[2023] JMCA Civ 33

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MISS JUSTICE SIMMONS JA
THE HON MR JUSTICE LAING JA (AG)

SUPREME COURT CIVIL APPEAL NO COA2021CV00068

BETWEEN	**LOUIS SMITH**	**APPELLANT**
AND	**DIRECTOR OF PUBLIC PROSECUTIONS**	**RESPONDENT**

Hugh Wildman instructed by Hugh Wildman & Co for the appellant

Mrs Andrea Martin-Swaby for the respondent

15 December 2022 and 2 June 2023

Judicial review - Application for leave to apply for judicial review – Delay - Civil Procedure Rules, rule 56.6 - Delay - Whether the appellant could properly be charged under the Money Laundering Act which had been repealed and replaced by the Proceeds of Crime Act at the time the charges were laid – Proceeds of Crime Act, section 139 - Interpretation Act, section 25(2)

Costs – Whether costs were properly awarded against the appellant – Civil Procedure Rules, rule 56.15(5)

BROOKS P

[1] I have read, in draft, the comprehensive judgment of my learned sister, Simmons JA. I agree with her reasoning and conclusions and I have nothing that I can usefully add.

SIMMONS JA

[2] This is an appeal from the decision of the Full Court made on 2 June 2021, refusing the appellant's renewed application for leave to apply for judicial review (see **Louis Smith v Director of Public Prosecutions and another** [2021] JMFC Full 3). The Full Court also refused the appellant's application for a stay of the proceedings in the Parish Court that are at the centre of this dispute.

Background

[3] In September 2013, the appellant was charged jointly with two others for the offences of drug trafficking and money laundering contrary to section 3(a) of the Money Laundering Act, 1998 ('MLA'). On 16 September 2019, when the matters were listed for trial before Her Honour Mrs Wong-Small ('the judge of the Parish Court'), the prosecution applied for and was granted permission to amend the information to charge the appellant and his co-accused under section 3(1)(c) of the MLA. The trial then commenced.

[4] On 18 September 2019, counsel Mr Wildman, who represented the appellant, made his first appearance in the matter. Counsel objected to the amendment of the information on the basis that the charges were a nullity as at the time they were laid, the MLA had been repealed by section 139 of the Proceeds of Crime Act ('POCA'), which came into effect on 30 May 2007. His objection was overruled.

[5] The appellant, aggrieved by that decision, filed an application for leave to apply for judicial review on 19 September 2019 against the Director of Public Prosecutions ('the DPP') and the judge of the Parish Court ('the respondents'). He sought declarations that the initiation of the proceedings was "illegal, null and void and of no effect" and was in breach of the Proceeds of Crime Act ('POCA'). He also sought an order of *certiorari* to quash the decision of the respondent to initiate the proceedings against the appellant as well as a stay of the decision to commence the proceedings. Damages were also claimed.

[6] The application, which was heard on 27 January 2020 by Wolfe-Reece J, was refused on 6 February 2020. The stay of the proceedings that was granted on 19 September 2019 was also lifted.

[7] On 7 February 2020, the appellant filed a renewed application for judicial review seeking the following orders:

> "1. A Declaration that the initiating of criminal proceedings by [the DPP] in the parish court of St. James and presided over by [the judge of the Parish Court], of charges of Drug Trafficking and Money Laundering against the [appellant] is illegal, null and void and of no effect.
>
> 2. A Declaration that the initiating of criminal proceedings by [the DPP] in the parish court of St. James and presided over by [the judge of the Parish Court], of charges of Drug Trafficking and Money Laundering against the [appellant], is in clear breach of the provisions contained in the Proceeds of Crime Act of May 2007, rending [sic] the said criminal proceedings illegal, null and void and of no effect.
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> 3. An Order of Certiorari quashing the decision of [the DPP] to initiate charges against the [appellant] as contained in the Information which is amended in which [the DPP] has commenced criminal proceedings against the [appellant] and being presided over by [the judge of the Parish Court] of Drug Trafficking and Money Laundering in the parish court of St. James.
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> 4. A Stay of the decision of [the DPP] to commence criminal proceedings against the [appellant] and being presided over by [the judge of the Parish Court] for the Parish of St. James, the said charges being contained in Information, until the determination of the Application for leave to apply for Judicial Review.
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> 5. Damages to the [appellant] to be assessed for the illegal action of [the DPP] in commencing criminal proceedings against the [appellant] for Drug Trafficking and Money Laundering, in breach of the Proceeds of Crime act [sic] of May 2007.

6. Costs of the Application to the [appellant]; and

7. The Court may on the grant of leave, give such other consequential directions as may be deemed appropriate."

An application for a stay of the proceedings in the Parish Court pending the determination of the renewed application was also filed.

Proceedings in the Full Court

[8] The Full Court indicated, at para. [36] of its judgment, that the following two issues arose for its consideration:

"(a) Has the [appellant] met the threshold for the grant of leave to apply for judicial review?

(b) Should the case against the [judge of the Parish Court] be struck out?"

[9] In dealing with issue (a), the Full Court considered the following:

"(i) Whether the application is barred by delay on the part of the [appellant]?

(ii) Whether the [appellant] has established an arguable case with a realistic prospect of success;

(iii) Whether the charges laid against the [appellant] in the St. James Parish Court are illegal, null and void and of no effect;

(iv) Whether there is an alternative remedy that is available to the [appellant]; and

(v) Whether the Full Court is the proper forum having regard to all the circumstances of the case."

[10] The Full Court addressed the issue of delay at paras. [47]-[57] of the judgment. In addressing that issue, the Full Court found that the grounds for the application first arose on 3 September 2013 when the proceedings against the appellant were initiated. Therefore, at the time when the application for judicial review was filed, the matter had been before the Parish Court for over six years. The court also considered counsel's

submission that from the moment the matter was commenced, "it represents a continuity of the illegality and every time it produces a new justiciable period of time". That submission did not fall on fertile ground.

[11] Counsel for the appellant submitted further that where it is alleged that a fundamental right of a litigant has been breached, the court has the discretion to grant an extension of time to apply for judicial review. Alternatively, that the court should extend the time, having regard to the public importance of the issues raised in the application. In treating with those issues, the Full Court found that no good reason had been proffered for the "obvious delay". The court quite rightly did not view this as the end of the matter. At para. [54] of the judgment the Full Court stated that the issues raised in the application are of "some public importance" and the question of whether there was an arguable case would "trump" that discretionary bar.

[12] The Full Court then considered whether the grant of relief would be likely to result in substantial hardship or prejudice to the rights of any person or was detrimental to good administration (see rule 56.6(5) of the Civil Procedure Rules, 2002 ('CPR')). The court found that any further delay in the hearing of the matter could result in "severe prejudice" to the applicant's co-accused "in terms of their time, financial resources, and simply the fact that during all this time this criminal matter is hanging over their heads". Further, any additional delay may have an impact on the availability of the witnesses and, in "the circumstances, could not be said to be tantamount to good administration" (see paras. [57] and [58]).

[13] Having found as indicated above, the Full Court correctly proceeded to consider whether the applicant's case had a realistic prospect of success. In dealing with that issue, the court having examined the provisions of the MLA, POCA and the Interpretation Act, concluded that the charges under the MLA were properly laid. In its determination of this issue, the court referred to para. [87] of **Dawn Satterswaite v Bobette Smalling** [2019] JMCA Civ 43 ('**Bobbette Smalling CA**') and stated thus at para. [71]:

> "[71] It is difficult to grasp how, with this very clear authority on this issue, counsel for the Applicant has made the submissions that once the statute has been repealed it ceases to be part of the law and that one cannot bring any proceeding pursuant to this repealed law. Counsel has instead sought to rely on authorities which are not only not on point but are clearly distinguishable on the facts and in the law."

[14] The Full Court found that the appellant had failed to meet the required threshold for a grant of leave to apply for judicial review. In the event that it was incorrect in its assessment of the appellant's prospect for success, the court considered whether he had an alternative remedy. The court found that the Parish Court was the proper forum to address the issue of whether the charges were properly brought and that the appellant had the option to appeal the decision of that court in the event that he is convicted.

[15] Public policy considerations also informed the court's decision. At para. [102] it was noted that it was almost eight years since the matter first came before the Parish Court and that a third application for leave to apply for judicial review has been filed. The court said at para. [104]:

> "[104]…the repeated filing of applications for leave to apply for judicial review (and for stays of proceedings pending the hearing) whenever an accused is dissatisfied with a decision of the trial judge is bad practice that serves to obstruct the just disposal of the proceedings by the learned parish judge and derail the proper administration of justice. This Court expresses its strong disapproval of this course of conduct."

[16] With respect to the issue of costs, the court noted that the general rule is that no order for costs should be made against an applicant for an administrative order unless the applicant has acted unreasonably in making the application or in the conduct of the application (see rule 56.15(5) of the CPR). At para. [112] the court concluded that in light of the earlier decision of the court in this matter, it was appropriate for costs to be awarded against the appellant.

[17] Based upon the abovementioned reasons, the Full Court, on 2 June 2021, refused the applications for leave to apply for judicial review and a stay of the proceedings, and the case against the judge of the Parish Court was struck out. Costs were awarded to the respondents to be agreed or taxed.

