IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

COMMONWEALTH OF DOMINICA

(CIVIL)

DOMHCV2014/0005

DOMHCV2014/0006

KERLVIN JULIEN

1st named Claimant

And

BERTIE JEFFERS

BERTIST JEFFERS

Defendants

AND

ALEXANDRINA VICTORINE

2nd named Claimant

And

BERTIE JEFFERS

BERTIST JEFFERS

Defendants

KERLVIN JULIEN

Added Defendants

(Matter consolidated by order of Court dated 25 November 2014)

Appearances: ***Miss Cara Shillingford*** *for the first named claimant and added defendant*

Mrs Vanica Sobers Joseph *for the* second named claimant

Mrs Gina Dyer Munro *for the Defendants*

2017: February

March 14th

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[1] **STEPHENSON J**.: On Tuesday 14th May 2013 there was a motor vehicle accident involving two motor vehicles driven by Kerlvin Julien ("Julien") and Bertiste Jeffers and owned by Bertie Jeffers ("Jeffers"),

Shane Victor the son of Alexandrina Victorine ("Victorine") was a passenger in the vehicle driven by Julien and he died as a result injuries sustained in the accident. Julien and Victorine issued suit against Jeffers for damages[1] suffered as a result of what they allege to be the negligent driving of Bertiste Jeffers. Jeffers joined Julien as an added defendant in the law suit initially commenced by Victorine for the wrongful death of her son.

[2] A mediation referral order was made on the 24th June 2014, however mediation was not successful. Case management took place on the 25th November 2014. Pre Trial Review took place on the 19th May 2016 and a trial date was fixed in the matter on that day.

[3] All the statements of case and witness statements have been filed and full disclosure has been made. There were a few interlocutory hearings in the matter also orders were made on the various applications which have been filed. Trial dates were initially set for the 21st and 22nd November 2016 and on the first day of trial Counsel Mrs Dyer Munro for Jeffers raised objections to the collations of the bundles which she was served with since September 2016. As a result of those objections orders were made for the corrections to be made to the bundles and new trial dates were fixed for the 13th, 14th and 15th March 2017.

[4] On the 22nd December 2016 the application for stay of proceedings in the civil matter until the criminal matter[2] is completed was made by Jeffers. A joint affidavit sworn by the each of the Jeffers on the 22nd November 2016 and the 2nd December 2016 was filed in support of the application. Both Victorine and Julien opposed the application and filed affidavits in opposition. The application for stay was listed and heard before me and an order was made for the filing of submission on or before the 6th February 2017 for consideration by the Court for ruling on the 8th February 2017. Both Julien and Victorine submissions dated the 6th March 2017 were filed on the 6th March 2017 as ordered and Jeffers'

[1] Victorine has filed a suit for wrongful death of her son Shane Victor and Julien has filed for the damage and loss of his property as a result of the accident.
[2] Jeffers has been charged criminally as a result of the motor vehicle accident.

submissions which was dated 3rd March 2017 was filed out of time on the7th March 2017. Be that as it in may in pursuit of the Overriding Objective I will consider same.

[5] It is unfortunate that this application for stay has been made at this late stage in the proceedings and indeed it can be possibly seen as an abuse of process as has been submitted by Miss Shillingford on behalf of Julien.

Jeffers's case

[6] The Jeffers are seeking a stay of the civil proceedings on the following grounds that:

- **a.** the criminal proceedings against Bertiste Jeffers arising out of the same accident is still pending and that the issue to be decided in this matter is the same as in the criminal proceedings;
- **b.** the outcome of the criminal proceedings will have an effect on these matters and will be used in the trial of the civil proceedings and may bring an end to all litigation;
- **c.** the preliminary inquiry is still pending and not determined and it is in the interest of the administration of justice that the application be granted.

[7] In their affidavit in support of their application the Jeffers aver that Bertiste Jeffers will suffer severe prejudice in the criminal trial if the civil claim is to proceed and it will adversely affect his defence and his ability to get a fair trial.

