[2022] JMSC Civ. 23

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU 2021 CV 00504

BETWEEN	**FRITZ PINNOCK**	**1st CLAIMANT**
AND	**RUEL REID**	**2nd CLAIMANT**
AND	**HIS HONOUR CHESTER CROOKS CHIEF JUDGE OF PARISH COURTS**	**RESPONDENT**

IN CHAMBERS VIA ZOOM

Mr Richard Small and Ms Shawn Steadman Wilkinson for the Applicant

Mr Hugh Wildman and Miss Indira Patmore instructed by Hugh Wildman and Company for the Respondents/Claimants

Heard: January 26, 2022 and February 23, 2022

Application to set aside or vary order - Order was made granting leave to apply for judicial review - Applicant not a party to claim for judicial review - Applicant not served with application for leave - Whether order ex parte - If order not ex parte can order be revoked or stayed by a judge of concurrent jurisdiction - Applicant asserts interest as a party directly affected - Whether order should be varied or set aside.

PETTIGREW COLLINS J

THE APPLICATION

[1] The applicant filed a Notice of Application for Court Orders on September 29, 2021, seeking that:

1. The order of Mr Justice C Daye staying the proceedings in the Kingston and St Andrew Parish Court be revoked.

2. Alternatively, the order of Mr Justice C Daye staying the proceedings in the Kingston and St Andrew Parish Court be varied to "stay the trial"

[2] I will outline the grounds relied on as they also provide the background and in large measure, outline the events leading up to this application. The grounds on which the application was sought are numerous. They are:

1. The Honourable Mr. Justice C. Daye on the 11th day of June, 2021 granted the Claimants' application for leave for judicial review;

2. His Lordship also ordered that the grant of leave to apply for judicial review operates as a stay of the criminal proceedings;

3. The criminal proceedings to which the learned judge referred is the prosecution of the Claimants, together with other defendants, in the Kingston and St. Andrew Parish Court – Criminal Division for corruption related offences and other offences under the Proceeds of Crime Act;

4. The Applicant is the Financial Investigations Division (FID) established by section 4 of the Financial Investigations Division Act (FIDA), to among other things, investigate or cause to be investigated, any person who is reasonably suspected of being involved in the commission of any financial crime.

5. Investigations into financial crimes which led to the charges brought against the Claimants before His Honour Chester Crooks in the Kingston and St. Andrew Parish Court (Criminal Division) were conducted by, among others, investigators attached to the Constabulary Financial Unit (hereafter "CFU') situated at the FID.

6. The Applicant was not served with the application for leave for judicial review and, consequently did not have an opportunity to participate in the submissions made before the learned judge;

7. The decision to stay the proceedings was made without the input of the Applicant, (whose Attorneys-at-Law have obtained a fiat to associate with the prosecution) or the Office of the Director of Public Prosecutions (ODPP);

8. The grant of stay of proceedings has delayed the preparatory work that a court normally engages in, in order to bring the matter up to stage for trial;

9. If the court deems it necessary to stay the trial of the matter at a later stage, then that can be done;

10. This is a matter of public interest;

11. The grant of stay of proceedings has not only affected the prosecution, but the other Defendants charged jointly with the Claimants in the trial before the Parish Court;

12. If the instant application were granted a judge of the Parish Court would be able to continue to preside over the proceedings pending the hearing of the application for judicial review;

13. It is in the interest of justice that the instant application be granted.

14. The granting of the instant application will further the overriding objectives of the Civil Procedure Rules, 2002.

[3] The respondents to this application will be referred to as the claimants throughout this judgment. The claimants are opposed to the application. Both sides filed

written submissions in the matter and also supplemented the written submissions with oral submissions. The applicant has provided affidavit evidence

by way of two affidavits of Inspector Brenton Campbell filed on the 1st of September 2021 and 29th of September 2021. I will not outline the affidavit evidence of Inspector Campbell but I note that he gave evidence on all factual matters raised by Mr Small during his submissions. I will only make direct reference to his affidavit evidence to the extent I find it necessary in resolving the issues raised. There were initially two separate applications but the claimants indicated that they were not opposed to the applicant's application to be joined as an interested party in the claim. That order was granted with certain attendant orders also sought, to facilitate the applicant's participation in the claim for judicial review. The decision in respect of which judicial review was sought and granted was that of His Honour Mr Chester Crooks made on the 4th of February

2021 refusing the claimants' application to dismiss corruption related charges and directing that the trial of the claimants should proceed.

THE APPLICANT'S SUBMISSIONS

[4] In advancing his submissions, Mr Small observed at the outset that the claimants did not file any affidavits in this application and submitted that they should therefore not be able to rely on any matters not in evidence in this application. One could hardly disagree with his observation that facts cannot be established in submissions prepared by a lawyer.

[5] Mr. Small adverted to the fact that the FID has been made a party to all five previous proceedings in the Supreme Court and the Court of Appeal, emanating from the claimants' challenge to the proceedings in the Parish Court involving the prosecution of the claimants. See paragraphs 12 to 22 of the affidavit of Inspector Brenton Williams filed on the 1st of September 2022.

[6] Mr. Small submitted in essence that it was improper for the claimants/respondents not to have served the applicant in the proceedings seeking to impugn the ruling of His Honour Mr Chester Crooks. The reason counsel advanced, is that the FID has a direct interest in the matter, that is, it is a party directly affected by the order of the court in the judicial review proceedings.

Indeed, Counsel says that the claimants recognize the FID as such by virtue of the fact that the FID has been named by them as a party in all the previous judicial review proceedings. Counsel also adverted to the lack of opposition on the part of the claimants to the application filed on the 1st of September 2021, by the applicant seeking orders to allow it to join the judicial review proceedings as an interested party. This lack of opposition counsel reasoned was also borne out of this recognition.

[7] Mr. Small noted that the prosecution, that is the DPP and the FID, had no input in the decision to grant leave and stay the proceedings in the Parish Court. Counsel asserts that that is a relevant consideration in the court's deliberations in determining whether the order of Daye J should be amended or revoked.

[8] Mr. Small also submitted that the claimants had not complied with the Civil Procedure Rules in the application seeking leave to apply for judicial review. He asked the court to have regard to the decision of Sykes J as he was then, in the case of **R v Industrial Disputes Tribunal Ex parte J Wray and Nephew Limited** Claim no. 2009 HCV 04798. Counsel directed the court's attention specifically to paragraphs 41, 29, 36, 47, 77 and 40, (in that order). Those paragraphs address the status of a party directly affected and distinguished such a party from a party with a sufficient interest and deal with how a party directly affected should be treated with in an application for leave to apply for judicial review.

[9] He contends that the FID had a right to be heard at the leave stage. He insists that since neither the DPP nor the FID had notice of the application for the stay and

was not heard as to whether an order granting leave was appropriate, or if it was appropriate for the court to make an order, what order ought to have been made, the court in those circumstances ought to grant an order amending the order of Daye J. Counsel also asked the court to have regard to the definition of a party directly affected in the case of **R v Rent Officers Service and another (ex parte Muldoon**) [1996] 1 W.L.R. 1103.

[10] Mr. Small strongly disagreed with Mr Wildman's assertion as contained in his written submissions that this court is not able to revoke or vary the decision of another Supreme Court Judge where the order was a regular one. Counsel contends that we are here concerned with a decision which was made in the absence of a relevant party, the DPP and /or the party permitted to be associated with the DPP in the prosecution of the matter. Counsel points to the authorities which he says are authority for the proposition that an order is provisional where a necessary party has not participated in the proceedings from which the order emanated. It was also submitted that the circumstances of this case makes it eminently appropriate for such an order to be reviewed. He observed that the authorities also show that ordinarily, it would have been ideal that this application be heard by J Daye. Counsel posited that the authorities that Mr. Wildman has cited are not applicable to the circumstances of this case. The decision of **Leymon Strachan v The Gleaner Company** [2005] 1 WLR 3204 was referenced in this regard.

[11] In his written submissions, Mr. Small alluded to the court's powers under rule 26.1 (7) of the CPR. He also referenced the decision in **Re Pinochet No. 2** [1999] UKHL regarding the court's inherent jurisdiction to set aside an order made by a court of concurrent jurisdiction. He relied on the decision of **Minister of Foreign Affairs, Trade and Industry v Vehicles and Supplies (Jamaica**) Privy Council decision No2 of 1991 on May 13, 1991, **Bardi Limited v Millingen** [2018] JMCA Civ. 33 and **Petrojam Limited v Industrial Disputes Tribunal and the Ministry**

of Labour and Social Security [2018] JMSC Civ. 166, in this regard relating to setting aside an order granted ex parte.

