JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 39/2006

MOTION NO 12/2017

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

BETWEEN	**PAUL CHEN-YOUNG**	**1st APPLICANT**
AND	**AJAX INVESTMENTS LIMITED**	**2nd APPLICANT**
AND	**DOMVILLE LIMITED**	**3rd APPLICANT**
AND	**EAGLE MERCHANT BANK JAMAICA LIMITED**	**1st RESPONDENT**
AND	**CROWN EAGLE LIFE INSURANCE COMPANY LIMITED**	**2nd RESPONDENT**
AND	**THE ATTORNEY GENERAL FOR JAMAICA**	**INTERESTED PARTY**

Ransford Braham QC and Abraham Dabdoub instructed by Dabdoub, Dabdoub & Co for the appellants

Michael Hylton QC and Sundiata Gibbs instructed by Hylton Powell for the respondents

Mrs Nicole Foster-Pusey QC, Solicitor General, and Miss Carla Thomas instructed by the Director of State Proceedings for the interested party

18 and 19 December 2017 and 26 April 2018

MORRISON P

Introduction

[1] Section 103(1) of the Constitution of Jamaica ('the Constitution') establishes a Court of Appeal for Jamaica ('the court'), with "such jurisdiction and powers as may be conferred upon it by this Constitution or by any other law".

[2] Section 106(1) of the Constitution provides that a judge of the court, as also of the Supreme Court[1], holds office until he (or she) attains the age of 70 years ('the retirement age').

[3] But section 106(2) provides that, with the permission of the Governor-General, acting in accordance with the advice of the Prime Minister, a judge of the court who attains the retirement age may "continue in office for such further period after attaining that age as may be necessary to enable him to deliver judgment or to do any other thing in relation to proceedings that were commenced before him before he attained that age".

[4] Section 106(3) provides that nothing done by a judge of the court "shall be invalid by reason only that he has attained the [retirement age]".

[5] On several dates between March and November 2013, a panel of the court comprising Panton P, Dukharan and McIntosh JJA ('the judges') heard the applicants' appeal against a judgment of R Anderson J ('the trial judge') given in the Supreme

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[1] See section 100(1)

Court on 4 May 2006. On 6 November 2013, after a hearing lasting 18 days, the court reserved judgment on the appeal.

[6] Between May 2015 and July 2016, each of the judges retired upon reaching their respective retirement ages. There is no evidence that the Governor-General gave permission to any of them to continue in office for any purpose pursuant to section 106(2) of the Constitution.

[7] On 1 December 2017, a panel of the court comprising Phillips, Brooks and Sinclair-Haynes JJA delivered the decision of the judges on the appeal ('the impugned judgment') to counsel for the parties in open court. By the impugned judgment[2], the appeal was allowed, the decision of the trial judge was set aside, a new trial was ordered before another judge of the Supreme Court and the respondents were ordered to pay one half of the applicants' costs in this court and in the court below.

[8] By an amended notice of motion filed on 14 December 2017 ('the motion'), the applicants seek a declaration from the court that, the judges having retired before giving a decision on the appeal, and not having received permission from the Governor-General to continue in office beyond their retirement ages for the purpose of doing so, the impugned judgment is "null and void and of no legal effect". Contending that this court has jurisdiction to make them, the applicants accordingly seek orders that (i) "the hearing of [the appeal] which ended on November [6], 2013 be vacated and be heard

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[2] Authored by Panton P and concurred in by Dukharan and McIntosh JJA

de novo"; (ii) a date be fixed for the rehearing of the appeal; and (iii) the costs of the vacated hearing and of the motion be paid by the Attorney-General for Jamaica.

[9] The 1st applicant also seeks orders that (i) a freezing order issued against him by the trial judge on 6 May 2006 ('the freezing order') be discharged; and (ii) provision be made for continuation of payment of his living expenses of US$5,000.00 per month, as ordered by the trial judge on 15 June 2006, from November 2013 until the date of this court's order.

[10] In support of the motion, the applicants place principal reliance on the constitutional provisions relating to the retirement of judges of the court which I have summarised above. However, they also contend that, in all the circumstances set out above, and in the light of the time that has passed since the completion of the hearing of the appeal, there has been a breach of their constitutional right "to a fair hearing within a reasonable time by an independent and impartial court or authority established by law"[3].

[11] Neither the respondents nor the interested party have proffered any submissions, either strongly in support of or in opposition to, the applicants' basic premise, which is that, the judges having retired before purporting to deliver it, the impugned judgment is null and void and of no legal effect. However, the respondents strongly resist the 1st applicant's application for orders discharging the freezing order

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[3] The Constitution, section 16(2)

and providing for payment of his living expenses. The interested party equally strongly disputes the applicants' entitlement to an order for payment by the Attorney-General of the costs of the vacated hearing and of the motion. In addition, the interested party contends that this court is not in a position to determine whether there has been a breach of the applicants' right to a fair hearing within a reasonable time; rather, the interested party submits that, pursuant to section 19 of the Constitution, the appropriate forum for such a determination is the Constitutional Court of the Supreme Court.

[12] The issues which arise on the motion may therefore be summarised as follows:

1. Whether the court has the jurisdiction to vacate the 2013 hearing and to order a *de novo* hearing in the circumstances that have arisen (the jurisdiction issue).

2. What is the status of the impugned judgment (the status of the impugned judgment issue)?

3. Whether this court is the appropriate forum in which to determine whether the applicants' right to a fair hearing within a reasonable time has been breached (the fair hearing within a reasonable time issue).

4. Whether the freezing order against the 1st applicant should be discharged by this court (the discharge of the freezing order issue).

5. Whether this court should make provision for payment of his living expenses to the 1st applicant (the living expenses issue).

6. Whether the Attorney-General should be ordered to pay the applicants' costs of the hearing of the appeal thrown away and the costs of the motion (the costs issue).

[13] Since preparing a first draft of this judgment, I have had the great advantage of studying in draft the judgment prepared in this matter by Brooks JA. As regards the issues relating to the discharge of the freezing order, provision for living expenses and costs (issues 4, 5 and 6), I find myself so fully in agreement with Brooks JA's reasoning and conclusions that I am happy to endorse them without adding anything of my own. I also agree with Brooks JA's conclusions on the issues relating to jurisdiction, the status of the impugned judgment and the applicants' claim that there has been a breach of their right to a fair hearing within a reasonable time (issues 1, 2 and 3). However, given the fundamental importance of these issues, I think it may be useful if I were to state my views on them in my own words.

The jurisdiction issue

[14] The applicants submit that, in the light of the prolonged delay in the delivery of a judgment on the appeal and the retirement of the judges, it is appropriate that the court should vacate the hearing and set the matter down for a rehearing by the court. In their written submissions, the applicants support their contention that the court has jurisdiction to make the order which they seek in three ways.

[15] Firstly, the applicants place reliance on (i) the Constitution, which establishes the court[4]; (ii) the Judicature (Appellate Jurisdiction) Act ('the Act'), which confers jurisdiction on the court[5]; and (iii) the Court of Appeal Rules 2002 ('the CAR'), which describe the powers of the court[6]. In addition, the applicants rely on the Civil Procedure Rules 2002 ('the CPR'), to the extent that any of its provisions are expressly incorporated into the CAR (notably rules 1.1 and 26.1(2)(v) of the CPR, which state the overriding objective of the rules and the court's general powers of management).

[16] Secondly, the applicants submit that, even if the jurisdiction for which they contend is not expressly or impliedly conferred on the court by any of these provisions, the court nevertheless has such jurisdiction and/or authority by virtue of its inherent jurisdiction as a superior court of record. In this regard, the applicants rely on a number of authoritative statements, from Halsbury's Laws of England ('Halsbury's')[7] and the Supreme Court of Canada in **Endean v British Columbia**[8] (defining what the notion of the inherent jurisdiction of a court connotes); and from the Courts of Appeal of England and Wales and Belize in **Taylor and another v Lawrence and another**[9] and **RBTT Trust Limited v Cedric Flowers**[10] respectively (exploring the extent of the inherent jurisdiction of those courts to reopen and rehear proceedings in the particular circumstances of those cases).

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[4] Section 103(1) and (5)
[5] Section 10
[6] Rules 1.7 and 2.15 of the CAR
[7] Volume 11 (2015), para. 23
[8] [2016] 2 SCR 162
[9] [2002] EWCA Civ 90
[10] (unreported), Court of Appeal, Belize, Civil Appeal No 29 of 2008, judgment delivered 23 March 2012.

[17] And thirdly, the applicants rely on the principle that, until a judgment or order has been perfected, a court has the right to review and reconsider what has been done (**Re Harrison's Share Under A Settlement Harrison v Harrison and Others; Re Ropner's Settlement Trusts Ropner v Ropner and Others**[11]). The applicants submit that, although the appeal in this case has been heard, it has not yet been validly determined and the court cannot therefore be treated as *functus officio*.

[18] In his oral submissions before us, Mr Braham QC for the applicants supplemented these submissions by reference to the decisions of the Court of Appeal of England in **Craig v Kanseen**[12] and **In re Pritchard, Decd, Pritchard v Deacon and Others**[13], and of this court in **Morris Astley v The Attorney General of Jamaica and the Board of Management of the Thompson Town High School**[14]. The purpose of these citations was to make the additional point that, in cases in which "there is a defect in the proceedings leading up to the judgment or order, which is so serious as to warrant the judgment or order being treated as a nullity, the court can in its inherent jurisdiction set aside its own order, without the need for an appeal"[15].

[19] In her contribution to the discussion on the jurisdiction issue[16], Mrs Foster-Pusey QC for the interested party observed that neither the provisions of the Act nor the CAR

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[11] [1955] 1 All ER 185
[12] [1943] 1 All ER 108
[13] [1963] Ch 502
[14] [2012] JMCA Civ 64
[15] Ibid, per Morrison JA at para. [24]
[16] See the Submissions on behalf of the Interested Party on Notice of Motion to Vacate Hearing and to Hear Appeal De Novo, filed 5 December 2017 ('the interested party's submissions').

upon which the applicants relied, appeared to provide a basis for the order being sought on the motion.

[20] However, in relation to the court's inherent jurisdiction, Mrs Foster-Pusey also referred us to section 9 of the Act, which vests in the court the jurisdiction and powers of the Court of Appeal which it succeeded on 5 August 1962 ('the former Court of Appeal'). She pointed out that, by virtue of section 3(1) of the now repealed Judicature (Court of Appeal) Law, the former Court of Appeal was declared "to form part of the Supreme Court of Judicature". Accordingly, in **Berry and Morris v Kingston and St Andrew Corporation**[17], in which the issue was whether the court had jurisdiction to reinstate an appeal from the Resident Magistrate's Court which had been struck out by reason of the appellant's non-appearance, Luckhoo P (Ag), after a detailed review of the statutory history of the Act, concluded as follows:

> "If the Court of Appeal has acquired the jurisdiction and powers of the former Court of Appeal which itself formed part of the Supreme Court of Judicature established under the Judicature Law, 1879, and the Supreme Court, by the combined effect of ss. 20, 21 and 28 of the local 1879 Law … was vested with the jurisdiction and powers exercised by the old High Court of Chancery in Jamaica, which, in such matters as it tried, adopted the practice and procedure of the High Court of Chancery in England then it follows that, there being no enactment or rule regulating the practice or procedure in respect of the matter here in issue, this court has jurisdiction in a proper case to relist an appeal which has been struck out or dismissed for non-appearance of an appellant there being no hearing on the merits."

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[17] (1972) 18 WIR 351, at page 359

[21] Mrs Foster-Pusey also took us to some of the other decisions of the court in which the matter of the court's inherent jurisdiction was considered, such as **Charles Stewart v Glennis Rose**[18] and **Lijyasu M Kandekore v COK Sodality Co-operative Credit Union Limited and others**[19], before concluding[20] that:

> "… the power to order that the hearing commence de novo is necessary to enable the court to fulfil its role as a court of law. In addition, in light of the history of the Court of Appeal, the Court would also have an inherent jurisdiction in so far as the management of appeals before it is concerned."

[22] Mr Hylton QC for the respondents was content to agree with and adopt Mrs Foster-Pusey's position on the issue of jurisdiction.

[23] As I have indicated, the applicants' starting point on this issue is that the court's jurisdiction to entertain the motion is to be found in the provisions of the Constitution, the Act and the CAR. Thus, as regards the constitutional provisions, the applicants refer to section 103(1), to which I have already referred[21]; and section 103(5), which provides that "[t]he Court of Appeal shall be a superior court of record and, save as otherwise provided by Parliament, shall have all the powers of such a court". However, save for the characterisation of the court as a superior court of record, which, as I will

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[18] (unreported), Court of Appeal, Jamaica, Motion No 15/1997, judgment delivered 17 June 1997
[19] [2017] JMCA App 20
[20] The interested party's submissions, para. 17
[21] At para. [1] above

in due course suggest, is an obviously relevant consideration, I do not think that the answer to the jurisdictional issue can readily be found in either of these provisions.

[24] As regards the Act, no more promisingly, as it seems to me, section 10 provides simply that, "[s]ubject to the provisions of this Act and to rules of court, [the court] shall have jurisdiction to hear and determine appeals from any judgment or order of the Supreme Court in all civil proceedings …". Again, this section appears to speak more directly to the court's authority to hear appeals rather than to a power, such as the one contended for by the applicants in this case, to vacate the hearing of a civil appeal which has already been heard by a properly constituted panel of the court.

[25] In relation to the rules, the applicants rely on rule 1.7(2)(n) of the CAR, which empowers the court to "take any other step, give any other direction or make any other order for the purpose of managing the appeal and furthering the overriding objective"; rule 2.15(a), which gives the court, in addition to the specific powers set out in rule 1.7, "all the powers and duties of the Supreme Court including in particular the powers set out in CPR Part 26"; and rule 2.15(g), which gives the court power to "make any incidental decision pending the determination of an appeal or an application for permission to appeal". In addition, the applicants also rely on rule 1.1(1) of the CPR, which proclaims the overriding objective of the rules to be to enable the court to deal with cases justly; and rule 1.1(2)(d), which states that dealing justly with a case includes "ensuring that it is dealt with expeditiously and fairly".

[26] In my view, the powers of the court contained in the rules referred to by the applicants in both the CAR and the CPR appear, as Mrs Foster-Pusey suggested, to be geared towards the court's general powers of management of appeals and the nature of the orders that can be made to facilitate the hearing and determination of appeals. Despite the seeming breadth of the power to "make any incidental decision pending the determination of an appeal", I am rather inclined to doubt that the framers of rule 2.15(g) could have intended it to incorporate as fundamental a power as the one contended for in this case. In any event, it seems to me that, on general principle, to the extent that the jurisdiction of the court is as conferred on it by "this Constitution or any other law"[22], nothing in either the CAR or the CPR can be taken to have expanded that jurisdiction in any way. In other words, as Lord Scott of Foscote observed in **Beverley Levy v Ken Sales & Marketing Ltd**[23], "while Rules can regulate the exercise of an existing jurisdiction they cannot by themselves confer jurisdiction".

[27] But, of course, the applicants also rely on the inherent jurisdiction of the court. Both Mr Braham and Mrs Foster-Pusey referred us to the following extract from Halsbury's, in which the learned editors classify the inherent jurisdiction of a court as a discrete source of procedural law:

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[22] Section 103(1) of the Constitution

[23] [2008] UKPC 6, para. 19

"Unlike all other branches of law, except perhaps criminal procedure, there is a source of law which is peculiar and special to civil procedural law and is commonly called the 'inherent jurisdiction of the court'. In the ordinary way, the Supreme Court, Court of Appeal, and the High Court, are superior courts and as such no matter is deemed to be beyond their jurisdiction (including the general administration of justice within their territorial limits, and powers in all matters of substantive law) unless it is expressly shown to be so. The County Court, although an inferior court, also has an inherent jurisdiction to regulate its own procedures, provided that the exercise of his power is not inconsistent with statute or statutory rules.

The jurisdiction of the court which is comprised within the term 'inherent' is that which enables it to fulfil, properly and effectively, its role as a court of law. It has been said that the overriding feature of the inherent jurisdiction of the court is that it is a part of procedural law, both civil and criminal, and not a part of substantive law; it is exercisable by summary process, without a plenary trial; it may be invoked not only in relation to parties in pending proceedings, but in relation to any one, whether a party or not, and in relation to matters not raised in the litigation between the parties; it must be distinguished from the exercise of judicial discretion; and it may be exercised even in circumstances governed by rules of court (although a claim should be dealt with in accordance with the rules of court, rather than by exercising the court's inherent jurisdiction, where the subject matter of the claim is governed by those rules). The term 'inherent jurisdiction' is not used in contradistinction to the jurisdiction of the court exercisable at common law or conferred on it by statute or rules of court. Even in an area which is not the subject of statute or statutory procedural rules, the court's inherent jurisdiction to regulate how the proceedings should be conducted is limited because (subject to certain established and limited exceptions) the court cannot exercise its power in such a way as will deny parties their fundamental common law right to participate in the proceedings in accordance with the common law principles of natural justice and open justice.

> In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine, and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent vexation or oppression, to do justice between the parties and to secure a fair trial between them."

[28] Much of this extract from Halsbury's explicitly derives from a seminal article written by the late Sir Jack Jacob, QC, The Inherent Jurisdiction of the Court[24], which, though published as long ago as 1970, continues to be treated as the authoritative exposition on the subject. In introducing the topic, Sir Jack made an important point on terminology:

> "To understand the nature of the inherent jurisdiction of the court, it is necessary to distinguish it first from the general jurisdiction of the court, and next from its statutory jurisdiction.
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> The term 'inherent jurisdiction of the court' does not mean the same thing as 'the jurisdiction of the court' used without qualification or description: the two terms are not interchangeable, for the 'inherent' jurisdiction of the court is only a part or an aspect of its general jurisdiction."

