



# In The Supreme Court of Bermuda

## CIVIL JURISDICTION COMMERCIAL COURT

2007: No. 239

**B E T W E E N:**

**CAPITAL G BANK**

**Plaintiff**

**-v-**

**(1)WENDELL TYRONE EVE**

**(2)CARLISLE LOUIS ANDREW SIMMONS**

**Defendants**

### **RULING ON STAY APPLICATION**

Date of Hearing: October 8, 2008

Date of Ruling: October 16, 2008

Mr. Paul Harshaw, Lynda Milligan-Whyte & Associates, for the Applicant/1<sup>st</sup> Defendant

Ms. Juliana Snelling, Mello Jones & Martin, for the Respondent/2<sup>nd</sup> Defendant

#### **Introductory**

1. In possession proceedings brought by the Plaintiff mortgagee against the two Defendants as joint mortgagors, a dispute arose as to the extent of their respective entitlements to the net proceeds of sale of the foreclosed property (“the Property”). I directed that this dispute could be resolved in these proceedings to avoid the unnecessary costs of commencing fresh proceedings.

2. By Summons dated June 10, 2008, the Respondent applied for 100% of the net proceeds of sale. On June 23, 2008, directions were ordered by consent in relation to the Respondent's Summons. In paragraph 29 of the Respondent's First Affidavit dated July 17, 2008, the Respondent deposed as follows: "*I hope that the Court will agree that Mr. Eve is not entitled to any of the proceeds of sale by reason of his fraud and that any entitlement he has to them is to be held by him on constructive trust for me.*" His case is that he placed the Applicant's name on the deeds of the Property which he inherited to facilitate obtaining financing to develop the Property. After obtaining initial financing from the Plaintiff, the Respondent deposes that Applicant forged his signature in the course of attempts to obtain further financing from another lender. He also allegedly spent some of the initial loan proceeds for his own purposes. Once it became clear that the Property would have to be sold, the Respondent decided to terminate the agreement pursuant to which the Applicant became a joint owner of the Property.
3. The Applicant applied by Summons dated September 30, 2008 for the proceedings to be stayed until further order of this Court. The Applicant's Second Affidavit dated September 24, 2008 deposes that (a) he believed that the Respondent had initiated a criminal complaint against him in respect of the matter which forms the subject of the present civil dispute; (b) although the Police executed a search warrant and seized documents from him in or about June 2008, he did not realize the investigation was active until he was interviewed at Hamilton Police Station on September 12, 2008.
4. The Applicant invokes the common law principle that where criminal investigations into an alleged felony are pending in respect of the subject-matter of a civil claim, the Court has a duty to stay the civil proceedings until the criminal investigation (and any subsequent criminal proceedings) has concluded. The Respondent contends that this principle only applies in respect of a "felony", and the offence currently being investigated is neither (a) a felony (although it

once was), nor (b) a necessary element of the fraud allegations which form part of the Respondent's civil claim.

5. It is common ground that a Police investigation is pending in relation to an allegation of forgery made by the Respondent against the Applicant and that it is presently unclear whether he will be charged. It is also accepted that the criminal investigation arises out of the same property dealings which form the subject of the present application. Accordingly, two issues of principle fall for determination: (a) whether the jurisdiction to stay criminal proceedings established in *Smith-v-Selwyn* [1914] 3K.B. 98 is only engaged in relation to the pending investigation of felonies, and (b) assuming this principle is not engaged in the present case, whether the Court possesses and should exercise a general discretionary power to stay civil proceedings in the interests of justice.

#### **The classification of forgery and offences of dishonesty under Bermuda criminal law**

6. Ms. Snelling demonstrated with a concise yet comprehensive reference to the legislative history of the offences of stealing and forgery under the Bermuda Criminal Code that any offences which the Respondent has or may allege are not felonies. The classification of offences has changed since the original Criminal Code was enacted in 1907, with section 3(1) originally providing as follows:

*“Offences are of four kinds, namely, treasons, felonies, misdemeanors [sic], and simple offences.”*

7. Offences such as stealing and forgery were, from the beginning, felonies. This position appears to have remained the same until the Criminal Code Amendment (No.2) Act 2005 when the felony designation disappeared from the definition of these and related property offences. Felonies still exist under the current version of the Criminal Code, such as “*treasonable felonies*” (section 85) and various homicide offences (sections 286-301).

## The Smith-v-Selwyn principle

8. Where a civil claim is based on facts which constitute a felony, the civil court may stay the proceedings until the defendant has been prosecuted: *Smith-v-Selwyn* [1914] 3K.B. 98. This principle appears to have been primarily motivated by a concern that serious crimes should be reported to the Police and not simply dealt with by way of private civil claims. As Mr. Harshaw pointed out, this common law principle forms part of Bermuda law by virtue of the Court of Appeal for Bermuda decision in *Todd-v- Smith/Burgess* [1993] Bda LR 14. A stay was held to be properly required where the civil claim of misappropriation was being pursued while a criminal stealing complaint was being investigated. Harvey da Costa JA (at page 5 of his Judgment) held as follows:

*“In England the distinction between felonies and misdemeanors is now part of legal history...The result is to give the quietus to the rule in Smith v Selwyn as that rule applied only to felonies and not to misdemeanors.”*

9. Ms. Snelling relied on this passage as support for the proposition that the rule in *Selwyn-v- Selwyn* would cease to apply in Bermuda to any offence which used to be a felony but which is no longer a felony. However, this question did not fall for determination by the Court of Appeal and was not even argued in *Todd*.
10. Nevertheless, it is clear that the specific rule formulated in *Smith-v-Selwyn* in relation to felonies cannot be relied upon in the present case since the offences disclosed by the Respondent’s civil complaints do not disclose felonies.

