JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 6/06

BEFORE: THE HON. MR. JUSTICE HARRISON, P.
THE HON. MR. JUSTICE SMITH, J.A.
THE HON. MR. JUSTICE K. HARRISON, J.A.

BETWEEN	**DONALD PANTON**	**1ST APPELLANT**
AND	**JANET PANTON**	**2ND APPELLANT**
AND	**JEFFERY PANTON**	**3RD APPELLANT**
AND	**DOJAP INVESTMENTS LTD**	**10TH APPELLANT**
AND	**FINANCIAL INSTITUTIONS SERVICES LIMITED**	**RESPONDENT**

R. N. A. Henriques, Q.C. & Abraham Dabdoub instructed by Dabdoub, Dabdoub & Co. for appellants

B. St. Michael Hylton, Q.C., Solicitor General, Dave Garcia and Miss Annaleisa Lindsay instructed by Director of State proceedings for respondent

23rd, 24th February, 2nd March & 7th April 2006

HARRISON, P.

This is an appeal from the order of McIntosh, J on 6th February 2006 refusing to grant an application for an adjournment to a reasonable date in the matter that had been fixed for trial on 30st January 2006.

The facts are that these five actions, involving several financial transactions and take-over of financial institutions, were commenced in 1995 and 1997 and consolidated on 5th November 1999.

The appellants were represented since 1996, by Chancellor & Company, a firm of attorneys-at-law. The first and second appellants filed a joint defence on 24th May 2000. The third appellant filed his defence, settled by Mr. A. Dabdoub, on 1st February 2000. The 4th appellant, the directors of which are the first, second and third appellants, filed its defence on 1st February, 2000.

On 22nd March 2000 when an order for directions and for further and better particulars were made Mr. Dabdoub appeared for all the appellants.

Between March 2000 and 2004, there were several interlocutory applications and appeals, including an application to stay this matter until the termination of related criminal proceedings against the 1st and 2nd appellants. This latter appeal was ultimately dismissed by the Judicial Committee of the Privy Council in December 2003.

On 3rd March 2004, as a result of the introduction of the Civil Procedure Rules 2003, a case management conference was held and a trial date fixed for 8th November 2004. A previous trial date had been fixed on 9th October 2001 for 10th June, 2002. On 16th September 2004 at a case management conference a trial date was fixed for 30th May 2005, Mr. Dabdoub appeared for the appellants.

On 10th March 2005 the appellants applied to vary the case management schedule and on 8th April 2005 the trial date of 30th January 2006 was fixed. Mr. Henriques, Q.C. appeared for all the appellants. He also appeared as counsel for the first appellant on 3rd February 2004 when the trial date of 8th November 2004 had been fixed.

The affidavit of Miss Wanda Josephs reveals that her firm Chancellor & Company had briefed Messrs. Henriques, Q.C. and Dabdoub, as counsel in the matter.

After April 2005, negotiations for a settlement of the matter, at the request of the first appellant, commenced and was ongoing between the parties, that is, Mr. Walter Scott of Chancellor & Company and the Solicitor General for the respondent. In August 2005, the negotiations continued.

No brief nor documentary exhibits were sent to either Mr. Henriques, Q.C. nor to Mr. Dabdoub, to date.

On 5th December 2005 Mr. Scott presented to the first and second appellants the proposed settlement agreement. They disagreed with some of the proposals and consequently rejected the agreement. (See affidavits of Donald Panton and Janet Panton each dated 7th February 2006). The first appellant instructed Mr. Scott to continue the negotiations for a settlement and to involve therein counsel Mr. Henriques, Q.C. and Mr. Dabdoub.

On the said 5th December 2005 Mr. Scott wrote and delivered to the first appellant, a letter stating (i) that his firm would not appear to represent them at

the trial on 30th January 2006 and (ii) that if the matter was not settled he would remove Chancellor & Company from the record of the case by 31st December 2006. On 19th December 2005 the first appellant again requested Mr. Scott to continue the negotiations in order to effect a settlement of the actions.