[29] The scope of the inherent jurisdiction of the court was recently explored by the Supreme Court of Canada in **Endean v British Columbia**. The context was provided by concurrent class action proceedings brought on behalf of persons who had been infected with hepatitis C by the Canadian blood supply between 1986 and 1990. The

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[24] (1970) Current Legal Problems 23

parties reached a pan-Canadian settlement agreement, which assigned a supervisory role to the superior courts of British Columbia, Quebec and Ontario. The issue was therefore whether judges of those courts were seised with a discretionary power to sit outside their respective home provinces with their judicial counterparts, for the purpose of hearing motions arising out of the settlement agreement.

[30] The Supreme Court held that they were. Delivering the main judgment of the unanimous court[25], Cromwell J concluded that the exercise of such a jurisdiction was sanctioned by discretionary statutory powers in both Ontario and British Columbia; but that, even in provinces in which there were no such provisions, in the absence of some clear limitation, the inherent jurisdiction of the court would extend to permitting sittings outside of the home provinces in these circumstances. Explaining the ambit of the court's inherent jurisdiction, Cromwell J described it[26] as –

> "… a residual source of power which a superior court may draw on in order to ensure due process, prevent vexation and to do justice according to law between the parties … In short, inherent jurisdiction, among other things, empowers a superior court to regulate its proceedings in a way that secures convenience, expeditiousness and efficiency in the administration of justice."

[31] In **Taylor and another v Lawrence and another**, the issue was whether the Court of Appeal of England and Wales had power to reopen an appeal after final

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[25] McLachlin CJ, Abella, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon, Côté and Brown JJ. Wagner J delivered a separate concurring judgment on behalf of himself and Karakatsanis J.
[26] At para. [60]

judgment had been given and drawn up. This issue arose because, after the conclusion of the appeal in which the appellants were unsuccessful, they obtained information which gave rise to the possibility of an appearance of bias against the judge of the County Court who had presided at the trial of the case. Delivering the judgment of the court of five judges[27] constituted to address the issue of jurisdiction, Lord Woolf CJ said this[28]:

> "16. ... [I]t is accepted that the Court of Appeal does not have any inherent jurisdiction in respect of appeals from the county court but only that which is given by statute. However, use of the word 'inherent' in this context means no more than that the Court of Appeal's jurisdiction depends on statute and it has no originating jurisdiction. The position is very much the same in relation to other appeals to the Court of Appeal. Its jurisdiction is to be determined solely by reference to the relevant statutory provisions.
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> 17. We here emphasise that there is a distinction between the question whether a court has jurisdiction and how it exercises the jurisdiction which it is undoubtedly given by statute. So, for example, a court does not need to be given express power to decide upon the procedure which it wishes to adopt. Such a power is implicit in it being required to determine appeals. It is also important when considering authorities which, it is suggested, are laying down principles as to the jurisdiction of a court, to ascertain whether they are doing more than setting out statements of the current practice of the court, which can be changed as the requirements of practice change. These powers to determine its own procedure and practice which a court possesses are also referred to as being within the inherent jurisdiction of the court, and when the term 'inherent jurisdiction' is used in this sense (as to which see The Inherent Jurisdiction of the Court by Master Sir Jack Jacob, Current Legal Problems

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[27] Lord Woolf CJ, Lord Phillips MR, Ward, Brooke and Chadwick LJJ
[28] At paras 16-17

(1970) 23 at p.32 et seq.), the Court of Appeal, as with other courts, has an inherent or implicit jurisdiction."

[32] As regards the position of the Court of Appeal as an intermediate Court of Appeal, Lord Woolf added the following[29]:

"26. ... [T]his court was established with two principal objectives. The first is a private objective of correcting wrong decisions so as to ensure justice between the litigants involved. The second is a public objective, to ensure public confidence in the administration of justice not only by remedying wrong decisions but also by clarifying and developing the law and setting precedents. ...

27. There can, of course be an appeal to the House of Lords from decisions of the Court of Appeal. However, the House of Lords is not in a position to hear more than a minority of the appeals which litigants would wish to bring. The number of Lords of Appeal in Ordinary is limited to twelve, and they are required to sit both in the Appellate Committee of the House of Lords and the Judicial Committee of the Privy Council. It would not be practical nor proportionate or appropriate for the House of Lords to be involved in resolving the type of issue which is raised by Mr and Mrs Lawrence in this case, relying as it does essentially on fresh evidence for re-opening the appeal.

28. In addition, there are cases where there is no right of appeal to the House of Lords if the party seeking to have a decision of first instance set aside has been refused permission to appeal to the Court of Appeal. If there is no more appropriate form of relief, then in relation to decisions in the county court (but not the High Court), it is possible that a remedy might be available if an application for judicial review were made. Such an application, however, would be subject to the limitations inherent in an application for

[29] At paras 26-28

> judicial review, namely that it is not a procedure which is suited to the resolution of issues of fact."

[33] Lord Woolf went on[30] to distinguish between the Court of Appeal's broad general jurisdiction, which is to hear appeals, and its implicit or implied jurisdiction arising out of the fact that, "[a]s an appellate court it has the implicit powers to do that which is necessary to achieve the dual objectives of an appellate court to which we have referred already". As an instance of this implicit or implied jurisdiction, Lord Woolf referred to Lord Diplock's observation in **Bremer Vulkan Schiffbau Und Maschinenfabrik v South India Shipping Corp Ltd**[31] that -

> "The power to dismiss a pending action for want of prosecution in cases where to allow the action to continue would involve a substantial risk that justice could not be done is thus properly described as an 'inherent power' the exercise of which is within the 'inherent jurisdiction' of the High Court. It would I think be conducive to legal clarity if the use of these two expressions were confined to the doing by the court of acts which it needs must have power to do in order to maintain its character as a court of justice."

And, second, to Lord Morris's comment in **Connelly v DPP**[32] that –

> "There can be no doubt that a court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. I would regard them as powers which are inherent in its jurisdiction.

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[30] At paras 50-54
[31] [1981] AC 909, 977
[32] [1964] AC 1254, 1301

> A court must enjoy such powers in order to enforce its rules of practice and to suppress any abuses of its process and to defeat any attempted thwarting of its process."

[34] Finally, after pointing out[33] that "[i]t is very easy to confuse questions as to what is the jurisdiction of a court and how that jurisdiction should be exercised", Lord Woolf concluded[34] that, in a case such as this, in which it was alleged that a decision of the court was invalid as a result of bias –

> "… [t]he need to maintain confidence in the administration of justice makes it imperative that there should be a remedy. The need for an effective remedy in such a case may justify this court taking the exceptional course of reopening proceedings which it has already heard and determined. What will be of the greatest importance is that it should be clearly established that a significant injustice has probably occurred and that there is no alternative effective remedy. The effect of reopening the appeal on others and the extent to which the complaining party is the author of his own misfortune will also be important considerations. Where the alternative remedy would be an appeal to the House of Lords this court will only give permission to reopen an appeal which it has already determined if it is satisfied that an appeal from this court is one for which the House of Lords would not give leave."

[35] **Taylor and another v Lawrence and another** was applied by the Court of Appeal of Belize in **RBTT Trust Limited v Cedric Flowers**. That was a case in which the unsuccessful respondent sought an order setting aside a judgment of the Court of Appeal after it had been delivered and perfected. The application was prompted by

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[33] At para. 54
[34] At para. 55

information which the respondent obtained subsequent to the judgment regarding the prior connection to the appellant of a member of the court which heard the appeal[35]. As a consequence of that connection, the respondent submitted, the decision of the court was tainted by the appearance of bias in one of its members.

[36] The respondent's application ultimately failed on two grounds. First, the court was not satisfied that he had no other effective remedy but to seek a re-opening and re-hearing of the appeal; and, second, the court considered that, in the circumstances of the case, a fair-minded and informed observer would not have concluded that there was any real possibility of bias. However, the court accepted that, in a proper case, it had jurisdiction to reopen its previous decision. After referring to the passage from Lord Woolf's judgment set out at paragraph [31] above, Mendes JA said the following[36]:

> "… I consider it quite rational and in the interests of justice for this court to reserve unto itself the power to re-open its decisions where a substantive injustice has been done and there is no other avenue of redress. I venture to say ... that public confidence in the judicial system would be undermined if this court were to refuse to re-hear appeals in those circumstances. Nothing undermines confidence in the administration of justice more certainly than an injustice left un-remedied." (Emphasis in the original)

[37] In **Lijyasu M Kandekore v COK Sodality Co-Operative Credit Union Limited and others**, after referring to the passage from Lord Woolf's judgment in

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[35] Morrison JA
[36] At para. [18]

Taylor and another v Lawrence and another set out at paragraph [28] above, Brooks JA noted[37] that, "in this court, there have been differing views expressed" on the issue of inherent jurisdiction. In this regard, Brooks JA referred to **Re D C, An infant**[38], in which Duffus P observed that "the Court of Appeal which is a creature of statute cannot go outside of the law and clothe itself with a jurisdiction which it may not have ... [I]t is usual to set out in the relevant statute in clear language the right of appeal and the powers vested in the appellate court". In **Mr and Mrs Valerie Edwards v Mr and Mrs Douglas Garel**[39], Rattray P, speaking to the jurisdiction of both the Resident Magistrate's Court and the Court of Appeal, after pointing out that they were both creatures of statute, stated that "[i]t is therefore within statutory enactments including Rules of Court that we must search to find any authority for the exercise of our jurisdiction"; and **Charles Stewart v Glennis Rose**, in which Walker JA (Ag) (as he then was) stated[40], without discussion, that "the Court of Appeal has no inherent jurisdiction".

[38] However, Brooks JA also noted that, in **Charles Stewart v Glennis Rose**, both Downer JA and Walker JA (Ag) specifically referred to section 9 of the Act, which gives to the Court of Appeal "the jurisdiction and powers of the former Court of Appeal". Additionally, Downer JA referred to section 10, which states that, subject to the provisions of the section, "the Court shall ... have all the power, authority and

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[37] At para. [52]
[38] (1966) 9 JLR 568, 569
[39] (1994) 31 JLR 217, 220
[40] At page 19

jurisdiction of the former Supreme Court prior to the commencement of the Federal Supreme Court Regulations, 1958". The result of this, Downer JA concluded[41], was that, "by legislative references in section 9 and 10 of [the Act] it acquired the historic inherent, common law, equity and procedural powers of the former Appeal Court which was part of the Supreme Court prior to 1962".

[39] On the basis of these authorities, and keeping in mind first principles, it seems to me to be possible to harmonise any apparent differences in view on the inherent jurisdiction of this court in the following way. As Duffus P pointed out in **Re D C, An infant**[42], "[n]o person has an automatic right of appeal from a court". This court therefore derives its general jurisdiction as an appellate court from the provisions of the Constitution, the Act and any other statute which specifically confers jurisdiction upon it. It is in this sense that the court's jurisdiction can properly be said to be confined to those matters which it is empowered by statute to hear and determine; or, put shortly, that the jurisdiction of the court is purely statutory. While the Act is, of course, the court's principal source of jurisdiction[43], there are various other statutes which also provide that an appeal will lie directly to the court in certain specified circumstances.[44]

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[41] At page 6
[42] At page 569
[43] As to which, see sections 10, 12, 13, 21A and 22, which together provide for appeals to the court against decisions in civil and criminal cases from the Supreme Court and the Parish Courts, in proceedings for habeas corpus and in relation to prerogative orders.
[44] See, for instance, to take one random example, section 14 of the Public Accountancy Act, which provides that a public accountant may appeal to the Court of Appeal against a refusal by the Public Accountancy Board to register him or her as a public accountant, or against a decision of the Board to exercise disciplinary powers against him or her.

[40] But it is necessary to distinguish between questions which relate to the jurisdiction of the court as an appellate court and questions which relate to how that jurisdiction may, or is to be, exercised. In this regard, as with all superior courts of record, this court enjoys a residual jurisdiction, described variously as an inherent, implicit or implied jurisdiction, or an inherent power within its jurisdiction, to do such acts as it must have power to do, in order to maintain its character as a court of justice and to enhance public confidence in the administration of justice. It is this jurisdiction which, among other things, empowers the court to regulate its own proceedings in a way that secures convenience, expeditiousness and efficiency.

[41] In some cases, of which **Berry and Morris v Kingston and St Andrew Corporation** provides a good example, it is possible to identify such powers by reference back, as sections 9 and 10 of the Act enjoin us to do, to the historical powers and procedures of the court's predecessors. But, in other cases, it may be necessary for the court to have resort from time to time to its inherent jurisdiction to control its processes. Two modern examples of this are provided by **Sarah Brown v Alfred Chambers**[45] and **American Jewellery Company Limited and others v Commercial Corporation Jamaica Limited and others**[46]. In both cases, this court assumed the power to correct a clerical error, or an error arising from an accidental slip

[45] [2011] JMCA App 16
[46] [2014] JMCA App 16

or omission in its judgment or order, despite the absence from the CAR of any specific power to do this.[47]

[42] So the question is whether this is a case in which the court should invoke its inherent jurisdiction in the sense in which I have described it. In both **Taylor and another v Lawrence and another** and **RBTT Trust Limited v Cedric Flowers**, in each of which the court was asked to reopen a previous decision on the basis of an allegation of apparent bias, one of the factors explicitly taken into account was the availability of alternative remedies. In the former case, Lord Woolf considered that, because of the restricted category of cases in which leave to appeal to the House of Lords was usually given, there was in fact "no alternative effective remedy"[48]. And, in the latter case, Mendes JA, who took the view[49] that the court "should be concerned with real and not fanciful alternative avenues of redress" indicated that he "would be prepared on the appropriate occasion to consider finding that, for the purposes of the application of the rule in **Taylor v Lawrence**, there would be no alternative avenue of redress where an appeal [to the Privy Council] is beyond the litigant's financial means".

[43] In this case, the applicants contend that, the judges having retired without having given a decision on the appeal, the impugned judgment is a nullity. If they are right about this, they submit, I think correctly, that this motion is their only remedy,

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[47] Nor was rule 42.10(1) of the CPR, which is the equivalent of the well-known 'slip rule', among the rules of the CPR incorporated into the rules of this court by rule 1.1(10) of the CAR.
[48] See para. [34] above
[49] At para. [27]

since an appeal to the Privy Council is only available in respect of "final decisions in any civil proceedings"[50], properly so called.

[44] But, in any event, the 1st applicant also contends that the long-running litigation in this matter has been financially ruinous to him and that, at almost 80 years of age, he continues to "suffer financially and otherwise with a ruined professional and business career"[51].

[45] Taking all these factors into account, it seems to me that this is a case in which it can fairly be said that the applicants have no effective alternative remedy to asking this court to hear the motion. The matters raised by the applicants carry obvious and significant implications, not only for their own interests, but also for the wider interests of the administration of justice as whole. In these circumstances, this court must inevitably also be concerned to ensure and promote public confidence in the administration of justice. In my view, those concerns will be best served in this case by the court, in the exercise of its inherent jurisdiction, hearing and determining the motion.

The status of the impugned judgment

[46] This issue arises because, as has been seen, (i) section 106(1) of the Constitution sets the retirement age of a judge of appeal at 70 years; and (ii) by July 2016, all of the judges had retired, without having delivered a decision on the appeal,

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[50] Constitution, section 110(1)(a)
[51] Affidavit of Dr Paul Chen-Young in support of Notice of Motion, sworn to on 17 October 2017 and filed on 20 October 2017, paras 22-23.

and without having received any permission pursuant to section 106(2) to continue in office for such period as may have been necessary to enable them to do so. In these circumstances, the applicants submit that the judges were entirely without authority to act as such on 1 December 2017 and that, accordingly, the impugned judgment is "unconstitutional, illegal, null and of no effect"[52].

[47] In a more guarded submission, Mrs Foster-Pusey submitted that, unless section 106(3) of the Constitution can be read as a free-standing provision which allows a judge of appeal to carry out certain functions, including delivery of judgments, regardless of the fact that he or she has attained retirement age (a position for which she did not appear to strongly contend), the impugned judgment is null and void and a hearing *de novo* is required.

[48] It is therefore necessary to give close consideration to section 106(3), the full text of which is as follows:

> "Nothing done by a Judge of the Court of Appeal shall be invalid by reason only that he has attained the age at which he is required by this section to vacate his office."

[49] In Mr Braham's submission, section 106(3) is constrained by its context and must therefore be given a restrictive, rather than an expansive, meaning. It cannot be read in isolation and must be read with section 106(2), in the sense that a judge will only be

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[52] Appellants' Written Submissions dated 25 November 2017, para. 56

protected by section 106(3) if section 106(2) has been complied with. In other words, only a judge who has received permission from the Governor-General to continue in office beyond the retirement age will be able to claim the protection of section 106(3). However, during the course of oral argument, Mr Braham did appear to allow that section 106(3) might also have some scope for operation in the case of an inadvertent omission to comply fully with section 106(2).

[50] For his part, Mr Hylton submitted that section 106(3) is in fact no more than a codification of the well-known *de facto* officer doctrine: it is therefore apt to validate the actions of a judge who, having attained the age of retirement, nevertheless continues to act as a judge without having obtained permission pursuant to section 106(2).

[51] We were helpfully referred by Mr Hylton to three cases from the region in order to illustrate the operation of the *de facto* doctrine. The first in time is **Whitfield v Attorney-General**[53], a decision of the Court of Appeal of The Bahamas. The issue arose in that case because it was said that, as a result of a deficiency in the process by which the tenure of office of the Chief Justice had been extended beyond the constitutional retirement age of 65, a decision given by him as a member of the Election Court would be ineffective in law. At first instance, Gonsalves-Sabola J (as he then was) held that, on the basis of the *de facto* doctrine, "any decision given by the Election Court of which the Chief Justice was a member, would have been valid despite any

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[53] (1989) 44 WIR 1

irregularities in the manner of extending his tenure of office after his attainment of the age of sixty-five years"[54].

