[2015] JMCA Civ 16

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 52/2014

BEFORE: THE HON MR JUSTICE MORRISON JA
THE HON MR JUSTICE DUKHARAN JA
THE HON MRS JUSTICE McDONALD-BISHOP JA (Ag)

BETWEEN	**OMAR GUYAH**	**APPELLANT**
AND	**COMMISSIONER OF CUSTOMS**	**1ST RESPONDENT**
AND	**ATTORNEY GENERAL OF JAMAICA**	**2ND RESPONDENT**
AND	**AUDREY E CARTER**	**3RD RESPONDENT**

Paul Beswick, Miss Georgia Buckley and Miss Carissa Bryan instructed by Ballantyne, Beswick & Company for the appellant

Miss Althea Jarrett and Miss Marlene Chisholm instructed by the Director of State Proceedings for the first and second respondents

30 September 2014 and 13 March 2015

MORRISON JA

[1] I have read the reasons for judgment of my learned sister, McDonald-Bishop JA (Ag). I agree with her reasoning and conclusion and have nothing to add.

DUKHARAN JA

[2] I, too, agree with the reasoning and conclusion of my sister, McDonald-Bishop JA (Ag).

McDONALD-BISHOP JA (Ag)

[3] This is a procedural appeal brought by Omar Guyah, the appellant, against the order of McDonald J made on 29 May 2014 in which she ordered that the claim brought by him against the respondents is stayed pending the determination of criminal proceedings brought against him in the Corporate Area Criminal Court and that costs of the claim be reserved until the determination of those proceedings.

[4] After hearing the appeal, we made the following orders:

> "(1) The appeal allowed.
>
> (2) Order numbered (2) made by McDonald J is set aside.
>
> (3) Costs of the appeal to the appellant to be agreed or taxed."

We promised then to reduce into writing our reasons for making those orders. This is a fulfilment of that promise.

The background

[5] The appellant is employed to the Jamaica Customs Department as the Director of Customs in the Contraband Enforcement Department. He is currently on interdiction. Criminal charges were brought against him by the Revenue Protection Division ("the RPD") in March 2012, for breaches of section 210 of the Customs Act, breaches of the

Corruption Prevention Act and larceny. These charges relate to motor vehicles that include a Suzuki Swift motor car registered in the name of Audrey E Carter, the third respondent, that was seized as uncustomed goods.

[6] On 12 August 2013, the appellant filed a claim in the Supreme Court against the respondents in which he is seeking several remedies with respect to the seizure of that motor car. He is seeking, among other things, a declaration that the Suzuki Swift motor car is not legally classifiable as uncustomed goods and as such is not liable to seizure under section 210 of the Customs Act, damages for conversion and loss of use of the motor car, aggravated, exemplary and punitive damages. He contends that he is the owner of the motor car and that the officers and agents of the Jamaica Customs Department who effected the seizure of the motor car had no authority to do so and have abused the power granted to them under the Customs Act.

[7] The Commissioner of Revenue Protection, who is different in his functions from the Commissioner of Customs, and under whose aegis the RPD falls, was not made a party to the claim. An application was made before McDonald J to join the RPD but that was refused based on the material she had before her. It is accepted, however, that both the first and second respondents are connected to the criminal proceedings as it is in the name of the Crown that the criminal proceedings have been brought against the appellant in relation to matters concerning the Customs Act. The first respondent is the proper officer within whose portfolio the enforcement of section 210 of the Customs Act

falls. There is thus a common interest and real connection between the first and second respondents, along with the RPD, in the outcome of both proceedings.

[8] The fixed date claim form with the relevant supporting affidavit was served on the second respondent. The first and second respondents filed and served an acknowledgment of service but no defence or affidavit in response was filed and served by them within the prescribed time. Up to the date of the consideration of this appeal, the third respondent had not yet been served with the claim.

[9] The appellant filed and served an application for leave to enter default judgment against the first and second respondents pursuant to rule 12.3(6) of the Civil Procedure Rules, 2002 ("the CPR"). At the date fixed for hearing of the application, which was the first hearing of the fixed date claim form, counsel for the first and second respondents submitted that a default judgment could not be entered on a fixed date claim form. In the face of that objection, the appellant's counsel sought to move the learned judge to treat the first hearing as a trial of the claim since no defence or affidavit in response was filed by the first and second respondents.

