JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 97/2014

APPLICATION NO 171/2015

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE EDWARDS JA (AG)

BETWEEN THE JAMAICAN BAR ASSOCIATION APPLICANT

AND THE ATTORNEY GENERAL 1st RESPONDENT

AND THE GENERAL LEGAL COUNCIL 2ND RESPONDENT

Mrs Georgia Gibson-Henlin QC, Miss Catherine Minto and Miss Akuna Noble instructed by Wilkinson Law for the applicant

Mrs Nicole Foster-Pusey QC and Miss Tamara Dickens instructed by the Director of State Proceedings for the 1st respondent

Miss Kimberley Morris holding for Mrs Symone Mayhew for the 2nd respondent

10 May and 1 July 2016

PHILLIPS JA

[1] In this application, the applicant, the Jamaican Bar Association (JBA), sought orders: (i) to set aside an order made by Dukharan JA on 4 September 2015, extending the time for the respondent, the Attorney General (AG), to file skeleton arguments and the chronology of events; (ii) to stay the requirement for the JBA to comply with part 2.6(2) of the Court of Appeal Rules, 2002 (CAR) requiring the JBA to file and serve its skeleton arguments within 21 days of service of the AG's skeleton arguments, pending

the delivery of judgment and reasons by the Full Court in Claim No HCV 04772 of 2014; and (iii) to stay the appeal filed against an order made by Sykes J on 4 November 2014, pending the Full Court's determination and ruling on the JBA's fixed date claim form in Claim No HCV 04772 of 2014, with costs to the applicant to be taxed if not agreed.

Proceedings in the court below on Claim No HCV 04772 of 2014

[2] On 13 October 2013, the JBA filed a fixed date claim form against the AG and the General Legal Council (GLC) asking for, *inter alia*, declaratory relief, injunctions and other relief under the Constitution. The JBA's claim, in summary, was that the Proceeds of Crime Act (POCA) and the regulations in relation thereto, the consequential amendments to the Legal Profession Act (LPA) and the Legal Profession (Canons of Professional Ethics) Regulations, 1973 (the Canons), and the General Legal Council of Jamaica: Anti-Money Laundering Guidance for the Legal Profession (GLC Guidelines), in so far as they are extended to and affect attorneys-at-law, are unconstitutional, otherwise vague, over broad and unenforceable and ought to be struck down. The JBA sought several orders which include:

(i) 11 declarations that, *inter alia*, the amendments to POCA are not applicable to Jamaican attorneys-at-law; the treatment of attorneys-at-law as financial intermediaries is unconstitutional; and that information required under the amendments to POCA and the LPA breaches confidentiality, attorney client privilege and legal professional privilege;

(ii) a stay of the implementation of POCA and the LPA insofar as they require attorneys-at-law to establish procedures for the purpose of detecting money laundering and/or to consult with the GLC when carrying out its functions under POCA; and

(iii) an injunction restraining the AG and the GLC, by themselves, their servants and/or agents, from enforcing or implementing compliance and reporting obligations on attorneys-at-law under POCA.

[3] The JBA filed the affidavit of Donovan Jackson, an attorney-at-law and JBA member, on 13 October 2014, in support of the fixed date claim form. In summary, Mr Jackson deponed that the GLC's guidelines were established to ensure compliance by attorneys-at-law in respect of the regime established under POCA. He stated that pursuant to that regime, the GLC had the powers to inspect, examine, take copies, employ third parties, share information with other POCA authorities, and issue directives with criminal sanctions, or administer disciplinary penalties for non compliance. He claimed that this new regime imposed a significant burden on attorneys by: (i) requiring the storing of information that would not normally have been kept by attorneys; (ii) increasing staff, preparing manuals and training of staff to complete the tasks and obligations currently demanded by the state; and (iii) requiring attorneys to place clients and services into high risk or low risk categories, which, depending on the category, required enhanced due diligence procedures. Mr Jackson noted that under

this regime, the GLC is required to conduct four different types of examinations by accountants, which imposed additional costs, expenses and personal prejudice on an attorney, infringed the client's liberty and had a general negative impact on the administration of justice.

[4] Mr Jackson deponed further that by virtue of the amendment to POCA, the LPA and the GLC guidelines, attorneys who carry out certain transactions are designated non-financial institutions (DNFI), and having been so described, were required to appoint a nominated officer through whom reports were to be submitted to the Financial Investigation Division (FID) of the Ministry of Finance and Planning. This new regime, he indicated, imposed an obligation on attorneys, once they believed that funds involved in a transaction could constitute or be related to a money laundering transaction, to obtain the appropriate consent from the FID in order to proceed with that transaction. Mr Jackson also complained about a requirement for the collection of information which was ultimately to be made available to law enforcement agents for the purpose of investigating and prosecuting their clients. These requirements for reporting, he deponed, breached the principle of confidentiality and attorney client privilege; imposed severe sanctions on attorneys for non-compliance and raised serious issues concerning the independence of the Bar.

[5] Mr Robin Sykes, General Counsel for the Bank of Jamaica (BOJ), filed an affidavit on 23 October 2014, on the AG’s behalf, in opposition to the claim including the order for the injunction. He indicated that the BOJ was the lead agency in coordinating and arranging valuations of other member countries of the Caribbean Financial Action Task

Force (CFATF). He set out a comprehensive overview of the international conventions in respect of which Jamaica was a signatory with regard to the measures to combat money laundering. He referred to the international standards and protocols, particularly those of the Financial Action Task Force (FATF) and its most recent recommendations for assessing technical compliance. He noted that Jamaica was committed to adhering to the recommendations evidenced by their membership in CFTAF**.**

[6] Mr Sykes set out in detail Jamaica's compliance assessment and stated that Jamaica had been criticized for her failure to extend anti-money laundering and combating financial terrorism obligations to designated non-financial and businesses and professionals (DNFBP'S). Lawyers, he stated, were included in the FATF recommendations in the definition of DNFBP'S. A member country can be subject to certain sanctions if it does not meet the requirements of the FATF. He indicated that the last follow-up report on Jamaica noted the failure to implement legislation previously described which resulted in Jamaica being moved, in September 2012, to the second stage enhanced follow up category. He indicated measures undertaken by Jamaica to obtain compliance with the regime which included implementing, *inter alia*, an amendment to the POCA.

