JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MISS JUSTICE P WILLIAMS JA
THE HON MRS JUSTICE FOSTER-PUSEY JA
THE HON MRS JUSTICE DUNBAR-GREEN JA (AG)

SUPREME COURT CIVIL APPEAL NO 111/2017

BETWEEN	**JANETT FOSTER**	**APPELLANT**
AND	**DIRECTOR OF PUBLIC PROSECUTIONS**	**RESPONDENT**

Hugh Wildman and Ms Faith Gordon instructed by Hugh Wildman & Company for the appellant

Mrs Andrea Martin-Swaby instructed by the Director of Public Prosecutions for the respondent

22, 23 March 2021 and 4 March 2022

P WILLIAMS JA

[1] I have read in draft the judgment of Dunbar-Green JA (Ag) and agree with her reasoning and conclusion. There is nothing I wish to add.

FOSTER-PUSEY JA

[2] I, too, have read the draft judgment of Dunbar-Green JA (Ag). I agree with her reasoning and conclusion.

DUNBAR GREEN JA (AG)

Introduction

[3] In this appeal, we consider, among other things, whether section 25(2) of the Interpretation Act operated, in 2015, as a savings clause to preserve certain rights,

obligations and liabilities of the State under the Drug Offences (Forfeiture of Proceeds) Act ('DOFPA'), which was repealed in May 2007 by the Proceeds of Crime Act ('POCA').

[4] In 2004, Mr Lincoln White was convicted in the United Kingdom ('UK') for drug offences. Consequently, the UK Government obtained confiscation and restraint orders ('foreign orders') against properties held by Mr White in Jamaica, one of which was owned jointly with his sister, Janett Foster ('the appellant'). The foreign orders had no effect in Jamaica unless they were first registered in the Supreme Court under the Mutual Assistance in Criminal Matters Act ('MACMA') and subsequently made the subject of an enforcement order, also by that court. A condition for registration was proof of dual criminality between the UK and Jamaica. That is, it had to be established that had Mr White's criminal conduct occurred in Jamaica in 2004, it could have formed the basis of a criminal conviction and for orders similar to those which were obtained in the UK. DOFPA was the statute under which orders similar to the foreign orders were authorised prior to 30 May 2007, when it was repealed.

[5] On 10 November 2017, D Fraser J (as he then was) ('the learned judge') refused an application to set aside the order, by a judge of the Supreme Court, for registration of the foreign orders, which was brought by the Director of Public Prosecutions ('DPP') ('the respondent'), in 2015. The learned judge determined that although DOFPA had been repealed by the time the order for registration was made, the savings clause in section 25(2) of the Interpretation Act had ensured that the repeal did not operate to invalidate rights, liabilities and obligations flowing from conduct that occurred at a time when the legislation was in force, in the absence of a contrary intention being shown by the repealing statute. It is that refusal by the learned judge which has occasioned this appeal.

Factual background

[6] The facts are summarised from the affidavit of Andrea Martin-Swaby, filed 22 July 2015, in support of the application for registration of the foreign orders and the submissions of counsel.

[7] On 31 March 2004, Mr White was convicted in the UK for the offences of conspiracy to import and conspiracy to supply Class A Drugs (cocaine) contrary to section 1 of the UK Drug Trafficking Act, 1994 ('DTA'). On 25 October 2005, he was sentenced to 25 years' imprisonment for the commission of these offences.

[8] On 28 October 2005, a confiscation order was granted by the Crown Court in the UK against Mr White, on a determination that he had benefitted from drug trafficking. The confiscation order required him to pay €3,104,621.80 by 27 October 2006 and, in default of payment, to serve six years in prison. Mr White had no right of appeal from the confiscation order.

[9] The confiscation order was preceded by a restraint order, made on 9 June 2003 (prior to his conviction), against certain assets held by Mr White. That order, among other things, prohibited Mr White from dealing with or diminishing the value of his assets in and outside the UK. Particular accounts held at a bank in Jamaica and three properties owned by him in Jamaica were the subject of the restraint order.

[10] On 15 November 2005 (post-conviction and sentence), the restraint order was varied to include property located at Lot 3 Sewell Drive, Red Hills in the parish of Saint James, registered at Volume 1032 Folio 290 of the Register Book of Titles, in the joint names of Mr White and the appellant.

[11] Further to those proceedings, the UK Government requested the assistance of Jamaica in enforcing the foreign orders in this jurisdiction. In 2015, the DPP ('the Designated Central Authority') under MACMA, acting on the request, applied to register the foreign orders. At the time of Mr White's conviction in the UK in 2004, dual criminality could have been established under DOFPA, as well as the Dangerous Drugs Act ('DDA'). However, by the date of the application for registration of the foreign orders, in 2015, DOFPA had been repealed. The narrow issue, therefore, was whether dual criminality could be established, under the repealed DOFPA, in 2015.

[12] In the belief that the pre-condition of dual criminality had been satisfied under the repealed DOFPA, in tandem with section 25(2) of the Interpretation Act and relevant provisions under the DDA, the DDP made an *ex parte* application in the Supreme Court and obtained an order, on 31 July 2015, for registration of the UK foreign orders (referred to in the order as 'the confiscation order'). This meant, among other things, that the property registered jointly in the names of the appellant and her brother, Mr White, in Jamaica, would fall within reach of the UK, the foreign jurisdiction in this instance.

[13] On granting the order, the judge required that the formal order be served on the then respondents (in the court below), including the appellant. He also determined that any objection should be filed within 30 days of service. The affidavit of service included in the record of appeal indicates that the appellant was served on 21 October 2015.

