IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C. L. F014 OF 1996

B E T W E E N	FINANCIAL INSTITUTIONS SERVICES	PLAINTIFF RESPONDENT
A N D	DAVID PARCHMENT	DEFENDANT APPLICANT

David Muirhead Q.C. for the Defendant Applicant instructed by Priya Levers

Douglas Leys instructed by the Director of State Proceedings for the Plaintiff

Heard on the 21st and 26th days of November 1997 and 1st December 1997.

IN CHAMBERS

Coram : Courtenay Orr J

The applicant is an attorney-at-law. On or about the 14th day of September 1994, he assumed Chairmanship of the Board of Directors of Blaise Trust Company and Merchant Bank Limited, hereafter called Blaise. It was a term of his employment that he would be provided with a Toyota motor car for his use during his term as Chairman, and that on his demitting office it would be transferred to him or to one of his companies. This was to be in lieu of remuneration as a director of Blaise, as he undertook to forego all his fees.

Some days after taking up office he took delivery of Toyota Camry motor car licensed 8790 BB. At his direction the title to that car was registered in the name of Blaise.

On the 18th day of December 194, the Minister of Finance under powers conferred by the Financial Institutions Act, assumed temporary management of Blaise. Later, on the 26th day of October 1995, Blaise was taken over by the respondent and as a consequence the applicant demitted office as Chairman of the Board of Blaise at that time. The assets of Blaise were transferred to the respondent, who alleges that the said Toyota Camry motor car formed a part of the assets of Blaise, and is therefore the property of the respondent. The applicant denies this.

The respondent demanded that the applicant deliver up the car, but the applicant refused. Consequently the respondent brought the above intituled action by writ dated 8th February 1996 of which these proceedings form a part.

In the suit the respondent seeks a declaration that the respondent is the owner of the said motor car; an injunction to restrain the defendant from disposing of or dealing with the motor car without the consent of the respondent, damages for detinue and/or conversion, and an order for the delivery up of the motor car or payment of the value thereof.
In his defense the applicant seeks inter alia, a declaration that he is the owner of and is entitled to the possession of the motor car.

On the 29th day of April, 1997, Detective Inspector Winston Lawrence seized the said motor car at the home of the respondent, by virtue of a warrant under the Unlawful Possession of Property Law.

On the 8th day of May 1997, on the instructions of the Director of Public Prosecutions, Detective Inspector Winston Lawrence prepared an information and a summons charging the applicant with larceny.

The precise chronology of events by which the Director of Public Prosecutions came to make a ruling that the applicant should be charged for Larceny, is unclear, as no dates are given as to when the file on this matter was submitted to him or when he made his ruling. Detective Inspector Lawrence in an affidavit dated 18th May 1997, he states as follows:

> "3. That on or about 28th day of April 1997, I received a report from Mr. Patrick Hylton, Managing Director of Financial Institution Services Limited.
>
> 4. That consequent on the said report, I obtained a warrant under the Unlawful Possession of Property Act...
>
> 5. On the 29th day of April 1997, I went to premises at 3 Skyline Drive, Kingston 6, where I saw Toyota Camry motor car bearing registration number 8790 BB parked in the carport.
>
> 6. David Parchment came out of the house and spoke to me..."

9. He handed over the car to me..."

14. On the 8th day of May 1997, on the instruction of the Director of Public Prosecution (DPP), I prepared an information and summons charging David Parchment with Larceny."

Lisa Russell, whom I am told is the legal officer of the respondent Company in her affidavit dated 14th or 19th May 1997 (the date is unclear) states:

"3. That consequent on instructions received from Mr. Patrick Hylton, Managing Director of the Plaintiff company, I submitted the files concerning the matter of David Parchment and a 1994 Toyota Camry motor car bearing registration number 8790 BB to the Director of Public Prosecutions.

4. That I had discussions with the Director of Public Prosecutions who informed me and I verily believe that the action of the police in seizing the said motor car was not illegal and that criminal proceedings should be instituted against David Parchment under the Larceny Act."

