

**THE EASTERN CARIBBEAN SUPREME COURT  
IN THE COURT OF APPEAL**

**ANTIGUA AND BARBUDA**

**ANUHCVP2024/0011**

**BETWEEN:**

**DIRECTOR OF THE ONDCP**

Appellant

and

**MICHAEL G. ARCHIBALD**

Respondent

**Before:**

The Hon. Mr. Trevor M. Ward

Justice of Appeal

The Hon. Mde. Esco Henry

Justice of Appeal

The Hon. Mde. Paula Gilford

Justice of Appeal [Ag.]

**Appearances:**

Mr. Curtis Bird for the Appellant

Mr. Andrew O’Kola for the Respondent

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2025: June 05;

2025: July 22.

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Civil appeal – Production orders – Procedure for obtaining a production order - Statutory framework for production orders – section 15 of the Money Laundering (Prevention) Act 1996 – Money Laundering (Prevention) (Amendment) Act, 2020 – Whether a respondent, as a financial institution, which is served with a production order to produce documents in relation to an underlying criminal investigation has the right to be served with documents in support of the ex-parte application - Whether the respondent as counsel for the subject of the underlying investigation should have been heard on the issue of legal professional privilege before the learned judge granted the application for the production order - Whether a judge of concurrent or coordinate jurisdiction can review the order of another judge which had restricted disclosure

The Office of the National Drug and Money Laundering Control Policy (“the appellant” or “the ONDCP” or “the Director”) commenced a money laundering investigation into a client of Michael Archibald (“the respondent”), an attorney of the firm Phillips, Phillips and Archibald. On 26<sup>th</sup> February 2024, the appellant applied ex-parte for a production order pursuant to

section 15(ii) of the MLPA premised on an ongoing investigation into a potential money laundering offence by a client of the respondent's law firm. The respondent was named as the person to whom the production order was directed since, as an attorney of the law firm, he held certain documents relevant to the investigation which the ONDCP required him to produce and thus the firm was a financial institution within the meaning of the MLPA.

The ex-parte application came before Bakre J who initially adjourned the hearing to advise himself on the issue of legal professional privilege which might attach to any of the requested documents. Being satisfied that the appellant had met the requirements of section 15(ii) of the MLPA, and that the documents sought were not protected by legal professional privilege, Bakre J granted the application. He ordered the respondent to deliver specified documents including all customer due diligence information, correspondence and transaction records in relation to a specified property of the client within 7 days of being served with the order, with a penal notice included. At the appellant's request, Bakre J included a non-disclosure order which stated: "The Defendant [the respondent], a financial institution not being the subject of the Claimant's investigation, may be served this Order without the Claim Form, Application Without Notice of Access Code". The learned judge did not stipulate a return date for an inter partes hearing in his order, which was served on the respondent's law firm on 26<sup>th</sup> February 2024.

On 5<sup>th</sup> March 2024, the respondent filed a notice of application seeking: (i) a stay of execution of the production order, (ii) a copy of the ex parte notice of application; (iii) all evidence in support of the application; and (iv) the transcript of the ex-parte hearing. In that application, the respondent asserted that he intended to make an application to set aside or vary the ex-parte order and asserted that the appellant's failure to serve him with the documents filed in support of the production order and the authorization code, "undermines or is likely to undermine" his right to a fair hearing of his application to set aside or vary the ex-parte order made against him, and thereby breached his constitutional rights. The respondent's application further stated that the provision of the documents relied on in support of the application was essential for the respondent to understand the basis of the application and the order, to prepare an effective challenge and to ensure that the principles of natural justice and procedural fairness are upheld.

On 5<sup>th</sup> March 2024, Smith J heard the respondent's application for a stay and disclosure of documents on an inter partes basis. She granted the interim stay of the production order pending further hearing of the respondent's application. After hearing submissions from both sides at the further hearing conducted on 19<sup>th</sup> March 2024, Smith J ordered a stay of the production order; that there should have been a return date for an inter partes hearing; that the Court Registry set a date for the hearing before another Judge of the High Court; and that the respondent serve the applicant with the application, affidavit, order and access code.

Being dissatisfied with the order of Smith J, the appellant filed this appeal on 28<sup>th</sup> March 2024 citing 18 grounds, which were reduced to 7 at the hearing of the appeal. The substance of these grounds and the appellant's submissions included that (i) the judge failed to adopt a purposive interpretation of section 15 (ii) of the MLPA in line with its purpose as a confidential investigatory tool impacting national security, which purpose conflicts with the requirement to serve documents under CPR Rule 11.18; (ii) the judge did not treat the

application as constituting special circumstances under CPR Rule 26.1(2)(x), which allows the Court, on the application of a party, to dispense with compliance with any CPR rule in special circumstances; (iii) the Judge failed to apply the overriding objective of rule 1.1(2)(c) to act proportionately by ensuring that disclosure did not compromise the criminal investigation; (iv) the judge erred in ordering an inter partes hearing, in that she did not properly consider rule 11.17(c), which allows the court to deal with an application without a hearing if the judge considers a hearing to be unnecessary or inappropriate, and further ignored the requirement in section 15 of the MLPA that where a production order has been made, the documents are required to be produced 'forthwith' to the authorities and not after an inter partes hearing; (v) the Judge erred in treating the respondent as a defendant in the underlying criminal investigation who needed an opportunity to defend himself, failing to appreciate that a financial institution to which a production order is directed is not a defendant in the underlying criminal investigation. Smith J thereby gave undue credence to the respondent's demand for documents to defend himself, despite there being no allegations against him as Bakre J's order made clear; (vi) Smith J lacked jurisdiction to override Bakre J's non-disclosure order as she was not sitting in an appellate or judicial review capacity.

