[2021] JMCA Civ 28

JAMAICA

IN THE COURT OF APPEAL

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

SUPREME COURT CIVIL APPEAL NOS 30/2014 & 51/2015

BETWEEN	**DAWN SATTERSWAITE**	**APPELLANT**
AND	**THE ASSETS RECOVERY AGENCY**	**RESPONDENT**

Consolidated with

BETWEEN	**TERRENCE ALLEN**	**APPELLANT**
AND	**THE ASSETS RECOVERY AGENCY**	**RESPONDENT**

Douglas Leys QC and Miss Kenik Brissett instructed by LeySmith for the appellant, Dawn Satterswaite

Paul Beswick and Miss Georgia Buckley instructed by Ballantyne, Beswick & Company for the appellant, Terrence Allen

Miss Dawn Satterswaite represents herself and Terrence Allen (from July 2020)

Mrs Caroline Hay and Mrs Symone Mayhew for the Assets Recovery Agency

Miss Althea Jarrett, Mrs Susan Reid-Jones and Miss Lorraine Patterson instructed by the Director of State Proceedings for the interested party

4, 8, 11 July 2016, 20 July, 16, 17 September 2020 and 25 May 2021

PHILLIPS, F WILLIAMS AND P WILLIAMS JJA

[1] This is the judgment of the court, to which each member has contributed a substantial part.

[2] This consolidated appeal relates to the refusal of two judges to grant applications that sought to vary a restraint order made by B Morrison J, on 16 January 2014, pursuant to the Proceeds of Crime Act ('POCA'). The first appeal was filed by Miss Dawn Satterswaite against K Anderson J's refusal to vary the restraint order to provide for reasonable legal expenses. Mr Terrence Allen filed an appeal challenging C McDonald J's refusal to vary the said restraint order to provide for reasonable legal expenses and to exclude his pension emoluments and investments in Mayberry Investments Limited.

[3] There are certain issues that distinctly relate to one appellant, and therefore one appeal, and some that overlap both appeals. However, at the end of the day, one of the fundamental issues relative to both appeals was whether K Anderson and C McDonald JJ, in interpreting certain provisions of POCA whilst hearing the respective applications to vary the initial restraint order of B Morrison J, ought to have taken into consideration certain provisions of the Constitution of Jamaica ('the Constitution'), thereby granting Miss Satterswaite and Mr Allen ('the appellants') access to certain restrained funds for their legal expenses.

[4] For a better understanding of the issues that arose and for convenience, we have endeavoured to highlight the background to both appeals, the applications that were before the various judges and the orders made therein.

Background

[5] The appellants (who are married to each other) are being investigated for alleged money laundering activities, in connection to Mr Andrew Paul Hamilton, who had been convicted of drug trafficking offences in the United States of America. It is being alleged that Miss Satterswaite, who is a practising attorney-at-law, had shared a long term attorney/client relationship with Mr Hamilton, and through that medium, had benefited

from and facilitated the disguise and disposal of proceeds of Mr Hamilton's criminal conduct. As a consequence, Miss Satterswaite was charged with breaches of sections 92 and 93 of POCA, while (at that time) Mr Allen remained under investigation.

[6] On 16 January 2014, the Assets Recovery Agency ('ARA') filed an *ex parte* application for a restraint order pursuant to sections 32 and 33 of POCA and rule 17.1(1)(f) of the Civil Procedure Rules ('CPR'), against the appellants and three named respondents (who were not parties to this appeal). The application sought orders that, *inter alia*, realizable property that had been listed in the application be restrained until the conclusion of criminal proceedings, including appeals.

[7] The *ex parte* application was supported by an affidavit filed on the same date (16 January 2014), deponed to by Ronald Rose, a Forensic Examiner employed to the Financial Investigations Division ('FID'), acting in the capacity of Authorised Financial Investigator, pursuant to section 2 of POCA. Mr Rose referred to the affidavit of Bobette Smalling, a Detective Sergeant of Police assigned to the Major Organised Crime and Anti-Corruption Task Force ('MOCA') which had been filed on 16 December 2013 in support of a previous application for a warrant of search and seizure. These affidavits catalogued a litany of allegations against the appellants and other named respondents and outlined various properties which were to be subject to restraint.

[8] The *ex parte* application was granted by B Morrison J on 16 January 2014. It essentially restrained the appellants and the other named respondents, from dealing with or disposing of certain assets that had been listed and imposed requirements for the disclosure of all assets owned by them or on their behalf. The terms of the order are stated, in part, below:

> "1. Pursuant to Sections 32 and 33 of the Proceeds of Crime Act, 2007 ('POCA') and CPR 2002, Part 17.1(1)(f), the [appellants and other named] Respondents be restrained, whether by themselves, their servants or agents or however otherwise from disposing of, causing or allowing the disposal of and/or

dealing with the realizable property listed in the Tables below or any assets whether or not identified in this Order, **until the conclusion of criminal proceedings including Appeals**, now extant in respect of [the appellants and other named] Respondents:-

[Assets of each party set out in tabular form] ….

2. Pursuant to CPR 2002, Part 17.1(1)(g) the [appellants and other named] Respondents do forthwith disclose with full particulars the nature and location of all assets owned by them, whether or not identified in the order and whether they are held in their names or by nominees or otherwise on their behalf, such disclosure to be verified by affidavit and served on the [ARA's] Attorney-at-Law within **twenty-one (21) days** of service of this Order.

3. Liberty to the [appellants and other named] Respondents, to the General Legal Council and any other third party affected by the Order to apply to the Court on seven (7) days' notice to the [ARA's] Attorney-at-Law to set aside or vary this Order.

4. This Application will be further considered by the Court on the 6th day of February 2014 at 10:00 am or so soon as Counsel may be heard.

5. The [ARA] undertakes to serve copies of the following documents upon the [appellants and other named] Respondents not less than seven (7) days before the date fixed for further consideration of this Application:

   (i) The Interim Restraint Order;

   (ii) The Without Notice of Application for Restraint Order.

   (iii) The Affidavit in Support of the Notice of Application for Court Order.

   (iv) The Supplemental Affidavit of Ronald Rose.

6. To abide by any Order the Court may make as to damages, should the Court hereafter be of the opinion

that the [appellants and other named] Respondents or any Third Parties given notice of this Order have suffered any damages that the [ARA] ought to pay.

7. That Costs be reserved pending the further consideration of the Application." (Emphasis added and underlined as in original)

[9] On 5 February 2014, Miss Satterswaite filed an application to vary and/or discharge the restraint order to provide for her reasonable living and legal expenses and to allow her to carry on her employment as an attorney-at-law. This application was supported by an affidavit sworn to by Miss Satterswaite and filed on the dame date. The application was made on the basis that: (i) there was material non-disclosure by ARA in its *ex parte* application for the restraint order; (ii) the restraint order did not make provisions for reasonable living and legal expenses; (iii) the restraint order is arbitrary and unconstitutional or that section 32(1)(a)(i) of POCA is unconstitutional; and (iv) the restraint order was granted on insufficient evidence.

[10] Likewise, on 5 February 2014, Mr Allen filed an application to set aside the restraint order and compel ARA and its counsel to pay his damages that were to be assessed flowing from the restraint and the wasted costs. This application was premised on the grounds that: (i) ARA had not disclosed all relevant information to the court; (ii) the restraint order did not make adequate provision for his reasonable living and legal expenses; (iii) impropriety exists on the part of ARA, its officers and counsel; (iv) ARA did not satisfy the condition under rule 17.4(4) of the CPR for the grant of an *ex parte* restraint order; and (v) the restraint order is irregular and void.

[11] In his affidavit in support of this application, Mr Allen detailed what he described as his personal history and asset acquisition. He explained that the bulk of the savings of both his wife (Miss Satterswaite) and himself were in the Bank of Nova Scotia Jamaica Limited ('BNS') and that the information in the restraint order that Miss Satterswaite's name appeared on the accounts solely was incorrect since his name had been added to

the accounts in 2012. He also revealed that he was receiving a monthly pension from BNS from which he had retired in 2008 after working there for 40 years.

[12] Mr Allen's application was subsequently amended on 6 February 2014 to request a variation of the restraint order to provide for the payment of reasonable living expenses and legal fees.

[13] The applications for variation and/or discharge of the restraint order filed by the appellants, came before Sykes J (as he then was) for hearing on 6 February 2014. There has been no indication as to whether Mr Allen's amended notice of application (filed 6 February 2014) was before Sykes J. The learned judge made orders extending the time in which assets were to be disclosed (pursuant to order 2 of B Morrison J's order) to 18 February 2014. Sykes J also ordered that:

> "Without prejudice to the [appellants' and other named] Respondents' right to challenge the validity of the Restraint Order issued by Mr Justice Morrison on 16 January 2014 and without prejudice to the [appellants' and other named] Respondents' right to challenge the terms and conditions of the said Order, the said Order is varied in the following manner:
>
> (a) The [appellants] are permitted access to accounts held at Mayberry Investments Limited and the Bank of Nova Scotia Jamaica Limited on terms set out in letter(s) signed on the one hand by the Chief Technical Director of the Financial Investigations Division or by the Attorneys-at-Law for the Assets Recovery Agency and on the other hand by the [appellants] or their Attorney-at-law;
>
> (b) The Bank of Nova Scotia Jamaica Limited is permitted to accept deposits on account number 37613 in the name of Dawn Satterswaite (Client Account);
>
> …"

Case management orders were also made to facilitate further hearing of the matter, and the application to discharge the restraint order was adjourned to 4, 6 and 7 March 2014, with liberty being granted to any party to apply before him to deal with issues that arise from the execution of his order.

[14] On 18 February 2014, Miss Satterswaite and Mr Allen filed respective affidavits pursuant to the order for disclosure of assets as contained in the restraint order (and extended by Sykes J).

[15] In an effort to further comply with Sykes J's orders, several items of correspondence were exchanged between counsel for ARA on the one hand and counsel for the appellants on the other. The letters from ARA to counsel for the appellants disclosed ARA's position that, while it would agree to certain monthly living expenses, in the light of sections 32 and 33 of POCA, it was unable to agree to release funds for the appellants' reasonable legal expenses.

[16] Consequent to the parties' failure to agree, both the appellants filed applications to vary, suspend and/or strike out the restraint order and/or impose sanctions against ARA for its non-compliance with Sykes J's order stipulating that the FID ought to grant access to certain accounts on agreed terms.

Miss Satterswaite's subsequent application and the decision of K Anderson J

[17] Miss Satterswaite filed her subsequent application on 28 February 2014. She sought orders that would vary, strike out and/or suspend the restraint order and/or impose sanctions against ARA for its non-compliance with Sykes J's order stipulating that the FID ought to grant access to certain accounts on agreed terms. Miss Satterswaite's application was advanced on the ground that although Sykes J's order had contemplated that she would have been given access to certain accounts to provide for her reasonable living and legal expenses, and would also enable her to conduct her profession, upon agreement of the parties, as contained in a letter signed by a representative of the FID, she had been denied access to those accounts to meet her legal expenses.

[18] On 12 March 2014, the application for variation filed by Miss Satterswaite on 28 February 2014 came before K Anderson J for hearing. The learned judge refused to grant any further variation to the restraint order in relation to the payment of legal expenses. The orders he made are outlined in full below:

> "1. The 1st Respondent- Dawn Satterswaite, shall be entitled to obtain from any funds presently being restrained by order of The Honourable Mr. Justice Bertram Morrison as was made on 16th January 2014 the sum of Two Hundred and Fifty-Six Thousand Dollars ($256,000.00) per month as reasonable living expenses and the order of The Honourable Mr. Justice Bryan Sykes as made on 6th February 2014 is varied accordingly.
>
> 2. The Bank of Nova Scotia Jamaica Limited is permitted to accept deposits into and in respect of clients named in a list provided from time to time by the General Legal Council and to allow payments out of account number 37613 held in the name Dawn Satterswaite (client account).
>
> Provided that said list as referred to in this Order should have first been approved by the 1st Respondent- Dawn Satterswaite and the Applicant- Assets Recovery Agency and the General Legal Council and if thereafter there is to be any variation to that list such variation shall be approved of by the 1st Respondent- Dawn Satterswaite, the Applicant- Assets Recovery Agency, and the General Legal Council in order for this Order to take effect.
>
> 3. This Court denies the Application of the 1st Respondent- Dawn Satterswaite to strike out or otherwise suspend the order of The Honourable Mr. Justice Bertram Morrison as made on 16th January 2014.
>
> 4. This Court reserves its ruling on the application by the 1st Respondent- Dawn Satterswaite to further vary the order of The Honourable Mr. Justice Bryan Sykes by affording to the 1st Respondent- Dawn Satterswaite access to and use of a sum to be designated as

reasonable legal expenses until March 31, 2014 commencing at 2.00 p.m. for thirty (30) minutes during a hearing in chambers before K. Anderson J.

5. Ruling as to costs of this application are reserved to abide further order of this court.

6. Liberty to apply is afforded to the 1st Respondent-Dawn Satterswaite as regards hereof."

[19] Pursuant to order 4 above, when the application for variation of the order of Sykes J to allow for reasonable legal expenses was heard by K Anderson J on 31 March 2014, he made the following orders:

"1. [Miss Satterswaite's] application for further variation of Mr. Justice B. Morrison's order on the 16th of January 2014 as regards reasonable legal expenses is denied.

2. The costs of the application shall be equally borne by the parties.

3. [Miss Satterswaite] is granted leave to appeal orders number one (1) and two (2) above and the time limited for the filing of her notice of appeal with [respect] to any appeal of either or both of those orders is extended until April 22, 2014.

4. [ARA] shall file and serve this order."

[20] In his reasons for judgment (see **The Assets Recovery Agency v Dawn Satterswaite and others** [2014] JMSC Civ 93), K Anderson J noted that the parties had arrived at an agreement in respect of the sum of money in respect of which ARA would permit Miss Satterswaite to have access to each month for the purposes of meeting reasonable living expenses. Therefore, the learned judge stated that nothing further was required in that regard.

[21] He stated that the application to vary the restraint order for the provision of legal expenses was premised on the contention that section 33(4)(a)(i) of POCA was unconstitutional, and so, the initial restraint order and the previous subsequent variations made to it, ought not to have been made in the first place, as they were based on an

unconstitutional law. He stated further that counsel for Miss Satterswaite had maintained that a person's assets could not be restrained so that they could not have the use or access to the same to meet their legal expenses, since the access to legal advice and assistance was a fundamental right afforded by the Charter of Fundamental Rights and Freedoms ('the Charter'), to anyone arrested or charged with a criminal offence.

[22] The learned judge noted that POCA does allow for the court to grant restraint orders and provide for reasonable living and legal expenses but excludes offences that fall within section 33(5). Miss Satterswaite had been arrested and charged pursuant to an offence that fell within section 33(5) of POCA. As a consequence, the learned judge found that he had no jurisdiction in circumstances where ARA has not agreed to any variation of the restrained funds to meet reasonable legal expenses. It was his opinion that "[t]he statute, as it now stands, precludes this court from varying [the] same in that regard".

[23] The learned judge acknowledged that there were certain provisions in the Charter protecting legal advice rights but stated that he was not empowered to vary an order made by another judge of the same court, on the basis that the law relied on by that court was unconstitutional. He indicated that that issue should have been the subject of an appeal to the Court of Appeal with the leave of the Supreme Court, or the Court of Appeal, or for a claim for a declaration in the Supreme Court, that the statutory provision being impugned was unconstitutional. He noted that the latter approach had not been undertaken by Miss Satterswaite. He made it clear that he was not empowered to act in the role of an appellate court when, in fact, in dealing with the application before him, he was merely a judge of co-ordinate jurisdiction "within the very same court".

[24] The learned judge also noted that if section 33(4)(a)(i) of POCA was unconstitutional, then the previous orders of B Morrison and Sykes JJ would all have been void *ab initio*, as they would have been based on a law that was itself void. He said that he would first have had to declare those orders void and he had no jurisdiction, or lawful authority to do that, as a judge of co-ordinate jurisdiction. Additionally, there was no

application before him to make that declaration, or permission for such an application to be made. As a consequence, he refused the orders sought.

Mr Allen's subsequent application and the decision of C McDonald J

[25] As indicated, the inability to agree to pay reasonable legal expenses also led to Mr Allen filing a subsequent application on 3 March 2014, where he sought, *inter alia*:

> "That the Restraint Order dated the 16th day of January, 2014 granted in these proceedings be varied to allow [Mr Allen] access to funds which are outside the ambit of sections 32 and 33 of the Proceeds of Crime Act (hereinafter POCA), including access to all pension emoluments payable by BNS to [Mr Allen] and no less than 50% of the amounts standing to the credit of Mayberry Investment account #731860."

Mr Allen claimed that these funds were outside the reach of sections 32 and 33 of POCA as they were legitimately obtained.

[26] On 17 March 2014, Mr Allen's amended notice of application in which he sought payment for reasonable living and legal expenses, and his application filed 3 March 2014 (as indicated), came on for hearing before Edwards J (as she then was) and she made certain orders. In the formal order subsequently filed on 21 March 2014, it was stated that after hearing from the attorneys for both parties in the matter, orders were made that adjourned to 2 April 2014, consideration of various orders to include: (i) whether to grant reasonable living and legal expenses; (ii) 50% of amounts in Mayberry Investments; and (iii) whether sanctions should be made, and costs awarded. In relation to access to Mr Allen's request for access to his pension emoluments, the following order was made:

> "All pension emoluments, due, payable or which have already been paid by the Bank of Nova Scotia Jamaica Limited are released from the Restraint Order by Mr. Justice Bertram Morrison made on the 16th January 2014."