[52] The Court of Appeal affirmed this decision. The court referred to, among others, the decision in **State of Connecticut v Carroll**[55], in which it was explained that "[a]n officer *de facto* is one whose acts, though not those of a lawful officer, the law, upon principles or policy and justice, will hold valid so far as they involve the interests of the public and third persons, where the duties of the office were exercised". Reference was also made to **Re James (an insolvent) (Attorney General intervening)**[56], in which Lord Denning MR observed of such a judge that:

> "… He sits in the seat of a judge. He wears the robes of a judge. He holds the office of a judge. Maybe he was not validly appointed. But, still, he holds the office. It is the office that matters, not the incumbent. … So long as the man holds the office, and exercises it duly and in accordance with law, his orders are not a nullity …"

[53] This principle was also applied by the Court of Appeal of Belize in **R v Myers**[57]. That was a case in which a judge of the Supreme Court continued to sit and presided over a large number of criminal trials, despite the fact that he had attained constitutionally mandated retirement age of 65. It was held that the *de facto* doctrine applied to protect the validity of the decisions of the judge taken after he had passed

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[54] (1989) 44 WIR 1, 13
[55] 38 Conn 449, at page 471 (1871)
[56] [1977] 1 All ER 364, at page 372
[57] (2009) 76 WIR 163

the retirement age. After a painstaking review of a number of relevant authorities, Mottley P concluded as follows[58]:

> "From the cases it is clear that for the de facto doctrine to apply, the judge must have a colourable title or authority. In addition, the judge must have acted in good faith and must have been believed by himself to have the necessary authority to act and has been treated by litigants as having such authority. The doctrine cannot be invoked by a person who knows that he has no authority to sit as a judge but none the less usurps the function of a judge. The rationale for the de facto doctrine is that the logic of annulling the decision of the de facto judge must yield to the need to protect the reputation of the law and the public confidence in it as well the interest of the parties who acted on the assumption that the trial was being properly conducted. There is no evidence to show that at the time of the trial the appellant questioned the competency of the judge to preside over the trial. Both the prosecution and defence proceeded on the basis that the judge was qualified to preside."

[54] And lastly, there is the notable first instance decision of Rahim J in the High Court of Trinidad and Tobago in **Shirley Sookar v The Attorney General of Trinidad and Tobago**[59]. That was a case in which a judge of the High Court, who had resigned his office some three years before without having delivered judgment, was reappointed for a day for the specific purpose of doing so. The claimant's challenge to

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[58] At para. [29]

[59] (unreported), High Court of Justice, Trinidad and Tobago, Claim No CV 2010-04777, judgment delivered 4 November 2014

the validity of his appointment failed on other grounds, but Rahim J also considered that it would have been possible to apply the *de facto* doctrine to the case as well.[60]

[55] So, against this background, I must now consider the meaning and effect of section 106(3). I can say at once that I agree with Mr Braham that the subsection cannot be divorced from its context and given an independent life of its own. I therefore find it impossible to read it as a free-standing provision, offering effective validation for an indefinite period of anything done by a judge of appeal after retirement. Were that so, it would in my view make a nonsense of section 106(1) and section 106(2), which establish a fixed age of retirement for judges of appeal, subject only to the possibility of an extension beyond that age for specified purposes.

[56] But I was initially not attracted to Mr Braham's next step, which was to say that section 106(3) can only apply to a judge who has received permission to continue in office under section 106(2). The reason for my hesitation was that, at first blush, I found it difficult to see why a judge who had received permission to continue in office pursuant to section 106(2) would need the protection of section 106(3) at all. However, on a closer rereading of section 106(3), taken in its context, I am now more inclined to think that Mr Braham may be correct on this score as well.

[57] Taking the analysis step by step, section 106(1) provides that a judge of the Court of Appeal "shall hold office until he attains the age of seventy years". Section

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[60] See paras 71-77

106(2) provides that, "[n]otwithstanding the fact that he has attained the age at which he is required by ... this section to vacate his office", a judge of the Court of Appeal may, with the permission of the Governor-General, acting in accordance with the advice of the Prime Minister, "continue in office for such period after attaining that age as may be necessary to enable him to deliver judgment ...". This is the context against which one comes to section 106(3), which provides that "[n]othing done by a **Judge of the Court of Appeal** shall be invalid by reason only that he has attained the age at which he is required by this section to vacate his office" (emphasis mine). But, as section 106(1) and section 106(2), read together, plainly establish, a "Judge of the Court of Appeal" ceases to hold office upon attaining age 70, unless permitted by the Governor-General to "continue" in office beyond it. So, as it now seems to me, it is strongly arguable that the reference in section 106(3) to "a Judge of the Court of Appeal" can only be read as a reference to a judge who has received the Governor-General's permission under section 106(2) to continue in office beyond age 70. Read this way, while it might be considered to reflect an abundance of caution, section 106(3) provides a complement to, rather than an extension of, the meaning of section 106(1) and section 106(2).

[58] It follows that, in the light of my late conversion to Mr Braham's position on the import of section 106(3), I find it more difficult to accept Mr Hylton's submission that section 106(3) is in fact no more than a codification of the *de facto* doctrine. In my view, as I have already indicated, the phrase "a Judge of the Court of Appeal" in section 106(3) can only be read as a reference to "a Judge of Appeal properly so called in the

context of section 106(1) and (2), and not to a *de facto* judge in the sense in which that phrase has come to be understood.

[59] However, given that the *de facto* doctrine is itself a well-established doctrine of the common law, I think that it is still necessary, even if only for completeness, to consider whether it has any application in this case.

[60] There is no question that the judges, having reached their respective retirement ages, had retired. There is no evidence that an extension was given to any of them under section 106(2). The vacancies in the complement of the court brought about by their retirement were filled. Unlike the judge referred to in Lord Denning MR's famous dictum in **Re James (an insolvent)(Attorney General intervening)**[61], none of the judges can in any sense be said, after passing the age of retirement, to have held the office of a judge, worn the robes of a judge or sat in the seat of a judge. Nor has it been suggested that they acted under or by virtue of any kind of colourable authority, certainly not in the sense in which the Chief Justice in **Whitfield v Attorney-General** and the trial judge in **R v Myers** both continued to sit in court after their respective retirement ages. Accordingly, although no one can possibly doubt that the judges all acted in perfectly good faith in continuing to work on and producing the impugned judgment, I am clearly of the view that the *de facto* doctrine cannot be applied in this case.

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[61] See para. [52] above

[61] So I come then, finally, to the question of the status of the impugned judgment. In search of the answer to this question, Mrs Foster-Pusey very helpfully referred us to some authorities from different parts of the Commonwealth which may have a bearing on the matter. I will look briefly at a few of them.

[62] In **Surendra Singh and Others v The State of Uttar Pradesh**[62], the criminal appeals of three persons convicted of murder were heard by a two member panel of the High Court at Allahabad (Lucknow Bench) on 5 December 1952. The court (Kidwai and Bhargava JJ) reserved judgment, whereupon Bhargava J was transferred to Allahabad. While there, Bhargava J dictated a 'judgment', which purported to be a joint judgment on behalf of himself and Kidwai J, signed it on every page and at the end, and sent it back to Kidwai J in Lucknow. But, before the 'judgment' could be delivered, Bhargava J unfortunately died on 24 December 1952. On 5 January 1953, having signed and dated it, Kidwai J purported to deliver it as the judgment of the court. The appeals were dismissed and the sentence of death passed on the appellant was confirmed.

[63] The appellant appealed to the Supreme Court of India and the question for the court was whether this 'judgment' could have been validly delivered after the death of Bhargava J. It was held that it was not a valid judgment because, by the time Kidwai J purported to deliver it on 5 January 1953, the other member of the Bench which heard

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[62] [1954] AIR 194; [1954] SCR 330

the appeal had died. The appeal was accordingly allowed and the case remitted to the High Court for a re-hearing and delivery of a proper judgment. The court said this:

> "… [H]owever, much a draft judgment may have been signed beforehand, it is nothing but a draft till formally delivered as the judgment of the court. Only then does it crystallise into a full fledged judgment and become operative. It follows that the Judge who 'delivers' the judgment, or causes it to be delivered by a brother Judge, must be in existence as a member of the court at the moment of delivery so that he can, if necessary, stop delivery and say that he has changed his mind. There is no need for him to be physically present in court but he must be in existence as a member of the court and be in a position to stop delivery and effect an alteration should there be any last minute change of mind on his part. If he hands in a draft and signs it and indicates that he intends that to be the final expository of his views it can be assumed that those are still his views at the moment of delivery if he is alive and in a position to change his mind but takes no steps to arrest delivery. But one cannot assume that he would not have changed his mind if he is no longer in a position to do so. A Judge's responsibility is heavy and when a man's life and liberty hang upon his decision nothing can be left to chance or doubt or conjecture; also, a question of public policy is involved."

[64] In **Ritcey et al v The Queen**[63], the Supreme Court of Canada was concerned to apply a section of the Judicature Act of Nova Scotia[64] which authorised a judge who had resigned his office to give judgment or make an order at any time within eight weeks after his resignation, in any proceeding previously tried or heard by him, as if he had continued in office. In issue were four cases in which the particular judge involved, a

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[63] [1980] 1 SCR 1077
[64] Section 33(1), Judicature Act, 1972 (N.S.), c.2

County Court judge, having heard evidence but given no decision prior to the acceptance of his resignation due to deteriorating health, had pronounced verdicts of acquittal subsequent to, but within eight weeks of, his resignation. In a fifth case, the same judge, who had neither tried nor heard the case prior to his resignation, called witnesses and took evidence in respect of sentence within the eight week period after the resignation.

[65] In so far as is relevant to this case, the Supreme Court held, applying section 33(1), that the judge's decisions with respect to the four persons in relation to whom he had heard evidence before his resignation were validly made. However, the decision in respect of the fifth, whose case the judge had neither tried nor heard evidence in respect of before his resignation, was not valid:

> "The judge's extended authority described in s. 33(1) of the Judicature Act is … limited in its application to 'any proceedings previously heard or tried before him …' and in the [fifth case], [the judge] had neither tried nor heard his case when he embarked on the exercise of calling witnesses and taking evidence in respect of the sentence to be awarded. In this regard he was acting without any authority whatever …"[65]

[66] In **Orient Bank Limited v Fredrick Zaabwe and Mars Trading Limited**[66], an appeal was heard by a panel of five judges of the Supreme Court of Uganda on 6 December 2006. The unanimous decision of the court to allow the appeal was

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[65] At page 1087

[66] (unreported), Supreme Court of Uganda, Civil Application No 17 of 2007, judgment delivered 22 January 2008

pronounced in separate judgments of the five judges of appeal on 10 July 2007. However, by that date, one of the five judges who heard the case had retired from service. The losing party subsequently asked the Supreme Court to set aside this judgment, in reliance on (among other grounds) Article 131(1) of the Constitution of Uganda, pursuant to which the Supreme Court is duly constituted at any sitting if it consists of not less than five members. It was accordingly submitted that at the time of its delivery the court was not completely constituted, since 'any sitting' included a sitting for the purpose of delivering judgment, and the judgment was therefore invalid.

[67] Among the authorities cited to the court was **Surendra Singh and Others v The State of Uttar Pradesh**. While acknowledging the reasoning of the court in that case, the Supreme Court of Uganda nevertheless concluded that, having regard to the provisions of Ugandan law, the death or retirement of a judge in that jurisdiction did not necessarily invalidate an undelivered judgment which was signed by the judge before his death or retirement. The explicit basis of this conclusion was a provision of the Ugandan Supreme Court Rules[67] that "[w]here judgment, or the reasons for a decision, have been reserved, the judgment of the court, or a judgment of any judge, … being in writing and signed, may be delivered by any judge, whether or not he or she sat at the hearing …". For the purposes of this sub-rule, the court observed, "… it is immaterial that the judge is prevented by death or retirement provided that at the time of writing and signing the judgment the judge was a member of the Court".

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[67] Judicature (Supreme Court) Rules (S.I. 13-11), rule 32(8)

[68] In **Mr and Mrs Chimuza v Oswald Dzepasi**[68], the High Court of Zimbabwe had for consideration the case of a magistrate who, having heard and recorded the evidence of witnesses for the plaintiff and the defendant, left the service without having written and delivered judgment in the matter. The issue before the High Court concerned the validity of the judgment subsequently rendered in the case, with the consent of the parties, by another magistrate on the basis of his perusal of the record of the proceedings which had taken place before the former magistrate. In concluding that it was a nullity, Mwayera J observed, citing previous authority of the court, that –

> "… [where] a magistrate retires or is in capacitated [sic] or recuses him/herself or becomes *functus officio* the proceedings are a nullity. The proceedings are deemed abortive and have to be started afresh before a different magistrate … in the case of a resigned or retired magistrate like *in casu* … administrative remedies of recalling and having the individual take oath of office to finalise the partly heard matter would cure the anomaly of delay of proceedings starting *de novo*."[69]

[69] If there is a common thread running through these cases, albeit each based on different constitutional and statutory regimes, it seems to me to be this: where a judge dies, resigns or retires without having rendered judgment in matters heard by him or her prior to demitting office, absent some specific permission allowing him or her to do

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[68] (unreported), High Court of Zimbabwe, HH 487-15 CIV 'A' 224/14, judgment delivered 27 May 2015

[69] The same result was held to follow in the later Zimbabwean case of **The State v Brian Mugodhi**, (unreported), High Court of Zimbabwe, HH 104-17 CRB MRDP 38/12, judgment delivered 14 February 2017. In that case, the magistrate who heard the evidence having died before handing down a verdict, another magistrate did so on the basis of the record of the proceedings before the late magistrate and passed sentence on the defendant.

so (as, for instance, in section 106(2), or in provisions found in statute or rules, as in cases like **Ritcey et al v The Queen** and **Orient Bank Limited v Fredrick Zaabwe and Mars Trading Limited**), any 'judicial' act subsequently done by him or her will have been done without authority.

[70] It accordingly seems to me that, as I have already suggested, the only possible basis upon which a judge of appeal can continue to perform as such after he or she has attained retirement age is by virtue of permission given for the purpose by the Governor-General under section 106(2) of the Constitution. In this case, as far as the court has been able to ascertain, none was either sought or obtained. It therefore follows that, the judges all having retired before delivering judgment in this appeal, the impugned judgment handed down on 1 December 2017 must be regarded as a nullity. And it follows further that the applicants have made good their contention for an order that the appeal should be set down for a re-hearing at the earliest convenient time.

The fair hearing within a reasonable time issue

[71] As might be expected, the applicants' starting point on this issue is section 16(2) of the Constitution:

> "In the determination of a person's civil rights and obligations or of any legal proceedings which may result in a decision adverse to his interests, he shall be entitled to a fair hearing within a reasonable time by an independent and impartial court or authority established by law."

[72] The applicants also rely on **Grahame Henry Bond v Dunster Properties Ltd & Others**[70], a decision of the Court of Appeal of England and Wales, to make the point that the right to a fair hearing within a reasonable time, which is also a common law right, incorporates a right to timely delivery of judgments. Thus, as one contemporary commentator has recently observed in an article to which the applicants referred us[71], "[t]he guaranteed right to a fair hearing applies from the time of the initial proceeding until the final judgment on appeal".

[73] With a view to establishing a norm in this regard, the applicants referred us to the decisions of this court in **Desmond Bennett v Jamaica Public Service Company Ltd and another**[72], in which Brooks JA described a period of delay of almost three years as "clearly excessive"; and of the Caribbean Court of Justice in **Yolande Reid v Jerome Reid**[73], in which the court observed that "as a general rule no judgment should be outstanding for more than six months and unless a case is one of unusual difficulty or complexity, judgment should normally be delivered within three months at most".

[74] In the circumstances of this case, in which the judges' decision was outstanding for over four years, and in which the judges having retired without any indication of the Governor-General having given permission to "continue in office for such period ... as

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[70] [2011] EWCA Civ 455
[71] Sha-Shana Crichton, Justice Delayed is Justice Denied: Jamaica's Duty to Deliver Timely Reserved Judgments and Written Reasons for Judgment, 44 Syracuse J. Int'l L. and Commerce 1 (2016)
[72] [2013] JMCA Civ 28
[73] [2008] CCJ 8 (AJ), para. 22

may be necessary to enable [them] to deliver judgment ...", the applicants submit that there has been a breach of their right under the Constitution and at common law to a fair hearing within a reasonable time. Further, that by way of redress for this wrong, the court should, not only vacate the hearing, but also order the Attorney-General to pay the costs incurred by them in prosecuting the hearing before the judges. For this point, the applicants rely on Lord Bingham of Cornhill's statement in **Jennifer Gairy (as administratrix of the estate of Eric Matthew Gairy, deceased) v The Attorney General of Grenada**[74], that "[t]he court has, and must be ready to exercise, power to grant effective relief for a contravention of a protected constitutional right".

[75] As I have already noted, the interested party takes the position that the applicants' complaint of a breach of their right to a fair hearing within a reasonable time is not one that can properly be determined in the context of these proceedings. Mrs Foster-Pusey submitted, citing section 19 of the Constitution, that the proper forum for the ventilation of such a complaint is the Supreme Court. In so far as is presently relevant, section 19 provides as follows:

> "19 – (1) If any person alleges that any of the provisions of this Chapter has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress.

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[74] [2001] UKPC 30, para. 23

(2) ...