**Held:** Allowing the appeal, setting aside the order of Smith J made on 19<sup>th</sup> March 2024, discharging the stay of the order of Bakre J made on 26<sup>th</sup> February 2024 with immediate effect that:

1. Smith J did not have jurisdiction to overrule Bakre J's non-disclosure order on the application before her because as a court of concurrent or coordinate jurisdiction, she was not exercising an appellate jurisdiction. At most, Smith J could determine whether Bakre J's failure to stipulate a return date was a procedural irregularity requiring a stay of his order pending an inter partes hearing. Smith J's remit did not extend to determining whether Bakre J was right to order non-disclosure of the documents and evidence used in support of the ex parte application.

**Marily Jeffers Nee Weste v The Personal Representative of The Estate of Wyndgam West et al** ANUHCVP2022/0013 (delivered 24<sup>th</sup> March 2023 unreported) applied, **Harding v Forrester and others** (2014) 84 WIR 389 applied.

2. Furthermore, in purporting to exercise her discretion to order disclosure, Smith J considered irrelevant matters and failed to take account of highly relevant matters. She also erred by failing to appreciate that the respondent was not the defendant in the underlying criminal proceedings and as such there was no case against him. The production order was directed at the respondent in his capacity as an Attorney-at-Law performing an activity of a nature that renders him a financial institution within the meaning of the MLPA. In ordering non-disclosure, Bakre J expressly stated that "the defendant, not being the subject of the claimant's investigation, may be served this order without the claim form, Application Without Notice, or Access Code". This order was intended to safeguard the integrity of the underlying criminal investigation.

3. Smith J erred in not considering that her order for disclosure had the potential to undermine the underlying criminal investigation into the respondent's client and further erred in ordering disclosure of such highly sensitive material without at least reviewing it herself to consider, for example, whether any redactions should be made. There is nothing in Smith J's order or her certified notes of the hearing to suggest that she gave any consideration to such matters.
4. A court hearing an application for a production order pursuant to section 15(ii) of the MLPA has to be mindful of the sensitive nature and purpose of the application and must not adopt a mechanical application of the CPR, particularly in relation to disclosure of the evidence in support of the application, while ignoring the fact that the rules provide for deviation in special circumstances.
5. In the context of attorneys at whom a production order is directed, *qua* a financial institution, legitimate concerns about privilege might arise. Legal privilege applies to certain communications made in connection with providing legal advice or related to legal proceedings, including items enclosed or referred to in such communications. It is the making of communication in those circumstances which confers legal privilege. The privilege belongs to the client. However, it is a rule of the common law that privilege cannot be asserted and does not exist where the client has the intention to further a criminal purpose, even if unknown to his solicitor. Section 15 of the MLPA does not oust legal professional privilege.

**R v Central Criminal Court, ex parte Francis & Francis** [1989] 1 A.C. 346 applied,

**R. v. Cox and Railton** (1884) 14 QBD 153 applied.

6. The ability to be heard on the question of setting aside or varying a production order is therefore an important safeguard. Given the importance of this issue, it would have been prudent for Bakre J to have stipulated a return date to afford the respondent an opportunity to be heard on the question of privilege. In this case however, Bakre J was very much alive to the issue of privilege: he called for and received submissions on this issue at the ex parte hearing and delivered a brief written ruling explaining why he concluded that privilege did not attach to the documents that were the subject of the production order.
7. In the circumstances of this case, given that the respondent sought to assert privilege on the erroneous premise that he was the subject of the investigation, and once it is remembered that the privilege is the client's and that legal professional privilege does not exist where communication between the client and counsel is in furtherance of a criminal purpose, even if unknown to counsel, there is no utility in remitting the matter on the issue of privilege in circumstances where it is patently clear that the premise on which the respondent seeks to set aside or vary the order of the first learned judge is entirely misconceived.

**R v Central Criminal Court, ex parte Francis & Francis** [1989] 1 A.C. 346 applied, **The Attorney General v The Jamaica Bar Association** [2023] UKPC, 6 applied, **JSC Bank v Mukhtar Abylyazov** [2015] UKSC 64 applied.

## JUDGMENT

- [1] **WARD JA:** This appeal raises issues relating to the procedure for obtaining a production order pursuant to section 15 of the **Money Laundering (Prevention) Act 1996**, (“the MLPA”) the **Money Laundering (Prevention) (Amendment) Act, 2020** (“the MLPA as amended”), and the scope of applicability of the **Civil Procedure Rules 2023** (“the CPR”) in relation to such an application; in particular the right of a respondent to an application for a production order to be heard and to be served with all of the documents and evidence deployed in support of the *ex parte* application.

