IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN COMMON LAW
SUIT NO. C.L B 228 OF 1995; B 253 OF 1995;F053 OF 1997; B129 OF 1995;B248 OF 1995

BETWEEN FINANCIAL INSTITUTIONS SERVICES LIMITED	PLAINTIFF
AND DONALD PANTON	1ST DEFENDANT
AND JANET PANTON	2ND DEFENDANT
AND JEFFREY PANTON	3RD DEFENDANT
AND WINSTON DWYER	4TH DEFENDANT
AND ORRETT HUTCHINSON	5TH DEFENDANT
AND RAYMOND CLOUGH	6TH DEFENDANT
AND RAYMOND GARCIA	7TH DEFENDANT
AND EDWIN DOUGLAS	8TH DEFENDANT
AND UNIJAM LIMITED	9TH DEFENDANT
AND DOJAP INVESTMENTS LIMITED	10TH DEFENDANT
AND DJNJ INVESTMENTS LIMITED	11TH DEFENDANT

Mr. Walter Scott instructed by Chancellor and Co. for and on behalf of the 1st 2nd and 8th Applicants/Defendants

Mr. Michael Hylton Q.C and Mr. David Noel instructed by Myers Fletcher and Gordon for the Plaintiff/Respondent.

SUMMONS FOR STAY OF PROCEEDINGS

Heard:June 19, July 26, 2000

HARRISON J

Introduction

The matter before me is a summons to stay proceedings in the abovementioned suit. The applicants are seeking to obtain an order that the trial of the action herein against the 1st

2nd and 8th defendants be stayed and/or suspended until the trial in the criminal proceedings against them has been completed. They have been charged since the 1st day of August, 1996, for offences of conspiracy arising out of their involvement with the Blaise Trust Company and Merchant Bank Limited, Blaise Building Society and Consolidated Holdings. Civil actions have also been instituted against them in respect of their involvement with these entities and these suits have been consolidated by order of the Court dated November 5, 1999.

I am most grateful to Counsel on both sides in assisting me with written submissions. The submissions have been thorough and they have reduced the time for research.

Chronology of events

Briefly put, the chronology of events are as follows:

1.On December 4, 1994, the Minister of Finance assumed temporary management of the Blaise Trust Company and Merchant Bank.

2.On April 10, 1995 the Minister of Finance assumed temporary management of Consolidated Holdings and the Blaise Building Society respectively.

3. The plaintiff is a company incorporated under the Companies Act and is wholly owned by the Government of Jamaica and pursuant to an order of the Supreme Court made on the 26th day of October, 1995 all the assets of the Blaise Financial Entities were transferred to the Plaintiff.

4. At all material times the 1st, 2nd and 8th defendants were directors of the Blaise Trust Company and Merchant Bank.

5. On or about the 1st day of August 1996, the 1st, 2nd 5th and 8th defendants were arrested with several counts of conspiracy arising out of their involvement with the Blaise Financial Entities.

6.An indictment was subsequently prepared by the Director of Public Prosecutions against the defendants for counts of conspiracy to deceive, conspiracy to defraud respectively, and a count for falsification of accounts preferred against the 8th defendant

7. Suits were filed by the plaintiff against the defendants commencing in 1995 seeking inter alia, damages for fraud, damages for and by reason of unjust enrichment and an injunction restraining the defendants from removing from the jurisdiction or otherwise disposing of or dealing in any way with any of their assets until after the trial of this action. The actions were consolidated pursuant to an Order of the Court dated November 5, 1999.

8. A writ of summons was filed in the Registry of the Supreme Court by the defendants against the Director of Public Prosecutions and The Attorney General on the 30th day of June 1997 seeking declarations and orders from the Full Court and also an injunction to

stay the criminal proceedings, pending the hearing of this action. The Full Court matter is yet to be heard.

9. An amended statement of claim was filed by the plaintiffs in the consolidated action on the 2nd day of December, 1999.

10. Defences have been filed and the pleadings are now closed.

11. The process of discovery is completed and affidavits of documents have been exchanged between the plaintiff and the 1st and 2nd defendants.

12. A trial date is to be set for the matter to be heard.

The Facts

There are no substantial disputes on the facts and the issues are all set out in the pleadings. I should point out that although the summons speaks of an application by the 1st, 2nd and 8th defendants, no affidavit was filed by or on behalf of the 8th defendant.

The first defendant has sworn to an affidavit on the 17th day of May 2000 in which he states that he is the husband of the second defendant and is duly authorized to make this Affidavit on her behalf as well as his own. He has stated inter alia, in this affidavit:

"11. That the subject matter, the particulars, the documents and other materials which will be used in this Consolidated action includes most of the subject matter, particulars, documents and other materials which will be used by the Prosecution in the Criminal Trial.

