[2017] JMCA Civ 40

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 39/2006

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE DUKARAHAN JA
THE HON MRS JUSTICE MCINTOSH JA

BETWEEN	**PAUL CHEN-YOUNG**	**1ST APPELLANT**
	AJAX INVESTMENTS LIMITED	**2ND APPELLANT**
	DOMVILLE LIMITED	**3RD APPELLANT**
AND	**EAGLE MERCHANT BANK OF JAMAICA LIMITED**	**1ST RESPONDENT**
	CROWN EAGLE LIFE INSURANCE COMPANY LIMITED	**2ND RESPONDENT**

Roald Henriques QC, Richard Small and Abraham Dabdoub instructed by Dabdoub, Dabdoub & Co for the appellants

Michael Hylton QC, Mrs Michele Champagnie, Sundiata Gibbs and Miss Melissa McLeod instructed by Michael Hylton & Associates for the respondents

11, 18, 19, 20 March; 30 September; 1, 2, 3, 4, 22, 23, 24, 25, 28, 29 October; 4, 5, 6 November 2013 and 1 December 2017

PANTON P

[1] This appeal was filed on 30 May 2006 and is from a judgment of Roy Anderson J dated 4 May 2006 in the Supreme Court. In summary, the judgment, details of which will follow, was in favour of the respondents on almost every aspect of the suit which

they filed in November 1998. There is a counter notice of appeal against the judge's order as to the period of time for the calculation of interest.

The identity and status of the parties

[2] It is agreed by all parties that the first named respondent (Eagle) was licensed to conduct the business of banking, including the taking of deposits from members of the public; and the second named respondent (Crown Eagle) was an insurance company authorized to accept premiums from members of the public.

[3] It is also agreed that the first named appellant (Dr Chen-Young) was a director of both Eagle and Crown Eagle. In the case of Eagle, he was executive chairman, chief executive officer and the majority shareholder, and in the case of Crown Eagle, he was its chairman. Eagle paid his salary. In view of the positions he held, he had a fiduciary duty to both entities.

[4] The second named appellant (Ajax) was an industrial and provident society governed by the Industrial and Provident Societies Act. Dr Chen-Young was a member of the committee of management of Ajax. As regards the third named appellant (Domville), the respondents alleged that it was a company incorporated under the laws of Jamaica and was beneficially owned by Ajax to the tune of 51%.

[5] On 12 March 1997, Finsac Limited, a company wholly owned by the Government of Jamaica, took control of Eagle and Crown Eagle.

The nature of the transactions giving rise to the suit

[6] There were three transactions that one or the other of the respondents did not find palatable and which have allegedly resulted in serious loss and damage to them. They have been referred to throughout the proceedings as the Grenada Crescent transaction, the First Equity Corporation (First Equity) and IBM transactions, and the Domville loan transaction.

[7] Dr Chen-Young is alleged to have breached his fiduciary duty to Eagle in causing or allowing Eagle to enter into the Grenada Crescent and First Equity transactions. Alternatively, it is alleged that he was either negligent or in breach of his contract of employment. The same allegation of breach of fiduciary duty and the alternative of claim of negligence are made against Dr Chen-Young in respect of his duty to Crown Eagle so far as the Domville loan transaction is concerned.

(i) The Grenada Crescent transaction

[8] Ajax owned premises on Grenada Crescent. It leased the first, second and third floors to Eagle – firstly in 1992, and then again in 1995. The case presented by Eagle was that, at the request of Dr Chen-Young and Ajax, Eagle purchased furniture and did substantial renovations to the leased areas as well as to areas that were not covered by the leases. Eagle did not wish the renovations to be done, and received no benefit from the work done.

[9] On 11 March 1997, Dr Chen-Young allegedly sought to cause Eagle to surrender its option to renew the lease in respect of the second and third floors, with a view to

Ajax and himself getting the benefit of that surrender. In November 1997, Eagle vacated the premises and Ajax became the beneficiary of the improvements.

[10] Eagle's claim against Dr Chen-Young and Ajax was for the sum of J$65,824,056.00, being the amount spent by Eagle for renovating the Grenada Crescent premises.

