JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 27/91

COR: THE HON. MR. JUSTICE CAREY - PRESIDENT (AG.)
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE GORDON, J.A. (AG.)

BETWEEN	BRUCE GOLDING (On behalf of and as representing the Standing and Central Executive Committees of the Jamaica Labour Party)	DEFENDANTS/APPELLANTS
	& ANOTHER	
AND	PEARNEL CHARLES	PLAINTIFF/RESPONDENT

Emil George Q.C., David Muirhead Q.C., & Patrick Foster instructed by Dunn, Cox & Orrett for Appellants

Berthan Macaulay Q.C., & Wentworth Charles instructed by Margaret Macaulay for Respondent

13th, 14th, 15th, 16th May & 7th June, 1991

CAREY, P. (AG.)

This appeal focuses attention on the importance of a summons for directions as an essential step in the procedural scheme of setting down a civil case for trial in the Supreme Court and raises as a not uninteresting point - what is the result of the failure to take out such process. In the action from which this appeal stems, no summons for directions was ever taken out: no application to enter the action on the cause list was ever made, nor did it ever appear on any cause list. Yet it came on for trial before Marsh J, who upon objection taken by the appellants to the action being tried, ruled that it should proceed.

All these omissions which constitute the non-compliance with the rules governing the setting down of actions in the Supreme Court provoked and generated a deal of argument before Marsh J, twice before this Court viz, on an application for leave to appeal the ruling of the judge and secondly on the appeal proper. Time has thereby been consumed largely unproductively. Costs have been incurred wastefully. The rights which the respondent (the plaintiff in the action) seeks to vindicate have not begun to be adjudicated. The irony of the situation is that the parties were endeavouring to have the plaintiff's rights determined speedily. The actual order which prompts this appeal is dated 7th May, 1991 and is as follows:

> "1. That the Application by the Defendants/Appellants Counsel for the matter to be removed from the trial list because of the failure to comply with Section 272 of the Civil Procedure Code be refused."

A number of provisions in the Civil Procedure Code govern the setting down of an action for trial in the Supreme Court, viz sections 342 to 344. But the process all begins with a summons for directions.

After pleadings are closed or deemed to be closed, the plaintiff is entitled to apply for an order on a summons for directions. This is provided in section 272 which applies to all matters commenced by writ of summons save for six exceptions:

> "272 (1) In every action to which this Title applies, the plaintiff shall with a view to providing an occasion for the consideration by the Court or a judge of the preparation for the trial of the action, so that -

" (a) all matters which must or can be dealt with on interlocutory applications and have not already been dealt with may so far as possible be dealt with; and

(b) such directions may be given as to the future course of the action as appear best adapted to secure the just, expeditious and economical disposal thereof,

take out, within seven days from the time when the pleadings are deemed to be closed, a summons (in this Law referred to as a summons for directions) returnable in not less than twenty-one days.

(2) This section applies to all actions commenced by writ of summons except -

(a) action in which the plaintiff has applied for judgment under Title 13 or Title 13A or for a trial without further pleadings under Title 13 (B) and directions have been given accordingly;

(b) actions in which an order for accounts has been made under Title 14;

(c) actions in which an order has been made under section 291 of this Law for the trial of an issue or question before determining a right to discovery or inspection;

(d) actions which have been dealt with under section 329 of this Law (which relates to the trial of agreed questions of fact);

(e) actions in which directions have been given under section 470A (which enables directions to be given on applications under Title 39 for an injunction, for orders for the preservation or inspection of property or for any of the other purposes specified in that Title);

(f) actions for the infringement of a patent."

One of the orders made by the judge on a summons for directions is to fix the time within which the plaintiff is to set the action down for trial (section 342 (1). Of course, if the plaintiff fails to comply with the order, the defendant is himself at liberty either to apply to set the action down for trial orto apply to dismiss (section 342 (2)). In order to set the action down, the plaintiff makes a written request to the Registrar copied to the defendant, to do so. The rule actually requires notification of the defendant of this fact within twenty-four hours by the plaintiff but the practice is, as I have indicated. (Section 343 (2)).

Thereupon the Registrar in the order of the receipt of requests by plaintiffs enters (section 344 (2)) the action on one or other of the two Cause Lists which he is enjoined by section 344 (1) to keep. Section 344 (5) which is concerned with the mechanics of arriving at dates for trial was refined by a Practice Direction dated 24th January, 1989. For purposes of this appeal, I need say no more of it, except to comment on one aspect thereof. There is now introduced a requirement whereby the plaintiff's attorney files a document called a "Certificate of Readiness." It is intended to show that the parties are now ready to prosecute the litigation seriously, presumably because all outstanding fees have been paid. This requirement, as I will hereafter demonstrate, has nothing to do with readiness in point of interlocutory process relevant or necessary for a "just, expeditious or economical disposal" of the case.

From what I have said thus far, it is clear that an order on a summons for directions is a condition-precedent to an action coming on for hearing in the Supreme Court. It is the order for trial made by the judge on the summons for directions which sets in motion the setting down process carried

out by the Registrar. In my judgment, neither of the parties to an action can unilaterally or consensually set the action down for trial; the intervention of the court is a sine qua non.

With that introduction, I turn now to consider the scope and importance of a summons for directions. As section 272 (1) provides, the summons for directions is an opportunity for the court, not the parties, to consider the readiness of an action for trial. It has been described as a thorough stock-taking (See RSC Order 25/1/1. The purpose of judicial intervention is expressly stated in these terms:

> "272A (1) When the summons for directions first comes to be heard, the Court or Judge shall consider whether -
>
> (a) it is possible to deal then with all the matters which by the subsequent sections of this Title are required to be considered on the hearing of the summons for directions; or
>
> (b) it is expedient to adjourn the consideration of all or any of those matters until a later stage,
>
> and, in particular, whether those matters or some of them ought or ought not to be dealt with only after there has been discovery."

