

**THE EASTERN CARIBBEAN SUPREME COURT**

**IN THE HIGH COURT OF JUSTICE  
(CIVIL)**

**SAINT LUCIA**

**CLAIM NO. SLUHCV 2020/0034**

**BETWEEN:**

**1. PETER HIPPOLYTE  
2. MICHAEL AUGUSTIN  
3. MARTINUS ALEXANDER**

**Claimants**

**And**

**MAGISTRATE BERTLYN REYNOLDS**

**Defendant**

**Appearances:**

Mr. Horace Fraser of Counsel for the Claimants  
Mr. Seryozha Cenac, Senior Crown Counsel with him Mr. George K. Charlemagne,  
Crown Counsel, Attorney General's Chambers of Counsel for the Defendant

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2022: June 3,  
December 1.  
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**JUDGMENT**

- [1] **INNOCENT, J.:** The claimants were arrested on 26<sup>th</sup> May 2010 and subsequently indicted for the offence of unlawful possession contrary to section 441 of the Criminal Code. On 31<sup>st</sup> December 2018, the Director of Public Prosecutions ('DPP') withdrew the indictment and the criminal proceedings against the claimants was discontinued. At the time of the claimants' arrest a significant cash seizure was made by the police. The cash was seized by Police Constable Alain James and remained in the custody of the police authorities until 24<sup>th</sup> April 2019.
- [2] On 25<sup>th</sup> April 2019, an application was made to the magistrate at the behest of the Police for the continued detention of the cash seized by the police authorities on 26<sup>th</sup> May 2010.

- [3] On 26<sup>th</sup> April 2019, the magistrate made an order for the continued detention of the cash seized for a period of three months.
- [4] On 30<sup>th</sup> April 2019, the claimants filed an application before the magistrate who had granted the continued detention order by which they sought a declaration that the continued detention order made by the magistrate on 26<sup>th</sup> April 2019 was a nullity and that the seized cash (the 'property') be released to the claimants. This application was opposed and was heard before the magistrate on 26<sup>th</sup> July 2019. At the conclusion of the hearing, the magistrate reserved her decision to 23<sup>rd</sup> August 2019, and the detention order was continued until that date.
- [5] On 23<sup>rd</sup> August 2019, the magistrate delivered her decision dismissing the claimants' application. In her written decision the magistrate held that the magistrates' court had jurisdiction to continue with the process of civil detention having made a detention order on 26<sup>th</sup> April 2019.
- [6] On 23<sup>rd</sup> August 2019, the magistrate made a further continued detention order for a period of three months.
- [7] By order of the court dated 9<sup>th</sup> February 2022, on the claimants' application for leave to file a claim for judicial review, the claimants were granted leave to file a claim for judicial review against the magistrate's order dated 26<sup>th</sup> April 2019 and her written decision of 19<sup>th</sup> August 2019.
- [8] The claim for judicial review was filed by the claimants on 16<sup>th</sup> February 2022, by virtue of which they sought the following declarations and orders, namely:
- (1) a declaration that the magistrate's decision of 26<sup>th</sup> April 2019 granting a detention order to Woman Police Constable Dalia Jules ('WPC Jules') acting on behalf of the Financial Intelligence Authority ('FIA') was unlawful and ultra vires the provisions of section 29A of the Proceeds of Crime Act as amended by the Proceeds of Crime (Amendment) Act, No. 14 of 2013 ('POCA');
  - (2) a declaration that the decision of the magistrate was irrational;

- (3) a declaration that in arriving at her decision, the magistrate took into account irrelevant considerations;
- (4) a declaration that the continued detention order made by the magistrate on 26<sup>th</sup> April 2019 and continued and extended on 19<sup>th</sup> August 2019 was null, void and without legal effect;
- (5) a declaration that the magistrate had no jurisdiction to grant the detention order;
- (6) a declaration that the property was detained by the Police without any lawful authority;
- (7) an order of certiorari quashing the magistrate's decision of 25<sup>th</sup> April 2019 and 19<sup>th</sup> August 2019; and
- (8) an order directed to the Commissioner of Police for the release of the property to the claimants.

[9] The claimants, in support of their claim for judicial review, contended that the magistrate's decision of 25<sup>th</sup> April 2019 was ultra vires section 29A of the POCA and that the magistrate's decision was irrational, unreasonable, and was based on irrelevant considerations and was therefore wrong in law and unsustainable. In support of these general assertions, the claimants relied on the following grounds set out below.

[10] The claimants contended that the property having been seized and detained by the police authorities, purportedly pursuant to the police powers of seizure and detention under the provisions of the common law or the Criminal Code had failed to obtain an order from a magistrate for the continued detention of the property either under the Criminal Code or the Proceeds of Crime Act.

[11] They also contended that the magistrate, being empowered by the provisions of section 29A of POCA to make a detention order, incorrectly or unlawfully applied her discretion to make the continued detention order, having exercised her

discretion on the basis that the exercise of the magistrate's discretion was dependent on the reasonableness of the conduct of the police in making inquiries and taking investigative measures prior to the pursuance of an application for the continued detention of the property pursuant to section 29A of the POCA.

- [12] The claimants further contended that the magistrate's findings of fact as it related to the time when the seizure of the property occurred, which the magistrate held to have been on 24<sup>th</sup> April 2019, was unreasonable and unsupported by the evidence.
- [13] In addition, the claimants contended that arguably, based on the assumption that the Police could have availed themselves of the opportunity to apply for and obtain an order for the continued detention of the property pursuant to section 29A of the POCA, the magistrate failed to consider, that in any event, a period in excess of 72 hours had elapsed since the initial seizure of the property by the police authorities, the discontinuance of the criminal proceedings against the claimants and the making of an application for a detention order on 25<sup>th</sup> April 2019.
- [14] The claimants maintained that the magistrate's ruling that no jurisdictional point arose for consideration, and having premised her decision on matters pertaining to restitution, divisibility of government and the reasonableness of the actions of the police in detaining the property beyond the time prescribed by law, took into account irrelevant considerations thereby rendering her decision unreasonable and ultimately outside the purview of the statutory remit of section 29A of the POCA.
- [15] The substance of the submissions made by the Honourable Attorney General ('Attorney General') to counter the arguments raised by the claimants can be summarised in the following manner. Firstly, the Attorney General submitted that contrary to the claimants' assertion that the application for the detention order was made by the Commissioner of Police, the application was indeed that of WPC Jules acting in the capacity of a financial investigator of the FIA.

- [16] According to the Attorney General, the initial application having been made in the name of the Commissioner of Police and subsequently amended to substitute the name of WPC Jules as the applicant in place of the Commissioner of Police, the application for the detention order was that of WPC Jules and not that of the Commissioner of Police. It appears that the amendment to the application for a detention order was not opposed. WPC Jules purportedly seized the property on 24<sup>th</sup> April 2019 pursuant to section 29A of the POCA. Therefore, according to the Attorney General, the seizure of the property that preceded the application made pursuant to section 29A of the POCA was that conducted by WPC Jules and not the original seizure of the property by the police investigative authority.
- [17] On the foregoing premise, the Attorney General argued that the magistrate's jurisdiction was triggered at the time of the seizure, which for all intents and purposes was on 24<sup>th</sup> April 2019. It was also contended that the magistrate possessed the power to order the continued detention of property seized in accordance with section 29A of the POCA once the magistrate was satisfied that there were reasonable grounds for suspecting that the property represented any person's proceeds of criminal conduct and, that the continued detention of the property was justifiable while its derivation was being investigated.
- [18] In a nutshell, the Attorney General argued that the FIA was authorised by the provisions of section 29A of the POCA to seize cash suspected to be the proceeds of criminal conduct and to make the necessary application to the magistrates' court for the continued detention of property seized. Therefore, the Attorney General contended that the property having been seized by WPC Jules on 24<sup>th</sup> April 2019 pursuant to section 29A of the POCA, the application for continued detention made on 25<sup>th</sup> April 2019 and the continued detention order made by the magistrate on 26<sup>th</sup> April 2019 was within the time limit prescribed by section 29A. The Attorney General argued that the magistrate conformed to the statutory remit of section 29A when she made the continued detention order.

- [19] The claimants contended that contrary to the Attorney General's assertions regarding the seizure of the property on 24<sup>th</sup> April 2019, the property was in fact seized by the police investigative authority on 26<sup>th</sup> May 2010 and kept in their possession after the criminal prosecution against the claimants had been discontinued. During this period there had been no application made to the magistrates' court for the continued detention of the property. Therefore, for all intents and purposes the property was unlawfully in the possession of the police investigative authority.
- [20] The claimants also contended that the purported seizure of the property by WPC Jules on 24<sup>th</sup> April 2019 was a nullity since legally there could have been no seizure from a source that was not in unlawful possession of the property. In short, WPC Jules could not have seized the property from the Commissioner of Police. To hold otherwise would amount to a legal absurdity.
- [21] Therefore, the claimants contended that the purported seizure by WPC Jules on 24<sup>th</sup> April 2019 was not sustainable in law because the only seizure that occurred and which was relevant for the purposes of the continued detention order was the seizure made by the police investigative authority on 26<sup>th</sup> May 2010. In the premises, the purported seizure of the property by WPC Jules, a financial investigator of the FIA, on 24<sup>th</sup> April 2019 was a nullity and therefore, could not have triggered the magistrate's jurisdiction to grant a detention order pursuant to section 29A.
- [22] The claimants went on further to argue that WPC Jules' assertion that she applied for a "continued detention order" on 25<sup>th</sup> April 2019 is palpably misleading since on 25<sup>th</sup> April 2019 there had been no prior detention order in force with respect to the property that was brought into being by any prior application made by either the police investigative authority, or any police officer at the behest of the DPP or the FIA.
- [23] The Attorney General also took the position that the claimants' claim for judicial review ought to fail since the claimants did not appeal the magistrate's decision to make a forfeiture order, if granted, to the High Court pursuant to sections 49A and

49B of the POCA. Accordingly, the claimants were possessed of an alternative remedy which they failed to pursue. Had the claimants availed themselves of this right of appeal to the High Court it would have afforded them an opportunity to have a hearing de novo in which they could have raised issues relevant to the irregularity of the entire proceedings. Additionally, it was argued that the claimants also had a right of appeal pursuant to section 909 of the Code of Civil Procedure which they failed to utilise.

[24] With respect to the question of an alternative remedy, the claimants contended that there was in fact no alternative remedy available to them in relation to the magistrate's making of a detention order pursuant to section 29A. The detention order granted on 25<sup>th</sup> April 2019 is in fact the subject of the present claim for judicial review and not any forfeiture order subsequently made. Therefore, the claimants argued that the appellate procedure was only capable of being utilised upon the grant of a forfeiture order pursuant to the POCA. In the premises, according to the claimants, the claim for judicial review does not interrogate any issue with respect to the grant of a forfeiture order that would have enabled the claimants to exercise the statutory right of appeal pursuant to section 49 of the POCA.

[25] In addition, the claimants argued that the right of appeal conferred by Article 909 of the Code of Civil Procedure is a general right of appeal whereas the right of appeal against an order for forfeiture under the POCA is specific with respect to matters arising by virtue of the enactment. Therefore, the only right of appeal available to the claimants was only in respect of a forfeiture order and not a detention order; and then only under the POCA and not the Code of Civil Procedure. In the premises, the claimants argued that the Attorney General's allusion to an alternative remedy is misconceived.