12. (a) That large numbers of the documents that I require to properly defend this action are at the premises which formerly housed Blaise Trust Company and Merchant Bank Limited, Blaise Building Society and Consolidated Holdings Limited.

(b) That this premises and the documents are under the control of the plaintiff Financial Institutions Services Limited.

© That upon the receipt of the Folders A to I (inclusive) from the Director of Public Prosecutions, my Attorneys at Law and I gained access to a substantial number of these documents.

13. That I will be greatly prejudiced in my Defence in the criminal matters if I am forced to proceed with the action herein before the said criminal charges are tried.

14. That I am advised by my Attorneys at Law and verily do believe that as I am presumed to be innocent of the said conspiracy charges and as the burden of proof is on the prosecution, and the standard of proof is proof beyond a reasonable doubt, that arising therefrom I have a right of silence at the trial of the said criminal charges.

15. That I am further advised by my Attorneys at Law and verily do believe that in so far as this action is concerned, the standard of proof is on a balance of probabilities and that in the circumstances I will be obliged to testify at the trial hereof if I am to have the opportunity of succeeding on my defence.

16. That the plaintiff in this action is an arm of the State as its shares are held by the Accountant General for and on behalf of the Government of Jamaica. That the Prosecution of the criminal charges is by the State.

17. That the interests of justice requires that the State's right to recover compensation against me be put in abeyance pending the prosecution of the State's complaint against me on the said criminal charges.

18. That I will be greatly prejudiced in my Defence in the criminal matters if I am forced to proceed with this action before the conspiracy charges are tried.

19 That I am informed by my said Attorneys at Law and verily do believe that presentation of the Defence in the civil action by actual testimony could or would lead to a miscarriage of justice in the trial of the criminal charges.

20. That in the circumstances I humbly pray that this Honourable Court will stay the trial of this action until after the trial of the criminal charges."

Carina Cockburn who states that she is duly authorized to swear to the affidavit of the 14th June 2000, on behalf of the plaintiff has deposed inter alia:

"6. The trial of the Criminal Proceedings has not yet started and a trial date is not currently set for the matter to commence. Indeed, the matter is set for mention in October 2000.

7. Further, on June 30, 1997 the 1st and 2nd defendants and others filed an action in the Constitutional Court and had in that action applied for an injunction staying the Criminal Proceedings pending the hearing of that action...

8. I am reliably informed by the Plaintiff's Attorneys at Law and do verily believe that the substantive action has yet to be heard by the Full Court and that only an interlocutory matter has been heard by the Full Court and the Court of Appeal. The interlocutory application made by the plaintiffs in that action sought an interlocutory injunction to prevent the Director of Public Prosecutions and the Attorney General from making use of the statement given by Mr. Raymond Clough to the Police and for a stay of the Criminal Proceedings pending the hearing of that action. I have been reliably informed by the Plaintiff's Attorneys at Law and do verily believe that the Full Court refused to grant the injunction and that the Court of Appeal upheld this decision. I understand that the plaintiffs in that case intend to appeal those decisions to the Judicial Committee of the Privy Council.

9. I am also reliably informed by the Plaintiff's Attorneys at Law and do verily believe that it is unlikely that the criminal proceedings will proceed to trial until the action filed by the 1st and 2nd defendants seeking constitutional redress in relation to the Criminal Proceedings is heard and determined. It is therefore unlikely that there will be a trial of the criminal proceedings for a year depending on whether the decisions of the Constitutional Court and if necessary the Court of Appeal on the substantive issue are appealed.

10. The Pleadings in this matter are now closed and the process of discovery is completed. Detailed Affidavits of Documents have been exchanged between the Plaintiff and the 1st and 2nd defendants. All that remains to be done is for a trial date to be set for the matter to be heard.

11. Until this matter is tried, the plaintiff will continue to be severely prejudiced and if these proceedings are stayed pending the determination of the criminal proceedings, the prejudice to the Plaintiff and the public will be substantial."

The applicants' contention

The applicants contend that the civil action against them ought to be stayed as the Constitution of Jamaica guarantees them a fair hearing by an independent and impartial court. They also contend that the Constitution guarantees " that every person who is charged with a criminal offence shall be presumed to be innocent until he is proven or has pleaded guilty"(See sections 20(1)(5) of the Constitution of Jamaica). Accordingly, they maintain that the right to silence is a fundamental principle of law flowing from the presumption of innocence guaranteed by the Constitution. Mr. Scott submitted therefore, that an accused person "has the inalienable right not only to remain silent but to put his accusators to proof, proof beyond a reasonable doubt."

The issues put forward

Mr. Scott implored upon me that the issues for my consideration in this matter should be:

"1. Whether the prejudice to the applicants that they may not have a fair trial in the criminal proceedings outweighs the potential prejudice to the Respondent in staying a trial which seeks purely pecuniary remedies.

