Michaelmas Term
[2022] UKPC 44
Privy Council Appeal No 0030 of 2020

JUDGMENT

Bobette Smalling (Appellant) *v* Dawn Satterswaite and others (Respondents) (Jamaica)

From the Court of Appeal of Jamaica

before

Lord Hodge
Lord Briggs
Lord Hamblen
Lord Burrows
Lord Stephens

JUDGMENT GIVEN ON
17 November 2022

Heard on 21 June 2022

Appellant
Andrew Mitchell KC
Caroline P Hay KC
Nigel Parke
(Instructed by Andrew Mitchell KC Litigator/Agent)

1st Respondent (Dawn Satterswaite)
Terrence F Williams
Isat Buchanan
John Clarke
(Instructed by Simons Muirhead & Burton LLP)

2nd and 3rd Respondents (Janet Ramsay and Paulette Higgins)
Ian G Wilkinson KC
Lenroy Stewart
Jhawn Graham
Khadine Hylton
(Instructed by Axiom DWFM)

LORD STEPHENS (with whom Lord Hodge, Lord Briggs, Lord Hamblen and Lord Burrows agree):

1. Introduction

1. This appeal raises an important question as to whether a search and seizure warrant issued under section 115 of the Jamaican Proceeds of Crime Act 2007 ("POCA") for the purposes of investigating criminal conduct occurring on or after 30 May 2007 can nevertheless authorise the search for and the seizure of information or material that came into existence prior to 30 May 2007.

2. Counsel for Dawn Satterswaite ("the first respondent") submitted that because a person can only be charged under POCA for offences committed on or after 30 May 2007, any search or seizure in respect of her must be limited to information or material arising on or after 30 May 2007. This submission was rejected by Straw J at first instance, in her judgment dated 17 September 2015 ([2015] JMSC Civ 183) but was accepted in the Court of Appeal (Phillips, F Williams and P Williams JJA) in the judgment of Phillips JA dated 20 December 2019 with which the other justices agreed ([2019] JMCA Civ 43). The Court of Appeal held that material and information prior to 30 May 2007 could not be obtained on foot of a search and seizure warrant issued under section 115 of POCA. As a result, the Court of Appeal ordered that any documents, which predated 30 May 2007 and had been seized by Detective Sergeant Bobette Smalling ("the appellant") upon the execution of the warrant, must be returned forthwith to the first respondent and Janet Ramsay and Paulette Higgins ("the second and third respondents").

3. On 23 June 2020 Her Majesty granted special leave to appeal to the Judicial Committee of the Privy Council in relation to the question set out in paragraph 1 above and granted a stay of execution of the Court of Appeal's order regarding the return of the documents.

2. Factual Background

(a) The appellant

4. The appellant, Bobette Smalling, is a Detective Sergeant of Police assigned to the Major Organised Crime and Corruption Agency ("the MOCA"). The MOCA is a branch of the Jamaica Constabulary Force that targets major criminals and their

facilitators. For the purposes of Part VI of POCA, headed "Investigations", the appellant is both an authorised financial investigator and an appropriate officer.

(b) Andrew Hamilton

5. Mr Andrew Paul Hamilton ("AH") was suspected by the United States Drug Enforcement Agency ("the DEA") of involvement in drug and arms trafficking in the USA, as well as money laundering in the USA and Jamaica. He has been convicted in the USA twice. In 1998 he was convicted for a drug trafficking offence and served one year in prison. Subsequently on 10 February 2012 he was indicted on charges of drug trafficking and money laundering offences. He was arrested in the USA on 9 March 2012 and he pleaded guilty on 22 October 2012 to counts on that indictment involving drug trafficking and conspiracy to launder money.

6. In relation to AH DEA investigators have informed the appellant that:

(a) On 12 February 2010, US$637,405 and 2672.8 lbs of marijuana was seized from AH during a narcotics transaction with an unidentified Hispanic male known only as "Chad."

(b) On 16 July 2010, US$709,930 was seized from AH when he had two boxes of money shipped from New York and one box of money shipped from Georgia to Irvine, California.

(c) On 20 July 2010, US$10,000 was seized from AH when a search warrant was executed on his apartment in Irvine, California.

(d) On 13 October 2011, US$10,543 was seized from AH following a vehicle stop.

(e) On 8 November 2011, US$40,000 was seized from AH following the execution of a search warrant at one of his apartments in California.

(f) On 12 March 2012, US$174,978 was seized from AH after his arrest and the execution of a search warrant at his residence in Georgia.

Accordingly, it is understood that over US$1.5 million and 2,672.80 lbs of marijuana have been seized from AH by the DEA.

(c) The investigations

7. In or about February 2010 the Financial Investigations Division ("the FID") of the Jamaican Ministry of Finance and the Public Service commenced an investigation in relation to AH's ownership of assets in Jamaica. Since December 2010 the FID, the MOCA and the DEA have been conducting joint investigations into the suspected money laundering of AH's criminal property. Those investigations have involved AH and certain of his associates including, amongst others, the first respondent, Dawn Satterswaite, an attorney-at-law, who has acted for AH and for his relatives and close friends since in or about 2002. AH's sisters, Paulette Higgins and Janet Ramsay, the second and third respondents respectively, have also been investigated. The agencies suspected that AH was laundering criminal property by sending substantial amounts of cash to Jamaica to purchase real estate in his name or in the name of his company, Andrew Hamilton Construction Ltd, or in the name of one or more of his relatives so that by December 2013 he effectively owned real estate in Jamaica with an estimated value of J$319,700,000, together with other real estate with an estimated value of US$300,000. The agencies also suspected that AH was laundering criminal property by using his company, Andrew Hamilton Construction Ltd, to purchase and import into Jamaica assets such as heavy-duty tractors, motor vehicles and parts with a total value of J$61,000,000 as well as a fishing vessel, the "Sir Jack."

