Hilary Term
[2023] UKPC 6
Privy Council Appeal No 0084 and 0053 of 2021

JUDGMENT

The Attorney General (Appellant) *v* The Jamaican Bar Association (Respondent) (Jamaica)

The General Legal Council (Appellant) *v* The Jamaican Bar Association (Respondent) (Jamaica)

From the Court of Appeal of Jamaica

before

Lord Briggs
Lord Kitchin
Lord Hamblen
Lord Burrows
Lord Richards

JUDGMENT GIVEN ON
9 February 2023

Heard on 29 and 30 November 2022

Appellant (The Attorney General)
Lisa White
Faith Hall
(Instructed by Charles Russell Speechlys LLP (London))

Appellant (The General Legal Council)
Allan S Wood KC
Symone Mayhew KC
Caroline Hay KC
Sundiata J Gibbs
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Respondent (The Jamaican Bar Association)
Richard Mahfood KC
M Georgia Gibson Henlin KC
Emile G R Leiba
Weiden Daley
(Instructed by Signature Litigation LLP (London))

LORD BRIGGS AND LORD HAMBLEN:

1. This hard-fought litigation raises the question whether certain aspects of the statutory regime in Jamaica for combatting money laundering, in its application to Attorneys-at-Law ("the Regime"), violate without demonstrable justification certain rights guaranteed by the Jamaican Constitution, so that they should be declared void. A three-judge panel of the Supreme Court of Judicature of Jamaica ("the Full Court") concluded that they did not, but the Court of Appeal decided that they did. Both courts were unanimous in their fundamentally opposed conclusions, supported in each case by lengthy and scholarly reasons in reserved judgments of more than 150 and 250 pages respectively. There were nonetheless no disputes of primary fact, although in their written evidence the parties differed in the emphasis which they placed upon aspects of the background.

The Parties

2. The claimant in this litigation, and the respondent to these appeals, is the Jamaican Bar Association ("the JBA"). It is a guarantee company with its membership drawn from Jamaican Attorneys-at-Law ("attorneys"). Its objects are to promote the interests of attorneys, the administration of justice and the civil liberties of the people of Jamaica. Its pursuit of this claim is in no sense motivated by narrow professional self-interest. Rather it is submitted that the Regime, in its application to attorneys, is destructive of the essential confidentiality of the lawyer-client relationship and puts at unacceptable risk the continued integrity of legal professional privilege ("LPP"), upon which the ability of Jamaican citizens to obtain reliable legal advice and representation heavily depends.

3. The first defendant, and first appellant in these appeals, is the Attorney General of Jamaica ("the AG") who seeks to uphold (and now reinstate from having been quashed by the Court of Appeal) those parts of the Regime challenged by the JBA. The second defendant, and second appellant, is the General Legal Council of Jamaica ("the GLC"), which is a statutory body created by section 3 of the Legal Profession Act ("the LPA") as the professional regulator of attorneys, charged with upholding standards of professional conduct and vested with wide disciplinary and intervention powers. Fourteen of its seventeen members are legal practitioners, nominated by the JBA. The Regime gives the GLC an extended regulatory role in relation to attorneys for anti-money laundering purposes, and it makes common cause with the AG in seeking to uphold the validity of those parts of the Regime thus far successfully challenged by the JBA.

The Charter

4. The vehicle by which Jamaica has given constitutional force to widely recognised human rights is the Charter of Fundamental Rights and Freedoms ("the Charter") which was introduced by amendment made in 2011 as Chapter III of the Constitution. So far as is relevant for present purposes, the Charter provides as follows:

> "13
>
> …
>
> (2) Subject to sections 18 and 49, and to subsections (9) and (12) of this section, and save only as may be demonstrably justified in a free and democratic society-
>
> (a) this Chapter guarantees the rights and freedoms set out in subsections (3) and (6) of this section and in sections 14, 15,16 and 17; and
>
> (b) Parliament shall pass no law and no organ of the State shall take any action which abrogates, abridges or infringes those rights.
>
> (3) The rights and freedoms referred to in subsection (2) are as follows-
>
> (a) the right to life, liberty and security of the person and the right not to be deprived thereof except in the execution of the sentence of a court in respect of a criminal offence of which the person has been convicted;
>
> …
>
> (j) the right of everyone to-
>
> (i) protection from search of the person and property;

(ii) respect for and protection of private and family life, and privacy of the home; and

(iii) protection of privacy of other property and of communication;

…

(p) the right to freedom of the person as provided in section 14;

…

(4) This Chapter applies to all law and binds the legislature, the executive and all public authorities.

…

14.

(1) No person shall be deprived of his liberty except on reasonable grounds and in accordance with fair procedures established by law in the following circumstances-

…

(b) in execution of the sentence or order of a court whether in Jamaica or elsewhere, in respect of a criminal offence of which he has been convicted;

…

(f) the arrest or detention of a person

(i) for the purpose of bringing him before the competent legal authority on reasonable suspicion of his having committed an offence; or

(ii) where it is reasonably necessary to prevent his committing an offence;

…"

5. For present purposes the guaranteed rights in issue are privacy, liberty and the freedom from search of property. Privacy is guaranteed by the combination of section 13(3) (j)(ii) and (iii). Liberty is guaranteed by the combination of section13(3)(a) and (p) and section 14(1). Freedom from search of property is guaranteed by section13(3)(j)(i). For the determination of the issues in these proceedings the most important of these guaranteed rights is privacy.

Privacy as between Attorney and Client

6. Long before the enactment of the Charter, and indeed before the making of the European Convention on Human Rights on which the Charter is loosely based, the common law of both England and Jamaica conferred important rights of confidentiality upon the clients of attorneys (solicitors in England). They may usefully be grouped under two headings, namely confidentiality and privilege.

7. First, equity recognised that the nature of the attorney-client relationship imposed an obligation on the attorney to keep confidential all dealings with and information about the client, derived from the discharge by the attorney of the retainer by the client. Secondly, the client was accorded privilege from the enforced disclosure of information and documents arising from two types of professional service provided by the attorney, namely the giving of legal advice and the conduct of litigation. Separately the privileges are usually called legal advice privilege and litigation privilege. Collectively they are generally labelled legal professional privilege ("LPP").

8. There are important similarities and differences between confidentiality and privilege arising from the attorney client relationship.

9. Significant similarities include, first, that both confer rights exclusively upon the client, and duties exclusively upon the attorney. Thus the client may waive either of them at any time and to any extent. But the attorney must uphold them at all times, even after the end of the relationship, unless authorised to do otherwise by the client. Secondly (and this is common ground) whereas both could be cut down or attenuated by Parliament, both are now constitutionally guaranteed in Jamaica, so that they can only be invaded, if at all, if the derogation is demonstrably justified in a free and democratic society: see section 13(2) of the Constitution. Thirdly there is no confidence, or privilege, in iniquity. This means that neither may be used to prevent or restrict the disclosure of information or documents which are generated in the commission of crime or fraud. There are differences between the way in which this principle affects confidence and LPP, but they do not call for examination here.

10. There the main similarities end, and the differences between attorney client confidentiality and LPP are of greater importance for present purposes. First, confidentiality extends to protect a far broader range of information and documents than does LPP, all the more so now that attorneys increasingly offer professional services in areas which may involve neither the giving of legal advice nor the conduct of litigation. By contrast the extent of LPP is relatively strictly confined, not least because LPP is, but confidentiality is not, a ground for the client refusing to give inspection of relevant documents or the provision of relevant information in answer to interrogatories in civil litigation or under cross-examination in litigation generally, thereby at least impeding to some extent the ability of the court to determine the truth about matters in dispute.

