[2022] JMSC Civ 6

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2015 HCV 05731

BETWEEN	**MAURICE ARNOLD TOMLINSON**	**CLAIMANT**
AND	**ATTORNEY GENERAL OF JAMAICA**	**DEFENDANT**
AND	**THE CHURCHES**	**1ST INTERESTED PARTY**
AND	**JAMAICA COALITION FOR A HEALTHY SOCIETY**	**2ND INTERESTED PARTY**
AND	**LAWYERS CHRISTIAN FELLOWSHIP LIMITED**	**3RD INTERESTED PARTY**
AND	**HEAR THE CHILDREN'S CRY**	**4TH INTERESTED PARTY**

IN CHAMBERS

Mr Ian Wilkinson QC and Lenroy Stewart instructed by Wilkinson Law for the Claimant/Respondent

Ms. Althea Jarrett and Carla Thomas instructed by the Director of State Proceedings for the Applicant/Defendant

Ms. Danielle Archer for the First Interested Party

Ms. Caroline P Hay QC holding for Ransford Braham QC instructed by Richards, Edwards, Theoc and Associates for the Second Interested Party

Mr Wendell Wilkins and Jamila Thomas instructed by Lambie-Thomas and Co for the Third Interested Party

Mrs. Caroline Hay QC instructed by Caroline P. Hay for the Fourth Interested Party

Heard: March 8th, 2021, March 9th, 2021 and January 19, 2022

Application for separate trial of preliminary issue – Court's Case Management Power – Power of Court to dispose of other applications at first hearing – Distinction between summary judgment and trial of preliminary issue – factors to be considered upon application for separate trial of preliminary issues – can application be determined without consideration of evidence

HUTCHINSON, J.

INTRODUCTION

[1] In 2015, Mr Tomlinson filed a claim in which he seeks declarations in respect of alleged breaches of the rights guaranteed to him by the Constitution of Jamaica. The claim challenges the constitutionality of sections 76, 77 and 79 of the Offences Against the Person Act (OAPA). These provisions create sexual offenses and constitute the law in force immediately before the commencement of the Charter and specify as follows;

> *76. Whosoever shall be convicted of the abominable crime of buggery, committed either with mankind or with any animal, shall be liable to be imprisoned and kept to hard labour for a term not exceeding ten years.*
>
> *77. Whosoever shall attempt to commit the said abominable crime, or shall be guilty of any assault with intent to commit the same, or of any indecent assault upon any male person, shall be guilty of a misdemeanour, and being convicted thereof, shall be liable to be imprisoned for a term not exceeding seven years, with or without hard labour.*
>
> *79. Any male person who, in public or private, commits, or is a party to the commission of, or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person, shall be guilty of a misdemeanour, and being convicted thereof shall be liable at the discretion of the court to be imprisoned for a term not exceeding two years, with or without hard labour.*

[2] The declarations sought by the Claimant are to the effect that sections 76 and 77 of the OAPA do not apply to consensual sexual activities between any person age 16 or older, including persons of the same sex and such activities are excluded from the operation of sections 2, 29, 30, 31, 32, 33, 34, 35 as well as the First

Schedule of the Sexual Offences Act, 2009 [SOA], and regulations 11, 16, 17, 18 and 21 of the Sexual Offences (Registration of Sex Offenders)

[3] Section 2 of the SOA designates offences found in the First Schedule of the SOA as "specified offences" to which reporting obligations under the SOA apply. As a result of these provisions, persons convicted of any of the offences of buggery, attempted buggery, or gross indecency between men under sections 76, 77 and 79 of the OAPA are subject to the regulations; which require the entry of their names in a Sex Offender Registry and monitoring within the community.

[4] The substantive action also challenges section 13(12) of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act ("The Charter") which provides:

> *13(12) Nothing contained in or done under the authority of any law in force immediately before the commencement of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 201 1, relating to- (a) sexual offences; (b) obscene publications; or (c) offences regarding the life of the unborn, shall be held to be inconsistent with or in contravention of the provisions of this Chapter'*

[5] On the 1st of November 2019, the Defendant/Applicant filed a notice of application for Court orders in which it seeks the following orders;

a. *As a preliminary issue, there is to be a separate trial of the question of whether the Constitutionality of sections 76,77 and 79 of the Offences Against the Person Act can be enquired into by the Court in light of the Savings Law clause in section 13(12) of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act.*

b. *No order as to cost.*

[6] The application is opposed by the Claimant and it is his position that this application should be dismissed for the following reasons;

a. *Severance is not available in the instant matter.*

b. *The Defendant's application is too late in time*

c. *The savings clause is not purely a legal issue*

d. *Severance is not allowable in this case as granting the defendant's application would not be finally determinative of the issues before the Court.*

Issue

[7] In respect of the application before me, the issue to be resolved is whether the Court should hold a separate/preliminary trial to determine whether the constitutionality of sections 76, 77 and 79 of the Offences Against the Person Act (OAPA) can be enquired into in light of the savings law clause in section 13(12) of the Charter.