[27] The applications filed by Mr Allen came on for hearing before C McDonald J and were heard for some six days over the next year with a judgment handed down on 30 April 2015 (see **The Assets Recovery Agency v Dawn Satterswaite and others**

[2015] JMSC Civ 78). The learned judge granted the application to vary the amount to be paid to the applicant for reasonable living expenses but not for legal fees. She also refused access to sums allegedly outside of sections 32 and 33 of POCA, relating to funds at Mayberry Investments and Mr Allen's pension emoluments, and she also awarded half costs to Mr Allen.

[28] In her reasons for judgment, C McDonald J referred to the fact that there were provisions in POCA, "as draconian as it may seem" which exempted access to reasonable legal expenses for matters under criminal investigation. She referred specifically to the comments of Sykes J in **The Assets Recovery Agency v Yowo Senhi Morle and others** [2012] JMSC Civ 137, indicating that properly drafted restraint orders ought to make provision for reasonable living and legal expenses "unless there is a good reason not to do so or the exception to provision for legal expenses found in section 33(4) applies". C McDonald J examined section 33(4) and (5), several authorities and a similar legislative scheme (the United Kingdom Proceeds of Crime Act 2002 ('UK POCA')), and concluded that POCA, passed by the Parliament of Jamaica, expressly exempts legal expense relating to any offence under section 33(4). In her opinion, that exemption was not surprising given the underlying scheme of POCA. Although she did accept that there could be circumstances where a court may vary a restraint order to account for reasonable legal expenses in civil proceedings under POCA.

[29] The learned judge rejected, as unsustainable, an argument made by counsel for Mr Allen, in reliance on **R v Waya** [2012] UKSC 51, that pension emoluments could not be restrained because they had no market value and could not fall into the definition of 'property'. She found that the definition of property in section 2(1) of POCA specifically includes "things in action or other intangible or incorporeal property" which meant that pension emoluments or payments were realizable. She refused Mr Allen's application for the release of at least 50% of the funds in Mayberry Investments, as those funds cannot fit within section 33(4) of POCA which governs exceptions for reasonable living and legal expenses. She also found that the sums in Mayberry Investments were realizable property.

[30] C McDonald J stated that she recognised that Mr Allen was contending that his constitutional rights were being breached by operation of section 33(4) and (5) of POCA. However, she accepted the submission by counsel for ARA that given the presumption that POCA is constitutional, the court was not required to resolve any perceived ambiguity as the section was clear. The learned judge concluded that legal expense fell into the exemption set out in section 33(4) and the restraint order could therefore not be varied to permit payment of the same.

[31] The learned judge also found that the Judicature (Constitutional Redress) Rules ('CRR') had been revoked in their entirety. They had been in force when the Judicature (Civil Procedure Code) Law was in place, which itself, had been repealed by the CPR. Part 56 of the CPR, she pointed out, has express provisions for constitutional challenges and redress. The learned judge noted further that there was no corresponding provision to rule 3(iii) of the CRR in the CPR. She concluded therefor, that "[a]t the end of the day a claim for relief under the [Constitution] must be in accordance with part 56". In all those circumstances, she thereafter made the orders stated in paragraph [27] herein.

The appeal

[32] The appellants appealed the respective decisions. Miss Satterswaite filed her appeal first, on 22 April 2014. The order appealed was K Anderson J's refusal to vary B Morrison J's order for the provision of reasonable legal expenses. Costs had been ordered to be paid equally by the parties. The orders sought are that the variation be granted to allow for the payment of reasonable legal expenses in accordance with the provisions of the Constitution and that the costs, both in this court and the court below, be Miss Satterswaite's.

[33] There were seven grounds of appeal filed. They are set out below:

> "i. The learned judge misdirected himself in relation to his jurisdiction to take into account the provisions of the Constitution in interpreting the provisions of POCA.

ii. The learned judge failed to interpret the provisions of POCA and in particular section 34 thereof in a restrictive manner consistent with the principles of constitutional interpretation where there are exceptions (as in this case) to a person's fundamental rights and freedoms.

iii. The learned judge failed to take account of [Miss Satterswaite's] constitutional rights in particular sections 16(5) and 16(6)(c) of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011 and apply the same in his interpretation of the provisions of POCA.

iv. The learned judge fettered his discretion to invoke his broad powers under section 34 of POCA to vary the terms of the order of Morrison J. dated 16th January as he could not take into account the provisions of the Jamaica (Constitution) Order in Council 1962 because the application was not brought as a constitutional one.

v. The learned judge misinterpreted the provisions of section 33(4)(a) of POCA by restricting the provisions as applicable only to payment of reasonable legal expenses arising out of civil proceedings.

vi. Alternatively if the learned judge's interpretation of Section 33(4)(a) of the Proceeds of Crime Act is correct, then the said provision is unconstitutional and cannot stand.

vii. The learned judge failed to take account of the provisions of rule 64.6 of the Civil Procedure Rules 2002 (as amended) when he made the costs order."

[34] Mr Allen filed his appeal against C McDonald J's judgment on 6 May 2015. The grounds of appeal were stated to be:

"a. That the Learned Judge erred when she found that [Mr Allen's] pension, held by the Bank of Nova Scotia, was property which [Mr Allen] had a 'vested interest' in and which therefore could be restrained by a Restraint Order;

b. That the Learned Judge erred when she proceeded to act as a Court of Appeal and review and over rule [sic] and/or alter the decision of [Miss] Justice Edwards, dated 17th March, 2014;

c. That the Learned Judge erred when she distinguished the case of R v Waya on the basis that the restraint order proceedings are 'fundamentally different from confiscation proceedings';

d. That the Learned Judge erred when she had held that all of [Mr Allen's] resources could and should be restrained in circumstances where he was able to show that the funds were legitimately acquired;

e. That the Learned Judge erred when she decided that the Civil Procedure Rules had impliedly repealed the Judicature (Constitutional Redress) Rules in its entirety.

f. That the Learned Judge erred when she decided that articles of or the rights enshrined in the Jamaican Constitution could be negated or displaced by provisions in the Proceeds of Crime Act;

g. That the Learned Judge erred when she found that sections 32 and 33 of the Proceeds of Crime Act could trump the Articles 14, 16(1) and 16(2) of the Jamaican Constitution and deny [Mr Allen] from acquiring and paying for legal representation of his own choosing;

h. That the Learned Judge failed to appreciate the distinction between the legal aid regimes in the United Kingdom and Jamaica and incorrectly placed too much reliance on academic writing which does not make a distinction between the 'Parliamentary sovereignty' of the United Kingdom and the 'Constitutional sovereignty' of Jamaica;

i. That the Learned Judge failed to appreciate that investigations in the United Kingdom are undertaken at a different pace and with a different mindset from investigations in Jamaica. As a result the Learned Judge placed undue weight on the fact that an investigation had been ongoing against [Mr Allen];

j. That the Learned Judge erred when she decided that [Mr Allen] was not entitled to the entirety of the costs of his application to vary the restrain order, ostensibly because he was unsuccessful with all the orders he sought." (Italicised as in original)

[35] The orders requested by Mr Allen are for his appeal to be allowed and for the orders of C McDonald J to be set aside, in part. To that effect, he requested a declaration that his pension emoluments are not realizable property and a reinstitution and affirmation of Edwards J's order in that regard. He also sought a declaration that he is entitled to pay for reasonable legal expenses for the defence of proceedings brought against him under POCA, from assets legitimately acquired. Mr Allen also sought a declaration that the provisions of POCA could not prevent him from exercising his right to counsel of his choosing, as guaranteed by sections 14 and 16 of the Constitution. Finally, Mr Allen sought an order for costs in his favour.

[36] Mr Allen was subsequently charged with money laundering offences contrary to section 92(2) of POCA.

[37] Case management orders were granted by a single judge of this court on 19 January 2016, that, *inter alia*, consolidated the appeals and permitted the Director of State Proceedings to file and serve submissions and authorities in the matter, on the Attorney General's behalf.

[38] When this consolidated appeal came on for hearing before us in July 2016, it took a rather unusual course. Counsel for the appellants made certain submissions in relation to particular issues in the appeal. However, at the end of those submissions, and shortly after the commencement of submissions by Mrs Symone Mayhew, on behalf of ARA, counsel for the appellants sought on 8 July 2016, an adjournment of the appeal to pursue a constitutional claim in the constitutional court. In pursuit of that claim, they sought an order from this court (pursuant to section 33(5) of POCA) that would grant them access to the restrained funds for legal expenses to file and pursue a constitutional claim, with costs attendant therewith being reserved pending the outcome of the appeal.

[39] After further dialogue between the bench and bar, and relative to certain positions taken by counsel and the issues joined in the appeal, counsel, after some deliberation between them, arrived at the following agreement, which was duly noted by the court, on 11 July 2016, as follows:

> "It is hereby ordered by and with the CONSENT of the parties, pursuant to section 35(3)(b) of POCA and without prejudice to any of the rights of the parties in the appeal or in any court whatever as follows:
>
> (1) The Restraint order granted by His Lordship Mr Justice Bertram Morrison on the 16th January 2014 is hereby further varied to provide for the payment of each Appellants' reasonable legal expenses solely relating to any constitutional claim filed in the Supreme Court by either or both appellants challenging the constitutionality of Part III of the Proceeds of Crime Act 2007.
>
> (2) This appeal is adjourned part-heard to the week commencing 28th November 2016.
>
> (3) The appellants undertake through their respective counsel to serve all applications for constitutional relief on the office of the Director of State Proceedings, the Attorney General now being a party to the proceedings, relating to any constitutional claim, both in that court and in the court below.
>
> (4) Costs reserved pending the outcome of the appeal."

[40] In spite of that understanding, years elapsed, and nothing happened in the proceedings. No application was filed in the constitutional court or the Supreme Court. Counsel for ARA requested that the matter be set down for case management conference in this court for directions on the way forward. The case management conference was duly held, and the consolidated appeal was fixed to continue for a period of two days in the week commencing 20 July 2020. Time was fixed for the remaining submissions to be made before the court.

[41] When the matter came up before the court, part-heard, for its continuation on 20 July 2020, Miss Satterswaite sought and was granted leave for the appellants to abandon their earlier application to amend the notice of appeal, made at the last sitting of the court on 5 July 2016, with no opposition from ARA. The order granted on that application was therefore vacated. The court also granted leave to withdraw the consent order filed on 11 July 2016, with no opposition from ARA. Leave was also granted to Miss Satterswaite to amend the original notice of appeal filed on 22 April 2014, also with no opposition from ARA, so that paragraph 4 of the notice of appeal read as follows:

> "The appeal be allowed and the order of Morrison J dated 16 January 2014 be varied to allow for the payment of the appellant's reasonable legal expenses in accordance with the provisions of the Constitution of Jamaica."

Miss Satterswaite was ordered to file the amended notice of appeal in accordance with the above order, on or before 21 August 2002.

[42] Mr Allen also applied to amend his notice of appeal filed 6 May 2015, to record that C McDonald J had dealt with a matter not properly before her, as it had been disposed of by Edwards J, a judge of coordinate jurisdiction. There were other case management orders made and the matter was adjourned for continuation for two days, 16 and 17 September 2020, with a new schedule for submissions by counsel for the parties, and from the Attorney General, as *amicus curiae*.

[43] The amended notices of appeal were duly filed by the appellants, although Mr Allen's amended notice of appeal was not in exact accordance with the order made by the court. The consolidated appeal was duly heard on 16 and 17 September 2020. With regard to the written submissions made by counsel, in some instances, the parties were still embracing submissions made previously with some adjustments, or with additions, and in some instances, the new submissions filed replaced and subsumed those initially filed. At the hearing in September 2020, Miss Satterswaite appeared in person on her own behalf and on behalf of Mr Allen. As indicated, the Attorney General was invited to make submissions as there were certain grounds that raised important constitutional

issues. We hope, with those continuing developments, that we do no injustice to the final competing contentions by all parties and their respective counsel.

Issues

[44] Against that backcloth and based on the grounds of appeal and submissions advanced by counsel, we have identified five issues that require determination. As indicated, there are certain issues that relate distinctly to one appeal, and others that overlap. The issues identified are as follows:

1. Whether K Anderson and C McDonald JJ erred in failing to address questions that touch and concern the appellants' constitutional rights, as the court had not been constituted as a constitutional court, having regard to the CRR (grounds (i) and (iii) in Miss Satterswaite's appeal and ground (e) in Mr Allen's appeal)?
2. In the hearing of the applications to vary the restraint order of B Morrison J, whether K Anderson and C McDonald JJ erred in:
    (i) failing to interpret the limiting provisions of section 33(4) and (5) of POCA restrictively, in keeping with the principles of constitutional interpretation;
    (ii) fettering the exercise of their discretion when invoking section 3(4) of POCA, on the basis that it was not a constitutional action/application; and
    (iii) their interpretation of sections 32-34 of POCA given certain provisions of the Charter specifically sections 13, 14 and 16 (grounds (ii), (iv) and (v) in Miss Satterswaite's appeal and

grounds (d), (g), (h) and (i) in Mr Allen's appeal)?

3. Whether the proper interpretation of section 33(4) and (5) of POCA is that it is unconstitutional and cannot stand (ground (vi) in Miss Satterswaite's appeal (i)-(vi) and ground (f) in Mr Allen's appeal)?

4. Did C McDonald J err:

   (i) in reviewing and making findings in relation to the:

      (a) pension emoluments;

      (b) Mayberry Investments (grounds (a-b) in Mr Allen's appeal); and

   (ii) when she distinguished **R v Waya** on the basis that the restraint order proceedings 'are fundamentally different from confiscation proceedings (ground (c) in Mr Allen's appeal)?

5. Whether K Anderson J erred in awarding costs in the court below and whether C McDonald J erred in not awarding costs to Mr Allen in their entirety (ground (vii) in Miss Satterswaite's appeal and ground (j) in Mr Allen's appeal)?

Issue 1: The proper forum to address questions that touch and concern the appellants' constitutional rights having regard to the CRR and the CPR

Submissions on behalf of Miss Satterswaite and Mr Allen

[45] Counsel for Miss Satterswaite, Mr Douglas Leys QC, in his written submissions filed on 13 May 2016, submitted that K Anderson J, in the exercise of his powers, could adjudicate on the constitutional issues raised in the application. He referred to section 16(5) and (6)(c) of the Constitution which, he stated, the court had the jurisdiction to consider. He referred to section 19 of the Constitution and submitted that the jurisdiction

conferred therein was not confined to situations where the court was convened as a constitutional court. Indeed, he submitted that the court could exercise the jurisdiction outlined in section 19 once constitutional issues arose in the proceedings before the court.

[46] He referred specifically to section 19(4) of the Constitution which, he stated, was to be contrasted with section 25 which preceded the promulgation of the Charter. Section 25, he submitted, had been interpreted to mean that once there were alternate means of redress, either at common law or statute, the court would not invoke its powers under the section, but is obliged to direct that the applicant pursues its remedies elsewhere. He referred to several authorities for that proposition (see **Director of Public Prosecutions v Michael Feurtado and the Attorney General** (1979) 16 JLR 519 and **Kemrajh Harrikissoon v Attorney General** (1979) 31 WIR 348). Queen's Counsel pointed out though that section 25 of the Constitution had been repealed, and although the principles enunciated in the cases are still applicable, the court now has more flexibility to entertain constitutional claims under section 19 of the Charter, as the jurisdiction is now discretionary, although the court still adopted a restrictive approach.

[47] He relied on the dictum of Lord Nicholls of Birkenhead, on behalf of the Board in **Attorney General of Trinidad and Tobago v Ramanoop** [2005] UKPC 15; [2006] 1 AC 328, to draw an analogy with the provisions of the Constitution of the Republic of Trinidad and Tobago ('T&T Constitution') and the Jamaican Charter, to say, that since the damages that the appellant sought in **Ramanoop**, could only be given pursuant to the Constitution, then he had every right to invoke the constitutional provisions. He submitted that similarly, in the instant case, where the appellant was not seeking constitutional redress, there was no need to have the Supreme Court convene as a special tribunal exercising its constitutional jurisdiction. He submitted that the specific relief being sought was a variation of the restraint order to enable the appellant to have access to her funds for her reasonable legal expenses. This relief, he argued, was available under POCA and so the appellant was praying in aid certain sections of the Constitution, namely, section 16(5) and (6)(c), to prove her entitlement.

[48] Mr Leys submitted that the appellant claimed that her constitutional right to the presumption of innocence would be breached if she did not have access to her resources. She would not have continued legal representation if she was denied access to her resources to pay for the said legal representation. These, he said, were common law rights codified under the Constitution, and she should be able to pray those principles in aid, in seeking to obtain the relief she sought under POCA. She ought not to have to approach the court, in a specialised constitutional jurisdiction, particularly since she was not seeking constitutional redress, but relief under POCA. Indeed, he submitted that the famous case of **Moses Hinds and others v R** [1977] AC 195, was illustrative of that contention. He referred also to **Frank Robinson v R** [1985] AC 956, where the constitutional point was not even taken in the court below but argued on appeal.