11. Although legal advice privilege is not limited to documents which expressly seek, or give, legal advice, there must be a 'relevant legal context' in which the communication occurs if it is to be privileged: see *Balabel v Air India* [1988] Ch 317. That limitation serves the purpose of LPP, which is to enable the client to obtain reliable legal advice in confidence, and it serves to separate and exclude from privilege communications of a purely business nature between attorney and client, such as where the client is using the attorney as a mere business agent, for example for the collection of rents: see *Balabel* at pp 331G to 332B.

12. Secondly, and this is a corollary of the first, attorney client confidence is, on its own and apart from privilege, only a heavily qualified form of protection, whereas LPP is, or is almost, absolute. As already noted, attorney client confidence is no answer at all to the obligation to give inspection of relevant documents or to answer questions in civil litigation. In sharp contrast, where LPP is properly claimed, the court or the regulator has no discretion to override it, however valuable the privileged documents or information may be in getting to the truth. The successful assertion of LPP does not

depend upon the client satisfying some kind of proportionality test, or the court performing some sort of balancing exercise: see *R v Derby Magistrates' Court, ex parte B* [1996] AC 487 per Lord Taylor of Gosforth CJ at 502, 507-508:

> "The principle which runs through all these cases, and the many other cases which were cited, is that a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client must be sure that what he tells his lawyer in confidence will never be revealed without his consent. Legal professional privilege is thus much more than an ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests.
>
> …
>
> As for the analogy with public interest immunity, I accept that the various classes of case in which relevant evidence is excluded may, as Lord Simon of Glaisdale suggested, be regarded as forming part of a continuous spectrum. But it by no means follows that because a balancing exercise is called for in one class of case, it may also be allowed in another. Legal professional privilege and public interest immunity are as different in their origin as they are in their scope. Putting it another way, if a balancing exercise was ever required in the case of legal professional privilege, it was performed once and for all in the 16th century, and since then has applied across the board in every case, irrespective of the client's individual merits."

The Regime

13. The assault on money laundering in Jamaica began in 1994, with provision for the forfeiture of the proceeds of certain specified crimes. In 1996 the Money Laundering Act created a new offence of money-laundering and in 2007 the Proceeds of Crime Act ("POCA") made comprehensive provision for the confiscation of the proceeds of crime generally, creating for that purpose the Assets Recovery Agency in the form of the Financial Investigations Division of the Ministry of Finance and Planning ("the FID").

14. Jamaica is a signatory to the United Nations Convention Against Illicit Traffic in Narcotics Drugs and Psychotropic Substances 1988 (the Vienna Convention) and the United Nations Convention Against Transnational Organized Crime 2000 (the Palermo Convention). In order to give effect to those Conventions, the G7 Nations created an intergovernmental body known as the Financial Action Task Force ("FATF") with the mandate to set anti-money laundering standards and to promote effective legal and operational measures to protect the international financial system. The mandate of the FATF was thereafter enlarged to set standards and to promote effective implementation of legal and operational measures to combat money laundering, terrorist financing and other related threats to the international financial system.

15. By its recommendations, the FATF has issued standards to prevent and detect money-laundering, terrorist financing and other related threats for implementation by member states, which at the time of the filing of this action numbered 180 states and territories, including Jamaica, committed to implementing the FATF recommendations to counter money laundering and the financing of terrorism. FATF recommendations were first issued in 1990 and revised in 1996, 2003 and 2012. The regulatory scheme which FATF initially proposed focussed on banks and other financial institutions. But in 2003 FATF recommended that a comprehensive regime of regulation and supervision be extended to specified classes of Designated Non-Financial Businesses and Professions ("DNFBPs") including attorneys.

16. Jamaica is a member of the Caribbean Financial Action Task Force ("CFATF") which seeks to secure implementation of the FATF recommendations by, inter alia, mutual evaluation of member states, a form of peer review. CFATF's evaluation of Jamaica in 2005 criticised its failure to extend the anti-money laundering regime to DNFBPs, including attorneys. This led to Jamaica being placed in the second stage of Enhanced Follow-up, under which Jamaica was subjected to a High Level Mission by CFATF in September 2012. This proved to be one of the triggers for the extension of the anti-money laundering regime to attorneys (and other DNFBPs) by amending legislation in 2013, which include the provisions challenged as unconstitutional by the JBA in these proceedings.

17. The other trigger was the National Security Policy for Jamaica published in 2013 in which the Jamaican Government identified money-laundering as part of a Tier 1 threat to national security (ie a clear and present danger) and specified removing the profit from crime (ie attacking money laundering) as the first of six recommendations for tackling Tier 1 threats (p 28). Prominent among the recommendations was the shifting of the focus of law enforcers from street level criminals:

> "to the top bosses, who enjoy and control the profits, and the people who handle the money, i.e. the facilitators (including) the politicians, lawyers, accountants, bankers, businessmen, real estate brokers and others who operate in both the licit and illicit worlds". (p 29)

18. Schedule 4 to POCA enabled the Minister by affirmative resolution to designate persons as a designated non-financial institution, which has the effect of bringing persons so designated within the regulated sector for the purposes of the Act. By paragraphs 2 and 3 of the Proceeds of Crime (Designated Non- Financial Institution) (Attorneys -at-law) Order 2013 ("the Attorneys Order"), attorneys were so designated, to the extent that their activities on behalf of any client fell within the following six categories of professional services:

(a) purchasing or selling real estate;

(b) managing money, securities or other assets;

(c) managing bank accounts or savings accounts of any kind, or securities accounts;

(d) organizing contributions for the creation, operation or management of companies;

(e) creating, operating or managing a legal person or legal arrangement (such as a trust or settlement); or

(f) purchasing or selling a business entity.

The Board will refer to them as "the six activities". They reflect the recommendations made by the FATF.

19. This designation had the effect of extending to attorneys the whole of the anti-money laundering regime applicable to DNFBPs, mainly then contained in POCA, which was amended at the same time to add section 91A, in the following terms:

“91A. (1) In addition to any other functions of a competent authority under this Part, and without prejudice to any other functions which that competent authority may exercise under any other enactment, a competent authority shall exercise the functions set out in subsection (2) for the purpose of ensuring that any business in the regulated sector which that competent authority is responsible for monitoring operates in compliance with this Act and any regulations made under this Act.

(2) A competent authority-

(a) shall establish such measures as it thinks fit, including carrying out, or directing a third party to carry out, such inspections or such verification procedures as may be necessary;

(b) may issue directions to any of the businesses concerned; and the directions may require the business to take measures for the prevention or detection of, or reducing the risk of, money laundering or terrorist financing;

(c) may examine and take copies of information or documents in the possession or control of any of the businesses concerned, and relating to the operations of that business;

(d) may share information, pertaining to any examination conducted by it under this section, with another competent authority, a supervisory authority or the designated authority, or an authority in another jurisdiction exercising functions analogous to those of any of the aforementioned authorities-

(i) other than information which is protected from disclosure under this Act or any other law; and

(ii) subject to any terms, conditions or undertakings which it thinks fit in order to prevent disclosure of the kind referred

to in subparagraph (i) and secure against the compromising or obstruction of any investigation in relation to an offence under this Part or any other law;

(e) may require the businesses concerned, in accordance with such procedures as it may establish by notice in writing to those businesses-

(i) if a registration requirement does not already exist under any other law, to register with the competent authority such particulars as may be prescribed; and

(ii) to make such reports to the competent authority in respect of such matters as may be specified in the notice.

(3) Nothing in subsection (2)(c) shall be construed as requiring an attorney-at-law to disclose any information or advice that is subject to legal professional privilege.

(4) Subsection (3) does not apply to information or other matter that is communicated or given with the intention of furthering a criminal purpose.