### **The procedural history**

- [2] The circumstances giving rise to the present appeal are as follows. The Office of the National Drug and Money Laundering Control Policy (“the appellant” or “the ONDCP” or “the Director”) commenced a money laundering investigation into a client of Michael Archibald (the respondent) of the firm Phillips, Phillips and Archibald. On 26<sup>th</sup> February 2024, the appellant applied *ex parte* for a production order pursuant to section 15(ii) of the MLPA. The application was based on an ongoing investigation into a potential money laundering offence by a client of the firm Phillips, Phillips & Archibald. The naming of the respondent as the person to whom the order was directed was premised on the fact that the respondent, an attorney in the firm of Phillips, Phillips and Archibald held certain documents relevant to the investigation, which the ONDCP required him to produce.
- [3] The application came before Bakre J who initially adjourned the hearing to advise himself in relation to the issue of legal professional privilege which might attach to any of the documents sought by the appellant. Being satisfied that the appellant had met the requirements of section 15(ii) of the MLPA and that the documents sought were not protected by legal professional privilege Bakre J granted the application. The Order

required the respondent to deliver up specified documents: essentially all customer due diligence information, correspondence and transaction records in relation to a specified property of the client within 7 days of being served with the order. The order contained the usual penal notice. At the appellant's request, Bakre J also included the following non-disclosure order at paragraph 6:

“The Defendant [the respondent], a financial institution not being the subject of the Claimant's investigation, may be served this Order without the Claim Form, Application Without Notice or Access Code.” (Emphasis added.)

- [4] The Order did not set a return date for an inter partes hearing. It was served on the respondent's firm on 26<sup>th</sup> February 2024.
  
- [5] On 5<sup>th</sup> March 2024, the respondent filed a Notice of Application with a certificate of urgency attached seeking: (i) a stay of execution of the production order (ii) a copy of the *ex parte* notice of application; (iii) all evidence in support of the application; and (iv) the transcript of the *ex-parte* hearing. The application indicated that the respondent *intended* to make an application to set aside or vary the *ex parte* order. The application asserted that the appellant's failure to serve him with these documents and the authorisation code to access them “undermines or is likely to undermine the Applicant's [respondent's] right to a fair hearing of his application to set aside or vary the *ex parte* order made against him, thereby breaching his rights as enshrined in the Constitution of Antigua and Barbuda”, and was also in breach of rule 11.19 of the CPR which entitles him to apply to set aside or vary an order made on a without notice application. It also asserted that rule 11.19 (3) was breached as the order did not contain a statement advising the respondent of this right.
  
- [6] According to the application, the provision of the documents relied on in support of the *ex parte* application was essential for the respondent to understand the basis of the application and the order to prepare an effective challenge and to ensure the principles of natural justice and procedural fairness are upheld. The stay of execution was said to be necessary to prevent irreparable harm to the respondent and to ensure the

integrity of the judicial process, allowing for a fair and just determination of the matter with the respondent's participation.

- [7] The application was accompanied by an affidavit in support sworn to by the respondent on 5<sup>th</sup> March 2024. At paragraphs 4 and 5 the respondent averred:

- "4. This failure on the part of the Respondents has placed me at a significant disadvantage and has impaired my ability to fully understand the claims against me upon which such an order is made when one considers the relevant provision under which the application was granted.
5. Immediately upon being served, recognizing the severity of the order and its potential impact on my professional and personal life, I contacted the Office of National Drug and Money Laundering Control Policy (ONDCP) directly to request the aforementioned documents. My aim was to gain a comprehensive understanding of the basis for the order and to begin preparing my challenge."

- [8] The affidavit also raised issues not mentioned in the notice of application. In particular, at paragraphs 11-16, the respondent asserted that the documents and information requested by the appellant are governed by legal professional privilege. This was asserted to buttress the respondent's argument that he was entitled to understand the claim against him and to challenge that claim to prevent irreparable harm to himself.

- [9] On 5<sup>th</sup> March 2024, Smith J heard the respondent's application for a stay and disclosure of documents on an inter partes basis. She granted an interim stay of the production order pending further hearing of the respondent's application. That further hearing was conducted on 19<sup>th</sup> March 2024. After hearing submissions from both sides, Smith J made the order dated 19<sup>th</sup> March 2024, that is the subject of this appeal. It is useful to set out the full terms of the operative parts of the order:

- "1. The stay of the Production Order granted in Claim Number ANUHCV2024/0052 - Director of the ONDCP v Michael G. Archibald is granted.

2. There should have been a return date for an inter parte (sic) hearing.
3. The Court Registry is to set a date for the hearing before another Judge of the High Court.
4. The Respondent will serve the Applicant with (sic) following:
  - a. The Application,
  - b. The Affidavit,
  - c. The Order, and
  - d. The Access Code.”

