



[2015] JMSC Civ. 183

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN THE CIVIL DIVISION
CLAIM NO. 2013HCV 06888**

BETWEEN	BOBETTE SMALLING	APPLICANT
AND	DAWN SATTERSWAITE	1ST RESPONDENT
AND	ANNMARIE CLEARY	2ND RESPONDENT
AND	PAULETTE HIGGINS	3RD RESPONDENT
AND	JANET RAMSAY	4TH RESPONDENT
AND	DOROTHY HAMILTON	5TH RESPONDENT

Mrs. Caroline Hay and Mr. Nigel Parke for Applicant.

**Mrs. Jacqueline Samuels-Brown, QC. Instructed by Knight Junor and Samuels for
1st Respondent**

**Ms. Akuna Noble instructed by Wilkinson & Co. watching proceedings for 3rd and
4th Respondents.**

Heard: 27th February, 4th August and 17th September 2015

**Legal Professional Privilege – Common Law fraud exception – Inspection by
court.**

In Chambers

Straw J.

THE APPLICATION

[1] The applicant, Bobette Smalling, is an Authorized Financial Investigator and Detective Sergeant of Police and an appropriate officer within the meaning of Part VI of the Proceeds of Crime Act 2007 [POCA] who is stationed at the Major Organized Crime and Anti-Corruption Task Force [MOCA.]

The 1st respondent, Dawn Satterswaite is an attorney-at-law of 20½ Duke Street on whom search and seizure warrants were executed which resulted in the removal of various files, transactions and documentations including electronic material from her law offices by MOCA. The 1st respondent has claimed that legal professional privilege applies to the above material which is presently sealed.

[2] The applicant is seeking orders in as set out in paragraphs, 1, 4, 5 and 6 of a relisted notice of application filed on 28th October 2014, a summary of which is set out below:

“1. A determination of what material is relevant to and included in Table A [The Listed Material] described in Search and Seizure Warrant issued in these proceedings by Mrs. Justice Marva McDonald-Bishop, as she then was, on 16 December 2013.

4. That all the said files, transactions, communications, dealings of whatever kind as manifested in the physical and electronic documents, records, articles contained in the respective containers and computer which were removed from the law offices of the 1st respondent which were ordered by the court to be retained sealed by MOCA be examined by this court for a determination of what material attracts legal professional privilege.

5. That all the files, transactions, communications etal, as described in # 4 above which have been examined by this court and found to attract legal professional privilege be returned within 3 working days to the possession, custody and control of the 1st respondent.

6. That the said files, transactions etal which have been examined and found not to attract legal professional privilege be retained and unsealed by MOCA for examination, consideration and use by MOCA in the furtherance of its

investigation and/or in the determination of what is relevant for disclosure and use in the criminal trial of the 1st, 2nd, 3^d and 4th respondents, who have been charged with breaches of the Proceeds of Crime Act, 2007 [POCA].

THE ISSUES

There are 3 basic issues for determination by the court in these proceedings.

- [3] i. Whether the applicant has satisfied the court that legal provisional privilege ought not to apply to the sifted material [Listed Material] and should therefore be examined by the court for such a determination to be made.
- ii. Whether the repeal of the Money Laundering Act and its replacement with POCA in May 2007 has any effect on the sifted material that may be ordered unsealed.
- iii. What is a suitable process for examination by this court of the sifted material in order to determine what, if any, may be ordered unsealed.

ISSUE 1

Does legal professional privilege cover the sifted material?