[26] Based on the evidence and the submissions of the parties it appears that the following questions arise for determination:

(1) Whether the purported seizure by WPC Jules on 24<sup>th</sup> April 2019 amounted to a seizure for the purposes of section 29A of the POCA, and in all the

circumstances of the case lawful thereby triggering the magistrates' court's jurisdiction to make a detention order.

- (2) Assuming that question (1) above is answered in the negative, whether the magistrate had the jurisdiction to make a detention order pursuant to section 29A of the POCA.
- (3) Assuming that question (1) is answered in the affirmative, whether the magistrate acted lawfully and within the ambit of the provisions of section 29A when she made the detention order.
- (4) Assuming that the magistrate had acted without jurisdiction to make a detention order in respect of the property, whether the continued detention of the property by a financial investigator of the FIA was unlawful and the entire proceedings that culminated in the forfeiture of the property was thereby rendered a nullity.
- (5) Whether the continued detention of the property by the police investigative authority subsequent to the discontinuance of the criminal proceedings against the claimants was unlawful.
- (6) Assuming that the answer to question (5) is answered in the affirmative, by extension, whether the fact of such unlawful detention amounted to a defect in the proceedings under the POCA that could have been cured by the purported seizure of the property by WPC Jules a financial investigator of the FIA.

### **The proceedings before the magistrate**

- [27] The claimants' submission before the magistrate was that it was unlawful for the Police to neglect to release the property to the claimants when the DPP had filed a discontinuance. The other party's response to the claimants' submission was that the law did not impose an obligation on the police to release property held in their custody upon the discontinuance of criminal proceedings involving that property.

[28] The claimants also submitted before the magistrate that the police, having ignored any recourse they may have had to the POCA for many years, while only opting to proceed under the provisions of the Criminal Code, debarred the police from pursuing any application for detention with a view to civil forfeiture proceedings. This was ostensibly because the property had been seized by the police on 26<sup>th</sup> May 2010, therefore, the application was in excess of the period of 72 hours. In the circumstances, the magistrate had no jurisdiction to make a detention order in respect of the property on the application of the police. It was argued in response to the claimants' submission that the State was not an indivisible unit to the extent that the police authority was bound by the DPP's discontinuance of the criminal proceedings which acted as a bar to the police authority resorting to civil forfeiture proceedings at the behest of the FIA under the POCA.

#### **The magistrate's decision**

[29] In her written decision dated 23<sup>rd</sup> August 2019, and delivered on even date, the magistrate said:

"At the time of their arrest the POCA parent Act (Cap.3.04) had been in force since 1995 but its first amendment (Act #4 of 2010) had come into force just about five months earlier on 25<sup>th</sup> January 2010. The RSLPF opting to proceed under the criminal law only and taking no recourse under the civil law POCA, at the time, is the foundation of Mr. Fraser's submissions about laches leading to unlawful detention to date."

[30] It appears from the magistrate's written decision that the magistrate found that:

"...no order for restitution of the cash to these three men was made. Indeed there being no POCA civil action yet in place, the issue of release of the cash to them did not arise."

[31] After a recitation of her factual findings, the magistrate determined that the issue that arose for consideration was:

"Whether the RSLPF retaining of the cash respondent between 31<sup>st</sup> December, 2018 and 26<sup>th</sup> April, 2019 was unlawful, in the absence of any order for restitution issuing at the time of discontinuance of the case of "Unlawful Possession".

[32] The magistrate, having resolved the abovementioned issue in favour of the police, said:

“CPS submits that the initial seizure of cash in 2010 for criminal proceedings was in keeping with sections 622 to 636 of the Criminal Code. These address the police authority to seize upon things they may later subject to forfeiture and a Magistrate’s authority to order police seizure. I would add only that sections 624 and 644 authorise a court to order restitution of such seized goods to a complainant, or an acquitted defendant, as the case may be. I believe that no order was made because no application was made, this being a discontinuance rather than an acquittal after full trial.”

[33] In arriving at the above conclusion, the magistrate relied on the decision in **Marcel v Commissioner of Police of the Metropolis**<sup>1</sup> in support of the proposition that after a discontinuance there was no automatic right to release property to one from whom it was seized but that the test of police power to retain seized goods is one of necessity so long as it was necessary to carry out the purposes for which the power is given and that necessity clearly included the primary purpose of investigating and preventing crime.

[34] The magistrate then went on to find that:

“Whereas Mr. Fraser cites the actions of the RSLPF between discontinuance in December 2018 and civil action in April 2019 as unlawful retention and unnecessary delay the CPS (supported by documentation) demonstrates due diligence of the RSLF in the interval.”

In this regard, the magistrate went further to discuss the evidence contained in the various affidavits filed in support of the application for continued detention. Based on this affidavit evidence the magistrate held:

“I believe the RSLF acted responsibly, in the absence of any court order for restitution or any application for release from the respondents in the interval...”

[35] The magistrate also found that the case of **Olupitan** cited before her by the police prosecutor to be “on point” with the proceedings before her. Relying on this authority, the magistrate held:

“I was indeed persuaded, as the CPS submitted that the RSLPF after investigation, which may include a seizure, may choose to approach the court through the DPP in criminal proceedings or the FIA in civil proceedings under the POCA because the Crown is not indivisible. Neither is the RSLPF bound by the DPP’s discontinuance.”

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<sup>1</sup> [1992] 1 All ER 72

The magistrate also relied on the decision in **Inqbal v South Bedfordshire Magistrates' Court**<sup>2</sup> in support of her finding that the detention order made on the application of WPC Jules was lawful.

[36] The magistrate further held:

“A magistrate still has jurisdiction to hear and grant a continued detention order under the POCA notwithstanding that criminal proceedings under the Criminal Code in relation to the same res or cash have earlier been discontinued. COD application under POCA is not an abuse of process.”

[37] Ultimately the magistrate opined:

“Where there is a 2010 seizure of cash in contemplation of proceedings under the Criminal Code, which the DPP discontinued in 2018, the police are not obliged automatically to release the cash ..., without the issuing of an order for restitution under the very Code or an order for release under POCA.”

[38] In respect of the claimants' contention that the magistrate failed to properly exercise her discretion in relation to the making of an order for detention of the property pursuant to section 29A (2) of the POCA thereby rendering the detention order a nullity, the same not having been made in compliance with the enactment, the claimants advanced the argument that the magistrate did not properly and adequately or at all consider the matters enumerated at section 29A (2) (a) and (b) of the POCA. In relation to this aspect of the complaint made by the claimants it is necessary to examine closely the basis upon which the magistrate exercised her power. The magistrate said in her written decision that:

“I am persuaded having scrutinized the affidavits of the de facto applicant and the four members of the RSLPF that the suspicion they maintain in 2019 that the respondent cash was tainted from the outset, is reasonable within the meaning of section 29A. I believe the affidavits in support of this application presented to me in April and now again in August, 2019 by the de facto applicant, show toilsome efforts to determine the derivation of the cash from several businesses and financial institutions. Since I am so persuaded I am not disposed to grant the application of the respondents' counsel for release of the cash to the human respondents at this time.”

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<sup>2</sup> [2011] EWCA 705

### **Police seizure**

- [39] A convenient starting point in resolving the matters in dispute in the present proceedings is the initial seizure and detention of the property by the police on 26<sup>th</sup> May 2010. It is unclear pursuant to what powers the police investigative authority seized and detained the property in question on 26<sup>th</sup> May 2010. However, the seizure and continued detention by the police investigative authority could only have been made pursuant to powers exercised under the Criminal Code or under the POCA.
- [40] However, it is now clear that the police authority did not pursue any application for seizure and detention of the property pursuant to the POCA at any point while the criminal proceedings were extant. Therefore, it is reasonable to assume that the police authority and the DPP retained the property on the basis of their investigative powers under the Criminal Code. It is also relevant that no application was made by any person for the release of the property while the criminal proceedings were extant.
- [41] Section 635 of the Criminal Code provides that a judge or a magistrate may order the seizure of any property which there is reason to believe has been obtained by, or is the proceeds of any crime, or into which the proceeds of any crime have been converted, and may direct that the property is kept or sold, and that the property or its proceeds, if sold, is held as he or she directs, until any other person establishes to his or her satisfaction a right to the property. Where no such right is claimed by any person within 6 months from the seizure, the property, or its proceeds, shall vest in the Accountant General for use of the State, and shall be disposed of accordingly.
- [42] In the present case there was no such application made by the prosecuting authority. In any case, it is doubtful that this right to apply for seizure of the property could have been made pursuant to the provisions of the Criminal Code in light of the discontinuance of the criminal proceedings against the claimants. However, this was a viable option opened to both the police and the DPP at the commencement

of the criminal proceedings or while the criminal proceedings were extant. In any event, the property remained evidence for the purposes of the criminal proceedings.

[43] The law permits the seizure and detention of property that would afford evidence in the commission of a criminal offence or criminal conduct. However, the criminal proceedings were discontinued against the claimants on 31<sup>st</sup> December 2018. At no time between the date of the claimants' arrest and the discontinuance of the criminal proceedings by the DPP did the Police or the investigative authority apply to the court for an order to seize and detain the subject property. Such an obligation could not have existed upon the discontinuance of the criminal prosecution against the claimants.

[44] Between 31<sup>st</sup> December 2018 and 24<sup>th</sup> April 2019, no application had been made by the police pursuant to section 29A of the POCA. Therefore, the property remained in the possession of the police otherwise than in accordance with the provisions of section 29A of the POCA.

[45] At the time of the claimants' arrest on May 26<sup>th</sup> 2010, section 29A of the POCA was not yet in force. Section 29A only came into being by virtue of section 3 of the Proceeds of Crime (Amendment) Act No. 14 of 2013 which came into force on 5<sup>th</sup> December 2013.

[46] Section 29A of the POCA which was inserted into the POAC by the Proceeds of Crime (Amendment) act No. 14 of 2013 provides:

“(1) A police officer, of the rank of corporal or above, or a financial investigator of the Financial Intelligence Authority, may seize and detain, in accordance with this Part, any cash in Saint Lucia if the officer or investigator has reasonable grounds for suspecting that it directly or indirectly represents any person's proceeds of criminal conduct or is intended by any person for use in any criminal conduct.

(2) Cash seized by virtue of this section must not be detained for more than seventy-two hours unless its continued detention is authorized by an order made by a Magistrate; and no such order must be made unless the Magistrate is satisfied—

(a) that there are reasonable grounds for the suspicion mentioned in subsection (1); and

(b) that continued detention of the cash is justified while its origin or derivation is further investigated or consideration is given to the institution, whether in Saint Lucia or elsewhere, of criminal proceedings against any person for an offence with which the cash is connected.

(3) Any order under subsection (2) must authorize the continued detention of the cash to which it relates for such period, not exceeding three months beginning with the date of the order, as may be specified in the order; and a Court of summary jurisdiction, if satisfied as to the matters mentioned in that subsection, may thereafter from time to time by order authorize the further detention of the cash except that—

(a) no period of detention specified in such an order must exceed three months beginning with the date of the order; and

(b) the total period of detention must not exceed two years from the date of the order under subsection (2).

