[2018] JMCA App 17

JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO 144/2015

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MISS JUSTICE P WILLIAMS (AG)

BETWEEN	**THE ATTORNEY GENERAL OF JAMAICA**	**APPLICANT**
AND	**CLAUDETTE CLARKE (as Administratrix of the Estate of Keith Clarke, deceased, intestate, and in her own right)**	**1ST RESPONDENT**
AND	**BRITTANI CLARKE**	**2ND RESPONDENT**

Mrs Nicole Foster-Pusey QC, Miss Carla Thomas and Miss Deidre' Pinnock instructed by the Director of State Proceedings for the applicant

Leonard Green and Miss Sylvan Edwards instructed by Chen, Green & Co for the respondents

27, 28 October, 4, 20 November 2015 and 13 July 2018

PHILLIPS JA

[1] I have read in draft the reasons for judgment of my learned sister, McDonald-Bishop JA, which I found entirely reflect my own reasons for concurring in the decision of the court. I endorse them and there is nothing that I could usefully add.

MCDONALD-BISHOP JA

Introduction

[2] These proceedings concern an application for permission to appeal brought by the Attorney General of Jamaica ("the applicant") from the order of K Anderson J, made in the Supreme Court on 17 July 2015. By that order, the learned judge refused the applicant's application for an order for a stay of civil proceedings brought by the respondents, pending the determination of criminal proceedings in the Home Circuit Court. The criminal proceedings in the Home Circuit Court have emanated from a charge of murder, instituted against three members of the Jamaica Defence Force ("the JDF") for the death of Mr Keith Clarke ("Mr Clarke"), which occurred on or around 27 May 2010. The learned judge also denied the applicant's application for permission to appeal the order refusing the stay.

[3] During the course of the hearing of the application before us, counsel appearing for the parties gave their consent for the hearing of the application for permission to appeal to be treated as the hearing of the appeal.

[4] On 20 November 2015, following a consideration of the matter, including the helpful submissions of counsel, we made these orders:

> "1. The applicant is granted permission to appeal the order of K Anderson J, made on 17 July 2015.
>
> 2. The application for permission to appeal is treated as the hearing of the appeal and the appeal is allowed.

3. The order of K Anderson J made on 17 July 2015 is set aside.

4. The trial of claim No. 2013 HCV 0315 **Claudette Clarke and Brittani Clarke v The Attorney General** is stayed until the determination of the trial of the case **R v Odel Buckley, Greg Tingling and Arnold Henry for Murder** or until further orders.

5. The case management conference orders made in the civil proceedings by Stamp J (Ag) on 15 January 2015 and in respect of which time was extended for compliance by G Fraser J on 12 October 2015 are stayed until further orders.

6. In the event the criminal trial, having been scheduled for commencement, shall fail to commence after two (2) consecutive adjournments, at the instance of the defence or upon their application (for reasons not attributable to the prosecution and or the respondents herein or their attorneys-at-law) this order for stay of the civil proceedings shall be lifted UNLESS a judge of the Supreme Court (other than K Anderson J) shall otherwise direct after hearing the parties on the issue and having regard to all the circumstances, including the reason(s) for the adjournment.

7. In the event the criminal trial, having been scheduled for commencement, shall fail to commence after two consecutive adjournments due to the fault of the prosecution or on their application (not being attributable to the conduct of the respondents herein or their attorneys-at-law), the stay shall be lifted UNLESS a judge of the Supreme Court (other than K Anderson J) shall otherwise direct after hearing the parties and having regard to all the circumstances, including the reason(s) for the adjournment.

8. In any event, if the criminal trial should fail to commence within twelve (12) months of the date hereof (provided it is due to no fault of the respondents or their attorneys-at-law), the stay shall be lifted and the civil proceedings shall proceed without the need for further orders.

9. Upon the commencement of the criminal trial or the lifting of the stay, the Registrar of the Supreme Court shall fix a date for a further case management conference in the civil proceedings.

10. The parties are at liberty to apply to a judge of the Supreme Court other than K Anderson J in order to give effect to this order.

11. A copy of this order is to be served on the Director of Public Prosecutions.

12. No order as to costs."

[5] We promised then to furnish the detailed reasons for our decision in writing at a later date. This is in fulfillment of that promise. The delay in furnishing the written reasons is regretted and, on behalf of the court, I extend profound apologies.

The background

[6] Mr Clarke was the husband and father of the first and second respondents, respectively. On or around 27 May 2010, Mr Clarke lived together with the respondents at premises situated at Red Hills in the parish of Saint Andrew.

[7] The events leading up to the death of Mr Clarke had their origins in the joint effort of the police/military team consisting of the Jamaica Constabulary Force and the JDF ("the security forces"), made during May 2010 to apprehend Christopher "Dudus" Coke, who was the subject of an extradition request by the United States of America. The events that resulted from this joint police/military operation are now widely known as the "Tivoli incursion".

[8] The undisputed facts surrounding the death of Mr Clarke are as follows. During May 2010, the security forces were involved in operations in their effort to apprehend Christopher Coke who was by then a fugitive. These operations started in Tivoli

Gardens and the general environs of West Kingston and later spread to other parts of the island. On 27 May 2010, the security forces went to the Clarkes' residence. The members of the security forces reported that they attended on the Clarkes' residence because of an intelligence report they received that Christopher Coke was at these premises along with heavily armed men. During this operation, Mr Clarke was fatally shot by members of the security forces.

[9] There is much dispute between the respondents and the members of the security forces as to the circumstances that led to the shooting of Mr Clarke. The accounts are diametrically opposed. The members of the security forces contend that Mr Clarke was shot and killed when he pointed a firearm in the direction of members of the security team who had entered the house and were conducting a "clearing exercise" after they were shot at by persons inside the house during the course of the operation. Their justification for the shooting is that they were acting in lawful self-defence.

[10] The respondents' version, on the other hand, is that Mr Clarke was shot multiple times to the rear of his body, as he descended from a cupboard, with his back towards the soldiers who broke into their home in search of wanted men. It is their contention that he was shot by three of the soldiers, Lance Corporal Greg Tingling, Lance Corporal Odel Buckley and Private Arnold Henry ("the accused soldiers"), who did so "unlawfully, maliciously and without reasonable or probable cause". The respondents say that at no time did they or Mr Clarke attack the members of the security forces and at no time were they and Mr Clarke hosting Christopher Coke and heavily armed men on the

morning of 27 May 2010. The members of the security forces, they averred, had no justifiable reason for entering their premises and for shooting Mr Clarke.