2. Whether there is a real likelihood of injustice in the criminal proceedings if the civil proceedings are heard and determined before the criminal proceedings.

3. Whether the administration of justice and the public interest is better served by the applicants having a fair trial in the criminal proceedings or a potentially unfair criminal trial by the expedited hearing of a pecuniary claim in the civil action.

4. What, if any, is the effect of the Mareva injunction ordered by the Court against the applicants on the issue of prejudice to the respondent.

Submissions

Mr. Scott submitted that:

"1. The applicants in this summons are defendants in both criminal and civil proceedings.

2. The issues being litigated in both the criminal and civil proceedings are the same.

3. (a) The applicants are constitutionally guaranteed a right to a fair hearing in the criminal proceedings.

(b) The applicants are also constitutionally guaranteed a right to silence and are presumed to be innocent.

© By answering on oath the issues in the civil action the applicants will by oblique methods have been forced to give up their right to silence. This is an issue which could be separately litigated in the Constitutional Court but this Court has jurisdiction to consider this issue.

(d) .... it is precisely because the accused man's right to a fair hearing is enshrined in the Constitution, which right would be whittled away if this Court should refuse the Order being sought herein, why this Court should see this action to the point of setting the matter down for trial and thereafter staying the action until after the hearing of the criminal trial.

(e) If this Court refuses the Orders herein, the applicants will be forced by the very Court that is designed to protect them under the Constitution to relinquish their rights in the criminal trial, thereby prejudicing their Defence in those proceedings, in the interest of maintaining their defence in the civil action in this Court. It seems that a refusal of the order sought in this Summons would be tantamount to "eroding the Defendants right to silence by sidewind"

4. The liberty of the subject and the requirements of a fair hearing must of necessity always outweigh the purely pecuniary considerations of a civil action whose remedy is in damages and not specific performance or an injunction.

5. Public policy as enunciated in Smith v Selwyn and the Australian cases cited in BOJ v Dextra demands that public justice, in the form of criminal proceedings should take priority over civil remedies even if the State or a parastatal body is one of the parties to the civil action.

6 (a) The Respondent in this action is protected by the Mareva injunction which has been in existence against the applicants for over 5 years.
(b) The Pool of Assets to secure any possible judgment which the Respondent may obtain remains undisturbed by virtue of the Mareva Injunction.

© Delay does not bring any risk of dissipation and hence carries no prejudice.

7. Finally there is the effect of the undertaking given to the Director of Public Prosecutions. (Paragraph 7-10 of the Affidavit of Donald Panton refers). It is clear from this affidavit that as a precondition for receiving certain documents being relied on by the Crown in the criminal matter Attorneys acting for and on behalf of the defendants have given an undertaking to the Director of Public Prosecutions not to use those documents in any civil proceedings. Clearly this contemplated a criminal trial beforfe a civil trial."

Mr. Scott concluded thus:

"There is no real price on freedom. The significance of the criminal proceedings is that an adverse result for the applicants in those proceedings will result in the deprivation of their liberty. All that is at stake in the civil action is money. The forcible removal of the practical advantages of the right to silence by coercing the applicants to testify in the civil action before the criminal proceedings are heard and determined will result in the lack of a fair hearing as the right to silence will be taken away from the applicants. The prejudice to the applicants must be greater than the prejudice to the respondents.

On the evidence contained in the affidavits it is clear that there is a real likelihood of injustice in the criminal proceedings if the civil proceedings are tried first. The overall administration of justice is clearly best served by the trial of the criminal proceedings before the trial of the civil proceedings."

Mr. Hylton Q.C
Mr. Hylton Q.C submitted on the other hand, that:

"1. The real issue is whether the defendants have established that it is likely that they will suffer prejudice or that there will no be a fair trial of the criminal proceedings if there is no stay. The onus then is on the defendants to show that there is a real (and not merely notional) risk of injustice. The plaintiff is entitled to have the action tried in the ordinary course of the procedure of the Court, and it is a "grave matter" to interfere with this entitlement.

2. The right to silence is not a sufficient basis to stay this action because:

(a) The defendants have already disclosed their defences; and
(b) The right is in relation to criminal proceedings and there is no basis in this case for it to be extended to the civil proceedings. The court ought not to seek to preserve the procedural or tactical advantages that may result from the existence of the right of silence.

3. The defendants have not alleged or proven any other prejudice or injustice that would result if these proceedings were not stayed and there is no basis on which the stay should be granted or the trial delayed.

4. In none of the cases referred to in the submissions of either side (except in Smith v Selwyn) was a stay of the civil proceedings granted. The defendants have not produced one other authority in which a stay of the civil proceedings was granted.

