[2019] JMCA Civ 35

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 96/2018

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE EDWARDS JA

BETWEEN	**THE ATTORNEY GENERAL OF JAMAICA**	**APPELLANT**
AND	**CLAUDETTE CLARKE (Administratrix of the Estate of Keith Clarke, Deceased and in her own right)**	**1st RESPONDENT**
AND	**GREG TINGLIN**	**2nd RESPONDENT**
AND	**ODEL BUCKLEY**	**3rd RESPONDENT**
AND	**ARNOLD HENRY**	**4th RESPONDENT**
AND	**CHIEF OF DEFENCE STAFF**	**INTERESTED PARTY**
AND	**INDEPENDENT COMMISSION OF INVESTIGATIONS**	**INTERESTED PARTY**
AND	**DIRECTOR OF PUBLIC PROSECUTIONS**	**INTERESTED PARTY**

Written Submissions filed by the Director of State Proceedings for the appellant

Written Submissions filed by filed by Chen Green & Company for the 1st respondent

Written Submissions filed by Hylton Powell for the 2nd – 4th respondents

12 November 2019

MORRISON P

Introduction

[1] By a Proclamation published on 23 May 2010[1], the Governor-General declared a State of Public Emergency in Jamaica. In the early morning of 27 May 2010, while the period of public emergency was still in effect, a joint police-military team entered premises occupied by Mr Keith Clarke ('the deceased') and his family in the Kirkland Heights area of Saint Andrew. Present on the premises at the material time were the deceased, 1st respondent ('Mrs Clarke'), who was the deceased's wife, and Miss Brittani Clarke ('Miss Clarke'), the deceased's daughter. Save where the context otherwise requires, I will refer to the two ladies together as 'the Clarkes'.

[2] In circumstances which have yet to be judicially determined, the deceased was shot and killed by members of the joint police-military team who were present on the premises. This tragic event has spawned three sets of proceedings in the Supreme Court, one criminal and two civil, and this procedural appeal sits at the intersection of the three of them. It raises a narrow but important issue arising out of the alleged failure by K Anderson J ('the judge') to properly exercise the court's case management powers under the Civil Procedure Rules, 2002 ('the CPR') to order that the trial of an issue or issues raised in a particular proceeding be stayed or postponed for hearing as part of another proceeding.

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[1]Jamaica Gazette Supplement Proclamations, Rules and Regulations, Sunday, May 23, 2010, Proclamation No 6/2010

Background

[3] In order to make the issues which arise on the appeal intelligible, it is first necessary to recite a brief history of the matter. By a voluntary bill of indictment issued on or about 30 July 2012, the 2nd – 4th respondents, who were at the material time members of the Jamaica Defence Force and of the joint police-military team, were charged with the murder of the deceased as a result of the events of 27 May 2010. For ease of reference, I will refer to these proceedings as 'the criminal proceedings'.

[4] On 24 May 2013, Mrs Clarke (as administratrix of the deceased's estate and in her own right) and Miss Clarke filed action against the appellant under the Fatal Accidents Act and the Law Reform (Miscellaneous Provisions) Act[2]. Arising out of the events of 27 May 2010, the claim was to recover damages for negligence; and/or in the alternative trespass to the person; and/or in the alternative misfeasance in public office; and/or in the alternative breach of the deceased's right to life, right to protection of private property and the right not to be treated in a degrading and inhumane manner, in contravention of the Constitution of Jamaica.

[5] The particulars of claim in this action (which I will refer to as 'the 2013 action'), set out the following particulars of the alleged constitutional breach[3]:

> "The military and police personnel who invaded the house of the deceased Keith Clarke and his family on May 27, 2010 breached the fundamental rights and freedoms of the occupants set out under Chapter III of the Jamaican Constitution in that they:

[2] Claim No 2013 HCV 03159
[3] Particulars of Claim, para. 25

i. Intentionally shot and killed the deceased Keith Clarke without lawful justification in contravention of his right to life under s. 14(1) and 13 (a).

ii. Unlawfully maliciously and without reasonable or probable cause, attacked invaded and shot up the residence of the deceased and his family without lawful justification in contravention of their rights to protection of privacy for their home contrary to s.19(1) and 13(a).

iii. Treated the deceased in a cruel degrading and inhumane fashion when he was shot some 21 times [,] 15 of those shots penetrated his back and killed [sic] in the presence of his wife and young daughter and treated the claimants in a cruel and inhumane manner when they caused them to be exposed to the spectacle of seeing their husband/father being shot some 21 times in the master bedroom of the family home in contravention of s.17(1) and 13(a)."

[6] In the defence filed on 29 July 2013, the appellant admitted that members of the security forces had opened fire at the premises occupied by the Clarke family and at the deceased, but maintained that they had done so in response to being shot at and in self-defence.