The notice and grounds of appeal

[18] By notice of appeal, filed 16 July 2021, the appellant seeks to challenge both findings of fact and law and lists 10 grounds of appeal. The grounds of appeal are as follows:

> "a. The Full Court erred when it concluded that the Appellant's co-accused in the criminal proceedings in the St James Parish Court are being prejudiced when there was no evidence from the Appellant's co-accused before the Court, that they were in fact being prejudiced.
>
> b. The Full Court failed to appreciate that there was no delay in bringing the Application. The action of [the DPP] amounts to a continuous act of illegality and every time an application is made against it as was done by the Appellant, time begins to run afresh.
>
> c. The Full Court failed to appreciate that the illegal act [complained] of amounts to a continuous act of illegality and in those circumstances time would not preclude the appellant from bringing an action for Judicial review.
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> d. The Full Court erred in law when it held that the effect of section 25 of the Interpretation Act is to close gaps and allow [the DPP] to bring a charge against the Appellant under the repealed [MLA].
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> e. The Full Court failed to appreciate that when a statute is repealed it ceases to form part of the law of the country. Therefore, any charges brought under the repeal [sic] statute is a nullity.
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> f. The Full Court failed to appreciate that by bringing charges after some six (6) years, under the repeal [sic] law, there was no scope for invoking the Interpretation Act as there was nothing to interpret.

g. The Full Court misinterpreted instances where a charge had been in existence prior to repeal and after repeal, the Interpretation Act may [have been] invoked, unless the contrary intention is manifested in the statute that repeals the prior Act with the present situation where there was no such charge in existence prior to repeal.

h. The Full Court failed to appreciate that to proceed on the illegal charges is a clear breach of the Appellant's right under section 16(1) of **The Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011**.

i. The Full Court erred in law when it concluded that the Appellant has an alternative remedy.

j. The Full Court erred when it concluded that an order for costs should be imposed against the Appellant as the general rules [sic] is that no order for costs may be made against an Appellant for an administrative order unless the court considers that the Appellant has acted unreasonably in making the application or in the conduct of the application as the Appellant has not acted unreasonably in making his applications or in the conduct of the applications. The Appellant has not acted unreasonably, the Appellant is exercising his rights pursuant to Rule 56.5(1) of the Supreme Court Civil Procedure Rules 2002, as amended."

[18] The appellant seeks orders allowing the appeal and for the charge of money laundering brought by the respondent to be quashed. In addition, that the costs of the proceedings in this court and the court below be awarded in his favour.

[19] The grounds of appeal raise the following issues:

(1) Whether the Full Court erred when it concluded that the appellant's three co-accused in the criminal proceedings in the Saint James Parish Court are being prejudiced by his application? (ground a)

(2) Whether the appellant acted promptly in bringing his application for judicial review? (grounds b and c)

(3) Whether the appellant was properly charged under the MLA which had been repealed at the time when the charges were laid? (grounds d -h).

(4) Whether the Full Court erred in law when it concluded that the appellant has an alternative remedy? (Ground i)

(5) Whether the Full Court erred when it concluded that an order for costs should be made against the appellant? (Ground j)

Whether the Full Court erred when it concluded that the appellant's three co-accused in the criminal proceedings in the Saint James Parish Court are being prejudiced? (ground a)

Appellant's submissions

[20] Counsel for the appellant, Mr Wildman, submitted that there was no evidence before the court to support the finding that the appellant's co-accused were being prejudiced by his application for leave to apply for judicial review. Counsel argued that the Full Court's finding was based on speculation. It was submitted further, that the appellant's actions are likely to enure to the benefit of his co-accused if he succeeds in obtaining a declaration that the laying of the information is illegal.

Respondent's submissions

[21] Counsel for the respondent, Mrs Martin-Swaby, did not directly address this issue in her submissions before this court. She did, however, submit that the trial in the Parish Court commenced four years ago and its progress has been delayed for two years. She also stated it is now 10 years since the charges were laid and there have been three applications for judicial review made on the appellant's behalf. In the circumstances, Mrs Martin-Swaby submitted that this appeal is an abuse of the process of the court.

Analysis

[22] In this matter, no evidence was presented to the Full Court from the appellant's co-accused. The Full Court appears to have inferred from the absence of any application for leave to apply for judicial review being made on their behalf, that the appellant's co-

accused are being prejudiced by the bringing of the applications by the appellant and the consequent stay of the proceedings. This was the position taken by the respondent in the court below. Respectfully, that inference is not the only one that can be drawn. The appellant's co-accused may have elected not to make their own applications for various reasons. For example, they may have decided to simply await the outcome of the appellant's application. The issue of the legality of the charges is not confined to the appellant's case. Whilst it is true that the additional delay could have an impact on the availability of witnesses, if the court finds that the information was not properly laid under the MLA, the appellant's co-accused will also benefit from that ruling. In the circumstances, it is my view that the conclusion of the Full Court on this point cannot, without more, be supported. Ground (a) therefore succeeds. That success is, however, of no moment as the resolution of this issue in the appellant's favour is not determinative of the appeal.

Whether the appellant acted promptly in bringing his application for judicial review? (ground b)

Appellant's submissions

[23] Counsel submitted that the decision of the DPP to proceed and that of the judge of the Parish Court to preside over the trial, are amenable to judicial review. It was submitted, further, that the Full Court failed to appreciate that each time an application is made in opposition to the institution and continuation of the matter and it is rejected, time begins to run afresh. Therefore, the timeframe within which the application is to be made is to be computed from the last date on which the court rejected the application opposing the continuation of the proceedings and not the date when the information was laid. Reference was made to **Rovenska v General Medical Council** [1996] EWCA Civ 1096 ('**Rovenska**'), in support of that submission. In any event, even if the three-month period had elapsed, the appellant ought not to have been barred from applying for judicial review as his fundamental rights have been breached (see section 16(1) of The Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011).

[24] Mr Wildman, having referred to **R v Wakefield Metropolitan District Council and anor** [2001] EWHC Admin 915 ('**Wakefield**'), submitted that if the appellant is successful, the outcome would affect every Jamaican citizen who is potentially exposed to being tried under a repealed statute. He stated that the Full Court had a duty to intervene in order to protect the appellant from any such arbitrary action by the State and ought not to be "constrained or shackled" by procedural rules. Reliance was placed on **Coard and ors v The Attorney General for Grenada** [2007] UKPC 7, **Hughes v R; Spence v R** [2002] 2 LRC 531 and **R v Secretary of State for the Home Department ex parte Ruddock and ors** [1987] 1 WLR 1987 ('**ex parte Ruddock**').

Respondent's submissions

[25] Mrs Martin-Swaby stated that there was a delay of six years before the applicant brought the proceedings for judicial review and that the Full Court properly applied the principles in **Sharma v Browne-Antoine & ors** [2007] 1 WLR 780.

Analysis

[26] Rule 56.6 of the CPR, which addresses the issue of delay, provides:

> "(1) An application for leave to apply for judicial review must be made promptly and in any event within three months from the date when grounds for the application first arose.
>
> (2) However the court may extend the time if good reason for doing so is shown.
>
> (3) Where leave is sought to apply for an order of certiorari in respect of any judgment, order, conviction or other proceeding, the date on which grounds for the application first arose shall be taken to be the date of that judgment, order, conviction or proceedings.
>
> (4) Paragraphs (1) to (3) are without prejudice to any time limits imposed by any enactment.
>
> (5) When considering whether to refuse leave or grant relief because of delay the judge must consider whether the granting of leave or relief would be likely to –

(a) cause substantial hardship to or substantially prejudice the rights of any person; or

(b) be detrimental to good administration."

[27] In **Sharma v Brown-Antoine**, the court stated at page 787:

> "The ordinary rule now is that the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy; *R v Legal Aid Board, Ex p Hughes* (1992) 5 Admin LR 623 at 628, and *Fordham, Judicial Review Handbook* (4th Edn, 2004), p 426. But arguability cannot be judged without reference to the nature and gravity of the issue to be argued. It is a test which is flexible in its application. As the English Court of Appeal recently said with reference to the civil standard of proof in *R (on the application of N) v Mental Health Review Tribunal (Northern Region)* [2005] EWCA Civ 1605, [2006] QB 468, at para 62, in a passage applicable mutatis mutandis to arguability:
>
> > 'the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities. Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities.'
>
> It is not enough that a case is potentially arguable: an applicant cannot plead potential arguability to 'justify the grant of leave to issue proceedings upon a speculative basis which it is hoped the interlocutory processes of the court may strengthen': *Matalulu v Director of Public Prosecutions* [2003] 4 LRC 712 at 733."

[28] Mr Wildman, in his submissions before the Full Court, argued that the initiation of the criminal proceedings was a continuing breach of the appellant's constitutional rights

and as such, there was no delay in the making of the application. In the circumstances, the judge of the Parish Court's refusal of the appellant's application to discontinue the criminal proceedings resulted in time beginning to run afresh. Before this court, he made that very same submission and relied on the decision of the court in **Rovenska**. In that case, Dr Elena Rovenska who qualified as a doctor in Czechoslovakia sought registration to practice as a medical practitioner in the United Kingdom ('UK'). A doctor who trained outside of the UK, was for the purposes of registration required to satisfy the provisions of the Medical Act 1983 which stipulated that he has the "professional knowledge, skill, experience and proficiency in English". The General Medical Council (GMC) would not deem such qualification to have been proven unless the applicant either passed or was exempted from a test conducted by the Professional and Linguistic Assessments Board (PLAB).