(d) The application for a search and seizure warrant

8. By a without notice application dated 16 December 2013, the appellant sought a search and seizure warrant pursuant to section 115(1)(b) of POCA to search specified premises including the home and the law office of the first respondent and the homes of the second and third respondents and to seize "listed material" such as records of transactions which involved AH or various named associates of AH. The "listed material" included the first respondent's conveyancing files in relation to various properties set out in Tables 1 and 2 of the appellant's affidavit supporting the application ("the appellant's affidavit"). Table 1 provides details in relation to the purchase of various properties that have been retained whilst Table 2 provides details in respect of various properties that were purchased and then subsequently sold or purportedly sold.

(e) A summary of the appellant's affidavit

9. In her affidavit the appellant sets out various matters as providing reasonable grounds for believing that the respondents were part of a group of persons who had committed money laundering offences in relation to the proceeds of AH's drug

trafficking. There has been no replying affidavit from any of the respondents – as a result, the matters set out in the appellant's affidavit are unchallenged.

10. In her affidavit the appellant sets out the information in paras 5 – 7 above. She states that AH and his relatives have acquired and retained the properties set out in Table 1 with an estimated value of J$319,700,000 together with other real estate with an estimated value of US$300,000 and acquired the properties in Table 2 without being in receipt of any sufficient legitimate income to be able to afford the purchases, all of which were made without any financing, as evidenced by the certificates of title.

11. To demonstrate that AH could not afford to purchase the properties based on any legitimate income, the appellant details his business interests and income. She states that AH is the majority shareholder in Andrew Hamilton Construction Ltd, a company incorporated in Jamaica which was and remains dormant in relation to any legitimate commercial activity. In support of this, the appellant refers to the companies' annual income tax returns for the years 2004, 2005, 2006, 2007, 2009 and 2010 which show nil income received by the company and nil tax paid. The appellant also states that AH is the majority shareholder in Andrenhan Seafoods Co Ltd, a company incorporated in Jamaica in 2008, which she states also was and remains dormant in relation to any legitimate commercial activity. In relation to AH's income the appellant states that his income tax returns over the period 1982 to 2010 declared a total income of J$184,817.44 and that he has paid J$27,208 in tax over the period 2005-2011. Accordingly, the appellant states that AH's income was insufficient to acquire and retain the properties in Table 1 or to acquire the properties in Table 2. Furthermore, it is submitted that none of the respondents in seeking to oppose the search and seizure warrant have sought to establish that AH had sufficient legitimate income to purchase any of the properties.

12. To demonstrate that AH's relatives could not afford to purchase the properties from any legitimate income, the appellant sets out details as to their employment. The appellant states that only four of AH's relatives named in the affidavit appear on the database held by the Ministry of Labour for the period 1982 to 2010. The total amount earned by those four over the entire period ranges from a mere J$8,284.72 for Ann-Marie Cleary to J$8,611,050.38 for Paulette Higgins. Accordingly, the appellant states that AH's relatives' income was insufficient to acquire and retain the properties in Table 1 or to acquire the properties in Table 2. Furthermore, it is submitted that none of the respondents in seeking to oppose the search and seizure warrant have sought to establish that AH's relatives did have sufficient legitimate income to purchase any of the properties.

13. In Table 1, the appellant sets out details relating to 14 properties in Jamaica which she states were registered to or effectively owned in December 2013 by AH. In relation to each property, she identifies details such as the address, the identity of the purchaser as being either AH or one of AH's relatives, the purchaser's attorney as being the first respondent, the date of acquisition, the purchase consideration, and the estimated market value in 2013. Table 1 reveals that the purchase consideration for each property ranged from J$2,400,000 to J$12,000,000 and that the dates of acquisition were between 2 October 2002 and 31 January 2011.

14. In Table 2, the appellant sets out details relating to 15 properties in Jamaica which she says had been purchased and then subsequently sold or purportedly sold by AH or his relatives. In relation to each property, she identifies details such as the address, the identity of the vendor as being either AH or one of AH's relatives, the vendor's attorney as being the first respondent, the date of ownership, the purchase consideration, and details in relation to the sale including the date of sale, the name and address of the purchaser and the sale price. Table 2 reveals that the dates of sale were between 25 June 2010 and 29 January 2013 and that several of the properties were sold to purchasers in the USA. The appellant refers to these purchasers as "overseas persons". She states that on the instruments of transfer in relation to several of the properties sold to "overseas persons" that the words "whilst on a visit to Jamaica" appeared under the signature of the purchaser and that the first respondent purported to witness the signatures of those "overseas persons." The appellant also states that investigations conducted with assistance from the DEA and the US Postal Inspection Services ("the USPIS") with a view to establishing the bona fides of the "overseas persons" indicates that the overseas addresses provided for them on the transfer documents did not exist. Further the DEA and the USPIS were unable to verify the existence and or identities of these persons. As a result, the appellant believes that to conceal AH's criminal property the first respondent conducted ten sham transactions using fictitious names and addresses.