[8] Jeffers further averred that the application for stay came this late in the civil proceedings because it was thought that the criminal matter would have reached to a point where no prejudice would have been suffered and this was based on certain representations that were made to him that a certain course would have been taken in the criminal proceedings based on the fact that the pathologist in the criminal matter was no longer in Dominica.

[9] The Jeffers also aver that they have been advised by their Solicitor and verily believe that the outcome of the criminal matter will bring an end to all proceedings as the standard of proof in the criminal matter is higher than that in the civil matter. Further, that they have been informed by their Solicitor and verily believe that in previous matters before the court in Dominica a stay of proceedings has been ordered in civil proceedings pending the hearing and outcome of criminal proceedings.

[10] Julien filed an affidavit in opposition to the application averring that the matter is ready for trial in that there has been case management and trial bundles have already been filed and the matter scheduled for trial. That disclosure orders have been complied with and that the civil claim and the criminal claim are different matters being heard before different courts and that the outcome of the civil claim will in no way prejudice the criminal case and further that the outcome of the criminal matter will not bring an end to all proceedings.

[11] Victorine likewise, filed an affidavit in opposition to the application averring also that the civil proceedings were at an advanced stage and that the Jeffers did not apply to stay the proceedings at the earliest opportunity. Further, that the Jeffers knew of the ongoing criminal proceedings since 2013.

[12] Victorine averred also that the time for making further applications in these matters has passed as per the Pre Trial Review Order and that this application for stay has been made without first obtaining leave of the court. It is noted that indeed, on the 28th November 2015 I ordered that no further applications should be made in this matter after the14th January 2016.

[13] Victorine further averred that she has been informed and verily believes that the burden of proof although higher in the criminal court does not negate civil proceedings and the findings in the civil court is based on a different element of law being that of negligence and not criminal liability which is founded on the Motor Vehicle and Road Traffic Act.

[14] Victorine also stated that there is no date fixed for the completion of the matter in the Magistrates Court and that in the circumstances of this case if the civil proceedings are stayed pending the outcome of

the criminal matter the interest of justice would not be served and there will be a delay in justice for the death of her son. That she does not believe that any prejudice will be suffered by Jeffers if the civil matter is allowed to proceed.

The Jeffers' case

[15] Learned Counsel Mrs Dyer Munro based her submissions essentially of the premise that prejudice that will be suffered by her client if the civil trial were to proceed. Learned Counsel implored the court to have cognizance of the guidance offered by Smith J in the South African case of **Michael Wharton Applicant versus The Cape Law Society Respondent** [3] and to follow same. Unfortunately I find myself constrained not to necessarily do so, as the said decision was set aside by the Supreme Court of Appeal of South Africa[4] and the decision of Smith J was held to be erroneous and his order to stay proceedings was set aside.

[16] It was held that Smith J erred in his approach in two regards:

(i) In his broad formulation of the general principles to be applied in determining whether a stay should be granted where civil and criminal proceedings arising out of the same circumstances are pending against a person and where there is a likelihood of prejudice to the person concerned, if he or she made statement prior to the disposal of the criminal proceedings. It was found that this approach gave the court unlimited power to grant a stay of proceedings in those circumstances;

…

[17] Learned Counsel Mrs Dyer Munro went on to submit on the risk of disclosure of information and submitted that in this case the defendant Bertiste Jeffers is compelled to give evidence in that if in the

[3] High Court of South Africa Eastern Cape Division, Grahamstown Case No 2646/11
[4] The Supreme Court of Appeal of South Africa Judgment Case No Case No41/2012

civil trial he fails so to do, pursuant to the rules of CPR 2000 the court will not consider his version of the events in his defence.

