IN THE SUPREME COURT OF
THE TURKS AND CAICOS ISLANDS

Action Nos: CR 35/12 R v. THOMAS CHALMERS MISICK
CR 36/12 R v. MCALLISTER HANCHELL
CR 37/12 R v. MELBOURNE WILSON
CR 38/12 R v. CLAYTON GREENE
CR 40/12 R v. JEFFREY HALL
CR 44/12 R v. FLOYD HALL
CR 18/14 R v. MICHAEL MISICK

THE QUEEN

V.

(1) MICHAEL MISICK, (2) FLOYD HALL, (3) MCALLISTER EUGENE HANCHELL, (4) JEFFREY CHRISTOVAL HALL, (5) CLAYTON STANFIELD GREENE, (6) THOMAS CHALMERS ("CHAL") MISICK, AND (7) MELBOURNE ARTHUR WILSON

DEFENCE APPLICATION FOR A STAY OF PROCEEDINGS FOR ABUSE OF PROCESS

CORAM: AGYEMANG CJ

FOR THE CROWN: MR A. MITCHELL QC; WITH HIM MR. Q. HAWKINS AND MS K. DUNCAN

FOR THE FIRST DEFENDANT: MR. R. ARMOUR SC, WITH HIM MR. A KAYNE
FOR THE SECOND DEFENDANT: MR. E. WITTER QC, WITH HIM MR. K. SMITH
FOR THE THIRD DEFENDANT: MR. J. LYNCH QC, WITH HIM MR. P. MELLENY
FOR THE FOURTH DEFENDANT: MR. J. PERRY QC, WITH HIM MR. I. ROBINS
FOR THE FIFTH DEFENDANT: MR. R. BENDALL, WITH HIM MS. K. HALL
FOR THE SIXTH DEFENDANT: MR. M. BISHOP QC, WITH HIM MR. H. EVANS
FOR THE SEVENTH DEFENDANT: MR. A. SHEPHERD QC, WITH HIM MR. J. SHEPHERD

HANDED DOWN ON 7TH MAY 2021

JUDGMENT ON DEFENCE APPLICATIONS FOR A STAY OF PROCEEDINGS FOR ABUSE OF PROCESS

1. On the 16th of March 2021, the 2nd-7th defendants, filed a joint application for a stay of the within-named criminal proceedings for abuse of process, or for being otherwise unfair. On the 18th of March, the 1st defendant also filed a similar application.

2. The criminal proceedings that the present applications seek to stay, are a continuation of the prosecution of the defendants for various crimes, charged under the umbrella of corruption in public office in 2011, 2012 and 2014 (in respect of the 1st defendant).

3. The matters antecedent to the proceedings are that in 2009, a Special Prosecutor was appointed to investigate identified allegations of corruption after a Commission of Inquiry chaired by Sir Robin Auld looked into allegations of corruption against members of the House of Assembly between 2003 and 2009.

4. In 2011, a restraint order was ordered against the realizable assets of the first defendant in connection with impending proceedings. In November of that year, the second and seventh defendants were charged with offences. The following year: 2012, the third to sixth defendants were all charged with

various offences before Harrison J, a retired Jamaican Judge who was initially appointed for a period of two years and made solely responsible for the criminal proceedings.

5. At the Plea and Directions hearing in 2013, the Crown allegedly gave an estimate of the trial as three to five months. A year later in 2014, the first defendant who was extradited from Brazil, was charged along with the other defendants.

6. The trial which was to take place shortly after the defendants were arraigned, did not commence until December 2015.

7. It is common ground that the three-year delay for the 2nd to 7th defendants (one year for the first defendant) was caused by a number or pretrial applications from both the Crown and the defendants some of which were the subject of appeals all the way to the Privy Council.

8. The trial continued for five years and had just entered its sixth year when the trial judge: Harrison J, died on 7th February 2021.

9. The defence had just opened their case(s). The first defendant had announced his decision not to call evidence, and the second defendant was led in evidence-in-chief for thirty-four (or thirty-five) days. Cross-examination was into its seventh day (the lead Prosecutor having allegedly communicated that he had not even scratched the surface of the case), when the learned trial judge died.

10. For the 2nd and 7th defendant, ten years had elapsed since they were charged with offences; for 3rd to 6th defendants, nine years had elapsed from the time they were charged with criminal offences; for the first defendant, it had been seven years.

11. In the five years following the commencement of the trial in 2015 to the 28th of January 2021 when the court last sat over the case, a period of one thousand, eight hundred and seventy-nine (1,879) days had elapsed. Of that, only five hundred and twelve (512) (the Prosecution calculates 506) days had been utilised as sitting days.

12. The reasons for, and the circumstances of the delay in the conduct of the trial, will be set out in greater detail later in this judgment.

13. On 1st March, 2021, the lead Prosecutor announced the decision of the learned Director of Public Prosecutions to continue with the prosecution of the defendants in a new trial. A new Information containing thirteen counts of offences described by the Prosecutor as "streamlined" charges against the seven defendants, was filed on the 3rd of March 2021.

14. The lead Prosecutor also announced his intention to pursue an application for the trial on the new Information to be held without a jury.

15. It is to be noted that in the new Information, the events for which the defendants stand trial occurred on various dates between eleven and nineteen years ago: Count 13 alleges the commission of criminal acts in June 2002; the other counts are variously between 2003 and August 31, 2009.

16. It is against the new trial to be conducted upon the Information of 3rd March 2021 (the new Information), that the present application has been brought.

17. In order not to unfairly gloss over the case of each of the defendants, as well as the Prosecution, at the risk of some tedium in the presentation of the respective cases of the defendants, I will, in providing a summary of the arguments proffered on their behalf, provide some necessary detail:

DEFENDANTS' ARGUMENTS

First Defendant:

18. The court is invited to order a stay of proceedings for two reasons: first is that it is impossible for the first defendant to have a fair trial in the proposed retrial; and/or that it is unfair for the defendant to be tried on a new Information. The second is that a stay of the proceedings is necessary to protect the integrity of the criminal justice system of this country.

19. Further, (this is a discrete point), that his extradition to this country from Brazil in January 2014 with subsequent charges preferred against him upon his return, is an abuse of process. The matter of the first defendant's extradition will be dealt with in a separate judgment although orders in this judgment will be inclusive of findings made therein.

<u>No fair trial (Limb 1)</u>

20. It is the argument of the first defendant that he cannot have a fair trial in a retrial, due to the history of the trial of the offences with which he has been charged. This is because, he has already endured an unmanageable and

consequently unfair trial for five years, thus a retrial on the new Information filed on 3rd March 2021 charging 7 defendants on 13 counts in relation to 8 projects, with the right of all seven defendants to call evidence to defend themselves, is already taking on the proportions of the last trial, looming as the 'behemoth', that the aborted trial became.

21. He contends that the time estimate of five to six months given by the Prosecution (who in the aborted trial, estimated the proceedings to last three or four months), is unrealistic. He projects that two-years is a more realistic estimate and contends that a retrial within the said projected time frame could not be a fair trial, especially as it would be coming after the years he and the other defendants have endured at trial, with all the prejudice suffered, including having to wait for fifteen months and counting, for a verdict in a trial which for him had lasted four years, even after he decided not to offer evidence.

Unfairness of a retrial (Limb 2)

22. The first defendant gives three reasons why a retrial will compromise the integrity of the criminal justice system. First, is the unreasonable delay in the trial of the charges against him, after his assets were restrained in 2011 and his liberty was restricted in 2014. This delay, he attributes largely to an unmanageable trial which, having no structure, control or expedition, created unfairness. He alleges the prejudice of being in a five year trial and asserts that a retrial after the prejudice suffered in this way, would be oppressive and unjust, and could only bring the country's criminal justice system into disrepute.

23. Second, is the cost (to date) of these proceedings and the additional cost of a retrial; there is also the reality of holding a retrial with its implication of unfairness in a global pandemic which is ongoing.

24. Lastly, he alleges that there has been prosecutorial manipulation of the charges contained in the old Information, in that the charges in the new Information have been framed to secure a conviction. This 'framing' was allegedly done in response to 'no-case' submissions of learned counsel for the defendants that criticised the crafting of the charges in the old Information.

25. Some details of the criticism and the alleged recasting of the Prosecution's case allegedly achieved through the tailoring of charges to secure a conviction are reproduced for clarity:

The Criticism:

"... the evidence led was not capable of proving the existence of one overarching conspiracy as alleged in each of counts 1, 2, 5, 6 and 9 - the Griffiths point.

... count 2 was a bad count because of its particulars and that in order for it to be a good count on its face, the 4 particulars would have to be read conjunctively; in which case no properly directed [jury] could convict upon it; alternatively, if the particulars were read disjunctively, as the prosecution argued they could and should be, this approach, argued the defence had the effect of turning the count into one which was bad for duplicity and which charged a rolled up conspiracy.

... the PNP, as an unincorporated association, could not be defrauded as originally alleged in count 5.

<u>The new Information</u>:

"(i)The conspiracy to defraud the PNP originally charged in count 5 of the first trial Information is gone;

(ii)The single overarching conspiracy to receive bribes originally charged in count 1 of the first trial Information and which was alleged to have subsisted and endured between 2003 and 2009, and which the defence submitted could not be supported by the evidence led, has gone: it has been replaced by a series of substantive bribery allegations - counts 1, 3, 5, 6, 7 and 8;

(iii) The single overarching conspiracy to defraud originally charged in count 2 of the first trial Information and which was alleged to have subsisted and endured between 2003 and 2009, and which the defence submitted was not supported by the evidence led, has gone; it has been replaced by a series of individual conspiracies to defraud involving different named accused in relation to separate particularised projects - counts 2, 4 and 9;

(iv) The four particulars in the original count 2 of the first trial Information which the defence hotly criticised at the close of the Crown's case in the first trial, have not been replicated in any of the newly substituted conspiracies to defraud charged in counts 2, 4 and 9 of the new Information filed on 3rd March 2021."

Second Defendant:

26. Like the first defendant, the second defendant alleges he cannot have a fair trial, and also, that having regard to the circumstances, it will be unfair to re-try him.

No fair trial (Limb 1)

27. Like the first defendant, the second defendant argues that there has been prosecutorial manipulation of the charges, aimed at depriving him of his defence, while tailored to secure a conviction. This manipulation was allegedly done having regard to his evidence given at trial, and submission of no case. He alleges that the Prosecution's "tailoring" was done through a correction of the Prosecution errors in the "streamlining" of the charges in the new Information.

28. In this regard, he contends that the Prosecution has misused the trial process of the court, having used it "as a sounding board or, as a tool in their investigative or prosecutorial armoury".

29. He sets out examples of the "manipulation":

i. In Count 1 of the Information in the aborted trial which charged a Conspiracy to Receive Bribes against the 1st-6th Defendants and Lisa Hall (now discharged). This case of an overarching conspiracy, which was indicated in the Opening Statement of the Prosecution, appears to be now abandoned in the new Information. In particular, it is asserted that as the case of the Prosecution collapsed in the light of the sworn testimony of the second defendant, and also with regard to matters urged in relation to Count 1 in the no-case submission of the defendants.

ii. the Prosecution has now, in the New Information alleged six separate counts of bribery, in which, the second defendant is indicted with regard to four: 1, 3, 6 and 7, having abandoned allegations against the second defendant in relation to Beaches (Count 5) and West Caicos 1(Count 8).

iii. Counts 2, and 4 of the Old Information, which also alleged an overarching Conspiracy to Defraud, have been recast and the new Information to take account of an amendment that was unfairly granted to the Prosecution in the old trial after the defendants pointed out that the evidence adduced by the Prosecution disclosed ownership of relevant lands by the Crown and not the Government of the TCI, or Belongers of these Islands.

iv. the Old Counts 2 and 4 have now been replaced in the new Information, with an alleged conspiracy to defraud the Crown, the Government of the TCI and/or the Belongers by arranging the transfer of Crown Lands at Water Cay, North West Point and West Caicos.

v. Count 5 of the Old Information charged a "Conspiracy to Defraud" the PNP, in relation to alleged procured donations which were allegedly applied for the personal benefit of the 1st, 2nd, 3rd, 4th, 6th Defendants and Lillian Boyce (convicted on her Guilty plea and sentenced) Count 6 also charged a "Conspiracy to Disguise the Proceeds of Crime", that is, "funds which purported to be political donations but which were in fact and in truth bribes paid into the … Progressive National Party account" for the benefit of 1, 2, 3, 4, 6 defendants and Lillian Boyce. In the submissions of no case on behalf of all the defendants, it was contended that the said charges were fatal, as the PNP was an unincorporated association, not a legal person and therefore could not be defrauded, this also has been removed from the new Information.

vi. Also, Count 13 of the New Information which is said to bear a resemblance to Count 6 of the Old Information in that it alleges "payments to

the Progressive National Party which purported to be political donations …", seems to now acknowledge the lack of legal status of the Progressive National Party, but takes advantage the sworn testimony of the second defendant that he and the first defendant had practical control of the PNP banking cheque books.