Shortly stated, it is intended to save costs and ensure expedition. Section 272A lays on the judge the duty to consider a number of matters and authorises him to adjourn consideration thereof in order to obtain information which parties will be obliged to give. Sections 272A, 272B, 272C, 272E, 272F are all relevant in this regard.

> "272A (2) If, when the summons first comes to be heard, the Court or Judge considers that it is possible to deal then with all the said matters, the Court or Judge shall deal with them forthwith and shall endeavour to secure that all other matters which must or can be dealt with on interlocutory application and have not already been dealt with are also then dealt with.

" (3) If, when the summons first comes to be heard, the Court or Judge considers that it is expedient to adjourn the consideration of all or any of the matters which are by the subsequent sections of this Title required to be considered on the hearing of the summons the Court or Judge shall deal forthwith with such of those matters as the Court or Judge considers can conveniently be dealt with forthwith and shall adjourn the consideration of the remaining matters and endeavour to secure that all other matters which must or can be dealt with on interlocutory applications and have not already been dealt with are dealt with either then or at a resumed hearing of the summons.

(4) No order under Title 33 as to the place or mode of trial shall be made until all the matters which by the subsequent sections of this Title are required to be considered on the hearing of the summons have been dealt with.

(5) If the hearing of the summons is adjourned without a day being fixed for the resumed hearing thereof, any party may restore it to the list on two days' notice to the other parties.

272B. On the hearing of the summons for directions the Court or Judge shall in particular consider, if necessary of its or his own motion, whether, for the purpose of saving costs, any order should be made in the exercise of the powers conferred by any of the following provisions, that is to say -

(a) Section 259 of this Law (which relates to the amendment of pleadings and indorsements);

(b) Sections 368, 368A to 368E of this Law (which relate to the mode in which evidence may be given at the trial and the limitation of evidence in certain cases).

"272C. At the hearing of the summons for directions the Court or Judge shall endeavour to secure that the parties make all admissions and all agreements as to the conduct of the proceedings which ought reasonably to be made by them and may cause the order on the summons to record any admissions or agreements so made and (with a view to such special order, if any, as to costs as may be just being made at the trial) any refusal to make any admission or agreement.

272D. ...

272E. (1) (a) No affidavit shall be used on the hearing of the summons for directions except by the leave or direction of the Court or Judge, but, subject to the provisions of subsection (4) of this section, it shall be the duty of the parties to the action and their advisers to give all such information and produce all such documents to the Court or Judge on any hearing of the summons as it or he may reasonably require for the purpose of enabling it or him properly to deal with the summons.

(b) The Court or Judge may, if it appears proper so to do in the circumstances, authorise any such information or documents to be given or produced to the Court or Judge without being disclosed to the other parties but, in the absence of such an authority, any information or documents given or produced under this subsection shall be given or produced to all the parties present or represented on the hearing of the summons as well as to the Court or Judge.

(2) Notwithstanding subsection (1) of this section leave shall not be required for the use of an affidavit by any party on the hearing of the summons in connection with any application thereat for any order if, under this Law, an application for such an order is required to be supported by an affidavit.

"

(3) If the Court or Judge on any hearing of the summons requires a party to the action or his solicitor or counsel to give any information or produce any document and that information or document is not given or produced, then, subject to the provisions of subsection (4) of this section, the Court or Judge may -

(a) cause the facts to be recorded in the order with a view to such special order, if any, as to costs as may be just being made at the trial; or

(b) if it appears to the Court or Judge to be just so to do, order the whole or any part of the pleadings of the party concerned to be struck out, or, if the party is plaintiff or the claimant under a counterclaim, order the action or counterclaim to be dismissed upon such terms as may be just.

(4) Notwithstanding anything in the preceding subsection, no information or documents which are privileged from disclosure shall be required to be given or produced under this section by or by the advisers of any party otherwise than with the consent of that party.

272F. (1) Any party to whom the summons for directions is addressed shall so far as practicable apply at the hearing of the summons for any order or directions which he may desire as to any matter capable of being dealt with on an interlocutory application in the action, and shall, not less than seven days before the hearing of the summons, serve on the other parties a notice in writing specifying those orders and directions in so far as they differ from the orders and directions asked for by the summons.

(2) If the hearing of the summons is adjourned and any party to the proceedings desires to apply at the resumed hearing for any order or directions not asked for by the summons or in any notice given under subsection (1) of this section, he shall, not less that seven days before

> " the resumed hearing of the summons, serve on the other parties a notice in writing specifying those orders and directions in so far as they differ from the orders and directions asked for by the summons or in any such notice as aforesaid.
>
> (3) Any application subsequent to the summons and before judgment as to any matter capable of being dealt with on an interlocutory application in the action shall be made under the summons by two clear days' notice to the other party stating the grounds of the application; and any application by a party which might have been made at the hearing of the original summons shall, if granted on any subsequent application, be granted at the costs of the party applying unless the Court or Judge is of the opinion that there were sufficient reasons for the application not having been made at the hearing of the original summons."

Each member of this panel is very well aware that applications for amendments to pleadings are often made at trial in some cases, substantial amendments, which then require a reply from the other side. Eventually an adjournment has to be granted. Time is lost: costs are thrown away: the action cannot be disposed of expeditiously.

Even the most cursory reading of these provisions will make it obvious that the court has an independent duty, itself to consider the several matters listed in the long form of the summons for directions which was issued in a Practice Note dated 14th September, 1973. It imposed a duty on practitioners:

> "... to file Summonses for Directions in accordance with the attached form. Where an Attorney-at-law does not require an Order in any particular matter in the Summons he should strike out the number but not the text, which should be left for the Master."

This requirement is honoured more in the breach than the observance. The Master is expected to give due regard to agreed terms of proposed orders but there can be no consent order on a summons for directions. Both parties should be present to enable this stocktaking to occur. But usually, the plaintiff alone attends on the Master. The orders eventually made often relate to paragraphs 25 and 26 of the long form viz: liberty to apply and the place and mode of trial. No one should be surprised if summons for directions are regarded by practitioners as a useless chore. The use of the long form was intended to call attention to the several matters with which the parties should be prepared to deal before the Master. I have been at length on this process in order to remind of its importance.