Applicant's/Defendant's Submissions

[8] In submissions on behalf of the Applicant, Ms Jarrett stated that the question raised in this application is one of pure law which can properly be determined by the Court prior to the hearing of the substantive claim. On the question of the Court's jurisdiction to treat with this issue, she relied on the following provisions of the Civil Procedure Rules (hereinafter CPR):

> *56.13 (1) At the first hearing the judge must give any directions that may be required to ensure the expeditious and just trial of the claim and the provisions of Parts 25 to 27 of these Rules apply.*
>
> *26.1(2) Except where these Rules direct otherwise, the Court may-*
>
> > *(g) direct a separate trial of any issue;*
> >
> > *(j) dismiss or give judgment on a claim after a decision on a preliminary issue;*

[9] Emphasis was also placed on paragraph 59.32 of *Blackstone Civil Practice 2003* where it is stated that where matters are complex, costs and time can be saved if decisive or potentially decisive issues can be identified and ordered to be tried before or separately from the main trial. Counsel also highlighted that the authors of that text affirmed that the Court is empowered to make three type of orders namely;

a. the trial of a preliminary issue on a point of law,

b. the separate trial of preliminary issues or questions of fact and;

c. separate trials of liability and quantum.

[10] In addressing the relevant principles which should guide the Court in its consideration of this issue, Ms Jarrett cited the decision of **Steele v *Steele [2001] All ER (D) 227*** in which Lord Neuberger set out the factors that should be considered as follows: -

> *a. Whether the determination of the preliminary issue would dispose of the whole case or at least some aspect of the whole case;*
>
> *b. Whether a determination of the issue would reduce the time involved in pre-trial preparation;*
>
> *c. The amount of effort which would be involved in looking at the questions of law necessary to determine the issue;*
>
> *d. Whether it would be safe to draw conclusions on matters of fact usefulness of determining the preliminary issue;*
>
> *e. Whether the determination of the preliminary issue might unreasonably fetter the court in its pursuit of the just resolution of the proceedings;*
>
> *f. The extent of the risk that the determination of the preliminary issue would increase costs and delay;*
>
> *g. The relevance of determining the preliminary issue in the context of the whole proceedings;*
>
> *h. Whether the pleadings might be amended to avoid consequences of the determination of the preliminary issue and the extent of the risk of increased costs and delay thereby created;*
>
> *i. Whether with regard to the foregoing, it was just to rule on the preliminary issue.*

[11] It was acknowledged by Counsel that a number of decided cases on this point make it clear that Courts have developed a cautious approach when asked to make these orders. She argued however, that where the preliminary issue is one of law, does not require a determination of fact, is easily identifiable, can be isolated from the facts and the decision may determine the case as a whole; the utility of adopting such an approach has been recognised. The decisions of ***Craig Reeves v Platinum Trading Management Ltd, unreported decision from the***

Court of Appeal of the Eastern Caribbean delivered May 30th, 2008, Allen v Gulf Oil Refining Ltd [1981] AC 1001 and ***Wentworth Sons Sub-Debt S.A.R.L v Anthony Victor Lomas etal [2017] EWHC 3158(Ch)*** were cited in support of this argument.

[12] Ms Jarrett highlighted extracts from the affidavit of Carla Thomas, specifically paragraphs 6 and 7, in which reference was made to a number of applications filed by both the Claimant and the Interested Parties. The affiant also noted that the Claimant is seeking to have five (5) expert witnesses appointed and there were similar applications filed by the interested parties. Ms Thomas averred that in light of these circumstances, there was the potential for a large number of expert witnesses which could result in a lengthy and costly trial. She posited that this application is wholly a question of law, which can be resolved without any determination of the facts of the case or the need to hear from expert witnesses' as the Court's focus would be on the relevant provisions of the Offences Against the Person Act (OAPA), the Sexual Offences Act (SOA) and Savings Law Clause.