The proceedings emanating from the Tivoli incursion

[11] At the time of considering this matter, there were three separate and distinct concurrent or parallel proceedings treating with the activities of the members of the security forces in apprehending Christopher Coke in May 2010. All these proceedings, directly or indirectly, were concerned with the circumstances leading up to the death and or injury of persons during the Tivoli Incursion, including Mr Clarke.

(a) The criminal proceedings

[12] In July 2012, the Director of Public Prosecutions ("the DPP") ruled that the three accused soldiers should be charged with the murder of Mr Clarke. The proceedings against them were instituted by the preferment of a voluntary bill of indictment in the Home Circuit Court. At the time of the proceedings in this court, the criminal proceedings were still pending against the accused soldiers. The case had been adjourned to be mentioned on 18 February 2016.

(b) The civil proceedings

[13] On 24 May 2013, following the initiation of the criminal proceedings against the accused soldiers by the DPP, the respondents instituted civil proceedings in the Supreme Court against the applicant, seeking to recover damages under the Fatal Accidents Act and the Law Reform (Miscellaneous Provisions) Act. They are also seeking to recover damages for "negligence, and/or in the alternative, trespass to the person,

and/or in the alternative, misfeasance in public office, and/or in the alternative breach of the deceased's right to life, right to the protection of private property and the right not to be treated in a degrading and inhumane manner in contravention of the Jamaican Constitution".

[14] The applicant is sued by virtue of the Crown Proceedings Act, and has admitted that the accused soldiers were acting as servants or agents of the Crown at the material time. The applicant intends to rely on the evidence of the accused soldiers in order to properly and successfully defend the claim.

(c) The Commission of Enquiry

[15] The occurrences during the course of the Tivoli incursion also became the subject of a hearing by a Commission of Enquiry, named the West Kingston Commission of Enquiry ("the Commission"), which was appointed by the Governor-General in February 2014. The mandate of the Commission was to conduct an enquiry into the security forces' operations in Western Kingston and related areas in connection with the apprehension of Christopher Coke ("The Enquiry"). As part of its terms of reference, the Commission was to conduct an enquiry into the circumstances under which civilians and members of the security forces were shot and killed or injured during May 2010 in connection with the efforts of the security forces to arrest Christopher Coke. The Commission was also entrusted with the task of ascertaining the circumstances in which, and by whom, private property was damaged or destroyed during or around the period of the State of Emergency, declared in May 2010.

The application for stay of proceedings

[16] On 26 June 2015, the applicant filed an application in the Supreme Court for a stay of the civil proceedings in which these orders were sought:

> "1. There shall be a stay of the underlying civil proceedings brought by the Estate of Keith Clarke, deceased, intestate and his beneficiaries until after the conclusion of the criminal trial of R v Greg Tingling, Odel Buckley and Arnold Henry, who are on charges of murder of the said Keith Clarke, being prosecuted by the Office of the Director of Public Prosecutions and by the Estate of Keith Clarke, deceased, who holds a fiat;
>
> 2. The time for compliance with the Case Management Orders made on the 15 day of January 2015 by the Honourable Mr Justice Stamp is extended until the conclusion and conclusion [sic] of the criminal proceedings;
>
> 3. Alternatively, the proceedings are stayed until the close of the prosecution's case in R v Greg Tingling, Odel Buckley and Arnold Henry in the Home Circuit Court;
>
> 4. Costs to be costs in the claim;
>
> 5. Such further or other relief as this Honourable Court might deem just."

[17] The application was made on several grounds, which, in basic outline, were as follows:

(i) Rule 26.1(2)(e) of the Civil Procedure Rules, 2002 (CPR);

(ii) the overriding objective;

(iii) the commencement in the Home Circuit Court of the criminal proceedings which arise from the same set of facts and which

involve the three accused soldiers who will be needed to give evidence on behalf of the applicant in the civil proceedings;

(iv) the involvement of the respondents' attorneys in both the civil and criminal proceedings;

(v) serious risk of prejudice to the accused soldiers' right to silence and their defence in the criminal proceedings, which is likely to result from the continuance of the civil proceedings, in particular, the completion of the disclosure process;

(vi) serious risk of prejudice to the accused soldiers' right to a fair trial by jury which would result from the publicity that the civil proceedings will attract;

(vii) no prejudice to the respondents if the proceedings are stayed or alternatively, any prejudice caused will be adequately compensated for by an award of interest; and

(viii) the interests of justice.

[18] The application was supported by the affidavit of Miss Deidre' Pinnock. Miss Pinnock deponed to the incident that led to the institution of the criminal and civil proceedings. She also deponed to the assertions of the accused soldiers that they acted in lawful self-defence during the course of the operation. She highlighted the following as the bases for the application:

a. The learned DPP had formed the view that in light of the "high public attention" that the matter had commanded, and in the interests of justice for all parties, the matter was best served by circumventing the preliminary enquiry process in the Parish Court and so a voluntary bill of indictment was preferred in the Home Circuit Court.

b. Counsel for the estate of Mr Clarke had been granted a fiat to prosecute the criminal proceedings, along with the office of the DPP.

c. The evidence of the accused soldiers is vital to the just disposal of the case. However, the members of the operations teams have reservations about participating in the civil proceedings before the criminal trial as their defence will be prejudiced.

d. Since May 2010, the incident has received extensive media coverage both locally and internationally. The incident has commanded "high public attention with numerous uninformed theories as to the chain of events in May, 2010". The accused soldiers' right to a fair trial will be compromised as there is a real likelihood that potential

jurors would be exposed to material that may be outside of the evidence presented to the court.

e. Having regard to the difference in the nature and duty of disclosure in civil and criminal matters, if the applicant were to comply with the duty of disclosure before the criminal proceedings are concluded, and if the soldiers were to give witness statements and/evidence in this matter in December 2015, it would seriously prejudice their defence and their right to a fair trial.

The respondents' case opposing the application for stay of proceedings

[19] The respondents opposed the application. They relied on the evidence of the 1st respondent who refuted the claim of the applicant that Mr Clarke was killed when the security forces came under attack at their premises on the night in question. She averred that on the night in question, the security forces had visited the wrong address when they came to the premises. She further deponed, among other things, that the stay of the civil proceedings, pending the "uncertain event of a criminal trial", would be grossly unfair to her and her family.