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

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

(5) **Any person aggrieved by any determination of the Supreme Court under this section may appeal therefrom to the Court of Appeal**.

(6) Parliament may make provision or authorize the making of provision with respect to the practice and procedure of any court for the purposes of this section and may confer upon that court such powers, or may authorize the conferment thereon of such powers, in addition to those conferred by this section, as may appear to be necessary or desirable for the purpose of enabling that court more effectively to exercise the jurisdiction conferred upon it by this section." (Emphasis supplied)

[76] Mrs Foster-Pusey accordingly submitted that the Court of Appeal is an appellate body and not the court of original jurisdiction in respect of constitutional matters; the court is therefore not empowered to make a determination first on the question of whether the applicants' fundamental rights and freedoms have been abrogated and provide redress in respect of same. And this is so, it was submitted, notwithstanding

that the alleged breach arises from a matter that is being adjudicated by the Court of Appeal.

[77] Pointing out that the right to a fair hearing "within a reasonable time" is not an absolute right, Mrs Foster-Pusey submitted further that the question of whether or not there has been a breach of the applicants' right to a fair hearing in a reasonable time in this case necessitates detailed evidence and information from "the body that is said to have committed the breach". The failure of the applicants to adopt the "correct course" in seeking constitutional relief therefore deprives the court and the parties of the benefit of evidence in relation to the reason/s for the delay in delivering judgment and any mitigating factors so as to determine whether the delay may be justified.

[78] Substantially for the reasons advanced by Mrs Foster-Pusey, I agree that the applicants' complaint of a breach of their right to a fair trial within a reasonable time in this case is best brought and resolved in the Supreme Court. As Lord Templeman pointed out in the oft-cited decision of the Privy Council on appeal from a decision of this court in **Bell v Director of Public Prosecutions and Another**[75], which was also a case dealing with delay (albeit in the context of criminal proceedings) -

> "... the courts of Jamaica must balance the fundamental right of the individual to a fair trial within a reasonable time against the public interest in the attainment of justice in the context of the prevailing system of legal administration and the prevailing economic, social and cultural conditions to be found in Jamaica. The administration of justice in Jamaica is

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[75] [1985] 1 AC 937, at page 953

> faced with a problem, not unknown in other countries, of disparity between the demand for legal services and the supply of legal services. Delays are inevitable."

[79] In similar vein, Mrs Foster-Pusey also referred us to **Dyer v Watson and Another**[76], an appeal to the Privy Council from a decision of the High Court of Justiciary of Scotland. In that case, the Board was concerned with the impact on a criminal prosecution of the reasonable time requirement of article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms[77], which is in terms very similar to section 16(2) of the Constitution. Identifying the parameters of the enquiry which the court is required to undertake in such cases, Lord Bingham of Cornhill said the following[78]:

> "52. In any case in which it is said that the reasonable time requirement … has been or will be violated, the first step is to consider the period of time which has elapsed ... The threshold of proving a breach of the reasonable time requirement is a high one, not easily crossed. But if the period which has elapsed is one which, on its face and without more, gives ground for real concern, two consequences follow. First, it is necessary for the court to look into the detailed facts and circumstances of the particular case ... Secondly, it is necessary for the contracting state to explain and justify any lapse of time which appears to be excessive.
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> 53. The court has identified three areas as calling for particular inquiry. The first of these is the complexity of the case. It is recognised, realistically enough, that the more

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[76] [2002] UKPC D1, [2004] 1 AC 379, at paras 52-55

[77] "In the determination ... of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law ..."

[78] At paras 52-55

> complex a case, the greater the number of witnesses, the heavier the burden of documentation, the longer the time which must necessarily be taken to prepare it adequately for trial and for any appellate hearing. But with any case, however complex, there comes a time when the passage of time becomes excessive and unacceptable.
>
> 54. The second matter to which the court has routinely paid regard is the conduct of the defendant. In almost any fair and developed legal system it is possible for a recalcitrant defendant to cause delay by making spurious applications and challenges, changing legal advisers, absenting himself, exploiting procedural technicalities, and so on. A defendant cannot properly complain of delay of which he is the author. But procedural time-wasting on his part does not entitle the prosecuting authorities themselves to waste time unnecessarily and excessively.
>
> 55. The third matter routinely and carefully considered by the court is the manner in which the case has been dealt with by the administrative and judicial authorities. It is plain that contracting states cannot blame unacceptable delays on a general want of prosecutors or judges or courthouses or on chronic under-funding of the legal system. It is, generally speaking, incumbent on contracting states so to organise their legal systems as to ensure that the reasonable time requirement is honoured. But nothing in the Convention jurisprudence requires courts to shut their eyes to the practical realities of litigious life even in a reasonably well-organised legal system. ..."

[80] In my view (naturally with such differences in emphasis as the nature of the case will dictate), these or similar considerations are potentially as applicable to the enquiry in which the determination of whether the applicants' section 16(2) rights have been breached will obviously call for in this case. Accordingly, in order to balance the applicants' rights against such other factors as it may be relevant, it will be necessary for evidence to be adduced on both sides and assessed before a proper determination

can be made. It further seems to me that it may well be with considerations of this sort in mind that section 19(3) of the Constitution has assigned original jurisdiction to the Supreme Court (and section 19(5) an appellate jurisdiction to this court) in respect of alleged beaches of fundamental rights.[79]

[81] I would therefore hold that, on this motion, the court should make no ruling on the fair hearing within a reasonable time issue.

Conclusion

[82] It has given me absolutely no pleasure to have felt obliged to conclude that a judgment prepared by a distinguished former President of this court, with the concurrence of two former senior judges of appeal, is a nullity. As I have already indicated, there is no question that in preparing it, the judges acted in good faith and, I might add, in accordance with the longstanding practice of the court. But, ultimately, the motion has given rise to a pure question of law, which cannot admit of any considerations relating to the motivation of the judges, the sincerity of their efforts or the circumstances which may have contributed to the judgment not being delivered before their retirement.

[83] For the reasons which I have attempted to give, I would accordingly propose that the court make the following orders on the amended notice of motion:

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[79] See also the Judicature (Constitutional Redress) Rules, 1963, which flesh out the detail of how this jurisdiction is to be exercised.

1. The judgment handed down by the court in Supreme Court Civil Appeal No 39/2006 ('the appeal') is hereby declared to be null and void and of no legal effect.

2. The hearing of the appeal which ended on 6 November 2013 is hereby vacated.

3. In consultation with the parties, the Registrar is hereby directed to fix a date for the *de novo* hearing of the appeal as early as may be convenient to the court and to the parties.

4. There will be no order as to costs.

[84] As I have already indicated, I agree with all the other orders proposed by Brooks JA.

PHILLIPS JA

[85] I have had the opportunity of reading in draft the very thorough and detailed reasons for judgment by the learned President and my learned brother, Brooks JA, and agree with their conclusions. However, as this is an unusual and extraordinary application with rather far reaching implications, I wish to add a few words of my own.

Costs, discharge of the freezing order and the payment of funds

[86] With regard to the reliefs sought numbered 3, 4, 5 and 6, namely the costs thrown away in 2013, and the costs of and incidental to this motion, the issue of

discharge of the freezing order issued by R Anderson J (as he was then), and the payment of living expenses to the 1st applicant from the fund created from the sale of proceeds of the assets of the applicants, I too find myself, along with the learned President, in full agreement with Brooks JA's reasoning and conclusions and am content to endorse them without making any comments on those issues.

Should the court address the appellants' complaint of a breach of their right to a fair hearing within a reasonable time?

[87] I am in agreement with the submissions of the learned Solicitor-General, Mrs Foster-Pusey QC, that the applicants' complaint of a breach of their right to a fair hearing within a reasonable time, is not one that can properly be determined in the context of these proceedings. The learned Solicitor-General submitted, citing several authorities, some of which have been referred to by my learned brothers, and section 19 of the Constitution of Jamaica (the Constitution), that the Court of Appeal is an appellate body and not a court of original jurisdiction in respect of constitutional matters. The court is not, she argued, empowered to make a determination in the first instance on the question of whether there has been abrogation of any of the applicants' fundamental rights and freedoms and to provide redress in respect of the same. This, she indicated, was so, notwithstanding that the alleged breach arises from a matter that was being adjudicated by the Court of Appeal. She urged this court not to make any determination on the alleged breach of the applicants' rights to a fair hearing within a reasonable time. I agree that we should not make any ruling on that issue.

Jurisdiction of the court to vacate the hearing and order a *de novo* hearing

[88] With regard to whether this court has the jurisdiction to vacate the hearing of the applicants' appeal no 39/2006 which ended on 6 November 2013, and to order that the appeal be heard *de novo*, the applicants asserted that this court had the jurisdiction to hear the application by virtue of the Judicature (Appellate Jurisdiction) Act (JAJA), the Court of Appeal Rules (CAR) and its inherent jurisdiction and/or the right of the court to regulate its own procedure, and to make such orders as the interests of justice require.

[89] Section 10 of JAJA provides that in relation to appeals from any judgment or order of the Supreme Court, in all civil proceedings, the court shall have the jurisdiction to hear and determine appeals, and for all purposes of, and incidental to the hearing and determination of any appeal, and the amendment, execution and enforcement of any such judgment, the court shall have all the power, authority and jurisdiction of the former Supreme Court, prior to the commencement of the Federal Supreme Court Regulations, 1958. The examination of the jurisdiction and powers of the former Court of Appeal do not indicate that any such order could be made. However, section 14 of JAJA does contain express provisions and contemplates the court making an order for a new trial, but that relates to criminal proceedings in the court below.

[90] Section 10 of JAJA also relates to the jurisdiction to hear and determine appeals from any judgment from the court below, and speaks to "for all purposes of and incidental to the hearing and determination of any appeal". In my view, the section

does not embrace permitting the court to make an order to vacate the hearing of the appeal so that the hearing of the appeal can be started again.

[91] Equally, in my view, the CAR does not contemplate an order to vacate the appeal and to start *de novo* being made either. The powers of the court in relation to civil appeals are set out in rule 1.7 (under the court's general powers of management) and rule 2.15 (listing the general powers of the court, including, in particular, the powers set out in part 26 of the Civil Procedure Rules 2002 (CPR)). Additionally, the powers of the single judge of appeal are even more limited under the rule (2.11). I agree with the submission of the Solicitor-General and reject those of counsel for the applicants relating to this issue, as I am of the view that the provisions set out in the rules in relation to the powers of the court to begin afresh, are limited to the proceedings in the court below. Also, the application before the court to vacate the appeal and to start *de novo*, was not in the vein of making any incidental decision pending the determination of an appeal or taking any other step or giving any other direction or order for the purposes of managing the appeal, and furthering the overriding objective, which focuses on enabling the court to deal with cases justly. I hold the view, therefore, that there are no provisions in either the JAJA or the CAR which empowers the court to make the order being sought in this regard by the appellants.

[92] However, that is not an end of the matter. The next question with regard to whether this court has authority to hear the application, and to grant the specific relief prayed for to vacate the hearing of the appeal and to start the appeal *de novo,* requires

an examination of whether it has the inherent jurisdiction to do so. For this determination, I am persuaded by the powerful dictum of Lord Woolf, on behalf of the English Court of Appeal, in the judgment in **Taylor and another v Lawrence and another** [2002] EWCA Civ 90. One important issue in that case, was whether the Court of Appeal had power to re-open an appeal after it had given a final judgment and that judgment had been drawn up. The judgment of the Court of Appeal in this case was delivered in open court, wherein the appeal was allowed, the decision of the trial judge was set aside and a new trial was ordered before another judge of the Supreme Court. In their amended notice of motion to this court, the applicants also seek a declaration that the judgment be declared null and void and of no legal effect.

[93] The learned authors of Halsbury's Laws of England, Volume 11 (2015), paragraph 23 describe the inherent jurisdiction of the court as follows:

> "... The jurisdiction of the court which is comprised within the term 'inherent' is that which enables it to fulfil, properly and effectively its roles as a court of law. It has been said that the overriding feature of the inherent jurisdiction of the court is that it is part of procedural law, both civil and criminal, and not a part of substantive law; it is exercisable by summary process, without a plenary trial; it may be invoked not only in relation to parties in pending proceedings, but in relation to any one, whether a party or not, and in relation to matters not raised in the litigation between the parties;...
>
> In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine, and has been defined as being the reserve or fund of powers, a residual source of powers which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent

> vexation or oppressions, to do justice between the parties and to secure a fair trial between them."

[94] Lord Woolf in **Taylor v Lawrence** stated that the appellate court is established with two principal objectives: to correct wrong decisions so as to ensure justice between the litigants involved; and to ensure public confidence in the administration of justice not only by remedying wrong decisions, but also by clarifying and developing the law and setting precedents. In paragraph 50 of the judgment, he stated, that while it is uncontroversial that the court was established to hear appeals, equally it was not established to exercise an originating jurisdiction. So, in that sense, perhaps, it could be said that it has no inherent jurisdiction. However, he stated further that it was wrong to state, and I agree, that the appellate court has no implicit or implied jurisdiction, because it is an appellate court, as it does have the implicit powers to do that which is necessary to achieve the dual objectives set out above.

[95] Lord Woolf endorsed the speech of Lord Morris of Borth-Y-Gest in **Connelly v DPP** [1964] AC 1254, 1301 where Lord Morris said:

> "There can be no doubt that a court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. I would regard them as powers which are inherent in its jurisdiction. A court must enjoy such powers in order to enforce its rules of practice and to suppress any abuses of its process and to defeat any attempted thwarting of its process."

[96] Lord Woolf continued in paragraph 54 of the judgment to state this:

> "... It is very easy to confuse questions as to what is the jurisdiction of a court and how that jurisdiction should be exercised. The residual jurisdiction which we are satisfied is vested in a court of appeal to avoid real injustice in exceptional circumstances is linked to a discretion which enables the court to confine the use of that jurisdiction to the cases in which it is appropriate for it to be exercised. There is a tension between a court having a residual jurisdiction of the type to which we are here referring and the need to have finality in litigation. The ability to reopen proceedings after the ordinary appeal process has been concluded can also create injustice. There therefore needs to be a procedure which will ensure that proceedings will only be reopened when there is a real requirement for this to happen."

[97] He stated that one situation in which that could occur was one in which it was alleged that the decision was invalid. In **Taylor v Lawrence**, the allegation was that the court which made the decision was biased. In the instant case, the allegation is that the decision is null and void and of no legal effect. This court has held in **Charles Stewart v Glennis Rose** (unreported), Court of Appeal, Jamaica, Motion No 15/1997, judgment delivered 17 June 1997, that the Court of Appeal has an inherent jurisdiction as has the Supreme Court.

[98] I am of the view that the Court of Appeal, in order to act effectively to achieve its objectives, has the power to do so through its inherent jurisdiction, and is vested with that residual jurisdiction to avoid real injustice, particularly in exceptional circumstances, as are alleged to exist in the instant case.

The interpretation of section 106 of the Constitution of Jamaica/ the *de facto* officer doctrine

[99] The gravamen of my concern relates to the appropriate interpretation to be given of section 106 of the Constitution, on which the applicants have relied in support of the order sought at paragraph 1A of the amended notice of motion filed in this court on 14 December 2017. Section 106(1)–(3) reads as follows:

> "106.-(1) Subject to the provisions of subsections (4) to (7) (inclusive) of this section, a Judge of the Court of Appeal shall hold office until he attains the age of seventy years:
>
> Provided that he may at any time resign his office.
>
> (2) Notwithstanding that he has attained the age at which he is required by or under the provisions of this section to vacate his office a person holding the office of Judge of the Court of Appeal may, with the permission of the Governor-General, acting in accordance with the advice of the Prime Minister, continue in office for such period after attaining that age as may be necessary to enable him to deliver judgment or to do any other thing in relation to proceedings that were commenced before him before he attained that age.
>
> (3) Nothing done by a Judge of the Court of Appeal shall be invalid by reason only that he has attained the age at which he is required by this section to vacate his office."

[100] Gonsalves-Sabola J in **Whitfield v Attorney-General** (1989) 44 WIR 1, 19 in the Supreme Court of The Bahamas, stated:

> "A Constitution is the organic law of a country. It sets the parameters within which the country will be governed. It establishes the institutional structures of Government and either expressly, or by necessary implication, their inter-relationship, and spells out the basic rights of citizens and the obligations of the executive. Because a Constitution is

> drawn in such large outlines to satisfy its peculiar purpose, it has come to be treated in a special way."

[101] He recognised that the method of interpreting a Constitution should be with less rigidity and greater generosity than other statutes. Indeed, it is well recognised, that one ought not to give the provisions of the Constitution a narrow and technical construction, but rather a large, liberal and purposive interpretation as has been done over decades.

[102] It is apparent that section 106(1) of the Constitution provides the mandatory age of retirement of a judge of the Court of Appeal as being on the attainment of 70 years. Section 106(2) states that notwithstanding that he has attained that age, and is required to vacate the office, nonetheless, he can continue in office with the permission of the Governor-General, on the advice of the Prime Minister, for such period after attaining that age, as may be necessary to permit him: (i) to deliver judgments; and (ii) do any other thing in relation to proceedings which he had commenced before he had attained that age.

[103] These two provisions are fairly clear and in respect of the instant matter, all three judges whose judgment was delivered on 1 December 2017 had attained the age of 70 years, the mandatory age of retirement, and had proceeded on retirement. There is nothing in the evidence that indicates that permission had been obtained from the Governor-General, on the advice of the Prime Minister, for any of them to continue in office, so that aspect of section 106(2) of the Constitution is not applicable in this case.

[104] The issue arises therefore, what is the interpretation or construction to be given to section 106(3) of the Constitution, which speaks to acts of a judge of the Court of Appeal not being invalidated by reason only that he has reached the age at which he is required to vacate his office.