[18] Learned Counsel Mrs Dyer Munro urged that the court should not follow the decisions in the **Panton Case,**[5] **the Bank of Nova Scotia case**[6] and the **Guyah Case**[7] relied on by the Rouphine and Julien and I understood her to be submitting that the cases were to be distinguished from the case at bar. She submitted that:

a. The authorities must be looked at in the context of the particular jurisdictions and facts of the case, that "*in neither of the cases was it evident or stated that the witnesses in the civil trial and or the disclosure relied on in the civil trial were for the most part police statement of witnesses who would be required to give evidence in the criminal trial*. *As a consequence, the mere disclosure/list of document upon which the claimant relies set out clearly that the same witnesses are required in the civil and criminal trials"*[8]

b. That the countries where those cases emanate from do not have the peculiar circumstances of population as occurs in Dominica, in that the jury pool in Dominica is more susceptible to prejudice as stated in the affidavit of the second named defendant.

c. That in the **Panton Case** there was, based on the courts dicta, no explanation or specification in the arguments presented to the court as to the prejudice to be suffered by the defendants.

d. That the plaintiff in the matter was a temporary institution and in the circumstances of the **Panton Case** the mandate and public interest required its claim to be processed expeditiously so that it could be wound up as soon as possible which was the factor considered by the court regarding the delay which would have caused the plaintiff prejudice.

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[5] Panton et al –v- Financial Institutions Services Limited [2003] UKPC 86
[6] Bank of Nova Scotia –v- Cadogan & White BB 2013 HC 25
[7] Guyah –v- Commissioner of Customs et al JM 2015 CA 33
[8] *Re: Para 35 of Applicants' submissions filed on the 7th March 2017*

e. That in the **Bank of Nova Scotia case** the court's decision turned on the fact that there was lack of specificity and there was no estimated time stated for the delay which was being sought. That in the case at bar the stay which is being sought is requested for 8 months. That the applicants are not seeking an indefinite stay but rather one for at least 8 months.

f. Learned Counsel submitted that each case must be considered on its own particular circumstances and competing interest and that the **Bank of Nova Scotia Case** was decided within the Barbadian Society which is much larger than the Dominican society and therefore the possible effect on the jury pool would be different from Barbados

Victorine's case

[19] *Mrs Vanica Sobers Joseph, Learned counsel for Victorine made the submission that the court ought to consider a ring fencing order as was considered in Trinidad and Tobago case* ***Pricemart Clubs (TT) Ltd –v- Aaron Hosein***[9]

[20] Learned Counsel Sobers Joseph submitted that the Ring Fencing Order ordered *"that no document disclosed by him in the civil proceedings shall be used in evidence in the criminal proceedings without his consent and that the proceedings shall be heard in camera and that the file shall remain under the control of the Registrar of the High Court"*[10]

[21] Mrs Sobers Joseph made reference to the case of **AG of Zambia –v- Meer Care & Desai & Others.** [11] The court in that case dealt with the probable use of the evidence and materials from the civil proceedings in the criminal proceedings and the court dealt with it by making a ring fence order in the English proceedings. The proceedings took place in private and an order was made that none of the evidence adduced by the defendant in the English civil proceedings could have been adduced and

[9] (CV2014) -03980 @para 7(ii).
[10] (ibid @ para 10)
[11] [2006] EWCA 390

used in the criminal proceedings nor any of the documents disclosed by them in the proceedings could be used in the criminal proceedings unless they agreed or the court otherwise ordered, which resulted in no possible abuse of the criminal proceedings and the defendants' right to silence in the way in which they conducted their criminal defences. [12]

[22] Learned Counsel Mrs Joseph in response to Mrs Munro's submissions that the mind of potential jurors would be influenced submitted that the small size of the Dominican population does not automatically mean that the entire jury pool would be tainted. Learned counsel submitted that where there is little or no pre trial publicity there is no risk and the existence of safeguards in the jury selection process which ensures that potential jurors who may be aware of the trial would be excused also alleviates any risk of jury contamination. Re: **Bank of Nova Scotia –v- Cadogan & White[13].**

[23] Learned Counsel Mrs Sobers Joseph submitted that a properly selected and directed jury can alleviate any possibility of tainted jury as submitted by the Defendants. Learned counsel also submitted that a Ring fence order can also be made to further preserve any publicity on the matter. That a ring fence order can lead to the attainment of justice as it would strike a balance between the claimant's right to an expeditious and just disposal of her claim and the interest in having unrestricted access to the court by all and that all are entitled to equal protection of the law which will ensure no prejudice befalls the defendant.

