[2018] JMCC COMM. 05

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. 2016CD00313

BETWEEN	**CAROL ANN LAWRENCE-AUSTIN**	**CLAIMANT**
AND	**THE ASSETS RECOVERY AGENCY**	**DEFENDANT**

IN CHAMBERS

Ms Georgia Buckley instructed by Ballentyne Beswick & Company, Attorneys-at-Law for the Claimant

Ms Alethia Whyte for the Defendant

8th and 16th January 2018

Civil Procedure - Stay of proceedings - Principles to be applied - Exercise of Court's discretion and balancing of competing interests of the parties - Whether risk of inconsistent judgments can provide a basis for a stay

Laing, J

[1] By fixed date claim form originally filed on 4th August 2016, the claimant sought:

> *A declaration that the properties which were restrained by Restraint Order in Claim No. 2011 HCV 0440 are not criminal property for the purposes of Sections 92 and 93 of the Proceeds of Crime Act [2007].*

[2] 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.

The law relating to the stay of proceedings

[3] In the case of **Omar Guyah v The Commissioner of Customs and Others** [2015] JMCA CIV 16, the Court of Appeal considered an appeal by Mr Guyah against the order of a Judge, made on 29th May 2014, staying the claim brought by him against the respondents, pending the determination of criminal proceedings which had been brought against him in the Corporate Area Criminal Court. The Court of Appeal allowed the appeal and in doing so provided a comprehensive review of the law relating to the stay of proceedings. The case of **Guyah** explores issues similar to those with which this court must grapple and accordingly provides a helpful starting point for the analysis of the issues which will determine the Application.

Background to the Guyah Case

[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.

[6] The Court of Appeal confirmed that when a Court is deciding whether to order a stay of proceedings that is a matter in the exercise of its discretionary jurisdiction. The Court also recognised that "*the rule in **Smith v Selwyn** [1914] 3 KB 98, that had advocated an automatic stay of civil proceedings when there were concurrent criminal proceedings [emanating from a felony which is also a tort], no longer represents the law either in England or Jamaica.*"

[7] In paragraph 25 of **Guyah** the Court of Appeal quoted with approval the comments of Megaw LJ in **Jefferson Ltd v Betcha** [1979] 2 All ER 1108, at page 1113 as follows:

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

[8] In paragraph 26 of **Guyah** the Court of Appeal referred to the suggestion of Carey J in **Bank of Jamaica v Dextra Bank and Trust Co. Ltd** (1994) 31 JLR 361 as to the rule to be applied by our Courts which he said should be as follows:

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

[9] The Court of Appeal went on to consider a number of authorities such as **Panton and Others v Financial Institutions Services Limited** [2003] UKPC 86, **Ashley Mote v Secretary of State for Work and Pensions** [2007] EWCA Civ 1324, as well as the White Book, Volume 2, at paragraph 9A-184 and arrived at the following conclusions:

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

[10] In deciding whether the learned Puisne Judge was correct in granting the stay, the Court of Appeal made a number of insightful observations and comments, the first being that the applicants for the stay would have had to have gone further than relying on the mere fact that there are concurrent civil and criminal proceedings in order to provide a legal basis for the stay to be granted.

[11] The opinion of the Court of appeal as expressed in the following paragraphs is also very instructive:

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

> *[36] It means, then, that the onus was on them to demonstrate to the learned judge how they would have been prejudiced so as to suffer grave injustice or a serious miscarriage of justice in the criminal proceedings, if the appellant's ordinary right to have his claim tried is not stymied. In order to discharge that burden, they were obliged to place before the court sufficient material to satisfy the learned judge that there was a real risk of prejudice that might lead to an injustice to them in the criminal proceedings if the civil case was not stayed.*
>
> *[37] The position of the respondents in the criminal proceedings was thus a relevant factor to be considered in weighing the competing interests in order to determine wherein justice lies. From the record of appeal, it is seen that there was no evidence placed before the learned judge as to the potential prejudice to the Crown's case in the criminal proceedings. So, there was no evidence before the learned judge from the first and second respondents on which their position, relative to that of the appellant, in either the civil proceedings or in the criminal proceedings, could have been properly and objectively evaluated".*

[12] The Court of Appeal considered the argument advanced by the first and second respondents before the Supreme Court that, if the action was not stayed and Mr Guyah obtained the declarations he sought, that would affect the Crown's attempt to forfeit the Suzuki Swift motor car in the event of Mr Guyah's conviction. The Court of Appeal referred to the fact that the car had already been returned to the third Claimant who was no longer a party to the criminal proceedings and concluded as follows:

> *"[39] ...There is thus no guarantee in the circumstances, as disclosed, that even if the appellant is successful on his claim, that he would get back the car in his possession for it to be forfeited to the Crown in the event of his conviction. The single ground that was argued in advancing a case of likely prejudice to the Crown is, therefore, rendered rather tenuous in the light of the prevailing circumstances.*
>
> *[40] Miss Jarrett also further submitted that the learned judge had properly balanced the interests of the parties and correctly considered the real risk of injustice or potential prejudice in the prosecution of the criminal proceedings. The balancing of interests and weighing of risk of prejudice are not, however, reflected in the reasons the learned judge had advanced in granting the stay. In my respectful view, the consideration of the learned judge as to the existence of parallel proceedings and the likelihood of inconsistent decisions ought not to have been the determinative or the pivotal considerations although they would have been relevant ones".*

Submissions on behalf of the ARA

[13] Ms White for the ARA submitted that there are important distinguishing features between **Guyah** and the case herein which ought to be identified and the importance of these features weighed by this Court in considering the Application. The first of these features, she said, has to do with the relevance and impact of delay in the criminal proceedings where the stay is being sought in favour of such proceedings.

