JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVL APPEAL NO 10/2018

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MISS JUSTICE EDWARDS JA
THE HON MR JUSTICE D FRASER JA (AG)

BETWEEN	**CAROL ANN LAWRENCE-AUSTIN**	**APPELLANT**
AND	**THE ASSETS RECOVERY AGENCY**	**RESPONDENT**

Written submissions filed by Ballantyne Beswick & Company for the appellant

Written submissions filed by Miss Alethia Whyte for the respondent

6 May 2022

PROCEDURAL APPEAL

(Considered on paper by the court pursuant to rule 2.4(3) of the Court of Appeal Rules 2002)

MCDONALD-BISHOP JA

[1] I have read, in draft, the judgment of my learned brother, D Fraser JA (Ag). I agree with his reasoning and conclusion and have nothing to add.

EDWARDS JA

[2] I, too, have read the draft judgment of my learned brother, D Fraser JA (Ag) and I agree with his reasoning and conclusion.

D FRASER JA (AG)

[3] This is a procedural appeal against the decision of Laing J ('the learned judge'), delivered on 16 January 2018, in a written judgment cited as **Carol Ann Lawrence - Austin v The Assets Recovery Agency** [2018] JMCC COMM. 05, in which he ordered that fixed date claim number 2016 CD 00313, brought by the appellant, Mrs Carol Ann Lawrence-Austin, be stayed pending the determination of criminal proceedings in the Saint Ann Parish Court. The appellant is charged in those proceedings for offences under the Proceeds of Crime Act, 2007 ('POCA') and at common law. The learned judge also ordered that there should be liberty to apply, and that costs of the application for the stay should be costs in the claim. He also granted the appellant leave to appeal.

Background

[4] On 15 July 2011, by way of claim number 2011 HCV 00410, the respondent, The Assets Recovery Agency ('ARA'), pursuant to money laundering, forfeiture and civil recovery investigations involving the appellant and other persons, obtained from the Supreme Court a restraint order for properties, including the following owned by the appellant:

(i) Lot 47 Spot Valley, Charlotte Close, Rosevale Estate in the parish of Saint James, comprised in certificate of title registered at volume 1404, folio 677 of the Register Book of Titles;

(ii) Lots 42, 43 and 44 Ironshore, Little River in the parish of Saint James, comprised in certificate of title registered at volume 1376, folios 549-551 of the Register Book of Titles;

(iii) 2004 Grey Toyota Corolla motor car; and

(iv) 2000 Black Ford 150 motor truck.

[5] In 2012, the appellant and others were charged before the Resident Magistrate's Court for the parish of Saint Ann, as it was then known, for breaches of sections 92 and 93 of the POCA and offences at common law.

[6] On 18 May 2015, in claim number 2015HCV02588, the Office of the Director of Public Prosecutions obtained registration in the Supreme Court of a Foreign Consent Forfeiture Order pursuant to section 27(1) of the Mutual Assistance (Criminal Matters) Act, 1995. This was on behalf of the Government of the United States of America, and listed the said assets set out in the restraint order obtained by the ARA on 15 July 2011 in claim number 2011HCV04410.

[7] On 21 April 2016, pursuant to an application by the ARA, an order was made in the Supreme Court, in claim number 2011HCV04410, discharging the restraint order obtained on 15 July 2011 against the seven named respondents/defendants including the appellant. On 25 May 2016, the ARA filed a notice of discontinuance against all seven defendants in that claim.

[8] On 26 September 2016, the appellant filed fixed date claim number 2016CD00313 in the Commercial Division of the Supreme Court against the ARA, in which she sought a declaration that the properties which had been the subject of a restraint order, obtained in claim number 2011 HCV 04410, are not "criminal property" for the purposes of sections 92 and 93 of the POCA.

[9] The appellant outlined various grounds in support of her claim. Firstly, she asserted that a restraint order obtained by the ARA on 15 July 2011, against the affected properties, had been discharged on 21 April 2016, upon an application made by the ARA. Secondly, at the time of the filing of her claim, she asserted that the ARA had not initiated any civil recovery proceedings against her. Thirdly, on 25 May 2016, the ARA filed a notice of discontinuance in respect of a fixed claim form it had filed against her. Fourthly, she stated the properties were never criminal property at the time of acquisition or possession.

[10] The fixed date claim form was supported by two affidavits of the appellant filed 26 September 2016 and 17 March 2017. It was the appellant's assertion, in both, that the affected properties are legitimately owned. She claimed the properties have never been involved in nor used to facilitate any crime. She also insisted that she has no criminal record and that she has committed no crime. It was her complaint that the actions of the respondent have significantly prejudiced her financial dealings in respect of the properties. However, she acknowledged that, since 2012, the Director of Public Prosecutions has alleged that the affected properties are criminal property and she is the subject of charges pursuant to sections 92 and 93 of the POCA in the Saint Ann Parish Court. The delay in having the charges determined, she deposed, has prejudiced her upward mobility at work and has caused her severe emotional distress and trauma.

[11] The ARA, in an affidavit sworn to by Ms Karlene Barnaby, in response to the appellant's claim, objected to the declaration sought. Ms Barnaby referenced various documents to support the ARA's contention that the affected properties are criminal property. She deposed that given the registration of the United States forfeiture order in relation to the properties that had been the subject of the restraint order in claim number 2011HCV04410, that restraint order became redundant, which resulted in the ARA's application to have it discharged.

[12] The appellant in reply applied to have certain portions of Ms Barnaby's affidavit struck out on the basis that it contained hearsay evidence and evidence which was irrelevant and or prejudicial to her. Up to the time of the hearing before the learned judge that application had not yet been determined. Accordingly, the learned judge declined to allow the use of Ms Barnaby's affidavit in the stay proceedings.

[13] The ARA was, however, allowed to rely on an affidavit sworn to by Mrs Larona Montague-Williams and filed on 29 March 2017, specifically in support of the stay proceedings. That affidavit is also the subject of an application, to have certain portions struck out based on them allegedly being hearsay and prejudicial, which to date has also not been heard. The sections relied on by the learned judge, which are not subject to

that application, spoke to the nature and progress of the criminal proceedings against the appellant in the Saint Ann Parish Court.

[14] Mrs Montague-Williams deposed that the matter came up for mention on various occasions, as legal representation for the accused persons remained unsettled. However, on 2 September 2015, she stated, a "firm trial date" was set for 18 April 2016. On the latter date, the Crown was ready with three witnesses to commence the trial against the appellant, Mrs Montague-Williams asserted. However, on the application of counsel for the appellant, Mr Christian Tavares-Finson, the court granted an adjournment to 26 July 2016, for Captain Paul Beswick to join her defence team.