[14] Aggrieved by the judge's decision to grant the order for registration of the foreign orders, the appellant, on 19 July 2017, filed an application to set it aside on the basis that it was made in breach of section 2 of POCA. As was stated at paragraph [3], that application was heard by the learned judge who delivered an oral decision on 10 November 2017 and written reasons on 27 November 2017 (see **Director of Public Prosecutions v Lincoln Hugh Asquith Whyte and others** [2017] JMSC Civ 197), in which he refused to set aside the foreign orders.

The appeal

[15] On 16 November 2017, the appellant filed a notice of procedural appeal challenging the decision of the learned judge in which he ruled that section 25(2) of the Interpretation Act permitted the respondent to make an application for registration of the foreign orders, in 2015, in tandem with the repealed DOFPA, in respect of criminal conduct occurring in 2004. This notice was followed by a notice of application for leave to appeal, filed on 30 November 2017. The appellant was granted leave to appeal on 28 January 2019.

[16] In her appeal, the appellant challenges the "details of the Order" and the learned judge's findings of law that:

> "…Section 25 of the Interpretation Act allows the Respondent to make an application under the repealed Drug Offences (Forfeiture of Proceed) [sic] Act, in respect of conduct occurring before May 2007, concerning an application by the Respondent to register a confiscation order made in the United Kingdom, in the Supreme Court of Jamaica in contravention of Section 2 of the Proceeds of Crime Act of 2007, which repeals the Drug Offences Act and expressly states in Section 2 that 'criminal conduct' means conduct occurring on or after the 30th May 2007…[and that] [s]ection 25 of the Interpretation Act, applies to the application made by the Respondent and not the Proceeds of Crime Act of 2007."

[17] The grounds of appeal are reproduced as follows:

> I. "The learned trial Judge erred in law, in holding that *Section* 25 of the Interpretation Act allows the Respondent to apply under the Drug Offences (Forfeiture of Proceeds) Act, to register a confiscation order obtained in the United Kingdom, against the property of the Appellant in the Supreme Court, in breach of Section 2 of the Proceeds of Crime Act of May 2007, which expressly repealed the Drug Offences (Forfeiture of Proceeds) Act.
>
> II. The Learned trial judge failed to appreciate that he was bound by the clear language of Section 2 of the Proceeds of Crime Act of 2007 which expressly states that '**criminal conduct**' means conduct occurring on or after the 30th May 2007.
>
> III. The Learned trial Judge failed to appreciate that he was bound by the decision of the Privy Council in the **Assets Recovery Agency (Ex parte) Jamaica**, in which the Privy Council expressly stated that *Section 2* of the Proceeds of Crime Act of May 2007, does not include criminal conduct and property derived therefrom, before 30th May 2007."

[18] The orders sought by the appellant are:

"i. That the appeal be allowed;

ii. That the decision of the Honourable Mr. Justice David Fraser delivered on November 10, 2017 be set aside;

iii. Costs in the Court of Appeal and below to the Appellant to be agreed or taxed;

iv. Any further or other relief that this Honourable Court deems fit."

The scheme for registering foreign orders in Jamaica

[19] It is useful to set the stage for the legal arguments by outlining the key features of the legal scheme for registering and effecting foreign orders in Jamaica.

[20] Under Article 7 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988 ('the Convention'), member states are obligated to afford each other the "widest measure of legal assistance in investigations, prosecutions and judicial proceedings in relation to criminal offences established in accordance with article 3, paragraph 1". The mutual legal assistance may take any form allowed by the domestic law of the requested party.

[21] In keeping with the mandate of the Convention, to which Jamaica is a signatory, MACMA was passed in 1995. In accordance with the provisions of section 2 of MACMA and the Instrument of Designation of Central Authority (published in the Jamaica Gazette Extraordinary on 2 May 1997), the DPP is the "Designated Central Authority" ('DCA') duly authorized to offer mutual legal assistance to treaty designated states in criminal matters.

[22] Section 16(1)(b) of MACMA stipulates that the DCA can refuse to provide mutual legal assistance where the request by the foreign state relates to conduct which would not constitute an offence under any law in Jamaica.

[23] Section 27 of MACMA details the regime for the registration of foreign orders (that is, both forfeiture and restraint orders). Section 27(1) directs that the DCA must be satisfied that dual criminality exists between the foreign and requested states (in the

instant case, the UK and Jamaica) when there is a request for registration and enforcement of a foreign forfeiture order against tainted property believed to be in Jamaica. That section, in so far as is relevant, provides:

> "27. –(1) Where a relevant foreign state requests the Central Authority to make arrangements for the enforcement of-
>
> a. a foreign forfeiture order against tainted property that is believed to be located in Jamaica; or
>
> b. …
>
> and the Central Authority is satisfied that-
>
> c. a person has been convicted of an offence to which the foreign forfeiture order or foreign pecuniary order relates, being an offence in respect of which, if it had been committed in Jamaica, a forfeiture order or a pecuniary order could be made by a court in Jamaica; and
>
> d. the conviction and the order are not subject to further appeal in the relevant foreign state,
>
> the Central Authority may, in its discretion, apply for the registration of the order in the Supreme Court."

[24] A "foreign forfeiture order" is defined in section 2 of MACMA as "an order made under the law of a relevant foreign state for the forfeiture or confiscation of property in respect of a prescribed offence".

[25] Sections 27(2) and (3) of MACMA deal with restraint orders. Those sections are as follows:

> "(2) Where a relevant foreign state requests the Central Authority to make arrangements for the enforcement of a foreign restraint order, made in respect of a criminal offence against property that is believed to be located in Jamaica, the Central Authority may, in its discretion, apply for the registration of the order in the Supreme Court.