Regrettably the judge himself did not demonstrate any appreciation of the significance of a summons for directions. When the matter came before him on 6th May, 1991 he described what took place before him in these words:

> "... Mr. Foster applied for the case to be taken out of the list in the absence of a Summons for Directions. Plaintiff's Counsel stated that there was an agreement between the parties to abandon the Summons for Directions in the interest of a speedy trial. Mr. Foster for the Defendants disagreed. I, therefore, sent the parties back to the Registrar in an effort to reconcile the dispute. This, however, has not assisted, as the matter remains unresolved."

He did not appreciate that there could be no "agreement between the parties to abandon the summons for directions." His judgment continued -

> "... from a common sense point of view, it would seem that if the parties are clear on the issues, no serious damage should ensue because of any failure to file the Summons. ..."

And later:

> "In the absence of any clear authority, on the power to exclude the Summons (statutory language apart), I propose to deal with the matter on the very narrow question of fact, as to whether or not there was an agreement. ..."

I need say no more. It was with respect to the judge, a total misconception to proceed to deal with the matter "on the very narrow question of fact as to whether or not, there was an agreement." The judge was required to deal with a question of law, that which is now before this court, viz - What then is the result of a failure by the plaintiff to comply with section 272 requiring his taking out a summons for directions within seven days of the closing of the pleadings? This brings us naturally to section 678 of the Civil Procedure Code with which I must now deal:

> "678. Non-compliance with any of the provisions of this Law shall not render the proceedings in any action void unless the Court shall so direct; but such proceedings may be set aside either wholly or in part, as irregular, or amended or otherwise dealt with in such manner, and upon such terms as the Court shall think fit."

On behalf of the appellants, Mr. Muirhead Q.C. argued that the order of Marsh J that the trial should proceed, was void because the non-compliance with section 272 was so fundamental. He relied on re Pritchard (dec'd) [1963] Ch. 502 which was a decision of the English Court of Appeal with respect to RSC Order 70 r 1 which is in the same terms as our section 678 Civil Procedure Code. That case maintained the dichotomy of irregularities and nullities. In that case, what occurred was this. The plaintiff issued on originating summons under the Inheritance (Family Provision) Act 1938 naming the executors

as the defendants. It was entered in the local district registry instead of in the Central Office of the High Court. By a majority, it was held that the originating summons had never been issued and was a nullity ab initio. It was held by the majority that there had been a fundamental failure to comply with the requirements of the relevant rule. Lord Denning who dissented, held that the non-compliance was a mere irregularity which could be amended by the Court.

Since that decision, Order 70 has been repealed and a new rule Order 2 r. 1 substituted. It is in the following form:

> "1. (1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of any thing done or left undone, been a failure to comply with the requirements of these rules, whether in respect of time, place manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein."

The effect of this rule in general is that the distinction between nullity and mere irregularity disappears.

The Court in Eldemire v. Eldemire C.A. 79/89 (unreported) dated March 22, 1990 held that certain proceedings begun by originating summons instead of a writ were a nullity. In so ruling, we had followed the gloss on the original Order 70 which appears in the White Book 1962 but we were overruled when that case went on appeal to the Privy Council. See cit. P.C. 33/89 dated 23rd July, 1990 at page 5 where their Lordships spoke of the "modern practice."

> "... In general the modern practice is to save expense without taking technical objection, unless it is necessary to do so in order to produce fairness and clarification. ..."

I understand their Lordships to be saying that the distinction between nullity and a mere irregularity has been removed. The dissenting judgment of Lord Denning M.R. in re Pritchard (dec'd) (supra) should prevail in these matters. We were being told that that case should not be followed. We have achieved the same procedural position as it exists in the United Kingdom. Not only have we been saved the trouble of amending section 678 of the Civil Procedure Code, we are not obliged to invoke section 686. I think, however there may well be some failures to comply with the Code which a court would be constrained to hold, were so serious as to render the proceedings a nullity. In my view, where the omission was deliberate or, for the purpose of causing delay, evasion, deception or otherwise not in good faith, or contrary to natural justice, these I would venture to suggest, justify a court in declaring proceedings void. But I hasten to add that this is not intended as exhaustive but illustrative of the situations I have in mind.

In my view, the failure on the part of the plaintiff to take out a summons for directions has not led to any further proceedings which can really be declared void. The trial has not yet begun. There is, we were told a motion for judgment on admissions before the judge, but that procedure is not dependent on any summons for directions. As matters stand, the pleadings are closed. A summons for directions has not been sought. It is plain that both parties intended a contest. They consented to a speedy trial and agreed a date for trial. It is relevant to note that on the Registrar's part, that date was tentative only. He fixed it on the basis that the parties "make sure that everything is in place for the trial on the ...". Unfortunately, the Registrar who made that tentative fixture had been re-assigned to a higher post at the material time. There is, in my view, no need to discuss section 679 which provides as follows:

> "679. No application to set aside any proceeding for irregularity shall be allowed unless made within reasonable time, nor if the party applying has taken any fresh step after knowledge of the irregularity."

I am quite unable to see what "fresh step" after knowledge of the irregularity, has been taken by the respondents. The fixing of the tentative date for trial is, the only event which could be characterized as a step. But the date was fixed even before a defence was filed. It occurred after Walker J had dismissed a motion for judgment, made a speedy trial order and granted leave to file a defence out of time. In my judgment, this provision is wholly inapplicable to the circumstances of the instant case.

The irregularity brought about by the plaintiff's failure to take out a summons for directions, must now be dealt with. This court acting pursuant to section 678 of the Civil Procedure Code should deal with the matter "in such manner and upon such terms as the court thinks fit." We should give directions as on a summons for directions to facilitate the setting down process. Marsh J. could have and should have given directions.

