the duties and powers the FSC had, which, at the relevant time, as stated previously, specifically excluded it from regulatory and supervisory powers for insurance. It was submitted that "the source of the FCS's authority must be its own constitutive statute and none other". Section 4 of the Insurance Act, therefore, could only become applicable when the exclusion of the jurisdiction of the FSC over the insurance industry was specifically removed and the FSC Act empowered the FSC as a creature of statute to have such jurisdiction. Counsel contended that this must be so or Parliament would not have seen it fit to pass the subsequent enabling legislation (March 2005), as it was evident that there was an omission, or the retroactive validating legislation (August 2006), if the situation had already been accomplished by the 2001 Insurance Act. It was further submitted that that must have been the legislative intent, as there was no "concept or process as legislation by accident or chance".

[26] It was submitted therefore that prior to March 2005, the respondents could not have committed any offence under the Insurance Act. Although the Insurance Act was in force at the material time, there was no person with legal status to administer the Act. The direction from the FSC requesting information was unenforceable at the time it was made, and failing to comply with the direction was not a criminal offence. Counsel submitted that Section 147 of the Insurance Act could only relate to the failure to comply with a direction that the FSC was specifically authorized to give.

[27] Counsel relied on the House of Lords case, **Waddington v Miah** [1974] 2 All ER 377, where it was held that the penal provisions of the Immigration Act 1971 were

not retrospective, and accordingly a person could not be convicted of an offence under that Act in respect of anything done by him before the Act came into force. Counsel also referred to and relied on **AG for Canada v Hallet and Carey Limited** [1952] AC 427 and **Mackenzie v British Columbia (Commissioner of Teachers' Pensions**) (1992) 94 DLR (4th) 532 against the efficacy of retroactive penal legislation**.**

[28] It was therefore submitted that the provisions of the FSC Act which relate to the insurance industry and which were purportedly brought into operation on 4 March 2005 are unconstitutional, null and void and no punitive consequences can flow from them in relation to the respondents.

[29] It was argued, however, on behalf of the 2nd respondent, that the issue of whether the Validation and Indemnity Act breaches the Constitution of Jamaica, does not arise for consideration in relation to him as the Act "does not purport to be retroactive for creating an offence at a time when none existed". Counsel for the 4th respondent put it another way. He said, "The prosecution would have to prove, which they cannot, that at the material time the FSC had the authority to demand and to receive information." That being the case, counsel said, the Validation and Indemnity Act could not place them retroactively in such a position, as that would be in direct conflict with section 20(7) of the Constitution.

The Counter-Notices of Appeal

[30] Counsel accepted that the claims made on behalf of the respondents were all made by way of fixed date claim form and that there was no specific request noted thereon for costs to be granted to the applicants if successful, but there was a claim for:

> "Such further or other relief as this Honourable Court deems just."

The judgment, however, was silent with regard to costs. Counsel referred to rule 64.6 of the Civil Procedures Rules 2002, which sets out the general rule if the court decides to make an order in respect of costs, and rule 64.6(4) which seeks to outline some of the criteria which the court should consider when deciding the question of liability for the payment of costs. Counsel submitted that if this court were to uphold the decision of the full court, it would mean that the legislative process was flawed, and, he stated, in those circumstances, that would be a good reason for costs to follow the event. Counsel therefore asked that an order be made for the appellants to pay the costs incurred by the respondents in this court, as well as in the court below.

Discussion and Analysis

[31] This case has many unusual features. Firstly, one is required to construe several instruments of legislation and to apply that interpretation to the facts of the case. But an extremely important aspect of the case overshadows all else, which is the claim that certain provisions of relevant legislation have retrospective application and could thereby be in conflict with the Constitution of Jamaica and therefore null and void.

That consideration is of serious significance, because of the far-reaching implications, and must be approached with caution.

Issue (a)

[32] A full statement of the rules of statutory construction and interpretation is that of Lord Simon of Glaisdale in **Maunsell v Olins** [1975] AC 373 at 391:

> "...in statutes dealing with ordinary people in their everyday lives, the language is presumed to be used in its primary ordinary sense, unless this stultifies the purpose of the statute, or otherwise produces some injustice, absurdity, anomaly or contradiction, in which case some secondary ordinary sense may be preferred, so as to obviate the injustice, absurdity, anomaly or contradiction, or fulfill the purpose of the statute: while, in statutes dealing with technical matters, words which are capable of both bearing an ordinary meaning and being terms of art in the technical matter of the legislation will presumptively bear their primary meaning as such terms of art (or, if they must necessarily be modified, some secondary meaning as terms of art).

