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;
>
> (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;
>
> (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

> Company who applied to remove its name from Record."

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 r equires 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, 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." (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.

SMITH, J.A;

This appeal concerns the exercise of a judge's discretion in refusing an application for the adjournment of the consolidated trial of five actions. Four of these actions were filed in 1995 and one in 1997. The Court ordered their consolidation in November, 1999. The firm Chancellor & Company was on the record for the appellants. Shortly after the Court made an order for speedy trial, there were orders for Further and Better Particulars and then in October, 2002 in an order for Further Directions, a June 10, 2002 trial date was fixed. However, because of numerous interlocutory appeals by the appellants the trial did not take place.

Mr. Hylton, Q.C. emphasized that one of these interlocutory matters (an application to stay the trial pending criminal proceedings against the 1st and 2nd appellants) accounted for a delay of over three (3) years.

This consolidated matter was overtaken by the Civil Procedure Rules 2002. A Case Management Conference was set for March 3, 2004. At that conference Mr. Henriques Q.C. appeared as counsel for the 1st Appellant. A trial date of November 8, 2004 was fixed. On September 14, the case management timetable was rescheduled and a new trial date of May 30, 2005 was fixed. Mr. Abe Dabdoub then represented the appellants. On March 10, 2005 the appellants applied to have the case management timetable rescheduled. On April 2, 2005 a trial date of January 30, 2006 was fixed. A period of four weeks was set for the trial.

By letter dated December 5, 2005 Chancellor & Company informed the appellants that they would not be representing them at trial.

On January 4, 2006 Chancellor & Company filed an application to remove its name from the record. This application went before Beckford J on January 16, 2006 and was refused on January 23, 2006, Chancellor & Company appealed to the Court of Appeal which ordered that its name be removed from the record.

On January 30, 2006, Mr. Abe Dabdoub as **amicus curiae** applied for an adjournment until February 3, 2002 on behalf of the appellants. McIntosh J adjourned the trial until February 6, 2006.

On February 6, 2006 Mr. Dabdoub appeared on behalf of the appellants and applied for an adjournment of the trial. McIntosh J refused the application. It is against this order that the appellants have appealed.

The Issue and The Law

As stated at the outset the issue for the consideration of this court is whether or not McIntosh J erred in the exercise of his discretion when he refused to adjourn the trial as requested by the appellants.

Rule 39.7 of the Civil Procedure Rules 2002 (the CPR) gives the Supreme Court jurisdiction to adjourn a trial to a date and a time fixed by the Judge or to be fixed by the registry on such terms as the judge thinks

just. The provisions of this Rule are essentially the same as those of section 355 of the Civil Procedure Code which the CPR has replaced.

At common law the Supreme Court has the inherent jurisdiction to adjourn a trial in order to do justice between the parties – see ***Hinckley and South Leicestershire Permanent Benefit Building Society v Freeman*** [1940] 4 All ER 212.

The Court of Appeal has jurisdiction to entertain an appeal from an order of a judge adjourning or refusing to adjourn a case – see **Re Yates' Settlement Trusts** [1954]1 All ER 619.

However, as such a decision is prima facie entirely within the discretion of the Judge, the Court of Appeal will be reluctant to interfere with it – see ***Maxwell v Keun*** [1928]1KB 645. This Court will only interfere where it is clearly shown that:

(i) the Judge has failed to take into consideration relevant factors; or

(ii) the Judge has taken into consideration irrelevant or extraneous matters to the prejudice of the appellant ; or

(iii) the judge has misdirected himself on the relevant law and facts; or

(iv) the decision of the Judge is palpably unreasonable or unfair.

The Submissions

The submissions of Mr. Henriques Q.C. may be summarized as follows:

1. The overriding objective is to do justice between the parties. In this regard the critical question is – what are the circumstances

which gave rise to the necessity for the application for adjournment?

2. The basis for the adjournment is that the appellants/defendants on the day fixed for hearing (30th January, 2006) had neither a firm of Attorneys-at-law on the Record nor counsel fully briefed with all the documents and prepared for trial by instructing attorneys.

3. The reason for this state of affairs was that the attorneys-at-law on the record while pursuing settlement negotiations did not take the necessary steps to prepare the case for trial.