(ii) The First Equity/IBM transaction

[11] In or about September 1993, Eagle, through a subsidiary, paid for and acquired 88% of the shares in First Equity, a company incorporated in Florida and which carried on the business of a securities broker. The allegation was that, under the agreement, the transaction cost Eagle more than twice the net book value of First Equity. Between April 1994 and June 1995 Eagle spent over US$3,000,000.00 in respect of the operations of First Equity, through loans and advances.

[12] Eagle and another of its subsidiaries traded extensively through First Equity in the shares of International Business Machines Corporation (IBM). The trading was allegedly done speculatively and negligently on the instructions of Dr Chen-Young. In July 1995 the Board of Eagle instructed Dr Chen-Young to sell the IBM shares. He did so on 27 July 1995, but on the next day, he bought more IBM shares which were eventually sold at a loss. As a result of this latter share purchase, it is alleged that Eagle incurred losses of nearly US$5,000,000.00 .

[13] In addition to these share transactions, there are allegations that Eagle, at the direction of Dr Chen-Young, transferred US$995,000.00 to his personal trading account

at First Equity. A portion of this sum was paid for art work. The rest was allegedly converted by Dr Chen-Young to settle trading losses incurred by him in his account with First Equity.

[14] Eagle's claim against Dr Chen-Young in respect of the First Equity transaction was for US$10,954,811.00. The allegations were that he breached his fiduciary duty; in the alternative, Eagle claimed damages for breach of contract or negligence, and for conversion.

(iii) The Domville loan transaction

[15] It is agreed that Domville owned certain property and that it executed an instrument of mortgage and deposited certificates of title for the property with Crown Eagle which disbursed monies to Domville, or on Domville's behalf, to settle a debt to Mount Investment Limited. Dr Chen-Young executed an instrument of guarantee which Dr Chen-Young says was a guarantee to facilitate performance of the agreement. The loan remains unpaid but Domville denies that it is indebted to Crown Eagle.

[16] Dr Chen-Young is alleged to have fraudulently, and in breach of his fiduciary duty, caused the titles to be returned to Domville, and the instruments of mortgage and guarantee, as well as the file on the transaction, to be removed from Crown Eagle's possession.

[17] Crown Eagle's claim against Dr Chen-Young and Domville was for the sum of J$7,038,826.01 plus interest at the rate of 27% per annum or J$2,315.94 per day from 1 October 1998 to the date of payment or judgment. A declaration was also sought

against Domville that its property was subject to an equitable mortgage in favour of Crown Eagle, and therefore there should be an order for the execution of a legal mortgage in favour of Crown Eagle.

[18] Both Eagle and Crown Eagle sought an injunction against the appellants to bar them from dealing with funds in their accounts.

The defence

[19] Dr Chen-Young denied the allegations against him in respect of the Grenada Crescent and First Equity transactions, and said that they were entered into pursuant to instructions from the Board. As regards the Domville loan transaction, the defence pleaded that there was a pending joint venture agreement between Crown Eagle and a Chinese consortium and Domville. It is admitted that the loans were disbursed, but Domville denies that it is indebted to Crown Eagle. As regards the documents the respondents claim to be in his possession, Dr Chen-Young pleaded that he did execute an instrument of guarantee but the relevant documents are in the possession of Crown Eagle.

[20] Where monies were claimed to have been paid by Eagle to Dr Chen-Young, he said that the money transferred to his trading account was for payments made by him in respect of money owed to him by Eagle and Phoenix Trade Finance Corporation; or, alternatively, the money belonged to him or companies related to him.

The judgment appealed against

[21] After what seems to have been an unnecessarily long trial, with excessively repetitive cross-examination and very testy moments, the learned judge reserved judgment. Eventually, after a lengthy break, he came to a decision adverse to the appellants. He, quite helpfully, summarized his findings which appear on pages 213 and 214 of the Core Bundle on appeal. These findings may be grouped as follows:

a. At all material times Dr Chen-Young controlled the respondents, and was the beneficial owner of Ajax Investments Limited and Jellapore Investments Limited;

b. Dr Chen-Young "cannot escape or reduce his personal liability on the ground that he acted pursuant to the Board's approval";

c. Dr Chen-Young breached his fiduciary duty, was negligent and in breach of contract as regards the refurbishing of the Grenada Crescent premises;

d. The acquisition of First Equity was an action of the Board, and for that there is no liability on the part of Dr Chen-Young;

e. Dr Chen-Young's action in purchasing IBM shares on 25 July 1995 constituted a breach of fiduciary duty, breach of contract and negligence;

f. Dr Chen-Young and Domville are jointly and severally liable to repay the balance on a loan made to Domville;

g. Dr Chen-Young breached his fiduciary duty in the conduct of the Domville transaction;

h. Dr Chen-Young's contract was terminated by his resignation; and

i. Dr Chen-Young is not entitled to any compensation for leave allegedly not taken, nor is he entitled to the sum claimed in relation to pension contribution.