(5) A business in the regulated sector which fails to comply with any requirement or direction issued to it under this Part by the competent authority, commits an offence and is liable-

(a) on summary conviction before a Resident Magistrate, to a fine not exceeding two hundred and fifty thousand dollars; or

(b) on indictment before a Circuit Court, to a fine not exceeding one million dollars.

(6) Where a business which is convicted of an offence under subsection (5) is registered, or is the holder of a licence or other form of permit in respect of its operations under a regime administered by the competent authority concerned, the conviction for the offence shall be deemed to constitute

> grounds on which the registration, licence or other form of permit may be suspended or revoked; and the competent authority may, if it thinks fit, act accordingly."

For completeness, "competent authority" in section 91A means, by reference to section 91(1)(g):

> "the authority from time to time authorised in writing by the Minister to-
>
> > (i) monitor compliance by any type of business in the regulated sector, with the requirements of this Part and any regulations made under this Part; and
> >
> > (ii) issue guidelines to businesses in the regulated sector regarding effective measures to prevent money laundering."

The competent authority in respect of attorneys is currently the GLC. The designated authority within the meaning of section 91A(2)(d) is the Chief Technical Director of the FID: see section 91(1)(h).

20. POCA already contained provision for the reporting of suspicious transactions coupled with a prohibition of tipping-off, in sections 94 to 98. The effect of the Attorneys Order was to bring attorneys within the regulated sector to which these provisions applied.

Section 94 provides (so far as is relevant) as follows:

> "(2) A person commits an offence if-
>
> (a) that person knows or believes, or has reasonable grounds for knowing or believing, that another person has engaged in a transaction that could constitute or be related to money laundering;

(b) the information or matter on which the knowledge or belief is based or which gives reasonable grounds for such knowledge or belief, came to him in the course of a business in the regulated sector; and

(c) the person does not make the required disclosure as soon as is reasonably practicable, and in any event within fifteen days, after the information or other matter comes to him.

(3) For the purposes of subsection (2)(c), the required disclosure is a disclosure-

(a) to a nominated officer; or

(b) to the designated authority,

in the form and manner prescribed for the purposes of this subsection by regulations made under [section] 102, of the information or other matter on which the knowledge or belief is based, or which gives reasonable grounds for the knowledge or belief, that another person has engaged in a transaction that could constitute or be related to money laundering.

(4) …

(5) A person does not commit an offence under this section if-

(a) he has a reasonable excuse for not disclosing the information or other matter;

(b) he is an attorney-at-law and the information or other matter came to him in privileged circumstances

…

(8) Information or other matter comes to an Attorney-at- Law in privileged circumstances if it is communicated or given to him-

(a) by, or by a representative of, a client of his in connection with the giving by the Attorney-at-Law of legal advice to the client;

(b) by, or by a representative of, a person seeking legal advice from the Attorney-at-Law; or

(c) by a person in connection with legal proceedings or contemplated legal proceedings:

Provided that this subsection does not apply to information or other matter that is communicated or given with the intention of furthering a criminal purpose."

21. Sections 95 and 96 of POCA create similar offences for non-disclosure by authorised or nominated officers. Section 97 deals with tipping-off. Subsection (1) creates the offence. Subsections (2) and (3) contain relevant defences:

"(2) A person does not commit an offence under subsection (1) if-…

(c) the disclosure is to an attorney-at-law for the purpose of obtaining legal advice;

(d) the person is an attorney-at-law and the disclosure falls within subsection (3); or

(e) the disclosure is a disclosure to the competent authority.

(3) A disclosure falls within this subsection if it is a disclosure-

(a) to, or to a representative of, a client of the attorney-at-law in connection with the giving by the attorney-at-law of legal advice to the client; or

(b) to any person in connection with legal proceedings or contemplated legal proceedings:

Provided that a disclosure does not fall within this subsection if the disclosure is made with the intention of furthering a criminal purpose."

The relevant penalties for the offences described above include fines and imprisonment: see section 98.

22. There are other provisions of the Regime made applicable to attorneys as DNFBPs by virtue of being brought within the regulated sector by the Attorneys Order. But no complaint about them is made by the JBA, at least on these appeals, so that they need not be described.

23. It is worthy of note however that on these appeals the JBA does not challenge regulation of attorneys under the Regime per se, or indeed root and branch. Rather, it has focussed its challenge on those provisions which, it says, violate for them or for their clients the guaranteed rights of privacy, liberty and freedom from search. The foregoing is not therefore a complete picture or even summary of the Regime, and it will be necessary to refer later to further elements of it when addressing particular issues raised by these appeals.

The Court's Task – Burden and Standard of Proof

24. An application to the court for redress under section 19 of the Constitution of Jamaica, based on an allegation that legislation violates rights and freedoms guaranteed by the Charter without demonstrable justification, usually requires the court to engage in two processes of interpretation (which may be iterative) and (if justification is alleged) a process of legal evaluation. All those processes require to be undertaken in context, and there may be disputes of fact about that context, although not in these proceedings. The general principles to be brought to bear for this task are clearly set out in the recent opinion of the Board in *Day v Governor of the Cayman Islands* [2022] UKPC 6 at paras 34-38 and need no repetition.

25. Both the Charter and the allegedly offending legislation must each be interpreted to ascertain whether there is any incompatibility between them. For this purpose there is no particular magic in interpreting one before the other. The process may be iterative in the sense that, for example, an apparent incompatibility may be resolved by a further analysis of the meaning of the legislation so that in the case of some ambiguity an interpretation which gives rise to no incompatibility may be preferred over one which does.

26. It is in this context that recourse to the presumption of constitutionality originally established in *Hinds v R* (1975) 24 WIR 326, [1977] AC 195 (namely that Parliament is not lightly to be taken to have intended to legislate in disregard of constitutional rights) may be of some assistance. But since the Constitution preserves the right of Parliament to derogate from the rights and freedoms guaranteed by the Charter where to do so is demonstrably justified this presumption needs to be used, if at all, with some caution. Although the question whether any such presumption has a role to play was briefly argued before the Board, it is unnecessary to resolve it. This is because both the Full Court and the Court of Appeal approached their task by the application of the principles set out in the decision of the Canadian Supreme Court in *R v Oakes* [1986] 1 SCR 103. In short, the burden of establishing that legislation derogates from a constitutionally guaranteed right lies on the claimant for redress, whereas the burden of establishing demonstrable justification lies on the State. The Board agrees with the Full Court that the differences in language between the Canadian and Jamaican Charters do not detract from the applicability of the *Oakes* analysis of the court's task.

27. The Board is equally reluctant to become engaged in the supposed relevance of the distinction between the civil and criminal standard of proof. This is because these standards are concerned with proof of disputed facts, not with the processes of interpretation of statutory language, or the evaluation of demonstrable justification. As already noted, there are no contentious issues of primary fact in this litigation, to which a standard of proof could sensibly be applied.

28. It will be necessary to return later to the dicta in *Oakes* about the detail of the process by which the court evaluates justification. But first the issues as to alleged infringement of the guaranteed rights to privacy, liberty and the freedom from search must be addressed, to establish what if anything the State needs to justify.

The Right to Privacy

29. Both the Full Court and the Court of Appeal found (and the appellants do not dispute) that the Regime does derogate from that part of a client's right to privacy which is afforded by the attorney's obligation to keep non-privileged documents and information about the client confidential. This is first because the process of regulatory supervision by the GLC under section 91A of POCA will usually involve some element of inspection of such confidential but non-privileged documents, and the reading, and even sharing, of the confidential information therein contained. Secondly, the obligation to report suspicious transactions under section 94 of POCA (the "STR" obligation) is bound to involve the disclosure of matters that are within general attorney-client confidentiality. While it may be that the threshold for the STR obligation, namely knowledge or belief that there could be money-laundering, or the existence of reasonable grounds for such knowledge of belief, may often mean that the principle that there is no confidence in iniquity will remove any relevant confidentiality, that will not always be so. POCA is, quite simply, silent about such confidentiality, and it would in the view of the Board be a hopeless task for an attorney who failed to make a STR to say that mere confidentiality amounted to a reasonable excuse, in the absence of privilege.