5. It is clear that the rule in Smith v Selwyn is no longer good law. See Pitts v Hunt & Another [1990] 3 All E.R 344.

6. The public interest circumstances that existed at the time of Smith v Selwyn was relevant are no longer in existence today.

7. The defendants who have not disclosed their defences at the time of making an application for a stay would therefore not be entitled as of right to have the civil proceedings stayed. They would have to show that there would be a real risk of injustice if they were forced to disclose their defences. The burden of proof would be on the defendants and the court would have a discretion whether or not to grant the stay.

8. It cannot be argued that if there is no stay these defendants have to disclose a defence in this matter and that their rights to a fair trial in the criminal proceedings may therefore be jeopardized. This is because Defences have already been filed by these defendants and numerous Affidavits have been sworn to by them during the proceedings in relation to various aspects of the matter. Indeed, the pleadings in this matter are closed, the process of discovery between the Plaintiff and these Defendants is completed(extensive Affidavits of documents have already been exchanged, Orders for further and better particulars and Interrogatories have already been complied with). There is therefore no basis for the Defendants to argue that their "right to silence" is being affected since they have already disclosed their defences.

9.It is also clear from the evidence that the plaintiff would be prejudiced if a stay were granted here. The nature of the plaintiff and the reason for which it was established show that delaying the trial of this matter will severely affect the Plaintiff and not be in the public interest. Based on what is happening in the criminal proceedings, it is highly unlikely that the trial will commence in the near future, if at all.

10. There is therefore no basis on which a stay should be granted in this case."

The Case Law

An application to stay civil proceedings because of concurrent criminal proceedings against the same party is very rare in our jurisdiction so, one has to look elsewhere in order to obtain some guidance. A number of authorities were referred to me by both sides so I will now proceed to examine them as well as those cases which I have un-earthed during the preparation of this judgment.

Prosecution of felony before civil action rule

A discussion of the history of this rule and of the earlier authorities is to be found in the judgment of Watkin Williams, J., in **Midland Insurance Co. v. Smith** [1881], 6 Q.B.D. 561. His Lordship said, at page 568:

'The history of the question shows that it has at different times and by different authorities been resolved in three distinct ways. First, it has been considered that the private wrong and injury has been entirely merged and drowned in the public wrong and, therefore, no cause of action ever arose or could arise. Secondly, it was thought that, although there was no actual merger, it was a condition precedent to the accruing of the cause of action that the public right should have been vindicated by the prosecution of the felon. Thirdly, it has been said that the true principle of the common law is that there is neither a merger of the civil right nor is it a strict condition precedent to such right that there shall have been, a prosecution of the felon, but that there is a duty imposed upon the injured person not to resort to the prosecution of his private suit to the neglect and exclusion of the vindication of the public law. In my opinion this last view is the correct one.'

With the growth and development of the police force and with the abolition of the grand jury in England the necessity for the continued existence of this rule of law was called in question. But in 1914, in **Smith v. Selwyn**, [1914] 3 K.B. 98, the Court of Appeal held that it was still part of the law of the land. The Court of Appeal again affirmed the existence of the rule in Jack Clark (Rainham) Ltd v. Clark, [1946] 2 ALL E.R. 683, but there held that before the court could exercise its power to stay an action, it must be clearly satisfied that the facts upon which the action is based amount to felony and nothing else. Section 1 of the United Kingdom Criminal Law Act of 1967 has effectively abolished however, the distinctions between felonies and misdemeanours. It means therefore that the rule applies to instances where both types of crimes have been committed.

In this jurisdiction, the distinction between felonies and misdemeanours where the rule is concerned, was discussed in **Bank of Jamaica v Dextra Bank & Trust Company Limited** 31 JLR 361. Carey J.A said:

"...the courts have taken a robust view of the matter and ignore the distinctions as being of no significance. In this country where distinctions 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."

Smith v Selwyn [1914] 3 KB 98 was a case where the court held that a plaintiff against whom a felony had been alleged by the defendant cannot make that felony the basis of an action unless the defendant had been prosecuted or some good reason had been given why a prosecution had not taken place. Swinfen-Eady L.J said at page 105 that:

"It is 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 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 shewn for his non prosecution."

In **Rose v. Ford** [1937] 3 ALL E.R. 359; [1937] A.C. 826, at page 846, Lord Wright said:

> 'In any event, whatever the old law may have been, the modern law is quite clear, that if the act complained of constitutes a felony, the civil remedy is not drowned, but merely suspended. But, however limited, the rule that the plaintiff must first prosecute in a case of felony is an anachronism, now that the police prosecute or are assumed to prosecute in every case of probable felony.