[13] Ms Jarrett also made reference to the Privy Council decision of ***Lambert Watson v The Queen [2004] UKPC 34,*** which was cited by the Claimant. In that matter, the Court considered whether Section 3(1A) of the Offences Against the Person Act (OAPA) had been saved by Section 26(8) of the Constitution. Ms Jarrett asked the Court to note that in delivering the decision of the Court, Lord Hope observed that guidance on this issue is found in the interpretation of the section itself. His Lordship examined whether changes made to the Offences Against the Person Act, specifically the provision for a mandatory death sentence under Section 3(1A), would have made the law prior to the Bill of Rights (BOR) cease to be what it was. Counsel also made reference to Paragraphs 42 and 43 of the decision where Lord Hope stated as follows;

> ***[42]*** *These observations would plainly have had much force in this case if it were plain that the law under which the appellant was sentenced to death was a law which was in force immediately before the appointed day. But the issue in this case is whether the law under which he was sentenced*

> *falls within that description, when the provisions of s 26(8) are read together with those in s 26(9). Guidance as to how this issue should be approached is not to be found in any presumption as to whether the law which was in force immediately before the appointed day secured the fundamental rights of the people of Jamaica. It is to be found in the principle of interpretation, which is now universally recognised and needs no citation of authority, that full recognition and effect must be given to the fundamental rights and freedoms which a Constitution sets out. The rights and freedoms which are declared in s13 must receive a generous interpretation. This is needed if every person in Jamaica is to receive the full measure of the rights and freedoms that are referred to. Section 26(8) read with s 26(9) limits that protection. So it must be given a narrow rather than a broad construction. This means that careful attention must be paid to the precise meaning of the words used in s 26(9). If this amounts to what has been described as 'tabulated legalism', it is perfectly in order in this context.*
>
> ***[43]** Before coming to s 26(9) however, their lordships must deal briefly with a point which Mr Hylton made about the meaning of the word 'law' in s 26(8). Section 1 defines the word 'law' as including any unwritten rule of law. The offence of murder, it was said, remains the same as it always was, a common-law offence. It was already part of the law of Jamaica immediately before the appointed day. The separation of that offence by the 1992 Act into different categories for the purpose of sentence did not change the nature of the offence. So the fact that the sentence of death was no longer mandatory in cases of non-capital murder did not affect the law to the extent that it continued to provide that a sentence of death was mandatory. The answer to this point is to be found in the fact that immediately before the appointed day the mandatory death sentence which s 2 of the 1864 Act laid down formed part of the written law of Jamaica. It was enshrined in statute. **It is the state of that written law that must be scrutinised to see if it has ceased to be what it then was, not any rule of law which is unwritten.***

[14] Ms Jarrett submitted that applying the reasoning of the Privy Council to the instant case, the Court must consider whether the provisions of 76, 77 and 79 have been changed by SOA and whether the law in respect of the impugned provisions of the

OAPA, has ceased to be what it was. She stated that in conducting such an exercise, evidence as to the psychological impact that the statutory provisions may have on an individual would have no place in determining this issue. She also asserted that the argument that the sentence regime has changed the provisions of OAPA is a matter for the Court determining the preliminary issue.

[15] She argued that in order to determine if the SOA has changed the law contained in sections 76,77 and 79, so as to remove it from the application of Section 13(2) of the Charter, a legal interpretation of these provisions would have to be conducted by the Court. Ms Jarrett also contended that this would purely be an issue of statutory interpretation and not one of fact as asserted by the Claimant in his affidavit. She maintained that in any event this issue would have to be determined prior to embarking on any consideration of whether the Claimant's Charter rights have been contravened.

[16] In respect of the sequence of events which have occurred since this claim was filed in 2015, Ms Jarrett submitted that contrary to the assertions of the Claimant, the proceedings have not been delayed by any action on their part as the applications to be added to this matter, which were filed by the interested parties were made independent of the Applicant and the subsequent ruling and appeal were not matters over which she exercised any control.

[17] She also argued that although this application was filed on the 6th November 2019, this was prior to the first hearing of the fixed date claim form which had been scheduled for the 7th of November 2019 and created no additional listing for the Claimant, neither did it cause any delay to the proceedings as the application could properly be considered by the Court at the first hearing. Ms Jarrett insisted that the trial of the substantive claim, which is expected to involve ordinary and expert witnesses, would be lengthy and costly in contrast to the hearing of the preliminary issue, which she stated, would not be expected to last more than 3 days given that there was no requirement for evidence to be heard.

[18] In addressing the Applicant's failure to file a defence, Ms Jarrett relied on the Court of Appeal decision of ***Sandra Bailey & Basil Bailey v Donovan Lewis [2019] JMCA Civ 14 i***n which Phillips JA indicated that such a failure was not necessarily determinative of the issue where she stated;

> *[72] The appellants relied on rule 10.2(1) of the CPR which states that "a defendant who wishes to defend all or part of a claim must file a defence". They also relied on rule 10.7 which states that "[t]he defendant may not rely on any allegation or factual argument which is not set out in the defence, but which could have been set out there, unless the court gives permission". This was done to support their argument that since no defence had been filed in this matter, and no application had been made to proceed without one, there was no "issue" before the court, and the respondent could not defend the preliminary issue hearing, and concomitantly could not rely on any allegation as he had not set out the same in a defence.*
>
> *[73] I do not think that there is any merit in these arguments. I agree with submissions of counsel for the respondent that the fact that no defence had been filed did not mean that the preliminary issue could not be dealt with. It also did not mean that there were no issues between the parties. The issues were clearly delineated in the witness statements. No judgment in default had been entered and so the parties could set out their respective cases in their witness statements, and that was clearly what R Anderson J envisaged, and neither judge seemed to think that they were hampered by the lack of a defence.*

