[2019] JMCA Civ 43

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 99/2015

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE P WILLIAMS JA

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

Miss Dawn Satterswaite in person

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

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

22, 23, 24, 25 January 2018 and 20 December 2019

PHILLIPS JA

[1] An appeal lies before us against the decision of Straw J (as she then was) delivered on 17 September 2015. The learned judge had made orders that documents and material that had been taken from the residence and office of Miss Dawn Satterswaite (the appellant), were to be unsealed and examined by a judge in the

Supreme Court, in order to determine whether they attracted legal professional privilege. The appellant has lodged an appeal on the basis that the learned judge had applied the wrong standard of proof in deciding whether a particular activity constituted a breach of the Proceeds of Crime Act (POCA); that she failed to make a determination as to what constituted 'criminal conduct' pursuant to section 2 of POCA in order to determine which documents and material would attract legal professional privilege; and she failed to consider the likely breaches of the constitutional rights of the involved parties.

Background

[2] Miss Bobette Smalling (the respondent) is a Detective Sergeant of Police assigned to the Major Organised Crime & Anti-Corruption Task Force (MOCA), which is a branch of the Jamaica Constabulary Force. She filed a comprehensive affidavit in support of an application for a warrant of search and seizure dated 16 December 2013.

[3] She deponed that from about December 2010, MOCA, the Financial Investigations Division (FID) and the Drug Enforcement Administration (DEA) in the United Stated of America (USA), were conducting joint money laundering and civil recovery investigations into Mr Andrew Paul Hamilton. It was alleged that Mr Hamilton was involved in drug and arms trafficking in the USA, and money laundering in the USA and Jamaica. She indicated that Mr Hamilton was convicted of drug trafficking offences in the USA in 1998, for which he served one year in prison. Also, Mr Hamilton pleaded

guilty on 22 October 2012, to certain counts on an indictment charging him with, *inter alia*, money laundering and drug trafficking.

[4] Investigations by MOCA and the FID revealed that Mr Hamilton was sending substantial amounts of cash to Jamaica to purchase various assets in breach of POCA. The respondent stated that it was her belief that the facilitators of these offences were: the appellant (Mr Hamilton's attorney-at-law); his relatives (namely, Miss Annmarie Cleary (mother of Mr Hamilton's children), Paulette Higgins and Janet Ramsay (Mr Hamilton's sisters), Dorothy Hamilton (Mr Hamilton's mother), his children and his brother); associates (the appellant's mother, Gloria Satterswaite, and the appellant's husband, Terrence Allen); and companies in Jamaica.

[5] It was alleged that the appellant had "facilitated [Mr Hamilton], his companies, his relatives and other associates to conceal, disguise and dispose of benefits flowing from his criminal conduct". The respondent also deponed that it was her belief that Mr Hamilton's relatives had also facilitated, participated and benefited from laundering the proceeds of his criminal conduct, primarily, by acting as "the principal recipients of real estate registered in their names or jointly with [Mr Hamilton] and by assisting in making efforts to engage in transfers of the said properties".

[6] The respondent described about 29 "high value real estate properties" that had either been bought and/or sold between 1998 to 2009, by or to Mr Hamilton, his associates, relatives and his companies, with the appellant's assistance, who purported

to act as counsel for purchasers with carriage of sale to third parties. Those properties had an estimated value of J$319,700,000.00 and US$300,000.00, and yet, on the certificates of titles for each of those properties, there was no evidence of financing for any of the acquisitions. Indeed, many of the properties were sold below value. Individuals named as being the owners of these properties were not in receipt of legitimate income in quantities that would enable them to finance the assets they had acquired. The respondent deposed that she believed that some of those transactions were "shams designed to conceal the true ownership of the properties". The respondent also said that it was her belief that the appellant had also conducted sham transactions using fictitious names, signatures and addresses. Of the properties listed, 11 were acquired before 30 March 2007, and 18 were acquired thereafter.

[7] The application for the search and seizure warrant was heard by McDonald-Bishop J (as she then was), who granted the order for the warrant to search and retrieve relevant documents and other material from the appellant's residence at 1 Cherry Hill Drive, Townhouse #8, Kingston 8, and her office 'Chambers Consultants' situate at 20½ Duke Street, Kingston. It was stated in the warrant that the learned judge had reasonable cause to believe that seizure of the material at the designated places would assist in the investigation of certain offences under POCA, namely, sections 92(1)(a), 92(1)(b), 92(2), and 93(1).

[8] On 17 December 2013, the search warrant was executed at the places named in the warrant in the appellant's presence. She claimed that legal professional privilege

was attached to the documents and items seized, and so they were bagged, tagged and sealed in her presence, and remained unsealed in the respondent's possession.

[9] Subsequent to the removal of the documents, the appellant had entered into a consent order on 17 January 2014, made by B Morrison J, to participate in a process whereby the files and documents relating to the said particular client, namely, Mr Hamilton, would be separated from other files, and the latter returned to the appellant. Whilst in this process, however, the appellant objected, *inter alia*, to the presence and participation of the representatives of MOCA, and filed an application that the warrant for search and seizure be set aside; that all files, documents and other material removed from her office and home, be returned to her forthwith; and that there be an inquiry into the damages suffered by her, consequent on the unlawful search and seizure of the various files. There was also an application by the respondent that the application to set aside the warrant be stayed pending the appellant's compliance with the order of the court issued on 17 January 2014 by and with the consent of the parties. On 30 January 2014, B Morrison J dismissed the in limine point made requesting the stay of his hearing of the application to set aside the warrant.

[10] The matter was appealed to this court which ruled that the learned judge had embarked on a process of hearing an application to set aside a warrant issued by a judge of concurrent jurisdiction, in circumstances where he had no jurisdiction to do so. Additionally, as there was no application before the learned judge to vary the warrant, he could not do so on his own motion, particularly, when the matter related to a

criminal investigation under POCA. The court stated that the consent order and the directions in the warrant were to be carried out without delay. The appeal was therefore allowed and the order of B Morrison J was set aside.

[11] Following this order, the parties proceeded on the sifting exercise to ascertain the matters which had been removed from the appellant's office and home, which were not related to the listed material set out in the warrant, and which ought to be returned to the appellant. That process was completed prior to the hearing before Straw J.

The application before Straw J

[12] In the application before Straw J, the respondent sought orders that the court examine the documents removed from the appellant's office to determine if they were relevant to and included the 'listed material' described in the search and seizure warrant. If the material was found not to be relevant to or included in the 'listed material' in the warrant, then the court should order that the documents and other material be returned to the appellant's possession, custody and control within three working days. If, however, the documents and other material were found to be relevant to or included in the 'listed material', then they ought to be unsealed and retained by MOCA.

[13] Additionally, the application sought an order that if the documents and other material being examined by the court were found to attract legal professional privilege, then they should also be returned to the possession, custody and control of the

appellant within three working days, and if not, then they should be retained by MOCA for their examination, consideration, and use in the furtherance of their investigations.

[14] In her reasons for judgment, the learned judge set out the reliefs claimed in the application before her which have already been set out herein at paragraphs [12]-[13]. She indicated that there were three basic issues for determination by the court, namely:

> "i. Whether [the respondent] has satisfied the court that legal professional privilege ought not to apply to the sifted material [Listed Material] and should therefore be examined by the court for such a determination to be made.
>
> ii. Whether the repeal of the Money Laundering Act and its replacement with POCA in May 2007 has any effect on the sifted material that may be ordered unsealed.
>
> iii. What is a suitable process for examination by this court of the sifted material in order to determine what, if any, may be ordered unsealed."

[15] In dealing with the first issue (whether the applicant had demonstrated that legal professional privilege did not apply), the learned judge noted that the parties were generally in agreement with the applicable law. She referred to the seminal case from this court examining the issue of documents seized from the offices of an attorney-at-law, namely, **The Jamaican Bar Association v The Attorney General and Others** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal Nos 96, 102 and 108/2003, judgment delivered 14 December 2007. She recognised that that case acknowledged the settled principle that legal professional privilege was a rule of substantive law protecting the giving of information between attorney and client, for the

purpose of giving or obtaining legal advice or for the provision of legal services. The learned judge also recognised "that legal professional privilege would not be breached if there was an allegation of criminal conduct by the attorneys or their clients in the relationship as the privilege cannot be used to mask or permit criminal conduct" (see **R v Cox and Railton** (1884) 14 QBD 153).

[16] The learned judge, in addressing the issue of the standard of proof required, noted that certain authorities stipulate that the standard of a prima facie case was applicable when fraud was not an issue, but, when it was, a strong prima facie case was relevant (see **Kuwait Airways Corporation v Iraqi Airways Company** [2005] EWCA Civ 286). After examining the contents of the respondent's affidavit summarised at paragraphs [2]-[6] herein, the learned judge found that the respondent had made out a prima facie case of money laundering offences, which, in effect, displaced the privilege. She stated that this was so, particularly, "in light of the fact that there are no opposing affidavits which dispute this version of events". She stated that in her opinion one could proceed to inspection of the material, as the finding of the prima facie case of money laundering offences would dispose of issue 1, as identified by her, although, she cautioned that the exercise should be sparingly conducted. She concluded that the extent of the inspection would depend on the position she took on issue 2.

[17] With regard to issue 2, the learned judge outlined submissions by Mrs Jacqueline Samuels-Brown QC on the appellant's behalf and those made by counsel for the respondent, Mrs Caroline Hay. The learned judge concluded, based specifically on

sections 2, 91 and 92 of POCA, and submissions made by counsel, that although the appellant could only be charged for offences committed on or after 30 May 2007, there was no bar to investigations instituted or continued in relation to money laundering offences which may have been committed prior to POCA. She also rejected the argument by Mrs Samuels-Brown that the respondent could not examine documents up to 30 May 2007, because at that time it would not signify criminal property under POCA, as in her view, "[l]egal professional privilege cannot be used to mask or permit criminal conduct".

