IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

AP.11/97

BETWEEN: **BRENT WILLIAM GRAY**

Appellant

A N D: **DENISE MARIE THOM**

Respondent

Counsel: R.H.K. Jerram for Appellant
E.J. Hudson for Respondent

Hearing & Judgment: 13 February 1997

JUDGMENT OF PENLINGTON J

Solicitors: McKinnon & Co, Hamilton
E.J. Hudson, Hamilton

This is an appeal pursuant to leave against a Judgment of His Honour Judge Wolff refusing an adjournment of a civil action in the District Court. The proceeding is set down for trial for two days on Monday next, 17 February and Tuesday, 18 February.

The action arises out of a de facto relationship which existed between June 1977 and December 1989. It concerns certain property accumulated during the relationship. In particular, it concerns a commercial building at Collins Road, Hamilton which is worth about $200,000; and secondly some shares in a private company.

The appellant disputes that he is liable to pay any sum to the respondent. The respondent is the plaintiff. She now lives in Palmerston in the South Island. Her solicitors originally were Messrs Cameron Hinton. Later Mr Hudson was instructed as counsel.

The appellant is the defendant. He still lives in Hamilton. Mr Jerram has acted throughout for the appellant.

The proceeding was commenced initially in the High Court on 9 January 1992. It languished in this Court for about two years. Some action then took place in 1994. In October of that year Hammond J, at a Rule 441 conference, considered the possibility of a transfer to the District Court. In the event, this ultimately took place by an order of Mr Registrar Jopson made by consent on 22 June 1996. In the following month an application to set the proceeding down for

hearing was filed. It was signed by both counsel, who certified that in all respects the action was ready for hearing.

The mode of hearing will be evidence on affidavit, cross-examination of the deponents, and oral submissions involving issues of both fact and law.

Following the setting down, on 31 July 1996 time-tabling orders were made. By a fixture notice dated 15 November 1996, a priority back up fixture was allocated for 17 and 18 February 1997. The case stood immediately behind one firm fixture for the same two days.

As I have earlier said, the respondent lives in Palmerston in the South Island. Because of the nature of the fixture and her place of residence, Mr Hudson wrote to the Court and sought a conference. The purpose of this conference was to ascertain whether the respondent would definitely have to travel to Hamilton for the hearing.

In response to this request, a conference was established for 28 January 1997. Notice of this conference was duly given to the solicitors for both parties.

Mr Jerram practises in a firm now called McKinnon & Co in Hamilton. The firm has a number of partners, including one other common law partner. Mr Jerram was due for some sabbatical leave. He took this leave between 13 December and 3 February. He was out of New Zealand between

18 December and 27 January. His firm was closed for the Christmas/New Year vacation between 23 December and 6 January.

On 9 January 1997 the appellant's solicitors received notice of a fixture in a long running custody matter in which Mr Jerram had been appointed as counsel for the children. It is to be noted that Mr Jerram does a lot of this work and is one of the leading practitioners in Hamilton in the Family field. A fixture was given for the custody matter on 17, 18 and 19 February 1997. Thus, as from 9 January 1997 there was a potential clash of fixtures for Mr Jerram if the priority back-up fixture became a firm fixture in this case.

No steps were taken by the appellant's firm as to this potential clash. On 28 January the judicial conference to which I have earlier referred in the present case was held before His Honour Judge Wolff. Again, another error was made. The appellant's solicitors overlooked this conference. The appellant was accordingly not represented at the conference. Mr Hudson appeared for the respondent.

Because the firm fixture ahead of this case had not yet been settled, the learned Judge indicated that he would convene a conference in that case. It was also indicated that there would be a further conference in the present case, or a confirmation of the fixture, depending on whether the case ahead settled.

In the event, a conference was held in the case which had the firm fixture and a settlement resulted. At this point the present case then became a firm fixture.

Mr Jerram returned to work on Monday, 3 February. On that day he was informed by a member of the Court staff by telephone that this case would now proceed as a firm fixture on 17 and 18 February. That intimation was confirmed by letter from the Court.

Mr Jerram at once realised he had a conflict of fixtures. He immediately advised the appellant, Mr Hudson, and the Court. As well, he wrote to the Court. This was an informal request for an adjournment. A formal application for an adjournment, however, was required. This was lodged immediately.

The application for the adjournment came on for hearing before His Honour Judge Wolff on 11 February. This was the first day which was available to hear the application. The respondent was represented by Mr Hudson, who opposed the application.

