[2019] JMSC CIV 257

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU2019CV04098

BETWEEN	**FRITZ PINNOCK**	**FIRST APPLICANT**
AND	**RUEL REID**	**SECOND APPLICANT**
AND	**FINANCIAL INVESTIGATIONS DIVISION**	**RESPONDENT**

IN CHAMBERS

Hugh Wildman, Faith Gordon and Lois Pinnock for the applicants

Richard Small and Cheryl-Lee Bolton for the respondent

December 18 and 24, 2019

Judicial Review – Application for leave to apply for judicial review – Financial Investigations Divisions Act - Section 2, 3, 4, 5, 8, 9, 10, 15, 17, 19, 20, 28, 31 of the Financial Investigative Divisions Act – Authorised person under section 2

SYKES CJ

The application

[1] This is an application for leave to apply for judicial review by Professor Fritz Pinnock and Mr Ruel Reid who have been arrested and charged with a number

of offences. Both gentlemen assert that they were arrested and charged by the Financial Investigations Division ('FID') which was established by section 4 of the Financial Investigations Division Act ('FIDA'). The applicants say that the FID does not have the power to arrest and charge anyone. They say that by arresting both applicants, the FID acted outside of its statutory powers and therefore what it did was nullity. This position led the applicants to seek leave for judicial review. The applicants are seeking declarations. The declarations sought are:

(1) under FIDA the FID

(i) is a purely investigative body;

(ii) does not have the power to charge the applicants with any offence arising from any investigation it conducts;

(iii) does not have the power to seek and obtain a fiat from the Director of Public Prosecutions ('DPP');

(iv) the police officers designated by the Commissioner of Police ('CP') to be members of the FID are not authorised under FIDA to institute charges;

(v) the charges instituted by the FID are illegal, null and void and of no effect;

(vi) the proceeding instituted by the FID before His Honour Mr Vaughn Smith, Senior Judge of the Parish Court are illegal, null and void and of no effect.

[2] The applicants are also seeking:

(a) an order prohibiting the FID from taking steps to seek and obtain a fiat from the DPP to prosecute both applicants;

(b) an order of certiorari to quash the charges brought against them;

(c) a stay of proceedings.

[3] Mr Robin Sykes, Chief Technical Director ('CTD') of the FID, and Inspector Brenton Williams, Director of the Constabulary Financial Unit ('CFU') within the

Counter Terrorism Organised Crime Investigation Branch ('C-TOC') of the Jamaica Constabulary Force ('JCF'), say that is it not accurate to say that (a) charges were instituted by the FID and (b) the applicants were arrested and charged by the FID. The arrest and charge, it is said, were instituted by members of JCF using their powers under the Constabulary Force Act ('CFA') 'and other related legal instruments.'

[4] The court wishes to observe that it is not appropriate for a state agency to decline to state in full the legal power that it claims to have to do whatever it claims to have been lawfully done. This is especially so when the challenge to its power involves the freedom of the person. The court does not understand what is meant by 'other related legal instruments.' While the context is different the sentiment behind the regret expressed by Lord Walker in **Belize Alliance of Conservation Non-Governmental Organisations v Department of the Environment of Belize and another (Practice Noted)** [2003] 1 WLR 2839 **[15]**, **[28]** regarding non-disclosure by the state is of value. The court ought to have been told by Mr Robin Sykes and Inspector Williams what were these 'other related legal instruments' under which it is alleged that both applicants were arrested.

[5] They say that the applicants were arrested by the police using powers given to them in their capacity as police officers. If this turns out to be the case, then the application must be dismissed because the factual foundation for judicial review is not present and so there would be no need to determine whether the legal test has been satisfied.

[6] Mr Richard Small, for the respondent, says that the assertion of Mr Sykes and the Inspector that the applicants were arrested by JCF members acting as JCF members under the CFA has not been refuted by the applicants. The court observes that this is the very point in issue, namely, whether the applicants were arrested by persons acting under the FIDA or under other statutory powers and so a mere assertion one way or the other raises factual questions. Fortunately, in

this case, the factual issue can be resolved based on the material provided and the conclusions arrived at by the court. There is no need to determine the credibility of any of the deponents.

[7] Mr Wildman asserts that the powers under FIDA are not available to any member of the JCF at large. Such powers can only be exercise by a limited class of police officers. This limited class comprises those who are designated under section 2 of FIDA as authorized officers. One of the major premises of Mr Wildman's submission is that no JCF member can use the powers of FIDA unless he or she is designated as an authorized officer under section 2. Learned counsel also states that an inference to be drawn from this major premise is that once under FIDA the police officers cannot utilise any power they have as JCF members in respect of investigations under FIDA. According to counsel, the police officers who arrested and charged the applicants were authorized officers and in that capacity had no power to arrest and charge under FIDA. Any arrest and charge by these police officers are nullities.

[8] How did Mr Wildman get to this conclusion? Learned counsel examined a number of provisions of FIDA and submitted that such an examination yielded the major premises just stated. The court turns to the provisions of FIDA to see if they support Mr Wildman's propositions and conclusion.

The statute

[9] Mr Wildman referred the court to sections 2, 3, 5, 16, 17 (1), (2), (3), (7), (9), 18, 24 (5), (6), 29 (5), 30, 31 (1), (2), (2) (c), 31 (3), (6), (6) (a), (b), (c), (8), 32 (1), (a), (b), (c) and (d).

[10] Section 4 establishes 'a department of Government to be known as the [FID].' Section 3 informs that the object of FIDA is to establish a department '*with sufficient independence and authority to effectively deal with the multidimensional and complex problem of financial crime and confer upon it the responsibility to -*

(a) investigate all categories of financial crime;

(b) collect information and maintain intelligence data-bases on financial crimes;

(c) maintain an arm's length relationship with law enforcement agencies and other authorities of Jamaica … with which it is required to share information;

(d) exercise its functions with due regard for the rights of citizens.'

[11] Section 3 does not indicate what the functions of FID are. That is found in section 5.