30. The second defendant alleges also that the lapse of time will compromise his defence in a retrial as he has lost evidentiary material (both electronic and physical), and two of his witnesses who could have supported his case, have died. Regarding this, he avers that his defence which is largely based on his ability to demonstrate that he was the innocent recipient and disburser of money both prior to and during the period covered by the Information, is therefore compromised and will affect his ability to defend himself.

Unfairness of a retrial (Limb 2)

31. The second defendant also contends that it will be unfair to try him by reason of the lapse of time which will make the proposed retrial an affront to the dignity and integrity of the court process. In this regard he submits that his constitutional right to a trial within a reasonable time having been breached already, the contemplated retrial would undermine public confidence in the criminal justice system.

32. To establish these matters, the second defendant provides a chronicle of the events of the aborted trial which will be set out later in this judgment.
In summary, he refers to the period of these criminal proceedings that began for him with charges preferred on November 2, 2011: more than nine years and four months at the time of filing his submission- an alleged a breach of

section 6(1) of the Constitution. The charges he points out, are founded on allegations that relate in part to events which occurred more than eighteen years ago. Thus, the contemplated retrial lengthens the delay in the proceedings which in the long period since he was charged with the offences, has failed to resolve the allegations against him.

33. He fears that a retrial will also open rulings of Harrison, J., to re-litigation further lengthening the time of the conclusion of the proceedings.
The entire circumstance of such inordinate delay he contends, brings the process of the court into disrepute.

Third Defendant (Limb 2)

34. The third defendant urges this court to stay the proceedings against him in order to protect the integrity of the criminal justice system. In particular, he draws the court's attention to the fact of his having been charged with the various offences over nine years ago, and that he has spent over five years in trial, attending court for five hundred days without an end in sight.
This will be compounded by a new trial.

35. He points out that the proceedings against him have long since passed the point of complying with his constitutional right to a fair trial within a reasonable time; thus, the continuation of these proceedings in the form of a retrial would be to embark knowingly on a continued breach of that fundamental right, which could not be remedied within the trial process.

36. He laments the prejudice suffered which he describes as an "extraordinary burden" placed on him in the years he has spent in trial, and on the country

upon which has been laid this financial burden of an unreasonably delayed trial.

37. He urges the court to determine whether the period of time elapsed has been such as to give real concern, and if so, to enquire particularly into such matters as the complexity of the case; the conduct of the defendant; and the conduct of the state authorities, to make its determination that the continued prosecution will amount to abuse of the court's process.

38. He invites the court to have regard to the following to be matters in its consideration:

The Prosecution:

i. that the threshold of a trial of the defendants within a reasonable time has been crossed, leading to a breach of section 6(1) of the Constitution which guarantees the right to trial within a reasonable time;

ii. that the delay is allegedly attributable to a range of circumstances of the Prosecution's making, one of which is the circumstance of the Prosecution repeatedly serving the defence with voluminous evidentiary material even after they had declared themselves to be trial-ready. The sheer magnitude of the ever-expanding case affected the representation of the defendants which in turn affected legal aid, and occasioned further delay.

iii. the choice of the Prosecution to embark upon, and thereafter to insist on pursuing the trial of so many on one Information for over five years in spite of repeated applications by the defence to sever the trials and thereby to reduce the complexity. After five years, that trial was still far from completion, with the second of eight remaining defendants in the early stages of cross examination by the prosecution. In the proposed retrial, they now make a

belated attempt to reduce the complexity which they would not do for all those years, against fewer defendants.

iv. The new Information is hardly an improvement of the old one that produced an unmanageable trial; its 13 counts, 7 defendants and 8 projects, including charges of conspiracy to defraud which may require the calling of evidence regarding for example cabinet meetings, the process of negotiating development agreements, and land valuations; their witness list of the seventy-four witnesses, and twelve, that they intend to read, a number that may increase, should the defendants wish to have certain person produced.

v. These make unrealistic, the Prosecution's estimate that their own case would take between fifteen to twenty-five weeks or four to six months which they extend to a one-year trial estimate (apparently allowing for breaks, legal submissions and defence cases).

39. He therefore urges the court not to permit the Prosecution another chance to put the defendants through a second trial of the said dimensions, bound to produce a very long trial which will only perpetuate an ongoing breach of the defendants' right to a trial within a reasonable time, as well as require ongoing significant expenditure of public funds.

40. The court:

The court is also to be blamed for not managing the case properly, despite being aware of the delay in the trial and its causes. Regarding this, the third defendant cites the judgment of the trial judge in a 2018 abuse of process application (which he rejected), in which he attempted to explain the causes of the delay in these words:

"One cannot say that any blame lies on either the Defence or the Prosecution in the way it was plainly seen in the Boolell case. The main issues that created the three-year span in the instant case were: (1) The decision to set three weeks with one week off, that immediately created a reduction of the hearing period by a quarter, 25%. The breaks at Easter, Summer, and Christmas were also caused. Applications for adjournments that were granted, change of attorneys after the start of the trial/case. The illness of the learned trial judge, a break of approximately three months in 2017. Hurricane breaks in 2016, 2017, and 2018. And the detail [sic] method of proof of the vast volume of documentary evidence. I regard these issues, although influencing the trial length, were largely unavoidable."

41. He reminds the court that despite this introspection, the court continued in the very system of breaks it had identified as a source of the delay. Nor did the court grant the applications of the defence for severance to make the case more manageable.

42. The court is reminded that Lillian Boyce who was charged with similar offences as the other defendants was upon her plea of Guilty, sentenced to a six-month suspended sentence, when the trial judge's attention was drawn to the fact that she would have to serve a custodial sentence in default, not being in a position in addition to the $1m confiscation order (agreed with prosecution), to pay the financial penalty of US$$300,000.

Fourth Defendant

43. The fourth defendant who associates himself with all the arguments of the third defendant, asserts that the bar of exceptionality has been reached in this

case in which an extraordinary burden has been placed on the defendants in the five years they have spent attending court in a never-ending trial. With the third defendant, he points to an *"overly complex and an ultimately unwieldly case"* that an unbending Prosecution chose to present, as the source of the long delay in the trial of the case.

Fifth Defendant:

44. For the fifth defendant, it is submitted that for such reasons as: the unfairness of conducting the retrial proposed by the Prosecution including the alleged breach of his constitutional right to be tried within a reasonable time, the prejudice he has suffered, his good character and conduct in the proceedings, and the allegedly weak case against him, the proceedings against him must be stayed as an abuse of process.

45. In particular, it is asserted that it will no longer be fair to try the said defendant, as his right to a trial within a reasonable time, enshrined in s.6(1) of the Constitution has been violated. This is having regard to the fact that he was charged on the 7th of February 2012, and that at the time of the end of the aborted trial, there was no end in sight to the prosecution of the alleged count against him. Regarding this, he contends that the old Information was unwieldy and resulted in an unmanageable trial.

46. Like the other defendants, the fifth defendant submits that a retrial on the new Information presented, with its thirteen-count trial against seven defendants, involving 8 projects, seventy-four witnesses (possibly more), and evidence spanning a period of 6 years from 2003 to 2009, will, coming after such unreasonable delay in the proceedings, only compound the delay. This is

because the new Information is as loaded as the old Information that produced proceedings that lasted about nine years until the unfortunate death of the trial judge.

47. He submits that the new Information gives no confidence of a speedy trial as it follows the track record of the Prosecution (and indeed of the court) which has not been impressive, seeing that in the aborted trial, the Prosecution's case continued to expand without any check. With regard to the expansion of the Prosecution's case during the trial, he asserts that before the trial commenced, they had served **108,075** pages of evidence; during the trial, they added **61,891** pages.

48. He avers that a retrial on the new Information, the witness list and the proposed documentary evidence, suggest a repetition of the experience of the aborted one that produced such delay with accompanying prejudice to him.

49. He describes the prejudice of a family man (his children growing up with their father under a cloud all these years); and a provider - having lost custom from clients who would not stay with a lawyer facing criminal charges, as well as not being able to attract new ones. He alleges economic loss, as a lawyer who is facing criminal charges is not likely to keep or attract clients. He asserts that the suffering was all round, and apparently accounts for the suspended sentence handed down by the trial judge to Lillian Boyce.

50. Beyond what the fifth defendant has in common with the other defendants, he points to the injustice of continuing prosecution against such a man of high repute who even in the face of the proceedings, conducted himself well, doing

his best not to cause or contribute to delay. In this regard, he points to how he pressed for an early resolution of these proceedings, repeatedly asked for trial dates to be fixed, and opposed every application for adjournment, being desirous of an early conclusion. Consistent with this, he was the only defendant to agree to the Prosecution's proposed 'facts schedule'. He avers that the case against him is weak, not having been once mentioned in the Sir Robin Auld Commission's Report. Nor was it the case of the Prosecution that he had received any pecuniary benefit from criminal activity.

Sixth Defendant: (Limbs 1 and 2)

51. The sixth defendant contends that he cannot have a fair trial, in the retrial on the new Information which by its presentation, is sure to be a repetition of what the defendants have endured these five years in a never-ending trial of charges alleged against them. He asserts that between the Commission time, and the time charges that were laid before Harrison J was time spent in adverse circumstances; this was accompanied by a trial which lasted five years and was truncated by the death of the trial judge.

52. He attributes the cause of the delay (which he said was not merely administrative), to:

i. an unmanageable and unmanaged trial process involving an overloaded Information with too many defendants, regarding too many projects, and the continued service of exhibits and other evidential material from the unused (Schedule 2) and even from Schedule 3 which, at the start of the trial, the Prosecution assured everyone could be ignored, it being determined to be "completely irrelevant".

ii. the court which failed to do proper case management, indulging the Prosecution in their expansion of their case at will. In this regard, he alleges that the court "[placed] few restrictions on the way the prosecution proceeded. The prosecution was allowed to serve additional material from the unused as and when they wanted, "in case it was needed".

53. He insists that the six-month time estimate projected by the Prosecution is unrealistic. He also draws the attention of the court to the fact that it has been eleven years since the investigations that culminated in these charges, and that it is too long a time to expect the memories of the defendants as well as witnesses to be intact. He enquires how realistic it is to expect that the defendants will be able to remember basic details of transactions done so long ago, "… let alone the minutiae of an individual financial transaction (amongst hundreds), carried out at the request of a professional client; or to respond to cross examination about financial charts, prepared from banking material, not all of which is now available, and not served on the defendants until after the commencement of the trial".

54. He points to personal and professional prejudice he has already suffered from the delay in this case which for him, began with the Commission of Inquiry. Beyond this is the problem of the restrictions on his finances, with assets frozen, or monitored for about a decade.

55. The sixth defendant invites the court to seek answers to questions such as: whether any reasonable lawyer should have concluded that the original information was capable of being concluded in six months, and why the overloaded information was never simplified when it became apparent that it

was unmanageable; or why not even Lisa Hall and Earlson Robinson were discontinued against at the close of the prosecution case, or why it had to take the death of the trial judge for there to be a rethink of the Information.

56. Upon these questions, he poses the final question: whether it will be fair to permit the continued prosecution and whether it would not bring the administration of justice into disrepute.

Seventh Defendant: (Limbs 1 and 2)

57. The seventh defendant complains of inordinate delay that has breached his constitutional right to be tried within a reasonable time, and further, that this court needs to order a stay of proceedings to protect the integrity of its process. As a background to his complaint of unreasonable delay, he narrates first, the circumstances of his involvement (as a police officer in the Turks and Caicos Islands who became an attorney and started to work on Providenciales in 2000), in the matters for which he is standing trial, and also, the circumstances of unjustifiable delay in the proceedings.

58. He narrates that in May 2006, he acted for some individuals, subsequent shareholders of Urban Development Limited, in the transfer of four parcels of land at North West Point to a company called Urban Development Limited. When the transaction was called into question in the 2009 Commission of Inquiry, he was invited to give evidence. Subsequently, with the publication of the Commission's Report and the appointment of the Special Prosecutor, he was charged on 29th November 2011, to stand trial.

59. He has been in these criminal proceedings, for nine years, three months and sixteen days (485 weeks/111 months) from the time of the charge.

60. It is his case, that his constitutionally guaranteed right to a hearing within a reasonable time has been breached by the delay in the proceedings, and that this court, in the performance of its overriding duty to promote justice and prevent injustice, must have regard to the breach and order a stay of the proceedings.

61. He avers, that the bulk of the evidence given in the case against him in the aborted trial was in 2016, and that it related to matters that occurred in 2005 and 2006 - ten years before the said witnesses gave evidence to the Court, and sixteen years at the time of writing the submission.

62. He blames both the Prosecution (which repeatedly informed the court that the trial would take anything from four to five months, and that they were "trial ready"), as well as a trial that was unmanageable and inconvenient to defendants who had to sit through evidence of enormous proportions that had nothing to do with them; delays that were caused by legal aid matters and the determination of rates; the trial schedule of three weeks of sitting and one week of non-sitting; hurricane breaks in September/October every year; the trial judge's decision not to return to the jurisdiction when the borders opened in 2020; and court facilities not sufficient to conduct remote hearings.

63. He denies that he is responsible for any of the delays and urges this court not to count the 'sins' of co-defendants against him, as it considers the issue of delay and its impact on the proceedings.