After hearing argument from both counsel, the application was declined. The learned Judge delivered a short oral Judgment.

On the following day the appellant sought and obtained leave to appeal to this Court against the refusal to grant the adjournment. The respondent did not oppose the application for leave.

The application for the adjournment was advanced to the learned Judge on the following grounds:

1. That Mr Jerram considered that his professional duty dictated that he should appear as counsel in the custody application on 17, 18 and 19 February. He took that view because he had been connected with that case since its inception. There had already been a full hearing in the Family Court, then an appeal to this Court, which in the event did not proceed, and then a further application to the Family Court which was now going to trial on 17, 18 and 19 February. The children involved in the custody dispute are currently with the respondent father and the mother in the proceeding is the applicant. The case was of an urgent nature as there was a situation of great intensity between the parties and with no possibility of settlement. Even if the case could be adjourned, and its urgency dictated otherwise, another fixture could not be obtained for many months.
2. That as the result Mr Jerram was not available to appear for the appellant in the present case.
3. That the appellant wanted Mr Jerram to represent him as he had been involved in the case since 1992.
4. That Mr Jerram's efforts to obtain other counsel in Hamilton had been unsuccessful.
5. That accordingly to refuse the adjournment would leave the appellant unrepresented and therefore significantly disadvantaged and prejudiced at the forthcoming hearing.

The learned Judge, in his Judgment, exercised his discretion against the appellant and refused the adjournment. Having summarised the essential facts, he noted that "In the Waikato the Court lists are chock full". He went on to say:

> "Attempts to manage the civil list are being waged (not necessarily with a great deal of success) by attempting to case manage and to ensure that fixtures do proceed. In the last 12 months there have been a number of fixture weeks which have, in the end, really had no civil fixtures proceed in them or no significant civil proceedings proceed because those cases that were set down for hearing, for one reason or another, were adjourned or settled. In spite of the volume of work available to be done other counsel were not able to come on at short notice."

The learned Judge then stated, and in my view correctly, the essential question for determination. He said:

> "The issue in this case is whether the convenience of Mr Gray should be met or the convenience of Ms Thom. The primary responsibility of the Court to use the modern jargon is to its "users". The Court users here are the parties. The plaintiff has issued her proceedings and is entitled to have them brought on as soon as they are able. Mr Gray is entitled to counsel and to a limited extent counsel of his choice. The simple issue is whether Ms Thom should have her fixture delayed, possibly indefinitely, but at least for another six months because Mr Gray does not have his usual counsel."

In exercising his discretion, the learned Judge took into account that Mr Jerram's firm had other counsel available and that in England counsel are frequently changed at short notice.

The learned Judge then balanced the respective interests of the appellant and the respondent and concluded:

> "I believe that there would be greater inconvenience to Ms Thom if her fixture was lost than there would be to Mr Gray to have other counsel represent him."

The power to adjourn is a discretionary power. It is contained in Rule 484 of the District Court Rules 1992. It provides:

> "The Court or the Registrar may, before or at the hearing, if it appears expedient in the interests of justice to do so, postpone or adjourn the hearing for such time, to such place, and upon such terms as the Court or the Registrar thinks fit."

The corresponding Rule in the High Court Rules is Rule 480. Until the enactment of s.71A of the District Courts Act, there was no right of appeal against the refusal to grant an adjournment. See, for example, ***Fontainebleau Restaurants Ltd v Stanley Buildings Ltd and Ano*** [1974] 1 NZLR 46.

Mr Jerram accepted that this appeal was from the exercise of a discretion and that to succeed he was required to demonstrate that the learned judge had proceeded on a wrong principle or that he gave undue weight to some factor, or insufficient weight to another factor, or that he was plainly wrong. ***Fitzgerald v Beattie*** [1976] 1 NZLR 265 (CA); ***Brych v Medical Council of New Zealand*** [1976] 1 NZLR 204 (CA). He further accepted that it was not open to this Court simply to substitute its own view of the proper outcome for that of the District Court.

Mr Jerram's primary submission was that the learned Judge was plainly wrong and that the interests of justice dictated that an adjournment be granted, otherwise the appellant would be unrepresented at the hearing of the action. Mr

Jerram confirmed that he had continued to try and obtain other counsel after the refusal of the adjournment on 11 February. He had approached three members of the independent bar at Hamilton and one barrister practising in a firm; all without success. His common law partner was already committed on one of the days of the fixture in this case.