[7] The trial of the 2013 action was in due course fixed for 7 December 2015. But, by an order made on 20 November 2015[4], this court stayed the trial until the determination of the criminal proceedings. Among other things, it was ordered that, in

[4] [2018] JMCA App 17

the event of the criminal trial failing to commence within 12 months of the date of 20 November 2015 (provided that the delay was through no fault of the Clarkes), the stay should be lifted and the 2013 action could thereafter proceed without the need for any further order.

[8] As it turned out, the criminal proceedings did not come on for trial until 9 April 2018. Although this date was well past the 12 month deadline set by this court in 2015, Mrs Clarke has taken the position, based on advice, "not to proceed with the civil matter until the criminal trial has concluded"[5]. Nothing now turns on this.

[9] On 9 April 2018, the learned Director of Public Prosecutions ('the DPP') appeared for the Crown and advised the presiding judge (Glen Brown J) that the prosecution was ready to proceed.

[10] However, in what appears to have been a wholly unexpected turn of events, Mr Paul Beswick, who was not one of the attorneys-at-law on the record for any of the 2nd – 4th respondents, rose to take a preliminary point on their behalf. Mr Beswick then produced to the court certificates purporting to grant immunity from prosecution to each of them. Each certificate was on its face issued by the Minister of National Security ('the Minister') on 22 February 2016, pursuant to regulation 45(3) of The Emergency Powers (No 2) Regulations, 2010 ('the regulations'). The regulations were in turn made under section 3 of the Emergency Powers Act ('the Act').

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[5] See affidavit of Claudette Clarke, sworn to on 15 June 2018, para. 11.

[11] So far as is now relevant, regulation 45 provides as follows:

> "45 (1) Subject to paragraph (2), no action, suit, prosecution or other proceedings shall be brought or instituted against any member of the security forces in respect of any act done in good faith during the emergency period in the exercise or purported exercise of his functions or for the public safety or restoration of order or the preservation of the peace in any place or places within the Island or otherwise in the public interest.
>
> (2) ...
>
> (3) For the purposes of this regulation, a certificate by the Minister that any act of a member of the security forces was done in the exercise or purported exercise of his functions or for the public safety or for the restoration of order or the preservation of the peace or otherwise in the public interest shall be sufficient evidence that such member was so acting and any such act shall be deemed to have been done in good faith unless the contrary is proved."

[12] As read out in court, each certificate recited the following:

> "In accordance with Paragraph 45 of the above Regulation, I hereby certify that the actions of JDF Corporal Odel Carrington Buckley[6] on May 27, 2010, between the hours of 12 a.m. and 12 p.m. at 18 Kirkland Close, Red Hills, St. Andrew, which may have contributed to or cause [sic] the death of Keith Clarke, were done in good faith in the exercise of his functions as a member of the security forces for public safety, the restoration of order, the preservation of the peace and in the public interest.
>
> The said actions were undertaken by the named member of the security forces during the existence of the emergency period declared by proclamation number 6/2010 by the Governor General, May 23rd, 2010."

[6] A certificate in identical terms was issued in respect of the 2nd and 4th respondents.

[13] During the discussion which followed this revelation, the DPP queried the validity of the certificates (which I will describe as 'the good faith certificates'), given the fact that they appeared to have been issued by the Minister after the DPP had already exercised her constitutional power to commence the criminal proceedings. Hardly surprisingly, Mr Beswick took the opposite view. Having considered the matter briefly, Glen Brown J took the view that this was not a controversy which was for him to resolve. He therefore made an order staying the criminal proceedings for three months to enable the parties to apply to the Full Court for a determination of the question of the validity of the certificates.

[14] Accordingly, by a fixed date claim form issued on 15 June 2018, Mrs Clarke sought the following orders against the appellant and the 2nd – 4th respondents:

> "(1) A Declaration that the purported Good Faith Certificates dated February 22, 2016 issued by the Minister of National Security (then Mr Peter Bunting) to the [2nd – 4th respondents], infringe or are in conflict with the principle of the separation of powers enshrined in the Constitution and are therefore *ultra vires* and by virtue of section 2 of the Constitution, null and void;
>
> (2) A Declaration that the prosecution of the criminal trial of the [2nd – 4th respondents] cannot legally or constitutionally be barred by virtue of the said Certificates or any Certificates issued by the Minister of National Security;
>
> (3) A Declaration that the Emergency Powers (No 2) Regulations 2010 to the extent that it purports to grant the Minister of National Security the power to grant immunity or certificates of good faith are unconstitutional, null and void;
>
> (4) A Declaration that the Good Faith Certificates or any certificate issued on February 22, 2016 by the Minister of

National Security outside of the Emergency Period are *ultra vires*, null and void.