[33] Additionally, in **Vickers Sons & Maxim Ltd v Evans**, Lord Loreburn LC gave this caution:

> "... this appeal may serve to remind us of a truth sometimes forgotten, that this House sitting judicially does not sit for the purpose of hearing appeals against Acts of Parliament, or of providing by judicial construction what ought to be in an Act, but simply of construing what the Act says. We are considering here not what the Act ought to have said, but what it does say;..."

His later comment on the appellants' contentions, which he said involved reading words into a particular clause, and the role of the court was that, "The clause does not

contain them, and we are not entitled to read words into an Act of Parliament unless clear reason for it is to be found within the four corners of the Act itself."

[34] There is no dispute about any of the following facts:

(i) The FSC Act, which was promulgated in July 2001, established the FSC. In that Act, the FSC, "for the purpose of protecting customers of financial services" was established with the duty to supervise and regulate "prescribed financial institutions" (section 6 of the FSC Act).

(ii) By section 2 of the FSC Act (Appointed Day) Notice, the FSC Act came into operation on 2 August 2001, save and except in relation to the financial services provided and offered in respect of insurance, and also with regard to the provisions in the fourth schedule of the Act, in respect of the Insurance Act.

(iii) That situation changed on the issuance of the FSC Act (Appointed Day) (Insurance Provisions) Notice 2005, as then both the financial services in relation to insurance and the fourth schedule to the FSC Act came into operation on 4 March 2005.

(iv) The acts allegedly committed by the respondents were done between December 2004 and January 2005, before the applicability of the FSC Act to financial services in respect of insurance came into operation.

(v) The Insurance Act was passed later in the same year as the FSC Act, viz, in December 2001 and provided that the FSC (appointed under the FSC Act) shall be responsible for the general administration of the said Insurance Act.

[35] The Insurance Act does not state that it is subject to the FSC Act, but at the time of its promulgation, the FSC Act, by its Appointed Day Notice, clearly stated that it did not apply to financial services relative to the insurance industry, nor, by definition, to prescribed financial institutions as they offered financial services to the public (excluding insurance). Failing to remove that exclusion in relation to insurance when the Insurance Act was promulgated was obviously an error or omission on the part of the legislature. That conclusion cannot be avoided. What is of importance is how that legislative hiccough is to be interpreted particularly with respect to the facts of this case.

[36] The informations on which the respondents were charged disclosed that they were charged under section 147(1)(a) and (1)(c) of the Insurance Act. I do not agree with counsel for the DPP that the fact that the Insurance Act was later in time is illustrative of the intent of Parliament that the regulatory power of the FSC over the insurance industry was to be conferred by that Act. The Insurance Act does not expressly say that it is conferring any such power on the FSC; the Act only refers to a general administrative duty. The Insurance Act could not therefore by general words confer on the FSC, powers relating to financial services in insurance matters. The FSC had its own Act, which established it and gave it specific responsibilities, specifically excluding financial services in insurance.

[37] Section 46 of the Insurance Act confers on the FSC certain investigative powers. It indicates that the FSC may demand information from any local company relating to any matter in connection with insurance business, and from a foreign company in relation to any insurance business it carries on in Jamaica. As can be readily observed, the difficulty which arises is that under the Insurance Act, it is the FSC which may make the demand, and any person who fails to comply with that demand commits an offence. This means that the initiation of any prosecution which results from a breach of section 46 of the Insurance Act commences with the non-compliance of a demand from the FSC. This action under any scrutiny, must be a regulatory one, which at the material time, between August 2001 and March 2005, the FSC had no such authority to make. It is the appellants' position that the charges were laid pursuant to the Insurance Act, because by virtue of section 4 of the Insurance Act, the FSC could proceed. I do not agree. A careful perusal of sections 6 and 8 of the FSC Act make this clear: the FSC's authority was limited to the purpose of protecting customers of financial services, to supervise and regulate financial institutions; to give public understanding of their operations, thereby creating stability and public confidence in such institutions; and to promote modernization so as to comply with international standards of competence, efficiency and competitiveness (section 6). It also had the authority to give directions and obtain undertakings from prescribed financial institutions believed to be in breach of inter alia, Part A of the third schedule, in respect of compliance with their memorandum and articles and the conduct of the institutions' business in relation to the Act and/or regulations, particularly in relation to

solvency (section 8); all of this was in respect of the insurance industry subsequent to March 2005 and not before. Section 147 of the Insurance Act could not designate a failure to respond to the FSC at the material time an offence. The FSC is definitely a creature of statute and its powers, in my view, are governed by the statute which established it.