[4] Both parties agree in general on the applicable law as it relates to the above. **The Jamaican Bar Association v The Attorney General & The Director of Public Prosecutions, consolidated with Ernest Smith & Company [a firm] et al v The Attorney General and The Director of Public Prosecutions**, SCCA Nos. 96,102 & 108/2003, is the seminal case out of the Court of Appeal examining the issue of legal professional privilege in relation to documents seized from the offices of an attorney. Panton JA, who delivered the judgment of the court reiterated the general common law principle as expressed by the High Court of Australia in **The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission** [2002] HCA 49, delivered on November 7, 2002. At para. 47 of his judgment, Panton JA made reference to following aspect of the judgment in that case:

'At para.9, Gleeson, CJ, Gaudron, Gummow and Hayne JJ expressed themselves thus:

'It is now settled that legal professional privilege is a rule of substantive law which may be availed of by a person to resist the giving of information or the production of documents which would reveal communications between a client and his or her lawyer made for the dominant purpose of giving or obtaining legal advice or the provision of legal services, including representation in legal proceedings.'

[5] That being said, Panton JA also went on to reiterate the basic common law principle at para. 52 that legal professional privilege would not be breached if there was an allegation of criminal conduct by the attorneys or their clients in the relationship as the privilege cannot be used to mask or permit criminal conduct.

[6] In **R v Cox and Railton** [1884] 14 QBD,153 it was established that communications made to a solicitor by his client before the commission of a crime for the purpose of being guided or helped in the commission of it, are not privileged from disclosure. Stephen J, in delivering the judgment of the court gave expression to the rationale as follows at pages 167,168 and 171 respectively:

'A communication in furtherance of a criminal purpose does not "come into the ordinary scope of professional employment" '

'In order that the rule may apply there must be both professional confidence and professional employment, but if the client has a criminal object in view in his communications with his solicitor one of these elements must necessarily be absent. The client must either conspire with his solicitor or deceive him. If his criminal object is avowed, the client does

not consult his adviser professionally, because it cannot be the solicitor's business to further any criminal object.'

'.....If the client had a dishonest purpose in view in the communication he makes to his attorney with the view of making the attorney the innocent instrument of carrying out the fraud, it deprives the communication of privilege.'

[7] This then is the gist and substance of the common law fraud exception to legal professional privilege. This general principle is expressed also in **R v Central Criminal Court Ex Parte Francis & Francis** [1989] 1 AC 346; **The Queen v Bullivant and Others** [1900] 2QB 168; **Regina v Gibbins** [2004] EWCA Crim, 311; **The Queen on the Application of Hallinan, Blackburn-Gittings & Nott [a Firm] v Middlesex Guildhall Crown Court** [2004] EWHC 2726[Admin]. In relation to **Ex Parte Francis, Gibbins** as well as **Hallinan**, Queens Counsel, Mrs. Jacqueline Samuels- Brown, counsel for the 1st respondent, has asked that I tread with some caution in relation to the judgments expressed as they are based on an English statutory regime which could be said, in particular, **Ex Parte Francis**, to have restricted the common law principle as expressed in **The Jamaica Bar Association** case. However, counsel for the applicant, Mrs. Caroline Hay, has submitted that there has been no restriction on the common law in **Ex Parte Francis** as the decision by the majority judges is to the effect that the statute merely embraces the common law principle.

[8] The court in **Ex Parte Francis** examined section 10 of the [English] Police & Criminal Evidence Act, 1984. The section provides as follows:

"[1] Subject to subsection [2] below, in this Act 'items subject to legal privilege' means - [a] communications between a professional legal adviser and his client or any person representing his client made in connection with the giving of legal advice to the client; [b] communications

between a professional legal adviser and his client or any person representing his client or between such an adviser or his client or any such representative and any other person made in connection with or in contemplation of legal proceedings and for the purposes of such proceedings; and [c] items enclosed with or referred to in such communications and made –[i] in connection with the giving of legal advice; or [ii] in connection with or in contemplation of legal proceedings and for the purposes of such proceedings, when they are in the possession of a person who is entitled to possession of them.[2]Items held with the intention of furthering a criminal purpose are not items subject to legal privilege.”