(5) A Declaration that the criminal trial initiated by virtue of the Voluntary Bill of Indictment issued on September 12, 2016 by the Director of Public Prosecutions should be restored to the trial list and be permitted to continue;

(6) **A Declaration that the actions which were taken by the [2nd – 4th respondents] which included the forced entry into the Claimant's home and the killing of KEITH CLARKE engaged and infringed the fundamental rights of the said KEITH CLARKE and the claimant to protection of life (s. 13(3)(a)); to humane treatment (ss. 13(h) and 13(o), 13(j), 13(l); protection from search of property, of private and family life and privacy of the home, s. 13(j) and cannot therefore be excused or justified by the said Certificates**;

…" (Emphasis mine)

[15] On 23 August 2018, the appellant sought the following orders from the court in the exercise its case management powers under rule 26.1(2)(f), (g), (h) or (k) of the Civil Procedure Rules 2002 ('CPR'):

"1. In respect of the reliefs sought by the Claimant at paragraphs 1 to 7 of the Fixed Date Claim Form herein, the issues raised at paragraphs 1 to 5 are to be tried separately from the issues raised at paragraph 6 of the said Fixed Date Claim Form.

2. The issues raised at paragraph 6 of the Fixed Date Claim Form are to be tried with **Claim No 2013 HCV 03159 Claudette Clarke (as Administratrix of the Estate of Keith Clarke, deceased intestate and in her own right) and Brittani Clarke v Attorney General of Jamaica**, (hereinafter called 'the 2013 claim').

> 3. Alternatively, that in determining the legality, validity, constitutionality and effect of the Good Faith Certificates dated February 22, 2016 and issued by the then Minister of National Security in respect of the [2nd – 4th respondents], the court exclude from its determination the issues raised at paragraph 6 of the Fixed Date Claim Form.
>
> …" (Emphasis in the original)

[16] In essence, therefore, the appellant sought an order separating the trial in relation to the relief prayed for at paragraph 6 of the fixed date claim form, which relates to the constitutionality of the actions taken by the 2nd - 4th respondents on 27 May 2010, from the trial in relation to the other reliefs prayed for at paragraphs 1-5. For ease of reference, I will describe the question which this application raised as 'the paragraph 6 issue'. The stated grounds of the application included the following:

> "4. The issues raised at paragraph 6 of the Fixed Date Claim Form overlap with issues raised in the 2013 claim.
>
> 5. The Court of Appeal on November 20, 2015 granted the Attorney General a stay of proceedings in the 2013 claim and the trial of that claim has not yet taken place.
>
> 6. The issues raised at paragraph 6 of the Fixed Date Claim Form arise from the same set of facts which give rise to the 2013 claim and may be conveniently heard with the 2013 claim.
>
> 7. A determination of the issues at paragraph 6 of the Fixed Date Claim Form is not necessary to assist the court in making a determination on the validity, legality, constitutionality and effect of the Certificates of Good Faith issued by the Minister of National Security.
>
> 8. The Claimant will not be prejudiced in the pursuit of her claim.

> 9. The grant of the orders would be in accordance with the court's overriding objective to deal with cases justly."

[17] By his order made on 28 September 2018, the judge denied the application and ordered that the matter should proceed to case management on 24 October 2018. On that date, the judge made various case management orders, including an order fixing the trial of the claim for hearing before the Full Court in open court on 13 - 15 November 2019.

The grounds of appeal

[18] Pursuant to leave granted by the judge on 28 September 2018, the appellant now appeals against his refusal of the orders sought on that day, in particular the order denying the application. The grounds of appeal are as follows[7]:

> "(a) The learned judge misunderstood the nature of the application which was made by the Appellant and erred in finding that the Appellant sought to challenge the entire fixed date claim herein as being an abuse of process.
>
> (b) The learned judge erred in failing to appreciate the connection between the 2013 claim and paragraph 6 of the fixed date claim form, and that they amount to a duplication of proceedings. Under this ground of appeal it will be argued that:
>
> > (i) The learned judge erred in failing to appreciate the contents and implications of paragraph 6 of the fixed date claim form in keeping with the ordinary and natural meaning of the words therein.
> >
> > (ii) The learned judge erred in failing to appreciate that a determination of paragraph 6 of the fixed date claim form, as presently worded, will require