[12] Section 5 says:

(1) Subject to the provisions of this Act, the Division shall

(a) advise the Minister on matters of policy relating to the detection, prevention, prevention and control of financial crimes;

(b) collect, request, receive, process, analyse and interpret –

(i) information relating to financial crimes; and

(ii) transaction reports and any other reports made to or received by the Division under this Act or any other enactment;

(c) subject to section n10, take such action as it considers appropriate in relation to information and reports referred to in paragraph (b);

(d) where the [CTD] considers it necessary, to disseminate information and reports referred to in paragraph (b) to –

(i) the competent authority;

(ii) the Attorney General, the Commissioner of Police, any of the Revenue Commissioners under the Revenue Administration Act, the Commission for the Prevention of Corruption … or the Director of Public Prosecutions;

(iii) any other body designated by the Minister for the purposes of this paragraph;

(e) investigate, or cause to be investigated –

(i) at the request of the Director of Public Prosecutions, the Commissioner of Police or any other public body; or

(ii) on the initiative of the [CTD]

any person who is reasonably suspected of being involved in the commission of any financial crime;

(f) promote public awareness and understanding of financial crimes, and the importance of their elimination from the society;

(g) formulate and implement management guidelines and policies and an annual plan approved by the Minister for the control and prevention of financial crimes;

(h) establish a database and databank for the purpose of detecting and monitoring financial crimes;

(i) engage in the compilation and publication of statistics on –

(i) reports that made to it under this Act or any other enactment;

(ii) the prosecution of financial crimes;

(iii) investigations carried out by it;

(iv) the conviction of persons for financial crimes;

(v) judicial orders in connection with proceedings relating to financial crimes;

(vi) such other matters as the [CTD] may consider appropriate;

(j) manage, safeguard, maintain and control any property seized or restrained under this Act or seized, restrained or forfeited under any other enactment, in connection with proceedings relating to financial crimes;

(k) carry out such other investigation and perform such functions and enter into any transactions that –

(i) are assigned to it under this Act or any other enactment;

(ii) in the opinion of the [CTD], are necessary or incidental to the proper performance of its functions

(2) Subject to the provisions of this Act, the Division may, for the purpose of carrying out its functions-

(a) provide and receive information relating to the commission of a financial crime;

(b) provide information on typologies, statistics and other materials relating to financial crimes to –

(i) public bodies; and

(ii) such other persons as the [CTD] considers appropriate

(c) after consultation with the competent authority, give guidance to financial institutions and designated non-financial institutions regarding their obligations under this Act or any other enactment; and

(d) consult with and seek assistance from such persons as the [CTD] considers appropriate.

[13] The functions are set out. When it comes to investigations section 5 (1) (e) is restrictive. The FID can investigate or cause to be investigated at the request of the DPP, CP or on his own initiative. The threshold to be met is that the target must be reasonably suspected of being involved in the commission of a financial crime. Any modification to this is found in section 5 (1) (k) where the FID can carry out such other investigations as are assigned to it under FIDA or any other enactment. It can perform other functions as are necessary or incidental to the proper performance of its functions. This latter provision is simply the statutory formulation of the administrative law principle that states that when a power is granted to a statutory functionary then anything that is necessary to be done to

exercise that power is implied in the grant of power. It is not a licence to do anything that pops into the mind of the CTD.

[14] Financial crime is defined as any offence involving money or other benefits and includes any offence involving fraud, dishonesty, money laundering or the financing of terrorist activities (section 2).

[15] None of these provisions of this statute or any of the other provisions in the statute confer a power of arrest and charge on the FID. To arrest and charge is not a necessary power to have in order to exercise the power to investigate. Interestingly, the statute does not explicitly say what the FID is to do with the fruit of its investigation. The statute does not say that it must hand over the fruit of investigation to anyone.

[16] A reasonable argument could be made that if the FID is asked by the persons named in section 5 (1) (e) then inferentially it is to hand over the fruits of its investigation to the person who requested the investigation to be done. This need not be resolved in this case.

[17] Mr Wildman took the view that section 5 (1) (d) empowered the CTD to disclose his investigation to the persons or entities named there. This was counsel's attempt to find a solution to the question of what the FID is to do with its investigation of a financial crime. This is over generous because section 5 (1) (d) states that information and reports which can be disseminated are those which are within section 5 (1) (b). Section 5 (1) (d) does not authorise the FID to hand over the fruits of its investigation into a financial crime to anyone. Section 5 (1) (d) of FIDA is not referring to investigation into a financial crime but is directed to the power to collect, collate, interpret information about financial crime and transaction as well as other reports in order to assist in the development of appropriate policy to combat financial crime. In so doing the FID may develop material, analysis or typologies that are helpful to the persons named in section 5 (1) (d). This court concludes that Mr Wildman's submission on section 5 (1) (d) needs modification to the extent that section 5 (1) (d) is not the provision that

enables the FID to disclose its investigations into a financial crime to the persons named in that provision. Despite this, Mr Wildman's general point is well founded when he says that the FID is at best an investigative body empowered to use the investigative tools under FIDA to investigate financial crime.

[18] At this point section 3 must be borne in mind. It is this court's view that when sections 3 and 5 are read it is fairly obvious that the FID is intended to be the government's repository of information concerning the state of financial crime in Jamaica even if it never conducts a single investigation. The FID can request, collect, collate, process and analyse information relating to financial crime. This means that it can collect and analyse data relating to frequency, type, geographical location and any other characteristic about financial crime that it considers necessary. By doing these activities the FID places itself in a position to advise the Minister on 'matters of policy relating to the detection, prevention and control of financial crime' and duties such as promoting public awareness of financial crime. In effect, the FID is to become the expert body on financial crime in Jamaica. It accomplishes this by data that is collected, collated and analysed. It is to see if there are patterns to financial crime generally or particular types of financial crimes. It is to detect trends where it exists. The trend may show that a particular type of financial crime is being committed in a particular geographical location. The trend may reveal a pattern that shows that a specific type of financial crime is being committed in relation to the revenue authorities or customs department. Out of this work the FID may pass on information using section 5 (1) (d) as the gateway.

[19] This conclusion is supported by the fact that one of the entities to which communication can be made is the competent authority. Competent authority is defined in section 2 of FIDA in this way:

> *Competent authority means the entity from time to time authorised by the Minister, by order published in the Gazette for the purposes of this Act, to -*

(a) monitor compliance, with the obligations imposed by law for the prevention of financial crimes, by businesses in the regulated sector; and

(b) issue guidelines to businesses in the regulated section regarding effective measures to prevent financial crimes.