[14] Counsel in submitting that referred to the observations of McDonald Bishop JA at paragraph 43:

> *"[43]...I, for my part, would be slow to draw from the dictum of their Lordships any intention on their part to lay down as a general principle of universal application or a hard and fast rule that delay in criminal proceedings can never be a relevant consideration in determining whether to stay or not to stay concurrent civil proceedings. It is not possible, or indeed, advisable to lay down any hard and fast rules as to what should or should not be relevant considerations when the test to be applied is to consider what is required for justice to be done between the parties".*

[15] Counsel further submitted that the fact that the impact of the delay in the criminal proceedings, especially delay attributable to the prosecution, influenced the Court of Appeal's view as to the possible injustice of granting a stay in **Guyah,** is plainly evident in paragraphs 46 and 47 of the judgment which are reproduced hereunder:

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

> *question of delay may assume prime significance in considering whether civil proceedings should be stayed to allow criminal proceedings to proceed. This, in my view, is one such case.*
>
> *[47] It should be noted, in particular, that the kernel of the appellant's complaint is not simply about delay, without more, but is one that has arisen from a discontentment with the conduct of the Crown in the criminal proceedings. There was nothing from the first and second respondents to rebut the appellant's complaint. The existence of the state of affairs in the criminal proceedings that emanated from the Crown's conduct does warrant a consideration of all relevant factors, including delay. Indeed, the issue of delay, where it exists, must be part of the relevant considerations in treating with the questions of competing interests, risk of prejudice and potential injustice".*

[16] Counsel for the ARA, submitted that the prosecution's failure to have provided discovery formed a related but separate ground of conduct of the prosecution which had the effect of supporting the arguments as to the risks of an injustice to Mr Guyah if his civil claim was stayed pending the criminal proceedings. Counsel submitted that evidence of the Court of Appeal having attached weight to the prosecution's conduct in this regard can also be seen in paragraph 42 of the judgment as follows:

> *"[42]...This is, particularly, so in the light of the fact that there are unchallenged averments that there has not been full disclosure by the Crown for a trial date to be fixed in the criminal proceedings for over two years despite orders from the court for that to be done. The first and second respondents were not in a position to advise the learned judge as well as this court when that trial is likely to proceed so that there can be an estimate as to the likely duration of the stay. It may well be that justice could only be obtained in the civil proceedings in the Supreme Court".*

[17] Ms White submitted that unlike **Guyah**, the delay in the prosecution of the criminal matter involving the Claimant and other defendants was primarily the fault of those defendants including the Claimant, as well as the fault of the Claimant's legal representatives. Counsel referred to the second affidavit of the Claimant filed on 7th April 2017, in which she averred that between September 2016 and February 2017 there were a few delays in the proceedings before the criminal Court but that these were caused by both parties and were incidental to the ordinary course of litigation. Ms White relied on the affidavit evidence of Larona Montague-Williams, the Crown Counsel in the Office of the Director of

Public Prosecutions, who had conduct of those criminal proceedings in the St. Ann Parish Court which commenced in 2012. In her affidavit filed 29th March 2017, Mrs Montague-Williams chronicles the history of those proceedings and asserted that in the early stages, the matter came up for mention on a number of occasions because the legal representation of the defendants remained unsettled but was first fixed for trial on the 18th April 2016. Mrs Montague-Williams asserted that on that day the prosecution was ready to proceed to trial with three witnesses present but the trial was adjourned on the Application of Counsel for the Claimant in order to facilitate Mr Beswick joining the defence team and this caused the trial to be fixed for 26th July 2016.

[18] It is the evidence of Mrs Montague-Williams that on the 26th of July 2016 the prosecution was again ready to proceed but Mr Beswick made an application for the claim to be dismissed. She averred that his submissions were adopted by the other defendants and included, *inter alia*, an assertion that the Supreme Court had found that the relevant properties were not criminal properties. The application was dismissed by the Judge in the Parish Court who made an order that the matter proceed to trial. However, on that date of the Court's ruling the prosecution indicated an intention to apply for an amendment of the informations and the defence indicated their intention to object. This led to the Judge ruling that the application should be made in the form of written submissions to be filed and served on or before 23rd September 2016 with the defence filing their response on or before the 4th day of November 2016.

[19] Mrs Montague-Williams said that the prosecution's submissions were filed on the 30th September 2016 and served on the defence counsel, but that on the 8th December 2016 only counsel for the defendants other than the Claimant served their response to the prosecution's application.

[20] It is this failure to file the Claimant's written submissions which Mrs Montague-Williams claims accounted for the adjournment of the trial on the 12th December 2016 when the matter came up for hearing. She concedes however that on the

adjourned trial date of 20th February 2017 the prosecution was not represented because senior counsel with conduct of the matter was engaged in the circuit court although the point was made that no documents had been filed on behalf of the Claimant which would have facilitated instructions to other counsel for the Crown.

