JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NOS. 96, 102, & 108/2003

BEFORE: THE HON. MR. JUSTICE FORTE, P.
THE HON. MR. JUSTICE PANTON, J.A.
THE HON. MRS. JUSTICE McCALLA, J.A.(Ag.)

ON APPEAL FROM CLAIM NO. HCV-207/03

BETWEEN	**THE JAMAICAN BAR ASSOCIATION**	**1ST APPELLANT**
AND	**THE ATTORNEY GENERAL**	**1ST RESPONDENT**
AND	**THE DIRECTOR OF PUBLIC PROSECUTIONS**	**2ND RESPONDENT**

CLAIM NO. HCV-238/03

BETWEEN	**ERNEST SMITH & COMPANY (a firm)**	**1 ST APPELLANT**
AND	**ERNEST A. SMITH**	**2ND APPELLANT**
AND	**NESTA-CLAIRE SMITH**	**3RD APPELLANT**
AND	**PEARLINE BAILEY**	**4TH APPELLANT**
AND	**MARSHA SMITH**	**5TH APPELLANT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**1ST RESPONDENT**
AND	**THE DIRECTOR OF PUBLIC PROSECUTIONS**	**2ND RESPONDENT**

AND	**DEPUTY SUPERINTENDENT OF POLICE KARL PLUMMER**	**3RD RESPONDENT**

CLAIM NO. HCV 213/03

BETWEEN	**HUGH THOMPSON**	**1ST APPELLANT**
AND	**GIFFORD THOMPSON & BRIGHT**	**2ND APPELLANT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**1ST RESPONDENT**
AND	**THE DIRECTOR OF PUBLIC PROSECUTIONS**	**2ND RESPONDENT**

R.N.A. Henriques, Q.C., Dennis Morrison, Q.C., David Batts and Ransford Braham, instructed by Livingston, Alexander and levy for the Jamaican Bar Association

Frank Phipps, Q.C. and Ms. Carolyn Reid, instructed by Ms. Suzette Wolfe of Crafton Miller and Co. for Ernest Smith and Co. and Ernest Smith

Mrs. Jacqueline Samuels-Brown and Ms. Deborah Martin, instructed by Crafton Miller and Co. for Nesta-Claire Smith, Pearline Bailey and Marsha Smith

Mrs. Pamela Benka-Coker, Q.C., instructed by Bert Samuels for Hugh Thompson & Gifford Thompson and Bright

Michael Hylton, Q.C., Mrs. Nicole Foster-Pusey and Garfield Haisley for the Attorney- General and Deputy Superintendent of Police Karl Plummer

David Fraser, Mrs. Caroline Williamson-Hay and Mrs. Ann-Marie Lawrence-Granger, for the Director of Public Prosecutions

June 27, 28, 29, 30 July 1, 4, 5, 6,
September 19, 20, 21, 22, 23, 2005
& 14th December, 2007

FORTE, P.

I have read in draft the judgment of my learned brother, Panton, J.A. I agree with his reasoning and conclusion and have nothing further to add.

PANTON, J.A.

1. The circumstances of this case are unprecedented in the history of our country. In January, 2003, the offices of several attorneys-at-law were searched by the police, who seized several clients' files although there was no allegation that any of the attorneys or their members of staff had committed any criminal offences, or that there had been any wrongdoing by anyone on those premises. The attorneys-at-law who were affected by this action were joined by the Jamaican Bar Association in another unprecedented move, that is, the filing of suits against the state challenging its authority to behave in this manner. The consolidated suits were heard by the Constitutional Court (Wolfe, C.J., Karl Harrison and Hibbert, JJ.) which upheld the action of the state. This appeal seeks to overturn the decision of the Constitutional Court.

2. The police acted under the authority of three warrants dated 24th January, 2003, signed by His Honour Mr. Martin Gayle, Resident

Magistrate for the Corporate Area. The warrants were issued under section 23 (3) of the Mutual Assistance (Criminal Matters) Act (hereinafter referred to as "The Act") and addressed to Deputy Superintendent of Police, Karl Plummer who supervised the searches. The law offices specified in the warrants were those of Ernest A. Smith at 85 East St., Kingston, Ernest A. Smith and Marsha Smith at Main Street, Browns Town, Saint Ann, and Gifford Thompson and Bright located at 122 – 126 Tower St., Kingston. The warrants were similar in wording. Each recited, somewhat clumsily, that it appeared to the Resident Magistrate, upon the hearing of an information on oath laid by Deputy Superintendent Plummer, that:

> "there was reasonable cause to suspect that –
>
> 1. Any document or article pertaining directly or indirectly to any or all of the Respondents herein or to Bay Vista Villages and Lot 45 Breadnut Drive, Bengal, St. Ann.
>
> 2. Any document or article otherwise relevant to criminal proceedings and/or investigations being pursued against the respondents herein by the Canadian Government.
>
> are located at the following premises:
>
> The Law Offices of....."

Each warrant recited, further, that whereas it appeared to the Resident Magistrate that the seizure of the abovementioned articles would assist in the investigation of five stated offences currently under

investigation in Canada in respect of the Respondents herein, he was authorizing and commanding the Deputy Superintendent "forthwith and with proper assistance and with such force as may be necessary to enter the said premises at any time of the day or night and there diligently to search for the said articles as aforesaid and if any such articles shall be found to seize and take such articles with you". Although the warrants refer to "the respondents herein", it is noted that no "respondents" were named in the said warrants.

3. At the time of the searches, one Robert Thomas Bidwell, a Canadian citizen residing in Jamaica, was in custody awaiting the conduct of an extradition hearing in relation to himself at the Corporate Area Resident Magistrate's Court. Mr. Ernest Smith and Mr. Hugh Thompson, attorneys-at-law, and appellants herein, had been retained personally to appear for Mr. Bidwell. The latter had been arrested in late 2002, and the extradition hearing had been scheduled for February 25, 2003. Mr. Ernest Smith was then chairman of the Board of the Strata Corporation in respect of Bay Vista Village and his law firm Ernest A. Smith and Company was the legal advisor to the strata corporation. Mr. Bidwell was intricately involved with and undoubtedly linked to the acquisition of this property, its development, and the subsequent transfers of units therein. The police, on January

27, 2003, seized from Mr. Smith's Brown's Town office all files relating to Bay Vista Village. The following day, the police searched Mr. Smith's office at 85 East St., Kingston, and in the presence of Miss Marsha Smith, one of the appellants herein, examined the contents of the file containing Mr. Bidwell's instructions to Mr. Smith in respect of the pending extradition proceedings. Deputy Superintendent Plummer was sufficiently gracious and thoughtful not to remove this file from the office. He said: "...I took the decision not to take this file as it is a matter before the court and the file would be needed." (page 93 para. 57 of the record of appeal). On the said January 28, 2003, the police seized, read and removed several files relating to Mr. Bidwell and Bay Vista Village from the office of Mr. Hugh Thompson. The search party, which apparently included at least one member of the Royal Canadian Mounted Police, brushed aside all objections by the attorneys who contended that the searches breached legal professional privilege.

