THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. S-274 of 2017

Claim No. CV 2015-02943

BETWEEN

PRIMNATH GEELAL

AND

DHANRAJIE GEELAL

Appellants/Claimants

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Respondent/Defendant

Panel:

A. Mendonça JA

P. Rajkumar JA

R. Boodoosingh JA

Date of Delivery: 20 May 2021

Appearances:

Mr. Anand Ramlogan S.C, Ms. Renuka Rambhajan, Mr. G. Saroop instructed by Mr. Jared Jagroo on behalf of the Appellant

Mr. Douglas Mendes S.C, Ms. Sacha Sukhram instructed by Ms. A. Ramsook, Ms. K. Matthew on behalf of the Respondent

I have read the judgment of Rajkumar JA. I agree with it and have nothing to add.

…….

Allan Mendonça

Justice of Appeal

I too have read the judgment of Rajkumar JA. I agree with it and have nothing to add.

……

Ronnie Boodoosingh

Justice of Appeal

Judgment

Delivered by Peter A. Rajkumar J. A

Background

1. On the morning of Friday 31 July 2015, the Appellants' premises were searched. They claim that the search warrant was only shown to them from a distance. They claim that they were told only that the search was for arms, ammunition, and drugs, and the request of the first named Appellant to see a copy of the warrant was refused. The sum of approximately four hundred and thirty seven thousand four hundred and sixty seven TT dollars ($437,467.00) and various other foreign currencies, (together the equivalent in TT dollars of over one million dollars), was seized.

2. The Appellant explained at the time the money was discovered that the TT currency represented sales from his business, that some of the other currencies were monies left over from overseas travels, and that he had been accumulating sums in the U.S. and Canadian currencies, in the sums of $7,142.00 and $107,335.00 respectively over time, with the Canadian currency being earmarked to finance the education of his three children at University in Canada.

3. The first named Appellant, and his wife the second named Appellant, were detained at separate police stations on that Friday morning from around 11.00 am. They were released the following day, Saturday 1 August 2015, at approximately 7.00 pm with no charges being preferred against them.

4. On 4 August 2015 Acting Sergeant Francis made a sworn declaration before the then Chief Magistrate in support of an ex parte Order under the Proceeds of Crime Act Chapter 11:27 (POCA) to permit him to detain the cash which

had been seized for a further period of three months. The Magistrate made the ex parte Order (the Order) requested. The POCA provides by section 38 (7) that an application (the application) can be made for the return of cash so detained.

5. The Appellants contend that the Order was invalid because it did not provide the grounds for the continued detention of the cash, and those were not otherwise supplied. This constrained their ability to make an effective application under section 38 (7). They applied for leave for judicial review of the Order. The trial judge dismissed the application. The Appellants appealed the decision of the trial judge. The cash was eventually returned to the Appellants after the maximum period of two years for its detention had expired.

Issues

6.

i. Whether there was a requirement implicit in the POCA to **provide** to the Appellants the **grounds** for the detention order.
ii. If so, whether any requirement to provide grounds was modified or satisfied by **alternatives** available to the Appellants to obtain them.
iii. If grounds had to be supplied, in what **form** were those grounds required to be provided or supplied.
iv. If grounds were required to be supplied what was the **effect** of not providing them.

Conclusion

7.

i. **As to issue i.** there was such a requirement to provide grounds for the Order. The POCA itself requires that an application can be made for the

return of cash detained pursuant to an ex parte order. Inherent in such an application is the need to know the basis upon which the ex parte order was made. The right to make such an application is a fundamental part of the due process provided within the POCA to ensure that the continued detention of cash on the basis of the ex parte order did not amount to a deprivation of the right to property without due process of law. The application necessitated procedural safeguards to permit its effective exercise. The most fundamental safeguard was the need to know, and be provided with, the grounds of the ex parte detention order so as to enable the appellants to respond effectively, and satisfy the requirements for such an application under section 38 (7) POCA.

ii. **As to issue ii.** that requirement was not modified or satisfied by any of the alternatives available to the Appellant. The Order did not indicate the grounds for the continued detention of the Appellants' cash and they were not otherwise provided with them. The suggestion that an application could have been first made by the Appellants, with the grounds being provided subsequently upon disclosure or discovery, could not be an acceptable or effective alternative. Neither would the availability of an application to the Magistrate for those reasons under section 16 (1) of the Judicial Review Act[1] have been in this case, given the failure of the Chief Magistrate or her attorneys to respond when such a request was made. Further, an application for Judicial Review to compel their provision, would not be an adequate alternative to the instant application, which is also for Judicial Review, given that provision of the information is implicit in the POCA as a matter of right. Even if a continuation of the order upon application by the prosecution[2] were to

[1] 16. (1) Where a person is adversely affected by a decision to which this Act applies, he may request from the decision-maker a statement of the reasons for the decision.
[2]which application must be made every three months in order to continue the detention

have been made inter partes, and the material on which the ex parte order had been made then becoming available on discovery, (a matter on which there was no evidence), the Appellants would still have been without grounds for that three-month period.

iii. **As to issue iii.** The grounds upon which the order had been made could readily have been briefly specified in the order itself. Whatever the terminology used, whether grounds or reasons, or whatever the form or mechanism for providing the grounds, is not so important as their actual provision. Their purpose is to enable an effective application to be made for the release of the cash. That requires being informed of the grounds for its detention in the first place. If not so specified in the Order itself, the requirement could also have been easily and completely satisfied by service of the sworn declaration, which contained the matters required to **satisfy** the Magistrate of the need to make the ex parte order. It therefore necessarily contained the grounds to enable a response to those matters and an effective application for the return of the cash. (Alternatively, but not necessarily, the Magistrate could have adopted the more labour intensive course of supplying brief written reasons to either accompany the order or shortly thereafter). The grounds would in fact already be directly before that Magistrate because they are required to be contained in the materials provided on the ex parte application itself, and could not therefore constitute an undue imposition on the Magistrate.

iv. **As to issue iv.** the failure to provide grounds, whether in the Order or otherwise or thereafter, would render the Order invalid until they were supplied, because none of the alternative means suggested for accessing grounds addresses the essential purpose of enabling an effective and

timely application for the return of the cash under the POCA, and giving effect to the procedural safeguards provided within the POCA itself. In this case the failure to give effect to those procedural safeguards amounted to a denial of the due process protection provided within the POCA and was unconstitutional.

Order

8.

i. The Appeal is allowed.

ii. The Orders of the trial judge are set aside.

iii. It is ordered that:

a. a declaration is granted that the detention order made by the Chief Magistrate on the 4th day of August 2015 against the Appellants is unconstitutional, null and void, and of no legal effect,

b. a declaration is granted that the appellants' right to use and enjoy their property and not be deprived thereof except by due process of law under section 4 (a) of the Constitution was breached,

c. a declaration is granted that the appellants' right to the protection of the law under section 4(b) of the Constitution was breached,

d. the Respondent is to pay to the Appellants damages. The assessment of damages will be remitted to a judge of the High Court for that court to give directions as to how the assessment of the quantum of such damages should be undertaken.

e. the Respondent is to pay to the Appellants costs of the proceedings in the Court below to be assessed by a Master in default of agreement,

f. the Respondent is to pay to the Appellants the costs of this appeal being two thirds of the costs in the court below as quantified by the Master.