[7] Mr Sykes warned that failing to make those significant efforts could result in the country being subject to a public notice. Additionally, member countries could be encouraged to adopt certain counter measures affecting financial institutions in Jamaica, as has been done in Guyana, making it very difficult for subsidiary branches of those financial institutions to operate and/or engage in cross-border transactions and

also specifically requiring increased external audit requirements, which could ultimately affect the efficacy and efficiency of business transactions across the island of Jamaica, and their business relations with financial institutions in other countries. He also deponed that there were severe consequences for failure to obtain a favourable assessment, which includes reduced overseas investor confidence and reduced correspondent banking relationships with financial institutions here in Jamaica. He was adamantine that any restraint in the implementation of the POCA regime would represent a significant weakening in the anti-money laundering framework, and potentially result in Jamaica being considered a "high risk" for money laundering, and encourage investors to adjust their business relationships accordingly. Mr Sykes had therefore been opposed to the grant of the injunction as he stated that the grant of the injunction could negatively affect the consideration of the Jamaica's application to be removed from the follow-up process and not to be subject to a public notice.

The judgment of Sykes J

[8] Sykes J, delivered in his usual style, extremely wide-ranging thorough and interesting reasons for his judgment when considering and thereafter granting the injunction prayed for by the JBA against the implementation of the POCA regime applicable to the profession. He referred to several paragraphs and concerns of the JBA as set out in the affidavit of Donovan Jackson referred to herein, and canvassed the relevant sections of POCA.

[9] The learned judge noted that a serious complaint of the JBA was that the POCA regime undermined the independence of the Bar and consequently, the rule of law. The

learned judge made it clear that it was important to emphasise and appreciate that legal professional privilege was for the benefit of the Jamaican who sought legal advice from attorneys-at-law practising in Jamaica and was not for the benefit of the attorney. The learned judge indicated that the client may waive the privilege, and then the attorney must disclose all material in his/her possession. He canvassed several authorities from different countries in the Commonwealth, and noted that not all communications between attorney and client were privileged, and that the right, he stated, was not absolute, but once the information was protected by privilege, "it was out of the reach of the state, and cannot be firstly discovered, disclosed and is inadmissible in court".

[10] He also examined the Charter of Rights and concluded that legal professional privilege is a substantive rule of law and privilege was a fundamental right. He recognised the JBA's concern with regard to the GLC guidelines which encouraged attorneys to comply with the POCA regime, as the JBA was of the view that the approach "jettisoned confidentiality and secrecy" and was directing attorneys to reveal confidences and secrets in accordance with POCA and any regulations under it. Thus, examinations by the GLC in order to determine compliance by the lawyer in respect of certain money laundering activities cannot, he stated, take way the right to legal professional privilege.

[11] The learned judge accepted the submissions of the JBA's counsel that the relevant provisions in POCA were unspecific, and so attorneys were faced with the possibility of being found guilty of criminal offences, if their claim for legal professional

privilege did not find favour with the court, as that would mean that the attorney had failed to comply with the lawful request to produce a document. The learned judge referred to several instances which could result in conviction for a lawyer who endeavoured to make the claim for protection from disclosure in respect of the clients' business affairs. It was a serious condition, the learned judge opined, that an attorney could be faced with conviction, and subsequent expulsion from his profession on the basis of failure to comply with POCA. What if, he queried, an attorney's client was engaged in money laundering but the attorney honestly, but erroneously claimed the right to legal professional privilege, and therefore failed to report the transaction, would that be a reasonable excuse under section 94(5)(a) of POCA? That, he said was a very vexed question. The learned judge recognised the JBA's concern that certain of the provisions of POCA were too vague, and failed to fully recognise the work undertaken by lawyers.

[12] The other main issue examined by the learned judge was the independence of the Bar. He canvassed several authorities on this point and posited that the regime had interfered with the same "to an unacceptable degree" and the independence of the Bar was a principle of fundamental justice. He acknowledged that the JBA's concern was that the POCA regime deprived the public of the benefit of the principle of loyalty and fidelity "which undermines confidence in the legal system, and thereby erodes the ability of the public to take advantage of the fundamental rights guaranteed by the Charter of Rights and other rights". The learned judge also acknowledged the Solicitor General's position that the Charter of Rights did not recognise and accept "the

principles of fundamental justice". However the learned judge had a serious concern as to whether acceptance of the principle of the independence of the Bar, could invalidate a statute. He stated that the circumstances disclosed that the public could lose one of their fundamental rights, namely the right to competent legal advice from a strong and independent Bar, as opposed to counsel being a "covert operator for the state".

[13] The learned judge then examined whether there was a power to grant an injunction or stay of the anti-money laundering regime until the matter had been ventilated in the courts. The JBA was of the view, he stated, that he could, but the Crown was not of that view. The Crown, he pointed out, relied on section 16 of the Crown Proceedings Act, which prohibits injunctions against the Crown, save and except, in respect of proceedings in judicial review. The learned judge formed the view that the Constitution was a special document and so the Crown Proceedings Act did not apply, and he stated in detail why in his view it did not. It was also an issue as to whether the injunction could be granted at the Bill stage of the legislation, or as in the instant case, subsequent to the passage of the amendments to POCA and the LPA, and in circumstances where the litigant was asking the court, not only to grant interim relief, but also to have the particular legislation declared incompatible with the Constitution. It had been submitted, he acknowledged, that that should only obtain in exceptional circumstances.

