[2021] JMCA App 29

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MRS JUSTICE V HARRIS JA
THE HON MRS JUSTICE DUNBAR-GREEN JA (AG)

APPLICATION NOS 43 & 44/2020

MOTION NO COA2020MT0004

BETWEEN	**FRITZ PINNOCK**	**1ST APPLICANT**
AND	**RUEL REID**	**2ND APPLICANT**
AND	**FINANCIAL INVESTIGATIONS DIVISION**	**RESPONDENT**

Hugh Wildman instructed by Hugh Wildman & Company for the applicants

Richard Small, Mrs Shawn Wilkinson and Ms Cheryl-Lee Bolton for the respondent

8, 9 March and 26 November 2021

SINCLAIR-HAYNES JA

[1] On 8 March 2021, two applications were heard by the court. The first, was filed on 9 April 2020 on behalf of Messrs Fritz Pinnock and Ruel Reid, by way of notice of motion for conditional leave to appeal to Her Majesty in Council. The second, is the respondent's, which was filed on 2 February 2021, to dismiss the applicants' notice of motion, for want of prosecution and/or abuse of the due process of the court.

The background

[2] Messrs Fritz Pinnock and Ruel Reid, both outstanding educators, were arrested and charged for breaches of the Proceeds of Crime Act, the Corruption Prevention Act and for a number of common law offences. Their arrest and the charges instituted

against them, were the result of a joint investigation by the Financial Investigations Division ('FID'), the Major Organised Crime and Anti-Corruption Agency ('MOCA') and the Counter Terrorism and Organised Crime Division ('CTOC'). The matter was consequently placed before the Kingston and Saint Andrew Parish Court (Criminal Division).

[3] Holding steadfastly to the view that the officers who effected the arrests and instituted the charges, lacked the requisite authority to do so, thus rendering the applicants' arrests and charge unlawful, Mr Wildman, on behalf of the applicants, sought to invoke the jurisdiction of the Supreme Court by way of an application for leave to apply for judicial review of the FID officers' actions in arresting and charging the applicants.

The proceedings below

[4] The applicants' first application for leave to apply for judicial review of the FID's actions was heard by Sykes CJ before whom they sought several declarations and the following orders:

(a) an order prohibiting the FID from taking steps to seek and obtain a fiat from the DPP to prosecute both applicants;

(b) an order of certiorari to quash the charges brought against them; and

(c) a stay of the criminal proceedings.

[5] Sykes CJ, in his usual scholarly approach, examined the FID legislation and extensively referred to relevant portions. He agreed with learned counsel Mr Wildman's submission that the Financial Investigations Division Act ('the Act'), gave no authority or power to the authorised officers of FID to arrest and charge the applicants. The learned Chief Justice held however that, in so far as the authorised officers of FID are

members of the Jamaica Constablurary Force, their powers of arrests were derived from the Jamaica Constabulary Force Act. This he said, meant that thearrest and charge of the applicants was not done by FID but by members of the Jamaica Constabulary Force acting in that capacity. He held however, that to the extent the officers may have exceeded their powers, there was another remedy available to the applicants which they ought to have first pursued and refused the application for leave to apply for judicial review. He said:

> "[81] **The court is of the view that FIDA does not authorise FID to arrest and charge anyone or authorise FIDA [sic] to initiate charges and initiate an arrest. What it can do is investigate.** When investigating it can use certain powers under FIDA. FIDA enables FID to gain access to information and use investigative techniques that are not available to the JCF at large. **There is no power under the Constabulary Force Act for the ordinary JCF member to obtain a production order, restraint order or account monitoring order under FIDA. These are exceptional powers conferred by statute on specific statutory functionaries who can only use those powers in the circumstances and the manner prescribed by the respective statutes.** For persons other than the statutory functionary to exercise those powers, those persons need to enter the kingdom by the narrow statutory gateway labelled authorized officers.
>
> [82] **This court is of the view that the police officers in this case who arrested and charged the applicants were never designated under section 2 of FIDA**. Any power of arrest and charge that they did could only be by virtue of the JCF powers found under the CFA.
>
> [83] Consequently, it was not FID that arrested and charged the applicants but JCF officers in their capacity as JCF officers. That still leaves open the question of whether the JCF officers utilised any power under FIDA when they were not authorised to do. **If yes, that might raise**

> **admissibility issues which can be addressed during the criminal trial.**" (Emphasis added)

[6] Displeased with the latter ruling, the applicants renewed their application before the Full Court comprising Batts J, Stamp J and Jackson-Haisley J. On 2 March 2020 the Full Court unanimously refused the renewed application.

[7] Regarding the FID's power to arrest and charge, Jackson-Haisley J said:

> "[89] Throughout the provisions of FIDA there is nothing that speaks expressly to charging anyone for any offence. Does this mean that the power of authorized officers to charge is non-existent? **If the authorized officers are not empowered by any other means to charge then certainly they would not be able to do so by virtue of being authorized officers.** However, **if the authorized officers already have the power to charge then, it could not be suspended simply by virtue of an assignment to this Division**. **Although the main function of this Division is to investigate, when one looks at the intention of the legislation by the framers it must mean that any powers of arrest and charge must be complementary to the powers of investigation.** In my view, the suspension of the powers of a JCF officer would be an important provision and with the specificity of FIDA, would not be left for mere inference and would be expressly stated.
>
> [90] There is no evidence or law presented to the Court that would lead to the finding that the powers of arrest of the officers were suspended. The fact that these officers are authorized officers under FIDA could not without more mean that they can act only under FIDA. They still retain their powers as JCF officers. In the absence of any evidence or law to support the suggestion that the officers' JCF powers were suspended, that suggestion made by Mr. Wildman is at best speculative.
>
> [91] …

> [92] **It is my view that throughout the assignment of the officers as designated officers of the FID, they exercise a dual function**. They have powers under FIDA and so could carry out investigations under FIDA, take out warrants under FIDA **but it doesn't mean that they charged under FIDA.** I do not agree that any charges effected by them must have been done under FIDA. They still maintain their powers under the JCF Act to arrest and charge and this is the power they utilized." (Emphasis added)

[8] The learned judge continued at para. [98] as follows:

> "[98] I am therefore of the view that the designated officers acted within their JCF powers when they arrested and charged the Applicants. I agree with counsel Mr. Small that designated officers retain their full common law and statutory authority as police officers to arrest and charge. The police officers take with them all their powers and authority as police officers into their assignment to work at the FID. I agree that there is nothing in the FIDA that prohibits them from carrying out their normal functions as police officers. I am therefore of the view that it was these officers who effected the charges in their own right and that it was not the FID that charged the Applicants."

[9] The alternative remedy to which both Sykes CJ and the Full Court referred was, a trial by the Parish Court Judge, during which, Sykes CJ opined, an objection could be taken that the officers exceeded their powers, with which view the Full Court concurred.

[10] Also aggrieved by the Full Court's decision, the applicants applied to the Court of Appeal for leave to appeal the decision of the Full Court and for a stay of the criminal proceedings in the Parish Court.

The application for leave to appeal to the Court of Appeal and for a stay of the criminal proceedings

[11] The matter was heard by the Court of Appeal on 19 March 2020. Having heard the parties, on 3 April 2020, the court refused the application for leave to appeal, for the reason that there was no basis on which the finding of the learned Chief Justice and Full Court, that there was an alternative remedy available to the applicants, could be faulted. The court also refused the application for a stay of the criminal proceedings in the Parish Court.

[12] The Court of Appeal did not address the issue as to whether the FID had the power to arrest and charge the applicants. However, on the issue of costs, Phillips JA expressed the following view of the applicants' conduct:

> "[47] ….in my view, the circumstances of this case would warrant an order for costs against the applicants. There has been persistence in seeking leave to obtain judicial review, despite consistent rulings of the courts that an alternative remedy exists in the Parish Court, and also in the face of an application by the applicants to obtain similar relief before that court, where such relief ought initially to have been pursued, and where a date to determine the issues joined has now been set. Yet, the applicants have nonetheless pursued this application before this court, presumably '**hedging their bets', so to speak, which this court ought not to encourage. Therefore, in my view, costs ought to be awarded to FID to be taxed if not agreed**." (Emphasis added)

[13] Having refused the application for leave to appeal, costs were awarded to the respondent.

The notice of motion for conditional leave to appeal to the Privy Council

[14] Still clutching firmly to the views he aired on behalf of the applicants before Sykes CJ, the Full Court and the Court of Appeal, that by virtue of section 2 of the Act, the power of the officers who effected the arrest and instituted the charges was

restricted only to the investigation of financial crimes, and that, as a result, the Parish Court Judge lacked the jurisdiction to hear the matter, on 9 April 2020, Mr Wildman, on the applicants' behalf, sought conditional leave to appeal to the Privy Council.

[15] He contended in support of the application that:

(a) The Parish Court lacked the authority to entertain the matter;

(b) The appropriate course/procedure was that of judicial review of the FID's authority to arrest and charge;

© Section 2 of the Act deems the respondent authorised officers.

The application to dismiss the motion

[16] The notice of motion for conditional leave to appeal to Her Majesty in Council was trenchantly opposed by the respondent, both substantively and by way of their application to dismiss for want of prosecution and abuse of the process of the court, filed on 2 February 2021. The grounds on which the application was sought were that:

"1. The Applicants filed Notice of Motion for Conditional Leave to Appeal to Her Majesty in Council together with affidavit in support sworn on the 8th day of April, 2020.

2. Pursuant to section 2.4 of Practice Direction 1 of 2016 parties are required to file Written Submissions within fourteen (14) days of service of the application and affidavit in support on the Respondent.

3. The application and affidavit in support were served on the Respondent on or about the 9th day of April, 2020.

4. The Applicants have filed no Written Submissions in support of their application nor taken any further step towards the hearing of the application.

5. The Applicants have submitted to the jurisdiction of the Parish Court and are pursuing their alternative remedy by making the application to dismiss the charges before the said Parish Court."

[17] The respondent's application to dismiss the motion for conditional leave was supported by the affidavit of Inspector of Police and FID's authorised officer, Brenton Williams, filed also on 2 February 2021. Inspector Williams deponed that the applicants were arrested following joint investigations by the FID, MOCA and CTOC. He explained that the applicants were charged and placed before the Kingston and Saint Andrew Parish Court. He referred to the applications made by the applicants to the various courts and the results as follows:

(1) The applicants' application to the Supreme Court for leave to apply for judicial review and the refusal of that application by Sykes CJ;

(2) The applicants' renewal of the application for leave before the Full Court and the refusal of that application by the Full Court;

(3) The applicants' application to the Court of Appeal for leave to appeal the judgment of the Full Court and the court's refusal of permission to appeal on 3 April 2020;

(4) The Court of Appeal's refusal of the applicants' application for stay of the criminal proceedings in the Parish Court pending the determination of the application for permission to appeal the decision of the Full Court which was delivered on 2 March 2020; and

(5) The applicants' notice of motion for conditional leave to appeal to Her Majesty filed on or about 9 April 2020.

[18] Inspector Williams further averred that the applicants' affidavit in support of the notice of motion was sworn on 8 April 2020 and the respondent filed an affidavit in response sworn by him on 16 April 2020. The respondent then filed written submissions in response on 23 April 2020 and, on that date, sent an email to the applicants' attorneys-at-law indicating their preparedness to exchange submissions. He was however advised by the respondent's attorney-at-law that there was no response to that email.

[19] Inspector Williams further averred that:

> "14. The Applicants, on the 28th and 29th days of October, 2020 and the 11th day of December, 2020 made submissions in the Kingston and St. Andrew Parish Court, (Criminal Division) before Chief Parish Judge, His Honour Mr. Chester Crooks, to dismiss the case against the Applicants."

[20] He directed the court's attention to the fact that the matter had been scheduled to resume before the learned Parish Court Judge on 4 February 2021, for the delivery of his decision on the matter.

[21] It was also his evidence that he had been advised by the respondent's attorney that, pursuant to section 2.4 of Practice Direction 1 of 2016, written submissions were to have been filed within 14 days of service of the application and affidavit in support on the respondent. He was however advised that the application and affidavit in support were served on the respondent on or about 9 April 2020 and up to 2 February 2021, no submissions had been filed nor had the applicants taken any further step towards the hearing of the application.

Submissions on behalf of the FID on the application to dismiss the motion

[22] Mr Richard Small, on behalf of FID, urged the court to dismiss the application for conditional leave to appeal to Her Majesty in Council for want of prosecution and/or abuse of the process of the court. In support of that application, counsel pointed the court to section 2.4 of Practice Direction 1 of 2016 which, he argued, required the applicant to have filed written submissions within 14 days of service of the application and affidavit in support on the respondent.

[23] Mr Small also directed the court's attention to what he contended was the applicants' submission to the jurisdiction of the Parish Court by applying to have the charges dismissed. Counsel, posited that by so proceeding, instead of seeking a stay on the basis of their notice of motion for conditional leave to appeal to the Privy Council, the applicants have pursued their alternative remedy, thereby, clearly demonstrating that they have elected to submit to the jurisdiction of the Parish Court and abandon the motion to the Privy Council.

[24] He also relied on section 5 of the Jamaica (Procedure in Appeals to the Privy Council) Order in Council 1962 and argued that the rationale for Practice Direction No 1 of 2016 was to promote speedier and more cost-efficient determination of applications for conditional and final leave to appeal to the Privy Council.