The affidavit of David Fraser, Assistant Director of Public Prosecutions throws no light on the date of the ruling. He merely deposes that the relevant file was received by the Director of Public Prosecutions and that he ruled that the applicant should be charged for Larceny. One hopes that in future affidavits would be couched in more precise and candid terms.

One thing is clear, however, the Director of Public Prosecutions instituted and has conduct of the criminal proceedings for larceny against the applicant.

On 26th May 1997, the applicant was charged in the Resident Magistrate's Court, for Larceny of the said motor car.

The applicant then filed this summons dated 10th November 1997, in which he sought an order that:

"(1) The Plaintiff whether by themselves, their servants or agents or otherwise howsoever be restrained from further proceedings against David Parchment on the summonses to prosecute the criminal proceedings pending in the Half-Way-Tree Resident Magistrate's Court until the final determination of the issue joined in Suit No C.L. F014 of 1996.

(2) The criminal proceedings presently before the Half-Way Tree Resident Magistrate's Court due to be heard on the 4th November 1997, be stayed

pending the final adjudication of the relief raised in this Summons.

(3) That the Cost of this summons be costs in the cause:.

The matter came before Ellis J exparte on 31st October last, when he made an interim order in terms of paragraphs 1 and 3 for a period of 21 days from the date thereof. At that hearing the applicant abandoned the prayer in paragraph 2 above, no doubt because he recognised the constitutional impropriety of seeking a stay of proceedings instituted by the D.P.P. He now seeks inter partes, on interlocutory injunction in terms of paragraph 1 and 3 above.

THE SUBMISSIONS ON BEHALF OF THE APPLICANT

Mr. Muirhead cited the following authorities in support of his charge that the proceedings in the Resident Magistrate's Court were vexatious and an abuse of the process of the court:

Thames Launches limited v. Trinity House Corporation (Dephford Sound) 1961 1 Ch. 197

The Royal Bank of Scotland Ltd. v. Citrusdal Investments Ltd. 1971 3 All ER 558

The Mayor and Corporation of York v Sir Lionel Pilkington 2 ATK 301.

In Re Connolly Brothers Ltd. Wood v Connolly Brothers Ltd. [1911] 1 Ch. 731.

Halsbury's Laws of England Vol. 37 paragraph 442 - 446.

The Supreme Court Practice 1981 paragraph 5237.

He extracted the following principles from these authorities.

1. Where the same issues are raised both in civil proceedings and at a later stage by criminal proceedings, the court can restrain the prosecutors in the criminal proceedings, until the civil proceedings have been decided.

2. The court should look at the reality of the situation so that although the later criminal proceedings may be brought by a different person, such as an employee of the plaintiff in the civil suit, the court may find that the parties are the same.

3. The court may make an order in personam, to prevent the prosecutor from proceedings in the criminal trial, even though it may not grant an injunction to stay the trial.

4. It is vexatious and oppressive if somebody institutes proceedings to obtain relief in

respect of a particular subject matter where exactly the same issue is raised by his opponent in proceedings already instituted in another court, in which he is either plaintiff or defendant.

5. If two courts are faced with substantially the same issue or question it is desirable that that question or issue shall be determined in only one of those two courts, if by that means justice can be done, and the court will if necessary stay one of the proceedings.

As regards the issued raised in the instant case, he suggested that the issue of who is the owner of the motor car is at the root of both proceedings. Substantially the same issues of law and fact arise in both.

The plaintiff has conduct of the civil case, and although pleadings were closed from 4th June 1996, nothing further has been done to bring the case to trial. The criminal charge therefore was a means of intercepting the civil trial, and tends to a multiplicity of proceedings.

The application before the Court is not intended to fetter the powers of the D.P.P. as it is for an order in personam - against the plaintiff in the action and not against the D.P.P. or for a stay of the criminal proceedings.

There is nothing in the affidavits to show that the D.P.P. was aware of the earlier civil proceedings.