[12] Reliance was placed on **Belize Communication Limited v Attorney General of Belize et al** No 27 of 2002 Court of Appeal Belize, decided on the 10th of October 2003 to say that even where there was an inter partes hearing, but one in which the interested party did not participate, that is, was not present and was not represented, a grant of leave to apply for judicial review may be set aside on the application of the interested party. He maintained that as in the that case, the proceedings before Daye J remained ex-parte. Mr. Small observed that Phillips' JA pronouncement in **Bardi Limited v Millingen** that the relevant principles are not solely applicable to the court's ex parte jurisdiction, as '**any order made by the court can be varied or revoked by the court**' (Counsel's emphasis).

[13] Reliance was also placed on the case of **Sita Kamara Vafi v Secretary of state for the Home Department** [1996] Imm. AR 169, which also involved a situation where a grant of leave to apply for judicial review after an inter partes hearing, was discharged.

[14] The applicant also relied on the case of **Demetri Jobson, Max Albert Jobson v Administrator General of Jamaica and New Falmouth Resorts Limited** [2015] JMSC Civ. 253. This case addressed the provisions of rule 11.18 of the CPR which allows a party not present at a hearing to apply to set aside orders made in that party's absence. The court's attention was specifically directed to paragraphs 33 to 43 of the judgment.

[15] It was the applicant's position that it is not clear from a perusal of the judgment of Daye J whether there was any argument before the court on the question whether or not the criminal proceedings should be stayed pending the hearing of the application for judicial review. It was surmised that the stay of proceedings was merely a consequential order made by the learned judge pursuant to his powers under rule 56.4 (9) of the CPR. It was observed that the order for a stay was not

added to the judgment until when the order was perfected on June 15 2021, even though the judgment was given on June 11, 2021.

[16] Counsel also takes issue with the fact that the learned judge did not order that directly affected parties such as the applicant (the prosecution) and the other defendants be served with the application for leave to apply for judicial review. Counsels says this is so notwithstanding his acknowledgement that there is no requirement for interested parties or any party to be served at the leave stage. He made reference to rule 56.4 (4) which provides for the judge at the leave stage to direct service on the Attorney General and on the respondent to the application. The purpose of this rule counsel pointed out, is to ensure that in appropriate cases, relevant state agents against whom an order for grant of leave is made and who may be impacted may be given an opportunity to be heard through the Attorney General.

[17] Counsel pointed out that while it is accepted that the Attorney General was involved in the proceedings, the Attorney General did not represent the interests of the prosecution in the matter and was not a party with a full appreciation of the consequences of an order granting a stay. He adverted to what was said in the evidence of Inspector Campbell that the grant of a stay has had an inhibiting effect on necessary steps being taken in order to advance the prosecution of the matter. Counsel contends that even though the learned judge appeared to have considered the impact judicial review may have on the criminal proceedings at paragraph 50 of his judgment, it does not appear that he considered the impact which any stay of proceedings would have on the other defendants being tried with the claimants, in particular the impact on their constitutional rights to a fair trial within a reasonable time. He also pointed to the fact that the claimants were jointly prosecuted with other individuals, at least one of whom has expressed concern at the delay and has expressed that she ‘was very anxious to get on with her life’.

[18] It is the complaint of the applicant that Daye J ought to have heard from the prosecution even at the stage where the decision to stay proceedings was to be taken.

[19] It was also the submission of the applicant that it is clear from the authorities that the threshold to be met for a grant of a stay of proceedings is very high. He cited the case of **The Attorney General of Jamaica v Claudette Clarke and Brittani Clarke** [2018] JMCA App 17 as well as the decision of Sykes J in a related matter, **Fritz Pinnock and Ruel Reid v Financial Investigations Division** [2019] JMSC Civ. 257. Counsel asked the court to have regard in particular to paragraphs 65 to 92 of that judgment.

[20] Mr. Small also submitted that the decision in cases such as **Melanie Tapper v DPP** [2012] UKPC 12 and **R v Latif** [996] UKHL 16 and **Attorney General's Reference** [2004] 2 AC 72 supports his contention that the jurisdiction of the court to stay criminal proceedings is one which should be sparingly exercised.

Dictum in **R v Latif** to the effect that "the public interest in ensuring that those charged with committing grave crimes should be tried' ought to be weighed against any prejudice to the defendant are relevant factors in deciding on whether to grant a stay of proceedings.

[21] It was also the submission that the claimants in breach of their duty of candour failed to disclose a number of matters namely:

a) The stage at which the matter had reached, i.e., that notwithstanding the fact that the learned judge had ruled that the trial could proceed, disclosure had not been completed, nor had the case management conference been held;

b) The fact that the claimants were being tried together with other accused. Save an oblique reference in paragraphs 20, 22 and 25 of the claimant's affidavit to their 'co accused', there was no mention that the claimants were charged together with other defendants, the number of defendants or who those other defendants were;

c) The various applications made by the claimants and the fact that they were all concluded without a stay being granted, and during which time the proceedings in the Parish Court were able to proceed.

[22] It was thus contended that the judge failed to take into account all relevant factors because he did not have the full picture before him and that it is likely that he would have come to a different decision in respect of whether or not to grant a stay. Thus the view is taken that the learned judge did not appear to have addressed his mind to the other co accused in the parish Court proceedings. It was also said the judge was deprived of the opportunity to consider whether aspects of the prosecution could proceed while the judicial review hearing took place. It was also said that the learned judge failed to have sufficient regard for the public perception of the administration of justice caused by the stay of proceedings. It was the position that while the applicant conceded that fairness dictates equal treatment of all parties before the law, the learned judge failed to have sufficient regard to the public perception of the administration of justice.

[23] It was submitted that there can be no detriment to the claimants if for example the prosecution were to conclude disclosure, the case management conference takes place, and a trial date set.

THE CLAIMANTS'/RESPONDENTS SUBMISSIONS

[24] Mr. Wildman submitted that since the court is here concerned with an application that has been filed within an existing claim in relation to which facts are already set out, there is no need for the filing of new affidavits setting out facts.

[25] He boldly asserted that the applicant's submissions are grounded in a web of misconceptions. One such misconception he said relates to the purpose of judicial review. He contended that one can only ask for judicial review against a decision maker. On this basis, he said that the only decision maker in this instance was His Honour Mr Chester Crooks; that His Honour was the individual who made the

statement that he had a conflict of interest. He adverted to the fact that the Attorney General's involvement in the matter was as Counsel for the learned Chief Parish Judge and that she was never served as a party to the proceedings. He cited the decision in **Vehicles and Supplies** (supra) to say that judicial review is not civil proceedings under the Crown Proceedings Act which requires that persons with an interest are to be served.

[26] Mr. Wildman also contends that contrary to the applicant's assertion, the application before Daye J for leave to apply for judicial review was not an ex parte application, but that it was a regular inter partes application. He further stated that while the claimants take no issue with the applicant's desire to be involved in the judicial review proceedings in order to make submissions, he does not accept that the applicant was or must be a party to the application as neither the applicant nor the Director of Public Prosecutions made any decision in relation to which judicial review was being sought. Thus he said, the applicant is not a party directly affected. He observed that the FID was a party to previous judicial review proceedings because it was the FID that had laid the charges against the claimants and it was in relation to the decision to prefer the charges that judicial review proceedings were initiated in that instance.

[27] Mr. Wildman opined that the applicant is seeking to use the present application to overturn the decision of the judge and that such conduct amounts to a collateral attack on the learned judge's decision and hence an abuse of the process of the court.

[28] In response to the applicant's position that an already cynical public is looking on and that the judge did not have sufficient regard for the public perception of the administration of justice caused by the stay of proceedings, Mr Wildman argued that that is an irrelevant consideration and the claimants are entitled to due process and must be allowed to pursue procedure as they deem necessary. He asked the court to consider that if the claimant should succeed in his application for judicial

review, all orders made by His Honour Mr. Chester Crooks in the parish Court would be a nullity.

