JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATES' CIVIL APPEAL NO. 7/2007

BEFORE: **THE HON. MR. JUSTICE HARRISON, J.A.**
THE HON. MRS. JUSTICE HARRIS, J.A.
THE HON. MR. JUSTICE DUKHARAN, J.A.

BETWEEN **BALFORD LINDSAY** **APPELLANT**

AND **THURMUTIS DAWKINS** **RESPONDENT**

H. Charles Johnson, instructed by H. Charles Johnson & Company for the Appellant

Leroy Equiano for the Respondent

30th September, 29th October, and 11th December, 2009

HARRIS, J.A.

1. This is an appeal from a decision of His Honour Mr. Frank Williams, in which he awarded judgment to the respondent on her claim and dismissed the appellant's counterclaim. On the 29th October, 2009, we dismissed the appeal with costs of $15,000.00 to the respondent. We promised to put our reasons in writing. This we now do.

2. The facts giving birth to the appeal have their genesis in an agreement between the parties that during the appellant's absence from

the island, the respondent would supervise the construction of a house which the appellant was engaged in building at Hague in the parish of Trelawny. It was orally agreed that the respondent would assume the responsibility of the purchasing of materials and the payment of the workers. For this purpose, the appellant added her name to an account which he held at the National Commercial Bank in Falmouth. They also had a written agreement that the funds in the bank belonged to him solely. It was also orally agreed that the respondent would be paid $1,000.00 on each occasion she attended the hardware to purchase items and on each occasion she attended at the bank.

3. It was the respondent's evidence that she proceeded to carry out her obligation under the agreement. Sometime after she began, she discovered that the funds in the bank were almost depleted. This prompted her to make several telephone calls to the appellant. The appellant having been informed of the state of the finances requested her assistance in carrying on the funding of the construction. As a consequence, she expended $24,000.00, which she borrowed, to pay workers and $31,000.00 for plumbing work. All sums expended by her were recorded in a book given to her by the appellant. She stated that she also furnished the appellant with the relevant receipts. Copies of bills with respect to the purchase of materials, the book showing payments

made to workmen with their respective signatures for the payments and the bank passbook were exhibited in evidence.

4. Sometime after he returned to the island, she made a request of him to refund the amount due to her. He informed her that he would do so subject to him verifying the amount with a Mr. Cardinal Nelson's documents and after he, the appellant, had scrutinized the books. Mr. Nelson was called as a witness by the respondent.

5. Subsequently, the appellant made her sign a document stating that she informed him that she had borrowed $24,000.00 to pay workmen and once that amount was paid he would only be owing her money for work performed on the house, which would be settled. He asked one Ophelia Needham to witness it. This document was exhibited. Then to her utter dismay, he informed her that the document she signed showed that she was defrauding him of $24,000.00. Her astonishment impelled her to demand that they both go to the police. They went. The police directed her to seek legal advice.

6. A Mr. Seymour Doctor was also called as a witness for the respondent. He was the owner of a hardware store/business/company from which the respondent purchased materials. He testified that the materials were delivered to the appellant's construction site. On delivery, they were checked off and stored in an area for which he had a key. He

stated that during the time in which the respondent was involved in the construction, none of the materials went missing.

7. An affidavit filed by the learned Resident Magistrate shows that Mr. Cardinal Nelson's evidence is confined to that which was elicited in cross examination. The evidence essentially discloses that he supervised the work on the site, placed orders for materials, and prepared and submitted to the respondent the hourly or daily periods which the workmen worked. It also shows that the respondent was involved in the construction process by purchasing materials and paying the workers.

8. The respondent, having not received reimbursement for the sum she stated was due and owing to her, commenced an action claiming the amount of $62,000.00. The appellant's defence was a denial of the amount claimed. He alleged that the respondent had exceeded her authority as she was not authorized to pay debts on the site. He counterclaimed for $103,125.09 (a) for 100 bags of cement which were never delivered to the construction site; (b) for money received by the respondent which she failed to pay to the workers; (c) for defective material used by the respondent in the plumbing work; (d) for money sent to the respondent for shores which was not paid over to one Roland Eccleston. During the trial the counterclaim was amended, reducing the

claim to $52,750.00 which sum was in respect of item (b), namely, money sent to the respondent to pay the workers.