Thus, at the time of the hearing of this appeal, that is on the morning of Thursday, 13 February, with a full scale hearing only three and a half days away, the appellant still does not have any counsel. This is without any fault on the part of the appellant himself. It is obvious that even if the situation suddenly changed, and new counsel was obtained, he would have, at the most, three and a half days to master the brief in a case which has been on foot for five years.

I now pause to set out the relevant principles. The cases have shown that an appellate Court will be slow to interfere with the exercise of a discretion in relation to an adjournment. An adjournment will only be granted for good reason. The ultimate issue is the need to do justice between the parties; that is both parties. The question can be simply stated: Is an adjournment expedient in the interests of justice?

I now refer to a number of helpful authorities on the point.

In ***Maxwell v Keun*** [1928] 1 KB 645 CA at p.653, Atkin LJ, as he then was, said:

> "The other point that was made by the defendants was that this was a discretionary order, and that the Court of Appeal ought not to interfere with the discretion of the learned judge. I quite agree the Court of Appeal ought to be very slow indeed to interfere with the discretion of the learned judge on such a question as an adjournment of a trial, and it very seldom does do so; but, on the other hand, if it appears that the result of the order made below is to defeat the rights of the parties altogether, and to do that which the Court of Appeal is satisfied would be an injustice to one or other of the parties, then the Court has power to review such an order, and it is, to my mind, its duty to do so."

In ***Rose v Humbles*** [1971] WLR 1061, Buckley J, as he then was, when sitting on an income tax assessment appeal, said at p.1071:

> "I have been referred to authorities - *Maxwell v Keun* [1928] 1 KB 645 and *Dick v Piller* [1943] KB 497 - which I think indicate that, although the adjournment of a hearing by any tribunal is a matter prima facie for the discretion of the tribunal and an exercise of that discretion will not be interfered with by an appellate Court in normal circumstances, if the discretion has been exercised in such a way as to cause what can properly be regarded as an injustice to any of the parties affected, then the proper course for an appellate Court to take is to ensure that the matter is further heard".

Maxwell v Keun and *Rose v Humbles* were applied by Henry J in ***Feasey v Dominion Leasing Corp Ltd*** [1974] 1 NZLR 593.

Lastly, I refer to ***O'Malley v Southern Lakes Helicopters Ltd***, HC Christchurch, CP513/89, unreported Judgment 4 December 1990, in which Tipping J said:

> "However the essential question which the Court always has to consider when asked for an adjournment is whether or not that is necessary in order to do justice between the parties. One must not overlook that not only is it necessary to do justice to the party who is seeking the adjournment but also justice to the party who wishes to retain the benefit of the fixture. It is essentially a balancing exercise."

See also the discussion in 37 Halsbury 4th edition, paragraph 508; District Courts Practice, paragraphs R484-2 and R484-3; and McGechan on Procedure at p.3/856.

I now consider this appeal in the light of these principles.

I first of all look at the learned Judge's reasons. He considered that Mr Jerram's firm had other counsel available. That is in fact not so. Mr Jerram's common law partner is not available and it is therefore not possible to change counsel within Mr Jerram's firm, even if the appellant found that acceptable.

Mr Jerram, irrespective of the faults of his firm, has himself, since he first became aware of the clash of fixtures, made strenuous efforts to obtain other counsel, but without success. That is still the position.

The realities of the matter are that alternative counsel for the appellant are not likely to be obtained; or if obtained are not likely to be properly prepared for a hearing which is to take place next Monday. This means that the appellant will either be unrepresented, or represented by counsel who is inadequately prepared if the fixture proceeds.

Clearly in this situation the appellant, a lay person, would be seriously disadvantaged facing an advocate such as Mr Hudson, with his experience and ability. The appellant would therefore be in a position for which he is entirely

without fault. He has been placed in this situation because of the conduct of his solicitors; apart from Mr Jerram. Had they realised that a conflict of fixture situation was possible on 9 January when the Family Court fixture notice was received, the present situation might have been avoided. Likewise, had the firm had the appellant represented at the conference on 28 January, the Court would have been appraised at that time of the potential conflict situation.

In my view there would be a grave injustice to the appellant if this fixture proceeds in a situation in which the appellant is unrepresented. I likewise consider that even if by chance new counsel could be obtained at the eleventh hour, there would still be an injustice to the appellant as his counsel would not be properly prepared. In this latter regard I think that the observations of Thomas J in ***Willis v G. Kline Ltd***, 8 PRNZ 546, at 549 are in point. His Honour said:

> "But the key issue in this case is not the availability of alternative counsel. Mr Dale acknowledged that there are other lawyers who could be instructed. The point is that the new counsel could not be properly briefed in the limited time available without the risk of grave prejudice to Mr and Mrs Willis' cause. Mr Dale, himself, has limited time within which to brief counsel. The new counsel would then have an unreasonably short time to assimilate the facts of the case and digest the relevant law."