The Court is primary, and is not fettered in any way.

In Smith v Selwyn [1914] 3 KB 98, the only pleadings were of a felony. In the instant case the pleadings by the plaintiff are couched in terms of detinue and conversion. No felony is disclosed.

On Tuesday 25th November 1997, Mr. Muirhead advanced further submissions in writing concerning the case of smith v Selwyn (supra) which was drawn to the attention of counsel by the Court. His submissions were as follows:

The ratio decidendi of that case is that a statement of claim founded on a felony may be stayed by the court on the application of the defendant or on the motion of the Court itself.

For there to be a stay the action must be founded on a felony. In Smith v Selwyn the intention to commit a felony was pleaded in the statement of claim; and the Court so found.

The Court made an order staying the action, but granting leave to the plaintiffs to amend their statement of claim in such a way as to state a cause of action without alleging a felony i.e. without making a felony the foundation of the claim. They would be at liberty to continue the action when the amendment was made.

Nowhere in the pleadings in the instant case is there an allegation of a felony. On the contrary the issue throughout is who is the beneficial owner, insomuch that both sides seek a declaration of ownership in their favour. The applicant has pleaded that he is the beneficial owner of the car of which he had had the sole use and possession. He asserts a claim of right.

This clearly demonstrates that the instant proceedings in the Supreme Court are Civil Proceedings seeking the determination of the beneficial ownership of the motor car.

The respondent's asserted entitlement arose when the Minister of Finance proposed a scheme of arrangement approved by the Court on the 26th October 1995, and as from that date because the car was registered in the name of the plaintiff/respondent (predecessor in title), the plaintiff claimed it as beneficial owner.

Such an issue does not fall within the province of criminal proceedings because there is in fact a dispute as to the person who holds the beneficial ownership of this motor car.

The case therefore is not founded on a felony and the circumstances do no exist upon which a Court could grant or would consider the grant of a stay of the civil proceedings instituted by a plaintiff in respect of which there has been no application by either the plaintiff or the defendant.

In the circumstances this action does not fall within the rule of Smith v. Selwyn as the statement of claim is not founded on a felony and would in the ordinary course of events proceed to trial and adjudication."

THE SUBMISSIONS OF THE RESPONDENT

Mr. Leys submitted as follows:

The application is misconceived because the plaintiff in no way exercises dominion or control over the criminal proceedings. That is the sole prerogative of the D.P.P. and a fortiori since he has been excluded the court should not make an order which could effectively control or hamper the D.P.P.

The authorities cited by the counsel for the applicant are sound, but not applicable to the Jamaican jurisdiction in that the procedure for instituting criminal proceedings is quite different from that in England.

The D.P.P. is not subject to the dictates or control of the court other than that in which the proceedings are taking place, save in instances of judicial review. The Court has no jurisdiction to make the order sought.

Alternatively this is not an appropriate case in which to make such an order. To do so would stymie the proceedings instituted by the D.P.P.

THE COURT'S RULING

In respect of the submissions regarding Smith v Selwyn (supra) two comments will be made.

Firstly, the case illustrates that the rule in that case is based on public policy. Swinfen Eady L.J. adverted to this when he quoted Lord Tenterden's dicta in Stone v Marsh (6 B&C 511 at 564) at P. 105 line 17.

He said:

> "The rule is founded on a principle of public policy.:. Now public policy requires that offenders against the law shall be brought to justice, and for that reason a man is not permitted to abstain from prosecuting an offender, by receiving back stolen property, or any equivalent or composition for a felony, without suit, and of course, cannot be allowed to maintain a suit for such purpose. In White v. Spettique the law was laid down in somewhat similar terms by Rolfe B., who said:
>
> > 'I think the true principle is that where a criminal, and consequently an injurious act towards the public has been committed which is also a civil injury to a party, that party shall not be permitted to seek redress for the civil injury to the prejudice of public justice, and to waive the felony, and go for the conversion.'"