[14] The learned judge indicated that although the Solicitor General had submitted that there could be a grant of an injunction after the adjudication on the merits of the claim, he did not see any distinction between that approach and the court intervening

to grant interim relief once the application was before the court, and prior to the court having found that the provisions in the Act are unconstitutional. The issue, he opined really must be whether the order would be immediate, and irreversible and cause substantial damage, and also in his view, the circumstances must be exceptional. The learned judge therefore on the facts of this case determined that there was a serious constitutional issue to be tried and that the balance of convenience favoured the JBA. He opined that the international community would be comforted to know that Jamaica had put in place a regime that had some constitutional footing. The court determined that the JBA had made out a strong case for interim relief. He made it clear that while one must honour the objective of the Act to ensure that those involved in criminal activity are deprived of the fruits of their unlawful activity, that should not be achieved through the breach of the fundamental rights of the citizen. He therefore granted the injunction.

[15] The details of the orders made by Sykes J, based on the above reasoning, are set out below.

> "1. Attorneys-at-Law to whom the Proceeds of Crime Act was extended by reason of Proceeds of Crime (Designated Non-Financial Institution) Attorneys (Order), 2013 (DNF1 Order) are exempted from and/or are otherwise not required to comply with the following Acts, Regulations, Orders or Guidance pending the outcome of the Constitutional Motion herein:
>
> 1.1. The Proceeds of Crime Act and the Proceeds of Crime (Money Laundering Prevention) Regulations) 2007 as extended by the (DNF1 Order);

1.2. The General Legal Council of Jamaica Anti-Money Laundering Guidance for the Legal Profession that was published in the Jamaica Gazette Extraordinary of Thursday May 22, 2014, No 2;

1.3. Chapter IV sections 94 and 95 of the Proceeds of Crime Act in so far as it requires attorneys-at-law to report suspicious transactions (STR's) directly to the Financial Investigations Division;

1.4. The amendment to The Legal Profession Act to insert in section 5(3C) any regulation(s) issued or made pursuant thereto including The Legal Profession (Annual Declaration of Annual Activities) Regulations, 2014, July 10, 2014;

1.5. The amendments to the Canons of the Legal Profession Act by the Legal Professions (Canons of Professional Ethics) (Amendment) Rules, 2014, 2nd July 2014 requiring the Attorney-at-Law to certify to the 2nd Defendant by the 31st January 2015 whether the Attorney-at-Law engaged in the matters set out in the Order of the 15th November 2013, and

1.6. The amendment to Canon IV of The Legal Profession Act (Canons of Professional Ethics) to remove the proviso that enjoined the Attorney's ethical obligation to protect client confidences and permit client confidences to be revealed in compliance with the Proceeds of Crime Act."

The appeal

[16] The Attorney General filed an appeal on 11 December 2014. The grounds of appeal in relation to Sykes J's orders are set out below.

> **"Grounds of Appeal:**
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> 1. The Learned Judge erred in finding that an interim or interlocutory injunction can lie against the Crown in constitutional claims;
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> 2. The learned judge erred in finding that section 16 of the Crown Proceedings Act is not applicable where there is a constitutional claim or a constitutional challenge;
>
> 3. The learned judge erred in finding that section 16 of the Crown Proceedings Act is generally inapplicable in light of the fact that Jamaica has a written constitution which is the supreme law of the land;
>
> 4. The learned judge erred in finding that an injunction can be ordered to stay the implementation of an Act legitimately passed by Parliament, prior to the final hearing of the claim;
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> **Further and/or Alternatively to Grounds (1), (2), (3) and (4),**
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> 5. The learned judge failed to sufficiently consider the difference in the Jamaican charter as against the Canadian charter as well as the Canadian legislative provisions on which case law relied on by the 1st Respondent was premised. In so doing the learned judge failed to realize that no clear case of infringement of the Jamaican constitution was established so as to justify the grant of an injunction.
>
> 6. The learned judge failed to give sufficient weight to the prima facie position that the provisions in question advance concerns that are demonstrably justifiable in a free and democratic society;

7. The learned judge wrongly exercised his discretion in granting the injunction;

8. The learned judge failed to consider and/or to give due consideration to the evidence or irreparable harm to be caused to Jamaica if the injunction is granted;

9. The learned judge erred in concluding that irreparable harm would be caused to the [JBA's] members if the legislative provisions and guidance notes were to remain in force until the determination of the substantive hearing;

10. The learned judge failed to give consideration and/or due consideration to the public interest in the anti-money laundering laws and regulations in relation to the legal profession remaining in force, in weighing the balance of convenience; and

11. The learned judge erred when he failed to find, in weighing the balance of convenience, that the public interest in protecting Legal Profession Privilege was addressed by the legislative scheme.

12. The learned judge, in suspending the entire regime, failed to utilize the least drastic means to protect the [JBA] while preserving the will of Parliament.

Orders Sought:

1. The appeal is allowed and the injunction set aside; and

2. Costs to the [AG]."

The application for stay and to set aside order granting extension of time to file skeleton arguments and chronology of events

[17] On 29 July 2015, the AG filed an amended notice of application for extension of time to file skeleton arguments and chronology of events to 29 June 2015. This application was granted by Dukharan JA on 4 September 2015.

[18] On 2 May 2016, the JBA filed an amended notice of application to stay the appeal filed 11 December 2014 and to set aside the order of Dukharan JA on 4 September 2015, granting an extension of time to file skeleton arguments and a chronology of events.

[19] The JBA relied on several grounds in support of its application. It relied on rules 1.10, 1.7(2)(n); 1.7(7); 2.10(4); 2.11(2) and 2.15 of the CAR and 11.6 of the Civil Procedure Rules, 2002 (CPR). The JBA further relied on the fact that the AG was appealing the order made by Sykes J on 4 November 2014, granting an injunction in favour of the JBA, which had been granted pending the hearing of the JBA's claim by the Full Court, which matter had been completed and the judgment in relation to the said claim was pending. The JBA therefore claimed that it was in the interests of justice, and it would save time and costs, if the AG's appeal was stayed pending the ruling of the Full Court.