64. He invites this court to be guided by Canadian jurisprudence which is admittedly based on the Canadian Charter of Rights and Freedoms. In reliance on the said jurisprudence, and in particular, ***R. v. Jordan*** *[2016] SCC 27* in which the principle of calculating delay was used (thirty months presumptive ceiling), he urges the court to find a presumptive ceiling on delay as guided and require the Prosecution to show exceptional circumstances where the presumptive ceiling was crossed.

65. The seventh defendant contends that it is necessary to protect the integrity of the criminal justice system by staying the proceedings, as they are at this time, already of an unprecedented length, and have already breached the constitutional right to be retried within a reasonable time, a situation which would be compounded by a retrial.

66. He also draws attention to the waste of resources for legal aid-funded lawyers to have to be present for hearings that did not involve their clients. This "problem" would have been avoided if any of the several applications for severance including the seventh defendant's application for severance on 6th July 2012, had been granted.

67. He submits that at this time, any consideration of severance would lead to further unconscionable delay due to the prejudice of stigmatisation, loss of privacy, stress and anxiety created by the cloud of suspicion that accompanies criminal proceedings, especially on a practising attorney.

68. He urges the court to consider the importance of timely trials in maintaining overall public confidence in the administration of justice, and to stay the proceedings in consequence.

THE CROWN'S ARGUMENTS

69. While the Prosecution admits the existence of delay in the proceedings, caused and contributed to by the aforesaid matters, they contend that the defendants have not demonstrated the prejudice they have suffered because of it, or will suffer in the new trial. Their response to the arguments of the defendants under the two heads of Abuse of Process applications will for clarity, be grouped under various subheads.

Delay (Retrospective and Prospective) All defendants

70. It is the argument of the Prosecution, citing ***R v Horseferry Road Magistrate's Court ex p Bennett*** *[1994] AC 42,* that the court must proceed cautiously, as delay as a ground for abuse of process leading to a stay, is an exceptional remedy to be used carefully, sparingly and for compelling reasons; that *prima facie*, it is the duty of a court to try a person who is charged before it with an offence which the court has the power to try.

71. The Prosecution argues that the delay in the proceedings is attributable mainly to the conduct of the defendants and the judicial stance.

More particularly, the Prosecution set out a chronology of events which will not be recounted here, as the chronology they rely on: Khalila Astwood-Tatem's affidavit sworn in support of the constitutional motion, will be referred to in the consideration of the issues raised, later in this judgment.

72. A summary of some of what they rely on in explanation of the delay include several applications by the defendants at the trial and appellate levels, as well as the refusal of the defendants to cooperate with the Prosecution both before and during the trial.

73. In the latter circumstance, the Prosecution aver that considerable time was lost when the defendants (save the fifth defendant) refused to engage with the process or to expedite matters. This included the defendants' decision not to accept as agreed facts, non-contentious evidence. The result was that all such evidence, including banking information had to be proved by the calling or reading of witness statements, taking up a lot of time.

74. Further, the trial judge's order for the defendants to provide witness statements was not complied with for many months.

75. The Prosecution avers that the defendants have been charged with serious criminal offences, and that the seriousness produces complexity, and complexity, length of time. Even so, and with all that the Prosecution had to deal with, after they closed their case on 20 September 2018 (although a final witness was called on the 20 January 2019 for a short cross-examination by counsel for the first defendant), further delay was occasioned by the defendants. First, was an abuse of process argument which was heard in four sitting days and was rejected; thereafter every defendant made submissions of no case to answer in respect of every count on the Information.

76. They point out that having considered written and oral arguments from 27 February 2019 to 26 June 2019 (some fifty-three sitting days which included

seven days for Prosecution's response) the court ruled on 29 July 2019 that there was a case to answer against every defendant in respect of each count on the Information.

77. In contrast, when the opportunity came for the defence to present their respective cases on 13 November 2020, the first defendant declined to give evidence in his defence, despite seeking an adjournment to prepare to give evidence. The second defendant took thirty-two days to give his evidence in chief, and his cross-examination was in its eleventh day (four days by the co-defendants and seven days by the Prosecution) and was ongoing.

78. They submit that the judicial stance also contributed to the delay. First, was the schedule of hearings ordered by the court: one week break in every four weeks; three weeks for Easter; three weeks for summer; three weeks in September/October (Hurricane break); three weeks over Christmas and New Year.

Second, was judicial acceptance of the stance of the defendants, that did not help matters for, the agreed facts which were never agreed meant that the prosecution had to prove every document, and every banking transaction which were in fact never challenged regarding their content. The trial judge's allowance of time when it was asked for by the defence, and his allowance of extensive and repetitive cross-examination of witnesses also contributed to the delay.

79. They also point to the unforeseen circumstances such as: adjournments caused by: the resignation of counsel for the first defendant, a leg injury of the trial judge and Hurricane Irma in 2017; the judge's injury followed by his

bereavement in 2018; the ill-health of counsel for the second and seventh defendants, the bereavement of counsel for the sixth defendant, whose partner was murdered on island, in 2019, and further adjournments due to ill-health of counsel for the second defendant who collapsed in court; in 2020 further adjournments (one day loss for counsel for the second defendant to prepare his case), other days lost due to the bereavement of a witness, and an adjournment due to the onset of the Covid 19 pandemic, a constitutional motion challenging the Governor's regulations permitting a judge to sit outside the islands, appeals all the way to the Privy Council, and the Judge's decision following that to sit from Jamaica after more days were lost with defence submissions insisting that he should sit in person in the Islands; and in 2021, more submissions and illnesses which occasioned further adjournments.

80. It is the submission of the Prosecution that if the two hundred and twenty days in a working year had been applied to the trial, the trial would have lasted twenty-six months and four days before the death of the trial judge. But this did not happen as the court used only 44.5% of the time.

No Prejudice

81. It is the Prosecution's case that while there was delay caused and contributed to by the aforesaid matters, the defendants herein have not demonstrated, beyond their extensive complaint about delay in the aborted trial, how they will be prejudiced in a new trial as they are required to do.

82. The Prosecution aver that if the court considers the delay that has accrued, then the period of elapsed time to be considered is what has occurred since

the trial judge overruled the same arguments of delay. In this regard, none of the delays caused by the suspension of proceedings due to the pandemic; the delay caused by the constitutional challenge and subsequent appeals by the defendants to the remote hearing regulations; and the death of the trial judge, are attributable to the Prosecution.

83. Regarding the common theme running through all the applications, which is, the effect of the trial on the day-to-day professional/personal lives of the defendants, the Prosecution argue that not only is such integral to the criminal prosecution of serious crimes, but that it is the very circumstance that makes it important for a verdict to be reached.

84. Regarding the prejudice alleged by the second defendant, they aver, denying his allegations, that:

i. he could not be prejudiced by the death of the Conrad Higgs and Auden Smith who died in 2013 and 2016 respectively. The second defendant has not before now, alleged any prejudice arising from their unavailability, although Higgs' evidence was read;

ii. the alleged loss of documentary evidence (the PNP papers), always was, an issue. However, in the light of the evidence of the successor of the second defendant as the party's Treasurer that he was not given the materials in the first place, there could be no substance to the claim of loss and prejudice to the second defendant's case through any alleged termite infestation or a forgotten USB drive.

iii. There has been no manipulation of the new Information, only a clarification exercise which could not deprive the second defendant of any defence which he may have had. In the amendment sought at the aborted trial

which the second defendant now decries, prejudice was not raised as a ground to resist it.

Unmanageability

85. The Prosecution deny that the aborted trial was unmanageable, or that the new trial would also be unmanageable. They assert that it was because the trial was manageable that each defendant managed to raise arguments on each count, showing that they understood the charges against their clients, and the court found a case to answer in respect of each count.

86. They promise that a retrial - if permitted by the court - will be even more manageable, as the new Information is *"founded on exactly the same evidence but reduced in scope and size and focused on projects already relied on to prove the wider conspiracies".*

87. Furthermore, the defendants have heard the evidence against them; there is thus no need to produce and prove the vast majority of documents, as that was already done without challenge in the aborted trial and therefore can be shortly produced in the new trial; schedules of exhibits can be produced and agreed.

88. There will be no need to show every document to support the charts unless there is a specific reason to do so. The agreed facts were proved by the exhibits produced without challenge and the Court will wish to be provided with good reason why they cannot now be agreed.

89. Further, if there is some evidence to be given by witnesses not on the Prosecution list which the defendants would find useful, the Prosecution will either admit the fact or the transcripts can be read.

Prosecutorial Manipulation

90. The Prosecution aver that the new Information simply cuts down on the scope and size of the charges, and they deny that there has been any prosecutorial manipulation as alleged by the first, second and sixth defendants. They argue that they would not have any reason to use any of the matters urged on the court in the 'no-case' submissions, when the court had accepted the Prosecution's case and rejected the defendants' 'no-case' submissions. They assert that in any event, no evidence of prosecutorial misconduct has been presented such as would render it unfair to try the said defendants.

91. Regarding the second defendant's complaint that having revealed his defence, he will be prejudiced in a retrial, the Prosecution counter, that there is no rule of practice or law precluding a retrial if the defendant has given his evidence in chief and is undergoing cross-examination. Such a course, they argue, would by extension, preclude retrials after a jury that fails to agree, or a discharged jury during the defence case or following a death or loss of one of their number in a long trial.

Insufficiency of Evidence

92. The Prosecution replies to the fifth defendant's assertion that the evidence against him is insufficient, in short shrift. They point out the fact that like the other defendants, the learned trial judge in the aborted trial found that he had

a case to answer after he and the others made no-case submissions following the close of the Prosecution's case.

Cost of Proceedings

93. The Prosecution assert in response, citing ***Regina v W(P) and others***[1] that the cost of proceedings and the public interest is a factor expressly excluded by the common law from the consideration of a judge in deciding whether to stay proceedings as an abuse of process.

Applicable Jurisprudence

94. The Prosecution assert that the heavy reliance by the seventh defendant (and indeed by other defendants) on Canadian cases is not helpful, as the said cases were decided on Canadian Bill of Rights and not on common law principles; thus, where they are in conflict with the cases decided on the common law applicable in this territory, discerned primarily from the Privy Council, the Privy Council common law must be followed. More particularly, the Canadian jurisprudence on delay differs from that of Europe and the United Kingdom and should therefore carry little weight in this application.

Global Pandemic

95. Nor would the global pandemic render it unfair to try, as canvassed by the first defendant, unless the court was unable to try the case, which is not so in this case.

Arguments on the new Information (Sixth defendant)

[1] [2017] 4 W.L.R. 79

96. These are outside the abuse arguments which were the subject of the court's order of 2 March 2021. The said order required the defence if so minded, to file applications, if any, to stay the new Information as an abuse of process. Thus, submissions in respect of individual counts on the Information do not fall under the order and must not be dealt with at this time.

The Sentencing of Lillian Boyce

97. The Prosecution submit that the case against Lillian Boyce was in respect to two projects, North West Point in which she allegedly received US$1 million and West Caicos in which she allegedly received US$200,000, corrupt benefit. Her ill-health was also considered, and her plea and sentence effectively bar her from public life which is not the case for the first and third defendants who remain politically active. Therefore the acceptance of the plea of guilt and the sentence of Lillian Boyce must in this application, be relevant only in relation to the nature of her charges which are less serious than the other defendants'.

ISSUES

98. In my judgment, the following issues stand out for determination from the arguments:

    1. Whether or not any (or all) of the defendants have demonstrated that they are incapable of having a fair trial;

    2. Whether or not any (or all) of the defendants have demonstrated that it will be unfair to try them, or that doing so will bring the criminal justice system into disrepute;

    3. Whether or not the grant of a stay of proceedings is the appropriate remedy to grant upon a successful demonstration in (1) and/or (2).

Consideration of Issues

99. The answers to the issues raised, will be provided upon the consideration of the facts set out in the chronology of events in the proceedings.

Because the Prosecution and at least one of the defendants provide somewhat differing accounts, I must rely on the evidence that seems to be agreed on: the affidavit of Jahmal Misick deposed to in support of the constitutional motion (which is owned by all the defendants including the fifth defendant who was not a party to the constitutional motion), as well as the affidavit of Mrs. Astwood Tatem (relied on by the Prosecution). I do so for two reasons: The defendants did not rely on the chronology they owned in the constitutional motion in this application, the Prosecution however relied on Mrs. Astwood Tatem's account. Unfortunately, Mrs. Astwood-Tatem's affidavit was filed in response to Mr. Jahmal Misick's and was aimed at supplying what was said to be missing from the other affidavit, while "correcting" certain matters set out as facts. I therefore consider it safe to rely on the two, as I did in the constitutional motion, to provide a reliable account of the chronology of this case.