[18] The learned judge examined the evidence and noted again the dates of the purchases of the properties prior to POCA and subsequent thereto, and the allegations that some of the purchasers were fictitious persons, and that the appellant had allegedly witnessed their signatures. The learned judge stated that if those allegations were true, then the documents would reveal fraudulent conduct, although the charges that existed related to money laundering offences under POCA. She concluded that on the basis of the Interpretation Act, and the evidence which existed, which she viewed as relevant, there was "no basis to limit the documents that may possibly be unsealed to what exists post 2007". She also was not moved by a submission that the documents should be restricted only to those referable to count 3, being the only one that could satisfy the definition of 'criminal property', as the grand jury indictment charging Mr Hamilton referred to criminal activity from October 2009, but stated that it was nevertheless important that there was a conviction in 1998, pre POCA.

[19] The learned judge therefore concluded that, in the circumstances, she would grant the application that the listed material be unsealed and examined by the court, in order to ascertain if legal professional privilege attached to any of them, and whether the documents were relevant to the matter at hand. She set out the documents in categories as submitted to her by counsel for the respondent. She indicated that great care should be taken in the exercise being conducted by the court.

[20] With regard to issue 3, the learned judge indicated that although the court had the power to examine the documents to decide if legal professional privilege attached to them, that exercise was rarely done. But it was nonetheless an exercise of the discretion of the court. The examination was to safeguard communications between attorney and client for the purpose of giving advice or the provision of legal services including representation in legal proceedings. The learned judge confirmed that there were no legal rules indicating how one ought to proceed but also indicated that that could not be a bar from proceeding. She referred to authorities from other jurisdictions which have offered guidance, for instance, that outlined by Young J in **AWB Limited v Honourable Terence Rhoderic Hudson Cole (No 5)** [2006] FCA 1234, detailing the Australian approach, and then set out guidelines which, in her opinion, ought to be followed in respect of the exercise that was to be undertaken. These are the guidelines which she said may have been useful:

> "• The principles of natural justice must apply during the hearing. These are common law principles which should apply as of right. In addition the Jamaican

Constitution enshrines the principles that parties are always entitled to a fair hearing. The party seeking to claim privilege [the appellant] may address the court and comment on all or any documents without revealing its substance but will instead say why the nature of the particular document makes it privileged according to law.

- The hearing will be in the presence of counsel for the parties but they will not be allowed to view the documents during the process.

- The judge will peruse the documents without making specific reference to the substance of these documents but instead will concentrate on the nature of the document in order to determine whether it is actually privileged.

- The parties shall be immune from anything that they may say during the process being used at the trial.

- The purpose of the examination is to determine on its face whether the document meets the criteria for privilege, and not for the court to peruse the substance of these documents with a view to gaining knowledge of them."

[21] On 17 September 2015, Straw J made the following orders:

"1. That all files, transactions, communications, dealings of whatever kind as manifested in the physical and electronic documents, records, articles contained in the respective containers and computer ('the material') which were removed on December 17, 2013 from the [appellant's] law offices at 20½ Duke Street, Kingston and which were retained sealed by the Major Organised Crime and Anti-Corruption Task Force ('MOCA') will be examined by this Honourable Court by the Court [sic] for a determination of what material attracts legal professional privilege.

2. That all and any of the material described in Order 2 which upon examination by this Honourable Court is found not to attract legal professional privilege shall be retained and examined by MOCA's servants and/or agents for the purposes of MOCA'S continued investigation into offences for which the [appellant and the 1st and 2nd intervenors and others] have been charged with breaches of the Proceeds of Crime Act, 2007 ('POCA') and/or disclosure to the [appellant and the 1st and 2nd intervenors and others]

3. Leave to appeal granted.

4. Conditional stay of Orders 1 and 2 granted pending the filing of Notice and Grounds of Appeal by the [appellant] on the [respondent] by Friday October 2, 2015 at or before 4:00pm."

The appeal

[22] As indicated, the appellant appealed. Notice and grounds of appeal were duly filed on 1 October 2015, and later further amended and filed on 22 October 2015. The grounds of appeal are set out below:

"i. the learned judge erred in finding that the evidence adduced by the [respondent] discloses a ***prima facie*** case of breaches of POCA, including money laundering offences;

ii. the learned judge erred in ruling that the court should proceed to inspection of the relevant documents;

iii. the learned judge failed to consider, adequately or at all, the relevant standard of proof to be discharged by the [respondent] below before arriving at the decision to allow the inspection of the relevant documents;

iv. the learned judge failed to consider, adequately or at all, whether section 2 of the Proceeds of Crime Act, which specifically defines criminal conduct as conduct occurring on or after May 30 2007, evinced a

'contrary intention' as contemplated in section 25(2) of the Interpretation Act;

v. the learned judge erred in failing to appreciate or consider adequately or at all, that legal professional privilege is the client's and not the Attorney-at-law's; and

vi the learned judge failed to have regard to any likely breach of the constitutional rights of the parties, in coming to her decision, in particular, the right to protection from search of property - (s. 13(3)(j)(i) and the right to protection of privacy of communication – s. 13(3)(j)(iii)." (Emphasis as in original)

[23] The appellant sought the following orders:

"(a) That the ruling of Straw J dated the 17th day of September, 2015 be set aside;

(b) That the Respondent be ordered to return to the Appellant forthwith all the documents seized from the Appellant's office at 20 1/2 Duke Street, Kingston on the 17th day of December, 2013;

(c) That the costs of this Appeal and the costs below be awarded to the Appellant; and

(d) That there be such further or other relief as may be just."

An order was also made in this court permitting the interveners to participate in the hearing of the appeal.

Issues

[24] In my view, having perused the issues set out in the reasons for judgment by the learned trial judge and also the grounds of appeal filed in relation thereto, I have identified the following issues on this appeal:

> Was the learned judge correct when she ordered that the documents seized could be examined by the court for a determination of what material attracted legal professional privilege, in that:
>
> 1. did she err in applying the 'prima facie' standard of proof as the relevant standard of proof, as against a 'strong prima facie' standard of proof, and so found that the evidence disclosed a prima facie case of breaches under POCA (grounds (i) and (iii));
> 2. had she erred in failing to ascertain how, if at all, the definition of 'criminal conduct' in section 2 of POCA, with specific reference to conduct occurring after 30 May 2007, was affected by section 25 of the Interpretation Act, for instance, does section 2 of POCA evince a 'contrary intention' as contemplated by section 25(2)(e) of the Interpretation Act (grounds (ii) and (iv));

3. had the learned judge erred in failing to consider properly or at all, that legal professional privilege applied to the client; and also in failing to assess what was the true and proper effect of the application of the principle (ground (v)); and

4. had the learned judge erred in failing to properly consider the likely breaches of the constitutional rights of the parties, in particular, the right to protection from search of property (ground (vi))?

Issue 1: The standard of proof (grounds (i) and (iii))

Submissions

[25] Mrs Samuels-Brown provided skeleton arguments to the court on the appellant's behalf, although she did not appear during oral arguments at the hearing before this court. She indicated that since fraud was being claimed, which was acknowledged and accepted by the learned judge, the standard of proof required was a strong prima facie case and not merely a prima facie case. She therefore stated that the learned judge had erred by acting on a prima facie case simpliciter.

[26] This contention was supported by the appellant herself and Mr Ian Wilkinson QC on behalf of the interveners. In fact, Mr Wilkinson further contended that the learned judge had used the "lowest level standard" based on what was required in a civil case, as opposed to the higher standard of proof, which was applicable in the instant case,

where the allegations utilised vast amounts of hearsay evidence, and were criminal in nature. He also submitted that the standard of proof should be high, as the learned judge was endeavouring to ascertain if the material before her fell within the "fraud exception protection" in respect of the protection from disclosure accorded to material subject to legal professional privilege.

[27] Counsel for the respondent, Mrs Caroline Hay, submitted that the learned judge, at paragraph [19] of her reasons for judgment, was correct to find that the test of a "strong prima facie case" was to be utilised in order to determine whether legal professional privilege was displaced. She referred to the respondent's extensive affidavit evidence, which, she stated, outlined a 'strong prima facie case' that money laundering offences had taken place, and noted that that evidence had never been challenged by the appellant. Mrs Hay also submitted that no authority had been placed before this court, indicating that hearsay evidence was incapable of providing a basis for the court to hold that a prima facie case appeared on the evidence, on the application to unseal the material. Accordingly, she submitted, that the learned judge was correct to find that a prima facie case, sufficient to displace legal professional privilege, was made out on the respondent's evidence.

Discussion and analysis

[28] It is perhaps better to start with a short statement of the law. As said with clarity and cogency in Longmore LJ's judgment in **Kuwait Airways Corporation**, at paragraph 20, "[t]here are, as is well-known, two classes of legal professional privilege,

legal advice privilege and litigation privilege. But each class of privilege is in principle inviolate". This principle has been stated powerfully in many decisions over several decades (see **Hobbs v Hobbs and Cousens** [1960] P 112 and **R v Derby Magistrates' Court, Ex parte B and Other Appeals** [1996] AC 487)

[29] Of course, there is the well-known acknowledged exception that legal professional privilege does not attach to communications between lawyer and client if the purpose of the client seeking advice is to further facilitate crime or fraud. This exception was laid down in **R v Cox and Railton** and has been endorsed in several authorities since then. The "fraud exception" is also applicable to civil cases and the holder of the communication as well as to a third party (see **R v Central Criminal Court, Ex parte Francis & Francis** [1989] AC 346).