[29] Mr. Wildman relies on the cases of **Vehicles and Supplies** (supra) **WEA Records Limited v Visions Channel 4** Limited [1983] 1 WLR 721 and **Strachan v The Gleaner Company**, to say that where a regular order has been made, the mode of challenging such order is by way of an appeal.

THE ISSUES

[30] The main issues arising in this application is whether this court can set aside or vary the order of Daye J. which was made after a hearing which was contested between the parties named therein. Secondly, if the court has the jurisdiction to set aside the order, should that jurisdiction be exercised in the circumstances of this case? The question of whether the applicant is a party directly affected also arises but is subsumed under the question of whether the court has jurisdiction to set aside the order.

[31] Before I address the substantive issues, I will briefly address a matter raised by Mr. Small which is that the claimants have filed no affidavits in the matter and can therefore not rely on any evidence not put forward in these proceedings. Mr. Wildman's response was that since the court is here concerned with an application that has been filed within an existing claim and the facts are already set out in the claim, there is no need for new affidavits setting out facts. This assertion could only be understood to mean that there is no need to set out facts already deposed to in the existing affidavits and certainly could not conceivably mean that there is no need to file new affidavit evidence to the extent that facts not already deposed to are being relied on.

[32] Counsel should be mindful of the pronouncement in the case of **Chester Hamilton v Commissioner of Police** [2013] JMCA Civ. 35. At paragraph 34 of the judgment, Phillips JA had the following to say with regard to the use of affidavits

filed in support of the application for leave to apply for judicial review being used in the claim for judicial review:

> *"It is also my view, however, that the previously filed affidavit could not satisfy rule 56.9(2) and so there would not have been compliance with that rule. As indicated, rule 56.9(2) states that the affidavit must be filed with the fixed date claim form. In order to comply with that rule therefore, the affidavit would have to be filed subsequent to the order granting leave just as the fixed date claim has to be so filed to have efficacy, which was stated in* ***Lafette Edgehill, Dwight Reid, Donnette Spence v Greg Christie*** *[2012] JMCA Civ. 16 ...there is no similar provision in the CPR to clause 425 of the Judicature (Civil Procedure Code) Law (CPC), which permitted the use of affidavits previously made and read in court, to be used before a judge in chambers. Prima facie therefore, service of the affidavit previously filed (in support of the application for leave to apply for judicial review) with the fixed date claim form (filed 14 days after the grant of the leave), would have been irregular."*

[33] It is arguable that in the same way that one is not permitted to rely on an affidavit filed in pursuance of the application for leave in the judicial review proceedings, one may not be able to rely on such affidavit in subsequent proceedings to set aside or vary the grant of leave. There may be a distinction between relying on affidavits filed in support of an application for leave to apply for judicial review in the claim for judicial review itself, and relying on that affidavit in a subsequent application to vary or discharge the order granting leave. There is no need to decide the point since in my view nothing turns in this instance on the failure to file an affidavit. This is so because the applicants have set out sufficient evidentiary material and there is no need to rely on any information in Mr.

Wildman's submissions which cannot properly be placed before the court in that manner.

WHETHER THE COURT HAS JURISDICTION TO REVOKE OR VARY THE ORDER

Should the applicant have been served in the proceedings

[34] It may be convenient to begin by looking at the question whether the applicant should have been served in the application for leave. One has to examine whose decision is impugned in order to determine who is a necessary party to the proceedings. Judicial review is concerned with whether the public authority has exercised it power in accordance with the law. The individual seeking to impugn the conduct of the public authority must of necessity identify the public authority against whom he seeks relief or the individual who exercises the public function. The claimant in this case has identified the learned Chief Parish Judge as that party. It has not been alleged in the proceedings in question that the FID did or failed to do any act in pursuance of any power accorded to it. The complaint is about the conduct of the Parish Judge. This is quite unlike the previous proceedings where the complaint was against the actions of the FID. It means that the FID is not a necessary **party** to the present proceedings.

[35] It is to be remembered that Rule 56.4 (2) allows for leave to be granted without the judge even hearing the applicant. The Judge need only hear the applicant if he is minded to refuse leave. Further, Rule 56. 4(4) states that the judge **may** direct that notice of the hearing be given to the Respondent or the Attorney General. It is not mandatory that notice be given to anyone. It is purely discretionary as to who if anyone, is given notice.

[36] In **R v Industrial Dispute Tribunal (Ex parte J Wray and Nephew Ltd)**, J Wray and Nephew sought leave to apply for judicial review of the decision of the IDT reinstating workers who had been dismissed by reason of redundancy. The hearing at the IDT involved the Union of Clerical Administrative and Supervisory Employees (UCASE) and J Wray and Nephew. A preliminary objection was taken by the Attorney General on the question of whether the union had any right to be heard at the leave stage.

[37] In his judgment, Sykes J (as he was then) observed that part 56 of the CPR distinguishes between persons or bodies who are directly affected and persons or bodies who have a sufficient interest. He alluded to the definition of directly affected as given in the case of **R v Rent Officers Service and another (ex parte Muldoon**) [1996] 1 W.L.R. 1103. He went on to say that the "*consequence of the distinction is that persons who are directly affected "must be served*" with the claim form and affidavit **after leave** and 14 days before the first hearing" (see paragraph 41 of the judgment). Provision is made for service as explained by the learned judge in rule 56.11 (1) of the CPR. It is instantly noted that the terminology adversely affected is captured in rules 56.2 (1) and (2) (a) whereas in rule 56.11 (1) which deals with service of the claim form after the grant of leave addresses an individual who is directly affected. Adversely affected seems to be a clear reference to the claimant whereas a party directly affected is someone other than the claimant and the person against whom judicial review is being sought.

[38] Sykes J went on to say that the provision creates a right to be served, and that **after leave**, persons directly affected have a right to participate in the proceedings. This right to be served was clearly a reference to the right to be served after leave is granted. It may be discerned that the **right** to be served and the **right** to participate does not arise at the stage of the application for leave. I therefore disagree with Mr Small's contention that the claimants disobeyed the Civil Procedure rules in not serving the applicant in relation to the application for leave.

[39] At paragraph 22 of his judgment the learned Judge made the insightful observation that:

> *"Nowhere in part 56 is it stated what the criteria are to be met if the applicant desires to make the application an inter partes hearing. There is no threshold for the applicant to meet other than serving the respondent."*

[40] In considering any application, any judge regardful of his duties, must be mindful of the provisions of rule 1.1 of the CPR and all that dealing justly with a case entails. At paragraph 29 of his judgment, Sykes J posited that common sense makes it

plain that dealing with a case justly necessarily means that if the court views it as necessary, then the court can hear from persons who may be directly affected by a decision the court may make. He adverted to the fact that in the case at hand, there was a request for immediate interim relief. He answered a resounding “no” to his own interrogatory as to whether a court acting justly, should make an order staying the order of the IDT reinstating the workers without hearing from the workers through their representative, the union. He concluded that Mc Donald Bishop was correct to have ordered that the union be served with the application for leave. Clearly the order that the union be served was a matter within the discretion of Mc Donald Bishop J as she was then.

[41] Mr. Wildman’s reference to the observation in **Vehicles and Supplies** (supra) that judicial review is not civil proceedings under the Crown Proceedings Act which requires that persons with an interest are to be served is of no assistance

in the present proceedings since rule 2.2 (2) states that civil proceedings include Judicial Review.

FID a party directly affected

[42] In relation to Mr Small’s submission that the claimants have not disputed that the FID is a party directly affected, Mr Wildman has been quite clear that he does not consider the applicant as a party that is directly affected by the order of the court.

I do not accept that because he did not oppose the applicant’s orders seeking for its participation as an interested party is the same as saying that he concedes that the applicant is directly affected. The orders sought by the applicant in that regard were as follows:

1. Financial Investigations Division be permitted to be joined as an interested party in respect of the instant claim;

2. Financial Investigations Division be granted the right to be heard at all hearings of this claim and any appeal(s) that may be filed;

3. To be permitted to appear in person through its representatives, and/or by Counsel and make Written and Oral Submissions;

4. To be permitted to give evidence in this claim by affidavit or otherwise, as may be ordered by this Honourable Court;

5. An order that the Financial Investigations Division be served with the Notice of Application for Leave to Apply for Judicial Review together with any affidavits in support and in response;

6. An order that the Financial Investigations Division be served with the Claim Form herein together with any affidavit in Support and in response.