[25] Mr Small pointed to the applicants' failure to file their submissions pursuant to section 2.4 of the Practice Direction and submitted that although the respondent had e-filed its submissions in opposition to the application for leave on 23 April 2020, and had sought to exchange submissions with the applicants' attorney-at-law on that day, the applicant's attorney failed to respond. Hard copies of the respondent's submissions were filed on 18 June 2020. Mr Small also directed the court's attention to the fact that the applicants took no further step in the proceedings since the filing of their notice of motion on 9 April 2020 until submissions dated 16 February 2021 were served on the respondent. Mr Small submitted that the applicants have therefore failed to pursue their application.

[26] Relying on Edwards JA's statement in **MSB Limited and FINSAC Limited v Joycelyn Thomas** [2020] JMCA Civ 4 and Foster-Pusey JA's statement in **Sandals Royal Management Limited v Mahoe Bay Company Limited** [2019] JMCA App 12 in support of his submissions, Mr Small further posited that an application may be made to dismiss a claim for want of prosecution or abuse of the process of the court. He referred the court to the cases of **Grovit and others v Doctor and others** [1997] 2 All ER 417 and **Gerville Williams and others v The Commissioner of the Independent Commission of Investigations and others** [2014] JMCA App 7, in support of his argument that the matter ought to be dismissed, as the applicants have shown no interest in pursuing the motion for conditional leave to appeal.

[27] Learned counsel relied on the view expressed by Morrison JA (as he then was) in **Gerville Williams and others** and argued that the applicants' failure to take any step in furtherance of their application and their participation during that period in the matter before the Parish Court, demonstrated their lack of any real interest in pursuing their motion.

[28] He argued that the applicants' excuse that they were awaiting a date from the registrar of the Court of Appeal is also without merit. In support of that submission, he referred the court to Practice Direction 1 of 2016, which provides that such applications are generally considered by a single judge on paper. The applicants, he posited, ought, therefore, to have been prepared to have the matter so considered.

[29] The court's attention was also directed to what the respondent contended to be the applicants' failure to demonstrate that they had made any communication with the registrar, during the over 10 months delay, to enquire whether the matter would be considered on paper or whether a date for hearing would be set. According to counsel, the applicants proceeded to the Parish Court and dealt instead with their application to dismiss, which had been outstanding.

[30] Counsel further drew the court's attention to the fact that, on 26 May 2020, submissions in support of their application to dismiss were also filed in the Parish Court on the applicants' behalf. The parties attended the Parish Court on 3 July 2020 and no application for a stay of those proceedings pending the application for leave to appeal to the Privy Council was made. The learned judge therefore set their application to dismiss for hearing on the 29 October 2020 and the applicants participated fully and robustly in making their application to dismiss before the Parish Court on 29 and 30 October 2020 and 11 December 2020.

[31] Mr Small pointed to what he posited to be the alacrity with which the applicants obtained a date for the hearing of the application for conditional leave to appeal to the Privy Council after the ruling of the Parish Court Judge, which he submitted, supports the respondent's contention that the applicants' interest was only revived in this application because of the Parish Court Judge's failure to dismiss the charges.

[32] According to counsel, the applicants have continued to hedge their bets by simultaneously proceeding in the Parish Court while failing to withdraw the notice of motion, even though it was clear they had elected to proceed in the Parish Court. Counsel likened the applicants' behaviour to that of the appellant in the matter of **Gerville Williams and Others**.

[33] It was counsel's further submission that the applicants' persistence in pursuing the application despite the finding of the Full Court and the Court of Appeal is unreasonable and they ought not to be allowed to use up any more of the court's resources. Relying on rule 1.18 of the Court of Appeal Rules and Parts 64 and 65 of the Civil Procedure Rules, 2002 ('CPR'), it was his submission that the applicants' persistent pursuit of leave, amounts to unreasonable conduct on their part and even more egregious, he submitted, was the applicants proceeding to the Parish Court while simultaneously maintaining its application in the Court of Appeal. According to counsel, the applicants' action amounts to egregious misuse of the court's process and merits a further award of costs.

Should the notice of motion for conditional leave be dismissed for want of prosecution or as an abuse of process?

Delay in the hearing of the application

[34] The House of Lords, in the oft cited case of **Grovit and others v Doctor and others**, enunciated the principles to be applied in determining whether a matter ought to be struck out for an abuse of process. Inactivity *per se* was considered an abuse of process. It was also made plain in **Allen v Sir Alfred McAlpine & Sons Ltd** [1968] 1 All ER 543, that inactivity featured high on the list of factors to be considered for striking out for abuse of process. The court held that the imposition of costs was warranted to register the court's intolerance of inactivity.

[35] But can the delay in the hearing of the application for conditional leave to appeal to Her Majesty in Council be attributed to the applicants? If the answer is in the affirmative, the question is whether the delay can be regarded as inordinate and/or contumelious.

[36] In so far as will be seen, it was the fault of the applicants that the application was not properly filed until 30 July 2020, the delay in the hearing of the application for conditional leave is attributable to them. This delay persisted for over three months, which is lengthy. This is especially so where the applicants are before the criminal court awaiting trial and further in the light of the fact that judicial review matters are expected to be pursued with alacrity.

[37] The respondent submitted that although no date for the hearing of the application for conditional leave was forthcoming from the registry, the applicants ought to have made enquires. Whilst there was no bar to the applicants making enquires, it was the registry's responsibility to set a date and to inform the litigants. Section 7 of The Judicature (Appellate Jurisdiction) Court Act reads:

> "7. (1) There shall be a Registrar of the Court, and a person shall not be appointed to be Registrar unless he is a member of the Bar of Jamaica, England or Northern Ireland or of the

> Faculty of Advocates of Scotland, or a Solicitor of the Supreme Court of Jamaica or of the Supreme Court of Judicature of England, Scotland or Northern Ireland or a Writer to the Signet of Scotland.
>
> (2) The Registrar shall have such power and authority and perform such duties as shall be necessary for the due conduct and discharge of the business of the Court and as the President of the Court shall direct.
>
> (3) **Without prejudice to the generality of the provisions of this section, the Registrar shall take all necessary steps for obtaining a hearing under this Act of any appeals or applications, and shall obtain and lay before the Court of Appeal in proper form all documents, exhibits and other things relating to the proceedings in the court before which the case, or the appellant or applicant, was tried which appear necessary for the proper determination of the appeal or application**." (Emphasis added)

It ought not therefore, to be asserted, without more, that the failure of the applicants to make enquiries, resulted in the delay in the hearing of the application.

The failure to file written submissions within the specified time

[38] Practice Direction No 1 of 2016 (Applications for Conditional and Final Leave to Appeal to Her Majesty in Council) speaks to the procedure on a notice of motion to appeal to Her Majesty in Council, as of right, which may be heard by a single judge. The relevant section reads in part:

> "2. Conditional Leave
>
> 2.1 Upon the filing of an application for conditional leave pursuant to section 3 of the Jamaica (Procedure in Appeals to Privy Council) Order in Council 1962 the applicant(s) shall serve on the respondent(s) a copy of the said application along with the affidavit and any other documents in support of the application.

> 2.2 Upon service of the application, affidavit in support and any supporting documents on the respondent(s), the applicant(s) shall file an affidavit of service.
>
> 2.3 The respondent(s) to an application for conditional leave to appeal to Her Majesty in Council **may** within seven days from the date of service of the application file a response to the said application.
>
> 2.4 Parties **may** then file and serve written submissions and authorities within 14 days of service of the application and affidavit in support on the respondent(s).
>
> …
>
> 4.1 The application for conditional leave or final leave…shall be considered by a single judge of appeal.
>
> 4.2 The general rule is that the application will be considered by the single judge on paper. However, where the circumstances warrant, the single judge may direct that there be an oral hearing." (Emphasis added)

[39] Directions 2.3 and 2.4 are not mandatory in light of the use of the word "may" and not "shall" and is not applicable, in any event, to this case. The applicants' failure to file their submissions within the 14 days is therefore not necessarily fatal. Moreover, as the matter was heard in open court and Mr Wildman was precluded by the court from relying on his written submissions, but was allowed to submit orally, the failure to file written submissions cannot be said to have resulted in the hearing of the matter being delayed.

[40] Notwithstanding my conclusion on this issue, litigants would do well to take note of the recently issued Practice Direction No 1 of 2021 dated 30 April 2021, which highlights the various sanctions that may be imposed by the court in the event of the late filing of written submissions. These sanctions include removal of the appeal from the hearing list, standing down the appeal and reducing the offender's time to make oral submissions, and the imposition of various costs orders. In the instant case this

panel chose to sanction the applicants by preventing them from relying on their written submissions and permitting oral submissions only.

The hearing of the application soon after the Parish Court Judge's ruling

[41] The fact that a date for the hearing of the motion for conditional leave to the Privy Council was obtained shortly after the ruling of the learned Parish Court Judge cannot justly be attributed to the applicants. As stated earlier, date fixing for such matters is the responsibility of the registry upon the filing of the required documents and payment of the fees. In my view, in the absence of any affirmative evidence or information indicating the circumstances in which the matter came to be set for hearing, I am unwilling to make a negative inference either against the applicant or the registry of this court.

[42] It is important to indicate that the facts of **Gerville Williams and Others v The Commissioner of the Independent Commission of Investigations and others** are distinguishable. Like the applicants in the instant case, the appellants in that case were charged and placed before the Resident Magistrates' Court (as it was then called). Points *in limine* were raised in respect of alleged breaches of their constitutional rights against self-incrimination. The argument did not find favour with the Resident Magistrate but he acceded to their request for an adjournment of the proceedings in that court to facilitate their application to institute a constitutional claim in the Supreme Court. That claim did not find favour with the single judge of the Supreme Court or the Full Court.

[43] Notice and grounds of appeal in respect of that ruling were filed on the appellants' behalf on 13 June 2012. By way of notice dated 21 June 2012, the parties were advised by the registrar of the steps required to advance the appeal. Their attention was directed to rules 2.6 and 2.7 of the Court of Appeal Rules. They were further advised by the registrar, by way of letter dated 8 April 2013, of their failure to comply with certain requirements. Their attorney was also advised by the respondents' attorney of their failure to comply with certain requirements including their failure to

serve them with skeleton arguments. There was however no response by the appellants to either the registrar or the respondents.

[44] Meanwhile, the constitutional claim in the Supreme Court having failed, the trial in the Resident Magistrate's Court resumed on 28 August 2012 and continued for several days over a period in excess of a year, with the full participation of the appellants. On 31 May 2013, the 1st respondent applied for an order to dismiss the appeal for want of prosecution. The appellants consequently applied to extend time. That latter application was refused. Morrison JA (as he then was) expressed the court's displeasure at the appellants' conduct. In so doing he referred to their failure to take steps in furtherance of the application for over a year while over that same period they, "resumed - and sustained - active participation in the trial before the learned Resident Magistrate" (para. [31]). He further opined that:

> "[31] … the juxtaposition of these two factors, complete inaction in this court, as against steady activity in the other, supports a clear implication that the appellants had made an election between the two sets of proceedings."

[45] He expressed the view that such action was "clear abuse of the process of this court in the sense described by Lord Woolf in **Grovit and Others v Doctor and Others...**". Lord Woolf stated at page 424 as follows:

> "The courts exist to enable parties to have their disputes resolved. To commence and to continue litigation which you have no intention to bring to conclusion can amount to an abuse of process. Where this is the situation the party against whom the proceedings is brought is entitled to apply to have the action struck out and if justice so requires (which will frequently be the case) the courts will dismiss the action. The evidence which was relied upon to establish the abuse of process may be the plaintiff's inactivity. The same evidence will then no doubt be capable of supporting an application to dismiss for want of prosecution."

[46] Of significance is that in **Gerville Williams and Others** compliance with rules 2.6 and 2.7 was mandatory. Unlike the instant case, instead of an attempt to persuade

the court regarding its lack of jurisdiction to hear the matter, the appellants in **Gerville Williams and Others** actively participated in the criminal trial. The appellants' conduct was further exacerbated by their failure to comply with the rules, having been notified by the registrar and the respondents' attorney-at-law about their failure to file skeleton submissions and a record of appeal. The conduct of the applicants, in the instant case, in my view, is not as egregious.

Were the applicants "hedging their bets"?

[47] Were the applicants, by applying to all the courts in this jurisdiction to which they were allowed, guilty of "hedging their bets"? The law affords a litigant the right to explore all legal remedies to which he is entitled. There is however a line of demarcation between so doing and abusing the process of the court. The court will certainly not countenance the practice of parties "hedging their bets". Scrutiny of the applicants' conduct of this matter is necessary to determine:

(a) whether the applicants' applications to the various courts were indeed abusive of the process;

(b) whether the submissions made on their behalf by counsel in the Parish Court regarding that court's lack of jurisdiction whilst their application for conditional leave to the Privy Council was pending were abusive of the process.

[48] The applicants' renewed application to the Full Court was made on 31 December 2019. Following successful bail applications by their attorneys, the applicants were put on bail to return to the Parish Court on 23 January 2020 for the matter to be mentioned. The application before the Full Court was heard on the 10 and 11 February 2020 and the decision of that court was delivered on 2 March 2020.