[30] The relevant standard of proof in determining whether a fraud or crime had occurred that had displaced legal professional privilege has been canvassed in a number of authorities. The court in **Kuwait Airways Corporation** cautioned the disclosure of material on a prima facie basis, if all that was before the court was disputed versions of events, particularly, if they related to the said issue to be tried in the proceedings. In that case, disclosure was ordered as the court indicated that there was even more than a strong prima facie case of forgery and perjury of an important witness, and so the fraud/crime exception had been demonstrated. The focus in that case was whether the evidence of crime or fraud was "free standing and independent", meaning that there did not have to be any judgment in relation to the issues to be

tried. If that was not the case, disclosure could be refused, as Hoffmann J did in **Chandler and Others v Church and Others** (1987) 177 NLJ 451, but if the contrary was true, then a strong prima facie case of criminal or fraudulent conduct was required. In **Dubai Aluminium Co Ltd v Al Alawi and Others** [1999] 1 WLR 1964, Rix J also ordered disclosure on the facts, based on his finding that there was a strong prima facie case of criminal or fraudulent conduct.

[31] However, in **R v Gibbins** [2004] EWCA Crim 311, it was held that the issue as to whether there was a fraud or crime exception should be determined on a "test of probabilities", which has been interpreted to mean that the judge should be satisfied that there is a prima facie case. Porter LJ in **R v Gibbins** indicated that that test was the same regardless if the case was criminal or civil. The fraud exception had also been examined in the context of civil litigation by the House of Lords in **O'Rourke v Darbishire and Others** [1920] AC 581. In that case, Viscount Finlay made the point that it was not enough merely to allege that the communications were made for the purpose of getting advice for the commission of a fraud, "but there must be something to give colour to the charge. The statement must be made in clear and definite terms, and there must further be some prima facie evidence that it has some foundation in fact", a mere charge of fraud was not enough.

[32] Indeed, in the instant case, it was in my view correctly argued by counsel for the respondent, that the respondent could not be expected, on an application at an interlocutory stage of the proceedings, to prove more than what is required of the

Crown at the end of the prosecution's case, that is, a prima facie case based on the evidence. Fox JA from this court in **R v Rupert Miller v Vivian Wright** (1973) 12 JLR 1263, said at page 1267 that "in ruling in favour of the Crown upon a submission of no case to answer, the judge is not required to be convinced beyond a reasonable doubt, but only to be satisfied that the evidence offered proof of the prisoner's guilt on a preponderance of probability" (Emphasis added).

[33] In this case, Straw J had referred to the test for the standard of proof for disclosure, in circumstances where the protection of legal professional privilege was claimed, as being that of a 'strong prima facie case' in keeping with the dicta in **Kuwait Airways Corporation**. However, the learned judge nonetheless decided that the test to be applied was whether a prima facie case of fraudulent or criminal conduct had been made out to displace the principle of legal professional privilege. Based on my review of the dicta in the cases cited above, the decisions of the courts all seem to say that the matter must be considered on a "balance of probability in the sense of a prima facie case". I cannot therefore say that the learned judged erred in this regard, and so grounds (i) and (iii) of the appeal would fail.

[34] That would dispose of issue 1. However, I wish to state that in any event, as Lord Hughes has stated in **Assets Recovery Agency (Ex-parte) (Jamaica)** [2015] UKPC 1, a case from the Judicial Committee of the Privy Council, out of this jurisdiction (which I will deal with in more detail when analysing issue 2), extensive discussion on the standard of proof may be inappropriate for issues arising under POCA, as the test

does not require primary facts to be proved, but only for the applicant to show that they are believed to exist, and that there are objectively reasonable grounds for that belief.

Issue 2: Interpretation of the relevant statutes (grounds (ii) and (iv))

[35] This issue raises serious questions on the interpretation to be accorded certain sections of POCA, particularly, sections 2, 91 and 92, and also section 25 of the Interpretation Act. In my view, a clear understanding of the interplay of these provisions is likely to be determinative of this appeal. It may therefore be useful to set out the relevant provisions of POCA, namely sections 2, 91, 92 and 93(1) under which the appellant was charged, and section 25 of the interpretation Act.

[36] Section 2 of POCA states that 'criminal conduct':

> "means conduct occurring on or after the 30th May, 2007, being conduct which –
>
> (a) constitutes an offence in Jamaica; or
>
> (b) occurs outside of Jamaica and would constitute such an offence if the conduct occurred in Jamaica."

[37] Section 91 of POCA is as follows:

> "(1) For the purposes of this Part-
>
> (a) property is criminal property if it constitutes a person's benefit from criminal conduct or represents such a benefit, in whole or in part and whether directly or indirectly (and it is immaterial who carried out or benefitted from the conduct);

(b) money laundering is an act which –

(i) constitutes an offence under section 92 or 93;

(ii) constitutes an attempt, conspiracy or incitement to commit an offence specified in sub-paragraph (i); or

(iii) constitutes aiding, abetting, counselling or procuring the commission of an offence specified in sub-paragraph (i);

(c) a disclosure to a nominated officer is a disclosure that-

(i) is made to a person nominated by the alleged offender's employer to receive disclosures under this Part; and

(ii) is made in the course of the alleged offender's employment and in accordance with the procedure established by the employer for the purpose, and references to a 'nominated officer' shall be construed accordingly;

(d) for the purposes of paragraph (c)-

(i) references to a person's employer include-

(A) any body, association or organization (including a voluntary organization) in connection with whose activities the person exercises a function (whether or not for gain or reward); and

(B) where the employer is a company, a parent company of that company or subsidiary company of that parent company; and

(ii) references to employment shall be construed accordingly;

(e) 'authorised disclosure' means a disclosure made under section 100(4);

(f) 'authorised officer' means-

(i) a constable

(ii) a customs officer; or

(iii) an officer of the Agency

(ff) 'business in the regulated sector' has the meaning specified in section 94 for determination in accordance with the provisions of the Fourth Schedule.

(g) 'competent authority' means the authority from time to time authorised in writing by the Minister to-

(i) monitor compliance by any type of business in the regulated sector, with the requirements of this Part and any regulations made under this Part; and

(ii) issue guidelines to businesses in the regulated sector regarding effective measures to prevent money laundering;

(h) 'designated authority' means the Chief Technical Director of the Financial Investigations Division of the Ministry responsible [for] finance or such other person as

may be designated by the Minister by order.

(2) For the purposes of sections 92, 93 and 99-

(a) the appropriate consent is-

(i) if an authorised disclosure is made to a nominated officer, the consent of the nominated officer to do a prohibited act;

(ii) if an authorised disclosure is made to a constable, the consent of the constable to do a prohibited act;

(iii) if an authorised disclosure is made to a customs officer, the consent of the customs officer to do a prohibited act;

(iv) if an authorised disclosure is made to an officer of the Agency, the consent of that officer to do a prohibited act;

(b) a person shall be deemed to have the appropriate consent if the person makes an authorised disclosure to an authorised officer and-

(i) before the end of the notice period the person is not notified by the authorised officer that consent to the doing of the act is refused; or

(ii) the person is so notified before the end of the notice period, but ten days have passed since the receipt of the notice.

(3) The notice period referred to in subsection (2) and section 99 is the period of seven days (exclusive of Saturdays, Sundays and public general holidays), starting with the first day after the person makes the disclosure.

(4) References in subsection (2) and sections 99 and 100 to a prohibited act are references to an act prohibited by section 92 or 93."

[38] Section 92 of POCA provides that:

> "(1) Subject to subsection (4), a person commits an offence if that person-
>
> (a) engages in a transaction that involves criminal property;
>
> (b) conceals, disguises, disposes of or brings into Jamaica any such property; or
>
> (c) converts, transfers or removes any such property from Jamaica,
>
> and the person knows or has reasonable grounds to believe, at the time he does any act referred to in paragraphs (a), (b), or (c), that the property is criminal property.
>
> (2) Subject to subsection (4), a person commits an offence if that person enters into or becomes concerned in an arrangement that the person knows or has reasonable grounds to believe facilitates (by whatever means) the acquisition, retention, use or control of criminal property by or on behalf of another person.
>
> (3) For the purposes of this section, concealing or disguising property includes concealing or disguising the nature of the property; its source, location, disposition, movement or ownership or any rights with respect to the property.
>
> (4) A person does not commit an offence under subsection (1) or (2) if-
>
> (a) before doing any act described in subsection (1) or (2), the person makes an authorised disclosure and has the appropriate consent to act;
>
> (b) the person-

(i) intended to make such a disclosure before doing the act and has a reasonable excuse for not doing so; and

(ii) does make such a disclosure on his own initiative as soon as is reasonably practicable after doing the act; or

(iii) the person acts in good faith in the exercise of a function relating to the enforcement of any provision of this Act or of any other enactment relating to criminal conduct or benefit from criminal conduct."

[39] Section 93(1) states that:

> "Subject to subsections (2) and (3), a person commits an offence if that person acquires, uses or has possession of criminal property and the person knows or has reasonable grounds to believe that the property is criminal property."

[40] Section 25 of the Interpretation Act states that:

> "(1) Where an Act repeals and re-enacts, with or without modification, any provision of any Act in force, references in any other Act to the provision so repealed shall, unless the contrary intention appears, be construed as references to the provision so re-enacted.
>
> (2) Where any Act repeals any other enactment, then, unless the contrary intention appears, the repeal shall not-
>
> (a) revive anything not in force or existing at the time at which the repeal takes effect; or
>
> (b) affect the previous operation of any enactment so repealed or anything duly done or suffered under any enacted so repealed; or

(c) affect any right, privilege, obligation, or liability, acquired, accrued, or incurred, under any enactment so repealed; or

(d) affect any penalty, fine, forfeiture, or punishment, incurred in respect of any offence committed against any enactment so repealed; or

(e) affect any investigation, legal proceedings, or remedy, in respect of any such right, privilege, obligation, liability, penalty, fine, forfeiture, or punishment, as aforesaid,

and any such investigation, legal proceeding, or remedy, may be instituted, continued, or enforced, and any such penalty, fine, forfeiture or punishment may be imposed, as if the repealing Act had not been passed."