4. The instructing attorneys continued settlement negotiations up to the 19th January and were only removed from the Record by the Court of Appeal on the 27th day of January 2006.

5. It was unreasonable to expect the appellants to file a notice of change of attorneys and to be ready for trial in such a short period of time.

6. The trial judge acted unreasonably in inviting the appellants to peruse over 8,000 documents and expert reports in a matter of this complexity and magnitude.

7. The trial judge did not take into consideration all the relevant matters and did take into consideration irrelevant factors.

Counsel relied on ***Perkins v Irving*** 34JLR 396; ***Royal Bank of Scotland v Craig,*** Court of Appeal (Civil Division) 17th September, 1997 (unreported) and ***Ntukidem and Others v. Oko and Others*** [1989] LRC (Const)395.

The Solicitor General Mr. M. Hylton Q.C. for the respondent invited the Court to examine the historical context of this case. After engaging the Court in this exercise he made submissions which may be summarized as follows:

> "(1)The attorneys who have now been retained by the appellants have represented them in the

present proceedings for a number of years. In particular Mr. Henriques Q.C. was present at the case management conference.

(2) Rule 27.8 of the CPR requires that the attorney attending the case management conference be one who is fully authorized to negotiate on behalf of the client and "competent to deal with the case." Accordingly, it is an inescapable conclusion that Mr. Henriques, Q.C. was fully retained at the time of the case management conference.

(3) The attorneys the appellant now seek to have represent them would have been aware of the timetable set at the case management conferences held in this matter and in particular the date set for trial.

Further the affidavit evidence filed on behalf of the appellants does not complain that the attorneys would not have been available during the trial period. There could be not such complaint since the trial date was fixed on the basis of the availability of the very counsel that the appellants have now retained.

(4) The appellants were fully aware from early in December, 2005, that Chancellor & Company and in particular, Mr. Walter Scott would not be representing them at the trial. However, there is no evidence that the appellants' took any steps whatsoever to retain any attorneys for the conduct of the trial until after January 23, 2006 when Beckford J refused Chancellor & Company's application to remove its name from the record. Their complaint that the time was not sufficient to have another firm placed on the record is baseless.

(5) There is no reason for the appellants to have waited until one week before the trial to arrange alternative representation for the trial when from early December, 2005 they knew that

Chancellor & Company did not intend to represent them at trial.

(6) Any further delay in the trial of this matter would severely prejudice the plaintiff/respondent and would not be in the public interest.

(7) Some of the respondent's witnesses were unwilling to attend and had to be summoned. The appellants have all filed their respective witness statements and all procedural steps have been taken to facilitate the trial which was scheduled to last four (4) weeks.

The prejudice to the respondent and to the administration of justice outweighs any perceived prejudice to the appellants.

In the circumstances the learned judge properly exercised his discretion in refusing to adjourn the trial and there is no basis for this Court to interfere."

The Solicitor General relied on the following cases among others: ***Hare v Pollard*** [1997] EWCA Civ. 1872 (16th June, 1997) which approved the general principles identified by Millett LJ in ***Mortgage Corporation Ltd. v Sandoes*** [1997] PNLR 283; ***Cowen v AMI Healthcare Group PLS*** [1998] EWCA Civ. 1803 (19th November, 1998); ***Bale v Merton, Sutton & Wandsworth Health Authority*** [1998] EWCA Civ. 800 (8th May, 1998).

In my view the record of events support the contention of the Solicitor General that McIntosh J's refusal to vacate or adjourn the trial date was not unfair.

When the matter was called on the 30th January, 2006, an application was made by Mr. Dabdoub for an adjournment. The learned

trial judge made it clear that he did not propose to adjourn the trial. He however granted an adjournment to the 6th February.

On the 6th February shortly after the Court resumed, Mr. Dabdoub informed the judge that he had filed a notice of change of attorney that very morning and that he represented the 1st, 2nd, 3rd and 10th appellants. He then told the Court:

> "... the firm is not in a position, sir to conduct a trial and I am forced to apply for an adjournment this morning."

Thereafter followed a long dialogue between bench and bar during which the judge remarked:

> "You are asking for an adjournment, indefinitely. A four week case when you adjourn a four week case in this court when do you hope to have the trial?"

