JAMAICA [Cases referred to p16 (end)]

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 61/94

BEFORE: THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE GORDON, J.A.

BETWEEN	BANK OF JAMAICA	DEFENDANT/APPELLANT
AND	DEXTRA BANK & TRUST CO. LTD.	PLAINTIFF/RESPONDENT

Dr. Kenneth Rattray, Q.C.; David Muirhead, Q.C. and **Douglas Leys** for appellant

Richard Mahfood, Q.C.; Dennis Goffe, Q.C. and **Miss Susan McGhie** for respondent

June 13, 14, 15, 16, 17 and July 29, 1994

CAREY, J.A.:

On March 11, 1993, the present respondent, Dextra Bank and Trust Co. Ltd. (DB), a Caymanian Bank, filed a writ against Bank of Jamaica, the central Bank of this country (BOJ), claiming the sum of US$3M on a promissory note dated January 20, 1993, and interest thereon. By an amendment to the statement of claim on September 30, 1993, a claim for conversion of its cheque was added to recover the face value of the cheque, that is, US$2.999M. As well, there was an alternative claim in that sum for monies had and received. The appellant put in a defence whereby, as to the original claim, it averred that one of the signatures on the promissory note was a forgery and the other signatory was not authorized to sign the said note on its behalf. Further, it pleaded that the Caymanian Bank "**through** its negligence facilitated or caused the said forgery and fraud to be perpetrated on DB." With respect to the second claim, it was pleaded that BOJ changed its position for reasons particularized in the defence and further averred that it was a **bona fide** purchaser for value without notice of any claim or interest by DB in the amount

claimed. The respondent duly filed a reply. Further and better particulars were lodged by DB and interrogatories were administered on either side. An order for speedy trial was obtained by DB and confirmed on appeal to this court.

The matter came on for trial before Paul Harrison, J. on June 6, 1994. This was better than deliberate speed: it was simply breath-taking in light of the fact that the interlocutory stages included a side swing through the Court of Appeal at the instance of the appellant which had sought to have the order for speed trial set aside. It then applied for a stay of the proceedings pending criminal proceedings which it is alleged arose out of the same transaction and which had been instituted. By an order dated June 7, 1994, the judge refused the application for stay.

The appeal is taken against the refusal. The application for stay was requested on the footing that because of the considerable overlap between the instant case and criminal proceedings which had been initiated, the trial of the action then about to commence should be halted, pending the completion of those criminal proceedings. The essence of Dr. Rattray's submission was that with respect to applications for stay where there was an overlap between concurrent civil and criminal proceedings, the fundamental consideration was public policy in the administration of criminal justice. In exercising its discretion, the court must take into account all relevant factors and was not to be restricted by the fact that a defendant in the civil case was not a party to the criminal proceedings. As illustrations of relevant factors, he urged that the hearing of the civil case could give rise to adverse publicity to the prejudice of the defendants in the criminal trial. The shutting out of evidence which would otherwise be available to BOJ because of the rule of confidentiality after a criminal trial, constitutes a prejudice to BOJ in the present civil proceedings. Further, it was said that there was a possibility of a

miscarriage of justice in the criminal trial by reason of the prior civil proceedings because of the opportunities for fabrication of evidence or interference with witnesses in the criminal proceedings.

These arguments were presented against a background of facts contained in two affidavits of Randolph Dandy, the principal legal officer on the staff of BOJ. From the first affidavit, the following facts emerge:

(i) the issue of an alleged loan which took the form of a cheque for US$2.9M is the subject of a fraud, is a live issue;

(ii) there is a report that Orville Beckford was arrested and charged for fraud in respect of the promissory note (which will not be an issue in the civil trial) because the respondents have intimated that claim will no longer be pursued;

(iii) as a result of reports made by BOJ to the police, investigations were initiated, warrants have been issued for the arrest of two other persons, viz. John Wildish and Michael Phillips;

(iv) police investigations disclose that a substantial part of Jamaican dollar, proceeds of DB's cheque, was lodged to the account of Troy Megill. Jamaican dollar cheques issued as part of the payment for DB's cheque and drawn by Richard Jones and Wycliffe Mitchell on their accounts in BOJ were lodged to the accounts of Michael Phillips and John Wildish."