Submissions

[41] In her skeleton arguments, Mrs Samuels-Brown indicated that since POCA came into effect on 30 May 2007, by general principles of law and specific provisions of POCA, POCA cannot, and does not, apply to matters which predate its incorporation.

[42] The appellant referred to **Duport Steels Ltd and Others v Sirs and Others** [1980] 1 WLR 142 for the proposition that if the meaning of words in a statute are clear and unambiguous, they must be given their plain and ordinary meaning. She stated therefore that the proper interpretation to be given to section 2 of POCA was that criminal conduct referred to therein, was conduct after 30 May 2007, and could not therefore embrace conduct under the Money Laundering Act which predates POCA. She further submitted that the respondent was attempting to examine files in order to

ascertain whether there was any criminal conduct under the Money Laundering Act, to determine mens rea under POCA. In reliance on **Assets Recovery Agency (Ex-parte) (Jamaica)**, she argued that the warrant issued under POCA could not be used for that purpose. She also posited that section 25 of the Interpretation Act would only have been applicable if no contrary intention had been stated in POCA. However, pursuant to section 2 of POCA, 'criminal conduct' does not arise before 30 May 2007.

[43] On behalf of the intervenors, Mr Wilkinson submitted that the learned judge had found that there was a prima facie case with respect to properties acquired before 30 May 2007. However, he argued that of the 29 properties listed, 11 were acquired prior to 30 May 2007, and so ought to be excluded from examination, especially since no charges were laid under the Money Laundering Act. He indicated that these properties could not properly be characterised as a part of the relevant historical fact as they would have included activities that occurred prior to 30 May 2007, and so no prima facie case could arise in respect of criminal conduct referable to them. He stated that if this court were to permit review of documents and other material which predate POCA, then it would be endorsing a "retroactive prosecution". In any event, he said that there was no solid evidence that any of the properties had been acquired by the proceeds of crime, as only mere suspicions and allegations in the form of hearsay were presented to the court, which could not sufficiently ground a finding of a strong prima facie case.

[44] Mr Wilkinson, in reviewing the interplay between section 2 of POCA and section 25 of the Interpretation Act, stated that POCA had no retroactive effect. He further

stated that pursuant to section 25(2) of the Interpretation Act, investigations that had commenced under the Money Laundering Act, which had been repealed, could have been continued, especially if there was perceived ongoing criminal activity. But material obtained prior to the passage of POCA, could not be used to obtain any convictions under POCA.

[45] Mrs Hay, counsel for the respondent, submitted that there was no doubt that criminal conduct, as defined under POCA, relates only to conduct after the effective date of 30 May 2007. However, she argued, that the application before the court was not one to determine guilt before or after the effective date, but rather to "seek permission to unseal material uplifted from the appellant's law offices to which legal professional privilege had been claimed". She drew a distinction between 'similar fact evidence' and 'relevant background evidence', and submitted that material which existed prior to 30 May 2007 was "highly relevant background evidence which a trial judge could admit in evidence at a trial". She relied on **R v Pettman** [1985] Lexis Citation 1520 to show that background evidence can be adduced that was crucial to the comprehension of the respondent's case. Counsel also relied on **Regina v Alun Charles Phillips** [2003] EWCA Crim 1379 and **Regina v M (T) and Others** [2001] 1 WLR 421 to support her contention that the prosecution can rely on background evidence that is relevant to prove a fact in issue.

[46] Mrs Hay contended that the mens rea required to prove an offence under POCA, was the same as that required to prove an offence under the Money Laundering Act,

which deliberately relates to property derived from criminal activity. Between 1998-2007, any conduct which met those requirements would have been a crime. Counsel indicated that there was no bar to the institution of criminal proceedings, or investigation of conduct which was alleged to have taken place during the currency of the repealed Money Laundering Act.

[47] Counsel submitted that section 25 of the Interpretation Act saved the investigation inquiry into activity during the currency of the Money Laundering Act. The words "contrary intention" meant that investigation of conduct could be considered under the repealed Money Laundering Act unless POCA stated that this could not be done. She further contended that section 25 of the Interpretation Act was promulgated to ensure that there was no gap in the criminal law, and so preserves charges being laid under the Money Laundering Act. However, there is no provision in POCA which prohibits the use of information that existed before the statute was passed.

Discussion and analysis

[48] As indicated, many issues arise in relation to the interpretation of certain provisions of POCA, the Interpretation Act, and the alleged money laundering offences. The first issues which require consideration are: (i) whether investigations conducted prior to 30 May 2007 could be related to criminal conduct in respect of which the appellant/intervenors were charged; (ii) if those investigations do not relate to criminal conduct, could the property seized under the warrant be deemed criminal property; and

(iii) if not, could information relating to those properties be considered irrelevant to the proceedings currently being conducted.

[49] In **Duport Steels Ltd**, Lord Diplock stated at page 157:

> "...When Parliament legislates to remedy what the majority of its members at the time perceive to be a defect or a lacuna in the existing law (whether it be the written law enacted by existing statutes or the unwritten common law as it has been expounded by the judges in decided cases), the role of the judiciary is confined to ascertaining from the words that Parliament has approved as expressing its intention what that intention was, and to give effect to it. Where the meaning of the statutory words is plain and unambiguous it is not for the judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they themselves consider that the consequences of doing so would be inexpedient, or even unjust or immoral...."

So one must endeavour to ascertain and give to the words of the statute their plain and ordinary meaning. There is no place for a constrained construction and one cannot reject Parliament's intention and substitute one's own.

[50] As Sykes J (as he then was) so eloquently put it in paragraph [19] of his reasons for judgment in **Assets Recovery Agency v Adrian Fogo and Others** [2014] JMSC Civ 10, POCA had established two systems for removing property from either convicted persons or persons who held property derived from unlawful conduct. The two systems were: "(a) conviction-based or (b) civil recovery". I would daresay that the first system also embraces offence based, as in my view, whilst there must be an antecedent

offence for a defendant to be convicted of a substantive offence of money laundering, there does not have to be a conviction for the antecedent offence.

[51] **Assets Recovery Agency v Adrian Fogo** deals with an application for a restraint order under section 32 of POCA preventing the respondents or anyone from disposing of or dealing with several parcels of real estate and personal property including accounts at financial institutions, motor vehicles and heavy duty equipment. The case was brought by the Assets Recovery Agency (ARA) whilst conducting civil recovery and money laundering investigations under POCA in respect of properties held by the named respondents. It was also alleged in that case that the properties had been acquired directly or indirectly from criminal conduct, namely, drug trafficking and money laundering. Sykes J refused the application on the basis that, *inter alia*, there was no arguable case that the property acquired by Mr Fogo came from unlawful conduct, nor did the issue of criminal conduct arise.

[52] What is clear from Sykes J's judgment is that the definition of 'criminal conduct' in section 2 of POCA refers to criminal conduct occurring after the appointed day of 30 May 2007. He stated that transactions involving properties done before 30 May 2007 would be "off limits under POCA" as they could not ground criminal conduct.

[53] What is also interesting is that the Limitations of Actions Act does not apply to any proceedings under Part IV of POCA which deals with civil recovery claims. Section 71(2) states that civil recovery proceedings may be brought up to 20 years after ARA's

cause of action accrued. Section 71(3) describes when ARA's cause of action accrues, that is, when the original property obtained from the unlawful conduct was first acquired. So, from this it is clear that property acquired before POCA was promulgated can be seized in civil recovery proceedings, if it can be shown that it was obtained through unlawful conduct. The instant case, however, is not concerned with civil recovery.

[54] Sykes J stated that there are other provisions in POCA which permit the court, in deciding whether property was obtained through unlawful conduct, to assume that POCA was in fact in force at the time the property was acquired, even if acquired before the Act was in force. So, property acquired before POCA can be seized in civil recovery proceedings, once it can be shown that they have been obtained through unlawful conduct. The limitation period is 20 years since its acquisition. As Sykes J made clear, "this stands in sharp contrast to section 2(10) which provides in [sic] that nothing in the sections that assist in conviction-based recovery of property applies to 'conduct occurring, offences committed or property transferred or obtained before the appointed day'". Sykes J therefore concluded that the retrospective application or imposition of a civil penalty in respect of circumstances occurring before POCA was enacted or came into force, has express statutory authorisation.

[55] It is therefore of significance that in earlier proceedings relative to the parties in this appeal, a civil recovery claim had been filed pursuant to section 57 of POCA against Mr Hamilton, his relatives, associates and companies, and an application for a restraint

order had been made under section 32 of POCA, in respect of several properties owned by the parties. In his written judgment, reported at [2013] JMSC Civ 136, Sykes J made the restraint order, and extended the same until judgment or further order. In those circumstances the court was dealing with recoverable property (under sections 55 and 84 of POCA) obtained by way of unlawful activity, and not subject to the limitations as set out in section 2 of POCA, not being criminal property generated from criminal conduct as therein described. As indicated, the application before the court pursuant to the warrant was not related to a civil recovery claim.

[56] Another issue which arose in the instant case is whether by virtue of section 25(2)(e) of the Interpretation Act, investigations and legal proceedings which have been conducted under the Money Laundering Act, are affected by section 2 of POCA? In that, are the words "contrary intention [appearing]" referring to the date specific in the definition section of POCA with regard to criminal conduct? Additionally, could it not be said that, in any event, investigations being conducted prior to POCA, under the Money Laundering Act, could only lead to charges under the Money Laundering Act though repealed? This serious conflict in the understanding of the legislation has been the subject of review in relation to certain provisions of POCA by the Court of Appeal of the Commonwealth of the Bahamas in **Commissioner of Police v Michelle Reckley and Others** MCCrApp No 46 of 2019, judgment delivered 29 May 2019, and the Privy Council in **Assets Recovery Agency (Ex-parte) (Jamaica)**, which have given

directions and/or guidance in relation to certain aspects of the POCA regime in the Bahamas and Jamaica, respectively.