In pursuance of counsel's duty to the Court, Mr Hudson brought *Willis v Kline Ltd* to my attention during the argument. He acted very properly in so doing. He is nevertheless to be commended as this citation is plainly against him. Indeed, he conceded that it stood in his way. I agree with that view.

The learned Judge carried out the required balancing exercise. He recognised that the respondent is ready for trial and that a fixture is available to determine a matter which has been on foot since 1992 and which relates to events prior to 1989. These factors, in the view of the learned Judge, tipped the scales against the appellant. With respect, I consider that the learned Judge gave insufficient weight to the realities of the current situation which now face the appellant. I recognise, as did the learned Judge, that the administration of justice is a relevant factor. An adjournment affects not only the party opposing an adjournment, but also the other patient litigants waiting in the queue. The opponent of an adjournment is inevitably delayed in getting a resolution of the matter to which he or she is a party. Likewise, waiting litigants are deprived of the opportunity of using the Court time because of inadequate lead time to get ready for trial. An adjournment disrupts the Court programme. It sometimes leads to the wastage of a scarce resource, judicial time.

I wholeheartedly endorse the general practice adopted in the District Court at Hamilton in the allocation of civil fixtures and the disposal of that work. In the normal course, a fixture, once made, will only be adjourned for good reason. The present state of the work in the District Court at Hamilton requires this approach.

The dictates of the system must, however, always yield to the interests of justice, or as the matter was put by Mahon J in ***Fontainebleau Restaurants Ltd v Stanley Buildings Ltd***:

> "Rules of practice or procedures are of course subservient to the paramount rights of litigants to obtain proper determination of proceedings duly instituted."

And more recently, by Thomas J in ***Willis v G. Kline Ltd***:

> "Administrative practices designed to ensure that a case proceeds on the appointed day undoubtedly have their place in the disposition of the Court's business. There is an obvious public interest in achieving the efficient administration of justice. As I pointed out last year, that most venerated document, Magna Carta, reminds us that justice delayed is justice denied: see ***Rio Beverages Ltd v NZ Apple & Pear Marketing Board*** unreported, 25 November 1994, HC Auckland CL 81/93 at p 7. But, as I have already said above, administrative convenience cannot be permitted to override the right of the parties to a proper and fair hearing of their cause."

I note that in the present case the Court file shows that there are three other reserve fixtures for the week and so it is unlikely that in this instance judicial time will be wasted.

For these reasons, I am accordingly constrained to hold that the learned Judge wrongly exercised his discretion. I do so with regret as I am mindful of the almost intolerable burden currently being carried by the resident District Court Judges in Hamilton. They are dealing valiantly with a heavy judicial workload, which includes the civil fixtures system.

In the result, I propose to allow the appeal, which will result in an adjournment of the proceedings.

The adjournment has, in large measure, been occasioned by the fault of the appellant's advisors, with the exception of Mr Jerram. In these circumstances Mr Hudson asks for costs and he submitted that they should be paid by the appellant's solicitors personally. In my view this was a proper submission and in any event Mr Jerram very properly did not resist it.

One final matter. I was informed by Mr Hudson that the respondent has expended monies on a return air ticket. Whether a refund is possible is not as yet known.

The formal result is therefore as I announced earlier today at the conclusion of the argument:

1. The appeal is allowed.

2. The proceeding is remitted to the learned Judge for the granting of an adjournment until such time as he thinks fit.

3. The respondent is entitled to costs. I direct that the costs be paid by the appellant's solicitors. I fix such costs as follows:

    a) Appearance on the application for the adjournment $350

    b) Appearance on the application for leave to appeal $100

    c) Appearance in this Court on the hearing of the appeal $525

    d) Costs on the adjournment $750

4. I further direct that the appellant's solicitors are to pay the sum of $525 into Court forthwith; such sum is to be held by the Registrar in respect of the air fares for disbursement to the respondent, or the respondent to the appellant's solicitors or the appellant's solicitors, depending on the outcome of the respondent's application for a refund from the airline.

5. I further direct that the respondent is to use her best endeavours to obtain the maximum refund possible, or to transfer the fare to another airline ticket.

P.G.S. Penlington J