[29] Dr Rovenska failed the test in 1984 and 1985. She also sought exemptions on four occasions, the last being in 1991. Her applications were refused. On 2 December 1991, she was notified of the refusal of her last application. The Greenwich Council for Racial Equality then wrote on her behalf. On 10 January 1992, it received a similar response from the GMC. On 31 March 1992, Dr Rovenska submitted a race discrimination complaint.

[30] Her complaint was dismissed by an industrial tribunal on the basis that it was outside the requisite three-month time limit. She appealed to the Employment Appeal Tribunal which allowed her appeal on the basis that as long as the GMC acted in accordance with note LR 2, with her qualifications, Dr Rovenska's application for exemption was bound to be refused. Her complaint was therefore not a "once-and-for-all refusal of an exemption".

[31] By virtue of note LR 2 an exemption could only be granted to doctors who qualified at certain universities in named countries. Czechoslovakia was not included in that list. The court cited, with approval, the approach taken by Mummery J who delivered the decision of the Employment Appeal Tribunal. The learned judge stated at page 370:

> "(1) An act does not extend over a period simply because the doing of the act has 'continuing consequences' over a period. For example, a decision not to appoint an applicant for a particular post or not to upgrade his post (as in [*Sougrin v Haringey Health Authority* [1992] IRLR 416]) has continuing consequences (eg as to pay). But the act which produced those consequences took place at a fixed moment of time and did not, therefore, extend over a period of time.
>
> (2) An act does extend over a period of time, however, if it takes the form of a rule, scheme, practice or policy in accordance with which decisions are taken from time to time: for example, an employer's pension scheme, as in [*Barclays Bank Plc v Kapur*, [1991] 2 AC 355, [1991] ICR 208] or a scheme providing for mortgage subsidies for employees and restricting the benefit of them in such a way that some qualify for the benefits, while others are denied them. In those cases, as long as the scheme, rule, policy or practice is in operation, it may be properly said that there is an act extending over the period of its operation and a complaint may be brought during that period or, at the latest, before the end of the expiration of three months after the rule, scheme, practice or policy has ceased to operate."

[32] The EAT ruled that:

> "A decision to refuse an exemption in the case of a person such as Dr Rovenska is pre-determined by the provisions in LR2 regarding exemption. As long as the GMC acts on the contents of the Note LR2 Dr Rovenska, with her current qualifications, is bound to be refused exemption. Her complaint is not therefore of a once and for all refusal of an exemption. It is about the maintenance and operation of a scheme for exemption which extends over a period, that period being the currency of the scheme or rules."

[33] The Court of Appeal stated that if the regime that the GMC utilised was inherently discriminatory, each time Dr Rovenska's application was refused, that body would have committed an act of unlawful discrimination under the Race Relations Act. The court found that Dr Rovenska's application was made within time as the letter from the Greenwich Racial Equality Council had raised new matters for the GMC's consideration.

[34] The decision in the **Rovenska** case, in my view, does not assist the appellant. In the first place, the laying of the information cannot be properly classified as a "rule, scheme, practice or policy". This was a matter in which the DPP exercised her discretion based on the circumstances. Secondly, as stated by Mummery J, an act does not extend over a period because it has continuing consequences. In the instant case, the information is dated 3 September 2013 and the matter first came before the court on 5 September 2013. No issue was taken with the charges until 18 September 2019 which was the second day of trial. On that date, the judge of the Parish Court ruled that the matter was to proceed.

[35] Rule 56.6(1) of the CPR clearly states that an application for leave to apply for judicial review must be made within three months of the date when the grounds for the application "first arose". As such, the time would have begun to run when the information was laid. Mrs Martin-Swaby is, therefore, correct when she submitted that there was a delay of approximately six years in the bringing of the application. The appellant was in those circumstances, required to state the reason(s) for the delay. No reason(s) were provided.

[36] The Full Court, having considered **Wakefield**, **ex parte Ruddock** and **Re S (Application for Judicial Review)** CA 1998 1 FLR 790, found that although there was a delay of six years in making the application and no good reason had been advanced for that delay, the issues raised are of "some public importance". The issue was stated in the following terms at para. [55]:

> "If the Applicant is right, it would mean that he would be charged under a law that does not exist and for which there are no provisions in law."

[37] The reasoning, finding and approach of the full court pertaining to this issue cannot be faulted. The court was correct in its conclusion that the appellant did not act promptly. In any event, the issue of delay was not determinative of the application as the Full Court

proceeded to consider the merits of the case. Based on the above, it is my view that ground (b) has no merit and, therefore, fails.

Whether the appellant was properly charged under the Money Laundering Act which had been repealed at the time when the charges were laid? (grounds c -h).

Appellant's submissions

[38] Counsel stated that the MLA and the Drug Offences (Forfeiture of Proceeds) Act were both repealed by section 139 of POCA. He pointed out that the offence of money laundering for which the appellant is charged is alleged to have been committed during the period 1999-2005 when the MLA was in force. That legislation was repealed and replaced by POCA in May 2007 and the appellant was not charged until 2013. Mr Wildman argued, that whilst there is no statute of limitations in respect of criminal offences, the issue is whether the appellant was properly charged in 2013 under the MLA that had already been repealed.

[39] In this regard, he submitted that, as at May 2007, the MLA had ceased being part of the *corpus juris* or body of law and as such, the DPP could not properly have instituted proceedings against the appellant under that Act. He submitted further that section 25(2) in the Interpretation Act, on which the Full Court relied, does not assist the DPP as it only operates to retain the status quo for the period that the repealed statute was in operation. The Interpretation Act could not, therefore, be used validate the charge that was brought under the MLA. Reference was made to page 251 of Bennion on Statutory Interpretation 4th ed, **Meek v Powell** [1952] 1 KB 164, **Stowers v Darnell** [1973] CLR 528, **Director of Public Works & anor v Ho Po Sang & ors** [1961] AC 901 and **Société des Chasseurs de L'Ile Maurice & ors v The State of Mauritius & anor** [2016] UKPC 13.

[40] Mr Wildman stated that, as of May 2007, the offence of money laundering has been brought under POCA and section 2 of that act defines 'criminal conduct' as conduct that occurs after that date. Therefore, after May 2007 any charge for money laundering

must be brought under POCA. Reference was made to **The Director of Public Prosecutions v Lincoln Whyte & ors** [2017] JMSC Civ 197,–**Bobette Smalling v Satterswaite & ors** [2015] JMSC Civ. 183 ('**Bobette Smalling SC**') and **Bobette Smalling v Satterswaite & ors** [2022] UKPC 44 ('**Bobette Smalling PC**') in support of that submission. In the instant case, it was submitted that the appellant could not be liable under either the MLA or POCA.

[41] Counsel submitted that the conclusion of the Full Court that Parliament could not abolish a law and wipe the slate clean was absurd. He stated that the Full Court had confused the present circumstances with those in which action had already been taken under the MLA prior to its repeal. In those cases, where the process was already in train, the Interpretation Act could be used to bridge the gap between the MLA and POCA. In the circumstances, the laying of the charges against the appellant is an illegality and falls squarely within the principle in **Meek v Powell** and **Stowers v Darnell**. Counsel stated that the effect of the Full Court's ruling would permit the laying of a charge that did not exist before the enactment of POCA under the MLA, and the reliance on the Interpretation Act to save the charge. Counsel described such a scenario as being "manifestly absurd".

[42] In the circumstances, he asked the court to quash the charges as being a nullity.

Respondent's submissions

[43] Mrs Martin-Swaby submitted that the criminal law is dynamic and statutory instruments are repealed and replaced to facilitate the needs of society. She stated that charges can be brought years after the occurrence of an event and even after the law that existed at the time has been repealed and replaced.

[44] Counsel stated that in the instant case, the offence with which the appellant is charged is alleged to have been committed during the period 1999 to 2005, at which time the MLA was in force. The appellant having been charged in 2013, the issue is "[h]ow does the law treat with an investigation and prosecution of [the] alleged incident in the year 2013?"

[45] It was submitted that the decision of the judge of the Parish Court to proceed with the matter under the MLA was correct and as such, the appellant's application for judicial review had no reasonable prospect of success. She stated that section 25(2) of the Interpretation Act was a critical provision within the legislative structure as the import of that section is that the repeal of a statute will not necessarily result in the removal of all rights, responsibilities and obligations that were in force at the relevant time. Reference was made to **The Director of Public Prosecutions v Lincoln Whyte & ors** in which D Fraser J (as he then was) stated at para. [14]:

> "[14] Section 25(2) of the **Interpretation Act** was created to address just such an eventuality as has occurred in this case. It is a vital and critical section. It operates as a savings clause to ensure that, unless the contrary intention is shown, when legislation is repealed the effect of the repeal does not operate to invalidate rights, liabilities and obligations flowing from conduct that occurred at a time when the legislation was in force. It preserves the status quo relative to the time period when the repealed legislation was in effect."

