The Hon Chief Justice Sir Denis Malone

Privy Council Appeal No. 35 of 1989

Hadsphaltic International Limited *Appellant*

v.

(1) Tower Corporation Limited and
(2) Maples and Calder *Respondents*

FROM

THE COURT OF APPEAL OF THE CAYMAN ISLANDS

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 29TH OCTOBER 1990

Present at the hearing:-

LORD BRIDGE OF HARWICH
LORD ROSKILL
LORD OLIVER OF AYLMERTON
LORD JAUNCEY OF TULLICHETTLE
LORD LOWRY

*[Delivered by **Lord Jauncey of Tullichettle**]*

This appeal from the Court of Appeal of the Cayman Islands is concerned with a matter of procedure and involves, in particular, the construction of section 58 of the Judicature Law, Law No. 11 of 1975 and Order 35, rule 1(2) of the Supreme Court Rules, which are, so far as material, in the following terms:-

Section 58

> "If upon the day upon which any action is set down for hearing before any court, or upon any day thereafter to which the proceedings may be adjourned, the plaintiff does not appear, the cause shall be put down to the bottom of the list of causes for trial at such court; and if upon its being again reached the plaintiff does not appear the cause shall be struck out; ..."

Order 35 rule 1(2)

> "If, when the trial of an action is called on, one party does not appear, the judge may proceed with the trial of the action or any counterclaim in the absence of that party."

The circumstances giving rise to the appeal may be summarised as follows:-

(1) The appellants, who carry on business as building and civil engineering contractors, on 11th August 1982 agreed with Tower Corporation Limited ("Tower") to construct a substantial office building in Georgetown, Grand Cayman. Payment was to be made 90 days after practical completion and Tower gave security for due payment by way of charges in favour of the appellants over (i) a certain sum of money said to be held at a bank, and (ii) the building in question.

(2) Tower failed to make payment of any money on practical completion and the charge over the money said to be held at a bank could not be enforced.

(3) The appellants then took steps to enforce their charge over the building. To this end they obtained advice from the second respondent ("Maples and Calder") in this appeal who were their solicitors and they instructed auctioneers. On 15th May 1984 a public auction took place at which the successful bidder was the Cayman Islands' Government. The only other bidder was an associate company of the appellants.

(4) Thereafter Tower brought an action (419/1984) against the appellants alleging that they had failed properly to organise the auction whereby the building had been sold at a substantial undervalue. The appellants then brought an action (503/1985) against Maples and Calder alleging breach of contract and/or negligence in connection with the auction and claiming an indemnity against Tower's claim and the costs incurred in defending it.

(5) On 4th March 1986 the Grand Court, by consent, ordered that the two actions be tried at the same time with 419/1984 to lead. On 23rd September 1986 the Grand Court made a further consent order whereby it was ordered *inter alia*:-

   (a) that evidence given at the concurrent trial of the two actions should be evidence in both actions, and

   (b) that Maples and Calder should be bound by the result of 419/1984.

(6) On 9th February 1987 the trial of the two actions began. On 31st August 1987, being the 98th day of the trial, Tower's legal representatives withdrew from the case and Tower were thereafter unrepresented. At that date Tower had led all their evidence, the appellants had led all their evidence with the exception of one witness who was to be later interposed and Maples and Calder's first witness was being cross-examined.

(7) On 7th September 1987 the appellants' application to strike out Tower's action pursuant to the provisions of section 58 of the Judicature Law and of Order 35 rule 1(2) of the Rules of the Supreme Court was dismissed by the Chief Justice sitting in the Grand Court.

(8) On 24th October 1987 the appellants' appeal against the order of the Chief Justice of 7th September 1987 was dismissed.

(9) Notwithstanding the appellants' application to strike out, the trial continued and on 16th November 1987 the Chief Justice dismissed *in toto* both actions. In 419/1984 the appellants were awarded costs against Tower and in 503/1985 Maples and Calder were awarded costs against the appellants. No reasons for the decision were given at the time and none have been given since in spite of attempts by both parties to obtain them.

(10) On 26th November 1987 the appellants gave notice of appeal in 503/1985 and on 30th November 1987 Tower gave notice of appeal in 419/1984.

Mr. Croxford, for the appellants, asked this Board to set aside both the order of the Chief Justice of 7th September 1987 and that of the Court of Appeal of 24th October 1987. He did not however ask for an order striking out Tower's action, recognising that he already had the order of 16th November 1987 in his favour. He frankly admitted that the purpose of this appeal was to improve his tactical position in the event of the appeals in both actions proceeding.

In a valiant attempt to persuade their Lordships that the judgment of the Court of Appeal was wrong, Mr. Croxford presented two arguments, both of which had been presented to the Court of Appeal, namely:-

(1) that Tower having ceased to be represented after the 98th day of the trial the trial judge was bound to strike out the action by reason of section 58 of the Judicature Law, and

(2) that in any event he was, in the circumstances, bound to exercise his discretion under Order 35 rule 1(2) to strike out the action.