[21] Ms White in her submission also emphasised the fact that there was no egregious conduct on the part of the prosecution in the case herein which could be considered to be the failure to disclose which occurred in **Guyah**.

Submissions on behalf of the ARA on the issue of prejudice

[22] In Ms White's submissions on the issue of prejudice, heavy reliance was placed on the House of Lords case of **Imperial Tobacco Ltd. v Attorney General [1981] AC 718.** In that case, the plaintiffs were cigarette manufacturers who devised a scheme whereby "spot cash" cards were placed in packets of their cigarettes allowing purchasers to win prizes ranging from £5000.00 to £1 or a free packet of cigarettes. After the scheme was started summonses were issued against the plaintiffs alleging that that they had distributed tickets in an unlawful lottery contrary to the Lotteries and Amusements Act 1976.

[23] Subsequent to the summonses being issued, the plaintiffs by originating summons claimed a declaration that the scheme was lawful and did not contravene the provisions of the Lotteries and Amusements Act as being ether a lottery or an unlawful competition. Donaldson J heard the summons but dismissed the claim for a declaration on the ground that the scheme was both an unlawful lottery and unlawful competition. The Court of Appeal allowed the appeal and on further appeal to the House of Lords, the House of Lords in reversing the Court of Appeal, held that the scheme was a lottery within the meaning of the Act.

[24] On the issue of concurrent civil and criminal proceedings, the headnote which substantially reproduces the conclusion of Lord Lane's judgment at page 752C,

and this effectively captures the essence of the Court's judgment as it relates to declaratory relief where there are ongoing criminal proceedings, as follows:

> *"(3)That where 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 ...."*

[25] At page 741 of the case of **Imperial Tobacco**, Viscount Dilhorne considered the question "*Could the court in the proper exercise of its discretion grant the declaration sought*?" I am of the view that for completeness it is well worth reproducing the relevant portion of his analysis *in extenso* as follows:

> *"Donaldson J. thought he could but did not grant it as he thought that the Spot Cash scheme was a lottery and an unlawful competition. The Court of Appeal, holding that it was neither, granted it.*
>
> *That decision if it stands, will form a precedent for the Commercial Court and other civil courts usurping the functions of the criminal courts. Publishers may be tempted to seek declaration that what they propose to publish is not a criminal libel or blasphemous or obscene. If in this case where the declaration sought was not in respect of future conduct but in respect of what had already taken place, it could properly be granted, I see no reason why in such cases a declaration as to future conduct could not be granted. If this were to happen, then the position would be much the same as it was before the passing of Fox's Libel Act 1792 when judges, not juries, decided whether a libel was criminal, blasphemous or obscene.*
>
> *Such a declaration is no bar to a criminal prosecution, no matter the authority of the court which grants it. Such a declaration in a case such as the present one, made after the commencement of the prosecution, and in effext 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. 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.

The justification for the Court of Appeal taking this unusual and unprecented course – no case was cited to us where a civil court had after the commencement of a prosecution, granted a declaration that no offence had been committed – was said to be the length of time it would have taken for the matter to be determined in the criminal courts. I can well see the advantages of persons being able to obtain rulings on whether or not certain conduct on which they propose to embark will be criminal and it may be a defect in our present system that it does not provide for that. Here, I wish to emphasise, it was not a question whether future conduct would be permissible but whether acts done were criminal. It was said that the administration of justice would belie its name if civil courts refused to answer reasonable questions on whether certain conduct was or was not lawful. I do not agree. 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.

What was the urgency in the present case? The operation of the scheme began in October 1978. It was to end on March 31, 1979. It may be that far too much time elapses nowadays before accused persons are tried on indictment but why should these respondents be singled out for special treatment? I do not see that there was any particular urgency or that there was any special reason for the respondents to be treated differently from other accused. If the case had been tried summarily in the magistrates' court at Nottingham, I doubt if it would have taken longer, or an appreciable time longer, to reach this House. All the cases on lotteries to which I have referred were, with one exception, tried in the magistrates' courts".

[26] The essence of the submissions on behalf of the ARA, relying heavily on the case of **Imperial Tobacco,** was that the nature of the relief sought by the Claimant and in particular the declaration that relevant properties are not criminal property as defined by the Proceeds of Crime Act, 2007, is likely to prejudice the criminal proceedings because of the use to which such a declaration is likely to be put in those proceedings. Counsel submitted that the only possible purpose of the civil claim is to obtain a declaration to be used in an attempt to influence the tribunal in the criminal proceedings in the Parish Court of St. Ann. This is particularly the case in light of the fact that restraint order obtained in the Supreme Court against the Claimant and others had been withdrawn. It was submitted that the prosecution of the criminal proceedings would be prejudiced if

the claim is not stayed and if this Court in its civil jurisdiction, which is of great authority, makes a declaration the practical effect of which is that that no crime has been committed by the Respondent, who is accused in criminal proceedings.

