The Law Officers of the Crown v De Kock
Royal Court
16th September 2016

JUDGMENT
59/2016

Application that trial be stayed permanently on the basis that it would be an abuse of process for the trial to continue.

IN THE ROYAL COURT OF GUERNSEY

Between **THE LAW OFFICERS OF THE CROWN** **Prosecution**

-v-

DANIEL HERCULES DE KOCK **Defendant**

Before: Richard James McMahon Esq., Deputy Bailiff

Hearing dates: 13th and 14th September 2016

Judgment handed down: 16th September 2016

Advocate for the Prosecution: **Advocate R J Calderwood**
Advocate for the Defendant: **Advocate C M Fooks**

Cases and materials referred to in the Judgment:-

The Prevention of Corruption (Bailiwick of Guernsey) Law, 2003
Archbold: Criminal Pleading, Evidence and Practice 2016
Warren v Attorney-General for Jersey [2012] 1 AC 22
R v Manchester Crown Court, ex p. Cunningham [1992] COD 23
R v Maxwell [2011] 1 WLR 1837
Blackstone's Criminal Practice 2016
R v Telford Justices, ex p Badhan [1991] 2 QB 78
The European Convention on Human Rights
The Human Rights (Bailiwick of Guernsey) Law, 2000
Rowe and Davis v UK (2000) 30 EHRR 1
R v Crawley [2014] EWCA Crim 1028
R v Salt [2015] I WLR 4905
R v Dobson [2001] EWCA Crim 1606
R (Ebrahim) v Feltham Magistrates' Court [2001] 1 All ER 831
R v Haringey Justices, ex p DPP [1995] QB 351
Law Officers v Taylor [2011-12] GLR 81
The Royal Court Civil Rules, 2007
The Family Proceedings (Guernsey and Alderney) Rules, 2009
The Criminal Procedure Rules 2015

Introduction

1. The Defendant, Daniel Hercules De Kock, is due to stand trial next month on an indictment containing a single count of corruption, contrary to section 1 of the Prevention of Corruption (Bailiwick of Guernsey) Law, 2003, as amended. By a Revised Application dated 1

September 2016, he applies to have that trial stayed permanently on the basis that it would be an abuse of process for the trial to continue. The intention to make such an application was first raised some months ago when Advocate Fooks became involved in his defence and started making what has turned into a series of applications on behalf of the Defendant. An application dated 4 March 2016 was then lodged but was not pursued because other applications have been prioritised instead. The principal complaint of the Defendant remains unchanged, but the additional factors that Advocate Fooks submits need to be taken into account have evolved as a result of the way those other applications have been dealt with.

2. The Revised Application refers to three matters:

> "*(1) The Police failure to secure the attendance or evidence of Sam Alaia, on whose complaint the Prosecution is founded, thereby depriving the Defendant of the opportunity to cross-examine him and/or to challenge the evidence which emanates from him and which now includes hearsay statements made by him in the form of emails to Joe Castellino and other documents upon which the Prosecution seeks to rely.*
>
> *(2) That the Prosecution has consistently failed to discharge its duties in relation to disclosure necessitating applications to Court. Specifically the Prosecution has not complied with the Order of the Court on the 28 July 2016.*
>
> *(3) The conduct of the investigators and prosecution amounts to an abuse of process insofar as its dealings with disclosure and presentation of the case generally including but not limited to:*
>
> *(i) The failure of the Prosecutor to still provide an opening statement;*
>
> *(ii) The failure to deal properly with matters of disclosure;*
>
> *(iii) The investigators' and prosecutors' general approach to the case which lacks the necessary objectivity.*"

In support of the Revised Application, Advocate Fooks lodged a Skeleton Argument dated 6 September 2016, on which she elaborated during her oral submissions. Advocate Calderwood, who has represented the Crown throughout, resisted the Application in his oral submissions. I am grateful to them both for the manner in which they presented their arguments. At the conclusion of the hearing on 14 September 2016, and because this Application has been brought prior to the trial, I decided to reserve judgment to enable me to have a short time in which to reflect on the submissions that had been made before deciding the outcome.

3. I have set out much of the background in previous judgments I have issued or delivered on the other applications made on behalf of the Defendant and do not, therefore, intend to repeat that detail in this judgment. Where I have handed down a written judgment, I have re-visited what I said in each before reaching the decision set out in this judgment. I have focused very closely on the way in which Advocate Fooks suggests that a stay ought to be granted on either of the bases recognised as being applicable and have borne in mind that Advocate Fooks opened her submissions by describing this Revised Application as "*the big picture*" application. Accordingly, whilst I have considered each of the complaints made by her on behalf of the Defendant, I have also reviewed matters holistically in order to reach an overall assessment of whether the stay sought should be granted.

Legal principles

4. Counsel were agreed that the Court should have regard to the principles set out in the two leading practitioners' works and some of the cases referred to therein. *Warren v Attorney-General for Jersey* [2012] 1 AC 22, being the leading case in Jersey, supports this approach. At para. 4-104 of *Archbold: Criminal Pleading, Evidence and Practice 2016*, referring to *R v Manchester Crown Court, ex p. Cunningham* [1992] COD 23, it is suggested that "*When giving judgment on an application to stay proceedings, a few sentences showing the judge's command of the law on the topic will usually suffice, followed by a summary of the reasons for rejecting or granting the application*". In the context of a reserved judgment, I hope I will be forgiven for setting out the applicable principles slightly more extensively.

5. What Sir John Dyson SCJ (as he then was) said in *R v Maxwell* [2011] 1 WLR 1837 was cited by him at para. 22 of the *Warren* case:

> "*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 Magistrate's Court, ex p Bennett [1994] 1 AC 42 (at 74G)), or will undermine public confidence in the criminal justice system and bring it into disrepute (per Lord Steyn in Latif [1996] 1 WLR 104 (at 112F)).*"

In respect of these two categories of case, para. D3.68 of *Blackstone's Criminal Practice 2016* identifies that "*The former focuses on the trial process; the latter is applicable where the accused should not be standing trial at all (irrespective of the fairness of the actual trial)*" and continues:

> "*In DPP v Humphreys [1977] AC 1, Lord Salmon (at p. 46) commented that a judge does not have 'any power to refuse to allow a prosecution to proceed merely because he considers that, as a matter of policy, it ought not to have been brought. It is only if the prosecution amounts to an abuse of process of the court and is oppressive and vexatious that the judge has the power to intervene.'*"

Further, at para. D3.70, it is suggested that "*Two key questions run through many of the authorities: (1) To what extent is the accused prejudiced? (2) To what degree are the rule of law and the administration of justice undermined by the behaviour of the investigators or the prosecution?*" The burden of establishing an abuse falls on the Defendant to the standard of a balance of probabilities (see, eg, *R v Telford Justices, ex p Badhan* [1991] 2 QB 78).