It may well be that since a felony is not clearly pleaded in the instant case the court would not order a stay of the civil proceedings. But that is not the issue here. What is in point is whether the Court should in effect stay a prosecution for a felony so that the corresponding civil case may proceed.

The authorities indicate that the powers which the court may exercise on the basis that there is an abuse of process, are exceptional and should be used sparingly.

It is clear that the Court in Smith vs. Selwyn (supra), was doing its best to help an unfortunate victim who was seeking compensation from the rogue who had injured her. The application for a stay was made by the defendant who obviously wished to delay the consequences of a judgment in the civil action. Thus Kennedy L.J. said at p. 104 line 22:

> "I should be very loth to exercise our power in such a way as absolutely to deprive the plaintiffs of all civil remedy.... I only wish to add that there are two plaintiffs, husband and wife, and if any real distinction could be made between them it might be that the husband might maintain his claim upon the ground that the felonious act was not committed on him.... But here the two

> claims are so interlaced as to make it difficult to separate them,
> and moreover the husband's claim is a mere bagatelle...."

The defendant in Smith v. Selwyn was seeking to use a rule of public policy meant to discourage crime to bring further pain to the woman he had treated in the most disgraceful manner. It was a morally reprehensible tactic which the court was quite right to defeat.

DOES THE COURT HAVE JURISDICTION TO MAKE THE ORDER SOUGHT?

Mr. Leys, as noted earlier referred to the wide powers and protection given to the D.P.P. It is necessary to add a few remarks. The power given by the Constitution and Section 4 of the Criminal Justice Administration Act, to intervene in criminal cases, is wider than the power given to the Attorney General of England at common law! The power of the D.P.P. extends to all criminal proceedings, whereas at common law the power to enter a nolle prosequi was limited to indictable offences only - R v London County Quarter Sessions ex.p. Downes [1954] 1 QB 1 at 6.

In Brooks v director of Public Prosecutions 44 WIR 332 at 340 - 341 Lord Woolf declared:

> "Section 1(9) of the constitution: is primarily designed to make it clear that provisions of the nature to which it refers do not restrict the court's powers of judicial review. Its purpose is not to authorise a judge to exercise the continuing control which obviously needs to exist over the way the parties to criminal proceedings conduct those proceedings.....
>
> The Director of Public Prosecutions is not a part of Government, nor a Government official. If he wishes to bring proceedings inevitably there must come a stage when the manner in which he undertakes those proceedings is subject to control by the court. If he had initiated the proceedings himself, the proceedings would become subject to the control of the court, and in the event that they were held to constitute an abuse they would be dismissed..... That is normally at the commencement of the trial.
>
> (Emphasis mine)

It seems to me that to grant the order sought by the applicant would be to put the undertaking of prosecutions by the D.P.P. under the control of a judge. It would be to achieve what is prohibited in an indirect manner. I am of the opinion that if the applicant wishes an order of this nature he would be best served by bringing a constitutional motion making the D.P.P. a party, so that he may be heard.

I also think that applications of this nature are appropriate before the trial court itself. I am fortified in this by the decision of the Divisional Court in England in R v Manchester Crown Court exp. Cunningham and Others. The Times, October 31, 1991, and [1992] C.O.D. 23. The

fuller report is in the Crown Office Digest. In that case a judge of the Crown Court refused to make an order staying an indictment on the grounds of abuse of process; and to order discovery of documents by the D.P.P. and the Department of Trade and Industry.

The Divisional Court refused the application to overturn the judge's decision. In doing so the Divisional Court held inter alia:

"In light of the development of the law with regard to abuse of process there can now be no excuse for not raising the issue of abuse of process in the Magistrate's Court...."

They then added some helpful advice to judges.

> "In rejecting or granting on Application the judge need only deliver a short judgment showing his command of the law and a summary of the reasons for his decision in the instant case.

Secondly, in Grant v D.P.P. 30 WIR 248 Carberry J.A. giving the judgment of the Court of Appeal alluded to the desirability of taking objections before the trial judge first. That was a case in which the appellants alleged that massive pretrial publicity would prevent them from setting a fair trial before a jury. Carberrry J.A. said at p.278 a.