[19] Ms Jarrett argued that in a situation where the hearing of this issue could potentially dispose of the claim this approach should be adopted. She submitted further that in the event of an appeal from the decision of the Court on the preliminary issue, the issue being such a narrow one an appeal would not cause any undue delays.

[20] She also insisted that the assertion of the Claimant that paragraph 24 of his affidavit raise issues which could be described as mixed issues of fact and law should be rejected. She asserted that contrary to this argument, none of the material outlined has any impact on the discrete issue that the Court is being asked to determine. She submitted that applying the principles of ***Steele v Steele*** to this situation, the following become evident;

a. If the preliminary issue is determined in favour of the Attorney General, this would be dispositive of the claim resulting in the saving of costs.

b. If the ruling is in favour of the Claimant, this would have the effect of reducing the pre-trial preparation on all sides.

c. The effort involved in determining the preliminary issue does not compare to that which would be required for a full trial of the substantive claim as the issue is much narrower involving the interpretation of the Charter, OAPA and SOA.

d. The preliminary issue being one of law only, there would be no need to draw conclusions as to fact.

e. The determination of the preliminary issue would not unreasonably fetter the Court in pursuing the just determination of these proceedings.

f. Determining the preliminary issue is unlikely to increase costs or cause delay and the opposite result was likely.

g. The outcome of the hearing in respect of the preliminary issue would determine whether the Court could hear the Claimant's challenge to the constitutionality of Sections 76, 77 and 79 of the OAPA.

Submissions of the Interested Parties

[21] The Applicant's submissions were supported and adopted by the Attorneys who represented the interested parties. Separate written submissions were also filed on the 27th of May 2020 on behalf of the Lawyers Christian Fellowship. In these submissions Mr Wilkins asked the Court to note that while the CPR did not set down any principles or guidance to be applied in determining whether to direct a separate trial of any issue, the decisions of ***Anthony Ferrari v John Issa and***

An'or 32 JLR 389, Sandra Bailey (supra) and Koninklike Phillips v Asutek &HTC [2016] EWHC 867 *p*rovide useful assistance.

[22] He expanded on this point by submitting that although the ***Ferrari*** decision was Pre-CPR, the dicta of Carey JA was still useful, specifically where in reference to Order 323 of the Civil Procedure Code which gave the Court the power to order the trial of a preliminary issue, he stated as follows;

> *The legal principles applicable are not in doubt. It was accepted on hands that the order can be made if it appears that a decision on the question may render it unnecessary to try the question of fact. Lord Denning MR in* ***Carl Zeiss Stiftung v Herbert Smith & Co [1968] 3 WLR 281*** *at p285 said this; 'the true rule was stated by Romer LJ in* ***Everett v Ribbands [1952] 2 QB 198,206; [1952] 1 TLR 933; [1952] 1 All ER 823****;*
>
> *Where you have a point of law which, if decided in one way is going to be decisive of litigation, then advantage ought to be taken of the facilities afforded by the Rules of Court to have it disposed of at the close of pleadings, or very shortly after the close of pleadings. I have always understood this to be the practice'.*

[23] Mr Wilkins argued that the principle which was enunciated in that decision still applies and has not been affected by the CPR which, he maintained, gives a wider discretion to the Court. He submitted that this is seen in the fact that under the CPR the Court's discretion is not limited to making orders for a separate trial of any issue of law, but also allows for this to be done in respect of any issue of fact as well.

[24] In respect of the ***Koninklijke Phillips*** decision Mr Wilkins acknowledged that it re-affirmed the principles which were originally outlined in ***Steele v Steele.*** He asked that the principles enunciated therein be given careful consideration by the Court and accepted as consistent with the scheme of the CPR and its overriding objective to deal with cases justly and save expenses. He submitted that in light of the Claimant's assertion that there have been changes to the laws in respect of sexual offences which would make section 13(12) (a) inapplicable, the critical issue is a legal one which the Court must decide as it impacts whether it has the

jurisdiction to enquire into the constitutionality of Sections 76,77 and 79 of the OAPA.

[25] Mr Wilkins took issue with the Claimant's/Respondent's assertion that the question of whether or not the 'savings law clause' applies would require the Court to 'assess the significance of post-Constitution amendments which includes understanding their impact.' He argued that this issue would only become relevant if the Court was required to examine whether the challenged legislation breached certain rights but it was not a consideration in determining the preliminary issue.