[20] The JBA also relied further and/or alternatively on the grounds that (i) the JBA had not been served with the application for extension of time with the affidavit in support; (ii) it received the requisite notice from the registry of the Court of Appeal; and (iii) the AG's application had not been made promptly. Indeed the JBA claimed that the delay in doing so was excessive resulting in the parties participating in the hearing of the substantive matter before the Full Court in respect of which they were awaiting judgment. The JBA maintained that it would be severely prejudiced, as it had been by the order made by Dukharan JA on 4 September 2015, and further contended that the hearing of this appeal was purely academic, and only served to increase costs.

Additionally, the JBA also contended that the AG had not generally complied with all other relevant rules of the CAR.

[21] Miss Akuna Noble, an attorney-at-law, member of the JBA and associate of the firm of attorneys-at-law on the record for the JBA, swore to an affidavit in support of the application. She deposed that on 8 September 2015 the JBA's attorneys were served with "Notification to the Parties Regarding Application to the Single Judge of Appeal" which indicated that Dukharan JA had considered and granted the extension of time which had been requested by the AG. Miss Noble averred that prior to that notification, the JBA had not received any documentation from the AG in relation thereto, nor had there been any indication from the Court of Appeal that the application was going to be placed before a single judge for consideration.

[22] As a consequence, a letter was written by the JBA to the AG, on 8 September 2015, setting out their complaint. The Solicitor General responded on 16 September 2015, indicating that through inadvertence the JBA's attorneys had not been served with the application and affidavit in support thereof, and that the AG also had no knowledge nor had they expected that the application would have been placed before the single judge of appeal without proof of service. She informed, that it had never been the intention of her office to proceed without notifying the applicant and she suggested that:

> "...we collaborate in seeing how best we can regularize the matter and have the Respondents be given an opportunity to make submissions, if necessary."

[23] Miss Noble, through her own industry, obtained by way of facsimile transmission, copies of the documents from the registry of the Court of Appeal, and thereafter pursued a course of applying to set aside the order on several bases. She claimed that the AG had failed to disclose that the substantive matter had been heard before the Full Court in March 2015 some five months before the application for extension of time had been filed by the AG. It was the JBA's contention that the interlocutory applications at that stage were academic, did not further the administration of justice, and only served to increase costs. It was their further contention that the delay of three months in filing the application for extension of time was excessive and inordinate, and that no reasonable explanation for the delay had been given. Additionally, the affidavit in support of the application failed to disclose any realistic prospect of success on appeal.

[24] Miss Noble also complained of several breaches by the AG in that the Court of Appeal registry had informed that the application for extension of time filed by the AG had been made on the incorrect form. The record of appeal had also been filed without the notice and grounds of appeal, or the judgment of Sykes J, which were required to be included therein. Additionally, the skeleton arguments and chronology of events which initially had not been filed, and had therefore not been included in the record, were subsequently filed, but were filed without the requisite permission.

[25] On 3 May 2016, the AG filed an affidavit in response, sworn to by Miss Tamara Dickens, one of the attorneys representing the AG. She deposed that the failure to serve the application and the affidavit in support of the extension of time to file the skeleton arguments and the chronology was due to a "genuine error and oversight on

the part of the [AG]". She referred to the letter from the Solicitor General advising of the difficulty and apologising for the same and suggesting a way forward.

[26] She denied that the AG had failed to disclose material facts to the court below, and stated that she had indicated in the affidavit sworn to by her in support of the application for extension of time that the substantive matter had been ongoing in the court below when the skeletal arguments and the chronology were due in the Court of Appeal. Additionally, she deposed that it was stated in the chronology of events that the substantive matter had been heard in the week of 23 March 2015, before the Full Court, and that judgment had been reserved. She posited that the breaches referred to by counsel for the JBA, though regrettable did not display a "wholesale breach" of the rules. She stated that the judgment of Sykes J was attached to the notice and grounds of appeal filed in this court on 11 December 2011, and that the application had been filed as soon as was reasonably practical.

[27] Miss Dickens further contended that a stay of the appeal would be severely prejudicial to the Crown as it would render the appeal nugatory on the basis she claimed, that:

> "the issues raised in respect of injunctive relief and the power to grant same will not be addressed by the determination of the substantive matter being heard in the court below".

Indeed counsel insisted that:

> "the questions of law to be determined in this appeal are serious weighty issues of law which directly impact the

> Crown as they concern the right or power to grant an injunction staying the operation of legislation passed by Parliament."

[28] As a consequence she asked the court to refuse the stay of appeal and grant the application to extend the time to file the skeleton arguments and the chronology of events.

Submissions on behalf of the JBA

[29] Mrs Gibson-Henlin QC, for the JBA, referred to the challenge that the association had with POCA, which grounded the claim filed on 13 October 2014, referred to herein, namely sections 94 and 95 which she indicated created the offences of "failure to report suspected money laundering" and "tipping off" about money laundering disclosure or investigation. She referred also to the subsequent amendments which she submitted had brought attorneys within the legislation and mentioned specifically the establishment of the "competent authority" in POCA being the GLC, in respect of the legal profession. She specifically expressed the concern of the profession with regard to the functions of the competent authority, including the carrying out of inspections, the directions for attorneys to take measures for the prevention and detection of or reducing the risk of money laundering or terrorist activities, examining and taking copies of information or documents and sharing the same with other competent authorities.

[30] She pointed out that attorneys became subject to those amendments on 1 June 2014, and the Canons of the profession had been amended shortly thereafter so that the examinations by the GLC were slated to commence by 1 January 2015. As indicated

therefore, the JBA were impelled to raise the issues set out herein, in opposition to the legislation, mainly with regard to the need to preserve the independence of the Bar being part of the larger concept, counsel stated of fundamental justice and the rule of law. It was also of great concern that there was the likelihood of erosion of attorney client privilege and the attorneys' duty to keep the client's information confidential. There was no provision, Mrs Gibson-Henlin lamented, for the court to decide on the difficult question of legal privilege once raised, and so counsel argued there was no safeguard for the client. Queen's Counsel asserted, that it was the JBA's contention that the new POCA regime breached sections 13 and 16 of the Constitution of Jamaica.