6. In relation to the first category of cases (impossibility of a fair trial), there is an evident overlap with Article 6 of the European Convention on Human Rights. As a result of the Human Rights (Bailiwick of Guernsey) Law, 2000, this provision forms part of domestic law and the Court is a public authority with obligations to ensure that a person's Convention rights are not violated. In reality, this comparatively recent legislative step adds nothing to the fundamental principle of Guernsey justice that an accused person must be afforded a fair trial. Every judge in this jurisdiction is vigilant to ensure that this cornerstone of the justice system is not eroded. It is why the issues raised by the Defendant in his Revised Application deserve full and proper consideration.

7. The general comment in *Archbold* (at para. 4-77) about this first category of abuse is that:

> "*A stay will not be granted where the trial process is itself equipped to deal with the matters complained of: R. (Ebrahim) v. Feltham Magistrates' Court; Mouat v DPP [2001] 2 Cr.App.R. 23, DC, post, and Att.-Gen.'s Reference (No. 1 of 1990) [1992] Q.B. 630, 95 Cr.App.R. 296, CA, adopting the point made in R. v. Heston-Francois [1984] Q.B. 278, 78 Cr.App.R. 209, CA, in which it was held that the court's jurisdiction to order a stay does not include an obligation upon the judge to hold a pre-trial inquiry into allegations such as improper obtaining of evidence, tampering with evidence or seizure of a defendant's documents prepared for his defence. Such conduct is not ordinarily an abuse of the court's process. It is conduct which falls to be dealt with at the trial itself by judicial control on admissibility of evidence, the judicial power to direct a verdict of not guilty (usually at the close of the prosecution's case), or by the jury taking account of it in evaluating the evidence before them.*"

Advocate Fooks highlighted the further reference made to the same case in the following paragraph of *Archbold*:

> "*Guidance as to the approach to be followed where the complaint relates to the non-availability of evidence was provided in R. (Ebrahim) v. Feltham Magistrates' Court; Mouat v DPP, ante, after a detailed review of the previous authorities on this topic. The first issue in such cases is the nature and extent, in the particular circumstances of the case, of the duty, if any, of the investigating authority and/or of the prosecutor to obtain and/or retain the material in question. In this context, recourse should be had to the code of practice issued under section 25 of the CPIA 1996 (Appendix A-232 et seq.) and the Attorney-General's guidelines on disclosure (Appendix A-243). If, in the circumstances, there was no duty to obtain and/or retain that material before the defence first sought its retention, then there can be no question of the subsequent trial being unfair on that ground. If there has been a breach of the obligation to obtain or retain the relevant material it will be necessary to decide whether the defence have shown, on a balance of probabilities, that owing to the absence of the relevant material the defendant would suffer serious prejudice to the extent that a fair trial could not take place (i.e. that continuance would amount to a misuse of the process of the court), and in ruling on that question the court should also bear in mind that the trial process itself is equipped to deal with the bulk of the complaints on which applications for a stay are founded. A stay should also be granted if the behaviour of the prosecution has been so bad that it is not fair that the defendant should be tried, and in this regard a useful test is that there should be either an element of bad faith or at least some serious fault.*"

8. Advocate Fooks also invokes Article 6(3)(d), ECHR ("*Everyone charged with a criminal offence has the following minimum rights … to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him*"). In *Rowe and Davis v UK* (2000) 30 EHRR 1, the European Court of Human Rights held that:

> "*It is a fundamental aspect of the right to a fair trial that criminal proceedings, including the elements of such proceedings which relate to procedure, should be adversarial and that there should be equality of arms between the prosecution and defence. The right to an adversarial trial means, in a criminal case, that both prosecution and defence mat be given an opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party … In*

addition Article 6(1) requires … that the prosecution authorities should disclose to the defence all material evidence in their possession for or against the accused …

The requirement in Article 6(3)(d) that there be parity of conditions for the examination of witnesses requires disclosure of any material relevant to the testimony of the witnesses, including their credibility (Edwards v UK (1993) 15 EHRR 417, Commission Report)."

Further, *Blackstone's Criminal Practice* states that "*Article 6 can require positive steps to be taken to ensure that the accused can confront and call witnesses (Barbera, Messegue and Jabardo (1989) 11 EHRR 360 at [78])*" (para. A7.82) and that (at para. A7.84):

"*In Al-Khawaja and Tahery v UK (2011) 54 EHRR 807 a Grand Chamber of the ECtHR held that convictions based solely or decisively on statements from absent witnesses which were read out at trial will not automatically result in a breach of Article 6(1) in conjunction with Article 6(3)(d). As long as there are sufficient counterbalancing factors to compensate for the difficulties of admitting hearsay evidence, including strong procedural safeguards to ensure a fair trial, there will be no breach.*"

9. Turning to the second category of abuse (protecting the integrity of the criminal justice system), Advocate Fooks highlighted passages from the judgments given in *Warren* (*supra*), the first of which explains why referring to fairness is inappropriate (at para. 35):

"*It is unhelpful and confusing to say that this category is founded on the imperative of avoiding unfairness to the accused. It is unhelpful because it focuses attention on what is fair to the accused, rather than on whether the court's sense of justice and propriety is offended or public confidence in the criminal justice system would be undermined by the trial. It is confusing because fairness to the accused should be the focus of the first category of case. The two categories are distinct and should be considered separately.*"

The second is the comment in para. 80 from Lord Brown of Eaton-under-Heywood that a "*court seised of the question of whether proceedings should be stayed as an abuse of process … has a very broad discretion indeed*". The third is the passage in para. 83 in which Lord Kerr of Tonaghmore extracted a series of principles from his analysis of the recent jurisprudence:

"*(i) the principal purpose of the examination, in the second category of cases, of the question whether proceedings should be stayed is to determine whether this is necessary in order to protect the integrity of the criminal justice system – see R v Maxwell at para 13. This principle has been expressed in various, slightly differing ways in a number of judgments on the subject. Thus, in R v Horseferry Road Magistrates' Court, Ex p Bennett [1994] 1 AC 42 at 74G Lord Lowry said that a stay will be granted where a trial would "offend the court's sense of justice and propriety". In Latif Lord Steyn stated, at p 112F, that a stay should be granted where to allow the trial to proceed would "undermine public confidence in the criminal justice system and bring it into disrepute". In R v Mullen [2000] QB 520 Rose LJ said, at p 534C-D, that a stay should be granted notwithstanding the certainty of an accused's guilt where to refuse it would lead to "the degradation of the lawful administration of justice". I consider that it should now be recognised that the best way to describe this basis for a stay is that chosen by Lord Dyson in*

R v Maxwell – that it should be granted where necessary to protect the integrity of the criminal justice system.