[15] Mrs Montague-Williams further deposed that, on 26 July 2016, the Crown was again ready with three witnesses present. However, counsel for the appellant then applied to have the matter dismissed on the basis of undue delay by the Crown, the case lacking merit and the ARA's withdrawal of its claim. The application was refused. The Crown on that date indicated an intention to apply to amend the informations charging the appellant, and her counsel indicated an intention to object. The Judge of the Parish Court ordered that submissions be filed and served in respect of the impending application, which Mrs Montague-Williams, at the time of swearing to her affidavit, asserted had not been complied with by the appellant. The matter, she said, had been set for trial on 3 May 2017 and the Crown was ready to proceed.

[16] She also deposed that, prior to the trial date of 3 May 2017 being set, the matter came up for trial on two other occasions. She explained that on the first occasion the Crown had one witness ready and the others on standby, but the matter could not proceed as the appellant failed to file its submissions as ordered. On the second occasion, senior prosecuting counsel with conduct of the matter was engaged in the circuit court.

[17] Counsel for the appellant, Captain Beswick, in response to Mrs Montague-Williams' affidavit, deposed to the reason for the delay caused by his firm in the criminal proceedings before the Saint Ann Parish Court. He asserted that the reasons his

submissions were not served until 13 April 2017 were that on one trial date his junior was unaware the submissions in her possession should have been served and on another the representative of the Crown was absent. However, he denied that the reason for the adjournment on the first of the two occasions, before the trial date of 3 May 2017 was set, was due to counsel's failure to serve the submissions. Instead, he asserted that the adjournment was due to a co-accused of the appellant having recently given birth and her doctor had opined that the "strain of the trial would have been too great for her at the time".

Decision of the learned judge

[18] In coming to his decision to grant the stay, the learned judge considered that the relevant law was that outlined in the decision of this court in **Omar Guyah v Commissioner of Customs and Others** [2015] JMCA Civ 16, a case relied on by both parties. The learned judge also relied on the authorities of **Assets Recovery Agency (Ex-parte) (Jamaica) Privy Council** [2015] UKPC 1 and **Imperial Tobacco Ltd. v Attorney General** [1981] AC 718. Based on an extensive review of the authorities, in particular **Guyah** and the cases considered in **Guyah**, he determined that the question whether to grant a stay of proceedings was an exercise of his discretion. He also found that where a matter involved concurrent civil and criminal proceedings, there was to be no automatic grant of a stay, even where there was some risk of inconsistent judgments. He further considered the appellant's right, notwithstanding the charges against her, clothed as she was in the presumption of innocence, to approach the court for redress. This he said, meant that the court ought not to lightly refuse to hear or interrupt her right to have her claim heard. As such the burden of proof was on the ARA to show that it was "just and convenient" for the court to interfere with the appellant's right to have her claim heard.

[19] The learned judge conducted a "balancing exercise of the competing interests of the parties with the aim of doing justice between them", through an examination of the effect of the delay in the criminal proceedings, the conduct of the Crown, the nature of

the civil claim, the potential for prejudice to the appellant, and whether there was a real danger of causing injustice in the criminal proceedings.

[20] He found that: (1) there was no real risk of prejudice to the appellant if the stay was granted; (2) given the nature of the civil claim being one for a declaration in respect of an issue to be determined in the criminal proceedings, there was a risk of prejudice to the criminal trial, as well as a risk of inconsistent judgments; (3) the length of and reasons for the delay in this case, when taken together with the fact that trial dates had already been fixed, was not of such nature as to be a deciding factor as to whether the stay should be granted; and (4) the instant case could be distinguished from **Guyah**. He determined that although the delay was longer than that in **Guyah**, i) it was not caused solely by the prosecution, as in **Guyah**; ii) there was no egregious conduct on the part of the prosecution similar to the non-disclosure in **Guyah**; and iii) there was a fixed trial date in the instant case, unlike in **Guyah**.

The appeal

[21] The appellant, aggrieved by the learned judge's decision, filed a notice of appeal on 31 January 2018, challenging the grant of the stay and the order as to costs, on the following grounds:

> "a. That the Learned Judge erred when he found that there is no real risk of prejudice to the [appellant] if the stay of the civil claim is granted.
>
> b. That the Learned Judge erred when he found that there is a risk of prejudice to the criminal proceedings if the civil claim is allowed to proceed.
>
> c. That the Learned Judge erred when he found that the potential prejudice to the criminal proceedings in the case herein is established without filing evidence of it on affidavit.
>
> d. That the Learned Judge erred when he found that the risk of inconsistent judgments weigh so heavily as to tip the scales in favour of the granting of a stay.

e. That the Learned Judge erred when he found that it is just and convenient to stay the civil claim until the determination of the criminal proceedings."

[22] The appellant, therefore, seeks the following orders:

"a. The appeal is allowed.

b. The Order of the Honourable Mr. Justice Laing is set aside.

c. The trial of the claim 2016 CD 003013 be allowed to proceed.

d. Costs of this appeal and the application below are awarded to the Appellant and are to be taxed if not agreed and taxation authorized for both sets of costs."

The submissions

The submissions on behalf of the appellant

[23] Counsel for the appellant condensed the challenge to the decision of the court below into three grounds as follows:

a) 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;

b) The learned Judge in Chambers erred in concluding that [in this matter where there are] parallel criminal and civil proceedings, both arising from the same set of events, [the civil proceedings] should be stayed pending the completion of the criminal trial; and

c) The learned judge in Chambers erred in concluding that the making of a 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.

[24] In respect of ground 1, it was submitted that, in considering whether to exercise its discretion to stay civil proceedings, where there are concurrent criminal proceedings

concerning similar facts, the court must determine if the hearing of the civil proceedings posed "a real danger of causing injustice in the criminal proceedings". It was contended that in the circumstances of the appellant's application, it cannot be inferred that such a danger exists. The case of **Ashley Mote v Secretary of State for Work and Pensions** [2007] EWCA Civ 1324 was relied on.

[25] It was further submitted that, based on the authority of **V v C** [2001] EWCA Civ 1509, given that the determination of the civil proceedings will likely exculpate rather than inculpate the appellant, those proceedings should be determined on their merits, and the decision to stay the proceedings set aside.

[26] Finally, the case of **R v L** [2006] EWCA Crim 1902; [2006] 1 WLR 3092 was cited in support of the proposition that the mere existence of criminal proceedings is insufficient to ground the adjournment of civil proceedings and further, that the court will generally exercise its discretion "in favour of bringing the parallel proceedings without waiting for the conclusion of the criminal proceedings".