[57] In **Commissioner of Police**, the respondents were charged with money laundering, attempted money laundering and assisting to conceal the proceeds of criminal conduct. The allegations were that they had participated in diverting monies intended for a government initiative into their own pockets. The magistrate had discharged the respondents on two bases: firstly, because the charges were statute barred, having been laid outside the six month statutory limitation period; and secondly, on the basis that the statute (POCA 2000) under which the respondents had been charged had been repealed and replaced by POCA 2018, enacted on 25 May 2018. POCA 2018 was enacted before the respondents were charged but after the conduct which gave rise to the charges was alleged to have occurred.

[58] So, in that case, the proceedings were commenced pursuant to the repealed provisions of POCA, and the magistrate ruled that he did not have jurisdiction to hear the charges, and that to proceed with them would be an abuse of process. He indicated that the provisions of sections 20(d) and (e) of the Bahamian Interpretation and General Causes Act (the Bahamian Interpretation Act), (similar to sections 25(2)(d) and (e) of the Jamaican Interpretation Act, save that the following words were added to section 20(d) of the Bahamian Interpretation Act, namely, "against any written law so repealed") were applicable and interrelated. The appellant's appeal to the Court of Appeal was allowed, and the decision of the magistrate was set aside in its entirety on

the basis that, *inter alia*, the offences were not statute barred, and that section 20 of the Bahamian Interpretation Act supports the proposition that charges remain competent for prosecution under the repealed statute.

[59] The Court of Appeal gave its interpretation of sections 20(d) and (e) of the Bahamian Interpretation Act at paragraph 15 of its judgment. It read:

> "It seems to me, therefore, that what the section permits is the investigation, commencement, or institution of legal proceedings in respect of any offence found after any such investigation to have been committed 'against any written law so repealed', notwithstanding the repeal of that written law as if it had not been repealed. It is a time freezing device that keeps intact any possible criminal behaviour for subsequent review, investigation, institution/commencement of prosecution found to have been committed 'against any written law so repealed' so as to ensure that no criminal would escape the dragnet of the law on the pernicious technicality that his or her violation is of a law that has, since the commission of the illegal act, been repealed."

Several authorities were referred to, but ultimately, the court was making it clear, that repealing statutes, per se, did not "manifest a contrary intention", and if there was no contrary intention in the repealing statute, then the investigation can be carried on, and the proceedings can be initiated in respect of any offence as if the law had not been repealed.

[60] With regard to the impact of the Bahamian Interpretation Act and its provisions on the repealed POCA Act, Longley P on behalf of the majority of the court, concluded that section 20 of the Bahamian Interpretation Act supported the contention that the charges remained competent for prosecution under the repealed statute.

[61] Isaacs JA, for his part, made the point in this way at paragraph 71:

> "It seems to me, however, that the true import of section 20 was to ensure that persons who may have committed offences while the repealed Act was in force, but whose wrongdoing was not exposed until after its repeal, could be prosecuted for their transgressions without falling afoul of the principle that a person cannot be punished for acts that were not against the law at the time when they were done. This paid homage to the principle that there is a presumption against retrospectivity in criminal statutes. However, the characterisation as criminal of past conduct which was lawful when it took pace does not apply here because the past conduct was criminal when it took place."

The respondents could, therefore, he concluded, be prosecuted under the repealed Act with regard to any offences which were unlawful when the Act was extant.

[62] The difficulty that arises in the circumstances of the instant case, is that there was a "contrary intention appearing", in that, section 2 of the repealing statute (POCA) referred to the specific date of the creation of the offence. That would appear to indicate that any offence occurring before that date under the Money Laundering Act should be proceeded with under that Money Laundering Act although repealed.

[63] In **Assets Recovery Agency (Ex-parte) (Jamaica)**, Lord Hughes gave the judgment on behalf of the Board. He stated that the judge at first instance and the Court of Appeal had refused an application by the Assets Recovery Agency (ARA) for a customer information order (CIO) pursuant to sections 119-125 of POCA. The ARA appealed to Her Majesty in Council. The CIO directs a financial institution, for example, a bank or building society, or investment manager, to divulge information about the

customer to the prosecution, for instance, the name and address, and the taxpayer's registration details. There are other orders, it was stated, which can be obtained under POCA in aid of specific investigations. The orders include account monitoring orders (section 126), disclosure orders (section 105), and search and seizure orders (section 115). The investigations referred to in section 103 are: (i) forfeiture; (ii) money laundering; and (iii) civil recovery investigations. A money laundering investigation is an investigation into "whether a person has committed a money laundering offence".

[64] There are certain orders which flow from the investigations conducted pursuant to and within the statute's permission and which require a prior conviction to have occurred. These are 'forfeiture orders' which are in relation to seizure of identifiable property, which represents the defendant's benefit from his crime; a 'pecuniary penalty order', which is an order for payment out of any available assets held by him of a sum equivalent to the value of his benefit from crime; and a conviction for specific criminal offence of money laundering.

[65] Lord Hughes made it clear that the conditions which must exist in order to obtain a CIO are set out in section 121 of POCA, and were useful for the purpose of also obtaining other orders under POCA. Conditions (c), (d) and (e) of section 121 of POCA, which are relevant to this discussion, are set out below:

> "(c) in the case of a money laundering investigation, there are reasonable grounds for believing that the person specified in the application for the order has committed a money laundering offence;

(d) in the case of any investigation, there are reasonable grounds for believing that customer information which may be provided in compliance with the order is likely to be of substantial value, whether or not by itself, to the investigation for the purposes of which the order is sought; and

(e) in the case of any investigation, there are reasonable grounds for believing that it is in the public interest for the customer information to be provided, having regard to the benefit likely to accrue to the investigation if the information is obtained."

[66] Lord Hughes also pointed out that POCA had created new substantive offences of money laundering contained in sections 92 and 93, and referred to the definition in both sections with regard to criminal conduct and criminal property which required one to examine section 2 of POCA. In reviewing those sections, Lord Hughes stated in paragraph [8] of the decision, that:

"8. There can be no doubt that this means that before a substantive offence of money laundering can be committed, there must have been an antecedent (or 'predicate') offence committed by someone, which generated the criminal property concerned. The antecedent offence might of course be one of several different types. Fraud, drug trafficking, smuggling and the management of prostitution are no doubt common kinds of offence which generate money benefits which fall within the definition of criminal property, but there are also many others. So, for a prosecution for a substantive money laundering offence to succeed, the Crown must prove that such an antecedent offence was committed by somebody. The House of Lords so held in relation to similar earlier English legislation in *R v Montila* [2004] UKHL 50; [2004] 1 WLR 3141."

[67] However, he also said that there did not have to be a conviction of an antecedent offence for the defendant to be convicted of a substantive money laundering offence. It was necessary to prove that an antecedent offence had occurred, but not that a conviction followed.

[68] The Board also stated, at paragraph 10 of the decision, that it may be quite difficult to demonstrate that the antecedent offence has occurred, as it may not be known exactly what the antecedent offence was. The offence itself may be uncertain, the Law Lord noted, but the inference irresistible, that some antecedent offence had been committed. This may be sufficient to amount to proof to the criminal standard. In fact, Lord Hughes indicated that the Board had held previously that proof of a particular predicate crime was not necessary in order to prove a substantive charge of money laundering to the criminal standard (see **Director of Public Prosecutions of Mauritius v Bholah** [2011] UKPC 44).

[69] The conclusion, therefore, was that at that stage of an investigation, with an application before the court, as happened in the instant case, "what has to be established is not that a defendant has committed a money laundering offence, but that there are reasonable grounds for believing that a prospective defendant has done so". Applications for information in a money laundering investigation in order to conclude if a money laundering offence had been committed were to aid in the enquiry of the alleged predicate offence. A part of that enquiry was to ascertain if the antecedent offence had been committed. But as Lord Hughes stated at paragraph 11:

> "True it is that a money laundering offence cannot be committed unless the property handled was criminal property, and that it cannot be without an antecedent offence being committed by someone. But at the investigation stage, one may still be trying to find out whether the property is criminal property or not. It would be contrary to the wording of the statute to impose a requirement that there be proof that a particular, or any, antecedent offence has been committed, and even more so to impose a requirement not only that there should be proof of an antecedent offence but also a conviction of someone for it."

So, one does not require the existence of a conviction of the antecedent offence for applicants in a money laundering investigation.

[70] Lord Hughes explained the different approach set out in the provisions of POCA with regard to a forfeiture investigation and a money laundering investigation. The former is requiring the court to make an order under section 5 of POCA, that is, the forfeiture order, and the pecuniary penalty order. Although these orders must await conviction, the investigation can commence before, although the forfeiture hearings will usually await the conviction. However, the Board stated that if the application is made before conviction, the purpose of the document required to be disclosed ought to enable the investigation into the proceedings of criminal conduct.

[71] Under the money laundering investigation, which does not require a prior conviction, the Board outlined that one must disclose reasonable grounds for believing that a money laundering offence has been committed. In doing so, one must be able to show that the information sought is likely to be of substantial value to the investigation

under consideration, and that it is in the public interest to make the order sought. In the money laundering investigation, one must show reasonable grounds for believing a primary fact, such as that the person under investigation has benefitted from his criminal conduct, or has committed a money laundering offence, but the Board made it clear that this does not mean that one must prove that he has committed it. So, the Board further opined, that what is important is the existence of grounds for believing. As indicated previously, Lord Hughes stated that the issue of the standard of proof, whether criminal or civil, was "really inappropriate" as "the test does not ask for the primary fact to be proved. It only asks for the applicant to show that it is believed to exist, and that there are objectively reasonable grounds for that belief". The Board therefore ultimately held that in a money laundering investigation, the person specified does not have to have been "proved" to have some connection with criminal property.