The Submissions of behalf of the Claimant

[27] Ms Georgia Buckley in her submission on behalf of the Claimant placed heavy reliance on **Guyah**. She submitted that it was on all fours with the case herein and accordingly a similar result should obtain with this Court concluding that the Application ought not to be granted. Counsel argued that although the Court of Appeal made reference to the responsibility of the delay being that of the prosecution and made reference to the conduct of the prosecution in not providing disclosure, when read in its totality, it is clear that those facts did not influence the Court's decision.

[28] Ms Buckley submitted that in any event, the responsibility for the delays in the criminal proceedings in this case ought to be shared by the prosecution and the defendants. Counsel referred to the affidavit of Mr Paul Beswick filed on the 9th October 2017 in response to the affidavit of Mrs Montague-Williams. In that affidavit Mr Beswick averred that the reason for the adjournment of the trial on the 12th December 2016 was the fact that one of the co-defendants had recently given birth and had received medical advice that the strain of a trial would have been too great for her at that time. Mr Beswick admitted that the submissions on behalf of the Claimant had not been filed or served but were in his possession and that furthermore, he was fully prepared to make oral submissions. As it relates to the adjournment of the trial on the 20th February 2017, Mr Beswick averred that counsel for five of the defendants have served their written responses to the Crown's application and it was therefore inexcusable that other Counsel had not been instructed to conduct the matter since Mrs Montague-Williams was not available.

[29] Ms Buckley submitted that the Crown was therefore equally responsible for the delays in the criminal proceedings a portion of which was attributable to the late decision by the Crown to make an application to amend the informations. Counsel argued that since both parties were responsible for the delay, the more important consideration was the delay in those proceedings. Counsel argued that the delay in the instant case, is much longer than that which occurred in **Guyah** at the point when the Court heard the appeal. Argued that this is strong support for the Court in this case finding that the delay is so excessive that this Court ought not to grant the Application since a stay would further restrict the Claimant's right to be heard before the Civil Court.

[30] Ms Buckley was somewhat dismissive of submissions of Ms White in relation to the value of **Imperial Tobacco** (supra) in the context of the case herein. Counsel submitted that the case of **Imperial Tobacco** simply addressed the issue of the possibility of inconsistent decisions and that our Court of Appeal comprehensively dealt with that issue in **Guyah**. Counsel pointed specifically to paragraph 41 of the judgment in **Guyah** which reads as follows:

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

[31] In summary, the position advanced by Ms Buckley was that there are no distinguishing features if this case which could justify a result other than the conclusion reached in **Guyah** that the stay should not be granted. Counsel's position was that if there is indeed any distinction, it would be that the delay in the criminal proceedings involving the Claimant in the case herein, is much greater than in **Guyah** and this feature further strengthens the case for the Application to be refused.

The Court's analysis

[32] Before embarking on my analysis I think it is necessary for me to make particular note of some paragraphs of the **Guyah** judgment in which the Court of Appeal offers immeasurable assistance, but in doing so was also critical of the approach of my learned sister Judge. I adopt this approach with the intention that it will have the desired effect of focusing my mind and in so doing hopefully prevent me from falling into error in a similar fashion. To this end, I highlight the following paragraphs:

> *[51] In Halsbury's Laws of England, Volume 37, 4th Edition, at paragraph 442, it is stated:*
>
> > *"The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceedings beyond all reasonable doubt, ought not to be allowed to continue."*
>
> *[52] It is within this legal framework that appellant's right to have his claim proceed should have been considered by the learned judge. The appellant, despite the fact that he is charged in a criminal matter, has the benefit of the presumption of innocence. He is under no known disability to approach the court for redress in his own rights. He has his right of access to the court of first instance in bringing a bona fide claim on a properly pleaded cause of action and so the court ought not to lightly refuse him access by declining to exercise jurisdiction over his case and to interrupt his right to conduct his litigation towards trial. There must be strong and compelling reasons for the court to do so.*
>
> *[55] In the instant case, the learned judge did not, demonstrably, undertake such an assessment of the issue of prejudice, which is an essential factor to be considered if one is to seek to do justice between the parties, nor did she grant a conditional stay. The approach in Alton Brown [Alton Brown v The Attorney General and others [2013] JMSC Civ 106 unreported judgment of Sykes J], therefore, was not followed in this case and so the fact that a stay was granted in that case should not meaningfully assist the first and second respondents in advancing the argument before us that McDonald J's decision to order the stay in this case should not be disturbed.*
>
> *[56] The authorities have illustrated that the hurdle that is to be surmounted or the threshold to be reached by a party asking a court to*

> *stay civil proceedings until the completion of concurrent criminal proceedings in a high one. There must be a balancing exercise of the competing interests of the parties with the ultimate aim being to do justice between them. The mere fact that proceedings are ongoing in another court of competent jurisdiction that could lead to inconsistent decisions, as the learned judge had concluded, would not be enough in determining what justice requires.*
>
> *[57] I found that in the light of the prevailing circumstances of this case, the threshold that would justify a stay in favour of the first and second respondents had not been reached.*
>
> *[59] Unfortunately, it does seem that the learned judge failed to apply the correct principles and to take into account all the relevant factors in making the order that the civil proceedings should be stayed. In particular, she should have taken into account and weigh appropriately the competing interests of the parties and, in the end, sought to maintain an even balance in order to do justice between them.*
>
> *[60] In the final analysis, the first and second respondents have failed to convince this court that in all the particular circumstances of this case, it was just and convenient for an order to have been made staying the claimant's claim until the determination of the criminal proceedings. The learned judge also did not declare that she had found it to have been the just thing to do.*