[24] Learned Counsel urged upon the court that for a stay to be ordered in the civil proceedings would result in her client suffering great prejudice to wit she will face the uphill battle of probable loss of witnesses due to relocation, reassignment or fading memories. Learned Counsel also pointed that there is no date set for the completion of the preliminary inquiry so there is no timetable for the criminal proceedings to be completed.

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[12] Ibid @para 27
[13] Op cit

[25] Learned Counsel urged that courts to find that there is no real danger of prejudice that could be suffered by the defendants in the case at bar if the proceedings are to continue. That any prejudice can be mitigated by a possible order of court.

Julien's Case

[26] The Claimant Julien was represented by Learned Counsel Miss Cara Shillingford who also opposed the defendant's application for a stay.

[27] It was submitted by Miss Shillingford that based on the authorities cited and applied in the Jamaican case **Guyah –v- Commission of Customs et al,**[14] that there is a discretion to stay civil proceedings pending the hearing and outcome of concurrent criminal proceedings arising out of the same subject matter and that there is principle of law that "*the claimant in the civil proceedings* is to not *be debarred from pursuing the action in accordance with the normal rules merely because the defendant might be affect by disclosing his defence in the civil proceedings. However the civil court has a discretion to stay the proceedings if it appears to the court that justice between the parties so requires"*

[28] Learned Counsel submitted for the court's consideration the dicta of the Court in the **Guyah Case**[15] where the court reviewed the decisions and learning on the court's discretion and the principles guiding the court in the exercise of its discretion in cases such as the case at bar. That the discretion must be exercised in keeping with the established legal principles. That civil action ought not to be stayed unless the court is of the opinion that justice between the parties so requires … where there is a serious as opposed to a notional risk of serious prejudice which may lead to injustice or a serious miscarriage of justice in the criminal proceedings.

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[14] Op cit
[15] ibid

[29] Learned Counsel submitted that the granting of a stay is within the discretion of the Court however it is now an exception rather than a norm, which is in keeping with the Overriding Objective of CPR 2000 for the court to deal with all matters justly and expeditiously. Learned Counsel made reference to the ruling of the Privy Council in the **Panton Case**[16] where it was held applying a number of decisions that "*The issue of a stay to prevent civil proceeding 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 consideration".*

[30] Learned Counsel submitted that the pre existing ruling in **Smith –v- Selwin**[17] has been discarded. Counsel made reference to the court's dicta in the **Panton Case**[18] as follows:

> *"[11] Both courts began with the need to balance justice between the parties. The plaintiff had the right to have its civil claim decided. It was for the defendants to show why that right should be delayed. They had to point to a real and not merely a notional risk of injustice. A stay would not be granted simply to serve the tactical advantages that the defendants might want to retain in the criminal proceedings. The accused's right to silence in criminal proceedings was a factor to be considered, but that right did not extend to give a defendant as a matter of right the same protection in contemporaneous civil proceedings. What had to be shown was the causing of unjust prejudice by the continuance of the civil proceedings. The Court of Appeal also gave particular attention to the appellants' constitutional rights, a matter to which their Lordships will return.*
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> *[12] Both courts emphasised the limited claim made by and on behalf of the appellants in the affidavit filed in support of the application for a stay. They also called attention to the*

[16] Op cit
[17] Op cit
[18] Ibid paragraphs [11] – [15]

facts that the appellants had filed their amended statement of defence and counterclaims, that discovery had been completed and that, according to the High Court judge, the parties had complied with orders for further and better particulars and interrogatories.