[7] See amended notice of appeal dated 5 November 2018

> affidavit evidence from the 2nd, 3rd, and 4th respondents, will require the court to make findings of fact and will require the court to make a determination as to whether the fundamental rights of Keith Clarke and Claudette Clarke were engaged and infringed, thus resulting in a lengthening of the proceedings in the fixed date claim.
>
> (iii) The learned judge erred in failing to appreciate that a determination of paragraph 6 of the fixed date claim form, as presently worded, will require the appellant to respond twice to the same allegations in two separate proceedings and before two different tribunals.
>
> (c) The learned trial judge erred in failing to appreciate that a determination of paragraph 6 of the fixed date claim form, as presently worded, is irrelevant and unnecessary for making a determination on the legality, validity, constitutionality or effect of the Certificates of Good Faith in light of the provisions of Regulation 45 of the **Emergency Powers (No. 2) Regulations, 2010**.
>
> (d) The learned judge erred in failing to appreciate that the Appellant's application did not put the 1st Respondent at risk of any bar to her claim on the basis of the principles of res judicata, issue estoppel or abuse of process." (Emphasis as in the original)

[19] On the strength of these grounds, the appellant now seeks an order in terms of the notice of application for court orders filed on 23 August 2018. The single issue which arises on the appeal is therefore whether the judge erred in exercising his discretion against the grant of the case management order relating to the paragraph 6 issue.

The submissions

For the appellant

[20] The appellant filed detailed written submissions on 12 November 2018. As the appellant readily acknowledges, this being a challenge to K Anderson J's exercise of a discretionary power, this court must approach the matter with the traditional deference usually accorded by an appellate court to a judge's exercise of his or her discretion. As this court explained in **The Attorney General of Jamaica v John MacKay**[8]:

> "This court will therefore only set aside the exercise of discretion by a judge on an interlocutory application on the ground that it was based on a misunderstanding by the judge of the law or the evidence before him, or an inference – that particular facts existed or did not exist - which can be shown to be demonstrably wrong or whether the judge's decision is 'so aberrant that it must be set aside on the ground that no judge regardful of his duty to act judicially could have reached it'."

[21] With this in mind, I hope that I do no disservice to the appellant's detailed submissions by summarising them in this way. On ground (a), the appellant submitted that the language used by the judge in refusing the application suggested that he failed to appreciate that the appellant was only seeking a stay in relation to paragraph 6 of the fixed date claim form, rather than a stay of the entire proceedings. Taking grounds (b) and (d) together, the appellant pointed to the close correspondence between the constitutional rights which were said to have been breached in the 2013 action and the declaration sought in paragraph 6. In these circumstances, in order to decide whether

[8] [2012] JMCA App 1, para. [20]

that declaration should be granted, the court trying the fixed date claim form will first have to make a determination as to whether the actions of the 2nd – 4th respondents on 27 May 2010 breached the Clarkes' constitutional rights. This will require the consideration of evidence and the making of findings of fact in both actions, thereby leading to an unnecessary duplication of proceedings and the possibility of inconsistent verdicts, an outcome which the law in general frowns at. And, on ground (c), it was submitted that the judge failed to appreciate that a determination of the paragraph 6 issue was unnecessary to a determination of the principal issue raised by the fixed date claim form, which was the validity and/or effect of the certificates and the regulations.

[22] In support of these submissions, the appellant referred us to three decisions, the first of which is the decision of the Court of Appeal of England and Wales in **Buckland v Palmer** ('**Buckland**')[9]. In that case, after the plaintiff had accepted a payment into court in a previous action in settlement of her claim for damages arising out of a motor vehicle collision, thereby staying the first action, a second action was brought in her name at the instance of her insurers against the same defendant in exercise of their subrogation rights. The second action was held to be an abuse of the process of the court. In explaining the basis of the decision, Sir John Donaldson MR emphasised the public interest in avoiding inconsistent decisions and promoting finality of litigation, while at the same time ensuring that justice is done on the facts of particular cases[10]:

> "The public interest in avoiding any possibility of two courts reaching inconsistent decisions on the same issue is

[9] [1984] 3 All ER 554
[10] At pages 558-559

> undoubted and this alone would suggest that two actions based on the same cause of action should never be allowed. Equally clear is the public interest in there being finality in litigation and in protecting citizens from being 'vexed' more than once by what is really the same claim. Against this must be put the public interest in seeing that justice is done. … These competing public interests will be differently reconciled on the differing facts of particular cases and this is best achieved if we hold, on principle and on the authorities … that (1) it is an abuse of the process of the court to bring two actions in respect of the same cause of action but (2) where there has been no judgment in the first action, that action can, in appropriate circumstances, be revived and amended so as to enable there to be an adjudication on the whole of the plaintiff's claim."

[23] In a brief concurrence, Griffiths LJ added this[11]:

> "… the rule against multiplicity of proceedings in respect of a single cause of action is soundly based on considerations of public policy designed to prevent the harassment of litigants by exposing them to the anxiety and expense of unnecessary legal proceedings; often in the past expressed in the legal maxims 'Nemo debet bis vexari' and 'Interest republicae ut sit finis litium'."