[27] In respect of ground 2, it was contended that the fact that the civil proceedings are based on the same events as the criminal proceedings, was not, on the facts of this case, a basis to stay the civil proceedings pending the outcome of the criminal proceedings. It was argued that the civil proceedings would not prejudice the appellant in the criminal proceedings, especially as it was the appellant who had brought the civil proceedings and wished them to proceed. It was also highlighted that the appellant had claimed no right to silence, and there was no indication that there was a real danger of injustice being meted out. The cases of **The Bank of Nova Scotia v Kevin Cadogan and Kirk White**; **The Law Society of the Cape of Good Hope v MW Randall (341/2012)**; **AWB Limited, Australian Securities and Investments Commission v Flugg et al**; and **McMahon v Gould** (1982) 7 ACLR 202 were relied on in support of those arguments.

[28] It was also submitted that, contrary to principles outlined in the cases of **Robertson v Cilia** [1956] 3 ALL ER 851 and **Hinkley and South Leicestershire Permanent Building Society v Freemen** [1941] Ch 32, the stay was not granted for a specified period. Rather, it had been granted for an indefinite period, which was unreasonable, as it would last for however long the criminal proceedings continued. It was further advanced that, no assessment was conducted of the risks attendant on the civil matter being allowed to proceed, before the stay was granted, as recommended in the case of **VTFL v Clough** [2001] EWCA CIV 1509. That failure, it was submitted, should provoke this court to reverse the ruling of the court below.

[29] It was further highlighted that following the case of **Donald Panton, Janet Panton and Edwin Douglas v Financial Institutions Services Limited** [2003] UKPC 86, decided by the Judicial Committee of the Privy Council, there was no longer a presumption that where civil and criminal proceedings arose from the same set of events, a stay or suspension of the civil proceedings would be granted if sought, until the criminal trial was completed. "What had to be shown was the causing of unjust prejudice by the continuance of the civil proceedings." It was also submitted that the learned judge incorrectly analysed the case of **Guyah** by placing undue weight on the question of delay of the criminal case, when that was only one aspect of the proceedings in that case.

[30] Further, it was argued in support of both this ground and the following ground 3, that the learned judge displayed inherent prejudice by directing the respondent to file the application for the stay. Therefore, no matter what argument was raised by the appellant, it would have failed.

[31] Regarding ground 3, it was also submitted on behalf of the appellant that the claim had little difference from the **Guyah** case, and, as the declaration being sought was purely a matter of law, it could not be deemed to cause any prejudice whatsoever to the criminal proceedings. The cases of **Financial Services Authority v John Edward Rourke** [2001] EWHC 704 and **Patten v Burke** [1994] 1 WLR 541 were cited to support a significant complaint advanced by the appellant, which was that the learned judge failed

to take into consideration the critical issue of prejudice to the appellant, before determining that a stay should be issued. It was also contended that the ARA failed to discharge the burden of proving that prejudice would befall the agency if the stay was not granted.

[32] Counsel additionally advanced that there is no indication the learned judge took into account the principles concerning the granting of declarations on a summary basis outlined by Lewison J in the case of **The Financial Services Division Authority v Anderson and Others** [2010] EWHC 599 (Ch). It was submitted that, if he had, he could not reasonably have arrived at the decision to order the stay of proceedings.

[33] Counsel for the appellant noted that all the charges in the criminal proceedings laid, concern three properties comprised in Certificates of Title registered at Volume 1376 Folios 549, 550 and 551 of the Register Book of Titles, being Lots 42, 43 and 44 Hatfield Meadows, Ironshore, Montego Bay, Saint James. Counsel submitted that, based on the case of **R v GH (Respondent)** [2015] UKSC 24, the court should make a declaration of fact and law, that these properties cannot be deemed criminal property as at the time of their acquisition by the appellant they were not criminal property and cannot now be deemed criminal property by virtue of their acquisition. He submitted there could be absolutely no risk of disparity between the ruling of the Supreme Court and that of the Parish Court in the criminal proceedings.

The submissions on behalf of the respondent

[34] In her submissions, counsel for the ARA treated with ground a advanced by the appellant and then compendiously with grounds b – e.

[35] Concerning ground a, counsel submitted that **Guyah** was the only case relevant to determining the merits of the appeal, as it was the only one where, as in the instant case, the defendant in the criminal proceedings is the one who brought the civil claim and sought to have the civil claim proceed before the determination of the related criminal

proceedings. Counsel submitted that the **Guyah** case was properly distinguished by the learned judge in coming to his decision to grant the stay.

[36] Counsel submitted that the delay caused by the Crown and the failure of the Crown to abide by an order for disclosure were the prime reasons in the **Guyah** case, for this court exercising its discretion not to grant the stay. Counsel advanced that the finding by the learned judge that both the Crown and the appellant were responsible for the delay in the criminal proceedings in this matter and the fact that there was no issue with the conduct on the part of the Crown, were critical distinguishing features between the instant case and the **Guyah** case. She relied on the affidavit of Mrs Montague-Williams, who was counsel for the Crown with conduct of the criminal proceedings at the time of the hearing.

[37] Counsel also argued that the learned judge recognised that the true purpose of the appellant seeking the declaration was to use it to relieve her from the negative consequences of the criminal prosecution. However, she maintained, the learned judge was correct to find that even if the civil proceedings commenced and the declaration was obtained, the appellant would still be at risk of facing criminal charges. Further, the appellant had not shown any special reason why she should be treated differently than other accused persons awaiting their criminal trial. Consequently, it was not appropriate for the declaration to be granted. Counsel noted that the learned judge took guidance on this point from the case of **Imperial Tobacco Ltd and another v Attorney General** [1981] AC 718. Counsel, submitted, therefore, that there was nothing before the court to demonstrate an aggravating feature that would result in prejudice to the appellant from the staying of her civil claim.

[38] With regard to grounds b – e, counsel for the ARA submitted that they all concern the possible prejudice to the criminal proceedings if the civil claim is allowed to proceed before the criminal proceedings are determined. Counsel cited the cases of **Imperial Tobacco Ltd and another v Attorney General** and **The Attorney General v Confidence Bus Service Limited** (1990) 27 JLR 414 for the principle that a civil court, save for exceptional circumstances, should not grant a declaration on the lawfulness of

past conduct which is already before the criminal court to be determined. Counsel submitted that the declaration was specifically worded to take account of the criminal charges brought against the appellant pursuant to sections 92 and 93 of the POCA and was being sought for the specific purpose of trying to influence the Parish Court, to dismiss the criminal proceedings.

