IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE FULL COURT

CLAIM NO. SU2019CV04098

CORAM: THE HONOURABLE MR. JUSTICE DAVID BATTS
THE HONOURABLE MR. JUSTICE CHESTER STAMP
THE HONOURABLE MRS. JUSTICE STEPHANE JACKSON-HAISLEY

`

BETWEEN	**FRITZ PINNOCK**	**1st APPLICANT**
	RUEL REID	**2nd APPLICANT**
AND	**FINANCIAL INVESTIGATIONS DIVISION**	**RESPONDENT**

Judicial Review – Renewed application for leave – Whether Respondent has power to arrest and charge- Whether "designated " constable under FIDA has power to arrest and charge- Whether Informations void - Whether alternate remedy available in the parish court – Whether Fiat to prosecute should be set aside - Costs.

Hugh Wildman and Faith Gordon for Applicants

Richard Small and Cheryl Lee Bolton for Respondents instructed by The Senior Legal Officer of the Respondent

Heard: 10th, 11th February & 2nd March 2020.

BATTS J.

[1] On the first morning of hearing Mr Richard Small, the lead counsel for the Respondent, was not in attendance. We accepted the apology proffered on his behalf and, with the concurrence of the Applicants' counsel, agreed to hear the Respondent's submissions on the 11th February.

[2] In their renewed application for leave to apply for Judicial Review, filed on the 31st December 2019, the Applicants seek the following relief:

1. *A Declaration that the Respondent is a purely investigative body of financial crimes under the Financial Investigations Division Act, 2010, and is not empowered by law under the said Act to institute charges against the Applicants.*

2. *A Declaration that the Respondent is not empowered by law under the Financial Investigations Division to charge the Applicants for any offence arising from any investigation conducted by the Respondent.*

3. *A Declaration that Police Officers designated by the Commissioner of Police to be members of the Respondent are not empowered under the Financial Investigations Division Act to institute charges under the said Act against the Applicants.*

4. *A Declaration that the purported charges instituted by the Respondent against the Applicants, for various offences, to wit, conspiracy to defraud, corruption, misconduct in public office, engaging in a transaction that involves criminal property are illegal, null and void and of no effect.*

5. *A Declaration that the proceeding instituted by the Respondent against the Applicants before His Honour Mr. Justice Vaughn Smith, Parish Court Judge for the Parish of St. Andrew, for the various offences of conspiracy to defraud, corruption, misconduct in public office engaging in a transaction that involves criminal property and the possession of criminal property, is illegal, null and void and of no effect.*

6. *A Declaration that the Respondent is not permitted under the Financial Investigations Division Act to seek and obtain a Fiat from the Director of Public Prosecutions to prosecute the Applicants in respect of the purported charges brought against the Applicants by the Respondent.*

7. *An Order of Prohibition prohibiting the Respondent from taking any steps to seek and obtain a Fiat from the Director of Public Prosecution to prosecute the applicants in respect of the purported charges brought against the Applicants by the Respondent.*

8. *An Order of Certiorari quashing the charges brought by the Respondent against the Applicants for the various offences of conspiracy to defraud, corruption, misconduct in public office, engaging in a transaction that involves criminal property and possession of criminal property.*

9. *A Stay of the charges brought by the Respondent against the Applicants for conspiracy to defraud, corruption, misconduct in public office, engaging in a transaction that involves criminal property and possession of criminal*

property pending the determination of this Application for Leave to Apply for Judicial Review.

10. Cost of the Application to be cost in the Application.

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

[3] Simply put the Applicants are seeking the permission of the court to apply for judicial review of the decision of the Respondent, or its agents, to institute criminal charges. These charges were laid, by way of Informations, in the Half Way Tree Parish Court. The Applicants wish to have it declared, among other things, that neither the Respondent, nor its agents, have a statutory power to institute charges. The Respondent's statutory role, it is contended, is purely investigatory. Permission is sought also to apply for Certiorari to quash the criminal charges so laid and to stay the proceedings. The Applicants wish also to prohibit the issue of a fiat by the Director of Public Prosecutions for that purpose.

[4] The test to be applied at an application for leave to apply for Judicial Review is now well established. The applicant for leave must demonstrate that he (or she) has an arguable case with a realistic prospect of success and which is not subject to a discretionary bar such as delay or an adequate alternative remedy, see ***Sharma v Brown-Antoine [2007] 1 WLR 780 (PC)***. The test has been applied on many occasions by our Court of Appeal. The test is flexible in its application in that the more serious the consequence of the allegation the stronger the evidence required. It is fair to say also that the bar is not to be set too high lest injustice results.

[5] The Applicants' initial application, for leave before a single judge, was refused. Hence the renewed application before us. In refusing leave the learned Chief Justice Bryan Sykes gave a written judgment. Counsel for the Applicants, in the course of his submissions, relied heavily on that judgment He relied also on

written submissions filed before the learned Chief Justice and additional written submissions filed before this court. The Respondent opposed the application and also relied on written submissions filed here and before Sykes CJ. The Respondent similarly found comfort in the judgment of the Chief Justice. I will return to a more detailed consideration of the Chief Justice's decision and judgment. Both parties were permitted to make extensive oral submissions.

[6] I am very grateful for the assistance thereby provided but will not, in the course of this judgment, restate the submissions made. Reference to them will be made only to the extent necessary to explain my decision. Counsel should rest assured that, in doing so, I intend no disrespect and choose this approach only for reasons of economy.

[7] In the event, and having heard and read the submissions authorities and affidavits filed, I am firmly of the view that the application must fail. This is because the Applicants have failed to avail themselves of an alternative remedy which is still available and, in many respects, more appropriate in all the circumstances of this case. It is out of deference to the carefully articulated submissions, as well as the judgment of the learned Chief Justice, that I proffer these fairly extensive reasons.

[8] The first reason, for rejecting the application, has to do with the availability of an alternative remedy. It was not disclosed, or stated by the Applicants to exist, when making the application. This is a breach of Rule 56.3 (3) (d) of the Civil Procedure Rules. Mr. Wildman, counsel for the Applicants, submitted that there was no alternative remedy and hence nothing to disclose. He is wrong. The Informations being impugned were laid before the Half Way Tree Parish Court. That is a court created by statute. Mr. Wildman's submission was that, as this was an application for judicial review to quash the originating process, it was inappropriate to make the application before an inferior tribunal. Such a tribunal, he suggested, ought not to rule on its own jurisdiction to hear the matter. He cited no authority which supported that position. It has been my experience in

the Parish Court (then called Resident Magistrates Courts), over many years of practice, that the judge or magistrate has often been called upon to decide jurisdictional issues. This one is no different.

[9] There are very good reasons why the parish judge, before whom the Informations are filed, is in the best position to determine the issues intended to be raised in the proceedings for judicial review. These may be summarised thus:

a) The Applicants contend that the Respondent has only investigative power and that the Information was laid by agents of the Respondent who were acting as such. The Respondent, on the other hand, says the Informations were laid by police officers acting in the capacity of police officers. Is not the Parish Judge, after seeing and hearing the witnesses, in the best position to determine that issue? It is after all one of mixed law and fact.

b) Even if the Applicants are correct, that the Informations were laid by agents of the Respondent acting as such, and that the evidence in its support was unlawfully obtained, the question will arise whether the resultant proceedings are void .It will be a discretionary matter, given that all prerogative remedies are discretionary, and moreso, because this case concerns the effect on an originating process, see ***Caribbean Pirates Theme Park Limited v Irish Rover Limited [2015] JMSC Civ 158 (*****unrpted judgment 29th May 2015)** upheld on appeal on the 11th October 2019. This is a matter that the learned Parish Court Judge should be best able to determine. It is well established that illegally obtained evidence, and/or irregular procedures, do not necessarily render proceedings void or evidence inadmissible, see ***Kuruma v R*** **[1955] 1 All ER**

236: Phipson on Evidence 17th edition paras. 39-01 to 39-08; *R v Sang* [1979] 2 All ER 122; *Boddington v British Transport Police [1998] 2 All ER 203*; and ***Caribbean Pirates Theme Parks* (cited above).** Judicial processes once commenced are valid until and unless set aside see, ***Swatch AG (Swatch SA) Swatch LTD v Apple Inc [2019] JMCC Comm 52*** upheld on appeal in ***Apple Inc v Swatch AG (Swatch SA) Swatch Ltd SCCA* 119 of 2018 (decided 11th October 2019).** The Parish Court judge is in as good a position, if not better, as this court to determine whether the justice of the case requires a dismissal of the charges.