The second affidavit adds no significant fact. Some general comments can be made at this stage with respect to the contents of these affidavits. Whatever may be the charges in respect of which warrants have been issued for the arrest of John Wildish and Michael Phillips, and which led to the arrest of Orville Beckford, this court has not been made privy to them. The nature of the prejudice to them as defendants which might be caused by adverse publicity is unknown. Certainly, no complaint in this regard is being made in the affidavit by any of those defendants. Nothing in the affidavit provides any basis whatsoever for asserting that the opportunities for fabricating of evidence or interference with witnesses exists: that is the merest

speculation.

It might be helpful at this stage if I stated the law applicable to the matter before the court. I can conveniently begin with Smith v. Selwyn (1914-15) All E.R. Rep. 229. There Swinfen Eady, L.J. at page 232 said this:

> "It is now well established that, according to the law of England, where injuries are inflicted on the civil rights of an individual under circumstances which constitute a felony, that cannot be made the foundation of a civil action at the suit of the person injured against the person who inflicted the injuries until the latter has been prosecuted or a reasonable excuse shown for his non-prosecution."

He relied on dicta dating back to 1827 in Stone v. Marsh (1827) 6 B & C 551 by Lord Tenterden and by Cockburn, C.J. in Wells v. Abrahams (1927) L.R. 7 Q.B. at page 557 who said:

> "No doubt it has been long established as the law of England that where an injury amounts to an infringement of the civil rights of an individual, and at the same time to a felonious wrong, the civil remedy - that is, the right of redress by action - is suspended until the party inflicting the injury has been prosecuted."

At this early stage of the development of the principle, it seems that the court was concerned to ensure that the victim of the injury(which gave rise both to a civil action and constituted a crime (a felony)) did nothing which prevented or stifled prosecution. Thus he was not permitted to abstain from prosecuting the offender by receiving his property back, no questions asked. It was the duty of the victim of a felonious act to prosecute the offender before seeking redress by civil action. See Wells v. Abrahams(supra). The applicant for the stay in Smith v. Selwyn (supra), itshould be noted, was the defendant who had not been charged for the rape or attempted rape of the plaintiff in the action. A stay was granted. The basis on which it was granted was that the right to maintain action is suspended until the offender has been prosecuted or a reasonable excuse proffered

for the failure to prosecute. The public policy involved is that public law must take precedence over private law.

The rule stated in **Smith v. Selwyn** (supra) was confined to facts which constituted a felony and also amounted to a tort. It did not embrace circumstances which amounted to a misdemeanour. See **Carlisle v. Orr** (1917) 2 I.R. 534; **Fissington v. Hutchinson** (1866) L.T. 390. The distinction between felonies and misdemeanours has been abolished in England, but the rule in **Smith v. Selwyn** nonetheless remains as reformulated in **Jefferson Ltd. v. Bhetcha** (1979) 2 All E.R. 1108 where it was held that the court controlling the proceedings in a civil action had a discretion under section 41 of the Supreme Court of Judicature (Consolidation) Act 1925 to stay the proceedings if it appeared to the court that the justice between the parties so required having regard to concurrent criminal proceedings arising out of the same subject matter. The situation in some states in Australia where there yet remains the distinction as is the case in this country, is that these courts have taken a robust view of the matter and ignore the distinction as being of no significance. In this country, where the distinction has only historical interest and no practical significance, I would suggest that a court in considering a stay of a civil action where there are concurrent criminal proceedings should likewise ignore entirely the categorization of felonies and misdemeanours. I would state the rule thus - the court in the exercise of its inherent jurisdiction to control its own proceedings is required to balance justice between the parties, taking account of all relevant factors. What must not be lost sight of is, that it is the justice between the parties in the civil action which is being balanced and the onus is on the defendant (who seeks the stay) to show that the plaintiff's right to have its claim decided should be interfered with. See **Jefferson Ltd. v. Bhetcha** (supra) at p. 1113. If

that be right, then the interests of the defendants in a criminal case, who are not parties to the civil action, cannot, in my view, be a relevant consideration.