[46] It was submitted further that, *prima facie*, the repealing statute will not disturb the status quo that existed during the life of the repealed statute as no contrary intention was expressed in section 139 of POCA. She stated that section 2 of POCA does not disclose a contrary intention as has been submitted by counsel for the appellant as the purpose of that section is to define certain terms that are used in the legislation. The definition of criminal conduct she argued cannot be used to infer that a person could not be charged under the MLA where the alleged offence occurred during the period of its operation. Reliance was also placed on **Janett Foster v Director of Public Prosecutions** [2022] JMCA Civ 8 ('**Janett Foster**').

[47] Mrs Martin-Swaby submitted that **Meek v Powell, Director of Public Works & anor v Ho Po Sang & ors** and **Stowers v Darnell** do not assist the applicant's case. She stated that in **Meek v Powell** the appellant was charged in May 1951 under the Food and Drugs Act 1938. That Act had been repealed and was replaced by the Food and

Drugs (Milk, Dairies and Artificial Cream) Act 1950 which came into force on January 1951. Consequently, at the time when the offence was committed the latter statute was in force. Similarly, in **Stowers v Darnell** the appellant was charged under a statute that had already been repealed at the time when the offence was committed. It was submitted that in both cases the incorrect statute had been used to lay criminal charges and in instances where the trial proceeded on information, the appellate court could not amend the information. Mrs Martin-Swaby submitted that those authorities can be distinguished from the instant case where at the time of the alleged offending the MLA was in force.

[48] With respect to **The Director of Public Works & anor v Ho Po Sang & ors**, it was submitted that, in that case, the Interpretation Ordinance did not assist the appellant, as the sections of the statute that had been repealed gave the Governor-in-Council the discretion to grant a rebuilding certificate. As such, the appellant did not have a right that could be preserved. Specific reference was made to pages 920 -921 where Lord Morris stated:

> "In the present case, the position on 9 April 1957, was that the lessee did not and could not know whether he would or would not be given a re-building certificate. Had there been no repeal, the petitions and cross-petition would in due course have been taken into consideration by the Governor in Council. Thereafter there would have been an exercise of discretion. The governor would have directed either that a certificate be given or be not given, and the decision of the Governor in Council would have been final. In these circumstances, their Lordships conclude that it could not properly be said that, on 9 April the lessee had an accrued right to be given a re-building certificate. It follows that he had no accrued right to vacant possession of the premises. It was said that there were accrued rights to a certificate, and, consequently, to possession, subject only to the risk that these rights might be defeated, and it was said that, in the events that happened, the rights were not defeated. In their Lordships' view, such an approach is not warranted by the facts. On 9 April the lessee had no right. He had no more than a hope that the Governor in Council would give a favourable decision. So the first submission fails."

[49] In conclusion, Mrs Martin-Swaby submitted that as there is no statute of limitations in criminal matters, charges may be brought many years after the offending ceases. In light of the fact that section 139 of POCA does not include any terms which suggest that Parliament intended that all obligations, rights and liabilities that existed under the MLA should cease to exist, the *prima facie* position as enunciated in section 25(2) of the Interpretation Act should stand.

[50] Mrs Martin-Swaby, in concluding her submissions on this issue, stated that the appellant has brought three applications for judicial review and the bringing of the current application is an abuse of the process of the court. She emphasized that the proceedings against the appellant were instituted 10 years ago and that the trial which began four years ago has been stayed.

Appellant's reply

[51] Mr Wildman submitted that **Janett Foster** could be distinguished from the instant case. He stated that POCA was intended to wipe the slate clean as its effect is prospective and not retrospective.

Analysis

[52] As stated in para. [3] above, the appellant was charged with drug trafficking and money laundering under the MLA. The offences that informed those charges were allegedly committed between 1999 and 2005. In 2007, that Act was repealed by POCA. The appellant was not charged until 2013.

[53] Whilst Mr Wildman has accepted that there is no statute of limitations in respect of criminal proceedings, he has posited that where charges are not laid during the currency of the MLA, any offence allegedly committed during that period is immune from prosecution. He has theorized that Parliament intended to wipe the slate clean in respect of such offences where the prosecution had not been commenced before the repeal of the MLA. His argument is that section 25(2) of the Interpretation Act can only assist where the proceedings were in train prior to the repeal of the MLA. As such, where, as in

this matter the informations were laid after the repeal of the MLA, they are unlawful and void.

[54] The Full Court found that the appellant "failed to establish that he has an arguable case with a realistic prospect of success". In arriving at that conclusion, the Full Court stated at para. [80]:

> "[80] It is our considered view that, when Wolfe-Reece J came to the conclusion that the Applicant was rightly charged for the offences committed prior to May 30th, 2007 under the MLA, she was not off the mark, as has been suggested by Mr. Wildman but rather she got it right when she said at paragraph [44] of the judgment: -
>
> > '**It is my considered conclusion that the applicant was rightly charged for the offences allegedly committed prior to May 30th 2007 under the MLA. That by virtue of S25(2) of the Interpretation Act, 1968 it is clear that where no contrary intention is shown by the new legislation, the rights, liabilities, obligations remain and may be instituted, continued or enforced as if the repealing Act had not been passed. Based on the foregoing, I am of the view that (sic) Applicant has not satisfied the required test that he has an arguable ground with a realistic prospect of success'**." (As in the original)

[55] The approach of the courts in matters of statutory interpretation is to determine the natural and ordinary meaning of the words used. In **Special Sergeant Steven Watson v The Attorney General and others** [2013] JMCA Civ 6, Brooks JA (as he then was), at para. [19], cited with approval Lord Reid's statement on this issue in **Pinner v Everett** [1969] 3 All ER 257 at 258-259, where he stated thus:

> "[19] 'In determining the meaning of any word or phrase in a statute the first question to ask always is what is the natural or ordinary meaning of that word or phrase in its context in the statute? It is only when that meaning leads to some result which cannot reasonably be supposed to have been the

> intention of the legislature, that it is proper to look for some other possible meaning of the word or phrase. We have been warned again and again that **it is wrong and dangerous to proceed by substituting some other words for the words of the statute**'." (Emphasis as in the original)

[56] This statement of the applicable principles was reiterated by Brooks JA in the more recent decision of **Jamaica Public Service Company Limited v Dennis Meadows and others** [2015] JMCA Civ 1 where, at para. [54], the court quoted page 49 of Cross Statutory Interpretation, 3rd edition, in which the authors summarized the major principles of statutory interpretation as follows:

> "[54] The learned editors of Cross' Statutory Interpretation 3rd edition proffered a summary of the rules of statutory interpretation. They stressed the use of the natural or ordinary meaning of words and cautioned against 'judicial legislation' by reading words into statutes. At page 49 of their work, they set out their summary thus:
>
> > '1. The judge must give effect to the grammatical and ordinary or, where appropriate, the technical meaning of words in the general context of the statute; he must also determine the extent of general words with reference to that context.
> >
> > 2. If the judge considers that the application of the words in their grammatical and ordinary sense would produce a result which is contrary to the purpose of the statute, he may apply them in any secondary meaning which they are capable of bearing.
> >
> > 3. The judge may read in words which he considers to be necessarily implied by words which are already in the statute; and **he has a limited power to add to, alter or ignore statutory words in order to prevent a provision from being unintelligible, absurd or totally unreasonable, unworkable, or totally irreconcilable with the rest of the statute**....'" (Emphasis as in the original)

[57] Brooks JA stated that the above "summary is an accurate reflection of the major principles governing statutory interpretation" (see also **Robert Epstein v National**

Housing Trust and another [2021] JMCA App 12 in which McDonald-Bishop JA also applied that principle).

[58] Section 3(1) of the MLA, under which the appellant was charged, states:

> "3. – (1) A person shall be taken to engage in money laundering if that person –
>
> (a) engages in a transaction that involves property that is derived from the commission of a specified offence; or
>
> (b) acquires, possesses, uses, conceals, disguises, disposes of or brings into Jamaica, any such property; or
>
> (c) converts or transfers that property or removes it from Jamaica,
>
> and the person knows, at the time he engages in the transaction referred to in paragraph (a) or at the time he does any act referred to in paragraph (b) or (c), that the property is derived or realized directly, or indirectly from the commission of a specified offence.
>
> (2) A person who, after the 5th of January, 1998 engages in money laundering is guilty of an offence and is liable –
>
> (a) on summary conviction before a Resident Magistrate
>
> i) in the case of an individual, to a fine not exceeding one million dollars or to imprisonment for a term not exceeding five years or to both such fine and imprisonment;
>
> (ii) in the case of a body corporate, to a fine not exceeding three million dollars;"

[59] The MLA was repealed by section 139 of POCA, which states:

> "The Drug Offences (Forfeiture of Proceeds) Act and the Money Laundering Act are hereby repealed".