[20] The 1st respondent further contended that on every occasion that she attended court in the criminal proceedings, the accused soldiers' legal representatives sought "adjournments after adjournments, which [were] invariably granted for one reason or the other". The accused soldiers' attorneys-at-law, she said, are doing everything to

delay the fair and just disposal of the civil case. She also contended that the respondents have no intention to do anything to prejudice the criminal trial but that after five years, it cannot be fair or just for their claim for compensation to await the outcome of proceedings over which they have no control. According to her, the applicant has provided no evidence to show when it is likely that the criminal trial will commence. She stated that there is nothing that can or will be done in the civil proceedings that could adversely influence the fair and just disposal of the criminal trial, given that the accused soldiers have already had a defence filed on their behalf, which states their position as the persons who entered Mr Clarke's bedroom on the night that he was killed.

The reasons for the judge's decision

[21] This court was not provided with written reasons for the learned judge's decision. However, counsel for both parties agreed that the primary reason given by the learned judge for refusing the stay of proceedings was that what had been shown by the applicant was a notional risk and not a real risk of prejudice to the accused soldiers in the criminal proceedings.

[22] The affidavit evidence of the parties also indicated that the learned judge, in coming to that conclusion, had opined, *inter alia*, that:

(i) the accused soldiers' right to silence referred to by the applicant was not an absolute right;

(ii) self-defence, being relied on by the applicant, was already pleaded and as such, sufficient facts were already before the court establishing the defence; and

(iii) the media exposure in the matter could not be avoided and the court has mechanisms to safeguard against pre-trial publicity, such as, the warning given to the jury before the commencement of a criminal trial that they should disregard anything they may have heard before coming to court and that they should only rely on the evidence in the case.

[23] The learned judge refused the applicant's oral application for permission to appeal on the ground that the appeal had no real prospect of success.

The application for permission to appeal

[24] The applicant renewed the application for permission to appeal before this court. The applicant contended that the permission should be granted on the basis that the proposed grounds of appeal had a real chance of succeeding. The proposed grounds of appeal were detailed as follows:

> "(a) The learned judge erred in determining that there was only a notional and not a real risk of prejudice, which could lead to an injustice and serious miscarriage of justice in the criminal proceedings in relation to witnesses of the applicant who are awaiting trial on murder charges.
>
> (b) The learned judge erred in law in his treatment of the issue of the effect of pre-trial publicity on the right of the applicant's witnesses to a fair trial in the criminal

proceedings.

(c) The learned judge erred in his treatment of the difference in the burden and standard of proof in respect of self-defence in criminal as opposed to civil proceedings and the impact of this difference on the right of the applicant's witnesses to remain silent, if the civil proceedings proceed before the determination of the criminal proceedings."

The evidence in support of the application

[25] The applicant's application before this court for permission to appeal was supported by the affidavits of Miss Deidre' Pinnock, which was filed in the Supreme Court in support of the application for stay (which is set out above in summary at paragraph [18]) and of Captain Michael Deans, attorney-at-law for the JDF. Captain Deans reiterated the facts and beliefs set out by Miss Pinnock in her affidavit and further deponed to matters, which, more or less, encompassed the grounds of appeal.

[26] Captain Deans also noted the following:

a. The proposed appeal had a real chance of success as the gravamen of the civil proceedings involves great national exposure that will impact on the fairness of the criminal proceedings and the liberty of the accused soldiers who were carrying out lawful orders, and are now at a real risk of prejudicing their defence in the criminal case in which they are charged for murder.

b. The accused soldiers have advised that they are extremely fearful about participating in the civil proceedings before

their criminal trial is determined because their defence will be severely prejudiced as Mr Green, the prosecuting counsel, would have the benefit of viewing the details of their evidence in the civil claim.

c. The learned judge had not applied his mind sufficiently to the law and to the evidence before him and as such had made a decision likely to cause a grave injustice to the accused soldiers and seriously prejudice their right to a fair criminal trial.

d. An injustice is likely to be caused to the applicant in the event that the accused soldiers refuse to give evidence in the civil claim. This would leave the applicant unable to properly defend the claim.

[27] The learned Solicitor General submitted, on behalf of the applicant, that although the authorities have established that the grant of a stay of civil proceedings is a matter of discretion for the court, this is a case in which this court ought to disturb the learned judge's discretion. This is so, she said, because the learned judge misunderstood the law and the evidence and that, even if he did understand the law, he did not apply it properly to the facts before him. In her effort to demonstrate that the learned judge erred in law in refusing the stay, learned Queen's Counsel pointed to several matters arising on the facts of the case.

[28] In advancing the application, the applicant relied on such cases as **Donovan Foote v Capital and Credit Merchant Bank Ltd** [2012] JMCA App 14; **Omar Guyah v Commissioner of Customs and others** [2015] JMCA Civ 16 ("**Omar Guyah**"); **Ashley v Chief Constable of Sussex Police** [2006] EWCA Civ 1085, [2007] 1 WLR 398; **Joan Allen & Another v Rowan Mullings** [2013] JMCA App 22; and **Jefferson Ltd v Bhetcha** [1979] 2 All ER 1108.

The respondents' response

[29] The application for permission to appeal was strongly opposed by the respondents, who contended that it should be denied. They relied on the affidavits of the 1st respondent, which was filed in opposition to the application for stay (terms of which have already been outlined) and that of Miss Sylvan Edwards, one of their counsel in these proceedings. Miss Edwards in her evidence provided a more detailed account of the learned judge's reasoning in refusing the applications for permission to appeal, which have all been noted. In essence, she maintained that the learned judge was correct to find that the appeal had no real chance of success and that a stay of proceedings would "create great injustice" to the respondents. She asserted her reasons for saying so, which included the fact that the criminal proceedings were adjourned to await the determination of the Commission of Enquiry and that if the application for stay was granted, the matter would not be reached before sometime in 2017.

[30] The respondents, for their part, contended through Mr Green, that the applicant has not produced any proof that there is any real chance of success on the appeal. Mr

Green submitted, inter alia, that the learned judge had given careful thought to what were the legal considerations that were to be applied and that this is evident by his clear statement of fact that there was only a notional and not a real risk of prejudice to the accused soldiers. This finding, counsel submitted, was one of fact and as such ought not to be disturbed by this court, unless it could be shown that the learned judge was plainly wrong. Learned counsel further contended, by drawing attention to the law and the specific issues raised for determination before the learned judge, that there was nothing to suggest that the learned judge had exercised his discretion in a manner that would justify the interference of this court with his decision. He submitted, on this basis, that this court should heed the warning given in **Hadmor Productions Ltd and others v Hamilton and others** [1982] 1 All ER 1042 ("**Hadmor**") and **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 1 ("**AG v John Mackay**"), and not interfere with the learned judge's decision.