[20] Regulated sector is not defined in FIDA. What is clear though is that the definition presupposes that there is an entity that oversees a sector that is regulated by the oversight body. Where such a body exists, the FID may share information arising from its collection and analysis of information on financial crime with that body.

[21] The court now turns to the FIDA provisions that provide for investigative tools. Mr Wildman also submitted that when the FID is carrying out investigations using the powers under FIDA ordinary JCF members cannot use those powers themselves. He submitted for any JCF member to use those powers they would first have to be authorized officers under section 2 of FIDA. When learned counsel said that JCF member are strangers to the powers under FIDA the court understood him to mean what has just been stated. The court will look at the investigative powers under the statute.

[22] Many of the provisions to which Mr Wildman referred are located in Part III of FIDA under the heading 'Enforcement.'

[23] Sections 16 to 19 of FIDA cover production (s 17 (3) (a)), inspection order (s 17 (3) (b)) or interrogation orders (s 17 (3) (c)). These are intrusive orders that can only be granted by a Judge of the Supreme Court or a Judge of the Parish Court (section 17 (1)). Section 17 (1) states that where the CTD 'has reasonable grounds for suspecting that a person has possession or control of any information, book, record or document which is relevant to an investigation of a financial crime, an authorized officer may apply… for an order under subsection (3).'

[24] The application for any of the orders must be supported by an affidavit stating the grounds on which the application is made. That is to say the affidavit must state

the facts relied on in support of the application (section 17 (1), (2)). The application for a production, inspection or interrogation order may be made by an authorized officer (section 17 (1)).

[25] From section 17 (1), the relevant suspicion is that of the CTD and not anybody else's. The authorized officer, in this case, is simply the person making the application pursuant to the CTD's suspicions. Needless to say the suspicion must be reasonable. If the reasonableness or otherwise of the suspicion is to be determined by the court, then the basis of the suspicion must be disclosed in the application. It is for the court to determine whether the suspicion meets the legal standard. If the basis for the suspicions is not disclosed, there is no material before the judicial officer for a determination of whether the CTD's suspicion is reasonable. The adjective 'reasonable' imports an objective standard that must be met. If the CTD does not state the basis for his/her suspicion or if it is stated but it is not found to be reasonable then no production, inspection or interrogation order can be granted. The CTD cannot be the judge of whether his suspicion is reasonable and so must disclose the basis of his/her suspicion to the judge hearing the application.

[26] The court digresses to mention section 9 (1) which states that the CTD may delegate in writing the exercise of any function conferred upon him by FIDA. There is no principle of delegation that permits the CTD's suspicion to be delegated to anyone. The statute does not allow any other person's suspicion to be the relevant suspicion under section 17 (1).

[27] Parliament excluded a Justice of the Peace as being able to make any of these orders found in section 17 (3). Judges must be aware that under the provision they are being asked to grant a significant permission to the state to have produced, have sight of or ask questions relating to confidential documents information. Such permission should only be granted if the application meets the statutory standard. There must be no watering down or accommodation of applications that fall short. The target is not present to make arguments against

the issuing of the orders. Full, complete and accurate disclosure must be made to the judge so that the judge can make an informed decision. Any information that tends to show that order should not be granted must be disclosed. In effect, these applications impose a high duty of candour on the applicant. The judges then are the gatekeepers and nothing must enter or pass through the gate unless the standard is met. Any other approach undermines the rule of law. As Lord Hughes observed in **Re Assets Recovery Agency (Jamaica)** (2015) 85 WIR 440 at **[21]**:

> *The role of the judge is crucial. Moreover, the duty of the applicant to the court is of great importance. Applications of this kind will normally be made ex parte. All ex parte applications impose on the applicant the duty to disclose to the judge everything which might point against the grant of the order sought, as well as everything which is said to point towards grant. That is especially so when, as here, the financial institutions may well have little interest beyond ensuring that anything they are required to do is covered by the order of the court, whilst the persons whose affairs are under investigation may not find out about the order until long after the event. The duty of the applicant in such circumstances is, in effect, to put himself into the place of the bank, but also of the person whose affairs are under investigation, and to lay before the judge anything which either could properly advance as reasons against the grant of the order sought. The role of the judge is to ensure that the order is justified.*

[28] Lord Hughes was referring to customer information order under the Proceeds of Crimes Act ('POCA') but his Lordship's observations apply with full force to ex parte applications generally and under FIDA.

[29] Regarding the legal test of reasonable grounds for suspecting under FIDA Lord Hughes' observation on the expression 'reasonable grounds for believing' under POCA applies with full force once 'believing' is replaced with 'suspecting.' His Lordship said at **[19]**:

> ***[19]*** *Reasonable grounds for believing a primary fact, such as that the person under investigation has benefited from his criminal*

> *conduct, or has committed a money laundering offence, do not involve proving that he has done such a thing, whether to the criminal or civil standard of proof. The test is concerned not with proof but the existence of grounds (reasons) for believing (thinking) something, and with the reasonableness of those grounds. Debate about the standard of proof required, such as was to some extent conducted in the courts below, is inappropriate because the test does not ask for the primary fact to be proved. It only asks for the applicant to show that it is believed to exist, and that there are objectively reasonable grounds for that belief. Nor is it helpful to attempt to expand on what is meant by reasonable grounds for belief, by substituting for 'reasonable grounds' some different expression such as 'strong grounds' or 'good arguable case'. There is no need to improve upon the clear words of the statute, which employs a concept which is very frequently encountered in the law and imposes a well-understood objective standard, of which the judge is the arbiter. Reasonable belief in the presence of stolen goods in premises was the historic test for the grant of a search warrant at common law: see Chic Fashions (West Wales) Ltd v Jones [1968] 1 All ER 229 at 233, [1968] 2 QB 299 at 308 per Lord Denning. The same test is made the condition for the exercise of several police powers under ss 50B, 50E and 50F of the Constabulary Force Act 1935, just as it is typically the condition for English powers of arrest (see s 24(2) Police and Criminal Evidence Act 1984). Nor is its use confined to matters of criminal procedure: see for example s 2(1) of the Misrepresentation Act 1967, establishing a right to damages in civil claims arising out of contracts.*

[30] Sections 20 to 27 govern restraint orders. Similar to the production, inspection and interrogation orders, section 20 (1) requires that the CTD ‘has reasonable grounds for suspecting’ the things enumerated in the provision. Identical reasoning applies here regarding the suspicion. It is the CTD’s suspicion that grounds the application and not the suspicion of anyone else. A naked assertion of fact without supporting evidence will not do. Section 20 (2) states that the application may be made without notice and shall be in writing.