[9] Lord Griffiths, one of the majority judges, was of the view that the definition in section 10 corresponded closely with the established common law principles that govern the existence of legal privilege. He expressed that on his first reading of section 10 [2], he was in no doubt that it was setting out the exception to legal privilege established in **Cox and Railton** [page 382, paras. g-h]. The majority decision held that the issue of the relevant intention required by section 10 [2] did not merely apply to the holder of the items, but to any other person. Lord Griffiths stated that if this were not so, then it would mean that almost all applications to have access to documentation held in a solicitor’s office would likely be unsuccessful as it would only be in the rarest of cases that the solicitors will be party to the crime [page 383, para. d].

[10] On the other hand, Lord Oliver, one of 2 dissenting judges, was of the view that the ordinary, natural meaning of the words meant that the only relevant intention was that of the holder of the items.[page 387,para.a-c.] In **Ex Parte Francis**, the police obtained a production order for material relating to the financial transaction of G, a client of the solicitors in relation to a particular property. The police believed that G had been

provided with the money to purchase the property by a person suspected of being engaged in drug trafficking whom they were investigating.

[11] The court by the majority verdict [5 out of 7], held;

“[1] that ‘items subject to legal privilege’ contained in section 10[1] were excluded from that definition if they were held with the intention, whether of the holder or any other person of furthering a criminal purpose. [2] That, on the assumptions [a]that the suspected drug trafficker had the intention, by acquiring property for G of furthering the criminal purpose of concealing the proceeds of drug trafficking; [b] that G was innocent of complicity..., that the solicitors, in advising G in connection with the acquisition of the property....had acted ...with complete propriety any legal privilege was excluded and the order properly made.”

[12] This judgment does not resonate completely with the ruling in **The Jamaican Bar** case as it seeks to remove privilege from documents held by an attorney even though there was no allegation of wrongdoing against the attorney nor the particular client. In **Ex Parte Francis**, Lord Goffe expressed the view that the statutory version of the crime-fraud exception ought not to be read as limited to materials relating to furthering the commission of a criminal offence. He stated that the effect of this would be to exclude cases where a criminal offence has been committed and the purpose of the criminal is to conceal for his own benefit, the proceeds of the crime. [page 394.] It is important to note, however, that in the present case, this is not an issue as the relevant attorney, the 1st respondent, is actually charged for criminal offences under POCA.

[13] Counsel, Mrs. Hay, has submitted that this court should have regard to the reliance of the court in **Ex Parte Francis** on Stephen J’s seminal judgment In **Cox** and **Railton** on the practical issue of how to access the material in order to assess whether

the client was seeking advice for a criminal purpose. [per Lord Bridge at 376 b-e.] In **Cox and Railton**, Stephen J expressed as follows at pages 175-176:

....in each particular case the court must determine upon the facts actually given in evidence or proposed to be given in evidence, whether it seems probable that the accused person may have consulted his legal adviser, not after the commission of the crime for the legitimate purpose of being defended, but before the commission...for the purpose of being guided or helped in committing it. We are far from saying that the question whether the advice was taken before or after---will always be decisive as to admissibility..... Courts must in every instance judge for themselves on the special facts of each particular case...

[14] The court would therefore be guided by a consideration as to whether the documents that comprise the sifted material are relevant to the issue as to whether they were used for masking or permitting criminal conduct as described under POCA. The court bears in mind also that the 1st respondent is not bound to produce any document which is not relevant to the issue [per Collins LJ, page 167 in **The Queen v Bullivant**]

[15] Mrs. Hay has submitted that the documents ought to be produced [unsealed in the present circumstances] if they tend to support the crown's allegations that they came into existence to further a crime. She relies on **Hallinan** as well as **The Queen v Bullivant and Others** [1900] 2 QB 168. In **Bullivant**, Romer LJ at page 169, expressed that where fraud or illegality is in issue, the documents are relevant to that issue and documents ought to be produced if they tend to support the allegation of the Crown.