[38] The appellants relied on the **Lowell Lawrence** case as, in some instances, there are similarities, in that the court reviewed the development of the legislation, namely, the FSC Act, the Validation and Indemnity Act and the Insurance Act, but in that case the court was dealing with different allegations made under and pursuant to the FSC Act. However, in the judgment of this court and, of the Privy Council, some observations were made with regard to the powers of the FSC before the FSC Act (Appointed Day) (Insurance Provisions) Notice 2005 was promulgated, which are instructive. It may be useful to set out a summary of the facts in that case.

[39] The appellant was an insurance intermediary for many years before 2001, who had been previously registered by the superintendent of insurance to settle policies on behalf of Life of Jamaica Limited. He had resigned from that company and had been engaged by others. His registrations had automatically been cancelled on his respective resignations. When he joined MONY Life Insurance Company of the Americas (MONY), however, he did so without being registered with the superintendent of insurance. It was the appellant's case that MONY was in the business of selling insurance before the Insurance Act came into operation and continued to do so after, without registration and with the knowledge of the FSC.

MONY applied for registration in 2002 on behalf of its intermediaries, including the appellant. The reply to that application was that the application form was incomplete. The appellant continued to act while the application was pending. At no time was he told that the application was refused. On his case the FSC was aware that he and MONY were doing insurance business and took no steps to stop either of them from selling insurance. The FSC's position was that when MONY submitted its application, the appellant had already settled 36 policies on its behalf although not registered with the superintendent of insurance or the FSC. It was on that basis that the FSC issued the penal notice under section 21 of the FSC Act in that it had formed the belief that the appellant was in breach of section 70(1) of the Insurance Act, that is, acting as an insurance intermediary having not been registered under the Insurance Act as required.

[40] In this court, Smith JA, in delivering the judgment on behalf of the court, indicated firstly that the parties were at one, that:

> "at the time when the FSC purported to act in this matter, it had absolutely no authority to do so because, due to neglect by the legislature, those provisions of the FSC Act giving the Commission authority to supervise the insurance industry had not been passed into law."

The court did not demur, and at page 8 of the judgment, Smith JA stated categorically:

> "... We have seen that on December 21, 2001, the Insurance Act of 2001 came into operation. However, on that date and subsequently, the provisions of the FSC Act relating to the insurance industry were not brought into

> operation obviously through an oversight. Hence, the purported exercise of authority by the FSC over the insurance industry was unlawful."

[41] The issue in the **Lowell Lawrence** case in the Court of Appeal was whether the unlawful acts of the FSC had been validated by the Validation and Indemnity Act. The court found that the Act had validated the actions of the FSC. In the Privy Council, Lord Clarke in delivering the judgment of the Board, and dealing with the legislative history as already set out herein, and expressing a concern as to why the full court had not been advised of the situation as it existed at the hearing before them, stated:

> "Whatever the explanation, two matters are plain. The first, as is conceded, is that when, on 1 July 2004, the FSC purported to serve a notice on the appellant under section 21 of the FSCA alleging an offence set out in the Fourth Schedule, the notice was void and of no effect because neither section 21 nor the Fourth Schedule was in force in so far as they related to insurance business. The second is that, if the FSC had disclosed the fact that the insurance provisions of the FSC 2001 only came into force on 4 March 2005, the Full Court would have quashed the notice and the appellant's application for judicial review would have succeeded, albeit not on the ground on which he had advanced it."

[42] I accept that this penal notice was issued under the FSC Act, as against the charges made in the instant case under the Insurance Act, but, in my view, the exclusion of the applicability of insurance from "financial services" in the FSC Act produces the same result, in that, the acts of the FSC during that relevant period in relation to the insurance industry were unlawful.