30. It follows that the only question in relation to this aspect of the alleged derogation from the guaranteed right of privacy concerns demonstrable justification. This will be addressed later in this opinion (see paras 75 – 97 below). Much more contentious, and the central issue in these appeals, is whether the Regime derogates in any significant way from that much more important aspect of client privacy constituted by LPP. The Full Court held that it did not, but the Court of Appeal disagreed. Furthermore, the appellants offer no justification for any significant invasion of LPP. Their all or nothing case is that no significant derogation from LPP is involved.

31. Both the Full Court and the Court of Appeal recognised that the relevant parts of POCA contain express savings for LPP, but the issue on which they divided was whether the detailed provisions of the Regime afforded LPP sufficient effective protection or safeguarding in practice. The Full Court was persuaded that the nature of the six activities in respect of which attorneys fell within the POCA regulated sector (see para 18 above) were inherently unlikely to generate much material protected by LPP. The Full Court said that it would:

> "only be in rare circumstances that LPP attaches to communications in relation to transactions concerning activities captured within the [Attorneys] Order."

This was plainly true of litigation privilege, but the Court of Appeal considered that legal advice privilege might arise across a wide range of the six regulated activities. On this issue the Board would ordinarily defer to the considered opinion of the local courts but, in view of their evident disagreement, must form its own view.

32. In this respect the Board finds itself in agreement with the Court of Appeal. If the relevant legal context test formulated in *Balabel v Air India* is applied, the Board thinks it likely that materials protected by legal advice privilege would commonly be found in attorneys' files in relation to at least four of the six activities. In that analysis the Board is enlightened by paragraph 14 of the GLC's published Anti-Money Laundering Guidance for the Legal Profession ("the Guidance"), which provides an extended description of what each of those activities involve. Taking them in turn, purchasing and selling real estate commonly involves attorneys in giving legal advice on title, almost invariably to purchasers, but also to their lenders and to sellers before they commit to a contractual obligation to sell. Organising contributions for the creation, operation or management of companies is likely to require legal advice to promoters about the risks of misstatement in prospectuses and similar documents, and about the rights to be afforded to the contributors by way of security or shareholdings of different types. Setting up and running trusts or settlements requires detailed legal advice about the fiduciary duties of trustees, the drafting of beneficial clauses and the incidence of taxation. Purchasing and selling a business entity is frequently likely to require sophisticated legal advice about many aspects of the transaction, including representations and warranties and about the inclusion in the sale contract of appropriate restrictive covenants to preserve the goodwill included in the sale.

33. Accordingly, like the Court of Appeal, the Board approaches the question of effective protection for LPP on the basis that the six regulated activities, taken as a whole, are likely to generate documents, communications and information protected by LPP, save of course where the attorney's activity is in furtherance of money-laundering or other iniquity, in which case no privilege would arise. It is necessary to address the question whether LPP is sufficiently protected separately in relation to regulatory inspection by the GLC under section 91A, and in relation to the making of STRs under section 94. The Board will address regulatory inspection under section 91A first.

34. The Court of Appeal's analysis starts (at para 217) with the acknowledgment that the Guidance, coupled with the contents of its standard Anti-Money Laundering Examination Form suggested that the GLC's role was regulatory rather than investigatory, and innocuous at least "at first glance". The Board agrees that its role does appear to be regulatory, but this is not just a first glance impression. This

regulatory role is firmly supported by section 91A(1) which provides in the clearest terms that the purpose for which the GLC is to exercise its powers under section 91A(2) is:

> "ensuring that any business in the regulated sector which that competent authority is responsible for monitoring operates in compliance with this Act and any regulations made under this Act."

This is therefore the purpose of all the GLC's powers of inspection, examination, taking copies and sharing documents made available by attorneys in relation to the six activities. In the unlikely event that the GLC were to use those powers as, in effect, the FID's bloodhound, for the investigation of money laundering offences, it would be liable to be judicially reviewed.

35. The Board recognises that the GLC has power under section 91A(2)(d) to share information "pertaining to any examination conducted by it under [section 91A]", both with FID and with an authority in another jurisdiction exercising an analogous function. Nonetheless section 91A(2)(d)(i) expressly excludes from the sharing power "information which is protected from disclosure under this Act or any other law", a phrase which must include material protected by LPP. This power is, like all the section 91A(2) powers, only to be exercised for a regulatory purpose, and the GLC is obliged to take reasonable care to ensure that any privileged material which may, by some mistake, have come into its possession during an inspection under section 91A is excluded from any such sharing.

36. The Court of Appeal next reflected upon what it regarded as the uncertainty as to the conduct of special or random examinations under section 91A(2). Mr Wood KC for the GLC submitted that the Examination Form in Appendix B to the Guidance was designed to be used for all examinations, routine, random and special. The Board does not feel able to resolve that question, but does regard it as clear that the regulatory purpose set out in section 91A(1) applies to all such examinations. Nonetheless there is, as the Court of Appeal said, no certainty that an entitlement to LPP could not arise during such an examination, in the sense that documents protected by LPP might fall to be inspected by the GLC if the attorney permitted this to happen. But, as the Court of Appeal noted, all GLC examinations under its section 91A powers are conducted on notice, and attorneys are encouraged by the Guidance to segregate LPP material during the notice period. And section 91A(3) provides in the clearest terms that the GLC's power of inspecting and taking copies of documents is not to be construed as requiring the attorney even to disclose the existence of any information or material that is subject to LPP, let alone to permit it to be inspected.

37. The Board is puzzled by the view of the Court of Appeal that the express invitation to attorneys to segregate LPP material in the Guidance, coupled with section 91A(3), demonstrates a risk of disclosure which is thereafter insufficiently safeguarded. On the contrary, it seems to the Board that the combination of those two provisions is to make it clear that attorneys are expected to act as gatekeepers for the preservation of their clients' privilege, so that privileged material is properly identified before an inspection takes place, and then simply not disclosed for inspection or copying.

38. The Board cannot see why that should be thought to be an inadequate means of protection. Traditionally, disclosure and inspection of documents in civil litigation was supervised by the parties' attorneys and their certificate (or the certificate given by their client on their advice) that a disclosed document was privileged from inspection was afforded great weight, albeit that it was not conclusive. Under the Jamaican Civil Procedure Rules the party has the responsibility of certifying that appropriate disclosure has been given, but Part 28.9 requires the attorney to certify that the client has been appropriately advised. That advice will plainly have to have dealt with LPP.

39. At paragraph 220 McDonald-Bishop JA, with whom Williams JA and Straw JA(Ag) agreed, stated that:

> "Once a possibility exists that privileged documents could be disclosed, wittingly, unwittingly, inadvertently or otherwise, then there should be adequate mechanisms in place to guard against such disclosure in protecting the client to whom it belongs, given the value of LPP to a free and democratic society."

It cannot be beyond the realms of possibility that an attorney may occasionally disclose privileged material unwittingly, or by mistake. The attorney is the everyday guardian of clients' privileged material in the attorney's possession, and mistakes will occasionally occur, by no means limited to the occasion of a section 91A inspection under POCA. The rule at common law is that if a person receives another person's privileged material by an obvious mistake, then it must be returned: see *Al Fayed v Metropolitan Police* [2002] EWCA Civ 780. The same obligation must apply *a fortiori* to the GLC. The usual answer to a claim to recover the mistakenly disclosed privileged document in a litigation context is that the recipient reasonably believed that privilege had been deliberately waived. But as the Court of Appeal acknowledged (at para 221) the natural expectation in the POCA context is that the attorney will claim (rather than waive) privilege. Thus the obligation of the GLC under the general law to return a mistakenly disclosed privileged document ought to provide reasonable protection

against the mistaken disclosure by the attorney causing harm to the honest client. Of course if the document was generated in furtherance of money laundering by the client, there will be no privilege in any event.