(4) Any application for an order under subsection (2) or (3) shall be made by a police officer of the rank of corporal or above or a financial investigator of the Financial Intelligence Authority.

(5) At any time while cash is detained by virtue of this section—

(a) a Court of summary jurisdiction may direct its release if satisfied—

(i) on an application made by the person from whom it was seized or a person by or on whose behalf it was being imported or exported, that there are no, or are no longer, any such grounds for its detention as are mentioned in subsection (2); or

(ii) on an application made by any other person, that detention of the cash is not for that or any other reason justified; and

(b) the Commissioner of Police or any police officer authorized by him or her may release the cash if satisfied that its detention is no longer justified but shall first notify the Magistrate or Court of summary jurisdiction under whose order it is being detained.

(6) Cash detained by virtue of this section must not be released until any proceedings pursuant to the application or, as the case may be, the proceedings for that offence have been concluded.”

- [47] It is worthy to note that during the period 5<sup>th</sup> December 2013 and 25<sup>th</sup> April 2019 there was no application made by a police officer in their capacity as a financial investigator of the FIA for the detention of the property pursuant to section 29A of the POCA on account of the same having been seized by them. Section 29A of the POCA sets out the conditions upon which a police officer not below the rank of corporal may seize cash and retain the same. The section also sets out in clear detail the matters to which a magistrate making an order for detention of cash must advert their mind before making a detention order.
- [48] In the present case, it is beyond dispute that the property was seized and detained by the police on 26<sup>th</sup> May 2010. This seizure and detention continued until and beyond the discontinuance of the criminal prosecution against the claimants on 31<sup>st</sup> December 2018. In the period between 5<sup>th</sup> December 2013 and 31<sup>st</sup> December 2018 there was no application made on behalf of the police, the DPP, the FIA or any police officer at or above the rank of corporal pursuant to section 29A. In the period 31<sup>st</sup> December 2018 and 25<sup>th</sup> April 2019 there was no application made by the Commissioner of Police, the DPP the FIA or any police officer at or above the rank of corporal pursuant to section 29A of the POCA. In the circumstances, the police remained seized of the property for a period in excess of the 72 hour time limit stipulated by section 29A(2) of the POCA and without its continued detention being authorised by either an order of a magistrate or any other lawful justification.
- [49] Therefore, it is the court's view that the continued detention and seizure of the property by the police during the period December 31<sup>st</sup> 2018 and 25<sup>th</sup> April 2019 was unlawful being contrary to the dictates of section 29A(2) of the POCA.
- [50] Several substantial issues arise from the abovementioned factual matrix. Firstly, whether the magistrate had properly exercised her power to make a detention order pursuant to section 29A (2) (a) and (b) of the POCA. Secondly, whether a police officer who is a financial investigator of the FIA could have lawfully seized the property on 24<sup>th</sup> April 2019 pursuant to section 29A (1) of the POCA. Thirdly, whether a police officer who is a financial investigator of the FIA could have made

an application pursuant to section 29A (2) of the POCA where the police having failed to make the requisite application within the stipulated time was deemed to have been in unlawful detention of the property.

[51] The substance of the claimants' arguments with respect to the question of the purported seizure of the property by WPC Jules was simply that on 24<sup>th</sup> April 2019 there was no question of the property being in any person's unlawful possession. The claimants argued, that in fact, the property was in the custody and possession of the police, albeit unlawfully. According to the claimants, the property was in the possession of an agent of the State. In addition, the claimants contended that WPC Jules, an investigator of the FIA was also an agent of the State. By extension, the claimants argued that this being the case, WPC Jules could not have seized the property while the same was already in the possession of another agent of the State.

[52] In addition, the claimants submitted that they had not been notified by WPC Jules of her seizure or intended seizure of the property on 24<sup>th</sup> April 2019. However, in the court's view, WPC Jules' notification to the claimants in any event would have been entirely superfluous given the fact that the property was neither in the claimants' possession nor was the property the subject of a pending criminal charge or an ongoing criminal investigation at the material time. In short, the claimants' submission was that WPC Jules could not, for the purposes of section 29A (1) of the POCA, have seized the property which was already seized and detained by the police and therefore already in the State's possession. The claimants argued that in the circumstances, the purported seizure by WPC Jules on 24<sup>th</sup> April 2019 was ineffectual in triggering the exercise of the magistrate's discretion under section 29A (2) of the POCA to grant WPC Jules an order for the continued detention of the property.

[53] The claimants went on further to contend that there being no seizure by WPC Jules in the strict legal sense, the property for all intents and purposes, was still in the unlawful possession of the police given the failure of the police to act in accordance with section 29A (2) of the POCA. In the premises, the claimants contended that the

court ought to declare such continued detention by the police unlawful and order the release of the property. In support of their argument that there was no seizure by WPC Jules in the strict legal sense, the claimants relied on the decision in **Carltona Ltd v Commissioner of Works and Others** to support their proposition.

[54] The Attorney General, relying on the authority of **Chief Constable of Merseyside v Hickman**, submitted that it was not unlawful for law enforcement to use all tools available to them against a person, which included the power to re-seize a thing under a separate enactment empowering them to do so.

[55] It was also submitted by the Attorney General that the claimants could not avail themselves of the principles laid down in **Carltona** as neither the police nor the FIA are bound by decisions of the State, in this case the exercise of executive authority by the DPP in relation to criminal proceedings; and, that in any event the police and the FIA are two separate, distinct and independent executive bodies of the State.

[56] It appeared that the Attorney General seemed to have been advancing the argument that the FIA being an independent executive body established by statute existed and operated independently of the Police. Therefore, notwithstanding the previous seizure and detention of the property by the Police, WPC Jules, a police officer and a financial investigator of the Financial Intelligence Authority was competent to seize the property pursuant to section 29A (1) of the POCA that empowered her so to do in the exercise of the authority conferred by section 29A (1) of the preceding enactment.

[57] In support of the foregoing argument, the Attorney General relied on the authorities of **Matthew McMillan v Alonzo Carty and the Attorney General**,<sup>3</sup> **Olupitan and another v Director of the Assets Recovery Agency**<sup>4</sup> and **Gough v Chief Constable of the West Midlands** which the court will examine in more detail shortly.

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<sup>3</sup> [2019] ECSCJ No. 364

<sup>4</sup> [2008] EWCACiv 104

- [58] It was on the foregoing basis that the Attorney General submitted that the property had been properly and lawfully seized by WPC Jules within the relevant statutory time period which entitled the magistrate to make the order for continued detention pursuant to section 29A (2) of the POCA.
- [59] In defence of the actions of the Police in detaining the property between 31<sup>st</sup> December 2018 and 24<sup>th</sup> April 2019, beyond the period prescribed by section 29A (2) of the POCA, the Attorney General submitted that such detention was reasonable insofar as the property was detained for such period and no longer than what was necessary to permit a determination to be made with respect to whether any other means of law enforcement could be applied in relation to the property. In support of this argument the Attorney General relied on the decision in **Marcel v Commissioner of Police of the Metropolis**.
- [60] In relation to the exercise of the magistrate's powers pursuant to section 29A(2) of the POCA, the Attorney General submitted that the magistrate had, in all the circumstances of the case, properly and adequately adverted her judicial mind to the matters that were relevant to a dispensation pursuant to the enactment.
- [61] It is not disputed that WPC Jules was authorised by section 29A (2) of the POCA to make an application for a detention order. What is in dispute is whether WPC Jules could have lawfully seized the property at the time at which she purported to do so; and by extension, whether such seizure by WPC Jules was an acceptable precursor to the magistrate's grant of a detention order in light of the circumstances that existed with respect to the actual detention of the property prior to 25<sup>th</sup> April 2019 when the application for continued detention was heard by the magistrate.
- [62] The FIA was established pursuant to section 4 of the Money Laundering Prevention Act (MLPA).<sup>5</sup> Section 4(4) of the MLPA provides that the FIA shall be serviced by a secretariat comprising such number of police officers having suitable qualifications and experience to serve as financial investigators. By virtue of section 5(1) of the

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<sup>5</sup> Cap, 12.02 of the Revised Edition of the Laws of Saint Lucia

MLPA the FIA is tasked generally with acting as an agency responsible for receiving, analysing, obtaining and disseminating information which relates to the proceeds of criminal conduct. Section 5(2) of the MLPA sets out specifically the functions of the FIA none of which appears to be directly or indirectly related to law enforcement in its strictest sense. Clearly, neither sections 5(1) or 5(2) of the MLPA confer any power on the FIA to seize or detain proceeds of criminal conduct or to prosecute anyone for an offence in relation to the proceeds of criminal conduct or a money laundering offence. The functions of the FIA are purely investigative and regulatory.

[63] The FIA is a statutory body which has only the powers conferred upon it directly and indirectly by the MLPA and any other statutory enactment. The main purpose for the passing of the MLPA was the combating of money laundering offences within the state. Therefore, the MLPA sets out a comprehensive procedural framework that coalesced with other enactments which required investigation and information gathering in relation to money laundering activities. The MLPA was passed in order to fulfill Saint Lucia's international obligations in the international fight against money laundering and terrorist financing activities.

[64] In the circumstances, the investigative and regulatory functions of the FIA are distinct from the prosecutorial functions of the police and the DPP. Clearly, it was the intention of the legislature to confer on the FIA only an investigative function, which was entirely consistent with the FIA's procedural obligation to conduct an independent investigation. It was never intended that the FIA would have both an investigative role and a prosecutorial function.

[65] In the court's view, the power conferred by section 29A (2) of the POCA on a police officer who is a financial investigator of the FIA to seize cash and apply for its continued detention is necessary and incidental to or consequential upon the performance of the FIA's functions under the MLPA.

[66] However, the fact that a police officer described in section 4(4) of the MLPA provides service to the FIA in the fulfillment of its mandate under the provisions of the MLPA does not translate into the police officer being an employee or agent of the FIA. The

police officer's designation remains the same. The police officer still acts under the superintendence of the Commissioner of Police in the exercise of their law enforcement powers on behalf of the State.

- [67] This is only logical since the FIA does not possess the power to seize, apply for the detention of seized property, and apply for the forfeiture of detained property in its own name and in its own right. Such powers are not conferred directly on the FIA as established under the MLPA. The purport and effect of section 4(4) of the MLPA quite rightly operates to confer the exercise of such powers on law enforcement, notably the police authorities.
- [68] In the premises, the court is inclined to adopt the view that at the time WPC Jules purported to re seize the property and apply for a detention order pursuant to section 29A (2) of the POCA, she was for all intents and purposes exercising her powers as a police officer and not as an agent of the FIA or acting under the direction and control of the FIA.<sup>6</sup>
- [69] Therefore, to answer the question whether the police had the right to re seize the property pursuant to a statutory scheme other than the Criminal Code; and by extension whether a police officer who is a financial investigator of the FIA can re seize and retain property in the possession of the police under a different statutory scheme from that which the police originally exercised their powers of seizure and retention, the court has examined the authorities cited by the Attorney General in relation to this question.
- [70] In **Chief Constable of Merseyside Police v Hickman and another**, the abovementioned question fell for determination where, the police seized a quantity of cannabis and cash under section 19 of the Police and Criminal Evidence Act 1984 after a search of the applicants' home. At that time, the minimum amount that could be seized under the Proceedings of Crime Act 2002 was greater than the amount

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<sup>6</sup> Matthew McMillan v Alonzo Carty and another [2019] ECSCJ No. 364; Police Commissioner of the Metropolis, ex parte Blackburn [1968] 1 All ER 763; Antigua Power Company Limited v Attorney General of Antigua and Barbuda and others

seized by the police. One of the applicants subsequently pleaded guilty to possession in relation to the drugs that had been found, but no order of forfeiture or deprivation was made in respect of the money. The other required the return of the seized cash as the power of the police to retain it under s 22 of PACE had lapsed with the guilty plea. The police issued two cheques, one in favour of each applicant, but immediately purported to seize them under s 294 of the Proceeds of Crime Act 2002. By that time, the minimum amount that could be seized thereunder had been reduced. The district judge found as a preliminary issue that the 2002 Act did not apply to the instant case and the Chief Constable appealed by way of case stated. On appeal it was held, allowing the appeal that the police had the power to re-seize cash previously detained by the police under one enactment pursuant to a different enactment.