Analysis

Issue i. - Whether there was a requirement under the POCA to provide to the Appellants the grounds for the detention order

9. The Act itself provides for an ex parte application being made for the Order for the continued detention for more than 96 hours of cash seized. The circumstances in which such an Order can be made for the detention of the cash seized are set out quite clearly in section 38 of the POCA. The relevant sections are set out hereunder: - (all emphasis added)

> *38. (1) A Customs and Excise Officer of the rank of Grade III or higher, or a Police Officer of the rank of sergeant or higher, may seize from any person and in accordance with this section, detain any cash in accordance with this section if its amount is more than the prescribed sum.*
>
> *(1A) A Customs and Excise Officer or Police Officer referred to in subsection (1), may seize and detain cash **only**, where he has **reason to believethat the cash directly or indirectly represents any person's proceeds of a specified offence**, or is **intended by any person for use in the commission of such an offence**.*
>
> *(2) Cash seized by virtue of this section shall not be detained for more than ninety-six hours unless its continued detention is detention authorised by an order made by a Magistrate, and no such order shall 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 Trinidad and Tobago or elsewhere**, of criminal proceedings** against any person **for an offence with which the cash is connected**.*
>
> *(3) Any order under subsection (2) shall authorise 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 Magistrate, if satisfied as to the matters mentioned in that subsection, may thereafter from time to time by order authorise the further detention of the cash but so that— (a) no period of detention specified in such an order shall exceed three months beginning with the date of the order; and*

(b) the total period of detention shall 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 in the prescribed form before a Magistrate by the Customs and Excise Officer or a Police Officer of the grade or rank referred to in subsection (1).
(4A) An application for an order under subsection (2) shall be made ex parte.
(4B) Where an order has been granted under subsection (2) or (3), ***the order shall be served*** *as soon as reasonably practicable on— (a) the person by, or on whose behalf the cash was being imported or exported, if known; or (b) the person from whom the cash was seized.*
(4C) An order referred to in subsections (1) and (2) shall be in the ***prescribed form****.*

(7) At any time while cash is detained under this section— (a) a Magistrate may direct its release if satisfied— (i) on 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 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 Comptroller of Accounts may, upon the written application of the applicant for the order, release the cash together with any interest that may have accrued, if satisfied that the detention is no longer justified.*
(7A) An application for the release of cash detained under subsection (7) shall be made in the ***prescribed form****.*

10. Among the various reasons proffered for the invalidity of the Order were that the reasons for the detention of the appellants' property were not provided. The trial judge referred to those sections[3] and found, inter alia, that they made no specific provision for the reasons for detention to be stipulated in any Order served. That being so he found that there could be no complaint that the Order did not specify the grounds. He concluded at paragraph 76 that

"It therefore follows that if the statute does not make any express provision for the grounds to be stated in the detention order any attempt

[3]At paragraphs 74, 75 and 79 of his judgment

to do so would mean the Magistrate is venturing beyond the parameters of the legislation".

11. A Magistrate's jurisdiction is created by statute. It is a misconception that the presence of a particular form or the content thereof is the basis of the jurisdiction. A Magistrate can make an Order, in the exercise of powers conferred by statute within the strictures of the powers so conferred, even in the absence of a prescribed form. Neither the absence of such a form nor the absence of a provision for a particular item of information required by the statute as a whole can deprive a Magistrate of jurisdiction to supply it. Such absence on a form cannot signify a lack of jurisdiction. The right under section 38 (7) to an effective application for the recovery of the cash required the provision of grounds, whether on or with the Order.

12. In fact the prescribed form itself was never published pursuant to the Act until September 3, 2015 a month after the incident in question[4].The appellants initially contended that the absence of the prescribed form of Order made the Order for the detention illegal[5] but are no longer pursuing that ground. The trial judge was of the view that his position was reinforced by the fact that when the prescribed form under section 38(4) (C) was subsequently promulgated by Parliament that it made no provision for the stipulation of the grounds for detention[6]. He concluded from this that "*Therefore, the claimants have not been prejudiced by the detention order made by the Chief Magistrate*". In so concluding he erred in failing to appreciate that the statute **required** grounds to be supplied, whether in the Order or otherwise. Regardless of the content of any forms prescribed, continued secrecy concerning those grounds was not justified, and not consistent with section 38 (7) of the POCA.

[4](see paragraph 50 of the judgment).
[5](page 313 record of appeal)
[6] Paragraph 62

13. The Act provides that the Order must be in the prescribed form. The trial judge correctly concluded that a purposive construction of the Act meant that the absence of the form did not deprive the Magistrate of jurisdiction to make the order for detention. He erred however in not appreciating that even if there were no provision for grounds in the prescribed form, (including the one subsequently promulgated after the seizure), that would not negate any requirement under the POCA associated with the right to make an application under section 38 (7) for the return of cash detained. This was a necessary statutory safeguard provided with and indivisible from the Magistrate's jurisdiction to make the initial Order for its detention.

14. The fact that a form was subsequently printed which did not make provision for the grounds for the detention carries the matter no further. Even if that form did not make provision for that information it is required by the Act, and needed to be inserted in, or supplied with, any Order that was made. In fact, the subsequent provision of a prescribed form of Order, one month later is of no relevance whatsoever. The POCA provides what is required. A Magistrate is a judicial officer. The content of the Order, regardless of whether a prescribed form has been provided, is provided within the POCA and requires, for the effective exercise of the right to make the application required therein, the provision of the grounds upon which the ex parte order had been made.

15. To the extent that it was originally alleged that in the absence of the prescribed form the Magistrate had no jurisdiction, such an argument was correctly rejected by the trial judge and properly abandoned on appeal by the appellants. The trial judge appreciated that the Magistrate had jurisdiction even in the absence of the form prescribed by section 38 (4). However he failed to recognize that for that very reason, that is because the Magistrate's

jurisdiction was derived from the entirety of the statute, it could not be contended that the Magistrate would be exceeding jurisdiction by stating in her Order the grounds upon which the Order was made, or otherwise providing them, simply because no provision was made on the form. Her jurisdiction to do so was derived from the statute and by necessary implication into section 38 (7) of the necessary procedural requirements to give effect thereto.

16. The POCA provides the jurisdiction for the making of the ex parte Order. It also provides the basis of the constitutional safeguard of the rights of the applicants/appellants to challenge the ex parte order and seek the return of their cash.

17. The Order for detention of cash for up to three months under the Act is on the basis of an ex parte application - a draconian jurisdiction. That being so, compliance with the statute was required. The POCA expressly provides that the ex parte Order can be made when the Magistrate to whom the application is made is **satisfied** that there are reasonable grounds for the suspicion in sub section 1. It appears that the closest thing to suspicion is the reasonable belief described in subsection 1A, (although curiously, inelegantly, and erroneously the word *suspicion* is not anywhere used, and section 1 rather than section 1A is referred to). In section 1A it is instead described as "**reason to believe** that the cash directly or indirectly represents any person's proceeds of a **specified offence**, or is **intended by any person for use in the commission of such an offence**"[7]. The cash must therefore have been seized and initially detained for no more than 96 hours in connection with the suspicion,("reason to believe"),as described, of a **specified offence**.