[16] In **Hallinan**, Lord Justice Rose, in considering a case where allegations of agreement to pervert the course of justice were made, stated as follows at paragraph 25:

Where...there is evidence of specific agreement to pervert the course of justice, which is freestanding and independent, in the sense that it does not require any judgment to be reached in relation to the issues to be tried, the court may well be in a position to evaluate whether what has occurred falls within or outwith the protection of legal professional privilege as explained in Cox and Railton.

Counsel has urged the court to consider that such 'freestanding and independent' evidence exists in this case based on the affidavit of the applicant.

[17] In relation to the standard required, Mrs. Hay has asked this court to be guided by the discussion on the issue in **Gibbins** by Lord Justice Potter [paras. 21-56] who delivered the judgment. He concluded at para. 50 that there is a need for the judge to be clear in his view that a prima facie case exists and that no gloss on that requirement is necessary.

[18] Counsel submitted that this court would therefore be required to consider the affidavit evidence contained in the applicant's affidavit to determine whether there is a prima facie case of a criminal purpose exception. She stated that there is no need to analyse the admissibility or impact of the evidence, as these are matters for the trial judge.

[19] However, in **Kuwait Airways Corporation v Iraqi Airways Co [2005] EWCA Civ. 286; [2005] 1 W.L.R. 2734 at para. 42, 2749 per Longmore LJ** the Court of Appeal did refer to the standard of a prima facie case in cases where fraud was not an issue but suggested that there ought to be a **strong** prima facie case where it was a relevant issue in the action. (Emphasis added)

SUMMARY OF THE APPLICANT'S AFFIDAVIT.

[20] The evidence contained in the affidavit of the applicant, Bobette Smalling is quite extensive and I will not be attempting to include all the details in this judgment. The material relates to one Andrew Hamilton [AH] who is under investigation by the MOCA and the United States Drug Enforcement Agency [DEA] for money laundering and civil recovery proceedings from about 2010. AH is said to have been involved in drugs and arms trafficking as well as money laundering. He was convicted in the USA in 1998 for a drug trafficking offence and served one year in prison. He was indicted in February 2012 for violation of drug laws, firearm violations and money laundering offences. A copy of the Grand Jury indictment has been exhibited. It is said that he pleaded in 2014 to two offences, drug trafficking and money laundering, contained in the indictment and is presently in prison.

[21] Based on investigations, the police believe that his companies, relatives, associates and other facilitators have assisted him in Jamaica to deal with the proceeds of his criminal conduct. In relation to the money laundering investigations, all the respondents are presently charged under POCA and have been identified as directly and intimately associated with AH. As far as the 1st respondent is concerned, she is said to have been associated with him for over a period of at least 10 years.

[22] It is alleged that the investigations reveal that the 1st respondent has facilitated AH, his companies, his relatives and associates to conceal, disguise and dispose of benefits flowing from his criminal behavior. AH was first arrested on 24 June 1998 in the name Andrew Campbell aka Barri Houston. He is also associated with the following names - Andrew Paul Campbell, Milton Paul Ramsay, Andrew P. Campbell, Anthony Randizzo, Adrian Christie, Webster Cunningham and Curtis Malone.

[23] Other family members suspected of being involved include children - Andrene Andrea Hamilton - [deceased], Andrew Paul Hamilton Jnr., Akeem Hamilton, Adrian Malik Hamilton, Amelia Hamilton, Akayla Hamilton - and brother Joseph Arnold - [deceased] There are other names listed in the affidavit of the applicant including Jenee

Smith, Tanya Osbourne, Devon Cleary, as well as Albert Williams who is connected to the sale of a fishing vessel,' Sir Jack.'