[71] Mitting J. delivering the judgment reasoned that:

“No time limit is fixed by s 294 or s 295, nor is there any sensible reason why it should be. The Director of the Assets Recovery Agency is not similarly constrained in the exercise of his powers which are exercisable in the case of cash as well as other property. Seizure under s 294 may, in my opinion, occur at any time. Is there a special limitation on the exercise of the power to seize under s 294 because a different statutory power under s 19 has been exercised in relation to the same property? I can see no principled reason why there should be.”<sup>7</sup>

[72] With respect to the claimants’ observations regarding the re-seizure of the property by WPC Jules, Mitting J. provides a useful answer when he said:

“The object of Pt 5 of the 2002 Act is set out in s 240. It is to recover or forfeit the proceeds of crime. The two words describe the same result, albeit achieved by different statutory procedures. Parliament cannot have intended to restrict the power of a constable using one of the two routes by which that result can be achieved in a manner other than that expressly set out in s 295. Can a constable seize cash which is already in the possession of the police? The answer is clearly yes, just as seizures under s 19 can be, and are routinely, made of property in the possession of the police at a police station following the arrest and search of a suspect.”<sup>8</sup>

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<sup>7</sup> At para [24]

<sup>8</sup> At para [25]

- [73] The case of **Olupitan and another v Director of the Assets Recovery Agency** reinforces the point that neither the FIA nor a police officer who is a financial intelligence investigator is bound by any decision of the DPP or even the Commissioner of Police for that matter.
- [74] In **Olupitan**, where it was submitted on behalf of the appellant that a concession by the Crown Prosecution Service ('CPS') in criminal proceedings should have been binding on the Director of Asset Recovery or that it was an abuse of process to go behind it, on the basis that the Crown in a matter such as this should be regarded as "indivisible"; therefore, the concession on one part of the Executive should be treated as binding on the other.
- [75] Lord Carnwath LJ delivering the decision of the Court of Appeal in **Olupitan** disagreed with this argument and, referring to the decision of the court below where it was held that "The Director is not to be equated with the Crown as prosecutor. The Director is independent with a different role and powers. That role and those powers exist regardless of criminal proceedings..." said:
- "That analysis is both succinct and, in my view, unanswerable. There may be contexts in which Mr. Krolick's first proposition holds good. He referred us, for example, to the somewhat inconclusive discussion of the concept in *Hunt v CCRC* [2001] QB 1108, [2001] 2 WLR 319, [2001] 2 Cr App Rep 76. But that establishes no more than that, in the words of Lord Woolf CJ, "the nature of the Crown differs according to its context" (para 27). Mr. Krolick was unable to point to any authority where the principle of indivisibility, so far as it exists, has been held to limit the duties and powers conferred on a distinct statutory agency, acting under a specific statutory scheme. Further, comparisons between the different connecting words of the two statutes are not helpful, without taking account of the whole context. The broader language used for confiscation proceedings is in the quite different context of the requirement to show a benefit linked with the commission of a proven criminal offence."
- [76] The reasoning of His Lordship in **Olupitan** appears akin to the reasoning of the Privy Council in **Indecom** and is consistent with this court's analysis and findings in relation to the role of WPC Jules as a financial investigator serving the FIA.

- [77] In **Gough and another v Chief Constable of West Midlands Police**,<sup>9</sup> where the appellants contended that although the police were lawfully entitled to take possession of their goods, their entitlement to retain possession had expired. The police argued to the contrary that their lawful entitlement to retain possession of the goods continued until the trial. The Court of Appeal found that the judge had erred having accepted the argument of the police, and held in favour of the appellants.
- [78] The Court of Appeal in **Gough and another v Chief Constable of the West Midlands Police**, examined several decisions from the Court of Appeal where a similar issue had to be determined. Their Lordships referred first to the case of **Webb v Chief Constable of Merseyside Police**<sup>10</sup> where the police suspected the appellant of drug trafficking. They seized money from him on suspicion that it was proceeds from that criminal activity. The seizure when made was lawful under statutory powers. However, the appellant was not prosecuted. The police accepted that their statutory power to seize the money had been exhausted and could no longer justify their retention of it. However, they refused to return the money to the appellant. The appellant brought an ordinary civil claim for the recovery of the money. The police sought to defend the claim on the grounds that although they had not prosecuted the appellant, they still suspected, and reasonably suspected that the money was the proceeds of criminal conduct. The judge found in favour of the police. However, this decision was reversed by the Court of Appeal on the basis that the genuine suspicion which the police had that it was the proceeds of criminal conduct did not provide them with a defence.
- [79] In **Gough**, the Court of Appeal also referred to the decision in **Costello v Chief Constable of Derbyshire Constabulary**<sup>11</sup> which involved similar circumstances as in **Webb** and raised similar issues. The Court of Appeal in **Costello** found that the statutory power to detain property suspected to be the proceeds of criminal conduct vested no title to the property seized but only a temporary right to retain property for

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<sup>9</sup> [2004] EWCA Civ 2016

<sup>10</sup> [2000] 1 All ER 209

<sup>11</sup> [2001] 3 All ER 150

the specified statutory purposes. Once those purposes were exhausted, the appellant, whether he was the true owner of the property or not, had a right of possession of it which was superior to any right of possession on the part of the police.

[80] The Court of Appeal in **Gough** described the consequences of the foregoing decision as follows:

“The consequences of those two cases for the present appeal are, as it seems to me: first, that if the police are holding property which they have seized from some other person who was previously in possession of it, they can only resist a civil claim by the former possessor for its return if they can identify a statutory power to retain it; second, that if the original seizure was authorised by a statutory power, it does not necessarily follow that indefinite retention of the property continues to be authorised by the statutory power; third, that a civil claim by the former possessor, brought under the Torts (Interference with Goods) Act 1977, is determined by common law principles deriving from the law of detinue and conversion, and thus rests on the right of possession; fourth, that, if the police do not have a continuing statutory power or right to retain the property, the former possessor's right of possession is superior to theirs; and fifth, that it is no defence for the police to argue that the former possessor, the claimant in the civil action, is not the true owner of the property. On the fifth point it may be different if the police can establish who the true owner is (I say nothing about a case where that is so), but otherwise the fifth proposition stands good.”

“The effect of the foregoing paragraph for this case is that the police can successfully defend the claimants' claim (based as it is on an admitted possessory title – see para 7 of Judge McKenna's judgment, quoted in para 4 above) only if they can invoke a statutory provision which gave them a right or power to retain the goods notwithstanding the claimants' request for them to be returned.”<sup>12</sup>

[81] Their Lordships also made the following observation in **Gough** in relation to the enactment that gave the police the statutory power to seize and detain property:

“...I think, obvious that the police must use the Act frequently to deal with matters where they find themselves in possession of items of property which they do not want to keep but do not know whether they can legitimately destroy them or what else they can do with them. In such cases the police will understandably wish to have the protection of a court order before destroying or otherwise disposing of the goods. Second, although the magistrates' powers do extend to making orders which can affect

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<sup>12</sup> At paras [15]–[16]

possessory or ownership rights, I do not think that it is a main purpose of the Act that it should be used in order definitively to resolve issues of that nature. It is noteworthy that s 1(2) provides that an order under s 1(1) does not affect the right of any person to take (within six months) legal proceedings against any person in possession of property delivered by virtue of the s1(1) order. Such proceedings would, I take it, be brought in the civil courts, not in the Magistrates Court which made the order.”<sup>13</sup>

[82] At paragraph [31] of the judgment in **Gough**, Their Lordships described two situations where the continued detention of goods seized by the police pursuant to their statutory powers may be justified. Their Lordships said:

“Sub-paragraphs (i) and (ii) of s 22(2)(a) specify two other situations in which retention of goods by the police is authorised: retention for use as evidence at a trial for an offence, and retention for forensic examination or for investigation in connection with an offence. Those two situations may have existed for a time, but they no longer existed by the time that the claimants commenced the present action. In a word used by Lightman J in the opening paragraph of his judgment in *Costello*, the purposes contemplated by those two sub-paragraphs were ‘exhausted.’”

[83] Their Lordships alluded to one other ground that may provide justification for the detention of seized goods, namely that provided by section 22(1) of the Police and Criminal Evidence Act, 1984 (‘PACE’) where it is provided that “ anything which has been seized by a constable ... may be retained so long as necessary in all the circumstances...”.

[84] It is necessary at this juncture to point out that the provisions of PACE do not apply in this jurisdiction and there is no similar or comparable statutory provision in force in Saint Lucia. Therefore, the references to the case law dealing with the specific provisions of PACE and how they are interpreted by the courts in the United Kingdom is strictly for purposes of exposition and comparative analysis to the facts and circumstances of the present case.

[85] At paragraphs [32] and [33] in **Gough** Their Lordships said:

“Was it necessary in all the circumstances for the police to retain the cars and parts which they had seized from the claimants? Mr. Khangure submitted that, when the police formed the intention of bringing the issue of

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<sup>13</sup> At para [19]

what to do with the goods before the magistrates under the Police (Property) Act 1897, it was necessary for the police to retain the goods. I accept that. For the police to bring an application before the magistrates would have been a proper course to take, and it would have defeated the whole point of it if the police had parted with possession of the goods before the application came on to be heard. However, that particular necessity for retaining the goods could not continue after the police, in reaction to the commencement by the claimants of the present civil action in the County Court, no longer intended to invoke the jurisdiction of the magistrates under the 1897 Act. Section 22(1) permits retention of the property 'so long as' is necessary. If the necessity arose from an intention to bring proceedings under the Police (Property) Act, it existed so long as that intention continued, but did not exist any longer once that intention had ceased.