40. Another concern of the Court of Appeal is that the regime contains no mechanism whereby a dispute about privilege (presumably between the attorney and the GLC's inspector) may be resolved if necessary in court, with appropriate input by the client. It is not clear to the Board how that dispute might arise. In civil litigation LPP is not a privilege from disclosure, but only from inspection. The party giving disclosure must therefore reveal that they have privileged material and claim the benefit of LPP as a reason for refusing inspection, which the other party may then challenge. But section 91A(3) of POCA places no such obligation to make a claim to privilege upon the attorney. The attorney is not required even to make disclosure of privileged documents or information. In such circumstances it is hard to see how the occasion for a dispute about LPP could arise. But even if it could, the proper procedure would surely be for the attorney to notify their client that LPP is being disputed by the GLC, and if the client wishes to maintain privilege it is hard to see why the court would, on the client's application, or that of the GLC, refuse to adjudicate upon it. It would be a denial of access to justice for the court to decline to do so, bearing in mind that privilege is a legal right of the client, guaranteed by the Charter. Where therefore the general law makes provision for such adjudication, as the Board considers that it does, it is not a legitimate criticism of POCA that it does not duplicate it.

41. More generally the extension of the Regime to attorneys engaged in the six activities would seem to call for attorneys to appraise their relevant clients of the essential details of the Regime, of the risk of the loss of confidentiality and the possibility of contested claims to privilege to which the Regime may give rise, at the outset of their retainer. It would certainly be a weakness in the protection of the client's privilege if the client were to remain entirely unaware of the risk of any challenge by the GLC to a claim for privilege by the attorney. But the attorney is best placed to ensure that the client is notified, and nothing in the Regime would prevent it, outside the ambit of STR, where the no tip-off rule might stand in the way. That aspect of the Regime is addressed below.

42. Finally, the Court of Appeal placed considerable emphasis upon Canadian experience of the operation of its own anti-money laundering regime, and the need for adequate safeguards against the invasion of lawyer-client secrecy. It will be necessary to consider the Canadian experience in more detail later in this Opinion, but for present purposes the Court of Appeal observed (at para 225) as follows:

> "The cases of Her Majesty The Queen v Lavallee, Rackel & Heintz and Others ("Lavallee")[2002] 3 SCR 209 and Attorney General of Canada v Federation of Law Societies of Canada and Others ("Canada v FLSC")[2015] 1 SCR 401, both heavily relied on by the appellant, are quite instructive. They offer a good insight into the form and level of protection that should be afforded to LPP by the Regime. When one looks at those cases, a clear picture emerges as to how much further the legislature in Jamaica could have gone, and ought to have gone, to better protect LPP, as a fundamental human right."

43. The Board does not consider that the Canadian experience, and in particular the review by the Canadian courts of the inadequacies in their anti-money laundering regime for the protection of lawyer-client secrecy, offers a reliable basis for a comparative review of the adequacy of the protection for LPP afforded by the Regime in Jamaica. The basis of lawyer-client secrecy and privilege is not the same in the two jurisdictions. Nor are the constitutionally guaranteed rights the same in both jurisdictions. More to the point, the two cases referred to by the Court of Appeal concern the consequences for lawyer-client secrecy of provisions for search and seizure in the Canadian regime which have no close parallel in Jamaica.

44. The particular principles which the Court of Appeal sought to transplant from Canada to Jamaica were, first, that it was wrong to lay upon the attorney the burden of protecting the client's privilege. Secondly that it was wrong for there to be a process for testing a claim to privilege without notice to the client. Thirdly that it was wrong for there to be no statutory mechanism for judicial oversight of the process for preserving privilege.

45. The Board has addressed these considerations in the different Jamaican context, above. In summary, first, the attorney is the natural guardian of the client's LPP, and there is no reason to suppose that, save for very occasional mistakes, the attorney will disclose privileged material to the GLC on a section 91A inspection, when both POCA and the GLC Guidance make it clear that the attorney should not do so. If an occasional mistaken disclosure of privileged material takes place, then the GLC, which is fully legally qualified to spot the mistake, will be obliged to return any relevant privileged material on appreciating that an obvious mistake has been made. Secondly, the practice that all section 91A inspections are made on notice to the attorney gives the opportunity for notice by the attorney to the client, if that has not already occurred. Thirdly, the absence of any obligation on the attorney even to disclose that he or she has privileged material to the GLC inspector makes a dispute as to the existence of LPP highly unlikely but, in any event, the combination of notice to the

client and an application to the court under the general law makes it unnecessary for there to be a specific LPP disputes procedure built into POCA.

46. In conclusion the Board agrees with the Full Court, albeit for reasons which differ in some respects, that the part of the Regime which consists of regulatory supervision of attorneys by the GLC under section 91A of POCA was neither intended to, nor did, derogate in any significant way from LPP in Jamaica.

47. The section 94 STR obligation, coupled with the prohibition of tipping-off in section 97, calls for separate analysis. The starting point is that section 94(5)(b) and (8) (see para 20 above) have the effect that no STR obligation arises if the information which would otherwise trigger a STR obligation came to the attorney in privileged circumstances. It is clear from subsection (8) that this means circumstances attracting LPP, since the two limbs of LPP are there scrupulously set out, alongside the iniquity exception. Furthermore the prohibition against tipping-off is disapplied, by section 97(2)(c), (d) and (3), if the disclosure (which would otherwise constitute tipping-off) is either to an attorney or by an attorney for the purpose of obtaining or giving legal advice. Thus an attorney is enabled to take advice from a specialist attorney as to whether there is an obligation to make an STR, and this would include advice as to whether the attorney had obtained the relevant information in privileged circumstances.

48. In reaching its conclusion that the STR part of the Regime involved no derogation from LPP the Full Court took considerable comfort from what it regarded (by comparison with the UK equivalent regime) as the high threshold of the trigger for the STR obligation, namely knowledge or belief rather than mere suspicion that there had been money-laundering. It reasoned that, if an attorney had that level of knowledge or belief, then LPP would in most cases be displaced by the iniquity exception. For that reason alone the Full Court was of the view that the STR obligation was unlikely to derogate from LPP.

49. The Board is less sure that the threshold is quite so high. The relevant part of section 94 is in subsection (2)(a) as follows:

> "that person knows or believes, or has reasonable grounds for knowing or believing, that another person has engaged in a transaction that could constitute or be related to money laundering."

The key word in this formula is "could". The STR obligation will be triggered if the attorney knows or believes (or should have known) not that money laundering has occurred, but that it could have occurred. That necessarily includes a situation where, in fact, money laundering did not in fact occur, so that there was nothing to displace LPP as an entitlement of the client. But even if that threshold is crossed, there is no obligation to make a STR if the relevant information came to the attorney in privileged circumstances.

50. The question remains, who is most likely to be able to form a reliable view about whether the attorney received the relevant information in privileged circumstances? The obvious answer is the attorney who received it, if necessary with the benefit of specialist legal advice, the obtaining of which is protected from being treated as tipping-off.

51. There remains the possibility that privileged information may be included in an STR by reason of a mistake by the attorney as to whether the privilege exception to the obligation had arisen. But the Board is not persuaded that the existence of a possibility of mistaken disclosure of material protected by LPP is enough to lead to a conclusion that the Regime itself derogates from the right to privacy constituted by LPP, if the Regime contains a reasonable legal and procedural basis by which LPP may be maintained.