[60] Section 25 of the Interpretation Act addresses the effect of the repeal of legislation. It states as follows:

> "25 (2) Where any Act repeals any other enactment, then, **unless the contrary intention appears, the repeal shall not**-
>
> (a) revive anything not in force or existing at the time at which the repeal takes effect; or
>
> (b) **affect the previous operation of any enactment so repealed or anything duly done or suffered under any enactment so repealed**; or
>
> (c) affect any right, privilege, obligation, or liability, acquired, accrued, or incurred, under any enactment so repealed; or
>
> (d) affect any penalty, fine, forfeiture, or punishment, incurred in respect of any offence committed against any enactment so repealed; or
>
> (e) **affect any investigation, legal proceedings, or remedy, in respect of any such right, privilege, obligation, liability, penalty, fine, forfeiture, or punishment, as aforesaid,**
>
> **and any such investigation, legal proceeding, or remedy, may be instituted, continued, or enforced, and any such penalty, fine, forfeiture or punishment may be imposed, as if the repealing Act had not been passed**." (Emphasis supplied)

[61] Based on the above, section 25(2) of the Interpretation Act is applicable unless there is a contrary intention expressed in POCA. The interplay between the regimes in the MLA, POCA and section 25(2) of the Interpretation Act was examined by Straw J (as she then was) in **Bobette Smalling SC**. In that matter, an application was made for a determination of whether documents obtained by the Major Organised Crime & Anti-Corruption Agency ('MOCA') pursuant to a search and seizure warrant were subject to legal professional privilege and for those that were not, that they be retained and

unsealed by MOCA for its examination, consideration and use in the furtherance of its investigation and/or in the determination of what is relevant for disclosure and use in the criminal trial of the 1st to 4th respondents, who were charged with breaches of POCA.

[62] Among the issues that arose was whether the court should order the return of all the material seized that predated 30 May 2007 as the offences created by sections 92 and 93 of POCA consisted of doing specified acts with criminal property. It was argued that the definition of criminal property in section 91(1)(a) provides that such a designation can only be made if the property in question "constitutes a person's benefit from criminal conduct or represents such a benefit, in whole or in part" and criminal conduct is defined in section 2 of POCA as conduct occurring on or after 30 May 2007. It was, therefore, submitted that the court was precluded from examining any documents that predated the enactment of POCA as there would be no criminal conduct prior to that date.

[63] Straw J concluded at para. [41] of her judgment:

> "[41] It does appear therefore that even though the 1st respondent can only be charged for offences committed on or after May 2007, there is really no bar to investigations instituted or continued in relation to money laundering offences that may have been committed pre POCA."

[64] The learned judge stated further:

> "[44] Table 2 relates to 15 properties that were sold by vendors AH and/ or other relevant names. Eight were sold after 30th May 2007.In relation to the 7 that were sold prior to May 2007, all of these are alleged to have been sold to fictitious persons and these signatures were witnessed by the 1st respondent. In all the transactions, the 1st respondent is the vendor's attorney. If these allegations are true, the documents would reveal fraudulent conduct, although the only charges that exist relate to money laundering under POCA. Under all these circumstances and having regard to the Interpretation Act and what can be termed relevant evidence, I have no basis to limit the documents that may possible be unsealed to what exists post 2007."

[65] In the circumstances, she ordered that all the documents seized be examined to determine whether they were subject to legal professional privilege.

[66] The 1st respondent appealed and this court ordered that all documents which predated POCA be returned to the appellant and the intervenors forthwith (see **Bobette Smalling CA**).

[67] The matter was appealed to the Privy Council which allowed the appeal (see '**Bobette Smalling PC**'). Lord Stephens who delivered the decision of the Board stated at paras. 44 - 48:

> "44. **To determine the interplay between the MLA and POCA it is necessary to consider various provisions of those Acts together with section 25(2) of the Interpretation Act.**
>
> 45. With its coming into force on 5 January 1998, the MLA created new substantive offences of money laundering. Section 3(1) of the MLA provided that a person shall be taken to engage in money laundering if he does specified acts such as engaging 'in a transaction that involves property that is derived from the commission of a specified offence' with the prescribed state of mind which is for instance that 'the person knows, at the time he engages in the transaction … that the property is derived or realized directly, or indirectly from the commission of a specified offence.' The specified offences are set out in the Schedule to the MLA and include for instance dealing in any narcotic drug contrary to the provisions of the Dangerous Drugs Act.
>
> 46. Section 3(2) of the MLA provided that:
>
> > 'A person who, after the 5th of January, 1998 engages in money laundering is guilty of an offence...'
>
> 47. …
>
> 48. The MLA was repealed by section 139 of POCA. The Proceeds of Crime Act, 2007 (Appointed Day) Notice provided that POCA came into operation on 30 May 2007 which means that the MLA was repealed on that date. However, **section**

25(2) of the Interpretation Act is a saving provision generally applicable to Acts of Parliament in Jamaica."
(Emphasis supplied)

[68] Having examined the provisions of section 25 of the Interpretation Act, his Lordship continued at paras. 49-50:

> "49. **Consequently, investigations or proceedings in respect of offences committed under the repealed MLA are not affected by its repeal, except if there is a 'contrary intention' in the repealing Act. There is no such contrary intention in POCA in relation to money laundering offences where either: (a) both the offence which generates the criminal property concerned ('the predicate offence') and the subsequent money laundering offence ('the substantive offence') were committed prior to 30 May 2007** or (b) where the predicate offence was committed prior to that date and the substantive offence occurred after that date. This means that the repeal of the MLA shall not, for instance, affect any penalty incurred in respect of any offence committed under the MLA, nor will it affect any investigation or legal proceedings in respect of offences under the MLA. Such investigations or legal proceedings continue as if the MLA remained in force, despite its repeal. The only exception to this is in relation to money laundering offences where both the predicate offence, and the substantive offence were committed on or after 30 May 2007. The MLA is not applicable to such offences.
>
> 50. Sections 92-93 of POCA created new substantive offences of money laundering. Under both sections, the offences created consist of doing specified acts (with the prescribed state of mind) in relation to 'criminal property'…"

And at paras. [52]-[53]

> "52. …The definition of 'criminal property' in section 91(1)(a) depends in part on the meaning of the expression 'criminal conduct'. 'Criminal conduct' is defined in section 2 as:
>
> > 'criminal conduct' means conduct occurring on or after the 30th May, 2007, being conduct which–(a) constitutes an offence in Jamaica; (b) occurs outside

> of Jamaica and would constitute such an offence if the conduct occurred in Jamaica;'
>
> The definitions of 'criminal property' and of 'criminal conduct' mean that (a) for a substantive offence of money laundering to be committed there must be a predicate offence committed by someone which generates the criminal property concerned; (b) for a prosecution for a substantive money laundering offence to succeed under POCA the Crown must prove that such a predicate offence was committed by somebody: see *Assets Recovery Agency (Ex-parte) (Jamaica)* [2015] UKPC 1 at para 8; (c) the criminal conduct, which is the predicate offence, committed by someone which generates the criminal property concerned must occur on or after 30 May 2007; so that (d) the substantive money laundering offence can only be committed on or after 30 May 2007.
>
> 53. **Thus, the dates of the suspected predicate and substantive offences will determine whether the offence is prosecuted under the MLA or under POCA**. Money laundering offences committed after 5 January 1998 where (a) both the predicate offence and the substantive offence were committed prior to 30 May 2007, or (b) where the predicate offence was committed prior to 30 May 2007 and the substantive offence was committed after that date, should be (and can only be) prosecuted under sections 3 and 5 of the MLA, despite the repeal of the MLA by POCA. However, where both the predicate and substantive offences in relation to money laundering were committed on or after 30 May 2007, such offences must be (and can only be) prosecuted under POCA." (emphasis supplied)

[69] In **Janett Foster**, in which Mr Wildman appeared as counsel, the effect of section 25(2) of the Interpretation Act on the Drug Offences (Forfeiture of Proceeds) Act ('DOFPA'), which was repealed by POCA, was considered. In that case, the appellant was the joint owner of property with Mr Lincoln White in respect of which a confiscation and restraint order was obtained by the United Kingdom Government consequent upon the conviction of Mr Lincoln White in the UK for drug offences. In order to be effective in Jamaica, the said order was required to be registered under the Mutual Assistance in Criminal Matters Act ('MACMA') and subsequently made the subject of an enforcement

order. A condition for registration was proof of dual criminality between the UK and Jamaica. The order was duly registered pursuant to MACMA and DOFPA which by then had been repealed. An application to set aside the order for registration was refused by D Fraser J (as he then was) on 10 November 2017, on the basis that although the DOFPA had been repealed by the time the application for registration was made, section 25(2) of the Interpretation Act ensured that its repeal did "not operate to invalidate rights, liabilities and obligations flowing from conduct that occurred at a time when the legislation was in force". The learned judge stated that section 25(2) "preserves the status quo relative to the time period when the repealed legislation was in effect". Ms Foster appealed.

[70] Dunbar Green JA (Ag) (as she then was), who delivered the decision of this court, noted that at the time when Mr White was convicted dual criminality could have been established. The learned acting judge of appeal stated at para. [29]:

> "[29] It is, therefore, plainly the case that, in 2004, Mr White could have been convicted in Jamaica for offences similar to those for which he was convicted in the UK., Also, he would have been liable to forfeiture and restraint orders against 'any realizable property' held by him or another person.
>
> [30] DOFPA was repealed three years after Mr White was convicted in the UK and some eight years before the application for registration of the foreign orders in Jamaica. As we have seen from the grounds of appeal, the main contention is whether POCA made DOFPA inapplicable – to establishing dual criminality - for the purpose of registration of the foreign orders in 2015. The determination of this question will, therefore, turn on the interpretation of sections 2 and 139 of POCA and section 25(2) of the Interpretation Act."