A number of cases were cited both from England and Australia, which made it clear that the defendant has to show a real risk of injustice to him in the criminal trial. The defendant in such circumstances can properly demonstrate that his interest may be prejudiced in the criminal trial by a prior hearing of the civil case because he is a party to both. In the unreported English case of Croft Bros. (CV) Ltd. v. Eyden & Anor. Court of Appeal (Civil Dividson) October 7, 1988, the appeal was from the refusal to grant an adjournment in civil proceedings which covered the same matters or part of the same matters in a criminal case against the defendants. The action was to recover £140,000 which it was alleged the first defendant, in conspiring with the second defendant, had stolen from the plaintiff company over a protracted period. The argument before the judge was that they should not be required to defend a civil action which required them to disclose their defence to criminal proceedings which were to be heard in a very short time. It was said that it would be unjust for the defendants to be required to decide between allowing the application for summary judgment to go by default and revealing the nature of the defence. The Court of Appeal refused to interfere. Parker, L.J., with whom Nourse and Balcombe, L.L.J. agreed, said this:

> "Mr. Millar rightly concedes that although to do so would deprive him of some tactical advantage in the criminal proceedings in that, if he disclosed where it is said that this money came from if not from the company, it would enable that story to be investigated in advance. But I can see no injustice in that and the Court of Appeal in Jefferson Ltd. v. Bhetcha (1979) 2 All E.R. 1108, (1979) 1 W.L.R. 898, made it perfectly plain that, for an adjournment to be granted or for leave to defend to be given, a real risk of injustice must be shown."
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> (Emphasis supplied)

It is to be noted that the defendants in that case could legitimately argue that their defence at the criminal trial might be prejudiced by its premature disclosure at the civil proceedings. The court held that there would be no injustice to them at the criminal trial. That I put forward no heretical view is exemplified in **Jefferson Ltd. v. Bhetcha** (supra) at page 1113.

> "Of course, one factor to be taken into account, and it may well be a very important factor, is whether there is a real danger of the causing of injustice in the criminal proceedings. There may be cases - no doubt there are - where that discretion should be exercised. In my view it would be wrong and undesirable to attempt to define in the abstract what are the relevant factors. By way of example, a relevant factor telling in favour of a defendant might well be the fact that the civil action, or some step in it, would be likely to obtain such publicity as might sensibly be expected to reach, and to influence, persons who would or might be jurors in criminal proceedings. It may be that, if the criminal proceedings were likely to be heard in a very short time (such as was the fact in the **Wonder Heat** case in the Victoria Supreme Court) it would be fair and sensible to postpone the hearing of the civil action. It might be that it could be shown, or inferred, that there was some real - not merely national - danger that the disclosure of the defence in the civil action would, or might, lead to a potential miscarriage of justice in the criminal proceedings, by, for example, enabling prosecution witnesses to prepare a fabrication of evidence or by leading to interference with witnesses or in some other way."

That statement, in my view, completely destroys the argument developed by Dr. Rattray, Q.C. that a real danger of causing injustice extends to persons who are parties to the civil action although they are not defendants in criminal charges. See also **Guiness PLC v. Saunders & Ors.** (unreported) Court of Appeal (Civil Division) October 17, 1988, to the like effect. In **Jefferson Ltd. v. Bhetcha** (supra), the defendant could properly and relevantly put forward a defendant's right to silence as the basis for the prejudice to him, and in **Guiness PLC v. Saunders & Ors.** (supra) the principle involved was a defendant's right against self incrimination. In neither of these cases were the grounds put forward, either speculative or

academic: material was put before the court to enable it to exercise its discretion. Support for this approach is evident in the words of Kelly, J. in Waterhouse and Ors. v. Australian broadcasting Corporation (unreported) Supreme Court Australia Capital Territory, March 6, 1987.

> "23. I think that a court dealing with applications such as these must be satisfied on the balance of probabilities that a foundation has been laid by independent proof based on admissible evidence that the plaintiffs or any one or more of them might reasonably be expected to interfere or tamper with witnesses or potential witnesses. That proof having been furnished, evidence might then be received of any acts or declarations of any one or more of the plaintiffs tending to establish the furtherance of that interference or tampering. Thereafter evidence might be received of incidents or statements, whether innocent or not on their face, which might reasonably be considered as tending to prove that the parties to the litigation in question might seek so to interfere or tamper."