[49] Mr Pinnock in his affidavit in support of the notice of motion, averred as follows:

> "20. While the matter was mentioned in the Parish Court, our Attorneys raised the objection that the FID does not have the power to arrest and charge anyone as per the Judgement of Justice Sykes and asked for further adjournment to renew the application before the Full Court challenging the legality of the actions of the FID members to arrest and charge the Applicants.
>
> 21. The Applicants in seeking this adjournment before the Parish Court were asking the Parish Court to defer or to stay the criminal proceedings to allow the Applicants to pursue the renewed application for Judicial Review in the Full Court of the Supreme Court in keeping with Rule 56.5(1)(a) of the Civil Procedure Rules and not to hedge any bets as ultimately concluded by the Court of Appeal."

[50] However, in Inspector Williams' affidavit in response he stated the following:

> "18. In relation to paragraphs 20 and 21 of the said [Mr Pinnock's] Affidavit, I have been advised by the Respondent's Attorneys-at-Law and do verily believe that at the Corporate Area Parish Court, Prosecutors from the Office of the Director of Public Prosecutions sought an adjournment to enable them to complete their review of the case file and the Applicant's Attorney-at-Law Mr Wildman, sought to have the Parish Judge dismiss the matter based on his interpretation of the Chief Justice's judgment. The Parish Court ordered that the Applicants' Attorney-at-Law file submissions in respect of his application to dismiss the matter on or before February 28, 2020 and to make the application formally on the 8th day of April, 2020."

[51] There are therefore two versions of the facts regarding what transpired before the learned Parish Court Judge. Mr Pinnock, in his affidavit, averred that his attorney raised an objection that the FID lacked the power to arrest and charge anyone. The applicants' attorney also asked the learned Parish Court Judge to defer or stay the proceedings to allow the applicants to pursue their renewed application before the Full Court.

[52] The respondents however dispute that account. Their version is that the Crown requested an adjournment of the matter to enable its completion and review of the file but Mr Wildman, on the other hand, referred the court to Sykes CJ's interpretation of the Act and urged the court to dismiss the matter. The learned judge consequently ordered the applicants' attorney to file written submissions on or before 28 February, 2020. The hearing of that application was adjourned to 8 April 2020.

[53] In the absence of a statement from the learned Parish Court Judge, both accounts could be true. Of significance is that by virtue of the criminal charges, the matter had been fixed before the Kingston and Saint Andrew Parish Court (Criminal Division), prior to the applicant's application before the Chief Justice challenging the legality of the FID's action to arrest and charge. The matter having been given a mention date, the applicants were therefore mandated to appear before the learned Parish Court Judge. Mr Wildman was also obliged to proffer a reason for requesting the adjournment.

[54] The raising of a preliminary point to the learned judge on the issue of the FID's lack of jurisdiction ought not, in my view, to be deemed abusive of the court's process. Further, the attempt at that juncture to persuade the learned Parish Court Judge regarding the FID's alleged lack of authority to arrest and charge, whilst seeking an adjournment to have the matter heard before the Full Court, also in my view, ought not be regarded as an abuse of the process.

[55] If, however, it is considered that in seeking the adjournment, counsel overstepped the bounds of merely explaining the reason for the adjournment and ventured also into the realm of attempting to persuade the learned Parish Court Judge to dismiss the application, he, having been made aware of the pending application before the Full Court to deal with that matter, ought not to have accompanied Mr Wildman down that path. He ought to have deferred to the Full Court. In the absence of the learned Parish Court Judge's notes, this court is ignorant as to the circumstances which led to the request for written submissions.

[56] Bearing in mind the court's desire to save time and expense, the following questions arise in light of the DPP's office unpreparedness at that juncture to embark on a trial and Mr Wildman's supposed interpretation of Sykes CJ's judgement:

1. Was Mr Wildman's insistence in seeking judicial review wholly unreasonable?

2. By appealing to the Full Court, were the applicants being recalcitrant or were they properly seeking judicial review of the FID's authority to arrest and charge, which they reasonably felt were open to them?

[57] The alternative remedy to which Sykes CJ and Batts J referred was a trial before the Parish Court Judge. Mr Wildman's view that the FID overstepped its bounds by arresting and charging the applicants (although in my view, erroneous), his insistence on pursuing judicial review, cannot be regarded as unreasonable in the light of his supposed interpretation of the judgment of Sykes CJ.

<u>The appearance before the learned Parish Court Judge whilst the application for conditional leave to appeal to Her Majesty in Council was before the Court of Appeal</u>

[58] The trial of the matter in the Parish Court was delayed consequent on the several applications made on behalf of the applicants to facilitate their challenge of the legality of the charge in the superior courts, which resulted in several adjournments of the trial. As already noted, consequent on the ruling of the Court of Appeal, the applications in this jurisdiction by way of judicial review challenging the charges instituted by the FID had been exhausted, save for the notice of motion for conditional leave to appeal to the Privy Council for which no date had been fixed for hearing.

[59] The applicants' compliance with the Parish Court Judge's request for submissions at that juncture cannot, in those circumstances, be regarded as hedging their bets as they were obliged to appear before the Parish Court, more so, in light of the

adjournments which the learned Parish Court Judge had granted to facilitate the various applications to the superior courts. Importantly also, was the Court of Appeal's refusal of the applicant's application for a stay of the criminal matter before the learned Parish Court Judge.

[60] Any further application for an adjournment of the trial would have been unreasonable in light of the applicants' failure to convince the superior courts in this jurisdiction on the issue of the FID's lack of jurisdiction to arrest and counsel's inability to persuade all the superior courts in this jurisdiction on the issue regarding the alternative remedy.

[61] However, Mr Wildman's insistence on pursuing leave for judicial review of the FID's authority to arrest and charge the applicants, cannot be regarded as a frivolous waste of judicial time, contumelious or recalcitrant. The circumstances in which matters ought to be struck out for abuse of process and for costs to be imposed to register the court's displeasure, as explained in **Allen v Sir Alfred McAlpine & Sons,** cannot justly be attributed to the applicants. Neither can the conduct of the matter by counsel be regarded as an egregious abuse of the process so as to warrant a dismissal of the application for conditional leave.

[62] Neither can it be reasonably asserted that the conditions required to conclude that they voluntarily submitted to the jurisdiction of the Parish Court have been satisfied. Goff LJ in **Astro Exito Navegacion S AA v Hsu (Messiniaki Tolmi)** [1984] 1 Lloyd's Rep 266 explained the circumstances in which a person voluntarily submits to the jurisdiction of the court. At page 270 he said:

> "Now a person voluntarily submits to the jurisdiction of the court if he voluntarily recognises, or has voluntarily recognised, that the court has jurisdiction to hear and determine the claim which is the subject matter of the relevant proceedings. In particular, he makes a voluntary submission to the jurisdiction if he takes a step in proceedings which in all the circumstances amounts to a recognition of the court's jurisdiction in respect of the claim

> which is the subject matter of those proceedings. The effect of a party's submission to the jurisdiction is that he is precluded thereafter from objecting to the court exercising its jurisdiction in respect of such claim."

[63] As already noted, the applicants were obliged to attend the Parish Court. Upon attending, they sought an adjournment. In justifying the application for an adjournment to appeal to the Full Court they endeavoured to convince the Parish Court Judge that he lacked the authority to hear the matter. In the absence of the judge's notes, this court is unable to find that the applicants' attorney sought to implore the learned Parish Court Judge to dismiss, as against his seeking to convince that the learned judge to grant the adjournment.

[64] On all accounts, at every stage, Mr Wildman's contention was that the Parish Court lacked the jurisdiction to hear the matter. The fact that whilst in the process of seeking an adjournment, the learned Parish Court Judge requested submissions from Mr Wildman regarding his opinion that he lacked the jurisdiction to hear the matter and submissions from learned counsel to demonstrate otherwise, cannot properly be deemed as voluntary submission to that jurisdiction.

[65] I conclude therefore that the application to dismiss the motion must be refused.

The issue of costs

[66] Although the respondent has failed in its application to dismiss the motion, I am not inclined to grant costs to either side in this application.

[67] Rule 64.6 of the CPR guides the court as to the circumstances in which costs should be awarded. Rule 64.6(3) requires the court to "… have regard to all the circumstances". Rule 64.6(4) speaks to particular circumstances that the court should have regard to in determining liability for costs. It states:

> "In particular it must have regard to-

(a) the conduct of the parties both before and during the proceedings;

(b) **whether a party has succeeded on particular issues, even if that party has not been successful in the whole of the proceedings**;

(c) any payment into court or offer to settle made by a party which is drawn to the court's attention (whether or not made in accordance with Parts 35 and 36);

(d) whether it was reasonable for a party –

(i) to pursue a particular allegation; and/or

(ii) to raise a particular issue;

(e) the manner in which a party has pursued –

(i) that party's case;

(ii) a particular allegation; or

(iii) a particular issue;

…" (Emphasis added)

[68] The English case **Three Rivers District Council and others v Bank of England** [2006] EWHC 816 (Comm), also provides guidance on the matter. Tomlinson J enunciated the principles to be considered in determining whether to award costs on an indemnity basis. Paragraph 25 of his judgment reads:

> "25. …I have already referred to the guidance given by Lord Woolf in the **Excelsior** case as to the circumstances in which an indemnity order may be appropriate - where there is some conduct or some circumstance which takes the case out of the norm. I agree with the Bank that the authorities, … demonstrate that the following principles should guide the Court's determination whether the Claimants should be required to pay the bank's costs of the action on an indemnity basis: -

(1) The court should have regard to all the circumstances of the case and the discretion to award indemnity costs is extremely wide.

(2) The critical requirement before an indemnity order can be made in the successful defendant's favour is that there must be some conduct or some circumstance which takes the case out of the norm.

(3) Insofar as the conduct of the unsuccessful claimant is relied on as a ground for ordering indemnity costs, the test is not conduct attracting moral condemnation, which is an a fortiori ground, but rather unreasonableness.

(4) The court can and should have regard to the conduct of an unsuccessful claimant during the proceedings, both before and during the trial, as well as whether it was reasonable for the claimant to raise and pursue particular allegations and the manner in which the claimant pursued its case and its allegations.

(5) Where a claim is speculative, weak, opportunistic or thin, a claimant who chooses to pursue it is taking a high risk and can expect to pay indemnity costs if it fails.

(6) A fortiori, where the claim includes allegations of dishonesty, let alone allegations of conduct meriting an award to the Claimant of exemplary damages, and those allegations are pursued aggressively inter alia by hostile cross examination.

(7) Where the unsuccessful allegations are the subject of extensive publicity, especially where it has been courted by the unsuccessful claimant, that is a further ground.

(8) The following circumstances take a case out of the norm and justify an order for indemnity costs, particularly when taken in combination with the fact that a defendant has discontinued only at a very late stage in proceedings;

(a) Where the claimant advances and aggressively pursues serious and wide ranging allegations of dishonesty or impropriety over an extended period of time;

(b) Where the claimant advances and aggressively pursues such allegations, despite the lack of any foundation in the

> documentary evidence for those allegations, and maintains the allegations, without apology, to the bitter end;
>
> (c) Where the claimant actively seeks to court publicity for its serious allegations both before and during the trial in the international, national and local media;
>
> (d) Where the claimant, by its conduct, turns a case into an unprecedented factual enquiry by the pursuit of an unjustified case;
>
> (e) Where the claimant pursues a claim which is, to put it most charitably, thin and, in some respects, far-fetched;
>
> (f) Where the claimant pursues a claim which is irreconcilable with the contemporaneous documents;
>
> (g) Where a claimant commences and pursues large-scale and expensive litigation in circumstances calculated to exert commercial pressure on a defendant, and during the course of the trial of the action, the claimant resorts to advancing a constantly changing case in order to justify the allegations which it has made, only then to suffer a resounding defeat."

[69] The New Zealand case **Richard William Prebble, Ken Shirley, Rodney Hide, Muriel Newman v Donna Awatere Huata** SC CIV 9/2004/ [2005] NZSC 18, provides guidance regarding the imposition of costs for the unreasonable pursuit of a matter. At paragraph 10 Elias CJ cited with approval the following statement from the judgment of Cooke P in **Kuwait Asia Bank EC v National Mutual Life Nominees Ltd** [1991] 3 NZLR 457, at page 460 in respect of the imposition of costs for the unreasonable pursuit of a hopeless case. He said:

> "It reflects a philosophy that litigation is often an uncertain process in which the unsuccessful party has not acted unreasonably and should not be penalised by having to bear the full party and party costs of his adversary as well as his own solicitor and client costs. If a party has acted unreasonably, for instance by pursuing a wholly unmeritorious and hopeless claim or defence – a more liberal award may well be made in the discretion of the judge, but there is no invariable practice."

[70] In this case, although the respondent has not succeeded in its application, in my view, it was not unreasonable for it to have brought the application, in these circumstances. On the other hand, the conduct of the applicants is such, that I am inclined, in the exercise of my discretion, not to follow the usual rule in awarding cost to the victor, and to instead make no order as to costs in this application.

The stamp duty issue

[71] Following the hearing of the applications, it was discovered that the stamp duty for the application for conditional leave was not paid prior to the submission of the application to the registry. Nor was it paid within the period of 21 days required by section 3 of the Jamaica (Procedure in Appeals to the Privy Council) Order in Council. This was evidenced by the fact that on 21 July 2020, the deputy registrar wrote to the applicants' attorney advising him that the required stamp duty was outstanding. By that time, more than three months had elapsed since the motion had been filed.

[72] As the court was of the view that the failure to comply with the requirement to pay the stamp duty within the time stipulated may have been fatal, the parties were asked to provide submissions on the matter. Both counsel duly complied with the request.