15. In relation to the first property listed in Table 2, which was acquired by AH and Dorothy Hamilton on 20 August 2002 for J$3,800,000 and despite its purported sale on 14 January 2011 for J$9,000,000 to an "overseas person", the appellant states that in December 2013 Janet Ramsay, the third respondent resided in that property. The appellant relies on this as further evidence that the sale of this property was a sham to conceal AH's criminal property.

16. In relation to the second property listed in Table 2 which was acquired by AH and Dorothy Hamilton on 20 September 2002 for J$6,300,000 and despite its purported sale on 12 January 2011 for US$980,000 to an "overseas person" the appellant states that in December 2013 the mother of AH's children, Ann-Marie Cleary

resided in that property. The appellant relies on this as further evidence that the sale of this property was a sham to conceal AH's criminal property.

17. In relation to two of the other properties listed in Table 2 which had purportedly been sold to "overseas persons" the appellant states that in December 2013 these properties were occupied by tenants. The appellant recounts that an occupant of one of those properties stated that they have not met or dealt with the owners of the property, but that they are paying rent to the first respondent either directly by payment into a bank account in her name or through persons acting as her agents, namely, her mother Gloria Satterswaite, and her husband, Terrence Allen. The appellant relies on this as further evidence that the sale of these properties was a sham to conceal AH's criminal property.

18. The appellant also states that she believes that three of the properties listed in Table 2 were purportedly sold to the same overseas person and yet the signatures on two of the three instruments of transfer appear to be inconsistent. The appellant relies on this as further evidence that the sale of these properties was a sham to conceal AH's criminal property.

19. The appellant asserts her belief that the purported sale of the properties listed in Table 2 was prompted by the seizures in the USA which commenced in February 2010. The appellant believes the purported sales were an attempt by AH to conceal his ownership of the properties and thereby to avoid their confiscation in Jamaica. Similarly, the appellant believes that the sale of the fishing vessel, the Sir Jack, on 23 March 2012 to Mr Albert Charles Williams for US$500,000 after AH was arrested on 9 March 2012 was an effort to conceal ownership of AH's criminal property. Mr Williams is believed to be one of AH's associates.

20. The appellant's affidavit sets out further evidence to support her belief that the properties in Table 1 and Table 2 were acquired with money generated by AH's drug trafficking. The appellant identifies a bank account at Scotial Investments Ltd, formally DB&G held in the names of "Satterswaite Client Account/Andrea Hamilton" which she believes was used to receive amounts in cash brought into Jamaica by Ann-Marie Cleary. The appellant sets out in Table 5 the travel pattern of Ann-Marie Cleary, giving details as to the dates upon which she returned to Jamaica and the dates and amounts credited to the account. The appellant states that a financial institution is not compelled to report to the FID transactions below the threshold amount of US$50,000 and that Table 5 shows that amounts less than US$50,000 were lodged to the account and that these lodgements coincided in time with Ann-Marie Cleary returning to Jamaica. The appellant believes that Ann-Marie Cleary brought those amounts in cash from the USA, deposited them in the account and that the first respondent (as a joint

holder of the account) remained in control of criminal property in the account. Furthermore, that money in the account was transferred to other accounts held by the first respondent including a client account held at Bank of Nova Scotia Jamaica Limited which the appellant believes was the primary conveyancing account being used by the first respondent to do her business for AH and his associates. The appellant also identifies another account held by the first respondent which she believes from the pattern of lodgements to be the account to receive rental payments in relation to the properties the subject of "sham" sales to "overseas persons."

(f) Reasonable grounds for believing that the first respondent has committed a money laundering offence

21. In summary, the appellant's affidavit asserts that the first respondent was involved as the attorney-at-law in all 29 property transactions set out in Tables 1 and 2 which are alleged to have been funded by cash generated by AH's drug trafficking, with the cash being brought into Jamaica by Ann-Marie Cleary and then deposited in an account under the control of the first respondent. Thereafter, it is the appellant's belief that the criminal property was concealed by the first respondent under the device of registering the properties in the names of AH's relatives.

22. It is also asserted that the first respondent has concealed AH's criminal property by conducting sham sales of properties in Table 2 to "overseas persons" and thereafter receiving rent from some of those properties into another account under her control.

23. Furthermore, it is asserted that the first respondent was instrumental in the incorporation of Andrew Hamilton Construction Ltd and Andrenhan Seafoods Co Ltd. Table 2 records that Andrew Hamilton Construction Ltd which the appellant asserts is a dormant company, purchased a property on 2 March 2004 for J$2,500,000 which was subsequently sold by that company with the first respondent acting as the vendor's attorney on 14 January 2011 for J$15 million to an "overseas person." Furthermore, it is asserted that the first respondent prepared a sham sale of the fishing vessel the "Sir Jack" to Mr Williams who is believed to be an associate of AH in order to conceal this criminal property.

(g) Reasonable grounds for believing that the second and third respondents have committed money laundering offences

24. In summary in respect of the second respondent it is asserted in Table 2 that despite having insufficient legitimate income that she permitted 3 valuable properties

to be registered in her name as a joint owner to conceal AH's criminal property and was then subsequently involved in sham sales to "overseas persons".

25. In summary in respect of the third respondent it is asserted in Table 1 that she permitted 9 valuable properties to be registered in her name either as a sole owner or as a joint owner to conceal AH's criminal property. Furthermore, that she was involved in the purchase and sham sale of two of the properties in Table 2.