The effect of delay in the criminal proceedings

[33] I am not of the view that it is necessary for me to attempt to determine with any mathematical precision, the relative proportion of blame to be ascribed for the delay in the criminal proceedings. However, I do find on the evidence before the Court that Crown and the Claimant each bear responsibility for the delay in the commencement of the criminal trial. I take special note of the evidence of Mrs Montague-Williams, which I accept, that in the early stages of the criminal proceedings the matter was mentioned on a number of occasions because the legal representation of the defendants remained unsettled, and that on first date fixed for trial, which was on the 18th April 2016, the Crown was ready to proceed but could not do so as a result of Mr Beswick's addition to the Claimant's defence team.

[34] As it relates to the reason or reasons for the trial having not proceeded on 12th December 2016, Mr Beswick and Mrs Williams-Montague have each given

contrasting explanations. I am unable to accept Mrs Montague-Williams' assertion that the sole reason for the adjournment was the failure of Mr Beswick to have provided his submissions in writing. This is so because Mrs Montague-Williams did not positively assert that the Judge was not prepared to proceed by allowing Mr Beswick to make oral submissions, nor did Mrs Montague-Williams specifically respond to Mr Beswick's assertion in his affidavit that the fact that a co-defendant had recently given birth was the reason for the adjournment.

[35] In paragraph [46] of **Guyah** (which has been reproduced earlier in these reasons), McDonald-Bishop JA concluded that that case was one of those cases in which the question of delay assumed prime significance in considering whether civil proceedings should be stayed to allow criminal proceedings to proceed. The learned Judge's conclusion is easily understood in light of the evidence that the failure of the Crown to provide full disclosure notwithstanding a court order to that effect was preventing the fixing of a trial date. Furthermore,the first and second respondents were not able to advise the Judge who heard the application for the stay (or the Court of Appeal for that matter) as to when the trial was likely to proceed. In the absence of such information any open ended stay would conceivably bear the risk of an injustice to the Claimant in the civil proceedings. Her Ladyship acknowledged Mr Guyah's interest in the expeditious and just disposal of his civil claim and further explained that point in the following terms:

> *[46]... His interest in having unrestricted access to the court as someone entitled to equal protection of the law must be weighed in the equation where there is inordinate delay in the criminal proceedings. It could not be just and convenient to stay the bona fide claim of a party who has the right to bring his claim until the determination of criminal proceedings when there is clear tardiness in pursuing those proceedings and the trial of the matter is nowhere in sight. An open-ended stay in the face of such marked delay could well be prejudicial so as to lead to an injustice to the appellant in pursuing his claim in the civil proceedings...*

[36] I similarly acknowledge the Claimant's interest in the expeditious and just disposal of her civil claim for a declaration. However it is the finding of this Court

as stated earlier in these reasons, that, there has been no clear tardiness on the part of the Crown in pursuing those proceedings. The criminal proceedings in which the Claimant is a subject involves multiple defendants and whereas it may be true that some of those delays were, as the Claimant puts it, "*incidental to the ordinary course of litigation*", it is evident that the Claimant shares the responsibility for those delays. I accept that the actual delay in this case is longer than that which occurred in **Guyah**, however, unlike **Guyah**, it cannot be said that there is no end in sight because there is a trial date fixed for 23rd January 2018.

[37] It is therefore my view that because of differences in the reasons and the responsibility for the delay, as well as the fact that there is an end in sight in the case herein, it is distinguishable from **Guyah** as it relates specifically to the issue of delay. It is also my considered view that having regard to the length and reasons for the delay, when taken with the fact that trial dates have already been fixed, that this is not one of those cases in which the question of delay ought to assume **prime** significance in considering whether civil proceedings should be stayed to allow criminal proceedings to proceed. Nevertheless, as stated explicitly in **Guyah** at [47], delay where it exists, (and it exists in this case) must be part of the relevant considerations in treating with the questions of competing interests, risks of prejudice and potential injustice. Specifically, this Court must consider whether having regard to the delay in the criminal proceedings, a stay pending the completing of these criminal proceedings might not be "*prejudicial so as to lead to an injustice to [the Respondent] in pursuing [her] claim in the civil proceedings*". This exercise will be conducted later in these reasons.

Conduct of the Crown

[38] In **Guyah** the Court commented at [47] as follows:

> *It should be noted, in particular, that the kernel of the appellant's complaint is not simply about delay, without more, but is one that has arisen from a discontentment with the conduct of the Crown in criminal proceedings...*

The conduct complained of in **Guyah** related to the fact that there had not been full disclosure by the Crown in order to facilitate a trial date to be fixed in the criminal proceedings for over two years and this was in the context of orders from the Court for such disclosure. Although the failure to disclose was closely tied to the issue of delay and the possibility of injustice caused by an open ended stay, the conduct of the Crown in this regard could arguably be viewed as being egregious in the circumstances. Other than its contribution to the delay of the criminal proceedings to which reference has already been made, there was no complaint about any egregious conduct of the kind complained of in **Guyah**, as it relates to the Crown. This case is therefore also distinguishable from **Guyah** in that respect, but having regard to the close connection between the failure to disclose and the issue of delay, the distinction between the cases on this particular point is not of great moment.