<u>The submissions</u>

[73] Mr Wildman asserted by way of his submissions that upon submitting the application to the registry, the requirement for stamping was discovered. An undertaking was consequently given to the registrar of the Court of Appeal which, Mr Wildman submitted, she accepted and allowed the document to be filed.

[74] Counsel relied on rule 3.7(3) of the CPR which permits an undertaking to be given to the registrar that the documents will be stamped. Counsel contended that the application is properly before the court for the following reasons:

> a. the documents were filed within the time stipulated for filing an application for leave to appeal to Her Majesty in Council; and
>
> b. at the hearing of the application, the stamp duty had been paid in accordance with the law.

[75] Mr Small however stridently contended that the applicants' assertion that an undertaking was given ought to be disregarded because of the failure "to provide any evidential basis for the statement that an undertaking was either given to and /or accepted by the Registrar". Counsel submitted that the applicants, having asserted that such an undertaking was given and accepted, it was the applicants' duty to provide the court with evidence by way of affidavit, as to when the undertaking was given and accepted by the registrar so as to determine whether the notice of motion was filed within the time.

[76] By way of his further submissions, of 9 November 2021, counsel directed the court's attention to an electronic mail dated 21 October 2021 from the registrar of the Court of Appeal to the parties. It reads:

> "Please be advised that the panel that heard the captioned matter wishes to invite the parties to make written submissions on an issue that emerged after they heard the applications.
>
> It was noted that the motion was received in the registry on 9 April 2020, but that Mr Wildman was notified on 21 July 2020 that the stamp duty was not paid. The fee was eventually paid on 30 July 2020.
>
> The Court wishes to direct the parties attention to:-
>
> rule 1.1.(10)(f) of the CAR which incorporates rule 3 of the CPR and in particular rule 3(7)(3) [corrected as 3.7(3)] of the CPR; rule 7 of the Court of Appeal Rules (Fee) 2002 (amended in 2017);

> and section 3 of the Jamaica (Procedure in Appeals to the Privy Council) Order in Council 1962; and invite their submissions on this issue.
>
> The submissions are to be filed on or before Friday 29 October 2021 by 3:00 pm and are also to be e-filed."

Learned counsel, Mr Small, urged the court to disregard Mr Wildman's submission that the failure to pay the required fee at the time of filing, is not fatal, because an undertaking to pay was accepted by the registrar.

[77] Counsel further directed the court's attention to the registrar's notification dated 21 July 2020 that the stamp duty was not paid. He submitted that the applicants had therefore failed to honour their undertaking for approximately three months which consequently required the registrar's notification, which, he submitted, "emphasize the Respondent's submission that the Applicants have flagrantly flouted the relevant rules at every stage and abused the process of the court".

[78] It was counsel's submission, that contrary to the applicants' assertions, it is evident that it was the registrar's notification which prompted the applicants to pay the fee nine days after receipt of that notice. The applicants' submission filed, on 27 October 2021, ought, he submitted, to be disregarded. There is therefore no valid notice of motion before the court and the notice of motion for conditional leave to appeal to Her Majesty in Council should be rejected with costs to the respondent to be agreed or taxed.

Discussion on the stamp duty

[79] I am unable to conclude whether or not Mr Wildman gave an undertaking in writing or verbally to the registrar which was accepted by the registrar, as there is no affidavit evidence from Mr Wildman which could warrant the court requiring evidence from the registrar in that regard. The burden was on Mr Wildman to provide evidence in support of his contention.

[80] Rule 7 of the Court of Appeal Rules (Fees) 2002, amended in 2017, requires that stamp duty of $5,000.00 be paid in the case of an application for conditional leave to appeal to Her Majesty in Council. Such fees are paid at the Stamp Office, and the registry is provided with the stamped document, usually, at the time of filing. Rule 3.7(3) of the CPR is also instructive. It reads:

> "Where a fee is to be paid a document is not to be treated as filed until –
>
> (a)the fee is paid; or
>
> (b) an undertaking to pay the fee acceptable to the registrar is received."

[81] Until the stamp duty was paid, the application could not be treated as having been filed. This principle was also expressed by Phillips JA in the case of **Georgia Pinnock (as Executrix of the Estate of Dorothy McIntosh, deceased) v Lloyd's Property Development Ltd and others** [2011] JMCA Civ 9. The learned judge of appeal at para. [38] said:

> "[38] However, in the instant case, as opposed to the factual scenario of the **Ogunsalu** case, the breach cannot as easily be corrected. The error in assigning the wrong claim number to a statement of case was in that case merely a mechanical exercise and the error could have been remedied by the Registrar affixing the correct suit number thereto. **In the instant case, the fixed date claim form must be impressed by stamp with the relevant fees, (see Judicature (Rules of Court) Act, Rules of the Supreme Court (Fees) 2002), and must also be sealed pursuant to rule 3.9 of the CPR. There was no evidence before us indicating whether the document had been stamped, which I would seriously doubt, as it was filed in an existing suit. If the requisite fee is not paid, then the document is not treated as filed until the fee is paid or an undertaking is received to satisfy the same (3.7(3) (a) and (b) of the CPR). …**" (Emphasis added)

[82] The application having been submitted on 9 April 2020, the stamp duty ought to have been paid on or before that date, but at the latest, prior to the expiration of the 21 days. The stamp duty was not paid until 30 July 2020, almost four months after the submission of the application to the registry. The application was therefore not properly filed until 30 July 2020. Consequently, it was filed well outside the 21-day period required for seeking conditional leave.

[83] It is settled that this court does not have the power to extend time for compliance with section 3 of the Jamaica (Procedure in Appeals to Privy Council) Order in Council. Carberry JA in **Chas E Ramson Ltd et al v Harbour Cold Stores Ltd** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 57/1978, judgment delivered 27 April 1982, having examining a number of cases, including the Privy Council case of **Roulstone v Panton** [1979] 1 WLR 1465, stated:

> "These cases show that this court has no power to extend the times fixed by sections 3 and 4(a) of The Jamaica (Procedure in Appeals to Privy Council) Order in Council 1962, governing the application for leave to appeal."

[84] In the circumstances, the failure to comply with the requirement to pay the stamp duty within the time stipulated is fatal. The court therefore has no choice but to refuse the motion on the basis that it was filed out of time.

[85] Notwithstanding this conclusion, I will nonetheless consider whether the application for conditional leave to appeal could have been granted, in any event.

Discussion on the notice of motion for conditional leave

[86] Applications to Her Majesty in Council for conditional leave to appeal from this court are governed by, *inter alia*, sections 3 and 5(a) of the Jamaica (Procedure in Appeals to Privy Council) Order in Council 1962; section 110(2)(a) of the Constitution of Jamaica ('the Constitution'); and Practice Direction No 1 of 2016.

[87] Sections 3 and 5(a) of the Jamaica (Procedure in Appeals to the Privy Council) Order in Council 1962 reads:

> "3. Applications to the Court for leave to appeal shall be made by motion or petition within twenty-one days of the date of the judgment to be appealed from, and the applicant shall give all other parties concerned notice of his intended application.
>
> 5. A single judge of the Court shall have power and jurisdiction-
>
> > (a) to hear and determine any application to the Court for leave to appeal in any case where under any provision of law an appeal lies as of right from a decision of the Court;"

[88] Section 110(2)(a) and (b) of the Constitution provides:

> "(2) An appeal shall lie from decisions of the Court of Appeal to Her Majesty in Council **with the leave of the Court of Appeal** in the following cases-
>
> > (a) Where in the opinion of the Court of Appeal the question involved in the appeal is one that, **by reason of its great general or public importance or otherwise**, ought to be submitted to Her Majesty in Council, decisions in any civil proceedings; and
> >
> > (b) Such other cases as may be prescribed by Parliament." (Emphasis added).

[89] What is considered to be of great general or public importance was regarded by this court as an issue which is subject to serious debate. This court in **Norton Wordworth Hinds and Others v The Director of Public Prosecutions** [2018] JMCA App 10 held that:

> "[32] … It must be a case of gravity involving a matter of public interest, or one affecting property of a considerable amount or where the case is otherwise of some public importance or of a very substantial character. …"

[90] The issue was also addressed in the matter of **The General Legal Council (ex parte Elizabeth Hartley) v Janice Causwell** [2017] JMCA App 16, wherein my learned sister, McDonald-Bishop JA stated at paras. [26] and [27]:

> "[26] … section 110(2)(a) of the Constitution … clearly establishes the requirements that must be satisfied for leave to appeal to Her Majesty in Council to be granted. This has been made absolutely clear in several authorities from this court ….
>
> [27] The principles distilled from the relevant authorities may be summarised thus:
>
> i. Section 110(2) involves the exercise of the court's discretion. For the section to be triggered, **the court must be of the opinion that the questions, by reason of their great general or public importance or otherwise, ought to be submitted to Her Majesty in Council.**
>
> **ii. There must first be the identification of the question involved. The question identified must arise from the decision of the Court of Appeal, and must be a question, the answer to which is determinative of the appeal.**
>
> iii. Secondly, it must be demonstrated that the identified question is one of which it can be properly said, raises an issue, which requires debate before Her Majesty in Council. If the question involved cannot be regarded as subject to serious debate, it cannot be considered one of great general or public importance.
>
> iv. **Thirdly, it is for the applicant to persuade the court that the question identified is of great general or public importance or otherwise.**
>
> v. It is not enough for the question to give rise to a difficult question of law; it must be an important question of law or involve a serious issue of law.
>
> vi. The question must be one which goes beyond the rights of the particular litigants and is apt to guide and bind others in their commercial, domestic and other relations.

> vii. The question should be one of general importance to some aspect of the practice, procedure or administration of the law and the public interest.
>
> viii. **Leave ought not be granted merely for a matter to be taken to the Privy Council to see if it is going to agree with the court.**
>
> ix. It is for the applicant to persuade the court that the question is of great general or public importance or otherwise." [Emphasis added]

[91] In **Olasemo v Barnett Limited** (1995) 51 WIR 191 Wolfe JA (as he then was), in interpreting section 110(2)(a) opined at page 201:

> " … Clearly, the phrase 'or otherwise' was added by the **legislature to enlarge the discretion of the court to include matters which were not necessarily of great general or public importance, but which in the opinion of the court might require some definitive statement of the law from the highest judicial authority of the land**. The phrase 'or otherwise' does not *per se* refer to interlocutory matters. The phrase 'or otherwise' is a means whereby the Court of Appeal can in effect refer a matter to their lordships' Board for guidance on the law." (Emphasis added)

Is there a question raised of general or great public importance?

[92] The applicants posed eight questions for our consideration as to whether they were of great general or public importance or otherwise. These were as follows:

> "a) Whether on the true construction of the Financial Investigations Division (FID) Act the Applicants have been unlawfully arrested and charged with offences by officers authorised under Section 2 of the FID Act with the result that the criminal proceedings initiated against them by the Respondent in the Parish Court are an abuse of process and a nullity, since authorised officers are restricted solely to the investigation of financial crimes.
>
> b) Whether the Applicants have satisfied the requirement that there was an arguable ground for judicial review having

a realistic prospect of success, which was not fanciful, in the light of the totality of the evidence before the Court, and in particular, the Affidavit evidence filed by the Applicants before the Hon. Chief Justice Sykes, and the additional Affidavit evidence filed by the Applicants before the Full Court of the Supreme Court.

c) Whether there was a genuine alternative remedy available to the Applicants in the criminal proceedings before the Parish Court, when the remedy which they would be seeking would be to set aside the criminal proceedings as an abuse of process and a nullity, which the Parish Court had no jurisdiction to entertain in the exercise of its statutory power as a first instance court of criminal jurisdiction, whose power should be strictly confined to matters directly affecting the fairness of the trial of the particular accused with whom it was dealing, such as delay or unfair manipulation of court procedures.

d) Whether the Parish Court can by its own decision finally decide on the question of the existence or extent of its own jurisdiction over criminal proceedings which are an abuse of process and a nullity, or whether such question should always be subject to review by the Supreme Court so as to ensure that the Parish Court does not usurp a jurisdiction which it does not possess, whether at all or to the extent claimed.

e) Whether the Court of Appeal erred in law by treating the mere existence of an alternative remedy in the form of the criminal proceedings before the Parish Court, of itself and by itself, as ousting the Court's jurisdiction to consider whether or not to exercise its discretion to review: see Leech v Deputy Governor of Parkhurst Prison [1988] AC 533, 588 C-D per Lord Oliver: *"An alternative remedy for abuse or excess, whether effective or not, may be a factor, and a very weighty factor, in the assessment of whether the discretion which the court undoubtedly has to grant or refuse judicial review should be exercised. But it cannot … bear on the question of the existence of the jurisdiction"*, or alternatively, by treating the existence of the proceedings before the Parish Court as an alternative remedy which necessarily entailed the exercise of the Court's discretion in one way only, against granting permission for judicial review and refusing leave to appeal.

> f) Whether if the Court of Appeal had properly exercised its discretion in all the circumstances, it should have granted a stay of the criminal proceedings in the Parish Court pending the determination of the application for judicial review, and granted leave to appeal and permission to apply for judicial review for the relief sought.
>
> g) Whether the Applicants failed to comply with the requirements of Rule 56.3(3)(d) of the Civil Procedure Rules 2002 since the criminal proceedings in the Parish Court did not constitute a forum which provided the Applicants with an alternative form of redress.
>
> h) Whether the Court of Appeal and the Full Court of the Supreme Court erred in law by awarding costs against the Applicants in favour of the Respondent." (Italics as in the original)

[93] Having considered these questions and the submissions and authorities from both sides, I am of the firm view that the applicants cannot succeed in this application.

