



[2023] JMCC Comm 14

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. SU2022CD00436

BETWEEN	NATIONAL FUELS AND LUBRICANTS	CLAIMANT
AND	TOTAL JAMAICA LIMITED	1ST DEFENDANT
AND	PETER ASHER	2ND DEFENDANT

Mr. Hugh Wildman, Attorney-at-law for the Claimant

Mr Maurice Manning, KC and Ms. Allyandra Thompson instructed by Nunes, Scholefield, Deleon and Company, Attorneys-at-law for the Defendants

IN CHAMBERS

Heard: 8th March, and 28th March, 2023

Application for a Stay of Civil Proceedings- Rule 26.1(e) Civil Procedure Rules, 2002 – Disclosure in criminal proceedings- whether there is a real as opposed to a notional risk of serious prejudice- Right of silence in criminal proceedings – Real risk of injustice

STEPHANE JACKSON-HAISLEY J.

INTRODUCTION

[1] This matter concerns the Defendants’ application for a stay of civil proceedings pending the determination of criminal proceedings concerning the 2nd Defendant.

It came before the Court by way of a Notice of Application filed on February 10, 2023.

- [2] The orders sought included an order that the proceedings herein be stayed pending the hearing and determination of the criminal proceedings in **The King v Peter Asher**, which is fixed for trial in the Circuit Court of the Supreme Court on October 2, 2023. They also seek an order vacating the trial dates set for the matter.
- [3] The Defendants relied on two affidavits from Attorney-at-law, Ms. Jaavonne Z. Taylor. No affidavit was filed by the Claimant in response however counsel for the Claimant resisted the application by virtue of oral submissions.
- [4] The substantive matter herein commenced by way of a Claim Form and Particulars of Claim on March 19, 2019 wherein the Claimant sought damages and losses against the Defendants in the sum of \$6.4 billion dollars. It is being alleged *inter alia* that seven properties, the subject of various Agreements for Sale, were fraudulently transferred to the 1st Defendant without the Claimant being paid the agreed purchase price. Further, that at the time of these fraudulent transfers the 2nd Defendant acted as Attorney-at-law and Company Secretary for the 1st Defendant.
- [5] Subsequent to the filing of this matter, the 2nd Defendant was charged with numerous counts of forgery, uttering forged documents, conspiracy to forge and causing property to be transferred by virtue of a forged document. The matter is currently before the Home Circuit Court and is set for trial on October 2, 2023 for a period of two to four weeks before a Judge alone.
- [6] It is the Defendants' contention that if the civil matter proceeds prior to the conclusion of the criminal proceedings, the 2nd Defendant will be severely prejudiced as he will be required to give evidence in this matter both in witness statements and in open court, which evidence will be available to the public and the complainant in the criminal proceedings. Based on the integral role played by the 2nd Defendant, he will be required to testify during the civil proceedings if the

Defendants are to have a fair opportunity of advancing their position and succeeding in their Defence. On the other hand, the 2nd Defendant will have the right to remain silent in the criminal proceedings.

- [7] Ms. Taylor in her affidavit in support of the Defendants' position stated that during the course of preparing witness statement in the matter they recognised that it would be prejudicial to file Witness Statements and proceed with the trial of the civil matter before the determination of the criminal matter.
- [8] In a further affidavit of Ms. Taylor, she outlined that the complainant in the criminal matter gave a further statement in the matter in which she utilized information contained in the Defence filed in the civil matter to further the criminal matter.
- [9] They believe that they are entitled to a stay of the proceedings as there is a real risk and not merely a notional risk of injustice to the Defendants, particularly the 2nd Defendant, if the civil matter were to continue and the Defendants are required to file witness statements from the 2nd Defendant, and other witnesses on which they intend to rely which witnesses will be common to both cases.