[24] The companies associated with AH are Andrew Hamilton Construction Ltd and Andrenhan Seafoods Co. Ltd. Table 1 of the Listed Material lists properties associated with AH, date of acquisition and ownership. Table 2 of the Listed Material lists properties associated with AH and sold to purchasers, George Lynch, Webster Campbell, Maurice Haskill, Maurice Chin Sue, Tamara Gayle Berger, Everal Williamson, Caribbean Research and Innovation Ltd, Louise Anne Miller, Cynthia Kennedy, Caroline Fisher, Hilary Roberts, Dawnel Andrea Thompson, Phillip Smith, Eric McGregor, Paulette Higgins and Jonathan Clifton Browning.

[25] The applicant speaks to the dealings of the 1st respondent in relation to all these properties, looks at the time of purchase, purchase or selling prices, lack of mortgage financing [i.e., there is an inference that these are cash transactions.] She also speaks to examining the means of the 2nd to 5th respondents, company returns for both companies, travel pattern for Annmarie Cleary [2nd respondent], bank account in joint names of 1st respondent, and client, Andrea Hamilton, and client account at BNS held in 1st respondent's name. She makes a link between the last account and the sale of relevant properties. She speaks to the issue of the purchasers of the properties and provides a basis for MOCA's belief for the committal of the described offences.

[26] Based on the allegations, it is my view that the applicant has made out a prima facie case of money laundering offences which is sufficient to displace the privilege, especially in light of the fact that there are no opposing affidavits which dispute this version of events. I am therefore persuaded that this court should proceed to the next step, which is that of inspection, to look at the position in the round. The extent of the inspection however would be subject to the court's decision in relation to issue 2.

[27] Of course, what may appear to be a sufficiently strong case of criminal activity may yet lack cogency at an actual trial. While the court, however, has to play the vital role of balancing two competing interests, it is to be appreciated that the power of the court to examine documents should be exercised with considerable restraint. Munby J in **C v C [Privilege]** [2008] 1 F.L.R. 115, at para. 67 expressed this view as follows:

I think that the power of the court undoubtedly to examine the documents should be exercised very sparingly...Privilege is, in principle, absolute. Too ready a judicial willingness to exercise the power to inspect...would put at risk the vitally important public policy on which the very principle of the privilege is founded.....Those who cannot meet the demanding test should not be allowed to go on a fishing expedition.'

ISSUE 2.

Should the court order the return of all the material sealed that predates 30th May 2007?

[28 Mrs. Samuels-Brown, has submitted that POCA came into effect on the 30th May of 2007 and, as a penal statute, it has no retroactive effect. The former Money Laundering Act has been repealed and the 1st respondent is charged with money laundering offences in relation to sections 92 and 93 of POCA. She submitted that an examination of the Act reveals that an antecedent or predicate offence must be committed by someone before a substantive offence of money laundering can be so committed. It is this predicate offence that generates the criminal property related to money laundering.

[29] She referred the court to the judgment of the Privy Council in **Assets Recovery Agency [Ex Parte] [Jamaica] [2015] UKPC 1**. In that case Lord Hughes, who delivered the judgment of the court, examined the statutory provisions of POCA and came to certain conclusions in relation to the issue of antecedent or predicate offences. Counsel also submitted that the only evidence of an antecedent offence of AH in this

case is based on the affidavit evidence of the applicant that he pleaded guilty to a count on the Grand Jury Indictment in 2014 which was exhibited. She stated that the conviction being relied on is outside of Jamaica and must be proved in a particular format which the crown has failed to do.

[30] Counsel further submitted that the Act provides that the offences created by sections 92 and 93 consist of doing specified acts with the criminal property. However the definition of criminal property is given in section 91[1] [a]:

Property is criminal property if it constitutes a person's benefit from criminal conduct or represents such a benefit, in whole or in part---

[31] Criminal conduct is defined in section 2 of the Act as conduct occurring on or after the 30th May 2007. The submission is therefore that the court cannot examine any documents that predate the abovementioned as there would be no criminal conduct existing previously. She further submitted that while para.17 of the applicant's affidavit details money and drugs seized from AH by the authorities, she has not established criminal conduct on the part of AH as contemplated by POCA so as to generate criminal property which could properly form the basis for the seizure of the listed documents.

