JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 110 OF 2000

SUIT NO: C.L. B228 OF 1995

BEFORE: THE HON. MR. JUSTICE FORTE, P
THE HON. MR. JUSTICE LANGRIN, J.A.
THE HON. MR. JUSTICE PANTON, J.A.

BETWEEN	DONALD PANTON	1ST DEFENDANT/ APPELLANT
A N D	JANET PANTON	2ND DEFENDANT/ APPELLANT
	EDWIN DOUGLAS	8TH DEFENDANT/ APPELLANT
A N D	FINANCIAL INSTITUTIONS SERVICES LIMITED	PLAINTIFF/ RESPONDENT

Walter Scott and **Miss Karene Stanley**
instructed by Chancellor & Company for the Appellants

Michael Hylton, Q.C. and Dave Garcia
instructed by **Valerie Alexander** for the respondent

June 25,26,27 and October 25, 2001

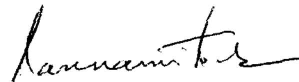
FORTE, P.:

I have read in draft the judgment of Langrin, J.A. and agree with his conclusion and reasons therefor.

It is only necessary for me to add, for emphasis that ***Smith v. Selwyn*** [1914-15] All E.R. (Reprint) 224 should not be followed in this jurisdiction. Instead, the dicta of Carey, J.A. in ***Bank of Jamaica v. Dextra Bank v.***

Trust Co. Ltd. [1999] 31 JLR 361 cited by Langrin J.A. discloses the correct approach that should be taken in these matters. I would confirm that the rule is that the Court in exercise of its inherent jurisdiction to control its own proceedings should balance justice between the parties taking of course all relevant factors into account. In determining the balance of justice between the parties in the civil case, the Court must be cognizant that since it is the appellants who seek the stay, then the burden must be on them to show that the respondent's right to have its claim proceed, should await the conclusion of the criminal proceedings.

For the reasons stated in the judgment of Langrin, J.A. with respect to the points raised by the appellants, I am of the view that the appellants have failed to discharge that burden.



LANGRIN, J.A:

This is an appeal from the order of Karl Harrison, J made on 23rd July 2000 whereby he dismissed an application by the appellants for a stay of proceedings of the civil matter. The appellants are seeking to have that Order set aside and to have this Court make an order staying the civil action until certain criminal proceedings have been completed. On June 27, 2001 the appeal was dismissed with costs to the respondents to be agreed or taxed. We promised then to put our reasons in writing. This we now do.

The genesis of these proceedings began with the plaintiff which was incorporated by the Government of Jamaica to oversee the winding down of the operations of certain financial institutions. Blaise Building Society, Blaise Trust Company and Merchant Bank Ltd. and Consolidated Holdings Ltd.

(Blaise Financial Entities) were among these financial institutions. The plaintiff has assumed certain liabilities of these financial institutions including the sums due to the depositors in these institutions. It is therefore seeking to liquidate its assets and to pursue claims against various persons and entities to recover sums which were due to those financial entities.

The first and second defendants were directors of the Blaise Trust Company and Merchant Bank. The eighth defendant was at all material times an auditor of the Blaise Financial Entities.

In 1995 the plaintiff filed suits against the defendants seeking to recover damages for fraud, damages for and by reason of unjust enrichment and an injunction restraining the defendant 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.

In essence, the claim by the plaintiff arose out of a breach of the defendants' fiduciary duties to the Blaise Financial Entities which caused or allowed the entities to enter into transactions resulting in loss.

The transactions which are the subject of the claims by the plaintiff are conveniently labelled in the Statement of Claim as the TPP transaction; the DOJAP Loans, the Workers Trust transaction; the UNIJAM Loans; the DJNJ Loan; Greenlight Car Rental and Transport Ltd. Loan; Navy Island Share Transactions; the L.S. Panton Transactions; the Deposit Liability Transport Transaction; The West Euro Transaction and the Blaise Industrial Park Transaction.

The defendants filed their Amended Defence and Counterclaim denying or not admitting the claims. Both parties have completed the process of Discovery and the matter has been placed on the Cause List.

On the 1st August, 1996 the defendants were arrested on several counts of conspiracy arising out of their alleged involvement with the Blaise Financial Entities. Subsequently, the Director of Public Prosecutions indicted the defendants on counts of conspiracy to deceive, conspiracy to defraud and a count for falsification of accounts.

It seems clear that the charges in the criminal proceedings and the claim in the civil action are founded on the same matter. The trial of the criminal proceedings has not yet started.

On June 30, 1997 the first and second defendants filed an action in the Constitutional Court claiming an injunction staying the criminal proceedings pending the hearing of the action. The substantive constitutional action is yet to be heard by the Full Court since only an interlocutory matter has been heard by the Full Court and the Court of Appeal.