### **The appeal**

[10] Being dissatisfied with the order of Smith J, the appellant filed a notice of appeal on 28<sup>th</sup> March 2024 containing 18 grounds. These were reduced to 7 grounds at the hearing of the appeal. The substance of these grounds and the appellant's submissions may be reduced to the following: (i) the judge failed to adopt a purposive interpretation of section 15 (ii) of the MLPA in line with its purpose as a confidential investigatory tool impacting national security, which purpose conflicts with the requirement to serve documents under CPR Rule 11.18; (ii) the judge did not treat the application as constituting special circumstances under CPR Rule 26.1(2)(x), which allows the Court, on the application of a party, to dispense with compliance with any CPR rule in special circumstances; (iii) the Judge failed to apply the overriding objective of rule 1.1(2)(c) to act proportionately by ensuring that disclosure did not compromise the criminal investigation; (iv) the judge erred in ordering an inter partes hearing, in that she did not properly consider rule 11.17(c), which allows the court to deal with an application without a hearing if the judge considers a hearing to be unnecessary or inappropriate, and further ignored the requirement in section 15 of the MLPA that where a production order has been made the documents are required to be produced 'forthwith' to the authorities and not after an inter partes hearing; (v) the Judge erred in treating the respondent as a defendant in the underlying criminal investigation who needed an opportunity to defend himself, failing to appreciate that a financial institution to which a production order is directed is not a defendant in the underlying criminal investigation. Smith J thereby gave undue credence to the respondent's demand for documents to defend himself, despite there being no allegations against him as

Bakre J's order made clear; (vi) the Judge lacked jurisdiction to override Bakre J's non-disclosure order as she was not sitting in an appellate or judicial review capacity.

[11] On behalf of the respondent, Mr. O'Kola submitted that the *ex parte* order granted by Bakre J breached the mandatory provisions of CPR 11.19 that required the listing of a return date for an inter partes hearing and for service of the documents relied on in support of the *ex parte* application for the production order. The respondent, as an attorney, has a direct interest in challenging the order to protect client privilege and constitutional rights and an investigation under the MLPA cannot justify suspending procedural fairness. The MLPA does not override legal professional privilege, and privileged communications remain protected unless it is part of a crime. Even as a "financial institution," the respondent had standing to challenge the order's validity, given its impact on his duties to his client and legal professional privilege.

[12] Mr. O'Kola further submitted that section 15 of the MLPA simply authorises the making of the production order but is silent as to whether the application for a production order may be made *ex parte*. Additionally, section 15 does not say whether the order should stipulate a return date, nor does it address legal professional privilege. The requirement to produce documents "forthwith" refers to the financial institution's duty to comply; it is not a ban on inter partes hearings. To permit an inter partes hearing does not undermine the purpose of the MLPA. The financial institution can still be required to produce the material, but after an inter partes hearing. While the respondent agrees that the initial application could have been made *ex parte*, he contends that the procedure to be followed is governed by CPR 11.18, which requires service of the *ex parte* order and any evidence in support of the without notice application. Further, rule 11.19 entitles the respondent to apply to set aside or vary the *ex parte* order. These CPR provisions are fundamental to a fair process, in the absence of safeguards within the MLPA.

[13] As to Smith J's jurisdiction, Mr. O'Kola submitted that she had jurisdiction to modify the *ex parte* order as this was a routine *inter partes* review; not an appeal or judicial review.

She was “entitled to enforce CPR 11.18” after the fact by ordering a return date and was further entitled to determine that it was appropriate for the respondent to see the evidence (subject to undertakings) and to order service of the relevant documents since Bakre J’s *ex parte* non-disclosure order did not bind her. He urged this Court to be slow to interfere with the way Smith J exercised her discretion.

### **Discussion - The statutory framework – Production Orders**

[14] The ONDCP is an office established under section 3 of the **Office of the National Drug and Money Laundering Control Policy Act**<sup>1</sup>. The ONDCP is headed by the Director. Section 10 of the MLPA designates the Director as the Supervisory Authority for all financial institutions except financial institutions licensed to carry on banking business under the Banking Act, 2015. Section 11A of the MLPA as amended sets out the powers vested in the Director of the ONDCP. Among these powers is the authority to receive reports from financial institutions, as defined, and to forward any such report to law enforcement authorities if, upon review, the Director has reasonable grounds to believe that a money laundering offence is being, has been, or is about to be committed.

[15] The appellant moved the court to grant a production order pursuant to section 15(ii) of the MLPA which is contained in **PART III** of the MLPA. Section 15(ii) provides:

“15. Upon the application by the Supervisory Authority (Director of the ONDCP), a Judge of the High Court, upon being satisfied that there are reasonable grounds for believing that a person (referred to in this section as “the defendant”) is committing, has committed or is about to commit a money laundering offence or has engaged or is about to engage in money laundering activity, may make an order—

(i) that any person reasonably believed to be in possession or control of any document relevant to—

(a) identifying, locating or quantifying any property of the defendant; or  
be required to deliver the document forthwith to the Director of the ONDCP or other law enforcement agency;

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<sup>1</sup> No. 11 of 2003 CAP. 283.

- (ii) that a financial institution forthwith produce to the Director of the ONDCP or other law enforcement agency all customer due diligence information and correspondence obtained by the financial institution and any information on business transaction conducted by or for the defendant with the financial institution during such period before or after the date of the order as the Judge directs.”

[16] In certain circumstances, attorneys at law are deemed financial institutions by virtue of the First Schedule to the MLPA as amended, which provides:

“26. Attorneys-at-Law when they prepare for, or carry out, transactions for their clients concerning the following activities: buying and selling of real estate...”.