[49] In Mr Leys' speaking notes filed 13 May 2014, he placed heavy reliance on rule 3(iii) of the 1963 CRR. It was further submitted that rule 3(iii) clearly confers jurisdiction on the court to entertain constitutional questions that arise during the course of proceedings. He also submitted that rule 56.7 of the CPR is a continuation of the previous rule 3(iii) of the CRR, as it confers on the court, jurisdiction to entertain constitutional questions that arise during the course of proceedings.

[50] So, Queen's Counsel concluded, a finding that as the court was not exercising its constitutional jurisdiction, it could not, in an application for an order for variation of a restraint order under POCA, make an order to gain access to funds for legal expenses, bearing in mind the specific constitutional provisions referred to, would be wholly misconceived.

[51] As the grounds of appeal relating to this issue overlap, written submissions filed and arguments advanced on Mr Allen's behalf, were essentially the same.

Submissions on behalf of ARA

[52] Counsel for ARA, Mrs Mayhew, submitted, in addressing section 19 of the Constitution, that it was counsel for Miss Satterswaite, Mr Leys' approach, which was

misconceived, and the cases relied on by him were inapplicable, as they related to the exercise of the court's discretion to grant constitutional redress and the approach the court should take where alternate redress was available to remedy the alleged breach of a constitutional right. Counsel argued that if the legal expenses were not permitted under section 33(4) of POCA, then there was no alternate avenue, save the pursuit of a claim to challenge the constitutionality of the legislation. Indeed, counsel submitted that although Miss Satterswaite and Mr Allen had stated that they were not seeking constitutional redress, which was what they were really attempting to do, by way of an appeal, in relation to the application for the variation of the restraint order.

[53] Mrs Mayhew submitted that there was a clear procedure to approach the court for constitutional relief, which was in Part 56 of the CPR, and if K Anderson and C McDonald JJ had granted the variation of the restraint order on the basis that not to do so would be in contravention of the appellants' constitutional rights, the learned judges would have erred, as the appellants would have been a beneficiary of constitutional redress by a sidewind. This, she said, would not be appropriate as the designated procedure in the CPR ensures fairness to the applicant as well as the legislature. Additionally, counsel said, the Attorney General, who is the guardian of the Constitution, should be given an opportunity to be heard on the issue.

[54] Counsel reminded the court that in **Harrikissoon** and **Ramanoop**, the constitutional relief had been sought by way of an originating motion as a direct challenge to the legislation. In **Hinds v R**, there was also a direct challenge to the legislation and constitutionality of the court established by the legislation to hear the criminal charges. Counsel referred to **Jaroo v Attorney General of Trinidad and Tobago** [2002] UKPC 5, a case from the Judicial Committee of the Privy Council, where constitutional redress was refused as there was an alternate mode of relief available at common law, and the court addressed the utility of the procedural rules and warned against abuse of the court's process.

[55] Mrs Mayhew also pointed out that a constitutional challenge to litigation is a matter of great importance, and so, not only should the Attorney General be a party to the proceedings, but the matter should be heard in open court, and if that is not done it would be in breach of the Constitution itself, which requires, pursuant to the principle of open justice, that a challenge to the constitutionality of legislation be done in public (see section 16(3) and (4) of the Constitution).

[56] Counsel argued that even if the relevant provisions of the CPR and rule 3(iii) of the CRR run together (based on one interpretation of a dictum in **The Attorney General v The Jamaican Bar Association and The General Legal Council** [2020] JMCA Civ 31), rule 3(i) of the CRR requires the filing of a constitutional motion to establish infringement of constitutional rights. It was ARA's submission, however, that rule 3(iii) of the CRR has been impliedly repealed by the preface to the CPR.

[57] Further, ARA contended that, even if the appellants established an infringement of their constitutional rights, the court would then be required, pursuant to the test in **R v Oakes** [1986] 1 SCR 103, to consider whether any limitations on the rights are reasonably justifiable in a free and democratic society. To do so, the court would need to consider evidence, of which there was none presented by the State, due to the way in which the matter proceeded in the court below, it was submitted.

[58] What was before K Anderson J was an application for a variation of a restraint order. Counsel contended that if the appellants wished to obtain constitutional relief from the court, they must first seek that relief by filing a constitutional motion. That challenge ought to have been one done by fixed date claim form, in open court, and not on an application to vary a restraint order in Chambers, and with representation for and on behalf of the Attorney General being in attendance. She stated that as the proper application for constitutional relief had not been made, K Anderson J was correct to decline to consider the constitutionality of the relevant sections of POCA.

Submissions on behalf of the Attorney General

[59] Counsel for the Attorney General, Miss Althea Jarrett, submitted that the starting point of the analysis was the recognition that the Constitution was the supreme law and would prevail over any law inconsistent with it, and to the extent that the law is inconsistent with the Constitution, it would be void. It was also recognised that subject to the Constitution, Parliament may make laws for the peace, order, and good government of Jamaica. Counsel noted that it is the role of the court to interpret and apply the Constitution as the supreme law.

[60] Counsel submitted further that it was important for the court to distinguish between judicial review of administrative actions and judicial review as a "constitutional species". The latter type of judicial review underpins the court's power to determine the conformity with the Constitution as "an incident of the supremacy of the constitution" (see Fundamentals of Caribbean Constitutional Law, by Tracey Robinson, Arif Bulkan and Adrian Saunders, at paragraphs 5-001-2). To do this, counsel argued, the court would have to construe the constitutional provision in issue. She referred to Phillips JA in **Collymore and Abraham v The Attorney General** (1967) 12 WIR 5 for these propositions, as section 2 of the Jamaican Constitution is similar to the said section 2 in the T&T Constitution.

[61] Counsel also examined section 19 of the Constitution and agreed with Mr Leys that it had replaced section 25, which latter provision did not give the Supreme Court the discretion whether or not to exercise jurisdiction if adequate means of redress existed under any other law, as it had been mandatory that the jurisdiction should have been refused in those circumstances. Indeed, the court made it plain that the application for constitutional redress was a remedy of last resort (see Downer JA in **Doris Fuller v The Attorney-General** (1988) 56 WIR 337).

[62] Counsel reviewed the CRR of 1963 and 2000 and ultimately submitted that, given that the CPR did not expressly repeal the CRR, and that Part 56 of the CPR implicitly recognises the CRR as it referred to the application for redress under the Constitution

being made by motion, that the CRR and the CPR should run together. It was the CPR, she pointed out, that stipulates that applications for constitutional redress should be by way of motion supported by affidavit. It was of significance, she posited, that the CPR has replaced the use of the notice of motion with the fixed date claim form, yet it has nonetheless referred to it in rule 56.1. Counsel submitted, however, that in keeping with the ratio of the Privy Council in **Olive Casey Jaundoo v The Attorney General of Guyana** [1971] AC 972, on appeal from the Court of Appeal of Guyana, in the absence of a specific procedure stipulated by Parliament, in accordance with the Constitution, the redress provision in the Constitution was wide enough to be invoked by any form of procedure possible.

[63] So, counsel submitted, the CRR embraces the concept of the court dealing with and determining any question which may arise under the Constitution, while hearing any action or proceeding. Counsel submitted, however, that litigants and sometimes the court, do not make "a clear distinction between a claim for constitutional redress under section 19 of the Constitution and a claim where questions arise in the course of proceedings relating to the constitutional rights under the Charter". She drew the court's attention to the dictum of Patterson JA in **Doris Fuller v AG**, where he commented on and gave clarity to that distinction, and its applicability in certain circumstances, and to that of Morrison JA (as he was then) in **Candine Anderson v The Attorney General of Jamaica** [2014] JMCA Civ 4, confirmatory of the approach set out therein.

[64] Counsel therefore concluded that in addition to the Supreme Court's original jurisdiction to grant constitutional redress, the CRR "undoubtedly demonstrate the Supreme Court's power to determine conformity with the Constitution" in keeping with the "'incident of the supremacy of the Constitution' where in the course of any civil or criminal proceedings, questions arise in relation to fundamental rights and freedoms".

[65] Counsel concluded also that the ratio in **Doris Fuller v AG** and the CRR, meant that a judge of the Supreme Court has the power in cases where the claimant is not seeking constitutional redress, to determine such questions that arise before the court

which relate to a claimant's constitutional rights and give effect to such determination so far as is practicable. So, specifically dealing with the question posed by the appellant, the court, counsel posited, need not be "constituted as a constitutional court" to do so.

Analysis

[66] It may be prudent at this time to set out the impugned provisions of POCA, and the relevant provisions of the Charter, the CRR and the CPR for better comprehension of the competing contentions in this appeal. We will start with sections 32, 33 and 34.

[67] It is clear that the Supreme Court is empowered under section 32 of POCA to grant a restraint order if certain conditions are satisfied. For the purposes of this case, the conditions satisfied are that there is reason to believe that an alleged offender has benefitted from his criminal conduct and a criminal investigation has been started in relation to the offence, and proceedings have been commenced in Jamaica and have not been concluded (section 32(1)(a)(i) and (ii)).

[68] It is also clear that a judge of the Supreme Court may grant the application for a restraint order on an application made by the Director of Public Prosecutions or ARA without notice in Chambers (section 33(1)(a) and (b)).

[69] The issues, in this case, relate to the interpretation to be accorded section 33(2), (3), (4) and (5). Those sections empower the court to make orders prohibiting persons from dealing with realizable property held by a specified person. Additionally, the section indicates that the restraint order may state that it applies to all realizable property held by a specified person, whether or not it is stated in the order, or if the realizable property has been transferred to the specified person after the order has been made (section 33(2), (3)(a) and (b)).

[70] Realizable property is defined in section 2 of POCA and means:

> "(a) any free property held by the defendant; or

(b) any free property held by the recipient of a tainted gift."

[71] The restraint order may be made subject to exceptions, which may provide for reasonable living and legal expenses, but not legal expenses which relate to an offence which falls within section 33(5), nor which are incurred by the defendant or by a recipient of a tainted gift (section 33(4)(a)(i) and (ii)). The order may also be made subject to an exception which makes provision for the purpose of enabling any person to carry on any trade, business, profession, or occupation (section 33(4)(b)) or may just be made subject to conditions (section 33(4)(c)).

[72] The offences, for these purposes, which fall within section 33(5) are those set out in section 32(1)(a)(i) and (ii) above once the conditions stated therein are satisfied.

[73] If the applicant for the restraint order applies to proceed under the subsection, as part of the restraint order or afterwards, the judge, having made the restraint order, may make such order as he believes is appropriate for the purpose of ensuring that the restraint is effective, including any order for the preservation of the property in respect of which the order was made (section 33(6)(a) and (b)).

[74] Under section 34 of POCA, an application can be made to the court to vary or discharge the restraint order, either by the person who applied for the order, or any person who is affected by the order, and on that application, the court may vary or discharge the order. However, if the condition that was satisfied under section 32(1) was that proceedings had been started, or an application had been made, or an investigation had been started or was to be made, then the court shall discharge the order on the conclusion of the proceedings, or the determination of the application, or with regard to the investigation, the court shall discharge the order if, within a reasonable time, proceedings for the offence have not been started, or the application was not commenced.

[75] Perhaps it would be useful to say at this time that we agree with all counsel, in the main, that the words in section 33 of POCA are very clear. There is provision for the

grant of the restraint order (by ARA) applicable to realizable property if the conditions in section 32 are satisfied and the court is permitted to make the order subject to exceptions that exclude, *inter alia*, legal expenses relating to the offences set out in section 33(5), which embraces certain conditions as outlined in section 32(1). The word "offence" cannot refer to civil proceedings, as submitted by counsel for Miss Satterswaite. Additionally, there are no exceptions stated in section 33(5) excluding civil proceedings. The provisions in sections 32-34 are therefore neither obscure nor ambiguous. The canon of construction, namely, the presumption of constitutionality, relied on by counsel, based on there being a situation of choosing between one or two interpretations of the alleged impugned legislation, would not arise, and would be inapplicable.

[76] Having set out the relevant provisions of POCA including the challenged provisions, and the literal meaning thereof, it is important to set out succinctly the relevant and significant provisions of the Charter.

[77] Section 13 embraces the position that the fundamental rights and freedoms set out in the Charter shall afford protection of those rights and freedoms to the extent that they do not prejudice the rights and freedoms of others. Additionally, subject to certain other provisions the Charter guarantees the rights and freedoms, including those set out in sections 14 and 16, save only as may be demonstrably justified in a free and democratic society.

[78] Section 14 of the Charter deals with freedom of the person, and section 14(2)(d) states that any person who is arrested or detained shall have the right "to communicate with and retain an attorney-at-law".

[79] Section 16 deals with the protection of the right to due process. Section 16(1) and (2) of the Charter gives a person charged with a criminal offence, or one seeking the determination of a person's civil rights and obligations, or one in any legal proceedings, a right to a fair hearing, within a reasonable time, by an independent impartial court established by law. Section 16(5) states that every person charged with a criminal offence

shall be presumed innocent until he is proved guilty or has pleaded guilty. Section 16 (6)(c) indicates that every person charged with a criminal offence shall "be entitled to defend himself in person or through legal representation of his own choosing or, if he has not sufficient means to pay for legal representation, to be given such assistance as is required in the interest of justice".

[80] This appeal focuses on the impact of the above constitutional provisions on the provisions of POCA which have also been set out above. Another focus is the process by which interpretation of legislative provisions ought to be brought to the courts.

[81] Section 19 of the Charter deals with applications for redress. If any person alleges that any of the provisions of the Charter has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter, which is lawfully available, that person may apply to the Supreme Court for redress. The Supreme Court will have original jurisdiction to hear and determine any such application, and the court may make such order as it considers appropriate for securing the enforcement of any protection of the provisions of the Charter to which such person may be entitled. The Supreme Court may, however, decline to exercise its powers where any application is made for redress under the Charter, and may remit the matter to the appropriate court, tribunal, or authority if the court is satisfied that adequate means of redress for the contravention alleged, are available to the person concerned (section 19(1), (3) and (4)).

[82] It is important to recognise the similarity in the provisions of the CRR of 1963, and the subsequent amendments thereto in 2000, and also, of significance, the similar and relevant provisions of the CPR.

[83] The CRR, in both publications, speak to applications being made pursuant to the former section 25 of the Constitution for redress by any person who alleges that provisions 14 – 24 of the Constitution have been or were being contravened in relation to those applicants, by motion to the court supported by affidavit. The later rules include

an allegation "likely to be contravened" in the future and permits the applicant to seek a declaration of rights, an injunction or other appropriate order. The later rules also require that the Attorney General, if not a party to the application, be served with the motion and affidavit. Rule 3(2) in the 2000 rules replicates rule 3(iii) in the earlier version and states that:

> "Where in the course of any action or proceedings (civil or criminal) before the Court any question arises under the provisions of sections 14 to 24 inclusive, of the Constitution, the Court may determine such questions and give effect to such determination as far as applicable, in its judgment or decision in such action or proceeding."

[84] An issue arose in the proceedings below as to whether the CRR set out above had been repealed in part or in their entirety. There were competing contentions and C McDonald J found the latter. At the commencement of the CPR there is a statement that "[a]ll Rules of Court relating to the procedure in civil proceedings in the Supreme Court, save for those relating to insolvency (including winding up of Companies and bankruptcy), and matrimonial proceedings are hereby revoked". Rule 2.2 indicates that the CPR apply to "all civil proceedings in the court", and "civil proceedings" are defined to include judicial review and applications to the court under the Constitution under Part 56. Part 56 of the CPR - Administrative Law, states that it deals with applications for, *inter alia*, judicial review and by way of originating motion or otherwise for relief under the Constitution. Rule 56.7 states that "[t]he court may at any stage direct that the claim is to proceed by way of an application for an administrative order".

[85] As discussed in paragraph [75] herein, the ordinary and natural meaning of the words of section 33(4) of POCA are clear. The court is empowered to make a restraint order once certain conditions are satisfied, and with certain exceptions such as reasonable, living and legal expenses, other than any legal expenses, as set out in section 33(5). There is therefore no alternative interpretation that can be accorded that provision so that one must perforce choose one interpretation over another. We agree with the submissions of Miss Jarrett that, in those circumstances, this aspect of the principle of

presumption of constitutionality, as a canon of constitutional construction may not arise. However, it is also well accepted and recognised that the judiciary will be slow to interfere with laws properly enacted by Parliament, based on the thinking that this demonstrates an "initial presumption that Parliament did not intend to pass beyond constitutional bounds" (see **Federal Commissioner of Taxation v Munroe; British Imperial Oil Co Ltd v Federal Commissioner of Taxation** 38 CLR 153).

[86] The next issue is an examination of how the appellants approached the court for their remedy in this matter. The appellants have repeatedly said that they have not applied for constitutional redress. They have not therefore approached the court initially for an interpretation of certain provisions of the Constitution, and/or for relief under the Constitution (section 19). It was their position that at the hearing of the application to vary the restraint order, the principles and canons of constitutional interpretation should be applied. That approach must be examined against the backcloth of authorities, rules, precedent, and academic scholarship.