(ii) A balancing of interests should be conducted in deciding whether a stay is required to fulfil this primary purpose. As Lord Steyn observed in Latif, the various factors that might arise in the range of cases in which this issue may have to be considered are potentially extensive and it is unwise to attempt to list these exhaustively or, as Lord Dyson has said in para 26 of his judgment in this appeal, to rigidly categorise those cases in which a stay will be granted. But where a stay is being considered in order to protect the integrity of the criminal justice system, "the public interest in ensuring that those that are charged with grave crimes should be tried" will always weigh in the balance – Lord Steyn in Latif at 113A-B. Lord Steyn mentioned that a possible countervailing factor was that the impression should not be created that the court is giving its sanction to an approach that the end justifies any means. With the emphasis that is given in this and other cases to statements that prosecutorial or police misbehaviour will never be condoned, this may not be as significant a consideration as heretofore. Other factors that will commonly call for evaluation are those referred to in the passage from the book by Professor Choo, Abuse of Process and Judicial Stays of Criminal Proceedings, 2nd ed (2008), quoted by Lord Dyson in para 24 of his judgment but, again, these should not be regarded as exhaustive.

(iii) The "but for" factor (i e where it can be shown that the defendant would not have stood trial but for the executive abuse of power) is merely one of various matters that will influence the outcome of the inquiry as to whether a stay should be granted. It is not necessarily determinative of that issue.

(iv) A stay should not be ordered for the purpose of punishing or disciplining prosecutorial or police misconduct. The focus should always be on whether the stay is required in order to safeguard the integrity of the criminal justice system."

The passage from Professor Choo's book to which reference is made by Lord Kerr reads (see page 132):

"*The courts would appear to have left the matter at a general level, requiring a determination to be made in particular cases of whether the continuation of proceedings would compromise the moral integrity of the criminal justice system to an unacceptable degree. Implicitly at least, this determination involves performing a 'balancing' test that takes into account such factors as the seriousness of any violation of the defendant's (or even a third party's) rights; whether the police have acted in bad faith or maliciously, or with an improper motive; whether the misconduct was committed in circumstances of urgency, emergency or necessity; the availability or otherwise of a direct sanction against the person(s) responsible for the misconduct; and the seriousness of the offence with which the defendant is charged.*"

10. Advocate Calderwood reminded me of what Sir Brian Leveson P stated in *R v Crawley* [2014] EWCA Crim 1028 (at para. 18): "*... there is a strong public interest in the prosecution of crime and in ensuring that those charged with serious criminal offences are tried. Ordering a stay of proceedings, which in criminal law is effectively a permanent remedy, is thus a remedy of last resort.*" In relation to the *Warren* case (*supra*), he commented that this was where the investigation had involved unlawful steps being taken and so was, as noted in that case, very much one where the "but for" situation arose, yet the decision of the Commissioner of the Royal Court of Jersey to refuse to grant a stay had been upheld on appeal. This was a more

extreme set of circumstances than in the present proceedings. Similarly, in *R v Salt* [2015] I WLR 4905, the Crown successfully appealed against the stay ordered by the trial judge. That order was made during the second week of a trial that had already been disrupted in such a manner that the task of defence counsel was made impossible, the jury's patience had been tried and the trial had had to be stopped because of failures attributable to the prosecution, particularly in relation to disclosure. However, the judge had not found any lack of good faith on the part of the police and had identified that a fair re-trial could be accommodated by the court within a reasonable time. The Court of Appeal in England and Wales expressed their sympathy with the position in which the trial judge found himself but concluded that the balancing exercise was such that the proceedings against the defendants should continue and so set aside the stay.

11. Because Advocate Fooks had repeatedly emphasised that she was not alleging any bad faith on the part of Advocate Calderwood, he further drew attention to the analysis of *R v Dobson* [2001] EWCA Crim 1606 given in para. D3.86 of *Blackstone's Criminal Practice* relating to the level of prejudice facing an accused and to the two passages from the judgment of Brooke LJ in *R (Ebrahim) v Feltham Magistrates' Court* [2001] 1 All ER 831 (at paragraphs 25 and 27 respective) quoted in the following paragraph in that work:

> "*Two well-known principles are frequently invoked in this context when a court is invited to stay proceedings for abuse of process:*
>
> *(i) The ultimate objective of this discretionary power is to ensure that there should be a fair trial according to law, which involves fairness both to the defendant and the prosecution, because the fairness of a trial is not all one sided; it requires that those who are undoubtedly guilty should be convicted as well as those about whose guilt there is any reasonable doubt should be acquitted.*
>
> *(ii) The trial process itself is equipped to deal with the bulk of the complaints on which applications for a stay are founded.*
>
> *It must be remembered that it is commonplace in criminal trials for a defendant to rely on 'holes' in the prosecution case, for example, a failure to take fingerprints or a failure to submit evidential material to forensic examination. If, in such a case, there is sufficient credible evidence, apart from the missing evidence, which, if believed, would justify a safe conviction, then a trial should proceed, leaving the defendant to seek to persuade the jury or justices not to convict because evidence which might otherwise have been available was not before the court through no fault of his. Often the absence of a video film or fingerprints or DNA material is likely to hamper the prosecution as much as the defence.*"

12. Because the two categories of abuse are distinct and separate, I have approached the Revised Application by looking first at whether the Defendant can have a fair trial and, in particular, whether Advocate Fooks has persuaded me that this is impossible. If she has, the stay follows. However, if I conclude that a fair trial is possible, I must then consider separately whether everything that has happened to date offends the court's sense of justice and propriety or continuing with a trial will undermine public confidence in the criminal justice system and bring it into disrepute. This necessarily involves balancing the various interests engaged.

Absent witness

13. The first paragraph of the Revised Application relates to the fact that Sam Alaia will not be a prosecution witness at the trial. As a consequence, it is alleged that the Defendant is being deprived of the opportunity to cross-examine the person on whose complaint the prosecution of the Defendant is founded. In particular, Advocate Fooks submits that an opportunity to

secure some evidence from Mr Alaia was missed and that is what renders any trial of the Defendant unfair.

14. The issue of whether Mr Alaia was in the United Kingdom in or around May and June 2014 has not been satisfactorily resolved. Albeit that this overlaps with paragraph 2 of the Revised Application, this was something that was canvassed at the hearing in July 2016 and led to directions being given to the Crown to cause certain enquiries to be undertaken relating to police plans in respect of Mr Alaia. As a result of those directions, further statements have been lodged from PC Wright, Mark Radford and Paul Yabsley, in each of which the same questions relating to Guernsey law enforcement working with Devon and Cornwall police and the individuals' knowledge of Mr Alaia having returned to the country at that time have been addressed. What has not been covered, though, is the issue of whether it was known to the police in England that Mr Alaia had returned or even whether as a fact Mr Alaia had returned. Clearly, if it had been clarified that Mr Alaia had not been in England at this time, the suggestion on behalf of the Defendant of a missed opportunity to speak to him and possibly even to arrest him would completely fall away. As a result of not having that level of clarity, Advocate Fooks had to resort to inviting the Court to draw inferences from the material available.