[10] In these circumstances I find that, even had the Applicants disclosed the existence of the alternative remedy, I would have dismissed the application for leave. It is not consistent with the efficient use of judicial resources to permit the claim given that the Applicants had, and still have, an opportunity to apply for dismissal before the Parish Court. Furthermore it emerged, in the course of oral submissions that the Applicants have made such an application. A date for the hearing of which has been fixed. Significantly the Applicants, we are told, rely heavily on the judgment of the learned Chief Justice in support of that application.

[11] I could end my judgment here. However, out of deference to the extensive submissions made, the judgment of the learned Chief Justice and, in the event I am wrong about the existence of the alternative remedy, I will go on to consider other issues.

[12] Mr. Wildman says that this matter raises constitutional issues and that is a further reason why leave should be granted. He says his client is being deprived of a fair trial, contrary to section 16 of the Constitution. There is no reference to a constitutional claim in the Notice of Application filed before this court. However, I accept that a litigant is entitled to raise a constitutional issue at any time. He or

she is also entitled to raise it before any court. The existence of a constitutional issue is therefore not a bar to the Parish Court hearing the application to dismiss an Information or a charge. Furthermore I do not agree that an arguable constitutional issue arises. There is no evidence before us to suggest that the Applicants will not receive a fair hearing before the Parish Court. No constitutional issue is apparent. The Applicants seek judicial review on the basis that an agency created by statute has exceeded its jurisdiction. The determination of that issue involves statutory interpretation. There is no issue of constitutional law, save perhaps, in the extended sense that the constitution of a country incorporates all law.

[13] On the substantive issue, whether or not the Informations laid are lawful, the Applicants similarly have no real prospect of success. But for the existence of the judgment of the learned Chief Justice I would have declined to state a view on this point. This is because, having determined that the Applicants have a viable alternative remedy, it would not be prudent, or just, to appear in any way to influence or pre-determine the issue. The litigant should be free to pursue the alternative remedy, and the Parish Court to determine the issue, without encumbrance. That is, I think, why the learned Chief Justice was at pains to indicate that nothing in his judgment should affect the decision of the Parish Court, see Paras 84, 85, 89 and 90 of his judgment.

[14] The Applicants contend that the learned Chief Justice decided that the Respondent has no statutory power to lay charges. That being so, and since the police officers who instituted the charges were agents of the Respondent, it follows that the Informations were unlawful null and void. This is the main point they seek permission to articulate before the court of judicial review. Like the learned Chief Justice I too wish nothing I say, in this judgment, to interfere with the determination of the learned Parish Court Judge or to appear to be directing a finding one way or the other. However, in order to demonstrate why the Applicants' claim is unrealistic, I must address the matter.

[15] In the first place, on the face of the Informations before us, there is no indication that the Respondent laid any charge. All are signed by constables some of the rank of Inspector. Each constable is empowered under the Constabulary Force Act so to do. In laying a charge the constable is also doing that which every citizen has the right to do, that is, initiate a criminal prosecution. This right is not the sole preserve of the state or its agents. Secondly, and even if the Informations were laid by agents of the Respondent while acting as such ,it will be for the trial judge to determine if the taint of illegality is sufficient to justify dismissal of the charges. The judge can make this determination at any stage of the proceedings although it is customary to do so during trial and after the Crown has presented its case.

[16] More fundamentally, and to the kernel of the Mr. Wildman's position, it is manifest that the Respondent is far more than just an investigative body. Mr Wildman is correct that the Respondent is not a legal person. It therefore acts through its "authorised officers". These include, but are not limited to, any member of the Jamaica Constabulary Force so designated by the Commissioner of Police, see section 2 of the Financial Investigations Division Act (hereinafter referred to as FIDA). It is a point to consider that the Applicants seek leave to review a non legal person. It may have been more appropriate to name the Attorney General as a Respondent or the individuals who signed the Informations. This aspect was not raised or submitted on so I say no more about it.

[17] It is the case for the Applicants that, once designated, the constable loses all his power under the Constabulary Force Act. He can act only pursuant to FIDA. No authority was cited for the proposition. Mr Wildman was content to say that on a true construction of the statute it is clear the power as a constable was "suspended." Mr. Wildman made bold to say that the Inspector so designated could not even write a traffic ticket. I respectfully beg to differ.

[18] There is nothing in the FIDA which suggests, or lends credence to the suggestion that, a designated constable loses his status, privileges or protection under the Constabulary Force Act. On the contrary it seems to me that it is that very status which gives the "*raison d'être"* for his designation. When, for example, an attorney at law is named an "authorised officer" is it credible to suppose that he or she can no longer function as an attorney? Similarly the Respondent has no need for a constable who cannot function as such. If therefore the designated constable remains a constable (as I find is clear), and if he chooses to institute a prosecution, there is nothing inherently invalid or void about it. The question may arise however, whether he has done so in reliance on confidential information obtained while acting as a designated officer and whether this reliance is in breach of any duty, and therefore whether the charges ought to be dismissed. Such questions, it seems to me, are best answered by the judge who is in command of all material facts and circumstances (see discussion at paragraph 8 (b) above). The application for judicial review has no real prospect of success given that designated constables retain their capacity as constables, and indeed as ordinary citizens, to initiate a criminal process.

[19] Finally, and as a footnote to the above, I should clearly indicate that I am not at all in agreement with one considered view articulated by the learned Chief Justice. Although considered it was, and I say so respectfully, not necessary for the decision at which he ultimately arrived. His decision, correctly made, was that there was an alternative remedy and that as a matter of policy courts of judicial review should not, where that alternative remedy was to be found in another court, allow *"the supervisory jurisdiction being used as a "de facto" appeal*." (Paragraph 89 of his judgment*).* The learned Chief Justice, it appears to me, was firmly of the view that the matter was best aired before the Parish Court. Similarly, with respect to the Applicants' complaint about the issue of the fiats, the learned Chief Justice felt that this was the purview of the Director of Public Prosecutions and was not a power with which a court of judicial review should, or would interfere, except in exceptional circumstances. No exceptional

circumstances were evident. The point of obiter dictum, with which I respectfully urge caution in its application, is summarised at paragraph 81, of the Chief Justice's judgment:

> *"The court is of the view that FIDA does not authorise FID to arrest and charge anyone or authorise FIDA[sic] to initiate charges and initiate any arrest."*

[20] Mr. Wildman submits, with some conviction, that the learned Chief Justice means that no authorised officer could lawfully institute charges with information obtained by virtue of his position as an authorised officer. This, according to Mr. Wildman, is prohibited by FIDA and the Chief Justice so found. I am not convinced that the learned Chief Justice meant any such thing. His words may be better read as meaning there is no expressed power in the Respondent to prosecute. This is not surprising as the Respondent is not a juridical person. However the Respondent acts through its authorised officers and therefore, as Mr. Wildman submits, the Chief Justice can reasonably be taken to mean that its authorised officers are not empowered to institute charges in the capacity of authorised officers. I have already indicated that, even if correct, this route to a favourable result must fail because there is nothing in law, or in the FIDA, which strips authorised officers of their powers under the Constabulary Force Act or as private citizens. I have also already indicated that it is for the Parish Court Judge to say whether any alleged breach occurred and if it did whether it is such as, in all the circumstances, to lead to a dismissal of the charges. I will nevertheless now treat with the issue on the assumption that Mr Wildman's interpretation of the Chief Justice's words is correct.