On 4th January 2006 Chancellor & Company filed an application to remove their name from the record. On 16th January 2006 Miss Justice Beckford was told by the appellants that they had lost confidence in their attorneys Chancellor & Company and that they were not happy with the settlement agreed on their behalf. The learned judge adjourned the matter to 23rd January 2006, having encouraged the parties to make an attempt to effect a satisfactory settlement of the matter. The parties met at the Attorney-General's office on 19th January 2006 pursuant to the urgings of the learned judge. No settlement was reached. On 23rd January 2006 the said judge dismissed the application refusing to allow Chancellor & Company to remove its name from the record.

On 23rd January 2006 in the afternoon Mr. Dabdoub advised the first appellant that he would be prepared to represent the appellants as instructing attorney and brief counsel in the matter – see affidavit of the first appellant dated 23rd January 2006 at page 50 of volume 1 of the record. The said appellant at paragraph 20 of the said affidavit said:

> "Mr. Dabdoub also stated as a condition that adequate arrangements would have to be made which gave his firm access to monies set aside for the payment of Counsels' fees who were instructed by Dabdoub, Dabdoub & Co. and a retainer and monies

> for pre-trial preparation would have to be paid to Dabdoub, Dabdoub & Co. ..."

On 27th January 2006 on appeal to this Court, Panton, J.A. granted the order removing the name of Chancellor & Company from the record as attorneys for the appellants.

On 30th January 2006, the trial date, Mr. Dabdoub advised the learned trial judge:

> "I am here because my firm has been approached to take over the matter from Chancellor & Company, but they have not yet been provoked. Not only that, sir, I understand counsel who had represented them before is deceased and Mr. R.N.A. Henriques, Q.C. took his place but with the withdrawal of Chancellor ..."

Mr. Dabdoub, maintaining that he appeared amicus curiae, said of the appellants, at page 78 volume 1 of the record:

> "Well, they are unrepresented this morning, and I am certainly not in a position, M'Lord, to even, were I willing to commence this matter without the provocation which is necessary, I would not be in a position to do so, because I understand there are some 29 bundles which the firm and counsel will have to get acquainted, whichever counsel is now going to be retained, in order for this matter to proceed. So that in the circumstances the interest of justice would require that the Defendants be given an opportunity to obtain new counsel."

He said that he did not then represent the appellants and applied for an adjournment on behalf of the appellants "... in order (for them) to put their representation in place." He stated further that negotiations had been ongoing

up to the Friday before with the Solicitor General with a view to an amicable settlement, but he had been retained only for the purpose of such negotiations.

The learned judge pointed out the number of years that the case had been before the court, that the rules stipulate that "only lawyers who will be representing the clients at the trial can or should be involved in these case management and pre-trial fixtures," and that he Mr. Dabdoub was unable to say until what date he desired the adjournment.

Mr. Dabdoub then applied for an adjournment until Friday of that week "... for them to be able to obtain legal representation." The learned trial judge adjourned the matter until 6th February 2006 and indicated that he would commence the trial then.

On 2nd February 2006 the firm of attorneys, Dabdoub, Dabdoub & Company, was retained to represent the appellants. The affidavit of the first appellant dated 6th February 2006 recited that Mr. Henriques, Q.C. was asked if he would appear as counsel. Dabdoub, Dabdoub & Company, on 6th February 2006 filed a notice of change of attorneys, and applications for variation of the Mareva Injunction in order that the appellants could dispose of assets to pay legal professional fees, and for an adjournment. The learned trial judge refused the application to vary the Mareva Injunction and refused that second adjournment. The first appellant's said affidavit indicated that the assets they possess are mainly in the form of real estate and it will take some time for them to be sold and transferred to realize the funds to pay instructing attorneys.

The second appellant stated, in her affidavit dated 7th February 2006 that Mr. L Haynes of Dabdoub, Dabdoub & Company represented her as from 3rd February 2006.