[31] In advancing their position, the respondents relied on such authorities as **Antaios Compania Naviera SA v Salen Rederierna AB** [1983] EWCA Civ J0708-1; **VTFL v Clough** [2001] EWCA Civ 1509 ("**V v C**"); **Donald Panton and others v Financial Institutions Services Limited ("Panton v FIS")** [2003] UKPC 86 as well as **Omar Guyah.**

The applicable law

[32] There is no dispute that the applicant, having been refused permission to appeal by the learned judge, was entitled to apply to this court for permission. See section

11(1)(f) of the Judicature (Appellate Jurisdiction) Act and rule 1.8(2) of the Court of Appeal Rules ("CAR").

[33] Rule 1.8(7) of the CAR makes provision for the basis upon which permission to appeal may be granted by this court. It reads:

> "The general rule is that permission to appeal in civil cases will only be given if the court or the court below considers that an appeal will have a real chance of success."

[34] The determinative question of whether the appeal had a real chance of success was evaluated within the framework of the law applicable to the stay of proceedings, where there are concurrent criminal and civil proceedings arising from the same events. This legal context in which the question fell to be decided is well settled on statutory as well as common law authorities.

[35] The power of a judge of the Supreme Court to stay proceedings is derived from the inherent jurisdiction of the court as well as section 48(e) of the Judicature (Supreme Court) Act ("the Act"). The section states that the court shall make such order for stay of proceedings as it thinks fit and that the court, upon such an application for a stay, "shall thereupon make such order as is just".

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

[37] The legal principles applicable to the question of whether a stay of proceedings should be granted, when there are concurrent civil and criminal proceedings, have substantially evolved from case law, and it is now settled beyond debate, that there is no automatic right to stay civil proceedings where there are concurrent criminal proceedings arising out of the same events. It is a matter of discretion. The Privy Council made that abundantly clear in **Panton v FIS** in this statement at paragraph [7]:

> "…the issue of a stay to prevent civil proceedings when criminal prosecutions arising out of the same events are also pending is a matter of discretion to be exercised by reference to the competing considerations. It is not a matter of rule. **Smith v Selwyn** has been discarded."

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

judge), is whether there is a real risk or danger of causing injustice in the criminal proceedings.

[39] See **Jefferson Ltd v Bhetcha**; **Panton v FIS; Bank of Jamaica v Dextra Bank and Trust Co Ltd** (1994) 31 JLR 361; **Omar Guyah** and **Mote v Secretary of State for Work and Pensions and another** [2007] EWCA Civ 1324.

[40] In considering the merits of the application against the background of the relevant law and the submissions of counsel on behalf of the parties, the court was also guided by the oft-cited principles enunciated by Lord Diplock in **Hadmor** and adopted by this court in several cases, regarding the function of an appellate court in treating with the exercise of discretion of a judge at first instance. See **AG v John Mackay** and **Joan Allen & Another v Rowan Mullings**.

Discussion

[41] The critical question that was before this court for determination is whether the learned judge erred in refusing the application to stay the proceedings on the ground that there was only a notional risk of prejudice, when all relevant factors in the circumstances of the case are considered.

[42] In evaluating this question, it was recognised that ground of appeal (a) is an all encompassing one that encapsulates the other grounds of appeal. So, for convenience, grounds (a) and (c) were considered together and ground (b), treating with pre-trial publicity, albeit related to ground (a), was examined separately (for reasons that will become readily apparent during the course of the discussion).

Ground (a) **Did the learned judge err in concluding that there was as only a notional risk to the accused soldiers in the criminal proceedings?**

Ground (c) **Did the learned judge err in his treatment of the difference in the burden and standard of proof in respect of self-defence in criminal as opposed to civil proceedings and the impact of this difference on the right of the applicant's witnesses to remain silent?**

a. *Risk of prejudice: "real" risk vs "notional" risk*

[43] The learned judge concluded that there would have been no real risk of injustice to the accused soldiers, if there were to be a continuation of the civil proceedings, prior to the commencement of the criminal trial. As the learned Solicitor General correctly pointed out, even though the authorities have stated that what must be shown is a real risk of prejudice and not a notional one, there is no decision in which the concept of a real risk of prejudice has been specifically defined, and particularly so, within the context of an application for a stay of proceedings. Also, the word "notional", although used in the authorities, is, seemingly, never defined within this legal context.

[44] The word "notional", according to the online Oxford Dictionary, means "existing as or based on a suggestion, estimate, or theory, or not existing in reality". It does appear, therefore, that "notional" may not be far removed from the word "fanciful", used in contradistinction to "real", in the tests applicable to other proceedings such as applications for summary judgment and the setting aside of default judgments. It could be safely concluded, therefore, that real risk of prejudice means a risk of prejudice that exists in reality, that is to say, a risk that is not fanciful. In determining whether there is

a real risk of prejudice in the criminal proceedings or the civil proceedings, if the stay is not granted, the authorities are clear that the judge, in determining the question, must conduct a balancing exercise of all competing interests and considerations in order to do justice between the parties.

[45] There is nothing to indicate from the paucity of the reasons for the learned judge's decision that have been furnished by counsel, that he embarked on a balancing exercise of all the competing interests and considerations involved in this case, in order to determine what was necessary to achieve the most just outcome. As a result, this court was left to examine, at large, all the circumstances of the case in order to determine whether the learned judge was correct in his decision.

b. *Parties not the same in civil and criminal proceedings*

[46] In considering whether the learned judge had exercised his discretion correctly, an apt starting point was to note that the parties are not the same in the civil and criminal proceedings. The applicant is not a party to the criminal proceedings, and, similarly, the accused soldiers, with whom the applicant is concerned in these proceedings, are not named as defendants in the civil proceedings. As it stands, the defendant in the civil proceedings is not the defendant in the criminal proceedings, which is usually the case in matters giving rise to the issue of risk of prejudice emanating from the concurrent proceedings arising from the same events. There is, however, a substantial connection between the applicant and the accused soldiers that legitimately gives rise to their common interests in both proceedings, and which would allow the applicant a proper basis on which to seek a stay of the civil proceedings.

[47] In **Bank of Jamaica v Dextra Bank and Trust Co Ltd**, at page 368 Carey JA opined:

> "In my judgment, there is no rule which ordains that any person not a party to or having a casual connection with the defendants in a criminal case can seek a stay on the ground that the civil action in which he is, of course, a party should be stayed because there are criminal proceedings arising from facts which overlap the civil case."