[10] An oral application was made by counsel for the first and second respondents for an extension of time for filing and serving a defence or an affidavit in response as well as for a stay of the civil proceedings pending the outcome of the criminal proceedings. In support of the oral application for the stay, the first and second respondents relied on the authority of **Alton Brown v The Attorney General and Others** [2013] JMSC Civ 106 [unreported judgment of Sykes J] contending that if the civil matter were to

proceed, it could give rise to inconsistent judgments. There was no evidence filed in support of the application.

[11] McDonald J reserved her decision on the applications and on 29 May 2014 she gave her decision. She denied the first and second respondents' application for an extension of time within which to file their defence or affidavit in response but granted the order that the claim be stayed pending the determination of the criminal proceedings. The learned judge granted leave to the appellant to appeal the decision granting the stay.

The impugned decision

[12] The learned judge has set out her reasons for granting the stay in paragraphs [15] and [16] of her written judgment as follows:

> "[15] The Court has a discretion as to whether to treat this first hearing as a trial of the matter. In my opinion this discretion is affected by the fact that there are criminal charges arising out of these same circumstances. The Resident Magistrate's Court a Court of competent jurisdiction is dealing with the same subject matter, that is the 2007 Suzuki Swift motor car as is before the Supreme Court which is being asked to declare that the said motor vehicle is not legally classified as uncustomed goods and as such is not liable to seizure under Section 210 of the Customs Act. This is one of the very issues the Resident Magistrate will have to decide.
>
> [16] I find that it would not be prudent for the Supreme Court at this time to risk possible interference with the criminal case which is actively going on and which may result in an inconsistent judgment. Arguments advanced at trial in the Supreme Court can be

> advanced before the Resident Magistrate and the Resident Magistrate would have all relevant facts before her as to why the vehicle was seized and would have the benefit of hearing from the witnesses. In light of the evidence of the criminal charges arising out of the same circumstances, I do not find that this is a case in which the Court should decide on having the civil case treated as a trial prior to the hearing of the criminal charges."

The grounds of appeal

[13] Against this decision, the appellant filed and argued three grounds of appeal as follows:

> "(i) The Learned Judge in Chambers erred in ruling that the civil action should await the conclusion of criminal proceedings currently underway in the Resident Magistrate's Court;
>
> (i) The Learned Judge in Chambers erred in concluding that parallel criminal and civil proceedings and civil proceedings, [sic] both arising from the same set of events should be stayed pending the completion of the criminal trial;
>
> (ii) The learned Judge in Chambers erred in concluding that the making of declaratory judgment concerning the law and on the facts, would result in a risk of inconsistent decisions by the court or would in any way prejudice the criminal proceedings."

[14] It is evident from the grounds as framed that there is an overlap among them which renders it convenient to address the decision of the judge and the reasons she gave as a whole for arriving at her decision to grant the stay. The propriety of the ruling of the learned judge has, therefore, been considered after an evaluation of all the grounds considered together and the submissions made in respect of them.

Submissions on behalf of the appellant

[15] Counsel on behalf of the appellant, Mr Beswick, made quite comprehensive submissions in an effort to demonstrate that the learned judge erred in law in ordering a stay of the appellant's civil proceedings. The main planks of those submissions have been elicited, compressed for expediency and outlined as follows:

(i) The application before the Supreme Court is for a declaratory judgment of fact and law under rule 8.6 of the CPR, concerning the Suzuki Swift motor car that forms the basis of the claim and is the subject matter of parallel criminal proceedings which are ongoing.

(ii) The declaration being sought is not one to declare the innocence or guilt of the appellant and will not cause any undue prejudice to the respondent but will serve to advance proceedings in the criminal courts as it is believed that this single declaration sought in the civil proceedings will result in nearly 27 months of malicious prosecution of the appellant by agents of the second respondent being brought to a finality.

(iii) There have been consistent delays and failure on the part of the RPD, who is the prosecutor in the criminal proceedings, to comply with the orders of the court for over two years. To date, the appellant has not been pleaded and whilst the case remains on the list to be tried, no trial date has been fixed and disclosure is still not complete because of the RPD's non-compliance with the orders of the court. All this has perpetrated irremediable detriment to the appellant as there appears to be no end to the criminal proceedings.

(iv) The substantial injustice being meted out to the appellant is causing significant prejudice to him and the need to have the declaration granted in the civil proceedings is in the interests of justice.

(v) The authorities have made it clear that the court has a discretion to stay the civil proceedings having regard to concurrent criminal proceedings but the court must take into account whether there is a real danger of causing injustice in the criminal proceedings. Based on the circumstances of this application, it cannot be inferred that such a danger of causing injustice exists. The determination of these proceedings, it is believed, will exculpate rather than incriminate the appellant and as such the civil proceedings should be determined on the merits.