9. In her defence to the counterclaim the respondent averred that all monies sent to her by the appellant had been disbursed in accordance with his instructions.

10. The matter was listed for hearing on eleven occasions, commencing on the 1st March, 2005. On the 6th September 2005, the trial began and was part-heard. It was further part-heard on the 12th December, 2005, on the 28th August, 2006 and was concluded on the 23rd October, 2006 when judgment was reserved. The appellant was represented by Mr. George Traille from the inception of the proceedings up to August 2006.

11. When the trial resumed in October 2006, a new attorney-at-law, Mrs. Anne Marie Brown-Chatoo attended on behalf of the appellant and applied for an adjournment on the ground that she was new in the matter. The learned Resident Magistrate refused the adjournment and proceeded with the trial. On the 27th November, 2006 he entered judgment for the respondent in the sum of sixty two thousand dollars ($62,000.00) with costs in the sum of two thousand five hundred ($2,500.00). He dismissed the counterclaim with costs to the respondent in the sum of two thousand five hundred dollars ($2,500.00).

12. The following grounds of appeal were filed:

> "1. The learned Resident Magistrate erred by exercising his discretion in favor of the Plaintiff under S.169 of the Judicature (Resident Magistrate) Act., given the history of the proceedings and the fact that the Plaintiff was herself absent on numerous occasions.
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> 2. The learned Resident Magistrate erred by trying the issues in the absence of the Defendant thereby causing a miscarriage of justice.
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> 3. The learned Resident Magistrate erred by considering the evidence of the Plaintiff and her witnesses only, thereby depriving the Defendant of his right to give evidence in rebuttal of the Plaintiff's case in support of the issues in the Counter Claim, which could have tilted the balance of possibilities (sic) in favour of the Plaintiff."

13. Mr. Johnson submitted that it cannot be denied that although the learned Resident Magistrate had jurisdiction to hear a matter in the absence of a defendant, his discretion was not unfettered. The learned Resident Magistrate, he argued, was obliged to have paid due regard to all the circumstances, including any hardship encountered by a party and the complexity of the issues. It was further submitted by him that the learned Resident Magistrate wrongly denied the requests for adjournments by the appellant and by his attorney-at-law and had wrongly proceeded with the trial in the absence of the appellant. He

further argued that the appellant's right to a fair hearing was violated, thus resulting in a serious miscarriage of justice.

14. Mr. Equiano submitted that, taking into consideration the history of the case, there was sufficient material before the learned Resident Magistrate to show that he had properly exercised his discretion. The case, he argued, was over a year old and there was nothing compelling which would have warranted the granting of any further adjournment when the appellant's attorney-at-law sought same.

15. It is necessary at this stage to give a chronological account of the events in the case. The matter first came before the court on the 1st April, 2005, the Return Day. The appellant was absent but his attorney-at-law and the respondent were present. The first trial date was on the 1st March, 2005, on which date the appellant was absent. His attorney-at-law and the respondent were present. On the 25th April, 2005, the matter next came on for hearing. Both parties were present. On that date, the appellant's attorney-at-law sought and was granted permission to file a counterclaim.

16. The matter was next fixed for the 22nd August, 2005 but was adjourned, as only one Resident Magistrate was available to man two courts. The trial began on the 6th September, 2005, at which time the evidence of the respondent was taken and she was cross examined by

Mr. Traille. The matter was part-heard and an order was made for subpoena to be issued for the respondent's witnesses. The 6th December, 2005 was the next date for the continuation of the trial. On that date, the matter was further part-heard for subpoena to be served on the witnesses.

17. The matter was further adjourned to 27th February, 2006. On that date, the appellant was present but the respondent and her witnesses were absent. The respondent's absence was as a result of her having sustained a broken leg. A new date of hearing, the 26th June, 2006, was fixed with the concurrence of the appellant.