[13] The affidavit by one of the appellants was put in general terms:

'I will be greatly prejudiced in my defence in the criminal matters if I am forced to proceed with the action herein before the criminal charges are tried.'

He mentioned the presumption of innocence, the burden and standard of proof and his right to remain silent in criminal proceedings. He would be obliged to testify in the civil proceedings if he were to have any opportunity of succeeding in them. He did not indicate how that testimony would prejudice him beyond the defence already filed, the material discovered and the answers given. Nor was there any specification in the course of the argument before the Board.

[14] The plaintiff in its affidavit in response said that by its very nature it was a temporary institution. Its purpose is to divest itself of all the assets acquired so as to reduce the substantial public debt that has been incurred as a result of the payments to the depositors in those financial institutions. The plaintiff's mandate and the public interest required that its claims be pursued expeditiously and that the operations of the plaintiff being wound down as soon as possible. Any delay in this matter being tried would therefore severely prejudice the plaintiff and would not be in the public interest.

[15] Their Lordships can see no reason to disagree with the position taken by the courts below. The appellants have failed to make out their case for a stay or suspension. The arguments against the application appear to them to be compelling."

[31] Learned Counsel Shillingford drew a parallel with the **Pantin Case**[19] to the case at bar in so far as that the defence, list of documents and witness statements have been filed and urged this court to do likewise as in that case to refuse the application for stay. Learned Counsel further took the aggressive stance that it was disingenuous of the defendants to want to argue their right to remain silent would somehow be affected by the civil claims, when the defence, witness statements and list of documents, were already filed and before the court and that the second named defendant's submission that the witness statement only stands as evidence in chief at trial is completely irrelevant and has no weight.

[32] Learned Counsel went on to submit that the signed witness statement which is relied on as evidence in chief in the civil proceedings does not change the fact that a signed witness statement is a previous statement within the meaning of the previous inconsistent statement rule. Further the second named defendant has already given several statements explaining his version of the accident in detail all of which were done voluntarily and in the circumstances it is illogical for him to want to now remain silent. It is noted by the court that it is and will always be the defendant's right to remain silent in his criminal trial for whatever reason he chooses.

[33] Learned Counsel Shillingford submitted that the defendant gave a signed statement to the police which is exhibited in the matter and that in that statement he gave full details of his version of the accident. That a defence was also filed in the matter where both defendants signed a certificate of truth and that his witness statement as filed gave full details of his version of the accident.

[34] Learned Counsel submitted that the Jeffers have failed to show how the second named defendant would be prejudiced by having the civil trial when he has already given his full version of the accident. Learned Counsel further submitted that even if the defendant wants to say something different at the criminal trial concerning what happened that the civil trial cannot prejudice him beyond the defence and witness statements he has already filed.

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[19] Op cit

[35] Learned Counsel Shillingford relied on the decisions of the Court in the cases of **Bank of Nova Scotia –v- Cadogan and White**[20] and **King –v- Olympic Pipeline Company LLC (An American case)** mentioned in the **Guyah Case**[21] in support of her submission that to stay the civil proceedings would be prejudicial to her client. Miss Shillingford submitted that the application under consideration of the court should be dismissed for similar reasons as cited in the **Royal Bank of Canada case**[22] in that, the application by the defendant is clearly a ploy to delay proceedings in order to obtain a tactical advantage.

[36] Learned Counsel then went on to look at the time lines involved in that the accident occurred since 2013 and the Preliminary inquiry (PI) is still ongoing and that it is estimated that the criminal trial will take place in about one year time and due to the passage of time the witnesses will forget important details concerning the accident and may just not be available for various reasons. Learned Counsel also pointed out that in these civil proceedings the claimants have the evidential burden of proving their case and where the witnesses may not be available that would be prejudicial to the claimants and to grant the stay was cause a serious risk of prejudice to the claimants.