[21] The FIDA when read as a whole clearly contemplates the initiation of criminal proceedings in consequence of the investigations, enquiries, searches and other steps the Respondent is empowered to take. The statute does not bar the initiation of prosecutions by its authorised agents and in particular the designated serving members of the constabulary. In this regard I reference Section 3:

> "3. *The object of this Act is to establish a department of Government with sufficient independence and authority to effectively deal with the multidimensional and complex problems of financial crime and confer upon it the responsibility to –*
>
> a) *Investigate all categories of financial crime;*
>
> b) *Collect information and maintain intelligence data bases on financial crimes.*
>
> c) *Maintain an arm's length relationship with law enforcement agencies and other authorities of Jamaica and foreign states, and with regional and international associations or organisations, with which it is required to share information;*
>
> d) *Exercise its functions with due regard for the rights of the citizens."* [emphasis mine]

[22] Mr. Wildman submits that, as the objects at (a) to (d) do not include "prosecution," then the Act bars the initiation of criminal proceedings by the Respondent or its agents. In doing so he ignores the fact that on a literal construction Section 3 outlines two objectives. One is to "*effectively deal with*" financial crime. The other is to have responsibility for the matters at (a) to (d). One can hardly be effective in dealing with crime without the ability to prosecute offenders. In creating the provisions for investigation, discovery, production and inspection as well as confidentiality the Parliament of Jamaica wanted to ensure that, when information was obtained or shared in the course of an investigation, the possibility of adverse consequences for a successful prosecution was minimised. In other words FIDA is designed to enhance the possibility of the Respondent successfully dealing with financial crimes by successfully prosecuting those responsible for such crimes

[23] This conclusion is further supported by Section 5 (1) (c) of FIDA. That section describes one of the functions of the Respondent as being to:

"take such action as it considers appropriate in relation to Information and reports referred to in paragraph (b)".

The information and reports in paragraph (b) are (i) information related to financial crime, and (ii) transaction reports and any other reports made to or received by the Division under the Act or any other enactment. Appropriate action in relation to information or reports received about crime must include the taking of steps to prosecute.

[24] This conclusion is made obvious when one considers the other broad powers included in section 5. These are to: (a) advise the Minister, (b) collect, request, receive, process, analyse and interpret information (c) disseminate information and reports to the competent authority, the Attorney General, the Commissioner of Police, Revenue authorities, Commission for Prevention of Corruption, the Director of Public Prosecutions and any other body designated by the Minister (e) investigate at the request of the DPP or Commissioner of Police or on the initiative of the Chief Technical Director (of the Respondent) any person reasonably suspected of being involved in committing a financial crime (f) promote public awareness [of financial crimes] (g) formulate and implement Management guidelines and policies and an annual plan and (h) establish a database and databank for detecting and monitoring financial crimes (i) compile and publish statistics on related matters (j) manage, maintain, safeguard and control any property seized or restrained in connection with "proceedings" relating to financial crimes (k) carry out such other investigations and perform such functions and enter into any transactions that (i) are assigned to it under this or any other Act and (J) in the opinion of the Chief Technical Director are "necessary or incidental to the proper performance of its functions." [emphasis mine]

[25] The Chief Technical Director is the person appointed pursuant to Section 8 and responsible for the day to day operation of the Respondent. It seems to me to be manifest that nothing in the objects or powers exclude the initiation of

proceedings, and in particular criminal proceedings, against anyone. Such proceedings, on the contrary, would seem to be necessary or incidental to powers given to an organisation established for the expressed purpose of dealing with and investigating financial crime. It is implicit and, given that certain members of the constabulary were authorised officers, unnecessary for the legislature to state the obvious. In effect therefore the Respondent was not made a juridical person and hence not able to sue or be sued in its own name or to initiate prosecutions. The agency acts through its Chief Technical Director and other authorised officers and agents (Sections 2 and 8 of FIDA). These persons may among other things take such action as it considers appropriate in relation to information and reports (Section 5(1)(c)) or, "necessary or incidental" in the view of the Chief Technical Director(Section 5(1)(k)(ii)).There is no good reason why such action does not include the initiation of criminal proceedings.

[26] Finally, on the matter of a power to prosecute, I reference Section 6, subsections (1) (2) and (3):

> "(1) S*ubject to subsection (2) the conferral of powers of investigation upon the Division by this Act shall not be construed as affecting the exercise of any functions relating to the investigation or prosecution of offences conferred upon any other authority (hereafter called an investigative authority) whether such functions are similar to those powers or not,*
>
> *(2) Every investigative authority shall cooperate with the Division in the exercise of the functions conferred on the Division.*
>
> *(3) The Division shall cooperate with an investigative authority in the exercise of any functions conferred on the authority under this Act or any other enactment."*

This provision allows for mutual cooperation. It means that there is nothing to preclude others prosecuting or investigating financial crimes but that the agencies should cooperate. It would I think hardly have been necessary, to say that the Respondent's investigations do not preclude prosecutions by other agencies, if the Respondent did not also have the power to prosecute.

[27] It is important to note that in his discussion of the issue (see paragraphs 16 to 18 of his judgment) the learned Chief Justice did not analyse Sections 5 (1) (c) or 6(1).

[28] The Applicants' counsel, after the court had reserved, forwarded to the Registrar of the Supreme Court two judgments for our attention. The first is ***Regina v Horseferry Road Magistrates' Court Ex parte Bennett [1994] 1 AC 42***. In that case the English House of Lords reviewed a decision, by a magistrate at committal proceedings, to refuse an adjournment so as to enable judicial review by the High Court. It was alleged that the accused had been kidnapped, and brought into the country, in breach of the law related to extradition. The case is distinguishable as the magistrate in question was involved in committal proceedings. That was the jurisdiction under consideration, see the judgment of Lord Griffiths page 63 B of the report. Even so he was clearly of the opinion that magistrates, whether sitting as committing justices or for summary trials, have the power to exercise control of their proceedings by the abuse of process jurisdiction. The power was to be exercised based on the fairness of the trial before them. Lord Griffiths felt however that if a serious issue arose, as to the abuse of process jurisdiction, the High Court was the proper forum. The question certified, and answered by the House of Lords in the affirmative, was: whether the High Court had power to enquire into the circumstances by which a person was brought within the jurisdiction for trial and, if satisfied it was in breach of extradition procedures, to stay the prosecution and order the prisoner's release (see page 64 (E) of the report). In coming to their decision all the judges (save Lord Oliver who dissented) were of the view that the judge conducting a criminal

trial could similarly dismiss or stay proceedings due to such an abuse of process, per Lord Griffiths pages 62 B and 64 B, per Lord Slynn of Hadley who agreed with the Lord Griffiths, per Lord Bridge of Harwich pages 65 A and 67 H to 68 A-D, per Lord Lowry pages 76 B-D, 77 B-D, 78 B and 80 D, this latter passage I quote:

> "*What I have said is not of course intended to detract from the power of the court of trial itself, as the primary forum, to stay proceedings as an abuse of process, but the convenience of staying the proceedings at an earlier stage is obvious, when that can properly be done.*
>
> *Short of allowing the proceedings to reach the Crown Court, the merit of having the case considered by the High Court in preference to the examining magistrate or magistrates is clear…… (I say nothing about the power of magistrates when sitting to try a case as a court of summary jurisdiction, as in Mills v Cooper [1967] 2 QB 459.)"*

[29] Therefore, contrary to the impression conveyed by the headnote to the report, the court did not decide that a magistrate conducting a criminal trial could not stay proceedings in the face of an abuse of process. The decision, as to incompetence to stay for reasons of abuse of process, related to committal proceedings. This is not surprising because firstly, it seems lay justices may be involved (see page 78 H) and more importantly, because a committal proceeding does not constitute a judicial inquiry but is more in the nature of a judicial or ministerial function and would not bind the trial court or preclude the issue of a voluntary bill of indictment, (see pages 82 E and 84 B of the report).