[7] It may also be noted that reason to believe is not the same thing as suspicion, although the requirement of reasonableness for both concepts may in practice minimize the practical effect of the distinction.

18. Grounds for a Magistrate's ex parte order, because they are a pre requisite to the exercise of the jurisdiction and discretion to make such order, must therefore be that he/she was **satisfied** that:

    i. there were **reasonable grounds to believe** that

    a. the cash represented directly or indirectly the **proceeds of a specified offence OR**,

    b. it is **intended for use** in the commission of such an offence, **AND**

    ii. its **continued detention** is **justified** while,

    a. its **origin** or **derivation** is **investigated, OR**

    b. consideration is given to institution of criminal proceedings for **an offence with which the cash is connected.**

19. It could hardly therefore be oppressive or an undue burden on Magistrates to require that the grounds for the Order be supplied, whether in the Order, or together with the Order, or otherwise, given that they simply require that he/she is satisfied that reasonable grounds existed for believing one of the matters specified at i. above, **and** that continued detention is justified because of one of the matters specified at ii. above.

20. Inherent in that is that the **specified offence**, of which there are twenty-three categories, in the Second Schedule to the POCA (and therefore many more possibilities), should be identified. The basis of reasonable grounds in respect of which the magistrate would have to be satisfied before making the ex parte order, would be the sworn evidence before him on the ex parte application.

21. There are combinations of separate and discrete matters under the Act, which could form the basis for satisfying the Magistrate that the ex parte order should be made. Without the necessary particulars identified above, the

Order that was served was incomplete and insufficient to enable an effective application under section 38 (7). For example, the Appellants needed to know:

i. what was the **specified offence**,
ii. what was the basis of the alleged **reasonable grounds** for the **belief** , for example having heard the evidence of someone,
iii. whether the jurisdiction was being exercised on the basis that it represented the **proceeds** of the offence specified, or whether it was being alleged that it was **intended to be used** in the commission of such an offence, as well as,
iv. the basis justifying its **continued detention**, for example whether a. investigation of its origin, or b. consideration of further criminal proceedings.

Specifying the grounds and providing them to the appellants could not possibly cause any hardship to a Magistrate given that that material would already be before him at the time of making the order.

22. The trial judge failed to appreciate that the provision in the POCA for an application to recover the cash seized could be rendered nugatory if the appellants did not know what was the basis upon which the cash was being further detained.

23. The trial judge wrongly concluded that even without the grounds for detention being provided in the Order that this did not deprive the applicant/appellants of the right to make an application for recovery of their cash. The right to make such an application would obviously be seriously constrained by not knowing what were the grounds upon which the cash was being further detained. An applicant who makes an application for return of his cash without at least knowing the grounds identified above upon which the ex parte order had been made cannot possibly be expected to have had

the necessary material to make an effective application to establish that there are no, or are no longer any, grounds for its detention as are mentioned in sub section (2).

24. There should be no reluctance to recognize that a Magistrate, in exercising draconian powers under the POCA to continue the detention of cash seized from a citizen, is required to ensure that the basis of the jurisdiction which he purports to exercise is a) satisfied and b) communicated to that citizen. Those matters are solely within the knowledge of the Magistrate and the prosecution because such an Order is made ex parte. The structure of the POCA provides recourse in respect of that Order under a section 38 (7) application. If the Magistrate does not indicate what were the grounds for her Order then the appellants could not address them in the application. Communication of those matters is therefore necessary in order to enable the exercise of rights under Section 38 (7) POCA to make an effective application for its release. A citizen cannot make such an application if he is not aware of, because he is not provided with, adequate grounds as to the basis of the Order.

Issue ii. If so whether any requirement to provide ~~reasons~~ grounds was modified or satisfied by alternatives available to the Appellants

25. The respondent contends that:

i) the failure to state the grounds for the detention in the Detention Order did not deprive the appellants of their right to apply to court for the release of their cash[8].This argument would be unaffected if that failure were to provide those grounds not only in the Order but otherwise or at all.

ii) the appellants could have applied directly to the Chief Magistrate for her reasons,

[8](Paragraph 79 of their submissions).

iii) they could have applied to the High Court for an Order compelling the Chief Magistrate to provide her reasons under the Judicial Review Act if she refused to do so; or

iv) they could have applied for **judicial review** challenging the rationality of the issue of the detention order.

26. As to i), (an application under section 38 (7) without knowing the grounds),the respondent submits that had the appellants made an **application** on the basis of the ex parte order, **without grounds** they would have been entitled to disclosure of relevant documents and the notes of evidence. This ignores the fact that this would require the applicants to make an application without knowing the basis of the application that they were making, and without even knowing whether there was any basis for making such an application. Such an application would require the appellants to guess at the grounds upon which their cash had been detained. However in order to make their application they had to establish those grounds, whatever they might be, did not or no longer applied.

27. At paragraph 89 (2) of the respondents' submissions it is contended that the appellants' were not deprived of the protection of the Law or due process because inter alia they were entitled under Section 38 (7) of the Act to apply immediately for the release of their cash putting before the Chief Magistrate the evidence which they claimed existed of the legal provenance of the cash.

28. The trial judge accepted this argument at paragraph 77 of his judgment as follows: *"It is this Court's opinion that the information deposed to by Mr. Geelal in his affidavit in support, more particularly: (i) that the local currency was earmarked to pay suppliers and creditors and to stock his business; and (ii) that the Canadian currency was earmarked to finance his children's education in Canada would be sufficient evidence to support his application*

that there are no grounds for the detention of the cash". This only needs to be stated to demonstrate that it could not possibly suffice to satisfy the Appellant's right to make an effective application for the return of their cash. It is based on an assumption that those matters would satisfy the statutory requirements and result in the return of their cash. However those matters ("earmarking") would have been unresponsive to the grounds and matters that the Court took into account in making the ex parte order in the first place. The trial judge was wrong to conclude that, even without the grounds, nothing precluded the appellant from making the application for the return of his cash. Paying lip service to the existence of the right to make such an application could not be what the POCA or the Constitution contemplated or required.

29. This submission therefore only reinforces the fact that a) such an application would not have been made on the basis of any specific material, on which the Order was made which the appellants would have been able to rebut. It therefore deprived them of the right to rebut such material. Further on this submission the onus of proof would have shifted to the Appellants to prove the origin or provenance of the cash rather than addressing the specific matters required for a specific application, namely, that there are or are no longer any grounds for the continued detention of the cash.

30. With respect to ii), (they could have **applied directly** to the Chief Magistrate for her reasons/grounds), this completely ignores the fact that there is no extraordinary effort required for the Chief Magistrate to include on the Order or otherwise the essential reasons/grounds that necessarily constituted the basis for her ex parte Order as identified above. Further, when such a request was made before the institution of the instant proceedings on August 20,

2015[9], to the Solicitor General, the legal representative of the Magistrate, no response was received, demonstrating the ineffectiveness of that alternative in this case.

31. With respect to iii), (an application to the High Court for an Order compelling the Chief Magistrate to provide her reasons if she refused to do so), the respondent makes the same error of ignoring the fact that **the Act itself** contemplates that the reasons would not be kept a secret and would be provided because an effective application could not be made without that essential information.