[43] As a consequence, it seems clear to me that the demands made by the FSC of the respondents between 17 December 2004 and 21 January 2005 were invalid at the time that they were made. This can be discerned from the above statements and observations, and giving effect to the plain and ordinary language of all the instruments of legislation and their amendments, in their primary sense, in a way which obviates injustice, and reading within the four corners of the several pieces of legislation. The FSC had no authority to make any demands in respect of the insurance industry and, therefore, the failure of the respondents to act or the submission of inaccurate information at the material time did not constitute any criminal offence.

Issue (b)

[44] Having accepted that the notice issued by the FSC to Lowell Lawrence in that case would have had to have been quashed, as given the state of the legislation there was no legal basis upon which the FSC could have issued such a notice, the question of the validation of the giving of the notice arose for consideration before the Board. Lord Clarke stated:

> "It is common ground that a statute will only be construed as having retrospective effect if it is plain that it was intended to have that effect or, to put it another way, that such a construction is unavoidable: see eg Yew Bon Tew alias **Yong Boon Tiew v Kenderaan Bas Mara** [1983] 1 AC 553…."

He declared later in paragraph 29 of the judgment:

> "The Board agrees with the Court of Appeal that there is no room for doubt as to what the intention of the legislature was in passing the Validation Act. The recitals make it clear that it was intended to validate all acts done in good faith by

> the FSC in the purported exercise of its functions under the FSCA and the Insurance Act 2001 in relation to the insurance industry 'during the period 21 December 2001 to the date of the commencement of [the Validation Act]' namely 11 August 2006."

[45] Lord Clarke went on further to say that the acts of the FSC and its staff in the purported exercise of its powers under the FSC Act and the Insurance Act, as they had been done in good faith and there had been no challenge to that, "were thereby declared to have been validly and lawfully done and were thereby confirmed". The Board also confirmed that the giving of the penal notice was one such act.

[46] It was not an issue in the **Lowell Lawrence** case, however, as to whether the giving of the penal notice, which when issued was bad, but was later validated and confirmed, could have created or constituted an offence for which Mr Lawrence could have been criminally charged.

[47] Indeed, on a perusal of section 21 of the FSC Act, the FSC can issue a notice to any person "who it has reason to believe" has committed an offence giving the person an opportunity to discharge any liability to conviction of that offence by payment of a fixed penalty. If the fixed penalty is paid in accordance with the section, that person shall not be liable to be convicted of the offence. The Board's position on this section, on reviewing the same and, in answer to the question: "Is the appellant entitled to have the notice quashed?", (although the arguments related to whether he ought to have been given an opportunity to have been heard before the issue of the same, which is not applicable in the case at bar) was as follows:

> "The FSC was not reaching any conclusion binding on the appellant that he had committed a criminal offence. Nor was its decision to offer him the opportunity to pay a fixed penalty itself the imposition of a regulatory sanction sufficient to render him unfit for registration…
>
> …In giving the notice the FSC was simply offering the appellant a choice, either to pay the penalty, or to refuse to pay and leave the FSC to report the matter to the DPP for possible prosecution. In the case of payment, the fact of payment would not involve his accepting that he had committed the offence. By section 21(3), no person who had paid the penalty was liable to be convicted. It was entirely a matter for the appellant to choose...
>
> …The Board can see no prejudice to the appellant in serving the notice on the appellant and giving him the choice provided by section 21."

[48] Thus, there was no determination of guilt by the FSC. Lord Clarke drew the analogy of the effect of section 21 to that of the appellant receiving a parking ticket, that would require the payment of a penalty to avoid further proceedings, which proceedings could lead to a conviction and payment of a fine. These were the facts in **Re McCutcheon and City of Toronto** (1983) 147 DLR (3d) 193, where in the Ontario High Court of Justice, Linden J, in dealing with an argument that the scheme was inconsistent with the right to be presumed innocent, and rejecting that position, stated thus:

> "In my view there is no merit in this submission. The sliding-scale settlements scheme has nothing to do with the presumption of innocence. It is a convenient way for a traffic violator to avoid being charged. Anyone can refuse to pay anything pursuant to the scheme and await the service of

> the summons. At that time, the full panoply of defence rights come into play, including the presumption of innocence. Accordingly, there is no infringement here of the right of the accused to be presumed innocent."