[31] Queen's Counsel indicated that as the matters were of great importance to the profession and to the public as a whole, the JBA had filed suit and had obtained an injunction. The matter had been heard by the Full Court and they were awaiting the decision of that court. Queen's Counsel informed us that at the conclusion of that hearing, the court inquired as to the status of the injunction and were advised that it remained in place pending their decision in the matter, the purpose of which was to restrict the application of the legislation to attorneys-at-law.

[32] Queen's Counsel argued that "any ruling or consideration including an appeal that pre-empts the Full Court's consideration of the matter will have the effect of rendering that hearing nugatory, academic, result in a misallocation of the Court's resources and a blight on the proper administration of justice, and the Court of Appeal should not be invited to take such a step".

[33] Queen's Counsel submitted that the court should consider two main issues against that background; namely: (i) whether the order made by Dukharan JA on 4 September 2015 should be set aside and (ii) whether the appeal ought to be stayed pending the Full Court's ruling on the claim below and as a consequence, whether there should also be a stay on the filing by the JBA of its skeleton arguments.

[34] With regard to the first issue. Queen's Counsel submitted that the rules require that applications must be served and the JBA had not received any copy of the same which had been acknowledged by the AG and therefore the order made in those circumstances must be set aside.

[35] Queen's Counsel submitted on the second issue that the delay in proceeding on the appeal had resulted in prejudice to the JBA, as there had been no application for a stay of the hearing before the Full Court and the AG had participated in the hearings in the court below. The appeal, she submitted, was now academic. As a consequence, it would be a waste of the court's time and costs to challenge an interim order after the substantive matter had been heard, especially since counsel argued, as there would be some overlapping in respect of the issues to be resolved. Indeed Queen's Counsel contended that there would be an anomaly in respect of the arguments at this stage, with regard to whether there were serious issues to be "tried" before Sykes J, when the matter would now have been "tried" and the parties were awaiting the court's decision. The concern, Queen's Counsel stated was that there could be inconsistent rulings emanating from this court and from the Full Court below.

[36] Queen's Counsel further submitted that such an anomaly should be avoided by a stay of the appeal. Additionally, it was a more practical approach to do so, and in keeping with the overriding objective to ensure that the courts' resources were utilised properly, for if the provisions of POCA were struck down as invalid much time effort and costs would have been wasted in seeking to lift an injunction in order to preserve provisions in the legislation which may have been found to be invalid.

[37] Queen's Counsel submitted that the more practical approach would be to stay the hearing of the appeal and She relied on the dictum of Mangatal J in **Cable and Wireless Jamaica Ltd (trading as Lime) and another v Digicel (Jamaica) Ltd** Claim No HCV 00036 of 2009 delivered 9 June 2010, where Digicel sought to set aside an order joining Oceanic Digital (Claro) to the suit as a second claimant which was refused. Digicel appealed, but while that appeal was pending Digicel filed an application to strike out Oceanic's claim and for an order for summary judgement against it. Mangatal J took the view that the application for summary judgement should await the order of the Court of Appeal as her deliberations would potentially relate to issues between parties, in circumstances where it may be found that one of them should not have been there *ab initio.* As a result, taking a practical approach the learned judge ordered that the parties await the decision of the Court of Appeal on the issue as to whether joinder of Claro as a claimant was correct in the first place.

[38] Mrs Gibson-Henlin accepted that this court had jurisdiction to deal with the appeal, but submitted that the real question was whether, bearing in mind the overriding objective, one should proceed with the appeal when the Full Court was

seized of the matter. Learned Queen's Counsel argued that proceeding with this appeal pending the findings in that court would serve no useful purpose, for if the tainted sections of the legislation were struck down, the injunction would no longer be necessary. It was the contention of Queen's Counsel that "to proceed on a narrow and academic issue as to whether injunctions can be granted against the Crown would not be a proper use of the court's time, if the substantive issues were to be decided in [JBA's] favour".

[39] On the other hand, learned Queen's Counsel submitted, if JBA did not succeed in the court below the injunction would be discharged and there would be less need for the appeal in those circumstances.

[40] Learned Queen's Counsel reminded the court that the appeal was at a very early stage in its process. There had not been any case management conference and no date had been fixed for the hearing of the appeal. The parties were merely at the stage of filing skeleton arguments, so the submission ran, little time had been spent on the appeal as opposed to the several days of hearing of the matter in the court below. It was therefore submitted that this was an opportune time to stay the proceedings allowing a period for the decision in the court below to be delivered.

Submissions on behalf of the AG

[41] The AG had properly stated that she had no difficulty with the order of Dukharan JA being set aside as it had been obtained by way of genuine mistaken circumstances, as it was not the AG's intention to obtain an order having not served the application,

and without having submitted, and therefore in the absence of, any proof of service. The AG was desirous of the application for extension of time being considered by this court, but in any event, strenuously opposed the application for stay of the appeal. The Solicitor General referred to the chronology of events namely Sykes J's order made on 4 November 2014 granting the injunction pending the outcome of the hearing of the constitutional claim before the Full Court, notice and grounds of appeal filed 11 December 2014, record of appeal filed 9 January 2015, amended record of appeal filed 27 July 2015, the notice from the registrar under rule 2.5(1)(b)(ii) issued 23 February 2015 requiring the chronology and skeleton arguments which were filed on 29 June 2015. The extension of time was granted on 4 September 2015, by Dukharan JA and the application to set aside the order was filed 13 October 2015. She set out this chronology of events to demonstrate that the AG had acted with reasonable dispatch throughout the proceedings and that the delay in the filing of the application to extend time should be viewed in that light.