32. With respect to alternative iv)above this alternative, (an application for judicial review challenging the rationality of the issue of a detention Order), the Respondents contend that on such an application, the Chief Magistrate would have been obliged to explain why she issued the Order. In those circumstances, there was no obligation to include the reasons/grounds in/with the Order. On this alternative the appellants would have had to file judicial review proceedings, as they have actually done in this case. The instant judicial review is based upon inter alia, the failure to provide **grounds**. To contend therefore that they had the alternative, but equally effective remedy of judicial review itself, but one which instead challenges the **rationality** of the issue of the detention Order is a distinction, the significance of which is difficult to understand. In any event if the appellants were constrained to make an application for judicial review then it could not be an effective alternative to having the grounds provided whether in or with the Order itself. Apart from being time consuming, expensive and susceptible to technical procedural bars, it unnecessarily **delays** the possibility of an

[9] Page 137, 140, 141, 147 of the Record of Appeal

effective **application under section 38 (7)** until the grounds are provided in a **manner** which is **not contemplated** by the structure of the POCA itself.

33. The fact that an application may be made under the Judicial Review Act does not detract from the fact that the Act itself makes provision for an application to be made without the additional hurdles of having to make separate applications under the Judicial Review Act. The alternative of an application for judicial review to obtain those reasons would be both time consuming, costly and unnecessary. It would add an extra element of delay and bureaucracy, which is entirely unnecessary given that the provision of reasons is implicit in the POCA as a matter of right. It is not to be equated with a request, with the possibility of refusal, given that it is a necessary procedural safeguard provided for a citizen against whom an order for detention of his cash has been obtained in his absence, and without an opportunity at that time to be heard. Such technical applications for judicial review could not be a substitute for an application for the actual return of the cash. In so far as such an application imposes an unnecessary financial burden on the applicant, it introduces a hurdle to access to justice that could not have been the intention of Parliament.

34. The delay inherent in receiving the Order unaccompanied by the grounds on which it was made is entirely unnecessary given the structure of the POCA, and the fact that the Act provides within itself the basis of the Magistrate's jurisdiction. The very exercise of that jurisdiction must be on the basis of the grounds statutorily required for making the Order. Given the minimal effort as identified above that would be involved in the magistrate's specifying the grounds for that Order there is no practical justification, and certainly no legal one, why those grounds should not have been communicated to the Appellants, whether in the Order itself, or together with it, or shortly

thereafter. The Respondents accept (in their submissions[10]) that the appellants would have been entitled to disclosure of that material had they made an application. Clearly therefore there can be no argument that they were not entitled to it.

35. In this case the Magistrate's failure effectively deprived the Appellants of the right conferred upon them by statute to make an effective application. Given that an initial detention order would last for up to three months after which it had to be renewed it is hardly likely that an appeal of a Magistrate's order would effectively result in the provision of those grounds within that time. In the interim an applicant would continue to be without the means contemplated within the POCA to make an effective application. Such an appeal, even if eventually successful, could not be considered an equally effective alternative remedy.

36. It is even possible that in some situations the provision of reasons whether in/with the Order or otherwise, could cause a person from whom cash is seized to consider not making an application for its release, depending upon the specified offence that is being investigated and his assessment of his ability to persuade the Magistrate of the matters required under section 38 (7). Without the necessary information, any applicant would be deprived of the opportunity to make that decision, another result that is not consistent with the structure of the POCA.

37. The POCA permits an ex parte detention order in relation to cash. However, the POCA does not require that a citizen be deprived of his cash without due process or that he search for due process protections among the several inadequate alternatives outside the POCA itself. It provides within itself for

[10] Paragraph 77

the due process right to make an effective application for its return. Such an application must be on the basis, inter alia, that there are no grounds or are no longer any grounds for detention of the cash as mentioned in sub section 2. The law does not justify an interpretation of the Act that an application for the return of the cash should be made without knowing how to address and respond to the statutory grounds upon which the ex parte order might have been made.

Issue iii. - If grounds had to be supplied in what form were those grounds required to be provided

38. The authorities cited on the necessity or otherwise for Magistrates generally to supply grounds are not applicable because in this case the POCA itself specifically contemplates that an application can be made under section 38 (7) to a Magistrate. It is a fundamental principle of natural justice that an applicant is required to know the grounds upon which a decision adverse to his interests has been taken, to inform any right available to him to respond to it. Therefore the grounds upon which the ex parte order was made, which that application must address to be effective, must be supplied in a timely manner.

39. As a practical matter the provision of the evidence of Marvin Francis would have satisfied the requirement to provide grounds for the Order. Those grounds would have readily appeared from his sworn testimony which formed the basis of his application to the Chief Magistrate. If for example, the transcript of that testimony had been provided to the appellants they would have been informed thereby of: a) the basis of the reasonable grounds for **suspicion** of the suspected **specified offence** in connection with which the cash had been seized, b) the basis upon which it had been seized, for example whether **proceeds** of that offence or **intended** use in its commission, and c)

the basis upon which the detention Order was being sought, for example, investigation of its origin or contemplated criminal proceedings.

40. An application under section 38 (7) must demonstrate that the grounds upon which the ex parte order was made either did not apply or no longer apply. In the instant case although the fact that the cash had to have been **seized** in connection with a **specified offence**, the offence was not specified. It would not have been an imposition to provide this information because Ag Sargent Francis had already indicated to the Magistrate in the application for the order[11], that 'it is suspected that the cash in issue was derived from the commission of specified offences namely, larceny, credit card fraud, and money laundering'.

41. Similarly, **the grounds for its detention** could also have been readily provided even on the Order itself, because according to Sargent Francis' application it was necessary "*to provide more time to thoroughly investigate the **source** of funds of the cash in issue*". That too was not in the Order. Yet there could have been absolutely no prejudice in the applicants being provided with that information in the Order, or otherwise, (for example by providing them with the sworn declaration of Sgt Marvin Francis), so as to enable an effective application to be made. Without that information an application under 38 (7) would be stymied by an inability to address those matters before the Magistrate.

42. This information was all already before the Magistrate. In fact it was a precondition to the exercise of her jurisdiction to make the Order. To simply provide the grounds upon which the ex parte Order was made therefore could

[11](page 285 record of appeal)

not possibly be a matter that would impinge upon the schedule of Magistrates.

43. Providing the grounds for the ex parte Order whether in or with the Order or otherwise is not the same as requiring the Magistrate making the Order to provide full written reasons for the decision, and no one is suggesting that the Act requires this. The inclusion of grounds in or with the Order is a completely distinct matter from the provision of extensive written reasons. The respondent appears to equate the two, but as demonstrated above, they are not the same. A brief statement enumerating those grounds as described above at paragraph 18 could hardly add significantly to the burden of a competent magistrate properly exercising his jurisdiction in making the ex parte order. In fact as identified above, simply providing, at the time of service of the ex parte Order, the materials on which the Order was made would significantly diminish the possibility of further contention that any grounds actually supplied were insufficient. It would have the added advantage of not contributing in any way to increasing the workload of Magistrates.

44. On the other hand the failure to supply that information, whether in, or together with the Order, or otherwise or at all, eviscerated the right conferred on the appellants to make the application for return of the cash. That right provides the protection of due process of law contemplated by the POCA.