The nature of the civil claim for a declaration and the issue of prejudice

[39] The law reports are replete with cases dealing with applications for stays of civil proceedings pending criminal proceedings where both sets of proceedings are conceived from the same factual matrix. By way of example, in the case of **Panton and Others v Financial Institutions Services Limited** (supra), both sets of proceedings arose out of the involvement of the appellants and others in the management of certain financial institutions which were taken over by the Jamaican Government during what have come to be known as "*the FINSAC years*". The civil proceedings, begun in 1995, claimed damages and alleged breaches of fiduciary duties and fraud. On the other hand, the criminal proceedings which were commenced in 1996, alleged conspiracies to deceive, conspiracies to defraud and falsification of accounts. In the line of cases represented by this case, the civil proceedings are primarily geared at remedies which are usually independent of the sanctions which might be handed down in the criminal proceedings. However, the defendant in the criminal proceedings will often be concerned as to the impact which the disclosure in the civil proceedings may potentially have on the prosecution's ability to frame and conduct its case in

the criminal trial and for that reason, as a matter of tactical advantage, usually prefer to have the civil proceedings stayed.

[40] Civil cases such as the one brought by Mr Guyah are rare. Not only because it was not the person charged in the criminal proceedings who was making the application for the stay, but more so, because Mr Guyah, the person charged in the criminal proceedings was the claimant in the civil proceedings seeking a declaration from the Supreme Court in respect of an issue which necessarily fell for the Court's determination in the related Parish Court criminal proceedings. It is therefore unsurprising that in **Guyah** there is the marked absence of any reference to a local decision in which the issue of a stay was considered in that context. All of the cases that were considered were in keeping with the line of cases represented by Panton as discussed earlier.

[41] Cases such as **Guyah** in which that type of declaratory relief is being sought, are rare, not only in Jamaica, but are also rare in England notwithstanding that country's history which is marked by centuries of jurisprudential development. As Donaldson J noted in the case of **Imperial Tobacco** (supra) at page 741 D-E "...*no case was cited to us where a civil court had after the commencement of a prosecution, granted a declaration that no offence had been committed...".*

[42] I do not think it can be reasonably challenged that the declarations in **Guyah** as well as in the instant case if granted, is not capable of having the practical effect of assisting in an assertion that the criminal case being faced by the Claimant cannot be proved as a matter of law, although obviously the declaration sought would not state this positively in those precise terms. Although the declarations are not worded as "*declarations of the innocence*" of the Claimant, they no doubt would be deployed as such. In my view, it is in this context that the reference by the learned law lords to "a declaration that no offence had been committed" ought to be understood.

[43] It is perhaps prudent for me to expressly state for the avoidance of any doubt, that I fully appreciate that the case of **Imperial Tobacco**, being a decision of the English House of Lords, is only of persuasive authority. It may also be prudent to highlight at this stage that the case of **Imperial Tobacco** had absolutely nothing to do with an application for a stay of proceedings. It was cited by Ms White primarily in support of her submissions as to the potential for prejudice in the criminal proceedings if the stay is not granted.

[44] At the very least, for purposes of this analysis, what the case of **Imperial Tobacco** does is to highlight the peculiar nature of the remedy of the declaratory judgment in the context of extant criminal proceedings and the potential prejudice which may arise depending on the manner in which the declaration is formulated. In his judgment at page 746 E, Lord Fraser of Tullybelton stated as follows:

> *"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".*

[45] However, although Lord Fraser of Tullybelton did not himself express the reasons for the undesirability of declarations in these types of circumstances, this was done by Viscount Dillhorne at page 741 of the judgment which has been reproduced earlier in these reasons. The undesirability has to do with the use that might be made of the declaration at the trial and implicit in this, is the possibility of inconsistent verdicts. The possible inconsistency arises because the declaration, despite it having been made by a civil Court of great authority. cannot prevent the criminal Court from making a wholly independent finding based on the evidence which is presented before, and accepted by that criminal Court. However, I think it can be reasonably be posited that implicit in the fear of the use to which the "declaration of innocence" will be put, is the risk of inconsistent verdicts.

What is the potential prejudice to the Claimant?

[46] I think it bears reiterating that the Claimant in her civil claim is not seeking remedies which are wholly independent of or unconnected to the criminal proceedings. The Claimant by her fixed date claim form is seeking a declaration that the properties which were restrained by restraint order in Claim No. 2011 HCV 0440 are not criminal property for the purposes of Sections 92 and 93 of the Proceeds of Crime Act, 2007.

[47] The Claimant is not seeking, for example, a declaration relating to statutory construction on any aspect of the Proceeds of Crime Act, the interpretation of which may be in dispute and the incorrect interpretation of which might prejudice her. In such a case it is arguable that different considerations might apply in assessing the prejudice to her of a stay being granted.

[48] It is common ground that the properties are no longer the subject of a restraint order because on 21 April 2016 the restraint proceedings in Claim No. 2011 HCV 0440 were discontinued.