In Street's Law of Torts, 1st Edn. [1955], at page 105, it is said:

> 'The origin of this rule probably lay in the fact that the property of a convicted felon was forfeited to the Crown. Now deprived of its original raison d'etre, the rule survives because there is said to be a policy of requiring an injured party to bring serious offenders before the criminal courts before he claims compensation for infringement of his private interests. This basis is obviously tottering now that the responsibility for enforcement of the criminal law is in fact entrusted to the police. Judicial awareness of this fact makes it difficult to forecast whether the courts will, in marginal cases, follow earlier cases where they are not directly binding or seek to narrow the rule as much as possible by grafting exceptions on to it.'

Yet another case of interest is the case of **Wonder Heat Pty. Ltd. v. Bishop** [1960] V.R. 489, a decision of the Supreme Court of Victoria, Australia, a judgment of Pape J. In that case the plaintiff issued a specially endorsed writ to recover a sum of 5618 pounds 9 shillings 6 pence from the defendant, being moneys which the defendant as manager of the service and installation section of the plaintiff's business was required and authorized to receive on the plaintiff's behalf and pay over to the plaintiff's cashier. The defendant had failed to pay over such moneys to the plaintiff's cashier or to the plaintiff. The plaintiff issued a summons for leave to sign final judgment against the defendant. The defendant thereupon issued a summons seeking an order that further proceedings be stayed or alternatively for an order adjourning the summons for leave to sign final judgment on the grounds that the defendant had been committed for trial for fraudulently omitting to account for moneys received as a servant of the plaintiff and that he had not yet been brought to trial. Pape J. held that the appropriate course was to adjourn the summons pending the defendant's trial rather than to stay the plaintiff's action. His Lordship had this to say at page 490 to page 491 of the report :

> " The basis upon which Mr. Shillito, who appeared for the defendant, asked me to order a stay of proceedings in the action was the principle of law which prescribes that where a civil action is brought against a defendant, and the basis of the claim is a felony committed by the defendant against the plaintiff, the action ought, as a general rule, to be stayed until the defendant has been prosecuted in respect of that felony or good cause shown why he has not been so prosecuted. It was at one time thought that this rule applied only to actions of

trespass or tort (see Master v. Miller [1791], 4 Term R. 320; 100 E.R. 1042), and there is an interesting discussion upon the historical basis of the rule in vol. 3 of Holdsworth's History of English Law, at page 331 et seq. The modern textbooks on torts still so refer to the rule, but this is, I think, due to the nature of the subject-matter of these treatises rather than to an intention to confine the rule to torts or trespass. In Winfield, 6th ed., at page 197, it is said that 'where the same facts constitute a tort and a felony, no action for damages can be brought by the plaintiff against the defendant so long as the defendant has not been prosecuted or a reasonable cause has not been shown for his not having been prosecuted, and the court, where such an action is brought, ought to stay further proceedings, until those conditions are satisfied. The court should only act when it is satisfied that the claim is for felony and nothing else'. See also Salmond, 12th ed., page 757; Street, 1st ed., page 105; Clerk and Lindsell 11th ed., page 147; Fleming, page 680. In Halsbury, 3rd ed., vol 1, page 11. in the article on 'Actions', the rule is stated in quite general terms in these words: 'It has long been recognized that where an injury amounts to an infringement of the civil rights of an individual and at the same time to a felony; the right of redress by action or by proof in bankruptcy is suspended until the party inflicting the injury has been prosecuted and public justice thus vindicated. The rule is based upon public policy. Formerly it appears to have been thought that the right of action was 'merged' or 'drowned' in the felony, but it is now settled that it is merely suspended. "

The "right of silence"

The question often asked is, whether the defendant's "right to silence" in criminal proceedings will be affected if he is forced to disclose a defence in the civil proceedings.

Jefferson Limited v Bhetcha [1979] 2 All E.R 1108, offers tremendous assistance with respect to this 'right of silence'. The facts of the case are as follows :

The plaintiffs employed the defendant as a general accounts clerk from March 1978 until 30th September 1978, when she was dismissed. In November 1978 the plaintiffs discovered that five cheques appeared to have been misappropriated. Three out of the five cheques had been paid into a building society account in the defendant's name and the remaining two into an account of a friend of hers. The plaintiffs brought an action against the defendant claiming 29,190.46 pound, being the total value of the cheques. After the defendant had entered an appearance, the plaintiffs applied by summons for summary judgment under RSC Order 14. By then criminal proceedings were also pending against the defendant in respect of the cheques. In an affidavit, the defendant stated that she had a defence both to the action and the criminal charges, but that if she was required to swear an affidavit in opposition to the plaintiffs' summons under RSC Order 14 it would necessarily disclose her defence to the criminal charges and prejudice her trial because she would be giving the prosecution advance notice of her case. She contended that the plaintiffs' action against her should be stayed until the conclusion of the