Section 25(1) of the Jamaica Constitution which provides redress for contravention of the constitutional rights and freedoms afforded in ss 14 to 24, requires that the applicant show that the provision in respect of which the contravention is alleged (in this case s 20(1), 'has been, is being, or is likely to be contravened in relation to him'.

So far as '*has been... contravened*' is concerned, this could only apply to the applicant if he had already been tried, and in the event was able to show that he had not had a 'fair hearing' or that his jury had been demonstrably not 'independent or impartial'.

At common law, as we have seen, this (if established) would have given to him in any event a good ground of appeal for quashing the conviction. The American authorities that have been cited to us show several instances in which it has been possible on the evidence for an appellate court to find that an accused had not had a fair hearing or an impartial jury, and consequently to quash the conviction.

So far as '*is being...contravened*' is concerned, in these circumstances it would apply only if it were raised during the actual course of the accuseds' trial. In such a case an accused might be able to say 'my right to a fair trial before an independent and impartial jury is even now being contravened':conceivably, he might show that members of the jury were being importuned with

further prejudicial matter, for example by hand-bills distributed as they went to and from the court, or perhaps by threatening crowds demanding conviction and seeking to intimidate the jury; an allegation made but not established in *R v Porter and Williams*.

In such circumstances the accused would bring such conduct to the notice of the trial judge in the first place, and seek to have the jury discharged. If indeed this happened, his complaint would have been met; and presumably a fresh jury under different conditions and with effective safeguards might be appointed to start the hearing afresh.

(Emphasis supplied)

But I do not rest my decision on the jurisdictional point alone. If I am wrong on this point, I still regard the order sought as quite inappropriate.

An analysis of the issues raised in the cases cited by Mr. Muirhead is instructive. Thames Launches Ltd. V. Trinity House Corporation [1061] Ch. 197 (supra) involved a question of construction. In April 1960, the Plaintiff issued an originating summons for declarations:

(1) that on a true construction of the Pilotage Act, 1913, the Plaintiff company was entitled to navigate its passenger-carrying vessels throughout the whole of the Port of London without being either (a) under the pilotage of a licensed pilot of the district or (b) under the pilotage of a master or mate possessing a pilotage certificate for the district who was bona fide acting as master or mate of the ship; and

(2) that on a true construction of the Pilotage Act, 1913, the Plaintiff company was entitled to navigate its passenger-carrying vessels throughout the whole of the Port of London on pleasure tours operating from piers inside or outside the London Pilotage District without being either (a) under the pilotage of a licensed pilot of the district or (b) under the pilotage of a master or mate possessing a pilotage certificate for the district who was bona fide acting as master or mate of the ship.

In October 1960, the summonses against J. Watson a licensed waterman of the plaintiff company were issued. The first summons alleged that on May 18, 1960, Watson being master on M.V. Viscountess, navigated Viscountess, (not being an excepted ship) within the limits of the London Pilotage District in circumstances in which pilotage was compulsory, Viscountess not being under the pilotage of either (a) a licensed pilot of the district or (b) a master or mate possessing a pilotage certificate for the district who was bona fide acting as master or mate of the ship, after a

licensed pilot had offered to take charge of the ship.

The second summons complained that Watson in May 1960, navigated Viscountess (not being an excepted ship) within the limits of the London Pilotage District in circumstances in which pilotage was compulsory but failed to display a pilot signal and to keep the signal displayed until a licensed pilot came on board.

Buckley J. pointed out at p. 207 said that

> "the question of substance to be decided in both cases is whether or not the use which was being made of motor vessel Viscountess was in law one which involved compulsory pilotage. That is precisely the question raised on the originating summons."