(vi) There is nothing to indicate that the learned judge took into account the relevant principles because if she had done so, she could not reasonably have arrived at the decision she did to order the stay of proceedings.

(vii) The court is being asked in the civil proceedings to make a declaration of fact based on cogent evidence and the law. There can absolutely be no risk of disparity between the ruling of the Supreme Court and the Resident Magistrate's Court in the criminal proceedings.

[16] The appellant relied on dicta from the following authorities: **Ashley Mote v Secretary of State for Work and Pensions and Anor** [2007] EWCA Civ 1324; **The Bank of Nova Scotia v Kevin Cadogan and Kirk White** Case No. 1878 of 2011 [Unreported]; **The Law Society of the Cape of Good Hope v Michael Wharton**

Randell [2013] ZASCA 36; **Donald Panton and Others v Financial Institutions Services Limited** [2003] UKPC 86; **Alton Brown v The Attorney General and Others** [2013] JMSC Civ 106; **Kirk Lofters v Attorney General and Anor** [2012] JMSC Civ 189; **Financial Services Authority v John Edward Rourke** [2001] EWHC 704; **The Financial Services Authority v John Cecil Anderson and Others** [2010] EWHC 599; and **Regina v Her Majesty's Attorney General *ex parte* Rusbridger and Another** [2003] UKHL 38.

The first and second respondents' submissions

[17] Counsel for the first and second respondents, Miss Jarrett, in advancing the argument that the learned judge's decision ought not to be disturbed, gave a gentle reminder to the court of the principles relative to the appellate court's function in reviewing the exercise of the discretionary jurisdiction of a judge of the lower courts. She pointed to the oft-cited dictum of Lord Diplock in **Hadmor Productions Ltd and Others v Hamilton and Anor** [1983] 1 AC 191 that:

> "…the function of an appellate court… is not to exercise an independent discretion of its own. It must defer to the judge's exercise of his discretion and must not interfere with it merely upon the ground that the members of the appellate court would have exercised the discretion differently."

[18] Following on that reminder, learned counsel contended as follows:

(i) The fact that the learned judge decided that the civil action should await the outcome of the criminal proceedings does not itself

impugn the exercise of her discretion. What must be shown is that the learned judge exercised her discretion on the wrong principle.

(ii) It is common ground that each case must be judged on its own facts and, as Megaw LJ stated in **Jefferson Ltd v Bhetcha** [1979] 2 All ER 1108, "it would be wrong and undesirable to attempt to define in abstract what are the relevant factors".

(iii) In the instant case, there is a real risk, and not merely a notional risk of injustice, if the civil matter were to continue. If the Supreme Court were to determine that matter in favour of the appellant and, declare that the 2007 Suzuki Swift motor car is not un-customed goods under section 210 of the Customs Act, there is no question that the Crown would be prejudiced if the criminal proceedings, ultimately, result in a conviction of the appellant and he is found to have breached section 210 of the Customs Act. One of the startling effects of such inconsistent judgments would be that the Crown would be stymied in any attempt to exercise its statutory right under section 210 of the Customs Act to forfeit to itself the said motor vehicle. This would certainly lead to a real injustice for the Crown. It is submitted, therefore, that there can be no doubt that in this case it is in the public interest that the stay be granted.

(iii) The issue of delay in the conduct of the criminal proceedings raised by the applicant and his views about those proceedings should be taken up in those proceedings and not in the present one: **Panton and Others v Financial Institutions Services Limited**. It is, therefore, not a ground on which to challenge the exercise of the discretion of the learned judge.

(iv) The appellant has failed to demonstrate that the learned judge had exercised her discretion on some wrong principle or that she had taken into account matters that she was not permitted to take into account. The appellant also has not demonstrated that the decision to stay the proceedings will result in any injustice to him.

(v) The learned judge properly balanced the interest of the parties and correctly considered the real risk of injustice or potential prejudice in the prosecution of the criminal proceedings, if the civil proceedings were permitted to continue.

(vi) Having regard to the factors taken into account by the learned judge, there is no basis for this court to interfere with the discretion that was exercised.

[19] The first and second respondents also relied on **Bank of Jamaica v Dextra Bank and Trust Co. Ltd** (1994) 31 JLR 361.