[39] Counsel also submitted that in the **Guyah** case, this court highlighted the aggravating features of that case, in particular lack of full disclosure by and inability of the Crown to advise when the matter was likely to proceed. In those circumstances, the court found that the possibility of inconsistent verdicts could not be determinative of whether or not a stay should be granted. Counsel argued that, given the absence of those aggravating features in the instant case, the issue of inconsistent verdicts would play a greater role and was rightly an important consideration for the learned judge in deciding whether to order a stay.

[40] In relation to the complaint in ground c that the learned judge erred when he found that the potential prejudice to the criminal proceedings was established without affidavit evidence, counsel submitted that this ground was incorrect as there was evidence in paragraphs 14 – 18 of the affidavit of Mrs Montague-Williams and in particular at paragraph 16. Further counsel pointed out that the learned judge highlighted the statutory remit of the respondent which, as a matter of law, makes the respondent interested in the outcome of criminal prosecutions (see paragraphs [58] – [59] of the judgment of the learned judge). Accordingly, counsel submitted there was no need for an affidavit to have been filed addressing that issue, when the position of the respondent is clearly set out under legislation.

[41] In conclusion, counsel for the respondent submitted that, if the claim for the declaration were allowed to proceed before the determination of the criminal matter, it would set a dangerous precedent for any person charged before a criminal court (without there being any special aggravating reason), to file a claim in the Supreme Court for a

declaration that the acts for which they are charged are not unlawful and then seek to use that declaration in the criminal court to have the criminal matter dismissed.

The response of counsel for the appellant

[42] In response to the submissions advanced by counsel for the respondent, counsel for the appellant, in further submissions, outlined what he contended transpired in proceedings before the Parish Court and in correspondence between the Office of the Director of Public Prosecutions and counsel for the appellant, during the years 2016 and 2017. Attached to the submissions were a number of documents to which the submissions referred.

[43] Counsel also again cited the case of **R v GH (Respondent)** for the proposition that a necessary ingredient to sustain the charge of possession of criminal property was that the property in respect of which a person is thus charged, had to have acquired that status prior to the transaction from which the charge arose; evidence which counsel argued was lacking in the prosecution's case before the Parish Court.

The reply of counsel for the respondent

[44] Counsel for the respondent vehemently objected to the submissions advanced on behalf of the appellant in response. Counsel contended that: 1) not only was counsel for the appellant trying to disguise an affidavit as submissions; but also 2) the "proposed evidence" though available at the time of the hearing of the matter in the court below was never placed before that court. Accordingly, counsel for the respondent maintained that this court should only have regard to the case of **R v GH (Respondent)** and the material contained in the record of appeal, which were the matters before the court below.

The issues

[45] The following are the issues which the court has identified for resolution:

(1) Did the learned judge err in finding that there was a real risk of prejudice to the criminal proceedings if the civil claim was not stayed based on:

   (a) The nature of the declaration sought by the claimant and how it was likely to be deployed in the criminal trial if obtained;

   (b) The possibility of inconsistent verdicts;

   (c) The absence of affidavit evidence of prejudice

(2) Did the learned judge err in finding that there was no real risk of prejudice to the claimant if the civil claim was stayed?

(3) Did the learned judge err in his assessment of the effect of delay relative to other relevant factors?

(4) Did the learned judge err in granting an unlimited stay?

(5) Did the learned judge exhibit bias by directing the respondents to file an application for stay?

Discussion and analysis

[46] Before addressing the issues identified, it is important firstly to note that the overarching question for this court is whether the learned judge correctly exercised his discretion to stay the civil proceedings pending the determination of the criminal proceedings brought against the appellant. All the grounds advanced and the issues identified are geared towards providing an answer to that question.

[47] The appeal being a review of the exercise of discretion, it is important to locate the role of the appellate court within the classic statement of the guiding principle outlined

by Lord Diplock in **Hadmor Productions Ltd and Others v Hamilton and Anor** [1983] 1 AC 191 at page 220 where he said:

> "[T]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."

[48] Secondly, it is not in doubt or in issue that the learned judge had power to stay the civil proceedings in this matter in part or in whole. That power which stems from the inherent jurisdiction of the Supreme Court to regulate its processes and proceedings was enshrined and preserved in section 48(e) of the Supreme Court Act. Provision has also been made under rule 26.1(2)(e) of the Civil Procedure Rules ('CPR') for the court, as part of its general powers of management, to stay proceedings in whole or in part, either generally or until a specified date or event.

[49] Thirdly, of vital importance in this matter is the fact that it is also now settled law, as declared in **Panton's** case**,** that where there are concurrent criminal and civil proceedings arising out of the same facts that give rise to both a felony and a tort, the old rule in **Smith v Selwyn** [1914] 3 QB 98, which gave automatic primacy to the criminal matter and required the civil matter to be stayed until the conclusion of the criminal matter, no longer applies. In **Panton's** case, the appellants were defendants in both criminal and civil proceedings that arose out of the same facts. The appellants sought a stay of the civil proceedings pending the outcome of the criminal matter. At paragraph 11 of the judgment, the Board in considering whether the lower courts erred when they refused to grant the stay sought by the appellants stated that:

> "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**." (Emphasis supplied)

[50] Succinctly captured within that paragraph, are broad considerations that are both complementary and competing and to which a court should have regard, when faced with an application to stay civil proceedings where there are concurrent criminal and civil proceedings arising out of the same facts. This in the context of the fundamental principle recognised by the Board that a plaintiff (claimant) has a right to have her claim decided. There must be a balancing of justice between the parties in the context of assessing whether there is a risk that there will be unjust prejudice caused by the continuance of the civil proceedings. Those are the considerations that will guide the court as each issue is traversed.

[51] The fourth consideration is the necessity to review the case of **Guyah** which was relied on by both parties and which significantly guided the learned judge in his analysis and decision. This is because the principles in that case affect all the grounds filed and the issues which arise from them for determination. The relevant facts of **Guyah** are adequately summarised in paragraphs [4] and [5] of the judgment of the learned judge as follows:

> "[4] Mr Guyah was employed to the Jamaica Customs Department. He was charged for a number of offences including corruption and breach of section 210 of the Customs Act. These charges related to a number of imported motor vehicles and in particular a Suzuki Swift motor car that was seized by officers of the Customs Department.
>
> [5] On 12th August 2013 Mr Guyah filed a claim in the Supreme Court seeking a number of remedies including a declaration that the Suzuki Swift motor car was not legally classifiable as uncustomed goods, that as a consequence it was not liable to seizure under

> section 210 of the Customs Act, and accordingly, it had therefore been unlawfully seized by officers of the Customs Department."

[52] The Commissioner of Customs and the Attorney General, having successfully applied for and obtained a stay of Mr Guyah's claim in the Supreme Court, Mr Guyah appealed that decision. For reasons that will be addressed at different points throughout this judgment and outlined in detail under the discussion of issue 3, this court in that case found that the stay should not have been granted and allowed the appeal.