[22] Before arriving at those findings, the learned judge stated that "by the mid nineties, Dr Chen Young had become the public face of the Group, and was the person who was perceived as the leader thereof". The "Group" referred to was the Eagle Financial Network. He referred to the Government of Jamaica taking control of the Group which included the respondents for a consideration of $1.00. The judgment gives the time of this takeover as being on or about March 1996 (page 129 Core Bundle). However, the evidence indicates that the takeover was in March 1997. The first issue that attracted the attention of the learned judge was that of "control". He reviewed the authorities that were presented for his consideration and concluded on the basis of the evidence that Dr Chen-Young was indeed the directing mind and will of the respondents and the appellant Ajax. He said that "the overwhelming preponderance of the evidence leaves little doubt that Dr Chen Young controlled not only the Claimants, but also Ajax and Jellapore, at all relevant times". However, he rejected the view that "a director of a company and, a fortiori, the chairman of the board of directors who is also a paid employee of the company, cannot escape liability for an improper act on the ground that it was pursuant to a decision of the entire board".

[23] As regards the Grenada Crescent transaction, the learned judge found that the leases were due to expire on 30 November 1997 and that there was no option to renew. The significance of the latter fact was that the Board was unaware of the lease terms and while Eagle was in serious financial straits, it was expending money on renovations which it would not enjoy and Dr Chen-Young and Ajax would be the beneficiaries of the expenditure. The learned judge found that there was no approval for the expenditure and that Dr Chen-Young gave the Board incomplete information in "bits and pieces". "[A]t the heart of the matter", he said, "was the lack of information by the board on the one hand, and the withholding of information by [Dr Chen-Young], on the other". In the circumstances, the judge found that there had been unjust enrichment and so Eagle was to be compensated. That Dr Chen-Young had breached his fiduciary duty and, or, his contract of employment was unanswerable, he said.

[24] In respect of the First Equity/IBM transaction, the learned judge expressed the view that the "preponderance of the evidence suggests that the Board of directors of Eagle thought that the acquisition of the corporation was a good investment". He said that a total of US$3,060,824.00 was paid for the purchase of First Equity, and it was eventually sold for US$1.2 million, resulting in "losses" of US$5,532,332.00. According to the learned judge, there is no evidence to suggest that Dr Chen Young had "any more or any less to do with the purchase", so he concluded that if Dr Chen-Young was to be liable for anything, "it is difficult to see why all the other directors would not also

be liable". He thought that all the directors were integrally involved in the acquisition so there was no liability.

[25] Anderson J found a different situation as regards the purchase of the IBM shares. He found "the Expert Report of Edward Avey, a Forensic and Investigative Accountant…instructive". He said that the evidence showed that Dr Chen-Young had the Board's authority to trade in shares on behalf of Eagle. This trading was carried out by Eagle and Eagle Holdings Cayman Limited, a subsidiary of Eagle, through First Equity. Mr Avey produced a report and gave oral testimony. Anderson J was impressed by his evidence. He said: "Little, if any, of his factual averments were seriously challenged". The learned judge, referring to the evidence of Dr Oswald Harding and Mrs Daisy Coke, said that "when the directors discovered that Dr Chen Young had invested Eagle funds very heavily in IBM stocks, this led to a confrontation between the board and Dr Chen Young". He said that Dr Chen-Young was instructed to sell the shares. He complied, and a profit of US$1,354,000.00 was realized. However, a day later, he caused Eagle to purchase a further amount of 190,000 shares for US$108.6944 per share. The learned judge noted that these transactions were recorded as booked on 27 and 28 July 1995. He noted that incorrect information was given by Dr Chen-Young to the Board subsequently at meetings held in August, September and October 1995 in respect of the value of the stock. As a result of margin calls made on Eagle in December 1995, in relation to its equity trading account, the shares were sold on 9 and 11 January 1996. The sales at this time resulted in a trading loss of over

US$4,000,000.00. When margin interest and the cost of loss of use of the funds were taken into account, Mr Avey put the total loss on the IBM shares at US$4,838,516.00.