(3) Where the Central Authority applies to the Supreme Court for registration of a foreign order in accordance with this section, the Court may register the order accordingly if it is satisfied that the circumstances so warrant."

[26] A restraint order could also be made under sections 27 and 28 of DOFPA. Those sections provide for such an order where a person is charged with or convicted of a prescribed offence. The prescribed offences listed in the schedule include the types of drug offences for which Mr White was convicted in the UK.

[27] A forfeiture order could be obtained against any property tainted by relevant criminal conduct. This would be under section 3(2) of DOFPA. That section, in part, provides:

"3.– (2) Where a person is convicted of a prescribed offence committed after the 15th day of August, 1994, the Director of Public Prosecutions may apply to a Judge of the Supreme Court (hereinafter referred to as the Judge) for one or both of the following orders –

(a) a forfeiture order against any property that is tainted property in relation to the prescribed offence;

(b) …"

[28] At the time of Mr White's conviction, in 2004, sections 8, 8A and 8B of the DDA made it a criminal offence for any person to cultivate, sell, deal in, possess or transport cocaine. As far as is relevant, those provisions state:

"8. Every person who imports or brings into, or exports from, the Island any drug to which this Part applies except under and in accordance with a licence, and into or from prescribed ports or places, shall be guilty of an offence against this Act.

8A. – (1) Every person who, save as authorized by a licence or under regulations made under this Act –

(a) sells or distributes any drug to which this Part applies; or

(b) being the owner or occupier of any premises uses such premises for the manufacture, sale or distribution of any such drug or knowingly permits such premises to be so used; or

(c) uses any conveyance for carrying any such drug or for the purpose of the sale or distribution of such drug or, being the owner or person in charge of any conveyance, knowingly permits it to be so used, shall be guilty of an offence, …

8B. - (1) A person shall not, save as authorized by a licence, or under any regulations made under this Act, be in possession of any drug to which this Part applies."

[29] It is, therefore, plainly the case that, in 2004, Mr White could have been convicted in Jamaica for offences similar to those for which he was convicted in the UK., Also, he would have been liable to forfeiture and restraint orders against "any realizable property" held by him or another person.

[30] DOFPA was repealed three years after Mr White was convicted in the UK and some eight years before the application for registration of the foreign orders in Jamaica. As we have seen from the grounds of appeal, the main contention is whether POCA made DOFPA inapplicable – to establishing dual criminality - for the purpose of registration of the foreign orders in 2015. The determination of this question will, therefore, turn on the interpretation of sections 2 and 139 of POCA and section 25(2) of the Interpretation Act.

The provisions in contention

[31] I now set out the provisions that are in contention. As can be seen, they are not convoluted; they are written in simple and straightforward language.

[32] Section 2 of POCA defines "criminal conduct" as:

"… conduct occurring on or after the 30th May, 2007, being conduct which –

(a) constitutes an offence in Jamaica

(b) occurs outside of Jamaica and would constitute such an offence if the conduct occurred in Jamaica."

[33] Section 139 of POCA simply states which statutes were repealed by this enactment, including DOFPA.

[34] Section 25(2) of the Interpretation Act, specifically sub-sections (b) to (e), operate as "saving provisions" in relation to repealed legislation in certain circumstances. The section provides:

"25. – (1)…

(2) Where any Act repeals any other enactment, then, unless the contrary intention appears, the repeal shall not –

(a) revive anything not in force or existing at the time at which the repeal takes effect; or

(b) affect the previous operation of any enactment so repealed or anything duly done or suffered under any enacted so repealed; or

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

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

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

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

Submissions on behalf of the appellant

[35] The appellant's main argument was that the learned judge, in considering the application to set aside the order for registration of the foreign orders, failed to appreciate that the provisions of section 25(2) of the Interpretation Act (which save legal proceedings under repealed legislation) are inapplicable in this case because POCA, which repealed DOFPA, expressly excludes criminal conduct occurring prior to 30 May 2007.

[36] Mr Wildman, appearing for the appellant, observed that POCA seeks to place in one statute all the relevant laws concerning proceeds of crime, money laundering and criminal and civil forfeiture of assets arising from proceeds of crime. Further to that observation, counsel submitted that Parliament, in passing POCA, was clear that offences prior to May 2007 should not be considered under this legislation in determining proceeds of crime and money laundering. It could not be clearer stated than in the language of section 2 of POCA that "criminal conduct" means conduct occurring on or after 30 May 2007, he asserted. It was also the case that in enacting POCA, the Parliament was clear in making a clean start.

[37] Counsel also reasoned that the fact that, in POCA, Parliament prescribed a date when criminal conduct should occur was, by itself, a clear expression of a contrary intention to take criminal conduct out of the operation of the repealed legislation. This meant that any recourse to DOFPA was ousted.

[38] It follows, he argued, that POCA is not subject to section 25 of the Interpretation Act. Therefore, the reasoning of the learned judge is contrary to the law as expressed in section 2 of POCA and the statement of principle in **Assets Recovery Agency (Ex parte) (Jamaica)** [2015] UKPC 1. Consequently, section 25(2) of the Interpretation Act could not be prayed in aid to secure the application of the respondent.

[39] Counsel also observed that the establishment of dual criminality between the UK and Jamaica was a condition precedent for the registration of the foreign orders. He contended that, in order to establish dual criminality, the respondent needed to show that the conduct, which resulted in the "benefit to the appellant", was conduct that was caught under section 2 of POCA, that is, conduct which occurred as of 30 May 2007. Any other criminal conduct could not be considered. So, he argued that since Mr White was convicted in the UK in 2004, and it was that conviction that triggered the application against the appellant's property, his criminal conduct would not have been captured by section 2 of POCA. Consequently, the respondent could not establish dual criminality and would have had no jurisdiction to apply for registration in 2015.