[87] Queen's Counsel, Mr Leys, referred to and relied on **Harrikissoon**, the Privy Council case on appeal from the Court of Appeal of Trinidad and Tobago. In that case, the applicant claimed a declaration that certain human rights guaranteed to him under the T&T Constitution had been contravened, and so, he sought redress in the High Court. The Board found his appeal to be wholly misconceived. His complaint was that he had been a class 1 teacher at Penal Government Primary School, and he had been unlawfully transferred, by the Teaching Service Commission, to a similar post at Palo Seco Government Primary School. He was unhappy with that. He stated that he was, as a holder of a public office, being transferred from one place to another against his will. But that was not a human right or fundamental freedom specified in the Constitution. Nor did it fall into a right of equality before the law requiring special protection under the Constitution. However, instead of pursuing the parallel remedy provided by legislation, he pursued an application for redress under the Constitution.

[88] Lord Diplock, on behalf of the Board, warned against applications for constitutional relief being used as a general substitute for the normal procedures for invoking judicial control of administrative action. Lord Diplock said, at page 349, that:

> "The notion that whenever there is a failure by an organ of government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by Chapter 1 of the Constitution is fallacious. The right to apply to the High Court under section 6 of the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action."

[89] He also said that the mere allegation that a human right had been infringed or likely to be, was not by itself sufficient to invoke the section under the Constitution, especially if:

> "... it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom."

[90] Lord Diplock also stated that there was a remedy open for the appellant to apply to the court for a breach of the regulations. However, he chose deliberately not to avail himself of that remedy. His decision to pursue a claim for a declaration for breach of his human right, Lord Diplock said, as previously indicated, was "wholly misconceived".

[91] We must say that **Harrikissoon**, relied on heavily by counsel for Miss Satterswaite, is of little, if any, assistance in the instant case; it seems to be in the reverse. Section 32 of POCA deals with applications to grant restraint orders, and the relevant conditions that have to be satisfied in order for the court to do so. ARA applied properly under that section. The applications to vary the restraint order which had been granted

on 16 January 2014, filed by both appellants, were also appropriately made. But the ratio in **Harrikissoon**, of not making an application for constitutional redress when an alternate parallel remedy is available under the common law or legislation, cannot avail the appellants in support of arguments for obtaining relief/remedy, pursuant to the Constitution, by way of an application for variation of a restraint order.

[92] The same observation can be made in respect of another Privy Council case on appeal from the Court of Appeal of Trinidad and Tobago, viz **Ramanoop**, also relied on by Mr Leys. In that case, Mr Ramanoop was assaulted by a police constable during arrest and subsequent interview at the police station. He sued the Attorney General seeking declarations that the arrest, detention, and assault by the police officer were breaches of his constitutional rights under section 4(a) of the T&T Constitution. He also claimed damages, aggravated and exemplary damages. At first instance, with the consent of the parties, he was granted damages in the amount of $18,000.00 for deprivation of liberty, and $35,000.00 for the assaults. The judge refused to make an award for exemplary and aggravated damages saying that he had no jurisdiction to grant them. The Court of Appeal overturned that decision and remitted the matter to the Supreme Court for assessment of damages. The Attorney General appealed to the Privy Council.

[93] The Board dismissed the appeal and held that the court had the jurisdiction and the power to award remedies for contravention of human rights, and that specifically involved damages related to misuse or abuse of power. Such an award was particularly to assuage the damage suffered, and to go towards vindicating the infringement of the constitutional right. The award was also needed to reflect the sense of public outrage, indeed, it was "to emphasize the importance of the constitutional right and the gravity of the breach".

[94] Bereaux J, at first instance, thought that in spite of the egregious behaviour of the police officer, exemplary damages were inappropriate and superfluous in proceedings brought under section 14 of the T&T Constitution (section 19 of the Jamaican Constitution). Sharma CJ, on the other hand, in the Court of Appeal, was of the opinion

that section 14 of the T&T Constitution "contains no limit on the forms of redress the court may direct".

[95] The issue really was could the court award exemplary damages under section 14, or ought the court only to award compensatory damages. The argument was that the State ought not to be punished. The Board felt that compensation awards may go some distance toward vindicating the infringed constitutional rights but may not in particular circumstances, suffice. In their view, the judge at first instance stated the jurisdiction too narrowly.

[96] However, for these purposes, the Board noted that the action had started by original motion for constitutional relief, as opposed to a common law action. The Attorney General had not objected, correctly, the Board commented, as the case involved a "shameful misuse of [police] coercive power". However, had the facts been in dispute, it may have been more appropriate for the court to have directed that it be pursued as if it had begun by writ, which is not a summary procedure, and one more suited for substantial factual disputes, which would require pleadings, discovery, and evidence.

[97] The Board, in referring to **Harrikissoon**, noted the dissimilar provisions in the T&T Constitution in relation to section 14 and in the different countries in the Caribbean. They noted that the T&T Constitution contains no provision "precluding the exercise by the court of its power to grant constitutional redress if satisfied that adequate means of legal redress are otherwise available". There is such a provision in the Constitution of the Commonwealth of the Bahamas. In Grenada, there is a provision in that country's Constitution empowering the court to decline to grant constitutional relief. None of those provisions was stated in the T&T Constitution, which provides (as in section 19 of the Jamaican Constitution) that on a constitutional application under section 14, the court may make such orders as it considers appropriate for enforcing a constitutional right.

[98] The Board, yet again, made reference to **Harrikissoon**, where, as indicated previously, Lord Diplock had given guidance as to how the discretion ought to be

exercised if a parallel remedy was available. Lord Nicholls reminded that Lord Diplock had warned against using applications for constitutional relief as a substitute for normal procedures invoking judicial control of administrative action. Lord Nicholls, on behalf of the Board, endorsed the position taken by Lord Diplock and stated at paragraph 25 that:

> "In other words, where there is a parallel remedy constitutional relief should not be sought unless the circumstances of which complaint is made include some feature which makes it appropriate to take that course. As a general rule there must be some feature which, at least arguably, indicates that the means of legal redress otherwise available would not be adequate. To seek constitutional relief in the absence of such a feature would be a misuse, or abuse, of the court's process. A typical, but by no means exclusive, example of a special feature would be a case where there has been an arbitrary use of state power."

[99] The Board, however, warned that that caution was not to be intended as a deterrent to litigants for seeking constitutional redress, where they are acting in good faith and believing that the case contains features that make it appropriate. In these circumstances, the court should be vigilant to protect that approach to it for redress. Frivolous, vexatious, or contrived invocations of constitutional redress should be repelled. However, the court maintained that bona fide resort to protect rights under the Constitution should not be discouraged.

[100] The Board noted that litigants generally pursue the original motion for constitutional redress as they are less costly and lead to an expedited hearing, than the proceedings which have been brought by writ. But Lord Nicholls pointed out that that was not a good ground for invoking the constitutional jurisdiction, nor merely to state that a parallel remedy was inappropriate.

[101] The Board then embarked on an analysis as to how the litigant ought to proceed. If in the constitutional proceedings there appears to be a substantial dispute as to fact, it would then be an abuse, and the litigant should then apply for the proceedings to continue as if begun by writ. It was clarified that, if after having commenced the action,

it also became clear that the decision to commence by constitutional motion was entirely inappropriate, it would also be an abuse to continue the matter in that way. The motion should either be withdrawn or directions obtained with regard to the matter continuing as if it had been begun by writ. There may have to be an amendment to the claim for constitutional relief, to seek a claim for a parallel remedy. It would be for the court to examine the situation and give the appropriate directions in all the circumstances.

[102] The Board advised that it may be prudent and in everyone's interest for the litigant to consider and decide what is the appropriate procedure before he commences proceedings or as soon thereafter as possible.

[103] **Ramanoop**, in our view, also does not assist the appellants. The ratio is exhorting the litigant to pursue the appropriate procedure, be it the parallel remedy pursuant to statute or by the common law action, or by motion for constitutional redress. In this case, the appellants appeared to require constitutional redress, as they are claiming a breach of their constitutional rights (section 16) and that certain provisions of POCA were unconstitutional. Nonetheless, they are pursuing an application for variation of a restraint order under POCA yet expecting relief and/or remedy under the Constitution. They are not claiming that they feared pursuing a remedy under the Constitution as being an abuse of the process. They are just claiming that the court should consider those alleged constitutional breaches and the unconstitutionality of certain provisions in POCA, in the application under POCA, without more. Additionally, they are also asking the court to consider the effect that the constitutional provisions should have on the interpretation which should be accorded specifically to section 33(4) and (5) of POCA. So, the appellants are seeking relief, either by way of a constitutional remedy, or under the guise of the impact of constitutional interpretation on certain impugned provisions in legislation. We shall examine this further.

[104] In yet another Privy Council case on appeal from the Court of Appeal of Trinidad and Tobago, **Jaroo**, the Board again referred to the abuse of process in filing a constitutional motion as against a common law action. The matter related to a motor car

purchased by Mr Jaroo, which he purchased in good faith, but which was suspected by the police authorities as being a stolen vehicle. The police requested that Mr Jaroo submit the vehicle to them for investigation. He did so voluntarily but was unable to obtain the return of the same subsequently despite numerous requests.

[105] Mr Jaroo filed a motion seeking damages for contravention of his rights under section 4(a) and (b) of the T&T Constitution. He relied on the right to enjoyment of property, and the right not to be deprived thereof except by due process of law. Mr Jaroo was unaware of the detailed basis the police had for the detention of his vehicle until they filed an affidavit in response to his constitutional motion. Up until then, Mr Jaroo had a right to possession of the motor vehicle. His constitutional right to enjoyment of property and the right not to be deprived thereof, was based on his possession of the motor vehicle and not his ownership thereof. The police, in their affidavit, claimed that the chassis and the engine numbers of the vehicle had been tampered with. In the absence of any explanation from him, the certification of ownership on which Mr Jaroo relied was insufficient to prove that the motor vehicle was his property.

[106] On the basis of that claim by the police, the judge at first instance accepted that it was reasonable for the police to believe that the car was stolen, and for them to seize it in order to conduct further inquiries. The judge thought that the detention was lawful. There was no mention though, that the claim ought to have been brought by a common law action and not by way of a constitutional motion.

[107] The Court of Appeal rejected Mr Jaroo's argument under section 4(a) of the T&T Constitution and indicated that the constitutional route was not appropriate. There was another obvious available recourse under the common law.

[108] Lord Hope of Craighead, on behalf of the Board, endorsed Lord Diplock's speech in **Harrikissoon**. Before the Board, the issue related to: (1) the extent of Mr Jaroo's constitutional rights under section 4(a) of the T&T Constitution; (2) whether his resort to

the use of the constitutional motion was an abuse of process; and (3) if not, whether his constitutional rights under section 4(a) were infringed.

[109] The discussion before the Board related to whether Mr Jaroo had a claim for breach of a constitutional right. The first instance judge found that, based on the tampering with the chassis and engine numbers, Mr Jaroo could not establish any claim that the vehicle was his property, and that he was entitled to possession of it. The Court of Appeal agreed that Mr Jaroo had failed to show a good paper title to the vehicle entitling him to claim deprivation of property without due process. The vehicle could not be returned to him as he would be using it contrary to the provisions of the Road Traffic Act. Lord Hope, on behalf of the Board, said that it was not necessary to show ownership. It was sufficient for Mr Jaroo to show that, at the relevant time, he was in possession of the motor vehicle. He stated clearly "[t]he rights which are protected by section 4(a) include the right to possession, which vests a possessory title in the possessor, as well as the right of ownership".

[110] Lord Hope then discussed the court's exercise of its discretion under section 14 of the T&T Constitution. The Board concluded that there was no doubt that there was a parallel remedy available to Mr Jaroo to enable him to enforce his right to the return of the vehicle. The Court of Appeal held that that was an appropriate remedy. So, the question was, was the Court of Appeal correct in stating that in the circumstances it was clearly inappropriate for Mr Jaroo to pursue the originating motion under section 14? The Board held that whereas there might have been reason to file a constitutional motion at the outset, after the information from the police had been presented, which remained unchallenged, "it would not have been open to the court to hold that they were acting unlawfully". And so, it was plainly no longer suitable to continue the action in that way. Once facts became in dispute, in relation to the detention of the vehicle, it would require, *inter alia*, amendment of the pleadings to pursue the common law remedy which had always been open to him. He should have done that, but he continued to pursue the constitutional claim which had then become unsuitable and an inappropriate procedure.

[111] Lord Hope confirmed the views expressed in **Harrikissoon** and **Ramanoop**, that it behoved Mr Jaroo to consider the true nature of his right which had allegedly been contravened, and whether another procedure could be conveniently invoked. If it could, then resort to the procedure by way of originating motion would be inappropriate and an abuse of process. It had become clear after the motion had been filed, that the procedure was no longer appropriate, and so steps should have been taken to withdraw the matter from the High Court without delay, "as its continued use in such circumstances will also be an abuse". The Board refused the declarations prayed for in the proceedings.

[112] The facts of **Ramanoop** are very disparate from those of the instant case. However, what can be gleaned therefrom as applicable, is that one should consider, in detail and comprehensively, how one wishes to access the court. If a litigant is claiming a breach of his/her constitutional rights, there is provision for that protection pursuant to a constitutional motion. The court may determine the matter, the litigant having taken that approach and in spite of there being alternative available processes, if in all the circumstances, it is in the interests of justice and there are exceptional circumstances to do so.

[113] It would seem that the admonition of Lord Hope could lead one to consider whether an adjournment ought to have been contemplated and requested by the appellants before K Anderson and C McDonald JJ, for an application/motion to have been filed and the claim for constitutional redress made in that way, in open court, with the participation of the Attorney General. Additionally, the specific constitutional remedies could have been considered, or for amendments to be undertaken to pursue a claim for an alternate remedy that may have been appropriate. The issue of obtaining that consideration of a constitutional remedy or relief without filing such a motion/application, and whether failure to do so could be considered an abuse of process remains the crux of this appeal.

[114] We found the case of **S v The Commissioners of HM Customs and Excise** [2004] ECWA Crim 2374, referred to and relied on by Miss Jarrett for the Attorney

General, very instructive and helpful in this discussion. In that case, the underpinning investigation related to VAT fraud connected to mobile phones. The restraint order was made against S in relation thereto. The appeal related to the true construction of section 41(3) and 41(4) of the United Kingdom Proceeds of Crime Act (UK POCA), (similar to section 33(4) and (5) of POCA).

[115] Scott Baker LJ, speaking on behalf of the court, noted that the legislation, as stated, appeared to give with one hand, provisions for the exceptions of living expenses and legal expenses, then take back with the other hand those expenses that could not be paid. The issue in the appeal with regard to the construction of the particular provisions was whether the words "relate to", in the section, include (and therefore did not permit) access to funds restrained for use in the restraint proceedings. The argument was that a clear distinction should be drawn between the underlying offence, in respect of which no issue was taken, that access to the funds was not permitted in that category, and the restraint proceedings on the other hand. It was submitted that the restraint/application order was quite separate and did not "relate to" the underlying offence.

[116] Scott Baker LJ recognised that the restraint order was "without question" one of a draconian nature, particularly as it was then triggered by the start of the criminal investigation, and not as had been the case previously, by the commencement of criminal proceedings, or at the very least, the settled intent to commence them. As a consequence, he recognised that the suspected offender could be the subject of such a restraint order, for a considerable period of time, while investigations are ongoing, and then no proceedings are ultimately brought. He queried therefore why such a person should not be able to pay for legal expenses to challenge the order or certain parts of it.

[117] In that case, there had been a considerable passage of time between the commencement of investigations/the restraint order and no charges having been laid. Indeed, in that case, the learned judge of appeal noted that any person who received a restraint order would wish to obtain legal advice. S's order advised him to consult a solicitor as soon as possible. But he could not do so, as his funds were restrained. The

right to ask the court to vary the order was also brought to his attention in the notice served with the order. The order also required full disclosure of all assets within three days, verified by a statement of truth, and the repatriation of all moveable assets outside of the jurisdiction within three weeks. All of which would require legal advice and representation.

[118] The important point in this case though is that Scott Baker LJ recognised that "[i]t is common ground that public funding is now available for applications and advice with regard to restraint orders". The court below had not dealt with that aspect of things, and so, Scott Baker LJ said that the court was therefore unable to conclude whether persons would be able to obtain public funding for legal advice and representation, with regard to restraint orders "when justice dictates that they should".

[119] In that case, for several reasons, including the fact that S and his wife's aggregated drawdown on funds from their disposable income under the order, made them financially ineligible, S was unable to obtain a public funding certificate. S and his wife got divorced and so there was a real issue as to whether their funds ought to have been compiled together but, suffice it to say, he did not receive public funding for the restraint application.

[120] The court pointed out the basis for the restraint on the use of funds for legal expenses in respect of the restraint orders and stated that it was important to maintain the value of the realizable property so as to satisfy any subsequent confiscation order. Scott Baker LJ referred to the words of Lord Woolf in **R v Sekhon and others** [2003] 3 All ER 508, at page 510 that:

> "One of the most successful weapons which can be used to discourage offences that are committed in order to enrich the offenders is to ensure that if the offenders are brought to justice, any profit which they have made from their offending is confiscated. It is therefore not surprising that Parliament has repeatedly enacted legislation designed to enable the courts to confiscate the proceeds of crime."

[121] Scott Baker LJ examined, minutely, the words of section 41 of UK POCA and particularly the exclusion of the recipient of the tainted gift, the detailed arguments of both counsel, recognising that the statute had been amended to control repeated arrangements for variation and increases in the amounts to be released for living expenses and legal expenses. If there was no control, the effect of those repeated applications, if granted, would deplete the funds available for confiscating orders, and so in exchange, the court ensured that in the orders, public funding was made available. The court perused UK POCA, as a whole, including the civil recovery orders made pursuant to an alleged criminal lifestyle being undertaken and concluded that Parliament intended to make public funding available. However, on a true construction of section 41, the release of restrained funds on an application to vary the restraint order so that S could obtain legal advice upon a restraint order, in the particular circumstances, was prohibited.