criminal proceedings. On the defendant's undertaking to pay 24,206.80 pound into a solicitors' joint account, the judge ordered the summons for summary judgment to be adjourned until after her trial. The judge apparently acted on the basis that it was an absolute principle of law that where there were concurrent civil and criminal proceedings against a defendant in respect of the same subject-matter the defendant's right of silence in the criminal proceedings carried through to the civil proceedings and the defendant was therefore entitled in the civil action to be excused from taking any procedural step which would in the ordinary way be necessary or desirable to take in furtherance of his defence in that action, if that step would or might have the result of disclosing in whole or in part his actual or likely defence in the criminal proceedings. The plaintiffs appealed against the judge's order. The defendant cross appealed, contending that the appropriate form of relief was not an order adjourning the RSC Order 14 summons but an order staying the civil action until the conclusion of the criminal proceedings.

The Court of Appeal held inter alia:

"1. The protection given a defendant facing a criminal charge (i.e the right of silence) did not extend to giving him as a matter of right the same protection in concurrent civil proceedings. The Court having control of the civil proceedings could, however, in the exercise of its discretion under section 41 of the Supreme Court of Judicature (Consolidation) Act 1925, stay those proceedings if it appeared to the Court that justice so required, having regard to the concurrent criminal proceedings and the Defendant's right of silence in relation to those proceedings and the reason for that right. However the burden was on the Defendant in the civil proceedings to show that it was just and convenient that the Plaintiff's ordinary rights in respect of the action (i.e of having his claim processed, heard and decided) should be interfered with. Wonder Hat Pty. Limited (supra) not followed.

2. An important factor to be taken into account by the Court in deciding whether to grant a stay (which in the present case would be the appropriate form of relief if the defendant was entitled to any relief) was whether there was a real, and not merely a potential danger that the disclosure of the defence in the civil action would lead to a potential miscarriage of justice in the criminal proceedings.

At page 1113 of the judgment Megaw L.J said :

"I should be prepared to accept that the court which is competent to control the proceedings in the civil action, whether it be master, a judge, or this court, would have a discretion under s. 41 of the Supreme Court of Judicature (Consolidation) Act 1925, to stay the proceedings, if it appeared to the court that justice (the balancing of justice between the parties) so required, having regard to the concurrent criminal proceedings and taking into account the principle, which applies in the criminal proceedings itself, of what is sometimes referred to as the

'right of silence' and the reason why that right, under the law as it stands, is a right of a defendant in criminal proceedings. But in the civil court it would be a matter of discretion, and not of right. There is, I say again, in my judgment, no principle of law that a plaintiff in a civil action is to be debarred from pursuing that action in accordance with the normal rules for the conduct of civil actions merely because so to do would, of might, result in the defendant, if he wished to defend the action, having to disclose, by an affidavit under Order 14, or in the pleading of his defence, or by way of discovery or otherwise, what his defence is or may be, in whole or in part, with the result that he might be giving an indication of what his defence is or maybe in whole or in part, with the result that he might be giving an indication of what his defence was likely to be in the contemporaneous criminal proceedings. The protection which is at present given to one facing a criminal charge (the so-called "right of silence") does not extend to give the defendant as a matter of right the same protection in contemporaneous civil proceedings."

Halsbury's Laws of England, fourth edition, volume 37 at paragraph 443 contains a passage worth repeating. It is worded thus :

" .... and if there are concurrent civil and criminal proceedings against the same defendant arising out of the same matter, the court has a discretion whether to stay the civil proceedings pending the conclusion of the criminal proceedings, taking into account all the circumstances including the defendant's right of silence in the criminal proceedings (Jefferson Ltd v. Bhetcha [1979] 2 All ER 1108, [1979] 1 WLR 898, C.A.)."

In **McMahon v Gould** (1982) 7 ACLR 202 Wooten J said:

"In considering why the "right of silence" exists, it is more fruitful to consider the reasons now argued in support of it, whether generally accepted or not. Many of them, and in particular those relating to the process of criminal investigation, are of no obvious relevance to the present problem. I refer to matters such as unfair pressure on a suspect in custody; the discouragement of improper police methods, the inducement of unreliable evidence; the absence of satisfactory methods of recording statements; the lack of time for reflection or of opportunity to take legal advice; the abhorrence of forcing a man to convict himself and the maintenance of dignity and humility in criminal trials. Perhaps the most relevant is the argument that because of the possibility that an innocent man forced into the witness box may give an impression of guilt through being stupid low, overawed or simply nervous, he should have the choice of whether he gives evidence or not, without the risk of adverse comment."