[40] Besides, no right had accrued to the respondent, which could be preserved under section 25 of the Interpretation Act. The respondent did not have more than the "hope or expectation" that the order granting registration would be made. That was not an accrued right as was contemplated by section 25(2) of the Interpretation Act, he contended. The learned judge was, therefore, incorrect. Neither was MACMA relevant to the accrual of any rights since it was purely procedural and did not give rights.

[41] In support of his main points that POCA was the relevant statute, though inapplicable, and that the pre-condition of dual criminality, under MACMA, had been invalidated in 2007 at the repeal of DOFPA, Mr Wildman pointed to the enforcement order which was made subsequent to the order for registration of the foreign orders, on 12 February 2016, and the appointment of a director receiver (both of which were apparently done under the POCA regime), and questioned how the respondent could say that it was relying on DOFPA for registration of the foreign orders, whilst simultaneously utilising POCA to enforce the foreign orders.

[42] In contending that this court should resolve this appeal without regard to the Interpretation Act and DOFPA, counsel concluded where he began - that the order granting registration of the foreign orders was made under a repealed statute and had

breached POCA. On that premise, he submitted that the appeal should be allowed in respect of both the order for registration and that for enforcement.

[43] Mr Wildman cited and made reference to a number of cases, including **Abbot v The Minister of Lands** [1895] AC 425; **Stowers v Darnell** [1973] Crim LR 528; **Meek v Powell** [1952] 1 KB 164; and **the Director of Public Works and Another v Ho Po Sang and others** [1961] AC 90 ('**Ho Po Sang'**)1. But his *force de resistance* seemed to have been **Assets Recovery Agency**, specifically paragraph 22, which he said was fatal to the respondent's case.

[44] In further submissions, counsel indicated that since the order granting registration was made in the absence of the appellant, the provisions of part 13 of the Civil Procedure Rules, 2002 ('CPR'), which provide for the setting aside of judgments obtained in default, were relevant. Counsel also relied on the cases of **Evans v Bartlam** [1937] AC 473 and **Strachan v The Gleaner Co Ltd and another** [2005] UKPC 33, to support his submission that where a judgment has been obtained by default in breach of a statute that judgment can be set aside by the appellate court regardless of the stage of the proceedings.

Submissions for the respondent

[45] For its part, the respondent asserted that the learned judge was correct in refusing to set aside the registration orders as, based on section 25(2) of the Interpretation Act, DOFPA, though repealed by POCA since Mr White's conviction, was the legislation that applied and the application for registration was correctly premised on dual criminality having been established under both DOFPA and the DDA.

[46] Mrs Martin-Swaby, who appeared for the respondent, pointed to section 139 of POCA as simply stating that DOFPA had been repealed. Counsel argued that since POCA had not gone further to say that no conduct could be considered criminal conduct before 30 May 2007, the interpretation of the relevant provisions put forward by counsel for the appellant was not correct. Further, if that was Parliament's intention it would have

expressed it in section 139 (the repealing section) and not section 2 which is the definition section of the statute.

[47] It follows, she argued, that section 25(2) of the Interpretation Act applied in this case, as no contrary intention was shown in the repealing Act, POCA, to exclude its operation. Accordingly, based on section 2 of the Interpretation Act, DOFPA, though repealed, was still applicable, and the application for registration was correctly premised on dual criminality as established by DOFPA (repealed) and the DDA.

[48] It was Mrs Martin-Swaby's further submission that the respondent would have fulfilled the requirement for dual criminality under the DDA and DOFPA and this having been established, the court had to be guided by section 25(2) of the Interpretation Act because that Act preserves legal proceedings instituted under DOFPA, prior to its repeal.

[49] Counsel concluded that none of the cases cited on behalf of the appellant supports the contention that section 25(2) of the Interpretation Act is inapplicable in these circumstances. In particular, **Assets Recovery Agency** deals with investigative and customer information orders which were sought under the provisions of POCA, for criminal conduct prior to 31 May 2007, whilst the instant case deals with an application for registration which has no relevance to POCA and had not been brought under POCA. It is MACMA that authorizes registration of foreign orders made before and after POCA, she insisted, and at the time of registration of the foreign orders, the relevant criminal conduct (occurring in March 2004) was captured by both the DDA and DOFPA (repealed) and not POCA.

[50] In her further written submissions, filed 7 April 2021, with the permission of the court, in response to the appellant's further authorities (referred to and relied on in Mr Wildman's oral submissions), Mrs Martin-Swaby submitted that **Abbott v Minister of Lands** ('**Abbott**'), **Stowers v Darnell** ('**Stowers**'), **Meek v Powell** ('**Meek**'), **Smith v Taylor** ('**Smith**') and **Ho Po Sang** were all distinguishable from the present case and

Smith, in particular, was irrelevant. She pointed to the distinguishing elements as follows.

[51] Unlike the position in **Abbott**, the repealing provision in section 139 of POCA does not contain any clear indication that the rights and liabilities which existed in the provisions of the repealed statute were extinguished. To apply such an interpretation to POCA, she argued, would run afoul of the provisions of section 25(2) of the Interpretation Act, which states that unless the contrary intention appears in the repealing statute, then all rights, obligations and liabilities that existed prior to the passage of the new legislation are preserved. No such provision as contained in **Abbott** exists in POCA. Also, the provision invoked in **Abbott** did not confer a right or liability which could accrue, whereas DOFPA conferred a right on the prosecution to pursue forfeiture proceedings where a person was convicted for an offence under the DDA, and such person was liable to have the proceeds of his offending forfeited to the Crown under the repealed Act.