The argument which remains is that, where the reason why the police no longer intended to bring proceedings under the Police (Property) Act was that the claimants had brought a civil action in the County Court, it was still necessary in the circumstances for the police to retain the goods, but now the necessity arose from the existence of the County Court action. I cannot agree with that argument. In my view it is circular. The claimants sue the police to recover goods which they say that they (the claimants) have a right to possess. The police defend the action on the ground that it is necessary for them (the police) to retain the goods. Why is it necessary to retain the goods? Answer: because the claimants are suing the police and the police are defending the action. In my view that cannot be right. It is certainly not an argument which would get anywhere in a case where the defendant is not the police. Assume that a defendant is sued for the return of some goods which he has in his possession and that he intends in good faith to defend the claim. He cannot risk disposing of the goods to a third party or destroying them, and he will not wish to return them to the claimant unless and until he loses the action. If he does lose the action and the claimant seeks damages for the detention of the goods in the meantime, the defendant could not escape by saying that it was necessary for him to keep the goods until the outcome of the action was known. Can PACE put the police in a unique situation of being able successfully to advance a defence of that nature? In my opinion it cannot."

[86] Ultimately, Their Lordships reasoned that:

"I accept that the words of s 22(1) are quite general: 'so long as is necessary in all the circumstances'. The statute does not explicitly identify what sorts of circumstances it has in mind. In my view it is likely to have in mind circumstances which are associated with the law enforcement functions of the police. In the present case it was certainly for one of the law enforcement purposes set out in s 19 of PACE that the goods were seized, and in my view the assumption behind s 22 was that that would always be the case. I would accept that, as a criminal investigation progresses, new

'circumstances' may emerge, and further reasons why the police may need to retain seized property may develop, in addition to the reason why the goods were seized in the first place. But I suggest that the circumstances and the necessities which s 22(1) contemplates are ones of a law enforcement nature, arising from the police force's function and role in society. I cannot believe that the conditions of the subsection are met where the only circumstance relied upon is that the police, who have no further law enforcement purpose for retaining the property, are not prepared to concede without litigation the previous possessor's claim to have the goods returned to him."

- [87] The case of **Marcel and others v Commissioner of Police of the Metropolis and others**<sup>14</sup> dealt with the extent of police powers to detain property under section 22(1) of PACE which entitled the police to retain seized property for "so long as is necessary in all the circumstances". Sir Slade, in his concurring judgment interpreted the words "so long as is necessary in all the circumstances" as having specified in general terms not only the duration but also the purposes for which retention of seized property may continue. Sir Slade stated:

"What then is the meaning of the phrase in s 22(1) 'so long as is necessary in all the circumstances'? In my judgment, in its context, this phrase can only mean: 'so long as is necessary for carrying out the purposes for which the powers given by ss 19 and 20 have been conferred'. I shall not attempt a comprehensive statement of those purposes. They clearly include, inter alia, the primary purposes of investigating and prosecuting crime and the return to the true owner of property believed to have been obtained in consequence of the commission of an offence. Further, the relevant sections would, I think, authorise acts which were reasonably incidental to the pursuit of those primary purposes, thus including in appropriate circumstances the disclosure to third parties of seized documents."<sup>15</sup>

- [88] Notwithstanding the pronouncements made in **Marcel**, the court having already determined that the provisions of PACE have no applicability to the present proceedings, the same not having been imported into the Laws of Saint Lucia, in the court's considered view, the case of **Marcel** does not assist in the determination of any issue in the present case. Therefore, the Attorney General's reliance on **Marcel** is of limited assistance not only to the court but it also does not support the arguments advanced by the Attorney General.

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<sup>14</sup> [1992] 1 All ER 72

<sup>15</sup> At p. 37

- [89] There is no statutory provision similar to section 22(1) of PACE in force in this jurisdiction. The powers of retention exercised by the police is governed strictly by the statutory scheme under the Criminal Code and the POCA. Therefore, the magistrate's reliance on the principle of 'necessity' was indeed unfortunate in this case.
- [90] The magistrate seemed to have placed significant reliance on the case of **R (on the application of Iqbal) v South Bedfordshire Magistrates Court**<sup>16</sup>, cited by the police in the proceedings below. That case involved the seizure of cash from the claimant by the police. The police took the decision not to proceed with the charges against the claimant. Separate charges were then pursued against the claimant. The police applied to the magistrates' court for an extended detention of the cash. The application was granted. On the question of whether the justices erred in granting the application, and whether the application was made outside of the 48 hour period from the time of seizure, the Divisional Court held on an application for judicial review by the claimant that cash lawfully seized by the police under section 19 of PACE and further detained pursuant to section 22 of PACE can be subsequently re-seized by the police under the provisions of section 294 of POCA since the continued retention of the cash by the police was lawful there was no requirement to return the cash to the claimant before effecting its re-seizure under POCA.
- [91] It is necessary to recite the facts in **Iqbal** in some detail for the purpose of exposition. The cash was first seized under provisions of PACE on the execution of a search warrant. The claimant was arrested on suspicion of money laundering. The investigating officer who was a civilian and not a constable took possession of the cash. The cash was initially detained under section 22 of PACE. On advice from the Crown Prosecution Service ('CPS'), the investigating officer was told that no criminal proceedings would be brought against the claimant. The investigating officer acting on instructions from Evidence Crime Unit of the police force went to the police

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<sup>16</sup> [2011] EWHC 705 Admin

station and extracted the money and then purported to seize the cash under the provisions of the POCA.

- [92] In **Iqbal**, the investigating officer testified before the magistrate's court that he believed the continued detention of the money would be justified because there were proceedings against the claimant for an offence with which the cash involved was connected and that those proceedings had been started but not concluded. It was submitted by the Chief Constable that the requirements of POCA had been satisfied. On the other hand the claimant submitted that the seizure under POCA should be taken to have occurred at the time when the power of detention under section 22 of PACE had lapsed; and therefore, the application for retention was not made to the court within 48 hours.
- [93] It was submitted by counsel for the claimant that where the power of retention under section 22 of PACE had lapsed, the cash, not being returned into the possession of the person from whom it was initially seized, before any power to re-seize arose under POCA, that the power of retention under PACE lapsed when the police decided to take no further action.
- [94] The court in **Iqbal** concluded that the money was lawfully seized under section 19 of PACE, and that it was lawfully detained under section 22 of PACE. The right to retain by virtue of section 22 had not ended. The court relying on the decision in **Hickman** held that the cash seizure under section 19 of PACE can subsequently be re-seized under section 294 of POCA. The court reasoned, placing reliance on the case of **Gough**, that section 22 of PACE permitted the police to continue to retain any property for a short period while they are considering their position. The court also found that at no time did the claimant request the return of the money or commence proceedings for its return. In the premises, the order for retention was lawfully made.
- [95] Mr. Fraser's complaint was that the property was unlawfully in the possession of the police after 31<sup>st</sup> December 2018 and therefore, there was no justification for the retention of the property by the police after that time. In other words, the right of the

police to retain the cash had been exhausted as at 24<sup>th</sup> April 2019 when WPC Jules purported to effect its seizure or reseizure as the case may be. In the premises, Mr. Fraser found fault with the magistrate's ruling with respect to the reasonableness of the conduct of the police during the interval between 31<sup>st</sup> December 2018 and 24<sup>th</sup> April 2019. According to Mr. Fraser, the magistrate applied the wrong principles when she arrived at the conclusion based on principles of necessity and the reasonableness of the police's conduct.

- [96] It appears from the magistrate's ruling that she placed great weight and reliance on the case law previously cited herein that dealt with the provisions of sections 19 and 22 of PACE. It seems that the magistrate mistakenly or erroneously imported the reasoning in the case law as it pertained to PACE in arriving at her decision as to the lawfulness of the continued detention of the property by the police subsequent to 31<sup>st</sup> December 2018. It is on this basis that the court accepts Mr. Fraser's argument.
- [97] It is clear that the decision in **Iqbal** is entirely distinguishable from the present case because in the former there was a distinct statutory framework which made detention of the property by the police justifiable in the circumstances provided for in section 22 of PACE; whereas in the latter case, there was no statutory provision similar to section 22 of PACE which the magistrate could have applied in arriving at her decision that the property was lawfully detained by the police after the DPP's discontinuance of the criminal proceedings against the claimants.
- [98] In the circumstances, it follows that the police were obliged to return the property to the claimants in whose possession it had been prior to its seizure. By extension, WPC Jules' could not have re-seized what was in the unlawful possession of the police. In order for WPC Jules' seizure pursuant to section 29A of POCA to have been lawful the property should have first been in the possession of the claimants. The court in **Iqbal** recognised that the case of **Iqbal** was readily distinguishable from the case of **R (on the application of Cook) v SOCA**.<sup>17</sup> Mr. Fraser's argument

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<sup>17</sup> [2010] EWHC 2119 (Admin); [2011] 1 WLR 144

seemed to have fallen in line with the latter decision. In **Cook** the Divisional Court held, in allowing the application for judicial review, that section 19 of the Police and Criminal Evidence Act 1984 could not be relied upon by the defendant (SOCA) so as to enable it to seize property that had been unlawfully obtained. There was also no authority for the proposition that SOCA could convert unlawful possession to lawful possession by seeking a receipt for the return of the property. The court in **Cook** reasoned that section 19 of the Police and Criminal Evidence Act 1984 did not permit the further seizure at the police station of property unlawfully obtained pursuant to an unlawful seizure and unlawfully brought to the police station; that before unlawfully seized property could be lawfully re-seized it had to be restored into the possession of the person from whom it had been taken.

[99] Two issues arise in respect of the purported re-seizure by WPC Jules. The court has already alluded to the status of WPC Jules as a police officer notwithstanding her designation as a financial intelligence investigator servicing the FIA. When WPC Jules purported to re-seize the property she was exercising powers conferred on her as a police officer and not any powers conferred on her by the FIA. WPC Jules could not purport to act under the direction and control of the FIA or any other superior ranking officer of the RSLPF in the exercise of the powers conferred on her by section 29A (2) of POCA. WPC Jules was exercising those powers that were germane to her status as a police officer and the powers specifically conferred on her by section 29A (2) of POCA which she ought to have exercised based on her personal knowledge and belief and in accordance with her individual right in executing the law enforcement mandate given to her in her capacity as a police officer.

[100] The court is fortified in this view particularly in light of the observations made by the court in **Iqbal** where Their Lordships said:

“In relation to the deemed seizure argument, he submits that s 294 is not a general catch-all power; it requires specific tests to be satisfied. It confers a personal power on a constable. He refers to the decision of the House of Lords in *O'Hara v Chief Constable of Royal Ulster Constabulary* [1997] AC 286, [1997] 1 All ER 129, [1997] 2 WLR 1. Lord Steyn stated at p 293:

“How can the badge of the superior officer and the fact that he gave an order make a difference in respect of a statute vesting an independent discretion in the particular constable and requiring him personally to have reasonable grounds for suspicion? It would be surprising if seniority made a difference. It would be contrary to the principle underlying section 12(1) which makes a constable individually responsible for the arrest and accountable for his law.”

For the power under s 294 to be exercised, Mr. Berry submits, a constable must address his mind to the s 294 criteria. I agree with that proposition.<sup>18</sup>

[101] The authority cited above provides a convenient transition into the question of whether the magistrate was satisfied that the provisions of section 29A had been strictly complied with when she made the detention order. In her written decision the magistrate said:

“I am persuaded having scrutinised the affidavits of the de facto applicant and the four members of the RSLPF that the suspicion that they maintained in 2019 that the respondent cash was tainted from the outset, is reasonable within the meaning of section 29A. I believe the affidavits in support of this application presented to me in April and now again in August 2019 ...”