[31] So important is the specificity of the statute that it actually states that the authorized officer applying for the production/inspection/interrogation order is to

be named in the order (section 17 (4)). This reinforces the point made by Mr Wildman that these powers under FIDA are not available to JCF members generally but to the restricted class who are authorized officers and must be so designated by the CP.

[32] The restraint order here is not the usual kind found in proceeds of crime statutes but the kind that restrains completion of transactions or dealings relating to property or restrains a financial institution from carrying out a financial transaction or other financial dealings of any kind of with a person. This is a very serious interference with freedom. The threshold for interference of this kind must necessarily be rigourous.

[33] Unsurprisingly, only a Judge of the Supreme Court can grant a restraining order under FIDA. The Parish Court Judge has no such authority under FIDA. Here we see that Parliament, when dealing with investigative tools such as production and inspection orders enables a Supreme Court Judge or a Judge of the Parish Court to grant such orders, when it comes to the restraining order such power is limited to the Judge of the Supreme Court.

[34] Another point of contrast between the production/inspection/interrogation order on the one hand and the restraint order on the other is now highlighted. It is to be noticed that in respect of production/inspection/interrogation order the CTD is identified as the person who must have the suspicion but an authorized officer is empowered to make the application. In respect of the restraint order, the CTD has the suspicion and it is the CTD that is named as the person to make the application. This deliberate shift in who may actually make the application was not accidental but deliberate and must mean something.

[35] Sections 28 to 30 apply to account monitoring orders. Only a Judge of the Supreme Court can grant this order. An authorized officer may apply for this order. The order can only be grounded if there are reasonable grounds for suspecting the matters set forth in section 28 (2). The grounds of the suspicion must be stated and in this case it must be the suspicion of whomever is applying.

[36] Section 28 as noted earlier covers account monitoring orders. An authorized officer may apply under FIDA for one. Since authorized officer includes JCF members designated by the CP it follows that any JCF member not authorized by the CP under section 2 of FIDA is not an authorized officer under section 28. This reinforces the point made by Mr Wildman that the FIDA powers are not available to any JCF member. Such powers are only available to those JCF members designated under section 2 by the CP.

[37] Section 29 (5) imposes a non-disclosure obligation on the authorized officer. He or she cannot disclose the existence of such an order except in the circumstances specified.

[38] The court now comes to section 31. Under that provision only an authorized officer can apply for a warrant. This warrant can only be had in in circumstances where (a) a person has committed a financial crime and (b) the book, record or other document would be available under a section 17 production/inspection/interrogation order.

[39] Reference has been made to authorize officer. It is defined in section 2 as:

> (a) the CTD;
>
> (b) any officer of the Division who is authorised as such by the CTD for the purposes of this Act;
>
> (c) any member of the JCF so designated by the CP.

[40] From this, the CTD has no power to designate police officers as authorized officers. That is the exclusive domain of the CP. Until the JCF member is made an authorized officer by the CP he/she is in fact a stranger to the investigative powers under FIDA. The JCF member cannot use any of those powers.

[41] Reference must also be made to section 3 (c) which states that the FID is to 'maintain an arm's length relationship with other law enforcement agencies and other authorities in Jamaica … with which it is required to share information.' This

is designed to support the 'sufficient independence and authority' of the FID. It is also designed to prevent other law enforcement agencies from having control over the FID whether at policy or operational levels. The FID must act independently while dealing with the other Jamaican law enforcement agencies.

[42] Mention must now be made of sections 9 and 10 in order to determine whether those sections enable the CTD to delegate any of his or her functions. A brief reference to section 9 was made already. Section 9 occurs in the part of the statute that deals with administration of the FID. Section 8 states that:

> *For the due administration of the [FID] there shall be appointed*
>
> *(a) a [CTD], who shall be responsible for the day-to-day administration and operation of the Division and*
>
> *(b) such other officers and agents as may be necessary for the efficient operation of the Division.*

[43] Section 9 (1) speaks to the delegation, in writing, of any function of the CTD under FIDA. Section 9 (2) states that such delegation shall not prevent the CTD from exercising the delegated function. Section 9 (3) provides that any act done by or in relation to the delegate in exercise of the delegated function shall have same effect as if done by CTD. Section 9 (4) states that in exercising any delegated power, the functionary so enabled is subject to the obligations and liability of the CTD.

[44] Section 10 (1) indicates that every person having an official duty or being employed in the administration of the FIDA shall 'regard and deal with as secret and confidential, all information, books, records or documents relating to the functions of the Division.' Section 10 (2) insists that any person who had an official duty or was employed in the administration of the FIDA shall maintain such confidentiality of all information, books, records or other documents relating to the functions of the FID. Section 10 (3) extends the secrecy cover to persons who received communication pursuant to the statute. Such persons 'shall regard and deal with such information as secret and confidential.' Section 10 (4) creates

safe-harbour provisions. If the material covered by section 10 is communicated in the circumstances outlined in section 10 (4) then no criminal offence is committed.

[45] Section 10 (5) says that information 'includes information from which a person can be identified and which is required by the Division in the course of carrying out its functions.'

[46] The power given to FID to apply for production/inspection/interrogation, restraint and account monitoring orders is to be exercised in furtherance of its functions stated in section 5 or in furtherance of any power conferred by any other statute. It seems to this court that any authorized officer who is exercising any of these powers must necessarily be bound by the provisions of the statute. What the court is saying is that the powers in FIDA are given exclusively to the FID to use in carrying out its functions. JCF members have no power under FIDA to exercise any of FID's powers unless they fall within the definition of authorized officer.