[52] In **Stowers**, the statute under which the appellant was charged had already been repealed when he committed the offence. Similarly, in **Meek**, the appellant was convicted on a summons that charged him under a statute that was subsequently repealed. Mr White's situation was different, she said, as at the time of his criminal conduct and conviction, the applicable law in Jamaica that grounded the dual criminality requirement in DDA and the DOFPA was in force.

[53] In relation to **Ho Po Sang**, counsel posited that, unlike the circumstances of the present case where post-conviction rights to bring forfeiture proceedings accrued to the prosecution, the lessee in **Ho Po Sang** did not have a right which could be preserved by the repealing statute. His was only an expectation. To the contrary, counsel submitted, the present case concerns rights, obligations and liabilities created under relevant statutes that create criminal offences and prescribe post-conviction orders that may be made and these have been preserved by section 25(2) of the Interpretation Act.

[54] With specific reference to the requirements for registration of foreign orders under MACMA, counsel submitted that: firstly, the confiscation order against Mr White stood as a post-conviction order which was not subject to appeal in the UK; and secondly, at the time Mr White was convicted and the post-conviction orders obtained, the issue of dual criminality was answered by the respondent, by pointing to the provisions of the DDA and DOFPA. She added that the obligations and liabilities which arose from Mr White's criminal conduct, under DOFPA, were preserved by section 25(2) of the Interpretation Act. She also stated that in matters of a criminal nature, it was critical that obligations and liabilities which arose from conduct occurring during the life of a particular statute, should accrue, even if the statute was repealed and replaced.

Arguments on the issue of delay

[55] The respondent, in its written and oral submissions, made a point of the appellant's delay in seeking to set aside the *ex parte* order for registration of the foreign orders.

[56] Mrs Martin-Swaby pointed out that in making the order for registration, the judge had specified a time within which objections to the order could be made, and the appellant had failed to file an objection within the time permitted by the order. It was not until years later that she filed an application to set aside what she claimed was a "default judgment". So, counsel submitted, regard must be had to the fact that the appellant had not provided any reason for the delay in bringing the application to set aside the order.

[57] She also argued that the reasons for delay are generally matters to be considered when courts consider whether to set aside an order which was obtained "by default". Counsel referred us to the **Attorney General of Jamaica v Roshane Dixon and Sheldon Dockery** [2013] JMCA Civ 23 in which it is stated, at paragraph [18], that delay is inimical to the good administration of justice.

[58] Even more, counsel contended, it would be prejudicial to set aside the order for registration after such delay and where the Asset Recovery Unit, since 2016, had been actively managing the enforcement process, including the appointment of a director

receiver, to seek to dispose of the assets included in the foreign orders. Additionally, she stated that these proceedings were quasi- civil matters for which the CPR could offer only some guidance, in the absence of regulations under MACMA.

[54] Mr Wildman claimed otherwise. He contended, in his oral submissions, that time would not run against the appellant since the grant of the order for registration of the foreign orders was a breach of POCA. He argued that if the delay were to be a bar in these proceedings, it would result in grave injustice to the appellant as she would be deprived of her property in breach of a statute and the Constitution, namely the Charter of Fundamental Rights and Freedoms.

[55] Besides, the use of an *ex parte* application and affidavit in the registration process in the Supreme Court is a feature of civil proceedings and not criminal proceedings. Furthermore, the granting of the registration order bears some similarity to a judgment in default in civil proceedings and should therefore be treated similarly – by applying the rules of the CPR for setting aside an irregular judgment in default. In support of that submission, counsel referred to **Carlton Smith v Lascelles Taylor and others** [2015] JMCA Civ 58, where this court set aside an order that was made 14 years prior, and the dictum of Lord Hughes in **Assets Recovery Agency**. The latter case, he submitted, makes it clear that these are civil proceedings.

[59] Whilst acknowledging that no objection had been lodged as the order for registration permitted, Mr Wildman contended that since there was a statutory breach, the court should exercise its inherent jurisdiction to set aside the order and preserve the rule of law, as was done in **Evans v Bartlam**. He also advanced the argument that the CPR could not be used to restrict the court's exercise of its inherent jurisdiction to set aside an order made in breach of a statute and the fundamental rights of the appellant to her property.

Discussion and disposal

[60] This court has consistently held that the appellate court's power to interfere with a judge's exercise of discretion is applied only if it is satisfied that the discretion was exercised on a wrong principle of law or otherwise, improperly. An authoritative statement of the law is found at paragraph [20] of **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 1, where, on an interlocutory application, Morrison P stated:

> "This court will…only set aside the exercise of a discretion by a judge on an interlocutory application on the ground that it was based on a misunderstanding by the judge of the law or of the evidence before him, or on an inference – that particular facts existed or did not exist – which can be shown to be demonstrably wrong, or where the judge's decision is 'so aberrant that it must be set aside on the ground that no judge regardful of his duty to act judicially could have reached it'."

[61] In my view, there was a correct synthesis of the principal issue and main questions of law at each stage of the proceedings below. At paragraph [2] of his written reasons, the learned judge summarised the issue in this way:

> "The narrow issue raised by this application, is whether or not in granting the order effecting registration, the court was correct to hold that section 25(2) of the **Interpretation Act** operated to preserve certain attendant rights and obligations of parties, (in this case the State and a private citizen), under **DOFPA**, which has been repealed by the passage of the **Proceeds of Crime Act, 2007 (POCA)**." (Bold as seen in the original)

[62] In approaching this question, the proper course was for the learned judge to have regard to the clear purpose in the legislation and to presume that Parliament's expression was intended to serve that purpose. In doing so, he should not strain the language of the Parliament or substitute them with his own (see Phillips JA at paragraph [49] in **Dawn Satterswaite v Bobette Smalling et al** [2019] JMCA Civ 43 ('**Dawn Satterswaite**')).