52. In this respect the Court of Appeal derived assistance, by way of comparative review, from the analysis of the comparable French regime revealed by the decision of the ECtHR in *Michaud v France* (2014) 59 EHRR 9. The French regime made provision for STR by lawyers to be routed through the French legal regulator, before transmission onwards to the French version of Jamaica's FID. This in the Strasbourg Court's view was a filter which was sufficient to justify the infringement of the lawyer's Art 8 rights constituted by the imposition of the reporting obligation. The STR obligation in the Jamaican regime is to report directly to either the nominated officer of the regulated business or to the FID, and the GLC has no intermediary role to play. Regulated attorneys are required to have a nominated officer to whom employees must report internally and it is the nominated officer who must make the determination of whether a STR should be made to the FID. By the POCA Regulations, the nominated officer must have adequate training to discharge this responsibility and the nominated officer is responsible for overseeing compliance with the anti-money laundering policies and procedures.

53. Again, the Board is not persuaded of the reliability of this necessarily high-level comparison. The guaranteed right is not the same. Lawyer-client secrecy in France is not the same as LPP in Jamaica. Nor is the French regime the same as the Jamaican

Regime. Each has its own internal checks and balances. While it is true that the GLC has no embedded role to play in the STR regime under section 94, other than by the provision of published Guidance and an advisory helpline, the ability of a Jamaican attorney to take specialist legal advice about LPP without risk of tipping-off liability seems to the Board to be a form of protection against inappropriate invasion of LPP just as effective in its own different way as may be the French filter. What matters is not which system does better under a comparative review, but whether the Jamaican Regime, taken as a whole and supported by the general law, does or does not derogate from LPP. To put it another way, does the Regime provide sufficient protection?

54. The Board's view is that the STR obligation does not derogate from LPP, and does provide sufficient protection for its preservation. That protection is mainly embedded in sections 94 and 97 of POCA as already described. There is simply no obligation to report on the basis of privileged information, and the ability to take specialist advice without liability for tipping-off provides a practicable mechanism which, if used, should enable an attorney to know whether in any particular case LPP displaces the STR obligation. There is admittedly a relatively tight timetable of 15 days (under section 94(2)(c)) within which such advice would generally need to be obtained, but the additional defence of reasonable excuse under section 94(5)(a) would be likely to avail an attorney who made a late STR where, through no fault of his or her own, that advice was itself provided late.

55. Mr Richard Mahfood KC for the JBA, in his last court appearance after a long and distinguished career, made much of the submission that attorneys were placed in a position of conflict in circumstances where a wrong decision about LPP might lead to criminal sanctions, thereby inclining them to make a STR rather than protect clients' privilege in a borderline case. But again, the obtaining and following of specialist legal advice would appear to afford reasonable excuse for not making a STR, even if a court were later to hold that the advice had been wrong.

56. Accordingly, and for the reasons given above, the Board considers that the Regime does not derogate from that part of the guaranteed right of privacy which consists of LPP.

The Right to Liberty

57. In respect of the right to liberty, the most relevant provisions of the Charter are section 13(3)(a) ("the right to life, liberty and security of the person and the right not to be deprived thereof except in the execution of the sentence of a court in respect of a criminal offence of which the person has been convicted") and section 14. Under

section 14 a person shall not be deprived of his or her liberty “except on reasonable grounds and in accordance with fair procedures established by law”. The circumstances in which that may be done are then set out. They include in execution of a sentence (14(1)(b)) and following arrest or while being held on remand (14(1)(f)).

58. The Full Court held that there was no infringement of the right to liberty guaranteed under section 13(3)(a). It recognised that the Regime engaged the liberty interests of attorneys as a failure to comply with the statutory provisions, such as failing to make a STR (section 94) or tipping off a client (section 97), or with various regulations, constituted criminal offences for which, if convicted, the attorney could be sentenced to imprisonment. It found, however, that such a deprivation of liberty would not be arbitrary or unjustified as it would come after a conviction and sentence following due process. That would fall squarely within the exception in section 13(3)(a).

59. The Court of Appeal criticised the reasoning of the Full Court. In particular, it considered that the Full Court had focussed too narrowly on deprivation of liberty following conviction, as opposed to, for example, on arrest or on being held on remand, and had not properly considered the relationship between sections 13(3)(a) and sections 14 and 16 of the Charter - "[t]he general liberty right stated in section 13(3)(a) receives more detailed articulation in section 14 (dealing with liberty of the subject) and section 16 (dealing with due process)" (para 315). Its fundamental disagreement with the Full Court was, however, that it had failed to have proper regard to its own conclusion that the Regime did infringe privacy rights, in particular through its interference with attorney-client confidentiality. If that infringement was not shown to be demonstrably justifiable there would be a breach of those rights and any deprivation of liberty for such a breach would be unconstitutional – “Any interference with the rights to liberty that would be occasioned by sanctions in connection with the violated constitutional rights to privacy must be viewed as, prima facie, unreasonable and not in accordance with fair procedures laid down by law” (para 350).

60. On the Court of Appeal’s analysis the question of whether there is a breach of the right to liberty depends upon whether the Regime is found to have breached other constitutional rights. If and to the extent that the Regime does breach other constitutional rights then it would be declared void. In those circumstances there could be no consequential breach of the right to liberty. On this approach it is therefore difficult to see how breach of the right to liberty arises as an independent issue.

61. The JBA submitted that the term “liberty” in its constitutional setting has a wider meaning than freedom from arrest or physical restraint and that it includes

freedom of action and freedom to pursue a lawful business or profession. In those circumstances, the mere threat of imprisonment for long periods of time and disbarment for not complying with the requirements of the Regime is itself a violation of the attorney's right to liberty.

62. The Attorney General's case is that "liberty" in section 13(3)(a) means the physical liberty of the person. Reliance is placed by analogy on the jurisprudence of the ECtHR in relation to Article 5 of the ECHR. This provides:

> "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law".

It is expressed in similar terms to section 13(3)(a) and the "following cases" in Article 5 are similar to the "following circumstances" in section 14.

63. It is well established that Article 5 contemplates the physical liberty of a person and that its aim is to ensure that no one should be deprived of that liberty in an arbitrary fashion – see, for example, *Engel v The Netherlands* (1976) 1 EHRR 647 at 669 (para 58), *Guzzardi v Italy* (1980) 3 EHRR 333 at 362–363 (para 92).

64. It is not necessary for the purpose of the present appeals to determine the precise ambit of the right to liberty guaranteed in section 13(3)(a). As the Court of Appeal held, the critical issue is whether the Regime breaches other constitutional rights. If there is no such breach it would follow that imprisonment for failing to comply with the requirements of the Regime has been found to be demonstrably justifiable. If so, the threat of such imprisonment cannot in itself infringe the attorney's right to liberty.

65. For all these reasons the Board does not consider that the Regime infringes the right to liberty.

Protection from Search of Property

66. Under section 13(3)(j)(i) of the Charter everyone has the right to "protection from search of the person and property". The issue is whether the powers of the GLC under section 91A(2) of POCA to carry out inspections (section 91A(2)(a)) and to

examine and take copies of information and documents (section 91A(2)(c)) involve an infringement of the constitutional right to protection from search.

67. The Full Court considered that section 91A does not expressly provide for a power to search attorneys' offices, nor does such a power arise by necessary implication. As it stated at para 188:

> "There is therefore nothing expressed or implied in POCA or the Guidance that can be interpreted as the [GLC] being empowered to 'search and seize'. POCA has not given the [GLC] coercive powers, neither has it taken these unto itself. In the event that the [GLC] is of the view that an attorney is not compliant, it will consider whether to take disciplinary action or make a report to the relevant authority. Therein lies its power."