One matter remains. There was some argument by Mr. Macaulay regarding the order of speedy trial which was made upon an application for injunction by the plaintiff. An order for speedy trial is a direction to the Registrar to take the action out of its natural order for trial, and to jump the queue. Actions are normally to be tried in the order in which they were set down on the Cause Lists; that constitutes the queue. The relevant rule is section 344 (2):

> "344. (2) Actions set down for trial shall be included in the Cause Lists in the order in which they were respectively set down, and, unless a Judge or the Registrar otherwise directs, shall come on for trial as nearly as may be in that order." (Emphasis supplied)

In my view, nothing is to be gained by considering whether the judge is exercising an inherent jurisdiction to control proceedings in his court or pursuant to section 344 (2) where he makes an order for speedy trial. It is plain that the Registrar on such an order will always act pursuant to this provision. But I must express my opinion with respect to the making of this order. Judges should in making this decision be provided with material justifying such an order. The judge must consider the nature of the case, the reasons for urgency in its disposal over other cases, bearing in mind that few aggrieved parties do not desire an early trial. The fact that a great deal of money is at stake, is not, in my view, a relevant consideration. The fact that the parties are important or national figures, should not by itself justify an order. Where the postponement of having an early decision in the case might have serious financial or other repercussions to the economy or a segment of the society, or if irreparable harm might result to a party, all these constitute the sort of factors which should predispose a judge to granting such an order.

It was necessary to make these observations as I understand a great many of these orders are being made nowadays, unmindful of the fact that there are a goodly number of actions on the Cause Lists and all should be determined with expedition. I am not to be taken as suggesting that the order for speedy trial in this action was wrongly made. A decision in this case is urgently required for the issue relates to stability in the political life of the country which is accordingly a matter of profound importance.

The mountain roared and has produced a mouse. This case is an example of much ado about nothing. The reason given to explain the plaintiff's failure to apply for directions was that there had been an agreement to abandon that procedure. But that fact was contested. Prudence dictated compliance with the rules. That failure on the plaintiff's part does not in my view entitle him to the costs of this appeal.

It was for these reasons that I agreed with my brethren that the appeal be dismissed in part. We directed that:

1. the defendants have leave to deliver to the plaintiff interrogatories within 7 days hereof and the plaintiff answer the interrogatories in affidavit within 7 days of delivery;

2. trial by judge alone (Place - Kingston, Estimated length - 4 days;

3. that the Registrar enter the case on the Cause List;

4. that the order for speedy trial be confirmed;

5. liberty to apply.

We further ordered that there be no order as to costs.

DOWNER, J.A.

This is an interlocutory appeal from an order of Marsh, J in which he refused the appellants request to remove the substantive action from the trial list. The appellants' claim was that there was a failure to comply with section 272 of the Civil Procedure Code - The Code. That section it was contended required a summons for directions to have been taken out within seven days from the time when the pleadings were deemed to have been closed.

At the bottom of this procedural dispute, there is a political conflict of the first order. On one side there is Pearnel Charles, the respondent in this appeal. In the substantive action he is seeking a judicial remedy to resolve the issue of his status in the Jamaica Labour Party. Ranged against him is Bruce Golding and Ryan Peralto. They are respectively the chairman and secretary of the standing executive committee of the party. They are the appellants in this case. The respondent Charles has been a Deputy Leader of the party and has held high office as a Minister of Government. He is currently a Member of Parliament and until the dispute arose he was the opposition spokesman for agriculture and a member of the shadow cabinet.

In his statement of claim, Charles has alleged that the Jamaica Labour Party is governed by rules embodied in its constitution, and in breach of those rules a decision was taken to prevent him from contesting the next election under the banner of the party. He has also claimed that that decision was in breach of the rules of natural justice as he was never accorded a hearing. It was in those circumstances that the issue between Charles and the party

became justiciable and it is within that context that this interlocutory appeal must be decided. As for the relief in the substantive action, Charles seeks a declaration that the action of the standing executive committee was void, and he also seeks an injunction to restrain that body from persisting with its unlawful action. As an interlocutory injunction was granted previously and time moves quickly in such matters, it ought to be in the interest of justice that the issue be speedily resolved.

An Account of the Previous Proceedings in the Supreme Court Before Walker, J and Marsh, J.

The best starting point is to refer to Minute of Order before Walker, J on 6th December, 1990. It reads in part -

> "By Consent
>
> a) Order for interlocutory injunction in terms of amended prayer of amended statement of claim
>
> b) Order for speedy trial"

Then it is appropriate to refer to the affidavit of Patrick Foster the junior counsel for the appellants who made an affidavit in this court when leave to appeal was sought.

> "5. That on the 18th of March, 1981, upon an application by the Plaintiff/Respondent for a Motion for Judgment before His Lordship Mr. Justice Walker, the Defendants/ Respondents were granted leave to file their defence within 7 days of the Order.
>
> 6. That immediately after the hearing of the Motion for Judgment on the 18th March, 1991, Margaret May Macaulay and I went before the then Acting Registrar of the Supreme Court, Mr. Karl Harrison, to fix a trial date in the matter.
>
> 7. That Acting Registrar fixed a trial date for the 6th of May, 1991. In entering the date of trial in the diary, the Acting Registrar stated that he was entering it in pencil

> "and enjoined us to 'make sure that everything is in place for the trial on the 6th of May, 1991'. Based on the foregoing, I understood the Acting Registrar to mean that all remaining interlocutory steps were to be completed including the filing of a Defence and a summons for directions.
>
> 8. That this action came up for trial for (sic) His Lordship Mr. Justice Marsh on the 6th of May, 1991."

The setting down of the case for trial is part of the ministerial duties of the Registrar of the Supreme Court. Provisions are made in section 344 of the Code in the keeping of Cause Lists of actions set down for trial. Section 346(2) is relevant to the issues in this case so it is important to cite it. It reads -

> "344(2) Actions set down for trial shall be included in the Cause Lists in the order in which they were respectively set down, and, unless a Judge or the Registrar otherwise directs, shall come on for trial as nearly as may be in that order."