100. The evidence thus provided, and the arguments contained in the various applications of the defendants will be considered in the context of the law on stays of proceedings for abuse of process, settled in a long line of cases since ***Connelly v DPP***[2]***,*** followed in subsequent cases such as ***R v Horseferry Road Magistrates' Court; ex p Bennett***[3]***; R v Latif and Shahzad***[4]***; R v Looseley***[5]***;***

[2] [1964] AC 1254
[3] [1994] 1 AC 42
[4] [1996] 1 WLR 104
[5] [2001] UKHL 53

R v Maxwell[6] and most recently in the Privy Council case of ***Warren v Attorney General for Jersey***[7]**.**

101. Regarding the circumstances in which the court will order a stay of proceedings, I reproduce ***R v. Maxwell*** (supra) at para. 13:

"It is well established that the court has the power to stay proceedings in two categories of case, namely (i) where it will be impossible to give the accused a fair trial, and (ii) where it offends the court's sense of justice and propriety to be asked to try the accused in the particular circumstances of the case. In the first category of case, if the court concludes that an accused cannot receive a fair trial, it will stay the proceedings without more. No question of the balancing of competing interests arises. In the second category of case, the court is concerned to protect the integrity of the criminal justice system. Here a stay will be granted where the court concludes that in all the circumstances a trial will "offend the court's sense of justice and propriety" (per Lord Lowry in R v Horseferry Road Magistrates' Court, Ex p Bennett [1994] 1 AC 42, 74G) or will "undermine public confidence in the criminal justice system and bring it into disrepute" (per Lord Steyn in R v Latif and Shahzad [1996] 1 WLR 104, 112F)"

Unfair to try the Defendants; or A Retrial Will be an Affront To The Court's Dignity

102. I will first deal with the second limb of abuse, set out as the second issue.

On this matter, all the defendants speak with one voice, alleging that it will be unfair to try them given the circumstances of this case. With one voice they

[6] [2010] UKSC 48
[7] [2011] UKPC 10, [2012] 1 AC 22

assert that the court's processes are the subject of abuse, and that a retrial in the circumstances of the case, will be an affront to its dignity; they insist that a retrial will erode public confidence in the criminal justice system of this country as they point to the excessive, unjustifiable delay in the aborted trial and grave prejudice arising from it to them, as well as the cost to date to the country, which will only be compounded by a retrial. They maintain that their prejudice will be repeated in a retrial of the magnitude presented by the new Information, and urge the court to protect its integrity by not countenancing it.

103. Individually and more particularly, the first defendant complains of a number of matters: the delay in the trial; the allegedly unmanageable nature of the aborted trial, an alleged unfair manipulation by the Prosecution of the process by tailoring the charges in the new Information upon the criticism leveled at the Prosecution in the defendants' no-case submissions; prejudice suffered by first defendant in the trial, and his allegedly unlawful extradition from Brazil.

104. The second defendant also contends that the delay which is in breach of his constitutional right to a fair trial, will make a retrial unfair as it will require him to defend himself with regard to matters that occurred about eighteen years ago. A retrial will lengthen and compound the delay in the proceedings as past applications before the court will be open for re-litigation.

105. The third and fourth defendants (the latter adopted the arguments of the former), complain that the delay in the trial was excessive, and that such could not be remedied in the trial process; further, they submit that the trial was unmanageable with an overloaded Information charging in a case of bribery,

large, “unnecessarily complex conspiracy allegations”; and the continual introduction of new evidentiary material by the Prosecution within the trial period. They also blame the court for not exercising proper case management. They urge the court to deny the Prosecution another chance to put the defendants through a second trial on another overloaded Information which is sure to produce considerable prejudice, repeating what they describe as an *“extraordinary burden that has been placed on the defendants”* as well as a financial burden on the country by reason of the years the proceedings have taken.

106. The fifth defendant also points to the delay in the aborted trial, which he insists will be made worse in a retrial. He also complains of an overloaded Information and a large volume of documentary evidence in an ever-expanding case that produced an unmanageable trial, and points at a new Information which is as overloaded, and with a long witness list, to contend that the contemplated retrial will fare no better than its predecessor that produced so much prejudice to his personal and professional life.

107. While the sixth defendant does not seem to place his argument in categories like other defendants, he complains of inordinate delay that has breached his constitutional right to a trial within a reasonable time; an unmanageable trial caused by the prosecutorial discretion to conduct an unmanageable trial involving an overloaded Information with too many defendants, regarding too many projects, as well as the continued service of evidentiary material. He blames the court for the lack of proper case management which permitted conduct from the Prosecution that produced inevitable delay.

108. The seventh defendant blames the Prosecution, the court and the judge (personally) for the delay in the proceedings. He also complains of an unmanageable trial which engendered the prejudice of stigmatization for close to a decade as well as the inconvenience to defendants who had to sit through evidence of enormous proportions that had nothing to do with them. He contends that the inordinate delay will affect the ability of the defendants to put up a proper defence in a retrial.

109. In order to discuss the issue of delay in the context of whether a retrial should be permitted, whether permitting it, the reputation of the criminal justice system will (or not) be brought into disrepute, and/or whether the only thing the court can do to protect its integrity, is to stay the proceedings, it is important to examine what happened at the aborted trial, to first ascertain whether there was indeed delay, and to consider whether in the circumstances of a trial of this nature, the delay was inordinate, and whether it will have the alleged impact in a retrial.

110. To do this, I must first set out a summary of the proceedings which will provide the chronology of events:

Summary of Proceedings and Time-line

111. These criminal proceedings have lasted nine years for the third, fourth, fifth and sixth defendants; for the second and seventh defendants, the proceedings have lasted ten years so far; for the first defendant, it has been seven years.

112. In accordance with the direction contained in ***Attorney General's Reference No. 2 of 2001***[8], these periods are counted from the time the said persons were charged in 2011, 2012 and 2014 (respectively), until the last sitting of the court on the 28th of January 2021.

113. At the time of the death of the trial judge on the 7th of February 2021, cross-examination of the second defendant who was the first to offer evidence (the first defendant having elected not to do so), had just commenced and was in its seventh day.

114. Chronology

i. In 2011, as a consequence of the investigations of the Special Prosecutor appointed after a Commission of Inquiry chaired by Sir Robin Auld which looked into allegations of corruption against members of the House of Assembly in the six-year period of 2003-2009, the first defendant who resigned as Premier became the subject of a restraint order.

ii. In November of that year, the seventh defendant was charged with the crimes he faced on the old Information as well as the new Information filed on 3rd March 2021.

iii. In the following year: 2012, the second to sixth defendant were all charged with various offences before Harrison J, a retired Jamaican Judge, who was appointed for an initial period of two years and made solely responsible for the criminal proceedings.

iv. The judge operated under an appointment that was extended from time to time until his untimely death in 2021.

[8] [2004] UKHRR 193 at 73

v. In the pre-trial review of this case in 2013, the Prosecution provided a trial time estimate of three to five months. The trial was fixed to commence on 7th July 2014.

vi. In 2014, the first defendant who was returned to the country after extradition proceedings, was also charged with some offences. The Prosecution made the decision to prosecute all the defendants on one Information.

vii. Before trial could commence, a number of intervening applications were made. They included: an application for judicial review to challenge the Supreme Court Registrar's directive on legal aid rates to be paid to defence counsel, heard in the Supreme Court in November 2012. An appeal was heard on January 14, 16, 2013 and dismissed.

viii. There followed in October 2013 a challenge by the first defendant of his extradition from Brazil on the ground that he was a victim of political persecution. The extradition was successful.

ix. On 11th April 2014, an application by a defence counsel before the Chief Justice for leave for judicial review of two decisions was refused, so was an application for judicial review challenging the court's refusal of an application to adjourn sufficiency hearing.

x. In the court's ruling of 17th April 2014 by which it dismissed the application, a comment was made that it was apparent that the application had been brought to delay the proceedings. The Prosecution brought an application for a trial without a jury under the Trial without a Jury Ordinance (TWAJO).

xi. Between January 2014 and December 2015 various interlocutory hearings/ directions hearings were held, a constitutional motion challenging

the Trial without a Jury Ordinance (TWAJO) was heard by the Court of Appeal from 2-11th September 2014.

xii. The Supreme Court's ruling in favour of a trial without a jury and judicial tenure on 23rd June 2014 was challenged on appeal.

xiii. On 11th September 2014, the Court of Appeal dismissed the proceedings and followed with reasons in January 2015 and granted leave to appeal to the Privy Council on the standard of proof required under the TWAJO.

xiv. On 1 May 2015, the Privy Council dismissed the appeals against the TWAJO, judicial tenure, and sentencing related to a Mr Richard Padgett in connection with the proceedings.

xv. During this time, while pretrial management issues were made to continue, the court stayed the trial until the appeal to Privy Council was determined. Among the applications at this time were: a defendant's application for severance from other defendants. Then there was another application by another defendant for severance on 8th January 2014.

xvi. Around this time, the defendants' application seeking the recusal of Harrison J on the ground of bias was heard on 10th February 2015 and refused on the 13th of February 2015; an appeal was lodged on 26th February 2015.

xvii. Another application for judicial review of the Governor's decision to extend the appointment of Harrison J was heard on 27th February 2015 and dismissed on 14th April 2015.

xviii. An appeal was lodged on 11th May 2015. A further judicial review was sought against the Governor's directive to replace the trial judge's instrument of appointment with another.

xix. On or about the 28th May 2015, an application for the joinder of the first defendant as a defendant was made.

xx. On 4th June 2015, the Court of Appeal refused the defendants' application made that day for leave to appeal against Harrison J's decision to not recuse himself.

xxi. On 7th September 2015 application was made to the Court of Appeal for leave to appeal to the Privy Council on the issue of Harrison J's alleged bias and recusal.

xxii. In or around August 2015, the defendants brought another constitutional motion before Ramsay-Hale CJ on the ground that the court specifically established to try the Defendants was unconstitutional and without jurisdiction.

xxiii. On 17th September 2015, the Court of Appeal also dismissed an appeal against decision against the constitutional motion heard in August 2015.

xxiv. On 25th November 2015 the Privy Council provided written notice of its refusal to grant special leave to appeal the constitutional motion which was dismissed by the Court of Appeal on 17th September 2015.

xxv. From February 2015 to September 2015, the Prosecution served a notice to the defendants for certain facts to be agreed. This was said to be towards achieving good case management, so as not to clog the trial. Only the fifth defendant responded, and even then, late. The other defendants failed to respond to the request; the third and fourth refused to do so insisting that it was the prosecution's duty to prove every allegation of fact.

xxvi. The first defendant at this time, made an application regarding his extradition and sought a stay of proceedings which was refused.

xxvii. Then followed an application by counsel for the second defendant seeking a six-month adjournment of the trial.

xxviii. The trial eventually commenced on 7th December 2015.

xxix. A further adjournment was sought by counsel for the third defendant which was refused.

xxx. On 18th January 2016, the Prosecution opened its case and concluded its case on or about 20th September 2018 with an undertaking to call as a witness Mr Keith Chamberlain upon his recovery from surgery.

xxxi. Between the said dates, there were other interlocutory proceedings. These were; an application by the first defendant in February 2016 for a mistrial to be declared; the fifth defendant applied for a stay, and the second defendant proposed to commence contempt of court proceedings against a newspaper reporting matters pertaining to the trial.

xxxii. In the conduct of the trial itself, there were a series of adjournments allegedly occasioned by some defence counsel, some lasting hours, others, days.

xxxiii. At the close of the Prosecution's case, the trial was adjourned to allow defence counsel to prepare submissions of 'no case to answer'.

All this was within a trial calendar that accommodated breaks. First there was the court's order for a sitting schedule of three weeks and a non-sitting week in the month.

1) The court also took long periods of break for Easter, Summer, and Christmas/New Year celebrations and a three-week break in October each year ("the Hurricane Break").

These adjournments and breaks were said to have happened for these reasons and in this manner:

2016

a) From 11th March to 4th April 2016:

b) Easter Break; from 22nd July to 15 August 2016:

c) Summer Break;

d) Hurricane Break from 29th September to 2nd October 2016

e) Christmas Break from 16th December to 16th January 2017: Christmas Break

2017

a) From 20th January to 27th February 2017 for first defendant to engage new counsel;

b) from 28th February – 20 March 2017:

c) adjournment due to injury to trial judge's leg; on 20th February 2017, adjournment at instance of new counsel for the first defendant;

d) from 9th March to 24th April 2017; trial resumed on 24th April 2017 and adjourned, from 1st May to 22nd May 2017.

e) First defendant fell ill and would not consent to evidence being led in his absence., Thus, the court sat on 30th and 31st of May 2017 but no work was done; from 9th June to 19th June 2017.

f) On 17th July 2017, the Prosecution served:

1. "schedules showing the movement of items of unused material from Unused Material Schedule 3 (which comprised items of unused material never served on the Defence but were listed on a Schedule and available for inspection at the SIPT office upon a reasonable request to do so being made) to the Unused Material Schedule 2, which were subsequently used as evidence in the trial".

2. a hard drive full of extra material, on the same day that the witness speaking to that evidence was called to begin his evidence.