[63] The learned judge considered that section 25(2) of the Interpretation Act operates as a savings clause to ensure that when legislation is repealed, this does not operate to invalidate rights, liabilities and obligations which flow from conduct that occurred when the legislation was in effect unless a contrary intention is shown. He observed that although repealed at the time of the registration of the foreign orders, DOFPA was in operation at the time of Mr White's criminal conduct. He noted that it dealt with the question of dual criminality, which provided the basis on which the request for registration of the UK foreign orders could be granted in Jamaica. At paragraph [16], the learned judge stated:

> "… Mr. White was convicted of the offences that grounded the confiscation order made in the UK. It was this established dual criminality that formed the basis on which the request for registration of that UK order could be granted under section 27 of **MACMA**. Section 25 (2) of the **Interpretation Act** makes it clear that in the circumstances outlined, the **DOFPA** would still apply, despite its [sic] having been repealed at the time of application for registration, given that it was the relevant legislation in effect in Jamaica, at the time of…Lincoln White's conviction."

[64] At paragraph [17], he remarked that there was no contrary intention shown in POCA:

> "Further there is nothing in POCA to even remotely suggest a contrary intention that would supersede or negate the general principles that would apply to all repealed legislation, contained in section 25(2) of the **Interpretation Act.** Accordingly, I am of the view that the court was correct to hold that **DOFPA** was the appropriate legislation to consider in determining whether the pre-condition of dual criminality had been satisfied…"

[65] The learned judge also considered that section 2 of POCA stipulates that criminal conduct is deemed to occur as of 30 May 2007, and he concluded, at paragraph [18], that this provision relates to "the detailed and intricate confiscation regime established under POCA… [and] circumscribes how that regime is to operate under POCA in terms of

what is criminal conduct and from what date that conduct can be taken into account for various considerations and computations under the Act".

[66] Thus, the learned judge's conclusion that the date of 30 May 2007 and the definition of criminal conduct do not have anything to do with applications that owe their life to the provisions of DOFPA. He correctly pointed out that "they are separate and distinct and the POCA has not re-defined or circumscribed anything that happened when the DOFPA was in effect". He also correctly observed, in my view, that "DOFPA having been silent on enforcement, no possibility of any conflict could exist with enforcement action being taken by the respondent pursuant to POCA" (see paragraph [20])

[67] It is clear to me that the purpose of section 2 of POCA is to define terms that are used in the statute. Wherever the term "criminal conduct" appears, it is meant to indicate that POCA governs the relevant criminal conduct if it occurred on 30 May 2007 or after. Put another way, the definition of "criminal conduct" in section 2 indicates that offences prior to 30 May 2007 may be governed by other legislation, such as the repealed provisions in DOFPA, which are saved by section 25(2) of the Interpretation Act. No provision in POCA supersedes, negates or expresses a contrary intention to that expressed in section 25(2) of the Interpretation Act.

[68] If, for the sake of argument, we assume that the definition and explanation of "criminal conduct" which Mr Wildman canvassed are correct, this would mean, for example, that a person who committed a criminal act under the Money Laundering Act (which was also repealed by POCA), a day before POCA came into effect, would not be liable to confiscation of ill-gotten gains which had not been discovered and confiscated by then. This would undermine the objective of depriving criminals of the benefits of unlawful deeds. It is doubted that Parliament could have intended such an absurd result.

[69] The design of the mutual assistance framework, prior to POCA, involved bits of legislation that worked in tandem to produce the desired effect. There was no time limit on when there could be registration of a foreign order for restraint and/or confiscation of

alleged tainted property, which could have been obtained in Jamaica on conviction of a relevant offence prior to 30 May 2007. The registration in issue was hinged on conduct that occurred in 2004. In consequence, POCA was irrelevant to whether dual criminality existed at the time of Mr White's conviction and to any right, privilege, obligation or liability of any person or the state. It is the DDA and DOFPA to which one would turn for that. This court's decision in **Dawn Satterswaite** supports this conclusion.

[70] **Dawn Satterswaite** addressed the question of whether certain orders could lawfully be obtained under POCA in relation to offences that were committed before the Act came into force. As Phillips JA explained, section 2 of POCA "referred to the specific date of the creation of the offence", which meant that an offence that occurred before the specified date would be dealt with under the statute which was in existence at the time of the offence. Thus, there is no "contrary intention" in section 2 that POCA should apply retrospectively to determine criminal conduct.

[71] Phillips JA summarised the legislative intent of the Interpretation Act and the effect on POCA and the statutes it repealed (referring specifically to the Money Laundering Act) in this way:

> "[87] …the properties purchased before 30 May 2007 and the transactions occurring before that date…would have to be pursued under the repealed Money Laundering Act, as sections 25(2)(d) and (e) of the Interpretation Act preserve that process.
>
> [88] **The intention was not to leave any gap in the pursuance of prosecution of criminal activity.** But, in construing the two statutes, **in my view, a contrary intention has been made clear, that prior to 30 May 2007, any allegations of criminal behaviour or activity was not criminal conduct under POCA, and cannot be prosecuted as such.** The interplay of the two statutes is clear. But there is no evidence of a gap. The offences must simply be pursued in keeping within the relevant statutory construction. **Activities with property after 30 May 2007**, for instance, sales or transactions between 2011 and 2014, comprising information relating to activity **which**

> **MOCA reasonably believed were money laundering offences would not fall afoul of section 2 of POCA, as they would not have occurred outside of the designated period stated in POCA, and so could generate criminal property**…" (Emphasis mine)

[72] A similar view of the law was taken by the Bahamian Court of Appeal in **Commissioner of Police v Michelle Reckley and others** MCCrApp No 46 of 29, judgment delivered 29 May 2019. The charges in question pertained to money laundering and proceeds of crime. When the matter came up for hearing on 29 March 2019, the magistrate declined jurisdiction on the basis that the statute under which the appellants were charged had been repealed. That statute was replaced by a new enactment, the Proceeds of Crime Act, 2018, which came into force on 25 May 2018. The new enactment took effect before the respondents were charged but after the alleged criminal conduct (which was between 2016 and 2017).