[42] The learned Solicitor General set out in detail the relevant legal framework for the application for extension of time beginning with rule 1.7 of CAR and which includes part 26 of the CPR. She relied on several well known authorities namely **Gerville Williams and others v The Commissioner of the Independent Commissioner of Investigations and another** [2014] JMCA App 7, **Peter Haddad v Donald Silvera** SCCA No 31/2003, Motion No 1/2007, delivered 31 July 2007 and **The Attorney General of Jamaica and another v Rashaka Brooks Jnr (A Minor) et al** [2013] JMCA Civ 16. She also explained the delay in relation to the application and

the merits of the same. I hesitate to deal with any of these submissions at this time as the AG conceded that Dukharan JA's order made on 4 September 2015 must be set aside and in any event the application for the extension of time on behalf of the AG was not properly before us. The affidavit of Tamara Dickens, filed on behalf of the AG on 14 July 2015, in support of the application which had been placed before Dukharan JA, stated that they were pressed for time as the Full Court hearing was going on at the same time when this appeal ought to have been prosecuted.

[43] With regard to the application for stay of the appeal, Miss Dickens deposed that the stay of the appeal would be highly prejudicial to the Crown, would render the appeal nugatory, particularly in light of the fact that the main issues raised in the appeal for injunctive relief, and whether the court had the power to grant the same, will not be addressed by determination of the substantive matter as those matters were not argued before the Full Court. The question of law to be determined in the appeal directly impacts the Crown, and the right and the power to grant an injunction staying the operation of legislation which had already been passed by Parliament.

[44] The learned Solicitor General asserted that the AG had a reasonable prospect of success on appeal and in any event the reasons and decision of this court in respect of the appeal will "provide significant guidance and serve to build jurisprudence of Jamaica on an issue for which there is no direct legal authority from our courts". Indeed, the learned Solicitor General insisted that:

> "The question of the right and power of the courts to grant an injunction, staying the operation of legislation passed by

> parliament and the ambit of that power is a novel and important point which demands judicial pronouncements from the highest sitting court in the land."

That is the basis on which she maintains that the appeal has merit.

[45] Mrs Foster-Pusey QC referred to **Charmin Blake et al v Alcoa Minerals of Jamaica Inc** [2010] JMCA Civ 31, a procedural appeal decided in this court where I set out some general principles in relation to the application for a stay of proceedings.

[46] Mrs Foster-Pusey accepted that in the application for stay of the appeal the court must ensure that steps be taken to ensure that there is proper use of the courts time and resources. The Solicitor General appeared genuinely concerned that if the JBA were to succeed before the Full Court, and even if they did not succeed, the injunction would fall away, and would be substituted with final orders from the court, which could result in the appellant being faced on appeal with the argument that no useful purpose would be served with proceeding with it. The learned Solicitor General indicated firmly that she did not agree with this contention, and argued that as the injunction would still stand as binding on the lower courts, it would leave the door open for other applications to be made seeking a stay of legislation which had already been passed.

[47] The Solicitor General therefore submitted that whatever the outcome of the substantive matter, the issue as to whether a party can obtain an injunction in circumstances where the legislation has already been passed remains an urgent matter to be determined by the courts and the appeal should be heard with dispatch. She conceded that there were certain issues, in the substantive matter, as well as in the

appeal, from the judgment of Sykes J which would overlap, but there was no other prejudice which could be experienced by the JBA.

[48] I do not think it would be appropriate at this time to canvass the detailed written submissions provided by the AG as this is not a decision in the appeal itself, but is a decision dealing with whether or not to grant a stay of the appeal relating to what the learned Solicitor General has described as "a ground breaking order," namely the grant of an injunction against the Crown. In relation to the first four grounds of appeal and in an effort to persuade this court that the appeal should not be delayed, she submitted that the issues were not argued before the Full Court and so the point of awaiting that judgment was unclear. She canvassed certain sections of the Constitution and the Crown Proceedings Act, and did a detailed comparison in order to demonstrate that the learned judge had erred when he found that the Constitution was a special document, and therefore the Crown Proceedings Act did not apply to the instant proceedings. She examined what are "civil proceedings" under the Crown Proceedings Act and having reviewed several provisions under that Act concluded that the Crown Proceedings Act "may well be applicable". The Solicitor General also detailed in her written submissions several authorities, and concluded that the learned judge had erred in exercising his discretion to grant an interim injunction where there was a constitutional challenge to POCA. However, most importantly, she made the statement that "in the unlikely event that the grant of an injunction against the Crown is to be contemplated in Constitutional claims, the time in respect of which that is expected to be done is at the final hearing of the Constitutional claim".

[49] As referred to in the judgment of Sykes J, the Solicitor General had made it clear in her written submissions that there were differing positions in the Canadian Charter and the Jamaican Charter with the latter not recognising the principles of fundamental justice. She therefore contended that the Canadian Constitutional provisions and case law on which the JBA had relied, were not applicable to the Jamaican Charter and circumstances, and could give no assistance whatsoever. The JBA, she claimed had also failed to appreciate that the provisions of the Jamaican Charter had not been breached at all by the provisions of POCA. It was her contention that the learned judge had not given sufficient regard to the evidence of Mr Sykes and the facts stated in his affidavit. She maintained that he had failed to give any regard to the FATF recommendations and the ultimate consequences of Jamaica's failure to comply with the same. She submitted that Sykes J had wrongly exercised his discretion in granting the injunction which is the main consideration on the appeal, as although he had used the correct test he had "failed to properly apply the evidence, and he had failed to give sufficient regard to the public interest consideration". Additionally, the Solicitor General submitted, he had failed to give due and proper regard to the provisions in POCA which give effect to, and protect legal professional privilege.

[50] As a consequence, the Solicitor General submitted in relation to the success of the appeal, that the learned trial judge had failed to give sufficient consideration to the overwhelming evidence of the public interest in favour of the anti money laundering laws remaining in place, and instead had focused on whether there were possible encroachments on fundamental rights.

[51] The learned Solicitor General thus concluded that the learned judge had failed to appreciate, when weighing the balance of convenience, that the public interest in protecting legal professional privilege was embraced in the legislative scheme. It was her serious concern that the learned judge had erred in suspending the entire scheme instead of utilising less drastic measures in protection of the JBA while preserving the will of Parliament.