[94] None of those eight questions posed raise any issue of great general or public importance, therefore they do not satisfy the the criterion set out in section 110(2) (a) of the Constitution. Neither am I of the view that the question of the powers of the officers to arrest and charge the applicants should otherwise be referred to their Lordships for their guidance.

[95] A police officer derives his power to arrest by virtue of the Constabulary Force Act. That power he retains until it is divested by way of his separation from the Force consequent on his retirement or for some other reason. Section 3 of the FID Act states:

> "The object of this Act is to establish a department of Government with sufficient independence and authority to effectively deal with the multidimensional and complex problem of financial crime and confer upon it the responsibility to –
>
> (a) investigate all categories of financial crime;

(b) collect information and maintain intelligence databases on financial crimes;

(c) maintain an arm's length relationship with law enforcement agencies and other authorities of Jamaica and of foreign States, and with regional and international associations or organizations, with which it is required to share information;

(d) exercise its functions with due regard for the rights of citizens."

[96] Section 5 speaks to the functions of the Division. It states:

"(1) Subject to the provisions of this Act, the Division shall -

(a) advise the Minister on matters of policy relating to the detection, prevention and control of financial crimes;

(b) collect, request, receive, process, analyse and interpret -

(i) information relating to financial crimes; and

(ii) transaction reports and any other reports made to or received by the Division under this Act or any other enactment;

(c) subject to section 10, take such action as it considers appropriate in relation to information and reports referred to in paragraph (b);

(d) where the Chief Technical Director considers it necessary, to disseminate information and reports referred to in paragraph (b) to –

(i) the competent authority;

(ii) the Attorney-General, the Commissioner of Police, any of the Revenue

Commissioners under the Revenue Administration Act, the Commission for the Prevention of Corruption established under the Corruption (Prevention) Act or the Director of Public Prosecutions;

(iii) any other body designated by the Minister for the purposes of this paragraph;

(e) investigate, or cause to be investigated –

(i) at the request of the Director of Public Prosecutions, the Commissioner of Police or any other public body; or

(ii) on the initiative of the Chief Technical Director,

any person who is reasonably suspected of being involved in the commission of any financial crime;

(f) promote public awareness and understanding of financial crimes, and the importance of their elimination from the society;

(g) formulate and implement management guidelines and policies and an annual plan approved by the Minister for the control and prevention of financial crimes;

(h) establish a database and databank for the purpose of detecting and monitoring financial crimes;

(i) engage in the compilation and publication of statistics on –

(i) reports that are made to it under this Act or any other enactment;

(ii) the prosecution of financial crimes;

(iii) investigations carried out by it;

(iv) the conviction of persons for financial crimes;

(v) judicial orders in connection with proceedings relating to financial crimes;

(vi) such other matters as the Chief Technical Director may consider appropriate;

(j) manage, safeguard, maintain and control any property seized or restrained under this Act or seized, restrained or forfeited under any other enactment, in connection with proceedings relating to financial crimes;

(k) carry out such other investigations and perform such functions and enter into any transactions that –

(i) are assigned to it under this Act or any other enactment;

(ii) in the opinion of the Chief Technical Director, are necessary or incidental to the proper performance of its functions.

(2) Subject to the provisions of this Act, the Division may, for the purpose of carrying out its functions-

(a) provide and receive information relating to the commission of a financial crime;

(b) provide information on typologies, statistics and other materials relating to financial crimes to –

(i) public bodies; and

(ii) such other persons as the Chief Technical Director considers appropriate;

(c) after consultation with the competent authority, give guidance to financial institutions and designated non-financial institutions

regarding their obligations under this Act or any other enactment; and

(d) consult with and seek assistance from such persons as the Chief Technical Director considers appropriate."

[97] Section 16 provides as follows:

> "An authorized officer acting in the execution of his office or duty may obtain such assistance from any other person, as he considers necessary."

[98] Further, section 17(1) reads:

> "Where the Chief Technical Director has reasonable grounds for suspecting that a person has possession or control of any information, book, record, or document which is relevant to an investigation of a financial crime, an authorized officer may apply to a Judge in Chambers or Resident Magistrate in accordance with subsection (2) for an order under subsection (3) in relation to the person suspected of having possession or control of the information, book, record or document."

[99] The Act confers additional powers on police officers who are deemed authorised officers by the Act to access information which are not afforded them under the Constabulary Force Act, for example: to gain access to information which officers would normally be barred from accessing, production orders, restraint orders or account monitoring orders.

[100] Police officers who are also authorised officers pursuant to the legislation are, by virtue of the Act, conferred with additional investigative powers. Indeed, these additional powers are conferred solely on officers deemed by the Act as authorised officers and are required to be utilised in strict conformity with the Act.

[101] Section 2 of the Act puts it beyond argument that police officers who are deemed authorised officers do not shed the robe of authority to arrest and charge as

these officers remain under the control of the Commissioner of Police. The section provides:

> "'authorized officer' means-
>
> ….
>
> (c) any member of the Jamaica Constabulary Force so designated by the Commissioner of Police."

[102] The facts of the case of **Commissioner of the Independent Commission of Investigations v Police Federation and others; Dave Lewin (Director of Complaints of the Independent Commission of Investigations) v Diah** [2020] UKPC 11 are therefore palpably distinguishable. The arrests in that case were effected by the Commissioner of Indecom who, although an authorised officer, remained a civilian. His authorisation pursuant to the Independent Commission of Investigations Act was limited to investigation. The Privy Council pointed out at paragraphs 26 and 27 that:

> "26. The long title to the 2010 Act and s 4 which sets out the Commission's functions make clear that the Commission's role is investigative. Its function is "to undertake investigations" and the functions identified in s 4 all focus on an investigative role. None of the provisions of the Act, considered individually or in combination, expressly confers on the Commission the power to bring a prosecution in respect of an incident offence.
>
> 27. The Commission submits, however, that this is the effect of s 20 which provides that for the purpose of giving effect to ss 4, 13 and 14 the Commissioner and the investigative staff of the Commission shall, in the exercise of their duty under the Act, have 'the like powers, authorities and privileges as are given by law to a constable.' The Full Court accepted this submission and held that this provision conferred the power to arrest and charge. In the Board's view, the Court of Appeal was clearly correct in rejecting this reading of the statute (Phillips JA at paras 87, 88; Brooks JA at para 195). Under s 20, the like powers, authorities and privileges of a constable are conferred for the purpose of

> giving effect to ss 4, 13 and 14. Each of those sections is concerned solely with the manner in which the Commission undertakes investigative functions pursuant to the Act. Powers are conferred by s 20 only for the purposes of investigation and in the particular respects identified by ss 4, 13 and 14. As Ms Phillippa Kaufmann QC puts it, on behalf of the respondents, the power to arrest for the purpose of charging and the power to charge and prosecute a criminal offence arising from an incident under investigation are not powers which are capable of being exercised to give effect to the investigative functions contained in ss 4, 13 and 14. Such powers are exercisable when an investigation is complete. They do not further the investigation, nor do they support the taking of any step in the investigation. Nothing in these sections, therefore, considered singly or cumulatively, can be read as conferring on the Commissioner, the Commission or its staff the power to arrest, charge or prosecute officers or officials for an incident offence."

[103] Although Batts J opined that civilians are empowered to arrest, that power is limited to the arrest of a fleeing felon and persons caught in the very act of wrong doing. The authorised officers who arrested and charged the applicants in the instant case, derived the power to do so by virtue of their status as police officers. By virtue of their assignment to the FID, and designation as authorised officers, the conferment of additional powers by virtue of the Act did not disrobe them of their power to arrest and to charge, but rather, they were additionally empowered by the Act to investigate *inter alia.*

[104] Consequently, it is my view that, in so far as the question of the power of the FID officers to arrest and charge the applicants does not arise from the judgment of the Court of Appeal, and in so far as the law is clear so that the guidance of their Lordships is not otherwise required on this question, there is no basis for leave on this or any of the other questions posed by the applicants.

[105] The notice of motion for conditional leave to appeal to Her Majesty in Council would necessarily, therefore, be refused.

Conclusion

[106] No basis has been shown to this court warranting the dismissal of the motion for conditional leave to Her Majesty in Council for want of prosecution or as an abuse of the process of the court and that application could not succeed on the facts. However, the notice of motion for conditional leave to Her Majesty in Council cannot succeed. That application was filed without the requsite stamp duty being paid in time and as a result was not properly filed until the duties were paid. By then, the time for filing the application had long passed. In those circumstances, the application for conditional leave not having been filed within the specified period, and the court having no power to extend the time, the application must be deemed as not having been filed. In any event, the applicant has raised no question of great general or public importance or otherwise and therefore the notice of motion for conditional leave to appeal to Her Majesty in Council ought to be refused with costs to the respondent to be agreed or taxed.

V HARRIS JA

Introduction

[107] I have had the privilege of reading the draft judgment of my learned sister Sinclair-Haynes JA. While I agree that the application to dismiss the motion for want of prosecution and/or abuse of the process of the court is to be refused; and the application for conditional leave to appeal to Her Majesty in Council is also to be refused; regrettably, for reasons that will be set out below I am unable to adopt her reasoning in its entirety. Therefore, as will be seen, I have arrived at the same decisions but by different routes. However, I agree with her reasoning and conclusion on the stamp duty issue (set out at paras. [71]-[84] above) that the motion should be refused on the basis that it was filed out of time due to the late payment of the required fee.

[108] The applicants, Fritz Pinnock and Ruel Reid, are seeking conditional leave to appeal to Her Majesty in Council from the decision and order of this court given on 3 April 2020 ('the motion'). That decision is embodied in the judgment of **Fritz Pinnock and Ruel Reid v Financial Investigations Division** [2020] JMCA App 13, which was delivered by Phillips JA, and with which Morrison P and Simmons JA agreed ('the judgment'). It was ordered that:

> "1. The application for permission to appeal the decision of the Full Court delivered on 2 March 2020 is refused.
>
> 2. The application for a stay of criminal proceedings in the Parish Court pending the determination of the application for permission to appeal the decision of the Full Court delivered on 2 March 2020 is also refused.
>
> 3. Costs to FID to be taxed if not agreed."

Dissatisfied with those orders, the applicants filed the motion on 9 April 2020, the hearing of which was delayed for reasons I will discuss in due course.

[109] The respondent, Financial Investigations Division ('FID'), is a government department established by section 4 of the Financial Investigations Division Act, 2010 ('the Act'). Prior to a date being set for the hearing of the motion, FID filed an application to dismiss the motion for want of prosecution and/or abuse of the due process of the court ('the application to dismiss'). Both applications, the motion and the application to dismiss, were heard on 8 and 9 March 2021. We reserved our decision for 30 April 2021. Regrettably, the delivery of our decision was deferred for reasons that were communicated to the parties. For this, we again apologise.

[110] To fully understand the circumstances that led to the motion and the application to dismiss, it is necessary to provide a brief background of the history of the litigation history.

Background

[111] The applicants were arrested and charged with other persons for breaches of the Proceeds of Crime Act, the Corruption Prevention Act, and several common law offences in relation to "financial irregularities" at the Caribbean Maritime University and within the Ministry of Education. The police officers who carried out the investigation and charged and arrested the applicants were designated as "authorised officers", pursuant to section 2 of the Act.

[112] Further to those charges, the applicants were brought before the Kingston and Saint Andrew Parish Court, Criminal Division ('the Parish Court'). They, however, sought to challenge the police officers' authority to institute charges by asserting that FID acted outside of its statutory powers and, therefore, the charges laid against them were a nullity. Accordingly, an application was made to the Supreme Court for leave to apply for judicial review.

[113] That application was heard by the learned Chief Justice Sykes, who on 24 December 2019, in his judgment **Fritz Pinnock and Ruel Reid v Financial Investigations Division** [2019] JMSC Civ 257, refused leave on the basis that the Parish Court possesses the powers and procedure required to address all matters of admissibility and proper procedure, especially since no constitutional question involving remedies unavailable in the Parish Court, was raised.

[114] The applicants filed a renewed application for leave to apply for judicial review, which was heard by the Full Court comprised of Batts J, Stamp J and Jackson-Haisley J. The Full Court delivered its written judgment on 2 March 2020 (**Fritz Pinnock and Ruel Reid v Financial Investigations Division** [2020] JMFC Full 2), which dismissed the application on the basis that the applicants had an alternative remedy that was more appropriate in all the circumstances of the case, that is, to make an application before the Parish Court regarding the lawfulness of the charges. The Full Court also noted that, in breach of rule 56.3(3)(d) of the Civil Procedure Rules, 2002

('CPR'), the applicants had failed to disclose the alternative remedy and explain their reasons for not pursuing it (see para. [51] of the judgment of the Full Court).

[115] The application for leave to apply for judicial review, the Full Court held, was inconsistent with the efficient use of judicial resources, especially since by the time of the hearing, the applicants had begun their pursuit of the alternative remedy, for which a date had been fixed. The Full Court also refused the applicants' request for leave to appeal their decision based on their finding that there was no real prospect of success.

[116] Committed to their pursuance of judicial review, the applicants filed an application seeking leave to appeal the decision of the Full Court pursuant to rule 1.8 of the Court of Appeal Rules, 2002 ('CAR'). As stated earlier, that application was refused. The Court of Appeal agreed with the Full Court that the applicants were not eligible to apply for judicial review since an alternative remedy available to them would be more appropriate to address the issues raised. Having been denied their application for leave to appeal the Full Court's decision, the applicants proceeded to file the present motion, which is the substantive application for our consideration.