Respondent's/Claimant's Submissions

[26] In submissions made on behalf of the Respondent, Mr Wilkinson conceded that the Court has the power to direct a separate trial of issues as seen at Rule 26.1(2)(g) of the CPR. He insisted however that to order a separate trial of the 'savings law clause issue' would not be a proper exercise of the Court's discretion in a claim for constitutional relief. In expanding on this point, Mr Wilkinson clarified that the Claimant was not seeking to assert that the Court can never order a separate trial of an issue joined in a claim for constitutional relief, as there may be instances where that may be appropriate. He contended however that the manner in which the Applicant was seeking to make this application was tantamount to an effort to have the Claim determined summarily.

[27] Mr Wilkinson submitted further that claims for constitutional redress are sui generis and ought not to be determined summarily. He asked the Court to note that the CPR makes it clear that claims for constitutional relief cannot be determined by way of a default judgment, mediation or summary judgment and asserted that this application was tantamount to an attempt to obtain summary judgment which is prohibited by Rules 15(a) (b) and (c).

[28] The filing of this application by the Defendant at this stage, was also highlighted by Counsel as a situation which would only give rise to further delay and he cited the authority of ***Howard & Ors v Chelsea Yacht and Boat Company Ltd &An'or***

[2018] EWHC 1118 (Ch) as providing useful guidance on the principles relevant to a 'split trial' in this regard. Specific reference was made to paragraphs 19 and 20 of the decision where Master Clark stated;

> *The general position is that two trials in respect of the same issues are likely to involve significantly more time and costs than one. Here, if D1 failed on the Issue, then undoubtedly the overall costs of the claim would be significantly higher. If D1 succeeded on the Issue, then the relevant comparison is between:*
>
> *(1) a single trial in which the claimants' entitlement to the Civil and Criminal Declarations is determined;*
>
> *(2) a trial of the Issue, followed by, if D1 succeeded, a trial limited to the claimants' entitlement to the Civil Declaration.*

[29] Mr Wilkinson argued that the Defendant should have filed a defence or affidavit in response to the claim in order for the Claimant to be able to file a reply. He described the filing of this application as being in flagrant violation of the overriding objective of the CPR and insisted that it ought not to be countenanced by the Court.

[30] The authority of ***McLoughlin v Jones and others [2001] EWCA Civ 1743*** was cited by Counsel in support of the contention that the instant claim is not a clear or appropriate one for the Court's exercise of its discretion to direct a separate trial. He also insisted that contrary to the Applicant's position, the savings law issue is not purely a legal issue and he asked that special note be taken of the decision of David Steel J in which he outlined a number of principles which should be utilised in coming to a decision on such an application. These were stated as follows;

a. *Only issues which are decisive or potentially decisive should be identified.*

b. *The questions should usually be questions of law.*

c. *They should be decided on the basis of a schedule of agreed or assumed facts.*

d. *They should be triable without significant delay making full allowance for the implications of a possible appeal*.

[31] Mr Wilkinson also highlighted paragraphs 14 to 17 of the Claimant's affidavit in response to this application which state as follows;

> *14. Paragraph 7 of the Defendant's affidavit alleges that the issue of the savings law clause is "...wholly a question of law, is readily identifiable, capable of being determined in isolation and does not require a determination of the facts of the case or the hearing of expert witnesses. This is inaccurate for the following reasons:*
>
> (a) *The savings law clause in s. 13(12) of the Charter prevents a court from finding "any law in force immediately before the commencement of the Charter ... relating to ... to sexual offences' to be inconsistent with or in contravention of the provisions of Chapter Ill of the Constitution (Charter of Fundamental Rights and Freedoms). However, any change in the law since the commencement of the Charter voids the application of the savings law clause to protect that law from constitutional scrutiny;*
>
> (b) *Determining whether there has been any change in the law criminalizing consensual sex between men in Jamaica since the adoption of the Charter is not solely a question of law but also of fact. This is evident as the new sex offender registration provisions in the Sexual Offences Act (SOA) of 201 7 and the Sexual Offences (Registration of Sexual Offenders) Regulations 2012 operate to impose even harsher consequences on a person convicted under one or more of sections 76, 77 and 79 of the Offences Against the Person Act (OAPA);*
>
> (c) *Further, these laws further contribute to the stigma, discrimination and violence facing gay men, including myself, and other men who have sex with men (and other members of the LGBT community more broadly) as a result of this criminalization; and*
>
> (d) *[n considering the state of the law, and the harm flowing from the law, that now governs the criminalization of consensual sex between men in Jamaica, it is not possible to separate the pre-Charter OAPA provisions from the additional provisions of the SOA and its regulations enacted since the Charter. They are inextricably linked and the SOA incorporates expressly by reference ss. 76, 77 and 79 of the OAPA, thereby amending substantively the law criminalizing gay men and other men who have sex with men.*
>
> *15. I emphasize that the changes to the law including the creation of sex offender registries will result in great harm to the LGBT community of which I am a part. In further proof of this I exhibit hereto marked "MT-29, MT-30 and MT-31 respectively, for identification copies of a report, an academic research paper and a study by Human Rights Watch about the damaging effects of sex offender registries on the lives of individuals. These resources highlight that the stigma of being a registered sex offender contributes to limited access to housing, education, and employment as well as community segregation, harassment and violence. These effects will be compounded by the already high level of stigma, discrimination, and violence that members of the Jamaican LGBT community face.*
>
> *16. The exhibited material clearly indicates that there are relevant factual issues to be considered and that the matter is not one of just "law".*
>
> *17. Contrary to what is asserted in the Defendant's affidavit, to rule on the question of whether the savings law clause "saves" the challenged OAPA provisions from*