[71] In that case, as he did before us, Mr Wildman argued that POCA was not subject to section 25(2) of the Interpretation Act. His interpretation was soundly rejected. Dunbar Green JA (Ag), having conducted a detailed analysis of the judgment of D Fraser J, stated:

> "[67] **It is clear to me that the purpose of section 2 of POCA is to define terms that are used in the statute. Wherever the term 'criminal conduct' appears, it is meant to indicate that POCA governs the relevant criminal conduct if it occurred on 30 May 2007 or after. Put another way, the definition of 'criminal conduct' in section 2 indicates that offences prior to 30 May 2007 may be governed by other legislation, such as the repealed provisions in DOFPA, which are saved by section 25(2) of the Interpretation Act. No provision in POCA supersedes, negates or expresses a contrary intention to that expressed in section 25(2) of the Interpretation Act**.
>
> [68] If, for the sake of argument, we assume that the definition and explanation of 'criminal conduct' which Mr Wildman canvassed are correct, this would mean, for example, that a person who committed a criminal act under the Money Laundering Act (which was also repealed by POCA), a day before POCA came into effect, would not be liable to confiscation of ill-gotten gains which had not been discovered and confiscated by then. This would undermine the objective of depriving criminals of the benefits of unlawful deeds. It is doubted that Parliament could have intended such an absurd result." (Emphasis supplied)

[72] The learned acting judge of appeal, in her consideration of the matter, referred to the decision of the Bahamian Court of Appeal in **Commissioner of Police v Michelle Reckley and others** MCCrApp No 46 of 2019, judgment delivered 29 May 2019 ('**Reckley**') and that of the Privy Council in **Panday v Virgil** [2008] UKPC 24 ('**Panday**').

[73] In **Reckley**, the respondents were charged with money laundering and other offences under the Proceeds of Crime Act, 2000 that had been repealed by the Proceeds of Crime Act, 2018. On that basis, the magistrate ruled that he did not have the jurisdiction to hear the matter and that to proceed with them would be an abuse of process. The Bahamian Court of Appeal, in its consideration of the matter, considered the effect of section 20 of the Interpretation and General Clauses Act which has provisions that are similar to section 25(2) of the Jamaican legislation. Sir Hartman Longley P, who delivered the decision of the court, stated thus:

> "15. It seems to me, therefore, that what the section permits is the investigation, commencement, or institution of legal proceedings in respect of any offence found after any such investigation to have been committed 'against any written law so repealed', notwithstanding the repeal of that written law as if it had not been repealed. **It is a time freezing device that keeps intact any possible criminal behavior for subsequent review, investigation, institution/commencement of prosecution found to have been committed 'against any written law so repealed' so as to ensure that no criminal would escape the dragnet of the law on the pernicious technicality that his or her violation is of a law that has, since the commission of the illegal act, been repealed**." (Emphasis supplied)

[74] In **Panday**, the Privy Council considered the effect of section 27(1) of the Trinidadian Interpretation Act which deals with the effect of the repeal of legislation. That Act is also similar to the Jamaican legislation. At para. 13 Lord Brown, who delivered the decision of the Board, stated:

> "13. …unless a contrary intention appears, s.27 expressly allows 'legal proceedings' to 'be instituted' in respect of 'any offence committed against the written law so repealed' 'as if the written law has not been repealed'."

[75] Having reviewed the above authorities, Dunbar Green JA (Ag) concluded at para. [91]:

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

[76] I am accordingly, fortified in my opinion that section 2 of POCA, contrary to the view expressed by Mr Wildman, cannot be interpreted as decriminalizing behaviour which occurred during the currency of the MLA. This was clearly the position of this court in **Janett Foster**. The decisions in **Reckley** and **Panday** are persuasive authorities and support the approach taken in **Janett Foster**. The cases of **Meek v Powell**, **Stowers v Darnell**, **Director of Public Works & anor v Ho Po Sang & ors** that were relied on by Mr Wildman, are of no assistance as they can clearly be distinguished as submitted by Mrs Martin-Swaby.

[77] Mr Wildman also relied on the decision of the Privy Council in **Société des Chasseurs de L'Ile Maurice & ors v The State of Mauritius & anor**. In that case representatives of the hunting community in Mauritius mounted a legal challenge to section 4(2) of the new Firearms Act, which provides that, "no individual shall hold more than two firearms at any time". Their argument was based on the principle of statutory interpretation that is set out in section 17(3)(c) of the Interpretation and General Clauses Act, 1974, which states:

> "(3) … the repeal of an enactment shall not –
>
> > (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under the repealed enactment."

[78] Lord Hughes, who delivered the decision of the Board, stated:

> "6. There is no doubting this general principle of statutory interpretation, which applies unless clear statutory language commands the conclusion that the removal or modification of accrued rights was indeed intended. It is allied to the similar principle of statutory interpretation that a statute will be assumed to be prospective, rather than retrospective, in effect, unless the contrary necessarily appears. **However, before section 17(3)(c) can be called into service, there must be a right acquired or accrued under the previous, now repealed legislation**." (Emphasis supplied)

[79] The Board found that the new Act "expressly re-shaped the regime for the issue of licences. It expressly did not continue the 1940 Act scheme; rather, it replaced it with a different one". At para. 10 Lord Hughes stated thus:

> "10. The 2006 Act makes explicit its relationship to the earlier 1940 Act by sections 50 and 51. Section 50 simply repeals the 1940 Act in its entirety. Section 51 provides:
>
> > '(1) Any licence or permit issued under the repealed Firearms Act which has not expired on the coming into operation of this Act shall remain valid until the date of its expiry.
> >
> > (2) Subject to subsection (1), any registration made under the repealed Firearms Act shall be deemed to be a registration under this Act.
> >
> > (3) Where this Act does not make provision for the necessary transition from the repealed Act to this Act, the Minister may make necessary regulations for such transition.'
>
> Thus, the 2006 Act is expressly inconsistent with any possibility of licences under the 1940 Act continuing in force, except to the end of the year of validity. It is equally inconsistent with the possibility that any right to renewal of a 1940 Act licence is preserved. The carrying over of any such right, assuming in the claimants' favour that it ever existed as a right rather than an expectation, is quite incompatible with the creation of a new licencing and control scheme by the 2006 Act. **It is a necessary consequence of section 51 that, except as it stipulates, the position for the future is to be governed by the new Act and no longer by the old. Section 17(3)(c) of the Interpretation and General Clauses Act cannot prevail against these explicit provisions**." (Emphasis supplied)

[80] This case can be distinguished on the basis that the grant of the licences was a discretionary matter and the provisions of the new legislation were totally inconsistent with the 1940 Act. That is not the position pertaining to the MLA and POCA. There is no explicit provision in POCA which addresses the situation where the alleged acts of money laundering were committed before its enactment. As such, there is no incompatibility

between them as was the situation in **Société des Chasseurs de L'Ile Maurice & ors v The State of Mauritius & anor**. The Full Court was correct when it found that section 25(2) of the Interpretation Act is applicable and that consequently, the proceedings were properly commenced against the appellant under the MLA.

[81] In the circumstances, it is my view that grounds (c) to (h) have no merit and, therefore, fail.

Whether the Full Court erred in law when it concluded that the appellant has an alternative remedy? (Ground i)

[82] Judicial review has been described as a remedy of last resort. In **Glencore Energy UK Ltd v Revenue and Customs Commissioners** [2017] EWHC 1476 (Admin) Green J expressed the principle in the following terms at para. 40:

> "40. The basic principle is that judicial review is a remedy of last resort such that where an alternative remedy exists that should be exhausted before any application for permission to apply for judicial review is made. Case law indicates that where a statutory alternative exists, granting permission to claim judicial review should be exceptional. The rule is not however invariable and where an alternative remedy is nonetheless ineffective or inappropriate to address the complaints being properly advanced then judicial review may still lie."

[83] In **Independent Commission of Investigations v Everton Tabannah and Worrell Latchman** [2019] JMCA Civ 54 Brooks JA (as he then was) stated at para. [62]:

> "[62] It is unnecessary to decide definitively in this judgment whether rule 56.3 of the CPR allows for leave to apply for judicial review where an alternative remedy exists. A reading of the rule certainly suggests, as the learned judge held, that at the leave stage the existence of an alternative remedy is not an absolute bar to the grant of leave. The relevant part of rule 56.3(3) states:
>
> > 'The application [for leave to apply for judicial review] must state –

…

(d) whether an alternative form of redress exists and, if so, why judicial review is more appropriate or why the alternative has not been pursued. …'

The issue is whether the alternative is more suitable than judicial review."

[84] The Full Court, in addressing this issue, stated:

"[84] Before embarking on determining this issue, we pause to remind ourselves of the essence of what is meant by judicial review and to distinguish it from remedies available in the trial process. The mechanism of judicial review has to do with challenging the lawfulness of the decision of a public authority and so it gives the courts a supervisory role to ensure that the decision maker acts lawfully. It is not so concerned with whether the decision maker is right or wrong as that has to do with the question of the merits of the actual decision.