[49] The Board indicated that the appellant Lawrence was in a similar position and ultimately found that the appellant was not entitled to have the notice quashed, because, "the notice was validated by the Validation Act and, on that footing, it was valid". In my view, this would suggest that the FSC Act (Appointed Day) (Insurance Provisions) Notice 2005 in March did not have retrospective operation, but prospective effect, and thus all acts undertaken previously which were unlawful required the Validation and Indemnity Act to make them valid. Indeed, the Board made it clear that the appellant Lawrence's application for judicial review, would have succeeded had the provisions of the legislation been known, accepted and acknowledged at the time that the matter went before the full court, on the ground that "the notice was plainly unlawful and one which could not properly have been issued..."

[50] It is thus clear to me that the basis on which the Board held that the Validation and Indemnity Act was of retrospective operation in respect of the acts done by the FSC in good faith was due, in that case, to the fact that the notice was merely offering the appellant a choice to accept the fixed penalty or in the alternative, open himself to possible prosecution for having carried on insurance business without having been registered, contrary to section 70 of the Insurance Act, which was (as the Privy Council clearly stated) in force at the material time. Section 70 reads as follows:

"**PART IV** ***Registration of Insurance Intermediaries***

70.-- (1) No person shall, in relation to insurance business of any class specified in section 3 (1) carry on or purport to carry on, business as, or act in the capacity of, an insurance intermediary, unless he is registered under this Part to do so.

(2) Any person who contravenes this section shall be guilty of an offence and liable on summary conviction before a Resident Magistrate to a fine not exceeding three million dollars or to imprisonment for a term not exceeding three years or to both such fine and imprisonment."

[51] This section therefore required any person engaged in insurance business to be registered. It is true that the application for registration is to be made to the FSC, which at the time could not have acted in pursuance of the provision (section 71), but the issues before the court related to the notice of payment of the fixed penalty and not any requirement of the FSC asking for information, or making a demand of any entity, the failure of which constituted an offence, punishable on summary conviction in a Resident Magistrate's Court by a fine not exceeding $3,000,000.00 or imprisonment for a term not exceeding three years (sections 147 and 148). The demand from the FSC could trigger such a prosecution (section 46).

[52] The Validation and Indemnity, in its detailed preamble, recognized that the Insurance Act did not bring the provisions of the FSC Act relating to insurance, into operation, and, in my view, therefore, was granting immunity for the actions of the FSC and its staff, when acting in good faith in the purported exercise of their powers in relation to the insurance industry (which acts appeared to be merely administrative,

and for which persons would have suffered no prejudice) and declaring the acts to have been validly, properly and lawfully done. However, the provisions in the Act were not, and could not have been, intended to clothe the unlawful actions of the FSC with legitimacy such as to constitute criminal offences. This aspect of the matter was not before the Privy Council. Indeed, in a postscript to the judgment, the Board indicated that the matter not having been properly argued before the Court of Appeal or the Board, it would not decide whether it would be an abuse of process for the FSC to pursue prosecution after all that had taken place, and in any event, that would be in the discretion of the DPP who was not a party to the appeal. Those circumstances were specifically contrary to the actions taken by the DPP in this matter, which was to initiate prosecutions relating to actions taken by the FSC at a time when it had absolutely no authority to do so. The informations were duly laid in a Resident Magistrate's Court for a Resident Magistrate to decide whether to convict and impose a sentence. I am therefore even more fortified in my view that the Validation and Indemnity Act relates to acts of purely administrative and procedural matters and not otherwise.

[53] I have dealt with the **Lowell Lawrence** case in some detail as it was dealing with several aspects similar to the case at bar, particularly, most of the instruments of legislation. A few other cases cited to the court, however, are deserving of mention.

[54] In his text on Statutory Interpretation - A Code, Third Edition, the learned author F.A.R. Bennion MA (Oxon), barrister, referred to the basis of the principle against retrospectivity in legislation as being "no more than simple fairness, which

ought to be the basis of every legal rule" (per Lord Mustill in the leading case of **L'Office Cherifien des Phosphates v Yamashita-Shinnihon Steamship Co Ltd** [1994] 1 AC 486). The learned author went on to state, "Retrospectivity is artificial, deeming a thing to be what it was not. Artificiality and make-believe are generally repugnant to law as the servant of human welfare."