Defence counsel caught by surprise, made submissions on the admissibility of such evidence, produced in this manner.

g) On 28th July 2017, Harrison J ruled to allow the Prosecution to use completely new financial evidence in the form of Charts, most of which had not been drafted;

h) On 3rd August 2017, the Prosecution served on the Defence counsel a second batch of financial charts by way of email transfer.

i) The court was adjourned for summer recess from 4th August to 28th August 2017.

j) The trial resumed on 28th August 2017 and adjourned, from 5th September to 10th October 2017 due to the threat of Hurricane Irma.

k) On 8th September 2017, Hurricane Irma hit the shores of the Turks and Caicos Islands. the trial resumed on 10 October 2017. Counsel for the second defendant sought an adjournment that was supported by all but counsel for the 5th defendant.

l) The court sat for two weeks out of the four weeks planned; Trial resumed on 13th November 2017; on 17th November, a constitutional motion was filed on behalf of the first defendant, supported by all defendants. A ruling was delivered on 23rd November 2017.

m) The trial resumed and was adjourned for Christmas Break from 14th December to 15th January 2018.

2018

a) The court's decision to resume sitting on 22nd January was postponed to 5th February 2018 due to the trial judge's ill-health.

b) The trial resumed on 5th February and adjourned, from 21st March to 16th April 2018 for Easter Break, which was lengthened by the trial judge's bereavement.

c) The trial which resumed 16th April 2018, was adjourned on 2nd July 2018 (four (4) week Summer Break instead of two). It is disputed that it was at the instance of the Prosecution.

d) The trial resumed on 27th August 2018 – 20th September 2018 (except for 7, 8 and 11 September 2018, due to the unavailability of a Prosecution witness).

e) On 20th September 2018 Prosecution closed its case subject to a witness Keith Chamberlain being called for "some formal matters" at the instance of counsel of the first defendant.

f) No case submissions were filed between 2nd - 5th November 2018. The deadline for the filing of submissions was changed from 29 October to 5th November to 17 December (Prosecution submissions). With these changes the entire timetable was changed.

g) The Prosecution replied to the submissions (after seeking a three-week extension), on 7th January 2019.

2019

a) On 14th January 2019, the Prosecution called its last witness, and formally closed its case on 15th January 2019.

b) On the 16th – 21st January 2019, an application was brought by one defence counsel for a Stay of the Proceedings on the ground that the trial was unmanageable.

c) On 24th January 2019, Harrison J refused the stay application, and on that day, ordered oral submissions on 'no case to answer' to begin on 29 January 2019.

d) The time for oral submissions was extended due to one of the defendants' counsel needing cancer treatment at the time.

e) On 27th February 2019 to June 2019 oral no-case submissions were made. In this long period, was an adjournment to accommodate the Easter holidays; also, the trial judge due to return for a hearing could not do so because he was not booked on a flight from Jamaica leading to an adjournment from 29th April 2019.

f) The court adjourned from 26th June -29th July 2019 to consider the no case submissions. On 29th July 2019, the court gave its ruling on the no-case submissions.

g) The court resumed sitting on 9th September 2019 upon the application of counsel for the first defendant to help him prepare his client for his testimony.

h) There followed a number of requests for adjournments, all of which were granted by the court:

i) On 15th October – 21st October 2019, the trial was adjourned to accommodate the bereavement of one of the defence counsel whose partner was murdered in a house raid;

j) from 21st October to 11th November 2019, the court was adjourned to accommodate cancer treatment for one of the defence counsel.

k) The trial resumed 11th November 2019. Counsel for the second defendant asked for an adjournment to prepare his client to give evidence when the first defendant made an announcement that he would not be calling witnesses.

l) A defence counsel made an application for a stay of proceedings at this time on the ground that another year had effectively been lost; a ruling was delivered on 13th November 2019.

m) The trial resumed on 15th November 2019 when the first defendant opened his defence; on 19th November 2019, the 2nd Defendant commenced his defence.

n) The trial was adjourned from 25th November to 9th December 2019 following the collapse of second defendant's counsel in court and medical issues following.

o). The trial resumed on 9th December 2019 but went for Christmas break from 18th December 2019 to 13th January 2020.

2020

i. On 13th January 2020, the trial resumed. On 24th February 2020 - the Prosecution commenced cross-examination of the 2nd Defendant;

ii. There followed a series of adjournments for a number of reasons, including an adjournment at the instance of counsel for the second defendant, a non-sitting week of the court, and the cancellation of the trial judge's flight from Jamaica.

iii. In March 2020, the trial was adjourned due to the Covid-19 pandemic.

iv. In April 2020-22nd June 2020, the trial was further adjourned (administratively).

v. On 20th June 2020, 20th August, 2020, and September 2020, counsel for the defendants urged the trial judge in remote meetings and by letter, to resume sitting in person; the request was however denied each time, and the trial was adjourned to await the outcome of the legal challenge to the Governor's Regulations before the Court of Appeal.

vi. On 14th May- 5th November 2020, the Defendants challenged the legality of Regulation 4(6) of the Governor's Regulations before the Supreme Court, Court of Appeal and Privy Council.

There was a tacit agreement which was communicated to the court that the trial be adjourned pending the decision, first of the Court of Appeal and then of the Privy Council.

i. On 5th October 2020 a directions hearing was aborted, and the trial was adjourned administratively to 9th November 2020.

ii. On 9th November – 16th November 2020, the trial was adjourned, as the 2nd Defendant was not ready to proceed virtually on that day; defence counsel asked for time.

iii. In November 2020-2nd December 2020 the court heard arguments and then delivered its ruling for trial to resume with the trial judge sitting from Jamaica as permitted by Regulation 4(6); the ruling was reiterated on 14th January 2021.

iv. On 14th and 16th December 2020 - January 2021 the trial was adjourned for the court administration to provide adequate logistics for the resumption of the trial.

v. On 8th January 2021, directions for hearing to resume on 11th January with trial judge sitting from Jamaica.

vi. On 11th January 2021, the defendant Lillian Boyce dismissed her attorneys and named a new legal team.

vii. On 13th January, defendant Lillian Boyce asked for a Goodyear indication on sentence, and received the indication the next day with the following details: a suspended sentence and restoration/compensation.

viii. On 20th January 2020, Lillian Boyce was sentenced to a fine of USD$300,000 and compensation of US$ 1 million. Upon the Prosecution's challenge in the light of the provisions of the Proceeds of Crime Ordinance, Lillian Boyce was resentenced accordingly.

ix. The sitting of 21st January 2021 was aborted as a defendant was in quarantine. On 28th January 2021 cross-examination of second defendant resumed.

x. The court adjourned to 8th February 2021.

xi. On 7th February 2021 trial judge died.

115. In summary, of the 1879 days that elapsed between the trial date in 2015 and the last day of sitting, only 512 days (the Prosecution puts it at 506 days in their written submission) were used as sitting days. The Prosecution graciously supplied its calculation in mathematical terms: that only 44.5% of the trial time was actually used as sitting time to prosecute the case against the defendants. They also put matters in context by indicating that but for the delay in the trial, the trial should have been concluded in twenty-six months and four days, and not in the five years and counting, that occurred.

116. Has there been delay?

As aforesaid, these are proceedings which began for most of the defendants in 2012 (2011 for the second and seventh defendants, and 2014 for the first defendant).

On the 28th of January 2021 when the court last sat, the first person to call evidence in his defence – the second defendant, was under cross-examination. There were eight more defendants to go. This was the stage of the prosecution after a trial that began in 2015 after a three-year delay in prosecution.

117. Without the need to apply Canadian jurisprudence on calculations to produce presumptive ceilings, I am in no doubt, that in the normal course of things, and on an objective standard, criminal proceedings that are just shy of a decade and a trial which in entering its sixth year was far from concluded as the defence had just opened its case (with eight more defendants to go), is anything but unreasonable delay.

118. That the defendants contributed to it, or that the fault lay in the Prosecution (a matter surprisingly negated by the trial judge in a 2018 ruling on an abuse application), or in the court (as both sides point to), does not alter the fact that a trial of that length is inexcusable.

119. There is therefore no controversy over the fact that there has been delay; the parties are on common ground on this and decry it, their point of difference being the reason for the delay. They point fingers at each other, but on one thing they are agreed: that the court did not manage the trial properly.

120. More particularly, the Prosecution assert that the delay was the fault of:

i. the defendants who allegedly made many spurious applications which took up a lot of time, especially as they travelled to the Privy Council; they also assert that the defendants refused to engage with the process by refusing to agree to uncontroverted facts – the result being, that the prosecution had to prove every transaction by calling witnesses;

ii. the court which also contributed to the delay by not adequately using the court's coercive powers to get the defendants to agree the said uncontroverted facts, and furthermore, allowed defence arguments, and

granted the defendants adjournments that many judges would not have countenanced.

121. The defendants blame:

i. the Prosecution for a trial that was so complex it was unmanageable; the Prosecution that was ill-prepared, offloading from time-to-time evidentiary material which was voluminous, and which took time for the defence to study, all the while, declaring themselves to be trial-ready.

ii. the court for indulging the Prosecution by ruling against applications for severance, and for permitting the Prosecution to continually introduce evidentiary material which ran into tens of thousands of pages, even up to 2017, two years into the trial.

122. Both sides have pointed to the regular (and sometimes extended) court-ordered breaks that the court took at Easter, Christmas, and what they dubbed the "Hurricane Break"; and then there were the circumstances, and situations that could not be helped: ill health, bereavement, change of counsel, a global pandemic and death.

123. Thus, there are answers in the three areas of blame that must be ascertained, see: ***Dyer v Watson***[9]*:* the complexity of the case, the conduct of the defendant, and the manner in which the case has been dealt with by the administrative and judicial authorities.

Prejudice

[9] [2002] 3 W.L.R 1488 at 1508

124. As I have set out in the summary of each defendant's case under this limb, the defendants complain of much prejudice in the aborted trial. These range from professional prejudice to financial woes (personal and country), to restriction of liberty and the restraint of assets, the inconvenience of having to sit through proceedings that had nothing to do with one, and the cloud of societal opprobrium from the fact of having been charged with criminal offences. They assert that they have endured all this for a decade or almost, with no end in sight, and this is not to speak of the five hundred days of attending court.

125. With this as a background to their complaint, they point in dismay to the new Information filed and served by the Prosecution which is loaded with thirteen counts, in respect of eight projects, for all seven defendants, and declare that this will most certainly produce the prejudice they have endured for a decade or close. They contend most forcefully that the court will be brought into disrepute, its integrity brought into question, and so they urge the court to protect its process.

126. Yet while the unjustifiable delay admitted by both sides is to be deprecated, should that circumstance mean that it will be unfair to try the defendants in a retrial?

127. The defendants have laboured hard and argued long to establish the fact of excessive delay; they have pointed to the prejudice suffered and the prejudice they will suffer in a retrial. They have submitted that under no circumstance should the retrial of the dimensions contained in the new trial with its sea of witnesses and forest of documents, be allowed to take place.

128. The Prosecution in response has stated that public interest does not matter, and that the cost to a country should not be in a court's consideration in an application of this nature (and have managed to find support in judicial pronouncements).

129. The matters that must exercise the court in the consideration of the second limb of abuse include its responsibility to ensure that the public sees an end to the sorry spectacle that this trial has been, in order that the sore that has festered for so long, may finally be healed, balanced with a responsibility to ensure that that the society is not left with a sense of injustice in that these men who are presumed innocent until proven guilty and whose constitutional right to a trial within a reasonable time is already violated, be made to go through another trial like the aborted one. The disrepute that the court will be brought into, in the eyes of the ordinary man in these islands should a retrial continue in the manner presented, is one the court must fiercely guard against.

130. But delay and its consequences including prejudice, is not the only matter that has been brought to the fore by the defendants under this limb.
The first, second, sixth and seventh defendants have also pointed to prosecutorial manipulation of the new Information.

131. I have already set out the arguments of the said defendants in this regard. Regarding the alleged manipulation, while the other defendants make sweeping allegations of misconduct which appear to be anchored on surmise, the second defendant summarises his complaint by alleging that:
"Prosecution driven by
a. the sworn testimony of the Second Defendant,

b. the No Case Submissions made in the aborted trial,

c. the acknowledged necessity to seek amendments to the Old Information and,

d. the amendments awarded by Harrison, J."

has altered the new Information to deprive him of his defence.

132. It is worth repeating the answer of the Prosecution to the complaint regarding their use of no-case submissions: that the said submissions were rejected by the learned trial judge. Taking that into consideration, it seems to me that if the said submissions had found favour with the judge, an alteration in a retrial that appeared to have been informed by them, may have indeed constituted manipulation. In this instance is difficult to see how rejected submissions may be pounced on by the Prosecution to deny the second defendant his defence.

133. With regard to the weighty complaint that the Prosecution have used his evidence in chief to deprive him of his defence in the new Information in order to secure a conviction against the second defendant, such a complaint if found to have substance, would indeed have led to a finding of manipulation, and would most likely have led to a finding that a fair trial would not be possible, see: per Sir Roger Ormrod in ***Reg. v. Derby Crown Court, Ex parte Brooks (1984) 80 Cr.App.R. 164, 168-169***:

"The power to stop a prosecution arises only when it is an abuse of a process of the court. It may be an abuse of process if either (a) the prosecution have manipulated or misused the process of the court so as to deprive the defendant of a protection provided by the law or to take unfair advantage of a technicality… The ultimate objective of this discretionary power is to ensure that there should be a fair trial according to law, which involves fairness to both the defendant and the prosecution."