[24] Next, there is the subsequent decision of this court in **Hon Gordon Stewart OJ & Others v Independent Radio Company Ltd & Anor** ('**Stewart**')[12], in which, in a comment on **Buckland**[13], Hibbert JA (Ag) observed that, in that case, "… it was clearly shown that what was paramount was the public interest".

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[11] At page 560
[12] [2012] JMCA Civ 2
[13] At para. [38]

[25] And finally, in **Lilieth Turnquest v Henlin Gibson Henlin (A Firm) and Calvin Green** ('**Turnquest**')[14], also a decision of this court, Panton P observed[15] that –

> "It has long been recognized that there ought to be finality to legal proceedings. Re-litigation of matters is an abuse of the process of the court..."

[26] Panton P then went on to refer with approval[16] to the well-known case of **Hunter v Chief Constable for West Midlands & Others** ('**Hunter**')[17]. That was a case in which the plaintiff was convicted of murder in criminal proceedings based on a confession about which he had made no complaint, either at trial or on appeal. But he then sued the chief constable in charge of the police officers who had recorded the confession, alleging that it had been obtained by the use of violence. The House of Lords unanimously upheld the decision of the Court of Appeal to strike out the action on the ground that it would be an abuse of the process of the court to allow the plaintiff to relitigate the identical issue decided against him in the criminal trial. At the very outset of his judgment in that case, Lord Diplock famously stated the following[18]:

> "My Lords, this is a case about abuse of the process of the High Court. It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which

[14] [2014] JMCA Civ 38
[15] At para. [26]
[16] At para. [28]
[17] [1981] 3 All ER 727
[18] At page 729

> abuse of process can arise are very varied; those which give rise to the instant appeal must surely be unique. It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power."

For the 2nd – 4th respondents

[27] In written submissions filed on 22 November 2018, the 2nd – 4th respondents strongly supported the appeal. Like the appellant, they rely on the case management powers of the court in rule 26.1(2) of the CPR. On that basis, they submit that the court has a discretion to order that the issues relating to paragraph 6 of the fixed date claim form be tried separately from the other issues in the claim; and/or at the same time as the trial of the 2013 action.

[28] In addition, the 2nd – 4th respondents make three further points relating specifically to the potential prejudice to them as defendants to the criminal proceedings. First, as a matter of plain language, paragraph 6 asks the court to determine the same constitutional issues raised in the 2013 action, which is the appropriate context within which they should be considered. Second, resolution of the paragraph 6 issue has nothing to do with the question whether the good faith certificates immunise these respondents against the criminal proceedings. In these circumstances, hearing this issue at the same time as the good faith certificates issue will only have the effect of delaying the criminal proceedings unduly, thereby affecting these respondents' due process rights. And third, these respondents' rights against self-incrimination in the

criminal proceedings would be prejudiced as they may be forced to give evidence in relation to the constitutional issues raised by paragraph 6 ahead of the trial of the criminal proceedings.

For the 1st respondent

[29] In written submissions filed on 13 December 2018, the 1st respondent makes the basic submission that, as a matter of law, the good faith certificates cannot provide immunity from criminal prosecution to the 2nd – 4th respondents if the impugned actions engage or infringe the fundamental rights of the Clarkes (including the deceased). Trial of the fixed date claim form without the paragraph 6 issue being determined at the same time could therefore produce the absurd result or possibility that the criminal trial might ultimately proceed, without the validity of the good faith certificates being finally determined, and it being later determined that they are invalid because of the paragraph 6 issue. In these circumstances, the criminal trial "would have proceeded on an improper and false basis". Determination of the validity of the good faith certificates must legally and properly include all legitimate grounds on which they are being challenged; and, in any event, if this respondent failed to challenge the good faith certificates on grounds which are now available to her, she would run the risk of being estopped from raising the issue subsequently at the trial of the criminal proceedings or the 2013 action.

[30] The 1st respondent also points out that she is entitled to have her constitutional claim heard before the Supreme Court under section 19(3) of the Constitution; and rule 8.3 and 8.9A of the CPR permits and encourages the use of a single claim form to

include any other claims which can conveniently be disposed of in the same proceedings.