[122] It was clear that the judge's finding on the construction of the clause was correct. The court did make the following observation, however, with regard to the terms of the restraint order, and stated that the order should clearly state, on the face of it, that public funding is available. Scott Baker LJ continued "[i]t is plainly desirable that defendants to restraint orders should in the ordinary course of events have legal representation".

[123] Interestingly, however, the court did find that the failure of S to obtain public funding did not infringe his right to legal representation or his right to a fair trial (contrary to article 6 of the European Convention on Human Rights). However, this comment may have been stated based on the particular facts of the case, and as the court said, S had been represented throughout the hearing of the application, and there had been no suggestion at that time that he had not had a fair hearing.

[124] **S v Commissioners of HM Customs** is instructive, although we recognise that the issue on appeal was the construction of section 41 of UK POCA with regard to legal representation on the restraint order application. Extrapolated, however, is the acceptance, by the court, that the wording in the legislation was clear, that legal

representation was prohibited for the defence, in relation to the offence with which S was charged. There was also an acceptance in the legislation and in the arguments before the court, that legal representation through public funding, ought to be afforded the litigant in the case for the restraint application/order *simpliciter*. In our view, that should be even more so in respect of criminal proceedings before the court. And even more so in the light of the constitutional provisions in the Charter that address this specifically and are set out in the guaranteed rights.

[125] As a consequence, in our opinion, in the hearing of the applications for the variation of the restraint order, consideration ought to be given to the provisions existing in relation to legal representation in the Charter, so as to give effect to the said provisions in the Charter, which state that on arrest or detention, there is a right to communicate with and retain an attorney-at-law; and when charged with a criminal offence, there is a right to defend oneself through legal representation of one's own choosing, or if there is not sufficient means to pay for legal representation, then such assistance is to be given, as is required, in the interests of justice. But interpreting the provisions of the Constitution, which have clarity and are without obfuscation, does not, in this situation, directly affect the true construction of the relevant provisions in the POCA legislation, which have equal clarity. This aspect of the interpretation of provisions in POCA, in the light of the constitutional provisions, will be dealt with in more detail when considering issue 3.

[126] The question of some importance, however, is what is the proper forum for making those considerations? That determination must be made having regard to whether the CRR of 2000 are still in effect; or have been repealed, impliedly or expressly, by the CPR and the significance of the CPR.

[127] The appellants sought to challenge the following findings and observations made by C McDonald J at paragraph [62] of her written judgment:

> "There is no evidence before the Court that the Constitutional Redress Rules made pursuant to the Judicature (Rules of

> Court) law 1961 have been repealed. I find that based on the proclamation of the Rules Committee on September 16, 2001 enacting the Civil Procedure Rules, the Judicature (Constitutional Redress) Rules in their entirety are revoked. Paragraph 2 reads: 'All Rules of Court relating to the procedure in civil proceedings in the Supreme Court save for those relating to insolvency (including winding up of companies and bankruptcy) and matrimonial proceedings are hereby revoked.'
>
> The Constitutional Redress Rules were promulgated when the Judicature Civil Procedure Code was in force, the Code has been replaced by the CPR Part 56 which has express provision for constitutional challenges and redress. There is no corresponding provision [to] rule 3 (iii) of the Constitutional Redress Rules in the CPR. At the end of the day a claim for relief under the constitution must be in accordance with part 56."

[128] In **AG v JBA and GLC**, there appears the following dictum at paragraph [50]:

> "It seems to me that there may very well be merit in Mr Manning's submission (previously mentioned at paragraph [23] of this judgment) that the constitutional redress rules and the CPR were meant to run together. One matter in favour of this view is the fact that, unlike the instance of the express revocation of the 1963 rules by the clear words of the 2000 rules, nothing has been produced to the court showing a revocation of the 2000 rules. It is also significant to note that the Rules Committee, as it stood at the time of the promulgation of the 2000 rules, was composed of largely the same members as at the time in September 2002, when the CPR was scheduled to come into force in January of 2003. The eight members of the committee whose names appeared in the Gazette in respect of the 2000 rules, also appear at page 454 of the CPR, with two additions and one change in the holder of the office of the Director of State Proceedings. In these circumstances, it would be difficult to accept that the CPR was enacted without an awareness of the existence of the 2000 rules, which have not been revoked."

[129] It is important, as well, to consider the paragraph that followed immediately thereafter (paragraph [51], which, so far as is relevant, reads as follows:

> "To my mind, however, even if we accept that it is solely the CPR that governs applications for constitutional redress, these arguments founder on a consideration of other provisions of Part 56…"

[130] Having regard to the wording in these two paragraphs, it would be difficult to assert that in that case, any concluded view was expressed on the matter of whether the CRR 2000 was revoked by the CPR. It is also unclear whether a particular statement in the preface to the CPR had been brought to the attention of the court in that appeal. As indicated previously, that section reads as follows:

> "2. All Rules of Court relating to the procedure in civil proceedings in the Supreme Court, save for those relating to insolvency (including winding up of Companies and bankruptcy), and matrimonial proceedings are hereby revoked."

[131] The definition of "civil proceedings", given in section 2.2 is also relevant in explaining the use of the term in the above-quoted rule:

> "(1) Subject to paragraph (3), these Rules apply to all civil proceedings in the court.
>
> (2) '**Civil proceedings**' include Judicial Review and applications to the court under the Constitution under Part 56." (Emphasis added as in original)

A consideration of all the relevant provisions leads us to the conclusion that the CRR 2000, were revoked by the CPR, and that it is Part 56 of the CPR that governs the procedure for seeking redress for violation of constitutional rights. From a considered view, the comments made at paragraph [50] of the case of **AG v JBA and GLC**, did not express a concluded view; do not form a basis for the decision and appear, therefore, to be *obiter dicta*. In that regard, C McDonald J did not err when she found that the CRR, in their entirety, were revoked, and so ground (e) in Mr Allen's appeal would fail.

[132] However, that is by no means the end of the matter. It is our view that, while Part 56 is the primary means of seeking redress for alleged breaches of constitutional rights,

we take the point made on behalf of the Attorney General that, in light of the supremacy of the Constitution and the court's role in interpreting and giving effect to its provisions and enforcing its guarantees, the Supreme Court should not shrink away from resolving questions that concern a litigant's constitutional rights that might arise otherwise than by way of an originating motion.

[133] To us, this is implicit in the use of the phrase "or otherwise" in rule 56.1(1)(b), which reads as follows:

> "This Part deals with applications -
>
> (a) for judicial review;
>
> (b) by way of originating motion **or otherwise** for relief under the Constitution;" (Emphasis added).

Additionally, rule 56.7(1) and (2), are worded in such a manner as to suggest that they contemplate a situation in which matters relating to constitutional issues are raised in claims the substance of which is not to seek an administrative order. Those provisions read as follows:

> "(1) This rule applies where a claimant issues a claim for damages or other relief other than an administrative order but where the facts supporting such claim are such that the only or main relief is an administrative order.
>
> (2) The court may at any stage direct that the claim is to proceed by way of an application for an administrative order."

[134] It seems to us that, when confronted with a claim that is not, on the face of it, one by way of originating motion seeking redress for breach of constitutional rights, but which involves or calls for a consideration of such rights, a judge of the Supreme Court is by no means constrained by the rules to take the straight-jacketed approach of refusing the application for reason that the correct originating document or procedure has not been used. Rather, these provisions bestow on such a judge a discretion to deal with

matters that might not, strictly speaking, conform with procedural requirements, in such a way as to achieve the ends of the overriding objective of dealing with cases justly.

[135] In the case of **Al-Tec Inc Limited v James Hogan and others** [2019] JMCA Civ 9, this court made, *inter alia*, orders declaring as unconstitutional sections of the CPR. It did so in a matter which came before it as an appeal from the refusal by a judge of the Supreme Court to set aside a default judgment and consequential orders. The relevant orders made by this court were as follows:

> "viii) It is hereby declared that rule 12.13 of the Civil Procedure Rules is unconstitutional to the extent that it restricts the right of participation by a defendant in an assessment of damages hearing.
>
> ix) It is hereby declared that rule 16.2(2) of the Civil Procedure Rules is unconstitutional to the extent that it provides for notice of the assessment to be sent to a claimant only."

[136] These orders were therefore made to address what the justice of the case required, although the issues did not arise from a claim brought by way of originating motion. The issue, however, appeared somewhat straightforward relating, as it did, to a breach of the fundamental principle of natural justice, namely, a restriction on the right to be heard on an assessment of damages once the default judgment remained intact. No evidence was required in that situation.

[137] In relation to the evidential requirements imposed on the State by the test in **R v Oakes**, we find that orders could have been made by the learned judges below, permitting an adjournment of the matter into open court, for the filing of the necessary affidavit evidence, and the invitation of the Attorney General to be present, so that all the important issues arising could have been addressed.

[138] In the result, based on the guidance given in the authorities, it is very important for a party who perceives that a breach of their constitutional rights has occurred, or that questions have arisen in relation to their constitutional rights, to decide how they wish to

properly access the court, and to make such adjustments as are legally appropriate in the process through the courts. In any event, we share the view put forward by the Attorney-General, that a court need not be constituted as a "Constitutional Court" and a claim need not come before the court, as an originating motion, for a judge of the Supreme Court to determine questions arising, which relate to a party's constitutional rights, as far as is applicable and necessary, **in cases where the main relief sought is not constitutional redress**. In that regard, K Anderson J erred. Grounds (i) and (iii) in Miss Satterswaite's appeal therefore succeed.

Issue (2): Construing the provisions in POCA and of the Constitution in keeping with the principles of constitutional interpretation

Submissions on behalf of appellants

[139] Mr Leys referred to what he described as elementary canons of constitutional construction which state that the Constitution must not be narrowly construed, but must be given a broad and generous interpretation, and exceptions contained in a Constitution, particularly those relating to provisions conferring rights and freedoms on the subject, ought to be given a strict and narrow construction (see **Dow v Attorney General** [1992] LRC (Const) 623 and **Makuto v State** [2000] 5 LRC 183).

[140] Queen's Counsel submitted that section 16(5) and (6)(c) of the Charter guarantee the right to be presumed innocent until proven guilty and the right to legal representation. Queen's Counsel accepted that although the right can be abrogated, the interference with those rights ought not to be greater than is necessary to protect the public interest, for example, to punish offenders and to remove criminal assets from circulation, as he recognised was the aim of POCA.

[141] Mr Leys referred to the preamble section of the Constitution which states the test that must be met to justify any restriction on the enjoyment of the rights guaranteed by the Charter, namely, "save as may be demonstrably justified in a free and democratic society". Queen's Counsel submitted that this provision was similar to that in the Canadian Charter of Rights and Freedoms and so guidance could be obtained from the Supreme

Court case out of Canada, **R v Oakes**. He referred to the case in detail and reminded the court that the burden of proving a limitation on a guaranteed right is on the party seeking to uphold the limitation which must be proved by a preponderance of probabilities, which must be applied rigorously. There were also criteria to be satisfied for the limit to be justified in a free and democratic society. Queen's Counsel submitted that the Charter focused on the protection of human rights and it was therefore incumbent in the instant case for ARA to demonstrate on a preponderance of probabilities that the limitation on the constitutional right of the appellants to defend themselves, by barring them access to their own funds for legal representation, was reasonably justified in a free and democratic society.

[142] Queen's Counsel submitted that the limitation imposed by section 33(4) of POCA was deleterious, unreasonable and draconian particularly in the light of the fact that the appellant had not been convicted and remained presumed innocent at the time of the hearing of the application. Additionally, Queen's Counsel submitted, the learned judge should have given the limitation in section 33(4) a narrow interpretation and found that the present proceedings did not relate to "an offence". Queen's Counsel therefore concluded that, in light of the reasons set out, section 33(4)(a) of POCA was unconstitutional as it had a "deleterious [effect on] and an unreasonable interference with the rights guaranteed by section 16(5) and (6)(c) of the Charter".

Submissions on behalf of ARA

[143] Mrs Caroline Hay examined the relevant provisions of POCA, particularly sections 32, 33 and 34. She submitted that pursuant to pure statutory interpretation, by its clear and ordinary meaning, section 33(4) exempts the access to, and use by the appellants of their funds for payment of legal expenses. Counsel submitted that the legal expenses referred to were those which relate to an offence that fell within those set out in section 33(5) of POCA. The exceptions applied to the appellant as she continued to be under investigation; there was reasonable cause to believe that she had benefitted from money laundering; and she had been charged and was before the court for an offence in respect of which she continued to be investigated. She submitted that, as harsh as it may seem,

Parliament had intended to exclude the recovery of reasonable legal expenses for certain matters which were under criminal investigation and charge. The court has no discretion in the current circumstances to make any such order.

[144] Counsel referred to the dicta of Sykes J in **ARA v Yowo Morle** and Scott Baker LJ in **S v Commissioners of HM Customs**, underscoring the principle that the purpose of POCA legislation and regimes in various jurisdictions is the same, which was to "preserve property believed to be the proceeds of crime pending the criminal prosecution so as to satisfy any confiscation orders that may be subsequently made" (see also section 33(6) of POCA).

[145] Counsel recognised the fundamental rights expressed in section 16 of the Charter but submitted that a denial of the request for a variation of the restraint order to allow for legal expenses does not amount to an automatic breach of the right to a fair trial, as there may be other relevant considerations, for instance, if there are other assets or if public funds are available (see **ARA v Yowo Morle** and **S v Commissioners of HM Customs and Excise**).

[146] Mrs Hay also submitted that "the well settled principle of the presumption of constitutionality" should be applied in this case. So, the provisions in POCA were cloaked with constitutional validity, unless the contrary was shown, and if there were alternative interpretations, the court should adopt the interpretation more consistent with constitutional provisions. She relied on the dictum of Panton JA (as he was then) in **The Jamaican Bar Association v The Attorney General and The Director of Public Prosecutions** [Consolidated Appeals] (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal Nos 96, 102 and 108/2003, judgment delivered 14 December 2007, for those contentions. Counsel also submitted that, in the instant case, the words in section 33(4) were clear. There was no ambiguity, so there was no need to choose one interpretation over another. As indicated, the legal expenses fell within the exception in section 33(4) of POCA and therefore could not be paid.

Submissions on behalf of the Attorney General

[147] In dealing with the issue as to whether in interpreting section 33(4) of POCA, the court ought to have regard to section 16(5) and (6)(c) of the Constitution, counsel reminded the court of its role in construing legislation and referred to what she described as certain general canons of construction.

[148] She referred firstly to "The Constitutional Law of Jamaica", by Dr Lloyd Barnett, published by the Oxford University Press, where Dr Barnett endorsed the principle that laws must be construed in a way to make them effective rather than ineffective and confirmed earlier arguments by counsel for the appellants and ARA, that where impugned legislation is open to two interpretations, one that makes the legislation constitutional and the other not, the court should choose the interpretation which preserves the validity of the legislation. This, she said, was the presumption of constitutionality as a canon of construction. But she also referred to the statement of Miss Tracy Robinson in her article "The Presumption of Constitutionality" (2012) 37 WILJ 1-4, where she made the distinction between the presumption of constitutionality as a canon of construction and as an allocation of the burden of proof. Counsel submitted that the canon of construction (presumption of constitutionality) was applicable where the legislative provision was obscure or ambiguous.

[149] So, since the court was obliged to interpret section 33(4) of POCA, counsel posed the question, was section 33(4) obscure or ambiguous? Counsel also submitted that K Anderson J was not limited to only taking account of the express provisions of section 33. He was obliged, counsel stated, to also interpret section 16(5) and (6)(c) of the Constitution, once the appellant had raised the rights guaranteed by those sections in support of the application to vary the restraint order.

[150] Counsel submitted further, that given the supremacy of the Constitution, and the presumption of statutory interpretation which requires that the legislation that has the effect of limiting existing fundamental rights should be interpreted strictly so as to preserve those rights as much as possible, it was important for the learned judge to have

recognised that the restrictions imposed by section 33(4) could impinge on the constitutional right to innocence guaranteed by section 16(5) of the Constitution. Additionally, the restrictions could impact the constitutionally guaranteed right for the appellants to be able to defend themselves by depriving them of the right to counsel of their own choosing (section 16(6)(c)). As a consequence, the CRR empowered the learned judge to decide whether he could determine such questions and give effect to the same.

[151] Counsel submitted, however, that section 33(4) of POCA was clear, there was nothing either obscure or ambiguous about it, and so the canon of construction of presumption of constitutionality was not applicable and need not have been invoked by the learned judge.

[152] Counsel said that since the application before the judge was not one for constitutional redress, and given the clear prohibition by section 33(4) of POCA, the relevant question was, could the learned judge grant a variation to permit the appellant access to her funds to pay legal fees without determining whether the section breached the appellant's right to the presumption of innocence or the right to defend herself with the legal representation of her own choosing? Counsel answered the question she posed in the negative.