[48] Similarly, the respondents are the claimants in the civil proceedings and are connected to the prosecution of the criminal proceedings, through a fiat obtained by their counsel from the DPP to act on their behalf.

c. *The unusual circumstances of the case*

[49] The circumstances of this case are unquestionably unusual and exceptional. The fact that the accused soldiers, themselves, are not personally sued in the civil proceedings must be taken into account. In fact, they stand in a conflicted position in relation to the Crown in the civil and criminal proceedings. In the civil proceedings, they are witnesses for the Crown, which has pleaded a case relying on self-defence; and, in the criminal proceedings, they are accused by the Crown, which stands to refute any defence that may be raised by them, including self-defence. The Crown, itself, is placed in a conflicted position in the simultaneous proceedings, with the accused soldiers caught in between. The accused soldiers are, therefore, in an unenviable and awkward position as agents and servants of the Crown.

[50] It is noted too that the offence with which the defendants in the criminal proceedings are charged is murder. There is no precedent brought to our attention in which the question of a stay of civil proceedings, where there are concurrent criminal proceedings that had arisen in the context of a murder case, and in circumstances such as these, involving the exercise of state power by agents of the State in special circumstances, such as during a State of Emergency.

[51] Furthermore, there is no case that has been brought to the attention of the court, in which there had been parallel criminal and civil proceedings, and a simultaneous hearing being conducted by a related Commission of Enquiry, in the same or substantially the same circumstances or events, which have given rise to the civil and criminal proceedings. There is nothing to demonstrate or reflect a serious consideration by the learned judge of the position of the accused soldiers, as witnesses in the civil proceedings, as well as defendants in the criminal proceedings, within the context of all the prevailing circumstances of the case.

[52] There is thus no perfect precedent, or indeed any precedent at all, that was available to provide guidance to the court in treating with the peculiar circumstances of this case. The case is one that had to be decided on its own special facts. As such, it would have required careful consideration by the learned judge in determining what was just in all the circumstances, which was the ultimate question to be resolved on the application.

d. *The risk of prejudice from disclosure and giving evidence in the civil proceedings*

[53] It is, indeed correct, as contended by the applicant, that the accused soldiers are central to the defence's case in the civil proceedings. The pleaded defence is that the accused soldiers were under attack and that they acted in lawful self-defence. The state of mind of those witnesses will be in issue in the proceedings, albeit that they are not named as defendants. The applicant will therefore require their evidence in order to mount a successful defence at the trial.

[54] The respondents contended that the pleadings have already disclosed that the applicant will be relying on self-defence in the civil proceedings, and so the facts on which the applicant is relying to establish that defence would have already been pleaded. In support of this argument, they pointed to the fact that the learned judge had found that the defence is already on the record and so the potential case is known. The contention of the respondents, in the light of all this, is that the applicant has not established how the disclosure of an exculpatory defence in the civil proceedings (which is already disclosed by way of pleadings) could seriously prejudice the accused soldiers so as to lead to a miscarriage of justice in the criminal proceedings.

[55] Self-defence is, indeed, an exculpatory defence and it seems that the basic facts constituting it would have already been disclosed by way of pleadings. However, the disclosure of relevant information and documents is required of the applicant in the civil proceedings, which would relate to not only what had transpired at the time Mr Clarke

was shot and killed but also in respect of the circumstances leading up to and surrounding the event in which the shooting occurred.

[56] It is crucial to note within this context that the accused soldiers do not bear directly the duty of disclosure and so they will not be in a position, vis-à-vis the applicant who is the defendant, to ultimately determine what is to be disclosed or withheld from disclosure. Ultimately, the proverbial "buck" stops with the applicant in the civil proceedings and not with the accused soldiers, in so far as the disclosure of information is concerned. The position of the accused soldiers as witnesses, rather than defendants, therefore places them in an invidious position which does not augur well for them, either in the civil or criminal proceedings. Their conflicted position as witnesses for the Crown in the civil proceedings and as accused persons in the criminal proceedings, coupled with their lack of control over disclosure in the civil proceedings, makes the inherent prejudice to them plain and obvious and not merely notional. This is, particularly, evident when viewed against the background that they have no duty of disclosure in the criminal proceedings.

[57] The duty of non-disclosure of a defence in criminal proceedings in this jurisdiction is a consideration that renders inapplicable, to an appreciable extent, the English case of **V v C**, relied on by the respondents. In the United Kingdom ("UK"), there is provision in law that an adverse inference may be drawn from failure to disclose a defence in criminal cases at an early stage of the proceedings and also from failure to give evidence at a criminal trial. So, there is a blurring of the line in the UK in relation to disclosure in civil and criminal proceedings, which is not the case in Jamaica.

There is still no legal obligation or implied compulsion on the part of a defendant in a criminal case within this jurisdiction to disclose his defence, whatever that defence may be. Therefore, the courts in this jurisdiction must still have some regard to the implication of the disclosure of a defence in the civil proceedings on the right to silence in the criminal proceedings, bearing in mind the reasons for that right.

[58] While disclosure of certain information may not, of itself, carry a risk of serious prejudice to the applicant, as defendant in the civil proceedings, it may well do so for the accused soldiers who stand charged in the criminal proceedings and who, themselves, have no conduct of the civil proceedings. To conclude, therefore, that there is only a notional risk to them, as distinct from a real risk of prejudice, in the process of disclosure in the civil proceedings, would be an over-simplification of the issues that have arisen for consideration against the background of the unusual circumstances of the case.

[59] In **Jefferson v Bhetcha**, it was stated that one example, where injustice may result from disclosure of the defence in the civil proceedings, is in situations where the disclosure would or might enable prosecution witnesses to prepare a fabrication of evidence; lead to interference with witnesses; or affect the criminal proceedings in some other way. It is noted within this context that the applicant has pointed out, in treating with the concern about pre-trial publicity, that there is already undisputed evidence of the use by the respondents of information obtained from media reports to bolster their contention that the security forces had gone to the wrong address on the night Mr Clarke was fatally injured.

[60] The possibility that information gleaned from the civil proceedings could be utilised by the respondents to strengthen the criminal case or to rebut the accused soldiers' case, is not at all far-fetched in the light of the respondents' use of the newspaper report to advance their case. This, of course, could not stand by itself as a bar to disclosure of information or of the defence in the civil claim, since whenever there are concurrent proceedings, there is the obvious risk of this occurring. The question is whether it is such a risk that would cause unjust prejudice to the accused soldiers in the criminal proceedings.

[61] This question has been considered in the light of other contentions of the applicant in advancing the argument that there is not merely a notional risk of prejudice to the accused soldiers in the criminal proceedings. The first contention was that credibility will be the critical issue in the criminal proceedings and the second concerns the involvement of the respondents' counsel, Mr Green, in both proceedings. It was part of the submissions of the learned Solicitor General that the accused soldiers' account of the incident will be subjected to detailed and intense cross-examination in the civil proceedings by the same counsel who has a fiat to prosecute in the criminal proceedings.