[37] Miss Shillingford further submitted that the defendants have alleged that potential jurors would be prejudiced but have failed to provide any evidence of publicity associated with the case or that this is a case that the media has covered or taken an interest in the case. Further it was also submitted that the length of time between the civil trial and the criminal case which should be at least one year will protect against the unlikely possibility of prejudice. Learned Counsel relied on the Privy Council Dicta in the **Panton Case** ***"****it was for the defendants to show why that right should be delayed. They had to point to a real and not merely a notional risk of injustice".* [23]

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[20] Op cit
[21] Op cit
[22] Op cit
[23] Panton Case op cit at paragraph 11

[38] Regarding the Jeffers' submission that "the outcome of the criminal proceedings against the second named defendant will have effect on these matters and will be used in the trial of the civil proceedings and may bring an end to all litigation"; Miss Shillingford submitted that the applicant is wrong in this submission, that the criminal proceedings are separate and distinct from the civil proceedings and that there are two different standards of proof one on the balance of probabilities and one beyond a reasonable doubt.

[39] Learned Counsel made reference to decision emanating out of the Eastern Caribbean Supreme Court of appeal in the case of **Emmanuel Rock –v- Theresa Jolly**[24] where Justice of Appeal Rawlins opined that even thought the trial judge in that case admitted evidence of the defendants criminal conviction that the trial judge would have had to make his conclusions based on the evidence that was before the court and not on the conviction. Based on this decision of the Court of Appeal, Learned Counsel submitted that regardless of the outcome of the criminal proceedings the civil court must make its determination as to liability based on the evidence before it.

[40] Reference was also made to the Grenada Decision of **Emrol Phillip & Nicole Phillip –v- Paul Greenidge and Daniel James**[25] where the court applied the rule in **Hollington –v- F. Hewthorne & CO Ltd**[26] which states that evidence of a criminal conviction for an offence arising out of the same facts in civil proceeding is inadmissible. Learned Counsel submitted that likewise acquittal by a jury in a criminal case cannot be relied on in civil proceedings and the reason being the difference in the standard of proof required in the criminal case and in the civil case make the cases contradictory.

Court's considerations

[41] Parties to a civil proceeding may make application to the court for stay of civil proceedings pending the determination of related criminal proceedings. The evidence in support of the application must contain

[24] Civil Appeal no 10 of 2006 (DOM)
[25] GDAHACV2015/0461
[26] (1943) KB 587

an estimate of the expected duration of the stay and must identify the respects in which the continuance of the civil proceedings may prejudice the criminal trial.

[42] There is no absolute rule that civil proceedings should not proceed when there are criminal proceedings pending.

[43] Where there are concurrent civil and criminal proceedings against the same defendant arising out of the same matter, the court has discretion whether or not to stay civil proceeding pending the conclusion of the criminal proceedings, taking into account all the circumstances of the case. Re: **Jefferson Ltd – v- Bhetcha**[27] and **M-vM**[28]**.**

[44] In making its decision the court is reminded that its discretion must be exercised judiciously and also in keeping with and in consideration of the "Overriding Objective" of CPR 2000 to deal with the cases fairly and justly. It is necessary for the court to look at the prejudices that could be suffered by both parties

[45] Is there a real risk of serious prejudice leading to injustice? If this is so, the proceedings can properly be stayed.

[46] Is there a basis upon which the court can properly exercise its discretion? What is the prejudice that could possibly be suffered by the defendant? What is the prejudice that could possibly be suffered by the claimant?

[47] In the **Jefferson Case**[29] the Court of Appeal held that the court had the discretion to stay the civil proceedings and one of the factors to be taken into account was whether there was a real danger of causing injustice in the criminal proceedings. [30]

[48] It must be stressed that it is important that there is a balance between the parties.(emphasis mine).

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[27] Op cit
[28] Op cit
[29] Op cit
[30] page10 para E per Megaw LJ

[49] The claimants have a right to have their claim decided. The defendants (applicants) in the civil action have to show that it is just and convenient that the claimants' ordinary rights of having their claim processed, heard and decided should be interfered with.