The interlocutory application made by the appellants in the constitutional action sought an interlocutory injunction to prevent the Director of Public Prosecutions and the Attorney General from making use of the statement given by Raymond Clough to the Police and for a stay of the criminal proceedings pending the hearing of that action. The Full Court refused to grant the injunction and the Court of Appeal upheld the decision. It is therefore unlikely that there will be a trial of the criminal proceedings until the constitutional action is heard and determined.

In an affidavit sworn to by the defendant Donald Panton the points were made in these terms:

> "...I will be greatly prejudiced in my defence in the criminal matters if I am forced to proceed with the action herein before the Criminal charges are tried.
>
> 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 there from I have a right of silence at the trial of the said criminal charges.
>
> 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 an opportunity of succeeding on my Defence.
>
> 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.
>
> 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.
>
> 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."

In an affidavit by the plaintiff in response at paragraph 3 it is stated:

> "The plaintiff is by its very nature a temporary institution and its purpose now is to divest itself of all the assets acquired so as to reduce the substantial public debt that has been incurred as a

> result of the payments to the depositors in those financial institutions. The plaintiff's mandate, and the public interest, therefore require that its claims be pursued expeditiously and that the operations of the plaintiff be wound down as soon as possible. Any delay in this matter being tried will therefore severely prejudice the plaintiff and will not be in the public interest".

By a summons dated May 8, 2000 the defendants applied for an order staying the trial of the action until the concurrent criminal proceedings against them have been heard and determined. As previously mentioned, this came before Harrison, J. who dismissed the application.

It is in relation to this appeal that the following grounds of appeal were filed:

"(1) The Learned trial judge erred in Law in holding that the appellants/defendants failed to establish that there was a real risk of injustice in the criminal proceedings if the application for the stay of proceedings is refused.

(2) The Learned Trial judge erred in Law by failing to apply the rule in **Smith v Selwyn** (supra) which is still the Law in Jamaica.

(3) The Court erred in Law in failing to appreciate that the real risk of prejudice for the First, Second and Eighth Defendants derived not from the act of filing defences in the civil action but from giving viva voce evidence which these appellants/defendants will be obliged to do if they are to have the opportunity of succeeding in their defences in the civil action, and that this would be tantamount to eroding their right to silence by a sidewind in the criminal proceedings when both civil and criminal proceedings involve the same facts and the same issues.

(4) The learned trial judge erred in Law by failing to appreciate that his refusal to stay

the Civil actions will cause the real risk of grave and fundamental breaches of the appellants/defendants constitutional rights.

(5) The learned trial judge erred in law in failing to consider the importance of the fact that the subject matter, the particulars, the documents and other materials which will be used in the civil action includes most of the subject matter, particulars, documents and other materials which will be used by the prosecution in the criminal trial and this in and of itself leads to a risk of injustice in the criminal proceedings".

This last ground was abandoned.

Counsel for the appellants contended that the appellants' right to silence in the criminal proceedings would be affected if they are forced to disclose their defence in the civil proceedings. He also argued that the issues involved in the criminal proceedings are substantially similar to those involved in the civil proceedings and an active defence in the civil proceedings would involve disclosures of their defence to the criminal charges.

The determination of whether to stay the civil proceedings in light of a pending or possible criminal prosecution involves the exercise of a discretion by the Judge hearing the application and in the exercise of that discretion, the primary consideration is to do justice between the parties, with the burden being on the defendants to show that if the civil action is not stayed there would be some real risk of injustice (not merely loss of a tactical advantage) to them in the criminal proceedings.

In ***Smith v Selwyn*** [1914-15] All E.R, 229, 232 it was held inter alia by Swinfen Eady L.J. that:

> "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".

This position was reversed by the decision in the English Court of Appeal in

Jefferson v Bhetcha [1979] 2 All E.R. 1108 where it was held:

> "(1) The protection given to 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 s.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 proceeding 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 (see p.112 h top 1113g and p.1115h, post)."

Megaw L.J. said at p.1113:

> "I should be prepared to accept that the court which is competent to control the proceedings in the civil action, whether it be a 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 proceeding 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."(emphasis added).

The test now used in England is therefore the justice between the parties and the principle requiring that the civil action await the criminal prosecution is no longer in existence.

The approach adopted in ***Bhetcha*** has been applied in ***Bank of Jamaica v Dextra Bank & Trust Co. Ltd.*** [1999]31 JLR 361. Carey J.A., in stating the principle now applicable, had this to say at page 364:

> "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 the stay) to show that the Plaintiff's right to have its claim decided should be interfered with see ***Jefferson Ltd. v Bhetcha*** at p. 1113. If that be right, then the interest of the Defendants in a criminal case, who are not parties to the civil action, cannot, in my view, be relevant consideration".