15. There is a transcript of a discussion held by telephone between employees at SG Hambros Private Bank ("the Bank") on 10 June 2014. On page 6, Camilla Le Maitre is recorded as saying: "*I listened to Paul's voicemail again before, well we met with him. And he said I ideally need to see you today at the very latest tomorrow morning. So there's obviously quite a bit of urgency … From possible Devon and Cornwall. Because Alaia is now back in the country and they don't know how long he's going to be here.*" Earlier in the discussion (at page 3), having explained that after interviewing the Defendant in accordance with the Bank's disciplinary procedures she and Tracy Bisson saw Mr Yabsley, Ms Le Maitre is recorded as saying "*Paul basically came in and said he was in a position that he could give us an update. And he said that the Law Officers have now reviewed the files and concerning various allegations and they have supported the police in launching a criminal investigation in to the allegations. And it will now move from intelligence gathering in conjunction with Devon and Cornwall to evidence gathering.*" In his statement dated 1 August 2016, Mr Yabsley says "*I cannot recall a conversation with Ms Le Maitre whereby she would have been told that Mr Alaia had left the country and had then returned for a limited period.*". He adds "*It is a possibility that the comments made by Ms Le Maitre which were recorded in a call between her and other SG Hambros staff on the 10 June 2014, came by way of a misunderstanding arising out of the way I communicated the potential for further action by the Devon and Cornwall Constabulary in respect of the suspected criminal offences and the possession of the E-Type Jaguar, by Mr Alaia, in circumstances which amounted to the vehicle representing the proceeds of crime*".

16. Advocate Fooks has also drawn attention to other references at around that time which she suggests points to Mr Alaia having been in England. In a transcript of a telephone conversation between Mr Alaia and another of the Bank's employees on 20 May 2014, Mr Alaia was asked to provide a contact telephone number. He replied that he was phoning from a "*pay as you go*" and enquired if that number had come through. The employee asked if it began with 07597 and Mr Alaia confirmed that that was his number. Mr Alaia is also recorded as saying that he "*would much rather like to fly over to Guernsey and sit down and go through it rather than it comes to the attention of the Press*", which Advocate Fooks suggests implies a short journey here from England rather than a trek from Australia. On 22 May 2014, Mr Alaia sent an e-mail to Sean Bougourd at the Bank, at the end of which he gave his direct mobile telephone number, which corresponded to the number mentioned two days earlier in the transcript of the telephone call. It is believed that the mobile telephone number is one issued in the United Kingdom rather than elsewhere.

17. Advocate Calderwood has also confirmed in response to the direction given in July 2016 that officers from the Devon and Cornwall Constabulary attended at Mr Alaia's address on 30 May 2014, following an allegation that he was the victim of theft of furniture. This does not state categorically whether Mr Alaia was present or not when those officers visited. Advocate Fooks suggests that there would be no reason to attend unless it was for the purpose of speaking to Mr Alaia as the complainant but I consider it possible that the officers wished to attend the scene of the alleged theft whether or not Mr Alaia was present. Philip Carruthers, whose evidence I had directed be taken in advance of the trial due to his deteriorating health, but who I understand has now died, swore an Affidavit on 17 August 2016 in which he confirmed the truth of his previous statement dated 9 November 2014 in which he also mentioned the theft of furniture allegation because it involved him. He refers to this being in June 2014. Although I appreciate that the admissibility of the content of this material may be challenged if it is to be relied on at trial, I am satisfied that I can properly consider it for the purposes of deciding whether or not there was a missed opportunity to speak to Mr Alaia.

18. Advocate Fooks has also referred to the content of Mr Radford's statement dated 8 July 2014, which is a broadly contemporaneous note of his telephone conversation with Mr Alaia that day. In that statement, Mr Radford refers to a message that Mr Alaia had left which had resulted in Mr Radford telephoning him that day. There is no indication as to when that message had been left. Mr Alaia is recorded as explaining to Mr Radford that he had said the police had called at his house. Again, it is unclear whether this is a reference to the visit Advocate Calderwood has confirmed took place on 30 May 2014 or to something else.

19. Taking into account all this material, and reminding myself that the burden on the Defendant is to satisfy me on a balance of probabilities only, I am persuaded that it is more likely than not that Mr Alaia was in the United Kingdom for a time in May and/or June 2014. I consider it more likely than not that the mobile telephone number he gave was his means of communication whilst he was in the United Kingdom and that it is unlikely that he would have used such a mobile telephone number to contact the Bank from Australia. I am satisfied that the number on which Mr Radford called Mr Alaia on 8 July 2014 is a different number with a dialling code in Australia, the implication being that by that time Mr Alaia was in Australia. The question of whether it was known to law enforcement in Guernsey that Mr Alaia was in the United Kingdom at this time is more finely balanced. I have not heard evidence on the issue from Ms Le Maitre (although I did see her give evidence at the *voire dire* earlier this year) or Mr Yabsley but, on the basis that I found Ms Le Maitre a credible witness before, I have no reason to question the way she relayed to her Bank colleagues what Mr Yabsley had told her. Moreover, Ms Bisson had, I understand, also met with Mr Yabsley and nowhere in the transcript does Ms Bisson correct Ms Le Maitre's version. I consider that that supports the accuracy of what was being said and I prefer what is in that contemporaneous record to the recollection of Mr Yabsley two years later and his attempt to explain a possible misunderstanding. The final issue on this topic, though, is one where I consider the Defendant has failed to discharge the burden and that relates to whether Mr Alaia was present when officers attended at his house in England on 30 May 2014. This is something that could have been clarified and the absence of clarification could be placed in the scales in favour of the Defendant, but I find myself left just not knowing whether Mr Alaia was there or not. I assess the two possibilities as equally balanced, which is why I find that the Defendant has not discharged that particular burden. In any event, the response from Advocate Calderwood says that the visit was unrelated to the investigation of possible offending relating to the Jaguar motor car, so it is perhaps not this visit that constitutes any missed opportunity but the absence of any apparent action whilst Mr Alaia was in England.

