

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. L1990/G-024

BETWEEN	MORRIS GRANT	PLAINTIFF
AND	HEIRLOAM UPHOLSTERING COMPANY LIMITED	1st DEFENDANT
AND	NATIONAL PROTECTIVE SERVICE LIMITED	2nd DEFENDANT
AND	MR. STONE	3rd DEFENDANT

IN CHAMBERS

Hector Robinson for Plaintiff-Respondent.

Winston Spaulding Q.C. and Miss Leila Parker for Second Defendant.

HEARD: NOVEMBER 18, 19, 1991.

CORAM WOLFE J.

This is a summons to stay the proceedings herein.

To properly understand the decision which I have arrived at it is necessary to set out a brief history of the case and the relationship of the parties to each other.

The plaintiff was employed to the first defendant at 18 Orange Street in the parish of Kingston. On the 27th day of May, 1989 the plaintiff was allegedly beaten with a baton and shot at point blank range by the third-named defendant, a security guard, employed to the second named defendant. The Statement of Claim recites circumstances which clearly indicate that the third defendant perpetrated a felonious act against the plaintiff. The Statement of Claim is silent as to whether or not the incident was reported to the police, and whether or not proceedings were commenced against the third defendant. Further, no reasons have been offered by the plaintiff for the failure to institute criminal proceedings against the third defendant, if this is so.

The first defendant was served with the Writ of Summons and entered Appearance on the 29th day of June 1990. On the 23rd day of July 1990 on the Application of Mr. Colin Henry, Attorney-at-Law,

the Appearance which was entered on the 29th day of June 1990 was withdrawn, on the basis that Mr. Henry had inadvertently entered Appearance on behalf of the first defendant and that the reason for so doing was that he had "mistakenly believing that our client was the company named as first defendant in this action. My firm entered an Appearance on behalf of the first defendant on the 12th day of March 1990. I subsequently discovered that our firm does not act for the first defendant named in the action, Heirloam Upholstering Company Limited and that the said first defendant did not give our firm any instructions to enter Appearance on its behalf. Our firm therefore has no authority in fact or in law to have entered the Appearance". A strange explanation indeed. Nevertheless his application was granted.

On the 5th day of March 1991 the Acting Master ordered the third defendant to be served. The plaintiff instead of complying with that order filed a notice of Discontinuance against the third defendant, the principal tort-feasor, on the 25th day of March, 1991. Strange, to say the least.

In an affidavit sworn to by Miss Leila Parker, Attorney-at-Law she states that she checked with the Registrar of Companies and she has discovered that there is no such company, referring to the first named defendant, incorporated and registered with the said Registrar of Companies. The first defendant does not exist, the third defendant and principal tort-feasor is released from the action by the plaintiff and the lifeless second defendant is left to bear the brunt of the attack, completely unable to traverse any of the allegations of the plaintiff without the assistance of the third defendant. Against this background an order was made on the 16th day of October by the Master directing the Registrar of the Supreme Court "to set a date for the trial of this action during the Michaelmas term 1991."

The second defendant now seeks by summons dated 25th September, 1991 to stay the proceedings.

ARGUMENTS IN SUPPORT OF STAY

Spaulding Q.C. submitted that "the statement of claim unequivocally discloses that the injuries sustained by the plaintiff was as a result of a felonious act. The Rule in Smith v Selwyn [1914] 3 KB98 states that when a tort is also a felony, no action can be brought in respect of the tort until the defendant has been prosecuted for the felony or a reasonable excuse has been shown for his not having been prosecuted." This is the Common Law. Since the abolition of the Classification of criminal offences into felonies and mis demeanours by statute in England the Smith v Selwyn rule no longer has any application there. However until a superior Court declares that such a common law rule never existed or until by legislation the rule is abolished I hold that Smith v Selwyn (supra) remains the law of the land. Sir James Campbell L.C. was very critical of the rule in Tyler v Cork Co. Council [1921] 2 I.R. 8, 18-20 but its retention was defended in Henry Harkin & Co. (Pty) v Hooke [1954] V.L.R. 30.

In the absence of any evidence to disclose that any steps have been taken to prosecute the matter of the felony and in the absence of any reasonable excuse for the failure so to do, I hold that the principle laid down in Smith v Selwyn applies. The view has been proffered that since the rule is founded on public policy that it seems that once it appears that the cause of action is founded on a felony the judge himself should stay the action and not allow the trial to proceed.

In the event that I am wrong in my approach to Smith v Selwyn (supra) I am of the view that grave injustice would be caused to the second defendant were it to enter upon trial without the presence of the third defendant and principal tortfeasor. The defendant has requested that it also be afforded time to commence Third Party Proceedings against the third named defendant as he would be liable to indemnify it in the event judgment is entered against the second

defendant. This application in my view is one designed to serve the end of of justice and will assist in resolving once and for all, all the issues between the parties.

In the light of the foregoing I order as follows:

1. That the proceedings be stayed until the felony is prosecuted or a reasonable explanation offered for the failure to do so.
2. In the event that the order at 1 cannot be complied with the order to set down the action for trial during the Michaelmas Session of 1991 is set aside to afford the second defendant the opportunity to commence third party proceedings against the third defendant.

Costs of this summons to be cost in cause.

Certificate of 1 Counsel granted.