

CASE NOTE:

HISCOX SERVICES LTD & ORS v ABRAHAM

The rule in *Smith v Selwyn* is no longer good law in Bermuda

“The test determining whether a civil case should continue is whether its continuation would run a real risk that the fairness of the criminal trial would be prejudiced.”

In the recent decision of *Hiscox Services Ltd & Ors v Abraham* (2018) SC (Bda) Civ (5 October 2018), the Bermuda Supreme Court has demonstrated commitment to maintaining an up-to-date legal system in Bermuda.

The Chief Justice held that the rule in *Smith v Selwyn* (1914) 3 KB 98 was no longer good law and should be disapplied. In so doing, the Supreme Court followed previous Privy Council authority, which it is bound to do, and brought another aspect of Bermuda’s laws into line with other common law jurisdictions.

In addition, the Court demonstrated its commitment to maintaining relevance in a digital age by holding that evidence gathered in New York by way of WhatsApp messages was capable of being admissible in the Plaintiffs’ application for summary judgment.

The Plaintiffs, which were the Hiscox insurance companies and were all members of the Hiscox Group, sought summary judgment against the Defendant, Mr Abraham for the sum of USD1.5 million and CHF334,000. Judgment was sought on the basis that between 6 June 2017 and 16 February 2018, Mr Abraham had caused or procured online transfers to be made out of the Plaintiffs’ bank accounts with HSBC Bank of Bermuda to an account at a bank in New York (the “Transfers”).

The Plaintiffs’ case was that in order to procure the Transfers, the Defendant produced false invoices for various fictitious consulting and other business services, for which services the Plaintiffs said there was no sensible business case. The payees of the Transfers were in fact manufacturers and/or retailers of luxury timepieces. The Plaintiffs alleged that Mr Abraham made the Transfers in consideration for the purchase of luxury watches.

Mr Abraham did not file any evidence in response to the summary judgment application, and instead applied to stay the application on the basis that there was an extant criminal investigation into his alleged conduct which arose out of the same facts as the civil summary judgment application. He asserted that as a result of the criminal proceedings, the civil application should be stayed until the criminal proceedings had been concluded, or an indication given that they were not going to be pursued.

The stay application was made in reliance on the rule established in *Smith v Selwyn* which requires civil proceedings to be stayed where the defendant has been accused of a felony arising out of the same facts (the “Rule”).

In making its decision, the Supreme Court had regard to the findings of the Court of Appeal in *Todd v Smith* (1993) Bda LR 14 in which it was held that the Rule was a well-established rule of law. The Plaintiffs' position was that it was questionable whether the Rule continued to apply Bermuda. The Privy Council decision in *Panton v Financial Institutions Services Ltd* (2003) UKPC 86 was referred to, which was an appeal from Jamaica where the Board noted that the Rule was no longer good law in England, and that the matter of whether a stay should be granted was for the discretion of the Court which was required to weigh up the competing considerations on a case by case basis. The Board in *Panton* had noted the prevailing move away from the Rule in most common law jurisdictions, and as regards Jamaica, held that there was no particular public policy considerations prevailing there that justified the common law developing differently in Jamaica as regards this issue to the direction that the common law had taken in England.

The Chief Justice held that in light of the Privy Council decision in *Panton*, the Rule was no longer good law in Bermuda. Even though that case was an appeal from Jamaica, decisions of the Privy Council sitting in London bind the Bermuda Court.

The Court went on to find that even if the Rule did apply in Bermuda, it could not apply in this case because its operation is limited to "felonies". The modern law in Bermuda is that the felony designation does not apply to property related offences, and continues to apply only in limited circumstances, for instance, "treasonable felonies". Mr Abraham's attorney was able to confirm that the charges that had been brought were not "felonies". Accordingly, the Rule could not be relied upon in this case in any event.

The Supreme Court held that irrespective of whether the Rule applies, the Court exercising its inherent jurisdiction retains the discretion to stay civil proceedings where criminal proceedings arising from the same facts have been, or are likely to be instituted. The test determining whether a civil case should continue is whether its continuation would run a real risk that the fairness of the criminal trial would be prejudiced.

In exercising its discretion, the court may have regard to the considerations set out below, which do not form an exhaustive list of factors.

- (1) Each case is to be judged on its own facts, the burden being on the defendant in the civil proceedings to show that it is just and convenient that there should be an interference with the plaintiff's ordinary right to have the claim heard and decided.
- (2) The protection given to a defendant in criminal proceedings of the 'right to remain silent' does not apply to civil proceedings.
- (3) It is undesirable for the Court to define all the relevant factors that may lead a court to conclude that there is a real danger of causing injustice in criminal proceedings. However those factors may include (i) that the civil proceedings would generate so much publicity that a fair criminal trial would be prejudiced; or (ii) that the disclosure of evidence in the civil case may lead to a miscarriage of justice in the criminal trial, for example by allowing prosecution witnesses to prepare fabricated evidence, or there being a risk of witness nobbling.

- (4) The defence of privilege against self-incrimination has limited application in the civil context, and it is only if a claimant seeks to compel, for example, discovery and production of documents that the privilege would appear to arise.
- (5) It is legitimate to start from the position that a positive defence is likely to exculpate rather than to incriminate.

Victims of fraud, in particular, employee fraud such as in the *Hiscox* case will be relieved that they are able to obtain relief from the Court quickly without the need to await the outcome of criminal proceedings. At the same time, by this decision, the Supreme Court in Bermuda has shown flexibility in maintaining its discretion to stay civil matters in favour of the outcome of criminal proceedings where to continue with the civil matter would run a real risk that the fairness of the criminal trial would be prejudiced.

For more information, please contact Shuvra Deb, Matthew Watson or David Kessaram.

November 2018

Author:



Shuvra Deb
Associate, Litigation Department
Tel: +1 441 294-1512
Email: sdeb@chw.com

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