[117] Upon the passing of almost 10 months without any progress in the motion, FID filed the application to dismiss, as well as an affidavit in support, on 2 February 2021. The affidavit was sworn to by Mr Brenton Williams, an Inspector of Police with the Jamaica Constabulary Force and an authorised officer appointed under the Act. FID argued, among other things, that the applicants had no interest in pursuing the motion, and their conduct indicated that they were abusing the due process of the court. Accordingly, I will first treat with the application to dismiss as it will determine the trajectory of the motion.

The application to dismiss the motion

[118] Counsel for FID, Mr Small, argued that the applicants, having filed their motion and affidavit in support on 9 April 2020 and served them on FID, failed to file written submissions within 14 days of service, in accordance with section 2.4 of Practice

Direction 1 of 2016 (Applications for Conditional and Final Leave to Appeal to Her Majesty in Council) ('the Practice Direction'). The Practice Direction provides, in part, as follows:

> "2. Conditional Leave
>
> 2.1 Upon the filing of an application for conditional leave pursuant to section 3 of the Jamaica (Procedure in Appeals to Privy Council) Order in Council 1962 the applicant(s) shall serve on the respondent(s) a copy of the said application along with the affidavit and any other documents in support of the application.
>
> 2.2 Upon service of the application, affidavit in support and any supporting documents on the respondent(s), the applicant(s) shall file an affidavit of service.
>
> 2.3 The respondent(s) to an application for conditional leave to appeal to Her Majesty in Council may within seven days from the date of service of the application file a response to the said application.
>
> 2.4 Parties may then file and serve written submissions and authorities within 14 days of service of the application and affidavit in support on the respondent(s)."

[119] Mr Small contended that FID appropriately filed its affidavit in response to the motion on 16 April 2020. Subsequently, FID's submissions were e-filed on 23 April 2020, and the hard copies were filed on 18 June 2020. The applicants, however, did not take any further steps towards the hearing of the motion until they served their written submissions with respect to the motion on 16 February 2021 (the record shows that the applicants' submissions were included in a bundle that was filed on 18 February 2021, but there is no evidence that the submissions were actually filed). Prior to that, counsel further contended, the applicants submitted to the jurisdiction of the Parish Court by pursuing their alternative remedy, that is, by applying to the said Parish Court to dismiss the charges.

[120] The applicants did not put their written submissions in support of the motion before this court until after their application in the Parish Court was dismissed on 11 December 2020. This, counsel argued, indicated that it was only upon the dismissal of that application before the Parish Court that the applicants' interest in the motion was revived. Mr Small further argued that the approach taken by the applicants was a clear indication of an abuse of the due process of the court. In support of that argument, he relied on several cases, including **MSB Limited v Joycelyn Thomas** [2020] JMCA Civ 4 and **Sandals Royal Management Limited v Mahoe Bay Management Limited** [2019] JMCA App 12.

[121] Mr Wildman did not file written submissions in response to the respondent's application to dismiss. In countering Mr Small's submission as to the effect of the Practice Direction, he submitted orally that the rules governing the application to the Privy Council are gazetted, whereas the Practice Direction is not, so the latter does not have force of law and is merely administrative. He relied on the Privy Council case of **Moses Hinds v R** [1977] AC 195, to argue that the court cannot use an administrative direction to take away a right guaranteed by the Constitution. He also submitted that since the Practice Direction states that the applicant "may" file written submissions, it was not mandatory. Accordingly, he argued that the applicants could elect not to file written submissions within the stipulated time frame of 14 days, and this should not be regarded as the reason for the delay in progressing the motion.

Discussion

The Practice Direction

[122] Section 2.4 of the Practice Direction states, "[p]arties **may** then file and serve written submissions and authorities within 14 days of service of the application and affidavit in support on the respondent(s)". I am, therefore, inclined to agree with Mr Wildman's submission that the use of the word "may" in the Practice Direction denotes that the requirement to file and serve written submissions and authorities in support of the motion is permissive or directory rather than mandatory.

[123] It is important to note, however, that the Practice Direction applies specifically to applications where appeals to Her Majesty in Council lie as of right from decisions of this court (see direction 1.4), which this matter is not. Nonetheless, it is trite that Practice Directions (such as the ones in question) are issued by the court to regulate procedural matters and/or to supplement rules of court. The core function of the Practice Direction is to promote **greater efficiency** in how applications for conditional and final leave to appeal to the Privy Council are to be conducted. Given its purpose, its relevance to appeals which do not lie as of right could be deemed appropriate. The distinction between the two types of applications is simply to facilitate the hearing of appeals which lie as of right, before a single judge of this court. Accordingly, a lack of compliance, in either scenario (whether the appeal lies of right or not), could invariably lead to inefficiencies and delays. It is beyond debate that courts and/or judges may issue their own practice directions especially in specialist proceedings (as these are) and in particular, where it is necessary so to do because of the absence of, or a deficit in, rules of court. Practice Direction 1 of 2021 addressed this court's concern with the frequency with which counsel file their submissions late. It is, therefore, expected that parties will file written submissions in advance of the hearing of their matters unless there is good reason not to do so. Where there has been a failure to comply with any such practice direction, and no good reason is shown (as in this case), the court may, based on its inherent jurisdiction to direct its own proceedings, appropriately sanction the non-compliance (see direction 1.4 of Practice Direction 1 of 2021).

[124] Therefore, in my view, had the applicants intended to advance the motion and rely on written submissions in support of their motion at the hearing, those submissions should have been filed within the 14 days stipulated. Instead, as was stated earlier, the applicants failed to file any written submissions and chose to include written submissions in a bundle filed on 18 February 2021. It was not until the first day of the hearing that it became apparent that the applicants intended to rely on those written submissions included in the bundle. The court took the view that in light of the applicants' failure to advance a good reason for their non-compliance with the Practice

Direction, they would not be permitted to rely on those written submissions and ruled accordingly. Counsel, however, was allowed to make oral submissions. We considered this to be an appropriate sanction.

[125] Whether the motion should be dismissed for want of prosecution and/or abuse of the due process of the court will now be examined.

Dismissal as a result of abuse of process and/or want of prosecution

[126] The House of Lords case of **Grovit and Others v Doctor and Others** [1997] 1 All ER 417 ('**Grovit v Doctor**') enunciated the principles to be considered by a court when determining whether to dismiss an application for want of prosecution. Lord Woolf, in his judgment, cited the dicta of Lord Diplock in **Birkett v James** [1977] 2 All ER 801, in which he outlined the following principles:

> "The power should be exercised only where the court is satisfied either: (1) that the default has been intentional and contumelious, eg disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court; or (2)(a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants either as between themselves and the plaintiff or between each other or between them and a third party."

[127] Applying those principles in **Grovit v Doctor**, the House of Lords found that both the deputy judge and the Court of Appeal were entitled to conclude that the appellant's inactivity in the libel action for over two years constituted an abuse of process. Consequently, there was no need to determine whether the plaintiffs' inactivity qualified as want of prosecution since it amounted to an abuse of the due process of the court. It is for that reason that the court decided to dismiss the proceedings. Lord Woolf held:

> "To commence and to continue litigation which you have no intention to bring to conclusion can amount to an abuse of process. Where this is the situation the party against whom the proceedings is brought is entitled to apply to have the action struck out and if justice so required (which will frequently be the case) the courts will dismiss the action. The evidence which was relied on to establish the abuse of process may be the plaintiff's inactivity. The same evidence will then no doubt be capable of supporting an application to dismiss for want of prosecution. However, if there is an abuse of process, it is not strictly necessary to establish want of prosecution under either of the limbs identified by Lord Diplock in Birkett v James. In this case once the conclusion was reached that the reason for the delay were [sic] one which involve [sic] abusing the process of the court in maintaining proceedings when there was no intention of carrying the case to trial the court were [sic] entitled to dismiss the proceedings."

[128] The case of **Gerville Williams et al v The Commissioner of the Independent Commission of Investigations et al** [2014] JMCA App 7 ('**Gerville Williams v INDECOM**'), on which FID relied, is also instructive as there is some similarity with the facts of the present case. In that case, the appellants, Mr Williams and seven other policemen were charged with the offence of failing to comply with a lawful requirement of the Independent Commission of Investigations Act without lawful justification or excuse. They made claims that their constitutional rights against self-incrimination and to maintain their silence were breached. After the learned Resident Magistrate ruled against them, they sought and were granted an adjournment of the proceedings in order to commence a constitutional claim before the Full Court. The Full Court found in favour of the respondents, and the appellants filed a notice of appeal. The registrar of the Court of Appeal advised the parties of the steps to be taken to advance the appeal, but the appellants, despite correspondence from the 1st respondent and the court, did not file the record of appeal. Also, the skeleton arguments, which were filed late, were not served on the 1st respondent. The 1st respondent thereafter applied to dismiss the appeal for want of prosecution. At paras. [31] – [33] of the judgment, Morrison JA (as he then was) stated:

> "[31] Without an order for extension of time, the appellants are back in the position in which they found themselves on 4 November 2013. I think it is fair to conclude that…**as at that date the appellants had shown no real intention of pursuing the appeal. For, not only had they failed to take any further steps to progress their appeal for well over a year, as has been seen, but over that same period they had resumed - and sustained - active participation in the trial before the learned Resident Magistrate. It seems to me that the juxtaposition of these two factors, complete inaction in this court, as against steady activity in the other, supports a clear implication that the appellants had made an election between the two sets of proceedings.**
>
> [32] In my view, this is a clear abuse of the process of this court in the sense described by Lord Woolf in ***Grovit and Others v Doctor and Others*** [1997] 2 All ER 417, 424…
>
> [33] Accordingly, on the basis of the same considerations that have formed my view that the appellants were guilty of an abuse of the process of this court, I came to the conclusion that the 1st respondent was entitled to an order dismissing the appeal for want of prosecution." (Emphasis added)

[129] I am of the view that the first limb of **Grovit v Doctor** applies. The applicants' default can be seen as intentional. The motion was filed on 9 April 2020 but was not heard until 8 and 9 March 2021. Mr Wildman is content in placing the blame for the delay on the registry. Mr Small, on the other hand, has put the fault squarely at the applicants' feet because they failed to file and serve written submissions in respect of the motion (as discussed above), and that it was their subsequent inactivity in pursuing the motion that led to the hearing being delayed for over 10 months. I do agree with my sister Sinclair-Haynes JA that the registrar, by virtue of section 7 of the Judicature (Appellate Jurisdiction) Act ('JAJA'), has certain duties and responsibilities to advance or progress the matters that are filed in this court (see para. [37] above). However, as will be discussed below, the delay is attributable, in part, to both the applicants and the registry.

[130] It was discovered, after the hearing of this matter (as discussed by my learned sister at paras. [71]-[84] above and as will be discussed at paras. [137] and [138] below), that the requisite stamp duty was paid almost three months after the motion was filed. In the light of rule 3.7(3) of the Civil Procedure Rules ('CPR') (incorporated by rule 1.1(10) of CAR), the motion could not be treated as having been filed. In those circumstances, the registrar was not in a position to carry out any of her administrative duties to progress the motion, other than to inform (or remind) the applicants about this requirement, which she did, albeit late. The delay in making the payment cannot be ascribed to the registrar or the registry. As a result, it would be inaccurate to say that the registry was entirely responsible for the delay in advancing the motion.

[131] Additionally, Mr Wildman seemed to have made no written enquiries or entreaties of the registry for a hearing date (although he would have had no basis on which to do so until the applicants paid the required fee), which counters the accepted principle that counsel ought to take steps to encourage the advancement of their matter. In my judgment, had the registry advised the applicants of the procedural requirements (even after the late payment of the stamp duty) and they failed to respond (as in **Gerville Williams v INDECOM**), this would have significantly strengthened FID's application to dismiss. In the absence of such communication, some apportionment of blame between the applicants and the registry is justified, in my view. Suffice to say; I have no intention of setting such a precedent, which I believe would be nothing short of alarming. I will simply take this opportunity to remind parties that they cannot place the burden entirely on the registry to ensure that their matters progress. They, too, have a duty to show a keen interest in advancing their cases.

[132] I will now address the issue of the applicant's pursuit of the alternative remedy. During the period of inactivity in this court, the applicants made an application to the Parish Court to challenge the lawfulness of the charges. It was upon the dismissal of that application, they took steps to advance the motion. Accordingly, by the time we heard the application to dismiss and the motion, the applicants had already pursued,

albeit unsuccessfully, the same alternative remedy they sought to argue did not truly exist. I am, therefore, compelled to agree with Mr Small that it is upon that dismissal that the applicants' interest in this motion was revived.

[133] Even if blame for the delay could in some respects fall on the registry, the overall conduct of the applicants suggests that they had no real intention of pursuing the motion until after their pursuit of the alternative remedy failed. It is arguable, in those circumstances, that the applicant's conduct has amounted to an abuse of the process of the court. In accordance with the dicta of Lord Woolf in **Grovit v Doctor**, this finding alone, without the need to consider the second limb, could ground the court's decision to dismiss the motion. However, there are other factors that require further contemplation, given the factual context of this case.

