IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE FULL COURT

CLAIM NO. SU2019CV03757

CORAM: THE HONOURABLE MR. JUSTICE CHESTER STAMP

THE HONOURABLE MRS. JUSTICE STEPHANE JACKSON-HAISLEY

THE HONOURABLE MISS JUSTICE ANNE-MARIE NEMBHARD

BETWEEN	**LOUIS SMITH**	**APPLICANT**
AND	**DIRECTOR OF PUBLIC PROSECUTIONS**	**1ST RESPONDENT**
AND	**PARISH COURT JUDGE FOR THE PARISH OF ST. JAMES SANDRIA WONG-SMALL**	**2ND RESPONDENT**

IN OPEN COURT

Mr. Hugh Wildman and Ms. Faith Gordon instructed by Hugh Wildman & Company for the Applicant

Mrs. Andrea Martin-Swaby instructed by the Director of Public Prosecutions for the 1st Respondent

Ms. Faith Hall instructed by the Director of State Proceedings for the 2nd Respondent

Heard: May 10 and June 2, 2021

Judicial review – Application for leave to apply for judicial review – The threshold test – Whether the applicant has an arguable ground with a realistic prospect of success – Applicant charged with offences under repealed statute – Whether the charges laid against the applicant are null and void and of no effect – Whether the Full Court is the proper forum having regard to all the circumstances of the case – Whether there is an alternative remedy available to the applicant – The Money Laundering Act, section 3(1)(c), The Interpretation Act, section 25(2), The Proceeds of Crime Act, sections 2 and 139, The Civil Procedure Rules, 2002, rules 56.3(1), 56.5(1), 56.6

Costs – Whether a cost order should properly be made in the circumstances –The appropriate cost order to be made in the circumstances – Civil Procedure Rules, 2002, rules 56.15(4) and (5), 64.3, 64.6(1), 64.6(3), 64.6(4)(a), (b), (d)(i) and (ii), (e)(i), (ii) and (iii), 64.6(4)(f) and 64.6(4)(g)

Stamp J, Jackson-Haisley J and Nembhard J

Introduction

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

[2] This matter concerns a renewed application by the Applicant, Mr. Louis Smith, pursuant to Part 56 of the Civil Procedure Rules, 2002. It is an application for leave to apply for judicial review to challenge certain decisions made by the 1st Respondent, the Director of Public Prosecutions ("the DPP") and the 2nd Respondent, the Senior Parish Court Judge for the St. James Parish Court, Her Honour Mrs. Sandria Wong-Small ("the learned trial judge").

Background

[3] Mr. Smith was jointly charged with Messrs. Robert Dunbar, Delroy Gayle and Melford Daley, on an Information dated 3 September 2013. They were charged

with the offences of Drug Trafficking and Money Laundering, contrary to section 3(a) of the Money Laundering Act, 1998 ("the MLA").

[4] The prosecution is alleging that, on divers dates between 1999-2005, Mr. Smith and his co-accused were engaged in the exportation of cocaine and that they used the proceeds of their crime to acquire certain assets.

[5] The matter first came before the St. James Parish Court on 5 September 2013, at which time the trial of the matter was scheduled to commence on 16 September 2019.

[6] On 16 September 2019, the trial of the matter was listed before the learned trial judge. On that occasion, the prosecution sought to amend the Information to charge Mr. Smith and his co-accused pursuant to section 3(1)(c) of the MLA, instead of section 3(a) of the MLA. The application for the amendment was granted by the learned trial judge and the trial commenced and proceeded on the basis of the Information, as amended.

[7] Learned Counsel Mr. Hugh Wildman, who represented Mr. Smith at the trial of the matter, first attended the trial on 18 September 2019. At that time, he raised an objection to the Information, on the basis that the charges are a nullity as, at the time that they were laid, the MLA had been repealed by section 139 of the Proceeds of Crime Act ("the POCA"). It was further submitted that it could not be disputed that the POCA was enacted and came into effect on 30 May 2007.

[8] That objection was overruled by the learned trial judge and, aggrieved by that decision, Mr. Smith filed a Notice of Application for leave to apply for Judicial Review, on 19 September 2019, in the Supreme Court.

[9] By virtue of that application Mr. Smith sought, inter alia, Declarations that the initiation of criminal proceedings in the St. James Parish Court, in respect of the offences of Drug Trafficking and Money Laundering is illegal, null and void and of no effect; and that the charges laid against Mr. Smith, in the St. James Parish

Court, are in breach of the POCA, thereby rendering them illegal, null and void and of no effect.

[10] Additionally, Mr. Smith sought an Order of Certiorari to quash the decision of the DPP to initiate charges against him, as contained in the amended Information, as well as a Stay of Proceedings, in respect of that decision.

[11] On 6 February 2020, Mr. Smith was refused leave to apply for judicial review by a single Judge in Chambers. He now renews that application before this Court.

The Renewed Application

[12] By way of a Renewed Notice of Application for leave to apply for Judicial Review, filed on 7 February 2020, Mr. Smith seeks the following Orders: -

(i) A Declaration that the initiating of criminal proceedings by the 1st Respondent in the Parish Court of St. James and presided over by the 2nd Respondent, of charges of Drug Trafficking and Money Laundering against the Applicant is illegal, null and void and of no effect;

(ii) A Declaration that the initiating of criminal proceedings by the 1st Respondent in the Parish Court of St. James and presided over by the 2nd Respondent, of charges of Drug Trafficking and Money Laundering against the Applicant, is in clear breach of the provisions contained in the Proceeds of Crime Act of May 2007, rendering the said criminal proceedings illegal, null and void and of no effect;

(iii) An Order of Certiorari quashing the decision of the 1st Respondent to initiate charges against the Applicant,

as contained in the Information which is amended, in which the 1st Respondent has commenced criminal proceedings against the Applicant and being presided over by the 2nd Respondent of Drug Trafficking and Money Laundering in the Parish Court of St. James;

(iv) A Stay of the decision of the 1st Respondent to commence criminal proceedings against the Applicant and being presided over by the 2nd Respondent as Parish Court Judge for the Parish of St. James, the said charges being contained in Information, until the determination of the Application for leave to apply for Judicial Review;

(v) Damages to the Applicant to be assessed for the illegal action of the 1st Respondent in commencing criminal proceedings against the Applicant for Drug Trafficking and Money Laundering, in breach of the Proceeds of Crime Act of May 2007;

(vi) Costs; and

(vii) Such other consequential directions as may be deemed appropriate.

[13] By way of a Notice of Application for Court Orders for Stay of Proceedings, which was filed on 7 February 2020, Mr. Smith also seeks a stay of the proceedings in the St. James Parish Court, pending the final determination of the renewed application for leave to apply for judicial review.