20. Advocate Fooks has also returned to what Mr Yabsley recorded on THEMIS on or about 9 June 2014 as being supportive of her contention that there was a plan in respect of Mr Alaia and that the United Kingdom authorities should have been, and so would have been, watching out for any return by him to the United Kingdom. In the suggested action points, one is to

"*Consider a means to a joint operation with Devon and Cornwall Police with regards to consecutive executive action against ALAIA and DE KOCK*". In respect of Mr Alaia, "*It is noted that ALAIA is wanted for charging by the Avon and Somerset Police*". This reference to being wanted by the Avon and Somerset Police implies that it concerns something unrelated to the Jaguar motor car. Accordingly, whether or not the Devon and Cornwall Constabulary were keen to speak with Mr Alaia at this time is, in my view, less apparent. Mr Yabsley's action point is to consider a joint operation. I think the proper inference is that this plan had not at that time come to fruition and that perhaps further explains why any visit to Mr Alaia's England address on 30 May 2014 did not relate to this investigation. Accordingly, to the extent that there was any missed opportunity (and I am not really persuaded that there was), the window of opportunity narrowed to after 9 or 10 June 2014 until Mr Alaia left the United Kingdom to return to Australia a few weeks later (assuming, for this purpose, that he was in England throughout that time). In any event, there has been no suggestion that Mr Alaia came to Guernsey during this period. Accordingly, law enforcement in Guernsey was not in a position to deal with Mr Alaia directly, so the extent of any missed opportunity really relates to executive action by another police force, potentially arising from a request for mutual legal assistance from the Guernsey Police or through that force's own investigations.

21. Even if there had been an opportunity for the police in England to speak to Mr Alaia and to consider further steps in an investigation of his activities, possibly with assistance from the Guernsey Police, I am not persuaded that there is any merit in Advocate Fooks' submissions about this leading to the Defendant being denied a fair trial. Advocate Fooks acknowledged that the prosecution has an unfettered discretion as to which witnesses to call. The existence of such a discretion was set out in *R v Haringey Justices, ex p DPP* [1995] QB 351 and seems to me applicable in the same way in Guernsey. It is for the prosecution to assess which witnesses are needed to prove its case before any statements are served. There is a difference in what happens where the prosecution choose not to seek evidence from a witness and where it involves a witness who has given a statement and is expected to form part of the prosecution case but then does not. Advocate Calderwood explained that he did not wish to seek any evidence from Mr Alaia because the latter was regarded as unreliable. Accordingly, Mr Alaia has never been a prosecution witness. That is a significant factor to take into account. It is also apparent that the Defendant knows of the existence of Mr Alaia and could take steps to locate him and so could, if he so wished, call him as one of his witnesses (although Advocate Fooks explained that this has been considered and rejected for a variety of reasons that I do not need to set out).

22. Although it is not directly in point, because the witness not being called in the *Haringey Justices* case was a police officer, Stuart-Smith LJ offered guidance which I consider can also be applied in the present case (at page 357G):

> "*Where in the exercise of their unfettered discretion the prosecution choose not to call a witness, such witnesses will fall into one of two categories. First, there are those whose evidence is helpful to the defence and tends to contradict the Crown's case. On being notified of the existence of such a witness, the defence can make arrangements to call him. Secondly, there are those whose evidence supports the Crown's case but, for whatever reason, it is decided not to call him or her. In the ordinary way the defence will obviously not wish such a witness to be called. But there may be exceptional cases where the defence do wish such a witness to be called. The instance case was such a one. Rightly or wrongly the defence considered that they would have a better prospect of establishing their case, which was that the two police officers were out to harass and assault two young black men, if they could cross-examine both officers and no doubt try to exploit discrepancies between them to show that the evidence was fabricated. Where the witness is a police officer it is in my view unrealistic to require the defence to call him and I do not think it is in the*

interests of justice that they should be required to do so. The situation with other witnesses may well be different and each case will have to be considered in the light of its own facts.

What then is to happen if, in the exercise of their unfettered discretion, the prosecution choose not to call a police officer. If the court is satisfied that the interests of justice require that he should give evidence and that it would be unfair to the defence that he should not do so, they should so rule, though I would emphasise that in my view this will be an exceptional case and the justices should not lightly reach this conclusion. That is what they did in the present case, and in my judgment that was a conclusion that they were entitled to reach. Indeed Mr. Carter-Manning does not seriously dispute that. Having so ruled, the prosecutor has a choice. He can either call the witness, which in the case of a police officer I would expect him to do, or decline to do so. What is clear is that the court cannot compel the prosecutor to call a witness."

His Lordship proceeded to explain further what he considers should have happened in that case where the decision not to call the officer was founded on him having been suspended from duty for unrelated reasons. In such a case, the solution was to call him to give evidence because he was effectively the complainant and was central to the incident that gave rise to the charge against the accused. This is because a "*purely collateral act of dishonesty, whether proved or merely suspected, does not mean that a witness's evidence on a wholly unrelated matter is not credible*" (page 358E). If the prosecutor declines to call the witness, rather than staying the proceedings as an abuse of process, the court could adopt the alternative approach of calling the witness itself. The power to do so had been clearly established in the Crown Court in accordance with the cases cited at the top of page 360 and His Lordship could see no reason why the position should be different in the magistrates' court.

23. In my judgment, there are a number of principles that can be extracted from this case to apply in Guernsey to the present proceedings. The first is that the prosecution has an unfettered discretion to choose not to call someone as a witness. Further, the court cannot compel the Crown to call someone as a witness. It follows, therefore, that it cannot be said that the Law Officers in this case have any duty to secure any evidence from Mr Alaia. As soon as the position is stated in this manner, it is quite evident that the principles from the ***Ebrahim*** case (*supra*) are not satisfied because if there was no duty to obtain the material, then there can be no question of the subsequent trial of the Defendant being unfair on this ground.

24. The second principle is that the Court must be alive to the options available before concluding that a fair trial is impossible. It is very much a remedy of last resort. The possibility of the Defendant approaching Mr Alaia was canvassed at the hearing but not fully resolved. However, Advocate Calderwood outlined the limited circumstances in which Advocate Fooks would get the opportunity to cross-examine Mr Alaia, which is the stated purpose underpinning why it is said in the Revised Application the Defendant cannot have a fair trial if Mr Alaia is absent. Mr Alaia would be a co-defendant and so might have pleaded guilty. In those circumstances, Advocate Calderwood would have chosen not to call Mr Alaia as a witness because of his view that he would prove to be an unreliable witness. That is part of his unfettered discretion. If the Crown did not call Mr Alaia, the Defendant could decide, just as he can at the moment, whether or not to call him as a defence witness. If Mr Alaia chose to plead not guilty, he would retain his right to silence and so would not be available for cross-examination. It would only be if he pleaded not guilty and chose to give evidence that he would be available to be questioned on behalf of the Defendant. In those circumstances, it seems highly probable to me that the evidence given by Mr Alaia in his own defence would be exculpatory of the Defendant as well. Accordingly, the Defendant's position is unaffected from what it is if he chose to engage with Mr Alaia as a witness on his own behalf.

25. For all these reasons, I cannot find that the absence of Mr Alaia as a witness for the prosecution and the preliminary stages of the alleged failure on behalf of the investigators to secure evidence from him renders the trial of the Defendant necessarily unfair. However, there is a second element to the submissions made by Advocate Fooks and that relates to the way in which what Mr Alaia has been saying about matters is being admitted indirectly as hearsay evidence, described by Advocate Fooks as being "*through the backdoor*", and there is no opportunity for the Defendant to challenge that evidence.