Discussion and findings

No automatic right to stay civil proceedings where there are concurrent criminal proceedings

[20] It cannot be denied that the issue that has arisen for consideration as to stay of civil proceedings, when there are parallel criminal proceedings arising from the same facts and concerning the same parties, is one that has troubled the minds of the courts, legal practitioners, academicians and litigants in common law jurisdictions the world over. Consequently, a mature jurisprudence has evolved around the question with a well - established line of authority emanating on the issue. The resultant principles of law from those authorities can now be taken as being well-settled and they have served to guide this court in its deliberations on the question of whether the learned judge was correct in law in staying the civil proceedings as she did.

[21] There is no dispute that the learned judge had the jurisdiction to grant a stay of the civil proceedings, either in part or in whole. Her power to do so is derived from the inherent jurisdiction of the Supreme Court which is statutorily recognised and preserved by the Judicature (Supreme Court) Act, section 48(e). The Act, in declaring that the Supreme Court's inherent jurisdiction to grant a stay had not been removed by its passing, states that the court shall make such order for stay of proceedings as it thinks fit and that the court upon such an application for a stay *"shall thereupon make such order as is just"* [Emphasis added].

[22] The CPR, in rule 26.1(2)(e), also provide that the court as part of its general powers of management may stay the whole or part of any proceedings generally or until a specified date or event.

[23] In Halsbury's Laws of England, 4th edition at paragraph 442, it is explained that the court's general jurisdiction to stay proceedings is not limited to rules of the Supreme Court and is distinct from the jurisdiction conferred by the rules. According to the learned writers, the two sources of the court's power continue to exist side by side and may be invoked cumulatively or alternatively.

[24] It is accepted, however, that whether the court in ordering a stay of proceedings is exercising its inherent power or that derived from the rules of court, it is in the exercise of its discretionary jurisdiction. Therefore, in the instant case, it was totally a matter for the learned judge's discretion whether to grant or not to grant a stay of the proceedings before her. See also **Metropolitan Bank v Pooley** (1884-5) L.R. 10 App, Cas 210 at 220-221, per Lord Blackburn and the 2010 White Book at paragraph 9A-176.

[25] The relevant authorities have shown that the rule in **Smith v Selwyn** [1914] 3 KB 98, that had advocated an automatic stay of civil proceedings when there were concurrent criminal proceedings [emanating from a felony which is also a tort], no longer represents the law either in England or Jamaica. In the oft-cited **Jefferson Ltd v Bhetcha**, it was held that the court having conduct of the civil action had a discretion under section 41 of the Supreme Court of Judicature (Consolidation) Act 1925 to stay the proceedings if it appeared to the court that justice (the balancing of justice between

the parties) so required, having regard to concurrent criminal proceedings arising out of the same subject matter. Their Lordships further held that an important factor to be taken into account by the court in deciding whether to grant a stay was whether there was a real and not merely a potential danger that the disclosure of the defence in the civil action would lead to a potential miscarriage of justice in the criminal proceedings.

Megaw LJ stated at page 1113:

> “In my judgment, while each case must be judged on its own facts, the burden is on the defendant in the civil action to show that it is just and convenient that the plaintiff’s ordinary rights of having his claim processed and heard and decided should be interfered with.
>
> Of course, one factor to be taken into account, and it may well be a very important factor, is whether there is a real danger of the causing of injustice in the criminal proceedings. There may be cases (no doubt there are) where that discretion should be exercised. In my view it would be wrong and undesirable to attempt to define in the abstract what are the relevant factors.”

[26] Carey JA, speaking on behalf of this court in **Bank of Jamaica v Dextra Bank and Trust Co. Ltd**, was to follow the lead of the court in **Jefferson Ltd v Bhetcha** and ‘suggested’ (his words) that the rule to be applied by our courts should be this:

> "[T]he court in the exercise of its inherent jurisdiction to control its own proceedings is required to balance justice between the parties, taking account of all relevant factors. What must not be lost sight of is, that it is the justice between the parties in the civil action which is being balanced and the onus is on the defendant (who seeks the stay) to show that the plaintiff's right to have its claim decided should be interfered with. See ***Jefferson Ltd v Bhetcha*** (supra) at p. 1113.”

[27] Carey JA's position and suggestion in **Bank of Jamaica v Dextra Bank**, following the English position as enunciated in **Jefferson Ltd v Bhetcha**, obtained unqualified approval from their Lordships of the Judicial Committee of the Privy Council in **Panton and Others v Financial Institutions Services Limited**. There it was established beyond question by their Lordships that the rule in **Smith v Selwyn** is no longer a part of the laws of Jamaica and is discarded. According to their Lordships, "the common law has moved on" and so the question as to the grant of a stay in cases where there are concurrent civil and criminal proceedings is within the discretion of the court, which is to weigh the competing considerations.