[153] Counsel stated that this matter was one of those cases where questions arise in connection with constitutional rights which required the court to direct that a constitutional claim be commenced. So, if in interpreting legislation, the canon of presumption of constitutionality is not applicable and so the question of the constitutionality then becomes relevant, it then requires the State to provide evidence to justify what *ex facie* appears to be a contravention. Counsel submitted that the application before the court was in that category.

[154] Counsel referred to the decision of this court, **The Jamaican Bar Association v The Attorney General and The General Legal Council** [2020] JMCA Civ 37, where

the court held that with the advent of the Charter the test of constitutionality is the test established in the Canadian Supreme Court decision of **R v Oakes**, where the legal and evidential burden is on the State to prove the justification of the impugned legislative provisions.

[155] Counsel posited that although the appellant claimed that she was not seeking constitutional redress, nonetheless, the issues she raised require the court to determine the constitutionality of section 33(4) of POCA, as the appellant was seeking the variation of the restraint order on the basis of the guaranteed constitutional rights, and expecting that those latter rights, would trump the clear provisions of POCA. Counsel submitted that this was a clear challenge to the constitutionality of the provisions of POCA and maintained that such a challenge could not be done on the application to vary the restraint order that was before the learned judge. What the appellant ought to have done and needed to do was to file a constitutional redress claim. The State also would have the opportunity to justify by way of evidence, the impugned legislative provision, as the burden would be on the State to do so. The balancing exercise directed as the approach to be adopted in **R v Oakes**, could not be undertaken without that evidence.

[156] Counsel referred to the dictum of Sykes J in **ARA v Yowo Morle**, indicating that in an application for a variation of a restraint order, the applicant is entitled to the presumption that the property has been lawfully obtained and the presumption of innocence. In determining therefore whether one ought to grant the application, one must consider whether it is just to do so. Counsel submitted, however, that the facts of that case were decidedly different from those of the instant case, as there was no question before Sykes J in relation to the provision of legal fees against the express prohibition contained in section 33(4) and (5) of POCA. Counsel said that the matter "cannot be determined in a vacuum in light of the statutory prohibition in section 33(4). The challenge to the constitutionality of the section has to be determined and the appropriate way for that to be done is by a constitutional redress claim in the Supreme Court".

Analysis

[157] It is important to set out succinctly for ease or reference and convenience for this appeal, some basic principles, tenets, and canons of constitutional interpretation, which may be useful for the disposal of these grounds of appeal.

[158] The Constitution is a *sui generis* instrument to be interpreted in a broad and generous way. The learned authors of Fundamentals of Caribbean Constitutional Law state that "[t]he rules applicable to [constitutional] interpretation should be broader and more purposive than those relevant to interpreting ordinary legislation or other legal instruments" (see paragraph 3-017). Lord Bingham of Cornhill in **Reyes v R** [2002] UKPC 11 states that the language of a Constitution should not be treated "as if it were found in a will or a deed or a charterparty".

[159] The learned authors of Fundamentals of Caribbean Constitutional Law also referred to several powerful statements made in various cases by eminent jurists relating to the proper approach to the interpretation of Caribbean Constitutions. The authors made it clear that: "[t]he principle of generous interpretation, though strongly associated with the construction of constitutional bills of rights, is relevant to the interpretation of Caribbean Constitutions in general" (see paragraph 3-017). They continue with the powerful words of Byron CJ in **Attorney General of Grenada v The Grenada Bar Association** (unreported), Court of Appeal, Grenada, Civil Appeal No 8/199, judgment delivered 21 February 2000, where he understood the Constitution of Grenada to demand that:

> "… a broad, generous and purposive approach be adopted to ensure that its interpretation reflects the deeper inspiration and aspiration of the basic concepts on which the Constitution is founded…" (See paragraph 7)

The learned authors, in quoting dictum from Lord Hope of Craighead in **Lambert Watson v R** [2004] UKPC 34; (2004) 64 WIR 241 as to why it is important to give a generous interpretation to the bill of rights, said that "[t]he objective is to secure the realisation of the 'full measure of the rights and freedoms'" (see paragraph 3-018).

[160] The authors also make it clear that, "[t]he flipside of a generous interpretation of guaranteed rights is that derogations from rights must be construed narrowly in an effort to secure meaningful protection for the guaranteed rights" (see paragraph 3-020). The authors also noted Pollard J's statement in **R v Mitchell Ken O'Neal Lewis** [2007] CCJ 3 (AJ) that Caribbean Constitutions are organic "living instrument[s]" that are "always speaking". Indeed, the authors recognised and underscored the dictum of Jackson JA who accepted in **Inland Revenue Commissioner and Attorney General v Lilleyman and others** (1964) 7 WIR 496 that the Constitution's:

> "…full import and true meaning can often only be appreciated when considered as the years go on, in relation to the vicissitudes of fact which from time to time emerge…" (See page 506)

[161] Indeed, the Jamaican Charter was promulgated on 8 April 2011 to provide "more comprehensive and effective protection for the fundamental rights and freedoms of all persons in Jamaica". Of significance, Lord Hoffmann in **Lennox Boyce and another v R** [2004] UKPC 32; (2004) 64 WIR 37, when commenting on the role of judges with his usual insightfulness, states that:

> "… [judges] in giving body and substance to fundamental rights, will naturally be guided by what are thought to be the requirements of a just society in their own time. In so doing, they are not performing a legislative function. They are not doing a work of repair by bringing an obsolete text up to date. On the contrary, they are applying the language of these provisions of the Constitution according to their true meaning." (See paragraph 28)

[162] In the instant case, there are several relevant provisions of the Constitution as set out in paras [77]-[81] herein. It is clear that a person arrested and detained is entitled to communicate with and retain an attorney-at-law; and if charged with a criminal offence, is entitled to a fair hearing within a reasonable time by an independent and impartial court; shall be presumed innocent until proved or pleaded guilty; and is entitled to defend himself in person **or** through legal representation of his own choosing, **or** if he

does not have sufficient means to pay for legal representation, then such assistance as is required, in the interests of justice, is to be given to him.

[163] These provisions are clear, they are also to be given a liberal and purposive interpretation. There are no provisions in the legislation, POCA or otherwise, derogating from them. Section 2 of the Constitution indicates that (subject to sections 49 and 50), if any other law is inconsistent with the Constitution, the Constitution shall prevail, and the other law shall be void to the extent of the inconsistency.

[164] The provisions of section 33(4) and (5) of POCA are also clear. They have simply stated that the person affected by the restraint order may not access their funds for legal expenses in their defence of certain offences and those are stated in the subsection. What is not stated in that section, is that the person affected by the restraint order is not entitled to defend himself or through legal representation of his own choosing, **or** if without sufficient funds to pay, that he is not to be given such assistance, as is required in the interests of justice. What has been stated is that the person affected by the restraint order is not to have access to those restrained funds in order to do so. There is no inconsistency with the constitutional provisions. The Constitution remains inviolate. Those funds remain restrained until the subject matter is disposed of or potentially, *inter alia*, on conviction, confiscation orders are made, or, if otherwise, the restraints are discharged.

[165] The next question, it seems to us, is the failure of the legislature to make it clear that there is public funding available, as was the case in **S v Commissioners of HM Customs**. The Legal Aid Act and the regulations except funding related to the defence of money laundering offences under the Money Laundering Act. There is no mention in any further amended regulations that money laundering offences under POCA, as exist in this case, are exempted. Section 16 of the Constitution indicates that a litigant charged with a criminal offence is entitled to defend himself in person or through legal representation of his own choosing. Alternatively, if a litigant does not have sufficient means to pay for legal representation, he should be given such assistance as is required

in the interests of justice. It would appear that such assistance would be provided through the legal aid scheme, or by way of assistance or, otherwise, from the State. It does not seem therefore that in the circumstances of this case, any ruling/determination has been made by K Anderson and C McDonald JJ, which demonstrates a failure to interpret the provisions of section 33(4) and (5) of POCA restrictively, in keeping with constitutional interpretation.

[166] With regard to the interpretation of section 33(4) of POCA, K Anderson J confirmed that Miss Satterswaite had been arrested and charged under POCA, and the legislation allowed for restraint orders and provided for reasonable living and legal expenses other than those related to offences which fell under section 33(5). He stated that Miss Satterswaite had been charged with offences that fell within that section. As a consequence, he had no jurisdiction to make any variation order to meet reasonable legal expenses in the circumstances. Indeed, it was his opinion, as stated in paragraph [22] herein that "the statute precludes the court from varying the same in that regard". He recognised that there are provisions in the Constitution protecting legal advice rights, but he said that he equally had no jurisdiction to vary the order made by another judge on the basis that it was unconstitutional, particularly since those orders would have had to have been unconstitutional also. However, as stated in paragraph [132] herein, the learned judge should not shrink away from resolving questions that concern a litigant's constitutional rights, which arise otherwise than by way of original motion for constitutional redress and could determine constitutional questions as far as is applicable or necessary.

[167] C McDonald J, in interpreting section 33(4) and (5) indicated that the applicant was the subject of a criminal investigation started in Jamaica (pursuant to section 32(1)(1)(i)). So, by virtue of those provisions, he would have been unable to claim legal expenses. Although she recognised that POCA may seem "draconian", she stated that it has expressly exempted legal expenses in certain circumstances. She compared the legal aid regime which exists in the UK with that which prevails in Jamaica, and indicated that

in Jamaica, no provision has been made to provide public funding to respondents in restraint proceedings. That latter finding was not entirely accurate.

[168] Sykes J (as he then was) took the view in **ARA v Yowo Morle**, that as the application to vary the restraint order is made at a time when the suspected offender has not yet been on trial, he is therefore presumed innocent, and there is a further presumption that the property restrained has been legally acquired. He described this as the pre-judgment period, where the purpose and power of the restraint order is to preserve property so that it is available for confiscation orders after conviction. The court, he said, should not conclude that the defendant was a criminal or had acquired his property from crime. The court must remember that at the time the restraint order is sought it is hoped that at the end of the proceedings which precipitated the restraint order, the court will then grant orders enforceable against the restrained property. So, Sykes J reiterated that the restraint orders are made at a time when the outcome of the case is not known. It is at a time, he stated, when the presumption of innocence and the concept of legally acquired property "have greater sway".

[169] It is different, he said, in the post-judgment period, when there is a judgment that will be enforced against the restrained property. He concluded, "[t]he difference between the two periods is quite significant and should be borne in mind when applications for variations of the restraint orders are being considered". Sykes J made the point that POCA provides no guidance regarding the exercise of the power to vary a restraint order except that which he said was implied in the purpose and power of the restraint order as stated above. Finally, Sykes J concluded at paragraph 43 that in his opinion:

> "The cases show that it is indeed standard practice for the initial restraint order to make provision for reasonable living and reasonable legal expenses even without an application for variation. In other words, ideally, a properly drafted restraint order should, from the initial stage, make provision for reasonable living expenses and reasonable legal expenses **unless there is good reason not to do so or the exception to provision for legal expenses found in section 33 (4) applies**. However, failure to make these

> provisions is not incurably bad. The defendant can apply for variation of the order." (Emphasis supplied)

[170] So, in the final analysis, Sykes J recognised that reasonable legal expenses which were allowed, in section 33(4) were excepted in certain instances and were not payable under section 33(5) of POCA. The learned judges in the instant case also came to the same conclusion. We cannot find any fault in their interpretations of section 33(4) and (5) of POCA. However, there was no attempt to construe the specific and relevant provisions of the Charter. As indicated, questions arising in relation to one's constitutional rights could be examined otherwise than on motions for constitutional redress, and therefore ought to have been considered in the appellants' applications before the court. If section 16(6)(c) of the Charter had been examined, the appellants would have been allowed either to represent themselves, or to do so through legal representation of their own choosing, or if they demonstrated that they had insufficient means to pay for legal representation, then assistance, as necessary and applicable, in the interests of justice, ought to have been provided. Grounds (ii) and (v) in Miss Satterswaite's appeal and grounds (d), (h) and (i) in Mr Allen's appeal, would therefore fail. However, grounds (iv) in Miss Satterswaite's appeal and ground (g) in Mr Allen's appeal would succeed.

Issue 3: The constitutionality of section 33(4) and (5) of POCA

Submissions on behalf of the appellants

[171] In later written submissions filed in person on 21 August 2020, six years later than those filed on her behalf by Mr Leys, Miss Satterswaite submitted, on her own behalf and that of Mr Allen, that "no legislation passed by Parliament can prevail over the Constitution of Jamaica". If a legislative enactment was in conflict with the provisions of the Constitution, it must be denied any legal effect or force. She submitted that based on her interpretation of the Jamaica Hansard (Parliamentary Proceedings of the Honourable House of Representatives), relating to POCA, the Hon Minister of Finance indicated that POCA had been enacted to assist in deterring crime by taking the profit out of crime. She underscored that the focus of Parliament was that persons who had committed a crime should be deprived of the benefits of their crime. Miss Satterswaite said that ARA was in

its operation giving the provisions of POCA greater force than had been intended by the legislature, which was in contravention of the Constitution.

[172] She stated that if persons can be permitted access to their personal resources for civil proceedings, funds should be even more readily available to persons who had been charged with a criminal offence, but who are still presumed innocent, so that they would still be in a position to defend themselves. Failing that, Miss Satterswaite submitted that the State (including ARA) would have to assume the responsibility to pay the legal expenses for such accused persons. If that was not done, the State would be acting in clear breach of the constitutional provisions which protect the right of persons in Jamaica to obtain legal representation of their own choosing. The ultimate result of that, Miss Satterswaite submitted, was that an accused, like herself in this case, would be denied a right to a fair trial, another guarantee under the Constitution, in respect of which no limitation could be justified in a free and democratic society.

[173] Miss Satterswaite also submitted that the only fair route open to the State or ARA, if sections 33 and 34 of POCA were going to be interpreted and applied to the effect that no variation of the restraint order could be permitted, was for the State to pay for her legal expenses as failing to do that would result in serious oppression of her. She submitted that the orders made by K Anderson and C McDonald JJ, refusing her application and that of Mr Allen to access their funds to pay for their legal expenses, in the circumstances of this case, would not assist in ensuring a fair trial, had placed the provisions of POCA above the Constitution, and also the rights of the State over the rights of the citizens of Jamaica. She submitted that sections 33 and 34 of POCA were in contravention of section 16(5) and (6)(c) of the Charter, and therefore unconstitutional. Sections 33 and 34 ought to be declared unconstitutional as was the case in **Al-Tec Inc Limited**.

Submissions on behalf of ARA

[174] In addressing this issue, counsel for ARA referred to the fact that in **S v Commissioners of HM Customs**, the court considered the availability of public funding

to a respondent to a restraint order which exists in the UK. Counsel pointed out that although the appellants may argue that there is no such facility in Jamaica (although the Legal Aid Act does have provisions for legal aid in civil matters, but which are not yet in force), the appellants had not presented any evidence before the learned judges to demonstrate that they did not qualify for, or were not able to access legal aid. Counsel concluded, therefore, that there was no evidence of a breach of their constitutional rights, and it was against the above background that the learned judges had refused the applications for variation.

[175] Counsel submitted that even if a breach of a fundamental right has been established, as the rights are not absolute, the court would have to consider if derogation from those rights is demonstrably justifiable. Counsel submitted that the authorities are clear that once the infringement of the right has been established, the burden of proof shifts to the State or party relying on the limitation of the rights to prove justification of it. But this counsel maintained required evidence, and the way the issue had arisen in this matter did not provide the opportunity for that to be done. Counsel relied on the seminal speech of Dickson CJ in **R v Oakes** for clarity on the basis for, and the process that ought to be adopted.

[176] Counsel concluded that in determining whether the limitations are demonstrably justified the court has to conduct a balancing exercise, which exercise it would not have been able to conduct at the hearing of the application to vary the restraint order, as the constitutionality of sections 32-34 of POCA arose in arguments on the application.

[177] It was therefore correct, counsel submitted, for the learned judge to refuse the application to vary the restraint order. Counsel stated that if the appellants insist that their constitutional rights are being infringed by POCA, then the court should direct that they pursue the matter as dictated by the rules of court, so that the issues can be properly ventilated before the court, with the court receiving relevant evidence.

Submissions on behalf of the Attorney General

[178] With regard to the constitutionality of section 33(4)(a) of POCA, counsel reiterated that, the ratio in **JBA v AG and GLC**, with the advent of the Charter, referred to therein, relied on the test in **R v Oakes** as being applicable, and that the legal and evidential burden rests on the State to justify the impugned legislative provision. Evidence will therefore be required, counsel submitted, which was not currently before the court. Counsel also referred to the dictum of Morrison P in **Paul Chen Young and others v Eagle Merchant Bank and others** [2018] JMCA App 7 when dealing with the issue of whether there had been a breach of the constitutional right to have a fair hearing within a reasonable time, raised for the first time on appeal, where he concluded that evidence was required to make such a determination, and that an application for redress under section 19 of the Constitution was the appropriate route.

[179] Counsel therefore concluded that the appropriate route in the instant case was for an application under section 19 of the Constitution for constitutional redress, where the court could determine with evidence being provided by the State, whether section 33(4) of POCA infringes provisions in the Constitution. Counsel maintained that the Attorney General ought to be made a party to that application.

Analysis

[180] As we understand it, the appellants are focused on obtaining access to their restrained funds. Specifically, in the case of Mr Allen, he sought funds which he vehemently argued have been legitimately acquired, and which ought to have been, as was found by at least one judge at first instance, in respect of his pension emoluments, returned to him.