4. These searches had their genesis in the receipt of a letter of request from Canada to the Director of Public Prosecutions (DPP) who then gave authority to the Deputy Superintendent of Police to make application to the Resident Magistrate for warrants to effect the wishes of the Canadian authorities. This entire process has come under attack from the attorneys-at-law directly involved as well as legal practitioners in general, through the Jamaican Bar Association. Hence

the claims that were filed by the appellants and adjudicated on by the Constitutional Court.

5. The appellants sought from the Constitutional Court a raft of declarations, orders of certiorari and mandamus, and an injunction. In keeping with the consolidation of the suits, it is appropriate to summarize the reliefs that were sought, and denied.

6. The appellants sought declarations that:

(1) The warrants breached sections 13, 18, 19 and 20 of the Constitution;

(2) The warrants prejudiced the right of citizens to legal professional privilege, contrary to common law, and sections 19, 21 and 23 of the Mutual Assistance (Criminal Matters) Act;

(3) the taking and reading of clients' documents breached sections 18, 19 and 20 of the Constitution;

(4) the Director of Public Prosecutions as the Central Authority pursuant to the Mutual Assistance (Criminal Matters) Act is in breach of the Constitution;

(5) section 23 of the Mutual Assistance (Criminal Matters) Act is inapplicable to documents and articles in possession of attorneys which are protected by legal professional privilege;

(6) the warrants were null and void for failure to disclose the names of the

respondents and for lacking in specifics as to documents and articles to be seized; and

(7) the Mutual Assistance (Criminal Matters) Act is in breach of the Constitution so far as it purports to authorize the issue of warrants to search attorneys' offices.

7. All appellants sought orders of certiorari to remove into the Supreme Court and quash the warrants issued by the Resident Magistrate. In addition, they, with the exception of the Jamaican Bar Association, sought orders of mandamus for the release and return of all documents, files and articles seized during the search. Further, the appellants in claim no. 238/03 (The Smiths and Pearline Bailey) sought an injunction to prevent the respondents from using the documents seized, and to restrain the Resident Magistrate from authorizing or issuing any other search warrant to search their offices.

8. The Constitutional Court had before it affidavits sworn to by, or on behalf of, the appellants. The affidavits were contentious only in so far as the details of certain aspects of the searches were concerned. Those contentious areas are not such as would prevent a proper determination of the issues before this Court. Miss Hilary Phillips, Q.C., President of the Jamaican Bar Association, deponed that the Association was incorporated on the 16th January, 1973, and has a membership of over nine hundred (900) attorneys-at-law. The

Association represents the views of not only its members, but also of the members of the Cornwall Bar Association, The Northern Jamaican Law Society and the Southern Bar Association which have all been adversely affected by the actions which have formed the basis for the suit. The issues raised by the suit are, she said, of immense public interest.

9. Mr. Ernest Smith is a member of the Jamaican Bar Association. He was admitted to practice in the very year of the incorporation of the Association. He was retained personally by Robert Bidwell in August, 2002, in respect of extradition proceedings which were then pending and subsequently scheduled for February 25, 2003. In December 2002, Mr. Smith was supplied with statements and affidavits relevant to the proceedings. On January 27, 2003, he arrived at his Brown's Town office while the search by Deputy Superintendent Plummer and his party was in progress. The search warrant was shown to Mr. Smith who challenged its validity. An argument developed between Mr. Smith and the search party. Deputy Superintendent Plummer asked Mr. Smith for the file dealing with Bidwell's extradition. Mr. Smith told him that that file was at his East St. office, in Kingston. The police seized from the Brown's Town office

thirty-four (34) files and or documents related to Bidwell and other clients, according to Mr. Smith.

10. Miss Marsha Smith, attorney-at-law, one of the appellants, deponed in respect of the search at the East St. office. That search saw about fifteen (15) officers being present from time to time in the office. The staff members were questioned by the Deputy Superintendent of Police who initially forbade them from leaving the office. Miss Nesta-Claire Smith claimed to have been prevented from leaving the office when she tried to go to another office to send a facsimile to the office of the DPP. Deputy Superintendent Plummer deponed that he objected to her leaving the office and instructed two police officers to stand guard at the door as it was necessary for her to be present while her office was being searched. According to him, Miss Smith assaulted the officers at the door in attempting to leave the office, and he warned her for prosecution for the offence of assault.

11. The Constitutional Court also had before it affidavits filed by Mr. Kent Pantry, DPP. In one of those affidavits, dated 31st March, 2003, Mr. Pantry referred to the Act by virtue of which the DPP was designated the Central Authority of Jamaica by the Minister of Justice. In paragraph 8 of that affidavit, Mr. Pantry said that the Central

Authority of Jamaica had received a confidential request (that is, the Letter of Request) dated the 3rd July, 2002, from the Central Authority of Canada "for the Central Authority of Jamaica to obtain search warrants from a Resident Magistrate for premises, including the Law offices of Ernest A. Smith and Company and Mr. Hugh Thompson of Gifford, Thompson and Bright." Consequently, he (the DPP) gave written authority to the Deputy Superintendent of Police to apply for the warrants under section 23 (1) of the Act. The DPP said that he gave clear instructions as to how the search party should handle those documents that were claimed to be subject to legal professional privilege. Incidentally, in his affidavit dated 5th June, 2003, Mr. Pantry said that he had made an error when he had said that the Letter of Request was dated the 3rd July, 2002. What he should have said is that he received it on the 3rd July, 2002.

12. In his reasons for judgment, the learned Chief Justice, quite appropriately and helpfully, classified the matters requiring determination into four issues. They are listed as follows:

> Issue I: the "constitutionality of the section of the Mutual Assistance (Criminal Matters) Act pursuant to which the search warrants were issued and the documents seized".
>
> Issue II : "the validity of the warrants and the searches and seizures carried out pursuant to the said warrants"

Issue III : "Legal Professional Privilege"

Issue IV : "Director of Public Prosecutions as Central Authority"

Karl Harrison, J. (as he then was) expressed himself as being in total agreement with the learned Chief Justice, and limited his own comments to the constitutionality of the search warrants.

Hibbert, J. agreed with the four-pronged classification, and dealt with the matter accordingly.

