Privy Council Appeal No. 95 of 2002

(1) Donald Panton
(2) Janet Panton and
(3) Edwin Douglas *Appellants*

v.

Financial Institutions Services Limited *Respondent*

FROM

THE COURT OF APPEAL OF JAMAICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL,

Delivered the 15th December 2003

Present at the hearing:-

Lord Nicholls of Birkenhead
Lord Slynn of Hadley
Lord Hobhouse of Woodborough
Lord Rodger of Earlsferry
Sir Kenneth Keith

*[Delivered by **Sir Kenneth Keith**]*

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1. The appellants are defendants in criminal and civil proceedings, both arising from the same set of events. They sought a stay or suspension of the civil proceedings until the criminal trial had been completed. The Supreme Court of Jamaica dismissed the application. The Court of Appeal dismissed the appellants' appeal but granted them leave to appeal to Her Majesty in Council.

2. The appeal raises two issues:

(1) Is the rule stated in *Smith v Selwyn* [1914] 3 KB 98 part of the law of Jamaica? That rule, in the words of Swinfen Eady LJ, is that:

> "... where injuries are inflicted on an individual under

circumstances which constitute a felony, that felony cannot be made the foundation of a civil action at the suit of the person injured against the person who inflicted the injuries until the latter has been prosecuted or a reasonable excuse shown for his non-prosecution." (105)

(2) If that rule is not part of the law of Jamaica – as the Jamaican courts ruled - should their refusal to exercise their discretion to grant the stay or suspension be reversed?

3. Both sets of proceedings arise out of the involvement of the appellants and others in the management of certain financial institutions which solicited and accepted deposits from the public. In 1994 and 1995 the Minister of Finance took over the temporary management of the institutions and later all their assets were transferred to the respondent company which is wholly owned by the Government of Jamaica. The civil proceedings, begun in 1995, allege breaches of fiduciary duties and fraud, and claim substantial monetary relief. The criminal charges, brought in 1996, allege conspiracies to deceive, conspiracies to defraud and falsification of accounts.

4. Mr Codlin, for the appellants, contended that the rule in *Smith v Selwyn* was still part of the law of Jamaica. In the course of oral argument he was, however, brought essentially to the position that that was not so.

5. Given counsel's position, their Lordships may indicate briefly why they have come to that conclusion. It was common ground that, in broad terms, parts of the laws of England which were applicable to the situation and conditions of Jamaica when it became a colony became part of its law. Mr Codlin referred their Lordships to a Jamaican judgment of 1867 in support of that proposition: *Jacquet v Edwards* (1867) 1 Stephens Rep 414, 419. That judgment in turn refers to *Blackstone's Commentaries*.

6. As will appear, *Smith v Selwyn* is longer good law in England, the matter of a stay now being in the discretion of the court which is to weigh the competing considerations. But that change was not decisive, said Mr Codlin, since a change in the law of England did not automatically carry over into the law of Jamaica. Their Lordships accept that that is so, but it is common experience that courts of jurisdictions which were initially subject to the *Blackstone* rule or some variation of it frequently choose to follow developments of the

common law as they occur elsewhere. Mr Codlin frankly accepted that he could not point to any local circumstances supporting the argument that the Jamaican courts should not have followed the movement in the common law to be seen elsewhere. He could say little more than that the courts in this case should have identified the issue in terms of the old *Blackstone* rule and should have pointed to the lack of distinguishing circumstances. He was not, of course, contending that the common law of Jamaica was frozen, for instance as at 1914 when *Smith v Selwyn* was decided, and he accepted that common law could move on and, in this particular situation, had indeed done so.

7. That movement may be briefly traced. The English Court of Appeal in 1979 in *Jefferson Ltd v Bhetcha* [1979] 1 WLR 898, the New South Wales Supreme Court in 1982 in *McMahon v Gould* 7 (1982) ACLR 202, the Federal Court of Australia in 1984 in *Re Cameron's Unit Services Pty Ltd v Kevin R Whelpton and Associates (Australia) Pty Limited and another* (1984) 4 FCR 428 and the Jamaican Court of Appeal in 1994 in *Bank of Jamaica v Dextra Bank & Trust Co Ltd* (1994) 31 JLR 361 have all held that the issue of a stay to prevent civil proceedings when criminal prosecutions arising out of the same events are also pending is a matter of discretion to be exercised by reference to the competing considerations. It is not a matter of rule. *Smith v Selwyn* has been discarded.