[181] The constitutional provisions state that a person who has been charged with a criminal offence is entitled to defend himself, or through legal representation of his/her own choosing, or if they do not have sufficient means to pay, then they ought to be given such assistance as is required in the interests of justice. The appellants argued that (section 33(4) and (5) of POCA) must be unconstitutional since, precluding them access

to their own funds, has the effect of denying them legal representation of their choosing, and placing them in a position of being unable to do so. This, they say, will ultimately result in denying them a fair trial in breach of those constitutional provisions. So, the issue is, if that is an accurate interpretation to be accorded all the relevant provisions, namely, that precluding access to their restrained funds equates to a limitation on their constitutional rights, would that pose a query as to whether those provisions of POCA are unconstitutional?

[182] This discussion starts with the dictum of McDonald-Bishop JA in **JBA v AG and GLC**. That case concerned the consideration of the constitutionality of several aspects of the anti-money laundering and counter financing of terrorism legislative measures, promulgated by Parliament, which had been extended to attorneys -at-law. As the court recognised, "by virtue of those legislative measures the attorneys-at-law were to be regulated in carrying out certain specific activities on behalf of their clients". The court noted that "attorneys-at-law did not believe that the legislative measures were consistent with their role in a free and democratic society, governed by the rule of law and the Charter".

[183] McDonald-Bishop JA examined whether the presumption of constitutionality was the appropriate test in the context of the Charter in determining the constitutionality of the regime with the extended legislative measures which the attorneys opposed. After much deliberation, and consideration of submissions and authorities, she noted that at first instance, the full court had correctly identified that as the Charter was presently worded, there must be a consideration of whether there should be a departure from the presumption of constitutionality of the legislative provisions. The court concluded in paragraphs [119] and [120] as follows:

> "[119] I am drawn into accepting the views, embraced by the appellant and the GLC, that the Charter is, in fact, an evolutive and innovative document, which requires a new approach to its interpretation. This is in line with the thinking in Canada and New Zealand, in treating with similarly worded constitutional provisions. In **Attorney General of Manitoba**

> **v Metropolitan Stores (MTS) Ltd** [1987] 1 SCR 110, it was held that the 'innovative and evolutive character of the Canadian Charter of Rights and Freedoms conflicts with the presumption of constitutional validity in its literal meaning, [which is], that a legislative provision challenged on the basis of the Charter can be presumed to be consistent with the Charter and of full force and effect'. I adopt this dictum.
>
> [120] In keeping with the letter, spirit, and intendment of the Charter, the R v Oakes two-stage approach seems to be more appropriate than the presumption of constitutionality approach in dealing with Charter cases."

[184] The court further made it clear that the real starting point in the analysis was that the Charter guarantees the rights and freedoms, which it seeks to protect, and those rights and freedoms should not be abrogated, abridged or infringed, unless it can be demonstrated (not merely asserted) that such abrogation, abridgment and/or infringement, is justified in a free and democratic society. So, the evidential and legal burden is cast on the State to bring justification upon proof by the appellants of that abrogation, abridgment, or infringement of the Charter right. So, there is a positive duty on the State to prove constitutionality. McDonald-Bishop JA said, endorsing the article by Miss Tracy Robinson, "The Presumption of Constitutionality", "[t]he Charter brings with it a new dawn which ought to be reflected brightly in the court's treatment of Charter rights. The guaranteed rights and freedoms must be taken seriously as warranted by the dictates of a free and democratic society".

[185] McDonald-Bishop JA also made it clear that the standard of proof is the civil standard, namely proof by a preponderance of probability.

[186] It is clear that the court has to conduct a balancing exercise, and that can only really be undertaken if there is evidence. There is the question of the proportionality between the extent of the applicant's alleged breach of the right, and on the State on whom lies that heavy burden of justification of any limitation. The appellants would therefore have to go through that approach even if the proceedings are undertaken by the State.

[187] The appellants would firstly have to establish the breach of their constitutional right, and if there is any limitation of that right in the legislation, that would then have to be proved to be justified by the State in this free and democratic society. That approach could have been requested at the hearings before K Anderson and C McDonald JJ, and the judges could have directed that the constitutional issues be dealt with by the full court, evidence adduced, and the balancing exercise undertaken. Unfortunately, that was not pursued. But if the appellants are desirous of pursuing and obtaining the order that section 33(4) and (5) of POCA are unconstitutional, the two-stage process which is outlined in **R v Oakes**, and which has been endorsed by this court in **JBA v GLC and AG**, must be followed.

[188] There has also been the decision of this court in **Paul Chen Young v Eagle Merchant Bank**, where Brooks JA (as he then was) addressed the issue of the Supreme Court having original jurisdiction, in matters relating to questions concerning constitutional rights (as opposed to dealing with these issues on appeal). He said at paragraph [178] that:

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

[189] The circumstances of this case seem to cry out for determination of these alleged breaches of constitutional rights being heard in the Supreme Court, being the court of original jurisdiction to deal with the evidence which ought to be adduced to prove the respective breaches of those constitutional rights, and the justification of any alleged limitations on those rights. Since, based on the principles enunciated above, we are unable to make a determination as to the constitutionality of section 33(4) and (5) of

POCA, at this stage, ground (vi) in Miss Satterswaite's appeal (i)-(vi) and ground (f) in Mr Allen's appeal must fail.

Issue 4(i)(a): Pension emoluments

Submissions on behalf of Mr Allen

[190] Miss Satterswaite submitted that C McDonald J had overreached her jurisdiction when she heard the application regarding the pension emoluments since that had been dealt with by Edwards J. Further, she contended, there was no application for the pension emoluments to be restrained again and, in any event, the pension emoluments cannot be realizable property.

[191] Miss Satterswaite submitted that the order made by Edwards J had removed the pension emoluments from the restraint order and thus the learned judge could not make any order relating to that issue.

[192] In written submissions that had been filed on 22 May 2015, by attorneys-at-law then appearing for Mr Allen, it was submitted that the issue of Mr Allen's entitlement to his pension emoluments had been determined since 17 March 2014, by Edwards J, and it was not open to C McDonald J, a judge of coordinate jurisdiction to act as an appellate court, re-examine the predetermined issue and make a further ruling on the subject matter. **The Geon Company v Thermo-Plastics (Jamaica) Ltd**) (unreported), Supreme Court, Jamaica, Suit No E300/1998, judgment delivered on 23 January 2008, and **Bobette Smalling v Dawn Satterswaite** [2014] JMCA Civ 55 were relied on in support of the submission. It was urged that the attempt of C McDonald J, to overrule the order of Edwards J, was a 'futile exercise' and should be set aside.

Submissions on behalf of ARA

[193] Mrs Hay, in response, maintained that the issue of the pension emoluments was live before C McDonald J. She noted that in the judgment the learned judge has rehearsed the submissions which had been made, and it was clear that the issue was argued fulsomely, and at no point was objection taken that the learned judge was not

empowered to hear the matter of the pension emoluments. In the written submissions which were filed from 8 October 2015, it was submitted that submissions were advanced on both the issues affecting the pension emoluments and the funds claimed by Mr Allen in the Mayberry Investments account.

[194] It was further submitted that C McDonald J made no additional or appellate decision on the pension emoluments. It was contended by Mrs Hay that it could not be denied that Edwards J had issued the order relating to the pension emoluments without any reference to argument, whatsoever, by ARA and despite ARA's protestations that an adverse order was being made against it by the court, without hearing from the disadvantaged party and to its detriment.

[195] It was contended further that the question of whether the pension emoluments fall outside the reach of POCA and whether B Morrison J's order should be varied to grant access to pension emoluments was specifically put forward by Edwards J for consideration by the court at a future date. Thus, it was contended, order 2 made by Edwards J could only be interim. It was also stated in these submissions that leave to appeal was refused.

[196] In conclusion, it was submitted that in these circumstances where there had been absolutely no hearing on the merits of the variation application, the order made by Edwards J could be nothing more than interim and subject to future consideration by the court at the date set by her.

Analysis

[197] The resolution of this issue must firstly be concerned with a determination of what was the true nature of the orders made by Edwards J. The minute of order signed by her indicates that she heard from all the attorneys-at-law, including those who represented ARA, before making the orders. We have not had the benefit of the submissions she heard. There were no reasons for the judgment from Edwards J indicating the basis for making those orders. However, it would be improper to look behind what is reflected in

the minute of order and determine whether Edwards J did not in fact hear arguments from ARA.

[198] If the order made was arrived at after hearing arguments, even if made over the protestations of the attorneys-at-law representing ARA, its full meaning would have taken effect. Further, there was nothing said in the order itself to indicate that it was of an interim nature, as Mrs Hay had contended. It is safe to say that if Edwards J intended the order to be interim, she would have taken care to have said so in unambiguous terms.

[199] The order stated that "all pension emoluments, due, payable or which have already been paid" were "released from the Restraint Order granted by Mr. Justice Bertram Morrison made on the 16th January, 2014". This, on the face of it, expressly removed pension emoluments that were due to be paid and even those already paid from the initial restraint order entirely.

[200] Thus, although the order sought initially related to access to all pension emoluments and no less than 50% of the amounts standing in the Mayberry Investments account, the fact that only the former was released from the restraint order, must be considered of some significance. The conclusion that can properly be reached is that the pension emoluments were no longer subjected to any restraint and there could therefore be no further order made in respect to them, by virtue of the applications remaining for consideration in the court below. It could be said that the pension emoluments had been, in effect, carved out of the orders sought and there remained for consideration only the matter of the variation of the restraint order to provide for the payment of living expenses and legal fees, and to allow access to no less than 50% of the amounts in the Mayberry Investments account.

[201] The fact that in the written submissions filed in this court on behalf of ARA, it was urged that the order was made despite protestations by them, suggests that Edwards J did not make the order without hearing something from ARA. It is also somewhat curious that in the written submissions it was indicated that leave to appeal was refused.

However, the fact is that no such order was recorded in the formal order signed by Edwards J but the assertion in the submission may well be viewed as indicating an awareness that the order was one which required being appealed to be set aside.

[202] Ultimately, the order made by Edwards J which released the pension emoluments from the restraint order was not an *ex parte* or interim order. As such, C McDonald J, as a judge of concurrent or co-ordinate jurisdiction had no jurisdiction to review the order in a manner that could only properly be done by this court.

[203] However, in fairness to C McDonald J, it must be acknowledged that there is no indication that the question of her jurisdiction to deal with the order in relation to the pension emoluments was raised before her. It is clear from her judgment that there were extensive submissions made by the parties on the issue of whether the pension emoluments, along with the sums in the Mayberry Investments account were realizable. At paragraph [22] of her judgment, C McDonald J noted the following:

> "It is [Mr Allen's] case that the sum of $240,000 now released to him as his pension payments is not realizable property and that the pension proceeds ought not to be used as a source of income as it was [sic] never liable to restraint in the first place..."

[204] C McDonald J, after reviewing the submissions made on Mr Allen's behalf, then noted that it was ARA's position that the pension emoluments fell within the definition of realizable property. She subsequently found that the argument that pension rights could never be realizable because they are legitimately acquired assets, was unsustainable.

[205] C McDonald J, at paragraphs [35] and [36], stated the following, in what could be regarded as her concluding remarks on this issue: -

> "[35] I find that Section 33(3) of POCA clearly includes both pension entitlements and payments in that the entitlement is held by [Mr Allen] and the money is transferred to him now since the order was varied by Edwards J…

> [36] The Scotia pension fund is an entity in which [Mr Allen] has a *vested interest* in respect of pension payments; as soon as payments are made from the pension fund to him it is now his property even if held by the bank. It is therefore realizable property. That property is then subject to a restraint order."

[206] C McDonald J clearly appreciated that the restraint order in relation to the pension emoluments, had been affected by the order of Edwards J in finding that the order had been varied and that the money had been transferred to Mr Allen. However, the basis on which she concluded that the order was a variation is not clear since the terms in which the order was made had no reference to it being such.

[207] C McDonald J seemingly was satisfied that she could subject the pension emoluments to a restraint order, in the face of Edwards J's order, releasing it from the order granted by B Morrison J. She did not appreciate that the order made by Edwards J had, in effect, meant the pension emoluments, having been so released, should not have formed a part of her consideration, especially since there was no application for the sums to be restrained again.

[208] C McDonald J would have erred in reviewing and making findings in relation to the pension emoluments and then re-imposing a restraint order on the pension emoluments, in this way, which amounted to a reversal of the order made by Edwards J. There is therefore merit in the complaint made by Mr Allen that C McDonald J proceeded to act as a Court of Appeal. He therefore succeeds on grounds (a) and (b).

Issue 4(i)(b): The Mayberry Investments funds

Submissions on behalf of Mr Allen

[209] Mr Allen, in seeking to have the restraint order varied to allow him access to no less than 50% of the sums in the Mayberry Investments account, asserted that those sums were outside of the ambit of sections 32 and 33 of POCA. The main thrust of the submissions advanced in relation to these sums, was that they came from a legitimate source, namely, his employment with a reputable bank for 40 years, and as such, could not be made the subject of a restraint order.

[210] Miss Satterswaite contended that POCA states that such an order could not be made in relation to property obtained before POCA was passed, which meant that such an order could only be made in relation to property obtained after 30 May 2007. She noted section 2(10) of POCA which provides:

> "2(10) Nothing in section 5 (making of order), 6 (criminal lifestyle), 7 (conduct and benefit), 8 (assumptions for determining benefit from general criminal conduct), 9 (effect of forfeiture order), 10 (voidable transfers), 20 (reconsideration of case where no order was made), 21 (reconsideration of benefit where no order was made), 22 (reconsideration of benefit after order is made), or 30 (court's power on appeal) refers to conduct occurring, offences committed or property transferred or property obtained, before the appointed day."

[211] Miss Satterswaite submitted that Mr Allen's funds in Mayberry Investments having been earned before 30 May 2007, cannot be regarded or treated as realizable property. She made submissions that specifically addressed the pension emoluments, which she maintained, were also not realizable, but given the finding of this court in relation to those funds, the submissions will nonetheless be considered, so far as they could be viewed as relevant to the Mayberry Investments funds.

[212] Miss Satterswaite noted that ARA relied on the provisions of UK POCA, equivalent to our POCA, which she pointed out does not have "an interpretation section for a cutoff date". She submitted that UK POCA does not have a date before which the Act does not apply whereas, she contended, our POCA makes it clear that no order can be made to forfeit any property which was obtained before 30 May 2007. She submitted that POCA has "no backward reach". Further, she submitted, no criminal conduct before 30 May 2007 can generate property that could be deemed to be realizable property within the meaning of POCA. It was her ultimate submission that realizable property under our law is any free property generated by criminal conduct occurring after 30 May 2007.

[213] Miss Satterswaite referred to **ARA v Yowo Morle**, where she contended Sykes J made the point that at the stage of an application for a variation of a restraint order under

POCA, the applicant is entitled to the presumption that the property is legally acquired as well as the presumption of innocence. She contended that if the source did not matter there would be no presumption as set out by Sykes J.

Submissions on behalf of ARA

[214] In response, Mrs Hay submitted that the definition of realizable property in the legislation includes all free property held by a defendant and the source or date at which the property was acquired is immaterial. She further contended that there is nothing in the statute that introduces the notion that realizable property is restricted to tainted property. She referred to **In re Peters** [1988] QB 871 and **Jennings v Crown Prosecution Service** [2005] EWCA Civ 746; [2006] 1 WLR 182 in support of these submissions.

[215] Much of the submissions counsel made were addressing the question of whether the pension emoluments could be made subject to a restraint order. In particular, the submissions dealt with the question of whether the pension emoluments were a chose in action and therefore were restrainable. As has already been noted, given the finding of this court in relation to the pension emoluments, there is no need to resolve that issue for the purposes of this appeal.

Analysis

[216] As indicated previously, POCA makes it clear that a judge of the Supreme Court may make a restraint order prohibiting any person from dealing with any realizable property held by a specified person, once any of the conditions set out in section 32(1) is satisfied (section 33(2)). The first condition to be satisfied, relevant to this issue, is the stage of the proceedings that the application is made. These can loosely be described as the investigative stage and then the stages following the investigation, namely, the charge and post-conviction stages.

[217] As also stated earlier, section 2 of POCA defines 'realizable property' as any free property held by the defendant or any free property held by the recipient of a tainted

gift. 'Free property' is defined as property in respect of which no forfeiture order is in force under any other law. 'Property' is defined as all property, wherever situate, including money, all forms of real or personal property and things in action and other intangible or incorporeal property. It is apparent that the issue which must be addressed, in considering if any property held by any defendant could be made the subject of a restraint order, is whether there is any forfeiture order in force in relation to that property.

[218] In **In re Peters**, the English Court of Appeal was considering the appropriateness of a variation of a restraint order obtained under the Drug Trafficking Offences Act 1986. The provisions for making such an order were largely similar to that contained in POCA. Lord Donaldson MR noted that that was the first occasion on which the court had to consider a restraint order under that legislation. In making general observations about the legislation, he had this to say about the purpose of a restraint order at page 874: -

> "The Act itself is terminologically complex, but the legislative intention and the broad scheme whereby that intention is to be achieved are reasonably clear. The intention is that no one convicted of drug trafficking offences shall be allowed to retain any part of the proceeds of his crime. The broad scheme involves the making of confiscation orders at the time of sentencing and of prior protective orders. The latter are designed to prevent an accused rendering a confiscation order inappropriate or nugatory by disposing of his assets between the time when an information is about to be laid against him and the making of a confiscation order in the event of conviction."