Issue iv. - If grounds were required to be supplied what was the effect of not providing any such grounds

45. Ground 14 of the grounds of the appellant's application[12] alleges quite clearly that "*the detention Order is invalid because in its present form it is defective in that it does not contain the grounds of the detention thereby defeating the*

[12] Page 56 record of appeal

constitutional procedural safeguard given to the claimants by Parliament to be able to apply to have the Order discharged and his cash released"[13].

Due Process - Law

46. The Constitution provides by virtue of Section 4(a) that no person is to be deprived of his right to property without due process of Law.

> *4. It is hereby recognised and declared that in Trinidad and Tobago there have existed and shall continue to exist, without discrimination by reason of race, origin, colour, religion or sex, the following fundamental human rights and freedoms, namely: (a) the right of the individual to life, liberty, security of the person and enjoyment of property and the right not to be deprived thereof except by due process of law;*
> *(b) the right of the individual to equality before the law and the protection of the law;*

47. In the case of **R v Secretary of State for the Home Department, ex parte Doody** [**1994] 1 A.C 531** it was recognized that natural justice may include a) a right to make representation before a decision and/or b) a right to make representation **after** a decision has been taken with a view to its procuring its modification. See the case **ex parte Doody**(cited at paragraph 25 of the appellant's submissions) and the six principles set out therein per Lord **Mustill**. Although this case dealt with administrative powers the principles are at least equally applicable to legal powers.

48. At page 560 d-g it was stated as follows:-

> *"What does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive that (1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their*

[13] Page 180 record of appeal

application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or ***after it is taken****,* ***with a view to procuring its modification****; or both. (6)* ***Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer****"*.(All emphasis added)

The right to make representations for the modification of the Order necessarily required the appellants to know or to be **informed of** the basis upon which the cash had been detained.

49. See also page 563, paragraph f-g *"It has frequently been stated that the right to make representations is of little value unless the maker has* ***knowledge*** *in* ***advance*** *of the* ***considerations*** *which,* ***unless effectively challenged****, will or may lead to an adverse decision. The opinion of the Privy Council in* Kanda v. Government of Malaya *[1962] A.C. 322, 337 is often quoted to this effect. This proposition of common sense will in many instances require an* ***explicit disclosure*** *of the substance of the matters on which the decision-maker intends to proceed. Whether such a duty exists, how far it goes and how it should be performed depend so entirely on the circumstances of the individual case that I prefer not to reason from any general proposition on the subject. Rather, I would simply ask whether a life prisoner whose future depends vitally on the decision of the Home Secretary as to the penal element and who has a right to make representations upon it should know what factors the Home Secretary will take into account. In my view he does possess this right, for*

without it ***there is a risk that some supposed fact which he could controvert, some opinion which he could challenge, some policy which he could argue against, might wrongly go unanswered****.* (All emphasis added)

Whether Constitutional Relief available

The Protection of the Law - Content

50. In the case of **Sam Maharaj v The Prime Minister of Trinidad and Tobago [2016] UKPC 37** where, (commencing at paragraph 25), the Judicial Committee of the Privy Council recognized that in a series of cases where the **protection of the law** provision in Constitutions in various Caribbean countries was considered, an expansive approach to its potential application has been taken.

> *In Attorney General of Barbados v Joseph and Boyce [2006] CCJ 3 (AJ) de la Bastide P and Saunders J said at para 60 of their joint judgment for the Caribbean Court of Justice said at para 60: "… the right to the protection of the law is so broad and pervasive that it would be well nigh impossible to encapsulate in a section of a Constitution all the ways in which it may be invoked or can be infringed*."

51. At paragraph 26 it cited the case of **The Maya Leaders Alliance v the AG of Belize** as follows:-.

> *In The Maya Leaders Alliance v Attorney General of Belize [2015] CCJ 15 at para 47 CCJ took a similar stance:*
> *"The law is evidently in a state of evolution but we make the following observations. The right to protection of the law is a multi-dimensional, broad and pervasive constitutional precept grounded in fundamental notions of justice and the rule of law. The right to* ***protection of the law*** *prohibits acts by the Government which arbitrarily or unfairly deprive individuals of their basic constitutional rights to life, liberty or property. It encompasses the right of every citizen of* ***access to the courts*** *and other judicial bodies established by law to prosecute and demand effective relief to remedy any breaches of their constitutional rights. However, the concept goes* ***beyond such questions of access*** *and includes the right of the citizen to be afforded, 'adequate safeguards against irrationality, unreasonableness, fundamental unfairness or arbitrary exercise of power.' The right to protection of the law may, in*

*appropriate cases, require the relevant organs of the state to take positive action in order to secure and ensure the enjoyment of basic constitutional rights. In appropriate cases, the action or failure of the state may result in a breach of the right to protection of the law. Where the citizen has been **denied rights of access** and the **procedural fairness demanded by natural justice**, or where the citizen's rights have otherwise been frustrated because of government action or omission, there may be ample grounds for finding a breach of the protection of the law for which damages may be an appropriate remedy."*

52. It then considered by reference to various cases from this jurisdiction that courts in Trinidad and Tobago have consistently favoured a wide-ranging interpretation of the "protection of the law" provision.

53. At paragraph 28 it referred to the case of **Rees v Crane [1994] 2 AC 173**and cited with approval the statement by Lord Slynn at page 188G that "the **protection** of the Law provision in Section 4 (b) included the right to **natural justice**".

Whether access to the courts will suffice for the purpose of section 4(b)

54. The Judicial Committee considered and rejected the argument as to whether the mere availability of access to the courts sufficed to confer the constitutional protection provided in section 4(b) of the Constitution[14]. It noted that while it was an important aspect of that right it may not by itself be sufficient. *"But, for the protection to be **effective**, access to justice must be **prompt and efficacious**."*

*37. Access to the courts in order to challenge a claimed breach of an individual's legal rights is clearly an important aspect of the constitutional protection provided for in section 4(b). **But, for the protection to be effective, access to justice must be prompt and efficacious**. In this case, the appellant was deprived of any form of remedy for many years. The passage of those years at least contributed to the decision that the*

[14]see paragraph 37

appellant was not entitled to any tangible recompense, for instance, in the form of reconsideration of his application to be reappointed.

*39. While there **may be cases where the right to the protection of the law can be fulfilled by the availability of an effective and prompt remedy provided by the courts, the Board is satisfied that this is not one of them**. For many years the appellant was denied legal redress for the obvious wrong which had been done to him. The finding of the Court of Appeal such a long time after that wrong had been perpetrated cannot be said to amount to **effective protection** of the law. There is, moreover, the consideration that it was the government, which should have been the guarantor of his constitutional right, that denied him that right.*

*40. While, therefore, Rees v Crane and Durity v Attorney General **should not be interpreted as laying down an inflexible rule that every instance of failure to observe the rules of natural justice will give rise to a constitutional claim**, in general, **where a prompt and effective legal remedy cannot be or is not provided, such a claim will arise**.*(All emphasis added)

55. At paragraph 43 of its judgment the Board concluded in relation to the specific case before it that while the availability of judicial review is a factor to be considered in deciding whether a constitutional claim in respect of section 4(b) should be entertained, it was not determinative.