8. Various reasons have been given for the discarding of the rule. One relates to the requirement of the rule that the facts upon which the civil action is based amount to felony and to nothing else. Of that Carey JA in the Jamaican Court of Appeal in *Dextra* said this (at 364):

> "In this country, where the distinction [between felonies and misdemeanours] 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."

In using the word "likewise" the judge is referring to Australian decisions which had taken, he said, quite a robust view of the matter and had ignored the distinction as being of no significance although it was still on the books. With the other members of the court he went on to state and apply a balancing test. Their Lordships note, in particular, that Carey JA had regard to the real situation in Jamaica

when deciding to discard the *Blackstone* rule.

9. One of the Australian decisions is that of Wootten J in the Supreme Court of New South Wales in *McMahon v Gould.* He helpfully discusses the suggested rationales for the rule:

> "The origin of the rule in *Smith v Selwyn* has been the subject of a deal of consideration by learned writers ... Whether the rule was 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, in New South Wales, despite our retention, for no discernible reason, of a totally artificial version of the archaic distinction between felonies and misdemeanours. What remains is the immutable principle that the common law will have regard to the requirements of public policy.
>
> I greatly sympathise with this view, and 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."

He went on to set out guidelines bearing on the exercise of the inherent jurisdiction of the courts to grant stays of proceedings in the interests of justice. In some jurisdictions that power may also take a statutory form, as in section 41 of the Supreme Court of Judicature (Consolidation) Act 1925 mentioned in the *Jefferson* case. Whether the power is part of the inherent jurisdiction of the court or takes statutory form appears to have no consequence for its application.

10. Their Lordships accordingly now turn to the question whether the Jamaican courts erred when they refused to grant the stay or suspension sought by the appellants.

11. Both courts began with the need to balance justice between the parties. The plaintiff had the right to have its civil claim decided. It was for the defendants to show why that right should be delayed. They had to point to a real and not merely a notional risk of injustice. A stay would not be granted simply to serve the tactical advantages that the defendants might want to retain in the criminal proceedings. The accused's right to silence in criminal proceedings was a factor to be considered, but that right did not extend to give a defendant as a

matter of right the same protection in contemporaneous civil proceedings. What had to be shown was the causing of unjust prejudice by the continuance of the civil proceedings. The Court of Appeal also gave particular attention to the appellants' constitutional rights, a matter to which their Lordships will return.

12. Both courts emphasised the limited claim made by and on behalf of the appellants in the affidavit filed in support of the application for a stay. They also called attention to the facts that the appellants had filed their amended statement of defence and counterclaims, that discovery had been completed and that, according to the High Court judge, the parties had complied with orders for further and better particulars and interrogatories.

13. The affidavit by one of the appellants was put in general 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."

He mentioned the presumption of innocence, the burden and standard of proof and his right to remain silent in criminal proceedings. He would be obliged to testify in the civil proceedings if he were to have any opportunity of succeeding in them. He did not indicate how that testimony would prejudice him beyond the defence already filed, the material discovered and the answers given. Nor was there any specification in the course of the argument before the Board.

14. The plaintiff in its affidavit in response said that by its very nature it was a temporary institution. Its purpose 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 required that its claims be pursued expeditiously and that the operations of the plaintiff being wound down as soon as possible. Any delay in this matter being tried would therefore severely prejudice the plaintiff and would not be in the public interest.

15. Their Lordships can see no reason to disagree with the position taken by the courts below. The appellants have failed to make out their case for a stay or suspension. The arguments against the application appear to them to be compelling.

16. Nor do the constitutional arguments assist the appellants. Section 20(1) of the Constitution provides that a person charged with a criminal offence shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law. Should there be any issue about the delay in the prosecution of the criminal proceeding, that is of course a matter to be taken up within that proceeding and not in the present one. Their Lordships were informed from the Bar that the trial was actually fixed for October 2003 but, by agreement, the proceeding did not begin then and was fixed for mention in February. Their Lordships have already considered and dismissed the contention that a fair criminal trial cannot be accorded in the circumstances of this case. The presumption of innocence stated in section 20(5) was also mentioned. The appellants will continue to be entitled to the benefit of that presumption and to the heavier onus of proof on the prosecution in the criminal proceedings. Their Lordships have already considered and found wanting any significance, in the circumstances of the present case, of the right to remain to silent in the criminal proceedings.

17. For the foregoing reasons their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellants must pay the respondent's costs.