[85] The issues raised here pertain to what effect the repeal of legislation has on anything that was duly done, or anything that happened, while the legislation was in force and whether the charges against the Applicant are properly brought under the repealed provision of section 3(1) (c) of the MLA and therefore illegal null and void and of no effect and also whether the charges are in breach of the POCA which stipulate that all criminal conduct for the purpose of money laundering must be after May 2007. Mr. Wildman has also submitted that judicial review is the appropriate remedy when you are contending that an inferior tribunal, in this case the DPP and the learned trial judge, exceeds its jurisdiction. Mr. Wildman further contends that, an appeal arises when you are saying that the inferior tribunal acts within jurisdiction but nonetheless makes an error by bringing a charge under a repealed law and that, by embarking on a trial, is an excess of their jurisdiction.

[86] The power of the DPP to institute proceedings is set out in section 94(3) of the Constitution of Jamaica and section 94(6) prescribes that she should not be subject to the direction or control of any other person. It could not be said that in deciding to charge the Applicant she was acting outside

of those powers and therefore in excess of her jurisdiction. The questions raised really pertain to whether or not the charges were correctly brought.

[87] The ability of the criminal court to provide an adequate remedy in a matter such as this was the subject of discourse in the case of **Fritz Pinnock and Ruel Reid v Financial Investigation Division**, …"

And at paras. [89]-[92] continued:

"[89] In our view, the Parish Court is the proper forum to deal with issues involving whether or not an individual is improperly charged or charged under an incorrect statute. The Parish Court can consider issues such as whether or not the Applicant is properly charged at any point in time that it is raised during the trial. Based on the contentions of the Applicant, the court would be called upon to apply the rules of statutory interpretation and also make a determination as to whether there exists any abuse of process. These are matters well within the province of the trial judge. The Applicant did in fact make submissions to the learned trial judge raising objection to the trial, on the basis that the Information containing the charges as presented by the 1st Respondent is a nullity and the learned trial judge ruled that the proceedings were not a nullity as the accused was appropriately charged under the MLA. The Applicant being aggrieved of this decision has the option of taking this point on appeal in the event of a verdict adverse to him.

[90] Mr. Wildman also argues that this matter raises constitutional issues and that is a further reason why leave should be granted. According to him, the Applicant is being deprived of a fair trial, contrary to section 16 of the Constitution. The Notice of Application for Court Orders makes no reference to a constitutional claim and although the failure to do so does not strictly speaking bar him from raising a constitutional issue at any time, it is not clear to the Court that there is in fact an arguable constitutional issue.

[91] Section 16(1) of the Charter of Rights stresses the need for a fair hearing by an independent and impartial court. There is no evidence before us to suggest that the Applicant will not receive a fair hearing before the Parish Court. The issues raised here have to do with the applicability and

> construction of the Interpretation Act and we fail to see how this translates to it being a matter having to do with a breach of any constitutional provisions.
>
> [92] We are therefore not convinced that the Full Court is the appropriate forum and that the matter cannot be addressed within the criminal process. No good reason has been shown as to why the issues raised cannot be ventilated in the Parish Court. The Applicant therefore has not demonstrated that judicial review is more appropriate than the other available remedy and so his application also fails on the basis that there is an alternative remedy available."

[85] Mr Wildman submitted before us that the appellant has no alternative remedy as no other course is available by which he can challenge the decision of the DPP to proffer the charge and that of the learned judge of the Parish Court to hear the matter, other than by way of judicial review. He submitted further that to wait for the trial to be completed and then appeal if the appellant is found guilty, is not an alternative remedy.

[86] Mrs Martin-Swaby, in response, submitted that the appellant has an alternative remedy as he can pursue an appeal if he is convicted.

[87] The general principle is that as far as possible all issues raised in a case should be resolved in the relevant court proceedings. This was clearly articulated in **Sharma v Brown-Antoine and others** at para. 34 of the joint judgment of Baroness Hale of Richmond and Lord Carswell and Lord Mance where it was stated that:

> "34 [v]iewing the matter generally, the present is clearly a case where all issues should if possible be resolved in one set of proceedings. There are potential disadvantages for all concerned, including the public, in a scenario of which one outcome might be long and quite probably public judicial review proceedings followed by criminal proceedings. We add that, in our view, it will in a single set of criminal proceedings be easier to identify and address in the appropriate way the different issues likely to arise."

[88] Their Lordships also stated that a "criminal judge" would be better placed to address the different potential issues which may arise.

[89] In **Fritz Pinnock and Ruel Reid v Financial Investigations Division** [2019] JMSC Civ 257, Sykes CJ, with whom I agree, stated at paras. [86]-[89]

> "[86] The court cannot help but note the increasing frequency with which resort is had to the supervisory jurisdiction of the Supreme Court in respect of matters in the Parish Courts. This court wishes to say that applications of this type should be discouraged except in exceptional circumstances.
>
> [87] It is this Court's considered view that where the legislature has conferred jurisdiction on an inferior court such as the Parish court it must be rare or exceptional for a superior court to grant declarations during the course of a trial or proceedings, regardless of the stage that those proceedings are, that may have the effect of undermining the authority of those courts. Once the matter is before the Parish Court then the matter ought to proceed along the normal course to completion. In the event of an adverse outcome then the remedy is by way of an appeal.
>
> [88] In **Atlas v DPP** [2001] VSC 209 Bongiorno J said:
>
> > '14 It is appropriate, at the outset, to deal with the question as to whether this proceeding constitutes an unjustified fragmentation of the criminal process so that the plaintiff should be refused relief, as a matter of discretion, even if grounds for granting it might otherwise exist.
> >
> > 15 In Sankey v Whitlam the High Court considered the use of the declaratory power by a superior court on questions of evidence or procedure arising during the course of criminal proceedings in an inferior court. Gibbs ACJ considered that the circumstances must be most exceptional to warrant the grant of such relief (at 25). He considered that such applications for declarations in such circumstances are: —
> >
> > > '…likely to be dilatory in effect, to fragment the proceedings and to detract from the efficiency of the criminal process. I am not intending to criticise those concerned with the conduct of Bourke v Hamilton [1977] 1 NSWLR 470, or to

> show any disrespect for the careful judgments delivered in that matter - indeed I have derived much assistance from them - when I say that that case provides an example of the way in which criminal proceedings may be needlessly protracted if they are interrupted by an application for a declaration - in the end the declaration sought was refused but the proceedings had been delayed for the space of almost a year. The present case itself is another regrettable example of the delay that can be caused by departures from the normal course of procedure. For these reasons I would respectfully endorse the observations of Jacobs P. (as he then was) in Shapowloff v Dunn [1973] 2 NSWLR 468 at 470, that a court will be reluctant to make declarations in a matter which impinges directly upon the course of proceedings in a criminal matter. Once criminal proceedings have begun they should be allowed to follow their ordinary course unless it appears that for some special reason it is necessary in the interests of justice to make a declaratory order. Although these remarks may be no more than mere 'administrative cautions' (cf Ibeneweka v Egbuna [1964] 1 WLR 219 at 224) I nevertheless consider that if a judge failed to give proper weight to these matters it could not be said that he had properly exercised his discretion.'

…

17 In Cain v Glass (No.2)(4) the New South Wales Court of Appeal was concerned with the question as to whether a magistrate, who was conducting a committal, erred in law in upholding a claim of public interest immunity in respect of documents identifying witnesses whom the applicants might wish to call in their defence. An application to Maxwell, J in the Supreme Court for declaratory relief was refused on the ground, inter alia, that the applicant did not establish the existence of exceptional circumstances calling for the intervention of the Court. On appeal, Kirby P, although dissenting in the result, agreed with

the other Justices of Appeal that the exercise of the Court's declaratory jurisdiction in such a case should be confined to circumstances described as 'most exceptional', 'exceptional' or 'special'. His Honour referred, amongst other reasons, to the undesirability of the remedies of declaration or the prerogative writs being misused to justify transfer to the superior courts of matters committed by law to (in that case) the magistracy. He also referred to the undue advantage that may be given to rich and powerful defendants to interrupt and delay the operation of the criminal law in a way not so readily available to ordinary citizens. There is no evidence here that the plaintiff is either rich and powerful or has in any way sought deliberately to delay his trial. Nevertheless, the trial has been delayed for two years.

18 Kirby P. considered a similar question in a case involving the legality of an indictment in Anderson v Attorney General where he said (at 200); —

> 'The jurisdiction of the Court to make a declaration of the law applicable to the indictment against the claimant was not disputed by the Attorney General. However the Court's disinclination to do so in criminal cases, particularly in circumstances where proceedings are in the charge of a judge who at this very moment is beginning the trial, has been frequently stated. Courts such as this will limit their intervention to special cases. They will intervene only in the 'most exceptional' circumstances; see Gibbs, ACJ in Sankey v Whitlam (1978) 142 CLR 1 at 25, or for 'some special reason' (Ibid, Mason J at 82); see also Bacon v Rose [1972] 2 NSWLR 793 at 797; [1977] 1 NSWLR 470 at 479; Barton v The Queen (1980) 147 CLR 75 at 104 and Lamb v Moss (1983) 49 ALR 533 at 545.'