[43] The applicant described itself as an interested party in the application. That terminology very broadly covers an entity or an individual who is adversely affected as well as an entity or individual with sufficient interest in the matter. The

orders that were not opposed by the claimants are in my view orders that could also be granted on the application of a party who is not directly affected but nevertheless, has sufficient interest in the subject matter.

[44] The basis on which the applicant asserts that it is a party directly affected by the granting of leave and the stay of the criminal proceedings was set out at paragraphs 32 and 33 of the affidavit of Inspector Brenton Williams filed on the 1st of September 2021. He deposed that the decision to stay the criminal proceedings affects the FID:

> *32. "having regard to its statutory role, the Attorneys at Law prosecuting who have been retained by the FID as well as the investigating officer and her role in the prosecution such as preparing the case and liaising with the witnesses." and*
>
> *33.Having regard, among other things, to the FID's statutory remit, its participation in the previous applications in this court and the Court of Appeal and its position in relation to the investigation and prosecution of the matters for which the charges have been brought before the Parish Judge…"*

[45] He had also earlier deposed to the fact that the FID, pursuant to its statutory remit, which includes the investigation of persons reasonably suspected of being involved in the commission of financial crimes, engaged in joint investigations with MOCA and CTOC at the CMU and the MOEYI and as a result arrested and charged the claimants

[46] In most of the cases dealing with the question of a party with sufficient interest, no distinction was made between a party directly affected and a party with a sufficient interest. In **Reg v Inland Revenue Commissioners Ex Parte National Federation of Self Employed and Small Businesses Ltd** [1982 AC 617, Lord Scarman observed that *'the one legal principle which is implicit in the case law and accurately reflected in the rule of court is that in determining the sufficiency of an applicant's interest, it is necessary to consider the matter to which the application relates.* (page 653 of the judgment).

[47] The definition of directly affected as provided in **R v Rent Officer Service and another Ex parte Muldoon** [1996] 1W.L.R. 1103 is that to be directly affected by something connotes that he is affected without the intervention of any intermediate agency. The facts of that case (as taken from the judgment of Sykes J) involved a situation whereby a local authority would be reimbursed up to 95% of the money it spent on housing benefits for persons entitled to housing benefits from the Council. The Secretary of State for Social Security sought to be made a party to judicial review proceedings brought by two applicants. The Secretary of State argued that he was a person directly affected within the meaning of Order 53 rule 5(3) of the English CPR. The House of Lords held that he was not because his liability would only arise in the event that the local authority paid the housing benefit.

[48] In Jobson Simmons J as she was then, alluded to the terminology as defined in the UK CPR 40.9 and the case of **Abdelmamond v The Egyptian Association in Great Britain** [2015] All ER 117

[49] In that case, the Egyptian Association in Great Britain (EAGB) was a company limited by guarantee. One of its founding members Mr. Ragab was a director, but resigned in 2011. Following Mr. Ragab's resignation, a new committee was elected and Mr. Ismail, Dr. Shalaby and others were appointed directors. At an Extraordinary General Meeting, the members voted and replaced the committee with Mr. Ragab, Dr. Shalaby and Mr. Issa. Mr. Ismail disputed the EGM and he and the other members of the committee continued as directors. Mr. Ismail and the members of his committee decided to bring proceedings against Mr. Ragab, and for this purpose, obtained a loan from Mr. Abdelmamoud on the company's behalf. In the meantime, an Annual General Meeting was held which was independently overseen and Mr. Ismail and two others were appointed directors of EAGB. EAGB defaulted on the loan and Mr. Abdelmamoud, issued a claim for the repayment of the loan with interest against them. The EAGB failed to acknowledge service or defend the claim and Mr. Abdelmamoud obtained default judgment and a third party debt order against EAGB. Mr. Ragab, Mr. Shalaby,

Mr. Issa and Mr. Madkour made a successful application to set aside the default judgment and third party debt order. Mr. Abdelmamoud appealed.

[50] The matter came before Deputy Judge Murray. The issue before him was whether the Deputy Master was correct as a matter of law in his conclusion that the Applicants had legal standing to bring their application to set aside the default judgment obtained by Mr. Abdelmamoud. At paragraph 58-59 of the judgment, Deputy Judge Murray defined directly affected. He said,

> *58.* ***"IPCom**, **Hepworht** and **Latif** all, in my view, support the proposition that in order for a non-party to be "directly affected" by a judgment or order for the purpose of CPR Rule 40.9, it is necessary that* ***some interest capable of recognition by the law is materially and adversely affected by the judgment or order or would be materially and adversely affected by the enforcement of the judgment or order.*** *In IPCom, the interest was the non-party's interest in the preservation of its confidential business secrets. The enforcement of the order for disclosure would have potentially harmed it economically.*
> *In Hepworht the non—party applicants clearly had an interest in a general sense in recovering the Spanish property that they had transferred to the*

> *defendants (and so were affected by the order, one might even say "directly" using that word in its everyday sense), but they had no restitutionary or other interest in the Spanish property recognised by the law and so were not "directly affected" by the order for the purpose of CPR Rule 40.9. In Latif the non—party was "directly affected" by the default judgment obtained by the claimants because that default judgment prevented its challenging the validity of a charge on residential property in which it had an equitable interest."*
>
> *59. Since the "directly affected" test is for the purpose of establishing locus standi, it is sufficient that the relevant judgment or order would prima facie be capable of materially and adversely affecting a legal interest. It is not necessary to show that it would, in fact, do so, for that would be the subject of the application itself."*

[51] Deputy Judge Murray held that the Deputy Master erred in law when he concluded that the respondents had locus standi. He reasoned that the respondents had no proprietary interest in any funds or assets of the company and no direct liability for the debts of the company. Therefore, they were not directly affected by the default judgment entered, to have locus standi to set it aside. This decision was affirmed in **Mohamed and another v Egyptian Association in Great Britain Ltd** [2018] EWCA Civ. 879.

[52] In **Re Endowed Schools Act v In re A Scheme Relating to Grammar School in Colchester** [1898] AC 477 the charity commissioners implemented a scheme for the administration of the Colchester Grammar School. Prior to implementing the scheme, it was met with opposition and the commissioners obtained consent from the governing body as required by section 19 of the Endowed Schools Act, 1869. The petitioners allege that they are directly affected by the provisions for the school contained in the scheme. They appealed the commissioners' decision on the ground that section 39 of the Act permits an appeal of the commissioner's decision and they have a right to challenge it and if it is found erroneous, the scheme should be remitted to the commissioners with such declaration as the nature of the case may require.

[53] The commissioners contended that the petitioners are not directly affected by the scheme within the meaning of section 39 of the Act. Lord Hobhouse considered

whether the petitioners had locus standi to appeal. At page 483 he held that "*The school is for those who belong to Colchester, and in a sense all who belong to the place have an interest in, and are affected by, a scheme for such* an important institution as its school. It is manifest that such an interest as that is not within the meaning of the term "directly affected." ***That term points rather to a personal and individual interest as distinct from the general interest which appertains to the whole community among which the endowment works***". He concluded that the petitioners had no locus standi to appeal the commissioners' decision as the petitioners have not shown how they are directly affected by the scheme except by describing themselves as inhabitants and rate payers of the Borough of Colchester and parents of sons who attend the school.

[54] In **Banque Nationale de Paris plc v Montman Ltd and others** [1999] All ER (D) 837Shapland Inc guaranteed a bank loan to Montman Ltd. Montman was unable to pay and Banque Nationale de Paris (the bank) demanded payment under the guarantee from Shapland. Shapland's only asset was a flat and soon after the demand was made, Shapland granted a legal mortgage over the property to Edict Ltd. The bank obtained a charging order against Shapland over

the flat. Shapland went into liquidation and the liquidator obtained an order setting aside the legal mortgage granted to Edict on the ground that it was a preference. Edict applied to set aside the charging order obtained by the bank. The bank argued that Edict had no standing to bring the application because it is not a person interested in the property the subject of the charging order. Hazel Williams QC agreed that Edict had no locus standi to bring the application as it was in the position of an unsecured creditor with merely the right to due administration of the assets of Shapland by the liquidator. He had no interest in the property. At page 580-581 she said "*It appears to me that it is plain that where the Charging Orders Act 1979 is referring to 'the debtor or any person interested in any property to which the order relates', the statute is looking at a person who can indeed be said to have* ***some form of interest in the property*** *which, as Miss Stonefrost says,* ***is either***

a proprietary interest or an interest akin thereto, in the sense that they are a person who at least has some interest such that their legal rights or liabilities are directly affected by the charging order."