[105] The applicants did not address this provision at all in their written submissions. In oral submissions, I understood Mr Braham QC to be asserting that sections 106(2) and (3) of the Constitution must be read together, and once the application had been made under section 106(2), then any act performed by the judge, who had attained the age of 70 years, having demitted office, would not be invalidated. The section is to be interpreted in its context, and interpreted and applied out of an abundance of caution, if section 106(2) has not been complied with effectively, or there was any defect in compliance. The Solicitor-General queried whether section 106(3) must be read as following section 106(2); was it merely affirming that when a judge of the Court of Appeal was allowed to continue in office, then whatever he did while continuing in office was to be valid, irrespective of the fact that he had attained the age when he was required by the section to vacate his office, or was the section free standing, in that, it allowed a judge of the Court of Appeal to carry out certain functions (including the delivery of judgments), regardless of the fact that he had attained the age of retirement? She submitted that it could be argued that section 106(3) was not necessary to support section 106(2), as it was clear in section 106(2) that the judge continued in office, and had power to deliver judgments, or to do any other thing relating to proceedings that were commenced before him before he reached the age of

retirement. However, on the other hand, The Solicitor General said that it could be argued that such a broad construction of section 106(3) would be dangerous, as it had not outlined any limits as to what a judge who had retired would be able to do.

[106] I must say that I am very attracted to the "*de facto* officer doctrine" being applicable to and giving meaning to section 106(3) of the Constitution, particularly, as I do not accept that it is only applicable once an application for permission has either been made or granted under section 106(2) or potentially has been made or granted but is defective. In my view, sections 106(2) and (3) do not necessarily have to be read together. Equally, I do not accept that with regard to the second limb of the doctrine, the fact that a judge was drawing a pension would eliminate any consideration that the judge had been acting in good faith as submitted by Mr Hylton QC.

[107] The "*de facto* officer doctrine" is a longstanding doctrine of the common law and has been summarised in Wade & Forsyth Administrative Law, 8th edition, pages 291-292, as follows:

> "The acts of an officer or judge may be held to be valid in law even though his own appointment may be invalid and in truth he has no legal power at all. The logic of annulling all his acts has to yield to the desirability of upholding them where he has acted in the office under a general supposition of his competence to do so."

[108] The authorities show that the *de facto* officer must have some basis for his assumption of office expressed as "colourable title" or "colourable authority". Lady Hale

in **Fawdry & Co (a firm) v Murfitt** [2002] EWCA Civ 643**,** referring to **State v Carroll** (1871) 38 Conn 448 said:

> "[21] … After an extensive review of the authorities, Butler CJ summarised the circumstances in which the doctrine would apply thus, at p 427:
>
> > 'An officer *de facto* is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid so far as they involve the interests of the public and third persons, where the duties of the office were exercised:
> >
> > First, without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people, without inquiry, to submit to or invoke his action, supposing him to be the officer he assumed to be.
> >
> > Second, under color of a known and valid appointment or election, but where the officer had failed to conform to some precedent requirement or condition, as to take an oath, give a bond, or the like.
> >
> > Third, under color of a known election or appointment, void, because the officer was not eligible, or because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise, such ineligibility, want of power, or defect being unknown to the public.
> >
> > Fourth, [under an unconstitutional statute, not relevant here]. . .'
>
> The first was sufficient to validate the justice's acts.
>
> [22] But the judge must not be a mere usurper who is known to have no such colourable authority. The doctrine depends upon his having been generally thought to be competent to act and treated as such by those coming before him. …"

[109] For my own appreciation of the doctrine, I have relied heavily on the Court of Appeal decision from Belize (Mottley P, Sosa and Carey JJA), **R v Myers** (2009) 76 WIR 163. Section 98(1) of the Belizean Constitution and its proviso is similar to sections 106 (1) and (2) of the Jamaican Constitution, though there are two distinct differences; the judge must retire at 65 years, but may continue to act until he has attained the age of 75 years, once permitted by the Governor General, acting on the advice of the Judicial and Legal Services Commission, and with the concurrence of the Prime Minister, after consultation with the Leader of the Opposition.

[110] In **R v Myers**, the trial judge had attained the age of 65 years on 28 December 2006, but he had not retired. He continued to sit and presided over trials so much so that after reaching the age of retirement, and up to 28 December 2007, he had presided over some 38 cases.

[111] Section 6(2) of the Constitution of Belize, provides that:

> "If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."

This case attracted the consideration of "the *de facto* officer doctrine". It was held that:

> "For the de facto doctrine to apply: (i) the judge had to have had colourable title or colourable authority when he presided over the trial; and (ii) the judge had to have acted in good faith and been believed by himself to have the necessary authority to act and been treated by litigants as having such authority. The doctrine could not be invoked by a person who knew that he had no authority to sit as a judge but none the less usurped the function of a judge. The rationale

> for the de facto doctrine was that the logic of annulling the decision of the de facto judge had to yield to the need to protect the reputation of the law and the public confidence in it as well as the interest of the parties who acted on the assumption that the trial was being properly conducted. ..."

[112] The court found that there was no evidence that either the prosecution or the defence had challenged the judge's competence and authority to preside over the trial. The court also found that in continuing in the office after December 2006, the judge had colourable title or authority to perform the functions of a judge, and whether he had acted in good faith was a question of fact. It would have to be for the appellant to show that he had not been acting in good faith. But the Chief Justice had continued to assign cases to the judge, and the judge believed that he was entitled to conduct the trials. The court held that in the absence of any provision in the Constitution dealing with a breach of section 98(1), it was necessary to resort to the *de facto* doctrine.

[113] The court held further that:

> "The logic of annulling the act of the judge when he had presided over the instant trial had to yield to the desirability of upholding the act of his presiding over the trial under the general understanding that he had been competent to preside."

[114] The court also held that the *de facto* doctrine was not inconsistent with the Constitutional provision requiring that the court before which the appellant was tried was an independent and impartial tribunal established by law. The court would have been established by the common law *de facto* doctrine, not one arbitrarily established.

It was established by the operation of the established common law principle. 'Law' meant 'the common law', which was an established part of the law of Belize.

[115] It is noteworthy, that the judge was formally appointed a temporary judge by the Governor General for the period September 2008 to August 2009, and that at the time of the application before the court, he had not attained the age of 75 years.

[116] The argument in this case was that the judge, having continued in office past the date of his required retirement, was in breach of the Constitution. His continuation in office was illegal, he was incompetent to preside over the trial, the trial was a nullity and the appellant, charged for murder and two counts of wounding, and convicted of the murder, had been deprived of his liberty, a right guaranteed by the Constitution. However, Mottley P concluded that from all the cases canvassed, it was clear that for the *de facto* doctrine to be applicable, the judge must have a colourable title or authority, and in addition he must act in good faith, believing himself to have the authority to act. Those were therefore the questions he asked. I must state, however, that he did say that it would require cogent evidence to show that that the judge had not acted in good faith, which he suggested could have been proven by evidence from the government showing the payment of a gratuity or pension, or otherwise by the judge shutting his eyes to the fact that he should have demitted office.

[117] In the instant case, the judges of appeal have retired. They have demitted office, they have not continued in office. They have however delivered judgment having heard the appeal and recognising that to do that was a part of what they had undertaken to

do as judges of appeal. There was no question that they all had the qualification, the competence, and the experience to deliver the judgment in this case. It was certainly a part of the judicial oath that each had taken on assuming the office of a judge of appeal.

[118] If section 106(3) is a free standing provision, then nothing would invalidate the acts which the judges of appeal undertook and continued to do, although they were over the age of retirement, and having reached that age, they were required to vacate their respective offices. So the question must arise, having reached the age of 70 years, and by section 106(1) been mandated to vacate their respective offices, and additionally, not having obtained permission from the Governor-General under section 106(2), were they clothed with the colourable authority to deliver judgment having heard the appeal?

[119] Further, could they be considered to be acting in good faith, given the practice of very long standing in this jurisdiction for judges delivering judgments both in the Supreme Court and Court of Appeal, after they have demitted office, they having attained the age of 70 years? No provision in the Constitution speaks to any sanction with regards to this. Does it therefore mean that the *de facto* doctrine would apply?

[120] In **Whitfield v Attorney-General**, the Chief Justice of The Bahamas was approaching the retirement age of 65 and had agreed with the Prime Minister that he would continue in office until age 67. Through inadvertence, the Prime Minister did not mention this to the Leader of the Opposition until after the Chief Justice had attained

the age of 65 years. The Leader of the Opposition therefore declined to agree. The Governor-General nevertheless appointed the Chief Justice with knowledge that the Leader of the Opposition had not agreed, but acted on the advice of the Prime Minister. The Constitution required the Leader of the Opposition to have been consulted prior to the appointment. When the Chief Justice sat with another judge on an election petition, his appointment was challenged on the basis that he had not been validly appointed to continue in office after the age of 65. Although the case at first instance and on appeal turned on the question of the claimant not having *locus standi*, the court found that the application of the *de facto* doctrine was not inconsistent with the Constitution, as far as it related to the appointment and continuation in office.

[121] Melville JA said that the submission that what was being challenged was the validity of the actions of the Chief Justice and not his appointment, was not in keeping with the authorities generally, and referred to Lord Denning MR's powerful judgment in **Re James (an Insolvent) (The Attorney General Intervening)** [1977] 1 All ER 364 at page 373 that:

> "He sits in the seat of a judge. He wears the robes of a judge. He holds the office of a judge. *Maybe he was not validly appointed.* But still he holds the office of a judge. It is the office that matters not the incumbent … so long as the man holds the office, and exercises it duly and in accordance with the law, his orders are not a nullity…"

[122] So the issue here really pointed to being in the seat of a judge and holding his office, and not the validity of his actions. Melville JA however also referred to the

dictum of Lord Denning MR in **Re James**, in which he quoted from **Norton v Shelby County** 118 US 425, which said:

> "Where an office exists under the law, it matters not how the appointment of the incumbent is made, so far as the validity of his acts are concerned. It is enough that he is clothed with the insignia of the office, and exercises its powers and functions … The official acts of such persons are recognised as valid on grounds of public policy, and for the protection of those having official business to transact."

Notwithstanding the fact that the constitutional provisions had not been complied with, the *de facto* doctrine was applied.

[123] In **Fawdry & Co v Murfitt**, the issue related to a judge trying a case in the Technology and Construction Court (TCC), although authorised to sit as a judge in the family division of the High Court, but not the TCC, to hear Queen's Bench cases. The question was therefore whether he had jurisdiction to try the case. Hale LJ (as she then was) found that, even if the judge had not been validly transferred, the order she made was valid as an act of a de facto officer. Hale LJ referred to and relied on the statements made by Butler CJ in his judgment in the **State v Carroll** on the *de facto* doctrine.

[124] In the instant case, all of the judges of appeal were validly appointed and continued under the circumstances of their appointment to fulfil their duties and the litigants would have had no reason not to assume that the judges of appeal had the permission of the Governor-General, as required, to continue to do the act they did,

writing the judgment in spite of the defect, or the irregularity in respect of the permission of the Governor-General on the advice of the Prime Minister to do so.

[125] In fact, Sedley LJ in **Fawdry & Co v Murfitt** recognised that the judge had the authority *de jure* to hear the cases in the TCC, despite the want of transfer, but made the point that the *de facto* doctrine ought not to be invoked in circumstances where the judge knew, or ought to have known that he did not have due authority, although he stated that that situation remains uncertain, as the purpose of the doctrine is the maintenance of stability and confidence in the legal system and for the prevention of technical difficulties relating to the formalities of appointment. So, unless the acts were done by a usurper, without any colourable title whatsoever, any judicial acts done in due form, in a competent court would remain valid and unimpeachable. He criticised the description "colourable authority" as being opaque, indicating that the ordinary English definition would suggest something "specious and therefore false", yet the phrase has acquired "a legal meaning which is almost the opposite: 'capable of being presented as true or right, having at least a *prima facie* aspect of justice or validity' ".

[126] In fact, Lady Hale concluded at paragraph [22] of her judgment, "[b]ut the judge must not be a mere usurper who is known to have no such colourable authority. The doctrine depends on his having generally thought to be competent to act and treated as such by those coming before him".

[127] **Coppard v Customs and Excise Commissioners** [2003] 3 All ER 351 is another English Court of Appeal decision which was referred to by Mottley P in **R v**

Myers. This case also related to an assessment of damages heard by a judge who was aware that he was not authorised to sit as a judge of the High Court, but who wrongly believed that he had authority to sit in the Queen's Bench Division by virtue of his appointment to the TCC. The issue in the Court of Appeal was whether when he sat and gave judgment he was in fact a judge of the High Court, and when he sat and adjudicated on the case of Mr Coppard, he did so without legal authority. In other words, the question was, had he sat and given judgment as a judge in fact, of the High Court, and in that event did that constitute a tribunal established in law?

[128] Sedley LJ said that the central requirement for the operation of the doctrine was the concept of a judge in fact (*de facto*). It must be that the person exercising the office must be reputed to hold it. He reiterated the statement made by the authors of Wade and Forsyth that the acts can be held to be valid even though the appointment is invalid or that he has no legal power at all.

[129] In **Coppard**, Sedley LJ also gave guidance on the definition of "usurper" as being one who lacks authority, and knows that he lacks authority, which would include a person who has shut his eyes to that fact when it was obvious, but not a person who had simply neglected to find out if he had the authority to act. In that case, the court found that the judge did not know of his lack of authority and it had not been shown that he had exhibited a wilful blindness to that situation. He was qualified to sit. It was not a case of the requisite lack of competence and qualification. So, he was a judge in fact.

[130] The question also arose yet again in this case as to whether the *de facto* doctrine validates acts done under colour of a supposed legal but non-existent authority. It was submitted that the doctrine does not create authority where none existed as its very premise is the non-existence of true authority in law. But would that therefore breach article 6 of the The European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, (similar to section 16(2) of the Jamaican Constitution) requiring a fair hearing before an independent and impartial tribunal established by law? Sedley LJ answered the question as to whether the acts were validated in this way:

> "[32] ... that a person who is believed and believes himself to have the necessary judicial authority will be regarded in law as possessing such authority. If this is the true meaning of the de facto doctrine of jurisdiction, as we hold that it is, then the first question of compatibility with article 6 is answered. The judge in fact is a tribunal whose authority is established by the common law."

[131] The court found that the *de facto* doctrine validated the authority of the tribunal and not merely its acts. But the next question was, was it "a validation of the authority of a person who was so incompetent to sit that to ratify him in office would amount to arbitrariness or irrationality offensive to the rule of law?" The answer to that question was that the doctrine cannot validate a usurper, who was an incompetent person who lacked legal authority, or one who does not know that he/she should be sitting as a judge. The court found that the judge sat as a judge of fact and was a tribunal established by law.

[132] This must have led to the conclusion, I would think, that the judges of appeal in the instant case were not usurpers. They were of the view that the delivery of the judgment would not be invalidated pursuant to section 106(3) of the Constitution, as though not continuing to sit, or holding office, they were qualified, capable, not incompetent, and therefore judges of fact in respect of the outstanding acts remaining for the performance of their authority relative to what they were required to do. They would therefore have authority established by the common law, pursuant to section 16(2) of the Constitution.

[133] **Baldock v Webster and others** [2005] 3 All ER 655, another English Court of Appeal case referred to by Mottley P in **R v Myers,** was about a recorder who sat as a judge of the High Court, in circumstances where although he was eligible, he had not been so authorised to do so. The recorder was unaware that it was a High Court matter; in fact, he believed that he was dealing with a County Court case. The defendants who lost the case brought a claim to set aside the recorder's order as having been made without jurisdiction. The recorder could not have believed that he had authority to sit in the High Court. It was held *inter alia* that:

> "... [t]he doctrine of de facto office applied in circumstances where the mistake as to the judicial authority of the individual concerned was a mistake by a recorder as to the status of the court in which he was sitting, just as it did where the mistake was as to the nature or the extent of the jurisdiction which a judicial officer possessed."

[134] Indeed, Laws LJ stated with regard to the impact of such mistaken conduct on the legal system:

> "[15] … No doubt the general reputation of the law and the public's confidence in it must be protected as surely as the interest of individual parties who have proceeded on the assumption that a judgment in their case is perfectly valid, where that is exactly how it seems to all the world. Public confidence as well as individual parties are, in my judgment, protected by the requirement that there be a court of competent jurisdiction convened to hear the case, that the judicial officer be not a usurper and that he have a colourable title to sit where he does sit."

[135] Laws LJ's final comment on this aspect at paragraph [19] was as follows:

> "The plain fact here is that the case was proceeding in a court competent to hear it. The judge was not a usurper. The parties and the judge apprehended no defect in his appointment or authority. He had what has been called 'colourable authority' or 'colourable title' because he was a duly appointed recorder eligible to be authorised by the Lord Chancellor to sit in the High Court'."

[136] The court therefore held that the *de facto* doctrine applied on these facts. The appeal was dismissed.

[137] Finally, in the string of cases which applied the *de facto* officer doctrine, is the first instance case of **Shirley Sookar v The Attorney General of Trinidad and Tobago** (unreported), High Court of Justice, Trinidad and Tobago, Claim No CV 2010-04777, judgment delivered 4 November 2014, where the admirable judgment of Rahim J was very instructive. This case was about Myers J, a puisne judge of the island

Republic of Trinidad and Tobago, who delivered judgment in a case only after being appointed to act in the office of puisne judge sometime after his resignation from his substantive post.