[30] The other authority, thrust upon us after the close of arguments, is **R (on the *Application of A) v South Yorkshire Police and the Crown Prosecution Service [2007] EWHC 1261(Admin).*** This was a decision of a two man Divisional Court sitting to consider an application for leave to apply for judicial review. The issue concerned the decision of prosecuting authorities to charge certain minors rather than give final warnings. Essentially it involved a review of policy and whether it departed from statutory guidance. The court rejected the Crown's preliminary argument that the point should be taken before the Youth Court where the youngsters were to be tried. The Divisional Court, referenced ***R v Horseferry Road Magistrates Court ex p Bennett*** **(cited above)** and, opined that the wider issue of policy involved was more suitably dealt with in the High Court by way of judicial review. Their decision appears to be correct on the facts before them which involved accused children and allegedly flawed prosecutorial policy. However it does not mean a trial court has no power to hear and determine such an issue. If that is what their reference, to the House of Lords' decision in ex parte Bennett, was intended to convey then the case is wrongly applied. I do not think the Divisional Court intended to say any more than that it was appropriate that the High Court review the policy. They stated that the magistrates expressed agreement by adjourning to allow the application for judicial review to be made. It should be noted that the Divisional Court refused leave after considering that the application had no merit.

[31] It is manifest that the circumstances of this case are quite different. We are not dealing with children who should be protected in every way possible so, for example, the correction of erroneous policy decisions should be done before their trial. Secondly the resolution of the present challenge necessarily involves a consideration of the peculiar circumstance of the parties and not some general issue of policy or statutory construction. This is because, as demonstrated at paragraphs 9 and 18 above, the issues involve mixed law and fact being (a) the capacity in which the persons who laid the informations acted and (b) whether, in the circumstances of the case, any alleged abuse of process warranted a stay or

dismissal of charges. Furthermore the case at bar involves public figures, has received much public attention and concerns probity in governance. Therefore the public interest requires timely resolution before one tribunal. It will not be served by multiple proceedings in different fora for an extended period.

[32] In the final analysis therefore the Applicants are refused leave to pursue judicial review. They ought to avail themselves of the opportunity afforded them, before the learned Parish Court Judge, to have these issues addressed. Whether the Informations were laid by persons acting *ultra vires* and/or in reliance on unlawfully obtained evidence, and its effect, are matters best resolved by the trial court. An accused person is entitled to allege *ultra vires* conduct in his defence, see ***Boddington v British Transport Police [1998] 2 All ER 203*** *and* ***Sharma v Brown-Antoine and others [2007]1 WLR 780*****,** per Baroness Hale, Lord Carswell and Lord Mance at page 795 D of the report . I adopt their words, spoken in the context of a challenge to a decision to prosecute the Chief Justice of Trinidad & Tobago, as applicable to the instant matter:

> "*Viewing 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 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 difficult issues likely to arise."*

[33] The Application therefore stands dismissed. On the question of costs I will say a few words. It is the policy of the court that applications for judicial review should not be discouraged by the fear of an award of costs. It is for this reason that the rules say that an unsuccessful Claimant should not, without more, be ordered to pay costs, see Rule 56.15 (5) and ***Robinson v AG [2019] JMCC Full 5 (unreported judgment delivered 30th May 2019)*** at paragraph 4. The principle has been applied frequently in our courts.

[34] In this case however the learned Chief Justice, when refusing leave, clearly articulated that the alternate remedy available ought to be availed. The Applicants chose to ignore that clear direction. In that circumstance are these Applicants to be spared a costs award? Is it right that, having put the Respondent to the expense of defending an unmeritorious application, they should be twice spared? I think not. It was unreasonable for the Applicants to have renewed the application before this Court. Furthermore, and as indicated earlier, the Applicants have already initiated an application before the Parish Court. A date for that application has been fixed. In so doing they implicitly acknowledged the correctness of the Chief Justice's decision. I do believe therefore, and so hold, that costs should be awarded to the Respondent. Such costs to be taxed if not agreed.

STAMP, J

I have read the draft judgments of my brother Batts J. and my sister Jackson-Haisley J. and I agree with their reasoning and conclusion.

JACKSON-HAISLEY, J

I agree with the decision of my brother Batts J. just as my brother Stamp J. has done, however I wish to add a few words of my own.

BACKGROUND

[35] On the 9th day of October 2019, the Applicants Professor Fritz Pinnock and Mr. Ruel Reid (hereinafter referred to as the "Applicants") were arrested and charged. On the 10th day of October 2019, twenty-eight informations were sworn before a Deputy Clerk of the Court for the parishes of Kingston and St. Andrew. These informations charged the Applicants among others jointly and severally for offences ranging from Conspiracy to Defraud, Possession of Criminal Property, Misconduct in a Public Office and for acts of Corruption. This was the consequence of an investigation launched by the Respondent, the Financial

Investigations Division (FID) against the Applicants. The charges on information were laid by Mr. Brenton Williams, Inspector of Police and Director of the Constabulary Financial Unit (CFU).

[36] The Applicants filed an application for leave to apply for Judicial Review in which they sought among other orders an Order of Certiorari to quash the charges brought against them. On the 18th day of December 2019 the application for leave to apply was heard by Sykes CJ and on the 24th day of December 2019, he refused the application for leave to apply for judicial review.

[37] The Applicants have now renewed their application before the Full Court pursuant to the provisions of the Civil Procedure Rules (CPR) 56.5 (1) which provide that an applicant may renew an application for leave to apply for judicial review by applying to the Full Court in a matter such as this which involves the liberty of the Applicants. The Applicants seek several Orders. Among them are a Declaration that the charges instituted against them by the FID are a nullity and an Order of Certiorari to quash the charges against the Applicants

[38] At this Renewed Application for Leave to Apply for Judicial Review, the Court heard extensive submissions from counsels and I am grateful to them for their submissions and their industry in presenting them to the Court. I will also indicate that my failure to refer to all aspects of the submissions is in no way indicative of a lack of appreciation of their value in this case.

[39] Based on the grounds filed, the submissions advanced, the cases cited and the the prevailing law, the main issues to be addressed can be expressed as follows:

(a) What is the test for the grant of an application for leave to apply for Judicial Review (The Test)?

(b) Is there an alternative remedy available to the Applicants and if so have the Applicants established that Judicial Review is more suitable (An alternative remedy)?

(c) Have the Applicants established an arguable case with a realistic prospect of success (An arguable case)?

THE TEST

[40] The principles guiding a Court before whom an application for leave to apply for Judicial Review is made, are the same as those guiding the Court on a renewed application for leave for Judicial Review. Courts have traditionally set a high bar for an Applicant applying for Judicial Review. In the first instance leave must be granted before a party can apply for Judicial Review. In the second instance there seems to be an even higher standard expected of an Applicant in a matter involving the liberty of the subject. The review of a prosecutorial decision has been described as a highly exceptional remedy. (See **R v. Inland Revenue Commissioners, ex parte Mead** [1993] 1 All ER 772 at 782) That seems however, to be balanced out by affording to the applicant in such a matter a second bite at the cherry. After having been refused leave by a single judge, the applicant has a right to make a renewed application before the Full Court.

[41] The purpose of an application for leave or simply put permission to apply is primarily geared towards protecting public bodies against weak and vexatious claims. This position finds support in a case from the Supreme Court of Fiji, **Matalulu v DPP** [2003] 4 LRC 712 at 732, where the learned Judge opined as follows:

> *"… The purpose of leave is to prevent the time of the court being wasted by busybodies with misguided or trivial complaints of administrative error. Permission should be granted where a point exists which merits investigation on a full inter-partes basis with all the relevant evidence and arguments on the law…"*

[42] The Applicants in this matter must also be guided by CPR 56.3 (3) (d) which stipulates that a person wishing to apply for judicial review must first obtain leave and that the application must state certain things. Among them are the grounds

on which the reliefs are sought and whether an alternative form of redress exists and, if so, why judicial review is more appropriate or why the alternative has not been pursued. Whereas the Rules themselves make no provisions for what the Applicant is required to establish in order for leave to be granted there are a number of cases which address this issue.