[50] Regarding the court's discretion it has been held in the case of **R v Panel on Takeovers and Mergers, ex parte Fayed**[31]; that this "*is a power which has to be exercised with great care and only where there is a real risk of serious prejudice which may lead to injustice"*.

[51] In exercising its discretion the court is required to consider the competing interests of the parties before it and balance justice between them. The burden of the burden of proving that there should be a stay lies on the applicant on a balance of probabilities. **Re: Panton Case** [32]

[52] In the **Panton Case**[33] it was also held that the applicant must point to a real and not merely notional risk of injustice. It has been held that "*A stay would not be granted simply to serve the tactical advantages that the defendants might want to retain in criminal proceedings*".

[53] The defendants cannot now claim that they would be giving advance notice to the prosecution of their defence in the criminal proceedings as they have already exposed their case which in the civil case they would be unable to change in any material way at this stage. In the circumstances of this case the likelihood of prejudice to the second named defendant having already disclosed his defence could not be characterized as being serious so as to lead to injustice. I agree with learned Counsel Mrs Sobers Joseph that any such prejudice as may arise can be adequately addressed by the court making orders that will restrict attendance at the trial of the matter and of any reportage of the matter.

[54] In the case at caption the defendants have already disclosed their defence in this matter in that they have not only filed their statement of defence but there has been disclosure of documents and witness

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[31] [1992] BCC 524
[32] Op cit
[33] ibid

statements filed and exchanged therefore there is no case protection from the of the likelihood of self incrimination by the defendant. It is noted also that the claimant has given a sworn voluntary statement to the police in the matter. It there cannot be said that the defendants have already produced documents which could possibly incriminate himself as he has already laid his cards on the table face up, so to speak.

[55] The Jeffersin this case have also submitted on the risk of publicity of the case which may prejudice the fairness of the trial by jury in a small jurisdiction such as Dominica. Indeed this is a concern to be considered by the Court in this application and in circumstances such as the case at bar.

[56] In ***Jefferson v Betcha*** [34] Lord Justice Megaw stated:

> *"… a relevant factor telling in favour of a defendant might well be the fact that the civil action, or some step in it, would be likely to obtain such publicity as might sensibly be expected to reach, and to influence, persons who would or might be jurors in criminal proceedings."*

Megaw LJ went on to highlight the need for there to be a specific identifiable risk:

> **"***It might be that it could be shown, or inferred, that there was some real — not merely notional — danger that the disclosure of the defence in the civil action would, or might, lead to a potential miscarriage of justice in the criminal proceedings, by, for example, enabling prosecution witnesses to prepare a fabrication of evidence or by leading to interference with witnesses or in some other way."*

[57] Learned Counsel Mrs Sobers Joseph has countered this submission with a rather attractive submission of her own that there are safeguards built into the system where it can be established prior to the empanelling of a jury whether anyone has previous knowledge and the extent of their knowledge to the

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[34] Op cit

case at bar and excluding them from the jury panel and also the possibility of the court making a "Ring Fencing" order as has been made in other cases

[58] On the other hand I hasten to remind counsel and the parties as to what happens in the criminal side of things. Most of the criminal trials in our jurisdiction are well publicized and jury verdicts are usually covered by the media houses, as are the sentencing hearings and reports of the sentences handed down by the court. In most if not all criminal matters save those that are closed by virtue of legislative provisions are covered by the media and the appeals are publicized as is the hearing and rulings of the court of appeal. Where the criminal convictions are overturned and retrial ordered those are usually reported in the media. The retrial of the defendant is conducted and I ask what happens in those circumstances regarding the tainting of the possible jury members in this small Dominica …there is fair retrial therefore the whole submission about the tainting of the jury in small Dominica really does not hold water so to speak.

[59] It is to also be understood that the regular normal everyday civil trials are not covered by the media unless the subject matter of the trial is one of great social and political interest.