(h) The grant and execution of the search and seizure warrant

26. On 16 December 2013 McDonald-Bishop J granted the search and seizure warrant. No reasons were given, though it was stated in the warrant that the judge had reasonable cause to believe that seizure of the material at the designated places would assist in the investigation of offences under sections 92(1)(a), 92(1)(b) and 93(1) of POCA.

27. On 17 December 2013 the search and seizure warrants were simultaneously executed at the specified premises by officers of the MOCA and the FID. During the searches, the first respondent asserted legal professional privilege over all the files in her office. The MOCA proceeded to seize all those files, as well as files found in her residence, but all the items were bagged, tagged and sealed in her presence to preserve the claim of legal professional privilege. They have remained in the MOCA's possession sealed except to carry out a sifting exercise to identify material which is irrelevant to the investigation.

28. On 16 January 2014 the appellant filed a court application served on the first respondent requesting that the sealed material be examined by the court to determine whether it attracts legal professional privilege and that any material found not to attract legal professional privilege be retained and unsealed by the MOCA. Prior to that application being heard, the sifting exercise was conducted and material which was irrelevant to the investigation was returned to the first respondent.

29. The appellant's application that the sealed material be examined by the court was heard by Straw J on 27 February 2015 and 4 August 2015. Mrs Jacqueline Samuels-Brown, QC appeared on behalf of the first respondent instructed by Knight Junor, and Samuels solicitors. The second and third respondents had been identified in Tables 1 and 2 as purchasers of some of the properties. As such it was open to them to assert that they were in fact the first respondent's clients and thus that legal professional privilege covered any communications they might have had with the first respondent in respect of those transactions. However, the second and third respondents did not

seek to intervene in the application. Ms Akuna Noble instructed by Wilkinson & Co. watched the proceedings on their behalf.

30. In her judgment delivered on 17 September 2015 the judge ordered that all the material be unsealed and examined by the court whether or not it came into existence prior to 30 May 2007 so that the court could finally decide whether the documents, in whole or in part, should be returned to the first respondent on account of being covered by legal professional privilege.

31. On 1 October 2015 the first respondent filed a Notice and Grounds of Appeal in which she challenged the order of Straw J. This notice was amended on 22 October 2015. The notice and the amended notice were drafted and signed by the first respondent's counsel Jacqueline Samuels-Brown QC who also provided a skeleton argument to the Court of Appeal on behalf of the first respondent.

32. On 16 November 2016 the second and third respondents gave notice of their application to intervene in the appeal, which was granted on 24 November 2016.

33. On 22 to 25 January 2018 the court heard the appeal against the order of Straw J. At the hearing the first respondent appeared in person, though with the benefit of the notice of appeal, amended notice and the skeleton argument all drafted by her senior counsel. Mr Ian Wilkinson QC and Lenroy Stewart instructed by Wilkinson Law appeared on behalf of the second and third respondents. As is apparent from para 89 of the judgment of the Court of Appeal, Mr Wilkinson advanced arguments at the appeal not only on behalf of the second and third respondents but also in support of the first respondent. The judgment was delivered on 20 December 2019. The Court of Appeal held that any documents that pre-dated the coming into force of POCA on 30 May 2007 could not have been lawfully seized by the MOCA and therefore had to be returned without prior examination.

(i) The criminal proceedings

34. On 17 December 2013 the respondents together with Ann-Marie Cleary (now deceased) were charged with several counts of money laundering. The counts charged related to the respondents' alleged role in the acquisition, disposal and management of assets derived from the drug trafficking activity of AH. The criminal trial commenced on 19 October 2017 before Parish Judge Chester Crooks in the Kingston & St. Andrew Parish Court. The trial is now adjourned pending the resolution of this appeal.

3. The judgments of the High Court and of the Court of Appeal

(a) The judgment of Straw J in the High Court

35. At para 3 of her judgment the judge identified three issues for determination:

> (a) Whether the [appellant] has satisfied the court that legal [professional] privilege ought not to apply to the sifted material and should therefore be examined by the court for such a determination to be made.
>
> (b) Whether the repeal of the Money Laundering Act ("the MLA") and its replacement with POCA in May 2007 has any effect on the sifted material that may be ordered to be unsealed.
>
> (c) What is a suitable process for examination by the court of the sifted material in order to determine what, if any, may be ordered to be unsealed.

36. In relation to the first issue the judge proceeded on the basis that communications in furtherance of a crime or fraud are an exception to the principle of legal professional privilege. Based on the evidence contained in the appellant's affidavit the judge held at para 23 that there was a prima facie case that the communications between AH and the first respondent were in furtherance of money laundering offences so as to displace legal professional privilege. Accordingly, that the court should proceed to examine the material to finally determine whether it attracts legal professional privilege and that any material found not to attract legal professional privilege be retained and unsealed by the MOCA.

37. In relation to the second issue the judge held at para 41 that, even though the respondents can only be charged under POCA for money laundering offences committed on or after 30 May 2007, there was "no bar to investigations instituted or continued in relation to money laundering offences that may have been committed pre POCA." This conclusion was based on the appellant's submissions that the investigation of material or information which came into existence prior to 30 May 2007 would be relevant as evidence potentially establishing mens rea in respect of offences alleged to have been committed after 30 May 2007. Furthermore, that such material or information would be part of a continual background of history relevant to offences committed on or after 30 May 2007 without the totality of which any account to the jury at trial would be incomplete or incomprehensible. Accordingly, the judge held at para 44 that there was "no basis to limit the documents that may [possibly] be

unsealed to what exists post 2007" and she granted the application that the material be unsealed for examination by the court to make a determination as to whether the documents, in whole or in part should be returned as attracting legal professional privilege.