[55] With regard to the principle against doubtful penalization, the learned author had this to say:

> "...it is a general principle of legal policy that no one should suffer detriment by the application of a doubtful law. The general presumption against retrospectivity means that where one of the possible opposing constructions of an enactment would impose an ex post facto law, that construction is likely to be doubtful. If the construction also inflicts a detriment, that is a second factor against it. A retrospective enactment inflicts a detriment for this purpose 'if it takes away or impairs a vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability, in regard to events already past' [**Yew Bon Tew v Kenderaan Bas Mara**]. The growing propensity of the courts to relate legal principle to the concept of fairness was shown by Staughton LJ when he said: 'In my judgment the true principle is that Parliament is presumed not to have intended to alter the law applicable to past events and transactions in a manner which is unfair to those concerned in them, unless a contrary intention appears [**Secretary of State for Social Security v Tunnicliffe** [1991] 2 All ER 712 at 724 (reversed on grounds not affecting this dictum in **Plewa v Chief Ajudication Officer** [1995] 1 AC 249]."

[56] In this case, the FSC Act and its Appointed Day Notice made it clear that the FSC could not act and had no regulatory power over the insurance industry. Yet the Insurance Act, later promulgated, provided for the said body to have full and general administration in respect of the said industry. The respondents were charged pursuant to section 147 of the Insurance Act. The charges were laid subsequent to the 2005 Notice but prior to the validating Act being passed. There is no doubt that in this case the construction of these enactments advanced by the appellants, would impose an ex post facto law, which could only be saved by the validating Act. This would, of necessity, require one to presume that the interpretation to be given to the validating Act is that the unlawful acts of the FSC could only be made valid by it, retrospectively. So, one must look very carefully, particularly given the circumstances of this particular case, to see the effect and fairness of such an interpretation and whether the interpretation would inflict detriment.

[57] Of even more relevance to the matter before the court is the statement of the learned author, that:

> "The strongest case against retrospective penalisation relates to the act of making something an offence which was not so when committed: *nullum crimen sine lege*."

[58] In **Waddington v Miah** (a case relied on heavily by the respondents), a native of Bangladesh, entered the United Kingdom illegally and attempted to pass himself off as a non-partial Pakistani. He was tried and convicted on two counts relating to offences under the Illegal Immigration Act. The particulars of the first

count were that he was not "partial" within the meaning of the Act and the second was that he was in possession of a false passport, which acts were supposed to have taken place between 22 October 1970 and 29 September 1972 in respect of count one, and on 29 September 1972 in respect of count two. The relevant sections of the Act under which he was charged did not come into operation until 1 January 1973. Despite objection that the Act was not retrospective, the appellant was convicted. His appeal was allowed by the Court of Appeal, and on appeal by the acting chief superintendent, the decision of the Court of Appeal was affirmed by the House of Lords. Lord Reid in delivering the judgment of the court made the comment that, "there has for a very long time been a strong feeling against making legislation, and particularly criminal legislation, retrospective". He said that it was important to bear in mind and he referred to article 11(2) of the Declaration of Human Rights of the United Nations, which provides:

> "No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed."

[59] Lord Reid also referred to article 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms in similar vein, which was ratified by the United Kingdom in 1951, and concluded with the comment, "So it is hardly credible that any government department would promote or that Parliament would pass

retrospective criminal legislation". I agree with this statement particularly with reference to the provisions of the Jamaica (Constitution) Order in Council 1962, which I will deal with under issue (c).

[60] The case of **Commissioner of Police v Woods**, (1990) 54 WIR 1, also relied on by the respondents, does not take the matter any further, as in that case the impugned provision, section 20(6) of the Drug Trafficking Act, was held by the Court of Appeal not to be a substantive provision, but one that "merely raised a rebuttable presumption in relation to a specified activity (participation in drug activity) without making that activity into an offence". It was therefore permissible to take into consideration property purchased before the Act came into operation without contravening the provisions of the Constitution which prohibited the creation of a new offence retrospectively.