The Submissions

The Submissions on behalf of the Applicant

The Effect of the Repeal of the MLA

[14] Mr. Wildman submitted that the initiation of criminal proceedings in the St. James Parish Court, in respect of the offences of Drug Trafficking and Money Laundering, is illegal, null and void and of no effect. It was also submitted that the charges laid against Mr. Smith in the St. James Parish Court are in breach of the POCA, thereby rendering them illegal, null and void and of no effect. Mr. Wildman contended that the DPP has no legal power or lawful authority to initiate criminal proceedings against Mr. Smith for the said offences, in light of the repeal of the MLA by virtue of section 139 of the POCA.

[15] It was further submitted that, by virtue of section 2 of the POCA, as of 2007, criminal conduct, as defined in the MLA, is no longer criminal conduct. Those provisions of the MLA, it was submitted, were replaced by sections 91 and 93 of the POCA. Furthermore, Mr. Wildman submitted, where a statute or a part of a statute has been repealed, it no longer forms part of the *corpus juris*. To ground these assertions, Mr. Wildman relied on the authorities of **Meek v Powell,**[1] **Stowers v Darnell,**[2] **Asset Recovery Agency (Ex-parte) (Jamaica)**[3] **and The Director of Public Works & Another (No. 3) v Ho Po Sang & Others**.[4]

[16] It was asserted that the Informations laid against Mr. Smith in the St. James Parish Court are bad, for the simple reason that they are not grounded in any statute and are a breach of Mr. Smith's constitutional rights under section 16(1) of the Constitution.

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[1] [1952] 1 K.B. 164
[2] [1973] QBD 528
[3] [2015] UKPC 1
[4] [1961] HKLR 308

[17] On this basis, Mr. Wildman asserted, Mr. Smith has an arguable case with a realistic prospect of success and ought properly to be granted leave to apply for judicial review.

The Issue of Delay

[18] In this regard, it was submitted that the issue of time and delay, the primary issue being raised on behalf of the DPP, would not be a bar to the application for leave to apply for judicial review. Mr. Wildman submitted that, in the circumstances of this case, where the allegations involve an alleged breach of fundamental rights, the court normally extends time to apply for judicial review in order that the application might be determined on its merits.

[19] Mr. Wildman did not agree that there has been any delay on the part of Mr. Smith in bringing his application for leave to apply for judicial review. In any event, it was submitted, the initiation of the criminal proceedings in the St. James Parish Court represented a continuing breach of Mr. Smith's fundamental rights. Every occasion on which a breach occurred constituted a new justiciable period of time. As such, it was submitted that the learned trial judge's refusal of the application to discontinue the criminal proceedings before her, amounted to a new justiciable right. It cannot be said that there has been any delay in seeking leave to apply for judicial review of that decision.

[20] In the event that that submission did not find favour with the Court, Mr. Wildman asserted that this Court should extend time, having regard to the public importance of the issues raised by the application. In this regard, the Court was referred to the authority of **Re S (Application for Judicial Review)**.[5]

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[5] [1998] 1 FLR 790 (CA)

The Joinder of the 2nd Respondent as a party to the Application

[21] Finally, Mr. Wildman asserted that the learned trial judge is properly joined as a party to the application for leave to apply for judicial review. He asserted further that this is so because she ought to have acceded to the application to discontinue the criminal proceedings in the St. James Parish Court. Her failure to do so makes her a proper party to these proceedings.

The Submissions on behalf of the DPP

[22] For her part, Learned Counsel Mrs. Andrea Martin-Swaby submitted that the test, in respect of the threshold to be met on an application such as this, is outlined in the authority of **Sharma v Brown-Antoine and others**.[6] She submitted that, having regard to the modern test outlined in that authority, Mr. Smith has not met the threshold test, that of having an arguable ground with a realistic prospect of success.

The Issue of Delay

[23] It was further submitted that the second limb of **Sharma** states that another aspect of the test is whether the refusal of leave to apply for judicial review could be based on a discretionary bar, such as delay. In this case, it was submitted, delay is a feature that this Court will have to consider. The charges under the MLA were laid in September 2013. Those charges were first challenged on 18 December 2019. Even at the stage of the scheduling of the trial dates in the St. James Parish Court, Mr. Wildman did not raise any objections to the charges as laid. Additionally, the St. James Parish Court heard an application for the reception of evidence via video link, at which time no challenge was raised to the charges as laid.

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[6] [2007] 1 WLR 780

[24] Mrs. Martin-Swaby contended that the application for leave to apply for judicial review is to be made within three (3) months from the date on which the grounds for the application first arose. That date, she further contended, was in 2013, when the Informations were laid.

[25] It was also submitted that, where leave is sought to apply for an order of Certiorari, the date on which the grounds for the application first arose shall be taken to be the date on which the order was made. She asserted that the relevant date, for present purposes, must be the date on which the charges were laid.

[26] It was further submitted that the trial in the St. James Parish Court commenced in 2019. The Court was reminded that Mr. Smith is jointly charged with three (3) other individuals and that this is the second of three (3) applications for leave to apply for judicial review that have been filed by Mr Smith. A third application was filed on 7 February 2021. In addition to this renewed application for leave to apply for judicial review, Mr. Wildman has also filed an application for a stay of the proceedings in the St. James Parish Court.

[27] It is against that background that Mrs. Martin-Swaby submitted that there have been multiple proceedings that have been commenced in the Supreme Court, in respect of the criminal matter, which cause grave concern about the manner in which the Supreme Court is being engaged.

[28] Mrs. Martin-Swaby also contended that there will be great hardship caused to the other defendants, where one (1) accused approaches the Supreme Court with three (3) applications. The first of those applications pertained to two (2) of the defendants. The second and third applications were brought solely by Mr. Smith.

The Propriety of the Criminal Charges

[29] In respect of the propriety of the criminal charges that were laid against Mr. Smith, Mrs. Martin-Swaby submitted that there is no statute of limitation with

respect to the timeline within which criminal charges may be laid. The issue is, what is the appropriate statutory provision under which those charges are to be laid. The MLA was repealed and replaced by the POCA in 2007. Mr. Smith was charged in 2013, in respect of criminal conduct that allegedly took place during the period 1999-2005. How should the law treat with a prosecution of that criminal conduct in the year 2020. The decision of Wolfe-Reece J, at paragraph [42], outlines the correct position. When one examines section 25(2) of the Interpretation Act, it is clear that it was not intended to do away with the rights and liabilities that existed before a statute is repealed. Legal proceedings may therefore be instituted as though the repealing statute had not been passed.

[30] It was also submitted that section 2 of the POCA, as is customary, is a definition section. It seeks to clarify the meaning of certain words or terms that are used in a particular statute. The POCA introduced the concept of 'criminal conduct' on the part of a defendant. Section 2 of the POCA merely seeks to define 'criminal conduct', for the purpose of the POCA.