134. But the evidence provided by the second defendant far from establishes this. The second defendant alleges:

"In course of the aborted trial, the Prosecution persistently described Count 1 above as an "over-arching conspiracy". The Prosecution sought to implicate the Defendants charged on this and other Counts primarily, if not almost entirely, by evidence suggesting the illicit receipt of monies allegedly "bribes". But no doubt, as their case unfolded and, in particular having regard to the sworn testimony of the Second Defendant, the Prosecution, realising that they were unable to connect him to several and so many of relevant Developments and Developers, have abandoned the theory of "an overarching conspiracy to receive bribes" and in the New Information now allege six separate counts of bribery, as regards which, the Second Defendant is indicted in relation to four, viz. Counts 1, 3, 6 and 7. Importantly, the Prosecution have abandoned allegations against the Second Defendant in relation to Beaches (Count 5) and West Caicos 1(Count 8)."

135. The Prosecution's argument that if giving evidence amounted to such prejudice that there could never be an order of retrial in respect of cases where the jury disagrees or a concluded trial is declared to be wanting in such material respects, finds favour with me, although the matter would have been different if indeed there had been evidence of such manipulation as would adversely affect the second defendant, or any of the defendants in their defence. I have not found such.

136. I am not persuaded that the abandonment of the charge of Conspiracy to Receive Bribes which was in the old Information, and the charges of Bribery

in the new Information support his allegation that the second defendant has been deprived of his defence, or that the Information has been tailored, based on his evidence, to secure a conviction. Nor am I persuaded that the abandonment of allegations against the said defendant in relation to "Beaches" and "West Caicos" would speak of the same.

137. The last complaint in that category, is that certain amendments allowed by Harrison J (which he describes as patently unjust), have been taken advantage of in the new Information.

138. It seems to me having regard to this complaint that the said amendments which had been allowed, were applied for by the Prosecution as necessary. There is no evidence that any appeal was lodged against the ruling now described as patently unjust. Having considered the argument, it seems to me that the inclusion of what was a sought-for correction of the old Information, in the new Information would hardly qualify as a manipulation, if it was allowed to alter the old Information.

139. The Prosecution has already announced that the new Information is "streamlined". While that may send red flags for an anxious defendant, the court cannot rely on mere suspicions of intent to find manipulation such as should lead to the conclusion that the second defendant (or any defendant) could not have a fair trial on the new Information.

140. The second defendant also complains of the loss of evidentiary material and the death of his witnesses. The Prosecution denies the alleged loss, asserting that the person who took over the second defendant's position as Treasurer of

the PNP said he had received nothing. Nor did the defendant ever raise the deaths of the two gentlemen: Aulden "Smokey" Smith, and Conrad Higgs as events that had caused him prejudice in his defence. One of the gentlemen died before the trial in 2013, and the other in 2016, during the trial.

141. Having regard to this complaint, I note that for thirty-four (or thirty-five) days, the second defendant gave evidence in his defence in 2019. The said gentlemen were long deceased by that time, and yet, there is no record that he complained of inability to make his defence for the reasons he now points to.

142. The second defendant has therefore failed to establish that he could not receive a fair trial due to prejudice arising from prosecutorial manipulation, or embarrassment in his defence.

143. I have taken great care to consider all the matters canvassed in the charge of prosecutorial manipulation; I am not persuaded that there is such, as the matters that have been set out in the various submissions of the first, second, sixth and seventh defendants were proven by cogent evidence. It seems to me that the evidence presented is the result of suspicion which has produced surmise; but a multitude of suspicions could never amount to an established fact.

144. I have therefore not found any merit in the allegation of prosecutorial manipulation. No doubt the Prosecution in their belated, half-hearted bid to reduce the magnitude of the trial, have removed certain counts. Also, no doubt advised by amendments they sought and were granted mid-trial, they changed the formulation of certain counts in the new Information. However, I do not

see the alleged targeted attempt to deprive any of the defendants of their defence in order to secure a conviction.

145. It is understandable that the defendants would experience some trepidation at the prospect of a retrial, especially, the second defendant who disclosed his defence in the aborted trial. However, that circumstance should not stop a retrial; otherwise, as the Prosecution observed in their submission, there could never be a retrial of an otherwise concluded case. I have not found such manipulation, and there the matter must end.

146. With regard to the similar complaints made by the first and seventh defendants also, no cogent evidence of the alleged manipulation was presented. Altogether, it seems to me that the said allegation is born out of suspicion and understandable anxiety, rather than on any solid ground of evidence of prosecutorial misconduct.

147. Nor am I persuaded that the second defendant who called evidence in his defence, and for many days presented his evidence-in-chief, will suddenly find himself unable to defend himself in a retrial. It simply does not carry the ring of truth. And this is so even without my having regard to the matters pointed out in the response submission of the Prosecution, regarding the evidence of Gordon Burton which allegedly belied the existence of any exculpatory evidence, and the death of the witnesses one of whom died before the trial commenced, and the other right after it commenced in 2016.

148. The Prosecution aver that the second defendant never complained of any prejudice in providing evidence by reason of the deaths. As I have said, he did

manage to give extensive evidence over thirty-four (or thirty-five) days, and there is no record that he at any time, indicated his present defence being handicapped by the said matters. I am not persuaded of these matters now being raised by the second defendant which do not appear to have been issues in the aborted trial although the circumstances existed before he presented his testimony in his defence.

Conclusion: Limb 2

149. Having thus investigated the complaints and the arguments of the defendants under this limb, should this retrial be stayed permanently because of the delay and all the prejudice it has engendered, and the fear that it will be replicated in a retrial under the new Information filed? Will such be necessary to protect the integrity of the court?

150. It cannot be denied that by reason of having gone through what became an amorphous trial that moved at a snail's pace with no end in sight the defendants have been put to unfortunate prejudice. The fact that their constitutional right to a trial within a reasonable time has not been respected, or protected in the aborted trial is itself, prejudice.

151. The dilemma of the court, faced with an application for a stay on the ground of abuse of process is rooted in the expectation that the court will protect the public interest by ensuring that crime (and especially serious offences), is punished, while ensuring that the society's sense of justice is satisfied, that in doing so, the fundamental rights of persons accused of offences are not trampled on.

152. In considering these matters, I must have regard to pertinent considerations, one of which carries grave weight, and it is: the seriousness of the offences the defendants have been charged with. In ***R v. Maxwell***[10] Lord Dyson gave some useful guidance on this:

"22. The gravity of the alleged offence is plainly a factor of considerable weight for the court to weigh in the balance when deciding whether to stay proceedings on the grounds of abuse of process. At page 534D in Mullen, giving the judgment of the court Rose LJ said: "As a primary consideration, it is necessary for the court to take into account the gravity of the offence in question". It is unnecessary to engage with the academic criticism of this approach… That is because, whatever the position may be in relation to an application to stay proceedings for abuse of process, it seems to me beyond argument that, when the court is deciding whether the interests of justice require a retrial, the gravity of the alleged offence must be a relevant factor. Society has a greater interest in having an accused retried for a grave offence than for a relatively minor one."

153. In an application of this nature, one has to perform what is described as a balancing exercise described by Lord Steyn in *Latif and Shahzad*[11]:

"*The court has a discretion: it has to perform a balancing exercise… Weighing countervailing considerations of policy and justice, it is for the judge in the exercise of his discretion to decide whether there has been an abuse of process, which amounts to an affront to the public conscience and requires the criminal proceedings to be stayed: Reg. v. Horseferry Road Magistrates' Court, Ex parte Bennett [1994] I A.C. 42. Ex parte Bennett was*

[10] [2010] UKSC 48
[11] [1996] 1 WLR 104 at p 112

a case where a stay was appropriate because a defendant had been forcibly abducted and brought to this country to face trial in disregard of extradition laws. The speeches in Ex parte Bennett conclusively establish that proceedings may be stayed in the exercise of the judge's discretion not only where a fair trial is impossible but also where it would be contrary to the public interest in the integrity of the criminal justice system that a trial should take place. An infinite variety of cases could arise..."

154. These gentlemen have been charged with serious offences and it is important that the interests of justice be met. This is not a case where evidence of prosecutorial, executive, or other misconduct that offends the integrity of the criminal justice system has been found to exist, as for example, the facts of ***ex parte Bennett***[12] *or* ***R v. Maxwell***[13]. What is relied on is the delay which it is contended, violates the defendants' constitutional right to a trial within a reasonable time, the prejudice to the defendants in the aborted trial which they fear may be replicated in a retrial, the complexity of the trial from the new Information and the other information provided, the cost to this country which the third defendant surmises is in the region of $100 million (no factual figures were presented); and the conduct of a trial in the middle of a global pandemic.

155. In performing the balancing exercise propounded by Lord Steyn (supra) it must be appreciated that on the side of ensuring the court's integrity is not compromised, and the machinery of justice brought into disrepute, the matter(s) to be considered are those that "*compromise the moral integrity of the criminal justice system to an unacceptable degree.":* Professor A.L-T

[12] Supra at 3
[13] Supra at 11

Choo[14]. Regarding this, it is noteworthy that in a number of cases concerned with the integrity of the criminal justice system, the failing complained about is a morally reprehensible act, as in the facts of leading cases: ***R v Horseferry Road Magistrates' Court Ex p Bennett*** *[1994]1 AC 42;* ***Latif and Shahzad*** *[1996] 1 WLR 104;* ***R v Mullen*** *[2000] QB 520;* ***R v. Maxwell***, all concerned with prosecutorial or executive misconduct. In ***Ex parte Bennett***, the defendant had been forcibly returned to England through the collusion of English and South African authorities in order to be tried. In ***Maxwell***, the police involved in the case had misled the Crown Prosecution Service, the defence and the Court as to benefits provided to procure crucial evidence from an informant; in ***Mullen***, British authorities secured Mullen's deportation from Zimbabwe in a manner described as *"a blatant and extremely serious failure to adhere to the rule of law with regard to the production of a defendant for prosecution in the English courts"*.

156. While the jurisprudence on stays of proceedings accepts that categories of cases that the courts will more readily consider in such applications are not closed, and certainly not limited to the "but for" category which tilts the court towards a stay, the authorities are agreed that under this limb, what will lead to a stay is where the moral integrity of the court will be compromised which is mostly found in the "but for cases", that is, where but for executive or prosecutorial (including police) misconduct, the prosecution would not even take place.

[14] Quoted in the opinion of Lord Brown in ***Maxwell*** at para 107

157. That is not the case here. In this case, there has been unjustifiable and excessive delay attributable to the defence, the Prosecution and the court. That it has produced prejudice has been canvassed and accepted as fact by this court. But ought the court to stop a retrial because it is sure to compound the delay that has already occurred? I think not.

158. While the list of categories that are considered pertinent in abuse of process under this limb is not closed, of delay, in ***Attorney General Reference No. 1 of 1990***[15], (where a reference was made following a stay of proceedings ordered by the Crown Court in the trial of a police officer in respect of an arrest he had made two years before, and the trial judge had stayed the proceedings on the ground that while the delay was not unjustified, it might be prejudicial to the defendant), it was held that:

"a stay for delay … was to be imposed only in exceptional circumstances; that, even where delay could be said to be unjustifiable, the imposition of a permanent stay was to be the exception rather than the rule; and that even more rarely could a stay properly be imposed in the absence of fault on the part of the complainant or the prosecution, and never where the delay was due merely to the complexity of the case or contributed to by the defendant's actions"

159. It is evident that the delay complained of, was the result of a mess of pottage contributed to by the Prosecution, the defendants and the court, by reason of the breaks ordered by the court without challenge by either side; and by exigent circumstances.

[15] [1992] Q.B. 630

160. While the prospect of a retrial of the dimensions that the new Information represents presents a problem regarding the fairness of a retrial, I do not consider that a case has been made upon which the court should order a stay of proceedings under this limb of argument.

161. I do not believe that the delay that occurred in the aborted trial, unfortunate, (or even reprehensible) as it may have been, qualifies as a compromise of the integrity of this court, in the circumstance of the death of the trial judge, even with regard to a retrial. Such delay could not be the reason for the stay of a retrial which has come about because tragically, the trial judge died.

162. Nor have I found the prosecutorial manipulation alleged which would surely have led to a stay of proceedings.

163. The cost of the proceedings so far must indeed be enormous after a decade. While it is a drain on the common purse, as I have already observed, the public whose purse has been drained all these years is entitled to have the allegations against the defendants either properly determined or abandoned by the Prosecution in their own discretion. Seeing that the circumstance of a new trial has come up only because the trial judge died, and not because of wrongdoing on his part or the part of the Prosecution, it seems to me that there is no danger of a compromise of the integrity of the court for the prosecution to be continued in order to bring proceedings to a conclusion.

164. The circumstance of a global pandemic could not be the reason for the stay of proceedings. The courts of Turks and Caicos Islands have proceeded with

their work unhampered by the COVID-19 pandemic, and there is as yet, no indication that any trial will be impossible.

These matters all considered lead me to the conclusion that the stay of proceedings the defendants seek on this ground (second limb), must fail.