[28] In that case, their Lordships, in upholding the decision of the Supreme Court and this court not to grant a stay of civil proceedings where there were concurrent criminal proceedings, made the important point:

> "11. Both courts began with the need to balance justice between the parties. The plaintiff had the right to have his civil claim decided. It was for the defendants to show why that right should be delayed. They had to point to a real and not merely a notional risk of injustice. A stay would not be granted simply to serve the tactical advantages that the defendants might want to retain in the criminal proceedings. The accused's rights to silence in criminal proceedings was a factor to be considered, but that right did not extend to give a defendant as a matter of right the same protection in contemporaneous civil proceedings. What had to be shown was the causing of unjust prejudice by the continuance of the civil proceedings."

[29] In a later English case, **Ashley Mote v Secretary of State for Work and Pensions**, the Court of Appeal discussed at length, by reference to earlier authorities,

including **Jefferson Ltd v Bhetcha**, the principles applicable to the grant of a stay. It was reiterated in that case that one factor to be taken into account is whether there is a real danger or risk of causing injustice in the criminal proceedings, for example, if publicity might influence potential jurors in the criminal proceedings or if disclosure of the defence might enable prosecution witnesses to prepare a fabrication of evidence or might lead to interference with witnesses.

[30] In the 2010 White Book, Volume 2, at paragraph 9A-184, the learned authors, having had the benefit of dicta from the various authorities, including **Jefferson Ltd v Bhetcha** and **Panton v Financial Institutions**, reiterated the principle that where there are concurrent civil and criminal proceedings against the same defendant arising out of the same subject matter, there is no principle of law that the claimant in the civil proceedings is to be debarred from pursuing the action in accordance with the normal rules merely because the defendant might be affected by disclosing his defence in the civil proceedings. However, the civil court has a discretion to stay the proceedings if it appears to the court that justice between the parties so requires.

[31] The same authors then cautioned:

> "*The discretion to stay civil proceedings until criminal proceedings have been determined is a power which has to be exercised with great care and only where there is a real risk of serious prejudice which may lead to injustice (**R v Panel on Takeovers and Mergers Ex. p Fayed** [1992] B.C.C. 525 CA). What has to be shown is the causing of unjust prejudice by the continuance of the civil proceedings* **(Panton v Financial Institutions** [2003] UKPC 86 December 12, 2003, unrep., PC)." (Emphasis added.)

[32] It is, therefore, accepted, not only on strong but on binding authority, that there is no automatic bar to the conduct of concurrent civil and criminal proceedings arising from the same facts. So, the first and second respondents were not entitled, as of right, to have the civil proceedings stayed until the determination of the pending criminal proceedings. The court has the discretion to stay the civil proceedings until determination of the criminal proceedings but such discretion must be exercised in accordance with the established legal principles. Those core principles are that the civil action ought not to be stayed unless the court is of the opinion that justice between the parties so requires, that is to say, where there is a real as opposed to a notional risk of serious prejudice which may lead to an injustice or a serious miscarriage of justice in the criminal proceedings. Usually, this need to avoid injustice would be in relation to the defendant in the criminal proceedings who usually would also be the defendant in the civil proceedings.

[33] It means then, in the context of the instant case, that the mere fact that there were ongoing concurrent criminal proceedings against the appellant would not have been, by itself, a sufficient and proper ground on which to rest a decision that his claim ought to be stayed. In other words, that, in and of itself, could not have influenced the exercise of the learned judge's discretion in favour of a stay.

Whether the learned judge was correct in granting the stay

[34] On the strength of the authorities, especially of **Panton** and **Dextra Bank** (which are decisions directly related to this jurisdiction), the first and second

respondents (as defendants in the civil proceedings and the applicants for the stay) would have had to go further than the mere fact that there are concurrent civil and criminal proceedings to provide a legal basis for the stay to be granted.

[35] The appellant is the one charged in the criminal proceedings but who is pursuing the civil proceedings. So, unlike in most of the cases on the point, he is not the defendant in both proceedings. So, this is not the usual case where the party seeking to stay the civil proceedings is the defendant in the criminal proceedings who would normally raise as an issue the potential breach of his constitutional rights to a fair trial in the criminal proceedings if the civil proceedings are not stayed. There is no such complaint from the appellant. It is the first and second respondents, who enjoy no such protection, who are seeking to halt the appellant's civil claim.