[31] On the question of whether any hearing of evidence or findings of fact will be required, the 1st respondent directs attention to the defence filed on behalf of the appellant in answer to the 2013 claim, in which a number of the allegations made by the Clarkes were explicitly or implicitly admitted. In these circumstances, the 1st respondent submits that breaches of their constitutional rights to humane treatment, protection from search to property, protection of private and family life and privacy of the home, and the protection from inhumane and degrading treatment have either been admitted or not contradicted. Accordingly:

> "13. … The Constitution does not allow these rights to be infringed on the grounds of the existence of a state of emergency. The Defendants may only justify the abrogation, abridgment, or infringement of these constitutionally guaranteed rights by establishing that such action was demonstrably justified in a free and democratic society. The issue therefore is whether ministerial certificates of good faith can be used to determine this constitutional issue. This is a question of strict Law and no determination of facts is required …
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> …
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> 16. … Since the abridgement or infringement of fundamental rights is admitted or not contradicted, the Court does not have to make any factual findings on that issue.
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> …
>
> 19. … the [Appellant's] contention that in order to grant the relief sought at paragraph 6 … it would be necessary for the Court to make findings of fact … is clearly incorrect. The facts of the entry into the Clarke's [sic] home, the search of

> the house and the restraint of the ladies and the killing of Mr. Clarke are not in dispute. What the Court is being asked to determine is whether the Minister can legally and constitutionally grant ministerial good faith certificates so as to stultify, nullify or invalidate legal proceedings brought in respect of such matters..."

[32] In relation to the cases relied on by the appellant, the 1st respondent distinguishes **Buckland**, on the basis that the critical factual issue in that case was that the plaintiff's claim had been determined in the first action and it was therefore an abuse of process to raise the question of damages in a subsequent claim. As regards **Stewart**, the 1st respondent points out that the application to strike out for abuse of process failed in that case on the basis that no trial date had been set in the first claim and the two claims could easily have been consolidated and tried together. And, as regards **Turnquest**, the 1st respondent urged us to avoid making a direction by which the validity of the good faith certificates is examined in relation to only a portion of the grounds on which they have been challenged, bearing in mind the court's caution in that case against re-litigation of matters.

Discussion and conclusions

[33] I will consider all four grounds together, under two broad heads. First, the scope of the immunity granted by regulation 45; and second, the resolution of the paragraph 6 issue. But, before doing so, it may be helpful at the outset to identify the case management powers upon which the appellant relies.

The applicable rules

[34] As might be expected, the appellant relies in a general way on the overriding objective of the CPR, which is to enable the court to deal with issues justly[19]. But, in making the application for case management orders in the court below, particular reliance was placed on rule 26.1(2)(f), (g), (h) or (k), which empowers the court to (i) decide the order in which issues are to be tried[20]; (ii) direct a separate trial of any issue[21]; (iii) try two or more claims on the same occasion[22]; (iv) exclude an issue from determination if it can do substantive justice between the parties on the other issues and determining it would therefore serve no useful purpose[23].

[35] To this list, I would only add rule 26.1(2)(e), which empowers the court to stay the whole or part of any proceedings generally or until a specified date or event.

[36] On the face of it, therefore, it appears that, in an appropriate case, the court has ample discretionary power to make any one or combination of the orders sought by the appellant. Indeed, the 1st respondent did not contend otherwise.

The scope of the immunity granted by regulation 45

[37] As I have already indicated, the regulations were made pursuant to section 3 of the Act. Section 3(1) provides that:

> "3 (1) During a period of public emergency, it shall be lawful for the Governor-General, by order, to make Regulations for

[19] rule 1.1
[20] rule 26.1(2)(f)
[21] rule 26.1(2)(g)
[22] rule 26.1(2)(h)
[23] rule 26.1(2)(k)

> securing the essentials of life to the community, and those Regulations may confer or impose on any Government Department or any persons in Her Majesty's Service or acting on Her Majesty's behalf such powers and duties as the Governor-General may deem necessary or expedient for the preservation of the peace, for securing and regulating the supply and distribution of food, water, fuel, light and other necessities, for maintaining the means of transit or locomotion, and for any other purposes essential to the public safety and the life of the community, and may make such provisions incidental to the powers aforesaid as may appear to the Governor-General to be required for making the exercise of those powers effective."

[38] The section is therefore concerned to empower the Governor-General to (i) confer or impose on any government department, or any persons in Her Majesty's Service or acting on Her Majesty's behalf, such powers or duties as may be deemed necessary or expedient for the purpose of achieving the aims of the period of emergency; and (ii) make such provisions incidental to those powers "as may appear to the Governor-General to be required for making the exercise of those powers effective".