Upon the refusal of the learned trial judge to grant the adjournment, Mr. Dabdoub applied for and was granted leave to appeal, resulting in the instant appeal.

The grounds of appeal were:

> "(1) The learned trial Judge wrongfully exercised his discretion in refusing the application for an adjournment;
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> (2) That the learned trial Judge erred as a matter of law and principle in the exercise of his judicial discretion in this matter;
>
> (3) The learned trial Judge erred in law in refusing the said application for an adjournment and failed to properly consider the matter or properly consider that the material before him in support of the application;
>
> (4) The learned trial Judge erred in law as he failed to consider the application to vary the Mareva Injunction;
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> (5) The learned trial judge erred as a matter of law when he made a decision to refuse the application before considering the merits of the application.
>
> (6) That there was no evidence to support the finding of fact that the Appellants were responsible for their Attorneys on the record, Chancellor & Company removing its name from the record as all the evidence before the Court clearly showed that it was Chancellor and

Mr. Henriques, Q.C. for the appellants argued that the reason for the application for the adjournment was that on the 30th January 2006, the date fixed for trial, neither the firm of attorneys on record nor counsel were briefed by the said attorneys with all the documents ready for trial. The instructing attorneys concentrated on the negotiations for a settlement to the exclusion of preparation for trial. Although the instructing attorneys by letter of the 5th December 2005 indicated that they would not be appearing in the matter and if it was not settled by 31st December 2005 their name would be removed from the record, at the request of the first appellant and the directions of the learned judge in chambers, the said instructing attorneys remained on the record up to 23rd January 2006 when their application was refused. When the name was removed from the record on 27th January 2006 by the Court of Appeal, a mere three (3) days from the trial date, it left no attorney on the record nor counsel to represent the appellants. The learned trial judge in the exercise of his discretion to refuse the application for an adjournment failed to consider that they did not have eight (8) weeks from 5th December 2005 to get counsel but it was the instructing attorneys who were on the record and continued negotiations up to 19th January 2006 who failed to brief counsel. The lay clients could not be expected to file notice of change of attorneys, nor to examine and understand documents in excess of 8,000 pages and conduct the trial of this complexity involving expert reports and legal arguments, by themselves. Despite fusion of

the profession the practice of instructing attorney, briefing counsel, exists and therefore attorneys in the matter have appeared in different and limited capacities. The learned trial judge failed to exercise his discretion judicially. The appellants' constitutional right to a fair hearing was denied in that they were not given the opportunity to properly present their case by the grant of the adjournment to obtain and brief counsel. He made up his mind prior to 6th February 2006, before examining the material put before him, that he would not grant the adjournment and thereby failed to observe the overriding objective to deal justly with the case. In all the circumstances the discretion was wrongly exercised. Learned Queen's Counsel relied, inter alia, on ***Perkins v. Irving*** [1997] 34 JLR 396, ***Ntukidem et al v Oko et al*** [1989] LRC (Const) 395 and ***Royal Bank of Scotland v. Craig,*** Court of Appeal (Civil Division) 17th September 1997 (unreported).

Mr. Hylton, Q.C. for the respondent argued that from early in December 2005 the appellants knew that Chancellor & Company would not be available for the trial on 30th January 2006, and counsel now retained had been involved in the matter for years. Rule 27.8 of the Rules require that the attorney attending the case management conference be "competent to deal with the case," consequently, Mr. Henriques, Q.C. who was at the case management conference on 3rd March 2004 is regarded as properly and fully retained. The appellants took no steps to retain counsel for the trial for eight (8) weeks from early December, until one (1) week before the scheduled trial on 30th January 2006.