26. I do not consider that this complaint is made out. I have heard full argument about the issue of whether certain documents fall within the exception to the hearsay rule as business documents. I have delivered my decisions on those questions and, although I appreciate that Advocate Fooks may wish to re-visit matters and I have indicated that my views in advance of trial may need to be re-visited depending on how matters progress, I do not consider that anything has changed since I reached those decisions earlier this year. It follows that the rulings I have made thus far are, in my view, the correct rulings and so the admissibility of this material at present is not something that offends against the principles I have set out relating to the Defendant's Article 6, ECHR right and, in particular, para. (3)(d). I have considered further the passage in para. 16-124 of *Archbold*, which was relied on by Advocate Fooks, to decide whether this is an area where I should now review the position, but I have concluded that it is premature to do so. The passage reads:

> "*Where there is no opportunity to cross-examine, the admission of disputed hearsay may be inconsistent with the requirements of Article 6(3)(d) where the evidence forms the sole or decisive basis for a conviction, although it is incumbent on a court to consider the fairness of the proceedings as a whole; the suggestion in Luca v. Italy (2003) 36 E.H.R.R. 46 that the "sole or decisive" test was dispositive of this issue is no longer to be regarded as correct: Al-Khawaja v. U.K. (2012) 54 E.H.R.R 23; and Horncastle v. U.K. (2015) 60 E.H.R.R. 31.*"

27. The way the Crown intends to put its case is not based solely on what is said by Mr Alaia in the documents that other witnesses giving oral evidence are likely to produce. Advocate Calderwood indicated that even if the rulings on admissibility had been determined in favour of the Defendant, it would not have led to him discontinuing the prosecution against him. It may present additional hurdles for the Crown to surmount, but I agree with this assessment to the extent that had the rulings been the other way round, it would not automatically have lent support to an abuse of process application succeeding. These are matters that have properly been addressed in advance of the trial, may be re-visited at the trial and so fall within the category of situations where the trial process itself is, in my view, equipped to deal with this type of complaint.

28. Overall, therefore, concentrating solely on the first category of abuse case and the question of Mr Alaia being what Advocate Fooks termed "*an absent witness*", I am not persuaded that this amounts to a reason to stay this prosecution.

Other grounds relating to fairness of trial

29. Advocate Fooks has raised various issues about disclosure by the Crown. Although these and the other complaints made on behalf of the Defendant may be more relevant to the second category of abuse, they are prayed in aid in respect of the first category as well. She submits that the prosecution has adopted an unduly technical and rigid stance when it comes to fulfilling its disclosure obligations. Reliance has been placed on *Law Officers v Taylor* [2011-12] GLR 81 without recognising that as each year passes the approach in England and Wales

appears to be evolving and so should the regime in Guernsey, which draws guidance from what operates in that other jurisdiction.

30. Paragraph 2 of the Revised Application alleges that "*the Prosecution has consistently failed to discharge its duties in relation to disclosure necessitating applications to Court.*" In particular, it is asserted that there has been a failure to comply with the Court's Order on 28 July 2016. I do not find that there has been a failure to comply with what was ordered, although I do think that the spirit of the Order has been misunderstood. Accordingly, if there has been any failing to supply information Advocate Fooks was expecting to receive, some of the blame must be assumed by me for not having been explicit enough in the order I made. The questions put to the persons who have supplied further statements cover the bare bones of what was involved. None of them has done what Advocate Fooks had wanted and what I imagined would have been answered, namely to confirm one way or the other whether Mr Alaia was physically present in England at any time in May to July 2014 and, if so, what contact, if any, law enforcement officers had with him. This is an issue to which I will return shortly.

31. It has to be accepted that applications for further disclosure are made from time to time in criminal cases. The number of applications in this case is probably higher than in most cases, but viewing the number of applications in isolation does not necessarily mean that the prosecution has "*consistently failed to discharge its duties*". As Advocate Calderwood quite properly pointed out, the applications made have not been granted in the terms sought. He assesses the balance of what has been ordered to be disclosed and what has not as potentially being no worse than equal and possibly tipping in favour of the prosecution. Further, he has alluded to the duties that the prosecution as a public authority has to other people concerned in the material that Advocate Fooks applied to have disclosed and how it cannot just accede to every request for information. I imagine that he considers that some of the rulings I have made go further than what the ***Taylor*** case supports in much the same way that Advocate Fooks disagrees with my interpretation of what is a business document for the purposes of the exception to the hearsay rule. That is one of the consequences of making, or as the case may be, resisting applications and I accept that, since she was instructed, the series of applications being made on behalf of the Defendant results from the way in which matters have been evolving. It might have been better all round if all of the applications had been capable of being taken in a global way at a single point of time, but the case has not developed in that manner.

32. I am satisfied, therefore, that the various applications made and the extent to which they have been granted cannot properly be viewed as impacting on the fairness of the trial. Through Advocate Fooks, the Defendant has been afforded every opportunity to seek further material. In part, she has succeeded in obtaining further information with the consequence that the Defendant has had disclosed to him those matters that I have ruled he is entitled to receive. The duty to disclose has, on that analysis, been performed in accordance with those rulings. I do not find that there has been a breach of duty in relation to making the further enquiries that have been ordered in the sense in which that is dealt with in the ***Ebrahim*** case. However, to the extent that there have been any shortcomings in that regard, any prejudice to the Defendant is not of sufficient seriousness to justify the case being stayed. Advocate Fooks has repeatedly stated that there is no allegation of bad faith and, in the light of the ***Taylor*** case, I cannot find that there has been serious fault. Moreover, I again take the view that these are matters that can be adequately dealt with once it comes to a trial of the Defendant, so a stay is not warranted.

33. In relation to the other complaints raised by Advocate Fooks, I will deal with them more fully under the second category of abuse and confine myself to a general conclusion that I have considered everything submitted on behalf of the Defendant relating to whether he can have a

fair trial and decided that he can as matters currently stand. Once again, I will make it clear that this is a view reached on the material placed before me and having regard to what has happened to date. Staying the proceedings will continue to remain an option if the situation justifies that, whether on application from the Defendant or even on the Court's own motion (but only after inviting representations from the parties). As I have already stated, affording an accused person a fair trial is a fundamental principle of Guernsey justice and the Court is obliged to respect the Defendant's rights in this regard.

Protecting the integrity of the criminal justice system

34. Moving on to the second category of abuse case, Advocate Fooks has properly invited me to take a step back from my involvement in each of the applications that have been before the Court this year and to reflect, in particular, on whether an observer would perceive that his or her confidence in the criminal justice system has been undermined. She has drawn attention to the unusual and close liaison between the law enforcement agencies and the Bank at the early stages of the investigation into the Defendant, stressing that the consideration must be viewed as a continuous process from May 2013 to date. Advocate Fooks repeats her criticisms about the necessity to make multiple applications to the Court, all of which have been resisted, suggesting that extracting information is "*like pulling teeth*". She has highlighted various examples of where she claims that Advocate Calderwood has failed to understand the significance and/or relevance of requests for information and so has adopted an unduly narrow interpretation of the prosecution's duties. The tenor of these criticisms can best be summarised as amounting to a charge that Advocate Calderwood does not co-operate, which is a topic to which I will return after dealing with a number of specific complaints.