13. In relation to Issues I and II, the Constitutional Court held that section 23 of the Act, dealing with the issuing of search warrants, was in keeping with section 19 of the Constitution; and that the warrants had been lawfully issued, and the searches lawfully executed. In respect of Issue III, it was held that the mere seizure of the documents did not offend, or infringe, the principle of legal professional privilege; and that the mere claim of privilege does not render the document privileged. So far as Issue IV was concerned, the Constitutional Court held that in the absence of a provision in the Constitution preventing the DPP from being named as the Central Authority, his designation as such was unimpeachable. In the circumstances, the Constitutional Court dismissed the claims.

14. The appellants filed thirty-seven (37) grounds of appeal in this matter, with a fair degree of repetition being evident. The grounds relate to the Court's findings in respect of the four issues listed in paragraph 12 above. Central to their challenge is the submission that the Act is unconstitutional. In particular, sections 15 and 23 of the Act have been targeted. The other areas covered by the grounds are (i) the alleged breach of section 19 of the Constitution, (ii) legal professional privilege and (iii) the alleged generality of the warrants. There is also one ground which challenged the designation of the DPP as the Central Authority. It is convenient to deal with that ground at this stage.

The designation of the DPP as the Central Authority

15. Section 2 of the Act defines "Central Authority" as "the Minister responsible for justice or any person designated by him for the purpose of performing such functions or duties of the Central Authority as may be specified in the instrument of designation". On April 30, 1997, according to a Government Notice published in the Jamaica Gazette Extraordinary on May 2, 1997, "Keith Desmond St. Aubyn Knight, Minister responsible for Justice ...designate (d) the Director of Public Prosecutions as the Central Authority for the purpose of performing the functions and duties specified in the Schedule to this Order". The Schedule provides for functions such as "Authorizing a

police officer to apply to a Resident Magistrate for a search warrant requested by a foreign state in relation to an article that is relevant to a proceeding or investigation relating to a criminal matter in a foreign state".

16. In neither the written nor oral submissions did the appellants make any reference to this ground of appeal. It is therefore taken that the ground, which is clearly without merit, has been abandoned. No further comment is necessary.

The Mutual Assistance (Criminal Matters) Act

17. The Act provides for Jamaica and relevant foreign states to make mutual requests for assistance in respect of investigations and proceedings in relation to criminal matters. The assistance is solely for the criminal law enforcement authorities [sections 4 and 15(1) and (2)(a)]. In respect of the request by a foreign state, assistance may be provided in respect of , among other things, the carrying out of search and seizure [section 15 (3) (f)]. A request for assistance made by a foreign state shall be refused, if in the opinion of the Central Authority, certain conditions exist. Two of these conditions are:

> (1) where compliance with the request would contravene the provisions of the Constitution, or prejudice the security, international relations or other essential public interests of Jamaica [section 16 (1) (a) (i)]; and

> (2) where the steps required to be taken in order to comply with the request cannot be legally taken in Jamaica in respect of criminal matters arising in Jamaica [section 16 (1) (a) (v)].

18. There is no dispute that Canada is a relevant foreign state and, as such, is entitled to make a request for assistance from Jamaica in accordance with the Act, section 15 (4) of which provides:

> "Requests made by a foreign state shall be made in writing to the Central Authority and shall contain such of the particulars set out in the Schedule as the Central Authority may require, but without prejudice to the requirement for such additional information as may be considered necessary for the purpose of giving effect to the request".

The Letter of Request was exhibited with Mr. Pantry's affidavit dated 5th June, 2003. It states that the request was being made to assist "an ongoing police investigation being undertaken by ... the Royal Canadian Mounted Police". At the time of the request, no charges had been laid. Having named the violations that were being investigated and the individuals who were allegedly involved, the letter requested that there be a search of "various locations to obtain certified copies of Robert Thomas Bidwell's, Beverley Hudson's and Bengal Vacations Limited's income tax declarations and to restrain properties identified through the above-mentioned criminal investigation as proceeds of crime" (page 9 supplemental record of appeal; repeated at page 28).

Under the heading "Request Portion", the letter sought the conduct of searches at six specific locations, namely:

> (1) "Robert Thomas Bidwell's residence located at Lot 45, Breadnut Drive, Bengal, Rio Bueno, Saint Ann Parish, Discovery Bay, Jamaica";
>
> (2) Bay Vista Village's business office, located at Queen's Highway, Rio Bueno;
>
> (3) The Law Offices of Ernest A. Smith and Marsha Smith, located on Main St., Brown's Town, St. Ann;
>
> (4) The Law Offices of Ernest A. Smith, located at 85 East St., Kingston;
>
> (5) The Law Offices of Maureen Smith, located in Fairy Hill; and
>
> (6) The Law Offices of Maureen Smith , located in Long Hill.

The non-inclusion of the appellants Hugh Thompson, and Gifford Thompson and Bright in the letter of request

19. As indicated earlier, the Constitutional Court, in dealing with Issue II, held that the warrants were lawfully issued and the searches lawfully executed. Mrs. Benka-Coker, Q.C., representing the appellants Thompson, and Gifford Thompson and Bright, submitted that the Central Authority of Canada made no request for the search of these offices so the search of these offices was illegal. She was critical of the reasoning of the Constitutional Court in arriving at their conclusion.

The learned Chief Justice at pages 52 and 53 of the supplemental record of appeal said:

> "In respect of the claimant Mr. Hugh Thompson it was argued that the Letters Rogatoire did not request that his office be searched and as a result the search of Mr. Thompson's office was unconstitutional.
>
> It is a fact that the Letters Rogatoire did not specifically request that the office of Mr. Hugh Thompson be searched. However, Deputy Superintendent Karl Plummer in his affidavit in support of the application for the warrants averred that the basis of his application was information contained in the Letters Rogatoire and from his own investigations. On this basis he applied for a warrant to search the offices of Gifford Thompson and Bright. Associates of the law firm Gifford, Thompson and Bright who purported to act on behalf of the law firm, while acting on behalf of Robert Bidwell in transactions dealing with the acquisition of real estate, were located in the said Chambers.
>
> The firm having acted on behalf of Robert Bidwell the documents could have been stored in any of the rooms occupied by the firm."

The learned Chief Justice then quoted section 15 (4) of the Act which, though quoted in the previous paragraph, has to be repeated at this time in view of the emphasis placed by the Chief Justice on the words indicated in bold:

> "Requests made by a foreign state shall be made in writing to the Central Authority and shall contain such of the particulars set out in the Schedule as the Central Authority

> may require, **but without prejudice to the requirement for such additional information as may be considered necessary for the purpose of giving effect to the request."**

He then quoted section 23 (2) of the Act thus:

> "Where a police officer authorized under subsection (1) has reason to believe that the articles to which the request relates is, or will, at a specified time be ... the police officer may lay before a Resident Magistrate an information on oath setting out the grounds for that belief and apply for the issue of a warrant under this section to search the person, land or premises for that article".