[47] This means that the powers of the JCF members under the CFA and other statutes do not enable JCF members to exercise any power under FIDA for the simple reason that there is no gateway provision in FIDA that enables the JCF members to exercise any power found in FIDA except being designated as authorized officers.

[48] Mr Richard Small made the point that police officers do not cease to be police officers if they are designated as authorized officers. The court agrees with that proposition and said as much to Mr Wildman during his (Mr Wildman's) submission. Where, respectfully, I think Mr Small is incorrect is to suggest that a police officer if designated as an authorized officer under FIDA can use that information acquired from the exercise of the powers under FIDA to execute his functions outside of FIDA as a police officer. An authorized officer is subject to the secrecy obligations imposed by section 10 of FIDA. Section 10 (3) speaks to this. It says 'any person to whom information is communicated pursuant to this

Act shall regard and deal with such information as secret and confidential.' This court is unable to see how this provision could not apply to police officers who have been designated as authorized officers. It is immediately obvious that the noun 'information' in section 10 (3) has the same meaning in section 5 (1) (b) (i) and section 5 (2) (a), (b).

[49] FIDA is giving the JCF member additional powers but only those JCF members who are also authorized officers; if not an authorized officer under FIDA then the FIDA powers cannot be used by the JCF. FIDA circumscribes how those additional powers are to be exercised, the circumstances under which they are to be exercised and importantly, how the information acquired as a result of the exercise of FIDA powers is to be treated. This is the fundamental point made by Mr Wildman which the court accepts.

[50] As Mr Wildman pointed out FIDA is a specialised statute and seeks to treat financial crimes investigated by FIDA in a special manner. FIDA does not have a monopoly on financial crimes investigations. The JCF can also investigate financial crimes but the JCF cannot use the powers under FIDA. That is to say, no JCF member could simply go to a court and say, 'I wish a production/inspection/interrogation, restraint or monitoring order under FIDA' and rush off to court and make an application under FIDA. The first hurdle is whether FIDA enables any JCF officer or put another way, whether FIDA empowers any and every JCF officer access to FIDA powers on his or her own motion without any reference to the FID. The answer is no.

[51] The court ought to make further mention of section 19. Section 19 (1) states that any book, record or document produced or made available under a production order or inspection order such information obtained directly or indirectly as consequence of the production or inspection (actual words are 'production or making available') of the book, record or document is not admissible against the person in any criminal proceedings except for an offence under section 17 (11)

(b). Section 17 (11) (b) criminalises knowingly provide false or misleading information in purported compliance with the production or inspection order.

[52] The wording of sections 17 and 19 also covers persons who are not suspects who may have or are suspected to have the possession or control of the information, book, record or document. The expression 'in relation to the person suspected of having possession or control of the information, book, record or document' covers suspects and non-suspects in financial crime.

[53] Section 19 supports the right against self-incrimination of a defendant. The court says this because section 17 (1) to which section 19 relates does not exclude suspects in financial crimes from the production/inspection/interrogation order procedure. Such a person is subject to these orders. If he or she complies with the order then no book, record or document, or any information, document or thing, obtained as a direct or indirect consequence of the production or making available of the book, record or document can be used against the person in any criminal proceedings of any kind except knowingly producing false or misleading information.

[54] This supports Mr Wildman's proposition which in essence is saying that FIDA creates a special regime and when FID is investigating financial crime it has to use the powers given to it by FIDA and other statutes because FIDA is not a police force or a member of the police force. It is a statutory creation and can only do what the statute says.

[55] Mr Wildman referred to the case of **Police Federation and others v Commissioner of INDECOM** [2018] JMCA Civ 10. The court did not understand him to be saying that the specific facts of that case were on all fours with the allegations in this case. The court understood Mr Wildman to be saying that the principles underpinning the analysis carried out by the Court of Appeal in order to determine whether INDECOM was a juristic person should be applied to FID. He also said that consequence of the principle should also be applied in the present case. Counsel was saying that FID is not a juristic person and so cannot carry

out any functions that only a juristic person can do. The court agrees with this analysis. This point was not just connected to the arrest and charge issue but the fiat issue. Learned counsel was saying that since FID was not a juristic person then it could do things such as asking the DPP to grant a fiat to Mr Small and Ms Bolton.

[56] Mr Wildman was also saying that the detailed examination of the Court of Appeal carried out in that case can be applied here in this respect, namely, the absence of certain powers given to INDECOM was a strong indication that it did not have the power it was claiming, specifically the power to arrest and charge anyone.

[57] Learned counsel was saying that if in the **Police Federation** case where INDECOM officers were given the powers of a constable but the Court of Appeal held that such powers was limited solely to investigation and not arrest and charge, then all the more so that FID could not possibly have the power of arrest when no employee of FID was given the power of a constable and there is no such statutory power to that effect in FIDA. The court agrees with this submission.

[58] As the Court of Appeal said in the **Police Federation** case we must take the statute as worded at face value to begin with and not seek to arrive at some other conclusion merely because the words point to an inconvenient conclusion.

[59] Thus what Mr Wildman was saying was that if FIDA circumscribes the manner in which financial crimes are investigated by FID and it further circumscribes what FID can do with the fruits of its investigation then so be it. That is what the court accepts is the principle to be derived from the **Police Federation** case.

[60] Section 19 (2) of FIDA states that for the purpose of section 19 (1) restraint and monitoring orders are not criminal proceedings. The purpose of this provision is to create an exclusion from the effect of section 19 (1) in order to be able to use the information obtained directly or indirectly from

production/inspection/interrogation orders to secure restraint and monitoring orders under sections 20 and 28.

[61] The court now comes to resolving the question of whether the police officers in this case were authorized officers under section 2 of FIDA.

[62] A memorandum of understanding ('MOU') was exhibited by Inspector Williams. Mr Wildman says that the MOU is ultra vires the statute because the statutory conditions under section 12 were not met.

[63] Section 12 permits the CTD to enter into a contract, MOU or other agreement or arrangement with (a) public body in Jamaica or (b) a foreign financial intelligence department or association of such departments regarding the exchange of information with the Division relevant to the investigation or prosecution of a financial crime. However, he can only do so if the Minister approves.