[138] Rahim J found that the interpretation of the relevant provisions of the Constitution applied similarly in relation to resignation as it did to retirement from office. Initially, the claimant's concern related to the delay in the delivery of the judgment, and not to the interpretation of the provisions of the Trinidad and Tobago Constitution, but later all issues with regard to the delay were abandoned.

[139] The trial had begun in June 2000 and ended in November 2000 when judgment was reserved. Myers J resigned from the judiciary on 21 July 2008. He was appointed to act as a puisne judge on 27 July 2011, the day that the judgment in the case was delivered. The claimant's submissions were generally to the effect that the judge was *functus officio* upon his resignation from the bench on 21 July 2008, and the judgment delivered by him was a nullity and of no effect. Section 136(2) of the Trinidad and Tobago Constitution (similar to section 106(2) of the Jamaican Constitution), had been sought to be applied to permit the re-appointment of a judge for the purpose of delivering the judgment after resignation. At the time of delivery of the judgment, so the claimant's argument ran, Myers J would not have been subject to the judicial oath and the claimant was therefore deprived of the protection of law. The claimant claimed that the appointment of Myers J was in breach of her constitutional rights. The judge

had no power to perform duties of a judge after resignation from office, whilst not appointed as a judge and not under the oath of a judge.

[140] Rahim J set out the competing contentions of the defence and of the Judicial and Legal Service Commission. I hesitate to even summarise them as it will only lengthen the few words I had intended to add to this judgment of the court. The learned judge accepted what he devised as the common thread of the submissions, which made it clear that the case pointed to the interpretation to be accorded sections 104, 107 and 136 of the Trinidad and Tobago Constitution (similar to sections 98, 102 and 108, and 106 of the Jamaican Constitution, respectively). He thereafter set out four questions which embraced whether the constitution provided the procedure whereby a judge who had resigned may be subsequently appointed to act in the office of a judge. If the answer to that query was yes, could the judge so appointed deliver a judgment relating to a case tried by him during his substantive appointment prior to his resignation? If the answer to that question was "no" then the issue was whether the claimant had been deprived of a fundamental right to enjoyment of property and/or was he deprived of protection of the law.

[141] The court accepted that once the judge retired or resigned, there was a termination of the office of the judge. He was unable to perform the functions of a judge. The plain and ordinary meaning of section 136 of the Trinidad and Tobago Constitution (similar to section 106 of the Jamaica Constitution) meant that the office became vacant upon the holder attaining the age of 65 years. However, Parliament had

provided for the continuation of the office of the judge who retires (section 136(2)). Indeed, Rahim J stated that there was no legislation requiring re-appointment to the office of the judge for the purpose of delivering a judgment. He also made it clear that the Constitution must be construed generally in such a way as to give full recognition to effect the fundamental rights and freedoms. It must be construed to be consistent with those rights and not to detract from them. Indeed, he maintained, "the court must adopt a purposive approach as the Constitution sets the legal architecture of the state and must always adapt to changing circumstances".

[142] It is of some importance that the court found that a litigant was entitled to the delivery of the judgment by the judge who heard and presided over his/her matter at trial. In this case, Myers J had taken an oath of office, heard the case, and then delivered judgment after having been appointed to do so. He was bound by the oath he took on his appointment as a judge and having heard the case, he was bound by the oath he took on his appointment to act as a temporary judge to deliver the judgment which he did. There was no evidence that he would have deliberated on the case in breach of his judicial oath.

[143] Equally, in the instant case, there was no indication that the judges of appeal were not acting consistent with the oath that they had taken. The oath does not state that it is only applicable while the judges are holding the office of judge of appeal. The question therefore must arise as to whether the *de facto* doctrine would be applicable. There is provision in the Jamaican Constitution for persons to act as judges of appeal as

Myers J did as a puisne judge, so the issue would be yet again, would they have had the colourable authority to act, and would they therefore have acted in good faith in the delivering of the judgment, on the assumption that the constitutional provisions would have been properly invoked and in the absence thereof, a colourable title could exist.

[144] Rahim J stated that section 104 of the Trinidad and Tobago Constitution, using purposive interpretation, would have required that Myers J be permitted to be appointed a judge for the purpose of delivering outstanding judgments, thereby avoiding litigation *de novo* with all the attendant consequences of such fresh litigation. Section 104(2)(d)(ii) of the Trinidad and Tobago Constitution is equivalent to section 99 of the Jamaican Constitution, in so far as the Supreme Court judges are concerned and section 105 in respect of the acting judges of the Appeal Court. So there is provision for a judge of appeal to be appointed to act. The only question which one would have to grapple with would be could one be appointed to act once a person was over retirement age? But the answer to that might be that section 106(2) of the Jamaican Constitution envisages that occurring, although that provision would suggest that one should "continue in office" with the permission of the Governor-General on the advice of the Prime Minister.

[145] Rahim J found that the judge would not be *functus officio* once there was provision for him to be appointed to act to deliver the judgment. Once appointed pursuant to the provisions of the Constitution, a judge is empowered to complete cases which includes the delivery of judgments, and it is only after the delivery of the

judgment that one becomes *functus officio*. For, as indicated, similarly, section 106(3) of the Jamaican Constitution recognises that a person can be given permission after he has reached the age of retirement to enable the delivery of the judgment.

[146] Rahim J acknowledged and recognised that on the basis of the submissions from the Attorney General, that "it was inconceivable that prior to the enactment of the Constitution, no judgments had been given by judges who had prior to the giving of the judgments retired or resigned. That it is improbable that the Constitution was enacted to preclude that possibility". He went on to say that no one appeared to have considered that the Constitution would have that effect given the practice that had occurred over the years since its promulgation, namely that judgments have been given post resignation and post retirement by judicial officers. The court therefore refrained from applying the maxim *expressio unius est exclusio alterius,* as to do so would have had that effect.

[147] In relation to the *de facto* doctrine, the claimant in **Sookar** challenged the efficacy of the appointment, and the authority to make the appointment for Myers J to be able to deliver the judgment. Rahim J relied on the principles which have been set out in **R v Myers** and which have already been set out herein. The learned judge distinguished the facts of **Sookar** from the case of **R v Myers**, but stated that the principle was equally applicable to it. He pointed out that at the time of the trial, all the parties proceeded on the premise that Myers J had authority to preside over the trial, and thereafter to give his outstanding judgment. The claimant had filed the proceedings

in 2010 and the appointment had been made in 2011 when the judgment was delivered. But the issue at that time related to the question of delay, not to the jurisdiction of Myers J to deliver the judgment as 11 years had elapsed.

[148] In the instant case, the parties did not and could not have taken issue with the authority of any of the judges to hear the appeal. The application to vacate the hearing of the appeal and to commence the hearing of the appeal *de novo* was filed on 20 October 2017. The judgment was delivered on 1 December 2017, and the application was thereafter amended and filed 14 December 2017, to pray for the declaration that the judgment delivered 1 December 2017, was null and void and of no legal effect.

[149] So, it still remains the issue, whether there was a colourable title although the judges had demitted office, but were proceeding to do what was within the functions of their office, as they had deliberated over the appeal which they had heard while they held their respective substantive posts. While section 106(2) of the Constitution has not been complied with as permission has not been obtained, nonetheless once the two limbs of the *de facto* doctrine have been complied with, the question which must be asked is; ought it not to be applied?

[150] The last case that deserves mention is that of the decision by the Judicial Committee of the Privy Council in an appeal from the decision of the Court of Appeal in Trinidad and Tobago in **Peter Sookoo and Another v Attorney-General of Trinidad and Tobago** [1986] AC 63. In that case, as indicated, the issue also related to the interpretation of section 136(2) of the Trinidad and Tobago Constitution. The

President, pursuant to section 136(2), had granted permission to the Chief Justice to continue in office after attaining the compulsory retiring age of 65 years to enable him to complete unfinished judicial business. The Chief Justice witnessed a writ in accordance with the rules of the Supreme Court of Trinidad and Tobago, which required that it had to be witnessed by him. The plaintiffs filed an originating summons to determine whether on the proper construction of sections 136(1) and (2) of the Trinidad and Tobago Constitution, the President had the power to permit the judge to continue in office as Chief Justice after having attained the age of 65 years. The first instance judge found that no such power existed. The Court of Appeal allowed the appeal. The Privy Council upheld the decision of the Court of Appeal. The Privy Council held that the power of the President existed to permit a judge to continue in office, and he could do so as the Chief Justice as that was the office that he had held before retirement.

Conclusion

[151] Although, as I had indicated, as I have been attracted to the *de facto* officer doctrine being applicable in respect of the interpretation to be accorded to section 106(3) of the Constitution, I have been at pains to explain why this is so, as section 106(3) addresses the issue of acts being done by judges of the court of appeal, which would not be invalid only because they had attained the age of retirement. In this case, permission had not been sought from the Governor-General under section 106(2). The judges, properly appointed and capable, had heard the appeal. They had then proceeded on retirement having attained the age of 70 years at various times, but

certainly by July 2016, without delivering the judgment. In my view, as indicated earlier, section 106(3) is a free standing provision and it need not necessarily be construed together with section 106(2). The whole issue turned on whether the judgment delivered on 1 December 2017, could be considered valid pursuant to section 106(3). Pursuant to the cases, it would appear, that initially all three judges had been competent to preside over the appeal, but at the time of the delivery of the judgment, if the interpretation of section 106(3) required them to be Court of Appeal judges, they were not Court of Appeal judges at that time. They no longer held that office.

[152] Could they yet be considered to hold the same by some colourable title to do so, as the doctrine presupposes that the appointment can be invalid and the person has no legal power at all? Additionally, if the application under section 106(2) could only be made for the judges to "continue in office", then would that mean that having demitted office, and gone into retirement, yet proceeded to deliver the judgment, the judges could not have been under a colourable title as the offices had been vacated, and had been subsequently filled? In **Sookar**, the fact that the judge had resigned and left the office for 11 years did not seem to be an impediment for the application of the doctrine. But the appointment to act as a judge to deliver the judgment, appeared to clothe him with authority, which however did not occur in the instant case. So the interpretation of the word "only" in section 106(3) may also create an insurmountable hurdle to the doctrine. Another hurdle to the doctrine is that potentially, all judges may be receiving pension, which could affect the good faith aspect of the doctrine, although not without more, but perhaps coupled with the fact that they had knowledge that the offices that

they had been compelled to vacate at age 70 years, had been filled. Accordingly, they could no longer act as Court of Appeal judges and therefore it would seem not with any colourable title.

[153] Another question is whether the judges are in the category of persons who simply failed to ascertain if section 106(3) would protect their acts, as there was a practice that had existed over many decades, which was that judgments could be delivered by judges post retirement? It is obvious that the judges believed themselves to have the necessary authority to deliver the judgment, and the litigants treated them as having such authority, subsequent to the end of the hearing of the appeal in November 2013. It is true that this was not a case of the judges sitting in their offices and wearing their robes after 2016, and although not specifically clothed with the insignia of their office, nonetheless they were attempting to exercise an important function of a judge of appeal, which is to deliver judgment after having heard the appeal. This was certainly a situation where initially, a court of competent jurisdiction had been convened to hear the appeal, and there was no defect in their respective judicial appointments. However, as I have attempted to demonstrate, that alone will not suffice for the doctrine to apply.

[154] In all the circumstances, the determination of this unusual issue has been a very difficult one for me. Although my learned brothers have come to the conclusion that the section 106(3) is not applicable, although through different routes, I still find myself with some reservations. I will nonetheless yield to the majority of the court, and agree

for the judgment to be declared a nullity. I would also agree with the other orders proposed by my learned brothers.

BROOKS JA

[155] This case is, perhaps, the most extreme example of the state of crisis which threatens this court. The judges who comprised the panel of the court that heard the appeal in this case, having reserved their decision for 18 months (November 2013 – May 2015), one by one, thereafter, retired from office without having given the decision. There are, however, other cases where the enormous stress of the workload that has been placed on the judges of this court has caused unacceptable delays which jeopardize the status of the court. In the vast majority of cases, the delay cannot be attributed to any of the parties to the appeal. The term "grotesque", recently used to describe the workload of a court in another jurisdiction, far better resourced than this one is, would easily be applicable to the workload, under which this court has been labouring for at least a decade.

[156] The appellants in this case, Dr Paul Chen-Young and two companies, with which he is associated, have applied to this court for the original hearing of the appeal to be vacated and for the appeal to be heard anew. These parties will be collectively referred to, hereafter, as "the applicants". The applicants have maintained their stance despite the fact that, since the filing of their application, this court has purported to hand down the judgment of the panel that heard the appeal. The applicants have asked, by way of an amendment to their application, that the judgment be declared null and void.

[157] In addition to those reliefs, the applicants seek to have the Attorney-General (who was not a party to the appeal) pay their costs, not only of this application, but of the hearing of the appeal that, the applicants say, has been made otiose by the retirement of the judges. The rationale for the request for costs is that the State (of which the judiciary is a branch) has breached the applicants' constitutional right to a fair hearing within a reasonable time. For that reason, the Attorney-General has been joined herein as an interested party.

[158] There are other reliefs which the applicants seek. Those will be set out later in this judgment.

The factual background

[159] It is unnecessary for these purposes to set out any of the details of the dispute that led the parties to seek the services of the courts. R Anderson J, on 4 May 2006, delivered judgment in favour of the respondents, Eagle Merchant Bank Jamaica Limited and Crown Eagle Life Insurance Company Limited. The applicants, being aggrieved by Anderson J's decision, filed a notice of appeal on 30 May 2006, seeking to overturn that decision.

[160] The hearing of the appeal commenced in March 2013 and ended on 6 November of that year, at which time judgment was reserved. The three judges, who heard the appeal and were then members of this court, were Panton P, Dukharan JA and McIntosh JA. Dr Chen-Young deposed that McIntosh JA retired on 17 May 2015, Panton P retired on 3 March 2016 and Dukharan JA retired on 8 July 2016. Retirement in each

case was mandatory, as each of the judges had attained the prescribed retirement age of 70 years.

[161] As was mentioned before, they all retired before handing down the reserved decision in this case. There is no evidence of any of them having remained in office beyond the mandatory retirement age, or of having been granted any extension of time, pursuant to the provisions of the Constitution of Jamaica (the Constitution), within which they could have remained in office.

[162] The notice of motion grounding the present application was filed on 20 October 2017. The judgment was handed down on 1 December 2017.

The issues raised by the application

[163] Apart from the issues peculiar to this case, the application raises the issues of:

a. the jurisdiction of this court to consider and decide the application;
b. the jurisdiction of this court to consider and decide on whether there has been any breach of the constitutional rights of the parties to the appeal;
c. the status of a judge of this court who has retired, and his or her ability to render a judgment thereafter;
d. the status of any judgment so rendered; and

e. if the application for rehearing is granted, the party, if any, that should bear the costs of the application and the costs thrown away in respect of the first hearing.

[164] These issues will be considered individually and in the order in which they have been set out in the last paragraph.

[165] Counsel for the applicants, the respondents and the Attorney-General, provided very useful submissions on these issues. Counsel for the respondents, Mr Hylton QC, did not oppose the applications for:

a. a declaration that the judgment handed down is a nullity;
b. the setting aside of the hearing of the appeal; and
c. a fresh hearing of the appeal.

He agreed with the arguments of Mrs Foster-Pusey QC, for the Attorney-General, in respect of the court's jurisdiction to hear the application. Learned Queen's Counsel, however, expressed no view on the aspects of the application dealing with costs.

The jurisdiction to consider and decide on the application

[166] Counsel for both the applicants and the Attorney-General agreed on this first issue. They contended that this court has the jurisdiction to consider and decide the application. Learned counsel both contended that the authority to do so was within the statutory jurisdiction and the inherent jurisdiction of this court, as a superior court of record, to control its own process.

[167] At least two authorities support the stance taken by learned counsel. The first is **Taylor and another v Lawrence and another** [2002] EWCA Civ 90; [2002] 3 WLR 640. The case addresses the issue from a common law point of view. In that case, the Court of Appeal of England and Wales relied on various authorities to explain the manner in which an intermediate appellate court, such as this court is, may carry out its duties. Their Lordships explained that the appellate court, although not having an inherent jurisdiction, in the strict sense, has an inherent power to control its process. They said, in part, at page 655 of the report of the case:

> "50 If, as we believe it is necessary to do, we go back to first principles, we start with the fact which is uncontroversial, that the Court of Appeal was established with a broad jurisdiction to hear appeals. Equally it was not established to exercise an originating as opposed to an appellate jurisdiction. **It is therefore appropriate to state that in that sense it has no inherent jurisdiction. It is, however, wrong to say that it has no implicit or implied jurisdiction arising out of the fact that it is an appellate court. As an appellate court it has the implicit powers to do that which is necessary to achieve the dual objectives of an appellate court** [that is to ensure justice between the litigants involved and to ensure public confidence in the administration of justice not only by remedying wrong decisions but also by clarifying and developing the law and setting precedents].
>
> 51 As to these powers, Lord Diplock, who perhaps speaks on a subject of this nature with the greatest authority of any judge, has dealt with the inherent power conferred on a court, whether appellate or not, to control its own procedure so as to prevent it being used to achieve injustice." (Emphasis supplied)

After referring to Lord Diplock's speech in **Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corporation Ltd** [1981] AC 909, at page 977, their Lordships continued at page 656:

> "53 In our judgment the final words of Lord Diplock, 'the doing by the courts of acts which it needs must have power to do in order to maintain its character as a court of justice' express the situation here under consideration exactly. If more authority is required, reference may be made in a very different context to the speech of Lord Morris of Borth-y-Gest in *Connelly v Director of Public Prosecutions* [1964] AC 1254, 1301 where Lord Morris said:
>
> > 'There can be no doubt that a court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. I would regard them as powers which are inherent in its jurisdiction. A court must enjoy such powers in order to enforce its rules of practice and to suppress any abuses of its process and to defeat any attempted thwarting of its process.'" (Emphasis supplied)

[168] The second authority, which supports the submissions of counsel, is a decision of this court, **Charles Stewart v Glennis Rose** (unreported), Court of Appeal, Jamaica, Motion No 15/1997, judgment delivered 17 June 1997. In that case, Downer JA found statutory authority for this court exercising what could be referred to as an "inherent jurisdiction". He said, at page 6 of his judgment, that the Judicature (Appellate Jurisdiction) Act gave to this court:

> "the historic inherent, common law, equity and procedural powers of the former Appeal Court which was part of the Supreme Court prior to 1962. Further, the Supreme Court prior to 1962 and continuing to this day, has inherited all the powers of the courts which were consolidated to form one Supreme Court…."