43. The Board does not agree. The availability of judicial review is a factor to be considered in deciding whether a constitutional claim that an individual has been denied the protection of the law should be entertained. It is not determinative of that issue. In the present case, it was open to the appellant to challenge the decision not to reappoint him by way of judicial review but, as was the case on the second ground put forward by Mr Durity, this was not an effective or timeous remedy.

56. In this case the Appellants were never provided with the grounds upon which the ex parte detention Order had been made. The effort involved in provision of those grounds is far outweighed by the effort required to resist the ensuing application for judicial review. The assertions by the Respondent that there were alternative legal remedies available to the Appellants on analysis turn out not to be justified. As demonstrated above those alternatives were **not prompt or effective** and the Appellants were, without the grounds being provided to them unable to make an

effective application. In fact their cash was only returned after the maximum two year period for its detention on successive renewed Orders had expired. This therefore could well constitute such an instance where failure to observe the rules of natural justice will give rise to a constitutional claim for breach of the protection of the law under section 4(b) of the Constitution notwithstanding the provision in the statute for access to the Courts, or the availability of less efficacious or timely alternatives.

57. The statute expressly provides for requirements as a pre-condition to jurisdiction. They include a statutory recognition that the appellants had a right to make an application for return of the cash. Consistent therewith the POCA requires service of the Order. The application for the return of the cash requires demonstrating that there are no grounds or are no longer any grounds for detention as mentioned in subsection 2.

58. Due process included the right to make an effective application. The appellants would not have had an effective right to make representations on an application under section 38 (7) if they did not know the grounds upon which the Order had been made and on which they needed to make representation. For example the detention under the Act had to be in connection with a **specified** offence. Because they were not provided with information thereon they would not have known the **specified** offence of which they were suspected. Failure to provide them with information on this and the other matters previously identified at paragraph 18 above would amount, and does amount in this case, to a breach of the constitutional right not to be deprived of property without due process of law. This could not be a result contemplated under the Act.

59. By depriving the appellants of the grounds for the Order, the very jurisdiction of the Magistrate to make such an order was in issue. This was because of her failure to give full effect to the content of the legislation under which she purported to detain

the cash. The Act's draconian power of detention would be unconstitutional without the countervailing statutory due process right to make an effective application under section 38 (7). Any interpretation which removes or ignores the right to be provided with the grounds of the ex parte order would render that right devoid of content and bring the matter within the realm of a constitutional breach.

60. To the extent that the ex parte Order did not recognize that right, and deliberately or inadvertently placed obstacles to the exercise of that right, such Order would necessarily be defective. This is all the more so because given the ease with which the grounds could have been provided by the Magistrate as demonstrated above, there is no logical reason as to why the grounds for making the Order could not have been briefly provided whether on the Order or together with it.

61. Without grounds being provided by or with the ex parte Order a potential applicant would be deprived of the option to consider whether an application may even be advisable. Further, without knowing what specific grounds to address in such an application circumstances may be envisaged where he may even inadvertently incriminate himself in a non-scheduled offence, in making an application and addressing matters "in the dark" that he hopes may be relevant to the application.

62. Therefore unless or until the Appellants were provided with the grounds for the Order they would have been deprived of their property in breach of their constitutional right not to be deprived thereof without due process of law. In the instant case they were never supplied. That due process, and such procedural provisions as were necessary to give effect to it, were already inherent in the POCA. That omission would also in this case constitute a breach of the constitutional right to the protection of the law.

63. The foregoing analysis demonstrates why and where the trial judge fell into error. The trial judge misdirected himself on several bases:- a) the significance of the absence of a prescribed form of Order which provided therein for grounds or reasons; b) his conclusion that a literal interpretation of the statute did not require the appellants to have been provided with the grounds for the detention of their cash. He therefore failed to appreciate that with respect to natural justice it is a fundamental principle of administrative law[15] that the justice of the common law would supply the omission of the legislature.

64. Although the legislature omitted to expressly provide that a person whose cash has been detained needed to be supplied with the grounds for the ex parte order it is apparent that, in order to give effect to the right to due process expressly set out in section 38 (7), that omission, (though clearly implied), would be supplied by the common law and therefore the courts. That right to due process consisted of, inter alia, the right to be heard as to the matters on which the ex parte Order had been made, and to be informed of the matters that needed to be addressed on an application under section 38 (7).

65. The trial judge was therefore plainly wrong in not appreciating that without those reasons the right provided by statute to make representations on the application for the modification or the setting aside of the detention Order was effectively compromised, if not negated. Even if the statute did not specifically make express provision for the grounds to be provided, it is implicit in this statute both by its structure, and by the necessary implication of such procedural provisions as necessary, to give content and effect to the

[15]Cooper v Wandsworth (1863) 143 ER 414 page 420 per Byles J cited with approval in Ridge v Baldwin [1964] A.C 40 at 122-123 per Lord Morris

right under section 38 (7) to make the application after the ex parte detention Order.

66. The consequence of the trial judge's failure to appreciate that the omission to provide grounds whether in or with the Order deprived the Appellants of an effective right to make an application under Section 38 (7), was that he also failed to appreciate:
    i) that that restriction on the right to make an application amounted to a **deprivation** of the appellants' **property without** affording them the necessary and effective **due process** that the statute contemplated for the opportunity to recover their cash.
    ii) It therefore effectively deprived them of the right to avail themselves of essential **procedural** due process provisions that the statute specifically conferred upon them in a manner which amounted to a breach of the Constitutional right to protection of the law;
    iii) The exercise by a Magistrate of the jurisdiction conferred by the statute could not be effected in a manner which deprived the appellants of the due process right expressly recognized, contemplated and conferred by statute.
    iv) The result therefore was that the ex parte Order of the Magistrate effected in that manner was invalid.

67. The trial judge dealt with the question of a **literal** construction of the statute and seemed to rely upon this as justification for not importing into the statute a requirement to provide grounds **in** the Order. (He did not address the wider possibility of providing grounds together with the Order or the possibility of simply providing to the Appellants the material on which the ex parte Order had been made. His reasoning however led to his conclusion that there was

no statutory requirement to provide **any** grounds[16]).Yet the trial judge adopted a **purposive** construction, in relation to his conclusion that the Magistrate had jurisdiction to make the ex parte order even in the absence of the prescribed form[17]. Such a purposive construction would have also permitted, and in fact would have led to the conclusion that the grounds for detention had to be provided in order for section 38 (7) to be meaningful. No justification for adopting a purposive construction in relation to one aspect of the section and not the other was provided. This is especially curious when the effect of not doing so was to eviscerate the right to make an effective application under section 38(7).

68. The trial judge also erred in suggesting that the Magistrate, being a creature of statute, could hardly make an Order that was **contrary** to any specified form promulgated under the statute. Provision of grounds was required under the POCA to give effect to section 38 (7). The Magistrate did not require the publication of a prescribed form of an Order to provide them. Even if a form was subsequently prescribed which did not provide thereon for the grounds of the Order to be specified, the Magistrate would still have a duty under the POCA to provide them regardless of that omission in a prescribed form. It would be compliance with, rather than a breach of, statute for a Magistrate to insert on or provide with such a form the basis upon which the jurisdiction is sought to be exercised, and specifying the matters identified previously.