The appellants created their own difficult position. The learned trial judge was correct to consider that it was relevant that the matter was before the Court for a period in excess of ten (10) years and an aspect of it was subject to a speedy trial order. The Privy Council in 2003 in refusing the application of the appellant for a stay recognized, that the respondent would be prejudiced and the public interest not properly served by any delay in winding down operations of the respondent. The interest of justice requires a broad view of both parties' interests and the interests of the administration of justice. There was already prejudice existing in the case of the respondent some of whose witnesses are reluctant to attend. Such prejudice and the disruption of the court's lists in finding alternative dates outweigh any prejudice to the appellants. Mr. Hylton, Q.C. relied on the case of ***Hare v. Pollard*** [1997] EWCA Civ. 1872 and ***Cowen v. AMI Healthcare Group plc*** [1998] EWCA Civ 1803 both of which he submitted supported the decision of the learned trial judge in the instant case.

Due to the stance of the Solicitor General in respect of the variation of the terms of the Mareva Injunction, in favour of the appellants that issue was not argued before us.

Rule 39.7 empowers a judge to grant an adjournment of a trial as he thinks just. It reads:

> "39.7 (1) The judge may adjourn a trial on such terms as the judge thinks just.
>
> (2) The judge may only adjourn a trial to a date and time fixed by the judge or to be fixed by the registry.

In exercising such a discretion a judge is required to be cognizant of and apply the rules as a "new procedural code" to enable the court to achieve the overriding objective to deal with cases justly (rules 1.1 and 1.2).

The proper exercise of the discretion involves not only the interests of the parties (See ***Hinckley v South Leicestershire PBS v Freeman*** [1942] Ch. 232), by maintaining a balance between the said parties by adopting a broader view avoiding prejudice to such parties and considering the public interest in the administration of justice. The interest of justice in the exercise of a judge's discretion was considered in the Court of Appeal case of ***Hytec Information Systems Ltd v Conventry City Council*** [1997] 1 WLR 1666. Lord Woolf, MR and Auld LJ concurred with the judgment of Ward, LJ. The latter dealing with the effect of an unless order, said:

> "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. The interests of justice require that justice be shown to the injured party for the procedural inefficiencies caused by the twin scourges of delay and wasted costs. The public interest in the administration of justice to contain those two blights upon it also weighs very heavily. Any injustice to the defaulting party, though never to be ignored, comes a long way behind the other two."

In the case of ***Maxwell v. Keun*** [1927] All ER Rep 335, Lord Hanworth MR commented that the refusal to grant an adjournment of a case where it was impossible for a plaintiff to appear at the trial, could not stand.

A trial judge, in the exercise of his discretion must give effect to all the circumstances peculiar to the particular case in order to achieve justice in deciding whether he should grant the adjournment or not. If justice cannot be achieved by a short adjournment, in that the case of one of the parties will be forced to present a partially prepared case, the delay is unavoidable and an adjournment ought to be granted (***Boyle v. Ford Motor Co Ltd*** [1992] 1 WLR 476). See also ***Ntukidem et al v. Oko etal,*** supra, relied upon by learned Queen's Counsel for the appellants where it was held that the absence of counsel on an occasion where he had missed his airplane flight and in circumstances where he was always present in the past, should not cause a court to refuse an adjournment in the exercise of its discretion.

In ***Hare v Pollard*** (supra) the English Court of Appeal refused to set aside a refusal of the trial judge to grant an adjournment at a late hour, two weeks before the trial date, although the refusal would prejudice the plaintiff, applying for the adjournment. The Court was of the view that parties are entitled to expect that the trial of the cases will be expedited, adjournments and vacation of trial dates prejudice not only the party not in default but other litigants and disrupts the administration of justice. Adjournments of trial dates should be permitted only as a last resort.

The Legal Profession Act which came into force in 1972 gave rise to the creation of the "attorney-at-law" "or "attorney" (section 5), which incorporated the rights and privileges and functions of the barrister and solicitor. The Legal

Profession (Canons of Professional Ethics) Rules ("the Canons") made by the General Legal Council under the provisions of section 12 (7) of the Act and published in the Jamaica Gazette Supplement dated 29th December 1978 provide in paragraph 2:

> "2. In these rules unless the context otherwise requires –
>
> "Attorney" includes a Firm of attorneys;"

However, the Canons themselves recognize the retention of some of the features of the former system of practice. Canon IV (h) reads:

> "(h) An Attorney on the record may instruct one or more Attorneys to appear as Advocates, in the same way as a Solicitor on the record has hitherto instructed Counsel."