[31] The pertinent section of the POCA, Mrs. Martin-Swaby asserted, is section 139. This is the section that provides that the Drug Offences (Forfeiture of Proceeds) Act and the MLA are repealed. It was further asserted that there is nothing indicated in the POCA that demonstrates that the prima facie position no longer obtains. If Parliament had intended that any investigation, legal proceedings or remedy could no longer be instituted or continued with the repealing of the MLA, it would have said so in section 139 of the POCA.

[32] To arrive at a different conclusion, it was further submitted, would be of significance in our jurisprudence. By way of analogy, because the Sexual Offences Act repealed and replaced the Offences Against the Person Act, in respect of the offence of Having Sexual Intercourse with a Person under the age of Sixteen, does that mean that a person could not be charged with this offence, in respect of an offence which took place before the Act was passed. It is the

Interpretation Act that allows for investigations to be advanced even where statutes are repealed and replaced.

The Submissions on behalf of the Learned Trial Judge

[33] Learned Counsel Ms. Faith Hall submitted, on behalf of the learned trial judge, that both applications should be struck out as against the latter. This submission was made on the basis that an examination of the Orders being sought by way of the renewed application for leave to apply for judicial review does not reveal that any decision made by the learned trial judge is being challenged. The first relief sought is a Declaration that the initiation of criminal proceedings by the DPP should be quashed. The second relief sought is an Order for Certiorari, to quash the decision of the DPP to initiate charges against Mr. Smith.

[34] Ms. Hall contended that the evidence presented on Mr. Smith's behalf does not disclose that the learned trial judge made a decision or that a complaint is being made in respect of same.

[35] As a consequence, Ms. Hall asserted, the learned trial judge should be removed as a party to both applications.

The Issues

[36] Having considered the submissions advanced and perused the relevant material, the substantive issues that arise for the Court's determination can be encapsulated in the following manner: -

(a) Has the Applicant met the threshold for the grant of leave to apply for judicial review?

(b) Should the case against the 2nd Respondent be struck out?

The Law and Analysis

Has the Applicant met the threshold for the grant of leave to apply for judicial review?

[37] Part 56 of the Civil Procedure Rules, 2002 ("the CPR"), is entitled Administrative Law and deals with applications such as this. The Applicant's right to make this renewed application before the Full Court, for leave to apply for judicial review, is grounded in the provisions of rule 56.5 (1) of the CPR which provide as follows: -

> *"Where the application for leave is refused by the judge or is granted in terms (other than under rule 56.4(12), the applicant may renew it by applying -*
>
> *(a) In any matter involving the liberty of the subject or in any criminal cause or matter, to the full court; or."*

[38] The role of the court in judicial review is to provide supervisory jurisdiction over persons or bodies that perform public law functions or that make decisions that affect the public. The approach of the court is by way of review and not of an appeal. The grounds for judicial review have been broadly based upon illegality, irrationality or impropriety of the procedure and the decision of the inferior tribunal. These grounds were explained in the case of **Council of Civil Service Unions v Minister for the Civil Service**[7].

[39] Roskill LJ stated as follows: -

> ***"...executive action will be the subject of judicial review on three separate grounds. The first is where the authority concerned has been guilty of an error of law in its action, as for example purporting to exercise a power which in law it does not possess. The second is where it exercises a power in so unreasonable a manner that the***

[7] [1984] 3 All ER 935

> ***exercise becomes open to review on what are called, in lawyers' shorthand, Wednesbury principles (see Associated Provincial Picture Houses Ltd v Wednesbury Corp [1947] 2 All ER 680, [1948] 1 KB 223). The third is where it has acted contrary to what are often called 'principles of natural justice'."***

[40] Judicial review is the courts' way of ensuring that the functions of public authorities are executed in accordance with the law and that they are held accountable for any abuse of power, unlawful or ultra vires act. It is the process by which the private citizen (individual or corporate) can approach the courts seeking redress and protection against the unlawful acts of public authorities or of public officers and acts carried out that exceed their jurisdiction. Public bodies must exercise their duties fairly.

[41] The requirement for leave is one aspect of the courts' function to act as a filter in relation to these types of claims. The starting point is rule 56.3(1) of the CPR, which provides that a person wishing to apply for judicial review must first obtain leave. Whilst the Rule provides that leave must first be obtained in order to claim judicial review, it is silent as to the threshold that must be met, in order to obtain leave.

The Threshold Test

[42] The test to be applied in determining whether the applicant has met the threshold for the grant of leave to apply for judicial review at this renewed application is the same as the test which is applied for the original application. This test was set out by our learned sister Wolfe-Reece J, who dealt with the application for leave to apply for judicial review and is in fact set out in a plethora of cases. It is one which resonates with us, it being a case from our sister nation of Trinidad and

Tobago and which was considered by the Privy Council, that of **Sharma v Brown-Antoine**.[8]

[43] Satnarine Sharma was the Chief Justice of Trinidad and Tobago and the case concerned an application by him to review the decision of the Deputy Director of Public Prosecutions to proceed with a charge of Attempting to Pervert the Course of Justice against him. The central question to be determined was whether the decision to prosecute the Chief Justice should be the subject of judicial review or whether the criminal process should be allowed to run its course. The Privy Council summarized the test in such a compelling way that this dictum has been used time and time again by this Court as the benchmark for the guidance of judges considering whether to refuse or grant such an application for leave.

[44] Lords Bingham and Walker stated in their joint judgment, at paragraph 14(4), as follows: -

> ***"(4) 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…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 (N) v Mental Health Review Tribunal (Northern Region) [2006] QB 468, para 62, in a passage applicable, mutatis mutandis, to arguability:***
>
> ***'the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before***

[8] supra

> ***a court will find the allegation proved on the balance of probabilities. Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities.'"*** [9]

[45] This test has been adopted and applied in decided cases in Jamaica such as **Digicel (Jamaica) Limited v The Office of Utilities Regulation**;[10] **Coke v Minister of Justice et al**[11] **and Tyndall et al v Carey**.[12]

[46] In **R v IDT (Ex parte J. Wray and Nephew Limited)**,[13] Sykes J (as he then was) describes the threshold test as being a new and higher test than that which had previously obtained. At paragraph [58] Sykes J opined that the application for leave to apply for judicial review is no longer a perfunctory exercise that turns back hopeless cases alone. Cases without a realistic prospect of success are also turned away. Judges are required to make an assessment of whether leave should be granted in the light of the now stated approach.

[47] With respect to the main issue as to whether the Applicant has met the threshold for the grant of leave to apply for judicial review five questions arise. They are as follows: -

(i) Whether the application is barred by delay on the part of the Applicant?