[73] The appellant appealed the decision of the magistrate. One of the grounds was whether the magistrate had the jurisdiction to hear the charges where the charging statute had been repealed. The court ruled that section 20 of the Interpretation Act (worded similarly to section 25(2) of the Jamaican Act) made the charges competent for prosecution under the repealed law. As the court stated, at paragraph 15, the savings provision served as "a time freezing device… so... that no criminal would escape the dragnet of the law on the pernicious technicality that his or her violation is of a law that has, since the commission of the illegal act, been repealed". And, as the Privy Council previously explained in **Panday v Virgil** [2008] UKPC 24, which dealt with a similarly worded provision in Trinidad and Tobago:

> "13. … unless a contrary intention appears, s.27 expressly allows 'legal proceedings' to 'be instituted' in respect of 'any offence committed against the written law so repealed' 'as if the written law has not been repealed'. So far from any contrary intention appearing, moreover, the 2000 Act itself provides by s.44 :

> 'Where anything has been commenced by or under the authority of the Integrity Commission under the Integrity in Public Life Act 1987, repealed by this Act, such thing may be carried out and completed by or under the authority of the Integrity Commission.'"

[74] These authorities reaffirm the plain meaning of section 25(2) of the Interpretation Act and its application of the language in section 2 of POCA, that any proceeding can commence or continue under the repealed law (with respect to offences which occurred during the time it was in force) unless the contrary intention is made clear in the repealing statute.

[75] The main issue in **Assets Recovery Agency** centred around the conditions for granting specific evidence gathering orders under POCA. The Privy Council held that the evidence gathering orders under POCA could not be utilised in relation to suspected criminal behaviour, which was said to have taken place before 30 May 2007.

[76] In the result, the Board found that the Court of Appeal was correct to have dismissed the agency's appeal and upheld the Supreme Court's refusal to grant an application for a customer information order under sections 119-125 of POCA.

[77] No other legislation but POCA was in issue, but the Privy Council did comment on whether POCA was applicable to offences prior to the date of its enactment. The Board noted, at paragraph 22(iv), that:

> "[the] assertions of suspected criminal behaviour, where made, included much which was said to have taken place before 30 May 2007, and thus which could not have been criminal conduct, and could not have generated criminal property, for the purposes of the Proceeds of Crime Act 2007 …"

[78] The statement of the Board at para 22(iv) reaffirms the law that "criminal conduct" as defined under POCA does not include criminal behaviour which takes place before 30 May 2007. This is the situation in the present case, except that here the respondent was

not proceeding under POCA and would have been in error had it done so because the relevant criminal conduct was in 2004.

[79] **Ho Po Sang** and **Abbott** lend no support to the appellant's case. They concerned the assertion of 'a right' which did not exist. Mr Wildman read more into those cases than there is when he submitted that the DPP had no more than "the hope or expectation" that the order granting registration would be made. That is not so. The orders which were sought and obtained by the DPP fell within the rubric of "rights, privileges, obligations and liabilities" accrued and "investigation, institution or continuance of legal proceedings" permitted under section 25(2) of the Interpretation Act.

[80] **Ho Po Sang** concerned an application for a rebuilding certificate which was made prior to the legislation being repealed but purportedly granted after. The issue, pertinent to this case, was whether the lessee had an accrued right which was preserved by the Interpretation Ordinance on the repeal of the relevant legislation.

[81] The facts of that case are summarised from the headnote. The second appellant was a Crown lessee of premises for which the lease had expired. The premises had been occupied by the respondents as the second appellant's tenant and sub-tenants. The second appellant applied for a renewal of the lease and conditions for the granting of a new lease were agreed with the first appellant. The conditions required, among other things, the demolition of existing buildings which were subject to a Landlord and Tenant Ordinance (Cap 255) ('the Ordinance'). Section 3A to E of the Ordinance provided a procedure that could enable the lessee to obtain vacant possession by obtaining a rebuilding certificate from the first appellant. On 11 June 1956, the lessee applied for such certificate and on 20 July 1956, the first appellant gave notice to the lessee of his intention to grant it, whereupon the respondents, who would have lost their tenancies, appealed to the Governor-in-Council.

[82] On 9 April 1957, sections 3A to E of the Ordinance were repealed. Subsequent to the repeal, the Governor-in-Council directed that the rebuilding certificate be given and,

on 12 October 1957, the first appellant gave the lessee the certificate. The lessee then called upon the respondents to quit the premises.

[83] The respondents, being aggrieved by the grant of the certificate after the repeal of the said sections of the Ordinance, commenced proceedings against the appellants contending, among other things, that the first appellant had no legal authority to issue the rebuilding certificate. The trial judge dismissed their action, but they succeeded on appeal. The appellants (defendants) then appealed to the Privy Council, contending, among other things, that the lessee had an accrued right to possession under the Ordinance prior to the repeal of sections 3A to E, which survived the repeal, by virtue of the Interpretation Ordinance. Their Lordships concluded that it could not properly be said that the lessee had an accrued right to be given a rebuilding certificate. He had no more than a hope that a certificate would be granted, dependent on the exercise of discretion by the Governor-in-Council. In the circumstances, no accrued right was preserved by section 10(c) of the Interpretation Ordinance, on the repeal of the legislation. Nor did the appellants' position come within section 10(e) of the Interpretation Ordinance which provides that a repeal is not to affect any investigation, legal proceeding or remedy in respect of any such right.