Despite this feature, the attendance of an attorney at a case management fixes such attorney with full knowledge of the case.

Rule 27.8(1) reads:

> "27.8 (1) Where a party is represented by an attorney-at-law, <u>that attorney-at-law or another attorney-at-law who is fully authorized to negotiate on behalf of the client and competent to deal with the case must attend the case management conference and any pre-trial review."</u> (Emphasis added)

Rule 27.8(1) therefore, mindful of Cannon IV (h), specifically imposes on an attorney that standard of professional responsibility.

In the instant case, the learned trial judge on 30th January 2006 had before him the consolidated action fixed for trial at a case management

conference held on 8th April 2005. On the latter date as well as the case management conference on 3rd March 2004 Mr. Henriques, Q.C. appeared for all the appellants. At the case management conference on 16th September 2004 Mr. Dabdoub appeared for all the appellants. He also appeared on 22nd March 2000 for all the appellants on the making of orders for directions and for further and better particulars. On 30th January 2006 therefore both counsel were deemed "competent to deal with the case," to say the least.

On 5th December 2005 when Mr. Scott delivered to the first and second appellants the draft proposal settlement agreement, only some of the proposals were rejected by the said appellants. The clear inference is that some of the terms were advantageous to them. There is nothing on the record to show that there was any legal opinion, subsequently given, to show that it was or was not the best settlement agreement in the circumstances as that was reasonably obtainable, as distinct from the personal hopes of the appellants. This would be relevant to the justification for the rejection of the said proposal by the appellants as put forward by Mr. Scott, their attorney in the matter for a period of approximately ten (10) years. The matter of the conflict between the statement of assets and the defence as filed could be easily dealt with by amendment.

Mr. Scott's letter of 5th December 2005 conveyed two distinct resolves, viewed in its entirety,

> (1) his firm of Chancellor & Company would not represent the appellant at the trial on 30th

> January 2006. This was an unqualified decision. No conditions were attached;
>
> (2) if the matter was not settled – he would remove Chancellor & Company from the record on 31st December 2005. This provided some leeway for further negotiations, conditional on a deadline of 30th December 2005.

Neither the first nor the second appellant made any request of Mr. Scott to continue in the case for the purpose of the trial. Each purposely chose not to do so. The first appellant chose, rather to specifically request Mr. Scott to confine himself to continuing the negotiations, a request repeatedly expressed in January 2006.

From as early as 5th December 2005 the first, second, third and tenth appellants had a responsibility to engage legal representation in respect of the trial date of 30th January 2006 to be met. They were under no illusions, as to the withdrawal of Chancellor & Company from the trial date. Although the first appellant did say:

> "I did not believe that Mr. Scott was serious about not representing us since he had represented us for so long and I regard the letter which I received on the 5th of December 2005 as an attempt to put pressure on us to accept the settlement he had negotiated without the involvement of Mr. Henriques and Mr. Dabdoub,"

he failed to state his basis for disbelief. The withdrawal of Mr. Scott was there in "black and white."

It is the litigant's responsibility, if he wishes to enjoy his constitutional right to have counsel of his choice, to employ such counsel.