[49] Paragraphs 8-11 of her affidavit first filed on August 2016 in support of her fixed date claim form are in the following terms:

> *8. That the actions of the Defendant has significantly despite the discharge of the restraint order there is still significant apprehension by any person who looks at the titles to the properties.*
>
> *9. That the Director of Public Prosecutions is also alleging that these properties are criminal properties and I am currently answering charges of breaches of Sections 92 and 93 of the Proceeds of Crime Act in the St. Ann's Bay Parish Court since 2012. The delay in having this case determined has significantly prejudiced my opportunity for upward mobility at my job and I am suffering from severe emotional distress and trauma while the case languishes with no end in sight. Each court hearing causes me extreme anxiety and mental anguish.*
>
> *10. That this declaration is urgently needed to assist me to restore my mental state, resolve my financial affairs and to start picking up the pieces of my life which are currently in shambles.*

> *11. That I have been held hostage since 2011 due to the actions of the Defendant and even though I was successful in that claim I am still suffering each day while this criminal prosecution continues.*

[50] It is therefore patently clear from the Claimant's affidavit, that it is her hope that the declaration will somehow result in relief from the negative consequences of the pending criminal prosecution. However, as a matter of law, the declaration without more would not have the effect of automatically terminating the criminal proceedings. As Viscount Dilhorne pointed out in the case of **Imperial Tobacco** (supra at page 741)

> *"...Such a declaration is no bar to a criminal prosecution, no matter the authority of the court which grants it. 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. 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".*

[51] The only way in which the declaration could offer the relief which the Claimant craves, is if the learned Director of Public Prosecutions (DPP) decided that having regard to the declaration she would terminate the criminal proceedings. However, there is no reasonable basis for concluding that the learned DPP would adopt this course. The learned DPP could properly continue the prosecution of the Claimant and the Claimant would accordingly be forced to endure the anxiety, mental anguish and suffering in respect of which she has complained.

[52] What then is the risk of prejudice to the Claimant of her claim for declaration being stayed? The risk is that she faces her properly instituted proceedings in the criminal Courts and sees them through to their natural conclusion as she would have done had she not sought a declaration. It cannot be gainsaid that the wheels of justice in the Jamaican Courts sometimes turn at a less than ideal pace, however, that is an unfortunate reality which the Claimant must face. In that regard she is no different than the thousands of other Jamaicans with

matters in the Criminal Courts, many of whom are in custody awaiting trial. If the delay in the criminal proceedings extends beyond that threshold which the Courts find acceptable, then there are other protections in place for the Claimant.

Whether there is a real danger of causing injustice in the criminal proceedings?

[53] In the case of **Assets Recovery Agency (Ex-parte) (Jamaica) Privy Council** [2015] UKPC 1, the Privy Council commented on the elements of offences under sections 92 and 93 of The Proceeds of Crime Act, 2007, as follows:

> *7. The Proceeds of Crime Act 2007 creates new substantive offences of money laundering. They are contained in sections 92-93. Under both sections, the offences created consist of doing specified acts (with the prescribed state of mind) in relation to "criminal property". In turn, "criminal property" is defined in section 91(1) (a) as follows:*
>
> *"91 (1) For the purposes of this Part –*
>
> *(a) property is criminal property if it constitutes a person's benefit from criminal conduct or represents such a benefit, in whole or in part and whether directly or indirectly (and it is immaterial who carried out or benefitted from the conduct);"*
>
> *This definition therefore depends in part on the meaning of the expression "criminal conduct", for which one turns to section 2, where it is defined as follows:*
>
> > *"'criminal conduct' means conduct occurring on or after the 30th May, 2007, being conduct which –*
> >
> > > *(a) constitutes an offence in Jamaica;*
> > >
> > > *(b) occurs outside of Jamaica and would constitute such an offence if the conduct occurred in Jamaica;"*
>
> *8. There can be no doubt that this means that before a substantive offence of money laundering can be committed, there must have been an antecedent (or "predicate") offence committed by someone, which generated the criminal property concerned. The antecedent offence might of course be one of several different types. Fraud, drug trafficking, smuggling and the management of prostitution are no doubt common kinds of offence which generate money benefits which fall within the definition of criminal property, but there are also many others. So, for a prosecution for a substantive money laundering offence to succeed, the Crown must prove that such an antecedent offence was committed by*

> *somebody. The House of Lords so held in relation to similar earlier English legislation in R v Montila [2004] UKHL 50; [2004] 1 WLR 3141.*
>
> *9. It does not, however, follow that for a defendant to be convicted of a substantive offence of money laundering, there must have been a conviction for the antecedent offence. What has to be proved is that an antecedent offence was committed, not that a conviction followed. It may quite often happen that there has been no conviction, for example if the antecedent offender has died before he could be prosecuted, or has escaped to a place from which he cannot be extradited. A conviction is only one way of proving that an offence has been committed.*

[54] The examination reproduced above 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. That is the enquiry which will have to be conducted in order to grant the declaration sought by the Claimant in the civil claim. That is also part of the enquiry which the criminal court will have to undertake and I am of the view that the criminal proceedings in the Parish Court will provide an ideal forum for the examination of the factual and legal issues, and the interplay between both, necessary to determine whether the property concerned is criminal property.