[62] The respondents' response to these arguments was that the applicant was merely seeking to secure a tactical advantage for the accused soldiers in the criminal proceedings, which is not a proper basis for a stay to be granted.

[63] In keeping with the respondent's argument, a relevant principle extracted from the authorities is that a stay will not be granted simply to serve the tactical advantages that the defendant might want to retain in the criminal proceedings (see **Panton v FIS**). A distinguishing feature in this case, however, is that it is not the defendant in the civil proceedings who wishes to retain the advantage in the criminal proceedings but rather the witnesses in the civil proceedings, who are accused persons in the criminal proceedings. So, the application of the principle derived from the authorities, concerning the desire of a defendant to preserve tactical advantages in the criminal proceedings, must be approached with that distinction in mind, whilst also bearing in mind that the ultimate test is what is just.

[64] Having borne the distinction in mind, it was found that the arguments of the applicant, concerning credibility, cross-examination and the role of Mr Green in both proceedings, each standing by itself or collectively with each other, were not sufficient to provide a sufficiently legitimate basis on which to ground a stay. However, it was the consideration of the cumulative effect of these matters, along with the difference in the incidence in the burden of proof in both proceedings, on the accused soldiers' right to silence in the criminal proceedings, that led to a conclusion that there was some discernible merit in the contention of the applicant that the learned trial judge erred in concluding that there was only a notional risk of prejudice to the accused soldiers. The reasons for this conclusion will now be outlined.

The accused soldiers' right to silence in the criminal proceedings and the burden of proof

[65] It is accepted, as pointed out by the Solicitor General, that the burden of proof in relation to self-defence is different in both proceedings. She relied on **Ashley v Chief Constable of Sussex Police** in support of this argument. Once self-defence is pleaded by the applicant in the civil proceedings, the burden of proof, both evidential and legal, would be on the applicant, as the defendant, to prove it. In the criminal proceedings, only an evidential burden would be placed on the accused soldiers to raise it for the consideration of the jury, if they are called upon to answer the charge. The legal burden would be on the prosecution to negative or rebut it. Indeed, as part of the burden on the prosecution to prove murder, it would be incumbent on the prosecution to prove as an ingredient of the charge that the killing was done without lawful justification, that is to say, not done in lawful self-defence.

[66] If the applicant is to successfully discharge the burden to prove self-defence, then the accused soldiers will have to give evidence in the civil proceedings. The fact of the matter is that once the accused soldiers testify in the civil proceedings and are questioned through cross-examination by counsel for the respondent, who is also involved in the criminal proceedings, the content of their defence in the criminal proceedings and material on which it is based, are likely to be fully tested in the civil proceedings. It is not far-fetched to believe that the prosecution could be placed in a stronger position to prepare their case to establish that the killing was not justified in order to establish the offence of murder. In a case where credibility is, indeed, the pivotal issue, this consideration assumes material significance.

[67] In considering all these matters, attention was paid to the fact that the accused soldiers, being competent witnesses for the applicant in the civil proceedings, are also compellable as a matter of law. This means that they could be summoned by the court to attend to give evidence, upon the application of the applicant. The accused soldiers would not be in a position to resist attending court as witnesses in the civil proceedings, if they are summoned to do so, unless at their peril. Once they attend court, they will have no right to silence in the civil proceedings.

[68] They, of course, would enjoy the privilege against self-incrimination. In Halsbury's Laws of England, volume 13, 1975, at paragraph 92, the privilege is set out this way:

> "92. **Privilege against incrimination of self or spouse**. There is a general rule of evidence that a person should not be compelled to say anything which might tend to bring him into the peril and possibility of being convicted as a criminal. Hence in any civil proceeding, any person, whether a party or not, cannot be compelled to produce any document or thing or to answer any question, if to do so would tend to expose that person, or his or her spouse, to proceedings for an offence or for the recovery of a penalty..."

[69] The privilege must be safeguarded by the court, but it is for the court to decide whether the persons appearing as witnesses may claim the privilege. They would not be entitled to it by merely asserting it. So, while the applicant cannot be forced to advance a defence in a civil claim, which would inevitably lead to loss of the claim (see **V v C**), the accused soldiers as witnesses, once summoned to attend court, cannot simply refuse to answer questions put to them either in cross-examination or otherwise. They could only do so at their peril. So, Mr Green's argument that the accused soldiers,

who are witnesses, have the option to remain silent in the civil proceedings is not as straightforward as counsel seemed to believe, given their position as witnesses and not defendants. While a defendant may elect not to call evidence on his behalf, the same election is not opened to a witness summoned to give evidence, unless to do so under pain of punishment.

[70] The authorities are clear that the right to silence in the criminal proceedings, may not, by itself, be a sufficient bar to the continuation of concurrent civil proceedings arising from the same events. It is, nevertheless, an important consideration. None of the authorities cited to this court have shown the specific circumstances in which the right to silence in criminal proceedings would be accorded primacy or given significant weight in considering the stay of civil proceedings. What they have generally said, however, is that what must be shown is a real risk of prejudice or a miscarriage of justice in the criminal proceedings, having regard to the right and the reasons for the right (**Jefferson v Bhetcha**).

[71] In this case, the persons who are entitled to the right to silence in the criminal proceedings are, potentially, compellable witnesses for the Crown in the civil proceedings, and not merely defendants who can decide not to give evidence in their defence, without fear of punishment in so doing. The right to silence must, as the Solicitor General contended, be given weighty consideration in such a case as this. This is, particularly so, in the light of the gravity of the criminal charge and the conflicted position in which the accused soldiers stand, vis-à-vis the Crown in both proceedings.

[72] It cannot be said, when all the circumstances are examined in the round, that there is no implication, of some gravity, on the accused soldiers' right to silence as a result of the difference in the incidence of the burden of proof, which is compounded by the direct involvement of counsel for the respondents in both proceedings. The accused soldiers have a legitimate reason, as potential witnesses in the civil proceedings, to seek to protect their right to silence, to which they are entitled in the criminal proceedings and, particularly, as accused persons on such a serious charge of murder. The more serious the charge and the penalty it attracts, the greater the need to safeguard the rights to which that accused person is entitled by law. The accused soldiers' desire not to be obliged to take part in the civil proceedings, before the criminal proceedings, cannot be viewed as a mere tactical advantage that they would wish to secure in the criminal proceedings. They are caught in a conflicted position in their status as servants or agents of the Crown, over which they have no control and their desire is to protect a right to which they are entitled by law, even if it is not an absolute one.