Fair Trial in a Retrial

165. In addition to the arguments they present on the second limb of the abuse argument, the first, second, sixth and seventh defendants also contend that it will be impossible for any (or all) of the defendants to receive a fair trial in the proposed retrial, by reason of the delay and other matters. I must say that while other defendants used the circumstance of unreasonable delay to argue their case under the second limb, the facts they relied on are relevant in the consideration of this limb of abuse also.

166. To guide my consideration of this complaint of the lack of a fair trial in the retrial to be conducted on the new Information of 3rd March 2021, I will adopt the definition of a "fair trial" in *Black's Law Dictionary*[16]*: "A trial by an impartial and disinterested tribunal in accordance with regular procedures; especially a criminal trial in which the defendant's constitutional rights are respected".*

167. Have the said defendants made a case which supports their application for a stay of proceedings on limb 1 which is, that it will be impossible to have a fair trial? The defendants bear the burden of proof of what they assert on the preponderance of the probabilities.

[16] 10th Ed. at 717

168. As discussed under the second limb, in ***Attorney General's Reference (No.1 of 1990)***[17] Their Lordships provided the following guidance in such applications:

i. a stay for delay was to be imposed only in exceptional circumstances;

ii. even where delay could be said to be unjustifiable, the imposition of a permanent stay must be the exception rather than the rule;

iii. rarely could a stay properly be imposed in the absence of fault on the part of the complainant or the prosecution, and

iv. never where the delay was due merely to the complexity of the case or contributed to by the defendant's actions;

v. there must be demonstration of such "serious prejudice" to the defendant no fair trial could be held, in that the continuation of the prosecution amounted to a misuse of the process of the court.

vi. to assess prejudice, the court must consider if it could be described as serious and must bear in mind the court's power at common law to regulate the trial process itself.

169. I have already held that there was delay in the aborted trial, and that it was excessive. In addition, what cannot be glossed over is that even after five years, the trial's snail pace had only brought them to the beginning of the defence case. The second defendant was still under cross-examination with eight more defendants to go.

[17] Supra at 15

170. This was after five years of trial which followed three years of delay attributable to all manner of matters including a multiplicity of applications by the defence and a couple by the Prosecution; the chronology of the trial already set out, speaks for itself.

171. The defendants' complaint that they will not have a fair trial in a retrial is based on the delay in the aborted trial (which as I have pointed out, is acknowledged by both sides), projected onto a retrial which follows the delay and all its prejudice. From the finger pointing, both the Prosecution and the defence bear some blame (although it may not be equal in degree).

172. Even so, as the Prosecution points out, if Harrison J had not died, the trial (which was trudging on at a pace criticised by both sides), would doubtless have continued, in the hope that it would come to an end at some point, after all eight of the remaining defendants had had a chance to call evidence in their defence. This is so although there was no telling when that end would have been, seeing that on the forty-third day of the second defendant's evidence (seven days into cross-examination), the Prosecution had on their own showing, barely scratched the surface of the case against him.

173. I cannot emphasise enough that there was inordinate delay in the trial, and further that it has been admitted by both sides. The Prosecution's calculations put the matter in perspective: that only 44.5% of the trial time was used; furthermore, that the trial, properly managed, should have been concluded in twenty-six months and four days, and not in the five years and counting, that actually happened.

174. What is truly unfortunate, is that the court which had been set up at the expense of the public purse, with all the trimmings that enabled it to be an *ad hoc* one, saddled with no other business than this case, failed in its duty to conduct a trial that had regard to the constitutional right of persons who were innocent until proven guilty, within a reasonable time.

175. But should this excessive and unjustifiable delay be sufficient reason for the prosecution of the defendants to be stayed for abuse of process?

176. The authorities are clear that a finding of unjustifiable delay does not automatically lead to a finding of the lack of a fair trial for which the proceedings may be stayed. As was held in ***Attorney General Reference No. 1 of 1990***[18], the defendant must show that he has or will suffer prejudice so serious that it will be impossible to have a fair trial.

177. This position was echoed in *R v S (SP)*[19] where Rose LJ (Vice President) stated, having reviewed a weight of authority, that

"... the correct approach for a judge to whom an application for a stay for abuse of process on the ground of delay is made, is to bear in mind the following principles: (i) Even where delay is unjustifiable, a permanent stay should be the exception rather than the rule; (ii) where there is no fault on the part of the complainant or the prosecution, it will be very rare for a stay to be granted; (iii) no stay should be granted in the absence of serious prejudice to the defence so that no fair trial can be held; (iv) when assessing possible serious prejudice, the judge should bear in mind his or her power to

[18] supra
[19] [2006] EWCA Crim 756 at 21

regulate the admissibility of evidence and the trial process itself should ensure that all relevant factual issues arising from delay will be placed before the jury for their consideration in accordance with appropriate direction from the judge; (v) if, having considered all these factors, a judge's assessment is that a fair trial will be possible, a stay should not be granted"

178. The prosecution contends that not only have the defendants not shown any prejudice, but that their complaint is untenable seeing that if Harrison J had not died, they would still have been undergoing trial. The last part of that assertion is without question, the first part is unfounded.

179. There is no gainsaying that the fact of a criminal trial produces its own prejudice, ranging from societal condemnation to other forms of prejudice. But beyond that, the defendants have each set out prejudice suffered, some in more detail than others. In my judgment, the prejudice which is attendant to criminal proceedings has in the present case, been needlessly and utterly multiplied by reason of the inordinate length of the proceedings.

180. However, as aforesaid, the prejudice that may be the reason for the order of a stay must be such that as Their Lordships held in ***Attorney General No. 1 of 1990***[20]: *"…no fair trial could be held, in that the continuation of the prosecution amounts to a misuse of the process of the court…".*

181. Have the defendants established on the balance of the probabilities, prejudice to the degree that it would be impossible to hold a fair trial?

[20] Supra at p 644

As aforesaid, the first defendant describes the prejudice he will undergo in a retrial, as an extension of the "ordeal" of undergoing a five-year trial which was the result of the Prosecution's presentation of an unmanageable trial. He draws the court's attention to the new Information which he describes as overloaded and which will to fare no better than its predecessor, and will predictably be a repetition of what they have had to endure these past five years of trial and the prejudice that has produced in the lives of the defendants.

182. The sixth defendant points to prejudice to his life and profession in the aborted trial which is bound to be repeated after so many years, in a new trial which by the look of the "overloaded" Information, will lead to another unmanageable trial like its predecessor. Regarding the details of the prejudice he suffered in the aborted trial, he avers that although that trial was estimated to last for six months, for him, it had moved into its ninth year when the trial judge died, with five years of trial and the defence now beginning their cases. He points out that with the passage of time caused by the delay, his memory regarding the "detail of events that occurred, let alone the minutia of an individual financial transaction (amongst hundreds), carried out at the request of a professional client" was likely to have faded and would affect him in a retrial. He wonders if after so long, he would be able to respond to cross examination about financial charts prepared from banking material.

He alleges that as a lawyer, he has been damaged in his reputation from the fact of being charged and that professionally, he has not been able to conduct meaningful work in all the years of these proceedings, at financial cost to him and his family, along with emotional stress. He describes how he has had to depend upon relatives to stand surety for his bail for over a decade, and talks of the restrictions on his finances, with assets frozen, or monitored, making

even obtaining banking services difficult. All this prejudice to his life and work he predicts, will be repeated in a retrial which is based on another overloaded Information and is bound to be as unmanageable as the aborted one.

183. All the other defendants have alleged variously, prejudice ranging from personal restraint, to restraint of assets, professional and financial prejudice, and the list goes on.

184. Is this the "serious prejudice" that would make a fair (re)trial impossible? In assessing the seriousness of the prejudice that no doubt accompanied the aborted trial and is being projected onto the new trial by reason of its dimensions, I refer to Their Lordships direction in ***Attorney General No. 1 1990***[21]:

"In assessing whether there is likely to be prejudice and if so whether it can properly be described as serious, the following matters should be borne in mind: first, the power of the judge at common law [and the applicable law] to regulate the admissibility of evidence; secondly, the trial process itself, which should ensure that all relevant factual issues arising from delay will be placed before the jury as part of the evidence for their consideration…"

185. I am also guided by Their Lordships in ***Attorney-General's Reference (No 2 of 2001)****: HL 11 Dec 2003,[2003] UKHL 68* where the House was asked whether it might be correct to stay criminal proceedings as an abuse for delay. In that case that was concerned with the Convention rights of the defendants,

[21] Supra at p 644

prisoners in a prison riot that occurred in 1998 and who submitted that a trial in 2001 was an abuse due to the delay, it was held that while they did have a right to a fair trial within a reasonable time, a stay would only be granted where it was demonstrated that no fair hearing remained possible, or there was some other compelling reason creating unfairness.

186. Their Lordships had this to say at para 13:

"It is accepted as "axiomatic" "that a person charged with having committed a criminal offence should receive a fair trial and that, if he cannot be tried fairly for that offence, he should not be tried for it at all": R v Horseferry Road Magistrates' Court, Ex p Bennett [1994] 1 AC 42, 68. In such a case the court must stay the proceedings. But this will not be the appropriate course if the apprehended unfairness can be cured by exercise of the trial judge's discretion within the trial process:"

187. Taking due cognisance of the direction contained in both cases, I have pondered the possibility of a cure very seriously and conscientiously, and find that a fair (re)trial will only be achievable after such excessive delay if drastic change is brought into the new Information by the severing of the trials, which this late, must have regard to what it will mean to the later trials in view of the continuing breach of the trial within a reasonable time constitutional guarantee.

188. In my consideration of this matter, I set out at length Lord Lane CJ's direction in ***Attorney General's Reference (No.1 of 1990)***[22]*:*

[22] Supra at p 643

"Stays imposed on the grounds of delay or for any other reason should only be employed in exceptional circumstances. If they were to become a matter of routine, it would be only a short time before the public, understandably, viewed the process with suspicion and mistrust …In principle, therefore, even where the delay can be said to be unjustifiable, the imposition of a permanent stay should be the exception rather than the rule. Still more rare should be cases where a stay can properly be imposed in the absence of any fault on the part of the complainant or prosecution. Delay due merely to the complexity of the case or contributed to by the actions of the defendant himself should never be the foundation for a stay. In answer to the second question posed by the Attorney-General, no stay should be imposed unless the defendant shows on the balance of probabilities that owing to the delay he will suffer serious prejudice to the extent that no fair trial can be held: in other words, that the continuance of the prosecution amounts to a misuse of the process of the court".

189. Mindful of this direction so clearly provided and having regard also to the fact that the delay which produces prejudice must be up to the point of the application and not to future delay: ***Dyer v Watson***[23], my response to the said question is: the delay in this case is excessive and exceptional to a degree, but it is still possible to have a fair trial if the Prosecution can sever the Information in a manner that will provide less complex and speedy trials.

190. I have come to this conclusion, because for starters, there is inordinate and unjustifiable delay admitted by both the Prosecution and the defence. This is

[23] [2002] 3 W.L.R. 1488 at 1527 B-C

a breach of the defendants' section 6(1) constitutional right to a trial within a reasonable time.

It is also imperative to avoid another spectacle of a trial that is badly managed and will be sure to compound the constitutional breach.

191. I do not find any remedy in the trial process, capable of addressing what looms as an unfair retrial, save in the severance of the trials in order to provide speedy trials for the defendants, many of whom have for close to a decade, endured the life of persons under trial, with all the prejudice that brings.

192. That the defendants have all suffered prejudice to some degree could not be denied, and they have all said so, and even in the absence of clarity or perhaps coherence regarding specific acts or conditions of prejudice, close to a decade (for second and seventh defendants, a decade) of being in criminal proceedings with all that it carries including in this case, restraint orders against their assets, restrictions to their liberty, and for some, financial and professional difficulty, must lead to the assumption of prejudice.

Mann LJ in ***R v Telford Justices ex parte Badhan [1991] QBD 78 at pp 91C – 92C*** summed it up excellently in these words:

"Where the period of delay is long, then it can be legitimate for the court to infer prejudice without proof of specific prejudice."

193. Most certainly, if the trial judge had not died, the sorry trial would have continued its limp towards a conclusion at some point. But the reality is that after so long in criminal proceedings (five years after the trial began), the defence case had only just begun with the second defendant who was the first to give evidence, under cross-examination. There were eight more to go. That

the trial would have been concluded in the year was anyone's guess. But that was the fate of that trial that ended with the death of the trial judge.

194. Now, ordinarily, the abortion of a trial by reason of death, should not end a prosecution which was well on its way, but not in this circumstance.
That the Prosecution should not break a step but get on with their mandate of prosecuting these persons charged with serious crimes, is the decision of the Director of Public Prosecutions. His decision to prosecute is not subject to judicial review: ***Sharma v. Brown-Antoine [2006] UKPC 57,*** and that in itself presents no difficulty.

195. What does present a difficulty and makes the proposed retrial an impossible exercise in fair trial, is the manner in which it has been presented in the new Information, which, by reason of the historical delay, and the track record, could not possibly produce a fair trial.

196. I have held that in the five years of trial, there has been prejudice, and I need not rehearse what I have set out so many times before. And while the direction in ***Attorney General's Reference No. 1 of 1990***[24] is for a court faced with such an application to aim for anything short of a stay of proceedings, it also exempts the exceptional situations in which a person can demonstrate serious prejudice. This has been demonstrated here pointing to the delay, prejudice already suffered in the trial, and the new Information for the retrial that looms as a mountain.