[134] The overriding objective to deal with cases justly is the paramount principle in all matters before the court. This phrase captures the position that matters are to be determined on the merits unless there are exceptional circumstances (abuse of the due process of the court qualifies as one such circumstance) warranting the draconian measures of summary dismissal or striking out of an application or case (see **Charmaine Bowen v Island Victoria Bank Limited and others** [2017] JMCA Civ 23). This posture is firmly entrenched in our jurisprudence based on the well-recognised and accepted tenet that the court in dealing with cases should always be mindful that "the overriding principle is that justice has to be done" (per Panton P in **Leymon Strachan v The Gleaner Company Limited and Dudley Stokes** (unreported), Court of Appeal, Jamaica, Motion No 12/1999, judgment delivered 6 December 1999 at page 20).

[135] Accordingly, while I have considered the applicants' conduct and their contribution to the delay in having the motion determined, I have also given due regard to the nature of the motion, the relevant authorities and the apportionment of some responsibility for the delay to the registry. I have also considered that the proceedings in the Parish Court were not stayed, and the applicants would have been required to

appear before that court and participate in its proceedings (unlike in **Gerville Williams v INDECOM** where the proceedings in the Resident Magistrate's Court were stayed). In this regard, I agree with the observations made by my sister Sinclair-Haynes JA at paras. [42]-[46] above when she distinguished the facts of the present case from those in **Gerville Williams v INDECOM**. Consequently, I am compelled to conclude that the motion ought not to be dismissed for want of prosecution and/or abuse of the due process of the court.

[136] I do not agree with my learned sister Sinclair-Haynes JA that there should be no order as to costs on the application to dismiss. In my judgment, it was not unreasonable for FID to have raised and pursued that application, given the overall dilatory conduct of the applicants in pursuing the motion. To this end, any prejudice to FID, as a result, can appropriately be remedied by an award of costs. I would propose, therefore, that the application to dismiss should be refused, and the costs of that application should be awarded in favour of FID.

The late payment of the requisite stamp duty

[137] As alluded to earlier (at para. [130] above), another matter that arose for our determination, which also led to the hearing of the motion being delayed, was the late payment of the required stamp duty in respect of the motion. At paras. [71]-[84] above, my learned sister has set out the circumstances, applicable rules and law, as well as some relevant cases concerning this issue and, therefore, there is no need for me to repeat them. As indicated earlier (see para. [107] above), I adopt her reasoning and conclusion on this issue. Therefore, I agree that the motion is to be refused for the reasons she has stated. However, I wish to make the following observations before leaving the issue under discussion.

[138] It is worth noting that given the time-sensitive nature of the motion, it would neither be reasonable nor expected that the registrar would have accepted an undertaking that was at large, that is, an undertaking that would have allowed the applicants to pay the stamp duty beyond the time (21 days) that is prescribed for the

filing of the motion. This would simply be preposterous. Therefore, I agree with the position taken by counsel for FID that, in any event, Mr Wildman would have breached any undertaking that was given to and accepted by the registrar, meriting a dismissal of the motion on this premise. It is perhaps timely to remind parties and their attorneys-at-law that the requirement set out by rules of court for the payment of fees is not to be flouted, and neither should they be paid merely at their convenience.

[139] Notwithstanding the conclusion arrived at on the present issue, for the reason stated at para. [107] above, I will now proceed to consider the motion.

The motion

[140] The motion is brought pursuant to section 110(2)(a) of the Jamaica (Constitution) Order in Council 1962 ('the Constitution') which provides that an appeal shall lie from decisions of the Court of Appeal in any civil proceedings to Her Majesty in Council with the leave of the Court of Appeal, "where in the opinion of the Court of Appeal the question involved in the appeal is one that, by reason of its great general or public importance or otherwise, ought to be submitted to Her Majesty in Council".

[141] In support of the motion is an affidavit sworn to by the 1st applicant, Mr Fritz Pinnock, on 8 April 2020, and filed on 9 April 2020. Mr Pinnock, having averred that he was permitted to swear the affidavit on Mr Reid's behalf, proceeded to proffer several submissions in support of the applicants' position. I would take this opportunity to remind counsel that affidavits are to contain facts and not submissions on the law. Mr Pinnock also averred that the issues raised in the motion involve questions that ought to be submitted to Her Majesty in Council by reason of their great general or public importance or otherwise. In response, an affidavit deponed by Mr Brenton Williams was filed, on behalf of FID, on 16 April 2020.

[142] The grounds on which the motion relied identified eight questions for our consideration, namely:

"a) Whether on the true construction of the Financial Investigations Division (FID) Act the Applicants have been unlawfully arrested and charged with offences by officers authorised under Section 2 of the FID Act with the result that the criminal proceedings initiated against them by the Respondent in the Parish Court are an abuse of process and a nullity, since authorised officers are restricted solely to the investigation of financial crimes.

b) Whether the Applicants have satisfied the requirement that there was an arguable ground for judicial review having a realistic prospect of success, which was not fanciful, in the light of the totality of the evidence before the Court, and in particular, the Affidavit evidence filed by the Applicants before the Hon. Chief Justice Sykes, and the additional Affidavit evidence filed by the Applicants before the Full Court of the Supreme Court.

c) Whether there was a genuine alternative remedy available to the Applicants in the criminal proceedings before the Parish Court, when the remedy which they would be seeking would be to set aside the criminal proceedings as an abuse of process and a nullity, which the Parish Court had no jurisdiction to entertain in the exercise of its statutory power as a first instance court of criminal jurisdiction, whose power should be strictly confined to matters directly affecting the fairness of the trial of the particular accused with whom it was dealing, such as delay or unfair manipulation of court procedures.

d) Whether the Parish Court can by its own decision finally decide on the question of the existence or extent of its own jurisdiction over criminal proceedings which are an abuse of process and a nullity, or whether such question should always be subject to review by the Supreme Court so as to ensure that the Parish Court does not usurp a jurisdiction which it does not possess, whether at all or to the extent claimed.

e) Whether the Court of Appeal erred in law by treating the mere existence of an alternative remedy in the form of the criminal proceedings before the Parish Court, of itself and by itself, as ousting the Court's jurisdiction to consider whether or not to exercise its discretion to review: see Leech v Deputy Governor of Parkhurst Prison [1988] AC 533, 588 C-

D per Lord Oliver: *"An alternative remedy for abuse or excess, whether effective or not, may be a factor, and a very weighty factor, in the assessment of whether the discretion which the court undoubtedly has to grant or refuse judicial review should be exercised. But it cannot … bear on the question of the existence of the jurisdiction"*, or alternatively, by treating the existence of the proceedings before the Parish Court as an alternative remedy which necessarily entailed the exercise of the Court's discretion in one way only, against granting permission for judicial review and refusing leave to appeal.

f) Whether if the Court of Appeal had properly exercised its discretion in all the circumstances, it should have granted a stay of the criminal proceedings in the Parish Court pending the determination of the application for judicial review, and granted leave to appeal and permission to apply for judicial review for the relief sought.

g) Whether the Applicants failed to comply with the requirements of Rule 56.3(3)(d) of the Civil Procedure Rules 2002 since the criminal proceedings in the Parish Court did not constitute a forum which provided the Applicants with an alternative form of redress.

h) Whether the Court of Appeal and the Full Court of the Supreme Court erred in law by awarding costs against the Applicants in favour of the Respondent." (Italics as in the original)

[143] I wish to thank counsel for their industry in preparing written and oral submissions for our consideration. In my analysis of the issues, I will not reproduce counsel's submissions. However, the parties can be assured that they were duly considered in arriving at my conclusion.

[144] Mr Wildman argued before us that there is no alternative remedy in criminal proceedings and that administrative law principles are applicable to challenge abuse of process. The dicta of Lord Griffiths in the case of **R v Horseferry Road Magistrates Court ex parte Bennett** [1994] 1 AC 42 ('**Ex Parte Bennett**') was relied on in support of his submission that the applicants' pursuit of judicial review in the Supreme

Court was appropriate. Mr Wildman also referred to the case of **Leech v Deputy Governor of Parkhurst Prison** [1988] AC F3, which he argued, provides that judicial review is the appropriate route even where there is an alternative remedy. This issue, he contended, raised questions that ought to be submitted to Her Majesty in Council.

[145] It is FID's position that it is trite law that the existence of an alternative remedy is a bar to the grant of leave to apply for judicial review. Mr Small argued that the alternative remedy was established and further that the Parish Court was the "most suitable avenue for dealing with issues arising in criminal proceedings". The motion, he argued, should fail on the basis that none of the questions posed could be said to be the subject of serious legal debate, nor has any novel or complex question been raised which requires consideration by Her Majesty in Council. Additionally, no issue of general importance to the practice, procedure or administration of the law arises on the questions. In support of his submissions, Mr Small referred to cases such as **Georgette Scott v The General Legal Council** (unreported), Court of Appeal, Jamaica, Civil Appeal No 118/2008, judgment delivered 30 July 2009, **National Commercial Bank Jamaica Limited v The Industrial Disputes Tribunal and Peter Jennings** [2016] JMCA App 27, and **The General Legal Council v Janice Causwell** [2017] JMCA App 16, which have proven to be very helpful.

[146] For the applicants' motion to succeed, they must satisfy this court, in accordance with section 110(2)(a) of the Constitution, that the questions proposed arise from civil proceedings and that because of their great general or public importance or otherwise, they ought to be submitted to Her Majesty in Council. The principal issue for consideration on the motion, therefore, is whether the questions delineated at para. [142], have satisfied the criterion of being "of great general or public importance or otherwise".

[147] The meaning of the phrase "great general or public importance" has been well settled by authorities from this court. In the case of **Michael Levy v The Attorney General of Jamaica and Jamaican Redevelopment Foundation Inc** [2013] JMCA

App 11 (‘**Michael Levy v The Attorney General**’), Morrison JA (as he then was), at para. [28] cited the following extract from the judgment of Saunders JA (as he then was) in the case of **Martinus Francois v The Attorney General** (St Lucia Civil Appeal No 37 of 2003, judgment delivered 7 June 2004):

> "…
>
> > ‘Leave under this ground is normally granted when there is a difficult question of law involved. In construing the phrase ‘general or public importance’, the Court usually looks for **matters that involve a serious issue of law; a constitutional provision that has not been settled; an area of law in dispute, or, a legal question the resolution of which poses dire consequences for the public**.’ ” (Emphasis added)

[148] Morrison JA continued his analysis at para. [34] as follows:

> "[34] …A similar point arose in **Martinus Francois v The Attorney General**, where, on the hearing of the application for leave to appeal to the Privy Council, the applicant sought to rely on the statement by Saunders JA in his judgment in the Court of Appeal that ‘…this matter has generated such public comment on matters of law that I believe I should briefly add a few remarks of my own on the substantive issues raised by the suit’. In his judgment dismissing the application, Saunders JA said this (at para. [10]):
>
> > ‘As for my own reference to the level of public comment generated by this case on matters of law, let me hasten to suggest that **the phrase that we are construing, namely, ‘general or public importance’, must perforce connote importance through the eyes of the law. Strong public comment does not in and of itself indicate great legal importance.** Equally, a case which gives rise to a matter of enormous general or public importance might well attract little or no comment in the Press.’ ” (Emphasis added)

[149] The case of **National Commercial Bank Jamaica Limited v The Industrial Disputes Tribunal and Peter Jennings**, on which Mr Small relied, has also been instructive on what is meant by the phrase "great general or public importance". At para. [33], Morrison P stated:

> "…So, in order to be considered one of great general or public importance, the question involved must, firstly, be one that is subject to serious debate. But it is not enough for it to give rise to a difficult question of law: it must be an important question of law. Further, the question must be one which goes beyond the rights of the particular litigants and is apt to guide and bind others in their commercial, domestic and other relations; and is of general importance to some aspect of the practice, procedure or administration of the law and the public interest…"

[150] Phillips JA, at para. [34] of the judgment of **Viralee Bailey-Latibeaudiere v The Minister of Finance and Planning and the Public Service and others** [2015] JMCA App 7, provided the following guidance on the court's approach in construing section 110(2)(a) of the Constitution:

> "[34] The question as to the true and proper interpretation to be given to section 110(2)(a) of the Constitution, has also been the subject of review in this court. In **Georgette Scott v The General Legal Council** SCCA No 118/2008, Motion No 15/2009, delivered 18 December 2009, I set out, on behalf of the court, at page 9 three steps that ought to be used in construing this section namely:
>
> > '… **Firstly**, there must be the identification of the question(s) involved: the question identified must arise from the judgment of the Court of Appeal, and must be a question, the answer to which is determinative of the appeal. **Secondly**, it must be demonstrated that the identified question is one of which it can be properly said, raises an issue(s) which require(s) debate before Her Majesty in Council. **Thirdly**, it is for the applicant to persuade the Court that that question is of great general or public importance or otherwise. Obviously, if the question involved cannot be regarded as subject to serious

> debate, it cannot be considered one of great general of public importance.'
>
> It is clear therefore that **before granting leave the court must be satisfied that the proposed appeal raises questions which arise from the decision of the Court of Appeal, are determinative of the substantive issues, on the merits of the appeal, and are by their nature of great general or public importance to justify being considered by Her Majesty in Council**." (Emphasis added)

[151] The relevant principles were distilled from the authorities and succinctly set out by McDonald-Bishop JA, at para. [27] of **The General Legal Council v Janice Causwell**; they are:

> "i. Section 110(2) involves the exercise of the court's discretion. For the section to be triggered, the court must be of the opinion that the questions, by reason of their great general or public importance or otherwise, ought to be submitted to Her Majesty in Council.
>
> ii. There must first be the identification of the question involved. The question identified must arise from the decision of the Court of Appeal, and must be a question, the answer to which is determinative of the appeal.
>
> iii. Secondly, it must be demonstrated that the identified question is one of which it can be properly said, raises an issue, which requires debate before Her Majesty in Council. If the question involved cannot be regarded as subject to serious debate, it cannot be considered one of great general or public importance.
>
> iv. Thirdly, it is for the applicant to persuade the court that the question identified is of great general or public importance or otherwise.
>
> v. It is not enough for the question to give rise to a difficult question of law; it must be an important question of law or involve a serious issue of law.