[72] However, the Board equally made it clear that that does not mean that their evidence gathering orders are available to the prosecution to do as they will. It is the judge who must decide if they are to be permitted to do as they seek to do. It is also the duty of the prosecution to provide all the information available to the court as these applications are usually made ex parte at least in the first instance.

[73] The Board set out what was important to be placed before the court, in that case, in the context of an application for a CIO. It also gave guidance as to the role of a judge in those circumstances, relevant to the money laundering investigation. I think it

important for the issues in the instant case to set out what was indicated in paragraphs 21(a), (b), (c), and (d) of the decision. They read:

> "(a) in both forfeiture and money laundering investigations, ensuring that the condition in sections 121(a) or (c) is met, and there are objectively reasonable grounds for believing, as the case may be, either that the person specified has benefitted from his criminal conduct or has committed a money laundering offence; this will normally mean asking the applicant to show what criminal conduct, or what money laundering offence, is believed to have been committed, and requiring a brief outline of the grounds for suspecting benefit or money laundering as the case may be.
>
> (b) in the case of a forfeiture investigation, ensuring that the dominant purpose for which the order is sought is the ancillary forfeiture enquiry and not the underlying criminal enquiry; this will normally mean asking the Applicant how far the criminal enquiry has got and why the order sought will help, not the criminal enquiry, but the forfeiture enquiry; it will often also mean asking what if any proposals are entertained in relation to a restraint order.
>
> (c) in both cases, testing whether the condition in s 121(d) is met, namely that the information sought is likely to be of substantial value to the relevant investigation; this is likely to mean asking how it will help.
>
> (d) in both cases, testing whether the condition in s 121(e) is met, namely that there are reasonable grounds for believing that it is in the public interest for the information sought to be ordered to be provided; this means performing a balance between the public interest in the detection of money laundering offences or the recovery of the proceeds of crime (as the case may be) and the legitimate interests of the individual whose affairs are in question to preserve the privacy of those affairs."

[74] Of great importance, however, and of relevance to the matter at hand, is the fact that the Board upheld the order of the Court of Appeal which upheld the order of the first instance judge refusing the CIO, as it stated that there were several defects in the application. Indeed, they stated that the application was deeply flawed, which meant that the statutory conditions for making the order had not been made out. I shall mention here a few of the defects referred to in paragraph 22 of the judgment, namely:

> "(ii) Some 13 (or in two places 14) persons were listed as under investigation without any attempt being made in the case of most of them to say what they were suspected of doing. Of some, all that was said was that they were related to others on the list. One person listed in the application was not referred to at all in the affidavit in support.
>
> (iii) Included in that list of persons whose details were sought was one who, according to the affidavit in support, could not have been within ss 119 and 121 because it was said that he was the innocent victim of some of the other named persons, rather than a suspected offender.
>
> (iv) The assertions of suspected criminal behaviour, where made, included much which was said to have taken place before 30 May 2007, and thus which could not have been criminal conduct, and could not have generated criminal property, for the purposes of the Proceeds of Crime Act 2007 – see s 2(1).
>
> (v) The affidavit in support included (at para 9) a recital of facts which might not involve any criminal offence at all, nor was any such possible offence suggested."

[75] In the instant case, there are statements which have been outlined; the warrant for seizure of the material has already been issued by order of a judge of the court of first instance; and the application before the court below related to whether the material seized could be examined. The orders sought were said to be in furtherance of a money laundering investigation, when the appellant/intervenors were claiming the protection from disclosure by virtue of the provisions of POCA, and the inviolate principle of legal professional privilege.

[76] So, do questions arise with regard to whether there was specific information relating to the persons and/or the premises listed with regard to what they were suspected of doing, and how they related to other persons/material on the list? Were they only named because they were related to persons who were suspected of the antecedent offence? Could the prosecutor reasonably have believed that any of the persons named in the warrant could have been suspected of criminal behaviour if there was evidence that much of the behaviour referred to included behaviour which would have taken place before 30 May 2007, and therefore could not have been criminal conduct, and could not have generated criminal property for the purposes of section 2 of POCA, and hence, not be relevant to the matter at hand?

[77] So, it appears that the issue of the civil and criminal standard of proof does not seem important or relevant as the test is whether there is reasonable belief that the offence has occurred, and not whether there is any proof of any money laundering offences. It is also clear that no conviction of the offences is required to have been

proved and no proof of any specific connection to criminal property. So, the arguments of the appellant would have no weight there. But Lord Hughes has also said that an application under POCA (such as for a CIO, or a search and seizure warrant) would be defective, if a lot of the information related to criminal behaviour/activity occurring before 30 May 2007, as it could not be criminal conduct, pursuant to section 2(1) of POCA, and therefore could not relate to any criminal property. This finding is of some importance to this matter. Indeed, any alleged criminal behaviour/activity before the appointed day would not be appropriate or relevant to such an application (such as the CIO, or a search and seizure warrant).

[78] As a consequence, it is crucial to examine all the material the respondent would be intending to rely on in relation to criminal conduct as it may not be useable even at the investigation stage. It is necessary therefore to scrutinize carefully the basis on which the respondent would wish the court to do that.

[79] As indicated, counsel for the respondent relied on the '**Pettman** principle' and the use of 'background information' to place information before the court occurring prior to 30 May 2007. The appellant's response was equally clear, that as the provisions of the statute were clear and unambiguous, criminal conduct cannot arise prior to 30 May 2007, and so the **Pettman** principle was inapplicable.

[80] **R v Pettman** was a case out of the criminal division of the Court of Appeal in England. In that matter, the appellant and several others were charged on an

indictment containing 15 counts for various offences such as robbery, conspiracy to rob, and possession of a firearm with intent to commit a robbery. The appellant was convicted on various counts, and he appealed his convictions. The issue that arose in the case was whether certain evidence was admissible, notwithstanding that it disclosed the commission of a crime in respect of which the appellant had not been charged on the relevant indictment. The judge ruled that it was. He found that the evidence was "relevant, important and therefore, admissible" and that it was "necessary and desirable that [the evidence] should be before [the] Jury". He found that the evidence may be "highly probative" and even if it may or may not be prejudicial was "nihil ad rem". The evidence therefore could be adduced.

[81] The Court of Appeal found the evidence not to be prejudicial even though it may have established a crime with which the appellant had not been charged. The court referred to the seminal speech of Lord Hailsham in **Director of Public Prosecutions v Boardman** [1975] AC 421, at page 452, where he stated:

> "...The mere fact that the evidence adduced tends to show the commission of other crimes does not by itself render it inadmissible if it is relevant to an issue before the jury and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused..."

[82] Purchas LJ, on behalf of the court in **Pettman**, referred to an earlier ruling made by the court in the decision of **R v David John Campbell** (unreported), transcript

dated 20 December 1984, which stated that: "the evidence relating to an incident some six months earlier than the date of the offence charged was necessary in order to give a continuous and intelligible account of the relationship between the appellant and the victim". The court in **R v Campbell** continued:

> "In a case such as this which depends upon the relationship between the parties as part of a continuum the excision of one isolated part of the history would, in our judgment, inevitably have caused distortions of the account placed before the Jury and would have prevented them from being in a position to judge the actions of the appellant in and about the early days of October in their true setting. The exercise of balancing the importance of the evidence as being relevant to an issue before the Jury, namely their consideration of the conduct of the accused in the immediate context of the offence in October, is one that is essentially for the exercise of discretion by the trial Judge, who is necessarily in the best position to judge."

[83] Purchas LJ concluded on page 5 of **Pettman**, referring to the dicta above in **R v Campbell**, with the statement which is oft cited as the **Pettman** principle in subsequent authorities. It reads:

> "Although the facts in R v Campbell were different from those in the instant case, in our judgment the principles remain the same, namely, that where it is necessary to place before the jury evidence of part of a continual background or history relevant to the offence charged in the indictment, and without the totality of which the account placed before the jury would be incomplete or incomprehensible, then the fact that the whole account involves including evidence establishing the commission of an offence with which the accused is not charged is not of itself a ground for excluding the evidence. In this case it would have been unrealistic and artificial to have stopped the evidence of the Brighton expedition as it were at the door of 25 Bedford Square. In

> our judgment, the whole of the evidence of the events of 2nd April, 1981 were admissible in law."

So. the court stated that although the evidence could be of "high probative value', it would still have to be considered against its prejudicial effect, but that could be nullified by a careful summing-up by the learned trial judge to the jury.

[84] This **Pettman** principle was referred to and endorsed by another more recent case out of the criminal division of the Court of Appeal in England, namely, **Regina v Alun Charles Phillips**. In applying the **Pettman** principle, the court held at paragraph 29 of the judgment that:

> "...To a great extent, they turn on their own facts. The essential question in every case is whether the evidence passes the test of relevance. If it is relevant, then it is admissible unless, in the exercise of its discretion, the court decides that fairness requires it to be excluded. The argument in the present case has been directed to the first rather than the second of these questions."

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

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

> continuous family history of sexual abuse was relevant to the particular offences charged against M and not simply to show propensity and was therefore admissible...."

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

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

[88] The intention was not to leave any gap in the pursuance of prosecution of criminal activity. But, in construing the two statutes, in my view, a contrary intention has been made clear, that prior to 30 May 2007, any allegations of criminal behaviour

or activity was not criminal conduct under POCA, and cannot be prosecuted as such. The interplay of the two statutes is clear. But there is no evidence of a gap. The offences must simply be pursued in keeping within the relevant statutory construction. Activities with property after 30 May 2007, for instance, sales or transactions between 2011 and 2014, comprising information relating to activity which MOCA reasonably believed were money laundering offences would not fall afoul of section 2 of POCA, as they would not have occurred outside of the designated period stated in POCA, and so could generate criminal property. Grounds (ii) and (iv) would therefore only succeed in part.