[43] A useful starting point is the decision of the Judicial Committee of the Privy Council in **Sharma v Brown-Antoine and Others** [2006] UKPC 57 where the Law Lords set out the rule with respect to an application for leave to apply for judicial review, as follows:

> *"(14) 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 parte 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] EW CA Civ 1605. [2006] QB 468, at para [62].in a passage applicable mutatis mutandis to arguablilty:*
>
> *'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 a 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.'*
>
> *(5) it is well established that a decision to prosecute is ordinarily susceptible to judicial review, and surrender of what should be an independent prosecutorial discretion to political instruction (or we would add, persuasion or pressure) is a recognized ground of review;.. It is also well established that judicial review of a prosecutorial decision although available in principle, is an highly exceptional remedy… .."*

[44] This Privy Council decision has been applied time and time again in the Supreme Court jurisdiction as well as in the Court of Appeal. What is meant by an arguable case with a realistic prospect of success is quite clearly set out by Mangatal J (as she then was) in the case of Hon. **Shirley Tyndall, O.J. et al v Hon. Justice Boyd Carey (Ret'd) et al** 2010 HCV00474 at paragraph 11 as follows.

> *"It is to be noted that an arguable ground with a realistic prospect of success is not the same thing as an arguable ground with a good prospect of success. The ground must not be fanciful or frivolous. A ground with a real prospect of success is not the same thing as a ground with a real likelihood of success. The Court is not required to go into the matter in great depth, though it must ensure that there are grounds and evidence that exhibit this real prospect of success."*

[45] Similarly, in the case of **Danville Walker v The Contractor General** [2013] JMFC Full 1, the Court accepted the test to be as set out in **Sharma** but focused its attention on the second limb which is that Judicial Review must not be subject to any discretionary bar such as delay or an alternative remedy. The Court reiterated the point at paragraph 42 of the judgment that the availability of an adequate alternative remedy, save in exceptional circumstances, has always been a bar to the grant of judicial review. The applicant conceded the availability of alternative remedies which he had not used. In the absence of any demonstration that judicial review was more appropriate or that exceptional

circumstances existed, the Court found that there was an alternative form of redress and dismissed the application.

[46] The existence of an alternative form of redress does not always mean that the claim must fail. The applicant is required to establish why judicial review is more appropriate. This was expressly stated in the matter of **The Independent Commission of Investigations v Everton Tabannah & Worrell Latchman** [2019] JMCA Civ. 15 where the Court stated the position as follows at paragraph 58:

> *"The learned judge concluded that the existence of an alternative form of redress did not automatically bar the grant of leave to apply for judicial review."*

[47] The Court continued at paragraph 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 issue is whether the alternative is more suitable than judicial review. In this case it is."*

AN ALTERNATIVE REMEDY

[48] One of the fundamental linchpins of Judicial Review is that an applicant must first exhaust all available remedies before applying for Judicial Review. First of all, the Applicant must indicate in his application whether an alternative form of redress exists and, if so why judicial review is more appropriate or why the alternative has not been pursued. In order to succeed in the application he must establish that no alternative remedy exists or if one exists, he must establish that Judicial Review is the more appropriate forum or indicate why the alternative has not been pursued.

[49] Counsel for the Respondent has argued that even in respect of this preliminary requirement the Applicants have failed. Further, that there is a viable alternative remedy available to the Applicants and that this is consistent with the decision of Chief Justice Sykes where at paragraph 85 of the judgment he opines as follows

> *"There are adequate means of redress open to the applicants both during the trial and in the event of an adverse outcome, by an appeal. The mechanism of judicial review is not an appropriate one to raise questions of admissibility of evidence…. "*

[50] Mr. Small averred that the issues of admissibility or inadmissibility of evidence in this matter were clearly dealt with by the Chief Justice in his reasoned judgment. He contended that where other means of redress exist the Applicants should exhaust those means. Further, that the Parish Court is the appropriate Court to investigate and rule on the issues herein raised. Judicial Review therefore is not the appropriate remedy to be sought. Learned Counsel also cited **Danville Walker v The Contractor General** (supra) where Campbell J addressed frontally any suggestion that the Parish Court judge is not equipped to deal with the issues that may arise in a judicial review claim. At paragraph 48 he stated that *"…an alternative remedy makes redundant the need for judicial review."*

[51] On a perusal of the papers filed on behalf of the Applicants, it is noted in paragraph 32 of the Renewed Notice of Application for Leave to apply for Judicial Review, that the Applicants contend that the remedy of Judicial Review in all the circumstances is the most appropriate remedy to quash the decision of the Respondents in instituting criminal charges against the Applicants. On a strict reading of the averments in paragraph 32, there is nothing that stipulates specifically whether or not an alternative form of redress exists and if so why judicial review is more appropriate or why the alternative has not been pursued. Counsel for the Applicants in his submissions before this Court responded that no alternative exists. This is even the more reason why this should have been

specifically indicated in the application. As a consequence, the Applicants have failed to comply with the provisions of CPR 56.3(3) (d) which are mandatory.

[52] Having decided that the Applicants failed to comply with the mandatory provisions referred to above, I will now analyse the circumstances to determine whether there is in fact a viable alternative remedy available to the Applicants. The case of **Plds Company Limited v Pendle Borough Council** [2012] EWHC 904 emphasizes the very clear principle that is at the core of Judicial Review proceedings at paragraph 17 as follows:

> *"But there is an additional and, in my judgment, even more compelling reason why this application should be refused. Judicial Review is a discretionary remedy. It is a remedy of last resort and ought not to issue when an alternative is available…"*

[53] Mr. Wildman further averred that judicial review is the appropriate remedy when an inferior tribunal such as the Parish Court is illegally exercising jurisdiction that could affect the fundamental rights and freedoms of the citizen. He cited the case of **R v The Resident Magistrate of Saint Andrew and the Director of Public Prosecutions, Ex Parte Basil Black, Tyrone Chen, George Chai and Edmund Thomas** 14 JLR 51 in support of this submission. Further, that the Respondent like the Parish Court is an inferior tribunal and the Parish Court cannot be asked to review the actions of another inferior tribunal. If so, the Parish Court Judge would be asked to embark on a judicial review. He further stated that if these issues were placed before the Parish Court, the Judge may have dismissed them and proceeded to try the matter on the basis that those issues would not be in his or her purview. He urged the Court not to leave such fundamental issues to the Parish Court Judge.

[54] He buttressed his submission by arguing that the application by the Applicant is a matter affecting substantive constitutional rights, in that the charges are in breach of the Applicants' constitutional right not to be tried unless properly charged and the charge is to be determined by an impartial tribunal. He quoted section 16 (1)

of the **Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act** as follows: -

> *"Whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."*

[55] Mr. Wildman indicated that this is a fundamental right which has nothing to do with the admissibility of evidence. It is a right which is to be protected by the Supreme Court exercising its supervisory function over all inferior tribunals including the Parish Court and the Respondent.

[56] He relied on the decision of the court in ***Wilmot Perkins v Noel B. Irving*** (1977) 34 JLR 396 in which the Court of Appeal had to consider a similar question in relation to the then Fundamental Rights provision under section 25 of the Constitution. At pages 400 to 401 Justice of Appeal Forte, writing on behalf of the majority of the Court said this: -

> *"In the instant case, it was before commencement of the trial, that counsel moved the Court to allow for another judge to try the case, as the appellant contended that a real danger of bias was likely. This was not an application made during the process of trial as to a matter affecting evidence which required a ruling as to admissibility or other matters of that sort. This application affected the more fundamental question of whether the particular tribunal was competent (in the sense of likely bias (unfairness) to adjudicate upon the issues joined. In those circumstances the learned judge was bound to determine that issue once and for all, and having done so to make an order consequential on his determination."*

[57] Mr. Small's response to this submission is to indicate that the legal issues raised in these proceedings are issues of the interpretation of statute law, constitutional principles and the common law. All of these are matters well within the competence of the Parish Court Judge to determine and if there is a conviction, then they are matters for the Court of Appeal. Learned Counsel also stated that

the trial in the Parish Court and appellate Courts offer an alternative remedy far more suitable than judicial review. He cited paragraphs 58 to 62 of ***Independent Commission of Investigations v Everton Tabannah & Worrell Latchman*** (supra) in support of this submission.