[73] There was nothing to indicate to the court how the learned judge had treated with the foregoing matters in determining whether there was a likely risk of serious prejudice to the accused soldiers as witnesses in the civil proceedings. Having considered them, I formed the view that the applicant had managed to raise meritorious arguments with a real prospect of success on grounds (a) and (c) that the learned judge erred in his conclusion that there was only a notional risk of prejudice to the accused soldiers. This finding, that the learned judge erred in his conclusion, was

sufficient to grant the permission to appeal and to allow the appeal but, interestingly, there was one other relevant consideration, which had to be thrown in as a consideration in the balancing exercise of all the competing interests and considerations in the case.

Other relevant consideration

[74] Before proceeding to highlight a relevant consideration that had further propelled me to the conclusion that the permission to appeal should be granted, I would pause to reiterate what I said in **Omar Guyah** at paragraphs [44] – [45] that:

> "[44] It should be borne in mind that the power to grant a stay of proceedings is preserved by the Judicature (Supreme Court) Act under the provisions relating to the concurrent administration of law and equity. This is a manifestation of the fusion of law and equity since the Judicature Acts of 1873. In this regard, then, the dictum of Brett LJ in **Thomson v The South Eastern Railway Company** (1882) 9 QBD 320 at 326, in treating with the question of stay of proceedings in a civil cross-action, proves quite instructive and worthy of endorsement. It states:
>
> > 'This seems to me to be a question of very great importance as to the administration of justice under the Judicature Acts. **I think the constant efforts of the Courts since the passing of the Judicature Acts have been, and I think have properly been, to so construe the Judicature Acts, and all the rules and orders under them, as to make as few absolute or unconditional, or what is called hard and fast rules, as can possibly be, and to make the interpretation of the Act and all the rules and orders so large that the Courts can (unless they are prevented by the words of the statutes) exercise a discretion in each particular case so as to do that**

which is most just and expedient between the parties.'

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

[75] There can be no hard and fast or inflexible rule if what is ultimately required is the need to do justice in the exercise of the concurrent jurisdiction of law and equity.

[76] It is for these reasons that some consideration was given to a relevant supervening event, which was brought to the attention of this court during the course of the hearing. This concerned the deferment of the criminal trial to await the completion of the Enquiry by the Commission, the third concurrent proceedings.

[77] In these proceedings, both sides have brought to the attention of the court (in affidavit evidence, and through submissions albeit for different reasons), that the criminal proceedings, which had been set to commence before the civil trial, had been deferred to await the completion of the Enquiry by the Commission. The likelihood of that course being adopted was raised before the learned judge but it seemed that no consideration was brought to bear on it. By the time of this hearing, the criminal matter

was adjourned and was fixed to be mentioned in February 2016, for a new trial date to be fixed upon completion of the Enquiry.

[78] Based on the affidavit of Miss Edwards, the civil trial was scheduled to commence during the period of the continuation of the Enquiry. The application to stay the criminal proceedings, until the completion of the Enquiry, was reportedly made by the DPP on the basis of, among other things, fairness to the accused soldiers in the criminal proceedings.

[79] With the intervention in the progress of the criminal proceedings on the ground of fairness in those proceedings, it seemed unjust, at the time, to allow the civil proceedings to proceed to trial uninterrupted, and to be heard simultaneously with the Enquiry. This is, particularly, in circumstances in which the criminal proceedings predated those proceedings and the legal representatives for the accused soldiers, as well as witnesses for the applicants in the civil proceedings, were reportedly involved in the Enquiry. Given that the civil proceedings involve questions that are substantially identical to those in the criminal proceedings, the same consideration of fairness that had influenced the decision to defer the criminal trial until the completion of the Enquiry, should, in my view, also apply to the civil proceedings in which the accused soldiers are crucial witnesses for the Crown. The course of action would be fair not only to the accused soldiers but also to the appellant in the civil proceedings.

[80] Having considered the fact of the deferment of the criminal trial to await the conclusion of the Enquiry, against the background of the totality of the special

circumstances of the case, I observed that there was nothing to persuade this court that the learned judge had fairly, properly and demonstrably balanced all the competing considerations before refusing the application for the stay.

[81] I found as rather instructive the dictum of the court in **Roache v News Group Ltd and Others** [1998] EMLR 161 at 172, which was adopted by this court in **Royden Riettie v National Commercial Bank Jamaica Limited and Others** [2014] JMCA App 36, at paragraph [43] which states that:

> "Before the [appellate] court can interfere it must be shown that the judge has either erred in principle in his approach, or has left out of account, or taken into account, some feature that he should, or should not, have considered, or that his decision is wholly wrong because the court is forced to the conclusion that he has not balanced the various factors fairly in the scale."

[82] In my view, the learned judge seemed to have failed to take into account some critical features of the case and it has not been demonstrated that he had balanced the various factors fairly in the scale in seeking to determine what was just. I therefore found that it was proper in all the circumstances for this court to interfere with the exercise of his discretion on the basis of grounds (a) and (c), without doing violence to the **Hadmor** principles relied on by the respondents.

Ground (b) The effect of pre-trial publicity on the minds of potential jurors and the accused soldiers to a fair hearing by jury.

[83] The applicant argued in ground (b) that the taking of further steps in the civil matter is likely to attract such publicity that the accused soldiers' right to a fair trial by jury would be prejudiced. Reliance was placed on the dicta of Megaw LJ in **Jefferson**

v Bhetcha (at page 1113) to argue that the extensive pre-trial publicity that is likely to arise from the civil trial would be such as to likely influence potential jurors in the criminal proceedings, which could lead to serious injustice to the accused soldiers. This, however, did not find favour with the court. These are the reasons for rejecting those arguments.

[84] The learned judge reportedly opined that enough safeguards were there in the trial process to protect the accused soldiers from any prejudice that could arise from pre-trial publicity. In saying so, he pointed to some relevant directions in law that are required to be given to the jury by a trial judge in criminal proceedings. Those directions are geared at providing an adequate safeguard for a defendant from the risk of injustice that could arise from pre-trial publicity.