[53] I now turn to the issues.

Issue 1: Did the learned judge err in finding that there was a real risk of prejudice to the criminal proceedings if the civil claim was not stayed?

[54] The factors that will affect the balancing exercise and which should be considered to determine whether unjust prejudice may arise if no stay is granted, have been examined in a number of cases. In **Ashley Mote v Secretary of State for Work and Pensions** the England and Wales Court of Appeal reviewed and commented on a number of such cases. Relevant factors identified that could present, "a real danger of causing injustice in the criminal proceedings" include:

a) publicity that might influence potential jurors in the criminal proceedings (see **Jefferson Ltd v Bhetcha** and **V v C**; and

b) where disclosure of the defence might enable prosecution witnesses to fabricate evidence or enable interference with witnesses (see **Jefferson Ltd v Bhetcha**).

[55] However, it was also highlighted in **Ashley Mote** that there are times when factors that have been put forward as potentially prejudicial to concurrent criminal proceedings have not been viewed in that light. Thus in **V v C**, where there was an application for summary judgment against a defendant also facing a criminal investigation and possible criminal proceedings, the England and Wales Court of Appeal made short work of his

contention that to mount his defence to the civil proceedings would breach his privilege against self-incrimination. Among other points made by the court it was observed that, "the privilege did not give rise to a defence in civil proceedings or a right not to plead a defence in civil proceedings" and that, "a positive defence was likely to exculpate rather than incriminate."

[56] Without question, the facts of each case are crucial to the determination of whether, in a particular circumstance, a stay should be granted. Each case has to be considered on its own merits. It has been noted by both parties, as well as by the learned judge, that a significant feature of this matter, as was the situation in **Guyah**, is that the application for the stay of the civil proceedings is being made by the prosecutor and not the defendant in the criminal case. That fact has led counsel for the appellant to submit that there was no basis for a stay, as the civil proceedings were likely to exculpate rather than inculpate the appellant who had claimed no right to silence. That same fact prompted counsel for the ARA to advance that the only case relevant to the determination of the matter was **Guyah** and to commend the learned judge's analysis of that case and the manner in which he distinguished its outcome on the facts.

[57] Against that background, I will now consider, in turn, the three sub-issues identified under issue 1. I will consider sub-issues a and b together.

a) *The nature of the declaration sought by the claimant and how it was likely to be deployed in the criminal trial if obtained*

b) *The possibility of inconsistent verdicts*

[58] At paragraph [53] of his judgment, the learned judge extracted paragraphs 7 – 9 of the judgment of the Judicial Committee of the Privy Council in the case of **Assets Recovery Agency (Ex parte) (Jamaica)** [2015] UKPC 1, and then observed that the Board "gives an insight into the enquiry which a Court will have to conduct in deciding whether property is criminal property for the purposes of Sections 92 and 93 of the Proceeds of Crime Act, 2007". He noted that that would be the enquiry which would have to be conducted for the declaration sought to be granted and was a part of the enquiry

that would have to occur in the criminal proceedings in the Parish Court. He opined that the Parish Court was the ideal forum for the combined factual and legal issues to be investigated to determine whether the property concerned is criminal property.

[59] While noting that the case of **Imperial Tobacco Ltd v Attorney General** was only of persuasive authority and was not a case dealing with an application for a stay, the learned judge accepted the principles it outlined, regarding circumstances where there is a risk of prejudice to criminal proceedings from concurrent civil proceedings. In that case, the plaintiff cigarette manufacturers created an advertising plan whereby "spot cash" cards were placed in cigarette packets by which purchasers could win monetary prizes or a free packet of cigarettes. After the plan was launched, summonses were issued against the plaintiff alleging that it breached the Lotteries and Amusements Act ('LAA').

[60] In response, by originating summons, the plaintiffs claimed a declaration that the plan was lawful and did not contravene the LAA. The plaintiffs failed at first instance but succeeded on appeal to the Court of Appeal. On further appeal to the House of Lords, it was held that the plan was a lottery within the meaning of the LAA. In the headnote, drawn largely from the conclusion of Lord Lane's judgment at page 752C, the following was stated in relation to an application for declaratory relief when there are concurrent civil and criminal proceedings:

> "[W]here there were concurrent proceedings in different courts between parties who for practical purposes were the same in each, and the same issue would have to be determined in each, the court had jurisdiction to stay one set of proceedings if it were just and convenient to do so or if the circumstances were such that one set of proceedings was vexatious and an abuse of the process of the Court. That where, however, criminal proceedings had been properly instituted and were not vexatious or an abuse of the process of the court it was not a proper exercise of the court's discretion to grant to the defendant in those proceedings a declaration that the facts to be alleged by the prosecution did not in law prove the offence charged, and that therefore in the present case a declaration should not have been made."

[61] Viscount Dilhorne, in his judgment, clearly expressed the difficulties that can arise when declaratory relief is sought in civil proceedings concerning the subject matter of concurrent criminal proceedings. At page 741D, he stated:

> "If a civil court of great authority declares on admissions made by the accused that no crime has been committed, one can foresee the use that might be made of that at the criminal trial."

[62] While this is not a case concerning admissions, the general principle applies; especially, as the terms of the declaration sought by the appellant addresses the exact question that the criminal court will have to answer to determine whether the charges under sections 92 and 93 of POCA have been proven. This in a context where, as the learned judge found, and with which I agree, the Parish Court is the ideal forum in which to conduct the inquiry and examination into the mixed considerations of law and fact, necessary to answer the question.

[63] It was considerations such as these which led Viscount Dilhorne to further observe later at page 741G that:

> "I think that the administration of justice would become chaotic if, after the start of a prosecution, declarations of innocence could be obtained from a civil court."

[64] Lord Fraser of Tullybelton expressed his reservations with the decision of the Court of Appeal to grant the declaration at page 746E in this fashion:

> "I am in entire agreement with my noble and learned friends that this is not a case in which the discretion of the court should have been exercised to make the declaration. By doing so the civil court, in my opinion, improperly intruded into the domain of the criminal court, notwithstanding that criminal proceedings had already been begun. We were not referred to any reported cases where such intrusion had occurred and in my opinion it ought not to be permitted except possibly in some very special circumstances which are not found here".