69. Therefore the trial judge fell into error in failing to recognize that the following general principles were applicable: -

[16] Paragraphs 74-77 of the trial judge's judgment
[17] Paragraphs 59-73 of the trial judge's judgment

i) the right of the citizen not to be deprived of property without due process of law requires that due process of law be observed;

ii) due process itself requires the right to natural justice;

iii) the right to natural justice itself requires the opportunity to make representation; and

iv) the right to make effective representation itself requires that the citizen know the reasons for the decision in respect of which he needs to make representation;

70. He further fell into error in failing to appreciate their application to the instant matter and in particular that:

i. The POCA provides for due process within itself by specifically providing for the effective right to make an application by a citizen whose monies have been seized and in respect of which a detention Order has been made.

ii. inherent in the opportunity to make the application were a. the natural justice requirements of the right to be heard, b. the right to make effective representations on the application and therefore, c. the right to know the matters in respect of which the representations had to be made. d. He failed to appreciate that even if requirements of natural justice are not all expressly specified in the statute, such as were necessary and no more would be implied into the statute.

While the decision itself to detain money made on an ex parte application could only be made on limited grounds identified at paragraph 18 hereinabove those grounds are capable of multiple permutations. Obviously in order for the appellants to effectively utilize and access that right to make that application they needed to

be informed with specificity as to which of the grounds for the Order applied.

Summary

71. The POCA authorizes:

i) the making of ex parte Orders for the detention of cash seized in specific circumstances;

ii) the Constitution specifically recognizes under section 4(a) the right to enjoyment of property and the right not to be deprived thereof except by **due process** of law;

iii) the POCA itself provides for **due process of law** in making provision for an application under section 38 (7), by a person affected by an ex parte detention order, to challenge that Order before a Magistrate and seek the return of cash;

iv) in order to do so effectively the applicant must know the specific grounds upon which the detention Order was made;

v) those possible grounds, of which there may be multiple combinations or permutations, are identified at paragraph 18 above;

vi) in order to give content to an effective right to make the application, it is essential for an applicant to at least know at the earliest opportunity, which of the various combinations of grounds under the POCA were the basis for the ex parte Order. This is because he has to demonstrate that the reasons for the detention of cash do not apply or no longer apply;

vii) to contend that provision or disclosure of those grounds is not required is to contend in effect that these are matters that the ex parte applicant or the Magistrate can keep to themselves. This obviously contravenes fundamental principles of natural justice in depriving the right to make the application of efficacy.

viii) It also negates the protection provided in the statute, without which the ex parte detention of cash and **deprivation of property** would be prima facie unconstitutional. Until a contrary Order has been made, prima facie the cash belongs to the suspect. The Constitution recognizes that until otherwise determined, the cash is the property of the applicant/appellants and they are not to be deprived of it without due process of law;

ix) It also amounts in this case to a breach of the constitutional right to the **protection of the law**. If that right is to be effectively exercised then it must be responsive to the matters that were taken into account by the Magistrate. Secrecy or non-disclosure in respect of the grounds for the Order cannot be justified because it is completely incompatible with the fundamental constitutional protection of the right to due process and natural justice;

72. Damages may be awardable for breach of those constitutional rights. Their assessment would need to be conducted by a judge of the High Court to whom this aspect of the matter must be remitted. This is because the opportunity to do so did not arise previously in the Court below. On such assessment, one of the matters that may need to be considered would be the period for which it is likely that the Appellants could have remained without grounds for the ex parte Order and the impact of that period on their deprivation of their cash.

Search Warrant

73. It can be concluded that no good reason has been provided for the failure to provide those grounds or even indicate the specified offence. In fact there is no evidence that a **copy** of the search warrant was **provided** to the Appellants

although Sgt Marvin Francis claimed to have shown it to them[18]. The Appellants dispute this and claim that they did not even have an opportunity to read it as it was simply shown to them from a distance of three feet away[19], (or five feet according to the affidavit[20]). If the police had been able to truthfully depose that they had left a copy of the warrant with the Appellants, they would at least have known that the search was in connection with inter alia, *"credit card account numbers, counterfeit cards, other related documents and articles which would afford evidence as to the commission of a summary offence namely trafficking in counterfeit cards under section 16 of the Electronic Transfer of Funds Crime Act No. 7951 as amended"*. This was information that appeared on the warrant dated 31 July 2015[21] and could have at least provided an indication to the Appellants of the **specified offence**.

74. The additional secrecy in not providing grounds for the initial search when the seizure of the cash took place compounds the atmosphere of secrecy that surrounded the seizure and the continued detention of the Appellants' cash. No logical reason could exist for not providing a copy of the search warrant at the time it was executed.

75. Section 41 of the Summary Courts Act 4:20 and Section 5 of the Administration of Justice (Indictable Proceedings) Act which came into effect December 16, 2011 provide for the issue and execution of a search warrant. They did not expressly stipulate that a copy of the warrant is to be provided. Neither did they prohibit it.

76. In fact, from January 8 2020 the desirability of providing a copy of a search warrant received statutory recognition in the Administration of Justice

[18]see paragraph 8, page 195 record of appeal
[19]See pre-action protocol letter dated 20th August 2015 - record of appeal page 134
[20]five feet according to the affidavit Paragraph 4 affidavit of first named appellant - page 70 record of appeal
[21]Record of Appeal page 205

(Indictable Proceedings) (Amendment) Act, No. 1 of 2020 by the insertion into section 5 of that Act of a subsection 2A (a), (b) and (c)[22] requiring a constable to inter alia produce to the occupier present at any place which is to be searched the search warrant and requiring that he supply him with a copy. The appellants' contention that they were simply told that the search warrant was to search for illegal arms, ammunition, and drugs, could easily have been rendered a non-issue.

The "Additional Grounds"

77. The trial judge also devoted a considerable portion of his judgment to his ruling to exclude six "additional grounds" on the basis that they constituted or were to be treated as equivalent to fresh evidence, and permitting their consideration in the appellants' reply submissions required further postponing the trial at a very late stage of proceedings. As it required reverting to the pretrial stage and allowing the claimant (sic) to amend its (sic) claim[23]. In relation to at least three of those "additional grounds" he was clearly wrong to exclude submissions thereon not least because they were neither additional nor evidence.

78. Those grounds are set out at paragraph 22 of his judgment as follows:-

> *[22] The Additional Grounds introduced in the reply submissions were as follows:*
> *1) That the Detention Order did not state the specified* ***scheduled offence*** *under section 38 (1A) POCA;*
> *2) That the part of the Detention Order entitled "Amount to which reasonable grounds for suspicion applies" was left blank;*

[22] Act No. 1 of 2020 " (2A) Where the occupier of any place which is to be searched is present at the time when a constable seeks to execute a search warrant, the constable shall—
(a) identify himself to the occupier and, if not in uniform, shall produce to him documentary evidence that he is a constable;
(b) produce the search warrant to the occupier; and
(c) supply the occupier with a copy of the search warrant.";

[23] Paragraph 25 of trial judge's judgment

3) That the Detention Order did not disclose who gave evidence in support of the application for detention;
*4) That the Detention Order **failed to inform** the Claimants of their right to make an application for the release of their cash;*
*5) That the Detention Order failed to state that the Magistrate was **satisfied** that the statutory conditions required in section 38 (2) POCA were met;*
*6) That the Detention Order **failed to advise** the Claimants on the procedure for having it discharged.* (Emphasis added)

79. It is not disputed on appeal that the first two grounds are capable of being considered particulars of the general ground set out at paragraph 15 of the first named Appellant's initial grounds in his affidavit filed on September 2nd 2015 (the general ground[24]), namely *"and/or the failure to disclose the reasons and/or grounds and/or basis for the detention order effectively compromises and/or undermines their ability to satisfy the statutory pre-conditions that would enable the court to make an order for the release of their cash. The Claimants are unable to mount a challenge to the grounds for detention of their cash, as they are not aware of the said grounds upon which the said detention order was granted".*

80. As to ground 3 it is accepted that the fact that someone has made such an application before a Magistrate would also be information encompassed within a failure to provide grounds for the ex parte order. It is not accepted however that the identification of that party would be an essential fact that must be supplied.