> *constitutional scrutiny, a court must consider not only the statutory interplay between the original OAPA and the subsequent SOA provisions, but assess the significance of the post-Constitution SOA amendments which includes understanding their impact. This can only be done by considering or reviewing a number of factual situations.*

[32] Counsel submitted that the contents of these paragraphs provide compelling evidence that the issue that the Applicant is seeking to have the Court determine actually involves questions of mixed fact and law. He argued that since consideration would have to be given to whether the amendments to the SOA and Regulations have changed the law in sections 76,77 and 79 of the OAPA, the assertion that this is solely a legal point is specious at best as it fails to take cognizance of the fact that the salient issues cannot be fully ventilated without affidavit evidence. He also maintained that close examination of the evidence by the Court dealing with the 'preliminary issue' may even require cross examination of expert and ordinary witnesses.

[33] Mr Wilkinson asked the Court to consider that if the answer to the question whether the existence of a new sexual offender's registry and new penalties in any way affects the relevant provisions of the OAPA is in the affirmative, then the Defendant's application for severance must fail. He argued that the requirement for an individual convicted of certain sexual offences to be registered as a sex offender and to carry an identifying pass with him is clearly a change or modification to the sentencing regime and as such would require determination by a Court on consideration of all the evidence including the impact of this legislation on individuals.

[34] It was also asserted by Counsel that whereas the consequences of this application being unsuccessful would only result in costs to the Applicant and a waste of the Court's resources, the Claimant would be prejudiced through no fault of his own as the determination of his claim would be unfairly delayed. It was also argued that this situation would be further compounded if the Applicant then seeks to appeal the Court's decision.

[35] The decision in ***Arthur Baugh v Court's (Jamaica) Limited and the Attorney General CL.B.099 of 1999*** was cited in support of the argument that laws which are in contravention of constitutional rights but protected by a savings law clause should not enjoy perpetual immunity from constitutional challenge. The dicta of Sykes J, as he then was, was also cited as follows;

> *20. 'the savings law clause's primary focus was to prevent uncertainty. It was never intended to confer on pre-independence laws, written or unwritten, perpetual immunity from unconstitutionality.'*

[36] Counsel also commended to the Court the reasoning of the Caribbean Court of Justice (CCJ) in ***Nervais v The Queen and Severin v The Queen [2018] CCJ 19(AJ)*** as instructive in matters treating with the savings law clause. Paragraph 59 of the judgment was highlighted which states;

> *'With these general savings clauses, colonial laws and punishments are caught in a time warp continuing to exist in their primeval form, immune to the evolving understanding and effects of applicable fundamental rights. This cannot be the meaning to be ascribed to that provision as it would forever frustrate the basic underlying principles that the Constitution is the supreme law and that the Judiciary is independent.'*

[37] The decision of ***McEwan etal v Attorney General of Guyana [2018] CCJ 30 (AJ)*** which echoed similar sentiments to the ***Nervais*** decision was also cited by Mr Wilkinson who recommended to the Court the four pronged approached outlined to 'ameliorate the harsh consequences of the application of the savings law clause', these were stated as follows;

> *a. Restrictive interpretation and application of the savings law clause.*
>
> *b. The clause only saves laws that infringe the individual's human rights stipulated in the clause itself.*
>
> *c. International implications must be considered; and*
>
> *d. There should be an attempt to modify the pre-independence law before applying the savings law clause.*

[38] Applying these principles to the instant case, Mr Wilkinson argued that it could not have been the intention of the Legislature to abrogate the Charter right to equality before the law and the right to freedom from discrimination when it enacted to save these provisions of the OAPA from constitutional challenge. The first instance judgment of ***The Attorney General of Belize v Caleb Orosco & Others 32 of 2016*** was cited by him in support of this position.