He went on to say:

"...There are some consequences of the "right of silence"which no one, so far as I am aware, puts forward as legitimate reasons for its existence. These include the

opportunity it may give the accused to remain silent till the end of the evidence against him at the trial, and then produce a fabricated story perfectly tailored to meet the evidence. They include the possibility of depriving the prosecution to check the accused's story and obtain evidence to refute it before the trial is over. In one particular matter – the last minute production of alibi – the injustice so frequent and obvious that the legislature made inroad into the right of silence by requiring notice of such an intended defence.

These are advantages which "the right of silence" gives to an accused, but they cannot reasonably be regarded as part of the reason why the right exists. In exercising its discretion to stay civil proceedings the court need not be concerned to preserve the advantages. It should be concerned to avoid the causing of unjust prejudice by the continuance of the civil proceedings, not to preserve the tactical status quo in the criminal proceedings whether it be just or unjust".

The likelihood of causing injustice in the criminal proceedings
In **Re Cameron's Unit Services Pty Limited** (1984) 59 ALR 754, Wilcox J said:

" I agree with the view expressed at the conclusion of this passage. The "right of silence" is a right which a person has in relation to present or anticipated criminal proceedings. As a matter of everyday experience, suspects or accused persons waive the right by giving an explanation of their conduct during the course of interrogation by police or other investigating authorities at their trial. No doubt the right is often waived incautiously or through ignorance, but it is also deliberately waived by informed persons who take the view that waiver will best serve the interests overall. The conflicts of interest which give rise to waiver already exist; the law does not step in to prevent those conflicts or to deny the ability to waive the right. The existence of a civil action which an accused person may wish to defend provides simply another example of a conflict of interest between maintaining silence and disclosing the substance of the defence in the criminal proceedings. I see no basis for the view that the Court should intervene to relieve against this particular conflict, when it does not relieve against the others. The fact that the existence of the civil action may result in a decision by the accused person to waive his right of silence is not, in itself, a sufficient reason to stay that action. The real question must be the likelihood of causing injustice in the criminal proceedings." [Emphasis supplied]

Wilcox J, in my view, has now put the issue in proper perspective. The real issue it seems, is whether the defendants have established that it is likely that they will suffer prejudice or that there will not be a fair trial of the criminal proceedings if there is no stay. On whom then should the onus lie? The cases suggest that the onus is on the defendant to show that there is a real risk of injustice.

In **Bank of Jamaica v Dextra Bank and Trust Co. Ltd** (1994) 31 JLR 361 the Court of Appeal (Jamaica) dealt with relevance of Smith v Selwyn today. At page 364 of the judgment Carey J.A said:

" I would state the rule thus – the Court in 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 a stay) to show that the plaintiff's right to have its claim decided should be interfered with."

Carey JA also said:

"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."

It should be noted however, that in the Bank of Jamaica case (supra) there were no criminal proceedings pending, for neither Bank of Jamaica nor Dextra Bank and Trust Co. Ltd. (who were the only parties to the action) were involved in criminal proceedings. Carey J.A therefore stated :

"That being so, the basis for urging that the criminal trial should be completed before disposal of the civil case readily disappears. There would be no civil matter overlapping the criminal matters..."

Conclusion

The authorities I have referred to above, serve as mere guidelines and, at the end of the day, it will be a matter for me to decide whether or not to order a stay.

I turn firstly to the rule in Smith v Selwyn. In applying the rule, two questions seem to arise. The first is whether that part of the rule which prescribes that the action should be stayed 'until the defendant has been prosecuted in respect of the felony' means that the defendant must have been prosecuted either to conviction or acquittal, i.e. whether the rule requires the prosecution to have concluded, or whether the requirements of the rule are satisfied if a prosecution has been commenced and the defendant committed for trial even though the prosecution has not been concluded. The second is whether, assuming the rule to require the conclusion of the prosecution, the plaintiff may by establishing that the prosecution has commenced, that its conduct is in the hands of the Crown, and that it is no fault of his that the trial has not taken place. No submissions were made with respect to these two concerns, but they may arise sometime in the future.

Mr. Hylton Q.C submitted however, that there was no longer a basis on which the rule in Selwyn v Smith should be applicable in Jamaica, and the rule should therefore be formally 'buried' here. The Australian court in New South Wales has effectively 'buried' the rule. In McMahon v Gould (supra) Wooten J said:

"It seems that even without having regard to the more recent cases such as Jefferson Ltd v Bhetcha, it would be wrong to regard the rule in Smith v Selwyn as a rule applying in New South Wales today. To seek to apply that rule in the circumstances obtaining today in this State would be to attribute to the common law a sterility and rigidity which are foreign to its nature."

He also said:

"Whether the rule is based upon 'the public policy of a bygone age when no police existed', or whether the origin of the rule lay in the fact that the property of a convicted felon was forfeited to the Crown, its foundation has clearly disappeared, if indeed it ever existed...