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[9] **Sharma v Brown-Antoine**, supra, per Lord Bingham and Lord Walker, page 787 D-H, at paragraph 14(4)
[10] [2012] JMSC Civ 91
[11] Claim No. 2010 HCV 02529, unreported, judgment delivered on 9 June 2010
[12] Claim No. 2010 HCV 00474, unreported, judgment delivered on 12 February 2010
[13] Claim No. 2009 HCV 04798, unreported, judgment delivered on 23 October 2009

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

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

(iv) Whether there is an alternative remedy that is available to the Applicant; and

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

Whether the Application is barred by delay on the part of the Applicant?

[48] An applicant for judicial review is required to act promptly. This is encapsulated in the provisions of rule 56.6 of the CPR, as set out below: -

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

(5) When considering whether to refuse leave or grant relief because of delay the Judge must consider whether the granting of leave or relief would be likely to -

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

(b) be detrimental to good administration."

[49] In the Applicant's affidavit in support of the renewed Notice of Application for leave to apply for Judicial Review, he states that he was charged on Informations dated 3 September 2013 and that these Informations are exhibited to his affidavit. It is clear from this that the proceedings against the Applicant were initiated from that date. This would therefore have been the date on which the grounds for the application first arose.

[50] At the time that he filed the application for leave to apply for judicial review, on 19 September 2019, the matter had been before the court for over six (6) years. Despite this lengthy delay between the time of the initiation of the matter and the time of the making of the application, that in and of itself is not a complete bar, as the Court has a discretion to extend the time but only if 'good reason' for doing so is shown. On an examination of the Applicant's affidavit there appears to be no attempt or otherwise to provide an explanation, that is to say 'good reason', for this delay or failure to act promptly. The Applicant has failed to provide the Court with any material on which it could embark on a process of determining whether 'good reason' exists for this delay.

[51] Despite this obvious delay and the failure on the part of the Applicant to provide 'good reason' for it, Learned Counsel for the Applicant has argued that there is no delay but even if the Court so finds, based on the nature of the matter the Court should allow the application to be determined on its merits. This is because

where allegations involve an alleged breach of fundamental rights, the court normally extends time to apply for judicial review, to allow for the matter to be justiciable because of the importance of the matter. Further, that from the moment the matter was brought, it represents a continuing of the illegality and every time it produces a new justiciable period of time. For these propositions he relied on the authorities of **R (Robertson) v Wakefield Metropolitan District Council and another,**[14] **R v Secretary of State for the Home Department ex parte Ruddock**[15] and **Re S (Application for Judicial Review)**.[16]

[52] In the **Wakefield Metropolitan** case, the issue of delay came up for consideration in a case where the claimant had failed to file his claim form within the three-month period stipulated in rule 54.4 of the CPR. Maurice Kay J, who handed down the judgment, addressed the delay but even without making a determination as to whether there had been a lack of promptness indicated that: -

> ***"I would have no hesitation in extending time so as to enable these grounds of challenge (which I am satisfied pass the arguability threshold) to be considered substantively. They raised points which, if correct, affect every elector and potential elector in this country. If there are or may be respects in which our electoral arrangements are not Directive – or Convention-complaint, there is a strong public interest in the matter receiving substantive judicial consideration. Accordingly, I shall, if necessary, grant an extension of time and proceed to determine the issues on a substantive basis."***

[53] Similarly, **Ex parte Ruddock** concerned an application for Certiorari and an applicant who delayed in making his application for well over three (3) months, as

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[14] [2002] QB 1052
[15] [1987] 1 WLR 482
[16] CA 1998 1 FLR 790

prescribed by the relevant Ordinance and who failed to provide a satisfactory explanation for that delay. It was the decision of the court that, despite the delay, in view of the importance of the issues, the court would not reject the application on the ground of that delay. Even though the court was unimpressed with the reasons given for the delay and found them to be unsatisfactory, the court however came to the conclusion that, since the matters raised are of general importance, it would be a wrong exercise of discretion to reject the application on the grounds of delay, thereby leaving the substantive issues unresolved. The court went on to extend time to allow the application to proceed.

[54] In **Re S (Application for Judicial Review)**, the court allowed an application for leave to apply for judicial review because of the general importance of the matters raised in the application. The court was quick to point out though that the issues raised must be genuinely of public importance and must be such that they can best be ventilated in the public law context and that such cases are likely to be exceptional.

[55] Mr. Wildman's arguments on this point are not without merit, as it seems clear that the question of whether there is an arguable case would trump any bar, such as delay and the failure to provide 'good reason' for not filing within the stipulated time. It cannot be denied that the issues raised on this application are of some public importance. If the Applicant is right, it would mean that he would be charged under a law that does not exist and for which there are no provisions in law. However, what is also clear from the cases cited is that, before departing from the rules and the need for promptness, there must be an arguable case or put another way, the Applicant should pass the arguability threshold. This is the next issue up for consideration.

[56] Before embarking on that issue, we think it important to address another point on the issue of delay. Rule 56.6(5) of the CPR provides that, when considering whether to refuse leave or to grant relief because of the delay, the judge must consider whether the granting of leave or relief would be likely to -

> *"(a) cause substantial hardship to or substantially prejudice the rights of any person; or*
>
> *(b) be detrimental to good administration."*

[57] The Applicant is not the only person charged before the court. He is charged along with three (3) other persons and they are being tried along with him. The Applicant first filed this application for leave to apply for judicial review on 19 September 2019 and simultaneously filed an application for a stay of the proceedings and on that date a stay was granted pending the hearing of the application for leave to apply for judicial review. It is of note that the Applicant herein is the only one (1) of the three (3) defendants who has made this application. The stay operated as a stay over the entire proceedings so the other defendants had to await the determination of the application in order for their matter to proceed. His application was heard on 27 January 2020 and was refused and the stay lifted. He then filed the renewed application on 7 February 2020 which is now being heard. All this time, the other accused men have had to await the outcome of these applications before their matter can proceed. There is no indication from them that they have an interest in these proceedings. The fact that they have had to await the determination of these applications could cause them severe prejudice in terms of their time, financial resources, and simply the fact that during all this time this criminal matter is hanging over their heads.

[58] Considering the delay of some six (6) years in making this application, granting leave would substantially prejudice the rights of the other three (3) defendants to have their matters dealt with in a timely way. Additional delay could also have an impact on the availability of any witnesses either the crown or other defendants may wish to rely on to support their case. On a reasonable view, those circumstances could not be said to be tantamount to good administration.

[59] With that said, we now move on to consider whether the Applicant has an arguable case with a realistic prospect of success. If he does, the Court would be

inclined to pay less regard to the issue of delay. If he does not, the inordinate delay would only add to this and compound the situation.