[58] It is my view that there is nothing to support the point made by Mr. Wildman that this is a matter dealing with a Constitutional issue. Section 16(1) of the Charter of Rights stresses the need for a fair hearing by an independent impartial tribunal. The issues in contention here are clearly distinguishable from those issues. I am in agreement with Mr. Small that the issues raised in this Renewed Application touch and concern the question of statutory interpretation as well as the questions of admissibility of evidence and are not Constitutional issues.

[59] Counsel for the Applicants has also suggested that the Parish Court being an inferior tribunal could not rule on an issue dealing with another inferior tribunal. Counsel has made these statements without providing any authority to support his proposition so that the Court can assess the applicability to the instant case. The Parish Court is a creature of statute with the ability to try matters within the jurisdiction of the Court which are brought on information or for which there is an indictment. It would have been open to the Applicants to raise a preliminary objection before any Judge of the Parish Court dealing with the matter even before embarking on the trial of the case. They could raise the issue of an abuse of the process. It would also be open to the Applicants to argue at the end of the prosecution's case that there is no case to answer. A Judge of the Parish Court is suitably placed to determine questions concerning the charges laid, the informations sworn to and any issues regarding admissibility of evidence regardless of whether or not the Respondent is an inferior tribunal.

[60] When all the circumstances are weighed, it is my considered view that firstly, the Applicants have not complied with the mandatory provisions of CPR 56.3. Secondly, there is clearly a viable alternative remedy available to them, which is the Parish Court. All the issues raised can be raised in the Parish Court and the

Parish Court is well qualified to deal with all these issues. If counsel is aggrieved by the decision of the Parish Court, they have a second recourse in the Court of Appeal and even a third recourse in the Privy Council.

[61] The Applicants have therefore not exhausted all their remedies and do not meet the test to be granted leave. I could end my judgment here, but in the event, I am wrong on this point I go on to consider the other issues raised.

AN ARGUABLE CASE

[62] In respect of this issue, several points have been raised by counsel for the Applicants in the grounds filed and also in the submissions advanced. The grounds as filed, with all due respect to counsel demonstrate some repetitiveness and overlap and so in the interest of clarity, the issues to be determined are summarized as follows:

1. Did the Respondent bring charges against the Applicants and if so, did it breach the provisions of the Financial Investigations Division Act (FIDA)?

2. Are Jamaica Constabulary Force (JCF) officers who are designated as authorized officers under FIDA permitted to institute criminal proceedings against the Applicants or are their powers under the JCF in suspension?

3. Did the JCF officers act illegally in charging the Applicants by utilizing any power under FIDA based on information obtained from FID in breach of the confidentiality provisions?

4. Did the Respondent seek and obtain a Fiat from the DPP to prosecute the Applicants and if so, are they permitted to do so?

[63] For convenience, the first three issues will be dealt with together.

[64] Mr. Wildman submitted that the charges brought against the Applicants are a nullity because the Respondent being a statutory body had no power to arrest and charge anyone. Therefore, any police officer who is designated as an authorized officer of the Respondent can only investigate financial crimes and does not have any power to arrest and charge. He suggested that the appropriate starting point in demonstrating that the charges brought by the Respondent are a nullity is the judgment of the learned Chief Justice who analysed the various provisions of FIDA and agreed with the Applicant's attorney that the Respondent, under FIDA, have no power to arrest and charge anyone. It follows therefore, that when Mr. Dwight Falconer arrested the 1st Applicant and charged him, those charges would have been illegal, null and void and of no effect. Similarly, when Mr. Brenton Williams laid the twenty-eight (28) informations in the Parish Court those informations would have been illegal, null and void and of no effect.

[65] Mr. Small on the other hand, asserted that the judgment of the learned Chief Justice accords with the arguments of the Respondent that "*any power of arrest and charge that the police officers had could only be by virtue of JCF powers found under the Constabulary Force Act. Consequently, it was not the Respondent that arrested and charged the Applicants but JCF officers in their capacity as JCF officers*."

[66] Mr. Small cited sections 9 and 11 of **Justice of the Peace Jurisdiction Act** and section 289 of the **Judicature (Parish Court) Act** and the case of ***Andrew Joseph O'Toole v Jack Scott & Anor*** [1965] AC 939 in support of this submission.

[67] The power to lay an information is derived from Section 9 of the **Justice of the Peace Jurisdiction Act** which provides as follows:

> *Every such complaint upon which a Justice or Justices is or are or shall be authorized by law to make an order complaint and every information for any offence or act punishable upon*

> *summary conviction, unless some particular enactment of this Island shall otherwise require, may respectively be made or laid without any oath or affirmation being made of the truth thereof, except in cases of information where the Justice or Justices receiving the same shall thereupon issue his or her warrant in the first instances to apprehend the defendant as aforesaid;*

[68] Section 9 stipulates further that every information or complaint may be laid or made by the complainant or informant in person, or by his counsel or solicitor, or other person authorized in that behalf.

[69] If the informations are to be taken at face value they clearly refer to "Brenton Williams, Inspector of Police for the Parish of Kingston" swearing before a Deputy Clerk of Court for Kingston and St Andrew. There is no mention of FID anywhere on any one of these informations. There is no reference to any of them being made on behalf of FID or any other person or body for that matter. When sections 9 and 11 of the **Justice of the Peace Jurisdiction Act** are carefully examined along with the case of ***Andrew Joseph O'Toole v Jack Scott & Anor*** (supra), what seems clear is that there are provisions in law for one person to act on another's behalf in bringing a charge but what is also clear is that it should be expressly stated. The informations bear no indication that they were made on anyone's behalf.

[70] In addition, even in the affidavit of the Applicant Fritz Pinnock when he speaks to being charged with the offences, he does not indicate he was advised that he was being charged by the FID or on its behalf.

[71] In any event the FID in and of itself could not have laid any information or charged anyone, including the Applicants. This is because the FID possesses no separate legal personality. Under FIDA, the FID is described in section 4 as simply a department of Government. There is nothing in the FIDA that ascribes to FID any separate legal personality. I am therefore in agreement with the words of the learned Chief Justice where at paragraph 75 of the judgment he states:

> *"From the terms of the statute, as noted earlier, FID itself has no power to arrest and charge anyone neither does it have the power to institute criminal proceedings before any court in Jamaica. It is not a company and either has it been conferred with legal personality by statute."*

[72] It is therefore patently clear as indicated by the learned Chief Justice that it was not the FID that arrested and charged the Applicants but JCF officers in their capacity as JCF officers. At paragraphs 83-84 of the judgment the Learned Chief Justice stated as follows:

> *"Consequently, it was not FID that arrested and charged the applicants but JCF officers in their capacity as JCF officers. That still leaves open the question of whether the JCF officers utilized any power under FIDA when they were not authorized to do. If yes, that might raise admissibility issues which can be addressed during the criminal trial.*
>
> *The court has come to this position on the basis of the absence of evidence that the police officers were authorized officers under FIDA…."*

[73] The Chief Justice however, in my mind, qualified his decision by indicating that he came to this position on the basis of the absence of evidence that the police officers were authorized officers under FIDA. The Applicants have argued that in light of the pronouncement of the learned Chief Justice, the Applicants having now provided this evidence, this Court should find that it was in fact the FID that charged the Applicants.