[39] It is against this background and in this context that regulation 45(1) grants immunity from any action, suit, prosecution or other proceedings to members of the security forces "in respect of any act done in good faith during the emergency period in the exercise or purported exercise of his functions or for the public safety or restoration of order or the preservation of the peace in any place or places within the Island or otherwise in the public interest". It is therefore in aid of this grant of immunity that regulation 45(3) (i) empowers the Minister to issue a certificate stating that any act of a member of the security forces "was done in the exercise or purported exercise of his

functions or for the public safety or for the restoration of order or the preservation of the peace or otherwise in the public interest"; and (ii) provides that the certificate "shall be sufficient evidence that such member was so acting and any such act shall be deemed to have been done in good faith unless the contrary is proved". The issuance of the certificate accordingly creates a rebuttable presumption that the member of the security forces acted in the capacity provided for in the regulations and in good faith.

[40] It seems to me that, in the context of this case, the important point to note about the immunity granted by regulation 45(1) is that it is an immunity from action, suit, prosecution or other proceedings granted to individual members of the security forces acting in their capacity as such. In other words, in keeping with the clear legislative intention as it appears from section 3(1) of the Act, regulation 45 taken as a whole must be seen as a manifestation of what the Governor-General considered to be required in order to make the exercise of emergency powers conferred on members of the security forces, as persons acting "in Her Majesty's Service or acting on Her Majesty's behalf", effective.

[41] But it is not, of course, an immunity from suit granted to the Executive itself. It therefore does not purport to bar action against the Executive in respect of the allegedly wrongful acts of its servants or agents, such as members of the security forces: under the established principles of vicarious liability, and naturally subject to proof, the Executive remains liable for any such wrongful acts. It is plainly on this basis that the Clarkes themselves filed the 2013 action, naming the Attorney General as the

sole defendant. And, in this regard, it is surely also significant to observe that, in the Attorney General's defence to the 2013 action, which fully traverses all the allegations of negligence, misfeasance in public office and constitutional breaches made in the particulars of claim, the fact that the events in question all occurred during a period of public emergency is neither prayed in aid nor even once mentioned.

[42] I therefore think that the 1st respondent's submission that, as a matter of law, the good faith certificates cannot provide immunity from criminal prosecution to the 2nd – 4th respondents if the impugned actions are in breach of fundamental rights, can only be resolved by a reading of regulation 45 itself. Having done that, I can discern nothing at all in the language of the regulation that suggests any such qualification of the scope of the immunity purportedly given.

[43] On the face of it, it therefore seems to me that the question of the validity of the good faith certificates, which is what the criminal proceedings were stayed to address, can effectively be considered in the light of all the matters so clearly identified in paragraphs 1-5: whether the good faith certificates infringe the principle of separation of powers and are therefore *ultra vires* the Constitution (paragraph 1); whether the criminal proceedings can legally or constitutionally be barred by the Minister's issuance of the good faith certificates (paragraph 2); whether, the Regulations, to the extent that they purport to give the Minister the power to grant immunity or good faith certificates, are constitutional (paragraph 3); whether the good faith certificates issued on 22

February 2016 are *ultra vires*, null and void (paragraph 4); and whether the criminal proceedings should be restored to the trial list and permitted to continue (paragraph 5).

Resolution of the paragraph 6 issue

[44] So the further question which arises is therefore whether, given that regulation 45 is not in my view qualified in the manner contended for by the 1st respondent, it is nevertheless convenient for the court to consider the paragraph 6 issue in the same proceedings. The main point which the appellant and the 2nd - 4th respondents make in this regard turns on the close resemblance between the cause of action relating to constitutional breaches upon which the 2013 action is in part based and the cause of action which paragraph 6 seeks to address.

[45] In the claim form in the 2013 action, the Clarkes claim against the appellant is stated to be, among other things, for "breach of the deceased's right to life, right to protection of private property and the right not to be treated in a degrading or an inhumane manner in contravention of the Jamaican Constitution". In the particulars of claim, in relation to several of the things that the members of the security forces are alleged to have done on the night of 27 May 2010, the Clarkes contend[24] that "the soldiers and police acted in flagrant violation of their fundamental rights and freedoms set out under Chapter III of the Jamaican Constitution". And, in paragraph 25, under the heading, "Particulars of Constitutional Breach", before giving full particulars, they reiterate that "[t]he military and police personnel who invaded the house of the

[24] At para. 19

deceased … and his family on May 27, 2010 breached the fundamental rights and freedoms of the occupants set out in Chapter III of the Jamaican Constitution".

[46] On the other hand, as has been seen, paragraph 6 asks for a declaration, "… that the actions which were taken by the 1st, 2nd and 3rd Defendants which included the forced entry into the Claimant's home and the killing of KEITH CLARKE engaged and infringed the fundamental rights of the said KEITH CLARKE and the claimant to protection of life (s. 13(3)(a)); to humane treatment (ss.13(h) and 13(o), 13(j), 13(l); protection from search of property, of private and family life and privacy of the home, s. 13(j) and cannot therefore be excused or justified by the [good faith certificates]".