[65] **Imperial Tobacco Ltd v Attorney General** was relied on in the Jamaican case of **The Attorney General v Confidence Bus Service Limited**, which was not cited before the learned judge in the court below. In that case, Confidence Bus Service Limited applied by originating summons for a declaration that regulation 123A of the Road Traffic Regulations, which requires drivers and conductors employed on public passenger omnibuses to wear uniforms, is ultra vires and invalid. The judge at first instance having granted the declaration, that decision was overturned on appeal by this court on the basis that he had erred in failing to correctly construe the section of the Road Traffic Act which empowered the Minister to make regulations. In the course of considering whether a declaration was an appropriate relief where the breach of the regulation was enforced by criminal sanction, the court stated at page 419 that an issue which was not considered by the court below was that:

> "[T]here is a rule of law, that the declaration, a civil remedy, is seldom granted when Parliament has entrusted the contravention of a statute or regulation to criminal tribunals."

[66] The court cited with approval the dicta of Viscount Dilhorne in **Imperial Tobacco Ltd v Attorney General** where he observed at page 741B that if the decision of the English Court of Appeal to grant a declaration sought in those circumstances was allowed to stand it would, "form a precedent for the Commercial Court and other civil courts usurping the functions of the criminal courts."

[67] I find, therefore, that the observation of the learned judge at paragraph [42] of his judgment, commenting on the declarations sought in **Guyah** and in the instant case that "[a]lthough the declarations are not worded as "declarations of the innocence" of the Claimant, they no doubt would be deployed as such", is fully supported in the circumstances of this case and accordingly represent a real risk of prejudicing the criminal proceedings related to this matter. The declaration, if obtained by the appellant, would likely be used to advance the position in the Parish Court that she could not be found guilty on the offences charged under POCA.

[68] The main risk is ultimately that inconsistent verdicts could arise from both sets of proceedings. As Viscount Dilhorne, commenting on the declaration granted by the Court of Appeal in **Imperial Tobacco Ltd v Attorney General**, stated at page 741D of the judgment:

> "Such a declaration in a case such as the present one, made after the commencement of the prosecution, and in effect a finding of guilt or innocence of the offence charged, cannot found a plea of autrefois acquit or autrefois convict, though it may well prejudice the criminal proceedings, the result of which will depend on the facts proved and may not depend solely on admissions made by the accused."

[69] Counsel for the appellant has acknowledged that the determination of whether the respective properties, the subject of the two sets of proceedings, is "criminal property", requires an examination of both fact and law. I have already indicated my agreement with the finding of the learned judge that the Parish Court is the ideal place for that examination to be conducted. As the finding in either proceeding will depend on the facts proved, there is a real risk that, even if the appellant were to obtain the declaration she seeks, the criminal court could, in important particulars, make findings that are wholly different from those made by the civil court. I, therefore, hold that the finding of the learned judge that there was a risk of inconsistent verdicts if the civil case was not stayed cannot be impeached. Further, there is no evidence that the learned judge placed unwarranted weight on this factor, considering the circumstances. Together with the nature of the declaration sought and the use to which it was likely to be put, the risk of inconsistent verdicts is significant and justified the learned judge taking it into consideration, in exercising his discretion to grant the stay.

c) The absence of affidavit evidence of prejudice

[70] Counsel for the ARA adverted to paragraphs 14 – 18 of the affidavit of Mrs Montague-Williams, which purport to narrate what transpired in the Parish Court on 26 July 2016 as providing evidence of prejudice. However, they were objected to in the further submissions of counsel for the appellant and, in any event, were not relied on by

the learned judge. The learned judge found that the nature of the statutory remit of the ARA under the POCA disclosed that they would be affected by any prejudice to the Crown's case in the criminal proceedings which would arise if the civil proceedings were not stayed. He, therefore, found that the absence of affidavit evidence showing prejudice to the ARA relative to the appellant in the criminal proceedings was not fatal to the application. He also noted that the fact that there was a statutory remit from which prejudice could be deduced was an important distinction between the instant case and the situation in **Guyah** where there was no evidence provided by the respondents (Commissioner of Customs and The Attorney General) in that case of the potential prejudice to the Crown's case in the criminal proceedings if the stay sought was not granted.

[71] The ARA is defined under section 3 of the POCA and its functions are set in in section 3(4) as follows:

> "The [ARA] shall have such functions as are conferred upon it by this or any other enactment and may do anything (including the carrying out of investigations) that is appropriate for facilitating, or is incidental to, the exercise of its functions."

[72] One such function is to make applications before a first instance superior court of record which may, pursuant to section 5 of the POCA (the learned judge referred to section 6 in error) grant forfeiture or pecuniary penalty orders. One of the scenarios in which section 5 may be invoked is where a defendant has been convicted of an offence in the Parish Court and on the application of the ARA, pursuant to section 52 of the POCA, the Judge of the Parish Court commits the defendant to the Supreme Court for the hearing of an application under section 5 of the POCA. The offences for which the appellant is charged under section 92 and 93 of the POCA are money laundering offences, conviction of which may prompt the ARA to make a section 52 application.

[73] Therefore, based on the ARA's statutory functions, it is manifest that its ability to carry out its mandate would suffer a risk of prejudice, if the criminal proceedings were

adversely affected by the application for the stay not being granted. I, therefore, agree with the finding of the learned judge that there was no need for affidavit evidence from the ARA establishing prejudice. He correctly recognised that there was an inherent risk of prejudice to the ARA based on its duties and functions, given that the criminal proceedings were likely to be prejudiced if the stay of the claim was not granted.

Issue 2: Did the learned judge err in finding that there was no real risk of prejudice to the claimant if the civil claim was stayed?

[74] In considering the issue of what prejudice might be occasioned to the appellant by the staying of her fixed date claim, the learned judge noted that, by her claim, the appellant seeks a declaration that the properties which were restrained in claim number 2011HCV0440 are not criminal property for the purposes of sections 92 and 93 of the POCA. This in a context where, in her affidavit in support of her fixed date claim form, she acknowledges that the Director of Public Prosecutions ('DPP') alleges that they are criminal properties and she is charged for breaching sections 92 and 93 of the POCA.

[75] The learned judge observed by way of contrast that the declaration being sought was not, for example, to settle a disputed interpretation of an aspect of the POCA, incorrect interpretation of which might prejudice her. He cited the quotation from Viscount Dilhorne in **Imperial Tobacco v Attorney General** previously outlined, which noted that a declaration cannot found a plea of autrefois acquit or autrefois convict. This he used to highlight the fact that the declaration sought, if granted, would not relieve the appellant of having to face the criminal charges, unless having regard to the declaration, the learned DPP terminated the criminal proceedings. He opined that there was no reasonable basis for concluding that the DPP would adopt that course (paragraphs [50] - [51]).