[64] Mr Wildman says that there is no evidence that the Minister gave approval to the CTD to conclude any MOU with the JCF. This court says that there is no evidence presented that Ministerial approval was granted. This means that there is no evidence that the CTD has the necessary legal foundation to conclude an MOU with the JCF.

[65] The MOU states that its purpose is to formalise the daily working relationship and to outline the responsibilities to be undertaken by each the JCF and the FID. The MOU states that the JCF is to provide 'officers who are security vetted and equipped with relevant skills and technical competencies to support officers of the FID to execute their functions under the Proceeds of Crime Act, Terrorism Prevention Act and [FIDA].' The FID is to provide staff with the relevant competencies.

[66] The reporting protocol says that each JCF member is a police officer and is subject to the superintendence and control of the JCF. The MOU states that the JCF members 'will be based within the [FID] but will be governed by all policies as stipulated in the JCF Act.' It is not clear whether this was an attempt to negate

the effect of being an authorized officer under section 2 of FIDA but an MOU cannot have that consequence unless a statute gives that indication.

[67] The abbreviation CFU makes its way into page 2 of the MOU without any prior indication of what it means. Presumably it means the Constabulary Financial Unit ('CFU') as indicated by Inspector Williams at paragraph 1 of his affidavit dated December 19, 2019.

[68] On page 3 of the MOU is found the heading 'AREAS OF COOPERATION.' Under that heading it is stated as follows:

> *The activities shall include inter alia the functions as per schedule below:*
>
> *The JCF*
>
> 1. *Title and Activity: Officers to perform their roles as both Authorised Financial Investigators and Authorized officers as outlined in the Proceeds of Crime Act, 2007. Officers of the CFU will be designated by the Commissioner of Police as Authorized Officers (sic) within the meaning of section 2 of [FIDA] in the furtherance of their powers and duties under the Act.*
>
> 2. *Title and Activity: Conduct investigations, interviews, search operations and enquiries, collect statements, prepare affidavits and execute search and conduct all necessary investigations into cash seizure, money laundering and forfeiture investigations.*
>
> 3. *Ensure that prosecution files for criminal and civil matters are professionally completed and presented to the legal officers at FID/DPP*
>
> 4. *Title and Activity: Coordinate security and safety arrangements for all personnel (FID Officers) and property whilst on operations.*
>
> 5. *Title and Activity: Conduct covert and overt intelligence gathering activities*

6. *Title and Activity: Collation and provision of statistics on financial crimes to include arrests ….*

7. *Title and Activity: Provide support to FID investigations when requested*

[69] In respect of the FID the document states

The FID

1. *Title and Activity: Provide legal assistance and advice as well as financial intelligence to the JCF with respect to financial crimes investigations*

[70] Equally as fundamental is the fact that the MOU, even if concluded with Ministerial approval, it is no longer in force. Page 7 of the MOU states that it shall be valid upon signature by both parties and shall remain in force for one year beginning with the date of signing stated below. The MOU was signed by Mr Justice Felice the then CTD and Mr Owen Ellington, the then CP. The only date on the document indicating a possible date of execution appears next to the signature of Mr Justin Felice and that date is July 17, 2013.

[71] Mr Robin Sykes states that the MOU was signed on July 17, 2013. There is no evidential foundation for this assertion other than the appearance of July 17, 2013 next to Mr Felice's signature. Mr Sykes does not say he was present when the MOU was executed and there is no date of execution on the document. It is reasonable to conclude that Mr Sykes' foundation was the July 17, 2013 date that appears beside Mr Felice's signature. There is no evidence that this MOU was renewed or replaced.

[72] The court must now refer to the affidavit of Mr Williams. He states at paragraph 50 that police officers were transferred by way of orders dated June 17 and 24 2010 to the Organised Crime Investigation Branch. He states that these officers (those transferred by way of the orders) were designated as Authorised Financial Investigators by the CP. The court now quotes directly from paragraph 50:

> *However, I am **unaware** of any document from the [CP] explicitly stating that we were designated to work at FID.* (emphasis added)

[73] Paragraph 51 of Inspector Williams' affidavit states that subsequent to this arrangement an MOU 'was entered into between OCID … and the FID which outlined the nature of the relationship between the two.' Inspector Williams has not referred to any other MOU but the one exhibited.

[74] The court pauses to make a number of observations. First, as noted earlier, there is no evidence that the Minister gave approval to the CTD to enter into the MOU. Second, the MOU had a life of one year from July 17, 2013 which means that the MOU expired on July 17, 2014. Third, the MOU states that officers of the CFU will be designated as authorized officers under section 2 of FID. Fourth, there is no evidence that the police officers were so designated by the CP. The expression 'will be' in the relevant passage of the MOU signals future conduct. They were to be so designated under section 2 but it appears that this was never done. This is consistent with Inspector Williams' evidence that he is unaware of any document stating that the CP had designated that the police officers were to work at the FID. The court understands this to mean that Inspector Williams is not aware of any evidence that the CP had designated the police officers as authorized officers under section 2 of the FID.

[75] What this means is that, and based on all the evidence before this court including the MOU, no police officer was or is now an authorized officer as required by section 2 of the MOU. This necessarily means that no police officer can utilise the powers under FID purely in his capacity as a police officer. From the terms of the statute, as noted earlier, FID itself has no power to arrest and charge anyone and neither does it have any power to institute criminal proceedings before any court in Jamaica. It is not a company and neither has it been conferred with legal personality by statute.

[76] Mr Small responded by saying that the respondents are not relying on any designation as authorized officers under section 2 of FIDA. Learned counsel

submitted that the JCF officers at the CFU have all rights, duties, privileges, obligations and powers given to them by the CFA and other enabling statute.

[77] Mr Small also referred to the affidavit of Mr Robin Sykes, the CTD. At paragraph 27, Mr Sykes stated that the FID did not initiate charges. He said that it was the police acting under the CFA and other legal instruments who initiated and laid charges against both applicants 'based on investigations carried out by members of the CFU and the FID civilian personnel.' At paragraph 32, Mr Sykes stated that the 'charges were initiated by evidence uncovered during financial investigations conducted by CFU police officers as well as financial and digital evidence analysis conducted by the FID's civilian staff.' At paragraph 33, Mr Sykes says that the FID collaborates with a number of key private and public sector institutions including the JCF. At paragraph 34 he stated that the JCF consistently provides support to FID's operations by assisting in investigations. Mr Sykes' affidavit does not say what 'collaborate', 'provide support' and 'assist' mean.