[36] It means, then, that the onus was on them to demonstrate to the learned judge how they would have been prejudiced so as to suffer grave injustice or a serious miscarriage of justice in the criminal proceedings, if the appellant's ordinary right to have his claim tried is not stymied. In order to discharge that burden, they were obliged to place before the court sufficient material to satisfy the learned judge that there was a real risk of prejudice that might lead to an injustice to them in the criminal proceedings if the civil case was not stayed.

[37] The position of the respondents in the criminal proceedings was thus a relevant factor to be considered in weighing the competing interests in order to determine wherein justice lies. From the record of appeal, it is seen that there was no evidence

placed before the learned judge as to the potential prejudice to the Crown's case in the criminal proceedings. So, there was no evidence before the learned judge from the first and second respondents on which their position, relative to that of the appellant, in either the civil proceedings or in the criminal proceedings, could have been properly and objectively evaluated.

[38] The argument advanced by counsel for the first and second respondents before the learned judge was that if the action was not stayed and the appellant was to obtain the remedies he sought in the civil action with respect to the motor car, it could affect the Crown in its attempt to forfeit the car in question in the event of the appellant's conviction. It should be noted, however, that although Miss Jarrett had advanced that argument, the second respondent, up to then, had received no instructions from the RPD with respect to the conduct and status of the criminal proceedings in order to materially advance their argument for a stay.

[39] It was borne out too during the course of arguments before this court that the car in question was returned to the third respondent who is no longer a party to the criminal proceedings, the Crown having offered no evidence against her. There is thus no guarantee in the circumstances, as disclosed, that even if the appellant is successful on his claim, that he would get back the car in his possession for it to be forfeited to the Crown in the event of his conviction. The single ground that was argued in advancing a case of likely prejudice to the Crown is, therefore, rendered rather tenuous in the light of the prevailing circumstances.

[40] Miss Jarrett also further submitted that the learned judge had properly balanced the interests of the parties and correctly considered the real risk of injustice or potential prejudice in the prosecution of the criminal proceedings. The balancing of interests and weighing of risks of prejudice are not, however, reflected in the reasons the learned judge had advanced in granting the stay. In my respectful view, the consideration of the learned judge as to the existence of parallel proceedings and the likelihood of inconsistent decisions ought not to have been the determinative or the pivotal considerations although they would have been relevant ones.

Relevance of likelihood of inconsistent decisions

[41] In relation to the learned judge's concern about the possibility of inconsistent decisions, it has been stated that where there are two courts faced with substantially the same question or issue, "***it is desirable that the question or issue should be determined in only one of those courts if by that means justice can be done***, ***and the court will, if necessary, stay one of the actions*** (**Royal Bank of Scotland Limited v Citrusdal Investments Limited** [1971] 1 W.L.R. 1469)": Para 9A - 183 of the White Book 2010. (Emphasis mine)

[42] In the instant case, there is nothing to say that justice would be done only in the criminal proceedings before the Resident Magistrate's Court if the related matters in dispute in the civil proceedings are left to be determined in that court. This is, particularly, so in the light of the fact that there are unchallenged averments that there has not been full disclosure by the Crown for a trial date to be fixed in the criminal

proceedings for over two years despite orders from the court for that to be done. The first and second respondents were not in a position to advise the learned judge as well as this court when that trial is likely to proceed so that there can be an estimate as to the likely duration of the stay. It may well be that justice could only be obtained in the civil proceedings in the Supreme Court. In such circumstances, the possibility of inconsistent findings cannot be determinative of the issue whether a stay should be granted.

Relevance of delay

[43] Ms Jarrett also relied on their Lordships' dicta in **Panton** to make the point that the appellant's complaint of delay in the criminal proceedings is not relevant in considering whether a stay should be granted. She contended that such complaint should be taken up in the criminal proceedings as their Lordships have stated in addressing such complaint in **Panton.** I, for my part, would be slow to draw from the dictum of their Lordships any intention on their part to lay down as a general principle of universal application or a hard and fast rule that delay in criminal proceedings can never be a relevant consideration in determining whether to stay or not to stay concurrent civil proceedings. It is not possible, or indeed, advisable to lay down any hard and fast rules as to what should or should not be relevant considerations when the test to be applied is to consider what is required for justice to be done between the parties.