Discussion and Analysis

[52] As indicated, the learned Solicitor General had conceded that the order made by Dukharan JA with regard to the extension of time to file skeleton arguments and the chronology of events would have to be set aside and the order to do so was accordingly made. It was clear that the application was meant, and is required, to be served. It was not served through inadvertence and the order was made erroneously without any notification or proof of service. As also indicated, I refrained from making any comment on the amended application for extension of time filed by the AG, as it was not properly before us (although the affidavit of Tamara Dickens and submissions on the point were provided), and in any event, bearing in mind the approach I intend to make on this application, nothing more need be said in relation to that application at this time.

[53] This court does have the power to stay an appeal or to stay proceedings generally. The learned authors of Halsbury's Laws of England 2015, Volume 11, paragraph 1039 stated that:

> "A stay of proceedings arises under an order of the court which puts a stop or 'stay' on the further conduct of the

> proceedings in that court at the stage which they have then reached, so that the parties are precluded thereafter from taking any further step in the proceedings. The object of the order is to avoid the trial or hearing of the claim taking place, where the court thinks it is just and convenient to make the order, to prevent undue prejudice being occasioned to the opposite party or to prevent the abuse of process.
>
> The court's power to stay proceedings may be exercised under particular statutory provisions, or under the Civil Procedure Rules or under the court's inherent jurisdiction, or under one or all of these powers, since they are cumulative, not exclusive, in their operation."

Additionally, under the court's general powers of management stated in rule 1.7 of the Court of Appeal Rules (CAR), the court may adjourn or bring forward a hearing to a specific date (1.7(2)(c)); decide the order in which issues are to be heard (1.7(2)(d)); direct a separate appeal of any issue (1.7(2)(e)); hear two or more appeals on the same occasion (1.7(2)(f)); take any other step, give any other direction or make any other order for the purpose of managing the appeal and furthering the overriding objective (1.7(2)(n)); and rule 2.15 of CAR incorporates part 26 of the CPR, which sets out the power of the court to stay the whole or part of any proceedings generally or until a specified date or event (26.1(2)(e)). It is clear from a review of these provisions that this court has the power to direct its proceedings, which also includes a stay of the hearing of an appeal in keeping with the overriding objective.

[54] The learned Solicitor General submitted that the first four grounds of appeal related specifically to the appeal from the judgment of Sykes J and would not benefit from and/or be addressed by the decision of the Full Court. As indicated, these grounds relate to issues concerning whether an injunction can be granted against the Crown in

constitutional claims; whether section 16 of the Crown Proceedings Act is applicable to such claims, particularly in Jamaica which has a written Constitution; and whether an injunction can be granted restraining the applicability of legislation passed by Parliament prior to the hearing of the claim.

[55] It is true that those grounds appear to relate to very narrow issues dealing with the grant of injunctions against the Crown. However, the remaining grounds have not been abandoned, and essentially cover matters relating to (i) the provisions of the Constitution and whether they had been infringed, (ii) the question of irreparable harm once the legislative provisions and the GLC guidelines had been imposed; and (iii) the balance between the administration of justice and the legal professional interest, particularly as to whether it had been demonstrated that the public interest embraced the principles of legal professional privilege in the legislation.

[56] These latter grounds numbered 6-12, clearly address matters which incorporate some issues to be determined by the Full Court based on the declarations sought on the fixed date claim form. There is no question that in assessing whether there was a serious question to be tried, and where the balance of convenience lay, that the learned judge examined the effect of the legislation on the principles of legal professional privilege and the independence of the Bar. Indeed, these issues formed the basis of the challenge to the legislation and were referred to in great detail in the judgment of Sykes J and will be the subject of the deliberations of the Full Court as it grapples with whether the provisions of POCA and the GLC guidelines fall afoul of the provisions in the Constitution.

[57] There is in my view considerable overlap, and if the appeal against Sykes J's judgment is split up so that only certain issues are dealt with at this time, the court may then be constrained to deal with these same issues at a later time depending on when the Full Court gives its rulings, and whether either party wishes to appeal these rulings. So, the appeal would be conducted in stages, which seems counter-productive and is not the best use of the court's time and resources.

[58] In the alternative, the court could proceed to hear the entire appeal now which may either influence the ruling in the court below or which may result in inconsistent rulings, and this court may then have to deal with all the issues again in relation to any potential appeal from the decision of the Full Court, which also does not appear to be the best use of the court's time and resources. In **Adoko v Jemal** (1999) Times, 8 July May LJ stated that:

> "..modern litigation culture required parties to litigation to cooperate with the court to ensure that litigation was conducted fairly and economically. The court must as far as practicable allot an appropriate share of the court's resources to each case."

[59] In **Stephenson (SBJ) Ltd v Mandy** (1999) Times, 21 July, in dealing with whether or not to hear an interlocutory appeal of an order restraining the defendant from breaching restrictive covenants relating to confidential information in his contract of employment, when a date for the trial of the issues was already fixed to be heard in some two weeks time, Nourse LJ in agreeing with the submission of Mr Browne-Wilkinson QC, that it would be entirely pointless and contrary to the objectives of the Civil Procedure Rules, stated that:

> "it was not a good use of the court's resources. It would be quite wrong in the circumstances to go into the merits of the appeal at that time."

There is no way of knowing at this time, whether there will be an appeal from the Full Court's ruling, but bearing in mind the importance of the matters before the court, one should expect that the judgment in relation thereto should be delivered with some dispatch.

[60] The learned Solicitor General had also indicated that it may be that the court could decide that an injunction could be granted but that it should really only be done at the end of the hearing of the substantive matter on its merits. In keeping with that submission, the injunction could be lifted at the end of the first hearing of the four grounds of appeal and then reimposed thereafter when further aspects of the case are considered, which would seem untenable also, and should be frowned upon by these courts. Such uncertainty in relation to compliance with fairly recently implemented legislation would not be acceptable in my view.