18. When the trial resumed on the 26th June 2006, the appellant and the respondent were absent. The respondent was said to be still ill. The trial continued on the 28th August, 2006. Both parties were present. Mr. Traille was absent. The respondent's witness Mr. Seymour Doctor was examined in chief. The appellant was invited to cross examine Mr. Doctor. He sought an adjournment until December, 2006. The application was refused. The matter was adjourned to the 25th September, 2006. On that date, the appellant was absent. Mr. Traile who was in attendance informed the court that his retainer had been determined by the appellant.

19. The court further adjourned the matter until October 23, 2006. The appellant was again absent. Mrs. Brown-Chatoo attended on his behalf

and applied for an adjournment to December, 2006 stating that she was new in the matter. An affidavit was filed by her in which she stated that she had not been properly instructed by the appellant who had indicated to her that he had a medical appointment overseas. The application was refused. The trial concluded on that day and judgment was handed down in November, 2006.

20. The fundamental issue in this case is whether the learned Resident Magistrate had improperly exercised his discretion in failing to grant the appellant an adjournment of the matter on resumption of the hearing on the 23rd October, 2006.

21. In refusing to grant the adjournment, the learned Resident Magistrate rehearsed the history of the case and went on to state as follows:

> "So then, at the end of the day, on the 28th August 2006, I exercised my discretion pursuant to S. 169 of the Judicature (Resident Magistrates) Act. In doing so, I had regard to the history of the matter, the number of times it had been before the court, the possibility that faces every Resident Magistrate of being transferred to another parish and my duty to manage the court list, and decided to refuse the application for the adjournment until December of 2006.
>
> In so doing, I also ad (sic) regard to the fact that the civil court date for December, 2006, would have been the 25th December (Christmas Day – a public holiday); so that granting the application for the adjournment would have

> meant an adjournment to January 29, 2006, (sic) i.e., some five months away."

22. Section 169 of the Judicature (Resident Magistrates) Act bestows on a Resident Magistrate the power to grant an adjournment. It provides:

> "The Magistrate may, in any case, civil or criminal, make orders for granting time to the plaintiff or defendant to proceed in the prosecution or defence thereof; and also may, from time to time, adjourn any Court, or the hearing, or further hearing of any such cause or matter in such manner as to the Magistrate may seem right."

23. The Act confers on a Resident Magistrate a discretionary right to grant an adjournment of a trial or hearing and to grant further adjournments if he deems it fit. Generally, in the proper exercise of judicial discretion, a judge is not entitled to proceed with a trial without the participation of all parties. If he does so, he could possibly defeat the rights of the party seeking the adjournment.

24. The deferment or postponement of a trial is dependent upon a judge's judgment. However, such power ought to be exercised with scrupulous care. Although a judge is empowered to grant adjournments, this does not mean that he should do so incessantly. He, at some stage of the proceedings, must apply some measure of restraint. Therefore, he being armed with control and power over a case before him, will have to

pay regard to the circumstances of the particular case and must do so as the justice of the case deserves.

25. The service to justice is the foundation upon which a judge's discretion is anchored. In **Hytec Information Systems Ltd. v. Coventry City Council** [1997] 1 W.L.R. 1666 at page Ward L.J., said:

> "The judge exercises his judicial discretion in deciding whether or not to excuse. A discretion judicially exercised on the facts and circumstances of each case on its own merits depends on the circumstances of that case: at the core is service to justice."

26. The discretion of a trial judge is unfettered, as Mr. Johnson rightly submitted. It follows that this court ought to be very slow to interfere with the exercise of his discretionary powers. It would only be on very rare occasions that this court would intervene. The case of **Sackville-West v. A-G** (1910) 128 L.T. Jo. 265 supports the fact that only in exceptional cases will an appellate court intrude in a trial judge's discretion. In the judgment of a court comprising Lord Cozen-Hardy, Moulton and Buckley, L.JJs., it was observed as follows:-

> "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."

27. Over the years, there have been other authorities which expressly dictate that this court may intervene only if it is demonstrably clear that the judge's decision is plainly wrong **Watt v. Thomas** [1947] A.C. 484; [1947] 1 All ER 582; **Eldemire v. Eldemire** (1990) 27 J.L.R. 316; **Industrial Chemical Co. (Jamaica) Ltd v. Ellis** (1982) 35 W.I.R. 303; or he had misdirected himself on the law or facts; or he had failed to take into account relevant factors; or had given consideration to irrelevant matters to the detriment of any of the parties before him.