It was in accordance with the order for a speedy trial, that the Registrar entered the trial date in his diary and whatever counsel may have thought about the manner in which it was set down a trial date was fixed.

After the serving of the defence on the 25th March, the appellants had upwards of forty days in which they must have realised that Charles had not taken out a summons for directions. They did nothing about it until the matter was before Marsh J on May 6th. Then the appellants requested that the matter be removed from the trial list so the request must be examined. And it must be examined in the context of the order for a speedy trial, the specific claim of Charles to have his status in the party resolved in the Courts, and the fact that an interlocutory injunction in terms of the amended prayer and the amended statement of claim, had been granted to him until trial or further order.

How did Marsh J resolve this issue? He decided that he could exercise his discretion on a "narrow question of fact" as to whether there was an agreement between the parties to exclude the summons for directions and he decided that since the appellants Golding and Peralto could not satisfy him, that they would be prejudiced, by the absence of a summons for directions, that the trial would proceed on the following day. It is best for the sake of accuracy to cite the passage in which these views were expressed:

> "In the absence of any clear authority, on the power to exclude the summons (statutory language apart), I propose to deal with the matter on the very narrow question of fact, as to whether or not there was an agreement.
>
> During the argument, I invited Counsel for the Defendants to indicate whether or not they would be seriously prejudiced (in any material particulars), by the absence of the inter-locutory procedure involved on the summons. They were unable to satisfy me on the point."

What is the scope and effect of section 679 of the Civil Procedure Code if there was non-compliance with section 272?

The substance of the submission advanced by Mr. Muirhead was that section 272 is mandatory and that summons for directions is a condition precedent for a trial to commence. He has treated the matter as one of construction but to construe section 272 reference must be made to other sections of the code to determine the effect of non-compliance. The aspect of the effect of non-compliance was dealt with by Mr. Macaulay for the respondent Charles.

The learned judge treated the matter as a 'narrow question of fact as to whether or not there was an agreement.' At the very outset of his judgment he showed his disagreement

with the approach of the appellants. Here is what he said -

> "In the instant case, there is a purported agreement between the parties to exclude the summons for directions in the interest and in the light of the order for a speedy trial. The defendants contend, however, that the provisions of section 272 of the Civil Procedure Code are mandatory and deny that there was any agreement with the Plaintiff's Counsel to exclude its provisions, or that there could be any such agreement. No authority from either side has been produced to support this contention and I have been merely left with the submission that the words of the section are mandatory."

It is now necessary to turn to section 272 to examine its scope. Section 272(1) reads -

> "272(1) In every action to which this Title applies, the plaintiff shall, with a view to providing an occasion for the consideration by the Court or a judge of the preparation for the trial of the action, so that -
>
> a) all matters which must or can be dealt with on interlocutory applications and have not already been dealt with may so far as possible be dealt with; and
>
> b) such directions may be given as to the future course of the action as appears best adapted to secure the just, expeditious and economical disposal thereof,
>
> take out, within seven days from the time when the pleadings are deemed to be closed, a summons (in this Law referred to as a summons for directions) returnable in not less than twenty-one days."

It is the judge who controls the trial under our adversary system of trial and it is necessary for the Court to examine the matter before trial to see what preparations have been made. It is necessary to ascertain that all interlocutory applications have been made and that the Court or judge shall give directions

for the future course of the action, so as to secure the just, expeditious and economical disposal of the action. The initial responsibility is placed on the plaintiff and section 272(1) requires him to take out this summons seven days after the pleadings are closed. Clearly the summons for directions is not a matter of agreement between the parties which can be waived. Disputes are complex so is the law which produces a solution. It was envisaged that there would be instances where it was not necessary to take out a summons for directions. These instances are enumerated in section 272(2) and they need not concern us as no issue was raised as regards their application in this case.

The appellants also have a role and this case is a good example of the importance of their role. They consented to an order for a speedy trial as the presumption was they have an interest that the issues are revolved with promptitude. Moreover they are restrained by an interlocutory injunction granted by Walker J since the 6th December. Because of its importance, it is helpful to set out -

> "(2) That the Central Executive and the Standing Committee of the Jamaica Labour Party be RESTRAINED FROM:
>
> (i) issuing any instructions or directives to or requirements, of any Constituency Committee of the Jamaica Labour Party not to consider the selection of the Plaintiff for recommendation to the Central Executive as the Party's Candidate to be approved and named by the Central Executive.
>
> (ii) taking any decisions which would affect the Applicant's membership of the Jamaica Labour Party or any benefits thereof including the opportunity to offer himself for selection to be recommended as the Party's Candidate in any elections, for any cause without giving the applicant any opportunity to be heard thereon."

So section 272(3) caters for instances where plaintiffs have failed to act, so that it was open to Golding and Peralto to have taken out a summons for directions. Sections 272(3) and (4) read -

> "(3) If the plaintiff does not take out a summons for directions in accordance with subsection (1) of this section, the defendant or any defendant may do so or may apply for an order to dismiss the action.
>
> (4) Upon an application by a defendant to dismiss the action under subsection (3) of this section, the Court or Judge may either dismiss the action on such terms as may be just or deal with the application as if it were a summons for directions."

In this case therefore, where pivotal institutions of the constitutionally recognised opposition party are restrained by an injunction until trial or further order, Golding and Peralto had an equal responsibility to take out a summons for directions and an equal interest in preparing the case with celerity so that directions for an order for speedy trial would be complied with. The insistence on complying with ascertained rules so as to achieve justice in individual cases is the hallmark of the administration of justice and is to be applied to all cases which come before the courts for adjudication. This is so, whether the subject matter be industrial relations, commerce, or as in this case the interpretation of the constitution of a political party. Its freedom of association is enshrined in section 23 of the constitution and is accorded a specific constitutional role by virtue of their representation in Parliament, hence the importance of these issues.