Issue 3: Legal professional privilege (ground (v))

Submissions

[89] Mr Wilkinson submitted on behalf of the appellant and the intervenors that the learned judge had given no or no sufficient regard to the fact that legal professional privilege was that of the clients. Pursuant to that principle, he contended, Mr Hamilton should have been notified by the respondent so that he could have been given the opportunity to participate in the process. Counsel referred to several authorities which enunciated the principle of legal professional privilege and indicated that it is a human right, incontrovertibly linked to the constitutional right to legal representation. Since it is a right that is absolute, he argued, there was no basis upon which the documents could have been unsealed for examination, and the learned judge erred in so ordering.

[90] Mrs Hay contended that the issue Straw J had been asked to determine was whether legal professional privilege was applicable in the circumstances. Counsel argued that it was not sufficient for the court to accept the bare assertion of the attorney that legal professional privilege attached to all seized material, particularly when the attorney herself was the subject of the investigation. Counsel contended that the learned trial judge had exercised her discretion correctly, and that all documents ought to be unsealed in order to ascertain whether the criminal purpose exception applied.

Discussion and analysis

[91] Stevenson J in **Hobbs v Hobbs** said this at pages 116-117:

> "...privilege has a sound basis in common sense. It exists for the purpose of ensuring that there shall be complete and unqualified confidence in the mind of a client when he goes to his solicitor, or when he goes to his counsel, that what he there divulges will never be disclosed to anybody else. It is only if the client feels safe in making a clean breast of his troubles to his advisors that litigation and the business of the law can be carried on satisfactorily... There is an abundance of authority in support of the proposition that once legal professional privilege attaches to a document ... that privilege attaches for all time and in all circumstances."

[92] The seminal speech of Lord Taylor of Gosforth CJ in **R v Derby Magistrates' Court, Ex parte B** is also worth re-stating. Having reviewed several authorities on the point, he said this:

> "The principle which runs through all the cases, and the many other cases which were cited, is that a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client must be sure that what he tells his lawyer in confidence will never be repeated without his consent. Legal professional privilege is thus much more than an ordinary rule of evidence limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests."

[93] Therefore, the remaining documents seized still have to be considered against the backcloth of the sacrosanct principles of the protection from disclosure on the basis of legal professional privilege. As indicated by both counsel and also by the learned trial judge, the right to communicate with one's legal adviser in confidence is a civil and legal right, and one which is founded on the special relationship between the lawyer/solicitor and the client.

[94] Indeed, this has been stated with clarity and confirmed yet again, decades ago, by the Supreme Court of Canada in **Simon Descôteaux and Centre communautaire juridique de Montréal v Alexandre Mierzwinski and Others** [1982] 1 SCR 860, where Lamer J said that communications to one's lawyer must be kept confidential, once the relationship is a professional one. It was further reiterated that "[t]he privilege with regard to confidential communications between solicitor and client for professional purposes ought to be preserved, and not frittered away" (see **Pearce v Foster and Others** (1885) 15 QBD 114, at page 119).

[95] The court recognised that documents, even if seized lawfully under a warrant, must still be subject to some degree of judicial control in respect of the examination of the documents, and one ought not to wait for the trial for that issue to be dealt with. As Lamer J stated "it would be small comfort indeed to the accused and to his counsel to discover that his only protection in such a case was to prevent the introduction into evidence of the documents that had been seized and examined" at trial, it having been seized and examined previously. The learned judge indicated further that, "such a result in [his] view would be absurd".

[96] In **Her Majesty The Queen v Lavallee and Others and Other Appeals** [2002] 3 RCS 209, the court grappled with whether section 488.1 of the Canadian Criminal Code, which set out a procedure for determining a claim for solicitor-client privilege in relation to certain documents (also seized from a law office under warrant), infringed section 8 of the Canadian Charter of Rights and Freedoms, and if it did, was it justified under section 1 of the Canadian Charter. The procedure in the Code permitted the solicitor to make application for an unsealing of the documents, within strict time frames, to ascertain if the material was indeed protected from disclosure by legal professional privilege, and from inspection from the Crown, without the permission of the court, in order to assist with the determination as to whether legal professional privilege attached to the documents.

[97] The court accepted that the principle relating to protection from disclosure on the basis of legal professional privilege was of "fundamental justice and a civil right of

supreme importance in Canadian Law". However, it also recognised that for the principle to remain as close to absolute as possible, the court must adopt the "strongest norms to ensure its protection".

[98] Ultimately, after thorough discussion and analysis, the court ruled the provision unconstitutional, mainly because, by its operation as set out, the privilege could be impaired by, *inter alia*, the inaction of the attorney-at law; the naming of clients; the failure to give notice to the client; the strict time limits set out therein for action to be taken; the absence of discretion on the part of the judge in determining the existence of solicitor-client privilege; and the possibility of the attorney-general's access to the documentation prior to the judicial determination. It was a serious concern of the court that the client, if not notified before the unsealing of the documents, could perhaps not even have had knowledge of the breach of the principle, nor would he have consented to waive the privilege. Certain recommendations were made by the court including but not limited to, in particular, that:

1. A search warrant should not be issued in respect of documents known to be protected by legal professional privilege, and other legal alternatives should first be pursued.
2. All documents from a lawyer's office should be sealed before being examined and/or seized.

3. Every effort should be made to contact the lawyer and the client when the search warrant was being executed. In the absence of the lawyer or client, a representative should be appointed by the law society or the court to examine the documents seized.

4. The attorney-general should make submissions but should not be permitted to inspect the documents beforehand.

5. The prosecuting attorney should not be permitted to inspect the documents until and only after the court had found that the documents were not privileged.

6. If the documents were found not to be privileged, they could be used in the investigation being conducted, but otherwise, they should be returned to the attorney forthwith.

[99] In arriving at these conclusions, the court made the specific comment that the privilege acquired an additional dimension in the context of a criminal investigation. Indeed, the court noted at paragraph 23 that:

> "...It is particularly when a person was the target of a criminal investigation that the need for the full protection of the privilege is activated. It is then not an abstract proposition but a live issue of ensuring that the privilege delivers on the promise of confidentiality that it holds...."

[100] In my view, that statement is no less accurate if the target of the investigation is the attorney-at-law, who, in most instances, was merely the holder of the document. In fact, the court also put it forcibly in this way:

> "...it is critical to emphasize here that all information protected by the solicitor-client privilege is out of reach by the State. It cannot be forcibly discovered or disclosed and it is inadmissible in court. It is the privilege of the client and the lawyer acts as a gatekeeper, ethically bound to protect the privileged information that belongs to his or her client. Therefore any privileged information acquired by the State without the consent of its privileged holder is information that the State is not entitled to as a rule of fundamental justice." (See paragraph 24)

[101] The court also stated that the Crown does not need to inspect the documents, and the issue of whether privilege attaches should be determined without allowing the attorney-general access to the seized documents. That, the court said, would include any member of the prosecuting authority. The court was of the view that granting the Crown access to the confidential communications passing between the attorney and client "would diminish the public's faith in the administration of justice and create a potential for abuse". It would be of no assistance to the client, the court concluded, if ultimately the document proved to be inadmissible if the contents have already been disclosed to the prosecuting authority. The court made it clear that any benefit that could be obtained from the assistance of the Crown in determining whether the document was subject to legal professional privilege was "greatly outweighed by the

risk of disclosing privileged information to the state in the conduct of a criminal investigation". I must say that I am completely persuaded by these comments.

[102] The consolidated case, **Jamaican Bar Association**, was cited as being an authority out of this court dealing with the issue of the protection from disclosure of documents seized under warrant from the law offices of the appellants, Ernest Smith & Company. Many of the authorities on legal professional privilege were referred to by the court, and the court endorsed the principles already enunciated herein. Panton P, who wrote the lead judgment of the court, referred to the judgment of the High Court of Australia **The Daniel Corporation International Pty Ltd & Another v Australian Competition and Consumer Commission** [2002] HCA 49. He set out the well-known dicta of the court comprising Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ, wherein at paragraph 9, Gleeeson, Gaudron, Gummow and Hayne JJ stated:

> "It is now settled that legal professional privilege is a rule of substantive law which may be availed of by a person to resist the giving of information or the production of documents which would reveal communications between a client and his or her lawyer made for the dominant purpose of giving or obtaining legal advice or the provision of legal services, including representation in legal proceedings...."

[103] And at paragraph 43 McHugh J said:

> "Courts do not construe legislation as abolishing, suspending or adversely affecting rights, freedoms and

> immunities that the courts have recognized as fundamental unless the legislation does so in unambiguous terms. In construing legislation, the courts begin with the presumption that the legislature does not interfere with these fundamental rights, freedoms and immunities unless it makes its intention to do so unmistakably clear...."

[104] And at paragraph 44 McHugh J said further:

> "Australian courts have classified legal professional privilege as a fundamental right or immunity. Accordingly, they hold that a legislature will be taken to have abolished the privilege only when the legislative provision has done so expressly or by necessary implication… The immunity embodies a substantive legal right...."

[105] The **Jamaican Bar Association** case, however, in my view, is not very helpful with regard to the particular facts of the instant case bearing in mind the facts of, and the issues raised in that case, in that, the warrant issued under the Mutual Assistance (Criminal Matters) Act was found to be unlawful, and the searches and seizures of documentation conducted and done under the said Act were therefore found to be in breach of section 19(1) of the Constitution. The searches and seizures were therefore also found to be in breach of legal professional privilege and the documents seized were ordered to be returned to the appellant. Additionally, in that case, there was no claim of criminal conduct on the part of the attorneys.