35. One of the examples of where Advocate Fooks says that Advocate Calderwood has not been cooperative relates to the application made on behalf of the Defendant to take evidence from Mr Carruthers in advance of the trial. That application was opposed on behalf of the Law Officers by Advocate Calderwood on 27 July 2016. However, at the same time, the Law Officers were making an application in similar terms to the Defendant's application in another case but in respect of a prosecution witness. In effect, Advocate Fooks submits that the Law Officers were taking inconsistent positions in two cases in which they were involved and that an observer might wonder why Advocate Calderwood was resisting an application at the same time that the very legislation on which Advocate Fooks was relying was being prayed in aid on behalf of the Crown.

36. I have some sympathy with that submission. With the benefit of hindsight, it may well have been preferable to have deferred considering the application being made on behalf of the Defendant in the present case to enable both applications to be heard together. However, the mere fact that the Law Officers wished to utilise a piece of legislation that I found could not be used does not, in my opinion, mean that public confidence in the process in this case has been undermined. Indeed, I think it points in the opposite direction. Moreover, it was clear to me that this was an application that needed to be determined urgently and so, coupled with my own impending holiday, I proceeded to hear the application and reach a decision as quickly as I could. As Advocate Calderwood was quick to point out, his principled resistance of the Defendant's application was found by me to be legally correct. He suggests that he should not, as an officer of this Court, be criticised for inviting the Court to make a ruling that it then does. I agree. Any criticism of him cannot relate to resisting the application made by the Defendant and must be confined to the fact that he was not actively considering where the justice of the underlying application lay. In other words, rather than just opposing the application being made, it was open to him to consider whether the outcome it sought to achieve could properly be accommodated by the Court. That was potentially a broader discussion to be had within the Law Officers' Chambers, but I do not consider that the apparent absence of such a discussion taking place leads to the levels of concern Advocate Fooks suggests. I believe that an observer of these proceedings would recognise that the

application made in both cases flowed from a previous instance of the legislation in question being used in this way, but that, entirely appropriately, detailed consideration needed to be given to whether the legislation extended to the situation the Court faced in each case. The fact that it was resolved in a timely fashion and a solution found that permitted the taking of the witness's evidence in advance of the trial would not, in my view, undermine public confidence in the criminal justice system but rather improve that confidence because of the way in which the ability to do justice prevailed.

37. Another discrete issue raised by Advocate Fooks, on which she has commented frequently during the hearings this year, is her allegation that the prosecution is failing to provide a copy of the opening speech that is to be used at the trial. In doing so, she recognises that there is no specific statutory duty to do this, but asserts that it is the usual practice. She expects that if there is no opening statement provided in advance, it will lead to disruption at the beginning of the trial if objections are made by her to what is being said. She also refers to Article 6, ECHR and the requirement that the Defendant knows the case he is facing and the way in which she says that the prosecution case against the Defendant has been shifting through the course of this year. (Although this engages the right to a fair trial, I have chosen to deal with it under the second category of abuse case because it has been accepted that there is no duty as such to provide an opening statement in advance of the trial.) Advocate Calderwood, on the other hand, challenges the impression Advocate Fooks has created that it is commonplace to provide opening statements in advance of a trial and tells me that he seldom does this. He would be concerned if this were to be perceived to be a requirement because it would inevitably mean that any wish to move away from what was then provided would have to be shared with a defendant's Advocate before the case could be opened differently from the text previously provided.

38. I take the view that this is an issue without any real substance when it comes to an abuse of process claim. The public's confidence in the integrity of the criminal justice system cannot be undermined by something about which they have no knowledge. In one case, there might be an opening statement provided to the Defendant's Advocate and in another there might not be. In is very much a matter of personal choice. There is, of course, no question of ambush because the provision of the statements of the witnesses who will be called to give evidence and documents that are likely to be produced enable a defendant to understand the case being faced. What the observer will see is what actually happens at the start of the trial. An observer may not even be aware as to whether the Advocate appearing is using a script or notes and, in either case, whether the Defendant's Advocate has seen any of it in advance. In all cases, if there were to be something untoward, the trial judge will have to assess how that impacts on the case but it would be wrong, in my opinion, to assume that there will be disruption of the type Advocate Fooks fears just because Advocate Calderwood has chosen not to write out what he proposes to say in opening the case on behalf of the Law Officers. I am aware that the basis of the case has been set out in writing previously. I am further aware of the time already taken to discuss in Court the elements of the offence with which the Defendant is charged. All of this has to be weighed in the balance and I am not persuaded that there has been, or will be, any impact on public confidence in the criminal justice system arising from Advocate Calderwood declining to provide his intended opening speech for the trial in advance.

39. In many respects, this type of complaint is covered by the general ground advanced on behalf of the Defendant that the investigators and Advocate Calderwood as the prosecutor take an approach to this case that is uncooperative and lacks objectivity. Advocate Fooks passed comment on the fact that a prosecutor's functions is not to secure a conviction at all costs although she did not direct that comment specifically at Advocate Calderwood and to do so would be inconsistent with her oft-repeated commented that she was not making any allegation of bad faith against him. I take the view that Advocate Fooks was wise to avoid any such allegation because I am satisfied that whatever else might be said about Advocate Calderwood

he is conscientious, understands his obligations as a prosecutor and is not motivated by any malice. However, what has become clear, and this is something to which Advocate Fooks has referred, is that there is a degree of antipathy between Counsel. Advocate Fooks explained that Advocate Calderwood will not speak with her and that, as a result, all of their communication is written. Advocate Calderwood did not suggest that Advocate Fooks had misrepresented the position, so I take her comments at face value. Advocate Fooks readily acknowledged that Advocate Calderwood promptly responds to correspondence, so I take from that comment that this manner of communication is not having an unduly adverse effect on how the case is capable of being managed.

40. In this regard, I am reminded that it is customary when a new Advocate is sworn in before the Court for the words of welcome to include the fact that there is collegial support from other members of the Guernsey Bar available to the newly-admitted Advocate. In my experience, it continues throughout an Advocate's time at the Bar. As the numbers of members of the Bar increase, it follows that not everyone will know all other Advocates as well as would have been the case even 20 years ago. However, those Advocates who come to Court to exercise their rights of audience with any regularity will come into contact with each other in their fields of practice. Where they do so and they are engaged on opposite sides in any piece of litigation, it is incumbent on them to be prepared to put aside any personal differences they may have had in the past and work together to do their best to facilitate the smooth administration of justice. This is a facet of the professionalism expected of them and for the benefit of their respective clients.