19 The law is undoubtedly the same in this State. In Rozenes v Beljajev the Full Court (Brooking, MacDonald and Hansen JJ) said, in considering the question of whether it would be appropriate to grant

declaratory relief in respect of a ruling on evidence made by a trial judge prior to the commencement of a trial: — 'In the criminal jurisdiction an important consideration will be the need to observe and not fragment the ordinary, and orderly, process of a committal or trial. That consideration would apply with particular force 'where proceedings are in charge of a Judge who at this very moment is beginning the trial'; Anderson v Attorney General for New South Wales (1987) 10 NSW LR 198 at 200 per Kirby P. Such fragmentation should be avoided unless there are exceptional or special circumstances. It is sufficient to refer in this context to: Sankey; R v Iorlano (1983) 151 CLR 678; Lamb v Moss and Brown (1983) 76 FLR 296; Yates v Wilson (1989) 168 CLR 338; Beljajev v Director of Public Prosecutions (1991) 173 CLR 28; Harland-White v Gibbs [1993] 2 VR 215; re Rozenes; ex parte Burd (1994) 68 ALJR 372. These considerations apply whether the application be for a declaration or other form of judicial review such as relief in the nature of certiorari.'

20 The correctness of this passage has been subsequently affirmed by the Court of Appeal in DPP v Denysenko, per Brooking JA at 316. See also Murray Goulburn Co-Op Limited v Blennerhassett and Francis v Solicitor for Public Prosecutions.

…

23 Many questions arise before and in the course of a trial in respect of which a trial judge would be much assisted by a definitive ruling of this Court or the Court of Appeal. However, the proper application of the principles of criminal procedure means that trial judges are required to make rulings on evidence or determine points of procedure as and when they arise either prior to or in the course of criminal trials (or, for that matter, civil trials) no matter how novel or difficult the points raised might be. The appeal system exists to ensure that an error made by a trial judge which leads to the possibility of a miscarriage of justice in the result can be corrected in the Court of Appeal.

> 24 On the other hand, when a trial judge or committing magistrate accedes to a request to stop the criminal process continuing whilst one of the parties (almost always the accused) seeks a remedy using the civil processes of a supervisory court, control of the criminal process passes to a large extent into the hands of the applicant for such remedy as occurred in this case. The result is that delay is inevitable and justice suffers. Even if the Crown is diligent in ensuring that the civil process is pursued with vigour and competence delays still commonly occur to the inappropriate detriment of the criminal process. (emphasis added)

> [89] This court agrees with the observation made by his Honour. **One of the important ideas behind this important principle is to avoid the supervisory jurisdiction being used as a 'de facto' appeal from a decision or ruling of the Parish Court. Parish Courts must be free to decide the matters there without the 'fear' that any decision made will be brought to and entertained by the Supreme Court. The appellate process is there to correct errors made by the Parish Court Judge. The Supreme Court must be cautious in exercising its power to grant stays of criminal proceedings in inferior courts thereby interrupting the normal and expected flow of criminal proceedings**." (Emphasis added)

[90] The learned Chief Justice, and later the Full Court, refused the application for leave to apply for judicial review. On appeal to this court in the decision of **Fritz Pinnock and Ruel Reid v Financial Investigations Division** [2020] JMCA App 13, Morrison P stated:

> "[2] In their joint judgment in **Sharma v Brown-Antoine and Others** [2006] UKPC 57; (2006) 69 WIR 379, Lords Bingham and Walker stated (at paragraph 13), that '[t]he ordinary rule now is that the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success **and not subject to a discretionary bar such as delay or an alternative remedy**' (emphasis mine). This test has been consistently applied by the Board and by this court (see, for instance, **Attorney General of Trinidad and**

Tobago v Ayers-Caesar [2019] UKPC 44, paragraph 2, where it is described as 'the usual test'; and **National Commercial Bank Jamaica Ltd v Industrial Disputes Tribunal and Peter Jennings** [2016] JMCA App 27, paragraph [9], where it is described as 'the now well-known test for the grant of leave').

[3] The applicants' application for permission to apply for judicial review has now been refused by Sykes CJ and, on their renewed application for permission, the Full Court of the Supreme Court. Despite differences in their reasoning, all four judges in the court below are unanimous in the view that the application should be refused by reason of the fact that the applicants have an alternative remedy with regard to the wrongs of which they complain.

[4] In seeking permission to appeal against the decision of the Full Court, the applicants must satisfy this court, as Phillips JA points out, that they have an appeal with a real chance of success.

[5] In my view, for the reasons so admirably stated by Phillips JA at paragraphs [40]-[47] below, the applicants have failed to show that they have an appeal with a prospect of success against the decision of the Full Court as they clearly have an alternative remedy in this case."

[91] Phillips JA stated thus at para. [42]:

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

[92] In this matter, the judge of the Parish Court has ruled that the informations were properly laid. There is no dispute that she had the jurisdiction to make that ruling. The trial should be allowed to proceed. In the event that the appellant is convicted he can appeal the decision of the Parish Court if he so desires. That is the alternative remedy that is available to him. In addition, the appellant has not, in my view, established that judicial review is a more appropriate remedy. The trial process should not be interrupted unless it is absolutely necessary. A party who disagrees with the ruling of a judge of the parish court has recourse to the Court of Appeal to correct any errors that have been made. Ground (i) therefore fails.

Whether the Full Court erred when it concluded that an order for costs should be imposed against the appellant? (Ground j)

[93] The appellant has also challenged the exercise of the Full Court's discretion in awarding costs to the respondents. The general rule in applications for judicial review is that "no order for costs may be made against an applicant…unless the court considers that the applicant has acted unreasonably in making the application or in the conduct of the application" (rule 56.15(5) of the CPR). The Full Court addressed this issue at para. [112]:

> "[112] However, in this case, in light of the fact of the earlier decision of the Court and the reminder to the Applicant of the function of the Parish Courts, we are of the view that an order for costs should be imposed against the Applicant."

[94] Mr Wildman correctly submitted that the general rule is that no order for costs should be imposed against an applicant for an administrative order unless the said applicant has acted unreasonably in making the application or in the conduct of the application. He stated that the appellant has not acted unreasonably in seeking to enforce his constitutional right not to be tried on illegal charges and was exercising his right to renew his application for judicial review pursuant to rule 56.5(1) of the CPR in a matter which involves the liberty of the subject.

[95] The approach of this court in matters concerning the exercise of a judge's discretion is well settled. In order to succeed on this ground, the appellant must demonstrate that the Full Court, in the exercise of its discretion, erred on a point of law or made a decision that no judge "regardful of his duty to act judicially could have reached" (see **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 1, in which Morrison JA (as he then was) summarized the principles in **Hadmor Productions Ltd v Hamilton** [1982] 1 All ER 1042 at 1046). The learned judge set out at para. [19]:

> "[19] It is common ground that the proposed appeal in this case will be an appeal from Anderson J's exercise of the discretion given to him by rule 13.3(1) of the CPR to set aside a default judgment in the circumstances set out in the rule. It follows from this that the proposed appeal will naturally attract Lord Diplock's well-known caution in ***Hadmor Productions Ltd v Hamilton*** [1982] 1 All ER 1042, 1046 (which, although originally given in the context of an appeal from the grant of an interlocutory injunction, has since been taken to be of general application):
>
> > '[The appellate court] must defer to the judge's exercise of his discretion and must not interfere with it merely on the ground that the members of the appellate court would have exercised the discretion differently'."

[96] In treating with the issue of costs, the Full Court, whilst acknowledging the general rule, stated thus:

> "[110] In deciding who should be liable to pay costs, the court must have regard to all the circumstances and, in particular, to the conduct of the parties both before and during the proceedings. The court may also consider whether it was reasonable for a party to pursue a particular allegation; and/or to raise a particular issue; the manner in which a party has pursued his/her case, a particular allegation or a particular issue; and whether the claimant gave reasonable notice of an intention to issue a claim.

> [111] The provisions of the CPR make it quite clear that the court has a wide discretion to make any cost order it deems fit, against any person involved in any type of litigation, including an application for judicial review. The general rule is, however, that no order for costs may be made against an applicant for an administrative order, unless the court considers that the applicant has acted unreasonably in making the application or in the conduct of the application.
>
> [112] However, in this case, in light of the fact of the earlier decision of the Court and the reminder to the Applicant of the function of the Parish Courts, we are of the view that an order for costs should be imposed against the Applicant."

[97] The application for leave was brought on the basis that the charges laid against the appellant are a nullity as a result of the repeal of the MLA by POCA and the inapplicability of section 25(2) of the Interpretation Act. It was pursued in the face of this court's decision in **Bobette Smalling CA** in which this court clearly rejected that line of reasoning that was advanced by Mr Wildman. His argument is also out of line with the position taken by the Privy Council in **Bobette Smalling PC**. Not one to be easily deterred, Mr Wildman has also advanced those arguments before us. The authorities are clear. The reasoning of the Full Court pertaining to this issue cannot be faulted. There is, therefore, no basis on which to disturb the costs order. I have concluded based on the above, that this ground of appeal has no merit. Ground (j), therefore, fails.

[98] In the circumstances, I would order that the appeal be dismissed and costs awarded to the respondent.

LAING JA (AG)

[99] I, too, have read the judgment of my learned sister Simmons JA. I agree with her reasoning and conclusion and have nothing useful to add.

BROOKS P

ORDER

1. The appeal is dismissed.

2. Costs are awarded to the respondent to be agreed or taxed.