[32] Counsel, Mrs. Hay, agrees that there must be an antecedent offence which generates the criminal property but disputes the need to prove that any one has been convicted of any offence. I would agree with her submission on this point as this is clearly stated in the judgment of Lord Hughes at paragraph 9 and 10 of **Assets**:

It does not, however, follow that for a defendant to be convicted of a substantive offence of money laundering, there must have been a conviction for the antecedent offence. What has to be proved is that an antecedent offence was committed---

Moreover, it may often happen that a plain case of money laundering is revealed but it cannot be known exactly what the antecedent offence was. In other cases there may be a plain case of money laundering but a mixture of antecedent offences.....Exactly which the antecedent offence[s] is or are may be uncertain, but the inference that some antecedent [s] were committed may be sufficiently irresistible to amount to proof to the criminal standard. In such circumstances the Board held in Director of Public Prosecutions of Mauritius v Bholah [2011] UKPC 44 that proof of a particular predicate crime is not necessary-----

[33] The evidence in the applicant's affidavit contained at para. 17 speaks to over US \$1.8 million in cash and 2,672.8 pounds of marijuana seized from AH between February 2010 to July 2010 and October to November 2011 prior to his indictment. It also speaks to US \$174,978.00 seized from AH subsequent to his arrest and the execution of a search warrant at his residence in Georgia, USA. It would therefore not matter whether he was charged with merely conspiracy or other substantive offences. At para.19 of the applicant's affidavit, she states that the DEA requested a financial profile on AH following the above occurrences and an investigation was commenced surrounding AH's ownership of assets in Jamaica. She concludes as follows in the affidavit:

Intelligence was received that AH was believed to be sending substantial amounts of cash to Jamaica to purchase assets. The intelligence also indicated that AH was using his daughter Andrene or {Andrea} Hamilton and other family members, as well as the following named companies to launder his ill-gotten gains:

[34] The applicant then makes reference to the companies as referred to at para. 24 above. She lays out between paras. 20 to 41 an extensive description of the results of

the investigations and inferences drawn in relation to the properties listed, the respondents charged, the purchasers of some of the properties, the assets of the companies and documentation in relation to the sale of a fishing boat “Sir Jack’. At para. 48, she speaks to the travel pattern of Annmarie Cleary [2nd respondent] and draws inferences between her travels and lodgments made into a joint account in the names of “Satterswaite Client account/Andrea Hamilton’ opened on 3 January 2007. This account is a lawyer/client account associated with the 1st respondent.

[35] At para.43 etal she makes an extensive analysis of the conduct of the 1st respondent in her role as attorney for AH and all his relatives and associates in relation to all the questioned property transactions. She also makes reference in para. 44 to ‘the questionable nature of the sale of eleven properties between January 2011 and April 2012 which commenced shortly after the raid on 2 addresses in December 2010 in Jamaica where relatives of AH resided.

[36] Mrs. Hay has submitted also that since section 92[1] of POCA speaks to mens rea - namely that “the person knows or has reasonable grounds to believe”, the pre POCA material would be relevant evidence from which mens rea could be inferred. She referred the court to **Archbold Criminal Pleading & Practice [2003]** paragraphs 13-34 to 13-38 where reference is made to the relevance of background evidence as being admissible to provide history relevant to offences charged. The authors make reference to the unreported case of **R v Pettman** in which Purchas L.J. had said, in giving the judgment of the court that the principle is that-

‘ Where it is necessary to place before the jury evidence of part of a continual background of history relevant to the offence charged in the indictment and without the totality of which the account placed before the jury would be incomplete or incomprehensible, then the fact that the whole account involves including evidence establishing the

commission of an offence with which the accused is not charged is not of itself a ground for excluding the evidence.'