[17] Section 15(ii) of the MLPA is an investigatory tool for the detection and investigation of the serious crime of money laundering. It is available to the ONDCP in pursuing a property or money tracking order otherwise referred to as a production order, which is the term I will use in this judgment. It permits the ONDP to obtain such an order where the Director satisfies the judge that there are reasonable grounds for believing that a person, “the defendant”, is committing, has committed, or is about to commit a money laundering offence, or has engaged, or is about to engage in money laundering activity. Where the judge is so satisfied, he may compel any person reasonably believed to be in possession or control of the relevant information/documents to provide access to the ONDCP in furtherance of its money laundering investigation.

[18] The MPLA makes other investigatory tools available to the Director in relation to money laundering offences. For example, the Director may apply to the High Court for a freezing order pursuant to section 19 or a civil forfeiture under section 20A.

[19] It is common ground that section 15 does not provide a detailed procedure for applying for a production order, whether *ex parte* or on notice. It does not specify how the application should be initiated, whether by affidavit or claim form, nor does it indicate whether the respondent may apply to vary or discharge the order.

[20] This is to be contrasted with other provisions relating to applications to the High Court for other types of orders. For example, section 19(1A) stipulates that an application for a freeze order shall be made *ex parte*. Section 19(1)(1B) stipulates that the ONDCP must give at least fourteen days' notice of the order to the owner of the property and to any person the Director reasonably believes may have an interest in the property. Section 19A(1A) stipulates that on an application for a freeze order pursuant to section 19(1)(b) the High Court may not make such an order unless the application for that order is supported by an affidavit of an authorized officer stating that he suspects that the defendant committed the offence. Section 19(1C) of the MLPA as amended, stipulates that the defendant or a person affected by a freeze order may apply to the High Court to vary or discharge the order. Additionally, section 28D of the MLPA makes provision for the giving of notice of certain applications and orders but only in relation to applications made pursuant to sections 2B, 18B(2), 19(1A), 20(A), 20(B)(1) and 20F(3) or an order pursuant to section 19A(5).

[21] In the face of section 15's apparent lack of procedural detail, section 28B(1) of the MLPA is relevant. It provides:

“Proceedings on an application under this Act are civil in nature, except as otherwise provided in this Act.”

[22] The question is: does this provision mean that the CPR applies; or does the MLPA provide otherwise? Both parties on this appeal have proceeded on the basis that the CPR 2023 governs an application made pursuant to section 15(ii), albeit they differ as to the extent of its application, especially in relation to rule 11.18. This requires a closer look at the relevant provisions.

[23] By virtue of rule 2.2(1), the CPR applies to all ‘civil proceedings’ in the Eastern Caribbean Supreme Court across the member states. The expression “civil proceedings” is defined as including judicial review and applications to the court under the Constitution of any Member State or Territory under Part 56: rule 2.2(2). However, the rules are disapplied in relation to certain types of proceedings, including “any other proceedings in the Supreme Court instituted under any enactment, in so far as Rules

made under that enactment regulate those proceedings”: rule 2.2(3)(e). Under the CPR, a “claim” is to be construed in accordance with Part 8, and “Claimant” is defined as a person who makes a claim (rule 2.4).

[24] Part 8 deals with how to start proceedings and rule 8.1(1) provides so far as relevant:

“(1) A claimant starts proceedings by filing in the court office the original and one copy (for sealing) of-

- (a) the claim form; and (subject to rule 8.2)
- (b) the statement of claim; or
- (c) if any rule or practice direction so requires—an affidavit or other document.”

[25] Rule 8.1(6)(a) provides that a person who seeks a remedy before proceedings have started must seek that remedy by an application under Part 11, which deals with applications for court orders made before, during or after the course of proceedings. Rule 11.8(1) provides that the general rule is that the applicant must give notice of the application to each respondent. Rule 11.8(2) provides that an applicant may make an application without giving notice if this is permitted by a practice direction or a rule. Rule 11.18 provides:

“After the court has disposed of an application made without notice, the applicant must serve a copy of –

- (a) the application;
- (b) any evidence in support of the application; and
- (c) the order made by the court,

on all other parties.”

[26] Rule 11.19 provides:

“(1) A respondent must make such an application not more than 14 days after the date on which the order was served on the respondent.

(2) An order made on an application of which notice was not given must contain a statement telling the respondent of the right to make an application under this rule.”

[27] The first point to note is that the production order sought is a creature of the MLPA and an application for such an order is instituted by virtue of the MLPA which stipulates who may make it, to whom it is to be made, and the requirements to be satisfied for

its grant. Considering that the sole and limited purpose of applying for a production order is to obtain documents, and in the case of a financial institution specifically, customer due diligence information, correspondence obtained by the financial institution, and any information on business transactions conducted by or for the defendant with the financial institution during the specified period in pursuance of a money laundering investigation, the provisions of CPR Part 8 seem an uneasy fit. There is no intention to issue a claim within the meaning of the CPR. The only potential outcome of the application being granted, if any, is a criminal charge against the defendant.

[28] Furthermore, there is no stipulation in the MLPA that an application for a production order be brought via a claim form. This is significant, considering that in relation to proceedings brought under **Part IVA**, section 28(3) of the MLPA as amended provides that “proceedings under **Part IVA** are brought when (a) a claim form is filed or (b) an application is made for a freeze order in relation to property, whichever is the earlier.” This wording, by its specific reference to a claim form, seems to more clearly contemplate the engagement of the CPR in relation to applications for a freeze order and civil forfeiture order. Had the draftsman intended the same procedure to obtain in relation to production orders, he could have easily said so.