28. Was the learned Resident Magistrate clearly wrong in continuing and completing the trial in the appellant's absence? Did his non appearance, culminating in his failure to give evidence, render the trial unfair in the sense that it resulted in an injustice to him? In light of the circumstances of this case, I have very little doubt that it did.

29. The appellant was the author of his misfortune. The first adjournment was occasioned by his absence on the initial trial date. A second adjournment was granted at the request of his attorney-at-law to facilitate his counterclaim. Although the matter was part heard in

September 2005, when it resumed in August, 2006, it is clear that the trial did not continue because of Mr. Traille's absence. The appellant was present in court then. He was aware of the September 2006 date fixed for the continuation of the matter. He elected to terminate Mr. Traille's retainer without arranging to have other legal representation on that date. On resumption of the matter in September, he was absent. The learned judge afforded him a further adjournment to October 2006, a date which was convenient to the court. He again failed to attend on the appointed date but had an attorney-at-law representing him.

30. The appellant's absence on three occasions after the hearing commenced is inexcusable. It was his duty to have made himself and his witnesses, if any, available on the first hearing date and more importantly, on each occasion the matter was fixed for continuation. This duty also extended to his attorney–at-law who was absent once. It cannot be denied that the respondent was absent on two occasions but her absence was due to her incapacitation.

31. In her affidavit Mrs. Brown-Chattoo stated that she first became aware that the matter had been part-heard upon her arrival in court on the adjourned date in October. The learned Resident Magistrate having refused the request for the adjournment, she telephoned the appellant who instructed her to retrieve a file from his agent. This file contained a

list of questions which the appellant instructed her to ask the witnesses. She said that she cross-examined the claimant. However, this would not be correct as the claimant had already been cross-examined by Mr. Traille. The learned Resident Magistrate stated in his affidavit that Mrs. Brown- Chatoo cross-examined the respondent's last witness, Mr. Cardinal Nelson and that Mr. Doctor was not cross examined by her. It is clear from the records that Mr. Nelson was the person who was cross-examined by her. She would have done so by the use of those questions supplied by the appellant. In light of this, it cannot be said that the appellant was denied representation by an attorney-at-law on the last day of trial.

32. Further, in his affidavit, the learned Resident Magistrate stated that at the end of the respondent's case, Mrs. Brown-Chatoo was asked to present a defence but she informed the court that she was not in a position so to do. The appellant was always represented by counsel save and except in September when Mr. Traille's retainer was determined. By that time, the matter had been part heard for over a year. Mr. Traille's retainer was terminated approximately a month prior to the next ensuing hearing date. The appellant, having had adequate notice of the adjourned hearing, ought to have immediately retained and given instructions to his new counsel.

33. The learned Resident Magistrate could not accommodate the appellant with a December sitting and he was so informed. It was incumbent upon him to have adhered to the October date given for continuation of the case by his attendance in court with his attorney-at-law properly instructed. In deciding against granting any further adjournments, the learned Resident Magistrate had rightly taken into account the unfortunate history of the case and the important factor of his responsibility in managing the cases before the court.

34. This is not a complex case as contended by Mr. Johnson. It is a simple matter. The learned Resident Magistrate was mindful that a counterclaim was in existence. He acknowledged that the issues which fell for consideration were questions of fact to be determined in accordance with the court's assessment of the witnesses and the evidence. He was correct in so doing. Having identified the issues and assessed the evidence, he found the respondent, Mr. Doctor and Mr. Nelson to be credible witnesses and accepted their evidence. The respondent brought her claim. She is entitled to have it heard and determined within a reasonable time. The inordinate delay in the conclusion of the matter was mainly due to the appellant's absence or his failure to retain counsel in a timely manner.

35. It is reasonable to infer that the learned Resident Magistrate was satisfied that the circumstances were such that substantial injustice would have been done to the respondent if the trial had not been concluded in October 2006. In my judgment, the prejudice to the respondent would outweigh any prejudice which might have been encountered by the appellant.

36. For the reasons stated above, we dismissed the appeal.