In relation to the first argument Mr. Croxford submitted that section 58 applied not only to the day when the trial of an action was due to start but to all subsequent days of the trial. Thus the words "any day thereafter to which the proceedings may be adjourned" comprehended not only a day to which the start of the trial had been adjourned but also a day to which the trial, having started, was thereafter continued or adjourned. In support of this argument he relied upon

Jordan v. Jones (1880) 44 J.P. 800 in which it was held by the Exchequer Division that where a plaintiff had appeared on the first day of a trial but had failed to appear at an adjourned hearing the action should be struck out under section 79 of the County Courts Act 1846. That section so far as relevant was in the following terms:-

> "That if upon the day of the return of any summons, or at any continuation or adjournment of the said court, or of the cause for which the said summons shall have been issued, the plaintiff shall not appear, the cause shall be struck out; ..."

It is to be noted that the section refers to "any continuation or adjournment" and makes no provision for the cause being "put down to the bottom of the list". Their Lordships consider that these material points of distinction deprive that case of any authority in relation to section 58 and they are of opinion that there are a number of reasons why the argument is unsound.

In the first place the direction that the cause shall be put down to the bottom of the list of causes for trial *prima facie* suggests the relegation of one of a number of cases due to be started on the same day, rather than a relegation of a case which is already under way. Indeed when a case is likely to run for a number of days it must be unlikely that other cases will be listed with it on those days. Thus if it is the only case listed for a particular day relegation to the bottom of the list will achieve nothing. In the second place section 58 which deals with the non-appearance of the plaintiff must be read together with section 59 which deals with the non-appearance of a defendant and is in the following *inter alia* terms:-

> "If upon any such day, the defendant does not appear or excuse his absence, or neglects to answer when called in court, upon proof to its satisfaction of service of due notice of the day so appointed, in accordance with any rules or in the case of an adjournment, the court being satisfied that the defendant was present when the adjournment was ordered or was given due notice thereof, may proceed to the hearing of the trial of the case on the part of the plaintiff; ..."

The words "any such day" must relate back to one of the alternative days referred to at the beginning of section 58. The words "may proceed to the hearing of the trial" point to a situation where a trial has not yet started but where the judge is given a discretion to start notwithstanding the absence of the defendant. Had it been the intention to cover a situation where the trial had already started one would have expected that the section would have read "proceed with" or "proceed to and continue with". Section 59 is clearly

intended to be the counterpart of section 58 and as the application of section 59 is restricted to a time when the trial has not yet started it would follow that the application of section 58 should be similarly restricted. In the third place it must be remembered that section 58 is mandatory in its terms and great injustice could result if non-appearance of a plaintiff automatically resulted in the striking out of a cause regardless of the stage which had been reached. In the present case 98 days of evidence and all the costs connected therewith would be rendered totally nugatory. It is inconceivable that the legislature can have intended such a result to occur automatically without a discretionary power in the court to relieve a plaintiff of the consequences of his failure.

In relation to the second argument Mr. Croxford was constrained to submit that where a plaintiff failed to appear the words "judge may proceed with the trial" must be construed as "judge may not proceed with the trial" and that there must be added to the end of the rule the words "and must strike out the action". Reference was made to a note in the Supreme Court Practice to the following effect:-

> "On the other hand, if the plaintiff does not appear, but the defendant does appear at the trial, the defendant is entitled to judgment dismissing the claim, and if he has a counterclaim, he may prove such counterclaim, so far as the burden of proof lies on him. The effect of this judgment is the same as if it were a judgment dismissing the action on the merits, i.e. the court will give the whole costs of the action and counterclaim to the defendant (*Armour v. Bate* [1891] 2 Q.B. 233)."

Mr. Croxford fastened on the words "is entitled to judgment" as the basis for the proposition that the court had no discretion to proceed with the trial when the plaintiff did not appear. Their Lordships are satisfied that this proposition is quite unsustainable for two reasons, namely:-

(1) It involves construing the simple unambiguous language of the rule in a manner which is wholly at odds with any reasonable understanding of the English language, and

(2) *Armour v. Bate* was concerned with a rule in the following terms:-

> "If, when a trial is called on, the defendant appears, and the plaintiff does not appear, the defendant, if he has no counterclaim, shall be entitled to judgment dismissing the action."

The distinction between the terms of that rule and the terms of Order 35 rule 1(2) is such that no assistance can be derived from *Armour v. Bate* in relation to

application of the latter rule. It follows that no support for Mr. Croxford's rather startling proposition is to be derived from the Supreme Court Practice.

For the foregoing reasons their Lordships have no doubt that the Court of Appeal were correct to reject the submissions of the appellants. They will therefore humbly advise Her Majesty that the appeal should be dismissed. The appellants must pay the second respondent's costs before the Board.