## General discretion to stay proceedings

11. In my judgment this Court clearly possesses the discretion to stay civil proceedings where an overlapping criminal complaint in relation to an offence (or offences) which is triable on indictment is still pending. The rule in *Smith-v-Selwyn* was developed in relation to felonies because most serious common law crimes fell under that common law classification. The original rationale of the rule, as stated in that case, was to prevent criminal complainants from not reporting serious crimes and simply seeking private restitution. However, in modern times with accused persons having constitutional fair trial rights, there is no meaningful distinction between this rule and the rule that when overlapping criminal and civil proceedings are pending, the civil proceedings should be stayed until the criminal proceedings have concluded. The public policy rationales underlying this related principle include the need to avoid prejudicing the defendant's criminal fair trial rights by requiring him or her to advance a defence to a civil claim while as a matter of criminal law the privilege against self-incrimination exists, and/or to avoid affecting the impartiality of jurors by adverse pre-trial publicity of the civil proceedings.
  
12. These fundamental concerns do not evaporate merely because certain criminal offences are re-classified for essentially administrative reasons which do not impact on the severity of punishment to which an accused person is potentially exposed to any significant degree. The initial maximum punishments for stealing and forgery in 1907 were 2 and 3 years respectively. Since these offences ceased to be classified as felonies, the penalties have been increased to 5 years (if convicted summarily) and 10 years (if convicted on indictment). In my judgment the Court continues to possess the inherent discretionary power to stay civil proceedings in relation to matters which overlap with the subject of a criminal investigation if there is a risk that a fair criminal trial would be prejudiced. However, the cogency of the risk must be assessed having regard to the peculiar facts in each case. The relevant principles were considered by the English Court of

Appeal in *Mote –v- Secretary of State for Pensions* [2007] EWCA 1324 where Richards LJ held (considering the refusal of an application to adjourn civil proceedings pending the determination of criminal proceedings):

*“[31] The authorities make clear that a relevant consideration is whether the continuation of the civil proceedings will give rise to a real risk of prejudice to the defendant in the criminal proceedings. If there is a risk of prejudice, then I would expect it to weigh heavily in favour of an adjournment pending the conclusion of the criminal proceedings, but it will not necessarily be decisive. I accept, of course, that the court must not act in breach of the defendant's Convention rights; but it is difficult to see how the continuation of the civil proceedings could give rise in itself to a breach of those rights. As the tribunal chairman held in the present case, the civil proceedings can be conducted in such a way as to respect them. An additional and important safeguard lies in the powers of the judge in the criminal proceedings to stay those proceedings for abuse of process or to limit the evidence admitted at the trial if, in the circumstances then prevailing, it is necessary to do so in order to prevent a breach of Convention rights or to ensure a fair trial. The civil court or tribunal can take into account the existence of those powers when considering the exercise of its own discretion whether to adjourn.”*

13. English authorities on the exercise of this discretion must be read with care as (a) the right to silence has been substantially abolished in the United Kingdom, and (b) the accused is not entitled to conceal the key elements of any defence until trial. Nevertheless the modern approach appears to be to lean towards allowing civil proceedings to go ahead unless a tangible case of prejudice can be made out which cannot likely be resolved by sensible case management in the criminal or civil court.

**Findings: should the Respondent's application be stayed?**

14. The Respondent's case as presently "pleaded" in his Affidavits makes civil complaints that constitute one or more offences which would have constituted felonies prior to 2005. A criminal investigation into these matters is currently pending and it is possible that the Appellant might be charged. The only obvious prejudice which might flow from this Court deciding matters which might support criminal charges for forgery or other offences of dishonesty at this juncture is that the civil findings might impact on the decision as to whether or not to lay criminal charges. This prejudice is real and cannot properly be ignored by this Court.
  
15. In my judgment trying the issue of whether or not the Applicant acted fraudulently as the Respondent presently seeks to do could be sufficiently prejudicial to the Applicant's position in the criminal investigation of the forgery complaint to justify granting the stay sought limited to the trial of the fraud issues. However, I grant the Respondent leave to notify the Court within 14 days by letter to the Registrar and/or by affidavit of such other issues (if any) which the Respondent is desirous of proceeding to have tried with a view to determining the issue of how the net proceeds of sale ought to be apportioned between the joint mortgagors.
  
16. The fundamental issue which requires determination in these proceedings appears to be whether the agreement pursuant to which the Applicant became joint owner of the Respondent's family property having become impossible to perform, the Applicant can still assert any equitable interest in the proceeds of sale of the Property. The Respondent has also indicated that he may wish to pursue an action for money had and received, which could also be pursued notwithstanding the stay which has been granted in this case. I expressed the provisional view at the hearing that this claim could be pursued within the present action, even though it is less directly linked to these foreclosure proceedings than the apportionment issue.

17. The ultimate result is in favour of the Applicant, albeit the decision is not based on the narrow grounds initially contended for. Unless either party applies within 14 days to be heard as to costs, I award the costs of the present stay application to the Applicant to be taxed if not agreed on the standard basis.

Dated this 16<sup>th</sup> day of October, 2008

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**IAN KAWALEY**

Puisne Judge