[39] Mr Wilkinson submitted further that as a result of Jamaica's ratification of the American Convention on Human Rights, the Court ought to give due consideration to provisions of the treaty which are applicable to Jamaica. He asked the Court to note that international tribunals have strongly renounced savings law clauses because of their inconsistency with international human rights obligations. In support of this assertion, he made reference to an observation in the Inter-American Commission on Human Rights (IACHR) of December 2020 that due to the inclusion of the impugned provisions of the OAPA, Jamaica has contributed to the perpetuation of violence against homosexuals which violates its international obligations.

[40] Mr Wilkinson also commended the decision of ***DPP V Kurt Mollison [2003] UKPC 6*** in which he highlighted that at paragraph 15, the Privy Council had opined that the wording of the savings law clause was not so comprehensive as to undermine Section 2 of the Constitution which declares the Constitution as the Supreme Law. He stated that in the ***Nervais*** decision, the CCJ reasoned that where there is a conflict between an existing law and the Constitution, the latter must prevail and the Courts apply the existing law with such modifications as may be necessary to bring them into conformity with the Constitution. Counsel asked that a similar approach be taken to the savings law clause in the instant matter.

[41] In conclusion, Mr Wilkinson submitted that note should be taken of the Privy Council decision of ***Watson v The Queen [2004] UKPC 34*** in which the Court observed that a savings law clause will protect a law, even if that law is amended, unless to do would result in a 'gross anomaly.' He urged the Court to adopt this

principle and rule that the SOA and its regulations made provisions that impacted the scope of sections 76, 77 and 79 which resulted in them being substantially changed and as such the savings law clause cannot operate to protect them.

DISCUSSION AND ANALYSIS

Does the court have jurisdiction to make the order?

[42] It is not in dispute between the parties that among the overriding objectives outlined in the CPR is the requirement that Courts deal with cases justly. Part 1 of the CPR provides in part that this objective is to be observed in instances when the Court exercises any discretion or power given by the Rules themselves or when it comes to interpret any rule. The Parties also agree that Rule 26.1(2) (g) provides that unless the Rules direct otherwise, the Court may order a separate trial of any issue and dismiss or give judgment on a claim after a decision on a preliminary issue. It was also unchallenged that pursuant to Rule 56.13(1) the judge at the first hearing may give any directions which are required to ensure the expeditious and just trial of a claim and the provisions of part 25 to 27 of these Rules apply in such instances.

[43] In light of the foregoing, it is clear that the Applicant is on good ground with its submission that a judge has a wide discretion to grant the order sought in managing the course of a trial and in this regard I wholly endorse the remarks of Denys Barrow JA where he stated in the ***Craig Reeves*** decision as follows;

> *'active case management by the court remains one of the most important of the innovations that CPR 2000 introduced'*

[44] In considering this application, I also took careful note of his Lordship's words of caution where he stated;

> *While an order for the separate trial of an issue is entirely within the range of case management orders that the court may make, such an order should normally be made at the case management conference fixed following the filing of the defence.*

[45] In the course of dissecting the issue identified, careful consideration was given to the Claimant's argument that to grant such an order would be tantamount to a summary judgment. It was evident however, that while summary judgment would ordinarily have the effect of bringing the substantive matter to an end, the Court's case management powers allow for this type of order to be made where it is feasible and in keeping with the mandate to treat with matters expeditiously. As such the question that would then have to be resolved is whether the order should be made in the instant case.

[46] In arriving at a resolution of this question, useful guidance was found in the ***Craig Reeves*** decision where the Hon Denys Barrow SC, Judge of Appeal stated as follows;

> *[17**] Wasting rather than saving time, complicating rather than simplifying issues, and engaging in mini-trials with no true justification for doing so, are among the risks that require careful consideration before a court decides to order the trial of a preliminary issue**. Lord Roskill warned of the need to be "extremely cautious" before ordering the trial of a preliminary issue in Allen v Gulf Oil Refining Ltd.7in the following statement: "... your Lordships' House has often protested against the procedure of inviting courts to determine points of law upon assumed facts. The preliminary point procedure can in certain classes of case be invoked to achieve the desirable aim both of economy and simplicity. But cases in which such invocation is desirable are few. Sometimes a single issue of law can be isolated from the other issues in a particular case whether of fact or of law, and its decision may be finally determinative of the case as a whole. Sometimes facts can be agreed and the sole issue is one of law. But the present is not a case in which this procedure ought ever to have been adopted ..."(emphasis added)*

Having stated thus, the Learned Judge continued;