The learned judge's reference was to section 10 of the Judicature (Appellate Jurisdiction) Act. That section states:

> "Subject to the provisions of this Act and to rules of court, the Court shall have jurisdiction to hear and determine appeals from any judgment or order of the Supreme Court in all civil proceedings**, and for all purposes of and incidental to the hearing and determination of any appeal**, and the amendment, execution and enforcement of any judgment or order made thereon, **the Court shall subject as aforesaid have all the power, authority and jurisdiction of the former Supreme Court prior to the commencement of the Federal Supreme Court Regulations, 1958**." (Emphasis supplied)

It is incontrovertible that the former Supreme Court was a superior court of record possessed of an inherent jurisdiction. In addition, it is important to note that section 103(5) of the Constitution, in establishing this court as an appellate court, states that it court "shall be a superior court of record and, save as otherwise provided by Parliament, shall have all the powers of such a court".

[169] The powers that an appellate court exercises in controlling its process may not conflict with any statutory or constitutional provision (see **Endean v British Columbia** [2016] 2 SCR 162). There is, however, no statutory or constitutional provision or any provision in the Court of Appeal Rules (CAR), which prevents the hearing of the present

application. Indeed, section 10 of the Judicature (Appellate Jurisdiction) Act gives the court the authority to exercise its powers "for all purposes of and incidental to the hearing and determination of any appeal".

[170] Based on those authorities, it is accepted that this court does have the authority to hear the present application and to rule upon it.

The jurisdiction of this court to consider and decide on whether there has been any breach of the constitutional rights of the parties to the appeal

[171] Whereas there was agreement between counsel for each of the parties on the issue of the jurisdiction to consider the application, there was a divergence of opinion between them, on this second issue of whether this court had the jurisdiction to hear a constitutional issue, which was being raised in the case for the first time.

[172] Counsel for the applicants, Mr Braham QC, submitted that a constitutional issue may be raised for the first time at the appellate level. He argued that this court could properly consider whether there had been a breach of the applicants' constitutional rights. Learned Queen's Counsel argued that, as the court has all the powers of the Supreme Court (as was alluded to by Downer JA in **Charles Stewart v Glennis Rose**), it can take into account anything which occurs incidentally during a case.

[173] Mr Braham pointed out that it was in this court that a constitutional issue was raised for the first time in the important constitutional case of **Hinds and others v The Queen; Director of Public Prosecutions v Jackson; Attorney General of Jamaica (intervener)** (1975) 24 WIR 326; [1976] 1 All ER 353. In **Hinds and others**

v The Queen, it was in this court, he submitted, that, for the first time, the constitutionality of certain aspects of the legislation, which established the Gun Court, was challenged. Mr Braham argued that the applicants should not be obliged to first go to the Constitutional Court to apply for a declaration, pursuant to section 16(2) of the Constitution, that their constitutional rights, to a "fair hearing within a reasonable time by an independent and impartial court", had been breached.

[174] Mrs Foster-Pusey argued that the correct forum for the application for a declaration about a breach of constitutional rights was the Supreme Court. Learned Queen's Counsel accepted that there have been cases in which constitutional issues were raised for the first time at the appellate level. She submitted, however, that the question of whether a constitutional right has been breached cannot be incidental to an appeal. The issue of the liability of the State for a breach of a constitutional right, she argued, is one which requires an assessment of facts in the Supreme Court. Mrs Foster-Pusey relied on section 19(3) of the Constitution, which, she submitted, bestowed original jurisdiction, for hearing such matters, on the Supreme Court.

[175] She further argued that the main issue in this case was not the issue of the delay in the delivery of the judgment. Instead, she argued, the main focus of the application was the issue of the status of the judges, once they had retired, and how, if it did, that status affected the status of any judgment that those judges had purported to hand down. In any event, Mrs Foster Pusey argued, where constitutional issues, such as the issue of delay in the delivery of judgments, arose, it was necessary for evidence to be

taken in order to determine whether that delay was unreasonable. She cited a number of cases in which the issue of a breach of constitutional rights was first dealt with at the level of the high court. These included **Alfred Flowers v The Queen** [2000] 1 WLR 2396 and **Shirley Sookar v The Attorney General of Trinidad and Tobago** (unreported), High Court of Justice, Trinidad and Tobago, Claim No CV 2010-04777, judgment delivered 4 November 2014.

[176] The starting point for assessing these competing submissions is a reference to sections 16 and 19 of the Constitution. The former, as part of protecting the right to due process, bestows the right of a fair hearing within a reasonable time. Section 16(2) states:

> "In the determination of a person's civil rights and obligations or of any legal proceedings which may result in a decision adverse to his interests, he shall be entitled to a fair hearing within a reasonable time by an independent and impartial court or authority established by law."

Bond v Dunster Properties Ltd and others [2011] EWCA Civ 455 is authority for the principle that the right to a fair hearing within a reasonable time includes the time taken for the delivery of a judgment (see paragraph [3]).

[177] The Constitution provides for redress in the event of a breach by the State of any of the rights conferred by the Fundamental Rights and Freedom (Charter of Rights) set out in the Constitution. Section 19 of the Constitution states that applications for redress for breaches of rights conferred in the Charter of Rights, must be made, in the first instance, to the Supreme Court. The section states as follows:

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

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

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

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

(5) **Any person aggrieved by any determination of the Supreme Court under this section may appeal therefrom to the Court of Appeal**.

(6) Parliament may make provision or authorize the making of provision with respect to the practice and procedure of any court for the purposes of this section and may confer upon that court such powers, or may authorize the conferment thereon of such powers, in addition to those conferred by this section, as may appear to be necessary or desirable for the purpose of enabling that court more effectively to exercise the jurisdiction conferred upon it by this section." (Emphasis supplied)

[178] It is undoubtedly true that constitutional issues have, on occasion, been first raised in cases at the appellate level. **Hinds and others v The Queen** is but one example of that phenomenon. It is similarly true, as Mrs Foster-Pusey has demonstrated, that claims for redress for breaches of constitutional rights are, for the most part, raised at the level of the trial court, being the Supreme Court. That court is better suited for the issues that are usually raised in those cases, because evidence is usually required; particularly evidence from the party said to have breached the relevant constitutional right.

[179] The circumstances of this case, from the evidence of Dr Chen-Young, as to the extent of the delay in the delivery of the judgment in this appeal, would require some evidence in response, which seeks to explain the delay. It is understandable that no such evidence has been adduced in this court, in response, as the explanation would, perhaps, reside with the present or former members of the court.

[180] Based on that observation, this court should decline jurisdiction to deal with the issue of assessing whether there has been a breach of the applicants' constitutional rights and whether redress should be provided. The provisions of section 19 of the Constitution should be followed. The applicants are at liberty to pursue that matter with the Supreme Court if they are so minded.

The status of a judge who has retired and his or her ability to render a judgment thereafter

[181] Declining to deal with the issue of the breach of constitutional rights does not prevent the court from dealing with the remaining issues that have been identified above.

[182] The essence of the principle advanced by the applicants, in respect of the issue of the status of a retired judge in this context, is that once a judge of this court demits office, that judge is incapable of performing any function that he or she could have performed prior to vacating the office. In the context of this case, the applicants contend that, having retired, the judges who heard the appeal have been rendered incapable of delivering any judgment in the case.

[183] Mr Braham demonstrated that the judges that heard the appeal were incapable of rendering a valid judgment in this case. He argued that the procedure to have allowed that situation was not followed. That procedure, he pointed out, is established by section 106(2) of the Constitution. By that provision, he submitted, a judge, having attained the age of 70 years, could have been granted permission so as to properly render a judgment, despite his or her age.

[184] He argued that section 106(3) could not be prayed in aid for these judges. That provision, he contended, was only available to cover an accidental slip, whereby the proper procedure had not been followed for a judge to remain in office for the purposes

of delivering judgments in cases that he had heard previously to having attained retirement age.

[185] Mr Hylton submitted that section 106(3) of the Constitution provided a method by which a judge, who had attained the mandatory retirement age, and who continues to act as a judge, could be held to have handed down a valid judgment. A judge in those circumstances, learned Queen's Counsel submitted, could be deemed to be a *de facto* officer of the court for the purposes of that judgment. Mr Hylton submitted that section 106(3) could be considered a codification of the *de facto* officer principle.

[186] He accepted, however, that if the judge's post has been filled by another person, it would be difficult to apply the "*de facto* officer" principle. He candidly submitted that the *de facto* officer principle could not be applied to the circumstances of this case.

[187] Mr Hylton submitted that the cases of **Shirley Sookar v The Attorney General of Trinidad and Tobago**, **Sookoo v The Attorney General of Trinidad and Tobago** [1986] AC 63, **R v Myers** (2009) 76 WIR 163 and **Whitfield v Attorney-General** [**of Bahamas**] (1989) 44 WIR 1 were relevant to this case, and could be applied.

[188] Mrs Foster-Pusey allowed for alternative positions to be taken in respect of the matter of the application of the *de facto* officer principle to this case. In her written submissions learned Queen's Counsel said at paragraph 73:

> "We submit that it is reasonable to construe subsections (1), (2) and (3) of section 106 of the Constitution in the following

> manner. On retirement, a Judge of Appeal vacates office. However, section 106(2) provides a due process for a person who holds office as a Judge of Appeal to continue in office to enable, *inter alia*, an outstanding judgment to be delivered. It is clear that a claim of *functus officio* would not be supported if a Judge of Appeal continues in office under section 106(2) of the Constitution in order to deliver an outstanding judgment. **However what is not absolutely clear is the impact of section 106(3) of the Constitution. If section 106(3) is a mere follow on of section 106(2) of the Constitution, then it is likely that the decision which would follow is that the judgment handed down was null and void and a hearing de novo is required**." (Italics as in original, emphasis supplied)

Mrs Foser-Pusey, in other submissions, did indicate that section 106(3) did allow for the application of the *de facto* officer principle.

[189] Learned Queen's Counsel, as part of her submissions on this point, provided a virtual cornucopia of relevant cases from various jurisdictions all over the world. The cases that Mrs Foster-Pusey cited ranged from Canada in the north through to Zimbabwe in the south and included Caribbean, European and Indian jurisdictions in-between. A failure to list or refer to all those cases individually is not intended as any disrespect to the commendable industry of learned Queen's Counsel. The learning provided by the cases was indeed beneficial.

[190] The background to this particular issue is that each of the judges, who heard the appeal in this case, retired, having attained the age of 70 years. Section 106(1) of the Constitution provides that a judge of the court may only hold office until he or she attains that age. On attaining that age, the judge is required to vacate the office. The

section only allows for a judge to continue in office if permission, so to do, is granted by the Governor-General. The relevant provisions of the section state:

> "(1) Subject to the provisions of subsections (4) to (7) (inclusive) of this section, a Judge of the Court of Appeal shall hold office until he attains the age of seventy years:
>
> Provided that he may at any time resign his office.
>
> (2) **Notwithstanding that he has attained the age at which he is required by or under the provisions of this section to vacate his office a person holding the office of Judge of the Court of Appeal may, with the permission of the Governor-General, acting in accordance with the advice of the Prime Minister, continue in office** for such period after attaining that age as may be necessary to enable him to deliver judgment or to do any other thing in relation to proceedings that were commenced before him before he attained that age.
>
> (3) Nothing done by a Judge of the Court of Appeal shall be invalid by reason only that he has attained the age at which he is required by this section to vacate his office." (Emphasis supplied)

[191] It must be stated, despite the plethora of cases canvassed by Mrs Foster-Pusey, that the "*de facto* officer" principle is wholly inapplicable to the present case. The fact which makes the principle inapplicable is that, the judges having retired, the posts which they occupied were filled by other judges. This was not a case, such as in **Sookoo v The Attorney General of Trinidad and Tobago**, **Myers v R** or **Whitfield v The Attorney General of Bahamas**, where the judge remained in office despite having attained the age of retirement, and so had the "colour" of authority. Nor

is it a case, as in **Sookar v The Attorney General of Trinidad and Tobago**, where the judge was re-appointed to office in order to allow him to deliver the delayed judgment. In all those cases, the judge in question was purportedly in the office of a judge when he carried out the act, about which complaint was made.

[192] Similarly, the provisions of section 106(3) cannot be prayed in aid in this case. Firstly, the subsection arguably requires the person to be "a Judge of the Court of Appeal". None of the judges who heard the appeal, could, after July 2016, have been so described. Secondly, the subsection only allows for the validity of actions of such a judge, if the only element applicable is that the judge "has attained the age at which he is required…to vacate his office". It cannot be said in this case, that the only factor applicable is that the judges had attained the mandatory requirement age. In addition to that factor is the element that each of them has demitted office and each of their respective posts has been filled by other persons.

[193] The demitting of office means that the judge is unable, thereafter, to perform the functions of a judge. This principle was expressly recognised in the judgment of the High Court of Trinidad and Tobago in **Sookar v The Attorney General of Trinidad and Tobago**. The court said at paragraph 44:

> "…This court would add that there is in principle no distinction to be made between the consequences of retirement and those which attend resignation. The effect is the same. **In both cases, there is a termination of office of judge and thus he is unable to perform the functions of a judge**. This is the plain and ordinary meaning to be given to section 136(1), in that the office of

> Judge becomes vacant upon the office holder attaining the age of 65 years.…" (Emphasis supplied)

[194] The section of the constitution of Trinidad and Tobago, to which the court referred, is differently worded from the equivalent portions of section 106 of the Jamaican Constitution. Nonetheless the effect is very similar. The provision to which that court referred stated:

> "136. (1) The holder of an office to which this subsection and subsections (3) to (11) apply (in this section referred to as "the officer") **shall vacate his office on attaining the age** of sixty-five years or such other age as may be prescribed.
>
> (2) Notwithstanding that he has attained the age at which he is required by or under subsection (1) to vacate his office, a Judge may, **with the permission of the President, acting in accordance with the advice of the Chief Justice, continue in office** for such period after attaining that age as may be necessary to enable him to deliver judgment or to do any other thing in relation to proceedings that were commenced before him before he attained that age." (Emphasis supplied)

[195] The High Court of Zimbabwe offered a similar opinion in the case of **Mr and Mrs Chimuza v Oswald Dzepasi** (unreported), High Court of Zimbabwe, HH 487-15 Civ 'A' 224/14, judgment delivered 27 May 2015. In that case, the magistrate, who heard the oral evidence, left the service without having written or delivered a judgment in the case. The court was of the view that his departure rendered the hearing a nullity. That situation, the court found, could not have been cured by the parties to the suit agreeing to have a different judge peruse the record and render a judgment thereon. Mwayera J,

with whom the other judge comprising the panel agreed, said at page 3 of his judgment:

> "Once appreciative of the rationale behind the desire for the presiding magistrate to writes [sic] judgment it becomes abundantly clear that an agreement by parties does not have the effect of clothing a nullity to become valid. The fact that parties agree to an illegality does not change the complexion of an illegality to be legal.
>
> I subscribe fully to the sentiments echoed by Bartlet J in *S v Likwenga and Ors* 1999(1) ZLR 498 wherein he quoted with approval Gillespie J's reasoning in *S v Tsangaiza* 1997 (2) ZLR 47. Both judges where [sic] of the opinion that were [sic] a magistrate retires or is in capacitated [sic] or recuses him/herself or becomes *functus officio* the proceedings are a nullity. The proceedings are deemed abortive and have to be started afresh before a different magistrate. In situation where a magistrate will have transferred or resigned before completing a partly heard matter the correct and expident [sic] approach is to utilise administrative remedies of recalling the magistrate to come in and complete the partly heard matters…." (Underlining and italics as in original)

[196] The principles set out by those extracts are, with respect, correct. The judges in this case, having attained the age of 70 years:

a. without having previously delivered a judgment therein;
b. without having received permission from the Governor-General to remain in office pursuant to section 106(2) of the Constitution;
c. without having remained in office despite attaining the age of retirement;

d. without having been re-appointed to the office of judge in order to deliver a judgment (the validity and logistics of which no opinion is expressed at this time); and

e. whose posts were filled subsequently to their retirement;

have, despite their good intentions and dedication to duty, no authority to render a judgment in the case. Their authority is spent.

The status of the judgment that was rendered

[197] The decision on the last issue leaves this issue to be answered very simply and quickly. Since the judges were without authority to render a judgment, the judgment that was purportedly handed down for them, on 1 December 2017, was a nullity.

[198] The consequence of that finding is that the appeal should be reheard by a different panel of the court. These aspects of the application should be granted.

If the application for rehearing is granted, liability for the costs of the application and the costs thrown away in respect of the first hearing

[199] The applicants' claim for the Attorney-General to be ordered to pay the costs of this application and the costs of the hearing, which has been rendered a nullity, is based on the fact that the State was liable to the parties for the default of the court. Mr Dabdoub argued, on their behalf, that the court is a part of the State and since the State has not complied with the standard for the delivery of a judgment within a reasonable time, the State should pay the costs incurred by the applicants' as a result

of the default. The claim for an order for costs was therefore hinged to the issue of redress for the breach of a constitutional right.