[37] Counsel submitted that the question is whether the evidence passes the test of relevance. If it is relevant then it would be admissible unless the court decides that fairness requires that it be excluded. She stated also that the issue of admissibility, however, would be for the trial court and not one for this court's determination.

[38] Counsel, Mrs. Hay, has made alternate submissions in relation to the issue of pre POCA material. She has stated that AH was twice convicted for drug trafficking offences in 1998 and 2014. She has submitted that the inference can be drawn that all property acquired up to 2007 would have been acquired from the proceeds of those crimes and accordingly represented money laundering under the former Money Laundering Act, 1986 and that post 2007, it would represent money laundering under POCA.

[39] For ease of reference I will include paragraph 109 of her written submissions in full:

Post 30 May 2007, Section 92 of POCA criminalized the offence of handling criminal property. Section 93 criminalizes the offence of being concerned in arrangements which handle criminal property. The nature of the offence is twofold- the act of handling or being concerned in the arrangements and the knowledge or at the least, the presence of reasonable grounds to believe one might be handling criminal property. Since the money laundering offence in Jamaica predated 2007, it is right to enquire into how far the circumstance go back from which the first respondent would have formed the requisite mens rea.

[40] Counsel also referred the court to section 25 of the **Interpretation Act** which deals with the effect of repeal of a statute. In particular the court notes the provision as set out in section 25 [2] [e]:

[2] Where any Act repeals any other enactment, then unless the contrary intention appears, the repeal shall not-

[e] affect any investigation, legal proceedings or remedy in respect of any such right, privilege, obligation, liability, penalty, fine, forfeiture, or punishment, as aforesaid, And any such investigation, legal proceedings,.....may be instituted, continued, or enforced, and any such penalty, fine, forfeiture or punishment may be imposed, as if the repealing Act had not been passed.

[41] It does appear therefore that even though the 1st respondent can only be charged for offences committed on or after May 2007, there is really no bar to investigations instituted or continued in relation to money laundering offences that may have been committed pre POCA.

[42] Mrs. Samuels-Brown is relying on the dissenting judgment of Lord Bridge of Harwich in **Ex Parte Francis** [page 377] and submitted that the applicant is attempting to say that property to which legal professional privilege applied up to 2007 (as it cannot denote criminal property under POCA) loses its common law protection of legal professional privilege based on statutory interpretation so as to become retroactively criminal property.

[43] I do not believe that this is however a fair assessment of what this court is being asked to do. Legal professional privilege cannot be used to mask or permit criminal conduct. An examination for example of Table 1, part of the Listed Material, shows the dates of real estate transactions in relation to certain properties. Eleven out of fourteen

were apparently acquired by AH and/ or other relevant names after 30th May 2007. In all the transactions the 1st respondent was the purchaser's attorney.

[44] Table 2 relates to 15 properties that were sold by vendors AH and/ or other relevant names. Eight were sold after 30th May 2007. In relation to the 7 that were sold prior to May 2007, all of these are alleged to have been sold to fictitious persons and these signatures were witnessed by the 1st respondent. In all the transactions, the 1st respondent is the vendor's attorney. If these allegations are true, the documents would reveal fraudulent conduct, although the only charges that exist relate to money laundering under POCA. Under all these circumstances and having regard to the Interpretation Act and what can be termed relevant evidence, I have no basis to limit the documents that may possibly be unsealed to what exists post 2007.

[45] In a final bid to prevent any material being unsealed for the examination by the applicant, Counsel, Mrs Samuel Brown, has also asked the court to examine the Grand Jury indictment which speaks to the earliest date of criminal activity as October 2009. She submitted that the conviction in 1998 predates POCA and there is no evidence prior to 2009 of AH being in possession of criminal property. Counsel stated also that counts 1 and 2 relate only to charges of conspiracy so count 3 is the only one that may satisfy the definition of criminal property. However, based on Lord Hughes assessment in **Assets Recovery** in relation to the antecedent offence [paragraph 10], the court does not have to be detained by this submission.