[26] The learned judge found it difficult not to conclude that, to the extent of the exposure to risk of the erosion of Eagle's capital base, what had taken place was an adventure that "was a reckless and even wanton disregard of prudent investment practices and cannot be brought within the realm of the 'business judgment rule' ". He rejected Dr Chen-Young's explanation that the instruction to sell had been interpreted to mean that there was to be a realization of the profit and then to return to the market; and that in any event, the purchase had been booked prior to the Board decision and could not then be stopped. In purchasing the batch of 190,000 shares, Dr Chen-Young was doing so in breach of contract and/or of fiduciary duty, according to the judge.

[27] As regards the Domville loan, the learned judge said that based on the documentation and the evidence, the funds were in fact disbursed. He found that the titles were deliberately withheld by Dr Chen-Young, and there is no evidence that the loan has been repaid.

[28] Anderson J rejected the counterclaim on the basis that Dr Chen-Young voluntarily resigned not only as a director but as executive chairman/chief executive officer. It was the judge's view that in the light of all the other findings made in the case in respect of Dr Chen-Young's conduct, Eagle was entitled to dismiss him. Finally, there was no basis for a "claim for payment for unpaid vacation leave".

Grounds of Appeal

[29] The grounds of appeal were filed in two parts. The first set was filed on 12 June 2006, and the second on 30 January 2008. There are 51 grounds all told. The first set of 21 relate to the judge's delay in handing down judgment and what the appellants think was his apparent disregard of the evidence and submissions put forward by them. They say that no satisfactory reason has been given for preferring the evidence given on behalf of the respondents to that given on behalf of the appellants. They challenge the judge's findings of fact as regards:

a. Dr Chen-Young's "control" of Eagle, Crown Eagle and Ajax;
b. Dr Chen-Young's alleged failure to provide Eagle's Board of Directors with relevant information on the renovations of Grenada Crescent;
c. Dr Chen-Young's alleged breaches of fiduciary duty and contract, and his negligence in purchasing IBM shares on 25 July 1995; and
d. Dr Chen-Young's resignation and non-entitlement to compensation.

[30] The second set of grounds mount a challenge as regards:

a. the appropriateness of the judge's treatment of the evidence of Mr Avey as an expert;
b. the judge's understanding of the effect of the minutes of meetings of the Board of Directors of Eagle;
c. the judge's understanding of the protection offered by the articles of association to directors;

d. the IBM transaction;

e. the appearance of bias on the part of the learned judge due to what has been termed a special relationship between himself and lead counsel and also the other counsel for the respondents; and

f. the judge's failure to disclose that he had at one stage been declared a bankrupt in the United States of America.

The submissions

(i) The Grenada Crescent transaction

[31] In voluminous written submissions followed by lengthy oral submissions, the appellants argued that the learned judge ignored the evidence presented on their behalf. Particularly, they said that he ignored the fact that the Board of Directors had been planning to house Eagle's operations elsewhere, but due to cost constraints, and as a last resort, decided to renovate the property that had been leased from Ajax with a view to being housed there for a long time. This, it was submitted, was confirmed by Mrs Coke under cross-examination. The judge also, they submitted, ignored the fact that the Board approved the expenditure for the renovations.

[32] They submitted that the learned judge was unfairly critical of the evidence of Mr Croskery, and when considered with his ignoring of Mr Stoppi's report, he erred in his ultimate finding of liability on the part of the appellants.

[33] The linking of the non-renewal of the leases with the renovations was unfortunate in the view of the appellants, as the fact is that the leases were not

renewed because of the decision to wind down Eagle subsequent to its acquisition by the Government.

[34] The position of the respondents was that Dr Chen-Young knew that the lease would not be renewed, and that although he knew that Eagle was in dire financial straits, he pressed along with the renovations so as to gain a benefit for himself and Ajax. He did so, according to the respondents, without keeping the Board fully informed. It is irrelevant, they submitted, that the renovations only came about as a last resort when no suitable location could be found to house the Eagle Financial Network.