DISCUSSION

- [10] The Applicants have conceded that there is no right to an automatic stay of proceedings however they argue that in this case they should be granted a stay because of the injustice that would be occasioned to them if they are forced to proceed in the civil matter before the criminal matter is tried. Kings Counsel Mr. Manning, in his submissions relied on the case of **Omar Guyah v Commissioner of Customs and Attorney General of Jamaica and Audrey E Carter** [2015] JMCA Civ 16 to buttress the point that the Court has a discretion to stay the proceedings if it appears to the Court that justice between the parties so requires.
- [11] It was pointed out that the Claimant has acknowledged that disclosures made by the Defendants in the civil matter were used to fill perceived evidentiary gaps in the criminal case. They are of the view that if the Defendants are compelled to

disclose their full evidence this will result in further allegations against the 2nd Defendant in the criminal matter.

[12] Counsel Mr. Wildman on the other hand argued that there is no basis in law, evidential or otherwise to sustain this application. He pointed out that the civil proceedings were filed long before criminal proceedings were instituted and that the criminal matter only came about after complaints were made about Mr. Asher's conduct. He submitted further that there are two separate streams. He contended that the right to silence in the criminal proceedings should have no bearing because if the 2nd Defendant elects not to give evidence in the criminal proceedings he could not be asked any questions so he could not be confronted with any material. In any event he contended that the purpose of a trial is to seek the truth and it would be in the interest of justice that the truth be unearthed.

[13] The main issue for the Court is whether the justice of the case requires that a stay of the civil proceedings be granted pending the trial of the criminal matter. The **Omar Guyah** case provides some guidance on how to determine this issue. McDonald-Bishop JA (Ag) (as she then was) highlighted the principles that should guide the Court in an application for a stay. At paragraphs 32 she stated as follows:

"[32] ...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."

[14] She continued at paragraph 36:

"[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.”

[15] The **Omar Guyah** case presents a good starting point for the discussion however, in the course of my research I found two other cases that provided me with invaluable guidance as to how to treat with this application. They are the Privy Council decision of **Donald Panton and Others v Financial Institutions Services Limited** [2003] UKPC 86 and the case of **The Attorney General of Jamaica v Claudette Clarke (as Administratrix of the Estate of Keith Clarke, deceased, intestate, and in her own right) and Brittani Clarke** [2018] JMCA App 17.

[16] The **Donald Panton** case was very instructive on the question of how to treat with an application for a stay. At paragraph 11 of the judgment the Court opined as follows:

“Both courts began with the need to balance justice between the parties. The plaintiff had the right to have its 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 right 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.”

[17] The **Claudette Clarke** matter concerned an application for permission to appeal an order refusing the grant of a stay in civil proceedings pending the determination of criminal proceedings in the Home Circuit Court. Criminal proceedings in that matter for the offence of Murder of Keith Clarke were instituted against three members of the security forces in July 2012 and civil proceedings were instituted on May 24, 2013 against the Attorney General seeking to recover damages in relation to the death of Keith Clarke, Negligence, Trespass to person and other reliefs. The Defendant/Applicant, the Attorney General applied for a stay of the civil proceedings until after the conclusion of the criminal trial. The grounds on

which they sought this order was that there was a serious risk of prejudice to the accused soldier's right to silence and their defence in the criminal proceedings which is likely to result from the continuance of the civil proceedings, in particular, the completion of the disclosure process. The learned judge at first instance refused to stay the proceedings on the basis that what had been shown by the applicant was a notional risk and not a real risk of prejudice to the accused soldiers in the criminal proceedings. The Judge was of the view that the accused soldier's right to silence referred to by the applicant was not an absolute right.