In ***Lownes v Babcock Power Limited*** [1998] PIQR 253 the English Court of Appeal (Lord Woolf M.R. and Potter L.J.) dismissed the appeal of a plaintiff, whose solicitor had failed to comply with an unless order to file an up-to-date schedule of her damage as a result of which the judge below had refused an extension of time to do so. Lord Woolf, in delivering the judgment of the Court, said at page 259:

> "... the person who suffers from the court applying the sanction of having the action dismissed is not the plaintiff's solicitors, but the plaintiff personally. This means that it can be said, and said with force, to a judge, 'You are visiting the sins of the solicitor on his client, and you should not let your desire to discipline the solicitor injure the plaintiff personally'. I am conscious of the force of that point. In my judgment, however, it would be wrong to give way to it. A plaintiff, even in a case of personal injuries, has to be responsible for the conduct of his solicitor. We have to consider the position, not only of the parties to this litigation but the parties to other litigation." (Emphasis added)

and at page 263:

> "The message to the profession, which should be heard and learned as a result of this case, is that the standards of diligence displayed in this case are totally unacceptable. Where cases come before the court and the court has to balance the prejudice to the plaintiff and the prejudice to the defendants, the court will also take into account the prejudice to other litigants, and the prejudice to the administration of justice generally, in deciding where the balance lies. (Emphasis added)

In the instant case the learned trial judge was correct in his refusal to grant a further adjournment on 6th February 2006, taking into consideration the fact that the case had been before the Court since 1995.

Mr. Dabdoub indicated on 6th February 2006 that Dabdoub, Dabdoub & Company then represented the appellants and that he had filed notice of change of attorney. He indicated that he would not be ready for trial for that week or the following week. He agreed that he came into the matter in "1999 the date of consolidation." A court cannot postpone a matter indefinitely (***Hinkley v Freeman*** supra)**.** Mr. Dabdoub referred the learned trial judge to the letter from Mr. Henriques, Q.C. that he would not be available until November 2005 or the following year.

Mr. Dabdoub then informed the court that he, "... personally will be available in June."

The learned trial judge, despite the spirited exchanges with counsel on 6th February 2006, had a duty to balance the prejudices to each party and to consider also the public interest in the administration of justice (***Bale v Merton*** [1998] EWCA Civ 800).

Mr. Dabdoub settled the defence of the third appellant which was filed on 1st February 2000. The third appellant's defence is a denial of any knowledge of the transactions. The first and second appellants filed a joint defence on 24th May 2000. The appellants are directors of the tenth appellant. There is no

apparent conflict in respect of the cases of the appellants that would prevent them being dealt with by one attorney.

Canon IV (l) permits an attorney to represent multiple clients –

> "(l) ... if he can adequately represent the interests of each and if each consent to such representation after full disclosure of the possible effects of such multiple representation."

The trial date of 30th January 2006 for the trial to continue for four weeks had been fixed from approximately nine (9) months before. The appellants were not entitled to sit back neutrally for that period and certainly not since 5th December 2005 and not ensure that their attorneys were ready for trial. They had a duty to enquire of their attorneys as to the progress of their business. They are "responsible for the conduct of" their attorneys.

On 6th February 2006 the learned trial judge was not wrong to refuse the request for a further adjournment. It is my view that Mr. Dabdoub, had a duty to assist his clients and the due administration of justice in that regard.

It would be quite unreasonable for any responsible court after a period of approximately eleven (11) years for an action to be diverted to a new trial schedule of nine (9) months to one year in accordance with Mr. Henriques, Q.C.'s availability and four to five months in relation to Mr. Dabdoub's. The respondent, charged with the task of collecting in assets would be severely prejudiced. The public interest and the administration of justice would not be properly served by such delay. There must be an end to litigation. Any prejudice that the appellants perceive that they would suffer cannot be elevated

to the level of the other parties concerned. The overriding objective supports the exercise of the learned trial judge's discretion to refuse the application for the adjournment.

Some judicial time has been salvaged by the part-hearing of the action. All parties have expressed the view that the case is concerned principally with documentary evidence. One aspect of the consolidated action has been expressly fixed with a speedy trial order – an observation echoed by the Privy Council in 2003. No prejudice would arise by the claimant's case being reopened and the witnesses recalled for cross-examination, if the appellants so desire. However, the learned trial judge must first consider the application in respect of the issue of legal professional privilege.

In all the circumstances this appeal should be dismissed with costs to the respondent and the trial should continue before McIntosh, J during the first half of the coming term.