I trust that the rule will stay buried, so that its ghost does not again rise to rattle medieval chains (albeit refurbished in Victorian times) in modern litigation"

Rather than attempting to bury the rule here, I think it more appropriate at this stage, to remind oneself of the rule as explained by Carey J.A, in Bank of Jamaica v Dextra Bank and Trust Co. Ltd.(supra) when he said:

" I would state the rule thus – the Court in 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 a stay) to show that the plaintiff's right to have its claim decided should be interfered with." (emphasis supplied)

There is a need then, to balance the justice between the parties in the civil action. Will the defendants 'right to silence' in the criminal proceedings be affected if I were not to grant a stay?

In exercising my discretion a number of factors will have to be considered. For example, the court has to consider if there are similarities in the civil and criminal cases; the progress of the criminal investigation and trial; the need of the plaintiff to proceed promptly with the civil action and the interests of the public.

Furthermore, the defendants would have to establish by evidence that there would be a real and not merely a notional risk of injustice in the criminal proceedings, if I were to refuse the order sought. Would my refusal lead to a potential miscarriage of justice in the criminal proceedings?

Of course, there are advantages which the 'right to silence' gives to an accused person. But should these advantages be regarded as part of the reason why the right exists? Wooten J in the McMahon case (supra) had this to say:

"....In exercising its discretion to stay civil proceedings the court need not be concerned to preserve these advantages. It should be concerned to avoid the causing of unjust prejudice by the continuance of the civil proceedings, not to preserve the tactical status quo in the criminal proceedings whether it be just or unjust"

In the instant matter, it was not the case for the defendants that if there is no stay the defendants would have had to disclose a defence and their rights to a fair trial in the criminal proceedings may therefore be jeopardized. The evidence on the other hand, reveals that the defendants have already disclosed their defences. Numerous Affidavits have been sworn to by them during the proceedings in relation to various aspects of the matter. Indeed, the pleadings in this matter are closed, the process of discovery between the Plaintiff and these Defendants is completed. Affidavits of documents have already been exchanged and orders for further and better particulars and Interrogatories have already been complied with.

There is also the order for directions. This order was made with the consent of the parties on the 22nd day of March 2000, and it has indicated inter alia, that the action should be set down for trial within thirty (30) days from the date of the order.

With respect to the similarity of issues and documents to be used by the parties, the first defendant has deposed at paragraph 11 of his affidavit of the 17th May, 2000 as follows:

"11. That the subject matter, the particulars, the documents and other materials which will be used in this Consolidated Action includes most of the subject matter, particulars, documents and other materials which will be used by the Prosecution in the Criminal Trial."

I agree therefore with Mr. Hylton that when the above factors are taken into consideration, there is no basis for the Defendants to argue that their "right to silence" is being affected since they have already disclosed their defences.

It is also my considered view that apart from the first defendant deposing that he would be greatly prejudiced, the defendants have not alleged or proved any other prejudice or injustice that would result if these proceedings were not stayed. The first defendant states inter alia:

" 18. That I will be greatly prejudiced in my Defence in the criminal matters if I am forced to proceed with this action before the conspiracy charges are tried.

19 That I am informed by my said Attorneys at Law and verily do believe that presentation of the Defence in the civil action by actual testimony could or would lead to a miscarriage of justice in the trial of the criminal charges.

20. That in the circumstances I humbly pray that this Honourable Court will stay the trial of this action until after the trial of the criminal charges."

The plaintiff claims on the other hand, that it would be prejudiced if a stay were granted here. The reason stated, is that the nature of the plaintiff and the reason for which it was established show that delaying the trial of this matter will severely affect the Plaintiff and not be in the public interest. I do agree with this submission. I am of the firm belief that where persons are entrusted with property on behalf of others they should be compelled to account without undue delay for their dealings with the property.

Having regard to the 'snail pace' at which the criminal proceedings are going, it seems highly unlikely that the trial will commence in the near future. Mrs. Sharon Usim, one of the Attorneys at Law having conduct of the Blaise matters has deposed in an affidavit of the 15th June, 2000, "that whilst it is correct that the criminal proceedings will not commence until the Constitutional Action is heard, the applications by the Plaintiff and the Defendants in the Constitutional Action are to be heard in the next judicial term".

Finally, it is my considered view and I so hold, that the defendants have not established that there is any real risk of injustice in the criminal proceedings if I were to refuse the application for a stay or that there is any other basis on which the stay should be granted.

Accordingly, the application is therefore dismissed with costs to the plaintiff to be taxed if not agreed.

Due to the fact that I am presently engaged in the Regional Gun Court, Montego Bay, I have asked the Registrar of the Supreme Court to request one of my colleagues to deliver this judgment for me. In this regard, I will also order that there be liberty to apply.