> vi. The question must be one which goes beyond the rights of the particular litigants and is apt to guide and bind others in their commercial, domestic and other relations.
>
> vii. The question should be one of general importance to some aspect of the practice, procedure or administration of the law and the public interest.
>
> viii. Leave ought not be granted merely for a matter to be taken to the Privy Council to see if it is going to agree with the court.
>
> ix. It is for the applicant to persuade the court that the question is of great general or public importance or otherwise."

[152] Brooks JA (as he then was) in **Shawn Campbell, Adidja Palmer, Kahira Jones and Andre St John v R** [2020] JMCA App 41 stated that two more principles should be added to those nine (applying **Nyahuma Bastian v Government of the USA and others** (unreported), Court of Appeal, Bahamas, SSCrApp & CAIS No 199 of 2017, judgment delivered 23 January 2020 and **Michael Gayle v The Queen** [1996] UKPC 18; (1996) 48 WIR 287). These two additional principles are that "the court should not refer a question to the Privy Council if the Board has previously given its opinion on that question" and that "it was not the function of the Judicial Committee to act as a second Court of Appeal". I respectfully adopt the reasoning of the learned judge of appeal.

[153] As it relates to the court's determination of whether the questions identified ought to be "otherwise" submitted to Her Majesty in Council, Wolfe JA (as he then was) explained the rubric of "or otherwise" in the case of **Emanuel Olasemo v Barnett Limited** (1995) 32 JLR 470. He stated that 'or otherwise' was included by the legislature to enlarge the discretion of the court to include matters which are not necessarily of great general or public importance, but which in the opinion of the court may require some definitive statement of the law from the highest Judicial Authority of the land". He added that the Court of Appeal could also refer a matter to the Privy Council (Her Majesty in Council) for guidance on the law.

[154] Accordingly, to satisfy the criterion set out under section 110(2)(a) of the Constitution, the question(s) identified must have arisen from the Court of Appeal's judgment, must raise an important question of law that is capable of serious debate and the answers to those questions must be determinative of the appeal. Moreover, the question(s) must go beyond the rights of the litigant to operate as a guide and bind others.

[155] It is in the context of the facts of this case, the judgment by the Court of Appeal and the applicable law that I have examined each question proposed for submission to Her Majesty in Council. Of the eight questions identified, only questions (b) to (h) satisfied the first hurdle of arising from the judgment. The remaining question (a) raised issues relating to the interpretation and application of the Act, specifically whether the applicants were unlawfully arrested and charged by officers authorised under the Act whose duties, the applicants contended, were restricted to the investigation of financial crimes.

[156] I find that it is clear upon reading the judgment that the court did not embark on any analysis, interpretation, or determination regarding those issues (in question (a)). Notwithstanding the extensive examination in respect of the interpretation of the Act by Sykes CJ and the Full Court, it was appropriately not considered or determined in the judgment. The only reference in the judgment to the issues raised under question (a) was at para. [41] where Phillips JA expressed that those issues lend themselves to determination in the Parish Court. That question, therefore, does not satisfy the criterion under section 110(2)(a) of the Constitution since it did not arise from the judgment. Consequently, I respectfully disagree with my learned sister Sinclair-Haynes JA that this question deserves discussion and analysis, and I will pay no further attention to it.

[157] Questions (b), (e), and (f) do not raise any difficult questions of law which require debate before Her Majesty in Council. Question (b) simply restates the issue put before this court in determining whether to grant the applicants leave to appeal the

decision of the Full Court. Question (e) seeks to impugn the court's finding that the existence of the alternative remedy, in the form of the proceedings before the Parish Court, meant that the applicants did not qualify for judicial review. Finally, question (f) addresses the court's decision to refuse the stay of the criminal proceedings in the Parish Court pending the determination of the application for judicial review.

[158] In the judgment, Phillips JA referred to the well-known test for the grant of leave to seek judicial review, which was established in the Privy Council case of **Sharma v Brown-Antoine and Others** [2006] UKPC 57 ('**Sharma v Browne-Antoine**'). The test provides that "the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy". Following Phillips JA's exhaustive review of **Sharma v Browne-Antoine**, the court agreed with the majority of the Law Lords and held that how to treat with the discretionary bar was of importance, especially in this case. In order to succeed on their application for leave to appeal against the decision of the Full Court, the applicants had to satisfy this court that their appeal had a real chance of success, which should be realistic and not fanciful (see **Swain v Hillman and Another** [2001] 1 All ER 91).

[159] As Phillips JA correctly pointed out in the judgment, the case of **Ex Parte Bennett**, on which the applicants relied, was distinguishable from the present case. Further to an abuse of the extradition process between the United Kingdom and South Africa, the appellant, in that case, was brought before a magistrate in the United Kingdom for committal proceedings. The magistrate refused an application for an adjournment to permit the appellant to challenge the jurisdiction of the magistrate's court. Thereafter, the appellant, having been committed for trial on five counts of dishonesty, obtained leave to apply for judicial review to challenge the magistrate's decision. In exercising its supervisory authority, it was held that the High Court had the power to inquire into the circumstances of the extradition. Nevertheless, the House of

Lords affirmed that magistrates possess the power to exercise control over their proceedings regarding jurisdictional issues and abuse of process.

[160] Whereas the issues related to the application for leave to seek judicial review have certainly arisen on the judgment, it cannot be properly said that those questions could be the subject of serious debate before Her Majesty in Council. The test laid out in **Sharma v Brown-Antoine**, was applied by four judges from the court below and three judges from the Court of Appeal, all of whom concluded that an alternative remedy existed and, as such, the applicants were not entitled to the leave sought. Consequently, having refused the application for leave to apply for judicial review, the court was obliged to also refuse the application for the stay (question (f)). Furthermore, the issues of law which arise on questions (b) and (e) have already been settled by the Privy Council, the same court the applicants now wish to submit to. It cannot, therefore, be said that questions (b), (e) and (f) are capable of serious debate in light of the fact that the Privy Council has already provided guidance on those issues.

[161] Questions (c), (d) and (g) raise issues concerning the Parish Court's jurisdiction. As already stated, the unanimous decision of the four judges in the court below (that is, Sykes CJ and the Full Court) was that the Parish Court had the jurisdiction to assess the legality of the charges before it. This court agreed with that decision, and Phillips JA held at para. [42]:

> "In this case, there is clearly an alternative remedy. The alternative process is to pursue the criminal proceedings in the Half-Way-Tree Parish Court. The application dealing with these issues is set before a Parish Court Judge on 8 April 2020. In my view, it is certainly well within the powers of that Parish Court Judge to analyse and determine these issues. The Parish Courts in Jamaica have extensive jurisdiction, and Parish Court Judges are called upon to adjudicate upon very complex and important criminal and other matters. An argument could not be sustained that the Parish Court is an inferior court lacking the requisite competence to deal with issues pertaining to statutory

> interpretation or any allegation of abuse of the court's process."

[162] Phillips JA also noted that the applicants had breached rule 56.3(3)(d) of the CPR, which provides that when applying for judicial review, the applicant must state whether there is an alternative form of redress. If an alternative remedy exists, the applicant must state why judicial review is the more appropriate route or why the alternative form of redress was not pursued. For those reasons, the applicants were unsuccessful in persuading this court that their appeal would have a real chance of success.

[163] As pointed out by this court and the court below, the applicants' fundamental complaint that the FID's authorised officers lacked the power to arrest and charge boils down to the interpretation of the Act. I am not of the view that the question of the Parish Court's powers to interpret the Act and make determinations as to its own jurisdiction in criminal matters could be the subject of serious debate. It is generally known that the Parish Court is vested with a wide range of powers, a principle acknowledged and affirmed by the very case on which Mr Wildman relied, that is, **Ex Parte Bennett**. Therefore, those charges having been brought before the Parish Court could be appropriately challenged before a Parish Court judge. In fact, it has been observed that despite Mr Wildman's submission that the alternative remedy was not genuine, he still pursued it and was unsuccessful. Consequently, I am not persuaded that questions (c), (d) and (g) satisfy the criterion of being of great general or public importance or otherwise, as they do not present any important question of law capable of serious debate or require any definitive pronouncement on the particular aspect of the law.

[164] Question (h) seeks to impugn the exercise of the courts' discretion (both here and in the court below) to depart from the usual costs order in respect of applications for judicial review. In the judgment, Phillips JA, while acknowledging that rule 56.15(5) of the CPR is not "specifically included in rule 1.1(10) of the CAR", referred to rule 2.15 of the CAR (now rule 2.14) in support of the decision to impose a costs order against

the applicants where, among other things, the court is of the view that an applicant has acted unreasonably in making the application. The learned judge of appeal observed at para. [47] of the judgment:

> "[47] …the circumstances of this case would warrant an order for costs against the applicants. There has been persistence in seeking leave to obtain judicial review, despite consistent rulings of the courts that an alternative remedy exists in the Parish Court, and also in the face of an application by the applicants to obtain similar relief before that court, where such relief ought initially to have been pursued, and where a date to determine the issues joined has now been set. Yet, the applicants have nonetheless pursued this application before this court, presumably "hedging their bets", so to speak, which this court ought not to encourage. Therefore, in my view, costs ought to be awarded to FID to be taxed if not agreed."

[165] Section 30(3) of the JAJA provides that this court's jurisdiction to award costs should be exercised in accordance with rules of court. As such, the relevant rule is 1.18(1) of the CAR, which incorporates Parts 64 and 65 of the CPR. Rule 56.15(5), as correctly observed by Phillips JA in the judgment, is not included in the CPR. However, the court is empowered by rule 2.14(f) "to make an order for the costs of the appeal and the proceedings in the court below". In addition, rule 64 of the CPR also states that in making a determination as to the payment of costs, the court is to have regard to all the circumstances, including the conduct of the parties before and during the proceedings, whether it was reasonable for a party to have pursued a particular issue and the manner in which a party has pursued its case (see rules 64.6(4)(a), (d) and (e) of the CPR).

[166] It is, therefore, beyond debate that the court has "complete unfettered discretion" to make orders as to costs once that discretion is exercised judicially (see **Ivor Walker v Ramsay Hanson** [2018] JMCA Civ 19 and **Bardi Limited v McDonald Millingen** [2021] JMCA Civ 25). In all the circumstances, the court's exercise of its discretion to order costs in favour of FID cannot be impugned. The

applicants unjustifiably made several applications for leave to seek judicial review despite receiving consistent direction regarding the more appropriate avenue. This is exacerbated by the applicants' conduct, specifically, their failure to disclose the alternative remedy in breach of 56.3(3)(d) of the CPR, and their concurrent pursuit of leave to seek judicial review as well as their alternative remedy in the Parish Court. In any event, the court's departure from a usual order as to costs is a discretion that the Privy Council would not lightly interfere with (see **Singh v Public Service Commission** [2019] UKPC 18). Accordingly, question (h) does not raise any issue which lends itself to serious debate and ought, therefore, not to be submitted to Her Majesty in Council.

Conclusion

[167] The judgment made it abundantly clear that the fundamental issue was whether the existence of an alternative remedy barred the applicants from seeking judicial review. All of the other questions raised, which arose on the judgment, were peripheral to that issue. Accordingly, I am of the view that the applicants' burden of persuading the court that the proposed questions are by their nature of great general or public importance or otherwise to justify consideration by Her Majesty in Council has not been discharged. There is no doubt that this matter has generated considerable public comment at all levels of the court; however, that has not translated to questions of great legal importance. To borrow the words of Saunders JA in **Martinus Francois v The Attorney General** (cited in **Michael Levy v The Attorney General**), the questions must "connote importance through the eyes of the law", which they have not. Accordingly, the criterion stipulated by section 110(2)(a) of the Constitution has not been satisfied by the applicants.

[168] Consequently, even if the motion had not been refused as a result of the failure to pay the stamp duty within the prescribed time, for all the reasons I have sought to explain, I would have, nonetheless, proposed that the motion for conditional leave to appeal to Her Majesty in Council be refused with costs to FID to be agreed or taxed.

DUNBAR-GREEN JA (AG)

[169] I have had the privilege of reading, in draft, the judgments of my learned sisters. I agree with their decisions that the respondent's application to dismiss the motion for want of prosecution and/or abuse of the process of the court should be refused, and the applicants' motion should be refused with costs to the FID. I also agree with Harris JA's reasons and decision that costs should be awarded to the respondents on the application to dismiss the motion.

SINCLAIR-HAYNES JA

ORDER

1. The respondent's application to dismiss the motion for conditional leave to appeal to Her Majesty in Council for want of prosecution and/or abuse of the due process of the court is refused.

2. The motion for conditional leave to appeal to Her Majesty in Council is refused.

3. Costs for the respondent's application to dismiss the motion and the motion for conditional leave to appeal to Her Majesty in Council to the respondent to be agreed or taxed.