Neither the appellant nor DB, who are the only parties to the action, are involved in criminal proceedings. There is an allegation of forgery of a promissory note by persons who are neither servants nor agents of either the appellant or DB. But the issue of forgery is no longer a live one, as we were advised in the course of the present appeal, that the plaintiff did not intend to continue to prosecute the claim for monies due under the promissory note. That being so, the basis for urging that the criminal trial should be completed before disposal of the civil case, really disappears. There would be no civil matters overlapping the criminal matters but I do not wish to rest the decision in this case on such a base. That route certainly was not open to Paul Harrison, J.

This brings me then to another argument urged upon us by Dr. Rattray, Q.C. He submitted that there was a serious prejudice to BOJ if the civil proceedings were heard before the completion of the criminal trial. In amplification he said that evidence

which would support BOJ's defence, could only be properly adduced at the civil trial after the completion of the criminal case on the footing that such evidence would only be available because it would have already come into the public domain. It is altogether unnecessary for me to consider whether Order 24 r. 14A of RSC (UK) are applicable in this jurisdiction as Dr. Rattray, Q. C. contends. The rule states:

> "14A. Any undertaking, whether express or implied, not to use a document for any purposes other than those of the proceedings in which it is disclosed shall cease to apply to such document after it has been read to or by the Court, or referred to, in open Court, unless the Court for special reasons has otherwise ordered on the application of a party or of the person to whom the document belongs."

I suspect that it is because learned counsel did not have a deal of faith in this argument that he essayed to maintain that so long as it could be shown that there was potential injustice in relation to the conduct of civil proceedings, if they were heard in advance of the criminal proceedings, a stay should be granted But he did not cite any authority in point or provide any basis for so concluding from any principle he advanced. In no case which has been cited to us, was it suggested that a stay could be obtained so as to assist a defendant in the civil action (not being a defendant in concurrent criminal proceedings) to obtain evidence to support a defence to the civil action.

Dr. Rattray contended for a wider basis for the granting of stays. He said that the wider basis was the public policy rule that public justice should take precedence over civil remedies. He relied on Waterhouse and Ors. v. Australia Broadcasting Corporation (supra), P.T. Garuda Indonesia Ltd. v. Grellman (unreported) Federal Court of Australia, February 16, 1994, and Polly Peck International PLC v. Nadir (unreported) Chancery Division, February 6, 1992.

With respect to the Garuda case, it is plain that the court was not invoking a wider basis for the grant of a stay. Lockhart, J. said this:

> "There are various possibilities as to the origin of the so-called rule, but in my view, an analysis of the cases establishes that the more probable foundation is the ground of public policy enunciated in many cases that it is a rule calculated to bring offenders to justice (**Master v. Miller** 4 TR 320 per Buller, J.); a rule intended to ensure that, until the vindication of the criminal law is complete, any civil action should not be entitled to proceed based upon the felony."

In my view, that dictum adds nothing different to the well-known felony-tort rule. The Polly Peck case concerned an action brought by the plaintiff company for alleged fraudulent breaches of duty by the defendant. The stay was sought by the defendant at the interlocutory stage of the proceedings. The court refused to grant a stay holding, **inter alia**, that there was no real chance of causing injustice in the criminal proceedings. In that case, both parties were involved in concurrent criminal and civil proceedings. No wider basis for the grant of a stay was articulated by the court but it made orders to protect the defendant's interest in the form of undertakings not to disclose to third parties' materials provided by the defendant otherwise than for the purposes of the action and other qualifications restricting the availability and use of the materials. With respect to Waterhouse, the defendant applied for stay of this action for defamation brought by four plaintiffs. Two of the plaintiffs had laid informations charging the executive producer of the show and a reporter working on the programme for publishing defamatory matter of each of those two plaintiffs. Kelly, J. in the course of his judgement, said as follows:

> "12. During the course of the hearing it became obvious that the real basis for the application was the concern of the corporation that during the course of interlocutory steps in the actions against it material