38. In relation to the third issue the judge set out guidelines in relation to how the examination of the material would take place.

(b) The judgment in the Court of Appeal

39. The issues for determination on the appeal were identified by the Court of Appeal at paras 1 and 24 of the judgment of Phillips JA. In so far as relevant to the issue before the Board, the issue was whether Straw J failed to ascertain the definition of "criminal conduct" in section 2 of POCA, and as a result erred in holding that a search and seizure warrant issued under section 115 of POCA for the purposes of investigating criminal conduct occurring on or after 30 May 2007 can nevertheless authorise the search for and the seizure of information or material which came into existence prior to 30 May 2007.

40. Counsel for the first respondent, Mrs Samuels-Brown in her skeleton argument submitted that because POCA came into effect on 30 May 2007 it cannot apply to matters which pre-dated its enactment.

41. Counsel for the second and third respondents submitted that of the 29 properties listed in Tables 1 and 2 eleven were acquired prior to 30 May 2007, and so that any document relating to those transactions ought to be excluded from examination, especially since no charges were laid under the MLA which was the legislation in force prior to POCA. It was submitted that applying the saving provisions in section 25(2)(d) and (e) of the Interpretation Act, the repeal of the MLA by section 139 of POCA still enables the institution of an investigation, legal proceedings, and the imposition of punishment under the MLA, as if POCA had not been passed. On this basis it was submitted that the investigation of crimes prior to 30 May 2007 ought to have been conducted under the MLA but could not be conducted under POCA.

42. Mrs Hay, on behalf of the appellant, whilst accepting that criminal conduct as defined under POCA relates only to conduct on or after 30 May 2007, submitted that material and information which came into existence before that date was relevant to an investigation as potentially constituting similar fact evidence, as background evidence or evidence establishing mens rea in respect of offences alleged to have been committed after 30 May 2007.

43. The Court of Appeal considered at paras 87 - 88 that the MLA and POCA did not leave any gap in the pursuance of the prosecution of money laundering offences and that the interplay between the two statutes is clear. Accordingly, offences and/or investigations prior to 30 May 2007 would have to be pursued under the repealed MLA as the processes under that Act were preserved by section 25(2)(d) and (e) of the Interpretation Act. In contrast, the Court of Appeal stated at para 86 that:

> "However, to be relevant under POCA, the alleged criminal activities must have occurred after 30 May 2007, otherwise, they cannot be considered criminal conduct generating criminal property. That would also refer to and include background information, if occurring prior to the appointed date of 30 May 2007, even though it could be said that the evidence was incomprehensible without it."

Accordingly, the Court of Appeal stated at para 116 that:

> "Properties therefore purchased and other transactions relating to the period prior to 30 May 2007 seized under the warrant issued by the court, are irrelevant to the money laundering investigation under POCA. So, any documents seized in relation to any such money laundering investigation must be returned to the [respondents] unless the prosecution can demonstrate that there were certain aspects of the alleged criminal conduct relating to the said property which had occurred subsequent to 30 May 2007. …. Investigations in relation to offences occurring prior to the appointed day stated in POCA, must be pursued under the repealed Money Laundering Act pursuant to section 25(d) and (e) of the Interpretation Act."

4. The interplay between the MLA and POCA regimes

44. To determine the interplay between the MLA and POCA it is necessary to consider various provisions of those Acts together with section 25(2) of the Interpretation Act.

45. With its coming into force on 5 January 1998, the MLA created new substantive offences of money laundering. Section 3(1) of the MLA provided that a person shall be taken to engage in money laundering if he does specified acts such as engaging "in a

transaction that involves property that is derived from the commission of a specified offence" with the prescribed state of mind which is for instance that "the person knows, at the time he engages in the transaction … that the property is derived or realized directly, or indirectly from the commission of a specified offence." The specified offences are set out in the Schedule to the MLA and include for instance dealing in any narcotic drug contrary to the provisions of the Dangerous Drugs Act.

46. Section 3(2) of the MLA provided that:

> "A person who, after the 5th of January, 1998 engages in money laundering is guilty of an offence..."

Section 5 provided that:

> "A person who conspires with another to commit, or aids, abets, counsels, or procures, the commission of, an offence under section 3, is guilty of an offence."

This means that an offence under either section 3 or 5 could only be committed after 5 January 1998.

47. In relation to investigatory powers contained in the MLA, section 8 enabled the Director of Public Prosecutions to apply ex parte to a judge in chambers for a monitoring order directing a financial institution, which is defined in section 2(1) as meaning for instance a bank licensed under the Banking Act, to give a constable information and such documents as the Director of Public Prosecutions may specify in the application other than documents covered by legal privilege.

48. The MLA was repealed by section 139 of POCA. The Proceeds of Crime Act, 2007 (Appointed Day) Notice provided that POCA came into operation on 30 May 2007 which means that the MLA was repealed on that date. However, section 25(2) of the Interpretation Act is a saving provision generally applicable to Acts of Parliament in Jamaica. In so far as relevant it provides:

> " (2) Where any Act repeals any other enactment, then, unless the contrary intention appears, the repeal shall not-
>
> (a) …

> (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."