[18] McDonald Bishop JA who wrote the judgment of the court at paragraph 38 of the judgment set the stage for embarking on a discussion of the relevant issues as follows:

"The authorities have also made it clear that the discretion must be exercised judicially and with great care. The threshold for the grant of a stay is a high one. The civil action ought not to be stayed, unless the court is of the opinion that justice between the parties so requires. In determining what is required to do justice between the parties, all relevant factors of a particular case are to be considered. It would be wrong, however, for the court to define in abstract what are relevant factors and so there can be no closed menu of relevant factors as circumstances do vary from case to case. It is for this reason that the principles enunciated by the authorities are not, and cannot, at all be treated as being exhaustive. However, one important factor that favours a stay of civil proceedings where there are concurrent criminal proceedings (and which assumes prominence in these proceedings given the decision of the learned judge), is whether there is a real risk or danger of causing injustice in the criminal proceedings."

[19] McDonald-Bishop JA went on to consider whether there was a real risk of prejudice as opposed to a notional risk of prejudice and she defined a real risk of prejudice at paragraph 44 of the judgment as "a risk of prejudice that exists in reality, that is to say, a risk that is not fanciful". She also made it clear that the judge must conduct a balancing exercise of all competing interests and considerations in order to do justice between the parties. One of the primary factors she considered in the **Claudette Clarke** case was that the applicant was not a party in the criminal proceedings and that the defendant in the civil proceedings was not the defendant

in the criminal proceedings which is usually the case in matters giving rise to the issue of risk of prejudice albeit a substantial connection.

- [20] In coming to its decision, the Court placed prominence on the fact that the accused soldiers did not directly bear the duty of disclosure so will not be in a position to ultimately determine what is to be disclosed or withheld. Their conflicted position as witnesses for the Crown in the civil proceedings and as accused persons in the criminal proceedings, coupled with their lack of control over disclosure in the civil proceedings, makes the inherent prejudice to them plain and obvious and not merely notional. She thereafter concluded that the Judge at first instance had not considered the likely prejudice to the applicant and thereafter proceeded to grant the stay.
- [21] There were several features in that case that are distinguishable from the instant case. The criminal proceedings in that matter predated the civil proceedings and the defendants in the civil case were different from the defendants in the criminal case. There was also the matter of the public interest concerns as well as the fact that the Court took into account the gravity of the matter, the charge being for the offence of Murder. Despite these distinguishing features, what was current throughout the judgment was the need to give paramount consideration to the question of risk of prejudice.
- [22] It is therefore clear that this Court must carefully consider the issue of whether there exists a real risk of prejudice to the 2nd Defendant. in the criminal proceedings. The 2nd Defendant has contended that he will be prejudiced in his right to remain silent. It is clear from the decision of the Privy Council in the **Donald Panton** case that although the right to silence was a factor to be considered, they did not find that there was any significance in that case of the right to remain silence.
- [23] Similarly here, short of mentioning the right to remain silent, the 2nd Defendant has not proven how it would affect the conduct of the Defence in the civil matter. Mr

Wildman pointed out that if the 2nd Defendant elects to remain silent then he could not be asked any questions in relation to any evidence he would have disclosed in the civil proceedings. He being the Defendant has control over what he can disclose and would be able to control the flow of evidence. This presents a distinguishing feature from the **Claudette Clarke** case as in that case it was not the defendant in those proceedings who wishes to retain the advantage in the criminal proceedings but rather the witnesses in the civil proceedings, who are accused persons in the criminal proceedings. The Court expressed at paragraph 69 of the judgment that while a defendant may elect not to call evidence on his behalf, the same election is not open to a witness summoned to give evidence, unless to do so under pain of punishment. In the **Claudette Clarke** case, the persons who are entitled to the right to silence in the criminal proceedings were potentially compellable witnesses for the Crown in the civil proceedings, and not merely defendants who can decide not to give evidence in their defence, without the fear of punishment in so doing. The right to silence was given weighty consideration in that case for those reasons and so the instant case is distinguishable in that regard. In the instant case I am of the view that the right to remain silent in and of itself does not demonstrate the risk of prejudice that would be occasioned by the 2nd Defendant.