[78] Mr Sykes said that the police officers were not restricted in the use of their police powers as JCF members. The court accepts that but the question is, did these police officers utilise any powers under FIDA which could only be exercised by them if they were designated as authorized officers under section 2 of FIDA? If yes, questions of admissibility may arise. Also having regard to the secrecy obligations under section 10, did officers of FID disclose any information acquired by the FID officers in their capacity as FID officers to the JCF members? If yes, then again admissibility and fairness questions must necessarily arise.

[79] Inspector Williams states at paragraph 49 of his affidavit to authorized officers under section 2 of FIDA includes both civilians and designated police officers. The rub here is that there is no evidence before this court that any police officer was ever designated as an authorized officer. He then makes a general statement to the effect that in the FID, the initiation of and laying of charges and arrests of suspects are done solely by designated police officers of the CFU. It is

not clear what is meant by designated police officers of the CFU. That is not a legal standard under FIDA. Respectfully, that does not make them authorized officers within section 2 of FIDA. There is no evidence before the court that a member of the CFU is necessarily a police officer designated by the CP as an authorized officer under section 2 of FIDA.

[80] The court has examined the two force orders transferring police officers to form OCID and the CFU within OCID. Nothing in those orders states that these officers are authorized officers under section 2 of FIDA. Nothing in the MOU designated any named officer as an authorized officer under section 2 of FIDA. There is no instrument or evidence showing that any police officer was ever designated under section 2.

Conclusion

[81] The court is of the view that FIDA does not authorise FID to arrest and charge anyone or authorise FIDA to initiate charges and initiate an arrest. What it can do is investigate. When investigating it can use certain powers under FIDA. FIDA enables FID to gain access to information and use investigative techniques that are not available to the JCF at large. There is no power under the Constabulary Force Act for the ordinary JCF member to obtain a production order, restraint order or account monitoring order under FIDA. These are exceptional powers conferred by statute on specific statutory functionaries who can only use those powers in the circumstances and the manner prescribed by the respective statutes. For persons other than the statutory functionary to exercise those powers, those persons need to enter the kingdom by the narrow statutory gateway labelled authorized officers.

[82] This court is of the view that the police officers in this case who arrested and charged the applicants were never designated under section 2 of FIDA. Any power of arrest and charge that they did could only be by virtue of the JCF powers found under the CFA.

[83] Consequently, it was not FID that arrested and charged the applicants but JCF officers in their capacity as JCF officers. That still leaves open the question of whether the JCF officers utilised any power under FIDA when they were not authorised to do. If yes, that might raise admissibility issues which can be addressed during the criminal trial.

[84] The court has come to this position on the basis of the absence of evidence that the police officers were authorized officers under FIDA. I make no pronouncement on the credibility of any of the deponents in this case. This means that this decision must not be understood as indicating that the deponents for the respondents were found to be more credible than applicants. Neither is the converse the case.

[85] There are adequate means of redress open to the applicants both during the trial and in the event of an adverse outcome, by an appeal. The mechanism of judicial review is not an appropriate one to raise questions of admissibility of evidence. The court must refer to one other matter.

Fragmenting the criminal process

[86] The court cannot help but note the increasing frequency with which resort is had to the supervisory jurisdiction of the Supreme Court in respect of matters in the Parish Courts. This court wishes to say that applications of this type should be discouraged except in very exceptional circumstances.

[87] It is this court's considered view that where the legislature has conferred jurisdiction on an inferior court such as a Parish Court it must be rare or exceptional for a superior court to grant declarations during the course of the trial or proceedings, regardless of the stage that those proceedings are, that may have the effect of undermining the authority of those courts. Once the matter is before the Parish Court then the matter ought to proceed along the normal course to completion. In the event of an adverse outcome then the remedy is by way of appeal. It cannot be that for just about every perceived difficulty resort is

made to the Supreme Court to take points that can properly be dealt with by the Parish Court and further addressed by way of an appeal.

[88] In **Atlas v DPP** [2001] VSC 209 Bongiorno J said:

> *14 It is appropriate, at the outset, to deal with the question as to whether this proceeding constitutes an unjustified fragmentation of the criminal process so that the plaintiff should be refused relief, as a matter of discretion, even if grounds for granting it might otherwise exist.*
>
> *15 In Sankey v Whitlam the High Court considered the use of the declaratory power by a superior court on questions of evidence or procedure arising during the course of criminal proceedings in an inferior court. Gibbs ACJ considered that the circumstances must be most exceptional to warrant the grant of such relief (at 25). He considered that such applications for declarations in such circumstances are: —*
>
> *"…likely to be dilatory in effect, to fragment the proceedings and to detract from the efficiency of the criminal process. I am not intending to criticise those concerned with the conduct of Bourke v Hamilton [1977] 1 NSWLR 470, or to show any disrespect for the careful judgments delivered in that matter - indeed I have derived much assistance from them - when I say that that case provides an example of the way in which criminal proceedings may be needlessly protracted if they are interrupted by an application for a declaration - in the end the declaration sought was refused but the proceedings had been delayed for the space of almost a year. The present case itself is another regrettable example of the delay that can be caused by departures from the normal course of procedure. For these reasons I would respectfully endorse the observations of Jacobs P. (as he then was) in Shapowloff v Dunn [1973] 2 NSWLR 468 at 470, that a court will be reluctant to make declarations in a matter which impinges directly upon the course of proceedings in a criminal matter. Once criminal proceedings have begun they should be allowed to follow their ordinary course unless it appears that for some special reason it is necessary in the interests of justice to make a declaratory order. Although these remarks may be no more than mere 'administrative cautions' (cf Ibeneweka v Egbuna [1964] 1 WLR 219 at 224) I nevertheless consider that if a judge failed to*

give proper weight to these matters it could not be said that he had properly exercised his discretion."