[61] I must say that I agree with the powerful dictum of Mangatal J in **Cable and Wireless and another v Digicel (Jamaica) Ltd** referred to by Mrs Gibson-Henlin, where the court found it prudent to adopt a practical approach in order to comply with the overriding objective of dealing with cases justly. She stated at paragraphs 14 -18 of the judgment:

> "14. ...In the Appeal which is before the Court of Appeal and yet to be considered, the relevant issue will be whether or not the 2nd Claimant is a proper party to this Law Suit in the first place. It does not seem to me that if I embarked on

this summary judgment application, it would be implicit that the 2nd Claimant is a proper party to the Law Suit, but that the question is whether this party properly before the court has a claim which has no real prospects of succeeding. In so far as the Defendant's application is alternatively for the striking out of the Second Claimant's Statement of Case, on the ground that it either is an abuse of the process of the Court or discloses no reasonable cause of action, in my judgment, it would also be implied that the Second Claimant is a proper party but that it's claim maybe faulty or flawed. In this case, I am not therefore concerned with whether the issues before the Court of Appeal are the same as those involved in the instant application but rather with the interrelationship of the respective issues involved.

15. I am of the view that the court should in keeping with the overriding objective take a practical approach to the matter, and concentrate on the essence of the considerations involved.

16. I am going to test the matter this way. If I go ahead and hear the summary judgment application, I would be hearing an application in respect of a party which I would have to assume is properly before the Court, but which assumption the Defendant/Applicant is itself challenging in the Court of Appeal. If the Defendant is serious about the Appeal, (and indeed, Mr. Beswick in his submissions states that the Appeal is of extreme importance and deals with a fundamental issue), what would be the rationale for the Court charging ahead to hear a summary judgment application against a party that may improperly be before it? Obviously, as a matter of logic, it makes more sense not to consider the question whether a claim has a real prospect of success before a consideration takes place as to whether there should be a claim by that party in this suit in the first place. The issue of whether a party is a proper party to a Law Suit is a fundamental question that logically and chronologically arises before the question of whether that party has a claim with real prospects of success. Mr. Beswick has not indicated any intention of withdrawing this Appeal. If the Defendant's Appeal were to succeed, that would mean that the Second Claimant Claro would not be a party in the Suit ab initio. In those circumstances, the consideration of whether or not summary judgment should be entered against the Second Claimant would indeed, as Mr

Robinson submits, be an exercise, in futility. Logically, the necessity for the Supreme Court to consider whether the Defendant is entitled to summary judgment against Claro, should only arise if the Appeal fails. To do otherwise would be to "put the cart before the horse", because if the Second Claimant is not a proper party to the Suit, then it is not entitled to have any claim at all, whether with or without prospects of success.

17. It seems to me that Mr. Beswick is focusing only on his client's right to apply for summary judgment, which is not denied, and on the effect for his client if the summary judgment application were to succeed. If the application for summary judgment were to fail and the Appeal were to succeed, would not the time and costs incurred in arguing, hearing and determining the summary judgment application have been wasted? Having seen the papers and many bundles filed in relation to the summary judgment application, I think it is quite probable that the hearing would occupy several days and I would likely have to reserve my judgment. If in the interim the Court of Appeal were to allow the Second Defendant's Appeal, then all of that judicial time would have been wasted.

18. Learned Counsel Mr. Beswick, has, I fear, only considered one set of outcomes. However, as judge, it is my duty to consider all of the possible outcomes and consequences. The factual situation is that the Appeal has not been withdrawn; it is alive and extant. In my judgment, hearing the application for summary judgment at this time would not be the best use of the Court's resources. It seems to me that hearing this application which it is not necessary for the Supreme Court to hear unless the Appeal fails, (and it has not yet failed and may not fail), will take up time, thought, consideration, and other judicial and court resources that could have been allocated to another matter. These are scarce resources with attached opportunity costs for other litigants and the justice system. The Supreme Court and the Court of Appeal are all part of court system. The proper use of the combined Court resources points in the direction of this Court waiting and deferring to the outcome or the determination of the Court of Appeal."

[62] I would say that there is nothing preventing this appeal being heard once the Full Court's decision has been given. Bearing in mind the issues in dispute, it would suggest that whichever way the court concludes, an appeal may be filed. In that event all issues with regard to the attorneys' challenge to the provisions of the POCA and the GLC guidelines infringing the provisions of the Constitution could be heard together. Discrete issues as to whether an injunction can be granted against the Crown in particular situations, namely, in constitutional claims, in circumstances where the challenge is to certain aspects of legislation which had been passed before the claim was filed could also be canvassed.

Conclusion

[63] I am therefore of the view that the application should be granted and the appeal should be stayed, but in an effort to keep the matter under the suzerainty of the courts, ensuring that the process is monitored and not allowed to languish in the court system, I would recommend that the appeal and the application for extension of time be placed before the court early in the Michaelmas term. It is pellucid that the JBA would not wish to have to file any arguments pursuant to rule 2.6 of CAR at this time. In my view, there should be a review and consideration on the way forward, as to the hearing of the appeal of Sykes J's decision and the AG's application for extension of time on 30 September 2016, depending on the status of the ruling by the Full Court. The question of whether the stay of the appeal should be lifted can be considered then. I would also order that the costs of this application should be costs in the appeal.

F WILLIAMS JA

[64] I have read in draft the judgment of my sister Phillips JA. I agree with her reasoning and conclusion and have nothing to add.

EDWARDS JA (AG)

[65] I too have read the draft judgment of my sister Phillips JA and agree with her conclusion.

PHILLIPS JA

ORDER

1. The application filed by the Jamaican Bar Association on 2 May 2016, is granted.
2. The order made by Dukharan JA on 4 September 2015, is set aside.
3. The appeal of Sykes J's decision made on 4 November 2014 is stayed until further order of this court.
4. There shall be a review and consideration of whether to hear the appeal against Sykes J's decision and the Attorney General's application for an extension of time on 30 September 2016.
5. Costs of this application to be costs in the appeal.