[44] It should be borne in mind that the power to grant a stay of proceedings is preserved by the Judicature (Supreme Court) Act under the provisions relating to the concurrent administration of law and equity. This is a manifestation of the fusion of law and equity since the Judicature Acts of 1873. In this regard, then, the dictum of Brett LJ in **Thomson v The South Eastern Railway Company** (1882) 9 QBD 320 at 326, in treating with the question of stay of proceedings in a civil cross-action, proves quite instructive and worthy of endorsement. It states:

> "This seems to me to be a question of very great importance as to the administration of justice under the Judicature Acts. I think the constant efforts of the Courts since the passing of the Judicature Acts have been, and I think have properly been, to so construe the Judicature Acts, and all the rules and orders under them, as to make as few absolute or unconditional, or what is called hard and fast rules, as can possibly be, and to make the interpretation of the Act and all the rules and orders so large that the Courts can (unless they are prevented by the words of the statutes) exercise a discretion in each particular case so as to do that which is most just and expedient between the parties."

[45] If what is to be considered is the ultimate question as to what is required to do justice between the parties, then, as Carey JA had said in **Bank of Jamaica v Dextra Bank**, "all relevant factors" are to be considered. Also, as Megaw, LJ in **Jefferson Ltd v Bhetcha** cautioned, "it would be wrong and undesirable to attempt to define in abstract what are the relevant factors". In my view, the question as to what are relevant considerations should, properly, be left to be determined based on the particular circumstances thrown up on the facts of each case. There can be no closed menu of relevant factors as circumstances may, and do, vary from case to case. So,

considerations as to risks of prejudice and injustice, may, in appropriate circumstances, demand a consideration of the issue of delay and the effect it could have on the parties, or any of them, if the civil proceedings were stayed or not stayed.

[46] In this case, the appellant, as the claimant in the civil proceedings, would have an interest in the expeditious and just disposal of his claim. His interest in having unrestricted access to the court as someone entitled to equal protection of the law must be weighed in the equation where there is inordinate delay in the criminal proceedings. It could not be just and convenient to stay the *bona fide* claim of a party who has the right to bring his claim until the determination of criminal proceedings when there is clear tardiness in pursuing those proceedings and the trial of the matter is nowhere in sight. An open-ended stay in the face of such marked delay could well be prejudicial so as to lead to an injustice to the appellant in pursuing his claim in the civil proceedings. The risk of injustice to the claimant in the civil proceedings is a relevant consideration in assessing the competing interests. So, there may well be cases in which the question of delay may assume prime significance in considering whether civil proceedings should be stayed to allow criminal proceedings to proceed. This, in my view, is one such case.

[47] It should be noted, in particular, that the kernel of the appellant's complaint is not simply about delay, without more, but is one that has arisen from a discontentment with the conduct of the Crown in the criminal proceedings. There was nothing from the first and second respondents to rebut the appellant's complaint. The existence of the state of affairs in the criminal proceedings that emanated from the Crown's conduct

does warrant a consideration of all relevant factors, including delay. Indeed, the issue of delay, where it exists, must be part of the relevant considerations in treating with the questions of competing interests, risks of prejudice and potential injustice.

[48] I would repeat and adopt an extract taken from the Barbadian case of the **Bank of Nova Scotia v Kevin Cadogan and Kirk White**, in which the learned judge in a quote taken from the 2000 decision of the Court of Appeal of Washington in **King v Olympic Pipeline Company LLC** 104 WN App 338 (2000) noted:

> "Civil Plaintiffs have a substantial interest in expeditious conduct of their litigation. That interest, and any potential prejudice from delay, must be carefully considered. Delayed resolution of the civil claims is, by itself, usually a detriment. In addition, delay carries with it the possibility of lost memories, and missing witnesses."

The nature and effect of a stay of proceedings

[49] In considering the question whether the learned judge exercised her discretion appropriately in granting the stay in the instant case, it is prudent to have due regard to the nature and effect of a stay of proceedings. An extract taken from the White Book 2010 at paragraph 9A-180, is quite instructive on this point. It reads:

> "When, for whatever reason, proceedings are stayed, in effect the court is declining to exercise its jurisdiction. That is a strong thing (**Shackeleton v Swift** [1913] 2 KB 304 CA, at 312 per Vaughn Williams L.J.). Obviously, jurisdiction should not be declined except for very good reason. In **Abraham v Thompson** [1997] 4 All E.R. 363, CA, Potter L.J. said (at p.374) that, "where a stay is sought in circumstances which are not provided for by statute or rules of court, the starting point, is the fundamental rule that an

> individual who is not under a disability, a bankrupt or a vexatious litigant, is entitled to untrammelled access to a court of first instance in respect of a bona fide claim based on a properly pleaded cause of action."