[60] In the circumstances therefore, the prejudice as claimed by counsel for the Jeffers is really more fanciful than realistic in the true and entire circumstances of this case. The dangers which the court would seek to protect the defendants from would be a real danger and in light of the foregoing I consider that the dangers of tainting of the jury are not realistic as posited by Learned Counsel.

[61] The defendants contend that they are seeking a stay for eight months. Is this a realistic estimation of time for the criminal matter to come to an end in the event that the second named defendant is committed to stand trial before a jury of his peers? A consideration clearly considered by his lawyer given the submission about possibly tainting the jury.

[62] It is noted as pointed out by Counsel for the Victorine that the Preliminary Inquiry (the PI) is not yet completed and given how long those matter are known to traverse from the Magistrate's court to the

High Court it is most unlikely that the criminal matter will be completed in eight months time, that is somewhat a fanciful thought.

[63] It is also noted that this accident occurred in May 2013 its two months short of four years ago and the PI has not concluded, that alone speaks for itself as to the delay in the matter. To further delay the civil proceedings for what is seriously an unknown amount of time and what can also be considered an indefinite period would certainly not do justice to this case certainly for the claimants.

[64] I note that the learning available in the **Halsbury's Laws Volume 11 5th Edition** at paragraph 310 as quoted by the court in the Barbados case of **Bank of Nova Scotia –v- Cadogan and White**[35]

> *"The evidence in support of the application must contain an estimate of the expected duration of the stay and indentify the respects in which the continuance of the civil proceedings may prejudice the criminal trial. …"*

[65] I agree with Counsel for Victorine and Julien in that the longer the delay the greater the chance of the witnesses' memories fading and or the non availability of the witnesses. This is a prejudice to be suffered by the claimant which cannot be overlooked.

DISPOSAL

[66] On consideration of the facts in this case and the legal principles explored and discussed in the body of the ruling, I am not persuaded that the continuation of the civil trial in this matter will cause the a risk of serious prejudice which would lead to injustice to the second named defendant Mr Bertiste Jeffers in any criminal trial that he may or may not have to face. I am not prepared to grant the stay of civil proceedings sought by the defendants and my reasons are set out below.

[67] The defence has already disclosed its defence in this matter by the filing the statement of defence, witness statements and they have also already filed their list of documents.

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[35] Op cit

[68] The applicants sought to submit that they are seeking a stay of eight months however this is not in the consideration of this court a realistic estimation of when the criminal matter could possibly be completed given the status of the PI, that is, it has not been completed and given the history of the way matters are prolonged in our courts when the parties chose to go the route of PI, eight months is not a realistic estimate of the time that the criminal proceedings would come to an end and therefore in the circumstances of this case it can be said with confidence that it is not known when the criminal proceedings will be completed and in the circumstances it would be extremely prejudicial to the claimants to stay the proceedings as to do so would be to stay it indefinitely. This is also taking into consideration the length of time that has already passed since the accident giving rise to the action before the court.

[69] The applicants' perception and indeed submission that the criminal trial of the second named defendant could be tainted so to speak causing injustice to the second named defendant can be simply dealt with by making a similar order to the orders made in the English Court. That is, to make a "*ring fencing" order* in these proceedings. This species of order is nothing new to these courts. We tend to say we will seal the file and I am minded to exercise my discretion and to also close the court and to have the matter heard in closed court. I can also order that there is no reporting in the media regarding this trial and also that when the time comes for the publication of the decision of this court that it be suspended until the hearing and outcome of the criminal matter. Such an order ought to curb any possibility of abuse of the criminal process or tainting of the jury.

[70] Before I conclude I wish to comment that it is indeed unfortunate that this application came as late as it did in the proceedings on the eve so to speak of the second trial date the first trial date being almost four months ago. Such a belated application could tend to smack of the defendants seeking to obtain a tactical advantage which is clearly not allowed given the authorities in this matter. However the application is dismissed for reasons as stated above and not because of the lateness of the application.

[71] The question of costs to be that of Julien and Victorine to be assessed if not agreed.

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M E Birnie Stephenson
High Court Judge