(ii) The First Equity/IBM transaction

[35] It has been submitted on behalf of Dr Chen-Young that the learned judge did not explain how the loss was caused by Dr Chen-Young. He did not refer to the material evidence presented on behalf of the appellant. It was submitted that the judge ignored Dr Chen-Young's evidence that trading in IBM shares was normal and that the Board had sanctioned it. The loss was caused by the Board's instruction to sell at a time which was not the right time. Reference was made to a decision of the Board that the shares should be kept until the value reached $114.00, and that accounted for the action of Dr Chen-Young, it was submitted. In addition, the appellants were very critical of the judge's reliance on the evidence of Mr Avey, although he lacked expertise in the area under discussion.

[36] The respondents submitted that the purchase of shares in July 1995 was in defiance of the directions of the Board. This, they said, was an unauthorized, reckless, grossly negligent act by Dr Chen-Young. The respondents have ridiculed the defence of Dr Chen-Young as regards his purchase of the shares after he had received instructions to sell.

(iii) The Domville transaction

[37] In respect of the Domville transaction, the appellants submitted that the learned judge was confused as regards his understanding of the nature of the transaction. They said that he did not realize that the circumstances were three-fold, in that there was an "original loan" from Mount Investments to Domville, then a loan by Crown Eagle to Mount Investments on behalf of Domville, and thirdly, an expenditure by Crown Eagle in a joint venture although Crown Eagle is describing it as a loan.

[38] The appellants submitted that the learned judge did not analyze the evidence properly because although there is no doubt that the original loan was disbursed; the real question is whether the second amount was ever disbursed. They said that the respondents have not proven that the money was paid by Crown Eagle to Mount Investments on Domville's behalf. On the other hand, the respondents have submitted that this was a simple loan transaction. According to them, Crown Eagle lent money to Domville which is controlled by Dr Chen-Young and Eagle. They have set out a chronology in Appendix 6 to their written submissions. The loan was not properly secured. On that score alone, the respondents submitted that Dr Chen-Young

committed a breach of fiduciary duty, having signed a commitment letter requiring registration of a mortgage of the Domville properties.

Decision on "the transactions"

[39] The decision on this appeal cannot be merely in respect of these three transactions that were the main focus of the trial. There are the added factors of the delay by the learned judge, as well as the question of the appearance of bias. It is however proposed to give my decision on the transactions and then to address the other complaints thereafter.

[40] It is clear that on the three transactions, much depended on the judge's assessment of witnesses and determination of facts. It is well-known that an appellate court does not lightly interfere with a trial judge's findings of fact. There is a long line of cases that embrace that principle: **Watt (Or Thomas) v Thomas** [1947] 1 All ER 582; **Industrial Chemicals Co (Jamaica) Ltd v Ellis** (1986) 35 WIR 303.

[41] In considering the decision of the learned judge on the **Grenada Crescent** transaction, it is impossible not to give a thought to the role of directors of a company. Eagle's articles of association provide that the business of the company shall be managed by the directors, and that directors must declare interest where he or she is involved or interested in a contract or proposed contract with the company. The directors are also required to cause minutes to be made in books provided for the purpose of all resolutions and proceedings at all meetings of the company, and of the directors, and of committees of directors.

[42] A board is not a silent structure designed to provide comfortable seats for directors. This is not to say that the board of Eagle was anything of the sort. A board of directors is a body that should have as its aim the direction of the company. It develops policy, and oversees its implementation. If there are obstacles in the process of implementation, it must act to clear those obstacles. For example, where there is an obstructionist or wayward chief executive officer, manager or other employee, it must act to bring such an individual in line or to arrange for a separation of ways. Where the members of the board cannot control such an individual, then perhaps the board should resign.

[43] In the instant case, the directors cannot hide behind an excuse that they approved a project without knowing the facts. It was their duty to know the contents of the lease, the state of the finances, the nature and cost of the renovations and the affordability of the same. The minutes show that there were discussions and approvals in relation to the renovations and furnishings. There were interventions by building professionals all the way. One director was a member of a company that had been engaged to check on the estimates. The checks were done and reassessments made. That ought to have been an end of the matter.

[44] In my judgment, with all the outside professional inputs and the approval having been given for the premises to be renovated and furnished in keeping with the standard of a modern bank, it was unreasonable for the directors to have apparently fallen

asleep and then to place blame on Dr Chen-Young. I am of the view that the learned judge erred in his findings in this respect. I would set aside the order made.