[102] Several observations can be made with respect to the reasons expressed by the magistrate in the foregoing extract from her written decision. First, the magistrate appeared to have placed reliance on the affidavits of other police officers in conjunction with that of WPC Jules. In other words, the magistrate did not rely on WPC Jules’ affidavit alone, in support of her finding that the provisions of section 29A had been satisfied. The question that arises is whether the magistrate erred having relied on these other affidavits.

[103] Second, it appears from the affidavits that were before the magistrate that WPC Jules was acting under the direction of other superior officers and that her alleged reasonable grounds for suspecting that the property directly or indirectly represented the claimants’ or any person’s proceeds of criminal conduct or was intended by any person for use in criminal conduct was parasitic and not the product of her own independent suspicion. It must be pointed out that WPC Jules was in no

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<sup>18</sup> At para [28]

way connected with or involved in the previous criminal investigation and prosecution of the claimants.

- [104] The third question that arises is whether WPC Jules' affidavit was sufficient to satisfy the magistrate with respect to the matters contained in section 29A (2) (a) and (b) of the POCA; particularly whether the magistrate was satisfied that WPC Jules had reasonable grounds for the suspicion mentioned in section 29A subsection (1).
- [105] In the court's considered view, the reasonable grounds for suspicion contemplated by section 29A of the POCA must be that of the police officer or financial investigator of the FIA who makes the application and who in fact seized the property. In addition, any reasonable grounds for suspicion must be seen to be the police officer's or financial investigator's independent thought process unpersuaded by any directive from any other person or authority.
- [106] In other words, it would have been improper for the magistrate to act on WPC Jules' evidence of reasonable grounds for suspicion if it was made to appear that WPC Jules' seizure of the property and the subsequent application for a detention order were actuated by the direction of any other person, entity, or authority, and was not triggered by her own personal and independent reasonable grounds for suspicion.
- [107] To amplify this point, it is necessary to examine with an eye of circumspection the evidence that was presented to the magistrate on the application for the detention order. The magistrate had before her the affidavit of Assistant Superintendent Andre Collymore ('ASP Collymore') employed with the RSLPF with the responsibility for crime. It is plainly obvious that at the material time ASP Collymore was a police officer and not affiliated with the FIA.
- [108] ASP Collymore said in his affidavit that he sought advice on how to deal with the matter of the detained property from the DPP and the Attorney General between January 2019 and April 2019. According to ASP Collymore he "went on to review whether there were any other options which could be pursued in order to address

the perceived criminal conduct” presumably on the part of the claimants. Interestingly, at paragraph 8 of his affidavit, ASP Collymore said:

“It has since come to my attention that notwithstanding the notice of discontinuance, the police were at liberty to apply to have the cash further seized and retained under section 635 of the Criminal Code or have the Financial Intelligence Authority (FIA) seize the cash under section 29A of the Proceeds of Crime Act (POCA) with a view to forfeiture of the cash under section 49A.”

At paragraph 9 of his affidavit ASP Collymore went on to state:

“After reviewing a report by then Sergeant No. 106 Patrick Scholar in relation to the criminal investigation ... it was determined that forfeiture should be sought under the POCA provisions.”

More importantly, at paragraph 11 of his affidavit ASP Collymore said:

“In considering the matter, I took into consideration the circumstances of the original seizure and the amount of cash ... I noted also that at the time of the original seizure, the POCA provisions in question has not yet been passed. I further considered the advice received on the matter and exercised my deliberate judgment in the course adopted.”

At paragraph 12 of the same affidavit he said:

“I maintain that the original seizure was under ordinary police powers and not under the POCA provisions.”

Even more salient to the present discussion, is ASP Collymore’s statement at paragraph 13 of his affidavit where he said:

“I therefore carried out my duties within a reasonable time ... mindful of the overarching law enforcement responsibilities of the police, ... In my opinion, (the cash) came from crime or was intended for use in crime. I am of the firm view that at all material times, the further retention of the cash was necessary for law enforcement purposes.”

[109] In assessing the question of reasonable grounds for suspecting for the purposes of section 29A of the POCA, and distilling WPC Jules’ and the FIA’s role in the seizure and detention of the property, the court also examined the contents of a memorandum from ASP Collymore to the Director of the FIA dated 15<sup>th</sup> April 2019 wherein ASP Collymore stated:

“...I am soliciting guidance from your esteemed office, as to whether your department would be interested in commencing an investigation into the

large cash seizure. The money is still in police custody and we are mulling whether or not to hand over the monies to the defendants ...”

- [110] The magistrate also had before her the affidavit of Superintendent Patrick Scholar (‘Superintendent Scholar’) who was the Deputy Director of the FIA. Superintendent Scholar said at paragraph 5 of his affidavit:

“I wrote to the Director of Public Prosecutions requesting a copy of the file which I received. After examining the contents of the file, I concluded that there were reasonable grounds to believe that (the cash) was derived from or was intended for use in criminal conduct. I then assigned Constable 565 Dalia Jules to investigate the matter. I am aware that WPC Jules seized the cash under section 29A of POCA on April 24, 2019.”

- [111] WPC Jules in her affidavit which was before the magistrate, said:

“Following my investigations, on 24<sup>th</sup> April 2019, on behalf of the Director of the Financial Intelligence Authority, I formerly seized the cash under section 29A of the Proceeds of Crime Act (POCA).”

Interestingly, at paragraph 9 of her affidavit, WPC Jules stated:

“Based on legal advice, Police Prosecutor Corporal 1 Henry, prior to making the application, made an oral application to amend its application, substituting the Commissioner of Police with WPC 565 Dalia Jules of the Financial Intelligence Authority, as it was that entity which was seizing the cash under section 29A of POCA ...”

At paragraph 10 of her affidavit WPC Jules went on to make what the court finds to be a most astonishing statement; she said:

“I am advised by Counsel and verily believe that the Financial Intelligence Authority has statutory authority under the POCA provisions, to seize cash suspected to be proceeds of crime and to make application for the forfeiture of seized cash.”

Then at paragraph 14 of the same affidavit WPC Jules said:

“...it was the Financial Intelligence Authority, acting through me, who seized the cash pursuant to section 29A of the Proceeds of Crime Act as amended.”

- [112] The extracts taken from the several affidavits laid before the magistrate, give rise to the following questions. First, whether a police officer who is a financial investigator with the FIA can successfully make an application pursuant to section 29A(2) of the POCA on the basis of information received from a third party; and by extension

whether the information received amounted to reasonable grounds for suspicion to justify the grant of the application.

- [113] In the court's view, in order to succeed on an application made pursuant to section 29A(2) of the POCA, the police officer must have formed a genuine suspicion that the property seized pursuant to section 29A(1) of the POCA directly represented any person's proceeds of criminal conduct or was intended by any person for use in any criminal conduct and that the continued detention of the property was justified while its origin or derivation was further investigated or consideration was given to the institution, whether in Saint Lucia or elsewhere, of criminal proceedings against any person for an offence with which the property was connected.
- [114] Undoubtedly, section 29A(2) required that the reasonable grounds for suspicion be subjective to the extent that the police officer personally has reasonable grounds for suspicion. Therefore, if the police officer knows nothing of the case and acts on orders from another person or police officer who perhaps does have such grounds, the police officer is not protected by section 29A(2). This interpretation of section 29A(2) is in keeping with the principle of the independence and accountability of the individual police officer.
- [115] Therefore, in the present case, the only relevant matters were those present in the mind of WPC Jules. The information which caused WPC Jules to be suspicious that the property directly represented any person's proceeds of criminal conduct or was intended by any person for use in any criminal conduct and that the continued detention of the property was justified while its origin or derivation was further investigated or consideration was given to the institution, whether in Saint Lucia or elsewhere, of criminal proceedings against any person for an offence with which the property was connected would have had to be in existence to the knowledge of WPC Jules and must have been vested in WPC Jules who engaged in the decision to apply for the detention order and not in her superior officers or any other authority.

- [116] It is the court's considered view, that given the independent responsibility and accountability of a police officer whether a financial investigator or not, implied by the provisions of section 29A of the POCA, it follows that the mere fact that a police officer has been instructed by a superior officer to apply for a detention order is not capable of amounting to reasonable grounds for suspicion within the meaning of section 29A of the POCA.
- [117] Therefore, in respect of a statute like the POCA vesting an independent discretion in a police officer, and requiring them to personally have reasonable grounds for suspicion it would be surprising if commands from a superior officer would make any difference. It would be contrary to the principle underlying section 29A which makes a police officer individually responsible for the application and accountable in law.
- [118] To simplify the matter, section 29A relates to what is in the mind of the police officer exercising the power to apply for a detention order. It is in part a subjective test because the police officer must have formed a genuine suspicion in her own mind that the matters required by section 29A existed. In part it is also objective, because there must also be reasonable grounds for the suspicion which she had formed. All that is required is that the grounds be examined objectively and they be judged at the time when the power is being exercised. It does not matter that at the time the police officer thought that the grounds were reasonable. The question is whether a reasonable man would be of that opinion, having regard to the information which was in the mind of the police officer. It is the police officer's own account of the information which he had which matters, not what was observed or known to anyone else. The information acted upon by the police officer need not be based on his own observation, as he is entitled to form a suspicion based on what he has been told. The question whether the information provided reasonable grounds for the suspicion depends on the source of the information and its context seen in light of the whole surrounding circumstances.

- [119] The court had great difficulty accepting the references made in WPC Jules' affidavit to having been instructed by the FIA or acting on behalf of the FIA who had the right to effect the seizure. These references portrayed a clear misunderstanding of the role and function of the FIA.
- [120] The Attorney General's argument was that the property was seized by an entity other than the RSLPF, in this case the FIA. The court found this to be a wholly misconceived and fallacious argument which seemingly flouts the operation of the provisions of sections 5 to 8 of the MLPA.
- [121] Section 5 of the MLPA sets out the functions of the FIA which includes acting as an agency responsible for receiving, obtaining and disseminating information which relates to the proceeds of the offences under the MLPA and the POCA, and the dissemination of information to the Commissioner of Police or the DPP and any other acts incidental to its functions under the MLPA.
- [122] For the purpose of carrying out its functions under section 5 of the MLPA, the FIA has by virtue of section 6 of the MLPA, the power to enter premises of a financial institution or persons engaged in business activity for the purpose of inspecting transaction records, and the production of such information which the FIA considers relevant to the performance of its functions. Section 7 of the MLPA grants additional functions to the FIA which includes reporting to the Commissioner of Police and the DPP information derived from an inspection carried out under section 6 on the basis that the FIA has reasonable grounds to suspect that a transaction involved the proceeds of a prescribed offence. Section 8 of the MLPA restricts the functions of the FIA and provides:
- "The Authority shall not conduct an investigation into a financial institution or a person engaged in business activity other than for the purpose of ensuring compliance by the financial institution or person engaged in the business activity with this Act."
- [123] On the basis of the abovementioned provisions of the MLPA, the court is lead to the ineluctable conclusion that the FIA is not empowered to perform any law enforcement functions or to act as a law enforcement agency. Therefore, the FIA

cannot in its own right initiate any procedure under the POCA. These law enforcement functions are entirely within the province of the Police and the DPP. The FIA simply was not established for that purpose.