[47] In my view, although slightly differently organised in each case, both actions in essence engage the same constitutional rights, that is to say, the rights to life, protection of private property, not to be treated in a degrading and/or inhumane manner in contravention of the Jamaican Constitution.

[48] Contrary to the 1st respondent's submission on this point, I simply do not see how the declaration sought by her in paragraph 6 can effectively be dealt with in the absence of evidence. It is not yet known, of course, what will be the 2nd - 4th respondent's defence to the charge of murder in the criminal proceedings. Nevertheless, I think that it is reasonably safe to infer from the defence filed by the appellant in the 2013 action that their account of what took place at the Clarkes' home on the night of 27 May 2010 will differ in at least some significant respect from that which the Clarkes will give.

[49] In these circumstances, it seems to me that the spectre of re-ligation of the same issue and the real possibility of inconsistent decisions on that issue must loom large in the court's contemplation of this issue. In the light of this, in my view, unless the potential of prejudice to the 1st respondent in not dealing with the paragraph 6 issue in these proceedings can be shown to exceed that to the 2nd - 4th respondents in keeping it in, then the court should, in the public interest, take such steps as it can to avoid this result.

[50] As to the question of prejudice to the 1st respondent, I have already expressed the view that a resolution of the paragraph 6 issue is not essential to the determination of the good faith certificates. One further suggestion made on her behalf was that, should she not have that issue dealt with in these proceedings, she might be estopped from raising it subsequently on the basis of the principle in the venerable case of **Henderson v Henderson**[25]. That case, as is well known, requires a party to litigation to "bring forward their whole case"[26], rather than leaving it to be dealt with in some subsequent proceeding. But, as both the appellant and the 2nd - 4th respondents submitted, I find it difficult to see how the principle of that decision could possibly apply in a case such as this in the face of an order of the court that the paragraph 6 issue should be dealt with otherwise than in these proceedings.

[51] On the other side of the coin, I consider that the potential of prejudice to the 2nd - 4th respondents, whose trial in criminal proceedings in which they remain

[25] [1843 - 60] All ER Rep 378
[26] Per Wigram V-C, at page 381

constitutionally entitled to be presumed innocent until proved guilty is still pending, is very real. As pointed out by them in their submissions[27], hearing the paragraph 6 issue in these proceedings will (i) bring with it the possibility of further delays in the criminal proceedings which have now been pending for over five years; and (ii) potentially compromise their rights against self-incrimination.

[52] As Lord Diplock was careful to point out in **Hunter**, "[t]he circumstances in which abuse of process can arise are very varied". The categories of abuse of process are therefore not closed. Although, as in **Hunter**, the circumstances of this case are wholly unusual, it seems to me that this is a case in which all the relevant considerations point strongly towards separating the trial of the paragraph 6 issue from the court's consideration of the question of the validity of the good faith certificates.

[53] In coming to this conclusion, I have not lost sight of the fact that in the court below this issue was dealt with by the judge in the exercise of his discretion. However, with the greatest of respect, it seems to me that, had he taken into account all the relevant considerations, he would inevitably have arrived at a different conclusion. Accordingly, in exercise of the court's power under rule 26.1(2)(e) of the CPR, I would therefore grant a stay of the determination of the paragraph 6 issue and order that it be dealt with at the same time as the trial of the 2013 action.

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[27] See para. [28] above

Disposal of the appeal

[54] I would therefore allow the appeal and set aside the order made by the judge on 28 September 2018. In its stead, I would make an order staying consideration of the issues raised by paragraph 6 of the fixed date claim form filed on 15 June 2018 to the date of trial of the action in Claim No 2013 HCV 03159. Unless a contrary submission is received in writing from any of the parties to this appeal within 21 days of the date of this judgment, I would (i) make no order as to the costs of the hearing before the judge; but (ii) award the costs of the appeal to the appellant, such costs, once agreed or taxed, to be paid by the 1st respondent.

F WILLIAMS JA

[55] I have had the opportunity of reading in draft the judgment prepared by the learned President. I agree with his reasoning and conclusion and have nothing to add.

EDWARDS JA

[56] I also agree.

MORRISON P

ORDER

1. Appeal allowed.

2. Order of K Anderson J made on 28 September 2018 set aside and consideration of the issues raised by paragraph 6 of the fixed date claim form filed on 15 June 2018 is stayed to the date of trial of the action in Claim No 2013 HCV 03159.

3. Unless a contrary submission is received in writing from any of the parties to this appeal within 21 days of the date of this judgment, there shall be no order as to the costs of the hearing before K Anderson J in the court below; but the costs of the appeal shall be awarded to the appellant, such costs, once agreed or taxed, to be paid by the 1st respondent.