Whether the Applicant has established an arguable case with a realistic prospect of success and whether the charges laid against the Applicant in the St. James Parish Court are illegal, null and void and of no effect

[60] For ease, these two issues will be addressed simultaneously. An applicant for leave must demonstrate that he possesses an arguable case with a realistic prospect of success. 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**[17] 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."***

[61] The crux of Mr. Smith's argument is that the proceedings against him are illegal, null, void and of no effect as the charges instituted against him were instituted at a time when the legislation under which he was charged had been repealed. Further, that the charges are in clear breach of the provisions contained in the POCA. As a consequence, the criminal proceedings are illegal, null and void and of no effect.

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[17] [2010] HCV 00474, unreported, judgment delivered on February 12, 2010

[62] In response, Mrs. Martin-Swaby contends that the decision by the learned trial judge, in proceeding with the matter under the MLA was a correct one and in the circumstances, there is no reasonable prospect of success established by the Applicant. Further, that by virtue of section 25(2) of the Interpretation Act, the repealing statute would not operate to disturb the status quo which existed during the life of the repealed statute.

[63] It is a fact that the Information which has been exhibited to Mr. Smith's bundle refers to a charge contrary to section 3(a) of the MLA which was subsequently amended to substitute it with section 3(1)(c) of the MLA. The Information refers to acts which took place on divers days on or about 1999-2005. The effective date of the POCA was 31 May 2007. The enactment of the POCA resulted in the creation of new money laundering offences which are provided for under sections 92 and 93 of the MLA. It is expressly stated in section 91(1)(b) that money laundering is an act which constitutes an offence under section 92 and 93. These provisions therefore superceded the previous provisions under section 3 of the MLA and in fact section 139 of the POCA expressly provides for its repeal in this way: -

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

[64] It may also be useful to set out the relevant provision under the MLA under which the Applicant has been charged. Section 3(1) of the MLA states that: -

> *"3. – (1) A person shall be taken to engage in money laundering if that person -*
>
> *(a) engages in a transaction that involves property that is derived from the commission of a specified offence; or*
>
> *(b) acquires, possesses, uses, conceals, disguises, disposes of or brings into Jamaica, any such property; or*

(c) converts or transfers that property or removes it from Jamaica, (emphasis ours)

and the person knows, at the time he engages in the transaction referred to in paragraph (a) or at the time he does any act referred to in paragraph (b) or (c), that the property is derived or realized directly, or indirectly from the commission of a specified offence.

(2) A person who, after the 5th of January, 1998 engages in money laundering is guilty of an offence and is liable -

(a) on summary conviction before a Resident Magistrate

(i) in the case of an individual, to a fine not exceeding one million dollars or to imprisonment for a term not exceeding five years or to both such fine and imprisonment;

(ii) in the case of a body corporate, to a fine not exceeding three million dollars;"

[65] The questions to be considered are what effect the repeal of legislation has on anything that was duly done, or anything that happened, while the legislation was in force; whether, in light of the repealed MLA, the Applicant could properly have been charged under the MLA; and whether, as a consequence, as submitted by counsel for the Applicant, the DPP exceeded her jurisdiction or acted illegally in preferring these charges against the applicant; and whether this would render the criminal proceedings illegal, null and void and of no effect.

[66] It is important to note that, at the time this offence is alleged to have taken place, the MLA had not then been repealed, as it was repealed in 2007, by virtue of the POCA. What is meant by the repeal of an Act of parliament was addressed in

Francis Bennion's text on *Statutory Interpretation, 4th Edition*, page 251, which was referred to by Mr. Wildman, in these terms: -

> *"Section 85. Meaning of 'repeal'*
>
> > *(6) To 'repeal' an Act is to cause it to cease to be a part of the corpus juris or body of law. To 'repeal' an enactment is to cause it to cease to be in law a part of the Act containing it…*
>
> *Effect of repeal - At common law the repeal of an Act makes it as if it had never been, except as to matters past and closed…"*

[67] Section 25 of the Interpretation Act operates to change the common law position. The side note to section 25 bears the description "effect of the repeal" and speaks clearly to its effect in the following terms: -

> *"25 (2) Where any Act repeals any other enactment, then, unless the contrary intention appears, the repeal shall not-*
>
> > *(a) revive anything not in force or existing at the time at which the repeal takes effect; or*
> >
> > *(b) affect the previous operation of any enactment so repealed or anything duly done or suffered under any enactment so repealed; or*
> >
> > *(c) affect any right, privilege, obligation, or liability, acquired, accrued, or incurred, under any enactment so repealed; or*
> >
> > *(d) affect any penalty, fine, forfeiture, or punishment, incurred in respect of any offence committed against any enactment so repealed; or*

> *(e) affect any investigation, legal proceedings, or remedy, in respect of any such right, privilege, obligation, liability, penalty, fine, forfeiture, or punishment, as aforesaid,*
>
> *and any such investigation, legal proceeding, or remedy, may be instituted, continued, or enforced, and any such penalty, fine, forfeiture or punishment may be imposed, as if the repealing Act had not been passed."*

[68] It was submitted on behalf of the DPP that, based on section 25 of the Interpretation Act, a statute which is repealed will not necessarily have the effect of removing all rights, liabilities and obligations which were in force at the time when the statute was in effect. Mrs. Martin-Swaby relied on the case of **Director of Public Prosecutions** v **Lincoln White et al**,[18] in which Fraser J (as he then was), after an examination of section 25(2) of the Interpretation Act, arrived at this opinion: -

> ***"It operates as a savings clause to ensure that, unless the contrary intention is shown, when legislation is repealed the effect of the repeal does not operate to invalidate rights, liabilities and obligations flowing from conduct that occurred at a time when the legislation was in force. It preserves the status quo relative to the time period when the repealed legislation was in effect."***

[69] Counsel for the Applicant, in response, has pointed out that when that matter came before the Court of Appeal on 28 January 2019, Brooks J (as he then was) granted leave to immediately quash the decision. It is to be noted that what came before the Court of Appeal was an Application for leave to Appeal and permission was granted to appeal the decision of Fraser J. There was no

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[18] [2017] JMSC Civ 197

quashing of the decision as has been suggested by Mr. Wildman. No written decision in this case at the level of the Court of Appeal was presented to us to be able to discern the actual findings and the reasons therefor.