[124] The FIA is a statutory body and it exercises only those powers that are conferred upon it directly or indirectly by the MLPA. On a proper interpretation of the MLPA it cannot be said that the legislature intended that the FIA would have a prosecutorial function in addition to the investigative function similar or consistent with the law enforcement and prosecutorial powers of the police or the DPP.

[125] In the court's view, neither the POCA nor the MLPA authorises the FIA to initiate any proceedings under the POCA which has been the subject of the FIA's investigation or information received or obtained under the provisions of the MLPA or the POCA. In the premises, the FIA could not have seized the property or applied for a detention order pursuant to section 29A of the POCA in its own right.

[126] The combined effect of section 4 of the MLPA and section 29A of the POCA is to give a police officer who is a financial investigator like powers given to any police officer authorised by section 29A of the POCA. However, the powers conferred on a police officer who is also a financial investigator with the FIA by the POCA are conferred on that police officer in light of the preexisting powers held and exercised by him in his capacity as a police officer and not purely in his capacity as a financial investigator under the MLPA.

[127] For the sake of completeness, the legislature has allocated the power to seize and apply for a detention order pursuant to section 29A of the POCA to the police and not to the FIA. All that section 29A and the other relevant provisions of the POCA does is enhance the FIA's investigative function by permitting it to be carried out in certain respects through the medium of a police officer authorised under the Act.

[128] At the time that the FIA purported to exercise its statutory powers under the MLPA there is no doubt that it was fulfilling its mandate under the MLPA at the open invitation extended to it by the police authorities. In any event, WPC Jules having

seized the property and applied for a detention order pursuant to section 29A of the POCA could have only done so by way of assistance to the FIA who was exercising its investigative authority. Any procedural or prosecutorial step taken thereafter was the responsibility of WPC Jules in her capacity as a police officer.

[129] Clearly, the seizure and detention can be justified as a consequence of the FIA's mandate under the MLPA notably the investigation of the derivation of the property and consideration being given to the institution of criminal proceedings against any person for an offence to which the property is connected. In the court's view there was every reason to justify the FIA's engagement of its investigative powers.

[130] Without a doubt, the investigative powers of the FIA were triggered by the overriding objective of the eventual forfeiture of the property which did not require that proceedings are brought against any person for an offence with which the cash in question is connected. It seems clear from the evidence presented before the magistrate, that the police authorities seemed perplexed by the dilemma of the eventual disposition of the property.

[131] Given the tenor of the affidavits of ASP Collymore and Superintendent Scholar, it seems fair to conclude that the police authorities were not only reluctant to return the property to the claimants but had willfully evinced the intention not to do so and to obtain the eventual forfeiture of the property by any means necessary. Again, the substance and tenor of the abovementioned affidavits gives a clear indication of the police having been aware that they were detaining the property without any lawful justification whatsoever. It is quite easy to speculate that the police authority were properly seised of the knowledge that the property was detained by them unlawfully or without lawful justification.

[132] The question that immediately arises is whether the conduct of the police provided reasonable justification for the unlawful detention of the property. The claimants' argument seems to be that the police authority having no lawful justification for the further and continued detention of the property was obligated to return the property to the claimants without being satisfied that the claimants were the rightful lawful

owners on the basis that the property was last in their possession. According to the claimants, the police authority having unlawfully detained the property deprived them of the possession thereof otherwise than in accordance with the due process of law.

[133] On the contrary, the Attorney General argued that the claimants had taken no steps under the civil law to demand the return of the property to them; an argument that was somewhat consistent with the magistrate's reasons. On the other hand the claimants insisted that they were not required as a matter of law to demand the return of the property by the invocation of any civil right or remedy available to them under the ordinary civil law.

[134] It appears from the magistrate's written reasons that she found that the police authority's continued detention of the property after the discontinuance of the criminal proceedings was not unlawful to the extent that there was no formal application for restitution by the claimants or any other person purporting to be the true owner of the property. The magistrate also seemed to have relied on the fact that the claimants had not pursued any civil remedy in detinue. The magistrate accepted the police prosecutor's submission that the provisions of sections 622 to 636 of the Criminal Code justified the continued detention of the property. According to the magistrate, these provisions "authorize the police authority to seize upon things they may later subject to forfeiture and a magistrate's authority to order police seizure". A most surprising and untenable proposition in the court's considered view.

[135] The magistrate also took the view that the court was only empowered to order restitution of seized property to an acquitted person. The magistrate placed emphasis on the fact that there was no application for restitution made by the claimants on the discontinuance of the criminal proceedings by the DPP and in so finding sought to make the distinction between a discontinuance and an acquittal. In so holding the magistrate failed to appreciate that the distinction between a discontinuance and an acquittal was irrelevant. What was relevant in the circumstances was the fact that the police no longer had any lawful justification for

the detention of the property whether by virtue of an acquittal or upon a discontinuance.

- [136] The magistrate's allusion to this distinction seemingly suggested that the claimants could not have in any event applied for the restitution of the property as a result of them not having been acquitted of the criminal charges. For the sake of argument this could have been the case had there been other criminal charges pending in relation to the same property. However, this was clearly not the case before the magistrate.
- [137] The magistrate, in arriving at her decision, also adverted her mind to the provisions of sections 622 to 631 of the Criminal Code in support of her findings in relation to the failure or inability of the claimants to apply for restitution of the property. These provisions have no relevance to the issues to be decided in the present case as they deal specifically to the seizure of things under warrant issued by the magistrate.
- [138] In relation to section 365 of the Criminal Code, which also seemed to be one of the underlying bases for the magistrate finding as she did in relation to the present issue, there simply was no order made pursuant to section 365 of the Criminal Code. Therefore, this section not having been invoked by the police at the time of the original seizure or at any time thereafter, could not have availed them in this instance and ought not to have been given any consideration by the magistrate in arriving at her decision.
- [139] What ought to have featured substantially in the magistrate's deliberations was that the only conceivable lawful authority which the police possessed to seize and detain the property was the fact that the property was kept as evidence by the police in a criminal prosecution; and the criminal prosecution having been discontinued meant that there was no longer any lawful justification for the detention of the property. Therefore, in the absence of any such lawful justification the property continued to be held by the police without lawful authority.

[140] It is clear on the evidence presented to this court and what was placed before the magistrate, that the police had no intention to pursue any further criminal proceedings in relation to any criminal offence to which the property was connected whether in relation to the claimants or any other person. The police, who were clearly faced with an obvious dilemma, were simply mulling over whether or not to return the property to the claimants.

[141] Mr. Fraser, in answer to the magistrate's finding that no application had been made by the claimants for the return of the property, relied on the decision in **Thakur Persad Jaroo v The Attorney General**<sup>19</sup> in support of the proposition that it was not necessary for the claimants to show that they had some good title to it. It was sufficient for them to show that at the relevant time they had been in possession of it. Their Lordships in **Jaroo** relied on the dicta of May LJ in **Webb** where he said:

“As to entitlement to possession, there is an instructive analysis in the decision of the Supreme Court of Victoria in *Field v Sullivan* [1923] Victoria LR 70. The essence of an extended passage in the judgment of Macfarlan J, at pp 84 to 87, is that if goods are in the possession of a person, on the face of it he has the right to that possession. His right to possession may be suspended or temporarily divested if the goods are seized by the police under lawful authority. If the police right to retain the goods comes to an end, the right to possession of the person from whom they were seized revives. In the absence of any evidence that anybody else is the true owner, once the police right of retention comes to an end, the person from whom they were compulsorily taken is entitled to possession.”<sup>20</sup>

[142] Having accepted the above proposition as a correct statement of legal principle, the court holds the view that the claimants ought to have taken the necessary action to assert their right to possession of the property. They did not, save and except by challenging the application for the detention order and the magistrate's jurisdiction to grant the same. It appears to the court that the claimants' contention was that the continued detention of the property by the police was not only unjustified and unlawful in the sense of continuing without any lawful authority whether pursuant to common law powers of detention but also in failing to have applied for a detention

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<sup>19</sup> [2002] UKPC 5; (2002) 59 WIR 519

<sup>20</sup> At para [20]. See also at para [21]

order within the time prescribed by section 29A of the POCA which in all the circumstances of the case was an arbitrary exercise of the executive authority of the police.

- [143] Taken to its logical conclusion, the argument made out on behalf of the claimants, suggested that the actions of the police were not only arbitrary but also capricious to the extent that the police, being well aware of the claimants' possessory title to the property and their unlawful detention of it, took active steps towards its re-seizure and eventual forfeiture, seemingly in an effort to frustrate any claim that the claimants may have had to secure its return to them.
- [144] This raises the question of whether the actions of the police were reasonable, fair and in keeping with the due process of law or actuated by some other oblique motive that amounted to an abuse of power. The question that also arises is with respect to whether the magistrate was correct in finding that the actions of the police in detaining the property beyond the time prescribed by law was reasonable in all the circumstances of the case.
- [145] It was argued on behalf of the Attorney General that the police acted reasonably in detaining the property beyond the time prescribed by section 29A since the police in the exercise of their law enforcement powers were obliged to uphold the public interest in detecting, solving crime and bring offenders to justice. The court makes several observations with respect to this point.
- [146] First, the magistrate seemed to have alluded to those objectives as justifying the continued (albeit unlawful) detention of the property by the police. However, the magistrate appeared to have done so on an improper basis. That is, by having relied on the provisions of PACE recited in the case law cited to her, which in the magistrate's view provided a yardstick by which to measure the reasonableness of the conduct on the part of the police.

[147] Second, section 29A of the POCA does not require the magistrate to consider the reasonableness of the conduct of the police. What the statute required was that the police do not retain property beyond 72 hours of its seizure before obtaining a detention order pursuant to section 29A. In the premises, the magistrate was wrong to factor the reasonableness of the conduct of the police in determining the lawfulness of their detention of the property beyond the period prescribed by section 29A. The question of the reasonableness of the conduct on the part of the police did not fall to be considered at that time.

[148] The point was eloquently made by Lord Denning MR in the case of **Ghani v Jones**<sup>21</sup> where he set out at least four propositions that required observance where the freedom of the individual, whose privacy and possessions were not to be invaded except for the most compelling reasons, had to be balanced against the interests of society at large in finding out wrongdoers and repressing crime. Lord Denning MR set out the following propositions which explain where the balance is to be struck:

“Balancing these interests, I should have thought that, in order to justify the taking of an article when no man has been arrested or charged, these requisites must be satisfied:

'First: The police officers must have reasonable grounds for believing that a serious offence has been committed – so serious that it is of the first importance that the offenders should be caught and brought to justice.

'Second: The police officers must have reasonable grounds for believing that the article in question is either the fruit of the crime (as in the case of stolen goods) or is the instrument by which the crime was committed (as in the case of the axe used by the murderer) or is material evidence to prove the commission of the crime (as in the case of the car used by a bank raider or the saucer used by a train robber).

'Third: The police must have reasonable grounds to believe that the person in possession of it has himself committed the crime, or is implicated in it, or is accessory to it, or at any rate his refusal must be quite unreasonable.

'Fourth: The police must not keep the article, nor prevent its removal, for any longer than is reasonably necessary to complete their investigations or preserve it for evidence. If a copy will suffice, it should be made and the

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<sup>21</sup> [1970] 1 QB 693 at 708; cited in *Jarvis v Attorney General* at para [26]

original returned. As soon as the case is over, or it is decided not to go on with it, the article should be returned.