[55] Just as it was within the discretion of McDonald Bishop J in **R v Industrial Disputes Tribunal Ex parte J Wray and Nephew Limited** to direct that the Union representing the interests of the workers be served, it was also a matter within the discretion of Daye J to direct that the FID be served. However, the position of workers whose jobs were at stake must be very different from that of the prosecuting authority in a criminal case. The prosecution represents the state and may broadly be said to represent the public interest and so must necessarily have an interest in the outcome of criminal prosecution and by extension matters affecting the progress of such prosecutions. The FID was with the permission of the DPP, actively engaged in the prosecution of the claimants.

[56] The role of the prosecutor is ultimately to see to it that justice prevails in any given case. Its role is to put forward its best case and let the chips fall where they may. If there are perceived procedural irregularities or a matter such as the potential existence of bias or apparent bias on the part of a judge hearing an application in the proceedings, then the view may be taken that the prosecution should adopt a neutral position in such circumstances and in a sense ought not to be said to be unfavourably or negatively affected. In cases where the courts have held parties to be adversely affected, there have been some extent that the prosecution should adopt a neutral stance, then while it is certainly a party with sufficient interest in the matter, it is quite arguable whether it is a party directly affected.

[57] The cases which examine when a party is directly affected reveal that the courts tend to find that a party is so affected when some proprietary or other legal interest akin to a proprietary interest is affected. That is not necessarily to say that a party without such interest can never be a party who is directly affected but I don't think that the applicant is a party who is directly affected in circumstances of this case.

[58] Even if the applicant is a party directly affected, what it means is that Daye J would not have exercised his discretion properly in failing to direct that notice be served on the applicant. That is not the same thing however, to say that he disobeyed the rules of court. Could it then be proper for a judge of concurrent jurisdiction to set aside or vary the decision of a judge who acted in the exercise of his discretion?

Under what circumstances will an order be varied

[59] Although I am not of the view that the applicant is a party directly affected, I now approach this matter as if it in fact is so affected in the event I am wrong in that regard. Mr Wildman has submitted that the order made by Daye J was a regular inter partes order and that it cannot be set aside by a judge of coordinate jurisdiction. It should be remembered that the order in question is an interlocutory one by its very nature. It is interlocutory in the sense that it does not put finality to the proceedings.

[60] Rule 11.18 of the Civil Procedure Rules 2002 (CPR) states as follows: -

> *"(1) A party who was not present when an order was made may apply to set aside that order.*
>
> *(2) The application must be made not more than 14 days after the date on which the order was served on the applicant.*
>
> *(3) The application to set aside the order must be supported by evidence on affidavit showing-*
>
> *(a) a good reason for failing to attend the hearing; and*
>
> *(b) that it is likely that had the applicant attended some other order might have been made."*

[61] As was observed in **The Matter of a Claim by Sharon Allen** [2017] JMCA Civ. 7 "*Rule 11.18 (1) is stated in broad neutral terms in that it speaks to a party (not necessarily a respondent who was not present at the hearing. It would seem however that rule 11.18, coming as it does after rules 11.16 and 11.17, does not apply to respondents, to whom rule 11.16 refers. Rule 11.16 deals with a specific circumstance, while rule 11.18 applies more generally."*

[62] It appears therefore that an application such as the present one may be made under rule 11.18 since the applicant was not a respondent in the proceedings. In the **Matter of a claim by Sharon Allen**, Brooks JA as he was then, ordered that the decision of Anderson J refusing to set aside an order of Campbell J be set aside. Brooks JA pointed out that there was sufficient material to support the appellant's contention that she had not been served with the application. This is in circumstances where the appellant was a party named in the claim. There was no question that the order of Campbell J had been made ex parte.

[63] **Vehicles and Supplies** dealt with the question of when a judge of concurrent jurisdiction can review or set aside the grant of an ex parte order. The JCPC determined that Carey JA was correct that a judge of the Supreme Court has an inherent jurisdiction to set aside or vary an order made ex parte and to revoke leave given ex parte. The Board also observed that what Rowe JA had said that section 564B of the CPC in providing for an appeal to the Full Court against a refusal of leave impliedly ousted any reconsideration of the matter by the same judge or another judge (evidently of concurrent jurisdiction) did not at all follow.

The basis the Board said, was that it would mean that a judge who had been wrongly persuaded by deliberate concealment of material facts and misleading evidence in making an order would be incapable of revoking it. It seems obvious to me that the JCPC was not in this case saying as Carey JA did, that the only basis for setting aside or varying the order was that there had to be new material before the court.

[64] One of the cases relied on by the applicant is **Bardi Limited v Millingen** [2018] JMCA Civ. 33. Phillips JA emphasized the fact that the charging order was a provisional one made ex parte and stated that the court by which such an order is made may at any time on the application of the debtor or interested party make an order discharging or varying same.

[65] In **Demetri Jobson and Max Jobson v Administrator General of Jamaica and New Falmouth Resorts Limited** [2015 JMSC Civ. 253, the claimants filed a Fixed Date Claim Form seeking certain reliefs. Within that Fixed Date Claim Form, they filed a Notice of Application for Court Orders. The same order sought in the NOCA was sought in the Fixed Date Claim Form. It was the NOCA that was heard by Simmons J. The applicants sought to set aside the order of Rattray J granting an application by the Administrator General on a Notice of Application for Court Orders pursuant to section 39 of the Administrator General's Act. which authorized her to ratify the sale of a parcel of land owned by Gilbert Baron Jobson deceased years earlier to the second defendant. The purchaser named in the agreement for sale was an individual and not the first defendant, a limited liability company.

[66] Simmons J considered whether the court had jurisdiction to set aside the order and if it did, whether there was any basis on which she could do so. She considered the provisions of Rule 11.18 and determined that she had jurisdiction. She alluded to the enunciation of Brooks J in **Re Dudley Ian Ward** to the effect that where a court hears a without notice application, and makes an order based on that application, then the order ought to be served on the respondent and on

any person directly affected by the making of the order. She concluded that if persons directly affected by the order were entitled to service of the order upon them, then they were entitled to apply to set aside the order. She also concluded that it was not necessary that the applicants before her be served with the order but that it was prudent that they be served and so they could properly have applied to set aside the order.

[67] Simmons J considered the claimant's submission that there was material nondisclosure and that at the date of the signing of the option to purchase, the second defendant was not yet in existence, and this amounted to fraud. The learned judge held that it must be proven that the first defendant the Administrator General (whose state of mind must be the primary focus because she made the application) was consciously and deliberately dishonest in relation to the non-

disclosure. She held that the Administrator General was not consciously and deliberately dishonest. She also found that there was no fraud and ultimately declined to set aside the order. This case it may fairly be said was one where the order of Rattray J was made ex parte.

[68] Phillips JA opined during the course of the judgment in **Bardi v Millingen** that the jurisdiction to revoke or vary orders is not only applicable to orders made ex parte. She opined that rule 11.16 does not specifically refer to ex parte orders. The same observation may be made of rule 11.18. Whilst rule 11.18 gives no guidance as to whether the type of order that may be set aside must have been made ex parte, it must be borne in mind that the rules regulate existing jurisdiction and do not confer jurisdiction which the court does not already have. The decisions examined so far, establish unequivocally that an ex parte order may be set aside if there is basis do do so

Setting aside of orders made at inter partes hearings

[69] It has also been demonstrated that orders made after an inter partes hearing may be set aside where the application as initiated was ex parte. That position is evidenced in the cases of **R v Secretary of State for the Home Department Ex**

Parte Sita Kamani Vafi and **Belize Telecommunications Limited and the Attorney General of Belize et al** a decision No. 27 of 2002 of the Court of Appeal of Belize. I am consequently not in agreement with Mr Wildman that an inter partes order cannot in any circumstance be set aside or varied.