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

50. Sections 92-93 of POCA created new substantive offences of money laundering. Under both sections, the offences created consist of doing specified acts (with the prescribed state of mind) in relation to "criminal property". Section 92 of POCA in so far as relevant provides:

> "(1) Subject to subsection (4), a person commits an offence if that person
>
> > (a) engages in a transaction that involves criminal property;

(b) conceals, disguises, disposes of or brings into Jamaica any such property; or

(c) converts, transfers or removes any such property from Jamaica, and the person knows or has reasonable grounds to believe, at the time he does any act referred to in paragraphs (a), (b), or (c), that the property is criminal property.

(2) Subject to subsection (4), a person commits an offence if that person enters into or becomes concerned in an arrangement that the person knows or has reasonable· grounds to believe facilitates (by whatever means) the acquisition, retention, use or control of criminal property by or on behalf of another person.

(3) For the purposes of this section, concealing or disguising property includes concealing or disguising the nature of the property, its source, location, disposition, movement or ownership or any rights with respect to the property."

51. Section 93(1) in so far as relevant provides:

"(1) Subject to subsections (2) and (3), a person commits an offence if that person acquires, uses or has possession of criminal property and the person knows or has reasonable grounds to believe that the property is criminal property."

52. Both offences require doing specified acts in relation to "criminal property" which is defined in section 91(1)(a) as follows:

"(1) For the purposes of this Part–

(a) property is criminal property if it constitutes a person's benefit from criminal conduct or represents such a benefit, in whole or in part and whether directly or indirectly (and it is immaterial who carried out or benefitted from the conduct);"

The definition of "criminal property" in section 91(1)(a) depends in part on the meaning of the expression "criminal conduct". "Criminal conduct" is defined in section 2 as:

> "'criminal conduct' means conduct occurring on or after the 30th May, 2007, being conduct which–(a) constitutes an offence in Jamaica; (b) occurs outside of Jamaica and would constitute such an offence if the conduct occurred in Jamaica;"

The definitions of "criminal property" and of "criminal conduct" mean that (a) for a substantive offence of money laundering to be committed there must be a predicate offence committed by someone which generates the criminal property concerned; (b) for a prosecution for a substantive money laundering offence to succeed under POCA the Crown must prove that such a predicate offence was committed by somebody: see *Assets Recovery Agency (Ex-parte) (Jamaica)* [2015] UKPC 1 at para 8; (c) the criminal conduct, which is the predicate offence, committed by someone which generates the criminal property concerned must occur on or after 30 May 2007; so that (d) the substantive money laundering offence can only be committed on or after 30 May 2007.

53. Thus, the dates of the suspected predicate and substantive offences will determine whether the offence is prosecuted under the MLA or under POCA. Money laundering offences committed after 5 January 1998 where (a) both the predicate offence and the substantive offence were committed prior to 30 May 2007, or (b) where the predicate offence was committed prior to 30 May 2007 and the substantive offence was committed after that date, should be (and can only be) prosecuted under sections 3 and 5 of the MLA, despite the repeal of the MLA by POCA. However, where both the predicate and substantive offences in relation to money laundering were committed on or after 30 May 2007, such offences must be (and can only be) prosecuted under POCA.

5. Investigatory powers under Part VI of POCA including a search and seizure warrant

54. Having dealt with the question of which Act criminalises the relevant conduct, the question then arises as to what the investigatory powers under POCA are.

(a) The investigatory orders which can be made under POCA

55. The several investigatory orders which can be made are contained in Part VI of POCA headed "Investigations". They include a disclosure order (see sections 105-114), a search and seizure warrant (see sections 115-118), a customer information order (see sections 119-125), and an account monitoring order (see sections 126-128).

(b) The substantial value condition and the public benefit condition

56. Before any of these investigatory orders can be made a judge has to be satisfied that there are reasonable grounds for believing that:

> (a) the information or material is likely to be of *substantial value,* whether or not by itself, to the investigation for the purposes of which the order is sought ("the substantial value condition"); and
>
> (b) it is in *the public interest* for the information or material to be produced or for access to the information or material to be given, having regard to the benefit likely to accrue to the investigation if the information or material is obtained ("the public benefit condition").

In respect of a disclosure order these conditions are set out in section 106(1)(c) and (d). In respect of a search and seizure warrant they are set out in section 115(1)(a) read with section 106(1) in circumstances where has been a failure to comply with a disclosure order, or alternatively where there has been no disclosure order they are set out in section 116(3)(a), if the information or material can be identified at the time of the application for the warrant, or section 116(3)(b)(ii) and section 116(6)(c)(ii) if it cannot be identified at that time. In respect of a customer information order, they are set out in sections 121(d) and (e). Finally, in respect of an account monitoring order they are set out in section 126(2)(d) and (e).

57. There are several points which can be made about the substantial value condition.

58. First, the judge must be satisfied that there are "reasonable grounds for believing" that the information or material is likely to be of substantial value. In this way the evaluation is based on the particular facts of the individual case.

59. Second, the condition is met if there are reasonable grounds for believing that the information or material is likely to be of substantial value.

60. Third, the judge must be satisfied that there are reasonable grounds for believing that the information or material is likely to be of substantial value to "the investigation." Accordingly, there may be reasonable grounds for believing that information or material may be of substantial value to "the investigation" even though there may be no reasonable grounds for believing that it will be of any value or of any substantial value as evidence in a subsequent criminal trial. For instance, it may be that to conduct the investigation properly, the investigators must understand the continual background of history relevant to the offence being investigated. On this basis there may be reasonable grounds for believing that explanatory information or material can be of substantial value to the investigation.