The concern of the judge must be seen in the light of the history of the proceedings with which he would no doubt have been familiar. In November, 1999 shortly after the consolidation order, this Court (Rattray, P, Downer, J.A and Panton, J.A) by a majority had ordered a speedy trial of one of the claims (***Panton v F.I.S. Ltd.*** SCCA 42/98). Further as the Solicitor General pointed out, the Privy Council accepted in December, 2003 the plaintiff's/respondent's statement, in an application by the 1st, and 2nd appellants to stay the proceedings, that:

> "the plaintiff's mandate and the public interest required that its claim be pursued expeditiously and that the operations of the plaintiff being

> wound down as soon as possible. Any delay in this matter being tried would therefore severely prejudice the plaintiff and would not be in the public interest."

I cannot agree with counsel for the appellants that the learned judge had failed to consider the principles relevant to a proper exercise of judicial discretion in this matter. The appellants relied on ***Royal Bank of Scotland v Harvey Craig*** (supra).

In that case the defendant through no fault of his was left without counsel, Mr. Allen who had returned the brief shortly before the trial was set to commence. The defendant's counsel had advised and represented him throughout and shortly before the trial date, the defendant's solicitors confirmed that Mr. Allen was available to represent him at the trial. His application for an adjournment on the ground that his counsel who was so well acquainted with the case was unavailable, was refused. On appeal Evans LJ stated that he would not think it right to interfere with the judgment unless he was satisfied that there were relevant matters which either were not referred to by the judge or which were wrongly discounted by him. He then went on to say that there were three matters of that sort. The first was that it was quite clear that the learned judge did not have the full history of the matter before him. In particular the judge did not know that it was the plaintiff who had twice requested an adjournment for the convenience of his witnesses. Nor did he know that there was an eight month period during which the plaintiff

made no effort to progress the case whereas it was the defendant who sought to have it brought on. Secondly in dealing with "the listing aspect" the judge did not take into account the fact that several matters were listed for the same week to be heard in the same court and that the case might not even be reached. This factor should be taken into account when considering the merits of the application which was based upon the non-availability of counsel for those particular dates. Thirdly the question the judge asked himself was whether there was a sufficient period for some other counsel to prepare for trial. What he should also have asked himself was whether there was any substantial prejudice to the defendant arising from the fact that this particular counsel who was well acquainted with the case was said to be unavailable to do it on the date that was fixed.

Evans LJ was of the view that for the above reasons, it was necessary for the Court of Appeal to consider the learned judge's exercise of the discretion upon the basis of the facts as they had been fully ventilated before the Court. The Court was entitled, if so minded, to come to a different conclusion from the judge on the question of discretion.

Having taken into account the fact that the length of the adjournment would be from the September, 24 to January of the following year and that the case was given no expedition , Evans LJ

concluded that the prejudice relied on by the plaintiff was of minimal weight compared with the prejudice established by the defendant if the date fixed was to stand. Accordingly the appeal was allowed.

I entirely agree with Mr. Hylton that the circumstances under which the appeal was allowed in ***Craig's*** case, are distinguishable from those in the present case. I will mention a few of the differences. In the first place both Mr. Henriques Q.C. and Mr. Dabdoub are well acquainted with the instant case and the application was not made on the basis that they were unavailable. Further the application for adjournment came over six (6) years after a speedy trial order was made and some six years after the Court accepted the respondent's contention that any delay in the matter being tried would severely prejudice the respondent and would not be in the public interest.

Another distinguishing factor is that in the ***Craig*** case several matters were listed for hearing during the same week whereas the ***Panton*** case was the only matter listed for four weeks.

In ***Craig's*** case the defendant was without blame and the history of the proceedings show that he had sought to bring on the trial for an early date. In the instant case the appellants made numerous interlocutory appeals and on at least one occasion applied for a variation of the case management timetable. There is no evidence that the appellants made any efforts to expedite the hearing of the matter.

The appellants also relied on ***Perkins v Irving*** (supra). It would appear that the issue of the refusal of the application for an adjournment was not argued before the Court in the ***Perkins*** case - see statement of Gordon, JA at p. 420 (c). Only Downer JA dealt with this issue. At p. 409G Downer JA found that Ellis J did not take certain factors into account and concluded that they would allow the appeal and set aside the order refusing an adjournment. In light of the particular facts of that case I do not find it helpful in this appeal.