'Finally: The lawfulness of the conduct of the police must be judged at the time, and not by what happens afterwards.'

- [149] A rather cogent question that arises in the present case is whether the unlawfulness of the initial detention of the property by the police could have amounted to an adequate predicate for its re-seizure and the grant of a continued detention order by the magistrate.
- [150] It is readily apparent that the power of seizure is distinct in nature and purpose to that of detention and that wholly different considerations are engaged. The two powers are not to be conflated. Seizure is the first stage of the statutory process leading to forfeiture. Detention is a temporary assertion of control over property which does not necessarily involve any seizure with a view to forfeiture.
- [151] The purpose of detention under POCA is to enable the FIA and its financial investigators to determine whether to take proceedings to forfeit the property or to restore it. This is consistent with the purport and effect of the provisions of section 6 of the Constitution save for the proviso that the seizure and retention is for so long only as may be necessary for the purposes of any examination, investigation, trial or inquiry or in the present case, in fulfilment of the FIA's obligations under POCA and that the exercise of the power was reasonably justifiable in a democratic society.
- [152] In the present case, there is no evidence that any investigation was carried out by the police authority in the interval between discontinuance and the re-seizure of the property by WPC Jules. Therefore, the continued detention of the property by the police was clearly without any lawful authority and in contravention of section 6 of the Constitution. However, the claimants were not without a remedy to vindicate a violation of this right, whether under the ordinary civil law or otherwise.
- [153] In the circumstances, it can only be rightfully said that the failure of the police authority or the DPP for that matter to take any steps towards regularising the detention of the property once seized, for a prolonged period albeit in excess of 11

years may rightly be viewed as a denial of procedural fairness to the claimants. In arriving at her decision, the magistrate should have been alive to these matters and ought to have taken them into account in determining whether the continued unlawful detention was necessary. Therefore, the magistrate's finding that the continued unlawful detention of the property by the police was reasonable is unsustainable and based on an incorrect approach and application of the law. Such a decision was clearly not open to the magistrate on the evidence before her. Accordingly, the magistrate's finding that the unlawful detention of the property by the police was reasonable amounted to an error of law.

[154] The question that also arises is whether it can be said that the explanation given for the unlawful detention of the property, namely that the police needed to make inquiries of the FIA with respect to whether the FIA was interested in the property was necessary in the fulfilment of the lawful exercise of police powers. Based on the evidence that was before the magistrate it can be reasonably inferred that the primary purpose for the retention of the property by the police without any statutory or other lawful authority was that of seeking its forfeiture. In other words, the primary objective was to make the property available in the likely event of the commencement of forfeiture proceedings by the FIA.

[155] The court has given consideration to the question of whether the property was unlawfully detained by the police for the primary purpose of securing its forfeiture. With respect to this issue the court has given consideration to the case of **Malone v Metropolitan Police Commissioner**<sup>22</sup> where it was held that if money could not have been retained as material evidence for the purpose of a criminal trial the police could not have been entitled to retain it for the purpose of making it available in the event of a conviction to satisfy an order for forfeiture or restitution under the Theft Act or the provisions of the Powers of Criminal Courts Act because none of these statutory provisions conferred power on the police to retain money not the subject

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<sup>22</sup> [1978] 3 WLR 936

of any charge which had been found in the possession of the accused at the time of his arrest.<sup>23</sup>

- [156] In **Malone v Metropolitan Police Commissioner**, the defendant sought to defend his continued detention of the money upon two main grounds. Whilst he accepted that it could not be justified on the ground that the money itself was the subject of a criminal charge, he claimed that it was material to both the conspiracy and substantive charges which was sufficient to be retained by him until the conclusion of the relevant criminal proceedings. Alternatively, the defendant argued that he was entitled to retain the money until the conclusion of the relevant criminal proceedings in order that the money might be available in the event of a conviction to secure restitution or forfeiture of the money.
- [157] In the above-cited case, it appeared that the police feared that if the money was not retained in order to facilitate the making of an order for restitution or forfeiture in the event of a conviction, there might have been strong judicial criticism of the police for releasing the money to the claimant so that it was no longer available for this purpose.
- [158] It must be recalled that in the present case, there was no statutory provision that justified the continued detention of the property by the police. Similarly, in **Malone**, the court there held that none of the statutory provisions relied on by the defendant conferred any specific power upon the police to retain money lawfully seized in the first instance solely in anticipation of the possibility of orders being made under one or more other statutes for restitution or forfeiture.
- [159] The court has discerned from the decision in **Malone** the principle that there is no general power in the police, when they have lawfully seized property which is thereafter not the subject of any criminal charge, to retain the property as against the person entitled to possession of it against some uncertain future contingency.

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<sup>23</sup> Per Lord Stephenson LJ at p. 944H – 995A; 946 A – E; 948A; 950H; 952F – 953A

The police must be able to justify the retention of such property in such circumstances upon some clearly ascertainable ground.

[160] However, in **Malone** Roskill LJ delivering a concurring judgment made a very valuable point when he said:

“This appeal raises an important point of principle in relation to police powers. It is the duty of the courts to protect the freedom and property of the individual against arbitrary action by the executive, whatever the form the particular action might take. But the courts, when performing that duty, must always have in mind that the administration of justice must not be hampered and that from time to time rights of individuals have to yield to a wider public interest which requires the abridgement of individual rights.”<sup>24</sup>

As salutary as the words of Lord Roskill LJ may seem, it still stands to reason that the police are themselves not entitled to engage in flagrant breaches of the law that are likely to result in the infringement of the rights of private citizens.

### **Alternative remedy**

[161] The Attorney General has challenged the claimants' right to seek redress by way of judicial review on the ground that the claimants have an alternative remedy by way of appeal pursuant to section 49A (4) of the POCA. Essentially, the argument made by the Attorney General is that the claimants ought to await the outcome of the entire proceedings up to forfeiture before challenging the magistrate's decision granting the detention order. The court finds no merit in this argument.

[162] Section 29A of the POCA does not provide any avenue of appeal or challenge against the decision of a magistrate granting a detention order. It would be absurd if a person who was interested in the property such as the claimants could not seek to challenge such action on the part of the police. In fact, having challenged the magistrate's jurisdiction to grant the detention order and seeking the return of the property to them, the claimants were well within their right to do so. This is perhaps one of the reasons why the court finds it more than passing strange that the

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<sup>24</sup> At p. 948 F

magistrate would have commented on the claimants failing to take any action to assert their right to possession of the property.

[163] The magistrate had essentially held that the claimants had no right to assert their entitlement to the possession of the property at that stage. However, the court has formed a different view. The application for a detention order by the police financial investigator was but a procedural step, albeit indirectly, employed by the police to retain the property. This clearly had the effect of frustrating any attempt that the claimants could have made to assert their right to possession of the property. This was indeed the first attempt by the police to assert any right to the possession of the property and to deprive the claimants of possession of what was unlawfully held by the police. In these circumstances, it cannot be correct that the claimants are proscribed from bringing a claim in administrative law because of the availability of a remedy in civil law that had been overtaken by recent events culminating in the grant of a detention order.

[164] It must also be accepted that section 29A(5) of the POCA provides that at any time while cash is detained by virtue of 29A a Court of summary jurisdiction may direct its release if satisfied on an application made by the person from whom it was seized or a person by or on whose behalf it was being imported or exported, that there are no, or are no longer, any such grounds for its detention as are mentioned in subsection 29A(2); or on an application made by any other person, that detention of the cash is not for that or any other reason justified.

[165] The claimants in the present case clearly adopted the procedure set out in section 29A(5) of the POCA having made an application before the magistrate for the release of the cash on the grounds purportedly that its detention was no longer justified in light of the discontinuance of the criminal proceedings against the claimants and the fact that the cash was unlawfully detained by the police. It is against the magistrate's decision refusing this application and continuing the detention order that the claimants have brought this claim for judicial review. Clearly,

the claimants would have had no other recourse against the magistrate's decision refusing their application at that stage of the proceedings.

- [166] The defendant's argument that the claimants had a right of appeal against the magistrate's decision to decline the claimant's application by virtue of Article 909 of the Code of Civil Procedure is unsustainable and is devoid of merit. Article 909 of the Code of Civil Procedure provides that any person aggrieved by a final judgment of the District Court or by a final order of the Magistrate may appeal to the Court of Appeal of the Eastern Caribbean Supreme Court. This provision appears to be of general application in relation to civil proceedings heard by a court of summary jurisdiction. The magistrate's grant of the detention order cannot be considered a final order within the context of the statutory framework of section 29A of POCA leading to a subsequent forfeiture order.

### **Conclusion**

- [167] It appears that since the delivery of the magistrate's decision WPC Jules applied for and obtained a forfeiture order pursuant to sections 49A (1) the POCA in respect of the property.<sup>25</sup> In the circumstances, it appears that any determination made by the court with respect to the magistrate's decision currently under review may be regarded as purely academic. It is left to the claimants to pursue whatever course of action available to them in the circumstances and in light of the court's reasoning and decision herein. It is indeed unfortunate that the claimants in seeking leave to file their claim for judicial review did not seek to obtain a stay of the forfeiture proceedings. However, in the court's view, a forfeiture founded on unlawful detention or an invalid detention order cannot stand. Nevertheless, the proceedings having progressed as they did it becomes entirely a matter for the exercise of the Court's appellate jurisdiction with respect to the order for forfeiture of the property.
- [168] However, in the court's view, the learned magistrate erred in law when she found that the property was lawfully detained by the police authorities. The infusion of the

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<sup>25</sup> At para 9 affidavit of Bertlyn Reynolds filed 14<sup>th</sup> April 2022.

concepts of reasonableness and “necessity” in line with the provisions of PACE as espoused in the decided case law adverted to by the learned magistrate rendered the magistrate’s decision unlawful on the basis that she took into account irrelevant considerations and thereby fell outside the ambit of the jurisdiction conferred on her by the provisions of section 29A of POCA. The magistrate was constrained by the provisions of section 29A of POCA and it was therefore forbidden for her to look outside of the statutory enactment. In the circumstances, the learned magistrate having applied the provisions of PACE amounted to an error of law and ultimately ultra vires the provisions of section 29A of POCA.

[169] Additionally, for reasons which the court has already stated, the grant of a detention order to WPC Jules was contrary to the provisions of section 29A of POCA, particularly in light of the court’s finding that the property had been unlawfully detained by the police authorities for a period in excess of 72 hours stipulated by the provisions of section 29A of POCA. The purported re-seizure of the property by WPC Jules did not cure the unlawfulness of the initial detention by the police authorities. Therefore, it follows that the grant of the detention order to WPC Jules itself was made without jurisdiction.

[170] Therefore, in light of the court’s findings contained in this judgment, the magistrate’s decision of 25<sup>th</sup> April 2019 and 19<sup>th</sup> August 2019 granting a detention order and a continued detention order respectively is set aside.

[171] Costs is awarded to the claimants to be assessed in accordance with CPR 65.11 and 65.12 unless agreed between the parties within 21 days of the date of this judgment.

**Shawn Innocent**  
High Court Judge

**By the Court**



**Dp. Registrar**