The learned Chief Justice then concluded thus:

> "I am satisfied on the authority of the provision cited above that the grounds for belief grounding the application are not restricted to those contained in the Letters Rogatoire but may also include information gleaned by the police officer from his investigations."

20. Harrison, J., expressed views similar to those of the Chief Justice in respect of the search of the premises of Gifford Thompson and Bright. He said that subsection (2) gave Superintendent Plummer "the authority to carry out his own investigations once he has reason to believe that articles to which the request relates are at a particular premises". The Letters Rogatoire, he said, revealed that Maureen Smith, an attorney-at-law, had acted on behalf of a purchaser in one of the land transactions under investigation and her address was

stated as 122-126 Tower St. There being evidence that Miss Smith was once Mr. Hugh Thompson's associate he being a partner of Gifford Thompson and Bright and their offices being at 122-126 Tower St. Harrison, J., reasoned that Superintendent Plummer's "investigations no doubt led him to the offices of Gifford Thompson and Bright and to this extent the Central Authority of Jamaica had authorized him to lay the application before the Magistrate in order to obtain the necessary search warrant".

21. The obvious obstacle to this reasoning is the fact that there was no such evidence from Superintendent Plummer. In this regard, therefore, and with the greatest respect to the learned judges, their reasoning on this point is flawed and insupportable. It is not sufficient for the superintendent to file an affidavit after he has conducted the search to the effect that he had conducted his own investigations and so the search was justified. He must put his information before the Resident Magistrate, prior to the search, so that the Resident Magistrate may bring his judicial mind to bear on the decision whether it is a fit and proper case for the warrant to be issued. The Resident Magistrate is not a mere rubber stamp. Nor is the superintendent at large to do as he pleases, with no regard to the particular request made in the Letter of Request. The superintendent is not empowered by the legislation to fill in any spaces that he thinks are blank. It

cannot therefore be said that a search is properly authorized where this procedure has not been followed. The Letter of Request forms the basis of all searches under the Act. In the case of the appellant Thompson, the Letter was silent and there is no evidence of any investigation by the superintendent. Mrs. Benka-Coker's submission that there was no basis for the issuance of any warrant in respect of Thompson's office or indeed of the offices of Gifford Thompson and Bright is well founded and ought to be upheld. The same applies in respect of the appellant Nesta Claire Smith. Accordingly, without more ado, their appeals ought to be allowed.

The status of the warrants

22. Mr. Frank Phipps, Q.C., submitted that "the search warrants were illegal, void and of no effect by a failure to provide in the particulars for search and seizure the precise description of the things to be seized as required (by) section 15(4) of the ... Act and set out in paragraph 6 of (the) Schedule to the Act." Mrs. Benka-Coker joined in this submission, and added that the proper procedure would have been for an application to have been made under the Drug Offences (Forfeiture of Proceeds) Act. According to Mrs. Benka-Coker, the Act makes a distinction between the **production** of a document and its **seizure.** In this regard, she referred specifically to section 23(3) under

which the warrants were purportedly issued, and section 15(3) which deals with the production of documents and other records. Seizure, she said, involves the forcible taking of the documents whereas a production order does not, and may be subject to judicial safeguards. She further submitted that it is of some significance that the word 'document' does not appear in section 23, thereby causing doubt as to whether the section was intended to be used for documents at all, especially as there are other provisions which expressly give powers for documents to be produced. In particular, she referred to section 20 which speaks to the production of documents (other than judicial or official records referred to in section 22) or other articles. Section 20(2)(b) empowers a Judge of the Supreme Court or a Resident Magistrate to request such production.

23. It was submitted on behalf of the DPP, in response, that the appellants have failed "to appreciate that there are real and substantial differences between the various methods of obtaining articles in possession of persons" (para. 34, written submissions). The submissions identified and acknowledged production orders (sec.20) and search warrants (sec.23) as the two methods expressly mentioned by the Act. In this regard, the DPP described a production order as one which does not permit entry on property but "permits the person to whom it is directed an opportunity to take the information to

whomever he is directed in the order. The sanction for non-compliance being held in contempt of court". On the other hand, it was submitted that the search warrant was the most effective tool to unearth articles which are critical to the investigation and prosecution of offences, and it ensures that the articles are preserved. The DPP embraced the views of Harrison, J. as regards the element of surprise inherent in a warrant thereby making it "the best means of acquiring evidence especially where there is a real risk that articles or documents might be destroyed, altered or hidden".

24. This opinion of Harrison, J. which the DPP has found supportive of his cause is quite in order, but, for it to be relevant, it must first be shown that the legislation authorizes the issuance of the warrant in the particular situation. It is therefore important to consider the scheme of Part III of the Act [sections 15 – 30] which deals with "Requests by Foreign States". The relevant sections for the present purpose are 15, 20, 23 and 28. Section 15 deals with the provision of assistance to a foreign state. The assistance may be in relation to, among other things,

> "the production of –
>
> (i) documents and other records, including judicial or official records; and
>
> (ii) other articles". [section 15(3)(c)]

Section 20 deals with the production of documents. The Central Authority may, in its discretion, in writing authorize the production of the documents and their transmission to the foreign state. Where there has been a request by a foreign state for the production of documents, and the Central Authority has so authorized, a Judge of the Supreme Court or a Resident Magistrate may require such production and shall send the produced documents to the Central Authority[section 20(2)(b)]. The judicial officer may hold a hearing for the purpose [section 20(3)]. Section 23 deals with the search for, and seizure of, "articles" that are not "tainted property" relevant to criminal proceedings in the foreign state, whereas section 28 makes provisions in respect of "tainted property".

25. Mrs. Benka-Coker's submission as to the inappropriateness of issuing a warrant for documents under section 23 is not without merit. As stated earlier, section 23(1) provides for the Central Authority to authorize a police officer to apply to a Resident Magistrate for the search warrant requested by the foreign state. The pre-conditions for the issuing of such authority are :

> "(a) a proceeding or investigation relating to a criminal matter as commenced in (the) relevant state;
>
> (b) there are reasonable grounds for believing that an article (not being tainted

> property) relevant to the proceeding or investigation is located in Jamaica; and
>
> (c) the relevant foreign state requests ... the issue of a search warrant under this section in relation to that article".