[70] In **Sita Kamani Vafi,** Miss Vafi had applied for judicial review of the decision to refuse her an independent medical examination regarding her fitness to be removed from the United Kingdom. She had entered the UK as a visitor. She was held in immigration detention as her reason as declared for entering the UK was found to be untruthful. While she was in detention, among the steps taken by her in a bid to remain in the UK was a refusal to eat properly. She was repeatedly seen and examined by medical personnel. At one stage, the medical foundation made

a request that they be allowed to send a medical examiner to examine her. In a bid to avoid removal from the UK, the following day, Miss Vafi's new Solicitors applied for an injunction to prevent her removal pending further examination and sought judicial review of the decision to refuse her independent medical examination. An injunction was granted and an inter partes hearing later took place. Leave to apply for judicial review was granted. Ms Vafi was not deported but was given extended permission to remain in the UK. The Home Department in those circumstances applied to review the grant of leave to apply for judicial review. The application came before a judge who discharged the leave.

[71] It is to be noted that the circumstances had changed. On that basis **Sita Kamani Vafi** is distinguishable from the instant case. The court determined that the matter as originally complained of, had become academic and the complaints which were being raised in the proposed application to amend, were refused on the basis that they were essentially private law complaints which were made with a view to establishing private law remedies. The Court of Appeal affirmed the decision of the first instance judge. In reiterating that the circumstances had wholly changed, the court of Appeal observed that Ms Vafi could not then be removed from the country except for the making of a fresh decision for her removal.

[72] In **Belize Telecommunications Limited and the Attorney General of Belize et al** a decision No. 27 of 2002 of the Court of Appeal of Belize, the appellants applied for judicial review of the decision of the government of Belize to award contracts to two particular entities. The ex parte application for leave was heard Before Blackman J. The appellant sought leave to add the Minister of Finance
Foreign Trade and Economic Development as a respondent. Attorneys for the AG the first respondent were heard in opposition to the grant of leave. The third respondent was not present at the hearing and was not represented. The Notice of Motion for judicial review was served on the third respondent. The third respondent applied for an order to set aside the leave that was granted on the grounds of material nondisclosure. Blackman withdrew the grant of leave.

[73] The appellant submitted before the Court of Appeal that the trial judge had no jurisdiction to set aside leave to institute judicial review as leave had been granted inter partes It was submitted on behalf of the appellant that there was no precedent for a scenario where a judge had ordered that the ex parte application should be heard inter partes, and where a respondent filed evidence, appeared and made submissions and the court accepted jurisdiction to set aside the leave for nondisclosure of material facts.

[74] At paragraph 43, the Court of Appeal said

> *"In our view, the issue as to whether in any given case a court should permit an unsuccessful party to return to court and seek to set aside leave rather than to proceed to a full hearing of the merits, is a separate one from a jurisdiction of the court to entertain such an application under any circumstance. We are of the clear view that the proceedings for leave to apply for judicial review remains ex parte and does not lose its character as such even if the respondent does come in and make submissions at the ex parte stage."*

[75] **Re Pinochet no 2** is another example where an order made after an inter partes hearing was set aside. It is not particularly clear whether the proceedings were initiated ex parte. In that case, Senator who had been the head of state of Chile from 173 to 1990, was in England receiving medical treatment in 1998 when the Spanish authorities issued international warrants for his arrest for his extradition to Spain. Senator Pinochet was arrested. He challenged the warrants. One of the warrants was quashed by the divisional Court. The second warrant was also quashed but was stayed to enable an appeal. The matter before the House of Lords was heard by a panel of five judges to include Lord Hoffman.

[76] Before the appeal was heard Amnesty International and other Human Rights bodies petitioned for leave to intervene and leave was granted. Amnesty intervened. By a majority of 3 to 2, the appeal was allowed and the warrant was restored. It was later revealed that Lord Hoffman had been a director of a charity which had close interaction with amnesty International. Pinochet's legal team then

alleged apparent bias in relation to lord Hoffman and sought to have the decision to restore the warrant overturned. They asserted that although there was no legal precedent, the House of Lord must have jurisdiction to set aside its own orders where they have been improperly made **since there was no other court** (emphasis my own) which could correct such impropriety. It is to be noted that the House of Lords accepted that there was apparent bias Their Lordship observed that the respondent did not dispute that the House of Lords had jurisdiction in appropriate cases to rescind or vary an earlier order of the House.

In concluding on the matter of jurisdiction, it was observed that:

> *"in principle it must be that your Lordships, **as the ultimate court of appeal**, have power to correct any injustice caused by an earlier order of this House There is no relevant statutory limitation on the jurisdiction of the House in this regard and therefore its inherent jurisdiction remains unfettered. In **Cassells v Broom** your Lordships viewed an order for costs already made by the House in circumstances where the parties had not had a fair opportunity for argument on the point….*

[77] Two observations may immediately be made about the case of **Re Pinochet**.

Firstly, their Lordships acknowledged the fact that there was no other court that had the power to correct the impropriety. Secondly, that as the ultimate court of appeal, it needed to correct the injustice that was done. Those circumstances make Re Pinochet entirely distinguishable from the instant case. There was no other course open to the appellant in that instance. That is not so in this case. The applicant still has the opportunity to make submissions since it is to be joined as an interested party in the substantive proceedings. It is the delay in the criminal proceedings that is of immediate concern.

Was the order of Daye J an ex parte one

[78] Ultimately, it was not strictly necessary to have embarked upon a discussion of whether the order of Daye J was ex parte having regard to my finding that inter partes orders may be set aside. However, in the interest of completeness I address the matter since it is Mr. Small's contention that the order of Daye J was an ex parte one. It may be convenient at this stage to define what is meant by ex parte.

In Black's Law Dictionary Ninth Edition ex parte is defined thus: "done or made at the instance and for the benefit of one party only, and without notice to, or argument by any person adversely interested. Of, or relating to court action taken by one party without notice to the other. An ex parte motion was defined as a motion made to the court without notice to the adverse party or a motion that a court considers and rules on without hearing from all sides. Ex parte proceeding is defined as proceeding in which not all parties are present or given the opportunity to be heard.

[79] In A Dictionary of Law (Oxford University Press) Seventh Edition the definition is on the part of one side only.' It is there further stated that in the glossary to the "Criminal Procedure Rules" the definition is a hearing where only where one party is allowed to attend and make submissions. Lastly, in Jowitts Dictionary of English Law, it is said that in in its more usual sense, ex parte means that an application is made by one party to a proceeding in the absence of the other.

[80] Part 56 Civil Procedure Rules of Belize have similar provisions to our part 56. The Belizean Part 56 is headed Constitutional and Administrative Law while the Jamaican provisions are headed Administrative law. There is no discernible difference in the rules dealing with application for leave to apply for judicial review. Rules 56.3 (1) and (2) which deal with the commencement of proceedings for judicial review in both jurisdictions provide that a person who wishes to apply for judicial review must first obtain leave and that that application may be made without notice.

[81] The proceedings in **Belize Telecommunications Limited and the Attorney General of Belize et al** were said to be ex parte it would appear, on the basis that the application was initially made ex parte.

[82] It was contended by the applicant that the hearing was ex parte on the basis that the applicant who was a party directly affected was not served and did not participate in the proceedings. If the decision in **Belize Telecommunications**

Limited and the Attorney General of Belize et al is sound, then the proceedings before Daye could also be said to be ex parte. I take the view that whether the proceedings before Daye J may properly be described as maintaining its ex parte character or not, is not definitive of whether the order can be set aside. since the nature of the order, that is whether it was ex parte or inter partes, is not decisive of the question of whether this court has jurisdiction to set it aside at the instance of a party who did not participate in those proceedings.

[83] The fact that an application may be initiated without notice and may also be heard without notice to a respondent or any interested party, but where in fact the respondent was served and heard, does not in my view mean that it should be described as an ex parte application and consequently should be treated as such even where it is made with notice being given to the respondent/s from the outset and where the application was in fact contested.

[84] It was not said in evidence if it was on the direction of a judge that the respondent the Chief Parish Judge was served. What is clear enough, is that an affidavit was filed by him, he was represented by the Attorney General and there was full participation in the proceedings by him through the Attorney Counsel.

The description ex parte cannot be ascribed to a contested hearing in so far as the necessary parties (meaning parties named in the claim or application) participated. In so far as **Belize Telecommunications Limited and the Attorney General of Belize et al** may be considered as authority for saying that a hearing conducted after service upon, and with the participation of the respondent named therein is ex parte, I very respectfully disagree with the conclusion therein, and consequently that the proceedings before Daye J could properly be described as ex parte.