And at page 879, he had this to say: -

> "[Counsel for the appellants] points out that a court faced with the making or variation of a restraint order or a charging order is not concerned with the making of a confiscation order or a process of execution in satisfaction of such an order. It is concerned solely with the preservation of assets at a time when it cannot know whether the accused will or will not be convicted. Such a jurisdiction is closely analogous to that exercised by the courts in relation to *Mareva* injunctions and might, not inaccurately, be referred to as a 'drugs Act *Mareva*.'

> Under the *Mareva* jurisdiction the interest of the potential judgment creditor has to be balanced against those of actual creditors, whether secured or unsecured, and of the defendant himself who may succeed in the action and should be fettered in his dealing with his own property to the least possible extent necessary to ensure that the processes of justice are not frustrated."

[219] It must be borne in mind that whereas under that legislation the focus was on drug offences and the confiscation of proceeds related to that offence, POCA is concerned with the identification and recovery of the proceeds of any crime. In the case on which Miss Satterswaite relied, **ARA v Yowo Morle**, Sykes J, partially guided by what was said by the court in **In re Peters**, made the point at paragraph [15], that the clear purpose of restraint powers "is to preserve property by preventing dissipation so that it is available for confiscation, for meeting any pecuniary penalty order made by the court, to satisfy the sum identified as representing some person's benefit from criminal activity or satisfying any civil recovery order that may be made". This correct statement of the purpose of the restraint powers can be expanded to include the fact that the source and date of acquisition of the property to be restrained is therefore not initially relevant.

[220] It was submitted that Sykes J in **ARA v Morle** made the point that an applicant, in seeking to have a restraint order varied, is entitled to the presumption that the property is legally acquired as well as the presumption of innocence. The full context in which the statement was made is however significant. At paragraph [27] he went on to say the following:

> "The unstated foundations of [the analysis of Rix LJ in **R v AW** [2010] EWCA Crim 3123] analysis were the presumption of innocence and the presumption that property was legally acquired, that is to say, in the pre-judgment period, the court should not conclude that the defendant was a criminal or acquired his property from crime. In the pre-judgment period, the restraint order is sought on the basis that it is hoped that at the end of the legal proceedings which precipitated the restraint order the court will grant orders which are then enforced against the restrained property. It is usually granted at a time when the outcome of the case is not known. The

> presumptions of innocence and legally acquired property have greater sway in this period. In the post-judgment period, the Crown would have secured a judgment in its favour and so there is now an actual judgment which can be enforced against the restrained property. The difference between the two periods is quite significant and should be borne in mind when applications for variation of restraint orders are being considered."

[221] It seems to us that Sykes J ought not to be taken to be saying that the presumptions meant that not all property could be restrained initially, but certainly, the presumptions must be paramount considerations when applications are made to vary the restraint order, such that the applicant can be given access to his funds to provide for the expenses provided for in the legislation. In other words, it is in recognition of the fact that the restraint order can potentially deprive the applicant of all his assets and thus cause hardship, that the presumptions that he is innocent, and the assets were legally obtained, become significant, and thus the application for variation is permissible, but circumscribed by the legislative provisions.

[222] The day appointed by the Minister for POCA to come into operation, 30 May 2007, becomes relevant, firstly, in consideration of what amounts to criminal conduct (see section 2(1) of POCA). The issue of criminal conduct and by extension the date of 30 May 2007, becomes relevant in satisfying the condition that the alleged offender has benefited from his criminal conduct. On a careful reading of section 2(10) of POCA, it is apparent that the limitations imposed in that section, referencing the appointed date, do not apply directly to a restraint order.

[223] In the circumstances of a case such as this, in the event of a conviction, ARA could apply for a forfeiture order or a pecuniary penalty order, at which time, the court would be obliged to consider, not only if the defendant has benefitted from his criminal conduct, but also, identify property that represents the benefit from criminal conduct. It is at this stage that the question of the date the property was acquired, and the source becomes relevant.

[224] However, the fact is that for the purposes of the restraint order, the judge must be satisfied that there is reasonable cause to believe that an alleged offender has benefitted from his criminal conduct but is not concerned with whether the property to be restrained was the benefit of that conduct. C McDonald J did not err when she held that all of Mr Allen's resources could and should be restrained even in circumstances where he was able to show that the funds were legitimately acquired. The entire monies in the Mayberry Investments fund could properly be made the subject of a restraint order pursuant to section 33. Thus, ground (d) of Mr Allen's grounds of appeal fails.

Issue 4(ii): C McDonald J's analysis of R v Waya

Submissions

[225] C McDonald J at paragraph [22] noted that, in the submissions made to her, **R v Waya** was relied on to support the contention that the pension emoluments could not be restrained because they had no market value and did not fall into the definition of property. Further, she noted that the case was also referred to so that she could advise herself on what realizable property is, and it was suggested, that by way of analogy, the way in which the reasoning, in that case, could assist her.

[226] C McDonald J proceeded to quote extensively the headnote of **R v Waya** and ultimately concluded that it was distinguishable on many fronts from the case at bar. She thus was satisfied that the restraint order proceedings were fundamentally different from confiscation proceedings otherwise called benefit proceedings. At paragraph [37] she stated:

> "…Waya was a case where the Defendant was convicted of criminal offences and sentenced and the Crown Court at Southwark was assessing any benefit from offending. Benefit Hearings as in Waya take place at the end of criminal proceedings when all evidence on which the Crown relied is known and pronounced upon.
>
> Restraint Order application takes place especially where an offender has not been charged, at an early stage and so it can be argued that cases such as Waya are of limited relevance

> in the context of an application for a Restraint Order made at the early stages of an investigation or prosecution. R v Waya is more concerned with the proceedings that take place in the context of what would be the equivalent of sections 5 and 7 of POCA."

[227] Since the case was relied on primarily to support the contention that a pension emolument was a chose in action and therefore not realizable, the submissions made before this court were focused on that issue. Given the general nature of the complaint about C McDonald J's finding, this discussion will be focused on whether she did in fact err when she sought to distinguish the restraint order and the confiscation order on the basis she did.

[228] **R v Waya** was heard by a nine-member panel of the UK Supreme Court to determine primarily the question of whether the operation of the confiscation regime might give rise to an order which infringed article 1 of the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950. As stated in the headnote, the issues before the court related to: (i) the impact of the Human Rights Act 1998, in particular whether the application of the rules for the calculation of benefit under the 2002 Act might, in some circumstances, give rise to a contravention of that article which provided for entitlement to peaceful enjoyment of possessions, and (ii) the identification and valuation of the property obtained by the appellant.

[229] Only a brief statement of relevant facts of the case is considered necessary. The appellant had purchased a flat using some monies from his own resources and the balance from monies provided by a mortgage lender. In order to obtain the loan, he had made false statements about his employment record and his earnings. He was convicted of one count of obtaining a money transfer by deception. Pursuant to an application under part 2 of UK POCA, a confiscation order was made against him. His dissatisfaction with the amount of the order led him to challenge the basis on which the amount was determined which culminated in the hearing before the UK Supreme Court, which allowed his appeal and quashed the confiscation order.

[230] The first significant difference between the restraint order under consideration in this case and the confiscation order being challenged in **R v Waya**, is that the former was a pre-conviction order whereas the latter was a post-conviction order that was being considered. It is settled that one of the purposes of the former was to prevent the dissipation of assets that may be needed to satisfy any orders ultimately made to deprive the offender of proceeds of his criminal conduct. The latter is to actually deprive the offender of those identifiable proceeds. There will necessarily be different considerations in the approach for determining the property to be affected by the two orders.

[231] Lord Walker SCJ and Sir Anthony Hughes, writing on behalf of the majority, in addressing the statutory provisions relating to a confiscation order had this to say at paragraph [7]:

> "The other structural feature is that the making and quantum of a confiscation order involve three stages. The first stage is the identification of the benefit obtained by the Defendant (ss 6(4), 8 and 76 of POCA). The second stage is the valuation of that benefit. It may fall to be valued (ss 79 and 80) either at the time when it is obtained, or at the date of the confiscation order ('the confiscation day'). Intermediate events may be relevant, especially for the tracing exercise that may be required under s 80(3), but the valuation date must be either at the beginning or at the end of the process. The third stage is the valuation as at the confiscation day of all the Defendant's realisable assets (designated in s 9 as 'the available assets'). This value sets a cap on the amount ('the recoverable amount') of the confiscation order (s 7)."

[232] From this identification of the stages involved in the making of a confiscation order, another important difference between the confiscation order and the restraint order which is apparent is that there is no requirement for the identification of any benefit which must then be valued in the making of a restraint order. Any free property held by the defendant is subject to the restraint order.

[233] It is useful to note that although there is reference to the term realizable assets as one of the items to be valued in one stage of the confiscation order, the term is said to be designated in section 9 of UK POCA as 'available assets'. Section 9 provides:

> "(1) For the purpose of deciding the recoverable amount, the available amount is the aggregate of-
>
> (a) the total of the values (at the time the confiscation order is made) of all the free property then held by the defendant minus the total amount payable in pursuance of obligations which then have priority, and
>
> (b) the total of the values (at that time) of all tainted gifts."

The difference between this definition of realizable assets in UK POCA and realizable property as defined in our POCA is immediately apparent.

[234] The learned judge cannot be faulted in appreciating the differences between the confiscation order as sought in **R v Waya** and the restraint order that she was considering. She did not err when she stated that the proceedings were fundamentally different. Ground (c) has no merit and must therefore fail.

Issue 5: The costs orders made by K Anderson and C McDonald JJ

Submissions

[235] Mr Leys challenged the order of K Anderson J that each party bear their own costs, as he submitted that Miss Satterswaite, having succeeded on one aspect of her application, namely, to vary living expenses, pursuant to rule 64.6 of the CPR, the court ought to have made an order for costs to the appellant on the issue on which she had succeeded.

[236] Mr Paul Beswick, in written submissions, indicated that C McDonald J had incorrectly exercised her discretion to award half costs to Mr Allen as she gave no consideration to rule 64.6(4) of the CPR which sets out the general rule and other considerations the judge must bear in mind when making a costs order. He also noted

that she gave no reasons for the costs order in circumstances where she had refused variation of the restraint order to provide funding for Mr Allen's legal expenses and had restrained his pension emoluments.

[237] In response to those submissions, Mrs Hay, on ARA's behalf, referred to the specific provisions in the CPR dealing with the basis and entitlement for costs. She stated correctly that costs are in the discretion of the court, and that the appellate court is always reluctant to interfere with a judge's discretion and would only do so in certain limited circumstances (see **ASE Metals NV v Exclusive Holiday of Elegance Limited** [2013] JMCA Civ 37 and **Hadmor Productions Ltd and others v Hamilton and others** [1982] 1 All ER 1042). As the learned judges had complied with the relevant principles and the decisions were not aberrant, their orders for costs ought not to be disturbed.

Analysis

[238] The order of K Anderson J was that the costs of the application should be borne equally between the parties. The order of C McDonald J awarded half costs to Mr Allen. Both judges gave no reasons for their decision, but their decisions do seem, on the face of it, to be self-explanatory.

[239] As is well known, the decision on costs is an exercise of the discretion of the court which must of course be exercised judicially. In this case, the learned judges considered that there were adjustments made to the reasonable living expenses on the application to vary the restraint order previously made by B Morrison J and adjusted subsequently by Sykes J. However, the application for variation in respect of reasonable legal expenses was denied. The costs orders made by both judges, therefore, seemed in keeping with rule 64.6 of the CPR. Each successful/unsuccessful party was ordered to pay the costs of the unsuccessful/successful party. In the circumstances, each party succeeded on an issue, and so the burden of costs, in respect of Anderson J, was ordered to be borne by the parties equally, and the order in respect of C McDonald J, viz one-half of the costs to Mr Allen was based on his partial success.

[240] It is therefore highly unlikely that this court would consider interfering with the discretion of the learned judges in the court below, on the award of costs, particularly when there is no indication of a misunderstanding of the law applicable to the grant of costs generally, or of the facts on which the orders were based (see **Hadmor Productions Ltd v Hamilton**). The orders seem eminently balanced, fair and just and we will not disturb them. Ground (vi) in Miss Satterswaite's appeal and ground (j) in that of Mr Allen also fail.

Conclusion

[241] In the light of all of the above, it is our opinion that in the hearing of the applications for variation of the restraint order, the court ought to give considerations to the provisions of the Charter relating to legal representation particularly sections 14 and 16. It is clear from the authorities that not every failure or omission by a government officer or entity to comply with the law, will result in a constitutional breach requiring an application for constitutional redress. Each litigant must appreciate that so that the value of the constitutional claim is not diminished, and its use is not misused or abused. However, if these rights are infringed and the litigant is acting in good faith, then the claim for redress should be pursued. But if there is a subsequent dispute as to fact, then if the claim for redress has been commenced by originating motion, it should be adjusted to proceed by way of a claim form or a fixed date claim form. It is important to consider the appropriate procedure before any action is commenced. However, the court will always review the circumstances and determine the matter in the interests of justice, even if there is alternate available process.

[242] In this case, the proper forum was an important consideration. The court found that the CRR were revoked by the CPR, but the CPR permits the court to use its discretion to deal with questions arising for the consideration of constitutional rights, even if the correct originating document has not been used, in keeping with the overriding objective and the interests of justice. A court need not be constituted as a constitutional court, and a claim need not come before the court as an originating motion for a judge of the Supreme Court to determine questions arising that relate to a party's constitutional rights.

It can do so, as far as is applicable and necessary, and once the relief sought is not for constitutional redress. In this case, the judges ought to have addressed the question relating to the appellants' constitutional rights whilst hearing the applications to vary the restraint orders.

[243] The principles of the interpretation of Constitutions are clear. The Constitution must be given a broad and purposive interpretation, and any limitation on its provisions must be strictly construed. Section 16 of the Constitution permits every person if charged with a criminal offence, to either defend himself in person, or through legal representation of his own choosing, or if he does not have sufficient means to pay for legal representation then such assistance as is required in the interests of justice, must be given to him, which we determine is through public funding (the legal aid scheme, the State, or otherwise). That is clear.

[244] Section 33(4) and (5) of POCA does not permit the appellants access to their restrained funds, in respect of reasonable legal expenses if referable to the offences charged. Those provisions do not preclude the appellants defending themselves, or through legal representation of their own choosing, or, if they do not have sufficient means to obtain legal representation, access to public funding.

[245] If the appellants require the court to declare section 33(4) and (5) of POCA unconstitutional, they must proceed through the Supreme Court's original jurisdiction and pursue the two-stage process outlined in **R v Oakes**, and which has been endorsed in **JBA v GLC and AG.**

[246] In this case, the order of Edwards J, removing Mr Allen's pension entitlements from the restraint order, has not been appealed, could not be disturbed by a judge of co-ordinate jurisdiction, and therefore remains extant. The funds in Mayberry Investments, even if legitimately obtained, fall under the rubric "realizable assets" in POCA, are therefore subject to the restraint order, and not accessible to Mr Allen, at this time. That must await the determination of the matter.

[247] The orders of costs granted below, are, as is well known, at the discretion of the court, appear reasonable in all the circumstances, and should not be disturbed.

[248] In this court, in keeping with the principles applicable to the award of costs, and pursuant to rule 64.6 of the CPR, which are applicable to awards made in this court, particularly that costs should follow the event, in our opinion, the appellants would be entitled to half costs of the appeal.

BY THE COURT

ORDER

1. The consolidated appeal against the orders made by K Anderson J on 31 March 2014 and C McDonald J on 30 April 2015, is allowed in part.
2. The orders made by K Anderson and C McDonald JJ, refusing variation of the restraint order made by B Morrison J on 16 January 2016, to provide for reasonable legal expenses, are affirmed.
3. It is hereby declared that section 33(4) and (5) of the Proceeds of Crime Act do not permit Miss Dawn Satterswaite and Mr Terrence Allen (the appellants) access to funds restrained pursuant to those sections. Any declaration that those sections are unconstitutional should be pursued by way of motion/claim, under section 19 of the Constitution of Jamaica, for constitutional redress.
4. It is hereby declared that the Judicature (Constitutional Redress) Rules were revoked by the Civil Procedure Rules, but the Civil Procedure Rules permit the court to use its discretion to deal with questions arising for the consideration of constitutional rights, even if the correct originating document has not been used, in

keeping with the overriding objective and the interests of justice.

5. It is hereby declared that pursuant to section 16(6)(c) of the Constitution of Jamaica, the appellants are entitled to defend themselves in person or through legal representation of their own choosing **or**, if they have not sufficient means to pay for legal representation, to be given such assistance as is required in the interests of justice. This could be done through the legal aid scheme or otherwise.

6. The order made by C McDonald J re-imposing the restraint order on pension emoluments is set aside.

7. The order made by Edwards J on 17 March 2014, that "All pension emoluments, due, payable or which have already been paid by the Bank of Nova Scotia Jamaica Limited are released from the Restraint Order by Mr. Justice Bertram Morrison made on the 16th January 2014", remains extant.

8. The orders for costs made by K Anderson and C McDonald JJ, in the court below, are affirmed.

9. The appellants are awarded 50% costs on appeal to be taxed if not agreed.