26. In the instant case, it is accepted that an investigation relating to a criminal matter had commenced in Canada in respect of fourteen persons listed on pages 8 and 9 of the supplemental record of appeal. Hence, section 23(1)(a) was satisfied. However, the situation is different so far as satisfying section 23(1)(b) and (c) is concerned. Paragraph (b) requires the existence of reasonable grounds for believing that "an article (not being tainted property) relevant to the proceeding or investigation is located in Jamaica"; and paragraph (c) provides that the foreign state must have requested the issue of a search warrant in respect of "that article". The Act defines "tainted property", and that definition so far as this case is concerned reads:

> "(a) property used in, or in connection with, the commission of a prescribed offence ;"

The Act also defines a prescribed offence as:

> "(a) a prescribed offence as defined in the Drug Offences (Forfeiture of Proceeds) Act;
>
> (b) an offence against the law of a relevant foreign state which involves –
>
> (i) the production...or other dealing in dangerous drugs;

(ii) the transportation, storage, importation or export of dangerous drugs;

(iii) money laundering"

So, the "article" for which the warrant is to be issued must be one that is not "tainted property" as defined above. However, it should be noted that the Letter of Request has not identified any specific "article". Instead, in the "Request Portion" of the document (pages 28-30), the assistance that is sought is in respect of documents of a general financial nature. The interpretation that the respondents to this appeal wish this Court to place on the word "article" is one which would include documents. This cannot be so, though, given the express provisions in Part III of the Act in respect of documents that are required by the foreign state.

27. There is, however, another hurdle for the respondents to overcome even if the word "article" may be interpreted to include documents. The Letter of Request advised that "the assistance of the competent Jamaican authority" was required "in order to search various locations, to obtain certified copies of Robert Thomas BIDWELL'S, Beverley HUDSON'S and Bengal Vacations Limited's income tax declarations and to restrain properties identified through the above-mentioned criminal investigation as proceeds of crime."

(page 9 supplemental record). On the following page, the request continues:

> "This assistance is required to ensure the seizure of evidence, to support the potential prosecution of the subjects listed above, and possibly others, for proceeds of crime, money laundering and drug related offences in Canada".

By virtue of these statements, it is clear that the foreign state wished the issuance of a warrant for an article (or articles) that would have been "tainted property" as defined above, and section 23(1)(b) of the Act specifically provides that the article must not be "tainted property". The tenor of the Letter of Request, the written submissions, and the oral submissions of both Mr. David Fraser, Senior Deputy Director of Public Prosecutions (acting), and Mrs. Caroline Williamson-Hay, Senior Prosecutor (acting) made it plain that the Canadian authorities were on a search for articles relevant to the investigation in Canada. Mrs. Williamson-Hay stated that "the Canadians were alleging that Bidwell was a career criminal specializing in acquisitive crimes which he converted into wealth". "Bidwell", she said, "was using unsuspecting lawyers to further his criminal career". It seems that notwithstanding these statements, the respondents were unmindful of the fact that the articles would then qualify as "tainted property" as defined by the Act. Consequently, section 23 of the Act could not properly have been prayed in aid of the cause.

28. As said earlier, sections 15 and 20 of the Act allow for the request by a foreign state for assistance in the production of documents. Section 15(3) states that assistance may be provided in relation to the production of documents and other records, including judicial or official records, as well as the production of other articles. Assistance under this Part may also be provided in relation to the carrying out of search and seizure [section 15(3)(f)]. Requests by the foreign state shall be in writing, and shall contain such of the particulars set out in the Schedule as the Central Authority may require [sec.15(4)]. The Schedule provides in paragraph 6 thereof that every request for search and seizure shall contain "a **precise description** of the place to be searched and **things** to be seized". By no stretch of the imagination can it be said that the request in this case contained a precise description of what was to be seized. It appeared to be more in the nature of a fishing expedition.

29. Section 20 of the Act provides for the intervention of a Judge of the Supreme Court or Resident Magistrate in the case of a request for the production of documents other than judicial or official records. Indeed, no person may be compelled to produce documents or other articles which he could not be compelled to produce in criminal proceedings in Jamaica or the relevant foreign state (section 21).

30. The position therefore is that section 23 of the Act does not provide authority for the issuance of a warrant to search for documents in the manner done in this case. Section 23 deals with search for articles, whereas section 15 makes provision for search and seizure as well as production of documents. Section 20 also provides for the production of documents. In any event, section 23(1)(b) is concerned with articles which are not "tainted property", but the evidence indicates that what was being requested by the foreign state would fall into the category of "tainted property". Furthermore, the "precise description" referred to in paragraph 28 (above) was missing. In the circumstances, the warrants that were issued were not in keeping with the legislation, and so Mr. Phipps and Mrs. Benka-Coker are correct that the warrants were unlawfully issued. The proper procedure in the situation would have been for the Central Authority to have acted under those provisions of the Act that deal specifically with documents.

31. The Act seems to have done no more than formalize the common law so far as the generality of warrants is concerned. In **Tranz Rail Ltd. v The District Court at Wellington and another** [2002] NZCA 259 (10 October 2002), the Court of Appeal of New

Zealand, in a judgment delivered by Tipping, J. frowned on general warrants. At para. 38, he said:

> "For centuries the law has set its face against general warrants and held them to be invalid. Entry onto or into premises pursuant to an invalid warrant is unlawful and a trespass: **Leach v Money** (1765) 19 State Tr 1002; **Chic Fashions (West Wales) Ltd. v Jones** [1968] 2 QB 299, [1968] 1 All ER 229 CA; and **Auckland Medical Aid Trust v Taylor & Ors** [1975] 1 NZLR 728, per McCarthy P. A general warrant in this context is a warrant which does not describe the parameters of the warrant, either as to subject matter or location, with enough specificity."

The challenge to the constitutionality of the Act

32. Mr. Henriques, Q.C., and Mr. Phipps, Q.C., both launched a severe attack on the constitutionality of the Act. They concentrated their efforts on sections 15 and 23. Mr. Henriques, Q.C, was of the view that there was confusion as to the test to be applied to determine whether a provision was constitutional or not. He said that in the United States there is a presumption of constitutionality that may only be displaced by the contender establishing beyond reasonable doubt its unconstitutionality. That principle, he said, was wholly inappropriate to Jamaica and he submitted that the Canadian approach has been endorsed by the Privy Council. Mr. Henriques, Q.C., referred to no less than twenty cases on this aspect. The industry displayed in this regard by Mr. Henriques, Q.C., and junior counsel with him is commendable. Notwithstanding their efforts, it has to be said that the body of judicial

opinion in the Caribbean is heavily against them. This opinion has been approved by the Judicial Committee of the Privy Council on more than one occasion. We see nothing that would suggest the need to distinguish those judgments.