[85] Purely on the basis of the definitions provided, which all in essence mean without notice to, or argument by any person adversely interested, it would appear that an order made in the absence of a party directly affected as distinct from one who is adversely interested (who I understand to be the same as a party adversely

affected), is not an ex parte order. A party adversely interested and a party directly affected do not mean one and the same thing as seen from rules 56.2(I) and (2)(a) and 56.11 (1) which were looked at in paragraph 37 above. I am also fully in agreement with the observation of Sykes J which was referred to in paragraph 39 above, and it is also partly on that basis why I say that the order of Daye J was not ex parte where it flowed from proceedings in which the respondent participated.

The decision in Leymon Strachan

[86] One basic principle is that an irregular order may be set aside by the court that made it upon application to that court; and a regular order can only be set aside by an appellate court upon appeal. **Isaac v Robertson** Privy Council Appeal No. 2 of 1983.

[87] I now turn to a consideration of the case of **Leymon Strachan** (supra) which was cited by Mr Wildman. In that case the appeal was brought by the plaintiff in an action from a judgment of the Court of Appeal of Jamaica, dismissing his appeal

from the refusal of Smith J to set aside an earlier order of Walker J. as being made without jurisdiction. By his order, Walker J. had set aside a default judgment for damages to be assessed after the damages had already been assessed and the final judgment entered in the plaintiff's favour. The Board determined that Walker J. had the jurisdiction to set aside the judgment for damages to be assessed.

[88] Although it was not strictly necessary to a disposition of the case, Lord Millet who delivered the opinion of the Board, addressed the following question: "if Walker J had no jurisdiction to set aside the judgment for damages to be assessed, was his order a nullity which Smith J had the jurisdiction to set aside?

[89] He posed the question whether an order of a judge of the Supreme Court made without jurisdiction is a nullity, not in the sense that the party affected by it is entitled

to have it set aside as a matter of right and not of discretion,(observing of course that the party is entitled to have the order set aside) nor in the sense that the excess of jurisdiction can be waived (noting that it cannot) but in the sense that it has no more effect than if it had been made by a traffic warden and can be set aside by a judge of co-ordinate jurisdiction.

[90] At paragraph 28 he said "*An order made by a judge without jurisdiction is obviously vulnerable, but it is not wholly without effect; it must be obeyed unless and until it is set aside and (as will appear) it provides a sufficient basis for the Court of Appeal to set it aside. On the other hand, since the defect goes to jurisdiction, it cannot be waived; the parties cannot by consent confer a jurisdiction on the court which it does not possess."*

[91] At paragraphs 29 and 30 Lord Millet relied on the decision of Sir George Jessel Mr. Brett and Lindley LJJ in **In *re Padstow Total Loss and Collision Assurance Association*** (1882) 20 Ch. D 137 to show the effect of such an order. The case concerned an order of the high court to wind up an association which it thought breached a section of the Companies Act which section was of course applicable to companies only. Sir George Jessel MR said, at p 142

> *"The first point to be considered is whether, assuming that the association was an unlawful one, and that the Court had no jurisdiction to make the order, an appeal is the proper method of getting rid of it. I think it is. I think that an order made by a Court of competent jurisdiction which has authority to decide as to its own competency must be taken to be a decision by the Court that it has jurisdiction to make the order, and consequently you may appeal from it on the ground that such decision is erroneous."*

At p. 145 Brett LJ said:

> *"In this case an order has been made to wind up an association or company as such. That order was made by a superior Court, which superior Court has jurisdiction in a certain given state of facts to make a winding-up order, and if there has been a mistake made it is a mistake as to the facts of the particular case and not the assumption of a jurisdiction which the Court had not. I am inclined, therefore, to say that this order could never so long as it existed be treated either by the Court that made it or by any other Court as a nullity, and that the only way of getting rid of it was by appeal."*

[92] Applying those principles, Lord Millet at paragraph **[32]** reasoned that

> *"The Supreme Court of Jamaica, like the High Court in England, is a superior court or court of unlimited jurisdiction, that is to say, it has jurisdiction to determine the limits of its own jurisdiction. From time to time a judge of the Supreme Court will make an error as to the extent of his jurisdiction. Occasionally (as in the present case) his jurisdiction will have been challenged and he will have decided after argument that he has jurisdiction; more often (as in the Padstow case) he will have exceeded his jurisdiction inadvertently, its absence having passed unnoticed. But whenever a judge makes an order he must be taken implicitly to have decided that he has jurisdiction to make it. If he is wrong, he makes an error whether of law or fact which can be corrected by the Court of Appeal. But he does not exceed his jurisdiction by making the error; not does a judge of co-ordinate jurisdiction have power to correct it."*

He held that Walker J had jurisdiction to make the order he did and if he was wrong in making that order, his decision could be reversed **by the Court of Appeal** which would be bound to set it aside as a nullity. However, the order was fully adjudicated and binding on the parties until **reversed by the Court of Appeal**. Smith J, a judge of co-ordinate jurisdiction, therefore had no power to set it aside.

[93] In **Petrojam v IDT and the Ministry of Labour,** Rattray J opined that the Judicial Committee was saying that where a judge of the supreme Court makes an order which exceeds his jurisdiction, such error may be corrected by the Court of Appeal. I do not understand the Board to be saying that the route by which the matter is to be addressed is optional and so an appeal is but one option, or that the Board was speaking in general terms.

[94] The hypothetical question in **Leymon Strachan** was concerned with the review by a judge of coordinate jurisdiction of a decision of another judge who sets aside an order of another judge made without jurisdiction. It seems clear enough that the first mentioned judge would have usurped the function of an appeal tribunal. The principle emanating from the case however seems to have been stated in a manner that would make it much wider in its application than in a scenario dealing with a second tier review. If I am correct in making this latter observation, then the decision may in my view only be reconciled with some of the decisions earlier

discussed to the extent that inter partes orders made in the circumstances in the cases discussed may be said to be other than regular orders and were interlocutory in nature. I understand an irregular order to be an order made in breach of rules of court or otherwise in breach of proper procedure, such as a breach of the rules natural justice.

Should the order of Daye J be varied or set aside

[95] Ultimately, it has been demonstrated by highly persuasive precedents that an interlocutory order made after an inter partes hearing, may be set aside at the instance of a party who did not participate in those proceedings but whose interest is directly affected. It must however be shown that one or more of the bases as established by case law for setting aside the order otherwise exist.

[96] The question is whether or not the circumstances of this case are such that the order in question can be varied or should be varied.

[97] Mr. Small also directed the court's attention to the relevant rule 26.1 (7) of the CPR which provides that a power of the court under these rules to make an order includes a power to vary or revoke that order. It has on occasions been questioned whether part 26 of the CPR is in any wise applicable to judicial review proceedings. However, it seems to me that it does since rule 2.2 (1) and 2(2) state that the rules apply to all civil proceedings in the court and as earlier observed, that civil proceedings include Judicial Review.

[98] Based on case law, whether the hearing resulting in the order made was ex parte or there was an inter partes hearing, the circumstances in which a party may succeed in having the order varied or set aside include situations where there has been a material change of circumstances, see **R v Secretary of State for the Home Department Ex Parte Sita Kamara Vafi;** where the judge was misled, or where there was fraud. See **Parr v Tiuta International Ltd** [2016] EWHC 2 QB (considered in **Bardi Limited v Millingen).** See also **Demetri Jobson and Max**

Jobson v Administrator General of Jamaica and New Falmouth Resorts Limited; or where there was material nondisclosure is also another factor; See **Belize Telecommunications Limited and the Attorney General of Belize et al**.

[99] Phillips and F Williams JJA also considered in **Bardi Limited v Millingen** that based on the reasoning in Parr, the categories were not closed and took the view that circumstances where new information came to light is also a relevant consideration.

[100] It would appear that the complaint regarding the decision of the learned judge is two- fold. A number of the criticisms levelled at the decision had to do with the manner in which he exercised his discretion. It is the complaint that there was non-disclosure of material information on the part of the claimants and the learned judge could only have acted on the strength of the information presented to him. Secondly, there is dissatisfaction with the manner in which he exercised his discretion on aspects of the matter where it could not be said that the learned judge's decision was impacted by nondisclosure of relevant factors.

[101] The complaint that the learned judge did not order that the applicant as a party directly affected be served is purely a matter of the exercise of the judge's discretion. So too it could be argued, is the assertion that the aspect of the order directing that the grant of leave to apply for judicial review should operate as a stay of the proceedings in the parish court seemed not to have been arrived at based on a reasoned position by the learned judge, but rather on the basis that the CPR makes provision for the judge to direct whether the grant of leave operates as a stay of the proceedings (Rule 56.4 (9)).