So considered the issue for this court to decide is, what is the position when there is non-compliance with section 272 of the Code, which is mandatory in form? Marsh J omitted to deal with this aspect of the case and therefore exercised his discretion wrongly on the basis that there was an agreement to dispense with the summons for directions. These are two statements of principle from Maxwell v Keun (1927) All E.R. Rep. 335 which shows the reluctance of appellate courts to interfere with a trial judge's discretion in the conduct of a trial, but if he has misinterpreted the law, or has failed to

take into account that his decision could deprive a party of his rights or that his decision results in injustice, then this court must interfere. At page 337 Lord Hanworth, M.R. said -

> "It is obvious that there must not be any attempt, or, indeed, less than an attempt, any interference, with the discretion of the learned judge in reference to the trial. It is most important that we should uphold that discretion. Yet the case to which our attention has been called - Sackville - West v. A.G. (1910) 128 L.T.Jo. 265, is an example of the fact that, although it must be on very rare occasions that the discretion of a learned judge is disturbed, yet there may be such occasions. The decision in that case is a decision of the Court of Appeal, and it is a decision which is binding upon this court. The observation is made in the judgment, which is a judgment of Lord Cozens-Hardy, Moulton and Buckley, L.JJ., to this effect:
>
> > "Yet it would be only in the most extraordinary circumstances that an application to review the decision of the learned judge as to the conduct of business in his own court could succeed; that the only case in which the Court of Appeal would so interfere would be if satisfied that the decision was such that, notwithstanding any exercise by the learned judge of the power of control which he would have over the action when it came on for trial, justice did not result, and he failed to see that such would be the effect of his decision."

Atkin L.J. had the same approach at page 338-339 -

> "The other point made by the defendants was that this was a discretionary order and that the Court of Appeal ought not to interfere with the discretion of the learned judge. I quite agree that the Court of Appeal ought to be very slow, indeed, to interfere with the discretion of the learned judge on such a

> "question as an adjournment of a trial, and it very seldom does do so; but, on the other hand, if it appears that the result of the order made below is to defeat the rights of the parties altogether and to do that which the Court of Appeal is satisfied would be an injustice to one or other of the parties, then the court has power to review such an order, and it is, to my mind, its duty to do so."

As Mr. Macaulay submitted it is section 678 which empowers the judge to exercise a discretion when there is non-compliance with section 272 of the Code. Section 678 reads -

> "Non-compliance with Law.
>
> Effect of non-compliance with this Law.
>
> 678. non-compliance with any of the provisions of this Law shall not render the proceedings in any action void unless the court shall so direct; but such proceedings may be set aside either wholly or in part, as irregular, or amended or otherwise dealt with in such manner, and upon such terms, as the court shall think fit."

The words 'or otherwise dealt with in such manner and upon such terms as the Court shall think fit' is a legislative reference to the inherent powers of the court to control its own procedure when the rules have not been complied with. By concentrating on the issue of whether there was an agreement between the parties to waive the summons for direction and finding that there was, Marsh J failed to exercise the inherent jurisdiction of the court to control its own procedure. This jurisdiction is recognised and preserved by section 678 of the Code. The effect of his approach would be that parties would control the conduct of the trial and the Court would have abdicated its role. That was procedurally impermissible, so his order must be varied.

Are there any cases which illustrate the resort to the inherent power of the court to give directions for the conduct of a trial when there is an absence of summons for directions? Such directions have been described as 'directions not contemplated by the rules' but the gist of decision in that case was that the court could and ought to give directions

when there is non-compliance or set aside the proceedings as irregular. The case was Nagy v Co-operative Press Limited (1949) 2 K.B. 188 at 192 Somervell L.J. said -

> "If I am wrong on that construction I think I should have come to the conclusion (though it is not necessary to decide it) that in the circumstances which have arisen here, the Plaintiff would be entitled to issue, and the court would have inherent jurisdiction to entertain, a summons (which would not be on this view the summons for directions contemplated by these rules) for trial by judge and jury, and further that the court would have inherent jurisdiction to consider whether the plaintiff should be entitled to have the issue outstanding as damages determined as it was in Morse v. Frost (1927) 1 K.B. 231 by judge and jury."

The circumstances which arose in Nagy case can be determined from the head note. It reads at page 188 -

> "Held, that the plaintiff was not bound to move for judgment under R.S.C. Or. 27, r.11. He was entitled to have the action set down for trial by a judge and jury for the purpose of having the damages assessed. Notwithstanding the fact that the defendants had put in no defence and accordingly the pleadings had not been closed, the plaintiff was entitled to take out a summons for directions under Or. 30, 1, and the master had jurisdiction under Or. 36, r. 1, on that summons for directions to make an order for the trial of the action by a judge and jury or, alternatively, there was power to take out such a summons and to make such an order under the inherent jurisdiction of the court."

Another case which illustrates the principle of resorting to the inherent jurisdiction of the court in the face of non-compliance with section 272 is Austin v Wildig (1969) L.W.L.R. 67 . In his submission Leolin Price Q.C. said at page 68 -

> "The plaintiff desires to take out a summons for directions, as directed by R.S.C. Ord. 25 4 1(1). but the pleadings are not closed because there has been no defence, and there has been no discovery.

> "R.S.C. Ord. 25, as a matter of language, gears the summons to the pleadings. R.S.C. Ord. 19, r. 7, provides a form of procedure in default of defence which is permissive only, and would not be satisfactory in this case. But under the inherent jurisdiction of the court the plaintiff can apply for directions as to the trial: Nagy v. Co-operative Press Ltd. (1949) 2 K.B. 188. It is true that in Nagy v. Co-operative Press Ltd. the application was in fact made by issuing a summons for directions as if the pleadings had closed, but the judgments in that case leave considerable doubt as to whether that was procedurally correct. In face of that procedural uncertainty, the plaintiff prefers to rely on the inherent jurisdiction."