[45] As regards the **IBM** transaction, the evidence is clear that there was full authority for Dr Chen-Young to trade in IBM shares for the benefit of Eagle. The evidence shows further that there had been successes for Eagle in this activity. Both appellants and respondents agree on this. The defence filed by Dr Chen-Young admits that there was instruction by the Board to sell. He admits that he purchased more the very next day. He offered an explanation for this purchase. The learned judge rejected his explanation. I see no basis for the challenge to the judge's rejection of the explanation. In the circumstances, I am of the view that the learned judge was entitled to come to the conclusion that he arrived at. I would affirm that order.

[46] In respect of the **Domville** transaction, I must confess that having waded through the mountain of documents, I have been unable to see the basis for the challenge to the claim. It was admitted by Domville that it executed an instrument of mortgage and deposited the duplicate certificates of titles with Crown Eagle, and that Dr Chen-Young executed an instrument of guarantee. Crown Eagle disbursed various sums to Domville. The learned judge did not accept the story of a joint venture, nor the reason offered by Dr Chen-Young for providing the guarantee. It was eminently reasonable for the judge to infer that Dr Chen-Young was responsible for the loan not being secured due to his mishandling, at least, of the titles. I would affirm this order.

The appeal regarding compensation

[47] Dr Chen-Young claimed for loss of compensation, alleging that the total sum due to him was US$200,000.00. He also sought damages for breach of a management contract. He claimed that he resigned, but only as a director, not as an employee. Eagle's response to that claim was that Dr Chen-Young resigned not only as a director but as an employee. Alternatively, he abandoned his employment. The circumstances according to Eagle were such that there was ample justification for terminating Dr Chen-Young's employment.

[48] Notwithstanding the volume of documents, I have not been able to find any submissions on behalf of Dr Chen-Young in respect of this aspect of the appeal. However, there was oral submission by Mr Roald Henriques QC that Dr Chen-Young agreed to resign and that the FINSAC obligations should not affect his entitlement. Mr Michael Hylton QC for the respondents said that there was never any issue of remuneration being outstanding at the time of Dr Chen-Young's departure.

[49] The evidence of Mr Patrick Hylton was that in January 1997, Dr Chen-Young submitted a proposal to the Government to remedy the insolvency of the Eagle Financial Network. Between February and March, the liquidity position worsened dramatically. As of 25 February 1997, Eagle had an overdraft of $3 billion with the Bank of Jamaica and Crown Eagle had a substantial overdraft with Eagle. On 12 March 1997, Eagle's overdraft at the Bank of Jamaica exceeded $10 billion. That very night, an emergency meeting was held with Dr Chen-Young. It was decided to protect depositors

and policyholders. FINSAC would acquire the Eagle Financial Network for $1.00 and Dr Chen-Young would immediately resign from all boards of the Eagle Financial Network. A formal agreement was signed on 17 September 1997. FINSAC would have to assume liabilities of more than $13 billion. Dr Chen-Young did not resume or attempt to resume duties after 14 March 1997.

[50] Given these circumstances, I find it incomprehensible that Dr Chen-Young gathered the courage to claim remuneration. In my judgment, the learned judge was right to reject that claim.

The question of the appearance of bias

[51] Mr Abraham Dabdoub argued at length and with much vigour that the appeal should be allowed because there were some undesirable circumstances that made it impossible for the trial to be deemed a fair one. He referred to the fact that the learned judge was once employed at the same law firm as the lead counsel for the respondents, Mr Hylton QC, and some of the other attorneys who have been associated with him in the conduct of the trial. The facts are that the judge was a consultant in the commercial section, and there is no dispute that there is a personal relationship between them. The case against Dr Chen-Young had its genesis at the said law firm during the period that the judge and counsel were in the firm. It happened that Mr Hylton became Solicitor-General of Jamaica and the case followed him to his new post. The conduct of the trial took place while Mr Hylton was Solicitor-General.

[52] Another feature of the case was that counsel were involved in approaching the Registrar of the Supreme Court with a view to agreeing for the trial to be conducted by the judge due to his experience in matters of this nature. This consultation included Mr Conrad George who then appeared for Dr Chen-Young. It appears that the learned judge was surprised that the case was put before him for trial and, in Chambers, he inquired whether they were comfortable with him being the trial judge. All agreed. Not all counsel were present at this Chambers hearing and there is no official record of the discussions. Suffice it to say that Dr Chen-Young was not privy to the consultation at the beginning. However, he was told thereafter and apparently reluctantly agreed with the decision that was taken. Subsequently, due to further communications, he had a change of heart expressing the view that he did not think it was fair. Hence the ground of appeal.