…

17 In Cain v Glass (No.2)(4) the New South Wales Court of Appeal was concerned with the question as to whether a magistrate, who was conducting a committal, erred in law in upholding a claim of public interest immunity in respect of documents identifying witnesses whom the applicants might wish to call in their defence. An application to Maxwell, J in the Supreme Court for declaratory relief was refused on the ground, inter alia, that the applicant did not establish the existence of exceptional circumstances calling for the intervention of the Court. On appeal, Kirby P, although dissenting in the result, agreed with the other Justices of Appeal that the exercise of the Court's declaratory jurisdiction in such a case should be confined to circumstances described as "most exceptional", "exceptional" or "special". His Honour referred, amongst other reasons, to the undesirability of the remedies of declaration or the prerogative writs being misused to justify transfer to the superior courts of matters committed by law to (in that case) the magistracy. He also referred to the undue advantage that may be given to rich and powerful defendants to interrupt and delay the operation of the criminal law in a way not so readily available to ordinary citizens. There is no evidence here that the plaintiff is either rich and powerful or has in any way sought deliberately to delay his trial. Nevertheless, the trial has been delayed for two years.

18 Kirby P. considered a similar question in a case involving the legality of an indictment in Anderson v Attorney General where he said (at 200); —

"The jurisdiction of the Court to make a declaration of the law applicable to the indictment against the claimant was not disputed by the Attorney General. However the Court's disinclination to do so in criminal cases, particularly in circumstances where proceedings are in the charge of a judge who at this very moment is beginning the trial, has been frequently stated. Courts such as this will limit their intervention to special cases. They will intervene only in the 'most exceptional' circumstances; see Gibbs, ACJ in Sankey v

Whitlam (1978) 142 CLR 1 at 25, or for 'some special reason' (Ibid, Mason J at 82); see also Bacon v Rose [1972] 2 NSWLR 793 at 797;Bourke v Hamilton [1977] 1 NSWLR 470 at 479;Barton v The Queen (1980) 147 CLR 75 at 104 and Lamb v Moss (1983) 49 ALR 533 at 545."

19 The law is undoubtedly the same in this State. In Rozenes v Beljajev the Full Court (Brooking, MacDonald and Hansen JJ) said, in considering the question of whether it would be appropriate to grant declaratory relief in respect of a ruling on evidence made by a trial judge prior to the commencement of a trial: —

"In the criminal jurisdiction an important consideration will be the need to observe and not fragment the ordinary, and orderly, process of a committal or trial. That consideration would apply with particular force 'where proceedings are in charge of a Judge who at this very moment is beginning the trial'; Anderson v Attorney General for New South Wales (1987) 10 NSW LR 198 at 200 per Kirby P. Such fragmentation should be avoided unless there are exceptional or special circumstances. It is sufficient to refer in this context to: Sankey; R v Iorlano (1983) 151 CLR 678;Lamb v Moss and Brown (1983) 76 FLR 296;Yates v Wilson (1989) 168 CLR 338;Beljajev v Director of Public Prosecutions (1991) 173 CLR 28;Harland-White v Gibbs [1993] 2 VR 215;re Rozenes; ex parte Burd (1994) 68 ALJR 372. These considerations apply whether the application be for a declaration or other form of judicial review such as relief in the nature of certiorari."

20 The correctness of this passage has been subsequently affirmed by the Court of Appeal in DPP v Denysenko, per Brooking JA at 316. See also Murray Goulburn Co-Op Limited v Blennerhassett and Francis v Solicitor for Public Prosecutions.

…

23 Many questions arise before and in the course of a trial in respect of which a trial judge would be much assisted by a definitive ruling of this Court or the Court of Appeal. However, the proper application of the principles of criminal procedure means that trial judges are required to make rulings on evidence or determine points of procedure as and when they arise either prior to or in the course of criminal trials (or, for

> ***that matter, civil trials) no matter how novel or difficult the points raised might be. The appeal system exists to ensure that an error made by a trial judge which leads to the possibility of a miscarriage of justice in the result can be corrected in the Court of Appeal.***
>
> *24 On the other hand, when a trial judge or committing magistrate accedes to a request to stop the criminal process continuing whilst one of the parties (almost always the accused) seeks a remedy using the civil processes of a supervisory court, control of the criminal process passes to a large extent into the hands of the applicant for such remedy as occurred in this case. The result is that delay is inevitable and justice suffers. Even if the Crown is diligent in ensuring that the civil process is pursued with vigour and competence delays still commonly occur to the inappropriate detriment of the criminal process.* (emphasis added)

[89] This court agrees with the observation made by his Honour. One of the important ideas behind this important principle is to avoid the supervisory jurisdiction being used as a 'de facto' appeal from a decision or ruling of the Parish Court. Parish Courts must be free to decide the matters there without the 'fear' that any decision made will be brought to and entertained by the Supreme Court. The appellate process is there to correct errors made by the Parish Court Judge. The Supreme Court must be cautious in exercising its power to grant stays of criminal proceedings in inferior courts thereby interrupting the normal and expected flow of criminal proceedings.

[90] In this particular case no ruling has yet been made by any Judge of the Parish Court but that does not matter. Once a criminal matter is properly before the Parish Court then it should proceed as normal unless there are exceptional circumstances. The case is before the Parish Court and all matters of admissibility and proper procedure can be adequately addressed by the powers and procedure available in that court. No constitutional question is being raised in this case which may involve remedies that a Parish Court is inherently incapable of providing.

Fiat

[91] The submission was made that the granting of the fiat by the DPP to Mr Small and Ms Bolton was invalid because FIDA does not authorise FIID to obtain a fiat. Respectfully, the DPP is authorised to grant fiats to attorneys at law to associate with the prosecution in any criminal matter. The fiat was granted to two attorneys at law and not to the FID.

[92] The prosecution in this case is a public one brought in the name of Her Majesty. The DPP, under the Constitution of Jamaica, is responsible for public prosecutions in Jamaica and in discharging her responsibilities is able to grant fiats as she sees fit. That is not a power with which this court will interfere except for exceptionally good reason. No exceptionally good reason has been cited and so there is no factual basis for granting judicial review.

Disposition

[93] The application for leave to apply for judicial review is refused. No order as to costs. This is not an appropriate case for the court to award costs against the applicants.