81. As to ground 5 – a statement by the Magistrate that he/she is satisfied of the matters required under the Act, - this assumes much less significance if the actual grounds for the Order have been supplied this is because it may more

[24] 180-181 record of appeal

readily be inferred therefrom that if the order was made on the grounds so supplied that the Magistrate must have been so satisfied.

82. Given that there remains no dispute with respect to additional grounds 1 and 2, and little real dispute with respect to grounds 3 and 5, that they could conceivably have been particulars of the general ground at paragraph 15, (namely that the ex parte order was invalid by reason of failure to provide grounds/reasons which included those matters), it is clear that the trial judge erred in excluding submissions on those allegedly additional grounds because he failed to appreciate that they were not evidence, nor were they to be equivalent thereto. Nor were they additional grounds. Rather they were aspects of an original ground of the application.

83. As to "additional grounds", 4 and 6 the respondent contends that these are new matters not encompassed in any original ground. It is not necessary to consider those particular grounds because there has been no effective opportunity for a response thereto. While a ruling thereon is not necessary for determination of this appeal, it may be noted however that a reference to the POCA would have provided this information. Its omission therefore from the order or otherwise would not have deprived the appellants of any substantive right.

84. The trial judge therefore erred in not recognizing that at least three of those grounds were clearly an elaboration of the main ground, being that the appellant was never provided in the order or otherwise with the reasons for the detention of the cash or any part of it. Original ground 15 made it clear that the appellants were contending that the statutory framework required that the right of the appellants to make the application for the return of their

cash necessarily required, that they have knowledge, or be notified of the reasons for the seizure of all or part of the cash.

85. Even without submissions on the "additional grounds" being permitted, the fact is the original ground 15 was already a ground upon which judicial review was sought. The trial judge dealt with the question of **evidence** being received **de bene esse i**n relation to the reply submissions. In dealing with those grounds on that basis, or with the CPR being applicable to exclude their consideration, he fell into error inter alia because no new evidence was required to be received and the question of reopening the evidence on the factual basis of the case did not arise. The trial judge therefore deprived himself of the opportunity of considering in relation to those matters what was the effect of the omission to supply information on those items identified in relation to the impact of their absence on the ability of the applicants to make an effective application.

86. In this case item i. was clearly critical, with the absence of items ii. and iii. aggravating their omission. It is not necessary to here consider what other permutations of absent information would have invalidated the order, save to observe that the absence of items iv., v., and vi. would not have had the effect of precluding or restricting the right to make the application contemplated by the POCA.

Conclusion

87.

i. **As to issue i.** there was such a requirement. The POCA itself requires that an application can be made for the return of cash detained pursuant to an ex parte order. Inherent in such an application is the need to know the basis upon which the ex parte order was made. The right to make such an

application is a fundamental part of the due process provided within the POCA to ensure that the continued detention of cash on the basis of the ex parte order did not amount to a deprivation of the right to property without due process of law. The application necessitated procedural safeguards to permit its effective exercise. The most fundamental safeguard was the need to know, and be provided with, the ~~basis~~ grounds of the ex parte detention order in order to enable the appellants to respond effectively, and satisfy the requirements for such an application under section 38 (7) POCA.

ii. **As to issue ii.** that requirement was not modified or satisfied by any of the alternatives available to the appellant. The Order did not indicate the grounds for the continued detention of the Appellant's cash and they were not otherwise provided with them. The suggestion that an application could have been first made by the appellants, with the grounds being provided subsequently upon disclosure or discovery, could not be an acceptable or effective alternative. Neither would the availability of an application to the Magistrate for those reasons under section 16 (1) of the Judicial Review Act have been in this case given the failure of the Chief Magistrate or her attorneys to respond when such a request was made. Further, an application for Judicial Review to compel their provision, would not be an adequate alternative to the instant application also for judicial review, given that provision of the information is implicit in the POCA as a matter of right. Even if a continuation of the order upon application by the prosecution, (which application must be made every three months in order to continue the detention), were to have been made inter partes, and the material on which the ex parte order had been made then becoming available on discovery, (a matter on

which there was no evidence), the appellants would still have been without grounds for that three-month period.

iii. **As to issue iii.** The grounds upon which the order had been made could readily have been briefly specified in the order itself. However the terminology used, or the form or mechanism for providing the grounds, is not so important as their actual provision. Their purpose is to enable an effective application to be made for the release of the cash. That requires being informed of the grounds for its detention in the first place. If not so specified in the Order itself the requirement could also have easily been satisfied by service of the sworn declaration, which contained the matters required to **satisfy** the Magistrate of the need to make the ex parte order. It therefore necessarily contained the grounds to enable a response to those matters and an effective application for the return of the cash. (Alternatively, but not necessarily, the Magistrate could have adopted the more labour intensive course of supplying brief written reasons to either accompany the order or shortly thereafter). The grounds would in fact already be directly before that Magistrate because they are required to be contained in the materials provided on the ex parte application itself, and could not therefore constitute an undue imposition on the Magistrate.

iv. **As to issue iv.** the failure to provide grounds, whether in the Order or otherwise or thereafter, would render~~s~~ the Order invalid until they were supplied, because none of the alternative means suggested for accessing grounds addresses the essential purpose of enabling an effective and timely application for the return of the cash under the POCA, and giving effect to the procedural safeguards provided within the POCA itself.

Order

88.

i. The Appeal is allowed.

ii. The Orders of the trial judge are set aside.

iii. It is ordered that:

a. a declaration is granted that the detention order made by the Chief Magistrate on the 4th day of August 2015 against the Appellants is unconstitutional, null and void, and of no legal effect,

b. a declaration is granted that the appellants' right to use and enjoy their property and not be deprived thereof except by due process of law under section 4 (a) of the Constitution was breached,

c. a declaration is granted that the appellants' right to the protection of the law under section 4(b) of the Constitution was breached,

d. the Respondent is to pay to the Appellants damages. The assessment of damages will be remitted to a judge of the High Court for that court to give directions as to how the assessment of the quantum of such damages should be undertaken.

e. the Respondent is to pay to the Appellants costs of the proceedings in the Court below to be assessed by a Master in default of agreement,

f. the Respondent is to pay to the Appellants the costs of this appeal being two thirds of the costs in the court below as quantified by the Master.

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Peter A. Rajkumar

Justice of Appeal