The facts in ***Ntukidem and Others v Oko and Others,*** which was also relied on by the appellants are clearly distinguishable. In that case the appellants had applied for an accelerated hearing.

Between June, 1982 and January, 1984 the hearing of the matter was adjourned on several occasions. On each occasion except one the appellants were always present and represented by counsel.

On the day before the date for hearing the appellant's counsel was unable to get a flight. This fact was not known to the appellants. An application for adjournment was refused. The appeal was allowed on the ground that the Court's refusal to grant an adjournment was wrong in that the record of events did not support the contention that it was unfair to adjourn the hearing or that the appellants had been given ample opportunity to bring counsel to court.

In my view the guidelines identified by Millett L.J. in ***Mortgage Corporation v Sandoes*** (supra) as to the approach which litigants can expect the court to adopt when there is a failure to adhere to time limits contained in the rules or directions of the court, are helpful.

These principles were accepted in ***Cowen v AMI Healthcare Group*** (supra) ***Hare v Pollard*** (supra) and ***Bale v Merton*** (supra) and approved by the Master of the Rolls and Vice Chancellor. In ***Cowen*** they were described as "a set of 10 guidelines of the very highest authority." They are as follows:

> "1. Time requirements laid down by the Rules and directions given by the court are not merely targets to be attempted; they are rules to be observed.
>
> 2. At the same time the overriding principle is that justice must be done.
>
> 3. Litigants are entitled to have their cases resolved with reasonable expedition. Non-compliance with time limits can cause prejudice to one or more of the parties in litigation.
>
> 4. In addition the vacation or adjournment of the date of trial prejudices other litigants and disrupts the administration of justice.
>
> 5. Extensions of time which involve the vacation or adjournment of trial dates should therefore be granted only as a last resort.
>
> 6. Where time limits have not been complied with the parties should co-operate in reaching an agreement as to new time limits

which will not involve the date of trial being postponed.

7. If they reach such an agreement they can ordinarily expect the court to give effect to that agreement at the trial and it is not necessary to make a separate application solely for this purpose.

8. The court will not look with favour on a party who seeks only to take tactical advantage from the failure of another party to comply with time limits.

9. In the absence of an agreement as to a new timetable, an application should be made promptly to the court for directions.

10. In considering whether to grant an extension of time to a party who is in default, the court will look at all the circumstances of the case including the consideration identified above."

In ***Hare v Pollard*** (supra) Brooke LJ in delivering the judgment of the English Court of Appeal expressed the view that the guidelines set out in ***Mortgage Corporation v Sandoes*** were "equally applicable in cases where a date for trial has been fixed a long time previously , and a party comes to court at the last minute with a request that the date for trial should be adjourned."

In applying the Millett LJ's list to a last minute application for adjournment, the English Court of Appeal in ***Pollard*** emphasized the point that the overriding principle is that justice must be done (principle 2). The other essential and relevant principles are that litigants are entitled

to have their cases resolved with reasonable expeditions (principle 3); that vacation or adjournment of the date of trial prejudices other litigants and disrupts the administration of justice (principle 4); vacation or adjournment of trial dates should be granted only as a last resort (principle 5). Principle 6 refers to the need for co-operation . Principle 9 refers to the need to apply to the court promptly for further directions and principle 10 relates to the need to look at all the circumstances of the case.

The Court emphasized the importance of the trial date, and the importance of making co-operative approaches to the other side and to the Court in good time, if there is any difficulty in meeting the trial date because something unforeseen has occurred.

In ***Bale v Merton*** (supra), the Court expressed the view that principle 5 in ***Mortgage Corporation v Sandoes*** (that vacating or adjourning trial date should be granted only as a last resort) should be "put into the scales as a heavy weight on one side before one even starts to consider the countervailing aspects."

In my judgment the appellants have not shown that the learned judge was plainly wrong in refusing their application made on the very day of trial to adjourn the trial indefinitely. The appellants have failed to show that their application was a last resort situation. Taking into account the submissions of counsel and all the relevant facts including

the interests of justice as the overriding consideration (and of course the interests of justice are not confined to the appellant's interests but also involve the respondent's interest, the interests of other litigants and the interests of the court in the speedy trials of matters,) I am firmly of the view that there is no valid reason for this Court to interfere with the exercise of the discretion of the learned trial judge. Accordingly, I would dismiss the appeal with costs to the respondent.