[74] Counsel for the Applicant has also referred to certain portions of the judgment of the learned Chief Justice which he contends supports their case in particular, that the Chief Justice agreed with the Applicants that police officers designated as authorized officers under FIDA cannot use the JCF Act to carry out their functions under the FIDA. He submitted that since it has now been established that the officers were in fact authorized officers, the Applicants are entitled to have the charges struck out *ex debito justitiae*.

[75] I preface any consideration of these grounds by indicating that the Full Court is not sitting in appeal of the judgment of the Learned Chief Justice. The ***Danville Walker*** case (supra) makes this point clear where Sykes J (as he then was), when considering Mr. Walker's renewed application for leave to apply for judicial review, indicated at paragraph 67 of the judgment that this is not an appeal but a second opportunity to make the case for leave to apply for judicial review. This Court therefore has to consider the circumstances afresh and come to a decision of its own.

[76] I note that the learned Chief Justice did not have the benefit of this document that referred to the designation of the officers. This document is before us now and so must be closely examined and viewed along with all the other available evidence. It reflects that these officers were authorized officers of the FID. Inspector Brenton Williams in his affidavit filed on January 31, 2020 indicated that he was an authorized officer and in proof of his assertion, attached to his affidavit a copy of the Force Orders which reads as follows under the date the 4th day of April 2013:

> *"Authorized Officers- Financial Investigation Division*
>
> *The under-mentioned have been designated as Authorized Officers under the Financial Investigations Division Act, 2010 with effect from 2013-04-08-*
>
> *"X" Div. X1608 Spl. Cons. B. Williams, AFI…."*

[77] In light of the submissions advanced by Counsel for the Applicants, which they claim to be supported by the dicta of the learned Chief Justice, I have to consider whether the designation of the officers as authorized officers means that any charges effected by them were effected by FIDA.

[78] In determining this issue, perhaps a good starting point is to look at the definition of an authorized officer as set out in section 2 of the FIDA to mean as follows:

> *" the Chief Technical Director:*

> *any officer of the Division who is authorized as such by the Chief Technical Director for the purposes of this Act*
>
> *Any member of the Jamaica Constabulary Force so designated by the Commissioner of Police;"*

[79] What is clear is that it was intended from the inception of the FIDA that police officers would be designated as authorized officers. It must have been contemplated that the functions of a JCF officer would be complementary to the purpose and objects of FIDA. In fact, I am in agreement with the submissions of Mr. Small that it is indeed the qualifications that a police officer has which enables him to be appointed as an authorized officer, so therefore how then could this qualification become a disqualification?

[80] To answer this question, it may be prudent at this point to examine the objects of the FIDA which are set out in section 3 as follows:

> *"to establish a department of Government with sufficient independence and authority to effectively deal with the multidimensional and complex problem of financial crime and confer upon it the responsibility to –*
>
> *investigate all categories of financial crime;*
>
> *collect information and maintain intelligence data-bases on financial crime;*
>
> *maintain an arm's length relationship with law enforcement agencies and other authorities of Jamaica and of foreign States, and with regional and international associations or organizations, with which it is required to share information;*
>
> *exercise its functions with due regard for the rights of citizens.*

[81] It is of note that there is no mention in the objects of FIDA about prosecuting or taking steps to prosecute financial crimes. In fact, the references to prosecution in FIDA are found in sections 5, 6, and 12.

[82] Section 5 (1) refers to the Division compiling or publishing statistics in relation to the prosecution of financial crimes. This is complemented by Section 12 subsections 1(b) and 7(c) which provide for the exchange of information relevant to the investigation and prosecution of a financial crime.

[83] Section 6(1) of FIDA is worthy of note and provides as follows:

> *"Subject to subsection (2), the conferral of powers of investigation upon the Division by this Act shall not be construed as affecting the exercise of any functions relating to the investigation or prosecution of offences conferred upon any other authority (hereinafter called an investigative authority), whether such functions are similar to these powers or not."*

[84] One of the essential duties of JCF officers is the duty to investigate. Apart from the JCF, other investigative agencies have been created to carry out particular types of investigations. For example, the Independent Commission of Investigations (INDECOM) was created to investigate cases of police shooting and of course the FID which has a primary function to investigate various categories of financial crimes. How then is section 6(1) to be interpreted? On a literal interpretation it could be construed to mean that the fact that the FID has been conferred with investigative powers does not affect the exercise of any functions relating to the investigation or prosecution of offences which any other authority possesses.

[85] An Inspector of police such as Inspector Brenton Williams is conferred with investigative powers by virtue of being a member of the JCF. When he becomes an authorized officer he takes on investigative powers as it relates to financial crimes. Counsel for the Applicants has contended that once he becomes an authorized officer whatever he does must be done in the name of the FID. Does this mean he loses those powers originally conferred on him by virtue of being an Inspector of Police? This is essentially what the Applicants are asking this Court to answer in the affirmative. When section 6 is given its ordinary meaning, it

appears to be guarding against any impact that the investigative powers of the FID could have on prosecution of offences. It seems then to be contrary to the essence of section 6(1) to suggest that because Inspector Williams is now an authorized officer of the FID he would lose his prosecutorial functions.

[86] Counsel Mr. Wildman was bold enough to suggest without more that by virtue of being an authorized officer, the powers of Inspector Williams under the JCF were suspended. He maintained that this is supported by section 3 of FIDA which recognizes this line of demarcation and respectively creates what in legal circles in referred to as a 'Chinese Wall'. Mr. Small on the other hand contended that police officers retain their full common law and statutory authority as police officers to arrest, charge and prosecute the Applicants following the investigation into the offences.

[87] With respect to this argument, counsel for the Applicants has failed to identify anywhere in the FIDA or any other legislation that speaks to or even suggests that the powers of a police officer are suspended when they become designated officers of FID. In addition, there is nothing in the JCF Act that speaks to this "suspension of powers". There is also no such reference in the Force Order dated April 4, 2013 that referred to the designation of Inspector Williams. In fact, when the Force Order is read in its entirety, it makes references to officers being on Departmental Leave, Vacation Leave, Dismissal, Resignation and even spoke to Suspension. It would no doubt have been appropriate to state in the Force Orders any suspension of powers of an officer designated an 'authorized officer' of the FID. Officers are guided in their duties by other documents such as Staff Orders, Police Force Orders and the JCF Book of Manual. There has been no suggestion that any of these speak to any suspension of the power to arrest and charge.

[88] Section 3 of FIDA does stipulate the need for FIDA to maintain an arms length relationship with law enforcement agencies. It is this provision that Mr. Wildman contends, lends support to his argument. I have examined this provision and it

seems clear to me that this provision is geared towards preserving the independence of the FID. The suggestion by learned counsel for the Applicants that it can be inferred from this section that designated police officers can no longer exercise their powers of arrest and charge is farfetched.

[89] Throughout the provisions of FIDA there is nothing that speaks expressly to charging anyone for any offence. Does this mean that the power of authorized officers to charge is non-existent? If the authorized officers are not empowered by any other means to charge then certainly they would not be able to do so by virtue of being authorized officers. However, if the authorized officers already have the power to charge then, it could not be suspended simply by virtue of an assignment to this Division. Although the main function of this Division is to investigate, when one looks at the intention of the legislation by the framers it must mean that any powers of arrest and charge must be complementary to the powers of investigation. In my view, the suspension of the powers of a JCF officer would be an important provision and with the specificity of FIDA, would not be left for mere inference and would be expressly stated.

[90] There is no evidence or law presented to the Court that would lead to the finding that the powers of arrest of the officers were suspended. The fact that these officers are authorized officers under FIDA could not without more mean that they can act only under FIDA. They still retain their powers as JCF officers. In the absence of any evidence or law to support the suggestion that the officers' JCF powers were suspended, that suggestion made by Mr. Wildman is at best speculative.

[91] Mr. Wildman proffered that the 1st Applicant outlined in his Affidavit that on the morning he was arrested and charged by Mr. Dwight Falconer and company, he was shown a Search Warrant under section 31 of FIDA wherein Mr. Falconer described himself as an authorised officer of the Respondent. He further contended, that the search warrants, having been exhibited in the Affidavits of the Applicants, clearly show that the police officers were in fact acting as

authorized officers of the Respondent and therefore, have no powers to arrest and charge anyone.