Conclusions

[46] In light of all the above circumstances I am granting the application that all the Listed Material be unsealed for examination by this court in order to make a determination as to whether the documents, in whole or in part should be returned as attracting legal professional privilege. Counsel, Mrs. Hay has conveniently grouped the material into 7 categories:

- Conveyancing or other property management files for: AH, Paulette Higgins - 3rd respondent, Annmarie Cleary - 2nd respondent. Janet Ramsay - 5th respondent,

Maurice Rainford and the other miscellaneous purchasers whose names appear on the listed material.

- Correspondence involving Monte Carlo Isles –property listed under table 2.
- Cheques, chequebooks and receipt for payments evidencing financial transactions
- Bills file for AH
- Certificates of Title
- Last will and testament of Andrene Peta Gaye Hamilton
- Documents concerning Andrew Hamilton Construction Ltd
- Material in electronic form which has not yet been disaggregated

What is clear is that great care would have to be exercised by the court in examining these documents to determine whether they contain communication in part or whole to which privilege may apply or indeed whether any of the documents as such are irrelevant for the purpose as alleged and so ought to retain the protection as privileged material.

ISSUE 3

What is the procedure to be adopted for any examination of the documents?

[47] While the decision as to whether certain documents will be sealed when there is a claim of privilege is generally decided through affidavit or other evidence, there may be instances of great contention where the court has to view the documents themselves to make a decision. The court does have the power to examine the documents although this is rarely done. It is the exercise of a judicial discretion. [**per Grant v Downs [1976] 135 CLR, page 674, a case from the High Court of Australia.**] In **R v Governor of Pentonville prison, Ex p. Osman** [1989] 3 All E.R. 701, the possibility of court inspection was first raised in a dictum of the Divisional Court which indicated that it could see no objection to a court looking, if necessary, at documents in order to determine whether they came into existence for a criminal or fraudulent purpose [per Lloyd L.J. at page 716]. This view also has some support in **Cox and Railton**.

[48] The court will be concerned to safe guard any material that would be considered communication between a client and the 1st respondent made for the purpose of giving or obtaining legal advice or the provision of legal services including representation in legal proceedings. Both counsel have conceded that there are no procedural rules in place to assist in guiding the court in this exercise. Counsel for the applicant has submitted that the lack of procedural rules should not be a bar to the court proceeding and has referred the court to two cases originating from the Court of Appeal in Trinidad and Tobago. **[Peters Winston] v Attorney - General and another; Chaitan [William] v Attorney - General and Another** [2001] 62 WIR 244; **Port Contractors Ltd v Shipping Association of Trinidad; Shell Trinidad Ltd v Seamen and Waterfront Workers Trade Union** [1972] 21 WIR 505.

[49] This court bears in mind the judicial discretion of the judge is rooted in common law principles and while there is no bar to inspection, it is prudent that some guidelines be developed to assist in this process. The following guidelines may prove useful:

- The principles of natural justice must apply during the hearing. These are common law principles which should apply as of right. In addition the Jamaican Constitution enshrines the principles that parties are always entitled to a fair hearing. The party seeking to claim privilege [the 1st respondent] may address the court and comment on all or any documents without revealing its substance but will instead say why the nature of the particular document makes it privileged according to law.
- The hearing will be in the presence of counsel for the parties but they will not be allowed to view the documents during the process.
- The judge will peruse the documents without making specific reference to the substance of these documents but instead will concentrate on the nature of the document in order to determine whether it is actually privileged.
- The parties shall be immune from anything that they may say during the process being used at the trial.

- The purpose of the examination is to determine on its face whether the document meets the criteria for privilege, and not for the court to peruse the substance of these documents with a view to gaining knowledge of them.

[50] The court makes reference to the Australian approach with devising these guidelines as outlined by Young J. in **AWB Limited v Honourable Terence Rhoderic Hudson Cole** [No. 5] [2006] FCA 1234.