I have had the benefit of discussing with the President and my brother, Harrison, J.A. the order that this Court should make and I agree with the order proposed by the President.

K. HARRISON, J.A:

I am in full agreement with the reasons and conclusions arrived at by my brothers in this matter. I wish however, to make an observation concerning the importance of case management timetables fixed pursuant to the Civil Procedure Rules 2002 ("the CPR") and their relationship to the adjournment of matters set for trial.

I begin by examining the background facts in relation to the case management conferences that were held. The first conference was held on the 3rd March 2004, and Chancellor & Company was on the record then as Attorneys for the Appellants. Mr. Henriques, Q.C., appeared for the 1st Appellant at this case management conference and a trial date was fixed for November 8, 2004.

On September 16, 2004, the case management timetable was rescheduled and a new trial date fixed for May 30, 2005. Mr. Abe Dabdoub appeared for the Appellants at the September case management conference.

On March 10, 2005 the Appellants applied for another variation of the timetable and an order was granted on April 8, 2005 fixing the trial date for January 30, 2006.

The Appellants were fully aware on December 5, 2005 that Chancellor & Company and in particular Mr. Walter Scott would not be representing them at the trial on January 30, 2006. They were advised of this decision by letter of the 5th December 2005.

On the 4th January 2006, Chancellor & Company filed an application in the Supreme Court seeking to remove their name from the record as appearing for the Appellants. This application was refused by Beckford, J on the 23rd January 2006. Chancellor & Company appealed the order of Beckford, J and on January 27, 2006, three days before the trial commenced, a single judge in this Court ordered the removal of Chancellor & Company's name from the record.

The Appellants contend that as a result of the removal of Chancellor & Company's name from the record, they were without an Attorney-at-Law when the matter came up for trial on January 30th. In the circumstances, they were unable to brief Counsel for the trial.

On the 30th January 2006, when the trial commenced, Mr. Abe Dabdoub appeared before McIntosh, J and applied for the trial to be adjourned until Friday, February 3, 2006 in order for the Appellants to make arrangements for legal representation. The learned judge granted the application and adjourned the trial until Monday, February 6, 2006.

On February 6, 2006 Mr. Dabdoub appeared on behalf of the Appellants. He had filed a Notice of Change of Attorneys and his firm was now on the record for the Appellants. Mr. Dabdoub applied again for an adjournment of the trial but his application was refused on this occasion. The learned judge proceeded with the trial after Mr. Dabdoub and Mr. Haynes left the courtroom.

An appeal was lodged by the appellants and a stay was eventually granted with respect to the trial. The issue now before this Court is whether or not the

learned trial judge erred in the exercise of his discretion by refusing to grant the adjournment.

The authorities have made it abundantly clear that an appellate court, although reluctant to interfere with the exercise of discretion by a trial judge on a matter such as an adjournment, will do so if the court is satisfied that the result of the order made below is to defeat the rights of the parties and to effect an injustice. See ***Maxwell v Keum*** [1927] All ER Rep 335.

The CPR has brought about drastic changes in the management of cases and therefore, the legal profession has to accept that there is no longer going to be the same tolerance extended by the courts, as has been allowed in the past, especially when it comes to the breaching of orders laying down timetables. The court is equally very conscious of the overriding principle that justice must be done where a party is likely to suffer real injustice due to strict application of the rules, then from time to time it is expected that the courts will have to allow departure from them.

In ***Cowen v AMI Healthcare Group plc*** [1998] EWCA Civ 1803 the English Court of Appeal observed that:

> "The interests of justice require an overall view, not only of (the defendant's) interests but also of the plaintiff's interests, the interests of other litigants and the interests of the court in its rules being complied with and getting trials on speedily."

In the Australian case of ***Sali v SPC Limited and Anor*** (1993) 67 ALJR 841 Brennan, Deane and McHugh JJ in the High Court of Australia said at p843 - 844 that in determining whether to grant an adjournment:

> "The judge of a busy court is entitled to consider the effect of an adjournment on court resources and the competing claims by litigants in other cases awaiting hearing in the court as well as the interests of the parties".