[76] A number of cases were cited by counsel for the appellant to support the contention that the appellant's claim should have been allowed to proceed. Here again, it is useful to highlight the unique nature of this matter in which the appellant is not the defendant in both proceedings and is not the applicant for the stay, as is the usual

scenario in these types of applications. Those significant facts render most of the appellant's cases unhelpful in the resolution of this and the other issues before the court. Thus the likelihood that the result of the civil proceedings would exculpate rather than inculpate the appellant, as was the case in **V v C**, or, as has been considered in the instant case would certainly be deployed in the criminal proceedings as having that effect, is not a basis to set the decision to stay the proceedings aside. Rather, it has been shown to be a weighty factor contributing to the risk of prejudice in the criminal proceedings if the stay was not granted or upheld.

[77] **R v L**, another case relied on by the appellant, also concerns facts that are materially different from those in the instant case. In that matter, there were care proceedings in respect of a child and parallel criminal proceedings against a defendant connected with that child in respect of a serious offence against the child. Unsurprisingly, the Court of Appeal did not consider the existence of the criminal proceedings by themselves a reason to adjourn the care proceedings, which, of necessity, are always treated with urgency, as delay is generally detrimental to children. It should be noted that the care proceedings also did not concern an application for a declaration that would have had a bearing on the criminal proceedings, as in the instant case.

[78] I, therefore, agree with the finding of the learned judge that the "risk of prejudice" to the appellant is that she will have to await her trial in the criminal courts as do other defendants, with the option to seek recourse if the delay in the criminal proceedings, "extends beyond the threshold which the Courts find acceptable". Based on what has transpired so far in the criminal proceedings, with an application for dismissal of the charges having been made and refused and applications for amendments of the informations having been made and responded to, those proceedings are already underway towards the trial phase. All things considered, balanced against the risk of prejudice to the criminal proceedings and the administration of justice if the stay was not granted, the risk to the appellant is comparatively not significant.

Issue 3: Did the learned judge err in his assessment of the effect of delay relative to other relevant factors?

[79] As part of the submissions made on the condensed ground 2, it was briefly advanced by counsel for the appellant that, the learned judge incorrectly analysed the case of **Guyah** by placing undue weight on the question of delay of the criminal case, relative to the other aspects of the proceedings in that case.

[80] Implicit in that submission is the fact that there is no challenge to the learned judge's finding that the responsibility for the delay in this case was shared by both the Crown and defence, including the appellant, and that in all the circumstances of the case, the delay occasioned by the Crown was not of such a degree that would, by itself, weigh in favour of the stay not being granted. It should be noted that the criminal matter did not proceed on 23 January 2018, which was the next date already set and adverted to by the learned judge in paragraph [36] of his judgment. There were submissions from counsel for the appellant laying the blame for that failure on the Crown. However, there is no affidavit evidence from either side concerning what transpired on that date. Subsequently, eight days later on 31 January 2018, the notice of appeal in this matter was filed.

[81] Therefore, based on the submissions and in the context of the available evidence, the complaint, as I understand it, is that other aspects of the case in **Guyah** were of greater significance than the issue of delay and those factors were inadequately weighted for application in this case by the learned judge, which led him into error.

[82] In **Guyah**, McDonald-Bishop JA went into some detail in identifying the factors which led the court in that case to conclude that the stay should not have been granted. These factors were:

a) the 1st and 2nd respondents (The Commissioner of Customs and The Attorney General 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 (paragraph [34]);

b) the 1st and 2nd respondents did not discharge the burden on them to show that there was a real risk of prejudice to them in the criminal proceedings if the civil proceedings were not stayed (paragraph [36]);

c) no instructions had been given by the Revenue Protection Division (a division under the Commissioner of Revenue Protection) to the 2nd respondent regarding forfeiture, though it was argued that if the stay was not granted and as a result, the appellant (Guyah) received the remedies he sought with respect to the motor car, that might affect the ability of the Crown to forfeit the car in the event of a conviction (paragraph [38]);

d) the car had already been returned to the 3rd respondent (Carter) who was no longer charged in the criminal proceedings, the Crown having offered no evidence against her. Hence, there was no guarantee that even if the appellant was convicted, he would get the car back in his possession for it to be forfeited (paragraph [39]);

e) it was not reflected in the reasons of the learned judge at first instance that she balanced the interests and weighed the risks of prejudice between the parties (paragraph [40]);

f) the fact that for over two years there had not been full disclosure to enable a trial date to be fixed in the criminal proceedings, despite orders from the court for that to be done.

Based on that the court observed that, "[i]t 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" (paragraph [42]); and

g) the delay in the matter assumed prime significance as it was not just delay without more. There was discontent arising from the conduct of the Crown in the criminal proceedings, and there was nothing advanced by the first or second respondent to rebut the appellant's complaint (paragraphs [46] – [47]).

[83] The learned judge in the instant case, in a closely reasoned judgment, considered all the factors addressed in **Guyah** and, where appropriate, distinguished the facts in the instant case from those in **Guyah**. He considered that merely because there are concurrent civil and criminal proceedings does not automatically provide a legal basis for a stay to be granted. Further, as outlined in the discussion of issues 1 and 2 above, he gave detailed and balanced consideration to whether there was a real risk of prejudice to the criminal proceedings if the civil claim was not stayed, or a real risk of prejudice to the appellant if the civil claim was stayed. Included in those considerations was the distinction he made between **Guyah** and the instant case, in which he found that the absence of affidavit evidence of prejudice from the respondent in the instant case was, unlike the situation in **Guyah**, not fatal to the application, given the statutory remit of the ARA, in a context where the first and second respondents in **Guyah** did not have a similar mandate.

[84] It is interesting that the complaint is that the learned judge misapplied **Guyah** by according too much weight to the issue of delay and too little to other factors. It is interesting because, in **Guyah**, McDonald-Bishop JA noted that the issue of delay was of "prime significance" especially as it was not mere delay, but delay occasioned by the conduct of the Crown in its persistent and ongoing breach of disclosure orders made by

the court, which made it impossible for a hearing date to be set. Against that background, it was entirely appropriate for the learned judge to conduct, as he did, a detailed assessment of the reasons for the delay in the instant case and to whom it was attributable. He was also justified in making the telling observation that the Crown, in the instant case, was not guilty of the inexcusable conduct which was a feature of the Crown's inaction in the **Guyah** matter.

[85] Further, in relation to the learned judge's conclusion that the risk of inconsistent verdicts was a factor which weighed in favour of the stay being granted, it should be noted that: i) the seminal case of **Imperial Tobacco Ltd v Attorney General**, on which a lot of his and this courts analyses are based, was not cited in **Guyah** (though on the facts of **Guyah** it is unlikely it could have affected the outcome); ii) as the conduct of the Crown was not impeached in the instant case as it was in **Guyah**, the situation is not, as was observed in **Guyah**, that "[i]t may well be that justice could only be obtained in the civil proceedings in the Supreme Court"*;* and iii) a canvas carried out by the learned judge and this court, of the issues of law and fact that will have to be determined in the instant case to resolve the issue of whether the relevant properties are criminal property, has led to the conclusion that the Parish Court is ideally placed so to do.