[106] In **AWB Limited v Honourable Terence Rhoderic Hudson Cole**, a case out of the Federal Court of Australia, the issues concerned, *inter alia*, whether legal

professional privilege attached to certain documents, and whether any privilege had been waived in relation to other documents due to earlier disclosure. The facts of the case were somewhat complicated. There were serious allegations of payments of funds by a company AWB to a Jordanian company called 'Alia for Transportation and General Trade Co', which turned out to be a front company for the Iraqi regime, headed by Saddam Hussein, which company channelled the payments to Iraq in contravention of the United Nations' sanctions. It was stated in the explanatory statement in the judgment, that AWB had the onus of proving that certain relevant communications had been brought into existence for the dominant purpose of giving or obtaining legal advice. The court stated that "[p]rivilege is not established merely by the use of verbal formula or by mere assertion that communications were undertaken for the purpose of obtaining 'legal advice'." "Dominant purpose", it was stated, was "a question of fact that must be determined objectively".

[107] The court indicated that it had inspected the documents, within their context, and had also examined the nature of the same, and the evidence in support of it, and its content. The court examined whether there had been waiver of the privilege claimed, and also particularly addressed the principle of the 'fraud exception' "relating to legal professional privilege", confirming that communications between lawyer and client which facilitate fraud or crime were not protected from disclosure. The court also noted that the 'fraud exception' "does not capture its full reach", as it "encompasses a

wide species of fraud, criminal activity or actions taken for illegal or improper purposes and extends to 'trickery' and 'shams'".

[108] In this case of high authority out of Australia, certain guidelines can be distilled with regard to the principles relating to the protection from disclosure of documents subject to legal professional privilege. They are set out below:

1. One must examine the document by reference to its context and nature.
2. The purpose for which it was brought into existence must be examined objectively.
3. The existence of the privilege was not established by use of verbal formula. The claim of privilege may not be sustainable in the absence of the context and purpose of obtaining or giving legal advice.
4. In communications between client and his/her independent legal adviser, it is appropriate to assume that legitimate legal advice is being sought, if no contrary intention has been shown.
5. A dominant purpose must be shown, that is, the prevailing and paramount purpose.

6. To ascertain the dominant purpose one should ask what was the intended use(s) of the document being brought into existence.

7. Legal advice is not limited, but is of a fairly wide character, and extends to professional advice relating to what should prudently or sensibly be relevant in the legal context, but does not extend to advice of a purely commercial or public relations character.

8. The privilege extends to protection from disclosure not only to legal work carried out by the lawyer for the benefit of the client, but also research, memoranda, collations, summaries of documents, chronologies and other documents of that type.

9. The privilege extends to notes, memoranda and other documents made by officers and employees of the client to the lawyer to enable the giving of advice.

10. The privilege can attach to documents between a salaried legal adviser and his/her employer provided that the communication is made in his/her professional capacity.

11. The privilege can attach to non-privileged documents with the important consideration being the 'dominant purpose' in respect of which the document came into existence.

12. The court made it clear that:

> "The Court has power to examine documents over which legal professional privilege is claimed. Where there is a disputed claim, the High Court has said that the court should not be hesitant to exercise such a power: *Esso Australia Resources Limited v Commission of taxation* (1999) 201 CLR 49; see also *Grant v Downs* (1976) 135 CLR 674, at 689. If the power is exercised, the court will need to recognise that it does not have the benefit of submissions or evidence that might place the document in its proper context. The essential purpose of such an inspection is to determine whether, on its face, the nature and content of the document supports the claim for legal professional privilege."

[109] It appears that in Australia, the court must consider whether the dominant purpose for which the document came into existence was as a communication between lawyer and client in respect of allegedly obtaining advice for the privilege to apply. That approach only obtains in specific situations in this jurisdiction (see **Waugh v British Railways Board** [1980] AC 521). Save and except that caution, however, the remaining aspects of the guidelines set out above are useful and applicable. I endorse and recommend them in the examination of whether documents are subject to the protection from disclosure on the basis of legal professional privilege.

[110] It is unfortunate that there are no rules yet under POCA, dealing with the process to be used, if orders are to be made by the court for the review of documents seized under a warrant issued pursuant to POCA. However, I agree with the learned trial judge that that should not be a bar to the court proceeding to do so. It is as stated in the authorities, an exercise of the discretion of the court, but one that should be used sparingly (see **Grant v Downs** (1976) 135 CLR 674). It requires this court to examine, yet again, by way of review, the manner in which the court ought to proceed, remembering that it is the exercise of a discretion which has been undertaken in the court below. This court proceeds to do so hesitatingly, within limited bases, as stated by Lord Diplock in **Hadmor Productions Ltd and Others v Hamilton and Others** [1982] 1 All ER 1042, and endorsed several times in this court.

[111] The learned judge set out certain guidelines. Having reviewed the authorities particularly the guidance given in **Lavallee**, I would endorse most of what she has stated should be applicable, but, additionally, given the statements made by the Law Lords in the Privy Council, I feel impelled to make some adjustments. Accordingly, there should be no participation of any member of the prosecution when the examination of the documents is being undertaken. Additionally, all efforts should be made, as are reasonable in the circumstances, to have the persons entitled to the privilege present or represented when the examination is being conducted by the court. The documents that are not relevant, as they do not refer to criminal conduct occurring after the appointed day, viz 30 May 2007, fall afoul of section 2 of POCA, and should not be

examined, and should be returned to the appellant and the interveners respectively forthwith. That would dispose of Issue 3, and ground (v), therefore, would succeed in part.

Issue 4: Breach of certain provisions of the Constitution (ground (vi))

[112] In the appellant's affidavit of urgency filed 15 July 2014 before Straw J she deponed that she had been informed by her attorneys that the provisions of POCA under which she had been charged were unconstitutional, and the statute was in breach of her constitutional rights. In her written submissions before us, she maintained this position, and claimed that she had a constitutional right to remain silent, particularly when the onus of proof remained on the prosecution to prove relevant facts. Mr Wilkinson contended that the learned judge paid no regard to sections 13(2) and (3) of the Constitution with regard to protection from search of the person and property and protection of privacy.

[113] Mrs Hay submitted that this argument had not been made before Straw J in the court below. There had also not been any written submissions relating to the content of what is now ground of appeal (vi) before the learned judge, and so she could not be faulted for not making any specific findings on the issue.

[114] It is clear from the perusal of the reasons from the judgment of Straw J that this aspect of the matter was not a part of the deliberations below. In my view, this ground was also not pursued before us with any vigour in the appeal. I do not think therefore

that this is the matter in which this court ought to make any pronouncement on whether a warrant issued under POCA in these circumstances was in breach of section 13 of the Constitution or otherwise. Nor is there any need to pronounce on whether reviewing the material as disclosed in this case was in beach of any of the provisions of the Constitution. I would therefore refrain from making any order in this regard.

Conclusion

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

[116] Properties therefore purchased and other transactions relating to the period prior to 30 May 2007, seized under the warrant issued by the court, are irrelevant to the money laundering investigation under POCA. So, any documents seized in relation to any such money laundering investigation must be returned to the appellant and the interveners forthwith, unless the prosecution can demonstrate that there were certain aspects of the alleged criminal conduct relating to the said property which had occurred subsequent to 30 May 2007. However, I would note that there is no bar to these documents being utilised if civil recovery investigations are under way. Investigations in relation to offences occurring prior to the appointed day stated in POCA, must be pursued under the repealed Money Laundering Act pursuant to section 25(d) and (e) of the Interpretation Act.

[117] In pursuance of the examination of the documents seized, guidelines set out by Straw J in the court below, must be followed, with the following adjustments:

(i) there should be no participation of any member of the prosecution when the examination of the documentation is being undertaken;

(ii) all efforts should be made, as are reasonable in the circumstances, to have the persons allegedly entitled to the privilege present or represented when the examination of the documents is being conducted by the court; and

(iii) the documents which fall afoul of section 2 of POCA should be returned to the appellant and the interveners forthwith.

[118] I would make no ruling at this time on the matters canvassed herein with regard to whether the seizure of documents under any of the provisions of POCA are in breach of section 13 of the Constitution or otherwise. Additionally, I would make no order as to costs.

[119] The delay in delivering this judgment is deeply regretted. The underpinning cause of that delay is well-known but that does not make it acceptable. It is however accurate and the regret is nonetheless sincere.

F WILLIAMS JA

[120] I have read the draft judgment of my sister Phillips JA and agree with her reasoning and conclusion. There is nothing I wish to add.

P WILLIAMS JA

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

PHILLIPS JA

ORDER

1. The appeal is allowed in part.

2. The order made by Straw J on 28 September 2015, is varied to read as follows:

"1. That all files, transactions, communications, dealings of whatever kind as manifested in the physical and electronic documents, records, articles contained in the respective containers and computer ('the material'), subsequent to 30 May 2007, which were removed on December 17, 2013 from the [appellant's] law offices at 20½ Duke Street, Kingston and which were retained sealed by the Major Organised Crime and Anti- Corruption Task Force ('MOCA') will be examined by this Honourable Court for a determination of what material attracts legal professional privilege.

2. That there should be no participation by any member of the prosecution when the examination is being undertaken.

3. That all and any of the material described in Order 1 which upon examination by this Honourable Court is found not to attract legal professional privilege shall be retained and examined by MOCA's servants and/or agents for the purposes of MOCA'S continued investigation into offences for which the [appellant and the 1st and 2nd intervenors and others] have been charged with breaches of the Proceeds of Crime Act, 2007 ('POCA') and/ or disclosure to the [appellant and the 1st and 2nd intervenors and others]".

4. All efforts should be made as are reasonable in the circumstances to have the persons allegedly entitled to the privilege present or represented when the examination of the documents is being conducted by the court.

5. The documents which fall afoul of section 2 of POCA should be returned to the appellant and the intervenors forthwith."

3. There shall be no order as to costs.