[50] In making that point, the learned authors re-stated the dictum of Marshall CJ, who in speaking for the United States Supreme Court in **Cohens v Virginia** (1871) 6 Wheat. 264 on the court's power in granting a stay, noted: *"We have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given".* [Emphasis added]

[51] In Halsbury's Laws of England, Volume 37, 4th Edition, at paragraph 442, it is stated:

> "The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceedings, beyond all reasonable doubt, ought not to be allowed to continue."

[52] It is within this legal framework that the appellant's right to have his claim proceed should have been considered by the learned judge. The appellant, despite the fact that he is charged in a criminal matter, has the benefit of the presumption of innocence. He is under no known disability to approach the court for redress in his own rights. He has his right of access to the court of first instance in bringing a *bona fide* claim on a properly pleaded cause of action and so the court ought not to lightly refuse him access by declining to exercise jurisdiction over his case and to interrupt his right to

conduct his litigation towards trial. There must be strong and compelling reasons for the court to do so.

[53] The first and second respondents had relied on the decision of Sykes J in **Alton Brown** in making their oral application before the learned judge for the civil proceedings to be stayed. In that case, Sykes J looked at the same possibility of inconsistent decisions and ordered a stay. He, however, did so after an examination of the question of the likelihood of prejudice to the claimants in the civil proceedings. After that assessment, he then arrived at a conclusion that the claimants would not have been prejudiced if the proceedings were stayed.

[54] Even more importantly, he went further to grant the stay on several conditions, having taking into account the failure of the defendants to comply with prior orders of the court. The stay was, therefore, made contingent on the compliance of the defendants in that claim with the rules and orders of the court. So, Sykes J sought to ensure that if the defendants should fail to comply, then the stay would be lifted for the claimants' civil case to proceed notwithstanding the fact that the criminal proceedings against them may not have been determined.

[55] In the instant case, the learned judge did not, demonstrably, undertake such an assessment of the issue of prejudice, which is an essential factor to be considered if one is to seek to do justice between the parties, nor did she grant a conditional stay. The approach in **Alton Brown**, therefore, was not followed in this case and so the fact that a stay was granted in that case could not meaningfully assist the first and second

respondents in advancing the argument before us that McDonald J's decision to order the stay in this case should not be disturbed.

[56] The authorities have illustrated that the hurdle that is to be surmounted or the threshold to be reached by a party asking a court to stay civil proceedings until the completion of concurrent criminal proceedings is a high one. There must be a balancing exercise of the competing interests of the parties with the ultimate aim being to do justice between them. The mere fact that proceedings are ongoing in another court of competent jurisdiction that could lead to inconsistent decisions, as the learned judge had concluded, would not be enough in determining what justice requires.

[57] I found that in the light of the prevailing circumstances of this case, the threshold that would justify a stay in favour of the first and second respondents had not been reached. The learned judge, therefore, would have exercised her discretion improperly in the circumstances.

Conclusion

[58] The well-intentioned admonition of Miss Jarrett that this court, in treating with the learned judge's decision, should heed the principles of **Hadmor Productions v Hamilton**, is not at all misplaced. It is accepted that the decision to grant a stay was purely in the discretion of the learned judge and so there has been full adherence to the cardinal principle that the learned judge's decision should not be disturbed unless it is found to have been made on wrong principles of law and/or is plainly wrong.

[59] Unfortunately, it does seem that the learned judge failed to apply the correct principles and to take into account all the relevant factors in making the order that the civil proceedings should be stayed. In particular, she should have taken into account and weigh appropriately the competing interests of the parties and, in the end, sought to maintain an even balance in order to do justice between them.

[60] In the final analysis, the first and second respondents have failed to convince this court that in all the particular circumstances of this case, it was just and convenient for an order to have been made staying the claimant's claim until the determination of the criminal proceedings. The learned judge also did not declare that she had found it to have been the just thing to do.

[61] Accordingly, I concluded that the learned judge fell into error in exercising her discretion in ordering a stay of the appellant's claim. It was this finding, based on the reasons that I have now provided, which led me to agree with my learned brothers, Morrison JA and Dukharan JA that the appeal should be allowed and the order of the learned judge set aside with costs to the appellant.