33. In **Attorney General and Minister of Home Affairs v Antigua Times, Ltd.** (1975) 21 W.I.R. 560, it was contended that section 1B of the Newspapers Registration (Amendment) Act, 1971, an Act of the Antiguan Parliament was unconstitutional on the ground that it subjected the right to publish to the grant of a licence at the discretion of the Cabinet, and the payment of an annual fee. Lord Fraser of Tullybelton, in delivering the opinion of the Board, allowing the appeal, said:

> "In some cases it may be possible for a court to decide from a mere perusal of an Act whether it was or was not reasonably required. In other cases the Act will not provide the answer to that question. In such cases has evidence (sic) to be brought before the court of the reasons for the Act and to show that it was reasonably required? Their Lordships think that the proper approach to the question is to presume, until the contrary appears or is shown, that all Acts passed by the Parliament of Antigua were reasonably required.
>
> This presumption will be rebutted if the statutory provisions in question are, to use the words of Louisy, J.,
>
> "so arbitrary as to compel the conclusion that it does not involve an exertion of the taxing power

> but constitutes in substance and effect, the direct execution of a different and forbidden power.
>
> If the amount of the licence fee was so manifestly excessive as to lead to the conclusion that the real reason for its imposition was not the raising of revenue but the preventing of the publication of newspapers, then that would justify the conclusion that the law was not reasonably required for the raising of revenue." (pp.573 I -574 B)

34. The judgment in the **Antigua** case was handed down on May 19, 1975. The Privy Council, on July 28, 1975, delivered judgment in the Jamaican case **Hinds And Others v. R.** (1975) 24 W.I.R. 326. There the Gun Court Act 1974 was challenged on the ground that it was unconstitutional. At page 340, Lord Diplock, in delivering the decision of the majority said:

> "In considering the constitutionality of the provisions of s.13(1) of the Act, a court should start with the presumption that the circumstances existing in Jamaica are such that hearings *in camera* are reasonably required in the interests of 'public safety, public order or the protection of the private lives of persons concerned in the proceedings'. The presumption is rebuttable. Parliament cannot evade a constitutional restriction by a colourable device: *Ladore v. Bennett* ([1939] A.C. at p.482). But in order to rebut the presumption their Lordships would have to be satisfied that no reasonable member of the Parliament who understood correctly the meaning of the relevant provisions of the Constitution could have supposed that hearings *in camera* were reasonably required for the protection of any of the interests referred to; or, in other words, that Parliament in so declaring

> was either acting in bad faith or had misinterpreted the provisions of s. 20(4) of the Constitution under which it purported to act."

35. The Court of Appeal of Trinidad and Tobago (Sir Isaac Hyatali, CJ, Phillips and Kelsick JJA) in **Faultin v Attorney-General of Trinidad and Tobago** had occasion in 1978 to consider whether certain sections of the Firearms Act 1970 were invalid on the ground of inconsistency with the 1962 Constitution of Trinidad and Tobago. Kelsick, J.A., in delivering the judgment of the Court, said at pp 359 g – 360 d:

> "There is a presumption of validity of the Act and that it is not void for inconsistency with the Constitution. The reasons for the rules are stated by Isaacs J in **Federal Commissioner of Taxation v Munro** (7) ((1926) 38 CLR at p180):
>
> > 'It is always a serious and responsible duty to declare invalid, regardless of consequences, what the national Parliament representing the whole people of Australia, has considered necessary or desirable for the public welfare. The court charged with the guardianship of the fundamental law of the Constitution may find that duty inescapable. Approaching the challenged legislation with a mind judicially clear of any doubt as to its propriety or expediency (as we must, in order that we may not ourselves transgress the Constitution or obscure the issue before us) the question is; has Parliament, on the true construction of the enactment, misunderstood and gone beyond its constitutional powers? It is a received canon

> of judicial construction to apply in cases of this kind with more than ordinary anxiety the maxim 'ut res magis valeat quam pereat'. Nullification of enactments and confusion of public business are not lightly to be introduced. *Unless, therefore, it becomes clear beyond reasonable doubt that the legislation in question transgresses the limits laid down by the organic law of the Constitution, it must be allowed to stand as the true expression of the national will.* Construction of an enactment is ascertaining the intention of the legislature from the words it has used in the circumstances, on the occasion and in the collocation it has used them. There is always an initial presumption that Parliament did not intend to pass beyond constitutional bounds. If the language of a statute is not so intractable as to be incapable of being consistent with this presumption, the presumption should prevail. That is the principle upon which the Privy Council acted in **Macleod v Attorney- General for New South Wales** (1891) AC 455. It is the principle which the Supreme Court of the United States had applied, in an unbroken line of decisions, from Marshall CJ to the present day (see **Adkins v Children's Hospital** 261 US 544 (1923)). It is the rule of this court (see, for instance, per Griffith CJ in **Osborne v Commonwealth** (1911) 12 CLR 337.' "

The Court then proceeded to refer to its 1976 decision in **Attorney-General v Mootoo** (1976) 28 WIR 304 where it held that there is a strong presumption of the constitutionality of statutes, especially taxing statutes; and that the provisions of an Act must be construed

as a whole, and any ambiguity therein must be resolved so as to effect their validity.

36. It is too late in the day for the argument of the appellants to succeed on this point. The hands of the clock may not now be turned back. This Court, like the other Courts in the Caribbean and Australia, embraces the principle that there is a presumption of the constitutionality of statutes. In any event, there is nothing in the challenged provisions of the Act that would warrant a declaration of unconstitutionality.

37. Mr. Phipps was more concerned with the process of the passage of the legislation which he described as flawed. He submitted that the Act was passed by the normal legislative process of a simple majority, whereas it required a special process as set out in sections 49 and 50 of the constitution, a process that includes the support of a two-thirds majority of both Houses. The basis for Mr. Phipps' submission was his claim that the Act had "altered" the constitution, so for the Act to be valid it had to comply with sections 49 and 50. That not having been done, he said, the Act was unconstitutional, and all actions by the state in accordance with the Act were unconstitutional.

38. According to Mr. Phipps, the Jamaican Bar Association was contending that the Act was applied in an unconstitutional manner, whereas the Smiths, for whom he appeared, were saying that the Act itself is unconstitutional. It had infringed the Constitution by depriving the appellants of their constitutional right to the protection and enjoyment of property guaranteed by section 19. That section reads thus:

> " 19.-(1) Except with his own consent, no person shall be subject to the search of his person or his property or the entry by others on his premises.
>
> (2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision which is reasonably required –
>
> (a) in the interests of defence, public safety, public order, public morality, public health, public revenue, town and country planning or the development and utilization of any property in such a manner as to promote the public benefit; or
>
> (b) to enable any body corporate established by any law for public purposes or any department of the Government of Jamaica or any local government authority to enter on the premises of any person in order to carry out work connected with any property or installation which is lawfully on such premises and which belongs to that body corporate or that Government or that authority, as the case may be; or

(c) for the purpose of preventing or detecting crime; or

(d) for the purpose of protecting the rights or freedoms of other persons."