He went on:

> "I do not anticipate that there would really be any issue of fact in the Magistrate's court although of course, I cannot be 'sure of that, but the question of substance would be one of law." (Emphasis mine)

In Mayor and Corporation of York vs. Sir Lionel Pilkington 2 ATR 301, the headnote reads as follows:

> "the plaintiffs claim the sole right of fishing in the river Ouse; the defendants claim a right likewise; a bill and cross bill were brought to establish their several rights. While these suits were depending, the plaintiffs caused the agent of the defendant to be indicted at York sessions, ... for a breach of the peace in fishing in their liberty."

In granting an order to restrain the plaintiffs from proceeding at the sessions, till the hearing of the cause and further order, Lord Harwicke explained what made it appropriate to make the order.

He said at 303:

This is a complaint merely for fishing in the river without any actual breach of the peace, which the mayor and the corporation say, is a trespass on them."

(emphasis supplied)

The Royal Bank of Scotland vs. Citrusdal Investments Ltd. [1971] 31 All E.R. 558 concerned

two civil cases. In the first, an action was brought by the defendant tenants in the country court applying for a new tenancy under Part II of the Landlord and Tenants Act 1954. Whilst those proceedings were pending, the Plaintiff landlords applied to the High Court for a declaration that the tenancy was not a business tenancy and had expired.

The Plaintiff's action was stayed by Plowman J, who held that it would be wrong to allow two sets of proceedings to decide whether the defendants' tenancy was business tenancy to proceed in two different courts at the same time."

In re Connolly Brothers, Limited Wood vs. Connolly Brothers Limited [1911] 1 Ch. 731, the owner of an equitable charge granted by a company sought to obtain priority for his security which ranked after that of a debenture holder by suing in the Palatine Court to enforce his security. This he did, well knowing the debenture holders earlier action in the High Court was pending. The Court of Appeal in England upheld the decision of Parker J, to grant an injunction to restrain the Plaintiff in the action in the Palatine Court.

Although the issues which arise in the two proceedings under consideration in this summons are the same, prima facie, the nature of the charge in the Resident Magistrate's court is an important factor. It is no mere trespass. It is an allegation of a felony and therefore the Rule in Smith v. Selwyn [1914] 3 KB 98 would apply. That rule is stated on the headnote as follows:

> "An action for damages based upon a felonious act on the part of the defendant committed against the Plaintiff is not maintainable so long as the Defendant has not been prosecuted or a reasonable excuse shown for his not having been prosecuted, and the proper course for the Court to adopt in such a case is to stay further proceedings in the action until the Defendant has been prosecuted."

But the applicant argues that the criminal proceedings are really an attempt to intercept the earlier civil proceedings.

It must be borne in mind that many torts may also be crimes. The torts of assault and battery may

in reality be the crime of causing grevious bodily harm with intent to cause grevious bodily harm; and many cases of detinue are really larceny. So too a conversion in tort may be the crime of Larceny. Therefore it is in my opinion quite proper, for an alleged victim who had begun to treat a matter as a tort, to later decide to prosecute it as a crime; if the facts support such a charge. Indeed if a Plaintiff who has begun a civil action in tort, later realizes that the facts of which he complains constitute a felony, he ought to have the defendant prosecuted.

Another important element in the instant case which distinguishes it from the cases cited is that here the prosecution was instituted by the Director of Public Prosecutions. In this case the D.P.P. has exercised his discretion to prosecute, and he must be presumed to have done so independently of any tainted motive which the Plaintiff may have had. (I am not saying that the Plaintiff has any such motive, I am merely saying that even if the Plaintiff's decision to seek the advice and intervention of the Director was governed by improper motives, that would not affect the Director's decision.) It cannot be said therefore as in the English cases that the parties in both civil and criminal proceedings are the same.

Finally, Mr. Muirhead submitted that in both cases the question at the root of the matter is in whom does ownership of the motor car lie? That says he raises a question of law. But it also raises so far as the criminal case is concerned an important question of fact:

Is there a claim of right made in good faith?

In the circumstances therefore, this is not a proper case in which the court should make the order sought.

The application is therefore refused with costs to the Respondent to be taxed if not agreed.