[86] It is apparent that the learned judge appropriately weighted, balanced and considered all the relevant factors before coming to his decision that the stay should be granted. Therefore, the complaint made by the appellant that the learned judge fell into error in this regard is without merit.

Issue 4: Did the learned judge err in granting an unlimited stay?

[87] The cases of **Robertson v Cilia** and **Hinkley and South Leicestershire Permanent Building Society v Freemen** were cited in support of the submission that the stay, if granted, should not have been for an indefinite period. The case of **VTFL v Clough** was also put forward as a model of the assessment of risks occasioned by the civil matter proceeding that should have been conducted before the stay was granted.

[88] Both **Robertson v Cilia** and **Hinkley and South Leicestershire Permanent Building Society v Freemen** concern the power under rules of court in England for the court to adjourn applications by mortgagees for possession of mortgaged property, the mortgage money being overdue. The decisions in those cases recognise that a court has power to adjourn those proceedings for a reasonable time while being mindful of the rights of the mortgagees. **Robertson v Cilia**, however, makes it clear that the court should not exercise the power to adjourn beyond a reasonable time to give the mortgagor an opportunity to pay, thereby forcing an agreement on the parties which they had not made. These cases, which address the fact that the court should not unreasonably interfere with a mortgagee's right to enforce his property rights, clearly have no application to the instant matter.

[89] **VTFL v Clough** is also unhelpful as it provides advice to address the usual situation where the person applying for the stay of the civil proceedings is the defendant in both the criminal and civil proceedings. It is geared towards assessment of whether there would be the risk of prejudice to the defendant in the criminal proceedings if the civil proceedings were not stayed, which is not the concern in these proceedings.

[90] I am of the view that the situation remains as outlined in the case of **Imperial Tobacco Ltd v Attorney General.** The courts should not countenance any precedent for "the Commercial Court and other civil courts usurping the functions of the criminal courts". It bears highlighting that the main reason why the stay was lifted in **Guyah** was because the egregious and inexcusable conduct of the Crown was such that the court was led to the conclusion that the civil case might have been the only proceeding in which the appellant could obtain justice. That is not the situation in the instant case. The case is before the Parish Court which is well placed to determine the main issue joined. Further, as the learned judge noted, "there are other protections the appellant may pursue if the criminal proceedings extends beyond that threshold which the Courts find acceptable". Accordingly, this is not a case in which it was desirable for any limitation to be placed on the stay granted.

Issue 5: Did the learned judge exhibit bias by directing the respondents to file an application for stay?

[91] In two instances, during the submissions on the summarised grounds, counsel for the appellant alleged bias in the tribunal on the basis that the learned judge directed the respondent to apply for a stay. It was also argued that, consequent on the posture adopted by the learned judge, no argument raised by the appellant could have succeeded.

[92] It is instructive to reproduce paragraph [2] of the judgment of the learned judge. He stated:

> "The Defendant, the Assets Recovery Agency ('the ARA'), on 3rd March 2017 without having filed a notice of application, attempted to make an oral application for a stay of these proceedings. Having regard to the very narrow and precise nature of the application, the Court dispensed with the requirement for the application to be made in writing and ordered that there be a hearing of the application on the 19th and 20th April 2017 as to whether the Court should exercise its discretion to stay the claim pending the determination in the St Ann's Bay Parish Court in which the Claimant is charged ('the Application'). The Parties were given liberty to file affidavit evidence in support of their positions. However, because there was a pending application by the Claimant to strike out portions of an affidavit filed on behalf of the ARA, that was already before the Court, it was ordered that only the affidavits filed pursuant to the Court's order of that day would be permitted to be used at the hearing of the Application. For reasons which are unfortunate, but not material, the hearing of the Application was adjourned more than once and was not heard until 8th January 2018."

[93] That paragraph clearly outlines that an attempt at an oral application was made by the ARA and, based on the nature of the matter, the court dispensed with the need for a written application but gave the parties liberty to file affidavit evidence in support of their positions. No written application was included in the record of appeal filed by the appellant nor evidence of any mandate given to either party directing that evidence

should be filed. There is nothing in the judgment or in any evidence filed that suggests that the idea for the application emanated from the learned judge.

[94] It should be reiterated in the strongest terms that an allegation of bias should never be lightly made and that if there is such an issue, it should be raised before the tribunal concerned and not for the first time before another forum (see **Leeds Corpn v Ryder** [1907] AC 420). Apart from the bald statements made in the submissions, there is no affidavit evidence grounding them, or any authority advanced in support. There is also no indication that such submissions were made before the learned judge, which would have afforded him the opportunity to consider and rule on the matter.

[95] In any event, applying the test for apparent bias as laid down in the case of **R v Gough** [1993] AC 646, the question is whether, in all the circumstances of the case, there appears to have been a real danger of bias concerning the learned judge, so that justice requires that his decision should not stand. The review of the judgment of the learned judge, far from disclosing any approach flowing from bias, revealed a detailed, balanced, well-reasoned and fair consideration of all the relevant factors that should be and were taken into account, to inform the exercise of his discretion. Accordingly, there is absolutely no merit in the complaint advanced.

Conclusion

[96] In the premises, it has not been established that the learned judge wrongly exercised his discretion to grant the stay. My analysis of the issues identified has shown that the learned judge was correct to find that there was a real risk of prejudice to the criminal proceedings if the civil claim was not stayed and conversely that there was no real risk of prejudice to the appellant if her civil claim was stayed. The analysis also led to the conclusion that the learned judge gave appropriate weight to the relevant factors in arriving at his decision and was justified in granting an unlimited stay. It was also demonstrated that, there is absolutely no evidence that his decision was actuated or influenced in any way, by the taint of bias.

[97] Accordingly, I am of the view that the appeal should be dismissed, the judgment of Laing J affirmed and costs awarded to the respondent to be agreed or taxed. I cannot end without expressing sincere apologies to the parties for the long delay in the delivery of this judgment. In the circumstances every effort should be made to have the criminal proceedings in the Saint Ann Parish Court now proceed apace.

McDONALD-BISHOP JA

ORDER

(1) The appeal is dismissed.

(2) The decision of Laing J, made on 16 January 2018, is affirmed.

(3) Costs of the appeal to the Assets Recovery Agency to be agreed or taxed.