[70] A more appropriate reference would have been to the Court of Appeal decision of **Dawn Satttherswaite v Bobbette Smalling**,[19] which provides useful guidance and which strengthens the position postulated by Counsel for the DPP, where at paragraph [87] of the judgment, remarks are made in the following terms: -

> ***"With regard to this case, therefore, the properties purchased before 30 May 2007 and the transactions occurring before that date, and as indicated, any allegations of criminal behaviour/activity are irrelevant to the application before the court and ought to be returned to the appellant/interveners forthwith. In my opinion, those offences and/or investigations would have to be pursued under the repealed Money Laundering Act, as sections 25(2)(d) and (e) of the Interpretation Act preserve that process."***

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

[72] In **Meek v Powell**,[20] the respondent was charged and convicted on Informations which charged him with unlawfully selling, for human consumption, milk which contained added water on 10 May 1951. This was an offence contrary to section 24 of the Food and Drugs Act, 1938. At the time the respondent was charged, on 30 June 1951, section 24 had been repealed by virtue of section 9 of the Food

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[19] [2019] JMCA Civ 43
[20] [1952] 1 KBD 164

and Drugs (Milk, Dairies and Artificial Cream) Act, 1950, which came into force on 1 January 1951. On the facts this case is distinguishable as the offence for which the respondent was charged and convicted was alleged to have taken place after the repeal of the statute under which he was charged. In the instant case the offence for which the Applicant is charged is alleged to have taken place at a time when the statute was current and in full force.

[73] Similarly, in **Stowers v Darnell**,[21] the appellant had been charged and convicted under a repealed statute. He appealed against his conviction on the ground that the statutory provisions of 1960 and 1967 were repealed by section 205 (1) Schedule 9 to the Road Traffic Act, 1972, which came into force on 1 July 1972 and that the Informations were bad as charging an offence under a repealed statute. At the time that the offence was committed, on 11 July 1972, the statute had been repealed some ten (10) days earlier. Therefore, at the time of offending the older statute was not in force due to the enactment of the new law. It is important to note that it is not the time of being charged that is a factor to be considered but rather it is the time the offence was committed that is relevant.

[74] Counsel relied with force on the Privy Council decision of **Asset Recovery Agency (Ex Parte) Jamaica**.[22] He indicated that the Privy Council was emphatic that there was no need to resort to any other statutory device, whether the Interpretation Act or any other statutory device, to give clear meaning and recognition to the intent and actions of Parliament, when it declared that henceforth, after May 2007, both money laundering and drug trafficking offences are to be defined in keeping with section 2 of the POCA.

[75] On an examination of the case, we are unable to agree with Counsel that this position was taken by the Privy Council. The case primarily concerned an

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[21] [1973] Crim LR 528
[22] [2015] UKPC 1

application by the Asset Recovery Agency for a customer information order (CIO) and so the Privy Council considered what had to be established for a CIO to be made in order to assist the prosecution in ascertaining whether a money laundering offence has been committed. They found that a money laundering offence cannot be committed unless property handled was criminal property. They examined the scope of the money laundering offences created by POCA and the meaning of criminal property and deliberated on whether there was a requirement to prove a conviction for an antecedent offence before a defendant can be convicted of the substantive offence of money laundering. Lord Hughes who wrote the judgment of the court postulated that what had to be proved is that an antecedent offence was committed and not that a conviction followed as a conviction is not the only way of proving the commission of an offence. Those were the primary areas of concern in this case. We fail to see how this case aids Mr. Wildman in the submissions he has advanced.

[76] Counsel also placed primacy on the decision of the **Director of Public Works and Another (No 3) v Ho Po sang and Others**[23] as being a decision which supported his point that the Interpretation Act does not confer the right to proceed with a charge after the repeal of a statute. On an examination of the case, the points raised are distinguishable from the Applicant's case. The main contentions relevant to this case were whether a lessee had an accrued right to vacant possession under an Ordinance prior to its repeal and if he did whether that right was preserved in light of the provisions of the Interpretation Ordinance, Cap 1. Section 10 of the Interpretation Ordinance which is similar to section 25 (2) of the Jamaican Interpretation Act and reads: -

"The repeal of any enactment shall not -

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[23] [1961] WL 20656 (SC)

(a) affect the previous operation of any enactment so repealed, or anything duly done or suffered under any enactment so repealed; or

(b) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed;

(c) affect any investigation, legal proceeding or remedy in respect of any such right."

[77] Their Lordships found that, on the date of the repeal of the Ordinance, the lessee possessed no such right and that he had no more than a hope of a favourable decision. They drew the distinction between an investigation in respect of a right and an investigation which is to decide whether such right should or should not be given. Upon repeal the former is preserved by the Interpretation Act, the latter is not. They agreed with the court below where the following observation was made: -

> ***"It is one thing to invoke a law for the adjudication of rights which have already accrued prior to the repeal of that law; it is quite another matter to sat that, irrespective of whether any rights exist at the date of the repeal, if any procedural step is taken prior to the repeal, the, even after the repeal the applicant is entitled to have that procedure continued in order to determine whether he shall be given a right which he did not have when the procedure was set in motion****."***

[78] The **Ho Po Sang** case related more to the vesting of the right prior to the repeal and whether the factual circumstances enabling the proceedings to be brought were in place before the repeal. It is quite evident that the circumstances in the case at bar are distinguishable from the **Ho Po Sang** case, as, the Applicant here is charged for an offence which is said to have taken place in its entirety, at a time when the MLA was still in effect.

[79] The import of section 25 of the Interpretation Act is to close any gaps in the criminal process and to preserve the power to charge where the offence took place during a time when the legislation was in force. Without this, it would mean that the repeal under section 139 of the POCA would have the effect of wiping the slates clean or acting as a pardon for past offenders. This could certainly not be the intention of the drafters of the POCA. Section 25 operates to preserve and not affect any 'right, privilege, obligation or **liability acquired**, (emphasis ours) accrued or incurred under any enactment so repealed'. There would therefore be no basis on which a court could find that the criminal proceedings are illegal, null and void and of no effect.

[80] It is our considered view that, when Wolfe-Reece J came to the conclusion that the Applicant was rightly charged for the offences committed prior to May 30th, 2007 under the MLA, she was not off the mark, as has been suggested by Mr. Wildman but rather she got it right when she said at paragraph **[44]** of the judgment: -

> ***"It is my considered conclusion that the applicant was rightly charged for the offences allegedly committed prior to May 30th 2007 under the MLA. That by virtue of S25(2) of the Interpretation Act, 1968 it is clear that where no contrary intention is shown by the new legislation, the rights, liabilities, obligations remain and may be instituted, continued or enforced as if the repealing Act had not been passed. Based on the foregoing, I am of the view that (sic) Applicant has not satisfied the required test that he has an arguable ground with a realistic prospect of success."***

[81] With that conclusion we are in agreement. Mr. Smith has failed to establish that he has an arguable case with a realistic prospect of success and so his application must fail. If we are wrong in our findings here that would not be the end of the matter, as the Applicant would still need to establish that he possessed no alternative remedy.