[61] Reliance by the appellants on **Director of Public Prosecutions v Lamb** [1941] 2 KB 89 was not very helpful as the issue related to whether the appellants could be subjected to a fine three times greater than that which existed at the time of the commission of the offences. The decision turned on the literal interpretation of the particular statute, which the court held was clear and unambiguous, in imposing the increased penalty on any person "thereafter convicted". Indeed, the chronology of the matter was that the offences were allegedly committed between 3 September 1939, and 11 May 1940, and the informations were laid in August 1940 and heard in September 1940. The additional power to impose the increased fine had been provided by an order in Council of 11 June 1940. Humphrey J stated that "the law was,

therefore, altered at a date considerably before the laying of the informations and to a greater extent before the hearing of them". The duty of the magistrate was therefore to consider whether in all the circumstances of the case the appellants were to be sent to prison or should be fined, but if the latter then he should consider what amount, not more than three times the value of the currency, ought to be imposed.

[62] In the case at bar the respondents were all arrested and charged subsequent to the FSC Act (Appointed Day) (Insurance Provisions) Notice 2005, in respect of offences which took place before, and the Validation and Indemnity Act was passed in 2006. There is no question that the arrests of and laying of the charges against the respondents at the material time were unlawful. On any interpretation therefore, to attempt by subsequent legislation to clothe those unlawful acts with legitimacy, so as to ground a criminal offence, would be depriving the respondents of a clear defence of the presumption of innocence. This would be prejudicial and entirely unfair. It could not have been the intention of the legislature to do that. Additionally, it could not have been the intention of the legislature to make acts done by the respondents, which were not criminal offences at the time, offences retroactively, yet give immunity to the FSC and its staff for past events which could have substantially and potentially harmful consequences for the respondents. The Validation and Indemnity Act, therefore, in my opinion, bearing in mind the opinion of the Board in the **Lowell Lawrence** case, would relate to those acts undertaken by the FSC which fell within the general administration of the insurance industry, which were unlawful at the time, due to the

state of the legislation but not to acts which would create criminal offences, and thus be detrimental to persons as they took away vested rights.

Issue (c)

[63] In any event, the provisions of the Constitution are very clear. As indicated earlier herein, section 20(7) provides:

> "No person shall be held to be guilty of a criminal offence on account of any act or omission which did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for any criminal offence which is severer in degree or description than the maximum penalty which might have been imposed for that offence at the time when it was committed."

The respondents cannot be held to be guilty of a criminal offence which at the time it took place did not constitute such an offence. I therefore agree entirely with the full court that by virtue of section 20(7) of the Constitution, the validating Act of 2006 would be ineffective in relation to the criminal offences with which the respondents were charged. In my view, the provisions of the validating Act which are contrary to section 20(7) of the Constitution are therefore unconstitutional, null and void.

[64] I must state before disposing of this appeal that I have not dealt with the arguments raised by the 1st and 3rd respondents that the FSC Act (Appointed Day) (Insurance Provisions) Notice 2005 was issued without jurisdiction in law, as the Minister having brought the FSC Act into operation, the power under section 1 of that Act was spent, so that the notice would have been ineffective. The full court did not

find it necessary to make any pronouncement on the submissions on that issue, and there were no counter-notices of appeal filed in relation thereto.

Conclusion

[65] In summary, I would conclude that the offences for which the respondents were charged did not exist as criminal offences at the time of their alleged commission. The Validation and Indemnity Act affected the actions of the FSC in a limited way, but did not operate retrospectively to create offences which did not exist at the material time. In any event, any such provisions of the Validation and Indemnity Act which could be construed in that way would be contrary to section 20(7) of the Constitution and would be null and void. I would therefore dismiss the consolidated appeals.

Counter-Notices of Appeal

[66] In my view, the costs of the appeals and the applications both here and below respectively should be the respondents. I have found that between December 2004 and January 2005, the offences for which the respondents were charged did not exist. The laying of the charges was ex post facto, subsequent to the FSC Act (Appointed Day) (Insurance Provisions) Notice 2005 which was prospective in its operation. The Validation and Indemnity Act could not cure the situation in light of the provisions so clearly stated in the Constitution. The FSC withdrew from participation in this appeal. The DPP and the Attorney General wished to have clarity and certainty in the law. The matter has now been concluded in the respondents' favour, twice adverse to the appellants. No reason has been shown why the costs of the applications should not

follow the event. The respondents ought to have their costs, both here and below, to be taxed if not agreed. I would therefore allow the counter-notices of appeal.

PANTON, P

ORDER

Appeals dismissed. Counter-notices of appeal allowed. Costs both here and in the Court below to the respondents to be agreed or taxed.