> would come to the attention of the plaintiffs which would enable them to identify readily enough the names of witnesses to the matters alleged in the segment. The corporation was concerned lest the plaintiffs or some of them at least, having such knowledge, might take action to interfere or tamper with witnesses or to prevent or inhibit them from giving evidence in the criminal proceedings with the result that its employees, the defendants, might be unable freely to conduct their defence.
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> 13. It was said, as I understood the argument put on behalf of it, that the corporation was so deeply and intimately concerned with the matters which would be canvassed in the criminal defamation proceedings that in effect its interests were as one with those of Mr. Manning and Mr. Jones. Accordingly, so it was said, it was in the interests of justice that the civil proceedings which might make available to the plaintiffs such material as that indicated above should be stayed to ensure that Messrs. Manning and Jones might properly put their case before the Local Court and, should that be necessary in due course, before the court which tried any indictment which might be presented against either of them.
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> 14. It is clear that the stays sought by the corporation are sought on a basis for their granting much wider than has ever been used in respect of such a stay before. That fact would not, in my opinion, in a proper case, inhibit the grant of such a stay nor would the fact that the stay would operate in aid of the interests of justice in respect of criminal proceedings being brought in another jurisdiction altogether in respect of persons who are not the same as the person seeking the stay. Naturally, the making of such an order should be approached with very great caution."

The wider basis to which the learned judge was referring appears to me to be the fact that the corporation was not itself involved in the criminal proceedings. The corporation's interest is stated at paragraph 13 (above) viz. its interest were at one with those of its employees or servants or agents.

But the position with respect to the instant case is entirely different. BOJ's interest is not at one with the defendants' in the criminal prosecution involving Wildish, Phillips or Beckford. In all the cases which I have reviewed, the parties seeking stay have been defendants in the criminal proceedings, or have a causal

connection with the defendant in the criminal case, as typical in **Waterhouse.** I am reinforced in this view by the observations of Lockhart, J. in **P.T. Garuda Indonesia Ltd. v. Grellman** (supra) where he said:

> "It must be clear that before a stay is granted the plaintiff's case is in fact based upon the commission by the defendant of the criminal act."

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

The learned judge in the instant case gave a considered judgment. At page 154, having reviewed a number of authorities and referred to **Smith v. Selwyn** (supra) and **Jefferson Ltd. v. Bhetcha,** (supra) said this:

> "I do not embrace the view, that the court's discretion should be exercised with the wide general view with regard to the overall interest of justice in preference to the view that the interest and rights of the particular parties should be paramount. This broad view would seek to countenance a stay of the proceedings, at the request of the Defendant in the instant case, whereas the Defendant has not been shown to be in danger of any risk of prejudice as a Defendant in any subsequent criminal prosecution. This broad view contended for would result in an extension of the principle in a manner not envisaged by the law.
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> The Defendant in the instant case alleges fraud on the part of the Plaintiff and others. The Defendant is denying that Orville Beckford is its servant or agent. It did not on the pleadings give any authority to the 'messenger of the Plaintiff', Wildish and Phillips. The Defendant has not shown that it would, nor would it be prejudiced by any subsequent criminal prosecution. Neither Wildish, Phillips nor Beckford is a Defendant in the instant case."

In my opinion, the learned judge was correct in stating his approach to the matter in the way set out; it accords with the law. It has

not been shown that he exercised his discretion on some wrong principle or took into account matters which he was not permitted to do. He correctly balanced the interests of the parties before him and considered the question of potential prejudice to BOJ in the criminal prosecution. He rightly found that there was no potential danger to BOJ because they were not defendants in the criminal proceedings.

It is for these reasons that I agreed with my brothers that the appeal should be dismissed.

WRIGHT, J.A.:

From a reading of the judgment in draft of Carey, J.A., I am satisfied that the reasons for my concurrence in the dismissal of the appeal have been adequately set forth. Accordingly, I will content myself with just a few comments.

The first comment I make is that Dr. Rattray's submissions are supported neither in principle nor by any decided authorities. None of the thirteen cases to which he drew the court's attention during the four days he occupied in pressing his case support his contention. It is obvious that what he was contending for is not the recognized felony-tort rule referred to as the rule in **Smith v. Selwyn** (1914-15) All E. Rep. 229 where Swinfen Eady, L.J. at page 232 said:

> "It is now established that, according to the law of England, where injuries are afflicted on the civil rights of an individual under circumstances which constitute a felony, that felony cannot be made the foundation of a civil action at the suit of the person injured against the person who inflicted the injuries until the latter has been prosecuted or a reasonable excuse shown for his non-prosecution."