68. The Court of Appeal disagreed. It considered that the power to "examine" is a power to search and the power to "take" is a power to seize. By authorising searches of attorneys' property section 91A(2) was authorising "warrantless" searches. This was an infringement of the constitutional right to protection from search of property.

69. The starting point, as explained in para 33 above, is that the GLC's role is regulatory. The purpose of its powers of inspection and to examine and to take copies of documents is to monitor compliance by attorneys with POCA and any regulations made thereunder, as clearly set out in section 91A(1). That regulatory role is to be distinguished from that of the FID, which is to investigate whether criminal offences have been committed. As already stated, it is not for the GLC to act as the FID's bloodhound, and it has no power so to do.

70. A regulatory body such as the GLC has no power to enter a person's property without that person's consent or to do so forcibly unless such a power is clearly conferred. Unauthorised entry into a property is a trespass. A warrant or a court order is generally required in order to do so. The statutory power under section 91A(2) to carry out regulatory inspections and examinations neither addresses nor confers a right of unauthorised entry. Without a warrant or court order the GLC's power to carry out inspections or examinations at an attorney's offices necessarily depends on the co-operation and consent of the attorney to enter those offices. There is a strong incentive for the attorneys to provide co-operation since under section 91A(5) a failure to comply with a requirement or direction of the GLC may involve the commission of

an offence. Nevertheless, the Board has no doubt that the GLC has no power of entry and search without such co-operation and consent.

71. This is borne out by the specific inclusion in section 115 of POCA of a power for a Judge to issue a "search and seizure warrant" for the purpose of an investigation, but only where the detailed requirements of that section are satisfied. Such a warrant authorises "an appropriate person" to "enter and search the premises specified" and to "seize and retain any information or material found there" which is likely to be "of substantial value" to the investigation. POCA itself therefore recognises the need for judicial authorisation of search and seizure powers.

72. It is also supported by the practice of the GLC as reflected in its Guidance. As stated in para 48 of the Guidance, the purpose of its examinations is to test "the adequacy of the programmes, policies, procedures, controls and systems implemented by attorneys engaged in designated activities to ensure compliance" with POCA and regulations made thereunder. There are four types of examination, namely routine biennial examinations, follow-up examinations, random examinations and special examinations. All these examinations are carried out following the giving of notice. The form used for the examinations (Appendix B) concentrates on matters of compliance policies and procedures. In the notice form used (Appendix C) for random examinations the attorneys are "asked" to make records available. There is no suggestion of compulsion.

73. As a matter of language the power to "take copies" of documents could be interpreted as being mandatory. In the context of an examination that requires consent for it to be carried out it is better understood as also requiring consent, albeit against the background of the risk of committing an offence for non-compliance with directions given. Again, there is a clear contrast with the specific seizure powers judicially authorised under section 115. There is also a power under section 105 for a Judge to make a disclosure order in support of an investigation. It is these sections that deal with coercive powers under POCA.

74. For all these reasons, the Board agrees with the Full Court that section 91A(2) does not confer coercive powers of search and seizure. The exercise by the GLC of its power to enter the premises and to take documents depends on consent. In those circumstances there is no infringement of the right to protection from search of property.

Demonstrable Justification

75. Although the Board has held that the Regime does not infringe rights to LPP, to liberty and to freedom from search of property, by invading attorney-client confidence it clearly does infringe the right to privacy guaranteed under section 13(3)(j)(ii) ("respect for and protection of private…life") and (iii) ("protection of privacy of other property and of communication"), as the Full Court held. This will involve a breach of those constitutional rights unless it can be shown that the infringement is "demonstrably justified in a free and democratic society".

76. In considering the issue of justification both the Full Court and the Court of Appeal applied the guidance provided by the Canadian Supreme Court decision in *R v Oakes* [1986] 1 SCR 103 in relation to the similarly worded provision in the Canadian Charter of Rights and Freedoms (under section 1 of which such rights and freedoms are guaranteed subject "to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society"). This guidance was summarised as follows by the Court of Appeal at paras 515-516:

> "[515] According to the **Oakes** test, there are two central criteria to be satisfied in order to establish that a limit is demonstrably justified in a free and democratic society. The first is that the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be of sufficient importance to warrant overriding a constitutionally protected right or freedom. The standard must be high in order to ensure that objectives, which are trivial or discordant with the principles integral to a free and democratic society, do not gain the constitutional protection afforded by the justificatory criterion.
>
> [516] The second criterion is that once a sufficiently significant objective is recognised, the party invoking the exception must show that the means chosen are reasonable and demonstrably justified. This, it is said, involves a form of proportionality test. The proportionality test comprises three important components, which are:
>
> i. the measures must not be arbitrary, unfair or based on irrational considerations;

> ii. they must be rationally connected to the objective, and should impair 'as little as possible' the right or freedom in question (that is, there should be minimal impairment of the right or freedom); and
>
> iii. there must be proportionality between the effects of the measures, which are responsible for limiting the Charter right or freedom, and the objective identified to be of sufficient importance."

77. This test is similar to that which the Board recently described as "the modern conventional approach to issues of proportionality" in *Suraj v Attorney General of Trinidad and Tobago* [2022] UKPC 26, [2022] 3 WLR 309, at para 51. This involves asking in relation to the relevant measure:

> "(i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community. See *Huang v Secretary of State for Home Department* [2007] 2 AC 167, para 19 (Lord Bingham of Cornhill) and *Bank Mellat v HM Treasury (No2)* [2013] UKSC 39, [2014] AC 700, paras 20 (Lord Sumption) and 73-74 (Lord Reed)."

78. In considering whether "a less intrusive measure could have been used" the need to allow the legislature a margin of appreciation is of particular importance. As Lord Reed explained in *Bank Mellat v HM Treasury (No2)* [2013] UKSC 39, [2014] AC 700 at para 75:

> "In relation to the third of these criteria, Dickson CJ made clear in *R v Edwards Books and Art Ltd* [1986] 2 SCR 713, 781-782 that the limitation of the protected right must be one that 'it was reasonable for the legislature to impose", and that the courts were "not called upon to substitute judicial opinions for legislative ones as to the place at which to draw a precise line'. This approach is unavoidable, if there is to be any real prospect of a limitation on rights being justified: as

> Blackmun J once observed, a judge would be unimaginative indeed if he could not come up with something a little less drastic or a little less restrictive in almost any situation, and thereby enable himself to vote to strike legislation down (*Illinois State Board of Elections v Socialist Workers Party* (1979) 440 US 173, 188-189); especially, one might add, if he is unaware of the relevant practicalities and indifferent to considerations of cost. To allow the legislature a margin of appreciation is also essential if a federal system such as that of Canada, or a devolved system such as that of the United Kingdom, is to work, since a strict application of a 'least restrictive means' test would allow only one legislative response to an objective that involved limiting a protected right."

79. It appears that a similar approach is taken by the Canadian courts in relation to the "minimal impairment" element of the *Oakes* test. As is stated in *Halsbury's Laws of Canada* HCHR 22 at p153:

> "Reasonability of degree of infringement. Historically the original phrasing of the *Oakes* test referred to testing whether legislators had adopted the 'least drastic means' that led to 'minimal impairment' of a right. This language is more stringent than the test that is actually applied, which is concerned at this stage of the test with whether a particular infringement falls within a range of reasonable options. It is particularly at this stage that the courts show deference on complex social issues where legislators are better suited than judges to determining the best way to go about addressing these issues. The requirement at this stage is effectively that the legislative measures limit the right 'as little as is reasonably possible' to achieve the objectives of the measure."