[102] It is accepted that on the application of a party who is directly affected, I have jurisdiction to set aside the order of Daye J on the basis of nondisclosure which would have impacted the manner in which the learned judge exercised his discretion. What counsel regarded as the oblique reference to the co accused of the claimants in paragraphs 20, 22, and 25 of the claimants' affidavit was sufficient

information to alert the learned judge that the claimants were charged and were being tried with others.

[103] Since I am of the view that the learned judge was sufficiently alerted to the involvement of other defendants in the criminal case, to the extent that it is said that he failed to consider their constitutional right to a trial within a reasonable time and therefore in essence he was not regardful of that fact when he ordered the stay, that was an indictment on the judge's perceived failure that could not be attributable to a lack of disclosure of relevant information.

[104] It is true as McDonald Bishop JA posited in **The Attorney General of Jamaica v Claudette Clarke and Brittani Clarke** [2018] JMCA App17, that the threshold for a stay of proceedings is a high one. She went on to say that "*the civil action ought not to be stayed, unless the court is of the opinion that justice between the parties so requires. She posited that in determining what is required to do justice between the parties, all the relevant factors of a particular case are to be considered…there can be no closed menu of relevant factors as circumstances do vary from case to case."* See paragraph 38 of the judgment. Those observations were made with regard to civil proceedings but would no doubt, in a tailored way, would be applicable to a stay of criminal proceedings.

[105] It was Mr. Small's not unreasonable submission that the public interest in ensuring that those charged with committing grave crimes should be tried' is a relevant factor which ought to be weighed against any prejudice to the defendant in deciding whether to grant a stay of proceedings. This position cannot be disputed. Counsel conceded that the learned Judge at paragraph 50 of his judgment, addressed certain matters regarding the public interest. It is noted that while he did not specifically refer to the impact of a stay of proceedings per se, the learned judge had regard to the impact the grant of leave would have. He referred specifically to the resulting delay and he said that he took into consideration the public interest in the efficient administration of justice.

[106] It is a given that a prosecution is initiated not just for the purpose of giving justice to a victim, but with a view to fulfilling the public interest. Any criminal offence, particularly serious ones, offends against the public in general and goes against core values that law must be respected and the integrity of public institutions must be maintained. It is of course important that all prosecutions be conducted in a timely manner. I could go on. The point I really wish to make is that even if Counsel were correct that the negative effects of granting a stay and the impact on the public perception of the administration of justice could have been addressed in a more fulsome way, that would be a complaint about the judge not having sufficient regard/or not making it apparent that he had had sufficient regard to matters that he should have, in exercising his discretion. Those considerations certainly do not fall within any of the category of matters identified in cases or matters analogous to those identified, on the basis of which it would be permissible to grant either of the orders sought.

[107] I still have to consider whether in this instance, the nondisclosure complained of is of sufficient materiality to form a proper basis for setting aside or varying the order.

[108] The applicant's contention that the claimants did not disclose in their application the stage at which the trial was is not entirely accurate to the extent that it was

the claimants' initial complaint that the judge had ruled against them at a case management conference, days before they filed the application for leave to apply for judicial review. It was said by the applicant that even though the learned parish judge had ruled that the trial could proceed, disclosure had not been completed and the case management conference had not been held. The only failure on the part of the claimants then, would have been a failure to disclose that disclosure had not been made (assuming that assertion to be correct). This cannot be said to be so material that on that basis Daye J might have come to a different conclusion regarding the question of whether or not a grant of leave should operate as a stay of the prosecution.

[109] I also do not consider that if there was material nondisclosure on the basis that the claimants did not state the number of other defendants and who were these defendants with which they were jointly prosecuted. It is difficult to fathom how information as to who the other defendants were could be material. It may very well be the case that the crown should consider whether in the interest of justice, the trial should be severed in order to pay due regard to the constitutional rights of co-defendants. That is an aside.

[110] The uncontested assertion that the claimants did not disclose the various applications made by the claimants and the fact that they were all concluded without a stay being granted, and that during the time, the proceedings in the Parish Court were able to proceed has to be looked at to see whether this is a basis on which Daye J might have made some other order relative to the stay of the proceedings in the parish court.

[111] It should be noted that the two previous applications for leave to apply for judicial review were refused. The application before the Court of Appeal seeking permission to appeal the decision of the Full Court was also refused. The application for leave to appeal to the Judicial Committee of the Privy Council is pending. There would therefore have been no basis on which a grant of stay of proceedings in the parish Court would have been made in any of those proceedings when none of those decisions has so far been favourable to the claimants. Thus a failure to disclose that fact is of little or no relevance.

[112] Further, for the reason that will be addressed in paragraphs 113, 114 and 115 below, even if the claimants had revealed in their evidence before Daye J the matters said to not have been disclosed, or any other matter having to do with the stage at which the trial had reached, as well as the number of defendants involved in the trial and who they were, that could hardly have changed the outcome of the application before J Daye.

[113] Mr. Wildman's postulation that if the claimant should succeed in his application for judicial review, all orders made by His Honour Mr. Chester Crooks in the parish Court would be a nullity is not balderdash. I am of the view that he is correct in that regard because an authority or tribunal whose decision is quashed has failed to dispose of the case and may normally be called upon to re do the task in relation to which the complaint whether it was of irrationality, illegality or unreasonableness was made. In fact, in this instance where there have been allegations of bias or apparent bias, the task would have to be done by a tribunal differently constituted.

[114] As gleaned from the judgment of Daye J, the claimants' contention forming the basis for the application for leave to apply for judicial review, was that they were deprived of a fair hearing of their preliminary objection in law because the learned Chief Parish Court Judge allegedly announced after ruling against their preliminary objection that he had a conflict of interest and would not be the trial judge. The claimant's argument also, was that the judge's failure to disqualify himself resulted in his commencing a hearing with a known bias and therefore the claimants did not have a fair hearing on an important preliminary objection
(see paragraph 13 of the judgment. It was on the basis of those complaints that Daye J granted the application for leave to apply for judicial review.

[115] It begs the question then, what would be the point in moving forward with the process in preparation for trial when there lies the distinct probability that the matters addressed before His Honour Mr. Crooks and most certainly the preliminary objection will have to be heard again before a tribunal differently constituted?

[116] Whether or not the learned judge considered all the relevant factors in making his decision, except to the extent that that failure was a consequence of nondisclosure, it is not a matter in relation to which a judge of concurrent jurisdiction could interfere with at all. Even a court of appeal is guided by certain dictates, which I do not find it necessary to discuss, before it can properly interfere with the exercise of a judge's discretion.

[117] Further, the applicant has not shown that the circumstances have materially changed, or that new information has come to light so that the circumstances are materially different from what the judge perceived them to be.

[118] Notwithstanding that the categories of cases in which an order may be set aside are not restricted to the examples mentioned, an assertion that the judge failed to properly exercise his discretion could hardly be one factor to consider. Nothing has been put before me that would cause me to say that the order in question should be varied or set aside.

CONCLUSION

[119] I entertain doubts that the applicant was a party directly affected by the order of Daye J, although I am firmly of the view that the applicant is a party with a sufficient interest in the matter. I have treated the applicant as a party directly affected for the purposes of carrying out my assessment of the matter. I am of the view that the orders of Daye J were not ex parte orders but that orders made inter partes may be varied. I am also of the view that to the extent that the order has been impugned for the manner in which the judge exercised his discretion where that exercise was not affected by nondisclosure of material facts, I have no jurisdiction to set aside or vary the order in question.

[120] I take the view however that where there are a combination of circumstances including those where the judge's exercise of discretion could have been affected by the failure to disclose relevant matters this court possessed the necessary jurisdiction. However, the matters advanced as forming the basis for the complaint of nondisclosure are not of sufficient materiality. Lastly and most importantly, it would be nonsensical to set aside or vary the order to facilitate the progress of the criminal prosecution in circumstances where it is possible for a finding to be made that all orders earlier made by His Honour Mr. Crooks are invalid and the process will have to start afresh.

[121] Based on the foregoing, the application is refused with costs to the claimants to be taxed if not sooner agreed.

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Andrea Pettigrew Collins
Puisne Judge