39. Mr. Phipps submitted that section 19(1) gives an unqualified right which has been modified by the Act. That sub-section, he said, "gives to the citizen an entrenched constitutional right which has been accepted as a fundamental right". Section 19(2) "gives no right", and "speaks against invalidation of anything done under authority of any law, making provisions reasonably required for the purposes listed at (a)". Section 19(2), he said, "cannot be elevated to an acceptance. For the saving provision to apply, there must be some law authorizing something to be done ... otherwise, the right in section 19(1) is undermined and becomes elusive".

40. The respondents submitted that the Act falls within section 19(2) of the Constitution. They contended that the activities of Bidwell and his accomplices breach "public morality", and so would fall within the scope of the exemption provided in section 19(2).

41. The Court takes serious note of the fact that the Act provides for co-operation among states in respect of the investigation, detection and prosecution of criminal offences. By no stretch of the imagination

can it be said that such co-operation is undesirable or unwelcome, in a world in which criminal activity has become big business enriching many, and ruining the lives of far more. The Constitution quite properly provides that an individual's premises may not be entered, nor may his property be searched, without his consent. If consent is not forthcoming, such entry or search may take place under the authority of a law which is recognized as being reasonably required in the interests of , for example, public morality.

42. Jamaica, it is well-known, is bombarded from within as well as without by illegal drug activity which generates millions of dollars for the enrichment of some, while corrupting the minds and bodies of a large section of the youths of not only Jamaica but the entire Western hemisphere. It is clearly corrupt for persons to be amassing wealth in such nefarious ways while individuals are dying or becoming gravely ill as a result of these activities. Legislation which seeks to deal with such situations may not be described as being other than reasonably required in the interests of public morality. Such legislation may also be regarded as reasonably required in the interests of public order and public health. It is also for the purpose of "detecting crime" [section 19(2) (c) of the Constitution]. The appellants' stance in this respect is clearly unsustainable and without any merit whatsoever. The Act is perfectly in keeping with our Constitution.

Legal professional privilege

43. This aspect of the appeal was the most intense and challenging. All the attorneys had objected to the reading and removal of their clients' files and documents by the police. The objection was on the basis that legal professional privilege would be breached. As indicated earlier, the police brushed aside these objections. Mr. Dennis Morrison, Q.C., was the main presenter of the arguments for the appellants on this area of the case. He submitted that legal professional privilege is a fundamental human right, which has not been abrogated or curtailed by Parliament. The Act has not expressly or impliedly provided for the breach of the right, he said. As regards the seizing of files and documents at the attorneys' offices, the action was unlawful so far as the "files contained the business of the client and correspondence between the clients and their attorney".

44. Mr. Morrison was of the view that the Constitutional Court had not fully appreciated the position of the Jamaican Bar Association on the matter. He referred in particular to the judgments of the Chief Justice and Hibbert, J. This is what the learned Chief Justice said:

> "In brief, the claimants contend that the issue of the warrants is a breach of the well established Legal Professional Privilege which is a substantive rule of law; a fundamental right, a basic civil or human right.

> The submission is that once documents are handed over by a client to a lawyer they become untouchables and are therefore protected from seizure.
>
> As I understand the principle such documents are not immune from seizure but from disclosure. If such documents are seized, before disclosure, a party may apply to the court to determine the question of privilege. If the documents are adjudged privileged then disclosure will not be permitted.
>
> The contention that the mere seizure offends the principle of the Legal Professional Privilege is untenable. Seizure by itself is not an abrogation of the privilege." (p.51 of the record)

Hibbert, J. dealt with the issue in this way:

> "The third issue concerning legal professional privilege had before the hearing began, become the subject of great debate within the legal fraternity in Jamaica. This great debate was expected to have reached it (sic) climax during the course of these proceedings. The Jamaica Bar Association however resiled from what appears to have been its original position that a warrant which authorized the search of an attorney's office was inherently bad. This position was not supported by the many authorities cited and relied on an (sic) behalf of the Association." (p.82-83 of the record)

The learned judge then made reference to **Nathan v Lawton**, a decision of the U.S. District Court, Southern District of Georgia, **Descateaux v Mierzwinski** [1982]141 DLR 590, a decision of the Supreme Court of Canada, and **R v Crown Court at Inner London**

Sessions, ex parte Baines (a firm) and another [1987] 3 All ER 105. He commented thus:

> "These authorities clearly show that searches and the seizures of documents from attorneys' offices do not per se infringe the principle of legal professional privilege. The mere claim of privilege does not render the document privileged. It is my opinion that it is for the courts to then decide whether or not legal professional privilege attaches to any of these documents. It is to be noted that the Respondents were not claiming that documents which are the subject of legal professional principle (sic) could be retained. In fact the second Respondent did apply to the court for determination as to whether or not the privilege attaches to any of the documents seized. The last two cases referred to show clearly the need for the balancing of two important societal rights. This was attempted by legislative action in Canada but in **Lavalee, Rackel and Heintz v Canada (Attorney General** (2002) 216 DLR (4^{th}) 257 this statutory provision was held to be unconstitutional. Perhaps, in Jamaica the Courts could play a role in formulating guidelines to govern the search of the offices of the attorneys-at-law."(p.84-85 of the record)

Alas, the learned Judge did not take advantage of the opportunity to start the process of playing the role that he was suggesting for the Courts.

45. Mr. Michael Hylton, Q.C., Solicitor General, addressed this issue on behalf of the respondents. He said that there was no difference of view between the appellants and the respondents so far as it is

contended that "legal professional privilege is a fundamental, substantive right which the Courts have been zealous to protect". There were, however, he said, two issues that separated the appellants and the respondents;

(a) what documents were privileged; and

(b) what is the protection that results from the document being privileged.

Although the respondents were not contending that documents subject to legal professional privilege should be disclosed, Mr. Hylton, Q.C., said that it was plain that the "privilege will not arise simply by virtue of the fact that there is documentation which constitutes communication between lawyer and client or, a fortiori, because a document is in an attorney's office". According to Mr. Hylton, Q.C., attorneys' offices would become "safe havens" beyond the reach of the law if the Court were to adopt the approach advocated by the appellants. He submitted that "provisions for the issue of a search warrant which would extend to lawyers' offices are clearly reasonably required for the investigation and detection of crime".

46. Mr. Hylton, Q.C., contended that not all documents in an attorney's office will be privileged, so there will have to be a determination as to whether any particular communication is properly subject to legal professional privilege. This, he argued, cannot be

known beforehand by the police, so, at the point that the claim is made, that is the time the issue is joined. He supported the position of the DPP that the documents were not immune from seizure, but rather from disclosure, and that if such documents are seized, before disclosure, a party may apply to the court to determine the question of privilege. He invited us to hold that the approach of the DPP (p.295-6 of the record) was appropriate in order to ascertain which documents were privileged, and to protect the privilege while seeking to achieve the objects of the Act.