In all the cases cited before us that was the principle invoked. In each of those (with the exception of one) the applicant for stay was the defendant in both the civil and the criminal case and even so the application was not always successful. In the instant case the appellant Bank of Jamaica (BOJ) does not fulfil that requirement, and the persons whose interests are said to be at risk through prejudice by publicity, occasioned by the trial of the instant case before the trial of the charges against those persons, are not even employees of BOJ. In the excepted case (supra) **Waterhouse et al v. Australia Broadcasting Corporation** S.C. 1877/86 delivered 6/3/87 (unreported) the persons whose interests were sought to be protected were employees of the Australian Broadcasting Corporation but the felony-tort rule did not avail the applicant, their employer.

But while it did seem odd that the Solicitor General gave the appearance of championing the cause of two fugitives from justice - John Wildish and Michael Phillips - whose whereabouts are unknown, as well as the administration of criminal justice in Jamaica, it was to my mind transparent that the real purpose of the exercise was to secure through the criminal proceedings, evidence which is prohibited from disclosure by section 45 of the Banking Act. The appellant's contention was that once that evidence was disclosed in the criminal trial - and such evidence appears to be vital to the appellant's defence in the civil case - then such evidence would pass into the public domain and so become available to the defence. But I readily confess ignorance of the means by which that end could be achieved. Insofar as the parties to the civil case are concerned, the criminal proceedings would be res inter alios acta and, accordingly, the notes of evidence in those proceedings could not be tendered in the civil case to prove anything that BOJ needs to prove. But on further reflection, if that were even possible the Solicitor General of the country could expect no plaudits for showing a way to violate the provisions of the Banking Act.

Finally, I must point out that from the evidence on the record, it is abundantly clear, particularly so from answers to interrogatories administered by both sides, that the Central Bank of Jamaica and the plaintiff Bank, a foreign bank, are trading very serious charges against each other. In those circumstances, it is essential both in the interest of the integrity of the Central Bank and the business community that there be a speedy trial of this case. The application is misconceived. Harrison, J. was correct in rejecting the wider view propounded by the appellant and refusing to stay the proceedings, holding that the interest of the parties is paramount.

GORDON J A

I have read the draft judgment of Carey J A and I concur in his treatment of the submissions made. I wish to add a brief comment.

The appellant, the Bank of Jamaica sought in this appeal a reversal of the order made by Harrison J in exercise of his discretion, dismissing the application of the appellants for a stay of proceedings in the action. The authorities cited by Dr. Rattray in support of his contention all indicate that consideration of an application for a stay will be entertained in cases where there is the likelihood of prejudice to the defendant in parallel criminal proceedings if the civil case should be tried first. The application must be made by or on behalf of the defendant or potential defendant in the criminal action.

The Bank of Jamaica was not the defendant nor a potential defendant in the criminal action and there was no support for Dr. Rattray's proposition that the stay was desirable on the basis of public policy. The Bank of Jamaica is the Central Bank and on the available evidence likely to be associated with the prosecution of the criminal case. There was no question of prejudice to them by premature disclosure of evidence.

The appellants failed to show that the exercise of the trial judge's discretion was flawed.

Cases referred to

1. Smith v Selwyn (1914-15) All ER Rep 229
2. Stone v Marsh (1827) 6 B & C 551
3. Wells v Abrahams (1927) L.R. 7 Q.B. 554
4. Carlisle v Orr (1917) 2 T.R. 534
5. Fissington v Hutchinson (1866) L.T. 390
6. Jefferson Ltd v Bhatcha (1979) 2 All E.R. 1108
7. Croft Bros (CV) Ltd v Eyden & Ors Court of Appeal (Civil Division) England - October 7, 1988 (unreported)
8. Guiness PLC v Saunders & Ors (unreported) (unreported) C of A (Civil Division) Oct 17 1988 (Eng.)
9. Waterhouse and Ors v Australian Broadcasting Corporation (unreported) Supreme Court Australia Capital Territory, March 1, 1987
10. P.T. Garuda Indonesia Ltd v Grellman (unreported) Federal Court of Australia, February 16, 1994
11. Polly Peck International PLC v Nadir (unreported) Chancery Division February 6, 1992