61. Fourth, conversely information or material in respect of which there are reasonable grounds for believing that it will be of substantial value to a subsequent criminal trial will necessarily be of substantial value to the investigation. For instance, explanatory information or material under the principle derived from the judgment of Purchas LJ in *R v Pettman* (2 May 1985 unreported), which subject to the trial judge's discretion may be admissible at a subsequent criminal trial, will be of substantial value to "the investigation." So also will be evidence establishing mens rea. If information or material may be admissible at a subsequent criminal trial, then there are reasonable grounds for believing that the information or material is likely to be of substantial value to the investigation.

62. Fifth, the nature of an investigation is that it is a preliminary stage, ordinarily starting with suspicion, in which the aim is either to obtain prima facie proof to move on to the next stage which is a criminal trial or to determine that there is insufficient or no proof to justify continuing with the investigation.

63. Sixth, the reasonable grounds for believing that the information or material is likely to be of substantial value to the investigation may be met by considering the information or material by itself or in combination with other material or information.

64. Seventh, there may be reasonable grounds for believing that information or material is likely to be of substantial value to the investigation if the information or material leads to a train of enquiry as to other material or information.

65. Eighth, there may be reasonable grounds for believing that information or material is likely to be of substantial value to the investigation if it eliminates a suspect or if it demonstrates that the suspicion which led to the investigation was misplaced so that the investigation should conclude.

66. Ninth, there is no limit as to the date upon which the information or material came into existence. Rather, the condition is that there are reasonable grounds for believing that the information or material is likely to be of "substantial value" to the investigation. It is not limited to reasonable grounds for believing that the information or material is likely to be of substantial value to the investigation provided the information or material came into existence on or after 30 May 2007.

67. Similarly, several points can be made about the public interest condition. First, and in the same vein as the substantial value condition, the requirement is for "reasonable grounds for believing" that it is in the public interest for the information or material to be produced or for access to the information or material to be given. In this way the evaluation is based on the particular facts of the individual case. Second, the condition is met if there are reasonable grounds for believing that it is in the public interest for the information or material to be obtained. Third, in determining whether there are reasonable grounds for believing that it is in the public interest for the information or material to be obtained regard is to be had to "the benefit likely to accrue to the investigation if the information or material is obtained." Fourth, the public interest can pull in both directions. On the one hand there is a public interest in investigation of criminal activity and on the other, there is a public interest in maintaining the privacy of information or material. The public interest requirement is intended to ensure compliance with the requirement that any interference with the right to respect for private and family life must be necessary for, among others, the prevention of crime. As such, the public interest requirement necessarily invokes a balance between competing considerations.

68. The Board considers it evident that information or material arising prior to the entry into force of POCA but relevant to the investigation of the alleged commission of an offence that must be prosecuted under POCA may fulfil both the substantial value and public interest conditions.

(c) A search and seizure warrant

69. This appeal concerns sections 115 to 118 of POCA which makes provision for search and seizure warrants.

70. Section 115(1) provides:

> "(1) A Judge may, on an application made to him by appropriate officer, issue a search and seizure warrant if he is satisfied that--

(a) a disclosure order made in relation to information or material has not been complied with and there are reasonable grounds for believing that the information or material is on the premises specified in the application for the warrant; or

(b) section 116 is satisfied in relation to the warrant.

Accordingly, a judge may issue a search and seizure warrant provided there is compliance with either of the conditions in (a) or (b). The condition in (a) applies if a disclosure order has been made. If no disclosure order has been made, then the applicable condition is "that … section 116 is satisfied in relation to the warrant."

71. Section 115(2) makes provision for what must be specified in the application for a search and seizure warrant. In so far as relevant it provides:

"(2) An application under subsection (1) shall state that-

(a) a person specified in the application is subject to … *a money laundering investigation*, … ;

(b) *the warrant is sought for the purposes of the investigation*;

(c) *the warrant is sought in relation to the premises specified in the application*; and

(d) *the warrant is sought in relation to information or material specified in the application*, or that there are reasonable grounds for believing that there is information or material falling within section 116(6) on the premises" (emphasis added).

72. Section 115(3) specifies what is authorised under a search and seizure warrant. It provides:

> "(3) A search and seizure warrant is a warrant authorizing *an appropriate person*
>
> > (a) to enter and search the premises specified in the application for the warrant; and
> >
> > (b) to seize and retain any information or material found there which is likely to be of substantial value, whether or not by itself, to the investigation for the purposes of which the application is made" (emphasis added).

73. Section 115(4) specifies who is "an appropriate person." In so far as relevant it provides:

> (4) For the purposes of this section and section 116, an appropriate person is-
>
> > (a) an authorized officer, if the warrant is sought for the purposes of … a money laundering investigation."

74. Section 116 can be satisfied by compliance with two conditions.

75. The first condition in section 116(1)(a) read with section 116(2) must be satisfied in every case. In so far as relevant to a money laundering investigation the condition which must be satisfied in every case is that:

> "there are reasonable grounds for believing that … the person specified in the application for the warrant has committed a money laundering offence."

76. The second condition contained in section 116(1)(b) is that the conditions set out in subsection (3)(a) or (b) are complied with. The conditions in subsection (3)(a) apply if the information or material can be identified at the time the application for the warrant is made. The conditions in subsection (3)(b) apply if the information or material cannot be identified at that time.