47. In determining whether there was a breach of legal professional privilege, an appropriate starting point is a judgment of the High Court of Australia: **The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission** [2002] HCA 49, delivered on November 7, 2002. At para.9, Gleeson, CJ, Gaudron, Gummow and Hayne JJ expressed themselves thus:

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

At para. 43, McHugh, J. said:

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

And at para. 44, McHugh, J said further:

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

48. The matter has also surfaced in New Zealand, where a judgment of the Privy Council commands our attention. In **B and Others v The Auckland District Law Society** (P.C. App. No. 34 of 2002, delivered on May 19, 2003), the issue was whether the Law Society was entitled under the Law Practitioners Act 1982 to require a law firm to produce privileged documents for the purpose of inquiring into allegations of professional misconduct. In its judgment delivered by Lord Millett, the Privy Council commented at para. 50 that the House of Lords had "rejected the argument that legal professional privilege is an interest that falls to be balanced against competing public interests". The

decision of the House of Lords that was being referred to was **R. v Derby Magistrates' Court, Ex p B** [1996] 1 AC 487. Lord Millett proceeded in the said paragraph to quote Taylor, CJ, thus at 508:

> "the drawback to that approach is that once any exception to the general rule is allowed, the client's confidence is necessarily lost. The solicitor, instead of being able to tell his client that anything which the client might say would never in any circumstances be revealed without his consent, would have to qualify his assurance. He would have to tell the client that his confidence might be broken if in some future case the court were to hold that he no longer had 'any recognizable interest' in asserting his privilege. One can see at once that the purpose of the privilege would thereby be undermined."

49. The judgment in this matter requires a close look. Paragraph 26 thereof provides the legislative background. It reads thus:

> "Section 126(1) authorises a Disciplinary Tribunal to require any person to attend and give evidence before it at the hearing of disciplinary proceedings and to produce all books, documents, papers, and records in that person's custody or under his control relating to the subject matter of the proceedings. Section 126(5) makes it an offence for a person, without lawful justification or excuse, to refuse or fail to attend and give evidence when required to do so by a Tribunal, to answer truly and fully any question put to him by a member of the Tribunal, or to produce to the Tribunal any book, document, paper or record required of him".

At the hearing at first instance, the learned judge, Paterson, J. held that the Act did not abrogate legal professional privilege and accordingly the firm was not obliged to produce privileged documents in response to the Society's requisitions. By a majority, the Court of Appeal of New Zealand held that privilege was not a good answer to a statutory requisition. That Court summed up their conclusions as follows:

> "The consistent theme in the legislation is that the public interest requires ascertainment of the factual position expeditiously ... That can only be achieved by recognising that the scheme and purpose of the disciplinary provisions of the 1982 Act preclude general application of legal privilege. It meets the high test for exclusion by necessary implication".

50. Lord Millett, at para. 45 of the judgment of the Privy Council, said:

> "It is, of course, well established that the privilege belongs to the client and not to his lawyer, and that it may not be waived by the lawyer without his client's consent".

At para. 55, he continued:

> "The common law is no longer monolithic, and it was open to the New Zealand Court of Appeal to make a deliberate policy decision to depart from the English approach on the ground that it is not appropriate to conditions in New Zealand. Had it done so, their Lordships would have respected its decision. But it did not. All the members of the

> Court of Appeal considered that they were applying established principles of English law. Their Lordships respectfully consider that the majority misunderstood them".

And at para. 58, he said:

> "Section 101 (3)(d) does not expressly exclude legal professional privilege. The majority of the Court of Appeal held that it did so by necessary implication. Their Lordships are unable to agree".

51. The Privy Council concluded, at para. 65, thus:

> "Their Lordships conclude that legal professional privilege is a good answer to a requisition under the 1982 Act whether at the investigative stage or in proceedings before a Disciplinary Tribunal".

Their Lordships then stated, at para. 69:

> "The documents are privileged because they were created for the purpose of giving or receiving legal advice. If they are not produced voluntarily, production cannot be compelled".

And, finally, of relevance to the instant matter, they added, at para.71:

> "A lawyer must be able to give his client an unqualified assurance, not only that what passes between them shall never be revealed without his consent in any circumstances, but that should he consent in future to disclosure for a limited purpose those limits will be respected".

52. In the circumstances that gave rise to these appeals, legal professional privilege was breached as there was no lawful authority for the searches and seizures. The situation would have been different if there was an allegation of criminal conduct on the premises, or by the attorneys or their clients in the attorney/client relationship, seeing that legal professional privilege cannot be used to mask or permit criminal conduct. There was no such allegation in the situations that have been presented to the Court. Attorneys have a duty to the Court, and to maintain the standards that are set out in the Gazetted code of ethics. If those standards are breached, there is a well established mechanism to deal with such attorneys. So far, it cannot be said that the mechanism has not been working. The Act provides for a method of securing the production of documents. That is the method that is to be used, particularly in situations where no criminal conduct is alleged. If there are situations that are not covered by the Act, then it is incumbent on state officials such as the Attorney General and the Director of Public Prosecutions to have discussions with the Bar in order to arrive at an agreement as to the procedure to be followed – as has happened in other Commonwealth jurisdictions.

53. The appellants have failed so far as the issue of the DPP being the Central Authority is concerned. They have also failed on the issue

of the constitutionality of the Act. However, they have succeeded in respect of the issues of (a) the validity of the warrants, and (b) the issue of legal professional privilege. The appellants Hugh Thompson, Gifford, Thompson and Bright, and Nesta Claire Smith have been particularly aggrieved as they were not even mentioned in the Letter of Request. So far as the searches and seizures were carried out under the purported authority of the warrants, there has been a breach of section 19(1) of the Constitution as there was no lawful authority.

McCALLA, J.A.

Having had the advantage of reading in draft the judgment of my learned brother, Panton, J.A., I agree with his reasoning and conclusion, and have nothing to add.

FORTE, P.

ORDER

The appeals are allowed. It is declared and ordered as follows:

1. The Mutual Assistance (Criminal Matters) Act is constitutional;
2. The designation of the Director of Public Prosecutions as the Central Authority pursuant to the Mutual Assistance (Criminal Matters) Act is in keeping with the Constitution;
3. The warrants purportedly issued under the Mutual Assistance (Criminal Matters) Act were unlawful;

4. The searches and seizures purportedly conducted and done under the Mutual Assistance (Criminal Matters) Act were in breach of section 19(1) of the Constitution;

5. The searches and seizures were in breach of legal professional privilege;

6. Certiorari is granted to remove into the Full Court of the Supreme Court and to quash the warrants issued on January 24, 2003 under the hand of His Honour Mr. Martin Gayle Resident Magistrate for the Corporate Area;

7. The documents seized are to be returned, and the respondents are restrained from making any use of them; and

8. Costs to the appellants are to be agreed or taxed.