[200] Learned counsel referred to the provisions of the Civil Procedure Rules 2002, (CPR) which allowed the court to order a person who is not a party to the claim to pay the costs of a party thereto. He cited, in particular, rule 64.9 of the CPR and the overriding objective, which is referred to in rule 1.1 of the CPR. Based on those provisions, Mr Dabdoub argued, the respondents could also have their costs paid by the Attorney-General.

[201] Mrs Foster-Pusey, in response, stressed that the Attorney-General was not a party to the case, but had been joined as an interested party for the purposes of the application. Learned Queen's Counsel argued that the circumstances of this case did not justify the costs order that the applicants have sought.

[202] Firstly, she argued, the authorities have demonstrated that it is only in exceptional cases that orders for costs are made against persons who are not parties to the case. She also submitted that in was only in specific circumstances that such orders were made, and that the circumstances of this case did not fall within those specifications. Learned Queen's Counsel relied on learning from pages 368-371 of Caribbean Civil Court Practice, 2011 and **Symphony Group plc v Hodgson** [1993] 4 All ER 143 for support in respect of those submissions.

[203] Mrs Foster-Pusey also submitted that the basis for the applicants' claim for costs was undermined by the fact that a judge, who is performing, or purporting to perform,

judicial responsibilities, is not an agent of the Government, but rather is acting for the common good of the State and society. She relied on section 3(5) of the Crown Proceedings Act and the authority of **AHQ v Attorney General and another** [2015] 5 LRC 542, as supporting her submissions in this regard.

[204] The award of costs is a matter within the complete discretion of the court. Section 30(3) of the Judicature (Appellate Jurisdiction) Act bestows that authority on this court. Rule 1.18 of the CAR allows this court to apply the provisions of parts 64 and 65 of the CPR.

[205] The general rule, according to rule 64.6(1) of the CPR, is that the court should order the unsuccessful party to pay the costs of the successful party. The general rule does not apply in these circumstances as there was neither a successful nor an unsuccessful party. This is because the hearing of the appeal, on the reasoning set out above, has been rendered a nullity by the retirement of the judges, who heard it.

[206] There was likewise, neither a successful nor an unsuccessful party in the present application. The respondents did not contest this aspect of the application, and so would not be ordinarily liable for the costs thereof. The Attorney-General, although she did contest the application for an order for costs, would not ordinarily be liable to costs, as she was joined herein as an interested party. It is true that the motivation for the joinder of the Attorney-General was largely to render her liable for the costs, but that liability, as mentioned above, would have been resultant on an order for redress for a claimed breach of the applicants' constitutional rights. That claim has not been resolved

in this application and therefore the Attorney-General would not be an unsuccessful party to the application.

[207] In an application of rule 64.9 of the CPR this court may make an order for costs against a person who is not a party to the proceedings. The decided cases make it plain, however, that such orders are only made in exceptional circumstances. The House of Lords first established that principle in **Aiden Shipping Co Ltd v Interbulk Ltd** [1986] AC 965; [1986] 2 All ER 409. In delivering the judgment of their Lordships, Lord Goff of Chieveley stated, at page 980 of the former report, that:

> "...In the vast majority of cases, it would no doubt be unjust to make an award of costs against a person who is not a party to the relevant proceedings. But, as the facts of the present case show, that is not always so...."

[208] The principle has been refined by various courts. The Privy Council provided guidance in **Dymocks Franchise Systems (NSW) Pty Ltd v Todd and others** [2004] UKPC 39; [2005] 4 All ER 195. In an appeal from New Zealand, their Lordships stated at paragraph [24], and in part, at paragraph [25]:

> "[24]
> What, then, are the principles by which the discretion to order costs to be paid by a non-party is to be exercised and, in the light of these principles, should the Board make the order here sought against [the non-party against whom costs were claimed]?
>
> [25]
> A number of the decided cases have sought to catalogue the main principles governing the proper exercise of this discretion and their Lordships, rather than undertake an exhaustive further survey of the many relevant cases, would seek to summarise the position as follows:

> (1) Although costs orders against non-parties are to be regarded as 'exceptional', exceptional in this context means no more than outside the ordinary run of cases where parties pursue or defend claims for their own benefit and at their own expense. **The ultimate question in any such 'exceptional' case is whether in all the circumstances it is just to make the order**. It must be recognised that this is inevitably to some extent a fact-specific jurisdiction and that there will often be a number of different considerations in play, some militating in favour of an order, some against.
>
> …" (Emphasis supplied)

[209] That case dealt primarily with the issue of the liability for costs for non-parties who funded a party's participation in litigation. Their Lordships did however speak broadly about a non-party, who is, in a real sense, interested in the litigation. They stated at paragraph [29]:

> "In the light of these authorities their Lordships would hold that, generally speaking, where a non-party promotes and funds proceedings by an insolvent company **solely or substantially for his own financial benefit**, he should be liable for the costs if his claim or defence or appeal fails." (Emphasis supplied)

[210] No exceptional circumstances exist in the present case which would make it just to award costs against the Attorney-General in these proceedings. This applies both to the costs of the hearing that have been thrown away, and to the costs of this application. This stance is not meant to foreclose the possibility, if the applicants pursue a constitutional claim in the court below, of that court granting costs as some form of

consequential relief for any loss suffered by the applicants, or indeed by the respondents.

The other aspects of the application

[211] Whereas this judgment has, thus far, dealt with the litigation up to and including the making of this application, the other aspects of the application concern the litigation going forward. The relevant paragraphs of the notice of motion, which encapsulates these aspects of the application, state:

> "4. That the Freezing Order (Mareva Injunction) issued by His Lordship the Honourable Mr. Justice Roy Anderson on the 6th May 2006 be discharged.
>
> 5. That in accordance with the Court Order of Mr. Justice Roy Anderson made on June 15, 2006 the Respondents do continue to pay to [Dr Chen-Young], from the fund created from the sale of the proceeds of the assets of the Appellants, the sum of US$5,000 per month from November, 2013 to the date of this Order."

The two issues raised by these paragraphs are, firstly, the continuation or discharge of the freezing order, and secondly the continuation (or, more accurately, the resumption) of a monthly payment to Dr Chen-Young toward his living expenses.

[212] The evidence regarding these issues is largely gleaned from two affidavits sworn to by Dr Chen-Young, for the applicants, and one from Mr Errol Campbell, on behalf of the respondents. Although there are disputes as to fact between these two deponents,

the following are the basic developments that are relevant to the issues which have been identified:

a. At an early stage of the litigation, Cooke J, as he was then, in 1998, granted a freezing order (then called a "Mareva injunction") against the applicants.

b. An application was made to Ellis J to remove the freezing order, but, on 10 March 2000, he declined to do so.

c. The grant of the freezing order, among other matters, were the subject of appeals to this court (Supreme Court Civil Appeal Nos 45 and 46/2000). The court affirmed the grant of the freezing order and confirmed the need for its continued existence. In the judgment handed down on 23 July 2002, Downer JA, on behalf of the court, said, in part, at page 82:

> "...It was therefore appropriate to restrict Chen Young's rights to his property, as it was rightly feared that he would remove his assets from the jurisdiction if judgment went against him and his two companies, especially as he now resides in Florida. If he were free to dispose of his assets there would be no means to satisfy a judgment if he lost at the trial stage...."

d. Those freezing orders were only enforceable until the trial of the respondents' claim, which was eventually conducted before Anderson J.

e. Anderson J, when he handed down his judgment on 4 May 2006 made several orders, including a freezing order. Order 7 stated, in part:

> "a) An injunction restraining the [applicants] from disposing of and/or dealing with their assets or with assets in their names wheresoever situate and from withdrawing or transferring any funds from their accounts or from accounts in their names wheresoever held until payment of the sums referred to in this judgment."

f. On 15 June 2006, Anderson J made orders in respect of two separate applications. In the first, he ordered the sale of properties owned by one of the applicants, Ajax Investments Limited (Ajax). In the second, he ordered the creation of a fund, by the respondents, from the proceeds of sale of assets owned by Ajax. From that fund, were ordered paid, the reasonable legal fees for the prosecution of the applicants' appeal and the sum of US$5,000.00 per month to cover Dr Chen-Young's living expenses.

g. The total sum of $185,529,810.50, was paid into the fund that was created in accordance with that second order. It was paid from the net proceeds of sale of Ajax' properties, which were listed in the 15 June 2006 order, with the exception of premises at Grenada Crescent. The sum also included some income that was generated from the rental of Grenada Crescent.

h. The Grenada Crescent property was sold under a different arrangement from the rest, and on 11 August 2015, Sykes J (as he then was) ordered that certain expenses should be paid from the sale of that property.

i. On 24 September 2015, Sykes J ordered, "by and with the consent of the parties" that US$855,530.50 be paid out of the proceeds of sale of the Grenada Crescent premises, to each of the attorneys-at-law representing the applicants and the respondents. The sum paid to the applicants' attorneys-at-law was to be used to pay Ajax' legal and other expenses. The sum paid to the respondents' attorneys-at-law was to be

on the respondents' account. As a condition of the payment to the respondents, Finsac Limited, a government controlled company, was to have given an undertaking to pay over, from those proceeds of sale, any sums due to the applicants in the event that their appeal was successful.

j. The respondents' portion of the proceeds of sale of Grenada Crescent was not deposited to the fund. The respondents have not given an explanation for the departure from the principle in Anderson J's order of 4 May 2006.

k. The respondents used all the monies in the fund in satisfaction of the purposes for which it was created. Payments to Dr Chen-Young ceased upon the fund being exhausted.

[213] The two issues identified as being those to be considered for the future handling of the case, shall be considered separately.

(a) The continuation or discharge of the freezing order

[214] Mr Dabdoub addressed this issue on behalf of the applicants. Learned counsel submitted that since all the assets listed in the order for sale, made by Anderson J on

15 June 2006, had been sold, there was no need for the continuation of the freezing order. He submitted that it should be discharged.

[215] Mr Hylton submitted that the circumstances of the case, including some dealings by Dr Chen-Young in Florida, justify the continuation of the freezing order. He cited the affidavit of Mr Errol Campbell which chronicled the various court orders made ensuring the continuation of the freezing order

[216] The history of the litigation and the various reinforcements of the need for the maintenance of the freezing order, justify it being retained in place. Some of those orders spoke to the freezing order being retained in order to protect the status of the parties pending appeal. Based on the reasoning set out above, that there ought to be a new hearing of the appeal, the justification of the order could only be undermined by a change in circumstances.

[217] Although Mr Dabdoub submitted that the sale of Ajax's assets is a sufficient basis for finding that the circumstances have sufficiently changed, there are two factors which still need to be taken into account. Firstly, not all the assets have been sold. The correspondence between the parties (specifically a letter dated 16 September 2002, which was exhibited to the affidavit of Dr Chen-Young filed on 23 November 2017), shows that Ajax still owns certain assets, namely an interest in a company called Cleopan Limited. That company in 2002 had an investment portfolio in excess of US$200,000.00. The interest in Cleopan was not mentioned in the order for sale and no recent account has been given of its status.

[218] In addition, the order for sale only addressed properties owned by Ajax. There was no order for sale of assets owned by the other applicants. There was specific exclusion of a property called Mount Lebanon Estates. Mr Hylton revealed that that property is a coffee farm and that it has not been sold. It is not immediately clear what other assets could be involved.

[219] The second factor to be considered is that Dr Chen-Young, who has been living in Florida, at least since the commencement of the litigation, has not informed the court of any other assets acquired or disposed of by him since Anderson J granted the freezing order on 4 May 2006. The various allegations and denials concerning the trading of a large number of parcels of real property in Florida cannot properly be considered as a factor in this issue, as none of the real estate involved was in Dr Chen-Young's name. What is, however, significant about the situation is Dr Chen-Young's active involvement in having those properties transferred out of the name of his family company, Florida Phoenix Finance Inc, at different times either shortly before or immediately after Anderson J handed down his judgment.

[220] Dr Chen-Young, at paragraphs 16 and 17 of his affidavit, filed in this court on 23 November 2017, explained that his action was calculated to protect the investors in Florida Phoenix. He admitted that "Mr. Hugh Croskery [who was the] Trustee of the Phoenix Trust...acted expeditiously to protect the money belonging to the Investors of the Trust" (paragraph 17 of the affidavit). Those actions support the need to retain control of the disposal of any relevant assets.

[221] The rationale for the institution of the freezing order, namely the protection of the Jamaican taxpayer, has not been undermined. The order should remain in place.

(b) The continuation or resumption of a payment to Dr Chen-Young

[222] The outline of the relevant developments since Anderson J handed down his decision on 4 May 2006 reveals that there has been no accounting for the sum of US$855,530.50 paid respectively to the attorneys-at-law for Ajax and for the respondents. Mr Dabdoub stated that the sums paid to Ajax' attorneys-at-law were used to settle debts. Dr Chen-Young did not provide any detailed evidence in support of that statement. He gave a general indication, in paragraph 10 of his affidavit filed on 23 November 2017, that the proceeds were used to pay monies that were due to him and to various professionals who acted in connection with the sale.

[223] Mr Campbell provided an accounting in respect of the receipts to, and payments from the fund, but did not give any account in respect of the sum of US$855,530.50 paid to the respondents' account.

[224] The question that is to be resolved at this stage is what, if anything, should be said about the sum of US$855,530.50, which was paid to the respondents' account. Mr Dabdoub submitted that it should be used to pay the costs of the re-hearing of the appeal. He submitted that those monies should be used in accordance with the tenor of Anderson J's order made on 15 June 2006.

[225] Mr Hylton argued that the proceeds of sale of Grenada Crescent should not have been paid into the fund. Learned Queen's Counsel sought to justify that assertion by pointing to the fact that the property was not sold in accordance with the terms of the order of Anderson J of 15 June 2006, but was sold by Ajax in accordance with an agreement between the parties. In addition, Mr Hylton submitted, the property was, prior to its sale, being managed by Ajax' attorneys-at-law on the basis that the net revenue from that property would be used to pay the expenses that the fund was designed to meet. That arrangement, he said, was by way of an agreement between the parties.

[226] Having paid, through the fund, for the first round of the appeal, Mr Hylton argued, an order, in accordance with what the applicants now seek, would mean that the respondents would pay twice for the applicants' appeal. On Mr Hylton's submissions there should be no further payment to Dr Chen-Young, or in respect of the applicants' legal expenses.

[227] It must be said that the fact that there was a change in the party who had conduct of the sale of the Grenada Crescent property, is not a proper basis for a departure from the tenor of the order made on 15 June 2006, by Anderson J. Whereas, for transparency, the respondents should provide an accounting for the sum of US$855,530.50, it must also be said that when Sykes J made the order on 24 September 2015, in respect of the division of the proceeds of sale, he did so "by and with the consent of the parties". The rationale for the departure from the tenor of

Anderson J's order for the proceeds of sale to be put in the fund was not explained. It must have, however, been considered by the parties. Dr Chen-Young's present claim to be unaware of any intention to depart from that tenor cannot be accepted.

[228] The fact that the case has taken so long to be completed is not sufficient basis to set aside the agreement which the parties made at the time. It must also be borne in mind that in the event that the litigation is eventually decided in favour of the applicants they will be entitled (pursuant to the order of 24 September 2015 by Sykes J) to rely on the undertaking of Finsac Limited, to pay any sums that are found due to the applicants as a result.

[229] The application for the continuation, or resumption, of the payment of monthly sums to Dr Chen-Young and of the applicants' legal expenses must be refused.

Summary and conclusion

[230] The application for a declaration that the hearing of the appeal conducted in 2013, and that the judgment delivered on 1 December 2017, should be declared nullities, should be granted. The judges, who presided over that hearing, have retired without handing down a decision. Their retirement, and the subsequent filling of their respective posts rendered them incapable, thereafter, to validly hand down a decision. The previous hearing, and the judgment handed down on 1 December 2017, having been declared nullities, the appeal should be heard afresh.

[231] There is, pending the handing down of a decision in the appeal, no basis for disturbing the freezing order that Anderson J made when he handed down his decision on 4 May 2006. The developments, since that order was made, do not undermine his rationale for making the order.

[232] The fund created from the sale of Ajax' assets, having been exhausted, there is no fund for the continuation of the payments that Anderson J ordered, on 15 June 2006, to be made from that fund. Undoubtedly, that situation has resulted, in part, from the length of time for which the litigation has dragged on. The situation is not the respondents' fault. They should not be called upon to fund the applicants' case going forward.

[233] The costs thrown away are not the fault of either party. None should be called upon to pay the other in that regard. Nor should the Attorney-General, who was not a party, be called upon to shoulder the costs of either party. A payment by that official could only arise if there has been a court order that the constitutional rights of one party or the other has been breached. That is an order to be made by the Supreme Court, after due consideration of the case. There has been no court order to that effect.

[234] The appropriate order therefore should be that there should be no order as to costs of this application and that each party should bear its own costs thrown away by virtue of the previous hearing having been declared a nullity.

MORRISON P

ORDER

1. The hearing of the appeal herein, which ended on 8 November 2013, is declared a nullity.
2. The judgment which was handed down by the court on 1 December 2017 is declared a nullity.
3. In consultation with the parties, the registrar of this court shall fix a date for the hearing afresh of the appeal.
4. The freezing order issued by R Anderson J on 4 May 2006 shall stand.
5. Future payments from the fund created pursuant to the order of R Anderson J made herein on 15 June 2006, may only be made from monies properly placed in the fund pursuant to an order, also made herein by R Anderson J on 15 June 2006.
6. No order as to costs in respect of the hearing, which has been hereby declared a nullity.
7. No order as to costs in respect of this application.