> *[18**] It will be seen from the speech of Lord Roskill that the trial of a preliminary issue will usually be of a point of law, which can be isolated from any factual dispute, or may be made separately triable because facts are agreed.** To order the separate trial of a question or issue of fact was described in the early case of Piercy v Young as an "extraordinary and exceptional" course*

> *that should only be made "on special grounds". In that case Jessel M.R. gave as illustrations three instances, which he had given in the earlier case of Emma Silver Mining Co. v Grant9,where this exceptional order was properly made. The illustrations are contained in the following passage from the judgment in Piercy v Young:*
>
> *"Separate trials of separate issues are nearly as expensive as separate actions, and ought certainly not to be encouraged, and they should only be granted on special grounds…….. . (emphasis added)*

Whether the determination of the preliminary issue would dispose of the whole case or at least some aspect of the whole case;

[47] In my analysis of this application, I took the view that the Applicant's 'case' evolved around whether or not the preliminary issue would dispose of the case as a whole. Applying the principles enunciated by the Court in the ***Lambert Watson*** decision as well as the guidance provided in ***Steele v Steele*** and ***Craig Reeves v Platinum Trading***, I am persuaded that while an argument can be made that the savings law clause may prevent a Court from enquiring into the constitutionality of the relevant provisions of the OAPA; this would have to be done in circumstances where the provisions of the SOA would need to be analysed to determine what changes if any have been brought about in respect of the sentencing regime.

[48] In the ***Lambert Watson*** decision, it was the Court's conclusion that where there had been changes which had caused the law to cease to be as it was then the savings clause argument could not apply. While this may appear to be an issue of pure law, I am of the view that in order for the matter to be properly disposed of consideration ought to be given to the Claimant's argument in respect of the impact of allowing the impugned provisions to stand. This is of particular importance in circumstances where the argument could be made that it is discriminatory in its application and runs counter to the constitutional rights of a specific segment of society. It is my opinion that any examination of this position would of necessity draw into focus the consideration of evidence in this regard including cross examination. I believe that this position finds support in the dicta of Sykes J in the

Arthur Baugh decision where he made specific pronouncements on how the application of the savings clause could be viewed as well as the intention of Parliament in respect of this provision. In light of the foregoing findings, I am not persuaded that the matter can be isolated in the way that the Applicant contends. As such, I do not believe that it is feasible to order a separate trial of this issue as this would not be sufficient to dispose of the substantive claim.

Whether a determination of the issue would reduce the time involved in pre-trial preparation

The amount of effort which would be involved in looking at the questions of law necessary to determine the issue;

[49] While the preparation of the parties in addressing the Court on this narrow issue would be significantly reduced when compared to that which would be required to address the substantive claim as a whole, based on the foregoing conclusion this would not provide sufficient foundation for the granting of such an order. The same would be true in respect of the effort which would be expended in the examination of the questions of law.

Whether it would be safe to draw conclusions on matters of fact usefulness of determining the preliminary issue;

[50] In circumstances where a finding has been made that the issue is not a purely legal one and requires careful consideration of matters of fact, I do not believe that it would be safe for a Court hearing this application to draw such conclusions in determining this issue. If this approach were to be taken, the questions would arise as to the manner in which such a venture could be undertaken without the taking of evidence and cross examination of individuals whose affidavits are being relied on. This is of particular importance where the parties are unable to agree the contents of these competing affidavits as is apparent in the instant case.

The extent of the risk that the determination of the preliminary issue would increase costs and delay;

[51] Although I am of the opinion that the preliminary issue would not be dispositive of the matter as a whole, I have gone on to consider the extent to which granting the order sought would have increased costs and brought about delay. While the Applicant has made the point that the delays prior to the filing of her application were in no way contributed by them, it is evident that before proceeding to make first hearing orders a Court would have to give consideration to this application as a matter of priority.

[52] This fact in and of itself involves a measure of delay and additional cost and this would be compounded if such a preliminary hearing were in fact to take place. It is accepted by both parties that if the ruling were to be against either side, it is likely that an appeal would be filed which would have to be heard and determined. This also involves additional delay and costs. If a decision is made in favour of the Claimant, this would still have the effect of pushing the matter several years into the future and possibly impact availability of witnesses which would be called by any of the parties. In light of these possibilities, I believe that there is merit in the argument that the issue of delays and additional costs would best be avoided by the matter being heard by one Tribunal.

CONCLUSION

[53] In light of the foregoing findings, I am of the view that it would be difficult to separate this preliminary issue of law from the claim as a whole. It is clear that the legal issue is inextricably connected to issues of fact which the Claimant wishes to have considered by the Court as part of his Constitutional motion. It is also evident that a separate trial would require additional resources and the possibility does exist that it could create additional delays particularly where it is not guaranteed that the Applicant would succeed. As such, the application filed on the 1st of November 2019 is refused.