Then Plowman J ruled as follows at page 69 -

> Plowman J. "I will order that the action be set down for trial in Part 1 of the list: not to come on before December 14, 1968; certify for a speedy trial: trial to be in London before a judge alone. I give leave to amend the writ, as asked, without re-service."

Both these cases are in keeping with Lord Templeman's dictum in Eldemire v Eldemire P.C. 33 of 89 dated 23rd July, 1990 which reads as follows at page 5:

> "In general the modern practice is to save expense without taking technical objection, unless it is necessary to do so in order to produce fairness and clarification."

To my mind the appellant and the respondent erred in this case. The initial responsibility to take out a summons for directions was with Charles. Since he failed to do so the Appellants Golding and Peralto should have acted. The pleadings were closed so they knew the issues. They had a date for trial , and the trial was before a judge in the Supreme Court. Regrettably the learned judge treated the matter as turning on the question of an agreement between the parties to dispense with a summons for directions. That was an error also. It is necessary to state

at this stage that there was also a motion for judgment on admissions before Marsh J pursuant to section 307 of the Code, but there was no appeal on that matter before this court. This court, to ensure that the interlocutory applications were dealt with, asked the appellants what directions they would have sought had they taken out a summons for directions, which were necessary for the fair course of the trial. They sought leave to deliver interrogatories and this was granted. It was for the foregoing reasons that I agreed with the order of Carey P. (Ag.) that this appeal be allowed in part the order below varied and the directions given as proposed.

GORDON, J.A.

On 6th May, 1991, the trial date fixed by the Registrar and agreed to by the parties, this action came on for hearing before Marsh, J. The appellants objected to the commencement of the trial and applied for the removal of the action from the trial list on the ground that no directions on a summons for directions had been obtained by the respondent in compliance with section 272 of the Civil Procedure Code Law. On the 7th May, 1991 after hearing submissions on this issue Marsh, J. ordered:

> "1. That the application by the defendant/appellants' counsel for the matter to be removed from the trial list because of the failure to comply with Section 272 of the Civil Procedure Code be refused.
>
> 2. That the application for leave to appeal be refused."

This matter now comes before us by leave granted by this Court on 8th May, 1991 and it is desirable that the background be given of the history of this matter.

The plaintiff, a member of the Jamaica Labour Party, the opposition in Parliament, and the Member of Parliament for the Eastern St. Thomas constituency, filed a writ dated the 21st day of November, 1990 seeking:

> "1. A Declaration that the action taken by the Standing Committee as evidence in his letter of the 8th August, 1990 to the Plaintiff is ultra vires of the Constitution of the Jamaica Labour Party.
>
> 2. That the decision of the Standing Committee contained in the letter of the 8th October, 1990 addressed to the Plaintiff is null and void as being contrary to the principle of natural justice."
>
> "Restraining the Central Committee and Standing Committee of the Jamaica Labour Party from issuing any instructions or directives to or

requirements of, any Constituency Committee of the Labour Party not to consider the selection of the Plaintiff for recommendation to the Central Committee, as the Party's Candidate, to be approved and named by the Central Committee.

Restraining the Central Committee and Standing Committee of the Jamaica Labour Party from taking any decisions which would affect any benefits of the Applicant's membership of the Jamaica Labour Party including the opportunity to offer himself for selection to be recommended as the Party's Candidate in any elections, for any cause without giving the Applicant any opportunity to be heard thereon."

On the 6th December, 1990 on a summons for interlocutory injunction issued by the plaintiff and dated 3rd December, 1990 Walker, J. made the following orders by consent:-

"2. That the Central Executive and the Standing Committee of the Jamaica Labour Party BE RESTRAINED FROM:

(i) issuing any instructions or directives to or requirements, of any Constituency Committee of the Jamaica Labour Party not to consider the selection of the Plaintiff for recommendation to the Central Executive as the "Party's" Candidate to be approved and named by the Central Executive.

(ii) taking any decisions which would affect the Applicant's membership of the Jamaica Labour Party or any benefits thereof including the opportunity to offer himself for selection to be recommended as the Party's Candidate in any elections, for any cause without giving the applicant any opportunity to be heard thereon,

until trial or further order."

"3. That there be a Speedy Trial;"

At the hearing of this application the appellants were represented by the same attorneys-at-law who are now before us in this appeal appearing on behalf of the appellant. The status of the action was that (a) no appearance had been entered on behalf of the defence, (b) no defence had been filed. The aspect which must not escape attention is that the orders made by Walker, J. were made with the consent of all the parties to the action.

On 11th December, 1990 appearance was entered to the writ on behalf of the defendants and by notice dated 5th March, 1991, the Registrar informed the attorneys-at-law that the action would be listed for trial during the week commencing 18th March, 1991.

On 18th March, 1991 the action was listed for trial before Walker, J. Despite entering appearance on 11th December, 1990, no defence had yet been filed to the suit and the respondent moved for judgment in default of defence. The minute of the order made by Walker, J. reads:

> "By Consent:-
>
> (1) Motion for judgment dismissed.
>
> (2) Time for filing defence extended for a period of seven days from the date hereof subject to any application the plaintiff may make thereafter in relation to such defence.
>
> (3) Defendants/Respondents to pay costs of motion up to today.
>
> (4) Certificate for counsel ...."

Mr. Patrick Foster, an attorney-at-law and an associate of the firm of Messrs Dunn Cox and Orrett, attorneys-at-law on the record for the appellants, filed an affidavit in support of the motion of the appellants for leave to appeal. He continues the narrative of events in this action in paragraphs 6, 7, and 8 of his affidavit in this manner:

> "6. That immediately after the hearing of the Motion for Judgment on the 18th of

March, 1991, Margaret May McCauley and I went before the then Acting Registrar of the Supreme Court, Mr. Karl Harrison, to fix a trial date in the matter."