41. In the context of a civil dispute, rule 1(4) of the Royal Court Civil Rules, 2007 requires the parties to help the Court to further the overriding objective to deal with cases justly. In truth, there was no need for this to be made explicit because it has always been part and parcel of how parties, and their Advocates, are expected to conduct themselves. Rule 1(2) of the Family Proceedings (Guernsey and Alderney) Rules, 2009 makes like provision. In England and Wales, the Criminal Procedure Rules 2015, as amended, contain a similar overriding objective to deal with cases justly and a duty is imposed on all participants in a case to prepare and conduct the case in accordance with that overriding objective. Guernsey has chosen not to make this explicit through comparable rule-making but, as I have just indicated, even without a rule in those terms, this is what all participants in a criminal case are expected to do because it assists in dispensing justice fairly. I am, therefore, troubled to learn that the usual way of trying to iron out matters between Counsel through talking, whether by telephone or face-to-face, is not operating in this case. I perceive that this is adding an unnecessary layer of cost to what is already a case to which much resource has, I suspect, been devoted simply because corresponding in writing must take longer than trying to resolve something through discussion.

42. There is, however, little that the Court can do about this other than to encourage the Advocates to deal with matters that arise in the most efficient and expeditious fashion possible. I am satisfied from my overall review of what has happened to date that any antipathy between Counsel is not such as to impact on the integrity of the criminal justice system to the extent that these proceedings must be stayed. Once again, this is something about which any observer is unlikely to be aware anyway and, although disappointing, it is not an issue that offends the Court's sense of justice and propriety.

43. I have carefully and fully reflected on everything that has happened in this case to date. I do not regard the fact that a trial was listed at a time when the Defendant was unrepresented as being of any relevance because those trial dates were then vacated and the Defendant has secured the services of Advocate Fooks since. Whether or not that trial would have been the catastrophe that Advocate Fooks suggests it would have been is neither here nor there now because it is what has happened since that matters. I do not find that there has been any serious prejudice to the Defendant because all matters that Advocate Fooks has wished to raise on his behalf have now been covered as a result of her meticulous approach. I do not consider

that there has been a lack of objectivity amongst the investigators and the prosecution, although I do accept the submission made that there appears to have been an unwillingness to recognise what it is that the Defendant through Advocate Fooks has been seeking. Disclosure is legally defined by reference to the principles set out in the ***Taylor*** case, but there should be some recognition that greater cooperation up to now, especially well before the trial, might produce efficiencies in the long-run. By way of example, if a fact is unearthed that the Defendant wishes to know, eg, whether Mr Alaia was present in England at some point in time in May to June 2014, which will remove the need to ask witnesses questions, it is inevitably going to be of greater assistance to the overall process to disclose that rather than wait for it to be elicited (if indeed it can be) at the trial. Advocate Fooks can, with a little justification, express her disquiet that everything seems to be an uphill struggle, but I am still not persuaded that matters have reached the position where a stay of these proceedings can properly be granted.

44. In reaching that conclusion, I have taken into consideration the public interest in ensuring that those charged with serious crimes should be tried. The offence of corruption is recognised by Advocate Fooks to be a serious one. I do not accept that it is victimless, as she first suggested it is, and I reject her further suggestion that, if there is any victim here, it is the Defendant himself. That submission appears to me to be about the process rather than the offence charged because it cannot follow logically that the alleged perpetrator of an offence is the victim of that offence. The 2003 Law was enacted to make provision domestically that would enable various international conventions on corruption to be extended to Guernsey. I understand the significance attached to using, where appropriate, the offences created. I also appreciate that in many of the cases in the United Kingdom in respect of similarly worded provisions (now repealed) that the defendants have largely tended to include persons who have given and received what might be called for these purposes the bribe (ie, active and passive bribery as it is not described) whereas in the present case it is only the alleged recipient who is before the Court. That in itself, though, is not a reason to treat what has happened as an abuse of process. The importance to the public of there being a trial of the Defendant in respect of this charge is, in my view, a significant factor to weigh in the balance.

45. I recognise that an observer of these proceedings to date would probably think that this is an unusual case. To many, I suspect that corruption smacks of public figures receiving favours to misuse their authority and that it would not be engaged in relation to an employee in the private sector. Moreover, the observer might wonder why only one party from what is already an unusual alleged transaction is before the Court and question the number of occasions that the case has been listed even before getting to the trial. It is, of course, a new offence for Guernsey and, in those circumstances, the number of hearings to date ought to be better understood than would be the position perhaps were an offence of a type frequently before the Court involved. Further, some of the hearings have been about issues that could have arisen in any other case, eg, the question of whether there should be an interpreter and the issue of taking evidence from a witness in advance of the trial. As I have attempted to explain, the case to date has not been perfect in every way. I doubt many cases are. Where applications have been made and resolved, I trust that that has assisted the parties in the preparatory process and I am satisfied that there is the clear potential for the Defendant to receive a fair trial and, in respect of this second category of abuse, that the integrity of the criminal justice system has not been undermined by what has happened. I have not found any wrongdoing on the part of the investigators or the prosecutor, nor have I found any serious fault. An observer might well view a stay of the case against the Defendant at this stage as a form of punishment for the way in which this prosecution has been conducted and that is not a legitimate basis on which to grant a stay. Whilst the process may be frustrating to the Defendant, who struggles to understand why he is the subject of these proceedings, the argument that there has been something offending this Court's sense of justice or propriety has not been established on his behalf.

Conclusion

46. For the reasons I have given, the Defendant's Revised Application is dismissed. I am satisfied that the Defendant can have a fair trial even if Mr Alaia is not a witness against him and he chooses not to call Mr Alaia as his own witness. The evidence to be adduced on behalf of the prosecution does not have to include direct evidence from Mr Alaia and indeed there is no power for the Court to direct the prosecution to call him as a witness. If the evidence led at trial is regarded as not being capable of supporting a conviction of the Defendant, a submission can be made on his behalf. These are all matters that can be dealt with as part of the trial process to ensure that the Defendant receives a fair trial. Further, I am satisfied that the disclosure elements have been discharged. Where there have been differences of view as to the extent of that obligation, they have been dealt with through the Defendant's applications. Such differences relating to the scope of the disclosure obligation form part of the pre-trial process in a reasonable number of cases and, although the number of applications made is high, in itself that does not equate to consistent failure to comply. Whenever a ruling has gone against the Law Officers, I believe compliance has followed thereafter. In any event, as appropriate, within the context of the forthcoming trial, some aspects might be raised again and will be covered as part of the trial process. Although I share some of the concerns that Advocate Fooks has raised and have encouraged a fresh, more cooperative approach, the Defendant has failed to discharge the burden placed upon him and I have not been persuaded that a stay of these proceedings is required to safeguard the integrity of the criminal justice system.