[55] The risk of prejudice to the criminal proceedings arises because, in the words of Viscount Dilhorne in the case of **imperial Tobacco** (supra) - "*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*". In the case herein, one can foresee the difficulties which will be posed to the Judge in the Parish Court criminal proceedings faced with a declaration by the Supreme Court that the relevant properties are not "criminal property" for the purposes of Sections 92 and 93 of the Proceeds of Crime Act, 2007. However, ultimately, and more importantly is a risk of inconsistent verdicts.

[56] The risk of inconsistent verdicts is therefore implicit based on the nature of the Claimant's claim and her affidavit evidence when viewed in the context of the criminal proceedings.

[57] I accept that as a matter of law, the onus is on the ARA to demonstrate to this Court how the criminal proceedings might be prejudiced if the stay is not granted. I also wholly accept, that in most cases this burden can only be discharged by an applicant for a stay, such as the ARA in this case, filing evidence by affidavit. However, I find that the potential prejudice to the criminal proceedings in the case herein is established without any such evidence.

[58] I have noted the statement of the Court in **Guyah** at paragraph 37 as follows:

> *The position of the respondents in the criminal proceedings was thus a relevant factor to be considered in weighing the competing interests in order to determine wherein justice lies. From the record of appeal, it is seen that there was no evidence placed before the learned judge as to the potential prejudice to the Crown's case in the criminal proceedings. So, there was no evidence before the learned judge from the first and second respondents on which their position, relative to that of the appellant, in either the civil proceedings or in the criminal proceedings, could have been properly and objectively evaluated.*

I have also observed that the evidence filed by the ARA concentrated on outlining the chronology of the criminal proceedings with an emphasis on explaining the reasons for the delay in the commencement of the trial and indicating the date now fixed which is the 23rd January 2018. There is no evidence filed, positively addressing the position of the ARA in the criminal proceedings relative to that of the Claimant. Notwithstanding that omission, I am of the view that that is not fatal to the Application. This Court is still capable of properly and objectively evaluating the respective positions of the parties and weighing their competing interests in order to determine wherein justice lies.

[59] To my mind, an important distinction between the ARA and the respondents in **Guyah** is that the ARA is a body constituted in order to give effect to the aims and objectives of the Proceeds of Crime Act, 2007. Its interest in prosecutions under the Act and the outcomes of those proceedings exists as a matter of legislation, having regard to its duties and functions as established under that Act. Notably, the Proceeds of Crime Act provides that the Court shall, upon the application of the ARA or the DPP make forfeiture or pecuniary penalty orders

pursuant to section 6 of the Act. The conviction of a defendant for an offence under section 92 or 93 of the Act might be a material consideration (along with other matters) in the Court deciding whether to grant a forfeiture or pecuniary penalty order. As a consequence the ARA is interested in the successful prosecution of the criminal proceedings in the Parish Court and will be affected by any prejudice to those proceedings arising from the stay not being granted.

Conclusion

[60] I have reviewed all the authorities to which reference has hereinbefore been made and the excellent guidance given in **Guyah,** which is binding on this Court. I have considered in particular paragraph [56] of **Guyah** which I have previously quoted. I note specifically the Court's observation that "*the authorities have illustrated that the hurdle that is to be surmounted or the threshold to be reached by a party asking a court to stay civil proceedings until the completion of concurrent criminal proceedings in a high one*". I have also noted the Court's conclusion that "*The mere fact that proceedings are ongoing in another court of competent jurisdiction that could lead to inconsistent decisions, as the learned judge had concluded, would not be enough in determining what justice requires.*" However I do not understand that statement to be a conclusive finding that the risk of inconsistent judgments can never weigh so heavily as to tip the scales in favour of the granting of a stay. For the reasons explained by the Court it did not having regard to the circumstances of that case.

[61] The Court in **Guyah** was at pains to emphasize that "*There must be a balancing exercise of the competing interests of the parties with the ultimate aim being to do justice between them*". In conducting this balancing exercise, I have found, for the reasons previously given herein, that there is no real risk of prejudice to the Claimant if the stay of the civil claim is granted. In contrast, having regard to the nature of the civil claim it being for a declaration in respect of an issue which falls for determination in the criminal trial, I have determined that there is a risk of prejudice to the criminal trial and there is a risk of inconsistent judgments.

[62] In all the circumstances of this case which I have reviewed above, including the fact that, unlike the situation which arose in **Guyah**, in the relevant criminal proceedings there have been previous trial dates fixed and the trial is presently fixed for 4 days commencing on 23rd January 2018, I am firmly of the view that it is just and convenient to stay the civil claim until the determination of criminal proceedings.

[63] I have also considered whether there are any conditions which this court might attach to reduce any possible prejudice which might be faced by the Claimant for any reason for example if for some unexpected reason the criminal proceedings do not commence within a reasonable time. I am of the view that allowing liberty to apply, which provision the Court expects will not be abused, should to provide an added level of protection against any injustice.

Disposal

[64] For the reasons outlined herein the court makes the following orders:

1. Claim No. CD00313 is stayed pending the determination of the criminal proceedings in the St Ann Parish Court in which the Claimant is charged for offences related to the Proceeds of Crime Act, 2017.

2. Liberty to apply

3. Leave to appeal granted

4. Costs of the application for a stay to be costs in the claim.