[85] In assessing the merit of this contention of the applicant, that the learned judge erred in his view on this issue, it was considered fitting to revisit the treatment of pre-trial publicity in the well-known case of **Desmond Grant and Others v Director of Public Prosecutions and Another** [1982] AC 190 ("**Grant v DPP**") (colloquially known as the "Green Bay" killing). In that case, the Constitutional Court, this court and the Privy Council addressed the issue of the likely effect on jurors of intense adverse media publicity. The criminal proceedings were concerned with a charge of murder, allegedly committed by members of the JDF, who were the applicants in the proceedings in the Constitutional Court that went on appeal to the Privy Council. It could prove useful to have a reminder of the salient facts of that case in an effort to

demonstrate the reason it is concluded that the complaint of the applicant about pre-trial publicity was a shaky one.

[86] As the headnote indicates, in January 1978, five men died of gunshot wounds at a military range in Jamaica. After an inquest, the jury returned a verdict of murder by persons unknown. There followed a prolonged island-wide media campaign, naming the 10 applicants as the murderers and demanding that they be charged and tried. The DPP preferred a voluntary bill charging them with murder and conspiracy to murder. The press campaign continued even after the applicants were bailed. Also, there was a change of venue for the trial to be conducted and when the applicants appeared in that court, a hostile crowd gathered and shouted abuse at them.

[87] The applicants applied to the Constitutional Court for constitutional redress on the ground, inter alia, that by reason of the strong pre-trial adverse publicity, their constitutional right to a fair hearing was being, and was likely to be, contravened. Both the Constitutional Court and this court opined that the applicants were unable to show that the pre-trial publicity would have been of such an effect that a jury of 12 persons could not be found in Jamaica to give a true verdict according to the evidence. Carberry JA, speaking for this court, noted that to establish that there was a contravention of the right to a fair hearing, the applicants would have had to show that there was likely to be a failure to afford them a fair hearing by an independent and impartial tribunal. Further, he stated that:

> "It is not sufficient for them to establish - as they have done - that there has been adverse publicity which is likely to

> have a prejudicial effect on the minds of potential jurors. They must go further and establish that the prejudice is so widespread and so indelibly impressed on the minds of potential jurors that it is unlikely that a jury unaffected by it can be obtained. We are not satisfied that they have established this, having regard to the common law remedial measures which we indicated are available to a trial court."

[88] The Privy Council accepted the decision of this court. Their Lordships noted the existence of the common law remedial measures identified by this court that would provide adequate safeguards against prejudice due to pre-trial publicity. These measures include change of venue to a parish distant from the area in which the deceased and their friends lived, as well as a postponement of the trial to allow the adverse publicity to fade in potential jurors' minds. Reference was also made to the right of an accused to challenge for cause.

[89] In the light of the dicta of our courts and the Privy Council in **Grant v DPP**, it could not be said that the learned judge was wrong to conclude that there was no real risk of an unfair trial resulting from the likely effect of pre-trial publicity on the minds of potential jurors. Ground (b) was found not to have had a real prospect of success.

Is a stay of the civil proceedings required in the public interest?

[90] Although the overriding question for this court was whether the justice between the parties merited a stay, there is no denying the fact that the circumstances of this case are extraordinary and have given rise to public interest considerations. The accused soldiers were involved in the execution of a public duty for a public purpose, which was the restoration of public peace, public safety and public order, during a State

of Emergency, when they visited the premises of the Clarkes. The allegations are that they proceeded to kill Mr Clarke within the sanctity of his home in cold blood. These allegations are as grave as they are alarming. It is for this reason that the occurrences leading to and surrounding the death of Mr Clarke were, and still remain, of grave national importance. The criminal proceedings ought to be expeditiously and fairly ventilated.

[91] The reasoning of the Privy Council in **Panton v FIS** at paragraph 14 revealed that their Lordships evidently had some regard to what was required in the public interest in deciding whether the civil proceedings should have been stayed. Their Lordships concluded that the mandate of the FIS, a government financial institution that had brought the claim against the appellants to recover money that was allegedly fraudulently taken from the public, as well as the public interest, required a continuation of the civil proceedings, despite the concurrent criminal proceedings which were later initiated against the appellants.

[92] In the light of the deferment of the criminal trial, and the special circumstances of the instant case, I saw it fit to follow the lead of the Privy Council and look at the public interest component of the case. I concluded that it was also in the public interest that the civil proceedings be stayed until the determination of the Enquiry as well as the criminal proceedings. I shared the view, being quite mindful of the question of delay, and the rights of the respondents to have their claim expeditiously and fairly determined. It was my view that the interests of the respondents could be properly

protected by the grant of a limited or conditional stay of the civil proceedings until some other convenient time, not being longer than 12 months.

The conclusion

[93] In concluding, I find it necessary to state that all the submissions of counsel on both sides have been considered and no disrespect is meant by the failure to condescend to particularity in treating with those submissions. It seems sufficient to indicate that the submissions and all the authorities cited by both sides have helpfully guided these deliberations, in particular, the strong arguments advanced on behalf of the respondents, in resisting the appeal.

[94] I found, upon an examination of the totality of the circumstances, that there were some relevant considerations, which were not shown to have been taken into account by the learned judge in the conduct of a balancing exercise of all the competing considerations arising from the concurrent proceedings. At base, he evidently failed to pay particular attention to the unique and conflicted position of the accused soldiers as witnesses for the applicant (the Crown) in the civil proceedings and as defendants on a charge of murder in the criminal proceedings (at the instance of the Crown).

[95] It was also found, additionally, that the change in circumstances arising from the deferment of the criminal trial to await the completion of the Enquiry by the Commission was a supervening factor of material significance that necessitated a stay of the civil proceedings at the material time, having regard to all the special

circumstances of the case. It was also found, as a residual consideration (albeit by no means taken as an overriding or determinative one), that in all the unusual circumstances from which the charge of murder against the accused soldiers arose, the public interest seemed to have favoured a temporary stay of the civil proceedings.

[96] While the court is mindful that the delay in the disposal of the civil proceedings is adverse to the interests of the respondents in having a just and expeditious consideration of the claim, to which they are entitled, it does appear that greater prejudice would be caused to the accused soldiers in both the civil and criminal proceedings, as well as to the applicant in the civil proceedings, if the civil proceedings were allowed to continue unabated alongside the Enquiry. It was my view that appropriate orders could have been made by this court (which were made) to safeguard the interests of the respondents by the lifting of the stay, if there is inordinate delay in the disposal of the criminal proceedings.

[97] It was for all the foregoing reasons that I concurred with my sisters, Phillips JA and P Williams JA (Ag), that the application for permission to appeal should be granted, that the appeal should be allowed and the stay granted on the terms detailed in the order of the court at paragraph [4] above.

P WILLIAMS JA (AG)

[98] I too have read in draft the reasons for judgment of McDonald-Bishop JA. I agree with the reasons she gave for our decision and have nothing to add.