[29] More concerning, however, is the potentially irreparable damage that could be inflicted on the underlying criminal investigation if the full disclosure regime of CPR 11.18 is applied to an application for a production order. The documents and evidence supporting the application would need to be disclosed, including the evidence against the defendant shared with the judge. Considering that section 15 of the MLPA is intended to provide law enforcement with an investigatory tool to aid a criminal investigation, applying CPR 11.18 when the investigation might be at a sensitive stage and the defendant has not been charged with a criminal offence, would completely undermine the purpose of section 15(ii) of the MLPA and the criminal investigation. It would entitle a person who is only a suspect at that stage to full disclosure, contrary

to the rules of disclosure in criminal matters, which generally require disclosure only after a person is charged with an offence.

[30] In **Vincent Cassell v The Director of Public Prosecutions**<sup>2</sup> this court had occasion to question the suitability of the CPR regime to applications such as these, albeit in the context of an application for a restraint order. The issue was whether an application for a restraint order under the **Proceeds of Crime Act** (POCA) must be commenced by fixed date claim form pursuant to CPR Part 8. Having examined the provisions of POCA, this Court held that it was not.

[31] This anomaly has also engaged the attention of academic writers. In her work, **Guide to Investigation and Prosecution of Serious Organised Crime**, 5<sup>th</sup> edn, Nicola Suter, former Criminal Justice Advisor to the Organisation of Eastern Caribbean States observes:

“11.2 Some courts in the Eastern Caribbean have been stipulating that applications for restraint orders are to be lodged with a fixed date claim form as opposed to an application form. It is suggested that this practice is not one that should be maintained. First and foremost, a fixed date claim form puts the respondent on notice of the hearing which is inconsistent with the intention of the restraint process.

11.3 In addition, the fixed date claim form invites the respondent to avoid a hearing by making payment of the fine in full. Again, this is inconsistent with the rationale of the restraint order, which is an interlocutory measure to preserve assets pending the making of a confiscation order; given that a confiscation order is unlikely to have been made when the restraint order is sought then the respondent could not possibly know how much to pay...”

[32] In my view, parallel arguments can be made in the context of production orders sought pursuant to section 15 of the MLPA. It is respectfully suggested that it may well be time for the authorities to consider providing a detailed procedure for applying for production orders within the context of criminal procedure rules, as in England, or within the MLPA itself.

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<sup>2</sup> MNIHCVP2023/0002 (delivered 8<sup>th</sup> December 2023 unreported).

- [33] That said, because the parties have argued the appeal on the basis that the CPR regime applies, it is not necessary to decide the point on this occasion. Nonetheless, assuming rule 11.18 applies to an application for a production order, for the reasons that follow, Smith J was wrong to order disclosure of the evidence deployed by the appellant in support of the *ex parte* application.
- [34] It is important to bear in mind that what was before Smith J was an application for a stay of execution of the order of Bakre J, disclosure of the documents relied on in support of the *ex parte* application, and the transcript of the *ex parte* hearing, pending an application to set aside or vary Bakre J's order. This was not the application to set aside or vary the order of Bakre J. Even though that order did not contain a statement advising the respondent of his right to have it set aside or varied, he was aware of his right and indicated clearly that he *intended to make that application at some future time*. At best, therefore, the failure to comply with rule 11.19(3) was a procedural irregularity which caused no prejudice to the respondent<sup>3</sup>.
- [35] One would have thought, though, that the respondent would have moved the court straight away to set aside or vary Bakre J's order. However, it is clear that the respondent's strategy was to claim that he needed to see the evidence in support of the *ex parte* application in order to be in a position to "defend himself" at a subsequent set aside hearing. This seems to have been the main focus of the application before Smith J.
- [36] The effect of Smith J's order was to vary the order of Bakre J by overruling his non-disclosure order and by staying his order so that the respondent was not required to comply within 7 days as stipulated in that order. Smith J also directed an inter partes hearing which she held Bakre J erred in omitting to provide for.

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<sup>3</sup> Seventh Day Adventist Cooperative Society Limited v Financial Services Regulatory Authority SLUHCMAP2022/0008 (delivered 31<sup>st</sup> January 2024 unreported).