80. The Full Court found that the *Oakes* test was satisfied. It held that:

(1) The objective was of sufficient importance – "money laundering perpetuates high levels of criminal activities which negatively impacts national development and cripples our standing in the international community" (para 362).

(2) The fact that the Regime is limited to the six activities shows that it is not arbitrary.

(3) The protection of LPP and the safeguards against inadvertent disclosure of privileged information show that the means employed minimally impaired the right to privacy.

(4) It is proportionate. “Bearing in mind the reality that wittingly or unwittingly attorneys are one group of professionals by the nature of the services they offer who are likely to be targeted to facilitate money laundering, the Regime is indeed an appropriate and adequate and proportionate response to the national and international fight against money laundering” (para 365).

81. The Court of Appeal disagreed on questions (3) and (4). This was “because of the absence of fair procedural safeguards and a carefully designed scheme to achieve the legislative objective, with the least reasonably possible impairment of Charter rights” (para 559). Central to the Court of Appeal’s reasoning was what it considered to be “the impact of the Regime on LPP” (para 539).

The importance of the objective

82. There can be no doubt about the importance of the objective of combating money laundering both generally and with specific regard to the situation in Jamaica. Crime is a serious problem in Jamaica. As explained in the National Security Policy it has one of the highest murder rates in the world. States of emergency have often had to be declared.

83. In his second affidavit, Mr Robin Sykes, the Chief Technical Director of the FID and formerly General Counsel of the Bank of Jamaica, explained (at para 33) how the government of Jamaica’s National Security Policy “led to” extension of POCA to attorneys in 2013. That Policy noted that the main causes of violence and homicide were transnational criminal organizations and local gangs who are supported by corruption, fraud, extortion and money laundering, and that:

> "….organized crime depends on facilitators; lawyers, accountants, politicians, bankers and real estate brokers who assist the criminals by protecting them, laundering the proceeds of crime (which lawyers can conceal by claiming 'client confidentiality'), creating shell corporations, operating

> offshore bank accounts, establishing front businesses to conceal illegal activity, creating a facade of respectability for these businesses by serving as proxy directors, and investing criminal profits in legitimate enterprises, real estate and other assets and holdings. The wealth, power and influence of major criminals and their facilitators distorts the economy, makes it harder for legitimate businesses to survive, deters investment and causes a haemorrhage of skills and capital from Jamaica."

84. The Policy placed money laundering and its facilitators as Tier 1 threats which merited top priority and active response. Its recommended response included reporting requirements under POCA for lawyers. The Regime reflects that response. Its key objectives include protecting attorneys from becoming potential accomplices for money laundering and also assisting in the detection, prevention and prosecution of money laundering.

85. As explained by Mr Sykes in his first affidavit, and as referred to in paras 13 to 16 above, the other main factor which led to the extension of POCA to attorneys was the need for Jamaica to comply with its international obligations and specifically the FATF recommendations. Mr Sykes highlighted the potential consequences of not having a favourable assessment by CFATF as including reputational damage to the jurisdiction and to the financial sector; reduced overseas investor confidence; enhanced scrutiny or strictures on financial transactions involving Jamaican financial institutions including potential reduction in correspondent banking relationships with Jamaican financial institutions; reduced capacity for law enforcement to gather information to mount investigations relating to the proceeds of crime and enhanced capacity for criminals to conduct business that disguises the proceeds of crime.

86. In terms of combating criminality and Jamaica's economic prosperity and international standing the objectives of the Regime were therefore of the first importance.

Rational connection and lack of arbitrariness

87. In the light of the internationally and nationally recognised need to extend money laundering controls to DNFBPs, including attorneys, there can be little doubt about rational connection. The focus, in accordance with FATF recommendations, on just the six activities demonstrates, as the Full Court found, that the Regime is not arbitrary.

Less intrusive measures/minimal impairment

88. A central objection of the JBA was the introduction of criminal sanctions as part of the Regime. It was submitted that there was no good reason why the objectives of the Regime could not equally be met by having a disciplinary regulatory regime rather than one involving the criminal law. This was a submission forcefully made by Mr Mahfood.

89. It no doubt would have been possible to have a purely disciplinary regime, which is how the legal profession is generally regulated. However, it seems clear that both internationally and nationally disciplinary regulation was insufficiently addressing the issue of facilitation of money laundering by lawyers.

90. In the affidavit of Albert Stephens, the Principal Director of FID, it was stated that STRs submitted since 2008 relating to attorneys in Jamaica had highlighted the following reasons for suspicions:

> "a) Large cash deposits especially in US currency;
>
> b) Cash deposits used to purchase USD drafts for third parties;
>
> c) Refusal to provide source of funds information;
>
> d) Inability or refusal to provide adequate 'know your customer' (KYC) information;
>
> e) Structuring of cash deposits. That is, deposits made frequently just below the thresholds;
>
> f) Clients' funds being placed on investment accounts in the attorney's name;
>
> g) Clients' funds being used in risky investment enterprises; including internet gaming and unlicensed alternate investment schemes;

h) Attorneys' accounts being used to transfer questionable funds internationally (wire transfers);

i) Multiple remittances being received from different senders;

j) Large outbound transfers with reasons given for these transfers not being credible;

k) Multiple foreign exchange conversions with limited source of funds information;

l) Funds from clients, who are under investigation or who have been charged by the police, being transferred to accounts in the names of their attorneys;

m) Inactive or dormant accounts being activated to receive large wire transfers."

91. Mr Stephens also explained that there were over 200 reports filed in relation to attorneys practising in Jamaica, although to the date of his affidavit only two lawyers had been arrested and charged.

92. As Mr Mahfood submitted, there are countries in which anti money laundering regimes have been implemented without involving criminal law sanctions. That is no doubt something that the Jamaican legislature would have considered but whether to take the further step, in the interest of effective detection, prevention and enforcements, of making the regime part of the criminal law is very much within the legislature's margin of appreciation. It is within the range of reasonable options open to it. It is also a course of action which has been taken in many countries, including the UK and the EU. In all the circumstances the Board agrees with the Full Court that this aspect of the test is satisfied.

Fair balance/proportionality

93. If, as the Court of Appeal found, the Regime infringed LPP then one could well understand the conclusion that aspects of the Regime are not proportionate given the importance and (almost) absolute nature of LPP. However, the Board has found that

LPP is protected and the infringement is of attorney-client confidentiality rather than LPP. That is a much less serious matter. Confidentiality is, for example, routinely invaded in civil litigation through the obligation to give inspection of relevant documents. This is justified by the need to get at the truth. The justification in the present context is as important, if not more so. Moreover, in civil litigation disclosure may well lead to the material being in the public domain, whereas disclosure under the Regime is controlled and in many cases will not extend beyond the GLC.

94. It is also of relevance that a number of protections have been built into the Regime. These include entrusting responsibility for monitoring compliance to the GLC rather than the FID and requiring there to be a nominated officer to receive internal reports and to make the decision about whether a STR should be made.

95. The Regime has serious implications for the practice of attorneys and imposes obligations previously unknown to the legal profession. That said, lawyers are just one of the DNFBPs to which the Regime is applied and in all cases it is limited to the six activities, as recommended by FATF.

96. Having regard to all the considerations urged upon us by the parties, the Board's conclusion, bearing in mind in particular the very great importance of the objectives of the Regime for Jamaican society and the Jamaican economy, is that a fair balance has been struck and that the Regime is a proportionate measure, as the Full Court held.

97. The Board therefore holds that the Regime's infringement of rights of privacy has been demonstrably justified.

Conclusion

98. For the reasons set out above the Board concludes that the Regime does not breach attorneys' or their clients' constitutional rights. It follows that the Board will humbly advise His Majesty that the appeals should be allowed and that the order of the Full Court should be restored.