[24] However, the right to silence carries with it certain implications regarding the question of disclosure. Although the 2nd Defendant would not be obligated to disclose his defence in the criminal matter, he may well feel that he is obligated to do so in the context of the civil matter if he is to have a fair chance of proving his case on a balance of probabilities. He has in fact suggested that in order to have a fair opportunity of succeeding in the civil matter he would no doubt have to give evidence in his defence and this may very well be so and as a consequence any evidence given or material disclosed could be used by the prosecution to buttress their case. The affidavits in support of the Notice of Application have set out actual scenarios in which the 2nd Defendant claims he has been prejudiced. He asserted that disclosures and other interlocutory steps taken by them in the civil litigation

have resulted in additional statements being given by the complainant in the criminal matter resulting in amendments being made with the addition of new charges and a reconfiguration of the crown's case theory in the criminal matter. They have also asserted that the pleadings and/or documents filed in the civil matter have been utilized by the complainant in the criminal matter as a basis for conducting further enquiries and causing an evolution or to reduce evidentiary gaps in the criminal case. The Claimant on the other hand did not seek to challenge any of these assertions by way of any evidence presented to the Court so there is uncontested evidence before me that the Claimant had previously used material disclosed in the civil proceedings to advance the criminal matter. Although a trial can be viewed as a truth finding exercise, on the part of a person accused of a crime he may be more concerned with the need to prove his innocence and his defence would no doubt be focused on this.

[25] Although this is not a Murder case as in the **Clarke** case, the allegations raised in this case concern billions of dollars and so it could not be argued that it is not serious case. The criminal matter involves forgery, the penalty for which is also life imprisonment and so although not as serious as Murder, it is a very serious matter.

[26] A conviction for an offence of this nature will have significant implications for the 2nd Defendant and so too a finding of liability would have several financial implications for him and so he would no doubt wish to present all the available information and evidence to support his Defence in the civil proceedings. However, he may be constrained to do so if he is of the view that that information may be used to buttress the case for the prosecution. This could not be viewed merely as a tactical matter. The Defendants have placed before me by virtue of the affidavit evidence sufficient material to satisfy me on a balance of probabilities that there is a real as opposed to notional risk of prejudice and there may be some injustice occasioned to the 2nd Defendant in the conduct of his Defence. This however is not the end of the matter.

[27] At the end of the day it is a balancing exercise of the interests of all the parties. I have to weigh the risk of prejudice to the Defendants against the factors raised on behalf of the Claimant. The Claimant has the right to have his civil case decided. This is a matter filed in the Commercial Division of this Court wherein there is a practice and expectation that matters are dealt with expeditiously. Moreover, the civil proceedings predated the criminal proceedings as it commenced from March 19, 2019 and relates to matters which had their genesis in January 2014. The trial is already set to take place over a twelve-day period from July 3 to 18, 2023. To vacate these dates would cause some inconvenience to the court's list. All of this has to be carefully balanced with the need to avoid the risk of prejudice to the Defendants.

[28] I am of the view that the Defendants have met the threshold for the grant of a stay however. When I consider the justice of the case, I am of the view that it should be a limited stay for up to a particular time. Even in the **Claudette Clarke** case the Court was careful not to grant an absolute stay until the criminal proceedings have been determined. To grant a stay until whenever the criminal matter is totally disposed regardless of when would cause some injustice to the Claimant. The criminal trial is set to commence on October 2, 2023 and is scheduled to last between two to four weeks. I would therefore be prepared to granted a limited stay, until after that date. If the criminal matter is not tried by the end of 2023 the civil matter is to proceed to trial commencing any time after the commencement of 2024.

[29] My Orders are as follows:

1. An order that the proceedings herein be stayed pending the hearing of the criminal proceedings in *The King v Peter Asher* which is fixed for trial on the Home Circuit Court Division of the Supreme Court on October 2, 2023.
2. An order vacating the trial dates of July 3-7, 10-13 and 17-18, 2023 and fixing this matter for a further Pre-trial Review.

3. That the proceedings herein are to be fixed for trial any time after January 7, 2024

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S. Jackson Haisley
Puisne Judge