[82] These two issues will be dealt with simultaneously. One of the fundamental principles of judicial review is that it is a remedy of last resort. Before approaching the court on an application such as this the applicant must first exhaust all available remedies. He must also expressly state in his application whether any alternative form of redress exists and, if so why judicial review is more appropriate or why the alternative has not been pursued. The provisions of rule 56.3(3)(d) of the CPR make this position clear in stipulating the need to indicate whether an alternative form of redress exists and, if so, why judicial review is more appropriate or why the alternative has not been pursued. However, the existence of an alternative form of redress does not always mean that the claim must fail.

[83] It is for the applicant to establish why judicial review is more appropriate and this was discussed in the judgment of the court in the matter of **The Independent Commission of Investigations v Everton Tabannah & Worrell Latchman**,[24] where the court stated the position as follows, at paragraph [58]:

> ***"It is unnecessary to decide definitively in this judgment whether rule 56.3 of the CPR allows for leave to apply for judicial review where an alternative remedy exists. A reading of the rule certainly suggests, as the learned judge held, that at the leave stage the existence of an alternative remedy is not an absolute bar to the grant of leave. The relevant part of rule 56.3(3) states: "The application [for leave to apply for judicial review] must state – … (d) whether an alternative form of redress exists and, if so, why judicial review is more appropriate or why the alternative has not been pursued. …" The issue is whether the alternative is more suitable than judicial review. In this case it is."***

[24] [2019] JMCA Civ 15

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

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

[86] The power of the DPP to institute proceedings is set out in section 94(3) of the Constitution of Jamaica and section 94(6) prescribes that she should not be subject to the direction or control of any other person. It could not be said that in deciding to charge the Applicant she was acting outside of those powers and therefore in excess of her jurisdiction. The questions raised really pertain to whether or not the charges were correctly brought.

[87] The ability of the criminal court to provide an adequate remedy in a matter such as this was the subject of discourse in the case of **Fritz Pinnock and Ruel Reid v Financial Investigation Division**,[25] where Phillips JA, after an identification of the issues raised in the application before her, considered the jurisdiction of the Parish Court to deal with the questions raised in that case and found that it was well within the powers of Parish Court Judges to analyse and determine these issues and then she went on to say this at paragraph [42]: -

> ***"…The Parish Courts in Jamaica have extensive jurisdiction, and Parish Court Judges are called upon to adjudicate upon very complex and important criminal and other matters. An argument could not be sustained that the Parish Court is an inferior court lacking the requisite competence to deal with issues pertaining to statutory interpretation or any allegation of abuse of the court's process."***

[88] The issues Phillips JA considered to be well within the province of the Parish Court were a claim for abuse of process, in the circumstances of this case, arising out of the alleged unlawful arrest, charge and prosecution of the applicants as a result of specific interpretations of certain provisions of FIDA and other relevant statutes. The issues raised in the instant case bear some similarity to those raised with regard to the abuse of process issue and that of the interpretation of the POCA and the Interpretation Act. Phillips JA also addressed the issue raised of the Parish Court being an inferior tribunal without the requisite power to deal with these issues and as seen above and found this argument to be unsustainable.

[89] In our view, the Parish Court is the proper forum to deal with issues involving whether or not an individual is improperly charged or charged under an incorrect

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[25] [2020] JMCA App 13

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

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

[91] Section 16(1) of the Charter of Rights stresses the need for a fair hearing by an independent and impartial court. There is no evidence before us to suggest that the Applicant will not receive a fair hearing before the Parish Court. The issues raised here have to do with the applicability and construction of the Interpretation Act and we fail to see how this translates to it being a matter having to do with a breach of any constitutional provisions.

[92] We are therefore not convinced that the Full Court is the appropriate forum and that the matter cannot be addressed within the criminal process. No good reason has been shown as to why the issues raised cannot be ventilated in the Parish

Court. The Applicant therefore has not demonstrated that judicial review is more appropriate than the other available remedy and so his application also fails on the basis that there is an alternative remedy available.

[93] The Applicant has therefore not met the threshold for the grant of leave to apply for judicial review.

Should the case against the 2nd Respondent be struck out?

[94] Ms. Hall submitted that the case should be struck out as against the learned trial judge. To take the position of striking out in light of our earlier findings may appear to be redundant. However, we think it is important nonetheless, to arrive at a position in this regard.

[95] On an examination of all the Orders sought, it is clear that the reliefs being sought in Orders one (1) to five (5) are with respect to the decisions of the DPP. These decisions include the initiating of criminal proceedings, the decision to initiate charges and the decision to commence criminal proceedings. Nowhere is it mentioned that any relief is being sought with respect to the decision to preside over the criminal proceedings. The reference to "presided and being presided over by the 2nd Respondent" appears to be a descriptive phrase, that is to say, describing the stage where the criminal proceedings are at.

[96] Therefore, if Orders one (1) and two (2) are to be given their ordinary meaning it is the 'initiating' that the Court is being asked to declare as "illegal, null and void and of no effect". Order three seeks an Order of Certiorari to quash the decision of the DPP to initiate charges. Paragraph four (4) of the Orders sought seeks a stay of the decision of the DPP to commence criminal proceedings and paragraph five (5) of the Orders sought seeks damages for the illegal action of the DPP. In the Orders sought all that has been indicated is that the learned trial judge is the presiding judge and not that they are seeking a declaration regarding any unreasonable or incorrect decision made by her.

[97] Counsel for the learned trial judge submitted that the application before the Court does not disclose that she made any decision which is being challenged and the remedies sought are not in relation to the learned trial judge but that they relate exclusively to the DPP. Mr. Wildman's submissions were that what he meant was for the learned trial judge's action in presiding to be subject to this Declaration to stop her from presiding. However, on a proper construction of the Orders being sought, this is not the meaning that is conveyed.

[98] It is vital in matters of this nature that there be precision and clarity in the Orders being sought so that the opposing party can be aware of exactly what the case is that they are required to meet, so as to be able to give adequate instructions and provide an appropriate response.

[99] We are in agreement with Counsel for the learned trial judge that, there is nothing disclosed in the application which can properly be made the subject of a judicial review application in respect of the learned trial judge and that the Applicant has failed to establish any basis on which the learned trial judge has been joined in the proceedings.

[100] Is the appropriate recourse to strike out the proceedings against the learned trial judge or simply to deny the application? The remedy of striking out is provided for in rule 26.3 of the CPR. Although not expressly stated, the basis on which the learned trial judge's application to strike out is made seems to be premised on the provisions of rule 26.3 (c) of the CPR which provide for striking out where the statement of case or part to be struck out discloses no reasonable ground for bringing the claim. In light of the unassailable position that the learned trial judge has initiated no proceedings, it is clear to us that there are no reasonable grounds for including her in this application.

[101] Although striking out at this point may well be redundant, it is an important point to be made that where parties are brought into a matter without reasonable grounds for doing so, the matter should not be allowed to stand against that

party. We are of the view that the matter should be struck out against the 2nd Respondent.