- [37] I am satisfied that Smith J did not have jurisdiction to overrule Bakre J's non-disclosure order on the application before her. As a court of concurrent or coordinate jurisdiction she was not exercising an appellate jurisdiction: **Marilyn Jeffers v The Personal Representative of The Estate of Wyndham Weste et al**,<sup>4</sup> **Harding v Forrester and others**<sup>5</sup>. At most, Smith J could determine whether Bakre J's failure to stipulate a return date was a procedural irregularity requiring a stay of his order pending an inter partes hearing. Smith J's remit did not extend to determining whether he was right to order non-disclosure of the documents and evidence used in support of the *ex parte* application.
- [38] Moreover, quite apart from the jurisdiction issue, in purporting to exercise her discretion to order disclosure, Smith J considered irrelevant matters and failed to take account of highly relevant matters in deciding to order disclosure of the documents sought by the respondent. In her notes of the hearing, Smith J records her view that *"The Applicant must have the ability to ascertain the case against him"*<sup>6</sup>.
- [39] In my respectful view, Smith J failed to appreciate that the respondent was not the defendant in the underlying criminal proceedings and as such there was no case against *him*. The production order was directed at the respondent in his capacity as an Attorney-at-Law performing an activity of a nature that renders him a financial institution within the meaning of the MLPA. While the respondent initially took issue with the production order being directed at him, the evidence before the Court below was that the firm was registered as Phillips, Phillips & Archibald Inc. The respondent is listed as one of two Directors and the company's attorney-at-law.<sup>7</sup> In ordering non-disclosure, Bakre J's order dated 26<sup>th</sup> February 2024 expressly stated that *"the defendant, not being the subject of the claimant's investigation, may be served this order without the claim form, Application Without Notice, or Access Code"*. This order was intended to safeguard the integrity of the underlying criminal investigation and

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<sup>4</sup> ANUHCVP2022/0013 (delivered 24<sup>th</sup> March 2023 unreported).

<sup>5</sup> (2014) 84 WIR 389.

<sup>6</sup> Page 199 of Volume 1 of the Record of Appeal.

<sup>7</sup> See affidavit of Marlon Proctor filed 15<sup>th</sup> March 2024 and Exhibit "MP-1".

was made after Bakre J had directed himself on the question of legal professional privilege, which he determined could not be maintained. Bakre J seems to have taken the view that given the respondent's status, there was no need for him to see the underlying evidence against his client. Bakre J had the advantage of having seen the material.

[40] We are advised that this material was not before Smith J. Considering that admission, the respondent's written submission that Smith J, *"had the benefit of hearing from both sides by 5 March; she likely concluded that the affidavit may not contain anything so exceptionally sensitive that the Respondent should be denied access"* is purely speculative and in fact erroneous.

[41] Smith J erred in not considering that her order for disclosure had the potential to undermine the underlying criminal investigation into the respondent's client and further erred in ordering disclosure of such highly sensitive material without at least reviewing it herself to consider, for example, whether any redactions should be made. There is nothing in her order or her certified notes of the hearing to suggest that she gave any consideration to such matters.

[42] I am fortified in my view that Smith J was wrong to order disclosure having regard to the fact that on the hearing of this appeal, Mr. O'Kola identified two purposes to be served by the inter partes hearing. The first purpose to be served was to allow the respondent to assert that the production order should have been directed at the firm and not him. Indeed, there was evidence before Smith J and before this Court that when the respondent first contacted the ONDCP after being served with the production order his only complaint was that while he had signed off on the transactions in question he had done so on behalf of the law firm Phillips, Phillips and Archibald. He asked Mr. Marvin Hall, Counsel for the ONDCP, to make representation to Bakre J to amend the order to direct it to the firm and "he will gladly comply with the order".<sup>8</sup> The second purpose intended to be served by an inter partes hearing was to

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<sup>8</sup> See affidavit of Marvin Hall filed 15 March 2024 at paras 3 and 4.

assert legal professional privilege. However, when taxed, Mr. O’Kola conceded that the respondent did not need to see the evidence to submit to Bakre J that the production order should have been directed to the firm. Mr. O’Kola further candidly conceded that the respondent did not require sight of the evidence against his client to be able to assert legal professional privilege since the production order detailed the documents to be produced and the respondent was able to identify what documents he thought attracted privilege. Mr. O’Kola next suggested that the respondent needed to see the evidence against the client to assess whether the respondent had made full and frank disclosure at the *ex parte* hearing in relation to the property transaction, the documents for which were sought by the production order. However, Mr. O’Kola conceded that the application before Smith J did not assert an absence of full and frank disclosure. When pressed, Mr. O’Kola could not identify a single reason why it was necessary for the respondent to have sight of the evidence against his client. Had this same degree of candour been exhibited before Smith J, she may well not have been led into error.

- [43] To the extent that Smith J purported to exercise her discretion to order disclosure, I am satisfied that this Court can intervene because her discretion was exercised without jurisdiction and, additionally, was made by considering irrelevant matters while ignoring highly relevant matters as identified at paragraphs [37] – [41] above. A court hearing an application for a production order pursuant to section 15(ii) of the MLPA has to be mindful of the sensitive nature and purpose of the application and must not adopt a mechanical application of the CPR, particularly in relation to disclosure of the evidence in support of the application, while ignoring the fact that the rules themselves provide for deviation in special circumstances.

**Requirement for an inter partes hearing on the issue of privilege**

- [44] Having regard to the important concessions made on this appeal, the only real issue the respondent would seek to raise at an inter partes hearing is the question of privilege.

[45] I do not agree with Mr. Bird's submission that because section 15(ii) of the MLPA requires the production of the documents to be made forthwith that must mean that it precludes an inter partes hearing. In the first place, I merely observe that Bakre J's order was for production within 7 days. Clearly, given the nature and number of documents that may need to be produced, some reasonable time for compliance must be allowed. Furthermore, in the context of this case, there may be very good reasons why a financial institution may need to be heard and should have the opportunity to vary or set aside a production order. There may be a patent error on the face of the order relating to details concerning the account number, account holder or property description. Mr. Bird recognised this in his amended written submissions in which he provided other examples of situations where a financial institution may require a variation of a production order. These include where the financial institution may not have custody or control of the records requested; or it is not legally the entity referred to in the order, or for some other legal reason that inhibits its ability to comply.