[84] Similarly, in **Abbott**, the appellant, who had previously been granted Crown land, applied for a conditional purchase of lands adjoining land he already owned and for the conditional lease of another parcel. The applications were disallowed by the local land board, and its decision was upheld by the Land Appeal Court, which referred the matter to the Supreme Court as a case stated. The Supreme Court affirmed the decision of the Land Appeal Court.

[85] Among the appellant's contentions was that although the particular provision under which he made the first conditional purchase had been repealed, a right had accrued for him to make the additional purchase. He also contended that, notwithstanding the repeal and there being no corresponding provision in the new Act,

the saving proviso of the repealing section of the latter Act preserved his accrued right. These were the words of the new Act on which he sought to rely:

> "Provided always that notwithstanding such repeal –…
>
> (b) All rights accrued and obligations incurred or imposed under or by virtue of any of the said repealed enactments shall subject to any express provisions of this Act in relation thereto remain unaffected by such repeal."

[86] Their Lordships held, among other things, that the appellant did not obtain the right to make additional conditional purchases under the relevant section of the statute and even had the original provision conferred upon him the right claimed, section 3 of the repealing Act prohibited the purchase of additional conditional purchases of Crown land and would therefore be inoperative to preserve such right. The Board affirmed the observation that was made by the judge in the lower court that "the power to take advantage of an enactment may without impropriety be termed a 'right'. But the question is whether it is a 'right accrued' within the meaning of the enactment which has to be construed".

[87] **Stowers v Darnell** and **Meek v Powell** concerned appellants who were charged unlawfully under statutes that had been repealed when the offences were committed.

[88] On 11 July 1972, Stowers was charged for operating a vehicle with a defective tyre. The provision under which the charge was made had been repealed on 1 July 1972. Stowers' appeal was upheld.

[89] Meek was charged in May 1951 for selling milk that contained added water, contrary to a provision of the Food and Drugs Act 1938. That provision was repealed but re-enacted in identical terms by another Act which came into force on 1 January 1951. However, the 1951 Act referred only to matters in existence at the time when it came into force and was therefore bad for charging an offence that occurred in the period of the repealed statute. The court found that the informations pertained to the repealed provision and could not be validated by the later Act. The matter was one of a technicality

but as Byrne J observed, it was "…nevertheless of importance that a conviction should be obtained under the correct statute".

[90] In short, unlike the present case, the authorities of **Stowers** and **Meek** simply do not concern the question of whether the Interpretation Act operated to preserve some acquired right, obligation or liability under a repealed statute but rather whether the criminal proceedings were conducted under the proper legislation.

[91] Mr Wildman's argument that, in enacting POCA, "Parliament was clear in making a clean start", should be rejected. POCA was meant to deal with specified criminal offences as at 30 May 2007 and onwards. At its core, **Dawn Satterswaite** points to the plain meaning of legislative language, which intends that there be no gap in dealing with criminalised behaviour when Parliament enacts new legislation that is not intended to decriminalise such behaviour, but, on the contrary, to streamline the framework for dealing with them.

[92] No gap was created in the regime for the establishment of dual criminality on the basis of criminal conduct which occurred prior to the enactment of POCA because the Interpretation Act, which covers a "very wide field", preserves, among other things, accrued rights, obligations and liabilities under DOFPA. And neither section 2 nor 139 of POCA manifests a contrary intention.

[93] There is no need to interpret the provisions of sections 2 and 139 of POCA and section 25 of the Interpretation Act than according to their plain and ordinary meaning.

[94] None of the cases relied on by the appellant supports a different conclusion about the interplay between POCA and the Interpretation Act. The learned judge was, therefore, correct that the applicable law for establishing dual criminality for the purpose of the registration of the foreign orders was DOFPA and not POCA. That said, there was no breach of POCA. And there was also no argument of merit on which to hold that the appellant's constitutional rights were breached.

[95] The learned judge also found that there was no conflict between the registration and enforcement mechanisms. He insightfully observed at paragraph [20] of his reasons, "DOFPA having been silent on enforcement, no possibility of any conflict could exist with enforcement action taken pursuant to POCA".

[96] It is true that there is no enforcement mechanism under DOFPA. That being so, no mechanism can be insisted on under that statute. But, as the outcome of this appeal is not dependent on questions about the enforcement mechanism, that not being a ground of appeal and there being little said about it in the arguments advanced, Mr Wildman's argument about one regime being used for registration and another for enforcement is uncompelling.

Delay

[97] It was a point of contention whether the rules of the CPR applied to the proceedings which were before the learned judge, such that, among other things, the appellant's delay in seeking to set aside the *ex parte* order for registration and the absence of reasons for any such delay should be relevant considerations. There is no indication that any such contention was raised before the learned judge and, at any rate, given the conclusions reached on the salient issue in this appeal, there is no need to consider the further question of delay raised by the respondent.

Conclusion

[98] For the foregoing reasons, I find that the learned judge correctly refused to set aside the order for registration made on 31 July 2015. Accordingly, I propose that the appeal be dismissed with costs to the respondent.

P WILLIAMS JA

ORDER

1. The appeal is dismissed.

2. The application to set aside the decision of D Fraser J made on 10 November 2017 is refused.

3. Costs of the appeal to the respondent to be taxed if not agreed.