[24] Supra at 22

197. The trial on the old Information which raised so many issues on different levels and unrelated projects, with its multiplicity of witnesses, was indeed unmanageable.

198. In a retrial of similar dimensions, the danger of such a trial is that a decision on the overloaded Information, may become unfair due to the enormous timescale of the alleged offences, the timescale of the trial, the sheer number of witnesses and the multiplicity of issues to be resolved by the court.

199. One recurring theme in the aborted trial, was the cry of unmanageability by the defendants. On at least two occasions, a defendant raised the matter, twice some defendants applied for severance. The court did not permit it but trudged along as the Prosecution continued to introduce new material two years into the trial in 2017.

200. The Prosecution now waves the banner of a no-case submission ruling, and the fact that each defendant managed to raise arguments on each count, as vindication that the trial was not unmanageable.

201. That is an argument I could not accept. The Prosecution of this case bears an uncanny resemblance to the case referred to commonly as the Blue Arrow case in which Their Lordships had choice words for both the Prosecution and the court that permitted an unmanageable case: ***R v Cohen***[25].

[25] [1992] Lexis Citation 1709

202. While some of the prejudice in that unmanageable trial was due to it being a trial by jury, there is no doubt that manageability which was at the core, would have just as much posed a problem even in a judge alone trial such as the present case. Their Lordships, in allowing the appeal of the defendants who had been convicted in the "unmanageable trial", stated:

"The prosecution has a heavy responsibility not to overload the indictment. We recognise that the discharge of that responsibility is not easy in a case of complex fraud… However, a fear of failure on the few ought not to inform a decision to proceed on the many. The authority must always and anxiously consider whether the proposed particulars do, despite their interrelationships, threaten a trial of greater length and complexity than is an "ineluctable necessity'… If they do, then the prosecution must reduce the number. That said, the trial judge has the ultimate responsibility of ensuring that the indictment is one upon which a manageable trial is possible, and to achieve that end he can use his power of severance…That said, we appreciate the judge throughout was confronted by a prosecutor who adhered to a notion of indivisible unity and who presented a task which the judge likened to the drawing of teeth. The drawn teeth were important but were relatively few, and thus it was the indictment continued to stand as it did."

203. After four years of trial, the Prosecution closed its case. I reiterate that the trial was indeed unmanageable, as the defendants had said all along, and continue to say. On the Information of January 2016 were seventeen counts of offences charging the commission of crimes in respect of a number of projects against nine defendants. Before trial commenced, they had served 108,075 pages of evidence; the Prosecution's case continued to expand with the introduction of

more evidence as late as three years into the trial (2017), having been permitted by the court to introduce 61,891 more pages of evidentiary material.

204. Doubtless, as observed by the Prosecution, complexity is integral to the trial of financial crimes; but it is the recognition of this, and the very nature of the array of projects involved and the volume of documentary evidence necessary to establish the crimes charged, that ought to have informed the Prosecution to sever the trials, in order that the defendants may not be unnecessarily prejudiced.

205. To put things in context, after enduring four years of trial, the first defendant elected not to call evidence, perhaps hoping for a verdict to end the prosecution for him. Fifteen months after that decision, he was yet to receive a verdict.

206. Now the Prosecution intends to continue with its work, to bring an end to what they started, and to fulfil their duty. But after all that happened in the aborted trial, what they have done, is to present a new Information which they describe as: “streamlined”.

207. The Information now charges seven persons, with thirteen counts of crime, in respect of eight projects. The Prosecution also presents the form/manner/content of the presentation of evidence in the retrial as follows:
74 witnesses to be called to testify (from Witness List A);
65 civilian witnesses who will be called by the Prosecution to only tender documents (from Witness List B);

25 police officers who will be called by the Prosecution to only tender documents (from Witness List C). (11 of the Police Officers on both the A and the C list);

Documents: With regard to the number to the number of documents to be tendered through witnesses, it is not clear from the Witness Lists provided by the Prosecution as the number of documents have not been itemised.

Nature of documents: Only Witness Lists B and C, describe the nature of the documents to be tendered, and these are as follows:
18 witnesses will produce production order materials; 10 witnesses will produce payment receipts, cheques and invoices; 7 witnesses will produce 'records working order'. (These are all witnesses from financial institutions); 6 witnesses will produce land registry documents; 5 witnesses will produce development agreements; 5 witnesses will produce planning files; 3 witnesses will produce FSC; documents; 3 witnesses will produce immigration files; 2 witnesses will produce policies published in the Gazette; 2 witnesses will produce banking documents; 2 witnesses will produce cabinet papers; 2 witnesses will produce letters from the Ministry of Natural Resources; 1 witness will each produce documents separately described as: Transactional documents and bank statements regarding Water Cay; Birth Certificates; American Express documents; Premier's office files; Oath book entries; Valuations; Jubilee Construction documents; Wehrli accounts (Wehrli is a Developer's name); TC Invest file; Treasury documents; Ministerial appointment file; Voter statistics; Arling Anstalt material; Emails from the Government server; Government files; Documents seized from search at Bellview; Documents seized from search at Saadet House.

208. To this daunting list which staggers under its own weight, is the calling of defence by seven defendants which must happen as our system of criminal justice, gives the right to a person charged with an offence, having faced his accuser and the accusation, to defend himself.

209. It seems to me therefore, that this new trial, however "streamlined", is of giant proportions.

The Prosecution have given a trial estimate of four to six months, one year on the outside.

Even if their track record of providing in 2013 (at the pretrial readiness hearing, and to the Court of Appeal and also to Their Lordships at the Privy Council, a trial time estimate of three to six months), was unknown to me, I would, on the witness and documentary evidence list provided for the retrial, conclude that the retrial should it happen, will not be a year's affair; far from it.

210. This, on top of what has already been endured by the defendants, will in my view, be not only to disregard, but to pour contempt on the constitutional guarantee of a trial within a reasonable time (seeing that the said right has already been breached), and will most certainly in my view, not constitute a fair trial where the defendants can adequately defend themselves.

211. To be sure, I recognise that beyond the matters I have already adverted to as sources of the delay, is that fact of adjournments granted by the court which shows both sides to be blameworthy. An analysis of the record shows that of the adjournments sought and granted, (each week being a five day working

week), the first defendant was responsible for an adjournment period of eight weeks; in a joint application of the first and second defendants, one week's adjournment was granted; the second defendant was responsible for five weeks and one day; the third defendant: three days; Lillian Boyce, one week; the sixth defendant one week; the seventh defendant, four weeks; all defendants, one day, a total of twenty weeks, one day. The Prosecution was responsible for adjournment periods of six weeks and a day; and by agreement between the parties, there was an adjournment period of four weeks, four days.

212. I cannot see how the retrial that is proposed on the new Information can produce a fair trial for any of the defendants after the long period of delay which is sure to impact their defence in another drawn-out trial.

213. The reassurance that the Prosecution obviously intended by promising that the retrial would be: *"founded on exactly the same evidence, but reduced in scope and size and focused on projects already relied on to prove the wider conspiracies*", is what rather conjures the spectre of unmanageability and consequent unfairness in the contemplated retrial. Upon my examination of the matter, it is my view, that while the old trial which charged seventeen counts is of course, numerically much larger than the thirteen counts in the new Information, a close look at content reveals that there is no significant reduction. It is no wonder that the witness and documentary list (set out before now), is what it is.

214. Nor is it comforting, as the Prosecution seem to suggest that, *"projects already relied on to prove wider conspiracies*" will be helpful in a new trial.

This is because in a new trial, everything must be proved afresh (if it was at all in the aborted trial).

215. The charges are in respect of a period that ranges between 2002 and 2009. The defendants have already spent close to a decade in proceedings, and five years and counting at trial. It seems to me that the retrial of giant proportions now presented could move the defendants into many more years.

216. These matters lead me to the irresistible conclusion that as the new Information stands, it cannot produce a fair trial in which the defendants will be able to defend themselves in respect of allegations of financial malfeasance which requires memory recall. This is because it is sure to result in another trial of huge dimensions with its attendant delay. The very nature of it will produce delay, even with the expressed will of the court to properly manage the trial in order to ensure some expedition.

217. Having come to this conclusion, I advert to the direction in ***Attorney General's Reference No. 2 of 2001***[26] that a stay not be ordered *"if the apprehended unfairness can be cured by exercise of the trial judge's discretion within the trial process*"

218. A fair trial must ensure that persons accused of crime can defend themselves. Professor Andrew L-T Choo makes an observation which provides a helpful guidance regarding the first limb of abuse:

[26] [2004] UKHRR 193

"…the concern of the first limb is with epistemic considerations. A 'fair trial', therefore, may be seen as one which facilitates accurate fact-finding or truth discovery; its concern is with what Bentham called 'rectitude of decision'. To put it simply, pursuant to the first limb, criminal proceedings may be stayed to prevent the wrongful conviction of an innocent person."[27]

219. In my judgment, for any fair trial to take place, there must necessarily be a severance of the trials to bring a speedy conclusion to the offences the defendants are alleged to have committed. In my judgment, severed trials will reduce the time each defendant spends in the retrial. With reduced complexity, it is my hope that the severed trials will be completed with some expedition so as not to compromise the ability of the defendants to defend themselves.

220. Admittedly, severance will create its own issues, as others have to wait in line. In *R v. Cohen*[28], Their Lordships remarked that

"…the problem presented by the overloaded indictment can be solved only by a robust and early use of the judge's power of severance. An exercise of the power can have disadvantage, as here where four defendants still await their trial, but it is the only power available to limit (as opposed to identify) issues (as opposed to evidence) in order to secure a manageable and therefore fair trial".

[27] Choo, A. L-T (2016) Abuse of Process and Delayed Prosecutions. In: Radcliffe, P., Gudjonsson, G.H., Heaton-Armstrong, A. and Wolchover, D. (Eds.), Witness Testimony in Sexual Cases Evidential: Investigative and Scientific Perspectives. Oxford University Press

[28] Supra at 16

221. In the present proceedings, if there is any hope of continuing with proceedings that will be fair, it will be achieved through severance of the trials with an eye for the reduction of complexity.

222. At the risk of appearing to unacceptably interfere with prosecutorial discretion, I will say that in severing the trials, regard must be had to the continuing breach of the constitutional guarantee of a trial within a reasonable time. Having regard to the time element, simplified trials which will achieve the goal of bringing the defendants to speedy justice, may be the way forward for all the defendants.

223. Will there be further prejudice to the defendants who have endured a long trial in severed trials? Indeed there will be some. It is unfortunate that the trial judge who could have brought a conclusion to the trial, died; but there will also be a conclusion that will satisfy the public interest that persons guilty of crime must be punished and those found to be not guilty, be acquitted, once and for all.

224. The seventh defendant fears that at this stage, even severance will not help the matter, as the delay will allegedly become unconscionable in a retrial. I disagree with such pessimism. I am in no doubt that although a retrial of the present contemplated proportions will be unconscionable; severed, less complex and well managed retrials may be fair trials.

225. Learned counsel for the third defendant in obvious frustration at the magnitude of the aborted trial, exclaimed, that this trial was essentially

"allegations of bribery, presented in the form of large, unnecessarily complex conspiracy allegations in proceedings that have lasted nine years…"

226. The Prosecution contends that the defendants have been charged with serious criminal offences, and that the seriousness produces complexity, and complexity, length of time. The truth of that statement cannot be denied: nor can it be denied that reduced complexity will equal reduced length of time.

227. Having considered all the matters raised in the applications as well as the response of the Prosecution, I find that there is merit in the defendants' arguments on this limb as I have discussed. Yet I also find that this is not altogether a lost cause, as a fair trial is still possible, and the integrity of the court will be upheld in less complex retrials which are properly managed to a speedy conclusion.

With these in mind, I order a temporary stay of proceedings on the ground of a lack of a fair trial on the new Information.

In accordance with the direction to provide a "cure" in the trial process to make for fair trials, I make the following orders:

1. The prosecution of ***R v Michael Misick and Ors***, is temporarily stayed until the 31st of May 2021.

2. On or before the 31st of May 2021, the Prosecution, if desirous of continuing with the prosecutions, must present to the court severed Informations to make possible, expedited trials.

3. With reference to the judgment on the extradition of the first defendant argued as a discrete point, in any Information charging the first defendant with offences, the charge of Conspiracy to Defraud must be excluded.

4. Should the Prosecution fail to comply with the time, and/or fail to sever the trials such as will permit speedy retrials as ordered, the stay may be made permanent on the application of any or all of the defendants on, or after the 31st of May 2021, or on the court's own motion on or after the said date.

5. In the event of retrials proceeding as judge-alone trials, an order is made for the trials to be expedited.

6. In the event of a conviction of any of the defendants, the prejudice suffered by reason of the failure of this court to try the defendants within a reasonable time must be taken into account in any sentence to be imposed, including for parity's sake and with due consideration of proportionality, the sentence of Lillian Boyce.

Sgd.

M. M. AGYEMANG CJ