77. The conditions in subsection (3)(a) are that:

> "(a) it would not be appropriate to make a disclosure order for any one or more of the reasons specified in subsection (4), and there are reasonable grounds for believing that-
>
> > (i) any information or material on the premises specified in the application for the warrant is likely to be of substantial value, whether or not by itself, to the investigation for the purposes of which the warrant is sought and
> >
> > (ii) it is in the public interest for the information or material to be obtained, having regard to the benefit likely to accrue to the investigation if the information or material is obtained"

One of the reasons specified in subsection (4) for not making a disclosure order is that "the investigation might be seriously prejudiced unless an appropriate person is able to secure immediate access to the information or material." The conditions in subsection (3)(a) are that there are reasonable grounds for believing the substantial value of the information or material to the investigation and that it is in the public interest for the information or material to be obtained. In this way the substantial value and the public benefit conditions (see paras 56 to 68 above) apply in relation to an application for a search and seizure warrant where there has been no disclosure order and the information or material can be identified at the time the application for the warrant is made.

78. The conditions in subsection (3)(b) are that:

> "(b) any one or more of the requirements set out in *subsection (5)* is met and there are reasonable grounds for believing that-
>
> > (i) there is material on the premises specified in the application for the warrant and that the information or material falls within *subsection (6)*; and

(ii) it is in the *public interest* for the information or material to be obtained, having regard to the benefit likely to accrue to the investigation if the information or material is obtained" (emphasis added).

As emphasised:

(i) (a) subsection (3)(b) stipulates that "any one or more of the requirements set out in *subsection (5)* is met." One of the requirements set out in subsection (5) is that "the investigation might be seriously prejudiced unless an appropriate person arriving at the premises is able to secure immediate entry to them."

(ii) (b) subsection (3)(b)(i) stipulates that there are reasonable grounds for believing that there is material on the premises specified in the application for the warrant and that the information or material falls within subsection (6). In so far as relevant subsection (6) provides:

"For the purposes of subsection (3)(b)(i), information or material falls within this subsection if the information or material cannot be identified at the time of the application and-

…

(c) in the case of a money laundering investigation, the information or material-

(i) relates to the person specified in the application or to the question whether that person has committed a money laundering offence; and

(ii) is likely to be of *substantial value*, whether or not by itself, to the investigation for the purposes of which the warrant is sought" (emphasis added).

In this way under subsection (6)(c)(ii) the substantial value condition and under subsection (3)(b)(ii) the public benefit condition (see paras 56 to 68 above) apply in relation to an application for a search and seizure warrant where there has been no

disclosure order and the information or material cannot be identified at the time the application for the warrant is made.

6. The application to the facts of this case of the power under POCA to issue a search and seizure warrant

79. It is common ground that (a) an application was made to the judge by an appropriate officer; (b) the appellant is an appropriate officer within the meaning of section 115(4); and (c) no disclosure order had been made so that the applicable condition in section 115(1)(b) is that the judge is satisfied that section 116 is satisfied in relation to the warrant.

80. Based on the unchallenged evidence contained in the appellant's affidavit, which is summarised at paras 9 to 20 above, the condition in section 116(2) that there are reasonable grounds for believing that the persons specified in the application for the warrant have committed a money laundering offence is satisfied in relation to all the respondents (see paras 21 to 23 above) and the condition in section 116(3)(a) that it would not be appropriate to make a disclosure order is satisfied because the investigation might be seriously prejudiced unless an appropriate person is able to secure immediate access to the information or material.

81. The remaining conditions are that the judge must be satisfied as to both the substantial value condition and as to the public interest condition.

82. There can be reasonable grounds for believing that information or material arising prior to the entry into force of POCA may fulfil both the substantial and public interest conditions; see para 68 above.

83. It is obvious that there are reasonable grounds for believing that the first respondent's conveyancing files in relation to all the property transactions listed in Tables 1 and 2 are likely to be of substantial value to the investigation even though particular transactions occurred prior to 30 May 2007. This is because there are reasonable grounds for believing that the files will contain information as to (a) the identity of the first respondent's client; (b) the source of the funds to purchase the properties; and (c) the first respondent's knowledge. Furthermore, information or material in the files may be admissible at the trial under the principle derived from the judgment of Purchas LJ in *R v Pettman* or as evidence tending to establish mens rea in respect of offences under POCA alleged to have been committed by the respondents.

84. Further indications that there are reasonable grounds for believing that the information or material is likely to be of substantial value to the investigation concern bank account details (see para 20 above), documents relating to legitimate income (see paras 11 – 12 above), communications with "overseas persons" (see para 14 above), communications with tenants (see para 17 above), documents in relation to AH's companies (see paras 11 and 23 above) and documents relating to the "Sir Jack" (see para 19 above).

85. For all these reasons, the Board considers that the substantial value condition is satisfied.

86. The Board also considers that the public interest condition is satisfied as there are reasonable grounds for believing that it is in the public interest for the information or material to be obtained having regard to the benefit likely to accrue to the investigation if the information or material is obtained. On the facts of this case the public interest in the prevention of crime clearly outweighs any rights to respect for private and family life. The Board considers that there are reasonable grounds for believing that there is likely to be a substantial benefit to the investigation if the information or material is obtained.

87. There is no restriction either on the investigatory power in POCA or on that power's application to the facts of this case, such as to prevent the search for and the seizure of information or material which came into existence prior to 30 May 2007. Straw J was correct to hold, at para 44 of her judgment, that there was "no basis to limit the documents that may [possibly] be unsealed to what exists post 2007."

7. Conclusion

88. For the reasons given, the Board will humbly advise His Majesty that the appeal should be allowed.