In my judgment there is no longer a basis on which the rule in ***Smith v Selwyn*** (supra) should be applicable in Jamaica and accordingly the rule should no longer be followed.

A factor to be considered where there are pending criminal proceedings is what is sometimes referred to as the accused's "right of silence". However, this right does not extend to give such a defendant as a matter of right the same protection in contemporaneous civil proceedings.

In ***McMahon v Gould,*** [1982] 7 A C.L.R. 202 Wooten J in discussing the rationale and scope of the right to silence had this to say:

> "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 investigations, 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 box may give an impression of guilt through being stupid slow, 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 that evidence. They include the possibility of depriving the prosecution of any opportunity 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 alibis – the injustice was so frequent and obvious that the legislature made an 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 these advantages. It should be concerned to avoid the causing of unjust prejudice by the continuance of the civil proceeding, not to preserve the tactical

> status quo in the criminal proceedings whether it be just or unjust." (emphasis added).

In **Re Cameron's Unit Services Pty Ltd.** (1984) 4 F.C.R. 428 Wilcox J referred to the above passage of Wootten J, and said (at para. 18):

> "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 or in evidence 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 their 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 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 added).

In applying these principles to the instant case there is no basis for the appellants to argue that their right to silence has been breached since no injustice has been established and they have already disclosed their defences.

In this context it is pertinent to ask this question: will the refusal to grant a stay result in a breach of the appellants' constitutional rights?

Counsel for the appellants contended that the refusal to stay the civil proceedings will cause a real risk of grave and fundamental breaches of the appellants' constitutional rights. In particular, the provisions which deal with fair hearing and presumption of innocence would be more affected.

Section 20 (1) of the Constitution provides:

> "**20.** (1) Whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."

There is no evidence of any interference of the civil action with the appellants' right to a fair hearing of the criminal charges. What is stated is that there is fear of an injustice, but this has not been established. Further there is no evidence that the civil trial would infringe any right of silence.

Section 20(5) of the Constitution provides:

> "(5) Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved or has pleaded guilty:
>
> Provided that nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this subsection to the extent that the law in question imposes upon any person charged as aforesaid the burden of proving particular facts".

The prosecution has a burden to prove beyond a reasonable doubt that the offences charged were committed. Whether the civil trial takes place first or not would not affect the burden of proof which the prosecution would have

to discharge in the criminal trial. The standard of proof in the two sets of proceedings is quite different.

The contention of the appellants that their constitutional rights may be infringed is misconceived.

In his conclusion to the judgment, the learned trial judge states:

> "The defendants have not established any real risk of injustice in the criminal proceedings if I were to refuse the application for a stay of the civil proceedings."

I agree with this view expressed by him. Indeed, the only disadvantage that would be suffered in the criminal proceedings by these appellants if they decided to give evidence in the civil proceedings would be that they could be prevented from giving different evidence at the criminal trial without explaining to the court a reason for the difference. In effect the appellants would be unable to fabricate a defence after the prosecution has proved its case, or change their evidence at the criminal proceedings without the prosecution demonstrating the inconsistency to the court.

There can be no injustice in preventing a defendant from changing his evidence without being required to explain the inconsistency.

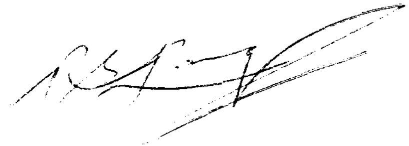
In ***Chambers v Commissioner of Taxation*** [1999] F.C.A. 163, the Federal Court of Australia considered the effect on the question of injustice in subsequent criminal proceedings, Mansfield J said at paragraph 18 of his judgment:

> "If the applicant's evidence on these appeals is flawed, so that the respondent can at some later stage disprove, it, it is hard to see how that produces any unjust prejudice to the applicant. If, on the other hand, it is not flawed, then any

> investigations carried out by the respondent will confirm it and it may result in issues which might otherwise have been asserted later in any criminal prosecution no longer being asserted. It is also entirely possible that such material may demonstrate to the respondents or to the DPP that the approach of the respondent in disallowing the objections is itself incorrect. No judgment of the Court on these appeals will give rise to any issue of estoppel in any criminal proceeding, but if the applicant succeeds overall in these appeals, it is not beyond the realms of possibility that the same material when made available to the DPP would lead to a decision not to institute any criminal proceedings."

The evidence clearly shows that the respondent would be prejudiced if a stay were granted. The purpose for which the respondent was established shows, that delaying the trial of this matter would not be in the public interest.

In the circumstances and on the facts of this case, I am unable to reach a conclusion that the exercise of the judge's discretion was improper or erroneous. Accordingly, I would dismiss the appeal.



PANTON, J.A.:

I agree and have nothing to add.