"7. That the Acting Registrar fixed a trial date for the 6th of May, 1991. In entering the date of trial in his diary, the Acting Registrar stated that he was entering it in pencil and enjoined us to "make sure that everything is in place for the trial on the 6th of May, 1991." Based on the foregoing, I understood the Acting Registrar to mean that all remaining interlocutory steps were to be completed including the filing of a Defence and a Summons for Directions."

"8. That this action came up for trial for (sic) His Lordship Mr. Justice Marsh on the 6th of May, 1991."

Section 272 of the Civil Procedure Code so far as is relevant for these purposes provides:-

"272. (1) In every action to which this Title applies, the plaintiff shall, with a view to providing an occasion for the consideration by the court or a Judge of the preparation for the trial of the action, so that -

(a) all matters which must or can be dealt with on interlocutory applications and have not already been dealt with may so far as possible be dealt with; and

(b) such directions may be given as to the future course of the action as appear best adapted to secure the just, expeditious and economical disposal thereof,

take out, within seven days from the time when the pleadings are deemed to be closed, a summons (in this Law referred to as a summons for directions) returnable in not less than twenty-one days."

"(2). This section applies to all actions commenced by writ of summons except -

(a-d) .....

(e) actions in which directions have been given under section 470A (which enables directions to be given on applications under Title 39 for an injunction, for orders for the preservation or inspection of property or for any of the other purposes specified in that Title);

(f) .....

(3). If the plaintiff does not take out a summons for directions in accordance with subsection (1) of this section, the defendant or any defendant may do so or may apply for an order to dismiss the action.

(4). Upon an application by a defendant to dismiss the action under subsection (3) of this section, the Court or Judge may either dismiss the action on such terms as may be just or deal with the application as if it were a summons for directions."

These provisions and succeeding provisions under this title make it clear that the summons for directions is not for the convenience of the parties to the action but to -

"provide an occasion for the consideration by the court or a judge of the preparation for the trial of the action."

The parties through their attorneys-at-law may agree on the orders to be made on the summons for directions but the Judge (or the Master who invariably deals with it) must approve and make the orders with such amendments as he deems necessary for the "just expeditious and economical disposal of the action." To borrow a phrase from the judgment of Carey, P. (Ag.):

> "The intervention of the court is a sine qua non."

When on 6th December, 1990 Walker, J. granted the injunction sought and ordered a speedy trial, this course had the approval of the parties. They consented to it. There was no indication that he dealt with the summons for injunction as a summons for directions as he could have done under the provisions of 470A (2) of the Civil Procedure Code (see section 272 (2)(e) supra.) The pleadings had not been closed because no defence had been filed.

On the 18th March, 1991 when the attorneys-at-law for the parties went before the Registrar and agreed the trial date the pleadings had not been closed but this is how the action stood:

> "(a) There was agreement on the place of trial; Kingston,
>
> (b) There was agreement on the mode of trial; by Judge alone,
>
> (c) There was agreement on speedy trial and to that end
>
> (d) There was agreement on the date of trial; 6th May, 1991."

These are all orders that are normally made on a summons for directions, but they had not been approved by the Master or a Judge. The respondent had ample time to formalise these terms by applying by summons for directions thereon.

Mr. Muirhead submitted that the failure of the respondent to follow the procedure laid down under section 272 of the

Civil Procedure Code was so fundamental that the court should declare the proceedings a nullity.

Section 678 of the Civil Procedure Code provides:

> "Non-compliance with any of the provisions of this Law shall not render the proceedings in any action void unless the Court shall so direct; but such proceedings may be set aside either wholly or in part, as irregular, or amended or otherwise dealt with in such manner, and upon such terms, as the Court shall think fit."

Acceding to the appellants submissions is but one of the methods of resolving the conflict posed by the respondent's failure to comply with the requirements of section 272. It does appear from the tenor of section 272 that when after the close of pleadings and before trial an application is made before the court or a judge, the court or judge 'may deal with the application as if it were a summons for directions'. When therefore the action came on before Marsh, J. and the respondent moved for judgment and the appellant raised the issue of the non-compliance with section 272, Marsh, J. should have dealt with the application as if it were a summons for directions and give directions "best adapted to secure the "just, expeditious and economical disposal of the action".

The respondent having failed to take out the summons for directions the appellant could have done so. This course is provided for in section 272 (3) (supra). Before Marsh, J. the respondent contended that there was an agreement between the parties to abandon the summons for directions in the interest of a speedy trial. Mr. Foster for the appellants disagreed. Be that as it may, both parties in perfect harmony and agreement went to the Registrar and set the 6th May, 1991 as the trial date in keeping with the under-

standing that there should be a speedy trial of the issues There was extant an injunction restraining the appellants from "issuing any instructions or directives " or "making any decisions" which would affect the (respondent's) membership of the Jamaica Labour Party." An early resolution of the issues seemed desirable.

Carey, P. (Ag.) in his judgment, with which I agree, has dealt fully with the procedural steps leading up to and consequent on the summons for directions. I have confined myself to a resolution of the issues raised on this appeal.

Should this court apply the first segment of section 678 and declare the proceedings void or should we deal with it in such manner and upon such terms as we think fit? This court is invested with the powers of the Supreme Court and by section 18 (3) of the Court of Appeal rules:

> "The Court shall have power to draw inferences of fact and to give any judgment and make any order which ought to have been given or made, and to make such further or other order as the case may require."

In considering the course which ought to be adopted the purpose of the summons for directions is an important factor. Directions that are given must be those best adapted to secure "the just, expeditious and economical disposal of the action" and "for the purpose of saving costs." Applying the first segment of section 678 as urged by the appellants would not ensure this objective. In adopting the second segment of section 678 I am satisfied it is the correct course because "in general the modern practice is to save expense without taking technical objections unless it is necessary to do so in order to produce fairness and clarification." Per Lord Templeman in Eldemire v. Eldemire, Privy Council Appeal No. 33 of 1990 delivered on 23rd July, 1990 at page 5. For these ...

reasons I concurred in the decision of the Court as set out in the judgment of Carey, P. (Ag.).