Public Policy Considerations

[102] The untidy history of these proceedings makes very sorry reading. The matter has been before the Parish Court since 5 September, 2013 and was ready for trial in July 2016. The trial was postponed due to the Applicant and another of his co-accused, Robert Dunbar, filing an application for leave to apply for judicial review of the decision of the learned parish judge to permit the evidence of a witness via video link. The applications were refused. Mr. Dunbar then applied for leave to appeal the decision and on 8 February 2019 the Court of Appeal refused leave to appeal. Thereafter, the matter was set for trial on 16 September 2019 and commenced on that day. However, on 18 September 2019, Mr. Wildman attended and objected to the continuation of the trial arguing that it was a nullity. A second application for leave to apply for judicial review was filed and on 19 September 2019 a stay of the proceedings in the parish court pending the hearing of the application was granted by a judge of the Supreme Court. On 6 February 2020, Wolfe-Reece J refused the application for leave to apply for judicial review and lifted the stay of proceedings. The very next day, 7 February 2020, this renewed application was filed.

[103] It is now almost eight (8) years since the matter first came before the Parish Court. Counsel for the 1st Respondent has deponed that in February 2021 a third application for leave to apply for judicial review challenging another decision of the parish judge (with the ancillary application for a stay of proceedings) has been filed in this matter.

[104] It is plain to see that the repeated filing of applications for leave to apply for judicial review (and for stays of proceedings pending the hearing) whenever an accused is dissatisfied with a decision of the trial judge is bad practice that serves to obstruct the just disposal of the proceedings by the learned parish

judge and derail the proper administration of justice. This Court expresses its strong disapproval of this course of conduct.

[105] It is worthy to reiterate the observations of Sykes CJ in **Fitz Pinnock, Ruel Reid v Financial Investigation Division**.[26]

> ***"[86] The court cannot help but note the increasing frequency with which resort is had to the supervisory jurisdiction of the Supreme Court in respect of matters in the Parish Courts. This court wishes to say that applications of this type should be discouraged except in very exceptional circumstances.***
>
> ***[87] It is this court's considered view that where the legislature has conferred on an inferior court such as a Parish Court it must be rare or exceptional for a superior court to grant declarations during the course of the trial or proceedings, regardless of the stage that those proceedings are, that may have the effect of undermining the authority of those courts. Once the matter is before the Parish Court then the matter ought to proceed along the normal course to completion. In the event of an adverse outcome then the remedy is by way of appeal. …"***

[106] So, in addition to the other reasons for the refusal of this application, the matter may also be placed on a public policy footing. Leave will not be granted to apply for judicial review except in the most exceptional circumstances. The exceptional circumstances can arise only where it is clearly demonstrable either on the face of the record or on indisputable evidence that the parish judge acted without jurisdiction or in excess of jurisdiction. In the absence of such clear showing, the application is hopeless and leave will not be granted. This conclusion accords

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[26] [2019] JMSC CIV 257. Also cited by Wolfe-Reece J at para. 50 of her judgment refusing the initial application in this matter.

with the judgment of the Court of Appeal in **Robert Dunbar v R**[27] (judgment refusing leave to appeal the refusal to grant leave to apply for judicial review on the first such application in this matter). The court said: -

> ***[30] In addressing the complaint on this issue, it is also to be noted that there is another well-established principle that the correct approach to challenging decisions of a Parish Court Judge is by way of an appeal rather than by way of judicial review. The decision in Brown and Others v Resident Magistrate, Spanish Town Resident Magistrate's Court, St Catherine (1995) 48 WIR 232, which was cited by Mrs Reid-Jones, demonstrates that principle. The headnote accurately reflects this court's decision, which has been editorially adjusted to reflect the changes brought about by the Judicature (Resident Magistrates) (Amendment and Change of Name) Act, 2016:***
>
> > ***"…the ruling of a [Judge of the Parish Court] was amenable to certiorari only if the [Judge of the Parish Court] had acted in excess of jurisdiction or without jurisdiction; a challenge to the ruling on the basis of an error in law as such was properly mounted by way of an appeal."***
>
> ***[31] In his judgment in that case, Carey JA explained the reasoning behind the principle. He said, at page 236d of the report:***
>
> > ***"A [Judge of the Parish Court] is permitted to fall into error but that does not necessarily make the judgment amenable to certiorari. It becomes so if, and only if, the [Judge of the Parish Court] can be said to be acting in excess of jurisdiction or without jurisdiction."***

[107] The judgment of the Court of Appeal in this case has settled the law and policy in this area.

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[27] [2019] JMCA App 2

[108] In all the circumstances and for all the reasons indicated previously, the application for leave to apply for judicial review, as well as, that for a stay of proceedings are refused.

Costs

[109] Part 64 of the CPR contains general rules in relation to costs and the entitlement to costs. Where a court decides to make an order about the costs of any proceedings, the general rule is that it must order the unsuccessful party to pay the costs of the successful party.[28]

[110] In deciding who should be liable to pay costs, the court must have regard to all the circumstances and, in particular, to the conduct of the parties both before and during the proceedings. The court may also consider whether it was reasonable for a party to pursue a particular allegation; and/or to raise a particular issue; the manner in which a party has pursued his/her case, a particular allegation or a particular issue; and whether the claimant gave reasonable notice of an intention to issue a claim.[29]

[111] The provisions of the CPR make it quite clear that the court has a wide discretion to make any cost order it deems fit, against any person involved in any type of litigation, including an application for judicial review. The general rule is, however, that no order for costs may be made against an applicant for an administrative order, unless the court considers that the applicant has acted unreasonably in making the application or in the conduct of the application.[30]

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[28] Rule 64.6(1) of the CPR

[29] Rules 64.6(3), 64.6(4)(a), (b), (d)(i) and (ii), (e)(i), (ii) and (iii), 64.6(4)(f) and 64.6(4)(g) of the CPR

[30] Rules 64.3 and 56.15(4) and (5) of the CPR and **Regina v The Industrial Disputes Tribunal (Ex parte J. Wray and Nephew Limited)**, (supra)

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

Disposition

[113] In the result, it is the judgment of the Court that: -

(1) The Orders sought on this Renewed Notice of Application for leave to Apply for Judicial Review, which was filed on 7 February 2020, are refused;

(2) The Notice of Application for Court Orders for Stay of Proceedings, which was filed on 7 February 2020, is also refused;

(3) The Case against the 2nd Respondent is struck out;

(4) The costs of both Applications are awarded to the 1st and 2nd Respondents and are to be taxed if not agreed; and

(5) The Attorney-at-Law for the 1st Respondent is to prepare, file and serve the Orders made herein.

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Stamp J

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Jackson-Haisley J

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Nembhard J