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

[93] Counsel Mr. Wildman submitted that FIDA makes it abundantly clear that information gathered as a result of an investigation under FIDA, cannot be shared with the JCF, as such, information must be kept confidential. Counsel has also argued that based on the confidentiality provisions in FIDA it is clear that the sharing of information is not permitted so how then could the officers be allowed to use information obtained from being authorized officers to carry out their functions as JCF officers? Counsel has indicated that the Chief Justice in his judgment agrees with his position when, after an examination of the section 10 provisions, he indicated that a police officer designated as an authorized officer cannot use information acquired from being an authorized officer to execute his functions as a police officer.

[94] Section 10 (1) of FIDA provides as follows:

> *"Every person having an official duty or being employed in Obligation the administration of this Act shall-*
>
> *(a) regard and deal with as secret and confidential, all information, books, records or documents relating to the functions of the Division; and*
>
> *(b) upon assuming such duty or employment, make and subscribe a declaration to that effect before a Justice of the Peace.*

> *(2) Every person who had an official duty or was employed in the administration of this Act shall maintain, after such duty or employment is terminated, the confidentiality of all information, books, records or other documents relating to the functions of the Division.*
>
> *(3) Any person to whom information is communicated pursuant to this Act shall regard and deal with such information as secret and confidential. (4) Every person referred to in subsection (1), (2) or (3) having possession of or control over any information, book, record or other document, who at any time communicates or attempts to communicate"*

[95] The learned Chief Justice did comment on this provision and said the following at paragraph 48 of the judgment as follows:

> *"…Where, respectfully, I think Mr Small is incorrect is to suggest that a police officer if designated as an authorized officer under FIDA can use that information acquired from the exercise of the powers under FIDA to execute his functions outside of FIDA as a police officer. An authorized officer is subject to the secrecy obligations imposed by section 10 of FIDA. Section 10 (3) speaks to this. It says 'any person to whom information is communicated pursuant to this Act shall regard and deal with such information as secret and confidential.' This court is unable to see how this provision could not apply to police officers who have been designated as authorized officers. It is immediately obvious that the noun 'information' in section 10 (3) has the same meaning in section 5 (1) (b) (i) and section 5 (2) (a), (b).*

[96] The provisions of section 10 must be read in conjunction with the provisions of section 5(2)(a) which provides that 'subject to the provisions of this Act, the Division may, for the purpose of carrying out its functions provide and receive information relating to the commission of a financial crime'. This suggests that there are certain situations in which information relating to financial crimes can be shared, and that the confidentiality provisions are not necessarily relevant to every situation.

[97] With respect to this issue, it is not the function of this Court to determine whether there has been any breach with respect to the secrecy and confidentiality provisions of FIDA by the police officers. Taken at its highest, if the officers breached those provisions when they arrested and charged the Applicants, this would have certain implications with respect to the nature of the evidence they would be able to give in court. It would perhaps fall into the category of illegally obtained evidence which the Court would have to deal with. This would not be a basis to say that the charges laid are a nullity

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

[99] The Applicants are seeking an order prohibiting the Respondent from taking any steps to seek and obtain a Fiat from the Director of Public Prosecutions to prosecute the Applicants. The Applicants aver in their affidavits that Mr. Robin Sykes, the head of the FID, indicated that he intends to seek a Fiat from the DPP to prosecute them. This brings me to the question whether the Respondent sought or obtained a fiat from the DPP to prosecute the Applicants and if so, are they permitted to do so? At this point there is no evidence before the Court that any Fiat has been sought by Mr. Sykes, however, the indication from Mr. Sykes is that he intends to do so.

[100] Learned Counsel for the Respondent stated that Sykes, CJ at paragraph 91 of the judgment held that the Fiat to associate with the prosecution was granted to two (2) Attorneys-at-Law and not to the Respondent. Mr. Small submitted that no

exceptional good reason has been cited for questioning or reviewing the refusal of leave to review the grant of a Fiat. With those submissions, I agree. The Applicants have failed to present any evidence to substantiate their assertion that the Respondent has ever sought any Fiat. The evidence before the Court is that it was attorneys-at-law who sought the Fiat of the DPP. Even if Mr. Sykes seeks a Fiat, that is not a matter that this Court will interfere with. The granting of any fiat by the DPP is solely within her purview. The Constitution of Jamaica makes it clear that the DPP is vested with the power to direct all prosecutions within this country. Associated with that power is the power to grant fiats to any counsel she deems fit to associate with the prosecution of this or any matter.

[101] In concluding on this issue as to whether or not the Applicants have established an arguable case with a realistic prospect of success, it cannot be over emphasized that in order to establish this the Applicants bear the burden of proof. In ***R (on the application of N) v Mental Health Review Tribunal (Northern Region)*** (supra) the court has indicated that "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 proven on a balance of probabilities". These are serious allegations having to do with the legality of the charges against the Applicants, but yet no evidence has been provided to support the assertions made on behalf of the Applicants. In order to establish an arguable case with a realistic prospect of success, the Applicants have a burden to establish that there are grounds and/or evidence which demonstrate this realistic prospect of success. In determining what is arguable one has to refer to the nature and gravity of the issues to be argued. It cannot simply be speculative.

[102] The Applicants have failed to present any evidence before the court in proof of the positions they assert. They have failed to show how the powers of the officers when designated as authorized officers came to be suspended. They have failed to prove that the officers in charging the Applicants failed to regard and deal with

any information they obtained in the course of their designation as secret and confidential. They have failed to show that the Respondents acted improperly with respect to the Fiat. They have failed to show that they have an arguable case with a realistic prospect of success.

ORDERS SOUGHT

[103] The Applicants have asked the Court to make declarations that the charges are null and void and are of no legal effect. Counsel for the Applicants has relied on the Privy Council decision of ***Leymon Strachan v The Gleaner Company Limited and Dudley Stokes*** [2005] UKPC 33, where the Court expressed that defects in proceedings which are so fundamental that they make the whole proceedings a nullity included proceedings which appear to be duly issued but fail to comply with a statutory requirement. Counsel submitted that this Court should find that the proceedings here appear to be duly issued but failed to comply with FIDA and therefore should be declared a nullity. The Applicants however have failed to established any failure to comply with the provisions of FIDA and therefore there is no basis to declare the charges null and void and of no legal effect.

[104] The Applicants also seek an Order for Certiorari to quash the criminal proceedings and to stay the prosecution. What the Applicants are seeking is a highly exceptional remedy. It has been stated time and time again that although Judicial review of a prosecutorial decision is available in principle, it is a highly exceptional remedy. This point was made clear in the case **A v R** [2012] EWCA Crim 434 where the Lord Chief Justice said at paragraph 81:

> *"As to judicial review, there can, we suggest, be very few occasions indeed when an application for permission by or on behalf of a defendant should not be refused at the outset on the basis that an alternative remedy is available in the Crown Court. This is the appropriate tribunal for dealing with these questions on the rare occasions on which they may*

arise. Precisely the same considerations apply to a case involving summary trial"

[105] No exceptional circumstances have been pleaded and no exceptional circumstances have been proven. The Applicants have not met the threshold for proving the exceptional circumstances requiring the grant of a Certiorari. The Orders sought on this Renewed Application for Leave to Apply for Judicial Review are refused.

[106] In all the circumstances, the Application fails because there is a viable alternative remedy and even if this were not so, the Applicants failed to establish the existence of an arguable case with a realistic prospect of success.

COSTS

I agree wholeheartedly with my brother's reasoning on the issue of Costs. There is no need for me to add anything further. Costs to the Respondents.

BY THE COURT:

[107] In the result it is the judgment of the court that:

(1) The Application is dismissed.

(2) Costs to the Respondent to be taxed if not agreed.

…….....
Batts J.

......
Stamp J.

.....
Jackson-Haisley J.