[53] At the outset, it needs to be said that this is not to be regarded as a reflection on the integrity of the judge or of counsel. The law on the matter is settled. In **Porter v Magill** [2002] 2 AC 357, at para 103, it states that "The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased". In the Jamaica that I know, the fair-minded and informed observer may well frown on the circumstances: the case having started at the firm where the relevant parties were employed; counsel resigning and going to another position; the case migrating with counsel; the colleague becoming a judge and ending up trying the very case after counsel having consulted with the Registrar; and other counsel from the same law firm also being involved in the trial.

[54] I accept that there was no discussion between counsel and the judge about the case during the period at the law firm, but the fair-minded and informed observer would still feel that there is a real possibility of bias. In the circumstances, notwithstanding that I have gone through the details of the learned judge's rulings, and have agreed with most of his findings, I feel constrained to allow the appeal on this latter basis. The appellants did not seek a retrial. They merely asked for the orders to be set aside. However, Rule 2.15(b)(d) of the Court of Appeal Rules gives the court the power, in relation to a civil appeal, to order a new trial before a different judge. Notwithstanding the passage of time, I am of the view that the matter ought to be re-heard on the basis that I agree with the appellants that it ought not to have been placed before Anderson J.

Delay

[55] Before parting with the case, I must deal with the question of delay. There was significant delay in the delivery of the judgment at first instance, and there was a similar situation on appeal. I would not allow this appeal on the basis of delay as delay by itself is not a good reason for a party to succeed. However, I must say that although it is a source of great embarrassment to have to apologize for delay, it is not that judges set out to cause delay. Indeed, there are many reasons for delay over which judges have absolutely no control. Having said that, I wish to apologize for the delay, and express the hope that there will not be such delays in the future. There is good reason to believe that as far as the Court of Appeal is concerned, finally the Executive is

taking the necessary steps to assist the Court in fulfilling its dream of delivering all judgments promptly.

[56] The facts of this case show, however, that delay is not only from the point of view of the judiciary. A significant reason for the number of years that this matter has taken to come to this point is delay on the part of the litigants themselves. The matter was first set down for hearing on 22 October 2007. At the request of the appellants, it was adjourned to 4 February 2008. In January 2008, the appellants filed additional grounds of appeal and asked for the hearing to be scheduled for June 2008. In June 2008 they sought another adjournment, and on 15 July 2008 another application was made to remove it from the list as the parties were discussing a settlement and the Solicitor-General would be out of the country. In November 2010, a declaration was sought in respect of another aspect of the case. The appeal hearing was then set for November 2011 when the appellants again asked for the matter to be removed from the list. It was then set down for February 2013, and was eventually heard in late 2013. So, it will be seen that for 6 years, the Court could have done nothing (apart from striking out the appeal) as the parties were not ready. Of course, if that had been done, there would have been the risk of complaints about injustice.

[57] That leaves the counter-notice of appeal. There is no need to make a decision on that aspect of the case in light of the decision at which I have arrived. If there was the need, I would have ruled in favour of dismissing it as the question of interest is in the

discretion of the judge; and there is no reason to fault the exercise of his discretion in this matter.

[58] So, in its totality, I would allow the appeal and, given the participation of the appellants' then attorney-at-law in the process of having this matter set down before Anderson J in the circumstances that were known to the attorney-at-law, I would award half costs of the appeal and the hearing in the court below to the appellants.

DUKHARAN JA

[59] I have read in draft the judgment of the learned President and agree with his reasoning and conclusion. I too would allow the appeal and order a new trial. In the circumstances I would also award half costs of the appeal and the hearing below to the appellants.

MCINTOSH JA

[60] I too have read the draft judgment of the learned President. I agree with his reasoning and conclusion and have nothing to add.

PANTON P

ORDER

Appeal allowed. Judgment and Order of Anderson J set aside. New trial ordered in the Supreme Court. Half costs of the appeal and the proceedings in the court below to the appellants to be taxed if not agreed