[46] In the context of attorneys at whom a production order is directed, *qua* a financial institution, legitimate concerns about privilege might arise. Legal privilege applies to certain communications made in connection with providing legal advice or related to legal proceedings, including items enclosed or referred to in such communications. It is the making of communication in those circumstances which confers legal privilege. The privilege belongs to the client. However, it is a rule of the common law that privilege cannot be asserted and does not exist where the client has the intention to further a criminal purpose, even if unknown to his solicitor: **R v Central Criminal Court, ex parte Francis & Francis**;<sup>9</sup> **R. v. Cox and Railton**.<sup>10</sup> I agree with the respondent's submissions that section 15 of the MLPA does not oust legal professional privilege, although on another occasion where the issue arises, the full purport of section 26(1) may have to be considered<sup>11</sup>.

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<sup>9</sup> [1989] 1 A.C. 346.

<sup>10</sup> (1884) 14 QBD 153.

<sup>11</sup> Section 26(1) provides: "Subject to this Constitution, the provisions of this Act shall have effect notwithstanding any obligation as to secrecy or other restriction upon the disclosure of information imposed by any law or otherwise."

[47] The ability to be heard on the question of setting aside or varying a production order is therefore an important safeguard. In my view, given the importance of this issue, it would have been prudent for Bakre J to have stipulated a return date to afford the respondent an opportunity to be heard on the question of privilege. In fairness to Bakre J, however, he was very much alive to the issue of privilege: he had called for and received submissions on this issue at the *ex parte* hearing. Having considered the cases of **R v Central Criminal Court, ex parte Francis & Francis, The Attorney General v The Jamaica Bar Association**<sup>12</sup> and **JSC Bank v Mukhtar Abylyazov**<sup>13</sup>, he delivered a brief written ruling explaining why he concluded that privilege did not attach to the documents that were the subject of the production order. He held:

“All these cases are to the effect that where the client is (sic) a subject of a criminal investigation the client and legal practitioner privilege will not affect communications required for the purpose of the investigation. It is in view of this that I grant the said application...”.

[48] I have pondered whether there is any point in remitting this matter to Bakre J for him to receive submissions from the respondent on the issue of privilege. The appellant and the respondent have addressed the issue of legal professional privilege in their written submissions in this appeal. Both have referred to the authorities relied on by the judge. The issue is addressed at paragraphs 23 and 24 of the respondent’s written submissions. Nothing said therein conflicts with Bakre J’s expressed understanding of the principle and, in particular, the exception to it. There is thus no dispute about the applicable legal principles.

[49] I am bound to say that in the respondent’s application to stay the order of Bakre J, there is no mention of legal professional privilege. The reason for seeking a stay and the evidence in support was “to prevent irreparable harm to the Applicant and to ensure the integrity of the judicial process, allowing for a fair and just determination of

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<sup>12</sup> [2023] UKPC, 6.

<sup>13</sup> [2015] UKSC 64.

the matter with the Applicant's participation<sup>14</sup>." This theme was picked up in the respondent's affidavit in support of his application. At paragraph 4 thereof he averred that the appellant's failure to serve him with the documents sought, "has placed me at a significant disadvantage and has impaired my ability to fully understand the claims against me upon which such an order is made...." The respondent clearly harboured a misconception that he was somehow the subject of investigation. Indeed, Mr. O'Kola said as much to this Court during oral submissions. He is recorded as saying that the applicant was still in doubt whether he was the subject of the production order. The Court asked Mr. O'Kola whether that could be a rational doubt in light of the unequivocal endorsement in the order of Bakre J that the respondent was not the subject of an investigation. He candidly admitted that it could not be.

[50] What then remains? Once it is remembered that the privilege is the client's and that legal professional privilege does not exist where communication between the client and counsel is in furtherance of a criminal purpose, even if unknown to counsel, there is no utility in remitting the matter on the issue of privilege in circumstances where it is patently clear that the premise on which the respondent seeks to set aside or vary the order of Bakre J is entirely misconceived. It is grounded in the erroneous belief that the respondent is the subject of the appellant's criminal investigation. That is also the erroneous basis on which Smith J determined that the respondent should be afforded the opportunity to "ascertain the case against him". The respondent cannot properly assert the client's privilege to defend, challenge, or answer a non-existent case against himself.

[51] For the foregoing reasons, I would allow the appeal and make the following orders:  
(1) the order of Smith J made on 19<sup>th</sup> March 2024 is set aside and the stay of the order of Bakre J made on 26<sup>th</sup> February 2024 is discharged with immediate effect.

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<sup>14</sup> Paragraph 9 of the Application Notice For A Stay Of Execution And For Provision Of Documents And Transcript filed on 5<sup>th</sup> March 2024.

[52] The respondent shall pay the appellant's costs to be assessed if not agreed within 21 days of the delivery of this judgment.

I concur.  
**Esco Henry**  
Justice of Appeal

I concur.  
**Paula Gilford**  
Justice of Appeal [Ag.]

**By the Court**

**Chief Registrar**