Toohey and Gaudron JJ noted at p. 849 that the modern approach to court administration has introduced another consideration onto the scales weighing up the competing interests on the application for an adjournment. Their Lordships also expressed the view that the conduct of litigation is not merely a matter for the parties but is also one for the court and the need to avoid disruptions in the court's lists with consequent inconvenience to the court and prejudice to the interests of other litigants waiting to be heard.

One has to recognize however, that case management is not an end in itself. It is an important and useful aid for ensuring the prompt and efficient disposal of litigation. But it ought always to be borne in mind, even in these changing times, that, the ultimate aim of a court is the attainment of justice.

The under-mentioned principles have been extracted from the cases in relation to case management timetables, and are useful guides. They are:

1. Time requirements laid down by the Rules and directions given by the Court are not merely targets to be attempted; they are rules to be observed.

2. At the same time the overriding principle is that justice must be done.
3. Litigants are entitled to have their cases resolved with reasonable expedition. Non-compliance with time limits can cause prejudice to one or more of the parties to the litigation.
4. In addition the vacation or adjournment of the date of trial prejudices other litigants and disrupts the administration of justice.
5. Extensions of time which involve the vacation or adjournment of trial dates should therefore be granted only as a last resort.
6. Where time limits have not been complied with the parties should co-operate in reaching an agreement as to new time limits which will not involve the date of trial being postponed.
7. In considering whether to grant an extension of time to a party who is in default, the court will look at all the circumstances of the case including the considerations identified above.

See the cases of ***Mortgage Corporation v Sandoes*** [1997] PNLR 283; ***Cowen v AMI Healthcare Group plc*** (supra) ***Hare v Pollard*** [1997] EWCA 1872.

Rule 27.8 of the CPR is of major significance in these proceedings. The rule requires that the Attorney attending the case management conference must be one who is fully authorized to negotiate on behalf of the client and is "competent to deal with the case". In the context of this Rule, it seems that an inescapable inference can be drawn from the facts outlined above, that both Mr. Henriques, Q.C., and Mr. Abe Dabdoub would have had a fairly good knowledge

of the case brought against the Appellants. These Attorneys have appeared on behalf of the Appellants for a number of years. They were aware of the timetable for trial set at the various case management conferences and must have appreciated the need for strict observance of the Rule.

The Appellants themselves were fully aware of the various dates fixed for trial. In particular, they were aware of the trial date fixed for the 30th January 2006.

It is therefore my view, when all the surrounding circumstances are considered that Mr. Dabdoub would have been in a good position to proceed with the trial on the 6th February. It could not be said that he was brought in at a stage when he had no knowledge of the case.

It is further my view, that, the Appellants were under an obligation on the 5th December 2005, to make alternative arrangements for the trial that was scheduled to commence on the 30th January 2006. They were aware that Chancellor & Company and Mr. Scott would not be available to represent them at the trial. Fortunately, for them, they did bring in Mr. Dabdoub who had knowledge of the case. In the circumstances, they ought to have seen to the timely transfer of files and documents from Mr. Scott to Mr. Dabdoub or some other Attorney in order to avoid a change of the trial date. I do agree with the submissions of Mr. Hylton, Q.C., when he said, "The Appellants did not find themselves in a difficult position. They placed themselves in a difficult position."

It is also my view, that, the decision of the learned trial judge to refuse to grant the adjournment sought by the Appellants is supported by the authorities. Four weeks had been set aside for the trial of this case and at the very last minute the Court was asked to abandon the entire four weeks. It must be stressed and brought home to litigants and their advisers the importance of the trial date and the importance also of making cooperative approaches to the other side, and to the court, in good time if there is any difficulty in meeting the trial date.

In balancing the interests of all involved in this case, I do agree with Mr. Hylton, Q.C., when he submitted that "the prejudice to the Respondent and to the administration of justice outweighs any perceived prejudice to the Appellants."

In my judgment, it would be wrong for this court to interfere with the exercise of the learned judge's discretion and the Appeal ought to be dismissed. I agree with the order proposed by the President.

HARRISON, P.

ORDER:

The appeal is dismissed. Trial to continue before McIntosh, J. during the first half of the coming term.

Claimant's case to be reopened if they wish to do so. Judge below should consider the application in respect of legal professional privilege.

Costs to the respondent to be agreed or taxed.